

Costs of Democracy

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Foreword

Vitam et Sanguinem pro Regina Nostra! ...sed avenam non! According to an old Hungarian anecdote in the 18th century Hungarian noblemen supported Queen Maria as one man promising her their lives and blood, however, in the background they quietly added to their altruistic exclamation that they would not give their oat i.e. money...

We devote this volume to one of the most important values of our community life, which is democracy. Democracy is a core value of European political systems whose protection as well as continuous re-defining are in the centre of the battle of political elites. A regime offering equality and freedom to our community life can be compared with different regimes, however, those being members of such a community can experience every day that democracy has costs. These costs appear in various forms. They are not exclusively the maintenance costs of the infrastructure of state organization and social coexistence but those costs which are specifically connected to democracy. By respecting human dignity and other human rights the state waive the right to learn about private sphere and fully control our incomes and “malicious” businesses as a result it will be deprived of substantial revenues and will pay a considerable cost to operate the machinery of freedom. Society also faces the costs of democracy i.e. by tolerating (even financing) differing opinions; by the threat of flourishing crime due to the respect of privacy and destructive lifestyles spread without limits; by the price paid both in taxes and inconveniences for social services created to fulfil the idea of social equality (in the interest of peaceful coexistence and human dignity) and by the difficulties arising from the time spent on and the devotion to participation in politics, and so on.

When structuring this volume we were led by the intention to analyse some of the costs mentioned, in terms of democratic systems and especially the challenges of Central European states. We would like to demonstrate what costs are incurred from human rights protection, from a discourse on the building and new contexts

of democracy, from the freedom of media, from the support of participants and arenas of democratic debates, from the provision of the preconditions of social rise, from the protection of our communities and from cooperation with international community. The costs of democracy are borne by all members of community, and states play an important role in distributing and re-distributing available sources and the costs “to be paid”. Defining legal and public financial frameworks of freedom and re-distribution is the main subject matter of constitutional, economic and social policy debate in states struck by crisis and under terror threat. Therefore, the multidisciplinary papers of this volume strive to answer not only the question of “why” but also the question of “how”. We hope that these studies will convince everybody that democracy does not content itself with a symbolic devotion, “*vitam et sanguinem*”, but our active participation is needed to make it successful even by sacrificing our oat.

Peter Smuk
editor

PRINCIPLES

Cost of Human Rights

Introduction

On June 25 1993 in Vienna, 171 UN Member States renewed their efforts to strengthen and implement the body of existing international human rights instruments by adopting the Vienna Declaration and Programme of Action. The World Conference on Human Rights stated: “Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached”.¹ In these resounding words, the international political community expressed that they should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world. It was stressed that the promotion and protection of human rights was a matter of priority for the international community. The international human rights system as the machinery for the protection of human rights needs human and financial resources to carry out human rights activities. Of course, ensuring the resources for human rights mechanisms and activities is an essential precondition not only at international but also at regional and local level.

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¹ *Vienna Declaration and Programme of Action*. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, I.8. URL <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (12 May 2016)

The protection of human rights at international level

Since the end of World War I, due to the growing belief of governments, the necessity of the international protection of human rights became generally accepted. Governments faced difficulties and they alone could not safeguard human rights that required international guarantees. There was a growing understanding that social justice was an essential precondition for universal peace. It was a concern that the improvement of working conditions could result in undesirable disadvantages in international competition. In 1919 in Geneva, this recognition has led to the creation of the International Labour Organization (ILO) which has a special tripartite structure with workers and employers participating as equal partners with governments to ensure workers' rights and social security. The ILO formulates international labour standards in the form of conventions and recommendations setting minimum standards of basic labour rights, e.g. freedom of association, the right to organize, collective bargaining, abolition of forced labour, abolition of child labour, equal remuneration, equality of opportunity and treatment, and other labour standards.² In the aftermath of World War I, international treaties and peace agreements in particular involved many of the human rights related issues (e.g. the minority rights, the fundamental rights of those who were affected by the population exchange), which were sought to be brought to an international level.

After World War II, significant efforts were made to address issues of protection and promotion of human rights through international law. International human rights law emerged as a standard subject of international relations and a major legal framework for the protection of individual rights and freedoms. The Preamble of the UN Charter includes a determination "to reaffirm faith in fundamental human rights" and recognizes that peace and stability among nations is related to the recognition of and respect for human rights, and seeks to establish conditions under which both peace and human rights, including the social and economic advancement of all peoples, can be achieved.³

The United Nations (UN) gradually built up a range of documents and mechanisms to protect human rights. As a result of a slow progress, the UN made efforts

² URL <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (17 May 2016)

³ Art. 1 of the Charter states that one of the aims of the United Nations is to achieve international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion", thus enshrining the principle of non-discrimination. Art. 55 expresses a similar aim, and by Art. 56 all members of the United Nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55". Moreover, all UN Member States must fulfil, in good faith, the obligations they have assumed under the *Charter of the United Nations*. URL <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (13 May 2016)

to codify human rights in a universally recognized regime of treaties, institutions, and norms. Thus the first legally binding specific agreement initiated by the recognition of the principle of international respect for human rights was the so called Genocide Convention adopted by the UN General Assembly on 9 December 1948.⁴ One day later, a major step in drafting the International Bill of Human Rights was realized on 10 December 1948, when the UN General Assembly through its Resolution 217(III) adopted the Universal Declaration of Human Rights (UDHR) which serves “as a common standard of achievement for all peoples and nations”.⁵ The Preamble of the UDHR stated that “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom [...] Now, Therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations [...]”⁶ The UDHR was the first non-binding instrument of a general nature, a new catalogue of modern human rights which has been translated into more than 360 languages. The UDHR has been the basis for the UN to take steps in a standard setting. The majority of the rights proclaimed in the UDHR have been progressively developed and codified in the subsequent decades. The International Convention on the Elimination of Racial Discrimination in 1965 (CERD), the two most important conventions; International Covenant on Economic, Social and Cultural Rights (ICESR), the International Covenant on Civil and Political Rights (ICCPR), and an Optional Protocol thereto in 1966, and thereafter, were adopted in this period. These agreements were followed by a long line of international conventions.⁷ Ensuring the implementation of the internationally recognised human rights, States parties are requested to submit a report on the measures taken to give effect to their

⁴ Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9 December 1948. General Assembly Res. 96 (I), adopted on 11 December 1946, affirmed “that genocide is a crime under international law which the civilized world condemns.” The Convention entered into force on 12 January 1951. *Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277.*

⁵ The preparatory work of the Universal Declaration needed thirteen months between May 1947 and June 1948. The debates and drafting of the Declaration were made by UN Commission on Human Rights and subsequently in the Third Committee of the General Assembly and complemented by the UNESCO. *Universal Declaration of Human Rights, G.A. Res. 217A, at 71, UN GAOR, 3d Sess, 1st plen. mtg, UN Doc. A/810 (Dec. 12, 1948).*

⁶ See more: Aggelen, Johannes: *The Preamble of the Universal Declaration of Human Rights.* 2003. pp. 129–144. URL http://www.pegc.us/archive/Articles/van_aggelen_macro_final.pdf (17 May 2016)

⁷ *The United Nations Human Rights Treaty System, Fact Sheet No. 30/Rev.1*, United Nations, New York – Geneva, 2012. URL <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf> (16 May 2016)

obligations under the convention within a specified time limit, after the entry into force of the convention for the States party concerned.

During the development of human rights a significant progress was made by the Vienna Declaration and Programme of Action in 1993 which constituted a milestone of the UN history of human rights. It stated that: “[...] All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms [...]”⁸ Still a long way to brush up on how to develop the UN human rights system, but the important thing is that some changes have been made. Among these bigger changes was setting up the full-fledged and standing UN Human Rights Council (UNHRC) by the UN General Assembly Resolution 60/251 of 15 March 2006, which reflects an increasing importance attached to human rights on the UN agenda. The UNHRC has played a pivotal role in overseeing and contributing to the interpretation and development of international human rights law. The UNHRC have to ensure universality, objectivity and non-selectivity in the consideration of human rights issues, and also the elimination of double standards and politicization. The UNHRC monitors implementation of the core international human rights treaties of all 193 UN member states with their international human rights obligations through the Universal Periodic Review (UPR).⁹ Under such a fair, transparent system, every Member State could come up for review on a periodic basis (over a four-year cycle), which result in specific and authoritative recommendations for action. The UPR as an inter-state review mechanism, provides insights into the *opinio juris* of UN member states.¹⁰ For the time being the UN human rights bodies form a complex system with charter-based bodies, including the Human Rights Council and bodies created under the international human rights treaties and made up of independent experts mandated to monitor States parties’ compliance with their treaty obligations.¹¹ Special attention needs to be paid to the specialized agencies and bodies and institutions of the United Nations system, which play a vital role in the

⁸ URL <http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf> (15 May 2016)

⁹ There are a total of 54 countries or territories that currently are not in the United Nations.

¹⁰ UN General Assembly Resolution 60/251 the UPR shall be based on objective and reliable information of the fulfilment by each State of its human rights obligations and commitments. URL <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (15 May 2016)

¹¹ The treaty bodies have formulated a series of General Recommendations and General Comments in response to issues concerning interpretation of the relevant treaty. General Recommendations and General Comments are also not legally binding but do provide appropriate guidance on the interpretation of the treaty in question. General Recommendations and General Comments of these bodies have

formulation, promotion and implementation of human rights standards. The High Commissioner for Human Rights (UNHCHR) is worth mentioning, who provides support for UN human rights activities, including secretariat support for all UN human rights bodies, maintenance of specialized human rights document databases, reception of individual complaints to the human rights bodies and preparation of fact sheets and training materials on human rights topics.¹² The UN Millennium Report highlighted the collective responsibility of the governments of the world to uphold human dignity, equality and equity for all people and especially for children and the most vulnerable, as a duty of world leaders.¹³ As a response to the Kofi Annan dilemma, an independent commission was charged with the task of clarifying the scope and objectives of *the responsibility to protect*. The International Commission on Intervention and State Sovereignty (ICISS) elaborated a new element of the international law on the core principles of the responsibility to protect (R2P).¹⁴ As the ICISS report formulated, this report is about the so-called “right of humanitarian intervention”: the question of when, if ever, is it appropriate for states to take coercive—and in particular military—action, against another state for the purpose of protecting people at risk in that other state. The R2P is evoked by four specific categories: genocide, crimes against humanity, ethnic cleansing and war crimes. It means that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.¹⁵

The development of human rights at the UN level was accompanied by the establishment of regional human rights systems. In Africa, the Americas and Europe steps have been taken to develop a catalogue of human rights, and established hu-

greatly promoted the development of human rights, they are indispensable in analysing a particular convention.

¹² High Commissioner for the promotion and protection of all human rights, A/RES/48/141 85th plenary meeting, 20 December 1993. URL <http://www.un.org/documents/ga/res/48/a48r141.htm> (12 July 2016). Since September 2014 Zeid Ra'ad Al Hussein of Jordan has been holding the position of High Commissioner for Human Rights. See: Gaer, F. D. – Broecker, C. L. (ed.): *The United Nations High Commissioner for Human Rights. Conscience for the World*. Brill Nijhoff, 2013. URL <http://booksandjournals.brillonline.com/content/books/97890042542501> (14 June 2016)

¹³ ‘We, the Peoples’. *The Role of the United Nations in the 21st Century*. Millennium Report of the Secretary-General. URL www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf (13 May 2016)

¹⁴ *The Responsibility to Protect*. International Development Research Centre, Ottawa, 2001. URL <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (12 July 2016)

¹⁵ United Nations A/70/999–S/2016/620, Advanced copy, 22 July 2016, Report of the Secretary-General General Assembly Security Council Seventieth session Items 15 and 116. Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields. Follow-up to the outcome of the Millennium Summit Seventy-first year, *Mobilizing collective action: The next decade of the responsibility to protect*. URL http://www.un.org/ga/search/view_doc.asp?symbol=A/70/999 (29 July 2016)

man rights commissions and courts. The scope of this paper unfortunately prevents an in-depth exploration of this very interesting topic, only we have to mention that these systems play a significant role in protecting human rights among their Member States, including the decision on whether a State is responsible for violations alleged in complaints submitted by individuals.¹⁶

It may be noted that one of the most developed and elaborated regional human rights systems and regimes is the European one. The Council of Europe (CoE), the European Union (EU) and the Organization for Security and Cooperation (OSCE) could be considered as the three main pillars of the European human rights regime.

The Council of Europe (CoE) was set up in 1949 with 10 founding members (*Statute of the Council of Europe*); now there are 47 member states.¹⁷ The Council of Europe has three thematic pillars: Human Rights (including the European Court of Human Rights), Rule of Law and Democracy. The organization's purpose is to achieve European unity and facilitate economic and social progress. The CoE has provided the framework for the negotiation and conclusion of more than 100 multilateral agreements among its member states ("European treaties"). It is concerned with issues such as human rights, minority rights, education and cultural projects, public health, domestic violence, countering terrorism, bioethics, protection of the environment, sports etc.¹⁸ The first and the greatest treaty of the CoE, the first comprehensive text for protecting human rights at European level, was the *Convention for the Protection of Human Rights and Fundamental Freedoms* which was signed in 1950 and came into effect in 1953.¹⁹ All the members of the Council of Europe are

¹⁶ The regional human rights bodies are: African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights, Arab Human Rights Committee, ASEAN Intergovernmental Commission on Human Rights, European Court of Human Rights, European Committee of Social Rights, Inter-American Court of Human Rights, Inter-American Commission on Human Rights. URL <http://bangkok.ohchr.org/programme/other-regional-systems.aspx> (14 May 2016)

¹⁷ *Statute of the Council of Europe, London, 05/05/1949, ETS No.001* URL <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001> (17 May 2016)

¹⁸ The Council of Europe (CoE) was created in 1949 with 10 founding members (*Statute of the Council of Europe*), 87 UNTS 103, E.T.S. 1; there are now 47 member states. The organization's purpose is to achieve European unity and facilitate economic and social progress. It is concerned with issues such as human rights, education and cultural projects, sports, public health, protection of the environment, etc. The CoE has provided the framework for the negotiation and conclusion of more than 100 multilateral agreements among its member states ("European treaties").

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.005 sets forth a number of fundamental rights and freedoms (right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination). More rights are granted by additional protocols to the Convention (Protocols 1 (ETS No. 009), 4 (ETS No. 046), 6 (ETS No. 114), 7 (ETS No. 117), 12 (ETS No. 177), 13 (ETS No. 187), 14 (STCE 194), 15 (CETS No. 213) and 16 (CETS No. 214)). Protocol 16 ECHR contains

Contracting Parties to the ECHR. The aim of these CoE conventions and recommendations is to standardise the legal practice of its member states. In addition to the ECHR, the Council of Europe developed an effective supervision and protection system of human rights and fundamental freedoms and human dignity, identifying the threats to these rights and freedoms. It is also of importance that the CoE has six human rights monitoring mechanisms, namely: the Commissioner for Human Rights, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT), the European Committee of Social Rights (the ECSR), the Advisory Committee on the Framework Convention for the Protection of National Minorities (the ACFC), the European Commission against Racism and Intolerance (ECRI) and the Committee of Experts of the European Charter for Regional or Minority Languages (the CECL). The human rights monitoring mechanisms of the Council of Europe seek to establish a permanent dialogue with governments to encourage them to better implement human rights treaties. They function principally through the use of national reports, based on which they make recommendations, and may also visit or question states directly.

The European Human Rights Court's (ECtHR) remarkable case law makes the ECHR and its Protocols a powerful living instrument.²⁰ The case law points out that by the interpretation of the Convention it must be considered that *any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention', an instrument designed to maintain and promote the ideals and values of a democratic society.*²¹

Particular attention needed to be given to the activities of the European Commission for Democracy through Law, known as the Venice Commission. The Venice Commission was created in 1990, as an advisory body of the Council of Eu-

the preliminary ruling process, e.g. highest courts and tribunals of a contracting party, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. (See more: Callewaert, Johan: *Protocol 16 and the autonomy of EU law: who is threatening whom?* European Law Blog, October 3, 2014, URL <http://europeanlawblog.eu/?p=2551>; URL <http://www.coe.int/et/web/conventions/full-list/-/conventions/treaty/005> (17 May 2016)

²⁰ HUDOC is the database of the European Court of Human Rights. The use of Council of Europe treaties in the case-law of the European Court of Human Rights Council of Europe / European Court of Human Rights, June 2011. URL www.echr.coe.int/Documents/Research_report_treaties_CoE_ENG.pdf (19 May 2016)

²¹ *Opinions of the Lords of Appeal for Judgment in the Cause Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant) Do (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) on Thursday 17 June 2004*, Session 2003-04 [2004] UKHL 26 on appeal from: [2002] EWCA Civ 1856. URL

<http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040617/ullah-1.htm> (10 June 2016)

rope, composed of independent experts in the field of constitutional law and it has been recognized as an instance of independent reflexion.²² The Commission works in three areas: democratic institutions and fundamental rights, constitutional justice and ordinary justice, elections, referendums and political parties.

The Venice Commission's opinions on constitutional provisions and other legal norms or drafts are sometimes disregarded, but most states do react positively.²³ It may be noted that since 2002 the European Court of Human Rights (ECtHR) has referred to Venice Commission opinions in more than 50 cases.

The European Union attaches a great importance to promoting and protecting the universality and indivisibility of all human rights in partnership with countries from all regions, in close cooperation with international and regional organisations and with civil society. According to the EU's philosophy (EU Action Plan on Human Rights and Democracy 2015-2019), sustainable peace, development and prosperity cannot exist without respect for human rights.²⁴ The Amsterdam Treaty (1997) clearly stated that the Union is *founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*. The European Union's human rights actions could fall into three main groups: external relations, internal arena and the case law of the European Court of Justice. In particular, the requirement of the respect for human rights was kept in mind in foreign relations as a basic precondition of regional or bilateral treaties and agreements, such as Association Agreements and Partnership and Cooperation Agreements with third countries. Following the adoption of the Agenda for Change and the Strategic Framework on Human Rights and Democracy in 2012, the EU became committed to moving towards a Rights-Based Approach (RBA) for development cooperation.²⁵ Accession partnerships, including EU pre-

²² URL <http://www.venice.coe.int/webforms/events/> (10 June 2016)

²³ CDL-AD(2016)012 English 13/06/2016. *Poland. Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts. Adopted by the Venice Commission at its 107th Plenary Session* (Venice, 10–11 June 2016); CDL-AD(2013)012 English 17/06/2013. *Opinion on the Fourth Amendment to the Fundamental Law of Hungary. Adopted by the Venice Commission at its 95th Plenary Session* (Venice, 14–15 June 2013); CDL-AD(2012)004 English 19/03/2012. *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary. Adopted by the Venice Commission at its 90th Plenary Session* (Venice, 16–17 March 2012)

²⁴ URL https://eeas.europa.eu/human_rights/docs/eu_action_plan_on_human_rights_and_democracy_en.pdf (11 June 2016)

²⁵ “The Council notes that the implementation of a rights-based approach to development cooperation should be based on the universality and indivisibility of human rights and the principles of inclusion and participation in decision-making processes; non-discrimination, equality and equity; transparency and accountability. The application of these principles should be central to EU development cooperation, thereby also ensuring the empowerment of the poorest and most vulnerable, in particular of women and girls, which in turn contributes to poverty reduction efforts.” Council conclusions on

accession financial aid, are conditional upon compliance with the requirement of respect for democratic principles. If the rule of law, respect for human rights or the protection of minorities are violated, if the country concerned fails to make continuous progress towards the fulfilment of any one of the above mentioned conditions, the partnership will have to be suspended. Concerning the accession to the EU, the Treaties stated that any European country may apply for membership if it respects the democratic values of the EU and is committed to promoting them. Among the binding political criteria the achievement of institutional stability was laid down as a guarantee of democratic order, rule of law and ensuring respect for human rights, as well as respect for and the protection of minorities. The European Council, meeting in Luxembourg on 12 and 13 December 1997, reaffirmed that “Compliance with the Copenhagen political criteria is a prerequisite for the opening of any accession negotiations”.²⁶ In other words it means; the ratification and implementation of legal human rights standards, respect for the rights of minorities, the right to freedom of speech, and the freedom of the media, the abolition of capital punishment, where applicable, the legal accountability of police, military and secret services, the elimination of torture and ill-treatment, the acceptance and encouragement of the non-profit-making sector, as guardians of the effective protection of fundamental rights and civil liberties. This also means that the EU requires the applicant countries that they have set up democratic institutions and independent judicial and constitutional authorities and they will carry out specific substantive reforms within a specific time frame.²⁷ The EU tries to enhance the effectiveness of bilateral human rights and democracy work and improve the mainstreaming of human rights across the EU’s external action. The European Union’s Special Representative for Human Rights (EUSR) play an important role to enhance the effectiveness and visibility of EU human rights policy, strengthening democracy, internal justice, humanitarian law, abolition of the capital punishment, freedom of expression, gender equality and protection of children rights in armed conflicts.²⁸ Mention should also be made of the EU human rights dialogues with over forty countries and organisations

a rights-based approach to development cooperation, encompassing all human rights Foreign Affairs (Development) Council meeting Brussels, 19 May 2014. URL

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/142682.pdf (11 June 2016)

²⁶ „Commission opinions and accession negotiations [...] 25. Compliance with the Copenhagen political criteria is a prerequisite for the opening of any accession negotiations.” p. 5. URL http://aei.pitt.edu/43332/1/Luxembourg_European_Council.pdf (11 June 2016)

²⁷ URL http://www.europarl.europa.eu/enlargement/briefings/20a2_en.htm (11 June 2016)

²⁸ The European Union (EU) currently has nine Special Representatives (EUSRs) covering the following countries or regions: Central Asia, Middle East Peace Process, Afghanistan, Bosnia and Herzegovina, Kosovo, the South Caucasus and the crisis in Georgia, Horn of Africa, Human Rights and the Sahel.

URL http://eeas.europa.eu/background/eu-special-representatives/index_en.htm (13 June 2016)

by which the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations. Each dialogue is established in accordance with the EU Guidelines on human rights dialogues.²⁹ Human Rights are an important part of the EU-UN relationship and the European Union is very active in UN human rights (e.g. UNHRC), regularly presenting initiatives on country situations of concern as well as thematic priorities and participating actively in debates.³⁰ The European Union as part of its multilateral diplomacy, closely works with the UN secretariat and its agencies, as an active donor it cooperates with UN funds and programmes, partnering on a range of global issues and challenges, such as migration, climate change, or fight against terrorism. The European Union and its Member States have again kept their place as the world's leading aid donor in 2015, providing more than half of the total Official Development Assistance (ODA).³¹ The EU actively supports human rights and democracy around the world by its Election Observation Missions (EUEOMs), including the support to the institutional capacity of election bodies, technical and material support to electoral processes. Their purpose is to assist partner countries in their objective to hold elections of a high standard, by analysing the electoral process and providing an impartial and informed assessment of the elections. Since 1993 the EU has conducted more than 110 observation missions.³²

²⁹ Since the first Action Plan on Human Rights and Democracy (2012-2014) the EU has adopted several new

^{EU} Guidelines on Human Rights, and a Toolbox on a Rights-Based Approach to Development. The EU now has guidelines on the following subjects: Death Penalty (updated in 2013), Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (updated in 2012), Human Rights Dialogues (updated in 2009), Children and Armed Conflict (CAAC) (updated in 2008), Human Rights Defenders (updated in 2008), Promotion and Protection of the Rights of the Child (updated in 2008), Violence against Women and Girls and Combating all Forms of Discrimination against them (2008), Promoting Compliance with International Humanitarian Law (updated in 2009), Promotion and Protection of Freedom of Religion or Belief (2013), Promotion and Protection of the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual Transgender and Intersex (LGBTI) Persons (2013), Freedom of Expression Offline and Online (2014).

³⁰ Some of the points identified for 2016 were: addressing the situation in Syria and Iraq, addressing human rights violations by terrorist groups, including Da'esh and Boko Haram, highlighting the serious human rights violations linked to the conflict in Ukraine, supporting the work of the UN human rights bodies to address human rights violations and abuses around the world, protecting the rights of asylum seekers, refugees, migrants and all displaced persons, addressing restrictions to freedom of expression and freedom of association, working against all forms of discrimination. URL <http://www.consilium.europa.eu/en/policies/human-rights/> (10 July 2016)

³¹ URL http://europa.eu/rapid/press-release_IP-16-1362_en.htm (16 July 2016)

³² Council adopts new EU action plan on human rights and democracy, "Keeping human rights at the heart of the EU agenda" Council conclusions on the action plan on human rights and democracy 2015–2019. URL http://eeas.europa.eu/top_stories/2015/200715_human_rights_action_plan_en.htm (25 July 2016)

In 2000 the European Union proclaimed a Charter of Fundamental Rights which since the Treaty of Lisbon (2009) has gained the same legal value as the Treaties.³³ The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. It entrenches all the rights found in the case law of the Court of Justice of the EU, the rights and freedoms enshrined in the ECHR, other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments. The Charter reflecting to the scientific and technological developments, includes so-called third generation human rights, such as: data protection, guarantees on bioethics (e.g. the prohibition of eugenic practices, in particular those aiming at the selection of persons, the prohibition on making the human body and its parts as such a source of financial gain or the prohibition of the reproductive cloning of human beings) and transparent administration. The Charter is legally binding but does not bind states unless they are acting to implement EU law and it does not extend the powers or competences of the Union. The institutions and bodies of the EU and the EU Member States must ensure that they do not violate the rights contained in the Charter when they take action, such as when creating or implementing EU law and policy. Where EU institutions or bodies and EU members under certain conditions fail to comply with the Charter, individuals can make use of judicial and political mechanisms available to hold them to account. Mention should be made of the fact that during the discussions on the relationship between the Charter and the Lisbon Treaty the government of the United Kingdom secured a clarifying Protocol on the application of the Charter to the United Kingdom, which states that neither the national courts of United Kingdom nor the Court of Justice may declare United Kingdom law incompatible with the Charter. Poland later joined this compromise and concluded the same opt-out.

As it has already been noted above, within the EU, the rule of law is of particular importance. Respect for the rule of law—in accordance with the international law—is a prerequisite for the protection of all the fundamental values listed in the Treaties and also is a prerequisite for upholding all rights and obligations. The often cited Article 7 TEU aims at ensuring that all EU countries respect the common values of the EU, including the rule of law. This Article was established as a way to hold EU Member States accountable for violation of the European values and fundamental rights. This procedure can be triggered by a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission. There are two parts—Article 7.1 can be activated only in case of a “clear risk of a serious breach” and can allow the Council to give a formal warning to any country

³³ Charter of Fundamental Rights of the European Union (2010/c 83/02). *Official Journal of the European Union*, 30 March 2010. URL <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF> (25 July 2016)

accused of violating fundamental rights. If that does not have the desired effect, in case of a "serious and persistent breach" of EU values Article 7.2 could impose sanctions and suspend voting rights. It is important to stress, however, that neither the preventive nor the sanctioning mechanisms of Article 7 TEU have so far been applied. Having seen how this mechanism is unsuitable for managing the specific rule of law problems within the EU, in March 2014, the European Commission adopted a new framework for addressing systemic threats to the rule of law in any of the EU Member States. This new rule of law framework is complementary to infringement procedures and to the "Article 7 procedure" ('nuclear option') and has a three-step mechanism for addressing systematic threats to rule of law in any EU Member States.³⁴ This new framework established a tool allowing the Commission to enter into a dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law. First time the new framework for addressing systemic threats to the rule of law was used concerning Poland. First Vice-President of the European Commission Frans Timmermans visited Poland two times; on 5 April and on 24 May 2016 for exchanges with his Polish counterparts on how to resolve the situation. Extensive exchanges took place between the Commission and the Polish Government in meetings at various levels. However, despite these exchanges it was not possible to find a solution to the issues identified by the Commission. On 1 June 2016 the Commission adopted an Opinion setting out the concerns of the Commission and served to focus the ongoing dialogue with the Polish authorities on finding a solution. In spite of every effort of the Commission and the views of the Venice Commission, on 22 July, the Polish Parliament adopted a new law on the Constitutional Tribunal, and a number of important concerns already raised remain.³⁵ In July 2016 the Commission formulated that "Recent events in Poland, in particular the political and legal dispute concerning the composition of the Constitutional Tribunal, the non-publication of judgments rendered by the Constitutional Tribunal, as well as the review of the law on the Constitutional Tribunal and its impact on the effectiveness of constitutional review of new legislation have given rise to concerns regarding the respect of the rule of law". As a second step in the process under the Rule of Law Framework, the Commission issued a Recommendation on 27 July 2016 setting out the reasons why the Commission considers that there is still a systemic threat to the rule of law in Poland and recommending how this situation

³⁴ See more: Kochenov, Dimitry – Pech, Laurent: Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction. *EUI Working Paper*, RSCAS 2015/24, Robert Schuman Centre for Advanced Studies Global Governance Programme-164. URL http://cadmus.eui.eu/bitstream/handle/1814/35437/RSCAS_2015_24.pdf?sequence=3 (10 June 2016)

³⁵ *Commission Recommendation regarding the Rule of Law in Poland: Questions & Answers*. Brussels, 27 July 2016. URL http://europa.eu/rapid/press-release_MEMO-16-2644_en.htm (30 July 2016)

can be addressed. The probable third stage, when the Commission would monitor the follow-up given by the Member State to the recommendation, would not be necessary. If there is no satisfactory follow-up within the time limit set, resort can be had to the “Article 7” procedure.

Special attention should be given to the EU’s own, separate court system in Luxembourg, the Court of Justice of the European Union (ECJ). The European Court of Justice is not a specialised body for human rights, but has developed its own case law on the role of fundamental rights within the European legal order.³⁶ It should be noted that the ECJ in its Opinion 2/13 has set out a position that the EU accession to the ECHR would be incompatible with European Community law.³⁷ The ECJ rejected the draft accession agreement, and provided a checklist of amendments to the accession agreement that would have to be made to ensure that accession is compatible with European community law. Much has been written about the Opinion 2/13 of the ECJ, which triggered an intense debate, but attention should be drawn to the fact that under the Treaties in force, the EU has a legal obligation for accession to the ECHR.³⁸

The Organization for Security and Cooperation in Europe (OSCE) is not only a European institution, since it comprises 57 participating States from three continents; North America, Europe and Asia. The OSCE is known as a security organization, but its comprehensive security concept also includes “hard” and “soft” security

³⁶ See more: Defeisz, Elizabeth F.: Human Rights and the European Court of Justice: An Appraisal. *Fordham International Law Journal*, Vol. 31 (2007) No. 5. URL <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2110&context=ilj> (10 June 2016)

³⁷ Opinion 2/13 of the Court (Full Court) 18 December 2014, (Opinion pursuant to Article 218(11) TFEU — Draft international agreement—Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms—Compatibility of the draft agreement with the EU and FEU Treaties) The request for an Opinion submitted to the Court of Justice of the European Union by the European Commission is worded as follows: “Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, [signed in Rome on 4 November 1950 (“the ECHR”)], compatible with the Treaties?”

³⁸ The Treaty of Lisbon amended Article 6 of the EU Treaty, which provides that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law, and that the EU is to accede to the ECHR. As regards such accession, Protocol No 8 (relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms) provides, however, that the accession agreement must fulfil certain conditions so as, in particular, to make provision for preserving the specific characteristics of the EU and EU law and to ensure that accession of the EU does not affect its competences or the powers of its institutions. URL <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf> (10 June 2016)

including the “human dimension” of security; human rights and democracy issues.³⁹ The creed of the OSCE is that lasting security cannot be achieved without respect for human rights and functioning democratic institutions. The OSCE monitors human rights situation in the participating States, the work of executive, judicial, legislative, and law enforcement institutions related to human rights compliance and if necessary it provides advice. The Office for Democratic Institutions and Human Rights (ODIHR) is the principal institution of the OSCE performing a wide range of work, e.g. strengthening and empowering state institutions (democratic governance and law-making), the development of pluralistic party systems and political-party regulation, political parties and non-governmental organizations, and promoting gender equality and women’s political participation. Due to the Annual Report 2015 ODIHR has multi-faceted activities.⁴⁰ During 2015, the election observation activities covered 17 countries and states’ responses to terrorism were monitored, as well as the impacts on human rights, including the freedoms of expression, religion or belief, assembly and association and the right to privacy. One of the main activities of the ODIHR is countering hate crime, racism, xenophobia, anti-Semitism and other forms of intolerance. The ODIHR gives a special attention to the situation of Roma/Sinti focusing on addressing discrimination and violence against Roma/Sinti and promoting equal opportunities for, and the protection of the human rights of these minorities.

Unfortunately, there are bodies with fewer functions to monitor human rights conditions in countries in the Middle East and Southeast Asia. The need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights, where they do not exist as yet, was formulated several times e.g. by the World Conference on Human Rights.

The protection of human rights at national level

As it has recently been presented, in the last decades serious human rights institutions and mechanism were built both at international and regional levels, whose decisions should be taken by the States Parties. According to a general rule of international law, the international agreements impose obligations upon their States Parties. Under international law, States are obliged to fulfil their international legal obligations, laid down in treaties to which they are parties and in binding decisions of

³⁹ See more: Galbreath, David J.: *The Organization for Security and Co-operation in Europe (OSCE)*. 2007.; Weiss, Thomas G. – Wilkinson, Rorden (ed.): *The Global Institutions Series*. Rutledge.

⁴⁰ Published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR). URL <http://www.osce.org/odihhr/248251?download=true> (23 July 2016)

international bodies whose competence they have recognised.⁴¹ International treaties have to be integrated in domestic legal orders. States Parties have to bear primary responsibility for effectively implementing international law, consistent with the object and purpose of an international agreement. Every international treaty must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 in the Vienna Convention on the Law of Treaties. The Law of Treaties provided that a [...] “treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to terms of the treaty in their context and in the light of its object and purpose”.⁴² The same rules should be applied to international human rights commitments as well. International human rights treaties play an important role at national level and have a clear impact on domestic law. States must build their own internal capacity to translate human rights norms into practice. The term implementation covers all measures that must be taken to ensure that the rules of international law are fully respected. States have general obligations to respect, protect and fulfil human rights. Obligations to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires the State and its agents to prevent the violation of any individual’s rights by any other individual or non-State actor. The obligation to fulfil human rights requires positive measures by the State in ensuring full realization of these rights, including the government, the legislature, the judiciary, the police and military institutions.⁴³ In the fulfilment of these obligations, civil society organizations, private corporations and individuals could also be involved.

It has become a cliché that the ratification of and accession or succession to international human rights treaties and protocols adopted within the framework of the international organisation is a general requirement.⁴⁴ It is politically important that human rights have been codified in international and national law.⁴⁵ The widespread ratification of international human rights agreements is taken as evidence

⁴¹ International law factors influencing the legal effect of human rights treaties in domestic law. In: CDL-AD(2014)036 690/2012 *European Commission for Democracy through Law (Venice Commission) report on the implementation of international human rights treaties in domestic law and the role of courts. Adopted by the Venice Commission at its 100th plenary session* (Rome, 10–11 October 2014). pp.17–18.

⁴² Vienna Convention on the law of treaties, No. 18232 Multilateral, concluded at Vienna on 23 May 1969. Article 31, General rule of interpretation. *United Nations Treaty Series*, (1980) p. 340.

⁴³ *International Human Rights Law* URL <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

⁴⁴ Traditionally, two main approaches to the relationship between international and national law have been distinguished: the monist approach (monism) and the dualist (dualism). Dubay, Carolyn A.: General Principles of International Law: Monism and Dualism. *International Judicial Monitor*, (2014) Winter Issue. URL http://www.judicialmonitor.org/archive_winter2014/generalprinciples.html

⁴⁵ See more: Tomuschat, Christian: *Human Rights: Between Idealism and Realism*. Third edition. OUP, Oxford, 2014.

for values being widely shared. The States Parties to the international human rights treaties are obliged to ensure that individuals within their jurisdiction enjoy judicial and other fundamental guarantees described in the international human rights treaties.⁴⁶ With regards to the Vienna Declaration and Programme of Action on Human Rights (1993), States have the right to choose the framework that best suits them in accordance with international human rights standards.⁴⁷ The fact, that States could choose the framework which is best suited to their particular needs at national level, does not mean that a State could disregard its international and domestic human rights commitments. It should be pointed out immediately that States Parties are required to give effect to their international law obligations in good faith. (*“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”*).⁴⁸ The Universal Declaration of Human Rights (UDHR) and binding human rights treaties influenced the constitutions of many States, and it can be said, nearly all countries acknowledge the need to protect human rights and fundamental freedoms in some form. However, greater attention is now being given to developing the capacity of national human rights institutions to increase their activities for the promotion and protection of all human rights. Human rights represent entitlements of an individual or groups against the government, as well as responsibilities of an individual and the government authorities. States as such are responsible for the timely and effective implementation of their international legal obligations. States Parties have to translate conventions and protocols into national language(s) and have to adopt appropriate measures for their communication and dissemination. States have to build democratic institutions and strengthen national human rights institutions capable of promoting respect for and understanding of human rights. States Parties have to adopt administrative and criminal legislation that punishes violations of internationally protected human rights. Every States Party has to train qualified persons, legal experts and advisers in particular within the public administration at national and local level. These obligation also includes participation in the above-mentioned international monitoring procedures.

As it has been noted before, States have to respect the standards contained in international human rights instruments and ensure that their administration of jus-

⁴⁶ The Vienna Convention on the Law of Treaties must be taken into consideration when it comes to the interpretation of treaties.

⁴⁷ “The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.” I.I. URL <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (10 June 2016)

⁴⁸ Vienna Convention on the law of treaties, No. 18232 Multilateral, concluded at Vienna on 23 May 1969. Article 26. “Pacta Sunt Servanda”. *United Nations Treaty Series*, (1980), p. 339.

tice, law enforcement and prosecutorial agencies are in line with the requirements of a strong and independent administration of justice.⁴⁹ Moreover, States should be suitable for receiving, investigating and resolving complaints of human rights violations, therefore, a formal institutional structure should be developed. The internationally adopted human rights obligations should be enforced at national level, including engagement of domestic courts. Many different types of domestic courts are possible, but generally speaking, domestic courts have to interpret and give effect to law in compliance with national law. National law must comply with international law, and domestic courts could review the compatibility of national legislation with international human rights treaties. Domestic courts sometimes work together with international courts e.g. the European Court of Human Rights (“Judicial dialogue”) to protect human rights. Domestic courts could apply human rights conventions directly or they could apply their domestic law in light of the convention, depending on constitutional law.⁵⁰ Special attention needs to be paid to national human rights institutions (NHRIs), which could play a crucial role in protecting and promoting human rights, including handling complaints, undertaking investigations, monitoring the performance of obligations under human rights treaties, recommending policy changes and providing training and public education. In 1992 the Commission on Human Rights elaborated “The Principles relating to the Status of National Institutions” (the Paris Principles) which were endorsed by UN General Assembly resolution 48/134 of 20 December 1993.⁵¹ Since their adoption, they have become the standards applicable to these institutions.

The maintenance costs of human rights institutions

Human rights institutions and mechanism both at international and national level need human, financial and other resources available to carry out their activities. The functioning of human rights institutions is rather covered by regular budgets while they try to seek increased extra-budgetary resources. The regular budget should be shared among States; without their contributions it would not be possible to operate the human rights system. In accordance with Article 101 of the Charter of the United Nations, the Member States have to adopt a coherent approach aimed at securing that resources commensurate to the increased mandates are allocated to the Secre-

⁴⁹ I. 27. URL <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (10 June 2016)

⁵⁰ Status: hierarchy of human rights treaties within domestic legal orders. In: CDL-AD(2014)036 690/2012 *European Commission for Democracy through Law (Venice Commission) report on the implementation of international human rights treaties in domestic law and the role of courts. Adopted by the Venice Commission at its 100th plenary session* (Rome, 10–11 October 2014). pp.10–13.

⁵¹ URL <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx> (21 July 2016)

tariat.⁵² Funding and expenditure of the international human rights institutions are public, so accessing data is quite simple. Overall, slightly more than 3% of the total UN regular budget is allocated to human rights. For the 2014-2015 biennium, US\$ 207 million was allocated to OHCHR, compared to US\$ 177.3 million for the 2012-2013 biennium.⁵³ The global funding needs for the Office of the United Nations High Commissioner for Human Rights are only covered by the United Nations regular budget at a rate of some 40%, with the remainder coming from voluntary contributions from Member States and other donors.⁵⁴ Due to the annual Report of the OHCHR, this amount is not enough to implement human rights mandates established by the General Assembly and the Human Rights Council and OHCHR have to use a substantial portion of extra-budgetary funds to supplement these activities. The voluntary contributions to OHCHR depend on the donors, and donation favour is very variable.⁵⁵ In 2015, OHCHR received a total of US\$ 125.9 million in voluntary contributions. As in previous years, the overwhelming majority of voluntary contributions came from Member States, which provided a total of US\$ 105.9 million, or 84.1 per cent of all contributions. The biggest voluntary contributions to OHCHR in 2016 came from the Netherlands, Germany, Spain, Switzerland, and Finland. Other donors include the Republic of Korea, Hungary, Nicaragua and Andorra.⁵⁶ International organizations, including the European Commission and UN partners, contributed with a further US\$ 19.6 million, or 15.5 per cent of all contributions.⁵⁷

The Council of Europe also publishes data on its budget. The “Council of Europe Programme and Budget for 2014-2015 (in €)” presented the detailed statistics on the allocation of the budget of €244 095 200.⁵⁸ As seen in the above-mentioned document, the first item is Human Rights of €100,400,600 (“Protection of Human Rights” of €8,103,700, including the European Court of Human Rights of €67,650,400 (ECtHR), “Promoting Human Rights” (€14,280,700) and “Promoting Social Rights” €4,716,500). For “Rule of Law” the CoE spent €15,844,400 and

⁵² URL http://legal.un.org/repertory/art101/english/rep_supp3_vol4-art101_e.pdf (22 July 2016)

⁵³ The United Nations regular budget, approved by the General Assembly every two years, is funded from “assessed contributions” of each Member State according to a formula that takes into account the size and strength of its national economy. URL <http://www.ohchr.org/EN/AboutUs/Pages/FundingBudget.aspx> (22 July 2016)

⁵⁴ *Op. cit.*

⁵⁵ According to the OHCHR Annual Appeal 2016, the OHCHR needs-based budget of US\$217.4 million in extra-budgetary requirements for 2016. This amount is based on what the Office estimates is necessary to respond to the requests for assistance we receive. *Op.cit.*

⁵⁶ More details on the donors to OHCHR can be found through the Donor Profiles included at the end of the yearly OHCHR Report.

⁵⁷ URL <http://www.ohchr.org/EN/AboutUs/Pages/FundingBudget.aspx> (22 July 2016)

⁵⁸ URL http://www.coe.int/t/budgetcommittee/Source/Programme_and_Budget_2014-2015_en.pdf (23 July 2016)

€46,410,300 on “Democracy”. The CoE budget for 2016 is €442,255,900. Similarly to the UN, the Council of Europe’s budget is mainly funded by Member States’ contributions, based on a formula which takes population and GDP into account. The six major contributors of the Council of Europe are: France, Germany, Italy, Russian Federation, Turkey and the United Kingdom. These countries pay the same rate for the ordinary budget, providing nearly 65 per cent of the total. States may also make voluntary contributions to support the Council of Europe’s special programme of work.⁵⁹

The European Union also has a “burden-sharing” system; according to the rules set out, the EU Member States finance its activities. Due to the “EU Action Plan on Human Rights and Democracy 2015–2019”⁶⁰ great importance must be given to the EU financial instruments which support human rights and democracy worldwide. The most well-known instrument is the “European Instrument for Democracy and Human Rights” (EIDHR), which has a budget of €1.249 billion for 2014–2020. With an annual budget of around €40 million from the EIDHR, the EU’s “Election Observation Missions” (EOMs) continued to build confidence and enhance reliability and transparency of democratic electoral processes. Its key objectives are to enhance respect for human rights and fundamental freedoms in countries and regions where they are most at risk, and to strengthen the role of civil society in promoting human rights and democracy. The other EU financial instrument is “The Instrument contributing to Stability and Peace” (IcSP) is the EU’s main instrument supporting security initiatives and peace-building activities in partner countries. It came into force in 2014, replacing the “Instrument for Stability” (IfS) and several earlier instruments that focused on drugs, landmines, uprooted people, crisis management, rehabilitation and reconstruction. It has a budget of €2.4 billion covering the 2014–20 financial years. Other funding sources that have the advancement of human rights and democracy as part of their objectives include the *European Neighbourhood Instrument*, the *Development Cooperation Instrument*, the *Instrument for Pre-Accession Assistance*, and the *European Development Fund*, and more widely the CFSP budget.⁶¹ Using these financial resources, the European Union actively promotes and defends universal human rights within its borders and when engaging in relations with non-EU countries as well. The European Union (Member States and the European Commission) is the largest Official Development Aid (ODA) donor

⁵⁹ *Op. cit.*

⁶⁰ URL http://eeas.europa.eu/factsheets/docs/150720_eu_action_plan_on_human_rights_and_democracy_2015-2019_factsheet_en.pdf (22 July 2016)

⁶¹ EU Action Plan on Human Rights and Democracy 2015–2019 and Brussels, 24.11.2015 COM(2015) 578 final Report from the Commission to the European Parliament and the Council 2015 Annual Report on the European Union’s development and external assistance policies and their implementation in 2014 {SWD(2015) 248 final}.

in the world, providing more than half of the contributions, and the EU maintained its commitment to promoting its core values worldwide.⁶²

States Parties, as it has already been mentioned, are subject to various international human rights monitoring organizations and international courts alike. If the monitoring system detects a malfunction of a country's institutional framework, it may make recommendations for correcting them. If damning court ruling is made, States Parties must be upheld to pay damages or other compensation. For example, in 2015 in the case *Varga and Others v. Hungary* the Chamber of the European Court of Human Rights (ECtHR) held, unanimously a violation of Article 3 (prohibition of inhuman and degrading treatment) of the European Convention on Human Rights (ECHR), and a violation of Article 13 (right to an effective remedy) read in conjunction with Article 3 of the Convention. The ECtHR stated that Hungary must take measures to improve the problem of widespread overcrowding in prisons, but did not specify how this was to be done.⁶³ The ECtHR has awarded damages of €73,900 to six Hungarian inmates and ordered the government of Hungary to pay €6,000 in legal costs. In addition to requiring Hungary to pay "just compensation" to the prisoners for the "inhuman and degrading"⁶⁴ conditions of their incarceration, the court ordered Hungary to take immediate steps to alleviate the overcrowded conditions of its prisons. The latest decision follows on the heels of four previous decisions holding the government of Hungary responsible and some 450 additional cases were pending. After the time when the decision came into force Hungary had six months to come up with a proposal and avoid that ECtHR render similar judgement in those cases. The ECtHR had set a precedent with this decision, and that, while the judgement had yet to cure, it was clear what the outcome of the other 450 cases would be, and it was likely the court would render verdicts one after another in rapid succession. It may be asked whether, when the ECtHR found a structural violation or initiated the pilot judgment procedure, this amounts to finding a serious violation of human rights. In March 2016 the Council of Europe published a

⁶² See more: *The EU as a global player: Financing EU's ambitions for 2014–2020. Overview Paper 'EU Policy Perspectives' seminar series Clingendael European Studies programme (CESP). Input paper by Sarah Wolff and Arnout Mijs. Policy seminar organised by the Clingendael Institute in cooperation with the Netherlands Ministry of Foreign Affairs Huys Clingendael, Clingendael 7, The Hague. 2–3 December 2010.* URL http://www.clingendael.nl/sites/default/files/20101129_overview_paper_financing_eu's_external_action.pdf (22 July 2016)

⁶³ Chamber judgment in the *Case of Varga and Others v. Hungary* (application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13). URL [http://hudoc.echr.coe.int/eng?i=001-152784#{"itemid":\["001-152784"\]}](http://hudoc.echr.coe.int/eng?i=001-152784#{) (22 July 2016)

⁶⁴ The Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances or the victim's behaviour (see *Labita v. Italy [GC]*, no. 26772/95, § 119, ECHR 2000-IV and *Balogh v. Hungary*, no. 47940/99, § 44, 20 July 2004).

report according to the CoE Annual Penal Statistics (SPACE)⁶⁵ and highlighted that overcrowding has been slowly declining in European prisons since 2011, although it remains a problem in one in four prison administrations.⁶⁶ The countries with the most crowded penal institutions were Hungary, Belgium, Macedonia, Greece, Albania, Italy, Spain (state administration), Slovenia, France, Portugal, Serbia, Romania and Austria. According to the report an average of 142 inmates were crammed into units designed to hold 100 people in Hungary, followed by Belgium with a ratio of 134 to 100. Following this report, which stated that the most overcrowded prisons in Europe are in Hungary, the Hungarian authorities decided to increase Hungary's prison capacity and to plan building more prisons. Obviously, these are substantial costs to the Hungarian budget, and we can say that the cost of these provisions could be considered as the cost of human rights.

Conclusions

The tasks of States Parties are not only to establish international human rights institutions and mechanism, but also they must ensure the maintenance of these treaty bodies and their mechanisms, fact-finding missions and commissions of inquiry as well. Moreover, the States Parties' compliance with their international obligations also requires appropriate national institutions and their maintenance. So, States Parties have a dual obligation. On the one hand, they have to maintain the international human rights institutions and mechanisms, on the other hand, they also have to establish and maintain the institutions at national level in accordance with their international obligations.

Of course, not every state is eager to take part in a human rights mechanism that reveals the deficits of democracy and highlight human rights violations. The states who strongly cooperate with human rights systems and create conditions of financing, are the most likely the States where national institutions and mechanisms are working in accordance with the rule of law, democracy and respect for human rights.

Not surprisingly, the States, where serious violations of international human rights law and international humanitarian law occurred—which are regulated *inter alia* by the Rome Statute of the International Criminal Court, as well as customary international law—are usually not cooperative with the international human rights

⁶⁵ The SPACE survey is conducted for the Council of Europe by the School of Criminal Sciences of the University of Lausanne. The SPACE I 2014 survey contains information on 50 out of 52 prison administrations in the 47 CoE member states. The SPACE II contains information on 45 out of 52 probation agencies.

⁶⁶ URL <http://www.coe.int/en/web/portal/-/2014-council-of-europe-annual-penal-statistics?redire> (24 July 2016)

institutions and mechanism. There are reasonable grounds to believe that these non-cooperative states could have committed gross violations of international human rights law and international humanitarian law, including unlawful killing, torture, arbitrary arrest and detention, sexual violence, indiscriminate attack, pillaging and destruction of property. In terms of the strong interdependence between human rights violations and a non-cooperating state e.g. Myanmar and North Korea can be mentioned. Abuse of human rights, civil liberties and political rights often lead to conflict, and conflict could result in more and more serious human rights violations. There are countries where the total breakdown of law and order and the emergence of parallel governance systems make the situation unbearable for individuals. These countries have been heavily criticised from all sides, but without political will, the appropriate solution is yet to be found. However, the solution would be simple; States must fulfil the decisions of the international institutions (e.g. UN Security Council, International Courts etc.) and have to respond to each recommendation (e.g. UNHCR, CoE, Venice Commission, and EU etc.) and implement them. The crimes must be promptly investigated, perpetrators held accountable and victims provided with an effective remedy. If violations of international human rights law and international humanitarian law persist, the individuals, who are entitled to certain basic rights under any circumstances, pay with their lives, which is the highest price for human rights violations. The cost of maintenance and operation of the current human rights system is obviously high, but it is all insignificant compared to the human losses and damage which could happen without these systems.

BENCE KOCSEV

The Impact of Populism on Democracies in Central and Eastern Europe¹

“[...] today populist discourse has become mainstream in the politics of western democracies. Indeed, one can even speak of a populist Zeitgeist.”

(Mudde 2004:252)

In 1989 the unthinkable happened: the communist system, dominated by the Soviet Union, and the era of the socialism—at least in most of the countries—came to an end. The end of the bipolar world, foreshowed by the fall of the “Berliner Mauer” on 9 November, ushered in an optimistic era of democratic change for members of the former Eastern bloc and expansion for the European Union. Liberal democracy has triumphed. In Fukuyama’s view democracy could win not only because it produces material prosperity, but also because it is thymotically fulfilling.²

“What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.”³

Most scholars argue that this post-1989 era can be divided into three periods: a short period of initial euphoria directly after the transition, an optimistic term until the end of the 90s, and recently a decade of increasing complications.⁴ The challenges of the latter period are wide and varied: the honeymoon period is definitely over. Within a brief compass—venturing a tour into the domains of history, sociology and political science—we would like to cover a vast range of topics which are

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¹ Some parts of this article have been already published in Agárdi, Izabella – Miszlivetz, Ferenc (eds.): *Towards New Approaches to Scientific Inquiry: Interdisciplinarity in the 21st Century*. ISES, 2015.

² Fukuyama relates Socrates’ ideas about Thymos and desire to how people want to be recognized within their government.

³ Fukuyama 1989.

⁴ Cf. Ekiert 2008.

closely related to these post-transition challenges. Moreover, the following paper is essentially a work of exposition that offers only (as Jon Elster would say) nuts and bolts, cogs and wheels which can be used to explain some complex phenomena to refer to some key issues such as democracy, populism and Euroscepticism. In the meanwhile, of course, we are bearing in mind Peter L. Berger's recommendation to all social scientists: "It can be said that the first wisdom [of sociology] is this: things are not what they seem. This too is a deceptively simple statement. It ceases to be simple after a while. Social reality turns out to have many layers of meaning. The discovery of each new layer changes the perception of the whole".⁵

Overture—aim and objectives

It is quite a commonplace that in recent years, the malaise around democracy (especially populism) has attracted large-scale interest from social scientists just as from political commentators and journalists. The two eminent scholars of the Harvard Weatherhead Centre, Noam Gidron and Bart Bonikowski noticed that this (*viz.* populism) phenomenon has been defined based on political, economic, social, and discursive features and analysed from numberless theoretical (structuralism, modernization theory, social movement theory, political psychology, political economy, democratic theory etc.) and practical (archival research, discourse analysis, and formal modelling) perspectives.⁶

In this paper we would like to contribute to the contemporary efforts to construct a broader framework for analysing populism that closely considers diverse features of populist politics. In this paper we are going to discuss different definitions and approaches to the study of populism and compare their theoretical assumptions as well as their methodological implications. The following text also addresses questions regarding practices which might be linked to populism, such as Euroscepticism. Are these practices linked to populism? How those practices affect political participation? Appropriate strategies at national as well as the European level were mentioned in the third part in order to face upcoming political, economic and social challenges in the Hungarian and the (Central-) European society.

⁵ Berger 1963:7.

⁶ Gidron–Bonikowski 2013.

Strukturwandel der Öffentlichkeit

After the collapse of Francisco Franco's and Antonio Salazar's dictatorships, thus after the "Huntingtonian" third wave of democratization, democracy expanded around the world like never before. Moreover, since its inception, the European integration process has aimed at strengthening liberal democracy across Europe. However, some scholars argue that democracy is in recession and one of the challengers is populism.

It is a commonplace that populist parties of various kinds, of course, pepper the political landscape across Europe for example the *Partij voor de Vrijheid* van Geert Wilders⁷ in the Netherlands, *Front National* in France, the slightly faded *Vlaams Belang* in the Flemish Region of Belgium, the *Independence Party* in the United Kingdom, *Die Freiheitliche Partei Österreichs* in Austria or the *Jobbik* in Hungary are on one side of the political spectrum and—to mention a few from the left "hemisphere"—*Podemos* in Spain, *Syrizia* in Greece and the *Socialistische Partij* in the Netherlands on the other. What are the main patterns behind this menace? Asked differently: Is it menace at all?

Until the 1990s, the behaviour of (most) political parties and voters was largely structured by left/right. Citizens used these political "hemispheres" to orient themselves in a complex political world. When "smart voting" was not even a possibility they used information about their left/right positions to assess which party is ideologically closest to their own position and which party to vote for at the ballot box. Similarly, political parties referred to their left/right positions to inform voters about their positions on concrete issues. Given these characteristics, left/right has been the most important predictor of party support in (at least European) democracies. However, there are reasons to believe that the capacity of left/right to structure party competition and voter behaviour has weakened over the last approximately two decades.⁸ The relevance of the left/right partition was over and one of the challengers was populism.

Before the rise of these parties high profile, intellectuals like Jürgen Habermas, Ulrich Beck, Anthony Giddens and Slavoj Žižek sounded the alarm on Europe's post-democratic, if not outright authoritarian "mutation", highlighting the need for European politics to return to the rough grounds of "the people". Beck—in his concepts about the (Welt-)Risikogesellschaft and the globalization—spoke of the influence of "sub-politics"⁹ (Giddens calls it "life politics"),¹⁰ political engagement that

⁷ It is worth emphasizing the leader of this party because it has Geert Wilders as its sole member making the party unique in the Dutch parliament.

⁸ Walczak 2012.

⁹ Beck 1992.

¹⁰ Giddens 1990.

rises from below and can have a significant impact upon the exercise of political power and upon the representative institutions of the political system of nation-states. Additionally, the several sub-politics can provide opportunities in order to weaken the Weberian “iron cage” of bureaucratic and state-oriented politics and to be effective against populism.

Beckian sociologists have also been arguing that we are living in conditions of “radical uncertainty”.¹¹ Developments of the “Risikogesellschaft” have weakened the traditional structures and have produced new forms of social/political/ecological/etc. order. It is a world of ontological uncertainty, which cannot be calculated or priced. A world of unknown unknowns into which we seem to have sleepwalked. As Ulrich Beck puts it: “Uncertainty returns and proliferates everywhere”.¹² All these factors are creating an atmosphere of uncertainty and fuelling fears for the future. As a result, populist groups and parties, most of which have only a short life span (e.g. Fremskridtspartiet in Denmark or the Lijst van Pim Fortuijn in the Netherlands), become a core part of the political scene, as many other forms of informal grouping do.

Although we admire the scientific oeuvre of Beck and Giddens, it is worthy of note that some researchers (perhaps the most prominent among them is Chantal Mouffe) are really unsatisfied with the Third Way view that was developed by Anthony Giddens in Britain, but also with the Radical Centre by Ulrich Beck in Germany. The two doyens of the recent sociology argued—as Chantal Mouffe pointed it out—that it was important to have some consensus at the centre between left and right, out of which centre-left and centre-right emerged because there seemed to be no alternative. They presented it as a progress for democracy which was becoming more mature. The critics of the Beckian way are arguing that this is not a progress for democracy. Obviously, at least according to these critics there is no possibility through the traditional representative democracy to offer alternatives to the existing political, social and economic order.¹³

Like all ideologies, populism proposes an analysis designed to respond to a number of simple but essential questions like “what went wrong; who is to blame; and what is to be done”?¹⁴ Put simply, the possible (and most received) answers are:

- (a) the government and democracy, which in its original condition should reflect the will of the people, have been occupied by corrupt elites;¹⁵

¹¹ Beck 1994.

¹² Beck 1994:12.

¹³ Mouffe 2014.

¹⁴ Bets and Johnson 2004:323.

¹⁵ Another aspect should be noted here. Two scholars of the University of Leiden, Mark Bovens and Anchrith Wille argue that the Netherlands has become a diploma democracy in which the higher educated dominate all fields of political participation and thus shape policy in their favour. “Modern

- (b) the elites and ‘others’ are to blame for the current undesirable situation in which people find themselves;
- (c) the “vox populi” must be re-recognized and the power must be given back to people through—of course—the populist leader and party. This view is based on a fundamental conception of the people as both homogeneous and virtuous. The above mentioned Dutch politician Wilders formulated it as follows: “But finally, after silently watching for years the immense damage done to our nation by the elite’s policies, the Dutch people had enough.”¹⁶

These points are closely linked to what Slavoj Žižek summarized in his essay “Against Populist Temptation”. Additionally, the Slovenian political thinker connects these factors with the—through the elite—marketization of politics. There is a global and local competition for the raw political material (votes) and for further commodities (power, influence etc.) carried out by the elite, thus, in this case by the professional politicians. It is clearly evident that few people control too much money and power.¹⁷

“However, the main threat to democracy in today’s democratic countries resides in none of these two [viz. right and left] extremes, but in the death of politics through the ‘commodification’ of politics. What is at stake here is not primarily the way politicians are packed and sold as merchandises at elections; a much deeper problem is that elections themselves are conceived along the lines of buying a commodity (power, in this case): they involve a competition among different merchandises-parties, and our votes are like money which we give to buy the government we want... what gets lost in such a view of politics as another service we buy is politics as a shared public debate of issues and decisions that concern us all.”¹⁸

parliamentary democracy is a Platonic meritocracy, a state run by the well-educated, by university graduates and former academics. In this sense Plato’s dream has come true.” Bovens-Wille 2011:2

¹⁶ Wilders 2008:282.

¹⁷ In this case it is worth to mentioning Francis Fukuyama who noted in one of his essays that a study carried out by Thomas Piketty and Emmanuel Saez shows that in the last three decades, the share of U.S. income accruing to the top 1 percent of American families jumped from 9 to 23.5 percent of the total. These data, according to the argumentation of Fukuyama, point clearly to the stagnation of working class incomes in the United States. Fukuyama 2012.

¹⁸ Žižek 2006.

Conceptualizing populism: some attempts.

Ghita Ionescu and Ernest Gellner began their classic edited collection on populism by paraphrasing Marx and Engels's famous opening line: "A Specter is haunting the world – populism".¹⁹ Even if a rising tide of populism can be stated, we can find ourselves in a terminological swamp. Paraphrasing the eminent political scientist, Larry Diamond defining populism is a bit like interpreting Talmud (or any religious text): ask a room of ten rabbis (or political scientists) for the meaning, and you are likely to get eleven different answers.²⁰ Although, it is not by accident that the topic of populism has received a great amount of scholarly attention the clinching point, the conceptualization of populism is still existing. The difficulty lies in the fact that the term populism has been attached to many different phenomena. Initially, the term "populism" originates from Latin "populus", meaning "people", which implies strong connection to democracy itself, which originates—take another classic language into consideration—from the Greek δημοκρατία (rule of people). In one of his books, Robert Morstein-Marx, professor of Classics at the UCSB gives a detailed account about the antique, more precisely about the Roman circumstances. The essence of his description is—to keep it short and to the point—follows:

"Our chief contemporary witnesses to the political life of the late Republic, Cicero and Sallust, are fond of analyzing the political struggles of the period in terms of a distinction between optimates and populares, often appearing with slight variations in terminology, such as Senate, nobility, or boni versus People or plebs. But what precisely is denoted and connoted by this polarity? Clear enough, one who is designated in these sources as popularis was at least at that moment acting as "the People's man", that is a politician — for all practical purposes, a senator — advocating the rights and privileges of the People, implicitly in contrast to the leadership of the Senate; an "optimate" (optimas), by contrast, was one upholding the special custodial and leadership role of the Senate, implicitly against the efforts of some popularis or other."²¹

Populism, however, is obviously not peculiar to Roman democracy. More generally we can assume that where is democracy, there is populism. The concept of populism in the political vocabulary has become commonly used from the 20th century, particularly referring to the Latin American experiences of Peronismo and Getulismo. It is a broad and undecided concept which firstly centred on people and their aspirations. The term populism has been used extensively in the last two decades. Political theorists have spent a lot of effort to define the concept unambiguously. Even so, we

¹⁹ Gellner 1969:1.

²⁰ Cf. Diamond 2008:21.

²¹ Morstein-Marx 2003:204-205.

believe that the ambiguity and ambivalence of populism make it impossible to create one, single definition of this phenomenon. According to Joseph Held “a certain shapelessness in ideas and organization is inherited in populism”.²² Isaiah Berlin claimed that the concept of populism suffers from a Cinderella complex: “there is a shoe in shape of populism, but no foot that will fit into”.²³ The University of Sussex professor, Paul Taggart emphasized similarly that “populism has an essential chameleonic quality that means it always takes on the hue of the environment in which it occurs”.²⁴ Berlin’s comparison and Taggart’s statement aptly illustrate how difficult defining this phenomenon is.

This paper covers the so-called “New Populism”, a term first used by the above mentioned Paul Taggart in his article,²⁵ a political culture which is still emerging in the post-Cold War world. Yet, besides historians, sociologists, political scientists and even economists have a preference to use this notion.²⁶ This New Populism is typically confrontational in style, it claims to represent the rightful source of legitimate power—the people, whose interests and wishes have been ignored by self-interested politicians and politically correct intellectuals.²⁷ Again, what is the new populism? The Princeton dictionary defines populism as “a political doctrine that supports the rights and powers of the common people in their struggle with the privileged elite.”²⁸ According to the frequently quoted Flemish author, David van Reybrouck:

“Het is inherent aan de populistische retoriek dat er wordt gesproken over een kloof. De populist werpt zich op als bruggenbouwer tussen volk en elite. Hij beweert altijd dat de elite niet meer weet wat er speelt bij het volk en dat hij de laatste is, of de eerste in lange tijd, die de mening van het volk kan verwoorden”.²⁹

In a 1999 article—to quote a scientifically more elaborated notion—Margaret Canovan speaks about populism as a “shadow cast” by democracy and went further. Populism is more than that: it is in fact the necessary by-product of the interaction of

²² Held, 2001: 63.

²³ Karstev, 2008:43.

²⁴ Meny–Surel, 2002:6.

²⁵ Taggart 1995.

²⁶ Populist economists are (especially one of the celebrity economists of the political left, Thomas Piketty) advocating to be contrasted with the so-called “Rich-ist economics” as currently and globally practiced. The 685-page book (*Capital in the 21st century*) of Thomas Piketty about wealth inequality is heading the best-seller lists along with Danielle Steele’s steamy new novel.

²⁷ Canovan 2005:25.

²⁸ URL <http://wordnetweb.princeton.edu/perl/webwn?s=populism>

²⁹ “It is inherent in the populist rhetoric that there is a cleavage. A populist presents himself as a bridge-builder between people and the elite. He always says that the elite does not know what is going on with the people and that he is the last, or the first in a long time who can express the views of the people.” (Author’s own translation)

the “two faces of democracy”.³⁰ Building on the distinction of Michael Oakeshott’s “politics of faith” and “politics of scepticism”,³¹ she argues that democracy is a permanent tussle between its two constitutive faces: a redemptive (heroic) face—“the promise of a better world through the action of a sovereign people”—and a pragmatic one, which is in fact the “grubby business of politics”³²—practices and mechanisms that are so many ways of dealing with conflict without having to resort to repression or violence. Populism—Canovan argues—occurs when the gap between the two appears too great and pragmatism seems to overtake the redemptive dimension of politics. Populism emerges in an attempt to fill the widening gap and reassert the people’s need to re-establish control over some key areas of their lives.

This is the relationship between the people and the elite. Canovan claims: “populism in modern democratic societies is best seen as an appeal to the people against both the established structure of power and the dominant ideas and values of the society”.³³ According to Cas Mudde, the situation is slightly different. He describes the above already mentioned dual perception of the political landscape as follows:

“An ideology that considers society to be ultimately separated into two homogenous and antagonistic groups, the pure people versus the corrupt elite, and which argues that politics should be an expression of the *volonté générale* (general will) of the people.”³⁴

More recently, he expressed his point in the German national weekly newspaper *Die Zeit*:

“Populismus ist eine Ideologie, die die Gesellschaft in zwei Gruppen teilt. Auf der einen Seite die ‘reinen’ Menschen und auf der anderen die ‘korrupte’ Elite. Populisten glauben, dass sie den Common Sense kennen, also den eigentlichen Willen der Menschen. Der Populist will eine echte Repräsentation dessen, was von ihm als rein wahrgenommen wird.”³⁵

³⁰ Canovan 1981:12

³¹ Michael Oakeshott is—many might say—the foremost British political philosopher of the twentieth century. In his book (*The Politics of Faith and the Politics of Scepticism*), as Timothy Fuller summarize it, “Oakeshott argues that modern politics was constituted out of a debate, persistent through centuries of European political experience down to our own day, over the question: what should governments do?” Oakeshott 1996

³² *Ibid.*

³³ Canovan 1999:3

³⁴ Mudde 2004:543

³⁵ “Populism is an ideology that divides society into two groups. On one side, the ‘pur’ people and on the other the ‘corrupt’ elite. Populists believe that they know the common sense, therefore, the actual will of the people. The populist wants a true representation.” Mudde 2015 (Author’s own translation).

We fully agree with the lecturer of the University of Amsterdam that at least in the past quarter century populism has become a regular feature of politics in western (including CEE) democracies. According to the Dutch scholar, Matthijs Rooduyn within the Dutch language there are more than 10 (quite recently) published books with the words populism, or populist in their title.

Because populism is often conceived as a threat to liberal democracy, and therefore as a pathological case of the politics, most of the contributions to the debates “are of an alarming nature”.³⁶ Countless amount of publications deal with the populist threat to liberal democracy. While populism is still mostly used by outsider or challenger parties, mainstream politicians, both in government and opposition, have been using it as well—generally in an attempt to counter the populist challengers.³⁷

Another approach can be found in David van Reybrouck’s book titled “A Plea for Populism”, which was published in 2008. The Flemish author attempts to make a distinction between “good” and “bad” populism. He describes “bad” populism as a contemptible phenomenon and pays little attention to it, suggesting that this type of populism is not prevalent in Belgium and in the Netherlands. The other form of populism, which does not want to drive the “people” out of politics but actually wants to build politics on the wishes of people, has much greater significance. N.B. Similar ideas—even if they not so explicit—can also be found in the books of the well-known Dutch sociologist, Herman Vuijsje.³⁸

Populism, Demokratieunzufriedenheit and Euroscepticism

“In 1990, when the system in Eastern Europe had only just begun to change, an essay appeared entitled “The Necessity and Impossibility of Simultaneous Economic and Political Reform”. Its author was none other than Jon Elster (1990); this brilliant theoretician needed only to glance at the unfolding events to reach the simple conclusion: impossible!”³⁹

It is a commonplace that the countries in Central and Eastern Europe struggle with the so-called post-accession blues. In other words: while the systemic transition to multi-party democracy and a capitalist market economy has been generally completed (how successfully is another question) and in most of the countries the speed of democratic consolidation (defined as improvement in the areas of political rights,

³⁶ Mudde 2004:27

³⁷ Mudde 2004:551. For differences between “ruling-party populism” and “opposition populism” see Mudde 2012

³⁸ Cf. Vuijsje 2008, Kocsev 2012

³⁹ Merkel 2008:12

liberties and democratic practices) was unexpectedly fast, the fine-tuning of these young democracies will take many more years and a great deal of the work will have to focus on the elusive concept of political culture. However, reports on current political developments in these countries conclude that popular democratic consensus has eroded since the initial wave of enthusiasm during the immediate post-Cold War years.⁴⁰ The transformation period was at least partly inspired by the “Return to Europe” or “Return to the European family” metaphors. Additionally, this was the time when Central European states were integrated into the West or—to use the terminology of Immanuel Wallerstein—into the “core”. However, euphoria among the citizens of Central and Eastern Europe has faded significantly.

Ever since Max Weber, it has been acknowledged that the stability of any political regime depends not only on the structures but also on the extent to which it is socially and culturally anchored.⁴¹ The democracies of Central and Eastern Europe are no exceptions. Did the above mentioned changes firmly anchor these societies to stability? In his interesting essay—which we often cite as a starting point—André Gerrits has a few more questions about the current situation. How do we define and explain the political and social trends in Central and Eastern Europe today? Are they as worrisome, as disturbing as they are often perceived? Is Europe facing a populist *Zeitgeist* at all? Is there any (and if yes, to what extent) relation between the assumed weakening of democratic (or some might say liberal) consensus and the increase of Euroscepticism in this region of the Union?⁴² These are questions which are going to be (briefly) featured in the upcoming paragraphs.

Central and Eastern Europe is—a commonplace again—a highly diverse region which copes with a series of shared historical, economical political and social issues and concerns. Despite downgrades in democracy scores during the last decade, most of the countries still score exceptionally high on the scales of most democracy observing institutions (Freedom House, Polity, BTI etc.). Of course, the Central Eastern European region (including the Baltics and part of Eastern Balkans) perform compared to Latin America or Asia relatively, but clearly, well. It would seem that the countries in this geographical area share a common ambiguity of periods of impressive democratic progress against periods of specific political drawbacks and disillusionment. Of course, a dozen of explanations can be given about the latter.

Among the most frequently mentioned problems of democratic government in the former Eastern Bloc states—on the supply side—are: neopatrimonialism, patronage and clientelism⁴³, behind-the-scenes (outside of formal channels) decision-

⁴⁰ Gerrits 2008:52

⁴¹ Weber 1987

⁴² Gerrits 2008:57

⁴³ Neopatrimonialism—derived from Max Weber’s term, patrimonialism, is “a form of organisation in which relationships of a broadly patrimonial type pervade a political and administrative system

and deal-making, corruption, political intolerance and intimidating moral rhetoric, creating political paranoia. On the demand side of politics, we witness as worrisome trends: a decrease in social trust in democratic institutions and procedures, declining voter turn-outs (higher level of electoral abstentionism), growing electoral volatility, declining party identification, decreasing party membership, a widening gap between citizens and politics.⁴⁴ How can we actually explain these factors?

According to André Gerrits the first option is that there is a disillusion on the so-called liberal consensus. It would seem that the spell of the “invisible hand” is no longer restricted to the market, it is now operating in the political realm as well.⁴⁵ Nevertheless, the people have got tired of the liberal parties and politicians that have dominated politics for more than a decade. They are distressed by the speed and disappointed with the social consequences of market reforms and, of course, with the unbridled (semi)peripheral version of capitalism. Consequently, the voters in Central and Eastern Europe have not only punished the political forces that stood behind the liberal consensus of the last decades; they reject political and economic liberalism as such. According to the Dutch scholar these symptoms could also refer to the crises of democracy as such. Gerrits probably exaggerate a bit when he says that the political problems in Central and Eastern Europe are reflecting on the malfunctioning of representative democracy, if it is not a case of the crisis of democracy *per se*.⁴⁶

Nevertheless, the above mentioned shortcomings and problems demonstrate that the progress of democratic transformation has been slowing down. On the other hand, popular dissatisfaction with the current political order could be seen as a positive phenomenon. Citizens may not be dissatisfied with democratic government; they are critical about their flawed—to use Philippe Schmitter’s term—“real existing” democracies. The hidden picture suddenly appears: we are facing with a *par excellence* *Demokratieunzufriedenheit*.⁴⁷ It is a comforting but not a very convincing interpretation. There is a real—and as it seems increasing—lack of interest, trust, and participation in democratic government on the part of Central and Eastern Europe’s citizens. Moreover, our ongoing empirical research also confirms that a huge percentage of the respondents do not believe that the current democratic institutions are working properly. Nevertheless, these factors are partly the symptoms of

which is formally constructed on rational-legal lines”. More about neopatrimonialism see Eisenstadt 1973.

⁴⁴ This last point relates to exactly what Reybrouck is concerned about: “While technology has diminished the gap between politicians and citizens, in other ways this gap has widened. At the level of personal integrity, we do not trust our parliamentarians anymore. The gap between voters and their representatives is actually widening”. Reybrouck 2011:55

⁴⁵ Böröcz 2005:167-168

⁴⁶ Gerrits 2008:60–61.

⁴⁷ More about this term see: Varga–Freyberg–Inan 2009

the so-called post-accession⁴⁸ or post-Maastricht⁴⁹ blues which—from an optimistic point of view—also could be seen as the “return of politics” to the region. There is room for real politics again: for non-consensus, for participation, for political choice, in other words: for real democratic accountability.⁵⁰ Of course, this return of politics may have some unpleasant features and effects but it is no serious threat to democratic gains. “Real-existing” democracies (RED’s)—according to Philippe Schmitter—can be reformed and improved in conformity with its two enduring core principles: the sovereign equality of citizens and the political accountability of rulers.⁵¹

However, in the middle of it all we should come back to populism and we should also notice that it has beneficial effects (“distinctive virtues and vices”) on democratic government.⁵² Several—initially Dutch⁵³—academics have suggested that populism can actually benefit democracy, therefore, the identification of the rise of populism with democratic backsliding is not the way forward. Populist politicians could engage the so-called marginalized into the demos as well as into the political process again. Populism may dissolve and heal paralyzed political practices and institutions (including political parties). And it is able to put issues on the political agendas which mainstream political parties are either reluctant or afraid to openly debate. Even populism, which seems so widely spread in today’s Central and Eastern Europe, could ideally function as a democratic control mechanism—as long as “a substantial majority of citizens prefer democracy and its political institutions to any non-democratic alternative and support political leaders who uphold democratic practices.”⁵⁴ The discussion on populism and related phenomena in Central and Eastern Europe, thus, would gain by a more sophisticated interpretation of democracy dissatisfaction.

Above we have sketched plenty of dilemmas faced by the new, post-communist members of the European Union. On more factor, the Euroscepticism, however, is still lacking. It is as multi-interpretable as democracy critique. Several scholars have distinguished between “diffuse” and “specific” support for European integration.⁵⁵ The former refers to “support for the general ideas of European integration that underlie the EU”, the latter denotes “support for the general practice of European integration; that is, the EU as it is and as it is developing”.⁵⁶ From a different

⁴⁸ Gerrits 2008

⁴⁹ Eichenberg and Dalton 2007

⁵⁰ Cf. Reybrouck 2011

⁵¹ Schmitter 1996

⁵² Krastev 2007:60

⁵³ Herman Vuijsje 2010, Reybrouck 2011

⁵⁴ Dahl 2000:158

⁵⁵ Kopecky–Mudde 2002:300

⁵⁶ *Ibid.*

perspective, Paul Taggart and his colleague, Aleks Szczerbiak refined the definition of Euroscepticism by making a distinction between hard and soft Euroscepticism. While the former implies outright rejection of the entire European project; the latter involves “contingent or qualified opposition to European integration”.⁵⁷

In the growing literature on the role and relevance of regional organizations in national democratization processes, the enlargement of the European Union is routinely presented as one of the most successful international democracy promotion strategies. Europe is a prime example of Philippe Schmitter’s observation that the context of successful democratization is neither national nor global, it is primarily regional.⁵⁸ Indeed, among regional organizations, the European Union in particular has had a strong and beneficial influence on the transitional and consolidation phases of democracy through its “deep integration” processes and the several mechanisms for democracy promotion: control, contagion, convergence and conditionality. The hardly usable but often referred Article 6 and 7 of the EU Treaty provide a mechanism for EU intervention if the values of the rule of law or democracy are violated in member states. Still, the European Union has successfully proved that an external democratization strategy on the basis of agreement is more effective than one which is based on pressure. We agree with Gerrits that despite the fact that the pursuit of membership is often considered as causally related to the development of democracy it remains extremely difficult to demonstrate to what extent the several conditionalities applied by the European Union has exactly influenced democracy.⁵⁹

As is well known, an existing democratic system with—among others—respect for political and civil rights was the *sine qua non* condition for accession. As yet, however, discussion has focused mostly on the pro-democracy effects of enlargement. The impact of the EU accession process and later the full membership on consolidation and on the quality of the quite new democratic regimes in these countries were analysed in detail. Besides the fact that the EU enlargement in 2004 was one of the most significant EU accomplishments, the possible negative effects of regional integration on democratization have received little attention.⁶⁰ On the one hand, thus, there are some scholars who doubt that the European Union suffers from a democratic deficit but on the other hand, the mainstream of political science literature on European integration criticizes the lack of democratic control, accountability, transparency and responsibility. Therefore, some questions can also be raised on the possible co-relationship between the state of democracy and European integration.

⁵⁷ Taggart 2001:5

⁵⁸ Schmitter 1996

⁵⁹ Gerrits 2008:59

⁶⁰ *Ibid.*

After all, enlargement was not only, and perhaps not even primarily, a strategy of democratization, but of integration—a strategy of integration in whose success the Union itself was a major stakeholder. Hypothetically, various features of this democratization / integration strategy may have negatively affected the current state of democracy in the Central-Eastern Member States. Since internal centre of dominance is represented by the core members and a periphery by the new members) the societies of East-Central Europe quickly fell into a situation of a new kind of intense, singular dependence. The enlargement of the European Union was an elitist enterprise. As József Böröcz concludes the EU represents an “elite pact” between some of the world’s most powerful business organizations—the transnational corporations based and/or active in Western Europe—and the “political entrepreneurs” of the Brussels Centre.⁶¹ The accession strategy to the European Union was built on “forced”, artificial consensus. Besides this, the EU benefited from a relatively weak civil society and low political participation.⁶² Secondly, despite the widely shared ambition to join the European Union, accession was poorly legitimized and suffered from a clear lack of accountability. Paradoxically, the European Union exerts less influence on the countries of Central and Eastern Europe today, now they have joined the union, than it did before, during the accession process.⁶³ From an institution which needs to be complied with, the European Union became one which can be disputed.

Reforming the contemporary real-existing democracy—some modest remarks

The backlash against the so-called “liberal consensus”, the advance of political populism and the rise of democracy dissatisfaction complicated with the “Weltrisikogesellschaft” form an unattractive mix. It is important to note that they may be a symptom of the flaws of the democratic order in the region but they should not be identified with the full rejection of democracy. Acknowledging that, while democracy is the only mode of government ensuring lasting solutions to political, economic, social and cultural problems facing these societies, it can take—despite several shared issues and concerns—different forms in different countries, depending on the political and social traditions and political and social culture of each state. To achieve some modest goals the following—highly diverse—steps are needed:

⁶¹ Böröcz 2005:165

⁶² Studies of social capital in the region found lower levels of social trust, community engagement, and confidence in social and political institutions across the region.

⁶³ Cf. Gerrits 2008

However, making democratic institutions work is a multi-stage process and therefore it is important to note that new policy making practices might be born out of the need to enhance the legitimacy the policy making process, not out of the wish to strengthen the quality of the policy-oriented deliberation. To avoid “bad” (counterproductive) populism act as a bridge between divided groups (what still characterizes our societies) and build consensus and strengthen the moderate and still lacking middle ground. Establish channels for dialogue between the political elite and the “demos/populus”. At a time of uncontrolled inequalities, in a period when the social gap between skilled elites and poor educated individuals continues to deepen the social project cannot be left aside.

In order to diminish the gap between the elite and the “rest” of the society we recommend that the governments of the CEE countries should actively support efforts at developing e-democracy which would offer citizens new sources of information intended to improve the quality, and quantity of their political participation: e-democracy is about making use of the ICT opportunities in order to strengthen democracy, democratic institutions and the democratic process. Introducing and developing e-democracy to enable people to become more involved in the democratic process and democratic institutions and to restore the declining interest in politics requires a conscious effort by all stakeholders, and determined leadership.

A strengthened dialogue among the academia—industry—government axis within the region is also good for democracy. In order to make knowledge and technology transfer efficient revitalizing of the already existing networks (through harmonizing programmes, funding complementary programmes, facilitating networking among researchers and innovators, generating joint projects, co-funding of projects) is highly needed. Moreover, there seems to be a need for research and analysis on some key issues—such as possible new conditions of democracy. During analysing these new factors make use of regional knowledge and networks. Moreover, regional organizations can provide the key to understanding local conditions and needs.

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Responses of States to Economic Crisis

Introduction

Modern democracies often turn swiftly to law in a state of emergency. The ever-present danger is that the executive forces with the emergency powers in their hands might abuse democracy itself.¹ In this article I will argue that the situation is less spectacular but at least as dangerous when the emergency is of economic or financial nature. I will use the term “emergency” or “emergency situation” for all situations which result in special state responses. If these responses are “exceptional”, independently of the constitution’s emergency rules (if the constitution contains such rules) I call this reaction “state of emergency” which also means the inherent processual and judicial guarantees in preserving human rights and the rule of law. I use the theory of “traditional classification”² of emergency situations. According to Subrata Roy Chowdhury, there are three different situations which may arouse the need for state of emergency.³ The first could be grave political crises with violence, such as are armed conflicts, terrorist attacks, rebellions and riots. The second category involves natural disasters, while the third is economic and financial crisis. According to Oren Gross, these categories may require different actions from the states, for example, a violent crisis may require prompt and definite reaction from the government (or from the legislation), while an economic crisis - mostly—allows for longer response

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¹ Ramraj, Victor V.: No doctrine more pernicious? Emergencies and the limits of legality. In: Ramraj, Victor V. (ed.): *Emergencies and the Limits of Legality*. Cambridge University Press, Cambridge, 2008. p. 3.

² Oren Gross uses the same categorization in his relevant work: Gross, Oren: Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional? *The Yale Law Journal*, Vol. 112 (2003) No. 5, p. 1025.

³ Chowdhury, Subrata Roy: *The Rule of Law in a State of Emergency—The Paris Minimum Standards of Human Rights Norms in a State of Emergency*. Printer Publisher, London, 1989. pp. 15–16.

periods.⁴ I do not examine all types of emergencies, I focus only on the third category. Here I must make my first thesis suggesting that emergencies usually lead to state responses because responsible authority(ies) in a constitutional democracy should grant the state's and the people's security. In turn, however, these responses in many cases lead to the restriction of human rights. This character of a state of emergency is much more spectacular in violent and political crisis; nevertheless, it would be very dangerous if one underestimates its effect on human rights in time of economic emergency. There are scholars who are of the opinion that economic or financial crises are not relevant "emergency" categories. They are suggesting that these events should be managed by the conventional measures of law (according to the principle of the rule of law) because it may turn to be very dangerous to identify these "relevant viewpoints"⁵ as an emergency situation ending in a state of emergency. In the background of this standpoint is the fear from the governmental abuse, which finally could lead to the end of democracy itself. So it might be possible that a given government tries to use economic emergency or even the rhetoric of economic emergency for strengthening its power. This point of view raises the argument that the only solution in challenging these events shall be inside the legal order, therefore it is unacceptable to use extra-legal measures when the state faces economic or financial crisis. As I will show, I cannot completely agree with this standpoint. In defining economic crisis as an emergency, I refer to Ferejohn and Pasquino who think that in a liberal democracy there are two types of conflicts: the conflict among citizens, which could be named as private conflicts, and the constitutional conflicts which are conflicts "among citizens who are political actors in competition for public offices".⁶ Emergencies produce "great disturbance of the political system or order, threatening its survival". In this way an economic emergency situation may be equally threatening to a liberal democratic regime like war or terrorism. I also agree with Scheuerman stating that "legal and political analysts have too often ignored the seriousness of the normative and institutional problems posed by the surprisingly pervasive reliance on emergency devices to grapple with the exigencies of economic affairs".⁷ Although the premise of an economic emergency is almost the same: "to that presented to justify the invocation and entrenchment of extraordinary powers in relation to national security threats and political conflict".⁸ It is also possible to

⁴ See Gross, *supra* note 2, at 1026.

⁵ Chronowsky Nóra – Vincze Attila: Alkotmánybíráskodás (gazdasági) válságban [Constitutional Jurisdiction in (economic) crisis]. *Alkotmánybíráskodás Szemle*, (2014) No. 2, p. 104.

⁶ Ferejohn, John – Pasquino, Pasquale: The Law of the Exception: A Typology of Emergency Powers. *International Journal of Constitutional Law*, Vol. 2. (2004) No. 2, p. 231.

⁷ Scheuerman, William E.: The Economic State of Emergency. *Cardozo Law Review*, Vol. 21 (2000) No. 6, pp. 1869–1870.

⁸ Reynolds, John: The Political Economy of States of Emergency. *Oregon Review of International Law*, Vol. 14 (2012), No. 1, p. 86.

compare the economic crisis with a violent crisis such as terrorism,⁹ because both of them have more or less the same characteristics. If we compare the financial crisis of 2008 and the terrorist attacks in 2001 and their aftermath, it is possible to outline four common features: both of them were publicly observable events, which evoked complex threat and led to some kind of panic, the proper response to the events was uncertain and the authorities needed special measures in order to handle the threat and the emergency.¹⁰

Responses to emergencies: inside or outside the legal order?

In this article—due to length restrictions—I am unable to discuss all the details of the “inside-outside” debate, still I will attempt to show the main elements at least. Although the debate primarily reflects on the so-called “classic” emergency situations (such as war, riot, national disasters, terrorist attacks, etc.), but in this article I am going to use these terms in specific emergencies, like economic and financial crisis as well. According to the German theorist Carl Schmitt, “the sovereign is he who decides on the state of exception”.¹¹ This definition reflects on the decision and even more on the exception and the normality dichotomy. According to Hussain, this concept of the exception is in relation with the state of emergency on the basis of the political and economic crisis in the 1930’s in Germany. Therefore, Schmitt tried to resolve these perils to the state by requiring the suspension of regular law.¹² According to Sarat, Giorgio Agamben also suggests “sovereignty is the power to decide on an exception and remove a subject from the ... law”.¹³ This approach - which we call decisionist - prefers a sovereign decision against the norm; Agamben calls this exception a “kind of exclusion”. Moreover, “what is excluded in the excep-

⁹ Without fully describing the question about and the possible answers to the direct link between terrorism and emergency, I only refer to Bruce Ackerman’s work and accept his standpoint that terrorism is an emergency. Ackerman, Bruce: *Before the next attack: Preserving civil liberties in an age of terrorism*. Yale University Press, New Haven, London, 2006. pp. 58–73.

¹⁰ About this comparison see: Posner, Eric A. – Vermeule, Adrian: Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008. *University of Chicago Law Review*, Vol. 76 (2009), No. 4, pp. 1638–1639.

¹¹ Schmitt, Carl: *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans.). MIT Press, Cambridge, 2005. p. 5.

¹² Hussein, Nasser: Thresholds: Sovereignty and the Sacred. *Law and Society Review*, Vol. 34 (2000), No. 2, p. 495.

¹³ Sarat, Austin: Introduction: Toward New Conceptions of the Relationship of Law and Sovereignty under Conditions of Emergency. In: Sarat, Austin (ed.): *Sovereignty, Emergency, Legality*. Cambridge University Press, Cambridge, 2013. p. 2.

tion maintains itself in relation to the rule in the form of the rule's suspension".¹⁴ In his later work Agamben tried to specify the nature of state of emergency, which he called "zone of indifference". With this definition Agamben contradicted the inside/outside opposition theories in relation with the state of exception and focused rather on the characteristics of the norm, the judicial order and the suspension. In his view the state of emergency (or state of exception, as he calls it) is "neither external nor internal to the juridical order [...] The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order".¹⁵ In the above-mentioned concepts, state of emergency means to suspend the rule of law. On this decisionist ground, Oren Gross also emphasizes that it is necessary for the officials to step outside the legal order if a particular case necessitates it.¹⁶ Gross's model also contains the assumption that the rule continues to apply in general, therefore "rule departure constitutes ... a violation of the relevant legal rule".¹⁷ Finally, it is up to the people to *ex post* ratify the official's extra-legal actions or punish for the illegal conduct. This *ex post* prosecution adds some kind of legality to this "extra-legal measures model".

Others, such as Dicey and Dyzenhaus emphasize the relevance of rule of law even in a time of emergency. According to Dicey, the state of emergency ("martial law") means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals is unknown..." According to the constitution, the "Declaration of the State of Siege" is unknown, and from this point of view he offers "permanent supremacy of law"¹⁸ in times of emergency as well. On this ground David Dyzenhaus questions the decisionist approach—which tries to define who decides on what in a state of emergency, or more precisely: who decides on fundamental issues of legality—with the thesis that the crucial question of legal order is not the location of this above-mentioned power, but rather its quality as a legal order, in which the "government exercises its power in accordance with law, in accordance, that is, with the rule of law or legality."¹⁹ In his interpretation the responses to emergencies should also be governed by the rule of law, and in this

¹⁴ Agamben, Giorgio: *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans.). Stanford University Press, Stanford, 1998. pp. 17–18.

¹⁵ Agamben, Giorgio: *State of Exception* (Kevin Attell trans.). University of Chicago Press, Chicago–London, 2005. p. 23.

¹⁶ See Gross, *supra*note 2. and Gross, Oren – Ni Aoláin, Fionnuala: *Law in Times of Crisis—Emergency powers in theory and practice*. Cambridge University Press, Cambridge, 2006.

¹⁷ Gross, Oren: Stability and flexibility. A Dicey business. In: V. Ramraj, Victor – Hor, Michael – Roach, Kent (eds.): *Global Anti-Terrorism Law and Policy*. Cambridge University Press, Cambridge, 2005. p. 92.

¹⁸ Dicey, Albert Venn: *Introduction to the Study of the Law of the Constitution*. Liberty Classics, Indianapolis, 1982. pp. 182–183.

¹⁹ Dyzenhaus, David: The "Organic Law" of Ex Parte Milligen. In: Sarat, Austin (ed.): *Sovereignty, Emergency, Legality*. Cambridge University Press, Cambridge, 2013. p. 22.

relation the rule of law is nothing more than the rule of fundamental constitutional principles which protect individuals from the state's arbitrary action. He accepts, of course, that in a time of emergency democracies have to suspend individual rights in order to preserve themselves, but he also adds that in our modern era there are several emergencies (such as terrorism, and here I also add financial and economic crisis) which have no foreseeable end, and therefore they are permanent.²⁰ For those who are troubled with the trend that a state of emergency and therefore emergency powers could last for an uncertain period, he offers the rule of law project which contains the cooperation of the legislative and the executive power and a significant role of the judges. He also mentioned that the rule of law meant more than formal or procedural principles, which could be regulated in the constitution, and which only protect the rights to the manner of decision making. The rule of law principles "do constrain the decisions of those who wield public power that protects the interests of individual subject of those decisions".²¹ This concept of the rule of law, in relation to the state of emergency reflects the moral resource of law or the inner morality of law.²² Taking everything into consideration, there is a very important task for judges in maintaining the rule of law. Although they "cannot restrain power when it is in wrong hands" but they have to "carry out their duty to uphold the rule of law. If they fail to carry out their duty, they will also fail to clarify to the people what constitutes responsible government—government in compliance with the rule of law".²³

To summarize the above-mentioned theories: there are two endpoints of the emergency theory. On the one hand, when a state deals with an emergency it might use illegal—or I myself would prefer the term extra-legal—measures, so it is evident that the rule of law does not have full impact on emergency politics. On the other hand, there is the nearly full power of legality, and in this case the rule of law has its effect on the emergency politics, practically due to the effective judicial review. The problem with this standpoint is that with a full judicial review power on the one side, the other side, namely effective state self-defence and security could suffer great sacrifices. Consider, for example, that broad judicial review can also entail belated emergency measures, and in this way the state cannot fight effectively against the emergency. Before finishing this summary I must admit that another important aspect might possibly represent the core problem of the first standpoint. If we accept that there is a constitutional authority to use the law itself to suspend law, and in

²⁰ See generally: Dyzenhaus, David: *The Constitution of Law: Legality in a Time of Emergency*. Cambridge University Press, Cambridge, 2007.

²¹ See Dyzenhaus, supranote 20, at 3.

²² Fuller, Lon L.: *The Morality of Law*. Yale University Press, New Haven, 1969. About this idea see also: Dworkin, Ronald: *Freedom's Law: The Moral Reading of the American Constitution*. Harvard University Press, 1996, pp. 33–34. Dworkin, Ronald: *Justice for Hedgehogs*. Harvard University Press, Cambridge–Massachusetts–London, 2013. pp. 400–415.

²³ See Dyzenhaus, supranote 20, at 65.

this way we create an exceptional regime near or upon the ordinary legal order—as Dyzenhaus mentioned this means a legal black hole²⁴ –, then we claim that the responses to an emergency mean a dualist legal order: one which responds to normal situation, and the “emergency law” which responds to exceptional situations.²⁵

Economic state of emergency: is it possible?

In this section I will try to fit the above-mentioned theories to a specific emergency, the economic and financial crisis. First of all we have to examine whether this kind of crisis could end up in an emergency or not? When I use the term “economic crisis”, is it possible to apply classical emergency definitions and solutions? I will show that economic and financial crises could lead to a kind of national tragedy that we traditionally call an “emergency situation”.

The economic and financial crises known in modern democracies, for example the one in France in January 1924, represented a serious crisis that threatened the stability of the French currency and the government asked for full executive powers over financial matters. In March a law was passed, which for a limited time gave the government special powers. Furthermore, in 1938 the government requested - and obtained from the parliament—the possibility to use exceptional powers and to legislate by decree. The main cause was the threat of the Nazi Germany, but the government needed this power also to deal with economic crisis.²⁶

Another generally known example is the history of the Weimar Constitution containing Article 48, which was an emergency clause. This article contained that “If security and public order are seriously disturbed or threatened in the German Reich, the president of the Reich may take the measures necessary to reestablish security and public order, with the help of the armed forces if required. To this end he may wholly or partially suspend fundamental rights...” The constitution also added that a law would specify the details of the presidential power, but this law was passed. Because the presidential emergency power remained quasi indeterminate, theorists use the phrase “presidential dictatorship”,²⁷ which is not far from reality. Between 1919 and 1933 owing to the frequent application of Article 48 the number of proclaiming state of emergency and using of governmental emergency decrees was more than two hundred. An important point for my analysis is the circum-

²⁴ See Dyzenhaus, supranote 20, at 196–220.

²⁵ See Ferejohn-Pasquino, supranote 6.

²⁶ Rossiter, Clinton L.: *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Harcourt Brace, New York, 1948. pp. 123–124.

²⁷ See Agamben, supranote 15, at 15.

stance that the reason behind applying Article 48 was in several occasions the fall of the mark, i.e. a financial, economic crisis.²⁸

Economic crisis—as an emergency situation—and the question of state of emergency are also known in the history of American constitutionalism. Although the constitution does not contain emergency powers provisions, the reaction to an emergency is known in the constitutional practice. As Agamben described, the main question in the theory of the American state of emergency is “the dialectic between the powers of the president and those of Congress”.²⁹ This means the “conflict over supreme authority in an emergency situation”; or, in Schmittian terms “[...] as a conflict over sovereign decision”.³⁰ In 1933, during the Great Depression, the American president Franklin D. Roosevelt was able to squeeze out extraordinary power against an economic emergency with using almost the same rhetoric as someone who needs power against political or violent crisis: “I assume [...] the leadership of this great army of our people dedicated to a disciplined attack upon our common problems [...] I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage war against the emergency, as great as the power would be given to me if we were in fact invaded by a foreign foe”.³¹ The result was the New Deal which delegated the president an unlimited power in order to control the crisis, and with this power he was able to control and regulate nearly every aspect of the economic life, which is a “perfect conformity with the parallelism between military and economic emergencies”.³²

With these examples in mind I would like to make one definite statement: in the history of state of emergency we are easily able to find responses to economic crises which are in terms of governmental power equal with the ones against violent crisis. Therefore, the states dealing with economic crisis often use state of emergency measures. The problem with this approach is that the nearly unlimited power raises the question: how is it possible to prevent permanent state of emergency when exception becomes the rule? The next question: is it necessary for a constitutional (liberal) democracy to regulate the basic rules for economic and financial crisis in order to deal with it effectively, and at the same time, to contribute in preserving democracy itself from permanent state of emergency and unlimited governmental power? Those who prefer to admit economic crisis as jeopardy³³ mainly fear this last scenario and therefore they also emphasize that dealing with economic and financial crisis is only possible under the protection of the rule of law. They recognize

²⁸ *Ibid.*

²⁹ See Agamben, supranote 15, at 19.

³⁰ *Ibid.*

³¹ Roosevelt, Franklin D.: *The public papers and addresses of Franklin D. Roosevelt. Volume two, The year of crisis, 1933*. Random House, New York, 1938. pp. 14–16.

³² See Agamben, supranote 15, at 22.

³³ See Chronowski–Vincze, supranote 5, at 104.

the “emergency nature” of the economic emergency by emphasizing that it triggers exceptional and also urgent measures, but they also stress that “the executive power has to act in the absence of an explicit legislative delegation”.³⁴ So there is not any possibility to use emergency powers against economic crisis. Although I accept this position in general, I have to add that this standpoint is only acceptable in a constitution which contains some kind of “emergency constitution”.³⁵ For legal scientists there are two constitutional solutions to deal with emergencies. Some constitutions, e.g. the French³⁶ provide special emergency powers and also assure some kind of suspension of ordinary constitutional protections. In contrast, the U.S. Constitution does not contain such provision except that the *habeas corpus* can be suspended by the president in cases of rebellion or invasion provided that public safety requires it. There is a debate between theorists whether a constitution should include or omit such provisions:³⁷ Those who believe in inclusion think that constitutional limitations are the only safeguards against governmental abuse. The aim is to resolve threat and to restore the constitutional system to its previous state. Those believing in omission maintain that “constitutional establishment of emergency powers is prone to cast apparent legitimacy on abusive use of these powers”.³⁸ However, modern democracies do not always need to use these constitutional powers when they face emergencies. Ferejohn and Pasquino offer an alternative constitutional emergency model, which they call the “legislative model” and which means that it is “possible to deal with emergencies through ordinary legislation”.³⁹ This legislation delegates some authority to the executive and this delegation of power may be enacted for temporary periods. This kind of legislation is special but still has to respect ordinary constitutional guarantees, therefore the act is the result of the normal constitutional system. On this basis we must not forget the possibility of constitutional review by the constitutional court, if there is any in a given legal system. The problem with this model is that “the legislature may be unready or unwilling to act in a timely fashion ... [and] even if the legislature is willing to enact emergencies

³⁴ See Ferejohn–Pasquino, *supra* note 6, at 232.

³⁵ The importance of the regulated state of emergency arising in democracies which do not regulate the state of emergency, such as in America the United States. See for example: Ackerman, Bruce: *The Emergency Constitution*. *The Yale Law Journal*, Vol. 113 (2004) No. 5, pp. 1029–1091.

³⁶ Article 16 of the French Constitution gives almost unlimited power to the president in the event that “the institutions of the republic, the independence of the nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat”.

³⁷ Baer, Susanne – Dorsen, Norman – Rosenfeld, Michel – Sajó András (eds.): *Comparative Constitutionalism: Cases and Materials*. West Academic Publishing, 2010. pp. 1511–1512.

³⁸ *Ibid.* 1512. On the effectiveness of constitutional state of emergency clauses in relation with defending human rights see also: Keith, Linda Camp – Poe, Steven C.: Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration. *Human Rights Quarterly*, Vol. 26 (2004) No. 4, pp. 1071–1097.

³⁹ See Ferejohn–Pasquino, *supra* note 6, at 215.

laws, that very action may implicate in the conduct of emergency rule and eliminate a valuable check or monitor on the executive. And finally, the laws made to deal with the emergency may become embedded in the normal legal system, essentially enacting permanent changes in that system under color of the emergency”.⁴⁰

Economic emergency and the role of the courts

Previously I mentioned that an economic or financial crisis has almost the same characteristics as a violent crisis. In this section I try to analyze the role of the courts in an economic emergency. Firstly, I will show the US Supreme Court’s decision which applied the wartime and violent emergency doctrine in its first so called “New Deal case”.⁴¹ Before the court⁴² appellant challenged the Minnesota Mortgage Moratorium Law which in his opinion violated the constitution’s Contract Clause as well as the Equal Protection and Due Protection Clauses thereof. The Minnesota statute temporarily extended the time allowed by existing law for redeeming real estate from foreclosure and sale under existing mortgages with declaration of the existence of an emergency demanding an exercise of the police power for the protection of the public and promote the general welfare of the people.⁴³ The “economic” emergency rhetoric in this case was the same as was in the non-economic ones when the court stressed that “Emergency does not create power [...] increase granted power or remove or diminish the restriction imposed upon power granted or reserved. The Constitution was adopted in period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system”.⁴⁴ I agree with the commentators⁴⁵ who argued that extra-constitutional responses to economic crisis can degrade liberty as much as such responses to violent crisis, contending that though “both violent and economic emergencies stretch the fabric of constitutional limitations with the sheer force of necessity, the nature of circumstances surrounding either executive or legislative response limiting economic liberty causes its effect to linger long past the time

⁴⁰ See Ferejohn–Pasquino, *supra* note 6, at 219.

⁴¹ See Gross–NíAoláin, *supra* note 16, at 76.

⁴² *Home Building § Loan Ass’n v. Blaisdell*, 290 US 398.

⁴³ *Blaisdell*, 290 US 398, at 400.

⁴⁴ *Blaisdell*, 290 US 398, at 425–426.

⁴⁵ See for example: Kahan, Rebecca M.: Constitutional Stretch, Snap-Back, § Sag: Why *Blaisdell* was a Harsher Blow to Liberty than *Korematsu*. *Northwestern University Law Review*, Vol. 99 (2005) No. 3, p. 1279.

when a similar limitation on civil liberty will have expired”.⁴⁶ But is it possible to use extra-legal measures in dealing with an economic crisis? In their comprehensive work, Posner and Vermeule⁴⁷ argued that the government has to be in better position than the legislature and the courts, because it has more secrecy, flexibility and speed than the courts, which are slow, open and rigid. Therefore, they think that deference to government should increase during emergencies. In my opinion, this view is somewhat vulnerable, though the bases are good for further considerations. The authors originally made their conclusion with respect to terrorism; however, the situation might be similar in economic emergency. After the Blaisdell decision, it can be assumed with good reason that the conclusion made in relation with violent emergency is also applicable to economic emergency. The courts—as the authors say—are marginal participants in economic crisis as well. The reason is that in many cases the courts came too late to make a real difference and “have pragmatic and political incentives to defer to the executive, whatever the nominal standard of review”.⁴⁸ They also emphasized that “courts possess legal authority but not robust political legitimacy”,⁴⁹ which is the essence of the problem. The first practical problem is the so-called “delayed review”, which means that there is a time gap between the government’s measures and the judicial decision on their legal validity. The authors are of the opinion that this delayed review may have severe costs because both the public and the officials may believe that the measures function well, and a judicial order that overturn or restrict emergency measures means “returning to the pre-emergency status quo”.⁵⁰ Consequently, “doing so would [...] re-create the conditions that led the legislature and executive to take emergency measures in the first place”.⁵¹ The opponents of this view praise delayed review, because they think that the delay ensures judges to be less likely to set precedents in the heat of an emergency.⁵² According to David D. Cole, although the court’s reaction often comes late “to forestall civil rights and civil liberties violations when they were initially undertaken, they have the prophylactic effect of forestalling the same or similar measures in future emergencies”.⁵³ Indeed, courts are very capable of playing this role because the emergency powers can be reviewed when the emergency is over, and “the fact that legal decisions offer a statement of reasons that then binds future cases

⁴⁶ See Kahan, *supra*note 45, at 1311.

⁴⁷ Posner, Eric A. – Vermeule, Adrian: *Terror in the Balance: Security, Liberty, and the Courts*. Oxford University Press, New York, 2007.

⁴⁸ See Posner–Vermeule, *supra*note 10, at 1654.

⁴⁹ *Ibid.*

⁵⁰ See Posner–Vermeule, *supra*note 10, at 1655.

⁵¹ *Ibid.*

⁵² See Dyzenhaus, *supra*note 20.

⁵³ Cole, David D.: Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis. *Michigan Law Review*, Vol. 101 (2003) No. 8, p. 2575.

contributes to the judiciary's ability to exert control over the next emergency".⁵⁴ The formalities of the judicial process may help reaching a justified result, and, finally but most importantly, their independence is a warrant that the claims related to the constitutional rights are being reviewed without political motivation.⁵⁵ Basically there are two views: one which could be called as the Schmittian view, which would prefer political decision to be ahead of legal aspects and thinks that dealing with an economic emergency sometimes needs extra-legal measures. The other view prefers the "inside the legal order" responses in which the courts thus have an important role in fulfilling the "rule of law demand."

In the last part I will briefly analyze decisions from the case law of the Lithuanian and Hungarian Constitutional Court. I made the choice because both Hungary and Lithuania are Post-Soviet but now European Union member countries, which provides an interesting starting point. The outstanding aspect is that the judicial review produced totally opposite views, and therefore we may easily categorize these cases with the above-mentioned method.

In both cases there was an economic or financial crisis, when the most important element was the government's legal and political action to deal with the emergency as well as the constitutional court's respond to it. In the case law of the Lithuanian Constitutional Court, the economic crisis as an emergency situation first appeared in the Judgment of 25 November 2002.⁵⁶ Following the 1998 economic crisis in 2000, the government adopted a measure which reduced the size of public pensions for the elderly due to the fact that incomes to the public social security fund were lowered drastically. However, the government decided to apply these measures only for those who had other financial resources.⁵⁷ The Constitutional Court examining the constitutionality of these measures stated for the first time in the Lithuanian constitutional history that there may be such extreme situations, like economic crisis, natural disaster, etc. when the state needs special responses to deal with them, and therefore it is possible for the government to reduce public pensions for the elderly, however, only to the extent that is necessary in the interest of society and protect other constitutional values. Exceptional measures should be provisional. The Court finally stated that the regulation was unfairly discriminatory and therefore anti-constitutional. In this case, the court did not recognize the situation as economic emergency and therefore did not accept the governmental measure as a state of emergency measure but admitted that there is a possibility to use state of emergency measures if the economic situation necessitate it. There were criticisms

⁵⁴ See Cole, *supra* note 53, at 2576.

⁵⁵ See Cole, *supra* note 53, at 2575–2577.

⁵⁶ Judgement of the Constitutional Court of the Republic of Lithuania of 25 November 2002, *Official Gazette*, 2002, no. 113–5057.

⁵⁷ About the decision and its background see: Vaicaitis, A. Vaidotas: State of Exception and Judicial Power. *Baltic Journal of Law & Politics*, Vol. 3 (2010) No. 2, pp. 32–36.

after the judgment, namely that the Court disregarded the principle of social solidarity and that the principle of legitimate expectations was treated as an absolute principle.⁵⁸ In this case, the court dismissed the possibility of state of emergency referred to an economic crisis; therefore, the government needed “inside the legal order” measures to deal with it.

“Panoplied” with this constitutional background, the Court nearly a decade later revisited the constitutionality of the government’s reaction to an economic crisis. After the worldwide economic and financial crisis in 2008, the Parliament (Seimas) mentioned that Lithuania was facing an economic crisis.⁵⁹ In a decision of 20 April 2010 the Court found that it is inevitable to officially announce economic emergency (which actually means state of emergency) to use emergency powers. As Vaicaitis pointed out, the Court did not “answer the question as to whether the economic crisis should be officially affirmed and each year reaffirmed by particular decree of the government”.⁶⁰ Without these processual details, there are very few guarantees left to preclude the permanent state of emergency, which practically equals with autocracy or dictatorship. The Court sided with the legislator when stated that the situation was a real emergency and therefore the government may reduce those social security guaranties that were previously promised.⁶¹ The decision recalled that, on the one hand, the reduction of salaries and pensions is constitutional in an economic state of emergency, however, on the other hand, the government and the Parliament should examine the necessity of the emergency measures every year when they are planning and adopting the state budget. The judgment also stated that the reduction of pensions and salaries should not come to such a level that it could influence the dignity of human beings. The Court defined the border of constitutional restrictions when stated that during economic emergency it is possible to change the whole social security system except those pensions mentioned in the Constitution. In my opinion, the most important statement was that when the economic emergency will come to an end, the reduction of social security payments should be compensated (“just compensation”).⁶² In relation with the reduction of social guaranties in economic state of emergency the Court formulated important principles which were the following:⁶³ (1) Before adopting the economic emergency measures the state should officially announce that there is a grave economic and fi-

⁵⁸ Vaicaitis, A. Vaidotas: What was Decided by Lithuanian Constitutional Court in Favour of Pensioners. *Teise*, Vol. 49 (2003), pp. 124–133.

⁵⁹ Provisional Law on Reevaluation of Social Payments. *Official Gazetta*, 2009, no. 152–6820.

⁶⁰ See Vaicaitis, supra note 57, at 34.

⁶¹ *Ibid.*

⁶² See Vaicaitis, supra note 57, at 35.

⁶³ Birmontiené, Toma: *Challenges for the Constitutional Review: Protection of Social Rights during an Economic Crisis. 20 Years of Existence and 100 Years of Constitutional Review: Constitutional Review—Tradition and Perspectives*. Universal Juridic, Bucarest, 2013. pp. 7–19.

nancial crisis which threatens normal functioning of the society. (2) In an economic emergency it is possible for the Parliament to reduce the salary of state officials, servants, and employees who are funded by the states, however, no more than for the duration of one budget year, although it is possible to renew the measures if it is necessary (temporary and proportional reduction). (3) With the limitation of social rights the Parliament must heed the state's constitutional imperatives (rule of law, equality of rights, legal security). (4) If old-age pensions are reduced, they must be compensated when the state of emergency is over.

To summarize the Lithuanian constitutional practice in a state of emergency, I conclude that this kind of emergency model is not far from the rule of law emergency model, which I discussed before as Dicey's and Dyzenhaus's model. I have to admit that the reason behind the constitutional court attitude, which prefers legality against effectivity, may be the totalitarian past, and the overall aim to preserve democracy. There were some criticisms against such a direct judicial intervention into economic life, because this practice may lead to the next economic and socio-political crisis.⁶⁴

The political background of the Hungarian constitutional democracy is nearly the same as the Lithuanian (post-Soviet state, EU member, democratic transition after decades of totalitarian regime). The new Hungarian constitution,⁶⁵ as opposed to the Lithuanian, contains a special emergency constitution the Special Legal Order⁶⁶ in which we can find emergency situations and state of emergency responses to them. These detailed rules also contain the processual and constitutional guarantees to preserve democratic institutions. With this constitutional regulation in Hungary, we have a special law, the emergency law, but the exaggeratedly detailed regulation raises the question: what shall we do if such an emergency occur which is not regulated in the Fundamental Law? Because the above-mentioned chapter of the Fundamental Law is not familiar with the economic and financial crisis, this question was raised after the global economic crisis.

The Hungarian Constitutional Court, first in its decision no. 23/2013⁶⁷, admitted that to deal with economic crisis effectively sometimes means using extra-legal measures. When the Court examined the constitutionality of the Act CLXVII of 2011, it also acknowledged that after the global economic crisis the rules of constitutionality and the system of human rights protection had changed. The meaning of this unravelled when the Court examined the Act XXXVIII of 2014 on the settlement of certain questions related to the Uniformity Ruling of the Curia on financial institutions consumer loan contracts (Settlement Act). The Settlement Act

⁶⁴ See Vaicaitis, *supra*note 57, at 38.

⁶⁵ *Fundamental Law of Hungary (25 April 2011)*

⁶⁶ *Article 48–54 of the Fundamental Law of Hungary*

⁶⁷ *Official Gazzetta*, 2013/157.

declared the application of the bid/offer spread unfair and used the presumption of unfairness in respect of all General Contracting Terms and Conditions that stipulate the option of unilateral contract amendment. Finally, any unfairly settled sums must be reimbursed to clients based on a separate Settlement Act. In its decision no. 34/2014⁶⁸ the Court asserted that the challenged regulation did not change the legal qualification of the unfair clauses of the contracts, it codified the already existing legal principle and judicial practice.⁶⁹ Therefore, the prohibition of unilateral changes to loan contracts did not go against the Fundamental Law. According to this decision, the economic crisis effected the whole society, therefore it is possible to reconsider our principles of legal certainty. With reference to the economic crisis in relation with paragraph 2 Article M of the Fundamental Law,⁷⁰ it could be possible to restrain fundamental constitutional principles such as prohibition of retroactive legislation, legal certainty, fair trial and several procedural safeguards and also some economic, social and cultural rights. By using this new proportionality test, which I call the economic emergency test, it is possible for the legislator to use emergency powers in the legal order without officially announcing it. After this decision now it is possible that the government will use the “economic emergency blank cheque” in order to use extra-legal measures regardless of whether a real emergency occur or not.

Conclusions

In this brief article I tried to draw attention to the fact that the definition “emergency” means not only violent situations such as war, terrorism etc., but there are also economic, financial and natural emergencies which could also challenge the democratic order. If the state response oversteps the legal framework, there must be an effective legal forum which could prevent abusive enactment. In order to control political actions this revision is crucial to keep democracy alive, particularly in those countries where democratic traditions and institutions are somewhat less advanced, like in the Eastern-European countries such as Lithuania and Hungary. I used some Constitutional Court’s decisions to help to provide a brief assessment, and I concluded that the two countries have totally differing rules and constitutional practice in dealing with economic emergency. Although the Lithuanian Constitution does not contain such detailed emergency provisions as the Hungarian, but

⁶⁸ *Official Gazzetta*, 2014/149.

⁶⁹ The summary of the Court’s decision can be found: URL http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2014-3-010#JD_E_HUN-2014-3-010

⁷⁰ “Hungary shall ensure the conditions of fair economic competition, act against the abuse of a dominant economic position and protect the rights of consumers.”

the model, which the Constitutional Court used, is much more “legality friendly”. Although the Lithuanian Court accepted that dealing with an economic emergency sometimes requires special responses from the state but also asserted that the measures have to be proportional with the threat and should not be abusive. In my opinion, this “strict” judicial review is essential in a young democracy. In Hungary it was unable to find this democracy protecting mechanism, which might prove to be very dangerous in a country with the history like Hungary. The Hungarian Parliament thus could rewrite constitutional guarantees when referring to economic emergency, and the constitutional necessity, proportionality tests may also suffer from rigidity. Although the measures used to deal with economic and financial crisis were not so spectacular, but what will happen if another special, constitutionally unregulated emergency occurs? The refugee crisis gave us some answer to it: on 4 and 21 September 2015 the Hungarian Parliament adopted two acts which enabled to proclaim the “emergency caused by immigration”, without using the Fundamental Law emergency mechanism. This means that a lot of emergency restrictions could be used without the constitutional guarantees. As I previously stated in another essay,⁷¹ the state of emergency started to leak into the regular constitutional order, therefore it may also result in a permanent state of emergency.

⁷¹ Mészáros Gábor: Egy „menekültcsomag” veszélyei [The Risks of “Immigration Enactment”]. *Fundamentum*, Vol. 2–3. (2015), pp. 107–119. state of emergency. therefore it also f restrictions could be used with In my opinion this „lity

ISTVÁN STUMPF

Constitutional Limitations of State Interventions into Property Rights

*Based on the Major Decisions of the
Constitutional Court of Hungary*

1. Introduction

After the global financial crisis, the possible role of the state must be re-examined. According to the two main paradigms: good government and god governance the following conclusion can be stated: the consequences of a market-based government are unacceptable and an active, intelligent and strong state is needed that creates balance between the market and society.¹ This paper put the focus on state interventions into property rights, based on the text of Hungary's Fundamental Law, with special respect to the jurisprudence of the Hungarian Constitutional Court.

One of the most important questions posed by the global crisis is to define the role of the state in eliminating market errors and in managing social crisis. The above-mentioned situation forced governments to establish not only social welfare but at the same time economic balance. As it was examined, according to the good government paradigm: the market, in and of itself cannot provide welfare, solidarity and fairness equally to all; we need an active, intelligent and strong state that creates balance between the market and society; the state has to correct market mechanisms for the good of the community and that of the market.² If the above-mentioned conclusion i.e. "strong, active and intelligent state is needed" can be accepted, another question is coming up: how can it be accomplished? Moreover: in what way can be a strong state prevented from misusing its powers and how to secure that it delivers the benefits expected from its active and extensive operation.

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¹ See in detailed: Stumpf István: *Erős állam—alkotmányos korlátok* [Strong state—constitutional limitations]. Századvég Kiadó, Budapest, 2014. pp. 104–107.

² See in detailed: Stumpf, István: Why we need a strong but constitutionally limited state? Paradigm of Good Government. In: Kovač, Polonca – Gajduscheck, György (eds.): *Contemporary Governance Models and Practices in Central and Eastern Europe*. NISPAcee, Bratislava, 2015. p. 114.

The only significant check in the Hungarian system balancing the legislature is the Constitutional Court, which — according to the Fundamental Law — “shall be the principal organ for the protection of the Fundamental Law”.³ The Constitution granted the Constitutional Court judicial review over rules of law (for example acts of Parliament, decrees of Government); judicial decision in individual cases could be only contested on the basis of a constitutional complaint by claiming that an unconstitutional law had been applied in that particular case.

The Fundamental Law extended the competence of the Constitutional Court over judicial decisions. On the one hand, it prescribed that “In the course of the application of law, courts shall interpret the text of rules of law primarily in accordance with their purposes and with the Fundamental Law”.⁴ On the other hand, it empowered the Constitutional Court on the basis of a constitutional complaint to review not only rules of law but also the judicial decision (that is the conformity of the judicial interpretation with the Fundamental Law).

2. Fundamental Law—property rights

The Constitutional Court is the “guardian” of crisis management actions from the constitutional point of view. In the jurisdiction of the Constitutional Court besides constitutional values, reference to economic conditions also appears. In the following part, the jurisdiction concerning property rights of the Constitutional Court will be examined.

The Hungarian Fundamental Law declares in Article XIII paragraph (1): “[e]veryone shall have the right to property and succession. Property shall entail social responsibility”. According to this, the followings can be concluded: the right to property can be restricted; requirement of state interventions into property rights observes guarantees in connection with rights (rooted in the Fundamental Law); the second sentence of the above-mentioned passage plays the most significant role. Comparing the text of the Fundamental Law⁵ and the Act XX of 1949 on the Constitution of the Republic of Hungary,⁶ the Constitutional Court came to the following conclusion.

³ *Fundamental Law Article 24, Paragraph 1*

⁴ *Fundamental Law Article 28*

⁵ Article XIII of the Fundamental Law: “(1) Everyone shall have the right to property and succession. Property shall entail social responsibility. (2) Property may only be expropriated in exceptional cases and in the public interest, in such circumstances and manner as stipulated by an Act; expropriation shall be accompanied by full, unconditional and immediate compensation.”

⁶ Article 13 of the Act XX of 1949 on the Constitution of the Republic of Hungary: “(1) The Republic of Hungary guarantees the right to property. (2) Expropriation shall only be permitted in

The Constitutional Court in 13/2013. (VI. 17) ABH Constitutional Court Decision decided to use its earlier case law if the text of the constitutional rule has not been significantly changed. That is why the Constitutional Court had to create an opinion in the field of property rights concerning arguments, legal principles and correspondences of the annulled decisions. In these new cases, the content of Article XIII of the Fundamental Law had to be examined, whether it was consistent with the Constitution.⁷ According to the 3009/2012. (VI. 21.) ABH Constitutional Court Decision: “The Act XX of 1949, The Constitution of the Republic of Hungary (in Article 13)⁸ also contained the right to property in alignment with Article XIII of the Fundamental Law. According to Article 24 paragraph (1) of the Fundamental Law, the Constitutional Court shall be the principal organ for the protection of the Fundamental Law. [...] it can be stated that the right to property is also guaranteed in the Fundamental Law, thus in the course of interpretation of the right to property, former statements of Constitutional Court are precedents in the future.” The Constitutional Court declared that Article XIII of the Fundamental Law has almost the same content as it stated in Article 13 of the Constitution, that is why arguments and legal principles concerning property rights of the former decisions of the Constitutional Court can be applied.

3. Jurisdiction of the Constitutional Court concerning property rights

In connection with the property rights restriction, the Constitutional Court examines if the restriction of the right to property (1) is in order to protect other rights effectively; (2) is in order to protect other constitutional values; (3) is unconditionally necessary; (4) is in order to protect the public interest; (5) the proportionality of the restriction can be determined.

In connection with property rights the Hungarian Constitutional Court in the early years of its operation came to the conclusion that the notion of property is the same in civil law and in constitutional law. That is why, concerning the restric-

exceptional cases, when such action is in the public interest, and only in such cases and in the manner stipulated by law, with provision of full, unconditional and immediate compensation.”

⁷ About the judicial control over the functioning of the public administration see in detail: Patyi, András – Téglási, András: The effective judicial control over functioning of the public administration in Hungary. In: Patyi, András – Rixer, Ádám (eds.): *Hungarian Public Administration and Administrative Law*. Schenk Verlag, Passau, 2014. p. 205.

⁸ The Constitutional Court came to the following conclusion: “Article 13 para. (1) of the Constitution guarantees the right to property. Article 13 para. (2) only permits the deprivation of the right to property in exceptional cases out of public interest, in cases and in the manner stipulated by Act of Parliament, and only if full, unconditional and immediate compensation is provided” [42/2006. (X.5.) ABH Constitutional Court Decision].

tion of property rights, the Constitutional Court examined its necessity and proportionality.⁹ The establishing of the property rights' notion from a constitutional point of view can be observed in the 64/1993. (XII. 22.) ABH Constitutional Court Decision. The protection of property rights was parallel with the protection against expropriation. According to Article 13 of the Constitution for expropriation, besides the guaranteed value the public (general) interest was necessary. In those cases where restriction of property rights was moderate the necessity of the restriction was not required, but the public interest became a requirement. The Court declared in its earlier decisions that the right to property is a fundamental right, but it can be restricted for necessary public goals. These restrictions must meet a strict constitutional scrutiny.¹⁰ According to the above-mentioned decision, the reference to the public interest by the Parliament was accepted. The Parliament is allowed to decide what can be determined as public interest. The Constitutional Court put the focus on examination of the proportionality of the restriction (the measure of the restriction is proportional to the public interest).

The constitutional test of restriction property rights seemed to be severe according to the 42/2006. (X. 5.) ABH Constitutional Court Decision. The Constitutional Court stated the following: "the 64/1993. (XII. 22.) ABH Constitutional Court Decision examined the constitutionality of the rule on the statutory right of option with regard to the flats transferred from State ownership to local government ownership, stressing that the Constitutional Court took into account the historical circumstances of the matter as well. As explained in the 64/1993. (XII. 22.) ABH Constitutional Court Decision in respect of the restriction of property right, the restrictions of a public authority nature is enforced on a wide scale, and due to those restrictions, protection similar to the one prescribed for the case of expropriation is often applied. At the same time, a converse tendency has also been developed: the owner must tolerate more and more restrictions without compensation. In particular, the owners of real estates must face many restrictions. In these cases, the concept of public interest is interpreted in a broad sense. The restriction of the right to property is restricted directly for the benefit of a private person, and the interests of the community are only indirectly served. According to the 64/1993. (XII. 22.) ABH Constitutional Court Decision, the public interest specified in Article 13 para. (2) is to be followed also when restricting the fundamental right to be protected under Article 13 para. (1) of the Constitution since due to the social and economic roles of property it is much more difficult to verify necessity as a requirement acknowledged

⁹ See for or example the following decisions of the Constitutional Court: 7/1991. (II. 28.) ABH Constitutional Court Decision ABH 1991, 22, 26.; 13/1992. (III. 25.) ABH Constitutional Court Decision, ABH 1992, 95, 96.; 24/1992. (IV. 21.) ABH Constitutional Court Decision, ABH 1992, 126, 128.

¹⁰ URL [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-3-017?fn=document-frameset.htm&f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-3-017?fn=document-frameset.htm&f=templates$3.0) (25 May 2016)

when other fundamental rights are to be restricted. In the examination of public interest it is sufficient to clarify whether it is justified to refer to public interest in the statute, and if no other fundamental right is violated in addition to the restriction of the right to property. As stated in the 64/1993. (XII. 22.) ABH Constitutional Court Decision, in addition to examining public interest, the Constitutional Court should assess whether the restriction of the right to property is in proportion with the public interest used as its basis. The smaller protection compared to other fundamental rights (the examination of only public interest instead of the necessity of restriction) can be counterweighted by the Constitutional Court setting special conditions, for example requesting compensation even if the case is not considered expropriation”.

The Constitutional Court developed the following principles concerning the restriction of the right to property: the right to property was regulated in the Constitution differently from other fundamental rights, but Article 13 paragraph (1) did not regulate the restriction of the right to property. According to the practice of the Constitutional Court, a fundamental right may only be restricted constitutionally when the restriction is contained in an Act of Parliament, and it is necessary and proportionate to its desired objective. [20/1990. (X. 4.) ABH Constitutional Court Decision 1990, 69, 70–71.] In line with the detailed principle on assessing the restriction, restricting a fundamental right requires the protection of the enforcement of another fundamental right or liberty, however, the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. [30/1992 (V. 26.) ABH Constitutional Court Decision 1992, 167, 171.]

The Constitutional Court in 42/2006. (X. 5.) ABH Constitutional Court Decision put the focus on the following concerning public interest: “When the right to property is restricted in the public interest, the Constitutional Court holds it insufficient for the statute to generally refer to public interest as a factor making the restriction necessary, leaving it to the free discretion of the authority to determine the concrete elements of property to which the restriction is applicable. The statute shall define the public interest in a manner allowing the courts to verify in the concrete case the necessity of the restriction in the public interest”.¹¹ For examining the constitutionality of restricting the right to property the necessity is based on the enforcement of another fundamental right, constitutional value or objective, or a necessity is based on public interest. The Constitutional Court was strict in connection with those regulations, which determine public interest in case of expropriation.

The next decision: 50/2007. (VII. 10.) ABH Constitutional Court Decision was parallel with the 42/2006. (X. 5.) ABH Constitutional Court Decision, in addition the Constitutional Court followed its former jurisdiction.

¹¹ ABH 2006, 520, 529.

4. Economic crisis—as part of the constitutional argumentation

The Constitutional Court in many cases had to face economic crisis, which had to be reflected in its decision and in its argumentation alike concerning property rights and public interest. One of the most significant decisions was 43/1995. (VI. 30.) ABH Constitutional Court Decision. In this decision, the Constitutional Court had to declare that legal certainty, as the most significant conceptual element and theoretical basis for the protection of acquired rights, is of particular significance for the stability of welfare systems. The basis of this Constitutional Court decision was the system of childcare, families, because the Economic Stabilization Act annulled the conditions of childcare benefits. Because of this Act, a certain proportion of families was no longer eligible under the new system. These changes replaced the family benefit system that families had grown accustomed to and also affected vested rights acknowledged by the former system. The Constitutional Court declared that these regulations could not be changed without sufficient reason or without a transition period. In the case of social security benefits where the insurance element has a role to play, the constitutionality of the reduction or termination of benefits should be evaluated according to the criteria of protection of property. In implementing the legal regulations aimed at transforming the welfare benefit system, it is a constitutional requirement that the state's actions be calculable, so that people can plan economic or family-related decisions.

In 2008 another economic and financial crisis emerged, and such a risk factor means new challenges for national constitutional systems. For this reason the “crisis legislation” also must be examined, it means governmental restrictive provisions concerning the bank system and investors. This process resulted in challenges for democratic constitutional states, namely in the course of governmental interventions, endangered constitutional values, economic and social rights, legal certainty and fair trial must prevail. In my opinion the legislative provision based on economic crisis is the legitimate goal, its depth and its aspects of fundamental right must be confirmed, considering state interventions into property rights, in which the (Hungarian) Constitutional Court plays a significant role. According to its previous decisions, the Constitutional Court does not examine the expediency of the legislative decision because, this is the scope of governmental (or parliamentary) authority. Besides the examination of necessity and proportionality of state interventions into fundamental rights, reference to public interest has an important role, especially in crises situations. In the following part the examination will focus on the latest cases of the Constitutional Court concerning property rights and the public interest as the part of the argumentation.

The 23/2013. (IX. 25.) ABH Constitutional Court Decision refused those petitions, which was in the base of the restriction of property rights, but at the same time declared that sustainable economic development and failing demographic sit-

uation led to the creation of the new constitutional definition of social welfare and safety, according to the Fundamental Law.

In 3048/2013. (II. 28.) ABH Constitutional Court Decision the Court examined the act on early payment and came to the following conclusion. First of all, the margin between the redemption in current rate and the fixed rate cannot be defined as a reversion for the creditors. It is not within the scope of the property rights' protection from the constitutional point of view. The Parliament is allowed to decide on its ability to intervene into civil affairs and also on the conditions of such interventions. This conclusion was strengthened by the 8/2014. (III. 20.) ABH Constitutional Court Decision on the interpretation of Article M paragraph (2) of the Fundamental Law. The Constitutional Court stated concerning early payment that the intervention of the Parliament was necessitated by an international economic crisis, which was significant as well as extreme situation in Hungary.

The Constitutional Court examined the Act CXXXV of 2013 on the integration of credit banks' co-operative society in 20/2014. (VII. 3.) ABH Constitutional Court Decision. The goal of the Act CXXXV of 2013 was to insure the operation of the credit banks' co-operative society in the future. In this decision the Constitutional Court put the focus on the stability of this sector but also stated that the followings can be the part of the public interest: (1) the calculable; (2) stabilized and prudent operation; and (3) minimizing of the business hazard augmentations of secure credit activity.

The Constitutional Court also examined the public interest in detail. In this particular case it came to the conclusion that (1) establishment of the safety of this sector, (2) protection of hundreds of thousands who have deposits; (3) controlling the co-operative society of credit banks; (4) reducing operational hazard; and (5) making the credit activity more intensive are parts of the notion called "public interest". The Constitutional Court stated that the establishment of integrated operation as public interest is grounded.

The Hungarian Parliament created the Act XXXIX of 2015 (Quaestor Act) on the establishment of a claims fund for Quaestor victims. The Constitutional Court examined it in 32/2015. (XI. 19.) ABH Constitutional Court Decision and annulled the above-mentioned act. The Parliament (contrary to the above mentioned Act CXXXV of 2013 on credit banks' co-operative society) in the Quaestor Act did not dispose of the public interest and of the monetary system. The goal was the offset of determinate investors' deficit. The Constitutional Court pointed out: 'If numerous clients are interested, the state post-intervention may enhance not only the confidence of the aggrieved persons but indirectly the confidence of all investors' (Justification, item 3.4.). Concerning the notion of public interest the Constitutional Court emphasized that solving the problems in credit bank sector in general can be defined as public interest; it can also be the cause of the constitutional property rights restriction. At the same time, the Court also added that state intervention oriented to compensate a well determined clientele cannot be defined as public interest.

After the review of the most important Constitutional Court decisions concerning property rights the followings can be concluded: reference to public interest was the part of the Court argumentation from the 1990s; notion of public interest is the part of the property rights' intervention's examination. Telling the truth, the Hungarian Constitutional Court did not create an academic background (cornerstone) for the examination of public interest, but the Court analyzes it case by case and in particular situation gives the notion a constitutional sense. In my opinion, it does mean a political part of the Constitutional Courts' argumentation, moreover this Court does not allow itself to operate as a decision-making machine.¹² In a critical period (caused by for example the worldwide economic crisis) also the economic and social process in a given state must be examined. Without this part of argumentation of the decision, the Constitutional Court would not be able to fulfill its mission declared in the Fundamental Law: "The Constitutional Court shall be the principal organ for the protection of the Fundamental Law" [Article 24 paragraph (1) of the Fundamental Law].

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¹² Chronowski Nóra – Vincze Attila: Alkotmánybíráskodás (gazdasági) válságban [Jurisdiction of Constitutional Court in (economic) crisis]. *Alkotmánybírószági Szemle*, (2014) No. 2, pp. 111–112.

PRACTICES

PÉTER DARÁK

The Changing Concept of Property

Trends and Novelties

I intend to describe some aspects of the history of property law and I shall try to foresee some trends of the future. My paper, firstly, will deal with the history of property law and the traditional notion of property. Secondly, I shall speak of the case-law of the European Court of Human Rights (ECtHR). Thirdly, I shall compare the jurisprudence of the European Court of Justice and the ECtHR. Finally, I shall formulate some conclusions. I shall also present some examples by recounting their factual background, then I will pose questions related to their legal issues, and we will solve these altogether six cases today.

1. Some historical aspects of property law

The question arises from the outset whether property was the same in the middle ages as it is today. In the middle ages, people could possess lands and castles only if they were on good relations with the monarch, and if they were noblemen. Ownership was divided between the vassal, the actual occupier of the land (who held the *dominium utile*) and his superior, the feudal lord (who held the *dominium directum*).¹ As Harold Berman put it, “Land, in fact, was not ‘owned’ by anyone; it was ‘held’ by superiors in a ladder of ‘tenures’ leading to the king or other su-

* President of the Curia of Hungary.

¹ This vertical division of ownership is sometimes referred to as the doctrine of *duplex dominium*. For a detailed explanation see Meynial, E.: Notes sur la formation de la théorie du domaine divisé (domaine directe et domaine utile) du XIIe au XIVe siècle dans les romanistes. In: *Mélanges Fitting*, Vol. II. Montpellier, 1908. p. 409; Rűfner, T.: The Roman concept of ownership and the medieval doctrine of dominium utile. In: Cairns, J. W. – Plessis, P. J. du (eds.): *The Creation of the Ius Commune: From Casus to Regula*. Edinburgh, 2010. p. 127.

preme lord”.² Another peculiarity of the feudal concept of ownership is that it was not clearly distinguished from government, partly because of the general lack of distinction between private and public.³ Lords had legal jurisdiction over their fiefholding vassals, the court of the lord was the court of first instance. Landholding was frequently attached to the holding of public offices and landholders owned public duties, such as military service. Property was not a right but a grant from a lord; if the vassal failed to perform his duties, his fief could be confiscated.

This feudal ownership gradually developed into a private property system, properties became independent from the state. The first declaration on the protection of property can be found in the Magna Carta Libertatum (1215). The freedom of property was later approved by the Petition of Right (1628), which prohibited confiscation via taxation. Natural law theories fundamentally redefined the relation of government and property-owning citizens. John Locke (1632–1704) argued that property rights are natural rights, which exist independently of any form of government. The basis of Locke’s theory is that every man holds a property right to his own body and labour, and man acquires private property over what he produces with his labour. For Locke, government does not create property rights, or grant such rights to citizens, but instead exists solely to preserve man’s natural, pre-existing right to property. For Locke, the justification for government was to guarantee and defend property rights.⁴ In 1753, Sir William Blackstone, no doubt influenced by the Lockean paradigm, wrote in his *Commentaries on the Laws of England*:⁵

“The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. [...] So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. [...] In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.

² Berman, H. J.: *Law and Revolution*. Cambridge (Mass.), 1983. p. 312.

³ Reynolds, S.: *Fiefs and Vassals—The Medieval Experience Reinterpreted*. Oxford, 1994. 48ff.

⁴ Rubin, P. – Klumpp, T.: Property Rights and Capitalism. In: Mueller, D. C. (ed.): *The Oxford Handbook of Capitalism*. 2012. For a more detailed discussion of Locke’s justification for private property see Clarke, A. – Kohler, P.: *Property Law*. Cambridge, 2005. 80ff.

⁵ Blackstone, Sir William: *Commentaries on the Laws of England*. Book I, Chapter I. (Edition used: Philadelphia, 1893, Vol. I, 138f. URL <http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-1>)

The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.”

Similar developments took place on the Continent. In the French Revolution, the Declaration of the Rights of Man and of the Citizen (1789) mentioned property as a sacred and inviolable right of man. By this time, property became a limitation on the state’s power, an integral part of civil liberties. On the other hand, the abolition of feudalism resulted in a return to the Roman concept of property (*dominium*) as absolute and undivided ownership,⁶ free from restrictions in favour of the feudal lord. This was enshrined in article 544 of the *Code civil*, which provides that “ownership (*propriété*) is the right to enjoy and to dispose of things in the most absolute manner provided they are not used in a way prohibited by statutes or regulations”. The modern concept of ownership thus combines the idea of absolute power over assets (the private law aspect of ownership) and the idea of a fundamental civil or human right (the constitutional aspect of ownership).⁷

What happened to property in the modern capitalist economy? Lands became an instrument of capitalism, a means of production. In addition, the landlord-tenant relationship was also revolutionised. Many new kinds of goods emerged which needed special regulation—think of mass products such as cars and other consumer goods. Intangible property became an important repository of wealth. Today, many companies have intangible property rights greater in value than their tangible property rights. Examples of intangible property are contractual rights to payment, goodwill, shares in a company, and various forms of intellectual property. There are also new ways and technologies to irritate people. For instance, if someone speaks loud in the elevator on his smartphone, it is a new form of nuisance. If somebody receives unsolicited newsletters and cannot stop them, it is a new form of trespass. And as an additional element, it should be mentioned that one’s property is protected by the state i.e. by the police, by the courts and by the state administration. Protection is provided against trespass and nuisance, e.g. if somebody in the neighbourhood plays music too loud, etc.

We are all familiar with the traditional architecture of property law, which includes the three basic components of property, namely the rights to possession, usage and disposition.⁸ This rigid and modular system was transformed in the capitalist era to become a modern system of property. In the US, legal realists assessed this

⁶ See e.g. Birks, P.: The Roman Law Concept of *Dominium* and the Idea of Absolute Ownership. *Acta Juridica*, Vol. 1 (1985).

⁷ See Faber, W. – Lurger, B. (eds.): *Acquisition and Loss of Ownership of Goods*. Sellier, 2011. p. 262.

⁸ Földi, A.: Historic and Dogmatic Aspects of the Triad of Proprietary Rights. In: Palma, A. (ed.): *Scritti in onore di Generoso Melillo*, Vol I. (2009), p. 353.

revolution as a bundle of rights, which became the reigning dogma. Bundle of rights meant a cluster of rights: privileges, immunities, duties and liabilities. The American realists speak about a complex society, a less formal and more contextual law in the field of property law. This great notion of the “bundle of rights” is mentioned again and again, one of the authors even discusses the idea of open-ended bundle of rights. They mention the “shadowy” regulation of property.

There are, of course, some other factors in the world, which also affect the development of property law. These influences come from the outside in the form of techniques, methods and procedures. For instance, recording systems have become of essential importance: contracts are drafted and rights are registered by computers. Hungary has a land register (to some extent similar to the German and Austrian *Grundbuch*): a contract in itself does not provide legal title to land, since the related property right must also be registered in the land register. The registration of mortgages is also a relatively new phenomenon. In property law, the publication of information plays an important role. Internet allows for wide access to information.

Other fields of law also influence property law, just think about consumer protection or public procurement. If somebody wants to conclude a contract of a service to be provided to the state, the contracting party cannot conclude it in a simple way, as there are complicated public procurement rules to comply with. Matrimonial property regime can influence property to a large extent. Furthermore, tax law provides the opportunity to develop property law. From a certain aspect, we can argue that one is not only an owner but also a risky taxpayer, if risk is involved, it is easier for the tax authority to seize his/her property. Thus, we can see that there are many outside factors influencing property law.

In the traditional way, if somebody wanted to sell his/her car, there was a bilateral context in which two parties concluded a contract, a seller and a buyer. However, nowadays service opportunities are shared, there is no more a purely bilateral context. The former concept was based on the exclusion of all other persons from one's property. In our days it is completely different, think of websites where people hiding their identity can post comments or send links, and they cannot really be controlled. This very old *in rem* concept is changing and transforming into an *in personam* regulation. Modern contract law has significantly contributed to the development of modern property law. Look at this citation about housing problems in the US: “When American city dwellers, both rich and poor, seek ‘shelter’ today, they seek a well-known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance.”⁹ They cannot be described with the three elements of property.

⁹ See *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) citation from *Nat'l Comm'n on Urban Problems, Building the American City*. H.R. Doc. No. 91–34, at 9 (1968).

Another statement pertaining to lease contracts (“The lease has long been a hybrid of many strains: contract and conveyance, personal and real property, promise and covenant”)¹⁰ shows that there are new elements that form part of a legal relationship.

One can also detect changes in the methods of law. For example, when law becomes too complicated, there will be a need to simplify it. This is the so-called substance over form approach, which is often used in tax law, where some taxpayers use very complicated contractual structures. This approach can also be found in the area of secured transactions law, where creditors keep developing new financing techniques, often to avoid (and evade) the sometimes cumbersome rules applicable to traditional proprietary security rights, such as mortgages and charges. In such cases, the judge should try to find the economic content of the transaction and base the judgement on it.

2. The Strasbourg view of property

Now let us focus our attention on the European Court of Human Rights (ECtHR) and try to analyse the Court’s property rights-related caselaw. Article 1 of Protocol No. 1 of the European Convention on Human Rights (ECHR) protects the peaceful enjoyment of possessions, limits the state’s power to interfere with property rights and imposes a positive obligation on the state to ensure the protection of property.

Article 1 contains three sentences. The first sentence protects the peaceful enjoyment of possessions. The second sentence provides limits for the deprivation of property, and the third sentence sets the requirements for the control of use by the state. The method of the ECtHR is to find the “fair balance”, so the Court tries to compare private and public interests, and tries to qualify the interference and then decides on whether Article 1 has been violated or not.

Besides the fair balance test, there are other requirements as well. Every interference must have a legitimate aim—public interest or securing the payment of taxes, contributions or penalties. It also has to have a basis under national law—if this basis is accessible, precise and foreseeable and there are procedural safeguards, then the interference with property is considered to be lawful and justified.

As to the deprivation of property, we can speak about formal deprivation and some forms of deprivation that are very special—*de facto* deprivations—which are treated in the same way by the ECtHR. One can find the bundle of rights approach—if only one particular right has been extinguished, it is not sufficient for establishing a violation of Article 1.

¹⁰ Glendon, Mary Ann: The Transformation of American Landlord-Tenant Law. *B.C. L. Rev.*, Vol. 23 (1982), p. 509.

What is the consequence of violations? Compensation. The ECtHR speaks about a compensation reasonably related to the value of the property. The state enjoys a wide margin of appreciation in determining the level of compensation. The ECtHR applies the fair balance test. There are factors, which may justify the lack of compensation if the measure's objective is to provide social justice, prevent windfalls or redress earlier violations of property rights.

The third type of interference is the control of use. There are many obligations, which the owner must fulfil, e.g. there are environmental regulations and regulations for renting or hunting. The control of use must also have a legitimate aim, must be lawful and a fair balance must be struck between the public and the property owners' interest.

EXERCISE 1 PROHIBITION AGAINST THE DONATION OF EMBRYOS¹¹

The first exercise deals with the peaceful enjoyment of possessions. Peaceful enjoyment is a notion defined in Article 1 of Protocol No. 1 to the ECHR:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Why did the drafters use the concept of peaceful enjoyment of possessions? It dates back to the 1950s when they tried to create a new document, which summarizes human rights and provides for a binding regulation. That was the “Europe of nations” that time; EU, Community did not exist. Property is a core part of national legislation, it is regulated in all countries in a very stringent and detailed way. The drafters tried to find a new, flexible concept, which reflected the functioning of property rights: this was the peaceful enjoyment of possessions.

The first question is whether the prohibition against the donation of embryos by a state constitutes a violation of one's property.

Answers/comments from the audience:

It depends on what can be qualified as property “stricto sensu”. If embryos are entitled to human dignity, they cannot be considered property.

¹¹ *Parrillo v. Italy*, Application no. 46470/11, 27 August 2015

What could be the reason for prohibiting the donation of embryos? How does your legal system regulate the sale or donation of embryos? Can you give blood or donate your organs?

Answers/comments from the audience:

It is not prohibited, there are healthcare guarantees regulating these issues—blood donation depends on health requirements, blood analysis. The same applies to the donation of embryos.

Recently, there has been a debate in Poland about this topic. This is also a new area for researchers.

In the case at hand, there was a couple who could not have children, therefore the applicant had recourse to *in vitro* fertilisation (“IVF”) treatment with her partner and the five embryos obtained from the IVF treatment were placed in cryopreservation. Before the embryos could have been implanted, the applicant’s partner died. After deciding not to have the embryos implanted, the applicant sought to donate them to scientific research and thus contribute to promoting advances in treatment for diseases that are difficult to cure. She made a number of unsuccessful requests for release of the embryos at the centre where they were being stored.

The director of the centre refused to comply with her request on the grounds that this type of research was banned and punishable as a criminal offence in Italy.

Answers/comments from the audience:

In Slovenia, it is definitely forbidden to sell embryos.

In Serbia, the mother can donate an egg.

The primary issue to be decided by the Court was whether the prohibition constituted a violation of Article 8 (right to respect for private and family life) of the ECHR, but the Court also addressed Article 1 of Protocol No. 1. The Grand Chamber of the ECtHR held that with regard to the economic and pecuniary scope of Article 1, human embryos cannot be reduced to “possessions” within the meaning of that provision.

EXERCISE 2 SEVERANCE PAYMENT AS LEGITIMATE EXPECTATION¹²

Article 1 of Protocol No. 1 to the ECHR has an autonomous concept of possessions¹³ including existing possessions and legitimate expectations. What is a legitimate expectation? If I promise you ten thousand forints, is it your legitimate expectation? No, under no circumstances. If your parents have been working for forty years and have paid contributions to social insurance system, do they have a legitimate expectation of oldage pension? Yes, they do, as it is guaranteed and protected by law. If one has a property right under national law, it is a property for the purposes of Article 1. But if one's property right is not recognized by national law, his/her right can still be protected under Article 1, as it has an autonomously interpreted concept of property, and it provides a higher level of protection. Very few legal systems give protection to legitimate expectations, but the ECHR does so.

There is a labour law regulation relating to civil servants: if a civil servant loses his/her office, (s)he is entitled to compensation. This compensation is called severance payment. What do you think about this expectation? If you lose your job, will you be entitled to compensation from the state? Is it a legal expectation or not? This is an example for a broad interpretation of law by the ECtHR. How can the state cut your money in this case? The law was changed, but can one still talk about a legitimate expectation?

Answers/comments from the audience:

Probably there is a conflict with a legitimate expectation, which has existed and has been guaranteed by the state for a very long time.

It is a pertinent remark, but what if there is a financial crisis and the state cannot guarantee the compensation?

Answers/comments from the audience:

One should get an amount which is sufficient for him/her to be able to survive, i.e. a minimum must be paid.

In the case at hand, the applicant had been a civil servant in a Hungarian ministry for thirty years when she was dismissed in 2011. In addition to two months' salary, she was statutorily entitled to a severance payment amounting to eight months' salary. However, in 2010, the Hungarian Parliament adopted an Act introducing a new

¹² *N.K.M. v. Hungary*, Application no. 66529/11, 14 May 2013

¹³ See e.g. Allen, T.: The Autonomous Meaning of 'Possessions' under the European Convention on Human Rights. In: Cooke, E. (ed): *Modern Studies in Property Law*. Vol. 2. Oxford – Portland (Oregon), 2002. p. 57.

tax on certain payments to public sector employees whose employment had been terminated. The aim of the Act was to fight against excessive severance payments in order to satisfy society's sense of justice and protect the public purse at a time of economic hardship. Benefits exceeding 3.5 million Hungarian forints were taxed at 98%. I agree that the 98% tax rate was very severe and the Court held that it had been disproportionate to the legitimate aim pursued by the Hungarian state, namely protecting the public purse against excessive severance payments. In other words, the severance payment was found to be a legitimate expectation protected under Article 1 of Protocol No. 1 to the ECHR and was therefore payable.

EXERCISE 3 THE STATE'S POSITIVE OBLIGATIONS¹⁴

There was an explosion at a refuse tip, there were deaths and destruction of flats in the neighbourhood of the tip. The applicant asserted that the State should be held accountable for the national authorities' negligent omissions that had resulted in the loss of his house and all his movable property, and therefore alleged a violation of Article 1 of Protocol No. 1. Did the state have an obligation to prevent the explosion? According to an expert opinion issued two years earlier, ventilation shafts should have been installed.

Answers/comments from the audience:

In that case, the state knew that this had been a risky area, so it should have taken appropriate measures.

Yes, the positive obligation required practical steps, the mere provisions of information on the risk would not have absolved the state of its obligation. The Court accordingly held that the right to the peaceful enjoyment of possessions "may require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions". In the instant case, the Court ruled that the gross negligence attributable to the State amounted not to "interference" but to the breach of a positive obligation, since the State officials and authorities did not do everything within their power to protect the applicant's proprietary interests.

¹⁴ Öneriyıldız v. Turkey, Application no. 48939/99, 30 November 2004

EXERCISE 4 BROADCASTING FREQUENCIES AS POSSESSIONS¹⁵

In this case, the state authority granted broadcasting licence to a television company, but its operations were delayed because the authority failed to allocate broadcasting frequencies to it. Do you think that broadcasting frequencies are possessions? Yes, that was the answer of the ECtHR.

The Court held that without the allocation of broadcasting frequencies broadcasting was deprived of its substance, and that the interests associated with exploiting the licence constituted property interests attracting the protection of Article 1 of Protocol No. 1. Therefore, it found that “the applicant company’s legitimate expectation, which was linked to property interests such as the operation of an analogue television network by virtue of the licence, had a sufficient basis to constitute a substantive interest and hence a ‘possession’ within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1”.

EXERCISE 5 CUTS IN PUBLIC SECTOR WORKERS’ SALARIES AND PENSIONS¹⁶

This case concerned the adoption of stringent budgetary measures in Greece and their application to all civil servants, including 20% cuts in the salaries and pensions and other allowances of public sector workers. The retroactive measures were justified by the exceptional crisis, which was unprecedented in the recent history of Greece and called for an immediate reduction in public spending. Where is the fair balance between the individual citizens’ right to the peaceful enjoyment of their possessions and the public interests, if any?

Let us try to reflect on some aspects of the case from both sides. From the side of the state, is a financial crisis a reason for a cut?

Answers/comments from the audience:

My problem is that this is a very strict and blanket restriction.

I think this case is not a good example, as it is based on the very special situation in Greece. My problem is that the reasoning is very general and one could think that Hungary could also do that. But I am sure that it could not. According to the Court’s reasoning, a cut can be imposed as long as the livelihood is not threatened.

¹⁵ *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, Application no. 38433/09, 7 June 2012

¹⁶ *Koufaki and Adedy v. Greece*, Application no. 57665/12 and 57657/12, 7 May 2013

EXERCISE 6 LIABILITY OF SUCCESSOR STATES
FOR YUGOSLAV-ERA BANK ACCOUNTS¹⁷

According to the facts of this case, citizens of the former Yugoslavia, now citizens of Bosnia and Herzegovina had bank accounts at the Sarajevo branch of (now Slovenian) Ljubljanska banka. They had not been able to withdraw their “old” foreign-currency savings from their accounts since the dissolution of Yugoslavia. What about the citizens’ old deposits?

Answers/comments from the audience:

The ECtHR decided in this case that the successor states are liable.

Is it justified why Slovenia and Serbia are liable for the bank accounts? It is a very complicated case involving international law, human rights law and so on.

**3. Some remarks on the protection of property rights
in the case law of the ECJ and the Curia of Hungary**

The last part of my presentation deals with similarities and differences between the jurisprudence of the ECtHR and the ECJ in respect of the right to property. There are some differences. In cases involving social security issues, Strasbourg allows for more opportunities in connection with legitimate expectations. There was an effort to connect the concept of property with personal efforts, they tried to look at the personal side of property. However, in the end, the Court concluded that there were goods, which could not be linked to such efforts. Another interesting case was whether one must be a lawful owner of the property to get protection? And the answer was no. If somebody follows the practice of the ECJ and the ECtHR, one will find some special types of goods, e.g. goodwill, rights from a leasing contract, or credit balance. There are also important questions relating to phenomena under EU law such as milk quotas and production quotas. There is a difference between the ECtHR and the ECJ as to whether these quotas can qualify as possessions. As to the claims against social security systems, there are differences as well.

Last but not least, a national civil law case before the Curia involved family members who filed an action for the termination of their joint ownership. Hungarian courts have a traditional method of handling such claims. It is the Curia’s long-standing practice that the court can rule that it is not reasonable to terminate the joint ownership and sell the real estate at a given moment if its transaction value—

¹⁷ *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the “Former Yugoslav Republic of Macedonia, Application no. 60642/08, 16 July 2014*

compared to the use value—is low and the parties’ habits of utilizing the real estate are still in a transitional phase. If the court rejects the claim for this reason, is it a violation of Article 1?

Answers/comments from the audience:

The order not to terminate the joint ownership violates the right to property to a small extent.

It is an open question, no official answer has yet been received. As far as the judiciary is concerned, there are often no legitimate aims, there are traditions. If the termination of joint ownership occurred at an inappropriate date of time, the court could reject the claim, and that is a long-standing tradition in Hungarian law, dating back to the 19th century.

As to the future perspectives of the protection of property, some think that we need a more dogmatic approach and a not too wide margin of appreciation for the states. I do not agree with this. If the judiciary can remain flexible, it can be open to new facts and new relations.

How Much Does the Operation of a Parliament Cost?

Questions Concerning Financing the Operation of Legislatures

1. Introduction

Parliamentary law and the topic of “cost of democracy” have two common fields: firstly, the parliaments’ competence of creating the state budget—generally via adopting it as an act—and secondly, the appropriate financing of the parliament itself i.e. its own operation. Naturally, these aspects are connected. On the one hand the state budget determines the parliament’s incomes and expenditures, and on the other hand the parliament needs appropriate material resources for its operation which includes the adoption of the act on the state budget.

Due to the principle of separation of powers, parliaments play the role of a classic branch in the system of state organs. Like all of the separated branches of power parliament shall have autonomy—or in other words shall be independent—from other state organs. There are several dimensions of independence of a state organ e.g. institutional, personal and financial.

Institutional independence shall be ensured via the organ’s regulation at the level of the constitution or act. Institutional autonomy also covers the organ’s own and inviolable competences which are protected by courts or constitutional courts. The personal aspect of independence of a state organ covers its members’ way of nomination and election/appointment, their incompatibility, immunity and ways of mandate-termination. The financial guarantees of the independence are having enough money at disposal for operation and free decision on expenditure.

All the three aspects are crucial for any state organ which shall operate independently from other organs. Parliaments have these guarantees accordingly: the core of their regulation belongs to the constitutional level¹, for instance they have sole

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¹ In those countries where there is written constitution—a constitutional chart—the constitution contains regulations on the parliament. In those countries where there is unwritten—historical—con-

competence to adopt acts and impose taxes. The personal aspect focuses on the MPs legal state—including their rights ensuring the participation in debates, their right for immunity (both for inviolability and non-accountability)—and their election system. These parts of parliamentary law are well elaborated by jurisprudence and political science, but scientific interest in financial issues of parliaments are significantly lower.

The apropos of my topic choice is the reduction of the number of the Hungarian parliamentary seats. The question of my research was if there is relationship between the costs of a parliament and the number of its members. Because of the apropos this paper focuses on the Hungarian National Assembly's regulation and economy, but I will also try to touch upon other national parliaments.

2. The general aims of parliamentary expenditures

The following four basic aims can be created connected to parliamentary expenditures:

- a) ensuring the professionalism of decision-making and decision makers;
- b) prevention of corruption;
- c) financing efficient administration and
- d) covering the cost of operation.

ad a), b)

Since Max Weber's essays titled "Politics as a vocation" the "sine qua non" of the professional politician is "living off politics" viz. getting salary for politics, being a politician: "Professional politicians live either from politics—that is, they make their living off politics (von der Politik)—or they live for the sake of politics (für die Politik)."² As Weber wrote: "The distinction hence refers to a much more substantial aspect of matter, namely, to the economic. He who strives to make politics a permanent source of income live 'off' politics as a vocation, whereas he who does not do this live 'for' politics."³

stitution the acts or other regulations concerning the parliament form parts of constitutional rules. See also the status of the British Parliament Acts 1911 and 1949.

² Mittleman, Alan: Weber's Politics as a Vocation: Some American Considerations. *Notre Dame J.L. Ethics & Pub. Pol'y*, Vol. 20 (2006), p. 279. URL <http://scholarship.law.nd.edu/ndjlepp/vol20/iss1/9282> (9 May 2016)

³ Gerth, H.H. – Mills, C. Wright (Translated and edited): *From Max Weber: Essays in Sociology*. Oxford University Press, New York, 1946. pp. 77–128.

Fundamental Law of Hungary states that “[m]embers of the National Assembly shall be entitled [...] to remuneration ensuring their independence.”⁴ So the main function of the remuneration of MPs is the prevention of corruption. This theory is quite simple: let’s give MPs enough money and they will not be bribed. It has a strong relation with the principle of the freedom of mandate, which is the basis of the legal status of MPs in Hungary.⁵ Free mandate means that MPs “shall perform their activities in the public interest, and they shall not be given instructions in that respect.”⁶ So the Hungarian parliamentary law expresses the MPs’ independence with this principle, which is based on the distinction between public and private—in the meaning of particular—interests: MPs shall work for the public and the exclusion of serving particular interests needs a special guarantee, the remuneration. Remuneration is appropriate if it can ensure the MP’s free actions and independence.

It is questionable whether higher salaries enhance the independence of politicians or not. For the answer, we have to analyse a pre-question: what shall make an MP independent? According to the principle of separation of powers, the minimum standard of MPs’ independence is the exemption of any influence coming from other state organs or other non-state source (e.g. private companies). But the core of the problem leads to the evergreen and insolvable conflict of the freedom of mandate and faction and/or party-discipline. This problem could be translated into what an MP can decide on. In the case of a parliamentary form of government it rarely occurs that a faction-member MP votes against his/her faction. Taking the phenomenon of the “voter-machine MP” into account the MPs’ independence loses its importance and consequently the MPs’ remuneration becomes a marginal question, too. Obviously, the party discipline can be the subject of political science. There is no legal boundary for an MP to follow the faction’s dicta but this political partisanship may have high costs⁷.

Max Weber’s thoughts on the relation between the politicians’ independence and their sources of incomes are also worth examining: “Under the dominance of the private property order, some—if you wish—very trivial preconditions must exist in order for a person to be able to live ‘for’ politics in this economic sense. Under normal conditions, the politician must be economically independent of the income politics can bring him. This means, quite simply, that the politician must be wealthy or must have a personal position in life which yields a sufficient income. [...] Either politics

⁴ Article 4 subparagraph (2) of Fundamental Law of Hungary. URL <http://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178> (10 May 2016)

⁵ Smuk, Péter: The Parliament. In: Csink, Lóránt – Schanda, Balázs – Varga Zs. András (eds): *The Basic Law of Hungary. A First Commentary*. Clarus Press, Dublin, 2012. pp. 217–218.

⁶ Article 4 subparagraph (1) of Fundamental Law of Hungary. URL <http://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178> (10 May 2016)

⁷ See for details: Kam, Christopher J.: *Party Discipline and Parliamentary Politics*. Cambridge University Press, 2009. pp. 130–149.

can be conducted ‘honorifically’ and then, as one usually says, by ‘independent’, that is, by wealthy men and especially by rentiers. Or, political leadership is made accessible to propertyless men who must then be rewarded. The professional politician who lives ‘off’ politics may be a pure ‘prebendary’ or a salaried ‘official’. Then the politician receives either income from fees and perquisites for specific services tips and bribes are only an irregular and formally illegal variant of this category of income or a fixed income in kind, a money salary, or both. He may assume the character of an ‘entrepreneur’, like a condottiere or the holder of a farmed-out or purchased office, or like the American boss who considers his costs a capital investment which he brings to fruition through exploitation of his influence. Again, he may receive a fixed wage, like a journalist, a party secretary, a modern cabinet minister, or a political official.⁸

Summing up Weber’s point of view, those persons may be independent who are economically independent of politics. Accordingly, if an MP earns his/her income dominantly as a politician he/she will be appendant to his/her party.⁹ The source of kind of appendance is just the MPs’ remuneration. Weber emphasizes that “[...] we do not mean to say that the propertyless politician will pursue private economic advantages through politics, exclusively, or even predominantly. Nor do we mean that he will not think, in the first place, of ‘the subject matter.’ Nothing would be more incorrect. According to all experience, a care for the economic ‘security’ of his existence is consciously or unconsciously a cardinal point in the whole life orientation of the wealthy man. [...] A non-plutocratic recruitment of interested politicians, of leadership and following, is geared to the selfunderstood precondition that regular and reliable income will accrue to those who manage politics.”¹⁰ So MP’s remuneration system is not the instrument of anti-corruption but it is good for opening political career for the poorer social classes.

ad c), d)

Naturally, the operation of a parliament does not only involve the work of MPs: administrative and technical staff is also needed for the professional and efficient legislative operation. The wages of the members of these staffs are also an obligate aim of parliamentary expenditures.

Covering the material conditions of operation subsumes the “housing” costs (costs of using the public utilities) of the parliament—which could be really expensive due to the grandiose buildings used by legislatures—the IT-costs, postal fees or traffic expenditures.

⁸ Gerth, H.H. – Mills, C. Wright (Translated and edited): *From Max Weber: Essays in Sociology*. Oxford University Press, New York, 1946. pp. 77–128.

⁹ In Hungary there is no real chance to gain a parliamentary mandate without party support.

¹⁰ Gerth, H.H. – Mills, C. Wright (Translated and edited): *From Max Weber: Essays in Sociology*. Oxford University Press, New York, 1946. pp. 77–128.

3. The short history of the 199-member Hungarian Parliament

As I mentioned above the apropos of my paper is the reduction of the number of Hungarian MPs. I would like to highlight the political debates which influenced the size of the National Assembly.

The number of the parliamentary seats has been regulated by act—adopted with two-third majority—since the change of regime. Act XXXIV of 1989 on the election of the members of the Parliament stated that the number of members of parliament is a total of three hundred and eighty-six.¹¹ The text of this act was created by the so-called round-table negotiation¹² and it shows the results of political bargains of 1989. For years and decades parliamentary parties—irrespective of their ideology or governmental or oppositional status—emphasized the reduction of parliamentary seats.

Emphasized political/party attention on smaller parliament was logical because the majority of voters supported the reduction of the MP's number.¹³ All the parties suggested a parliament with about 200 members. A bill in 2009 on the election models of the MPs shows the concordance between the parties. Two liberal and two conservative representatives initiated it and the faction of the Socialist Party as a governing party supported it.¹⁴ Between 2006 and 2009 the Government initiated two bills on a smaller parliament but they did not achieve two third majority. Fidesz, the leading party of the opposition also agreed that the reduction of parliamentary seats was important. Material consequences of the reduction as a typical argumentation for the smaller parliament were highlighted in the parliamentary debate of the above-mentioned bill, too.¹⁵ Despite the accordance, parties could not agree in

¹¹ *Act XXXIV of 1989 on the election of the members of the Parliament 1. § (1) subparagraph*

¹² The so-called National Round Table had three sides: the Opposition, the State Party (called Hungarian Socialist Workers Party – MSZMP), the “Third Side”—including the trade unions—and the fourth side was the publicity because the negotiations were open for the media. The role of the National Round Table was enormous because the Parliament elected in 1985 had no democratic legitimacy because almost all of its members were nominated by the “Patriotic National Front” which was an organisation of MSZMP. Bargains made by the National Round Table were adopted as an act by the Parliament. This way the preferences of the “Democratic Opposition” were ensured in the creation of the new—democratic—legal system and at the same time it could prevent the revolutionary—violent—change of regime. Smuk Péter: *Magyarország politikatörténete 1989–2011* [Hungary's Political History 1989–2011]. Osiris, Budapest, 2012. pp. 42–45.

¹³ Tamás Kern refers to Gallup's research. URL <http://index.hu/belfold/kisparl4660/> (11 May 2016)

¹⁴ Bill No. T/9057/1. was initiated by Bálint Magyar, Gábor Világosi (SZDSZ – Alliance of Liberal Democrats) and Miklós Csapody, Péter Karsai (MDF – Hungarian Democratic Forum).

¹⁵ Bálint Magyar's speech in the Parliament on the 10 November 2009. Source: Parliamentary Diary. URL http://www.parlament.hu/orszaggyulesi-naplo-elozo-ciklusbeli-adatai?p_auth=KmlaGwXd&p_p_id=pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsq

the method of the election—single constituencies with first-past-the-post-system, party list or mixed system—so the two-third majority was not achieved.

2010 parliamentary election was won by the Fidesz-KDNP alliance¹⁶ and they gained two third of the mandates. This political force used its ability for the modification of the constitution. Modification of the Constitution on 25 May 2010 declared that the number of the MPs shall be maximum 200. For the representation of the national and ethnical minorities, maximum 13 further MPs shall be elected.¹⁷ This regulation never came into effect because the act allowing these sentences to come into force was never adopted.

In 2010 the parliament started the preparation of the new constitution, too.¹⁸ A special committee—the Constitution-Preparing Committee—summarized the results of its operation and it was adopted as a resolution on the basic principles of the new constitution's regulation. This document contains two models for the "future legislature": one for a unicameral parliament and one for a bicameral parliament. Neither the unicameral nor the bicameral parliament's size was clarified by the Committee. The Parliament adopted 9/2011. (III. 9) OGY resolution whose appendix contained the Committee's document but only the parts concerning the unicameral model.

The new constitution—called Fundamental Law¹⁹—maintained a unicameral legislature but it does not contain any rule on the size of the parliament. Act CCIII of 2011 on the election of MPs states that the number of the representatives is 199. Over the number of MPs maximum 13 nationality spokespersons²⁰ shall take part in the National Assembly's operation.

¹⁶ Fogy_naplo.naplo_fadat_aktus%3Fp_ckl%3D38%26p_uln%3D241%26p_felsz%3D321%26p_felszig%3D337%26p_aktus%3D9 (11 May 2016)

¹⁶ Both parties are conservative (Fidesz – Alliance of Young Democrats; KDNP Christian-Democratic People's Party)

¹⁷ Source: Hungarian Gazette 25 May 2010. URL <http://www.magyarokzlony.hu/dokumentumok/3e78dd68b3c8a4ba8d067d65d8940ffae6c7881/megtekintes> (11 May 2016)

¹⁸ 47/2010. (VI. 29.) OGY resolution erected the Constitution-Preparing Committee.

¹⁹ The Fundamental Law was adopted on 18 April 2011 and the President of the Republic promulgated it on 25 April 2011. The new constitution came into force on 1 January 2012.

²⁰ Nationality spokespersons are the representatives of the 13 national and ethnical! minorities—the so-called nationalities—living in Hungary. There are two types of election lists—the party list and the nationality lists. Each nationality shall stand one list. If a nationality list cannot gain any mandate, the leader of the list becomes his/her nationality's spokespersons. Spokespersons have the same rights as an MP but they shall not vote at plenary sessions and they shall not have the right to speak except during the debate of those topics concerning the nationalities' legal status. For detailed information on the electoral system and the legal status of national spokesperson: Erdős, Csaba – G. Karácsony, Gergely: The Hungarian Electoral System. In: Smuk, Péter (ed.): *The Transformation of the Hungarian Legal System 2010–2013*. pp. 81–94.

Although the act on the election of MPs came into force on 1 January 2012²¹ the first time when its regulations had to be applied was the first general election of MPs after 1 January 2012. Accordingly, the 2014-elected parliament was the first legislature, which has 199 MPs and—maximum—13 national spokespersons.

4. Is the smaller more beautiful?²²—Is there an optimal size for a legislature?

In the debates on the size of the parliament, there was/is a recurring argument that the 386-member legislature was too big for the country's area and its population. This argument hypothesizes that there is an optimal size for a parliament.

For the confirmation or confutation of this hypothesis, we have to review the correlation between the population and the MPs' number in some countries.

	<i>Hungary (old)</i>	<i>Hungary (new)</i>	<i>Slovakia</i>	<i>Czech Republic</i>	<i>Poland</i>	<i>Austria</i>	<i>United Kingdom</i>	<i>Italy</i>	<i>France</i>	<i>Luxembourg</i>	<i>Netherlands</i>	<i>Sweden</i>	<i>USA</i>
Number of chambers	1	1	1	2	2	2	2	2	2	2	2	1	2
Total number of seats	386	199	150	281	560	246	1862	915	898	81	225	349	535
Population (million)	9.9	9.9	5.3	10.5	38	8.5	64.4	60.8	65.8	0.5	16.8	9.6	319
Number of inhabitants per MPs	25. 647	49. 748	35. 333	37. 367	67. 857	34. 553	34. 586	66. 448	73. 374	6. 173	74. 667	27. 507	596. 261

Source of data: Parline-database of the Inter-Parliamentary Union.

URL <http://www.ipu.org/parline-e/parlinesearch.asp>

Table 1 Number of inhabitants per MP in some European countries and in the USA.

²¹ *Act CCIII of 2011 21. §*

²² This is an allusion to E.F. Schumacher's well-known book titled "Small is Beautiful", where Schumacher criticises the Western economics scholars' consumption-centred theories (see also "bigger is better").

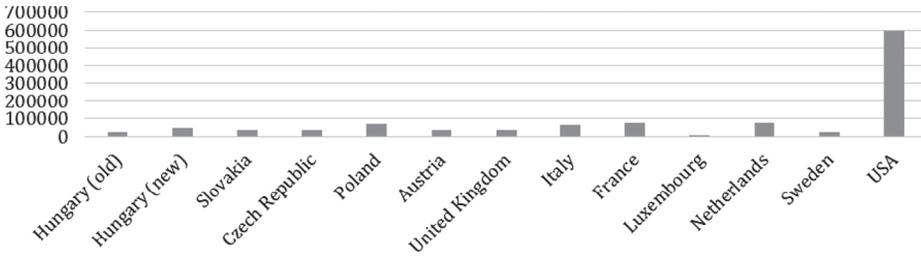


Diagram 1/A Number of inhabitants per MP in some European countries and in the USA

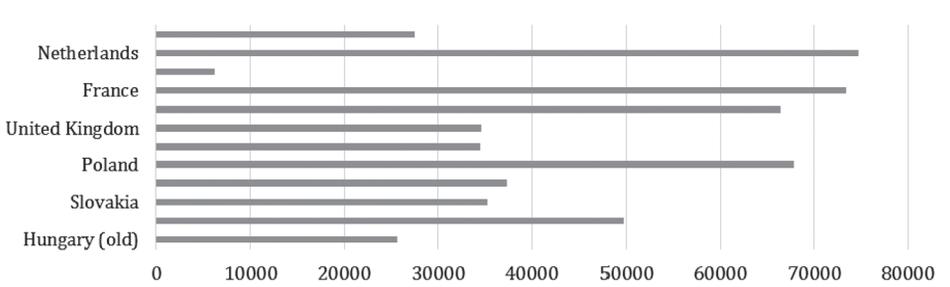


Diagram 1/B Number of inhabitants per MP in some European countries

Based on the data above there is no golden rule for the size of a parliament. The difference in data between the Luxembourg parliament and the US Congress is hundredfold, so the scatter is extremely huge in the ratio-index of population and parliament size of parliament. It is generally true that the bigger the population is the more inhabitants go per each MP. Nevertheless, the Netherlands do not have extremely large population but the number of the inhabitants per MP is the highest there among EU member states.

As a conclusion, we can declare that both the bigger and the smaller Hungarian parliaments fit the average size of European legislatures. The reduction of the number of the parliamentary seats did not cause any constitutional anxiety—although the modification of the constituencies and suffrage may be questioned.

5. Is the smaller the cheaper?

As I have mentioned above a typical argument for the smaller parliament was sparing. To confirm this thesis, I have checked the Chapter on Parliament²³ in the acts on state budget for years 2013,²⁴ 2014²⁵ and 2015.²⁶ I have analysed these three years because the smaller parliament started its operation in May 2014 so the last whole year of the bigger parliament was 2013 and the first whole year of the smaller one was 2015.²⁷

The National Assembly in the strict sense—the common assembly of the 199 representatives and the 13 national spokespersons—has no legal personality so it cannot have its own income and expenditures. Tasks of the parliamentary financial management are fulfilled by the administrative organ of the National Assembly, the Office of the Parliament (i.e. MPs get their remuneration from the Office, and the Office transfers money for the public utilities, too). In the acts on the state budget the subject of the budgetary subventions, incomes and expenditures is the Office of the Parliament and the Parliamentary Guard not the National Assembly itself.²⁸

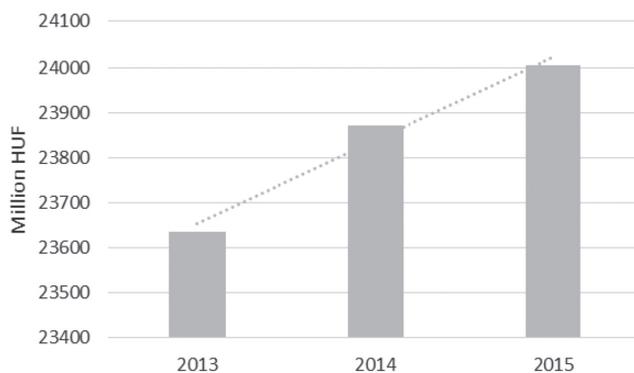


Diagram 2 Total expenditures of the Office of the Parliament and the Parliamentary Guard

²³ The first chapter of the Appendix of the acts on state budget deals with the economy of the Parliament. But data on the National Assembly's organs—the Office of the Parliament and the Parliamentary Guard—this chapter contains the economy of Historical Records of Services for State Security, Forum of the Carpathian-Basin Hungarian Representatives and the donations of the President of the Republic and the President of the National Assembly.

²⁴ *Act CCIV of 2012 on the Hungarian state budget for year 2013*

²⁵ *Act CCXXX of 2013 on the Hungarian state budget for year 2014*

²⁶ *Act C of 2014 on the Hungarian state budget for year 2015*

²⁷ When examining a longer term i.e. decades, inflation may distort data.

²⁸ The Appendix of the state budget acts has four relevant columns: the name of the organ, its expenditures its incomes (from non-budgetary sources) and its budgetary subventions (the amount spent on this organ from the state budget). So the summarized amounts of incomes and budgetary subventions shall not be less than the expenditures.

As we could see in the diagram, the reduction of the parliamentary seats did not result in the reduction of the parliament's total budgetary subventions, on the contrary, they became even higher. The growth is not significant, it was just 3.5%. If we extrapolate the annual expenses of Parliament to Hungary's population, the result shows that each Hungarian citizen spends less than 8 Euros for the legislation in a year.²⁹

6. Why is a smaller parliament not cheaper?—Elements of the parliamentary budget

For the explanation of the surprising result—namely, the smaller parliament is more expensive than the bigger one—we need to analyse the detailed budget of the Parliament.

<i>M HUF/M EUR (1 EUR=310 HUF)</i>	<i>2013 (bigger)</i>	<i>2014 (transition)</i>	<i>2015 (smaller)</i>
Total expenditures on National Assembly, from among:	21,460 / 69.2	21,345 / 68.9	21,421 / 69.1
Personal benefits altogether	13,384 / 43.2	13,382 / 43.2	13,868 / 44.7
Personal benefits	10,648 / 34.3	10,748 / 34.7	11,216 / 36.2
Taxes on pers. ben.	2,736 / 8.8	2,634 / 8.5	2,652 / 8.6
Material expenses	4,192 / 13.5	3,930 / 12.7	4,109 / 13.3
Other operational expenses	46 / 0.15	40 / 0.13	40 / 0.13
Reconstruction	3,471 / 11.2	3,471 / 11.2	1,882 / 6.1
Investments	368 / 1.2	431 / 1.4	1,431 / 4.6
Total expenditures on Parliamentary Guard	2,176 / 7	2,527 / 8.2	2,585 / 8.3
SUMTOTAL	23,636 / 76.3	23,872 / 77	24,006 / 77.4

Source: acts on state budget for years 2013, 2014 and 2015.

Table 2 Detailed data on parliamentary expenditures.

²⁹ 1 EUR = 310 HUF

The diagram shows the main—but not all—elements of the parliamentary expenses, too.

The personal benefits contain the net expenditures on salaries and their taxes. The table shows that the tax system can affect the parliamentary budget: in 2013 when the expenditures on net salaries were the lowest the nominal measure of the taxes was the highest.

Material expenses contain all the expenditures necessary for the everyday operation of the parliament and the house of parliament e.g. costs of papers, toners, electricity, gas, water, etc.

Reconstruction and investments are irregular expenses, the former was quite high because of the general renovation of the house. (Its limestone covering became black through the decades due to excessive exposure to smog so each stone was replaced. New decorative lightning of the house was also installed.) A special reconstruction was realized in the hall of the plenary session. Because of the reduction of the MPs number, the number of benches was also reduced. In the renovated hall, there are less lines of seats (benches) and it became more spacious. The expenses of both the building's exterior and interior renovation were significant during the examined period.

Due to the structure of the state budget and the detailed parliamentary budget, the expenses of the Parliamentary Guard are part of the general expenditures of the Office of the Parliament. Main task of the Guard is to secure the house of the parliament, and other buildings used by the legislature (e.g. building of the representatives' central office) and the personal protection of the speaker of the parliament.³⁰ Before the establishment of the Guard in 2013 these tasks belonged to the Government—de facto to the police's specified unit—so the Guard did not increase the expenditures on the parliament, it was only a re-arrangement of the security expenses between the two branches of powers.

³⁰ Act XXXVI of 2012 on the National Assembly 125. § (1) subparagraph: „The Parliamentary Guard shall be in charge of protecting the National Assembly, safeguarding the National Assembly's independence and its operation free from external influences, performing the functions connected to maintaining the order of the sittings as well as the duties of personal protection and facility security as laid down in this Act, ceremonial marching and performing primary fire extinguishing and fire safety functions.” URL <http://www.parlament.hu/documents/125505/138409/Act+XXXVI+of+2012+on+the+National+Assembly/b53726b7-12a8-4d93-acef-140feef44395> (12 May 2016)

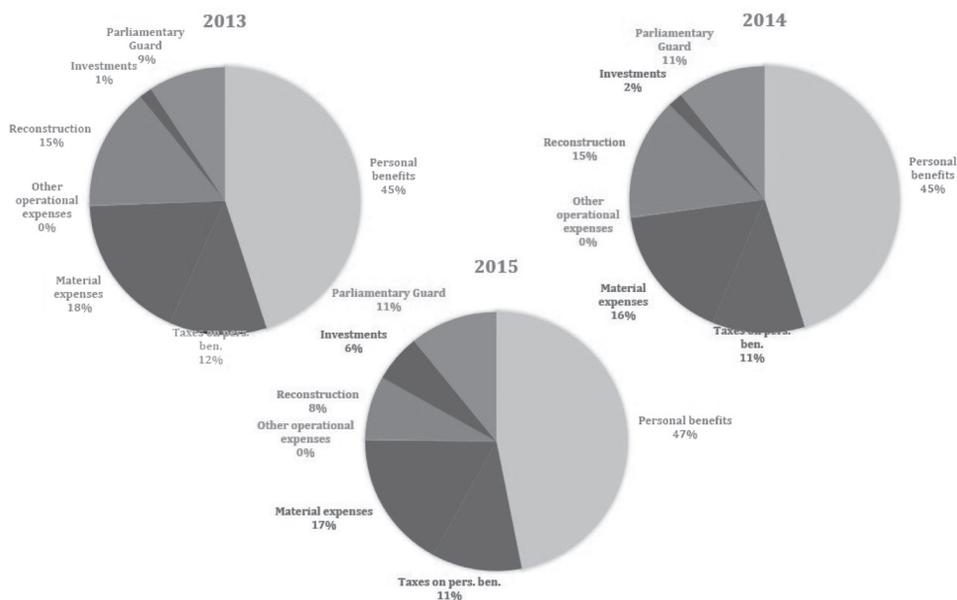


Diagram 3 Breakdown of parliamentary expenses by purposes (ratio)

The pie diagrams show that the biggest part of the parliamentary expenditures is the net personal benefits (salaries). Summing the net salaries, taxes and the everyday material expenses, we will get the three quarter of the total budget. The breakdown of expenses by purposes did not change significantly during the three- year period but the ratio of the net personal benefits increased (from 45% to 47%) despite the smaller parliament and the higher total budget.

The bar diagrams show the nominal measure of expenditures broken down by purposes. The large ratio of personal benefits seems obvious. However, the most interesting part of this diagram is the top of the net personal benefits' columns, because it doubtlessly demonstrates that we spend more money on parliamentary net salaries year after year. The increase is not extremely high, but the trend is clear despite the reduction of parliamentary seats. There should be 3+1 reasons which could explain the increase:

- a) increasing the number of the administration,
- b) higher salaries of the administration,
- c) higher remuneration of MPs or
- d) all the above combined.

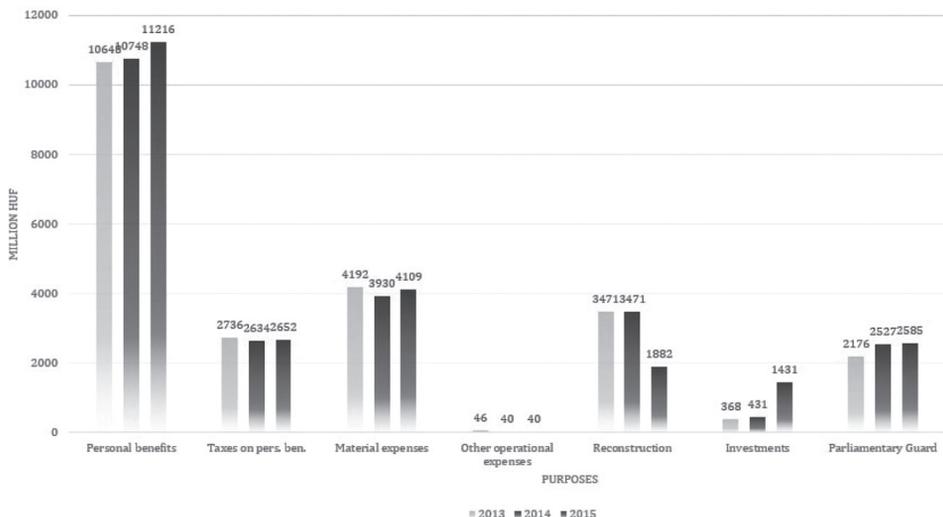


Diagram 4 Breakdown of expenditures by purposes and years (nominal rates)

ad a)

I examined only the data of two years: 2013 and 2015 because the new parliament’s statutory session was in 2014, and the change between the old and the new parliament caused extraordinary costs: e.g. severance pay for the MPs of the former parliament.

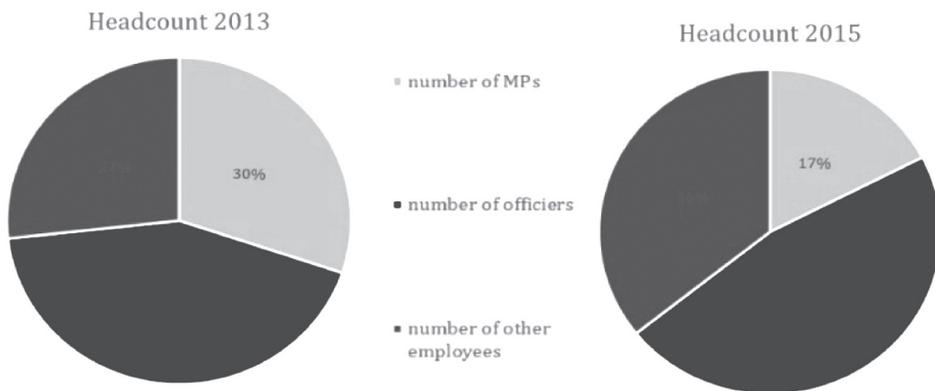


Diagram 5 Personal composition of the Office of the Parliament (ratio)

	2013	2015	ratio of change
number of MPs	386(+5)	199(+6+13)	52%
number of officers	551	535	97%
number of other employees	342	408	119%
total number of MPs, officers and other employees	1279	1142	89%
total number of officers and other employees	893	930	104%

Source: Particular budget of the Office of the Parliament for 2013 and 2015.

URL <http://www.parlament.hu/gazdalkodas1>

Table 3 Personal composition of the Office of the Parliament.

The size of the parliament does not affect the total headcount of the Office of the Parliament because what counts is the number of officers and other employees. Both in 2013 and 2015 there were much more administrative officers than MPs. And the number of other employees—especially secretaries, blue collar workers –increased during this three-years period. Only 30% and 17% of the whole headcount were MPs, while the total number of the Office of the Parliament grew by 4%.

ad b)

The next table shows the breakdown of personal benefits in 2013 and 2015.

	2013	2015	ratio of change
number of officers	551	535	97%
total expenses on officers' remuneration (HUF)	2,827,916,000	3,153,573,000	112%
average annual remuneration of an officer (HUF)	5,132,333	5,894,528	115%
average monthly remuneration of an officer (HUF)	427,694	491,210	
number of other employees	342	408	119%
total expenses on other employees remuneration (HUF)	1,146.896.000	1,626,145,000	142%
average annual remuneration of other employees (HUF)	3,353,497	3,985,649	119%
average monthly remuneration of other employees (HUF)	279,458	332,137	

Table 4 Breakdown of number and personal benefits of the administration³¹

³¹ Source: Detailed budget of the Office of the Parliament for 2013 and 2015. URL <http://www.parlament.hu/gazdalkodas1>

Firstly, I would like to highlight the correlation between the number of officers' and their total remuneration. While their number was reduced by 3% the sum of their total remuneration increased by 12%. The consequence is obvious: the average income of an officer must grow. The data also affirm our conclusion: the average remuneration of an officer grew by 15%.

Secondly, analysing the data concerning "other employees" we can see that their number and their total remuneration also grew between the years 2013 and 2015, but the increase of the remuneration was bigger (42%) than the growth of the number of employees (119%) The conclusion is the same like above: there was an average of 19% general increase of incomes.

ad c)

	2013	2015	ratio of change
number of MPs	386	199+13	52%
total expenses on MPs' remuneration (HUF)	4,229,106.000	3,766.394,000	89%
average annual remuneration of an MP (HUF)	10,956.233	18,926.603	173%
average monthly remuneration of an MP HUF)	913,019	1,577,216	

Table 5 Breakdown of number and personal benefits of MPs³²

Checking the correlation between the number of MPs and the expenditures on their remuneration, the significant increase (about 70%) of their average remuneration is evident: their number was almost halved but the expenses on their salaries we reduced only by 11%.

ad d)

Summing up the conclusions of point a-c), we can say that the number of the administration, the total expense on their remuneration, the average remuneration of an administrative employee (both the officers and the blue collar workers) and the average remuneration of an MP increased.

³² Source: Detailed budget of the Office of the Parliament for 2013 and 2015. URL <http://www.parlament.hu/gazdalkodas1>

7. Some comments on the MPs' remuneration

Although the incomes of MPs and other politicians is a hot topic from year to year the significance of this amount—summing all the personal benefits of MPs—is extremely low.

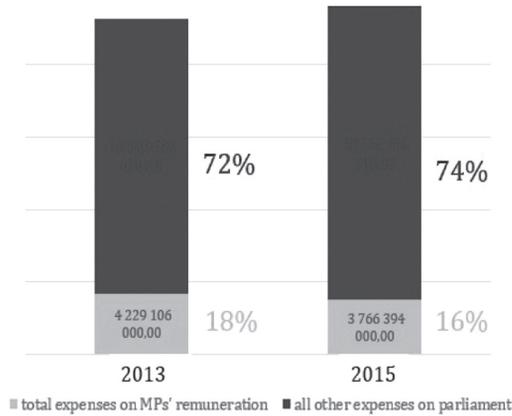


Diagram 6 Ratio between total expenses on MPs' remuneration and all other expenses of the parliament

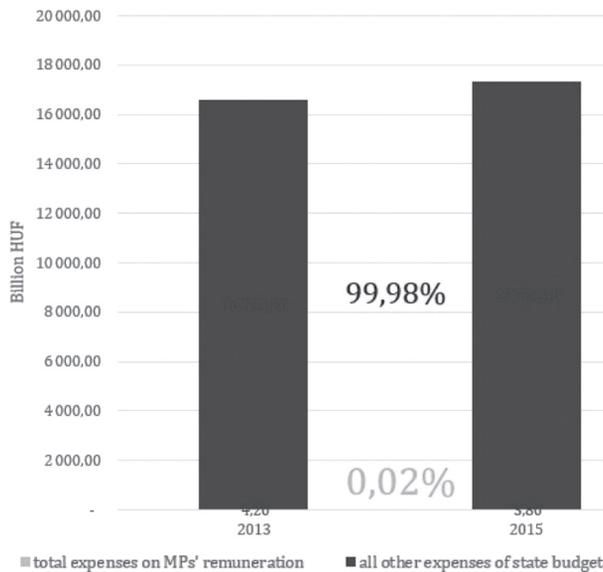


Diagram 7 Ratio between total expenses on MPs' remuneration and all other expenditures of the state budget

As the bar diagrams show the ratio of expenditures on MPs' remuneration is quite low in the light of the parliament's other expenses. Despite the pay-rise of MPs the expenditure on MP's remuneration has no influence on the state budget, because only 0.02% of the state budget is used for this purpose.

The other reason, which could make the remuneration of MPs an evergreen and hot topic, should be the huge difference between the MP's and the average salary. This argument could be easily challenged, if we compare data on Hungary and other countries.

	<i>basic salary of an MP per month (€)</i>	<i>average monthly salary (€)</i>	<i>ratio</i>	<i>year</i>
Hungary	2420	871	278%	2016
USA	13181	3940	335%	2015
Great-Britain	7805	2628	297%	2016
European Parliament	8020	1700	471%	2015
Germany	6878	2950	233%	2004
Austria	9520	2355	404%	2008
Italy	10974	2000	549%	2004
Czech Republic	1452	562	258%	2004
Poland	2325	744	313%	2009
France	5515	2874	191%	2012

Sources: Parline-database of the Inter-Parliamentary Union, URL <http://www.ipu.org/parline-e/parlinesearch.asp>; website of Eurostat, URL <http://ec.europa.eu/eurostat/web/main/home>; Pap András László: A képviselőlet ára [Price of the Representation]. In: Soltész István (ed.): *A képviselők jogállása* [Legal status of MPs]. Országgyűlési Módszertani Iroda, Budapest, 2004. pp. 233–267.

Table 6 Ratio between MP's basic salary and average salary.

Comparing the remuneration of MPs is almost impossible because of the different remuneration systems of MPs in these countries e.g. the housing or traffic allowance is part of the salary or it is provided in kind. Therefore, the basic salary of an MP is just a part—not even the bigger part—of the remuneration of an MP. Owing to the difficulties of comparison of the whole remuneration system I tried to analyse only the basic salary of MPs in some countries.

As the table shows, the Hungarian basic salary of an MP is less than the average earnings triplicate. The difference between the MP's basic salary and the average earning is bigger in the countries listed above—except France—than in Hungary. So the basic salary of a Hungarian MP is not higher—in relation to average earnings—than in other countries of the Western world.

The Act XXXVI of 2012 on the National Assembly simplified the remuneration system of the Hungarian MPs.³³ Main parts of remuneration are the following: honorarium (its amount depends on the function of the MP—i.e. speaker, vice-speaker, president of a committee), travel allowance (fuel card or free use of public transport), providing a flat in Budapest for those MPs who do not have flat in the capital city. Except for these, there is a quite significant administrative support for MPs: an MP shall have his/her own office in Budapest and in his/her constituency, the Office of the Parliament pays the MP's expenses on telecommunication and postal fees and each MP shall employ one person as a secretary.

There are indirect sources of financing the work of MPs: the budgetary allowances provided for parties and factions. These must be quite high i.e. the biggest party is entitled more than one billion HUF budgetary allowance a year.

8. Summary

I analysed questions concerning the size of a parliament, the correlation between the number of MPs and the expenses of the legislature, the division of parliamentary expenditures by purposes.

I arrived at the conclusion that the size of the National Assembly does not affect the amount of total expenses of the parliament. Despite the reduction of the number of parliamentary seats the operation of the National Assembly has not become cheaper for taxpayers, due to the increasing number of officers and other employees of the Office of the Parliament and the general pay-rise given for MPs, officers and other legislative staff.

³³ URL <http://www.parlament.hu/documents/125505/138409/Act+XXXVI+of+2012+on+the+National+Assembly/b53726b7-12a8-4d93-acef-140feef44395> (12 May 2016)

ARTEM GALUSHKO

Healing the Wounds of the Communist Past

Different Paths of Transitional Justice in Hungary and Ukraine

“People always ask, ‘Why reopen wounds that have closed?’...

Because they were badly closed. First you have to cure the infection, or they will reopen themselves.”

*Horacio Verbitsky*¹

1. Introduction

Although both Hungary and Ukraine experienced the peaceful fall of Communism, the two countries chose different approaches to transitional justice. In post-communist Hungary, state authorities confronted injustices perpetrated in the past. In Ukraine, after the collapse of the USSR, old Soviet apparatchiks stayed in power and decided not to “open old wounds” of the communist regime. The two approaches to the post-communist transitional justice could hardly be more different. Hungary introduced lustration of previous communist officials and commemorated victims of political persecutions shortly after the regime change in 1989. Ukraine has waited almost two decades to do the same only after massive protests during the so-called ‘Euromaidan’ in 2014. Although both countries still face ongoing transitional challenges, this paper will argue that Hungary confronted the communist past from the very beginning of its democratic transformation as opposed to Ukraine, where such an encounter with its Soviet legacy was delayed until the major social uprising. With this in mind, the main goal of this paper is to offer three criticisms of measures that have been recently introduced by the government of Ukraine in the course of an ongoing transition from communist totalitarianism to a democratic society.

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¹ Horacio Verbitsky interview, December 10, 1996, Buenos Aires. In: Hayner, Priscilla B.: *Un-speakable Truths: Transitional Justice and the Challenge of Truth Commissions*. 2nd ed. Routledge, New York, 2010. p. 145.

2. Different Paths of Transitional Justice in Hungary and Ukraine

Transitional justice in Hungary is characterized by various scholars as “incomplete transition”,² “mild transitional justice”³ and “a highly politicized issue”.⁴ Such assessments point to the fact that the peaceful transition from Communism to democracy “was [in part] initiated by reformists within the Communist élite”.⁵ Furthermore, weak transitional measures “in the early 1990s reflected the former communists’ influence over the legislative process, and the opposition’s tacit recognition of the communist era institutional and legal systems”.⁶ During the later stages of democratic transformations in Hungary “transitional justice measures were often shaped by scandals, revelations and realizations which were not apparent (or even not familiar) during the early days of transition”.⁷ Nevertheless, the trials and tribulations of transitional justice in Hungary could provide valuable lessons for Ukraine, which has only recently adopted transitional justice and decommunization measures in the aftermath of the civic uprising known as the “Euromaidan” Revolution.⁸ The public demand for lustration initiatives,⁹ broader access to communist archives and removal of communist symbols makes transitional justice a much-debated topic in Ukraine. Taking into account that such attempts to reassess the past have already taken place in Central and Eastern Europe, Ukraine can learn from neighbor post-communist countries like Hungary, which has already acquired significant experience of transitional justice after the fall of Communism.

² Uitz, Renáta: The incomplete transition in Hungary. In: Wouters, Nico (ed.): *Transitional Justice and Memory in Europe (1945–2013)*, Series on Transitional Justice. Intersentia, Cambridge, 2014. pp. 289–323.

³ Stan, Lavinia: Hungary. In: Stan, Lavinia (ed.): *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*, BASEES/Routledge Series on Russian and East European Studies. Routledge, London, 2008. p. 102.

⁴ Soon Kim, Dae – Swain, Nigel: Party Politics, Political Competition and Coming to Terms with the Past in Post-Communist Hungary. *Europe-Asia Studies*, Vol. 67 (2015) No. 9, p. 1465. DOI:10.1080/09668136.2015.1087969

⁵ Williams, Kieran – Szczerbiak, Aleks – Fowler, Brigid: Explaining Lustration in Eastern Europe: A Post-Communist Politics Approach. *SEI Working Paper*, (2003) No. 62, p. 6.

⁶ Stan, Lavinia: Hungary. In: Stan, Lavinia (ed.): *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*. 2008. p. 103.

⁷ Uitz, Renáta: The incomplete transition in Hungary. In: Wouters, Nico (ed.): *Transitional Justice and Memory in Europe (1945–2013)*. 2014. p. 306.

⁸ Diuk, Nadia: Euromaidan: Ukraine’s Self-Organizing Revolution. *World Affairs Journal*, (2014) March/April. URL <http://www.worldaffairsjournal.org/article/euromaidan-ukraine%E2%80%99s-self-organizing-revolution>. (7 April 2016)

⁹ A recent survey shows that nearly 80 percent of respondents support the [lustration] policy. In: Popova, Maria – Post, Vincent: *What is Lustration and is it a Good Idea for Ukraine to Adopt it?* URL <https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/09/what-is-lustration-and-is-it-a-good-idea-for-ukraine-to-adopt-it/> (10 April 2016)

George Orwell's assertion "[w]ho controls the past controls the future; who controls the present controls the past"¹⁰ is still more than relevant in the context of the post-communist democratic transformations. The importance of the politics of memory in transitional societies is traditionally recognized in the academic literature. For instance, Lavinia Stan effectively argues that "[c]onfronting the past responds to genuine needs for justice, truth, and atonement".¹¹ Furthermore, Enríquez, de Brito and Fernández accentuate in their study on politics of memory in democratizing societies that, "while selective forgetting is part of the process of history making [...], forgetting the meaning of past events can be like losing a moral compass".¹² István Rév observes that in 1989, ceremonial reburials of 1956 revolutionaries "served to reconstruct, if only for a single historical moment, a virtual community [in Hungary]".¹³ Rév also refers to Peter Brown's remarks that, similar to ancient burial of Christian relics, symbolic internments in post-communist Hungary "brought a sense of deliverance and pardon into the present".¹⁴ Nico Wouters reminds us about George Santayana's famous aphorism, "those who forget the past are condemned to repeat it".¹⁵ In Wouters' opinion, "the past becomes some kind of gigantic reservoir of 'lost wisdom' that we must try to put to good use".¹⁶ Though both Hungary and Ukraine tried to avoid mistakes of the past, the two countries had different types of transition after the collapse of Communism.

Since regaining its independence in 1991, Ukraine has not seen even symbolic decommunization, let alone lustration, declassification of Soviet archives or investigation of crimes committed by the communist regime. Cynthia Horne includes Ukraine into a group of countries such as Russia and Albania that had "no institutional change, meaning no vetting of bureaucracies and positions of public trust, and no credible moral cleansing or symbolic changes".¹⁷ Besides the absence of any official politics of memory, "there has been a systematic effort by countries in this category to avoid transitional justice altogether".¹⁸ Stan echoes this assessment by

¹⁰ Orwell, George: 1984. Harcourt Brace Jovanovich, New York, 1977. p. 88.

¹¹ Stan, Lavinia (ed.): *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*. 2008. p. 4.

¹² Barahona de Brito, Alexandra – González-Enríquez, Carmen – Paloma, Aguilar (eds.): *The Politics of Memory: Transitional Justice in Democratizing Societies*, Oxford Studies in Democratization. Oxford University Press, 2001. p. 25.

¹³ Rév, István: *Retroactive Justice: Prehistory of Post-Communism*, Cultural Memory in the Present. Stanford University Press, Stanford (California), 2005. p. 40.

¹⁴ *Ibid.* 37.

¹⁵ Wouters, Nico (ed.): *Transitional Justice and Memory in Europe (1945–2013)*, Series on Transitional Justice 17. Intersentia, Cambridge, 2014. p. 6.

¹⁶ *Ibid.*

¹⁷ Horne, Cynthia M.: The Impact of Lustration on Democratization in Post-Communist Countries. *International Journal of Transitional Justice*, Vol. 8 (2014) No. 3. p. 510.

¹⁸ *Ibid.*

pointing out that in Ukraine “transitional justice was not [...] [o]n the cards as long as Leonid Kuchma, a former Soviet Communist Party leader, was president of the republic”.¹⁹ Horne assigns Ukraine, Moldova and Georgia to post-Soviet republics with limited transitional justice, where “lustration proposals were introduced more than a decade after these republics gained independence, only to be rejected by parliaments [...] [, s]ecret archives remained close[d] to ordinary citizens [...] [,] no Communist Party official or KGB agent has been brought to trial...and the past has seemingly been forgotten”.²⁰ Kuchma’s successor Yushchenko, who came to power thanks to the Orange Revolution of 2005, “declared that the time of lustration has passed because neither the Ukrainian people nor the political elite supported it”.²¹ Therefore, after the collapse of the USSR the leadership of newly independent Ukraine chose not to rake up the communist past.

3. Transitional Justice Measures in Hungary

3.1. LUSTRATION

Although both Ukraine and Hungary had a non-violent exit from Communism, the latter took a more proactive approach of “trial and error” towards its transitional justice. After the first free elections in 1990, the Hungarian government introduced various transitional justice measures such as lustration,²² retroactive criminal justice and rehabilitation of communist regime victims. In terms of lustration measures, the Parliament passed the Lustration Act XXIII of 1994, which was “a milder solution compared to similar proposals adopted in neighboring countries, as it neither declared incompatible the holding of present public office with past collaboration with the secret police, nor proposed to unveil the entire communist surveillance system”.²³ After the Lustration Act had not passed the scrutiny of the Constitutional Court, the duration of mandatory lustration measures was extended until 2004 in the amended version of the Act and their scope was modified in 1996 and 2000.²⁴ The

¹⁹ *Ibid.* p. 238.

²⁰ *Ibid.*

²¹ *Ibid.* p. 239.

²² Lustration stems from Latin word *lustrare* (purify).

²³ Stan, Lavinia: Hungary. In: Stan, Lavinia (ed.): *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*. 2008. p. 111.

²⁴ Lavinia Stan mentions that the Constitutional Court criticized the Lustration Act on the following three grounds: 1) The proclaimed goal of lustration to protect a peaceful democratic transition from the representatives of the previous communist regime was no longer relevant in 1994; 2) The Lustration Act did not strike the balance between the personal data protection envisaged under *Article 59* of the Constitution and the right to disseminate information of public interest under *Article 61*; 3) Taking into account that the Act did not cover workers of electronic media, it was discriminating

primary political intent was to have a broad lustration.²⁵ Horne concludes, however, that, although Hungary eventually had “early but limited lustration; narrowly focused on president and parliament [...] [it still included] some removal from public office and public truth telling”.²⁶ Hungarian lustration was, in turn, “intertwined”²⁷ with access to communist secret files.

3.2. RIGHT TO TRUTH AND ACCESS TO CLASSIFIED/SECRET SERVICE ARCHIVES

Granting access to secret files of the former communist regime was closely connected with the establishment of a History Agency,²⁸ which “became the custodian of the secret archive”.²⁹ The creation of the Agency was envisaged by the Act XXIII of 1994, which granted access to files of the communist secret police (Hungarian: *Államvédelmi Hatóság* or *ÁVH*). Stan established in her research that “the act provided for extremely limited access to few files [...] [given that] [o]ne could only request to read his own secret file, from which the names of informers and third parties had been blackened”.³⁰ The adoption of Act III in 2003 transformed the History Agency into a Historical Archive³¹ responsible for all communist files and lustration documents. According to Gábor Halmai, the Act was in part adopted in response to a scandal, which revealed that the former Prime Minister Péter Medgyessy served as a counterintelligence officer during communist times and managed to conceal this information even under the lustration legislation effective at that time.³² Renáta Uitz concludes that, although the new act provided a better access to archive materials,³³ “during the first twelve years of the new democracy, the debate was dominated by

against representatives of printed media. Stan, Lavinia: Hungary. In: Stan, Lavinia (ed.): *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*. 2008. p. 112.

²⁵ Stan notes that the initial Lustration Act of 1994 (Act XXIII) covered “the President, ministers, deputies, judges, journalists working for public mass media outlets, and leaders and managers of state universities and public companies.” *Ibid.* p. 111.

²⁶ Horne, Cynthia M.: *The Impact of Lustration on Democratization in Post-Communist Countries*. 2014. p. 506.

²⁷ Uitz, Renáta: The incomplete transition in Hungary. In: Wouters, Nico (ed.): *Transitional Justice and Memory in Europe (1945–2013)*. 2014. p. 309.

²⁸ The History Agency - Történeti Levéltár (Hungarian).

²⁹ Stan, Lavinia: Hungary. In: Stan, Lavinia (ed.), *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*. 2008. p. 117.

³⁰ *Ibid.* p. 116.

³¹ *Állambiztonsági Szolgálatok Történeti Levéltára (Hungarian)*.

³² Halmai, Gábor: *The Right to Know the Past in Hungary*. URL http://ces.ufl.edu/files/Halmal-The_Right_to_Know_Hungary.pdf (13 July 2016)

³³ Renáta Uitz mentions that under the new law “the person under surveillance finally may learn the identity of the person or agent reporting on her, as well as the identity of their official contact.”

a quest to identify agents and lists of agents of the communist secret services”.³⁴ Although the process of granting access to secret files of the communist regime was prolonged and limited in its scope, it has generated an important debate about the communist past and enabled victims, historians and the general public to familiarize themselves with many archive materials that were previously inaccessible.

3.3. REPARATORY/RESTORATIVE JUSTICE

Rehabilitation and compensation laws are another component of transitional justice in Hungary. Rehabilitation was one of the first transitional measures used as early as 1989 when “the last socialist parliament passed a bill annulling the judgments for those convicted of crimes in 1956”.³⁵ From three other bills that were passed in 1990, 1992 and 2000 to nullify criminal convictions under Communism, “[t]he last two statutes do not offer a blanket rehabilitation: individual applicants have to approach courts with documentation of their cases in order to seek clearance individually”.³⁶ Uitz points out in her assessment of transitional justice in Hungary that “[t]he rehabilitation scheme was supplemented by various compensation instruments... [that], however, did not mean *in integrum* restitution³⁷ of property which had been confiscated via the nullified criminal convictions”.³⁸ Kim and Swain assert that “[t]he passage of property restitution legislation [...] was slowed by the different visions of the leading [government] coalition partners and became a bargaining chip”.³⁹ Some compensation statutes were passed “in response to Constitutional Court decisions [...] to remedy harm caused to private property and also non-material damages (i.e. deprivation of life and liberty)”.⁴⁰ Although these rehabilitation and restitution cases were protracted and incomplete, they became the first steps towards transition in the country.

Uitz, Renáta: The incomplete transition in Hungary. In: Wouters, Nico (ed.): *Transitional Justice and Memory in Europe (1945–2013)*. 2014. p. 318.

³⁴ *Ibid.* p. 318.

³⁵ Kim, Dae Soon – Swain, Nigel: Party Politics, Political Competition and Coming to Terms with the Past in Post-Communist Hungary. *Europe-Asia Studies*, Vol. 67 (2015), p. 1447.

³⁶ Uitz, Renáta: The incomplete transition in Hungary. In: Wouters, Nico (ed.): *Transitional Justice and Memory in Europe (1945–2013)*. 2014. p. 308.

³⁷ From the Latin ‘restitution in integrum’, meaning full restoration to the original situation. *Ibid.* p. 309.

³⁸ *Ibid.* pp. 308–309.

³⁹ Kim, Soon Dae – Swain, Nigel: *Party Politics, Political Competition and Coming to Terms with the Past in Post-Communist Hungary*. 2015. p. 1465.

⁴⁰ Uitz, Renáta: The incomplete transition in Hungary. In: Wouters, Nico (ed.): *Transitional Justice and Memory in Europe (1945–2013)*. 2014. p. 313.

3.4. RETROACTIVE JUSTICE

Retroactive criminal justice was probably the most controversial measure of the Hungarian transitional process. By suspending the statute of limitation for past crimes, “Hungary was [the] first among Eastern European countries to adopt the legislative framework needed for the criminal prosecution of communist officials”.⁴¹ The controversy surrounding this legislative initiative became obvious when the president of Hungary refused to sign it into law and the Constitutional Court declared that lifting the statute of limitations was incompatible with the rule of law principle under Article 2.1 of the previous Hungarian Constitution.⁴² Taking into account that the same decision of the Court permitted prosecution of crimes covered by the statute of limitations under international law, the Hungarian Parliament adopted a revised version of the law, which envisaged prosecution of war crimes and crimes against humanity perpetrated during the 1956 Revolution. The current version of the Hungarian Constitution also incorporates the norm on lifting the statute of limitations for certain crimes committed under the communist regime.⁴³ Out of twelve people who were accused of shooting unarmed protestors in 1956, only two defendants were convicted on charges of committing “prohibited acts in the case of armed conflict not of an international character”.⁴⁴ Korbely, one of the convicted persons, filed a complaint with the European Court of Human Rights (ECtHR) claiming that he was prosecuted for actions that could not be classified as an offence at the time of their commission.⁴⁵ The Grand Chamber of the Court found⁴⁶ that Korbely’s punishment violated *Article 7–1* of the Convention (*Nullum crimen sine lege*),⁴⁷ because the Hungarian courts failed to prove that Korbely’s action constituted a crime against humanity.

⁴¹ Stan, Lavinia (ed.): *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*. 2008. p. 120.

⁴² Uitz, Renáta: The incomplete transition in Hungary. In: Wouters, Nico (ed.): *Transitional Justice and Memory in Europe (1945–2013)*. 2014. p. 307.

⁴³ See *Article U (1) of the Fundamental Law of Hungary*. URL <http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf> (13 July 2016)

⁴⁴ Stan, Lavinia: Hungary. In: Stan, Lavinia (ed.): *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*. 2008. p. 122.

⁴⁵ See *Case of Korbely v. Hungary 9174/02 – Judgment (Grand Chamber), 19 September 2008*.

⁴⁶ *Case of Korbely v. Hungary, 9174/02 – Judgment (Grand Chamber), 19 September 2008*. In: Rainey, Bernadette – Wicks, Elizabeth – Ovey, Clare – Jacobs, Francis Geoffrey – White, Robin C. A.: *Jacobs, White and Ovey: The European Convention on Human Rights*. 6th ed. Oxford University Press, Oxford – New York, 2014. p. 300.

⁴⁷ *Nullum crimen sine lege* (Latin)—No punishment without law.

3.5. POLITICS OF MEMORY

The stipulation of official politics of memory in legislation and case law became yet another milestone of Hungarian transitional justice. In particular, Agata Fijalkowski discusses issues of law and memory in the context of *Section 269/B* of the previous Criminal Code of Hungary, which “prohibited to distribute, use before a public assembly or exhibit in public: a swastika, the SS sign, an arrow cross [...], the hammer and sickle symbol, the five-pointed red star [...] unless such conduct is required for the purpose of education, science, or art, concerns present-day official symbols [...] or provides information about history or current events”.⁴⁸ In *Vajnai v. Hungary* the European Court of Human Rights found, however, that the applicant’s right to freedom of expression⁴⁹ was violated when he was convicted for refusing to remove a five-pointed red star during a demonstration.⁵⁰ In its judgment, the ECtHR reasoned “that twenty years had passed after the collapse of Communism, making the authorities’ actions unnecessary in a democratic society”.⁵¹ While “the Ministry of Justice and Administration refused to follow the *Vajnai* ruling”,⁵² the Constitutional Court decided in 2013 that a blanket ban of all totalitarian symbols would be incompatible with the Constitution.⁵³ The new Criminal Code also partially addressed concerns raised by the court.⁵⁴ In my opinion, the constitutional jurisprudence and the reformed legislation played a crucial role in resolving the controversy around symbols of the past in Hungary.

The symbolic reburial of the 1956 Revolution Prime Minister, Imre Nagy, occupies a special place in transitional justice of Hungary. The importance of this event is mentioned by Csilla Kiss, who describes “[t]he funeral of the martyrs of 1956 (Imre Nagy and the other politicians executed with him) that took place on 16 June 1989 as one of the defining moments of the democratic transition”.⁵⁵ Uitz echoes this assessment with the statement that “the carefully manufactured reburial of Imre Nagy attained deeper significance in the Hungarian context than the collapse of the Ber-

⁴⁸ Fijalkowski, Agata: *The Criminalisation of Symbols of the Past: Expression, Law and Memory. International Journal of Law in Context*, Vol. 10 (2013) No. 03, p. 308. DOI:10.1017/S1744552314000135

⁴⁹ *Article 10-1 (Freedom of Expression) of the European Convention on Human Rights (ECHR)*.

⁵⁰ *Case Vajnai v. Hungary, 33629/06 (Second Section), 8 July 2008*.

⁵¹ Fijalkowski, Agata: *The Criminalisation of Symbols of the Past: Expression, Law and Memory*. 2014. p. 301.

⁵² In particular, Fijalkowski argues that “the ruling of the ECtHR was viewed by the Hungarian authorities as an unwelcome encroachment of Hungarian national sovereignty.” *Ibid.* p. 310.

⁵³ *Ibid.*

⁵⁴ See *Section 335 (Use of Symbols of Totalitarianism)*. URL http://thb.kormany.hu/download/a/46/11000/Btk_EN.pdf (13 July 2016)

⁵⁵ Kiss, Csilla: *We Must Remember Thus: Transitional Justice in Service of Memory in Hungary. Studia Universitatis Cibiniensis. Series Historica*. Vol. 11 (2014) No 71, p. 78.

lin wall and the opening of the Iron Curtain on the Hungarian-Austrian border”.⁵⁶ István Rév emphasizes the importance of Nagy’s reburial for the acknowledgment of numerous other victims including “the hundreds of until-then anonymous and improperly buried revolutionaries”.⁵⁷ Rév also points to the opportunity to achieve national reconciliation during the symbolic interment, “in which every person, in the presence of a large group could act out in a visible way his or her personal catharsis”.⁵⁸ Therefore, even though the reburial was largely a symbolic event, it appears to be crucial for rehabilitating other victims, reconciling past injustices and giving an impetus for further transitional justice measures and democratic transformations.

4. Late Transitional Justice in Ukraine

As opposed to Hungary, Ukraine has not introduced the above-mentioned transitional justice measures since the communist regime collapsed. However, some of these measures have been recently introduced in Ukraine for three reasons. Transitional justice was, first of all, necessitated by social and political changes that happened after the civic disobedience known as the “Euromaidan” Revolution. The protests were triggered by inconsistent foreign policies of then president of Ukraine, Viktor Yanukovich, who unexpectedly rejected in autumn 2013 the long-planned Association Agreement with the European Union in favor of closer cooperation with Russia.⁵⁹ The government used force to crack down on the protests, which led to numerous civilian casualties and Yanukovich’s eventual fleeing to Russia.⁶⁰ Although some officials from Yanukovich’s government joined him in Russia, many representatives of the previous regime stayed in Ukraine retaining their key positions in government, judiciary and politics. Proponents of transitional justice argue that it could help Ukraine purify its government of people that abused their power by sanctioning violence against Euromaidan protesters.

⁵⁶ Uitz, Renáta: The incomplete transition in Hungary. In: Wouters, Nico (ed.): *Transitional Justice and Memory in Europe (1945–2013)*. 2014. p. 320.

⁵⁷ Rév, István: *Retroactive Justice: Prehistory of Post-Communism*. 2005. p. 40.

⁵⁸ *Ibid.*

⁵⁹ Buckley, Neil – Olearchyk, Roman: *Ukraine Refuses to Sign up to Europe Deal*. URL <http://www.ft.com/intl/cms/s/0/2a1380b2-58de-11e3-9798-00144feabdc0.html#axzz45Po84XY2> (10 April 2016)

⁶⁰ Malkin, Bonnie – Raziye, Akkoc: *Vladimir Putin Saved My Life, Says Ousted Ukrainian President Viktor Yanukovich*. URL <http://www.telegraph.co.uk/news/worldnews/europe/russia/11692593/Vladimir-Putin-saved-my-life-says-ousted-Ukrainian-president-Viktor-Yanukovich.html> (10 April 2016)

The second reason for the introduction of transitional justice measures is the high level of corruption in Ukraine. Although the country has slightly improved its rating, according to the latest Corruption Perception Index, Ukraine is more corrupt than all of its neighbor countries.⁶¹ Such transitional justice measures as lustration can allegedly be useful for identifying and prosecuting corrupt public officials. Finally, the phenomenon of *Leninopad* (Lenin-falling) or spontaneous removal of numerous monuments of Lenin reinvigorated discussions about the necessity of decommunization.⁶² To introduce transitional justice, the Parliament of Ukraine adopted several bills including the Law on “Government cleansing” (Lustration Law), the Law on “Restoring confidence in the judiciary” and the decommunization laws such as the Law on “Condemnation of the communist and the national socialist (Nazi) regimes, and prohibition of propaganda of their symbols”. These laws prohibited symbols of the totalitarian past, introduced a financial audit of public officials’ income declarations, as well as banned from public office representatives of the former communist regime and those officials of Yanukovich’s government who did not resign from their positions during the Euromaidan protests. Although Ukraine needs to reconcile with its distant and recent past, this paper offers three criticisms of transitional justice measures introduced by the government of Ukraine more than two decades after the collapse of the Soviet Union.

5. Three Criticisms of Transitional Justice Measures in Ukraine

Firstly, Ukraine did not draw on lustration experience of other post-communist countries. Maria Popova and Vincent Post point out that “Ukrainian supporters of lustration often invoke the experience of other post-communist states [...] [like Hungary] and argue that lustration had positive effects on democratization and good governance in the region”.⁶³ There are, however, some differences between the lustration measures adopted recently in Ukraine and lustration implemented in other post-communist countries after the fall of Communism. For instance, Popova and

⁶¹ In 2015, Ukraine occupied rank 130 out of 165 positions and scored 27 out of 100 points, which shows that Ukraine is more corrupt, for example, than Belarus (rank 107), Russia (rank 119) or Moldova (rank 103), the *Corruption Perception Index 2015*. URL <http://www.transparency.org/cpi2015> (10 April 2016)

⁶² “According to the Ukrainian Institute of National Memory, 504 Lenin monuments were torn down in Ukraine after December 2013, with 436 of them removed between December 2013 and September 2014—all before the adaptation of the decommunization laws.” In: Shevel, Oxana: *Decommunization in Post-Euromaidan Ukraine: Law and Practice*. URL <http://www.ponarseurasia.org/memo/decommunization-post-euromaidan-ukraine-law-and-practice> (11 January 2016)

⁶³ Popova, Maria – Post, Vincent: *What is lustration and is it a good idea for Ukraine to adopt it?* URL <https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/09/what-is-lustration-and-is-it-a-good-idea-for-ukraine-to-adopt-it/>. (10 April 2016)

Post observe that laws adopted in Eastern and Central European countries envisaged “positive lustration”,⁶⁴ which meant, for example, that those who collaborated with the communist secret police could not occupy certain public offices. Namely, “these [lustration] laws either dismiss[ed] former secret service personnel from the bureaucracy, or they simply publish[ed] that information”.⁶⁵ Ukraine opted for the ‘negative lustration’ in the meaning that a person has to pass a lustration process to escape possible criminal prosecution in the future. Popova and Post conclude that Ukrainian “lustration [measures] reach much further than anything devised in East and Central Europe after 1989”.⁶⁶ This, in turn, resulted in excessive politicization of the lustration initiatives and inconsistency⁶⁷ between declared goals of lustration and its actual outcomes in Ukraine.

Secondly, the Ukrainian lustration law simultaneously addresses the issues of transitional justice and corruption, which goes beyond the traditional concept of lustration applied by other post-communist countries. Although corruption is a significant problem in Ukraine, the inclusion of anticorruption measures into a lustration process appears to be problematic from the point of its practical implementation. In particular, the European Commission for Democracy through Law (Venice Commission) noted in its final opinion on the Ukrainian lustration law that “despite the interrelation between corruption and anti-democratic practices in Ukraine, dealing with these two threats to the young Ukrainian democracy in a largely identical way gives rise to practical difficulties”.⁶⁸ To address this issue, the Venice Commission proposed to move anti-corruption measures from the lustration law to a corruption-related statute, such as the Law on “Principles of preventing and combating corruption” or modify the existing legislation to differentiate between anti-corruption measures and lustration in its traditional sense.⁶⁹ In this context, Ukraine can look at the Hungarian experience of lustration, which was interrelated with access to communist files.

Thirdly, the so-called decommunization laws appear to be just another attempt to create a desirable official memory. In spite of the outcomes of the *Vajnai* ruling mentioned above, Ukraine has introduced a blanket ban of all totalitarian symbols,

⁶⁴ Zirk-Sadowski, Marek – Wojciechowski, Bartosz: *Towards Recognition of Minority Groups: Legal and Communication Strategies*. Routledge, 2016. p. 197.

⁶⁵ Popova, Maria – Post, Vincent: *What is lustration and is it a good idea for Ukraine to adopt it?* URL <https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/09/what-is-lustration-and-is-it-a-good-idea-for-ukraine-to-adopt-it/> (10 April 2016)

⁶⁶ *Ibid.*

⁶⁷ Piasecka, Agnieszka – Drik, Oleksandra: *Current challenges of lustration in Ukraine*. URL <http://en.odfoundation.eu/a/6507,current-challenges-of-lustration-in-ukraine> (14 April 2016)

⁶⁸ See paragraph 29, p. 7, the *Final Opinion No. 788/2014 on the Law on ‘Government Cleansing’ (Lustration Law) of Ukraine, Venice, 19 June 2015*. URL <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282015%29012-e>. (11 April 2016)

⁶⁹ *Ibid.*

whose use is prohibited in all forms except art, science and education. The law does not take into consideration that such a general prohibition will essentially “mean that freedom of speech and opinion is subjected to the heckler’s veto”.⁷⁰ The *Vajnai* judgment makes it clear that the mere use of such symbols will not automatically justify state interference in political speech in a democratic society.⁷¹ Moreover, the law introduces a very high criminal penalty of five years of imprisonment with confiscation of property, which can be a very disproportionate criminal punishment given the general scope of the prohibition. Another decommunization law on “Legal status and commemoration of fighters for independence of Ukraine in the 20th century” promotes the “desirable official memory” by prohibiting “public denial of the lawfulness of the struggle for the independence of Ukraine in the 20th Century”.⁷² Taking into account that the struggle for independence included numerous activities, whose alleged lawfulness should in principle be determined only by court, the law creates an impression of history cleansing by dismissing beforehand any inconvenient historical research and data.

The delayed decommunization measures indicate that the Soviet past remains on the agenda of transitional justice in Ukraine. Spontaneous demolition of Lenin statues and other Soviet monuments revealed the wounds of the past that were neglected in Ukraine in the aftermath of the communist collapse. When the incumbent government of Ukraine eventually introduced transitional justice measures after the social uprising of the Euromaidan protests, these measures failed to draw on transitional experience of neighbor post-communist countries, like Hungary. In particular, Hungarian transitional justice could give Ukraine a valuable lesson on the crucial role played by the Hungarian Constitutional Court and the European Court of Human Rights in shaping transitional policies, the dangers of politicizing decommunization initiatives and the importance of symbolic measures for reaching national reconciliation and recognition of past injustices. Though both countries still face various transitional challenges, learning from Hungary as well as other post-communist countries could help Ukraine avoid common mistakes and borrow best practices in its delayed but necessary transition from communism to a democratic society.

⁷⁰ See *Case of Vajnai v. Hungary*, 33629/06 (Second Section), 8 July 2008, paragraph 57.

⁷¹ *Case of Vajnai v. Hungary*, 33629/06 (Second Section), 8 July 2008, paragraph 49. See also Harris, O’Boyle & Warbrick: *Law of the European Convention on Human Rights*. Oxford University Press, Oxford, 2014. pp. 614–617.

⁷² Article 6 paragraph 2 of the Law on ‘Legal status and commemoration of fighters for independence of Ukraine in the 20th Century’ of 9 April 2015.

GERGELY G. KARÁCSONY

Public Financing of Higher Education—Reasons, Means and Trends

In this paper I will examine the issue of financing higher education both from a theoretical aspect—relying on theories in the field of economics—and from a more practical point of view, through studying the recent years of legislation in this field in Hungary. In the first part I will guide the reader through some of the most important theories on financing the higher education sector (especially the institutions) in order to examine the following questions: who should pay for higher education; why is it beneficial for governments to finance higher education; and is state involvement in higher education financing a necessity? After examining the theories of financing, we shall proceed to looking at the models describing the most common ways of financing the higher education sector—including both privately funded and state funded higher education systems.

In the second part of the paper we take a closer look at the financing of the higher education system in Hungary, with special regard to the status of public (state owned) higher education institutions. In connection with state funding we examine the issue of the autonomy of higher education, including institutional autonomy and academic freedom, with special attention to the matter of (direct or indirect) government involvement in controlling the sector and in the internal economic decisionmaking of higher education institutions. In this part we refer to the recent developments of legislation regarding this subject, including the most important decisions of the Constitutional Court and the changes brought upon by the Fourth Amendment of the Fundamental Law (Constitution) of Hungary in 2013.

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1. Theories on financing higher education

The first question to be raised is: who should finance higher education? In order to examine this issue, first we have to take a look at some of the economic theories regarding the purpose (and beneficiary) of higher education. On this matter, I use three categories as described by Polónyi:¹ higher education as a means for an individual to develop in order to achieve a higher salary in the future; higher education as a means to foster economic development; and higher education as a means to achieve (external) beneficial effects for the overall welfare of society.

In early economic theories, education is described as a means to achieve higher individual salaries. In these theories, one of the purposes of learning is identified as a way to obtain specialised knowledge in order to better prepare for the participation in the economy based on the division of labour. Specialised knowledge makes a person capable of performing better and producing more profit for the employer, therefore he is paid more than an unskilled worker. Based on this theoretical approach, the participation in (higher) education can be considered a private investment, the profitability of which is to be determined by the higher salaries achieved later in the future. The cost of participating in higher education (personal cost and loss of income) is then weighed against the total of the extra profit expected in the future. This theory considers the decision of prospective students as a very rational one, based—mainly—on a cost-benefit calculation. In reality, however, this is hardly so.

It is also one of the earliest theories that considers education a way of fostering economic growth.² They point out that one of the most important factors of economic growth is human resource. Today the literature analysing the positive correlation between education and better economic performance is plenty; besides theorists, several international organisations (e.g. OECD) carry out research in this area. The main findings in this approach point out that the countries with the best economic performance are the ones with higher spending and participation rates in higher education. This theory can be challenged by pointing out that the correlation between the amount of money spent on education and the economic growth of the country does not necessarily show causation. Therefore, it cannot be determined, whether the higher spending on education fosters economic growth or the country spends more on the education sector because they can afford it due to the outstanding economic performance. However, it is agreed upon that advancement in knowledge is one of the crucial factors in economic progress.

¹ Polónyi István: Az oktatás és az oktatáspolitikai közgazdasági ideológiái. *Educatio*, (2011) No. 1, p. 74–88.

² *Ibid.* p. 77.

Finally, the third group of theories take into account the beneficial effect of education on the whole society. The early theories consider education as a way to achieve peace in the society, by teaching different classes of society to settle conflicts in a peaceful, rational manner; this—social peace—is considered the foundation of economic progress. Theories that are more modern look at the externalities of education: overflow of positive effects that are—unintended and therefore without any financial compensation—beneficial also to members of society not directly taking part in education. These external yields are the cause why education is considered quasi-public good, thus justifying state funding of the education sector. The most important external yields of education are the following:

1. Democratic institutions can function more efficiently—this also means that education improves social cohesion.
2. People—the workforce—can adapt more quickly to technical advancement, which fosters economic growth.
3. Less spending on unemployment benefits and health care—more educated people are less likely to be unemployed and have better general health conditions.
4. More educated people are less prone to becoming criminals, which decreases spending on law enforcement.
5. More educated people are more likely to participate in voluntary social activities, which leads to less government spending on these.

After taking into account some of the most important theories on the economic rationale of (higher) education, the motivations of state funding should be further examined.

1.1 STATE FUNDING—IN THEORY AND IN PRACTICE

When we further examine the motivations and reasons of state funding, we initially have to refer to the above detailed benefits of education and especially higher education. Governments have to take into account the beneficial effects of people participating in higher education when deciding on funding the higher education sector, thus considering long-term benefits to the society as a whole. The first of these effects is lower unemployment rate and higher salaries among people with a higher education degree. These external effects are especially strong in Central Europe, and even stronger in Hungary. In Hungary, participation in higher education creates a multiplying effect unparalleled even in the region, making the positive labour market situation of people with tertiary education much more visible. In the Central European region, the earnings premium of people with a higher education

degree is significant. In 2015 people holding a higher education degree earned more than twice as much as their counterparts with an upper-secondary education.³ Besides higher income, tertiary level education makes finding a job much more likely. If we look at the statistics, the most significant difference is to be found between the unemployment rate of people with a higher education degree and people with upper-tertiary education only. In Western Europe this difference is below twofold, but in the Central European region (and especially in Hungary) it far exceeds 250%. The difference is even more significant if we compare tertiary graduates with people with below upper-secondary education: in the Central European countries, the unemployment rate of the latter group is seven times higher.⁴ The other group of effects governments have to take into consideration are the above-mentioned externalities. It is obvious that social peace and cohesion, adaptability of the workforce, better general health status of the population and lower criminality rates are beneficial effects, which are well worth the money spent on education in order to achieve them.

Another argument supporting the governments' participation in funding higher education is based on social justice. It can be said that there can be significant differences in the quality of education provided by various institutions. Lower quality affects poor people more, who are at a disadvantage considering the choice of educational institutions available for their children.⁵ In Hungary, this argument is also complemented by the requirements set forth in Article XI of the Fundamental Law, stipulating that Hungary ensure the right to education by higher education accessible to everyone according to his or her abilities, and by providing financial support as provided for by an Act to those receiving education.⁶ The Constitutional Court ruled that this does not mean that financing higher education by the state is a fundamental right; therefore, the state is not obliged to provide free higher education. However, the state is obliged to create the real opportunity to pursue studies in higher education institutions.⁷

Furthermore, a part of state funding provided to the higher education sector serves another purpose: carrying out the Government's research, development and innovation agenda. The Government wants to use its influence and financially enable to reach the set public policy goals in this strategic and economically significant field. The state is still the most important funder in the research and development sector with a share adding up to almost half of the total sources available. The Hungarian agenda for the 2014–2020 period sets forth the further expansion of

³ *Education at a Glance 2015: OECD Indicators*. OECD Publishing, 2015. p. 116.

⁴ *Ibid.* pp. 105–106.

⁵ Friedman's argument is quoted by Polónyi. Polónyi István: *Az oktatás gazdaságtana*. Osiris Kiadó, Budapest, 2002. p. 166.

⁶ *Article XI paragraph (2) of the Fundamental Law*

⁷ Decision 62/2009. (VI. 16.) of the Constitutional Court.

the research funds available in the higher education sector.⁸ The funding of higher education within the Government's research and development strategy is not only crucial for researches carried out in the departments and research groups of universities, but it is also important because higher education provides the most important factor to a successful research and development agenda i.e. qualified professionals capable of carrying out R&D work.

By discussing the possible benefits and motivations for state funding, we wanted to demonstrate that there are many reasons for the state to enter the tertiary education scene as financial provider. Some of these reasons are based on solidarity and social care, while others are founded on pure economic rationale. A common ground for them is that all these theories consider the operation and financing of the higher education system a long-term investment and a strategic goal.

Finally, besides the broad range of theoretical reasoning, recent economic figures also indicate that—especially in Central Europe—states are still the biggest financial supporters of higher education systems. Although private returns to higher education are so high that it would suggest a greater contribution to the costs to be justified, the proportion of private financial investments is measurably low. Private sources (household expenditure and contribution of other private entities) range from less than 5 percent to more than 40 percent of total funds spent on higher education in most of the OECD countries. The proportion of private expenditure exceeds public investment in the higher education system⁹ only in a few countries.¹⁰ Therefore, it is to be concluded that states are still the most important funders of higher education, even in countries where students pay tuition fees for their studies.

Despite its strategic nature, and the fact that the largest proportion of funds come from public sources, the money spent on the state funding of higher education declined in the past years in several countries of Europe. Data published by the European University Association's Public Funding Observatory show that between 2008 and 2015 in half of the countries with available data the inflation-adjusted value of state funding declined.¹¹ Hungary is one of the countries with the most unfavourable data of public funding trends in this period. The total decrease of public funding in nominal value shows a dramatic 34% cut over the 2008–2014 period (it amounts to an even higher 46% corrected to inflation). It is only the recent year (2015), when Hungary came up with a more positive figure: the state funding in-

⁸ Item 4.6. of Government Decision 1414/2013 (VII.4.) on adopting the National Research, Development and Innovation Strategy (2013–2020).

⁹ Data source: *Education at a Glance 2015: OECD Indicators*. OECD Publishing, 2015. pp. 241–242.

¹⁰ Chile, Japan, Korea and the United States.

¹¹ 10 countries show an increase in public funding, whereas 15 countries cut public expenditure on higher education. Data source: *EUA Public Funding Report*, November 2015. URL <http://www.eua.be/Libraries/governance-autonomy-funding/november-2015.pdf?sfvrsn=0> (20 July 2016)

creased by 25 percent compared to the 2014 data. Still, the total decrease of state expenditure amounts to 17% over the 2008–2015 period, which is the third highest cut in funding among European countries.

2. Ways of financing higher education—the practical approach to public funding

When looking at the figures of higher education financing, it can be clearly seen that public funding makes up more than half of the total expenditure on the higher education systems in most European countries. Therefore, it is a fact that governments are the most important financial supporters of this sector. Considering this fact, it is important to look at the ways governments can finance higher education. Jongbloed and Koelman describe¹² an easy and useful theoretical framework to the classification of government funding systems. Their starting point is to look at two criteria: “what is funded by the government” and “how is it funded”?

The first question addresses the funding base for public funds to the institutions. Are those funds tied to outputs and performance, or are they tied to inputs? The second question addresses the degree of market orientation of the funding system. As for the output or input orientation of the system, we have to examine whether financial means are allocated to a certain institution to cover specific cost items, such as salaries, material costs, building maintenance, etc. In this case, the funding system is input based. If the financing is tied to the number of students enrolled in a certain time, we still talk about input orientation, since student numbers largely determine inputs spent at a certain time. In an output-oriented funding system the amount of resources allocated to an institution is based on criteria such as the number of degrees awarded in an academic year, the percentage of enrolled students successfully finishing their studies, the number of research papers published in learned journals, etc. These criteria are considered to create more incentives to institutions to perform more effectively and reach higher quality standards. Output-based systems however raise controversy among scholars, who believed that this approach can also create severe distortions¹³ in higher education systems (especially in the ones not having a widely accepted and strictly used quality assurance system), because higher education institutions tend to try the easiest way to reach the required

¹² Jongbloed, Ben – Koelman, Jos: *Vouchers for higher education? A survey of the literature. Study commissioned by the Hong Kong University Grants Committee*. CHEPS, Enschede, 2000.

¹³ Halász Gábor: *Finanszírozási reformok a felsőoktatásban: nemzetközi összehasonlító elemzés*. In: Temesi József (ed.): *Felsőoktatás-finanszírozás: nemzetközi tendenciák és a hazai helyzet*. AULA Kiadó, Budapest, 2012. p. 25.

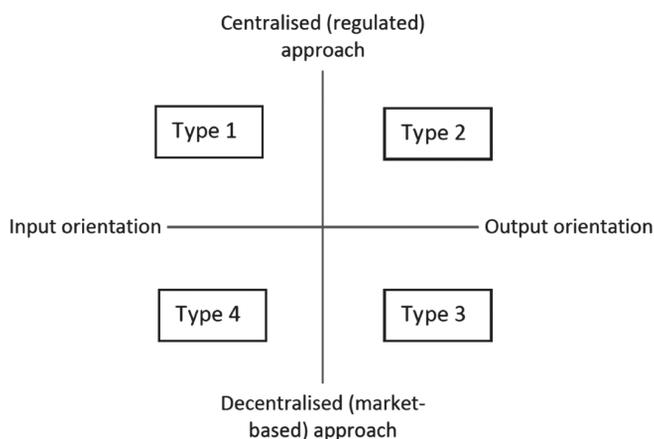


Diagram 1

output criteria, which can lead to an overall decrease in quality.¹⁴ In reality, actual funding systems are based on funding formulae created by a combination of input and output based indicators. The dominance of one over the other makes the funding system more input- or output-oriented.

As for the degree of market-orientation of the funding system, this dimension tells us whether the funding is planned (regulated) by central authorities or the flow of funds is directed by the decision of the “clients” (students) of the institutions. In the first highly regulated situation, the government decides the funding centrally (e.g. by determining the number of students to be funded in each programme). In the latter case, funding is controlled by the institution of the students’ choosing, by channelling the money (in some way) to the students.

Taking the two dimensions detailed above, and presenting them as the two axes of a coordinate system, we get the diagram depicted in Diagram 1. In this way, the two axes create four quadrants, each with unique characteristics in their arrangement. For the purposes of this paper, we only need to examine the first and fourth type of funding mechanisms.¹⁵

The first quadrant depicts a centralised and input-based funding system, which is a more traditional approach to financing higher education. In this model, funding is based on requests (e.g. budget proposals, development or activity plans) presented

¹⁴ Ecker, Brigitte – Leitner, Karl-Heinz – Steindl, Claudia: Funding formulas for teaching in public universities: International experiences and lessons drawn from a science policy view. Paper presented at the *EUA Funding Forum*. 2012. p. 3.

¹⁵ More on this topic and the detailed explanation of all four quadrants can be found in: Jongbloed, Ben: Funding higher education: options, trade-offs and dilemmas. Paper for *Fulbright Brainstorms 2004—New Trends in Higher Education 1*. CHEPS, University of Twente, the Netherlands, 2004. p. 5.

by institutions to funding authorities. The actual funding is determined by negotiations between the institution and the funding agency, and is often based on a traditional basis (mostly on last year's budget). To refine this model further, the method of distributing funds in a regulated and input-based manner should be divided into negotiated budgets and formula-based funding.¹⁶ Negotiated budgets are based on last year's funding, and any deviations are to be negotiated separately. Formula-based funding, however, is more likely an automatism lacking the human element of negotiations. This type—widely used in most European countries—calculates the funds to be given to any institution based on a formula with several indicators, both input and output-type. The most significant advantage of the usage of formulae is that it provides a transparent way of distributing public funds, while motivating universities to enhance the quality of their work. This way the government can set limits on the ever growing budgetary demand of higher education sector, distribute available funds in a way that is known and accepted by all the institutions and cut back on the duties of controlling the sector.

The fourth quadrant shows a demand-driven, input-oriented funding mechanism. In this case, higher education is financed through vouchers given to students by the government. Vouchers represent a certain value and can be used by the students to pay for (a part of) their tuition. The institution then cashes vouchers and they receive the funds from the government. This method is a strong incentive for institutions to provide better quality, constantly develop their programs in order to attract more students and therefore more funds.¹⁷

After laying down the most important theoretical models of financing, we should look at the ways of financing higher education in Hungary and the most important developments in this area in the past years.

3. Ways of state funding in Hungary

The Hungarian higher education system has two kinds of institutions: public higher education institutions maintained by the state and private institutions maintained by private entities, foundations or churches.¹⁸ In the case of state maintained institutions, the minister responsible for education should act as the maintainer of the institution. The higher education act currently in force (Act CCIV of 2011 on National Higher Education) has a considerably spare wording on the ways and means

¹⁶ Halász Gábor: Finanszírozási reformok a felsőoktatásban: nemzetközi összehasonlító elemzés. In: Temesi József (ed.): *Felsőoktatás-finanszírozás: nemzetközi tendenciák és a hazai helyzet*. AULA Kiadó, Budapest, 2012. p. 27.

¹⁷ Polónyi István: *Az oktatás gazdaságtana*. Osiris Kiadó, Budapest, 2002. p. 165.

¹⁸ *Section 4 of the Act CCIV of 2011 on National Higher Education*

of higher education financing. The Act basically delegates the responsibility of financing the institutions to the maintainer entity and declares that the government is responsible for the public financing of higher education institutions.¹⁹ This makes financing much less transparent than the models based on funding formulae, thus creating a less predictable system. The issue of financing higher education becomes a part of the political bargaining process of adopting the state budget every year. The Act does not declare any grounds for giving or receiving public funds, it only defines the aim of state funding of higher education: the aim of state funding is to provide financial support for student benefits, teaching, scientific advancement, maintaining duties, student sport, specific higher education tasks, the support of distinguished institutions, as well as cultural and development aids.²⁰

The way of calculating financial support—except for the funding of education—is not declared by law. On the financial support of education (teaching), the Act sets forth that the national budget supports the teaching activity of the institutions by providing financial means for education. The system of the financing of education shall be regulated by a decree of the government.²¹ This decree was adopted under the previous act on higher education, therefore some parts of it are outdated while others were amended in order to comply with the new act. The same decree governs the formula for calculating financial support for scientific activities, and it has a very brief declaration on the maintainer's financial contribution. Other means of channelling state funds into higher education are part of the funding system, but they are regulated in several other acts and decrees. I will summarize the current system of higher education financing below.²²

The first part of financing system is comprised of the funds that are given to higher education institutions in order to finance their basic functions of education (teaching) and scientific research: salaries for staff, cost of the maintenance of buildings and infrastructure, utility bills, etc. This is called the financing of institutions by educational, scientific and maintainer's norm and is regulated by the above-mentioned decree. Institutions enjoy a large degree of freedom in spending this part of their income: neither the Act nor the government decree defines specific purposes for which this funding should be used. It is basically up to the institutions' decision making bodies what expenses they will cover with it in the yearly budget of the in-

¹⁹ *Section 84 (1) of the Act CCIV of 2011 on National Higher Education* declares: "The maintainer should provide the financial support required for the functioning of the higher education institution. The Act on the Budget of Hungary determines the public funding of higher education. The Government decides on the system of state funding of higher education institutions".

²⁰ *Section 84 (2) of the Act CCIV of 2011 on National Higher Education*

²¹ This is *Decree 50/2008. (III. 14.) of the Government on The financing of higher education institutions by educational, scientific and maintainer's norm*.

²² Detailed description of the financing system can be found (in Hungarian): G. Karácsony Gergely: *Állami szerepek a felsőoktatásban*. Dialóg Campus Kiadó, Budapest–Pécs, 2016. pp. 116–125.

stitution. However, this is the only source of income where the spending purposes are not pre-determined by law. Both the educational and the scientific norms are calculated using a formula. This formula for educational norm is rather an easy one: the number of public financed students (students who don't pay tuition fees because their tuition is financed by the state via state scholarship) enrolled (with an active status) in the institution in a specific field of study multiplied by the amount of the norm of that particular field of study as specified in the annex of the decree. For the students enrolled after 2012 this amount of money is the same as the amount of their state scholarship. The funding of scientific activities is calculated using a formula as well, this time not one but several indicators are taken into consideration from the number of teaching staff to the amount of PhD degrees awarded to the staff members in the recent two years. As for the maintainer's contribution, there is no normative basis that would determine the method of calculation, so it is considered to be entirely up to the government's deliberation and is to be negotiated within the state budget. Finally, there is a category called cultural and development funds, on which there is also no specific legal regulation to be found as for the amount and the basis of its calculation, nor the institutions entitled to it. This part of funding is also up to the government's deliberation and is determined on a yearly basis with the state budget.

Moreover, the higher education act defines further funding methods. Unlike the above detailed ones, the financial sources in the following categories have a pre-determined and obligatory purpose of spending. These are the funds provided for student benefits and the funding of specific higher education tasks. The funds for student benefits are calculated using a formula based on the number of students (and doctoral students) with state scholarship multiplied by one of the different norms of the various status of students. These norms are found in the higher education act.²³ This norm-based funding however has specific purposes for which it should be used: providing performance-based and social scholarships, doctoral scholarship, the provision and enhancement of student services, maintenance of student dormitories, etc. The other fixed-purpose funding is the funding of specific tasks of higher education. Here there is no specific legal basis of calculation or detailed description of spending purposes. These are determined by the government on occasion, based on the specific tasks concerned.

Another type of fixed-purpose funds can be given to the institutions upon tender applications or other arrangements. The act gives examples of the purposes for which an application for funding can be submitted: cross-border provision of Hungarian language higher education, libraries of the institutions, research and development tasks, the functioning of student accommodation services, development

²³ Section 114/D of the Act CCIV of 2011 on the National Higher Education

of sport facilities, etc.²⁴ Requirement for and procedure of submitting such tenders shall be determined by the government, the financial basis of these funds is laid down in the annual state budget.

The act sets forth that—with the exception of the maintainer's financial support—all public institutions and, upon an agreement with the government, private and church founded institutions shall receive these funds on an equal basis. Therefore, it can be concluded that the above detailed state funds serve the purpose of the functioning of the higher education system as a whole and are connected to the maintaining of the entire sector rather than public institutions only.

Finally, the last element of the financing system is the funding of distinguished institutions: the extra funding given to specific institutions of excellence. The higher education act defines special categories of institutions entitled to this special financing: institutions of national excellence, research universities, research faculties and colleges of applied sciences.²⁵ The use of these extra funds is also determined: it cannot be used on financing education with other economic purposes, the marketing of programs, the lowering of the cost of education provided, etc. The global amount of funds serving the purpose of financing higher education excellence is determined annually in the state budget. Then the specific amount received by an institution is either determined by the minister of education (in the case of institutions of national excellence), or calculated using a formula based on the number of teaching staff with a scientific degree.

Summarizing the current system of state funding in Hungary, it can be pointed out that the system is a rather complex one using both input and (in very rare cases) output indicators. The financing system makes use of long-term arrangements between the government and institutions, and some funds are awarded by winning a tender application. Most of the funding is available both for private and public institutions, whereas a significant proportion of the funds is provided by the maintainer of the institutions. The largest portion of the funding is given to the institutions calculated by using a formula based on the number of students whose tuition fees are covered by the state. This is called state scholarship, and it can be very well considered a form of providing student 'vouchers': the state gives the funding to the perspective student (based on the score they reached in their entry exams), and they take it to any institutions they choose and are admitted to. In the next section we will further examine the state scholarship system.

²⁴ *Section 84 (4) of the Act CCIV of 2011 on the National Higher Education*

²⁵ The details of the requirements of these categories are specified in *Section 10 (1-3) of the Act CCIV of 2011 on the National Higher Education* and in *Government Decree 24/2013 (II.5.) on the National Higher Education Excellence*.

STATE SCHOLARSHIP AND TUITION FEES

At the time of admission higher education students in Hungary are assigned to one of three financial statuses: state scholarship, partial state scholarship and full tuition fee. The full cost of studies of students at state funded places and half of the cost of studies of students receiving partial state scholarship is financed by the state, whilst the student shall pay the full tuition fee if waivers are not offered.²⁶ The minister responsible for education annually determines the fields of study where (partial) state scholarship is available. This rule makes it possible for the minister to decide each year which study programmes are subsidized by the state, therefore he can direct the flow of funds towards the areas important for the carrying out of the government's higher education and training goals, correcting or balancing the trends of the 'higher education market'. This decision is made by the minister at his discretion and is not based on any requests or tender applications from the institutions. The minister also has the power to determine the minimal admission requirements (admission score) for entering a state scholarship program. In 2016 there are 41 study programs (including legal studies and most of the programs in the field of economics) where the minister set the minimal admission requirements. In any other programs, the minister only decides the maximum number of students to be enrolled in a specific program in a given institution. In the first case, the students reaching the previously set admission score for the chosen program will have the opportunity to enrol in a state funded status, regardless of the institution they choose. In the latter case, the financial status of a student merely depends on whether the number of state scholarships allocated to the chosen institution is filled by applicants with a higher score than him, or there are still statuses left in the quota. Therefore, the first case may be considered a sort of state voucher given to the students reaching the admission score set for the chosen program, which they can bring to any institution they choose and convert it to full (or partial) coverage of their tuition fees. The latter case is more likely to be considered the state funding of institutions with a formula based on the input-type variable of the number of students enrolled in the program. This falls into the category of centralised and input-based financing, whereas the first case is a market-driven model with input-type variables.

State scholarship has proven to be not only a vehicle of fostering the government's education agenda but a strong response to the current labour market situation and the issue of skilled labour moving and finding better paying jobs abroad as well. State scholarship has been designed as a bilateral agreement, on one side of which the government grants the funds covering the tuition fee of a student. On the other

²⁶ Section 46 (3) of the Act CCIV of 2011 on the National higher education

side of the agreement, the student undertakes multiple obligations.²⁷ The first obligation is to graduate in no longer time than the initial program duration plus two semesters. Failing to do so results in the obligation to pay the state back 50% of the total amount of state scholarship received. The other obligation is to maintain employment status with a Hungarian employer (or as a self-employed status) for the same length of time as the study program's duration within 20 years from graduation. Failing to fulfil this obligation results in paying back the state the total amount of state scholarship received, corrected with inflation. Complementing this, the government "strives [...] to provide sufficient job opportunities after graduation".

As we can see, state scholarship became a means of forcing skilled labour to stay in Hungary—at least for the same amount of time as their state financed studies lasted. This issue raised much controversy and resulted in a decision of the Constitutional Court. When the state scholarship system was first introduced students had to sign a "student contract" before entering in the state funded status. The content of this contract was determined by a government decree,²⁸ which was issued less than one month before the application deadline for higher education studies in 2012. As soon as the government realised that there is almost no time for prospective students to find out the contents of the decree and make a decision based on it, the application deadline was extended for another month.²⁹ Moreover, the Hungarian ombudsman petitioned the Constitutional Court raising the issue of unconstitutionality of this decree. The Constitutional Court examined the decree on both formal and substantial grounds and held that it is unconstitutional, therefore invalid. In the ratio decidendi it was held that the decree was nullified for formal reasons: the inadequate level of legislation. The Constitutional Court found that the decree contained the substantial rules and regulations concerning the student contract, which is in close connection with the right to education as set forth in Article XI of the Fundamental Law, therefore it should have been regulated in an act of parliament according to article I (3) of the Fundamental Law. Although the Constitutional Court nullified the decree on formal grounds, the wording of the decision made clear references suggesting that it would also have been found unconstitutional on a substantial basis. The decision set forth that prescribing a mandatory period of Hungarian employment (especially because the initial decree contained an obligation to spend a period twice the length of the studies in Hungarian based employment) violates the right to the free choice of employment (laid down in Article XII of the Fundamental Law) as well as the European Union's basic freedom of the free movement of

²⁷ The students' obligations are detailed in Section 48/A and 48/B, the state's obligations are laid down in *Section 48/C of the Act CCIV of 2011 on the National Higher Education*.

²⁸ *Decree 2/2012 (I.20.) of the Government*

²⁹ More on the issue of insufficient preparation time in the higher education legislation (in Hungarian): G. Karácsony Gergely: *Jogalkotás a felsőoktatás területén—követelmények és tanulságok. Magyar jog*, (2014) No. 9, pp. 490–499.

workforce. With this in the decision, the Constitutional Court laid the ground for a future annulment of a similar system based on substantial grounds. This second scrutiny never happened, because the Parliament enacted the Fourth Amendment to the Fundamental Law, which amended Article XI with the following third paragraph: “An Act may provide that financial support of higher education studies shall be subject to participation for a definite period in employment and/or to exercising for a definite period of entrepreneurial activities, regulated by Hungarian law”. This basically eliminated any perspective for a future decision of the Constitutional Court on the issue of mandatory Hungarian employment as a requirement of state scholarship. After the amendment, the legislator also amended the higher education act by adding the regulations on state scholarship.

OTHER WAYS OF FINANCING HIGHER EDUCATION

Finally, we should take a brief look at other means of financing higher education studies. Hungary has a two-level state subsidised student loan system. The first level of the system (Diákhitel 1) is a standard loan that is available for students of higher education. This type of loan is transferred to students, who are free to use it for whatever purpose they want to. It is to be paid back after graduation in calculated instalments based on the income of students, and a standard interest rate will apply. The second part of the student loan system (Diákhitel 2) is a fixed-purpose loan, which is solely intended to cover the cost of studies. Therefore, the yearly amount of this type of student loan is equal to the amount of the tuition fee of the study program the student is currently enrolled to. This loan is not paid to the student but is transferred directly to the higher education institution³⁰ with the purpose of covering the student’s tuition fees. After graduation, this type of loan is to be paid back with a government subsidised interest rate of 2%.

Basically, the fixed-purpose student loan system can be considered a way of state funding of higher education by making the enrolment available to students who would not be able to afford to pay tuition fees in regular instalments at the time of their studies. This approach is in close connection with the theory of the expectation of better future salaries as a motivation to participate in higher education.

Finally, we should briefly point out that there are some other instances when the state transfers funds to higher education institutions. These are mostly those cases when the government appears as a buyer of educational services from institutions. Such an example is the mandatory training of all government officials and public servants when trainings are carried out by higher education institutions, which are

³⁰ Section 13 (2b) of the Government Decree 1/2012. (I. 20.) on The Student Loan System

paid for by the government agencies where the enrolled employee works.³¹ In this case, the state appears as a “buyer” in a market-like situation, where the service providers submit tenders for training a number of public employees. This income source is not constant, it depends on the yearly amount of training services the government agencies select and order from institutions.

4. The economic autonomy of institutions

One of the most debated issues of the higher education system after the 1990 democratic transition in Hungary was the question of autonomy. The main question was whether the actual level of state (government) involvement in the regulation of the sector and the leadership of public institutions violate the autonomy of higher education or not. It was also asked what level of autonomy is required for the proper functioning of the higher education sector. The most important milestones of this debate are marked with higher education acts, and decisions of the Constitutional Court.

The first Higher Education Act of 1993 was dominantly on the side of institutional autonomy, leaving the decision-making bodies of the higher education institutions control the most important matters both in academic and operational management questions. The next act—and some amendments in between—was intended to cut down on the autonomy of the institutions, by delegating some (mostly operational and financial) matters to government-controlled bodies within the institution. This led to a decision of the Constitutional Court, which is considered the first one of the important “autonomy-decisions” of the Court. This decision³² held that “due to the autonomy of higher education, the institutions are independent from both the government and the public administration system. This autonomy does not only concern issues of science, education and research, but in order to ensure academic freedom the institution should be entitled to organisational, operational and economic autonomy as well”. The Constitutional Court also pointed out that “autonomy in economic decisions is also a part of the institutions’ freedom. Therefore—within the bounds of law—higher education institutions should have the right to adopt their own budget and manage their financial assets”.

In comparison with the above detailed approach, a few years later the Constitutional Court took a different path. In Decision 62/2009. (VI. 16.) they held that the financial autonomy of institutions is not the purpose in itself, but it is merely a means to ensure the prevalence of academic freedom. The closer the connection

³¹ More on this (in Hungarian): G. Karácsony Gergely: A felsőoktatás finanszírozásának modelljei és tapasztalatai. *Jog-Állam-Politika*, (2014) No 4, pp. 57–58.

³² *Decision 41/2005. (X. 27.) of the Constitutional Court*

between scientific and entrepreneurial activities is, the more constitutional protection the institution's financial autonomy should enjoy. The more distant the connection is, the lesser the level of protection is. In the latter case, the Constitutional Court established the formal requirement that an autonomous body should make the decisions, but the legislator has a large margin of decision upon establishing the limits of this decision.

Only two years after the above detailed decisions, the Parliament enacted the new Constitution (the Fundamental Law of Hungary) and a new act on national higher education. In these laws, the maintainer's control over higher education institutions was put in a new dimension, largely widening the maintainer's control over economic decision making within the institutions. These new laws adapt to the principles of the above-mentioned decision, and they also fit the broader margin provided by the Fundamental Law. Therefore, in the new legal framework the stronger the connection between an activity and science or research is, the wider the institutional autonomy is, and the narrower and more indirect the maintainer's and the government's influence is. The final act of this process was brought upon by the Fourth Amendment of the Basic Law, which directly placed the regulation of the institutions' economic decision making into the government's hands, by adding the following new sentence to Article X of the Fundamental Law: "the Government lays down, within the framework of an Act, the rules governing the management of public higher education institutions and supervises their management". The Higher Education Act specifically sets forth that "the maintainer's control should not violate the institution's autonomy in matters of the scientific subject and the contents of education and research". Since the above detailed legislation the autonomy of higher education institutions has not been a subject of a Constitutional Court judgement, therefore it is yet to be seen what kind of paradigm shift the new constitutional regulations will impose on the Constitutional Court's take on academic freedom and institutional autonomy.

5. Concluding remarks

In this paper, we examined the factors and economic rationale behind state funding of higher education both system-wide and in the relation of individual institutions. We found that there are several benefits for participating in higher education for individuals, and participation of people in tertiary education has benefits for both the state and the society. It is important to point out, however, that in the recent decade the worldwide trend is that the boundaries of higher education start to fade away. Firstly, higher education reached to fields previously belonging to secondary education—mostly because of the development and spectacular expansion of 'post-secondary' education forms –, thus fading away the strict boundary between sec-

ondary and tertiary education. Secondly, the borders dividing higher education and adult training have been opened: higher education institutions entered this market-based sector as service providers.³³ In addition, an important change is to be expected from the higher education institutions entering lifelong learning processes. Finally, a multitude of professions (teachers, doctors, civil engineers, etc.) already have mandatory training obligation for practicing professionals, where higher education institutions also appear as service providers.

Post-secondary education, adult training and professional training programs gain more and more significance and bring considerable financial sources into the higher education sector. In some cases, this provides another route for channelling public funds to higher education, and it also encourages higher education institutions to enter the market as service providers, thus developing more market-like behaviour. We can now definitely say that the classical model of higher education funding with the finances of institutions simply being a part of the state budget, has become obsolete. We can now observe the role of the state as a part of this multi-factor financing model.

³³ Halász Gábor: *Finanszírozási reformok a felsőoktatásban. Nemzetközi összehasonlító elemzés.* In: Temesi József (ed.): *Felsőoktatás-finanszírozás: nemzetközi tendenciák és a hazai helyzet.* AULA Kiadó, Budapest, 2012. pp. 12–14.

MARINA LAZAREVA

Russian Constitutional Court and ECtHR

Time for a Constructive Dialogue

This article gives a review of some judgments passed by the European Court of Human Rights (ECtHR) against the Russian Federation. These judgments seem to have set in motion the process of Russia “drifting” away from this international judicial body. We will also touch upon the corresponding rulings of the Russian Constitutional Court (RCC) and associated acts of legislation. The author will make an attempt to trace evolution of views expressed by the Russian authorities in regard to correlation between legal force of the ECtHR decisions and the country’s Constitution, as well as enactments of the Constitutional Court.

1. Case of Konstantin Markin v. Russia

1.1. CONSTITUTIONAL COURT RULING (2009)

Initially, a trend for “isolation” of the Russian Constitutional Court from the European system of justice was explicitly manifested in a widely publicized case of the Russian Army Captain Konstantin Markin.

In 2005 Mr. Markin requested his military unit command to grant him a three years’ parental leave provided by the Russian law only to servicewomen.¹ His request was denied. After several court proceedings, in 2006 he applied to the ECtHR refer-

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¹ *Federal law No. 76-FZ of 27 May 1998 ‘On the Status of Military Personnel’, Rossiyskaya Gazeta 104, 2 June 1998. Art. 11 (13)*

ring to a breach of Article 8 of the European Convention on Human Rights (ECHR) (the right to respect for private and family life) and Article 14 (non-discrimination).

Two years later, in 2008 Mr. Markin lodged a complaint with the Russian Constitutional Court to find these provisions of Law on the status of military personnel in conflict with the Constitution as they violate the constitutional principle of equal rights regardless of sex,² and equal rights of parents for child-care and upbringing.³

On 15 January 2009 the Ruling of the Constitutional Court declared Mr. Markin's complaint inadmissible,⁴ deeming that "[...] military service is a special type of public service which ensures the defense of the country and the security of the State [...] by voluntarily choosing this type of service citizens agree to the conditions and limitations related to the acquired legal status"⁵ Onwards "[o]wing to the specific demands of military service, non-performance of military duties by military personnel *en masse* must be excluded as it might cause detriment to the public interests protected by law. Therefore, the fact that servicemen under contract are not entitled to parental leave cannot be regarded as a breach of their constitutional rights or freedoms [...] By granting, on an exceptional basis, the right to parental leave to servicewomen only, the legislature took into account, firstly, the limited participation of women in military service and, secondly, the special social role of women associated with motherhood"⁶ It is true that the reasoning of the Constitutional Court sounds rather conservative, especially, in the last sentence.

1.2. FIRST SECTION JUDGMENT (2010)

In 2010 the ECtHR first section passed its judgment.⁷ This case caused quite a stir, while the European Court was accused of encroaching on the national sovereignty.⁸ Anatoliy Kovler, the then a judge of the ECtHR in respect of Russia, in one of his

² *Constitution of the Russian Federation of 12 December 1993. Art. 19 (2, 3)*. URL <http://publication.pravo.gov.ru/Document/View/0001201408010002> (19 May 2016)

³ *Constitution of the Russian Federation. Art. 38 (2)*.

⁴ *Russian Constitutional Court Ruling on Admissibility No. 187-O-O of 15 January 2009*. URL <http://doc.ksrf.ru/decision/KSRFDecision18793.pdf> (19 May 2016)

⁵ *Ibid.* para 2.1.

⁶ *Ibid.* para 2.2.

⁷ *Case of Konstantin Markin v. Russia (Application no. 30078/06, Judgment of 7 October 2010)*. URL <http://hudoc.echr.coe.int/eng?i=001-100926> (19 May 2016)

⁸ Kovler, Anatoliy: *Rossiya v Yevropeiskom Sude: 2012 - god "bol'shogo pereloma"* [Russia in the European Court: 2012—the Year of "Sharp Turn"]. *Rossiiskoye pravosudiye*, Vol. 3 (2013) No. 83, pp. 20–21.

interviews called this judgment “rowdy”⁹ and “rather impudent”.¹⁰ What riled the Russian lawyers?

The European Court found the reasoning of the Russian Government unconvincing: “[...] convincing and weighty reasons have not been offered by the Government to justify the difference in treatment between male and female military personnel as regards entitlement to parental leave”.¹¹ Moreover, it criticized the conclusions of the RCC Ruling of 2009, and we believe in some instances it used a rather strict wording: “[t]he Court is not convinced by the Constitutional Court’s argument”,¹² “[...] the core argument of the Constitutional Court [...] unconvincing”,¹³ “[t]he Court is particularly struck by the Constitutional Court’s intimation that”,¹⁴ “[...] the Court finds that the reasons adduced by the Constitutional Court provide insufficient justification for”.¹⁵

In particular, we can highlight paragraph 57 of the judgment where the European judges point out the lack of concrete evidence to substantiate the alleged damage to national security: the Court “follows that the Constitutional Court based its decision on a pure assumption, without attempting to probe its validity by checking it against statistical data or by weighing the conflicting interests”.¹⁶ Position of the Constitutional Court based on “the traditional gender roles”, “the perception of women as primary child-carers and men as primary breadwinners”, is bluntly called “gender prejudices”.¹⁷

After the review, the ECtHR concluded that there was a breach of Article 14 of the European Convention on Human Rights in conjunction with Article 8. The judgment was passed by six votes to one—a judge in respect of Russia, Anatoliy Kovler gave a dissenting opinion. He patriotically backed up the position of the Russian authorities, including the Russian Constitutional Court: ‘In my opinion “[i]he arguments advanced by the Russian Constitutional Court are more convincing and realistic than those of the Court”. He thinks that the national authorities know better than the international judges “what is in the public interest”. Instead of discrimina-

⁹ Opinion of Anatoliy Kovler in: ESPCh i Konstitucionnyj Sud RF: konflikt tolkovanij [The ECtHR and the Constitutional Court of the Russian Federation: conflict of interpretations]. *Zakon*, (2012) No. 5, p. 22.

¹⁰ Kovler, Anatoliy: Sluhi ob ostrom konflikte ESPCh i KS RF, mjagko govorja, preuvelicheny [To put it mildly, rumors about an acute conflict of ECtHR and RCC are exaggerated]. *Zakon*, (2012) No. 2. URL https://zakon.ru/discussion/2012/02/20/sluxi_ob_ostrom_konflikte_espch_i_ks_rf_myagko_govorya_preuvelicheny (19 May 2016)

¹¹ *Konstantin Markin v. Russia* (2010), para 58.

¹² *Ibid.* para 48.

¹³ *Ibid.* para 57.

¹⁴ *Ibid.* para 58.

¹⁵ *Ibid.*

¹⁶ *Ibid.* para 57.

¹⁷ *Ibid.* para 58.

tion of men's rights he talks about a "positive discrimination" which gives additional rights to women: "[i]t was therefore a policy choice, motivated by women's special social role as mothers, to grant them entitlement to parental leave on an exceptional basis".¹⁸

This case attracted a significant public attention, primarily among the legal community. The point is not only that "in this case—a rare occurrence—the Court found gender discrimination towards a man".¹⁹ The RCC Chairman Valeriy Zor'kin strongly criticized the ECtHR judgment. Notably he did this soon after the section judgment had been passed, having published his article under quite a belligerent title *The Limits of Flexibility* in *Rossiyskaya Gazeta*, an official periodical of the Russian Government, on 29 October 2010.²⁰ He called unprecedented the ECtHR conclusion that "the legislation in question is not compatible with the Convention and discloses a widespread problem in the legal framework concerning a substantial number of people".²¹ Zor'kin was particularly concerned about the general measures the European Court recommended to adopt in order to rectify the uncovered breach of the Convention, namely to make proper changes to the Russian Law on military service.²² He asks whether "such Court judgment is a direct invasion of national sovereignty, clearly outside the scope of rights and powers envisaged by the Convention?"²³ He also disputed the use of the legal position in the case *Smith and Grady v. the United Kingdom*, related to a discharge of a homosexual from the army, as an example of the European Court case law.²⁴

A standpoint of the RCC Chairman expressed in this article later served as a core for development of the legal position of the Court with regard to relations between national and supra-national origins in the modern international law: "[c]onvention as an international agreement of Russia is a component part of its legal system, but it is not above the Constitution. The Constitution in Article 15²⁵ establishes a primacy of an international agreement over provisions of law, but not over provisions

¹⁸ Dissenting opinion of Judge Kovler. *Konstantin Markin v. Russia* (2010).

¹⁹ Kovler, Anatolii: *Rossiya v Yevropeiskom Sude: 2012 - god "bol'shogo pereloma"* [Russia in the European Court: 2012—the Year of "Sharp Turn"]. *Rossiiskoye pravosudiye*, Vol. 3 (2013) No. 83, p. 21.

²⁰ Zor'kin, Valeriy: *The Limits of Flexibility*, *Rossiyskaya Gazeta*, 29 October 2010. URL <http://www.rg.ru/2010/10/29/zorkin.html> (19 May 2016)

²¹ *Konstantin Markin v. Russia* (2010), para 66.

²² *Ibid.* para 67.

²³ Zor'kin 'The Limits of Flexibility'.

²⁴ *Konstantin Markin v. Russia* (2010), para 56.

²⁵ Part 4 of Article 15 of the Russian Constitution runs: "The universally-recognised norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by law, the rules of the international agreement shall be applied". URL <http://constitution.garant.ru/english/> (19 May 2016)

of the Constitution. Monopoly to interpret provisions of the Constitution and to reveal constitutional meaning of law belongs to the Constitutional Court. Hence, interpretation of the Constitution given by the country's highest judicial authority cannot be overpassed by interpreting the Convention because its legal force does not anyhow outdo the legal force of the Constitution".²⁶ He reckons that "[...] when some or other decisions of the Strasbourg Court are questionable in terms of essence of the European Convention on Human Rights and moreover directly affect the national sovereignty, pivotal constitutional principles, Russia has the right to draw up a defense mechanism against such decisions. The issue of relations between the RCC and the ECtHR resolutions shall also be addressed in the context of the Constitution".²⁷

Dmitriy Medvedev, the then President of the Russian Federation, voiced a similar opinion. At the traditional meeting with the RCC judges on the eve of the Constitution Day on 11 December 2010 he said: "[a]s I see it, after all we have never handed over such a part of our sovereignty, the sovereignty of Russia, to allow any international or foreign court to pass resolutions to change our domestic law".²⁸

The legal community of Russia made a different assessment of the 2010 ECtHR judgment. For instance, Elena Lukyanova, a Doctor of Law, a professor of the Department of Constitutional and Municipal Law of the Faculty of Law of *the Moscow State University of M. V. Lomonosov*, arguing against V. Zor'kin spoke out that "the issue of relations between the RCC and the ECtHR resolutions shall be addressed not in the context of the Russian Constitution but in the context of international obligations of the country".²⁹ She believes it is a mistake not to consider the country's Constitution a legislation governed by the international law. Other practicing lawyers also advocated a quest for a compromise with the European Court, pointing out that the ECtHR judgment in the *Markin case* contradicts not the Russian Constitution, but the RCC legal position, expressed not in the RCC ruling on interpretation of the constitutional provisions, but in its ruling on admissibility, a document of a lesser legal force: "a decision is quite possible which could be constitutional 'Russia-wise' while at the same time being conventional 'Europe-wise'".³⁰

²⁶ Zor'kin: *The Limits of Flexibility*.

²⁷ *Ibid.*

²⁸ Meeting with the Constitutional Court judges. URL <http://www.kremlin.ru/events/president/news/9792> (19 May 2016)

²⁹ Opinion of Elena Lukyanova in: *The ECtHR and the Constitutional Court of the Russian Federation: conflict of interpretations*. p. 26.

³⁰ Opinion of Aleksandr Vereshchagin, Doctor of Law of the Essex University (UK) in: *Ibid.* p. 34.

1.3. GRAND CHAMBER JUDGMENT (2012)

In 2011 the Russian Government appealed against the judgment in the case *Konstantin Markin v. Russia* in the Grand Chamber. On 22 March 2012 the latter passed a judgment,³¹ confirming all main conclusions of the first section in the case and finding actions of the Russian authorities to be a breach of Article 14 of the Convention taken in conjunction with Article 8, it also awarded non-pecuniary damages to Mr. Markin. The judgment was passed by 16 votes to one. A judge in respect of Serbia Dragoljub Popović concluded that the applicant did not have victim status with regard to these articles of the Convention.³² This judgment has an indicative phrase of the ECtHR that “the Convention does not stop at the gates of army barracks and that military personnel”,³³ and also the words on “the gradual evolution of society towards a more equal sharing between men and women”.³⁴

It should be mentioned that the Grand Chamber did not allow for any sharp or emotional assessments conveyed in the previous judgment. In regard to a different position of men and women it used the phrases: “traditional distribution of gender roles in society”,³⁵ “gender stereotypes”.³⁶ The judgment quoted the RCC conclusions absolutely impartially, without any undue comments. What counts most is that the Grand Chamber removed from the judgment its recommendation to change the Russian law containing the discriminating provision, ultimately, this requirement provoked indignation of many Russian practicing lawyers: “since the ECtHR can recommend to change the domestic law only as a last resort, which is not the case with Mr. Markin”.³⁷

However, despite its impartiality the judgment of the Grand Chamber was criticized by some Russian specialists. Firstly, this refers to an unjustifiably wide interpretation of the Convention provisions by the European Court, actually beyond its competence.³⁸ Indeed, none of the Convention articles directly says that the Contracting Parties shall be obliged to guarantee equal rights for parental leave.³⁹ The

³¹ *Case of Konstantin Markin v. Russia* (Application no. 30078/06, Grand Chamber Judgment of 22 March 2012). URL <http://hudoc.echr.coe.int/eng?i=001-109868> (19 May 2016)

³² Dissenting opinion of Judge Popović. *Konstantin Markin v. Russia* (2012).

³³ *Konstantin Markin v. Russia* (2012), para 136.

³⁴ *Ibid.* para 139.

³⁵ *Konstantin Markin v. Russia* (2012), para 142.

³⁶ *Ibid.* para 143.

³⁷ Opinion of Olga Federova, *ad hoc* judge in respect of Russia in the ECtHR in the case *Konstantin Markin v. Russia* in: *The ECtHR and the Constitutional Court of the Russian Federation: conflict of interpretations*. p. 24.

³⁸ Opinion of Taliya Khabrieva, a Doctor of Law, a professor, active member of the Russian Academy of Sciences in: *The ECtHR and the Constitutional Court of the Russian Federation: conflict of interpretations*. p. 28.

³⁹ Olga Federova: *Ibid.* p. 24.

Court itself acknowledges this in its judgments and refers to Article 8 of the Convention.⁴⁰ Besides, the “evolutive” interpretation applied by the Court in this case also caused displeasure in the Russian legal literature.⁴¹

1.4. CONSTITUTIONAL COURT RULING (2013)

This was not the end of the court history of Captain Markin. After his victory at the ECtHR he applied to the Russian court requesting to re-consider his case due to “newly discovered or new circumstances” as provided by the Civil Procedure Code of the Russian Federation.⁴² However, the appeal court dismissed his claim; meanwhile the cassation court submitted a request to the Constitutional Court to check constitutionality of provisions of the Civil Procedure Code. Thus, the *Markin case* again landed in the Constitutional Court.

As a result the Constitutional Court adopted a Ruling on 6 December 2013.⁴³ For the first time this ruling raised a question as to what has primacy in the territory of Russia—the RCC decisions or the ECtHR judgments. It had laid the groundwork for those legal positions, which later were developed by the RCC and led to an open conflict with the European Court of Human Rights.

The Constitutional Court upheld the existing provisions of the Civil Procedure Code enabling citizens to go to a general jurisdiction court with a motion to review a valid court judgment in their cases due to violation of the Convention on Human Rights uncovered by the European Court when hearing their cases. Such recourse to a court cannot be impeded by the fact that the citizens have previously complained against a breach of their constitutional rights to the Constitutional Court, which have found no breach of applicants’ rights in the specific case.

In other words, this entails a possible conflict between conclusions of the RCC and the ECtHR with regard to compliance of domestic law provisions (applied during hearing a specific case) with provisions of the Constitution and the Convention on Human Rights. In this situation, a general jurisdiction court has the right to suspend the proceedings and apply to the Constitutional Court with a request to check

⁴⁰ *Konstantin Markin v. Russia (2012)*, para 130.

⁴¹ Zor’kin, Valeriy: Problemy implementacii Konvencii o pravah cheloveka [Implementation problems of the Convention on Human Rights]. *Zhurnal zarubezhnogo zakonodatel’sтва i sravnitel’nogo pravovedenija*, (2015) No. 5, p. 814.

⁴² *Civil Procedure Code of the Russian Federation No. 138-FZ of 14 November 2002. Art. 392 (4)*

⁴³ *Russian Constitutional Court Ruling No. 27-P of 6 December 2013*. In the case on the review of constitutionality of the provisions of Article 11 and Items 3 and 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation in connection with the request of the Presidium of Leningrad Circuit Military Court. URL <http://www.ksrf.ru/en/Decision/Judgments/Documents/2013%20December%206%2027-P.pdf> (20 May 2016)

constitutionality of these law provisions. If in the course of constitutional proceedings the reviewed provisions are found in compliance with the Russian Constitution, the RCC “defines possible constitutional ways to enforce the judgment of the European Court of Human Rights”.⁴⁴

2. Case of Yukos v. Russia

2.1. ECTHR AND PCA PROCEEDINGS (2014)

A new strain in relations between Russian and international/ European authorities happened in March 2014 after the referendum led to admission of the Republic of Crimea into the Russian Federation,⁴⁵ and sanctions were imposed on Russian natural and legal persons.⁴⁶

In 2014, the main court events encompassed two proceedings of *Neftyanaya Kompaniya Yukos*, both ended almost at the same time and resulted in multibillion judgments against Russia. It was assumed that these court proceedings which had stretched for several years were “sped up” in conditions of anti-Russian sanctions.

The first of the two proceedings took place in the European Court of Human Rights. The complaint was lodged by *Neftyanaya Kompaniya Yukos* as a legal person as far back as in 2004. Despite the fact that the company was declared insolvent in August 2006 and liquidated in November 2007, the ECtHR found its application partly admissible in 2009,⁴⁷ and as a result passed two judgments—one judgment primarily on the merits in September 2011⁴⁸ and one judgment on just satisfaction in July 2014 (both judgments came to effect after a stipulated period).⁴⁹ Within these

⁴⁴ *Ibid.* para 3.2.

⁴⁵ *Federal Constitutional Law No. 6-FKZ of 21 March 2014*. On admission of the Republic of Crimea into the Russian Federation and creation of new constituent entities in the composition of the Russian Federation—the Republic of Crimea and the city of federal significance Sevastopol. *Collection of Laws of the Russian Federation*, (2014) No. 12, item 1201.

⁴⁶ It is interesting to note that despite a tense international situation (or thanks to it) in July 2014 the Russian Ministry of Defense brought in a bill to the State Duma allowing to grant to military servicemen a parental leave, hence trying to enforce the ECtHR judgment in the *Markin case*. But in November 2015 the Government revoked this bill. See: Information of the Automated system for ensuring legislative activity at the *Official website of the State Duma*. URL <http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=540300-6&02> (20 May 2016)

⁴⁷ *Case of OAO Neftyanaya Kompaniya Yukos v. Russia (Application no. 14902/04, Decision on admissibility of 29 January 2009)*. URL <http://hudoc.echr.coe.int/eng?i=001-91378> (20 May 2016)

⁴⁸ *Case of OAO Neftyanaya Kompaniya Yukos v. Russia (Application no. 14902/04, Judgment of 20 September 2011)*. URL <http://hudoc.echr.coe.int/eng?i=001-106308> (20 May 2016)

⁴⁹ *Case of OAO Neftyanaya Kompaniya Yukos v. Russia (Application no. 14902/04, Judgment (Just satisfaction) of 31 July 2014)*. URL <http://hudoc.echr.coe.int/eng?i=001-145730> (20 May 2016)

judgments the ECtHR acknowledged that the Russian authorities violated the conventional right to a fair trial (Article 6 of the Convention) and right to property (Article 1 of Protocol No. 1 to ECHR) since the enforcement proceedings were disproportionate. At the same time the ECtHR avoided political evaluation and disagreed that the Russian authorities had misused the legal proceedings to destroy Yukos and seize its assets. The Court obliged “the respondent State to pay the applicant company’s shareholders as they stood at the time of the company’s liquidation and, as the case may be, their legal successors and heirs EUR 1,866,104,634”.⁵⁰ It is deemed that this payout amount is the largest in the history of the European Court, though it is several times smaller than the sum the plaintiffs demanded initially.⁵¹ Russia is in no hurry to pay this money: the 2016 budget allows only for 500 million Rubles “to pay out monetary compensations to plaintiffs in compliance with the ECtHR judgments”.⁵²

However, a much larger amount—USD 50 billion—was awarded to be paid out by Russia after the second proceedings by the international arbitral tribunal administered by the Permanent Court of Arbitration (PCA Tribunal). In February 2005 three companies, the Yukos shareholders - Hulley Enterprises Limited (Cyprus), Yukos Universal Limited (Isle of Man), Veteran Petroleum Limited (Cyprus)—initiated arbitration proceedings against Russia. As a result in November 2009 Interim Award on Jurisdiction and Admissibility was passed,⁵³ and in July 2014—Final Award for each case.⁵⁴ Unlike the ECtHR which judgments are based on the European Convention on Human Rights, PCA Tribunal had to apply primarily the Energy Charter Treaty (ECT), which is, in part, an international investment law instrument.⁵⁵ From a procedural perspective, the gathering of evidence, especially

⁵⁰ *Ibid.*

⁵¹ *Ibid.* para 3.

⁵² Federal Law No. 359-FZ of 14 December 2015 On the Federal Budget for 2016. *Rossiyskaya Gazeta* 285, 17 December 2015. Art. 21(5).

⁵³ *Hulley Enterprises Limited (Cyprus) v. The Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009, PCA Case No. AA 226.* URL <https://www.pcacases.com/web/sendAttach/419> (20 May 2016); *Yukos Universal Limited (Isle of Man) v. The Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009, PCA Case No. AA 227.* URL <https://www.pcacases.com/web/sendAttach/421> (20 May 2016); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009, PCA Case No. 228.* URL <https://www.pcacases.com/web/sendAttach/423> (20 May 2016)

⁵⁴ *Hulley Enterprises Limited (Cyprus) v. The Russian Federation, Final Award, 18 July 2014, PCA Case No. AA 226.* URL <https://www.pcacases.com/web/sendAttach/418> (20 May 2016); *Yukos Universal Limited (Isle of Man) v. The Russian Federation, Final Award, 18 July 2014, PCA Case No. 227.* URL <https://www.pcacases.com/web/sendAttach/420> (20 May 2016); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation, Final Award, 18 July 2014, PCA Case No. 228.* URL <http://www.pcacases.com/web/sendAttach/422> (20 May 2016)

⁵⁵ Detailed review of the ECtHR and the PCA Tribunal decisions on the Yukos case in: Dederer, Hans-Georg: The Yukos Cases. A Comparative Case Note on the ECtHR’s Decisions and the PCA

the hearing of fact witnesses, led the PCA Tribunal to frame its ‘theory’ that Russia intended to smash Yukos for political reason thereby abusing its tax law and related enforcement proceedings.⁵⁶ The Russian party challenged the decision of the Tribunal referring to the fact that Russia signed but did not ratify the Energy Charter Treaty.⁵⁷

2.2. CONSTITUTIONAL COURT RULING (2015)

In June 2015, one year later after the above judgments had been passed, when it was impossible to drag out their implementation any longer, especially that of the ECtHR, the State Duma Deputies (93 persons from different factions in total) applied to the Constitutional Court with a request to check constitutionality of some laws binding Russia to enforce the ECtHR judgments, including the Federal Law “[o]n ratification of Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereof”.⁵⁸ Without delay the Constitutional Court set this matter for hearing thus causing criticism of some lawyers.⁵⁹

The Deputies justified their request saying that “recently the European Court of Human Rights passed a number of judgments which discredited the highest judicial force of the Fundamental law of the Russian Federation—the Constitution of the Russian Federation”.⁶⁰ By way of example they named the cases of *Neftyanaya Kompaniya Yukos*, *Anchugov and Gladkov*, and *Konstantin Markin*. The ECtHR judgments for these cases are “in conflict with the RCC interpretation of the Russian law provisions and in particular, the Russian Constitution”.⁶¹ Indeed, the RCC adopted some rulings with regard to the *Yukos case* having confirmed constitutionality of the law provisions applied by the authorities to hold *Yukos* liable for tax evasion (the

Tribunal’s Awards. *Journal of Siberian Federal University, Humanities & Social Sciences*, Vol. 10 (2015) No. 8, pp. 2062–2091. URL http://elib.sfu-kras.ru/bitstream/2311/19825/4/07_Dederer.pdf (20 May 2016)

⁵⁶ *Ibid.* p. 2082.

⁵⁷ In April 2016 the PCA Tribunal Awards were revoked in the Hague District Court: *The Russian Federation v. Veteran Petroleum Limited (Cyprus), Yukos Universal Limited (Isle of Man), Hulley Enterprises Limited (Cyprus), Decision of The Hague District Court, 20 April 2016*. URL <http://uit-spraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230> (20 May 2016)

⁵⁸ Request of the State Duma Deputies of 11 June 2015. URL <http://sutyajnik.ru/documents/4825.pdf> (20 May 2016)

⁵⁹ Sultanov, Aidar: Deputatskij zapros v Konstitucionnom Sude RF protiv ispolnenija postanovlenij Evropejskogo suda po pravam cheloveka [Deputy request in the Constitutional Court of the Russian Federation against enforcements of judgments of the European Court of Human Rights]. *Zakonodatel'stvo i ekonomika*, Vol. 7 (2015) No. 375, p. 8.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

same can be seen in the other two cases).⁶² The request of the State Duma Deputies runs “[t]herefore, we find it necessary to study a possibility to acknowledge and enforce in the territory of Russia the ECtHR judgments contradictory to provisions of the Russian Constitution and the RCC legal position”.

In response, on 14 July 2015 the RCC passed a famous Ruling with a very long title, shortly called “[o]n applicability of the ECtHR judgments in the territory of Russia”.⁶³ In the resolute part of the ruling the constitutional judges concluded that the RCC has the right to decide the issue of applicability of the ECtHR judgments and taking individual and general measures. If the ECtHR judgment is based on the Convention on Human Rights interpreted the way it contradicts the Constitution of the Russian Federation, then the RCC can find such judgment not liable for enforcement. Such a request can be submitted to the Constitutional Court by the President of Russia, Government and any government agency responsible for ensuring Russia implements terms of international agreements. To do this, in its turn a federal legislator can provide for a special regulatory mechanism, with a mandatory participation of the RCC.⁶⁴

Among the Constitutional Court arguments can mention the follows. In 1996 when the Convention for the Protection of Human Rights and Fundamental Freedoms was signed and in 1998 when it was ratified by Russia,⁶⁵ the Convention complied with the Russian Constitution (otherwise its ratification would be impossible),

⁶² *Russian Constitutional Court Ruling No. 9-P of 14 July 2005*. In the case concerning the review of the constitutionality of the provisions of Article 113 of the Tax Code of the Russian Federation, in connection with a complaint of G. A. Polyakova and upon a request of the Federal Arbitration Court of the Moscow Circuit. URL <http://www.ksrf.ru/en/Decision/Judgments/Documents/2005%20July%2014%209-P.pdf> (20 May 2016); *Russian Constitutional Court Ruling No. 13-P of 30 July 2001*. In the case concerning the review of constitutionality of the provisions of Sub-Paragraph 7 of Paragraph 1 of Article 7, Paragraph 1 of Article 77 and Paragraph 1 of Article 81 of the Federal Law “On Executive Proceedings” in connection with requests of the Court of Arbitration of the Voronezh Region, Court of Arbitration of the Saratov Region and the complaint of the Open Joint-Stock Company “The Cut “Izykhsky”. URL <http://ksportal.garant.ru:8081/SESSION/PILOT/main.htm> (20 May 2016)

⁶³ *Russian Constitutional Court Ruling No. 21-P of 14 July 2015*. In the case on the review of constitutionality of the provisions of Article 1 of the Federal Law “On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto”, Items 1 and 2 of Article 32 of the Federal Law “On International Treaties of the Russian Federation”, Sections 1 and 4 of Article 11, Item 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation, Sections 1 and 4 of Article 13, Item 4 of Section 3 of Article 311 of the Arbitration Procedure Code of the Russian Federation, Sections 1 and 4 of Article 15, Item 4 of Section 1 of Article 350 of the Administrative Judicial Proceedings Code of the Russian Federation and Item 2 of Section 4 of Article 413 of the Criminal Procedure Code of the Russian Federation. URL <http://doc.ksrf.ru/decision/KSRFDecision201896.pdf> (20 May 2016)

⁶⁴ *Ibid.*

⁶⁵ *Federal Law No. 54-FZ of 30 March 1998*. On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto. *Rossiyskaya Gazeta*, 7 April 1998.

but “later just by means of interpretation” the Convention was specified in such a manner that it came into conflict with provisions of the Constitution.⁶⁶ Pursuant to Article 79 of the Constitution, the Russian Federation may participate in interstate associations and transfer to them part of its powers according to international treaties and agreements, “if this does not involve the limitation of the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation”.⁶⁷ However, such actions on the part of Russia do not signify that it renounces its national sovereignty.⁶⁸

The idea of national sovereignty is an initial thesis used by the constitutional judges as a basis for their discussions. The European Court of Human Rights must respect “national constitutional identity”⁶⁹ of the Contracting Parties, and efficiency of its decisions in domestic legal systems depends on this to a large extent. To justify their position the Russian judges refer to experience of foreign constitutional courts, including the Federal Constitutional Court of Germany in the case of *Görgülü v. Germany* and the Supreme Court of the United Kingdom and Northern Ireland in the case of *Hirst v. the United Kingdom* (N 2).⁷⁰

2.3. CONSTITUTIONAL COURT ACT AMENDMENTS (2015)

Ruling of 14 July 2015 was a judicial and ideological foundation for giving the RCC new powers in this matter and introducing amendments to the Federal Constitutional Law “[o]n the Constitutional Court of the Russian Federation”.⁷¹ This law just documented the ideas discussed previously. It was initiated by the deputies of all four factions⁷² of the Parliament.⁷³

⁶⁶ *Russian Constitutional Court Ruling No. 21-P of 14 July 2015, para 3.*

⁶⁷ Constitution of the Russian Federation of 12 December 1993. URL <http://publication.pravo.gov.ru/Document/View/0001201408010002> (19 May 2016)

⁶⁸ *Russian Constitutional Court Ruling No. 21-P of 14 July 2015, para 2.2.*

⁶⁹ *Ibid.* para 6.

⁷⁰ *Ibid.* para 4.

⁷¹ *Federal Constitutional Law No. 7-FKZ of 14 December 2015.* On Amendments to the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”. *Rossiyskaya Gazeta*, 284, 16 December 2015.

⁷² The bill was introduced by the Federation Council member Andrej Klishas and the State Duma deputies Vladimir Pligin (United Russia), Mihail Emel’janov (Just Russia), Vasilij Lihachev (Communist Party of the Russian Federation), Aleksej Didenko (Liberal Democratic Party of Russia). URL http://www.duma.gov.ru/news/273/1394767/?sphrase_id=2328239 (23 July 2016)

⁷³ *Bill No. 931766-6 ‘On Amendments to the Federal Constitutional Law.* On the Constitutional Court of the Russian Federation. URL [http://asozd2.duma.gov.ru/addwork/scans.nsf/ID/7D281BD306AD3A1643257F0100219655/\\$File/931766-6_18112015_931766-6.PDF?OpenElement](http://asozd2.duma.gov.ru/addwork/scans.nsf/ID/7D281BD306AD3A1643257F0100219655/$File/931766-6_18112015_931766-6.PDF?OpenElement) (21 May 2016)

The Constitutional Court checks enforceability of decisions of “an international body for protection of human rights and freedoms” (meaning: the ECtHR) in the context of “fundamentals of the Russian constitutional system” and the “human rights regime established by the Constitution of the Russian Federation”.⁷⁴ If the Court adopts a ruling that it is impossible entirely or partially to enforce some or other decision, then no actions can be taken to enforce it.⁷⁵ The right to submit a request is exercised by the federal executive authorities invested with powers to ensure protection of interests of the Russian Federation, and also by the President and the Russian Government.⁷⁶

This law certainly attracted attention of the European Commission for Democracy through Law (Venice Commission).⁷⁷ In its opinion the Commission commented that “whatever model of relations between the domestic and the international system is chosen”, under the Vienna Convention on the Law of Treaties, a State is bound to respect ratified international agreements and it cannot invoke the provisions of its internal law as justification for its failure to perform a treaty.⁷⁸ The power of the Russian Constitutional Court to declare an international decision as “unenforceable” is incompatible with the obligations of the Russian Federation under international law.⁷⁹ After the review the Venice Commission set forward a number of measures that should be taken by the Russian authorities, namely, “enforceability” should be replaced by “compatibility with the Russian Constitution of a modality of enforcement”.⁸⁰ If the Constitutional Court finds that a measure of enforcement is incompatible with the Russian Constitution, it should find alternative measures for executing the international decision. “One of these possibilities might be to amend the legislative framework, even the Constitution.”⁸¹

⁷⁴ *Ibid.* Art. 104.3.

⁷⁵ *Ibid.* Art. 104.4.

⁷⁶ *Ibid.*

⁷⁷ *European Commission for Democracy through Law (Venice Commission). Interim opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation.* Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). URL [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)005-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)005-e) (21 May 2016)

⁷⁸ *Vienna Convention on the Law of Treaties. Concluded at Vienna on 23 May 1969. Art. 26, 27.*

⁷⁹ Venice Commission. *Interim opinion*, para 98.

⁸⁰ *Ibid.* para 102.

⁸¹ *Ibid.*

3. Case of *Anchugov and Gladkov v. Russia* (2016)

However to this date the above provisions of the Law have neither been revoked nor amended as demanded by the Venice Commission. The first request regarding the new law was submitted to the Constitutional Court in early February 2016 by the Russian Ministry of Justice in connection with enforcement of the European Court judgment of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia*.⁸²

It is interesting to note that as far back as in October 2015 the Central Election Commission of the Russian Federation made a first attempt to settle the issue of enforceability of this ECtHR judgment. For this purpose it submitted a request to the Constitutional Court to interpret Section 3 of Article 32 of the Russian Constitution. Yet at that time the RCC denied the request since formally it was submitted by an “inappropriate applicant” and could not be deemed admissible.⁸³ The Court clarified that according to regulations stipulated in its Ruling of 14 July 2014 the request for interpretation of the Constitution provisions in relation to enforcement of the ECtHR judgment can be submitted only either by the President or the Russian Government.

The Ministry of Justice requested not to interpret the Constitution provisions, but to check enforceability of the ECtHR judgment in the case of *Anchugov and Gladkov* in compliance with the Russian Constitution. The RCC stated its conclusions in the Ruling of 19 April 2016.⁸⁴ In the resolute part the Court held that the ECtHR judgment is partially unenforceable. Thus, once again the RCC acknowledged that in the territory of Russia the Constitution has the primacy over an international agreement.

In 2004–2005 the Russian citizens Sergey Anchugov and Vladimir Gladkov lodged complaints to the European Court of Human Rights about a breach by the Russian authorities of their electoral rights envisaged in Article 3 of Protocol No. 1 to the Convention on Human Rights.⁸⁵ The point is that back in the day these people had committed major offence (including murder) and were sentenced to death. But later the death sentences were commuted to fifteen years’ imprisonment. The applicants complained that when they were convicted prisoners they had been unable

⁸² *Case of Anchugov and Gladkov v. Russia* (Applications nos. 11157/04 and 15162/05, Judgment of 4 July 2013). URL <http://hudoc.echr.coe.int/eng?i=001-122260> (21 May 2016)

⁸³ *Russian Constitutional Court Ruling No. 2055-O of 6 October 2015*. URL <http://doc.ksrf.ru/decision/KSRFDecision209857.pdf> (21 May 2016)

⁸⁴ *Russian Constitutional Court Ruling No. 12-II of 19 April 2016*. In the case concerning the resolution of the question of possibility to execute the Judgment of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia* in accordance with the Constitution of the Russian Federation in respect to the request of the Ministry of Justice of the Russian Federation. URL http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf (21 May 2016)

⁸⁵ *Case of Anchugov and Gladkov v. Russia*, para 47.

to vote in a number of elections held on various dates in 2000 to 2008 in Russia. According to Article 32 (Section 3) of the Russian Constitution citizens who are kept in places of deprivation of liberty ('imprisonment') under a court sentence shall not have the right to elect and be elected.

Before addressing the ECtHR, these citizens filed complaints with the Constitutional Court to check constitutionality of prohibition for convicts to vote. But the RCC denied them as it had no jurisdiction to check whether certain constitutional provisions were compatible with others.⁸⁶

The European Court agreed with Anchugov and Gladkov and found a breach of Article 3 of Protocol No. 1 to the Convention. The reasoning included the follows. Article 32 (Section 3) of the Russian Constitution imposes a blanket restriction on all convicted prisoners serving their prison sentence.⁸⁷ Disenfranchisement concerns a wide range of offenders and sentences, from two months to life and from relatively minor offences to offences of the utmost seriousness.⁸⁸ The legislature itself should avoid any general, automatic and indiscriminate restriction.⁸⁹ The Court believes the respondent Government may explore all possible ways in that respect, including "some form of political process" (meaning: to amend the Constitution) or "interpreting the Russian Constitution by the competent authorities—the Russian Constitutional Court in the first place".⁹⁰

In its Ruling of 19 April 2016 the Constitutional Court made the following objections. The thesis previously mentioned in the Ruling of 14 July 2015 that the ECtHR conclusion about a breach of the Convention by Russia "is based on the interpretation of its provisions, diverging from their meaning from which the Council of Europe and Russia as a party to this international treaty proceeded during its signing and ratification".⁹¹ This leads to a rather questionable conclusion that "in such circumstances the Russian Federation has the right to insist on the interpretation of Article 3 of Protocol No.1 to the Convention and its implementation in Russia's legal expanse in the understanding, which was taking place in bringing into effect of this international treaty of the Russian Federation". Article 3 of Protocol No.1 to the Convention literally says: "[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". It does not say a word about rights of convicts; hence the government by itself can establish rules for them using its wide margin of appreciation. Therefore,

⁸⁶ *Russian Constitutional Court Ruling No. 177-O of 27 May 2004*. URL <http://doc.ksrf.ru/decision/KSRFDecision30882.pdf> (21 May 2016)

⁸⁷ *Case of Anchugov and Gladkov v. Russia*, para 105.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* para 107.

⁹⁰ *Ibid.* para 111.

⁹¹ *Russian Constitutional Court Ruling No. 12-II of 19 April 2016*, para 4.2.

the Constitutional Court criticizes the practice of “evolutive” interpretation of the Convention provisions and Protocols by the European Court.⁹²

Additionally, the Constitutional Court draws attention to inaccurate English translation of Section 3 of Article 32 of the Russian Constitution used in the ECtHR judgment in the case of *Anchugov and Gladkov v. Russia*. The Russian words “лишение свободы” are translated as “detention” (as in Article 5 of the Convention).⁹³ It is more accurate to translate these words as “imprisonment” as a type of criminal penalty, and not as taking into custody.⁹⁴ Thus the provision of Section 3 of Article 32 of the Russian Constitution should be read as: “citizens who are kept in places of deprivation of liberty (‘imprisonment’) under a court sentence shall not have the right to elect and be elected”.

Nonetheless, we believe that the Constitutional Court through interpreting articles of the Russian Criminal Code and Penal Code made a step towards the European Court. In the resolute part of the Ruling (paragraph 2) it stipulates that “federal legislator is competent, consistently realizing the principle of humanism in criminal law, optimize the system of criminal penalties, including by means of transfer of individual regimes of serving deprivation of liberty to alternative kinds of penalties, although connected with forced restriction of liberty of convicted persons, but not entailing restriction of their electoral rights”. Meaning “colonies-settlements, representing, as follows from Articles 128 and 129 of the Criminal Executive Code of the Russian Federation, correctional institutions with a semi-liberal regime of serving the sentence, whose task is correction and adaptation of convicted persons to the conditions of life in freedom”.⁹⁵

According to some experts the challenging of the ECtHR judgment by the Ministry of Justice in the case of *Anchugov and Gladkov v. Russia* was just “a touchstone” to attempt to litigate the ECtHR judgment in “a more serious case”—the *Yukos case*.⁹⁶

4. Conclusions

The above review shows that relations between the European Court of Human Rights and the Russian Constitutional Court evolved gradually, but since 2010 they have taken a drastic turn for the worse resulting in a number of subsequent court

⁹² *Ibid.* para 4.3.

⁹³ *Case of Anchugov and Gladkov v. Russia*, para 31.

⁹⁴ *Russian Constitutional Court Ruling No. 12-II of 19 April 2016*, para 5.1.

⁹⁵ *Russian Constitutional Court Ruling No. 12-II of 19 April 2016*, para 5.5.

⁹⁶ *Minjust ne isključaet obrashhenija v KS po resheniju ESPCh o vyplatah po delu JuKOSa* [The Ministry of Justice does not exclude an appeal to the Constitutional Court against the ECtHR judgment on the payments in the Yukos case]. *RIA Novosti*, 16 June 2016. URL <http://ria.ru/politics/20160616/1448767749.html> (23 July 2016)

rulings. The case of *Anchugov and Gladkov v. Russia* was a stumbling stone and made the parties to define their positions more clearly. Course of events was certainly affected by the political situation, unprecedented political and economic pressure on Russia, which has considerably increased since the spring of 2014.⁹⁷ In a lot of ways the Russian authorities acted “demonstratively” laying emphasis on the doctrine of national sovereignty and supremacy of the national Constitution.

Experience of the first ECtHR judgment in the case of *Konstantin Markin v. Russia* (2010)⁹⁸ illustrated that in a tense situation the European Court and other institutes of the Council of Europe (Venice Commission) should be extremely tactful in their relations with Russia in order not to heighten the tension. Despite belligerent declarations voiced by the chairman of the Russian Constitutional Court, it is evident that both parties understand it is impossible to exist in isolation.⁹⁹

⁹⁷ *Parliamentary Assembly of the Council of Europe. Resolution 2034 (2015). Challenge, on substantive grounds, of the still ungratified credentials of the delegation of the Russian Federation, 28 January 2015.* URL <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21538&lang=en> (22 May 2016); *Parliamentary Assembly of the Council of Europe. Resolution 2063 (2015). Consideration of the annulment of the previously ratified credentials of the delegation of the Russian Federation (follow-up to paragraph 16 of Resolution 2034 [2015]), 24 June 2015.* URL <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21956&lang=en> (22 May 2016)

⁹⁸ *Konstantin Markin v. Russia (Application no. 30078/06, Judgment of 7 October 2010).*

⁹⁹ Valeriy Zor’kin’s speech at the international conference: *Modern constitutional justice. Challenges and perspectives* (St. Petersburg, 17 May 2016). URL <http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=77> (29 May 2016)

Media's Controversial Roles/Impact on/in Examples of (Un)Covering Fraud with EU Funds

1. Introduction

The key political roles of the media include providing information, checking the accountability of public figures and authorities, and creating a space for public debate. Among these roles, (un)covering corruption in its various forms is certainly a great task which may also be of great interest for the media. Reporting on occurrences of corruption or the suspicion of it conforms to preferred media policy, i.e., a hunt for negativity (good news is no news), and the media's role as a moral lighthouse. Indeed, the free media are considered as a key factor in promoting good governance and controlling corruption, usually in co-ordination with civil society (Mungiu-Pippidi, 2006;¹ Brunetti & Weder, 2003;² The World Bank, 1997;³ Mungiu-Pippidi & Kukutschka, 2013;⁴ Sowunmi et al, 2010;⁵ Stapenhurst, 2000),⁶ although Camaj⁷

* Senior researcher, School of Communication and Media, Bratislava, Slovakia. The paper was written with a contribution by Alena Ištoková, Ľubica Adamcová and some international experts mentioned among sources. Internal reviewer Juraj Filin. Primary data used in some of the tables were produced by particular national teams within the European Union: ANTICORRP research project (Grant agreement no: 290529) and supported by supplementary grant from the Slovak Research Agency (grant agreement DO7RP-0039-11).

¹ Mungiu-Pippidi, A.: Corruption: Diagnosis and Treatment. *Journal of Democracy*, Vol. 17 (2006) No 3, pp. 86–99.

² Brunetti, A. – Weder, B.: A free press is bad news for corruption. *Journal of Public Economics*, Vol. 87 (2003), pp. 1801–1824. DOI: 10.1016/S0047-2727(01)00186-4.

³ *Helping Countries Combat Corruption. The Role of the World Bank*. Washington DC, The World Bank. 1997. URL <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>

⁴ Mungiu-Pippidi, Alina and Roberto Martínez B. Kukutschka (2013). European Union Member States. In: Mungiu-Pippidi, editor, *Anticorruption Report*, Vol. 1, 14-54.

⁵ Sowunmi F. A. – Raufu A. A. – Oketokun F. O. – Salako, M. A. – Usifoh O. O.: The Role of Media in Curbing Corruption in Nigeria. *Research Journal of Information Technology*, Vol. 2 (2010) No. 1, pp. 7–23. URL <http://maxwellsci.com/print/rjit/v2-7-23.pdf>

⁶ Stapenhurst, Rick: *Media's Role in Curbing Corruption the International Bank for Reconstruction and Development*. 2000. URL <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/media.pdf>.

⁷ Camaj, Lindita: The Media's Role in Fighting Corruption: Media Effects on Governmental Accountability. *The International Journal of Press/Politics*. Vol. 18 (2013) No. 1, pp. 21–42. DOI: 10.1177/1940161212462741

(2012) tentatively suggested that the civil society variable possibly has no significant effect on fighting corruption but, instead, independent judiciary as well as parliamentary systems are important variables in supporting this role of the media.

Research conducted by Freille, Haque and Kneller⁸ supports the theory that restrictions on press freedom lead to higher corruption. However, the authors differentiate among various aspects of press freedom and, furthermore, their correlations are not conclusive (see also Brunetti and Weder, 2003). Nevertheless, other research findings tend to contradict or condition the presumably direct and/or strong correlation between freedom of the press and lower levels of corruption, either fully or partially. For example, Suphachalasai (2005)⁹ argued that media competition appears to serve as more important tool to combat corruption than press freedom. Freille et al. (2007)¹⁰ also suggest that political and economic freedoms are more relevant in generating positive outcomes in the fight against corruption than legal restrictions on media freedom. In their view, the political pressures have a slightly stronger effect on corruption, and reducing political influence on the media can thus form an important measure towards reducing corruption levels. They also argue that improving economic conditions for the press sector and contributing to a competitive environment would help to curb corruption. Moreover, Becker, English and Vlad (2013)¹¹ challenge the general argument that media freedom is unambiguously and strongly associated with lower levels of corruption. Their findings suggest that media freedom is indeed negatively related to corruption (at least as it is usually perceived by the general public), although their relationship is quite modest. In fact, if the measure of media freedom is produced by the elite evaluators from Freedom House or Reporters Without Borders, this relationship is only slight in the best case.

This article therefore deals with possible challenges of research that is based either on perceptions (opinion polls) or assumptions (annual surveys among professionals related to freedom of press), including indicators about the level of corruption based on media coverage. The article explores the real roles of the media in (un)covering and thus directly or indirectly fighting some aspects of corruption (namely suspicions or evidence of fraud, irregularity or misappropriation of allocated EU

⁸ Freille, Sebastian – Emranul Haque – Richard Kneller: A Contribution to the Empirics of Press Freedom and Corruption. *European Journal of Political Economy*, Vol. 23 (2007) No. 4, pp. 838–862.

⁹ Suphachalasai, Suphachol (2005). Bureaucratic Corruption and Mass Media, Uuniversity of Cambridge: Environmental Economy and Policy Research Discussion Paper Series.

¹⁰ Freille, Sebastian, Emranul Haque, and Richard Kneller. 2007. "A Contribution to the Empirics of Press Freedom and Corruption." *European Journal of Political Economy* 23 (4): 838–62.

¹¹ Becker, Lee B. – English, Cynthia – Vlad, Tudor: *Measurement Issues and the Relationship Between Media Freedom and Corruption*. Presented to the Journalism Research and Education Section, International Association for Media and Communication Research, Dublin, 25–29 June 2013. URL http://www.grady.uga.edu/coxcenter/Conference_Papers/Public_TCs/Becker_Naab%20_English_Vlad_IAMCR_5_22_2013.pdf

funds money) as reported by selected newspapers in the United Kingdom, Italy, Slovakia, France, Hungary, Latvia, and Romania.

Moreover, the research is also set into a specific context (sub-case study) with the Hungarian example, as among our sample, Hungary appears to be the country where media (in absolute as well as in relative numbers) most heavily (and increasingly—in the long term—more frequently) cover suspicions or evidence of fraud, irregularity or misappropriation of allocated EU funds. The situation in both politics and the media environment¹² in Hungary also appears to be one of the most problematic among EU member states (Trencsenyi, 2013/2014;¹³ Göncz, 2016;¹⁴ Mong, Nagy, Polyák and Urbán 2016;¹⁵ Magyar, 2016;¹⁶ O'Sullivan and Pócza, 2015).¹⁷

The research thus focused on the question as to how these contradictions were reflected in media coverage of suspicions or evidence of fraud, irregularity or a misappropriation of allocated EU funds money in selected Hungarian media in comparison with other countries in our sample. The second, and more general, question is, what does this research data tell us about the role of the media in covering corruption?

2. Methodology

This study is based on a literature review supported by a comparative countries study conveyed by the human-assisted content analysis (HACA) and focused on coverage of corruption in general (and in reference to EU funds in particular) among selected newspapers during the period of 2004–2013 (except the Romanian sample which covered the years 2009–2013 only. It should be noted that the Hungarian sample covered online versions of newspapers or only online newspapers). The analysed issues are thus illustrated by samples of newspapers from Italy, UK, France, Hungary, Latvia, Slovakia and Romania, four from each country. The underlying reason for the particular selection was to give representation to two quality newspapers—ideally from different ideological backgrounds—plus one business newspaper, and one tabloid newspaper. The selection and basic categorisation of newspapers can be seen from the table below, compiled by the University of Perugia.

¹² See also <https://freedomhouse.org/report/freedom-press/2015/hungary>

¹³ Trencsenyi, Balazs: From Goulash-Communism to Goulash-Authoritarianism? *IWM Post*, (2013–2014) No. 112, pp. 3–4.

¹⁴ See Hungarian Media Laws in Europe, CMCS, Budapest, Hungary. URL <http://medialaws.ceu.hu/summary.html#conclusions>.

¹⁵ Mong, Attila – Nagy, Krisztina – Polyák, Gábor – Urbán, Ágnes: *The Methods Are Old, The Cronies Are New. Soft Censorship in the Hungarian Media in 2015*. Mérték Booklets, Vol. 9. 2016.

¹⁶ Magyar, Bálint: *Post-Communist Mafia State. The Case of Hungary*. CEU Press, Budapest, 2016.

¹⁷ O'Sullivan, John – Pócza, Kálmán: *The Second Term of Victor Orbán. Beyond Prejudice and Enthusiasm*. BL Nonprofit and Social Affairs Unit., Budapest–London, 2015.

The total sample was based on nine general keywords: Corruption, Bribe, Kick-back, Collusion, Clientelism, Embezzlement, Favouritism, Nepotism and Familism. Out of this general sample, a “constructed week” of coverage was created for four selected newspapers in the period of 2004–2013. “Constructed weeks” in a two-month period mean that we had first randomly selected a certain number (defining a day in a week). Starting with this number, we constructed a full imaginary week of coverage in each newspaper for each year, invariably selecting each consecutive day of coverage. The research aimed at a sample that would cover a “constructed” two-month period in this way. Using this method, we obtained a total of 2,959 articles for Italy (of which 11 dealt with corruption and EU funds), 2,163 for the UK (38), 1,477 for France (40), 1,446 for Slovakia (48), 2,488 for Hungary (99), 1,678 for Latvia (24) and 558 for Romania (11). The Romanian sample was smaller in number than the others due to the unavailability of Romanian electronic archives for the whole research period, and therefore covered only about a half of the period.

In general, some ideological, theoretical, and financial issues always affect the measuring instruments of the research (see Giannone & De Frutos, 2016).¹⁸ McCurdy, Power, and Godfrey (2011)¹⁹ also believe that evaluation of media environments must take into account the ideological, theoretical, and methodological features of the tools used, while Cooley and Snyder (2015)²⁰ claim that international rankings always carry value judgements, methodological choices, and implicit political agendas. With regard to these inevitably occurring issues and in order to achieve a good quality research output, it was necessary to conduct three inter-coder reliability tests. Firstly, a pre-test was performed which used a random procedure on an international sample (eight long English articles, a separate sample). The results were cross-checked manually by the University of Perugia team. Secondly, we tested our approach on a local sample (4x100 articles, a subset of the full sample). The results were again cross-checked manually, this time by the Slovak research team. All coding disagreements were solved by using a “majority” decision rule in which the key researcher served as a tie-breaker. Thirdly, a reliability test was employed during coding of the full sample (randomly selected newspaper with 50 coded articles). All but two indices (Q27 and Q28) were included to calculate coders’ inter-reliability in samples. The resulting inter-coder reliability level coefficient for each country’s data set was declared as having “passed tests” by Dr. István János Tóth, director of the Centre for Research on Corruption, in Budapest, Hungary.

¹⁸ Giannone, Diego – Frutos, Ruth De: Measuring Freedom of Information: Issues and Opportunities from an Expert Survey. *International Journal of Communication*, Vol. 10 (2016), pp. 589–619.

¹⁹ McCurdy, P – Power, G. – Godfrey, A.: When theory meets practice: Critical reflections from the field on press freedom indices. In: Price, M. E. – Abbott, S. – Morgan, L. (eds.): *Measures of press freedom and media contributions to development*. Peter Lang, New York, 2011. pp. 47–67.

²⁰ Cooley, A. – Snyder, J. (eds.): *Ranking the world: Grading states as a tool of global governance*. Cambridge University Press, Cambridge, 2015.

	<i>Typology of the newspaper</i>			<i>Political bias</i>		
	<i>Business</i>	<i>Tabloid</i>	<i>Quality</i>	<i>Centre left</i>	<i>Centre</i>	<i>Centre right</i>
ITALY						
Il Corriere della Sera			+		+	
La Repubblica			+	+		
Il Giornale			+			+
Il Sole 24 Ore	+				+	
UK						
The Times			+			+
The Guardian			+	+		
The Sun		+				+
The Financial Times	+				+	
FRANCE						
Le Monde			+	+		
Le Figaro			+			+
Ouest France			+		+	
Les Echos	+				+	
SLOVAKIA						
Sme			+			+
Novy cas		+			+	
Pravda			+	+		
Hospodarske noviny	+				+	
HUNGARY						
MNO			+			+
Népszava online			+	+		
HVG	+			+		
Origo		+			+	
LATVIA						
Diena			+		+	
Latvijas Avize			+			+
NRA			+			+
Dienas Bizness	+				+	
ROMANIA						
Ziarul Financiar	+				+	
Jurnalul National			+	+		
Romania libera			+			+
Libertatea		+			+	

Table 1 Categorisation of Selected Newspapers

3. The media coverage of corruption

The media fight corruption not only in the day-to-day reporting of incidences or (what the media perceive as) wrong-doing/unethical behaviour but also in several other ways, such as by investigative journalism, conducting sting operations, holding public debates, publishing opinion polls, etc. Gonzáles (2007, 175)²¹ identified three key roles of the media in fighting corruption: a) the main discoverer of corruption, b) a watch-dog that can even prevent corruption from happening by creating fear of publicity among potential corrupters, and c) a public educator about the effects of corruption and the ways to tackle it.

An examination of the media's positive influence in the battle against corruption reveals that the effects are both tangible and intangible (Stapenhurst, 2000).²² Moreover, Németh, Körmendi and Kiss (2011)²³ mention that until those accused of corruption are treated appropriately, the media coverage of corruption may have both positive and/or negative impacts (see Tumbler & Waisbord, 2004;²⁴ Kramer, 2013;²⁵ Cunha, 2015).²⁶ The occurrence of ubiquitous reporting on corruption is also linked to the broader phenomenon of the potential desensitisation of the general public towards news reports, along with a loss of ability to differentiate the validity of information (Höschl in Wirnitzer, 2015).²⁷ Yet the complex public responses to corruption reports are difficult to discern (Entman, 2012).²⁸ Costa (2013)²⁹ opines that those countries with a free press appear to be the ones witnessing an increase in perceived corruption together with a simultaneous decrease in the perceived qual-

²¹ Gonzáles, Andrés: *Governance for the 21st Century. The Fight Against Corruption in Latin America*. LIT Verlag, Vienna–Berlin, 2007.

²² Stapenhurst: *Media's Role in Curbing Corruption the International Bank for Reconstruction and Development*. 2000. URL <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/media.pdf>.

²³ Németh, Erzsébet – Körmendi, Gábor – Kiss, Beatrix: The media's impact on corruption and its social judgement. *Public Finance Quarterly*. Vol. 56 (2011) No. 1, pp. 58–66.

²⁴ Tumbler, Howard – Waisbord, Silvio: Political Scandals and Media across Democracies: Introduction. *American Behavioral Scientist*, Vol. 47 (2004) No. 7–8, pp. 1031–1039.

²⁵ Kramer, E.: When news becomes entertainment: Representations of corruption in Indonesia's media and the implication of scandal. *Media Asia*, Vol. 40 (2013) No. 1, pp. 60–72.

²⁶ Cunha, I. F.: About the 'de-democratization' of Europe: democracy, Media and political corruption. *Intercom – RBCC*, Vol. 38 (2015) No. 1, pp. 37–62. DOI: 10.1590/1809-5844201512

²⁷ Wirnitzer, J.: Evropské hrozí invaze cizích hodnot, ale i nový vůdce [Europe is threatened not only by a possible invasion of foreign values, but also by a new führer]. *Idnes*, (2015, September 6). URL http://zpravy.idnes.cz/rozhovor-s-cyrilem-hoschlem-dgc-/domaci.aspx?c=A150902_170215_domaci_jw.

²⁸ Entman, R. M.: *Scandal and Silence: Media Responses to Presidential Misconduct*. Polity Press, Cambridge, 2012.

²⁹ Costa, S.: Do freedom of information laws decrease corruption? *Journal of Law, Economics, and Organization*, Vol. 29 (2013) No. 6, pp. 1317–1343.

ity of governance, rather than the expected improvement. According to him, an increase in perceived corruption apparently takes place particularly during the initial years of reform without major sustainability over a longer period. Costa used various corruption perception indices in his research project, both at the macro- and micro-level. His observations are rather intellectually challenging, and inspire the following question: Do these results imply that these perceptions are actually based on intensive media coverage rather than a negative change in the real occurrence of corruption? Indeed, the Hungarian case study conducted by Németh, Körmendi and Kiss (2011)³⁰ confirmed that if corruption cases are successfully uncovered and widely presented by the media, thus reducing the chance of corruption, its social perception is actually prone to increase considerably.

However, the media can also be prevented from fulfilling its role by impediments that are political (levels of political accountability through institutions of checks and balances, Camaj, 2012),³¹ legal (very low levels of press freedom, low access to information, see Cordis and Warren, 2014;³² or when civil society and civic activism do not participate in the process, Mungiu-Pippidi, 2014),³³ economic (low competition, see Suphachalasai, 2005;³⁴ small market size, failures of regulations, vested interests of owners, see UEA, 2013;³⁵ Pirinska, 2016;³⁶ Antonov, 2013),³⁷ professional (professional-ethical standards, when the audiences receive mostly fragments of information, Bergsdorf, 2002),³⁸ and/or possibly cultural (weak civil society, limita-

³⁰ Németh, Erzsébet – Körmendi, Gábor – Kiss, Beatrix: The media's impact on corruption and its social judgement. *Public Finance Quarterly*, Vol. 56 (2011) No. 1, pp. 58–66.

³¹ Camaj, Lindita: The Media's Role in Fighting Corruption: Media Effects on Governmental Accountability. *The International Journal of Press/Politics*, Vol. 18 (2013) No. 1, pp. 21–42. DOI: 10.1177/1940161212462741

³² Cordis, A. S. – P.L. Warren: Sunshine as disinfectant: The effect of state Freedom of Information Act laws on public corruption. *Journal of Public Economics*, Vol. 115 (2014), pp. 18–36.

³³ Mungiu-Pippidi, A.: Why Control of Corruption Works. When it Does. In: Alina Mungiu-Pippidi (ed.): *The Anticorruption Frontline. The Anticorruption Report*, Vol.2. Barbara Budrich Publishers, Opladen, 2014. pp. 90–123.

³⁴ Suphachalasai, Suphachol: *Bureaucratic Corruption and Mass Media*. University of Cambridge, 2005.

³⁵ *Media outlets and their moguls: why concentrated individual or family ownership is bad for editorial independence*. UEA, 2013. URL http://www.ueapolitics.org/wp-content/uploads/2013/12/ejc_eastminster_preprint.pdf

³⁶ Pirinska, Ana: Press freedom in Bulgaria: No country for old values? 22 January 2016. URL <http://www.cafebabel.co.uk/politics/article/press-freedom-in-bulgaria-no-country-for-old-values.html>

³⁷ Antonov, Stefan: *The Age of the Oligarchs: How a group of political and economic magnates have taken control of Bulgaria*. University of Oxford, 2013. URL <http://reutersinstitute.politics.ox.ac.uk/sites/default/files/The%20Age%20of%20Oligarchs.pdf>

³⁸ Bergsdorf, W.: Die politische Wirkung der Medien in skandalisierten Situationen. In: Bergsdorf, W. – Klein, H.K. – Lammert, N. – Schmitt Glaeser, W. (eds.): *Die repräsentative Demokratie und die*

tions in media literacy, see Armao, 2010;³⁹ Norris & Odugbemi, 2010).⁴⁰ Sometimes, the media or journalists may even become involved in corruption networks themselves or display potentially corrupt behaviour (see Limor and Himelboim, 2006;⁴¹ Greenwald, 2012;⁴² Osborne, 2012;⁴³ Orme, 1997;⁴⁴ Adam, 2016).⁴⁵ Moreover, Waisbord (2000)⁴⁶ suggested that factors unrelated to the quality of journalistic work also affect the impact of an exposé. According to him, these factors include the timing of the report's release, the prestige of the news organization, the production values of the investigation, etc.

Norris (2009),⁴⁷ Mendes (2013)⁴⁸ and Smit (2012)⁴⁹ included additional factors necessary for effective reporting on corruption (especially in a framework of investigative journalism) by media or journalists, and for the enhancement of the positive role of the media in a society.

Macht der Medien, Zukunftsforum Politik (10-20), (2002) No. 48. URL http://www.kas.de/wf/doc/kas_1034-544-1-30.pdf?021031104028

³⁹ Armao, Rosemary: Covering Corruption: The Difficulties of Trying to Make a Difference. 2010. URL http://www.cima.ned.org/wp-content/uploads/2015/02/CIMA-Covering_Corruption-Report_0.pdf

⁴⁰ Norris, Pippa – Odugbemi, S.: Assessing the Extent to Which the News Media Act as Watchdogs, Agenda Setters and Gatekeepers. In: Norris, Pippa (eds.): *Public Sentinel. News Media and Governance Reform*. pp. 379–394. World Bank, Washington, 2010. URL <http://issuu.com/worldbank/publications/docs/9780821382004>

⁴¹ Limor, Yehiel – Himelboim, Itai: Journalism and Moonlighting: An International Comparison of 242 Codes of Ethics. *Journal of Mass Media Ethics*, Vol. 21 (2006) No. 4, pp. 265–285.

⁴² Greenwald, G.: Correspondence and collusion between the New York Times and the CIA. *The Guardian*, 29 August 2012.

⁴³ Osborne, P.: Is the British press really so feral? *British Journalism Review*, Vol. 23 (2012) No. 3, pp. 61–68.

⁴⁴ Orme, W.A. (ed.): *A Culture of Collusion: An Inside Look at the Mexican Press*. Linner Rienner Publishers, Boulder, 1997.

⁴⁵ Adam, Ch.: Of droids and slaves. The media in the Orbán regime. *Hungarian Free Press*, 7 February 2016. URL <http://hungarianfreepress.com/2016/02/07/of-droids-and-slaves-media-in-the-orban-regime/>

⁴⁶ Waisbord, S.: *Watchdog Journalism in South America. News, Accountability, and Democracy*. Columbia University Press, New York, 2000.

⁴⁷ Norris, Pippa (ed.): *Public Sentinel: News Media & Governance Reform*. The World Bank, Washington DC, 2009. URL <http://www.hks.harvard.edu/fs/pnorris/Books/Public%20Sentinel.htm>

⁴⁸ Mendes, M.: *Overview of corruption in the media in developing countries*. Transparency International, 2013.

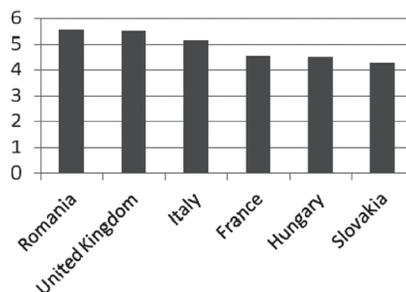
⁴⁹ Smit, Margo: *Deterrence of fraud with EU funds through investigative journalism in EU-27*. 2012. URL <http://www.europarl.europa.eu/document/activities/cont/201210/20121002ATT52809/20121002ATT52809EN.pdf>

4. Correlations between the perception of corruption as projected by media coverage, trust in the media coverage of corruption and the perceived level of corruption in a country

Research suggests that there is no direct correlation between the perception of corruption in politics and the public sector as projected by media coverage, and trust in the media reporting on corruption in a country (see Table 2, from Charon, 2013).⁵⁰ Trust in the media coverage of corruption was highest in Romania and the UK, followed by (in decreasing order) Italy, France, Hungary and Slovakia (Charon, 2013, 116): on a scale of 0–10, the level of trust ranged between 4.2 and 5.6.

On the one hand, the UK was not seen as a highly corrupt country, and the level of trust in the portrayal of corruption by the local media was among highest in this sample. On the other hand, Romania was regarded as a highly corrupt nation, but the faith in the media handling of corruption cases was among the highest in Charon's research. These data, therefore, clearly suggest that it may be problematic to rely solely on the media reporting about corruption as an indicator of relevance for further social science research or adopting policy measures.

Country	Value (2013)	CPI (rank 2013)
Romania	5,541	69
United Kingdom	5,521	14
Italy	5,151	69
France	4,527	22
Hungary	4,515	47
Slovakia	4,277	61



(Media Reporting Corruption from Charon, 2013, raw country averages of EQI 2013 survey question, Latvia was not included, the higher the better, CPI ranking from TIS, 2013)

Table 2 Trust in the Media Reporting Corruption

⁵⁰ Charon, N.: European Perceptions of Quality of Government. A Survey of 24 Countries. In: Mungiu-Pippidi, Alina (ed.): *The Anticorruption Frontline. The Anticorruption Report*, Vol. 1. Barbara Budrich Publishers, Opladen, 2013. pp. 99–120.

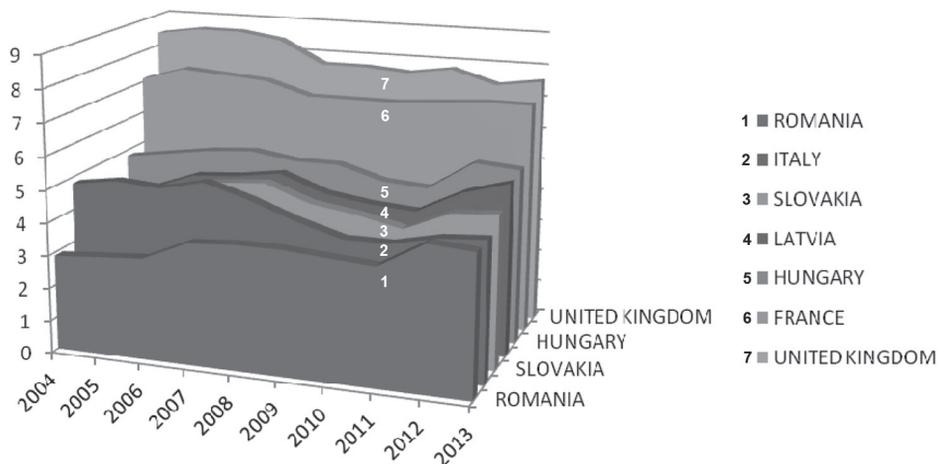
This inconsistency between media reporting on corruption and perception of corruption in a country is also visible when comparing the tables below (although the collection periods of the data in the tables do not overlap precisely, as is explained later).

The UK experienced a worsening of its rank in the Corruption Perception Index (CPI) during the 2008-2010 period, however, the country also improved (compared to other countries) its ranking in the Press Freedom Index (PFI) during the very same period.

A rapid deterioration of PFI can be noted in France in the period of 2009-2010; however, this was not so sharply reflected in CPI ranking during the same period and afterwards. France, nevertheless, witnessed the most similar CPI and PFI patterns in general during the analysed decade.

		<i>United Kingdom</i>	<i>France</i>	<i>Hungary</i>	<i>Latvia</i>	<i>Slovakia</i>	<i>Italy</i>	<i>Romania</i>
2004	rank	11	22	42	57	57	42	87
	score	8.4	7.1	4.8	4	4	4.8	2.9
2005	rank	11	18	40	51	47	40	86
	score	8.6	7.5	5	4.2	4.3	5	3
2006	rank	11	18	41	49	49	45	84
	score	8.6	7.4	5.2	4.7	4.7	4.9	3.1
2007	rank	12	19	39	51	49	41	69
	score	8.4	7.3	5.3	4.8	4.9	5.2	3.7
2008	rank	16	23	47	52	52	55	70
	score	7.7	6.9	5.1	5	5	4.8	3.8
2009	rank	17	24	46	56	56	63	71
	score	7.7	6.9	5.1	4.5	4.5	4.3	3.8
2010	rank	20	25	50	59	59	67	69
	score	7.6	6.9	4.7	4.3	4.3	3.9	3.7
2011	rank	16	25	54	61	66	69	75
	score	7.8	7	4.6	4.2	4	3.9	3.6
2012	rank	17	22	46	54	62	72	66
	score	7.4	7.1	5.5	4.9	4.6	4.2	4.4
2013	rank	14	22	47	49	61	69	69
	score	7.6	7.1	5.4	5.3	4.7	4.3	4.3
Average ranking		15	22	45	54	56	56	75

Table 3 Corruption perceptions index (CPI)—TIS



<i>Press Freedom Index (PFI)</i>									
	2004	2005	2006	2007	2008	2009	2010	2012	2013
Slovakia	-1	-8	-8	-3	-7	-44	-35	-25	-23
	0.50	0.75	2.50	1.00	3.00	11.00	11.50	0.00	13.25
UK	-28	-24	-27	-24	-23	-20	-19	-28	-29
	6.00	5.17	6.50	8.25	5.50	4.00	6.00	2.00	16.89
Latvia	-10	-16	-10	-12	-7	-13	-30	-50	-39
	1.00	2.50	3.00	3.50	3.00	3.00	8.50	15.00	22.89
France	-19	-30	-35	-31	-35	-43	-44	-38	-37
	3.50	6.25	9.00	9.75	7.67	10.67	13.38	9.50	21.60
Romania	-70	-70	-58	-42	-47	-50	-52	-47	-42
	17.83	16.17	14.00	12.75	9.00	12.50	16.00	14.00	23.5
Italy	-39	-42	-40	-35	-44	-49	-49	-61	-57
	9.00	8.67	9.90	11.25	8.42	12.14	15.00	19.67	26.11
Hungary	-28	-12	-10	-17	-23	-25	-23	-40	-56
	6.00	2.00	3.00	4.50	5.50	5.50	7.50	10.00	26.9

World Press Freedom Index, *Reporters Without Borders*

Table 4 Press Freedom Index

The Hungarian case supports the existence of correlation - rather radical worsening of press freedom was reflected in higher perception of corruption towards the end of our research decade (2011–2012). However, it should also be noted that Hungary did not actually present the worst average perception of corruption in the sample—it was Romania, followed by Italy, Slovakia and Latvia.

The Latvian and Slovakian cases are good examples of conformity to Costa's findings (2013). Both countries ranked among those states with the most successful freedom of press until 2009 (or 2008 respectively), yet their CPIs were much higher than those of the UK or France (and also Hungary) during the same period. In other words, free press did not help Latvia and Slovakia to achieve better rankings in CPI compared to those countries with lesser freedom of the press.

In addition, Slovakia's sudden deterioration of press freedom in 2009 and the following years can be linked not only to the change in the political climate but most likely also to the changes in ownership of some of the leading Slovak newspapers. For example, the former foreign owner of the daily *Pravda* was replaced by a Slovak owner in 2009/2010, and according to Zuzana Petková (2016),⁵¹ its former deputy editor-in-chief, who was forced to leave in the very same year, the daily (which until then exercised absolute freedom in its editorial policy) has become biased towards the ruling leftist governmental party, whilst the new management gradually pushed the journalists critical towards this party out of their jobs. Interestingly enough, Besley and Prat (2006)⁵² argued that foreign ownership of the press is associated with greater transparency in the political process and lower levels of corruption. In general, the cumulative research suggests that business owners are capable of influencing the freedom of speech by influencing the media they control, even though the modus operandi might differ from country to country (de Beer, Láb, Strielkowski & Tejkalová, 2015).⁵³ Regarding the correlation of CPI and PFI, Italy is a special case. While it shows better results in CPI than both Slovakia and Latvia during the period of the first four years, its ranking in PFI is extremely low if compared with these two countries during the same period. In other words, a correlation between CPI and PFI in Italy's case seems to work in the opposite way than the aforementioned theory assumes and that the Slovakian and Latvian examples confirm.

Lastly, Romania ranked equally low in both CPI and PFI during the first two to three years, although a similar but slightly more positive pattern with respect to

⁵¹ E-mail correspondence with Zuzana Petková, the former deputy editor-in-chief of *Pravda*, April 27, 2016.

⁵² Besley, Timothy – Prat, Andrea: Handcuffs for the Grabbing Hand? Media Capture and Government Accountability. *The American Economic Review*, Vol. 96 (2006), pp. 720–36.

⁵³ de Beer, A. S. – Láb, F. – Strielkowski, W. – Tejkalová, A. N.: Business influence on media news processing: a comparison of journalists' perceptions in the Czech Republic and South Africa. *Economics and Sociology*, Vol. 8 (2015) No. 1, pp. 222–233. DOI: 10.14254/2071-789X.2015/8-1/17

improving (at least in relative terms) the general situation in both parameters can be noticed towards the end of the decade.

PFI data for each year is presented as a rank, giving a position to a particular country in relative order in comparison to other countries. In this case, a smaller score corresponds to greater freedom of the press and, in addition, the smallest scores are in negative numbers.

Each report reflects the situation during a specific period. The year of the report represents the year when the particular report was released and thus reflects events occurring in prior years. For example, the 2009 report was published in October 2009 and reflects events between 1 September 2008 and 31 August 2009. No report was released in 2011. The 2011–2012 report (labelled “2012” in the table below) was published on 20 January 2012 and reflects events between 1 December 2010 and 30 November 2011. The 2013 World Press Freedom Index was published on 30 January 2013 and reflects events between 1 December 2011 and 30 November 2012.

It has to be mentioned that the comparative estimations of the freedom of the press in Central and Eastern Europe in the period of 2005–2014 (Balčytienė, 2015, 48)⁵⁴ do not suggest a full overlap with the above mentioned PFI, although in most cases the general trend according to Nations in Transit is similar.

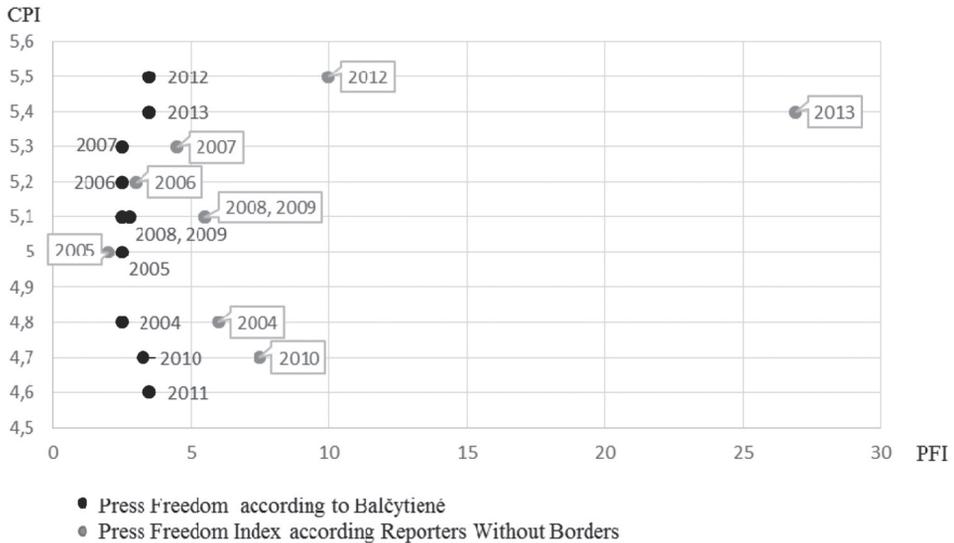
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Slovakia	225	225	225	250	275	300	300	275	275	275
Latvia	150	150	150	175	175	175	175	175	175	200
Romania	400	400	375	375	375	400	400	400	425	425
Hungary	250	250	250	250	250	275	325	350	350	350

according to Balčytienė (based on Nations in Transit data)

Table 5 Average scorings for “media freedom“

However, to give an example of the differences in these estimations, the comparative table of correlations between CPI and PFI has been constructed for the Hungarian case according to both Reporters Without Borders and Nations in Transit (Balčytienė).

⁵⁴ Balčytienė, A.: Institutions and cultures: an analytical framework for the study of democratization and media transformations in Central and Eastern Europe. In: Dobek-Ostrowska, B. – Glowacki, M. (eds): *Democracy and Media in Central and Eastern Europe 25 years On*. Peter Lang, Frankfurt am Main, 2015. pp. 47–62.

Figure 1: Correlations between CPI and PFI for Hungary

5. Case study of EU funds-related fraud coverage in six countries

The EU provides funding for a broad range of projects and programmes covering areas such as regional and urban development, employment and social inclusion, agriculture and rural development, maritime and fisheries policies, research and innovation, and humanitarian aid. Over 76% of the EU budget is managed in partnership with national and regional authorities through the system of “shared management”, and mainly through five large funds (the Structural and Investment Funds).⁵⁵ During the period 2014-2020, the EU will invest 325 billion eur in Europe’s regions through the Structural and Investment Funds.

However, a definitional problem already occurs here. As put by Smit (2012, 26): “What the public (and journalists, for that matter) easily call ‘fraud’ in the end can also be an irregularity or a ‘simple’ misappropriation of money.” His study on Deterrence of fraud with EU funds through investigative journalism in EU-27 (Smit, 2012)⁵⁶ showed that in some countries journalists did generate numerous strings of publications on the topic, especially in the United Kingdom, Romania and Slovakia

⁵⁵ See <http://europa.eu/about-eu/funding-grants/>

⁵⁶ Smit, Margo: *Deterrence of fraud with EU funds through investigative journalism in EU-27*. 2012.

(in addition to Spain and Bulgaria). According to the report, the UK has shown the highest publication of EU funds-related stories among all other EU countries.

Research by Fazekas, Chvalkovska, Skuhrovec, Tóth and King (2014)⁵⁷ has indicated that possibly as much as a third of EU funds (Structural Funds and Cohesion Fund) invested into public projects in the Czech Republic, Hungary and Slovakia were disbursed in irregular and obscure ways, or with a tendency to favour certain companies. These assumptions seem to illustrate the general trend in these areas. It was also remarked by Lenka Bradáčová, a Supreme State Prosecutor in Prague, the Czech Republic that while the organised crime in the 1990s specialised in violent forms of crime (racketeering), or focused on stealing money (both in violent and non-violent ways), joining the EU brought a new form of public sources to focus on—the EU funds (in Šnidl, 2015).⁵⁸

	<i>Population (million)</i>	<i>EU funds per capita (EUR)</i>
UK	62.5	1146
France	63	2138
Italy	60.5	1745
Hungary	10	3098
Romania	21.5	1074
Latvia	2.2	3203
Slovakia	5.5	2402

Table 6 Size of Population (2008) and Income from the EU funds per capita (2004–2013)⁵⁹

Yet these data do not help to explain differences in the intensity of coverage of corruption related to EU funding either. For example, while comparing Latvia and Hungary, the countries with the highest income per capita from EU funds during a decade, there is a ratio of 10:29 (1.4%:4%) in covering the topic of EU funds and corruption between these two countries.

⁵⁷ Fazekas, M. – Chvalkovska, J. – Skuhrovec, J. – Tóth, I. J. – King, L. P.: Are EU Funds a Corruption Risk? The Impact of EU Funds on Grand Corruption in Central and Eastern Europe. In: Mungiu-Pippidi, A. (ed.): *The Anticorruption Frontline. The ANTICORRP Project*, Vol. 2. Barbara Budrich Publishers, Opladen–Berlin–Toronto, 2014. pp. 68–89.

⁵⁸ Šnidl, Vladimír: Chytila Ratha: Je to aj výstraha pre ďalších [She Caught Rath: This is a warning to others]. *Denník N*, Vol. 121 (2015) No. 1, pp. 6–7.

⁵⁹ Population in 2008 (in the middle of research period) in millions with the exception of Latvia due to the overall small size of population + Income from EU funds per capita, based on average income per decade. URL https://en.wikipedia.org/wiki/Demographics_of_the_European_Union#Population_by_nation + own calculations.

<i>EU Funds, TOTAL EXPENDITURES, in millions EUR</i>							
	<i>FR</i>	<i>IT</i>	<i>LV</i>	<i>HU</i>	<i>RO</i>	<i>SK</i>	<i>UK</i>
2004	12 944.9	10 367.0	267.0	713.4	572.2	388.1	7 130.2
2005	13 620.5	10 696.3	385.0	1 357.0	634.5	609.5	8 670.4
2006	13 496.2	10 922.3	402.6	1 842.2	693.1	696.2	8 294.2
2007	13 897.2	11 315.3	675.0	2 427.6	1 602.4	1 082.6	7 422.9
2008	13 721.8	10 306.4	610.4	2 002.6	2 666.2	1 241.8	7 309.9
2009	13 631.9	9 372.3	710.3	3 568.6	2 951.2	1 192.4	6 247.1
2010	13 105.1	9 497.5	843.6	3 650.0	2 317.4	1 905.0	6 745.6
2011	13 162.3	9 585.9	911.0	5 330.9	2 659.5	1 785.1	6 570.0
2012	12 890.3	10 956.9	1 179.5	4 177.1	3 445.5	2 286.8	6 933.9
2013	14 239.3	12 554.3	1 063.2	5 909.8	5 560.6	2 026.1	6 308.3
	134 709.6	105 574.1	7 047.7	30 979.3	23 102.6	13 213.5	71 632.5

Source: EU expenditure and revenue 2000–2014.
http://ec.europa.eu/budget/financialreport/index_en.html

Table 7 Compilation of EU Funds Allocation for Selected Countries

Also, the data above do not show any unambiguous correlation between allocated money and the frequency of reporting on suspicions or evidence of fraud, irregularity or misappropriation of money from allocated EU funds. Yet these data may help us in understanding why there was so much attention paid to this issue in some of the Hungarian media. Hungary (being a more populated country) received the same amount of EU funds as Slovakia and Latvia combined. Moreover, as put by Bajomi-Lazár (2016),⁶⁰ the critics of Orbán's regime⁶¹ widely shared the view that the system is largely funded by EU development funds, most of which are channelled through public tenders to oligarchs, i.e. clients of PM Orbán, and most particularly to Lőrincz Mészáros, a former gas-fitter and now mayor of Felcsút, the village where Orbán was born and where he still owns a house (and had built a huge football stadium). As we shall see, these facts (supported by further experts' opinions) help to partly explain the politicised coverage of this issue among Hungarian media.

Nevertheless, these data do not explain the very low coverage of EU funds in Romanian newspapers (considering equally low reputation of Romania according to CPI), even when the limited sample of Romanian media is considered. Furthermore, the data do not clarify the low coverage of EU funds at national and local levels (in contrast to international level or foreign coverage) by French and British

⁶⁰ E-mail correspondence with Dr. Péter Bajomi-Lazár, editor-in-chief of the media studies journal *Médiakutató*, Hungary, April 19, 2016

⁶¹ See Göncz, Kinga: The games the EU and Hungary Play. *IWM Post*, (2016) No. 116, p. 5.

newspapers either—except that there were actually no suspicions or evidence of fraud, irregularity or misappropriation of allocated EU funds, which is a possible but unlikely explanation. However, more likely, as put by Smit, it can be a continuation of the tradition in which the tabloid papers are consistent in their approach to original EU stories. Regardless of the economic or political climate, they regularly produce small investigative-style articles, which aim to embarrass the European Commission. Finally, a general trend seems to exist among the UK newspapers and is fed by a general scepticism in the media towards the EU (Smit, 2012). The heavy coverage of EU funds by the *Financial Times* can be further explained by the 2010 research project by the Bureau of Investigative Journalism (BIJ) and the *Financial Times* into EU structural funds. The project tracked €347 billion [in EU structural funds] over seven years and from 100 agencies (Smit, 2012, 106).

Country	Newspaper	Total	Dealt with EU funds—all	Percentage	EU funds—National and local level	Percentage in total	Percentage in Dealt with EU funds
Italy	Il Corriere della Sera	855	12	1.4%	6	0.7%	50.0%
	La Repubblica	1036	7	0.7%	3	0.3%	42.9%
	Il Giornale	532	8	1.5%	5	0.9%	62.5%
	Il Sole 24 Ore	536	11	2.1%	3	0.6%	27.3%
	Total	2959	38	1.3%	17	0.6%	44.7%
UK	The Times	686	12	1.7%	0	0.0%	0.0%
	The Guardian	750	16	2.1%	0	0.0%	0.0%
	The Sun	186	5	2.7%	1	0.5%	20.0%
	The Financial Times	541	23	4.3%	0	0.0%	0.0%
	Total	2163	56	2.6%	1	0.0%	1.8%
France	Le Monde	570	17	3.0%	1	0.2%	5.9%
	Le Figaro	443	12	2.7%	1	0.2%	8.3%
	Ouest France	196	3	1.5%	0	0.0%	0.0%
	Les Echos	268	8	3.0%	2	0.7%	25.0%
	Total	1477	40	2.7%	4	0.3%	10.0%
Slovakia	Sme	570	18	3.2%	13	2.3%	72.2%
	Novy cas	144	2	1.4%	1	0.7%	50.0%
	Pravda	356	18	5.1%	15	4.2%	83.3%
	Hospodárske noviny	376	10	2.7%	8	2.1%	80.0%
	Total	1446	48	3.3%	37	2.6%	77.1%

Country	Newspaper	Total	Dealt with EU funds—all	Percentage	EU funds—National and local level	Percentage in total	Percentage in Dealt with EU funds
Hungary	MNO	1261	52	4.1%	42	3.3%	80.8%
	Nepszava online	249	13	5.2%	10	4.0%	76.9%
	HVG	756	23	3.0%	17	2.2%	73.9%
	Origo	222	11	5.0%	4	1.8%	36.4%
	Total	2488	99	4.0%	73	2.9%	73.7%
Latvia	Diena	639	6	0.9%	3	0.5%	50.0%
	Latvijas Avize	428	6	1.4%	4	0.9%	66.7%
	NRA	410	7	1.7%	5	1.2%	71.4%
	Dienas Bizness	201	5	2.5%	2	1.0%	40.0%
	Total	1678	24	1.4%	14	0.8%	58.3%
Romania	Ziarul Financiar	48	2	4.2%	2	4.2%	100.0%
	Jurnalul National	178	2	1.1%	2	1.1%	100.0%
	Romania libera	259	6	2.3%	5	1.9%	83.3%
	Libertatea	73	1	1.4%	1	1.4%	100.0%
	Total	558	11	2.0%	10	1.8%	90.9%

Table 8 Coverage of corruption and EU funds

In general, the coverage of corruption scandals related to EU funds was marginal. At an average country level it reached a minimum between 1.3–2% in Latvia, Romania and Italy, and a maximum of (almost) 3 up to over 4% in the UK, France, Slovakia and Hungary. Considering that EU funds represent a lot of money, and assuming that only a small fraction of corruption scandals and misappropriation of the money has been revealed, it seems that even the media coverage poorly reflected this issue in statistical terms. However, some major scandals in Slovakia (e.g. the Bulletin Board Scandal)⁶² and Hungary (the re-construction of Margaret Bridge,⁶³ Elios-case⁶⁴ and the example of the most covered case of misusing EU Funds in Hungary: a 40 cm high lookout tower in Bodrogkeresztúr)⁶⁵ indeed represented significant corruption cases related to the EU funds.

⁶² See <http://spectator.sme.sk/c/20127801/bulletin-board-tender-investigation-completed.html>

⁶³ See <http://atlatszo.hu/2013/11/27/atlatszo-hu-compiled-a-selection-of-budapest-corruption-stories-to-mark-the-140th-anniversary-of-the-citys-foundation/>

⁶⁴ See <https://english.atlatszo.hu/2015/07/05/more-and-more-signs-of-corruption-in-state-funding-of-pms-son-in-law/>

⁶⁵ See <http://www.europarl.europa.eu/document/activities/cont/200912/20091202ATT65755/20091202ATT65755EN.pdf>

The media in three countries from our sample—Hungary, the UK and Slovakia—paid the greatest attention to misappropriation of EU funds in absolute numbers. The low coverage (considering high CPI) was noted in Romanian media, but comparatively with highest percentage of national or local cases, which is slightly puzzling (and contradicts Smit's, 2012 findings). Milewski (2016)⁶⁶ further explained that the information related to EU funds in Romanian media did not mainly concern corruption but rather the EU fund absorption topic (actual spending of allocated money). During 2007–2013, Romania absorbed only about a third of the overall funds allotted by the EU for various national development projects.⁶⁷ However, those cases of corruption dedicated to EU funds have targeted the Romanian NGOs and companies that received the funds by fraud. The best known scandal which occurred in the Romanian media is the case of Melania Vergu, former advisor to the Minister of Education, who obtained 1.5 million Euros by scam and was sentenced to four years in prison in 2014. Regarding cases of corruption about misused EU funds, no such examples have been identified in the Romanian sample. A review of the Romanian database by Milewski proved that small- and large-scale corruption was mentioned as a potential risk to the EU funds' absorption. For example, an opinion found in some editorials considered that unresolved cases of corruption can lead to a potential decrease of funds allocated by the EU. However, Smit's (2012, 2012–2014) database includes many cases of EU money that were misused or stolen in Romania. His report suggested that while the regular Romanian media mostly ignore the topic of tracking EU funds, a co-operative NGO/journalists initiative dug properly into records and helped local journalists to identify stories based on a database of Romanian figures, although the project had to be abandoned after three years due to a lack of money.

There seemed to be a general trend of the UK (see also Smit, 2012, Annex 11) and French media almost ignoring local occurrences of corruption scandals in this area, with the very unlikely possibility that there were none. The media from new EU member states, especially in Hungary and Slovakia, actually considered national and local level corruption as an important issue. Italy and Latvia seemed to represent the in-between cases, when at least half of their media included in our sample significantly covered national and local scandals. Again, Smit (2012) reports that the Italian investigative journalism showed the same partisanship as politics until fairly recently: reporters largely investigated the opposing faction and ignored "their own side". However, since 2009 some media initiatives have taken on the public demand for coverage which the mainstream media was not providing, and the process

⁶⁶ E-mail correspondence with Dr. Natalia Milewski, Senior lecturer at the Faculty of Journalism and Communication University of Bucharest, Romania, April 20 and 21, 2016

⁶⁷ See <http://www.politicaromaneasca.ro/files/documente%20nou/Absorbtiafondurilorstructurale-sidecoeziune.pdf>

has proven that a paying market for truly independent in-depth reporting exists in Italy. Some even call it the “renaissance” of investigative reporting, despite the harsh political and economic climate. Yet, in general, Italian media seem to mainly report on cases, which are uncovered by legal authorities, partly in an effort to avoid possible libel cases (Smit, 2012).

Similarly, Latvia and its media were hit extremely hard by the economic crisis starting in 2008. The weakened media thus felt the pressure of powerful interests on their independent reporting, although the FOI apparently worked relatively well (Smit, 2012, 168-169).

In other words, the media in both last-mentioned countries face many internal regulatory and financial problems that hinder their proper functioning. This information can also explain some significant differences in their coverage of specialised topics such as EU funds.

Regarding particular newspapers, in absolute numbers, Hungarian *MNO* (Magyar Nemzet online, quality centre-right) and *HVG* (Heti Világgazdaság, business centre-left) devoted the most attention to EU funds and corruption, followed by UK's *The Financial Times* (business, centre), Slovak *Sme* (quality, centre-right) and *Pravda* (quality, centre-left) and France's *Le Monde* (quality, centre-left). However, in relative numbers (percentage of its total coverage of corruption), the coverage of EU funds issues renders different results: the most frequent coverage was provided by two Hungarian newspapers (*Népszava online*—quality, centre-left; *Origo*—tabloid, centre) and the Slovak newspaper *Pravda*, closely followed by *The Financial Times* from the UK.

It has to be noted that in the case of *Origo*, Smit (2012, 162) argues that this new medium belongs to the ones most open to investigative stories also on topics pertaining to Europe, since young journalists have migrated to the web, and away from politicised traditional media.

Moreover, more focused data suggested that in Slovakia, many of the stories were published by only a small number of outlets, mainly the dailies *Sme* and *Hospodárske noviny* (Smit, 2012, 72). The case of *Hospodárske noviny* as presented by our sample, then again, contradicts Smit's research.

6. The Hungarian case

The case of Hungarian media coverage is controversial and a more complex one. An investigation by Szántó, Tóth, Varga and Cserpes (2010)⁶⁸ found some differences both in the intensity of media coverage as well as in indirect governmental subsi-

⁶⁸ Szántó, Zoltán – Tóth, István János – Varga, Szabolcs – Cserpes, Tünde: *Media Representation of Suspected Cases of Corruption in Hungary (2001–2009)*. 2010.

dies to select newspapers in Hungary related to changes in governments. Urbán (2015)⁶⁹ has analysed distortions in the Hungarian media market and the impact of state advertising on competition in the media even further. Smit (2012)⁷⁰ argues that critical and in-depth reporting has suffered from the threats of new and highly controversial media law accompanied by an interesting shift of in-depth reporting from partisan traditional media to the domain of the Internet. Our data do not, however, fully support this claim. In general, four Hungarian newspapers in our sample have doubled their general coverage of corruption within our period in question.

The current situation in some of the Hungarian media, which are often targeted by the vested interests of local oligarchs, can be readily illustrated by the recent case (April 2016) of online news website *Vs.hu*. Its editor-in-chief and 11 other journalists collectively resigned from their functions upon their discovery of the website's controversial funding provided by the National Bank closely related to PM Orbán.⁷¹ This collective departure of journalists also resembles another case, the resignation of most of the staff from the above-discussed online news website *Origo.hu* in 2014, which happened after the initial departure of their editor-in-chief and most likely due to the extent of indirect pressure from the government on the editorial policy (via foreign owners).⁷²

Moreover, another puzzle is related to the fact that during our researched period, the print daily *Magyar Nemzet* and its online version *mno.hu* were owned by oligarch and former Fidesz party cashier Lajos Simicska, a former close friend of Orbán.⁷³

These facts thus seem to be contradicted by the findings of heavy coverage of corruption related to EU funds during the same period by this newspaper. Nevertheless, a plausible explanation is again offered by the contemporary political situation in Hungary. Two elections took place in the period under examination. For most of our research period, the socialist-liberal coalition ruled the country (MSZP–SZDSZ: 2002–2010, Fidesz–KDNP: 2010–now). As documented by Hajdu, Pápay, Szántó and Tóth (2016, 13),⁷⁴ the centre-right *MNO* reported on corruption more frequently (67% of the total number of articles) during the MSZP–SZDSZ govern-

⁶⁹ Urbán, Agnes: *Distortions in the Hungarian Media Market: the Impact of State Advertising on Competition in the Media*. Formalpress, Porto, 2015. pp. 157–167.

⁷⁰ Smit, Margo: *Deterrence of fraud with EU funds through investigative journalism in EU-27*. 2012.

⁷¹ See <http://www.omeiach.com/tlac/item/8944-odstupila-redakcia-portalu-dotovaneho-central-nou-bankouOdstupila>

⁷² See <https://english.atlatszo.hu/2015/03/24/the-fall-of-popular-independent-online-news-portal-origo-hu/>

⁷³ See *How did the Orbán-Simicska media empire function?* 9 April 2015. URL http://www.kreativ.hu/cikk/how_did_the_orban_simicska_media_empire_function

⁷⁴ Hajdu, Miklós – Pápay, Boróka – Szántó, Zoltán – Tóth, István János: *HACA Hungary Country Report*. 2016.

ment between 2002 and 2006, and less frequently (40%) during the Fidesz–KDNP government. Centre-left news outlets reported on corruption significantly more during the Fidesz–KDNP government, whilst the amount of articles published by *Origo* remained stable.

Indeed, Németh, Körmendi and Kiss (2011)⁷⁵ argued that 2010 elections in Hungary also clearly showed the consequences of the public coverage of corruption cases on the assessment and election results of certain political parties. Szabó (2016)⁷⁶ argues that “[...] being corrupt is one of the main criticisms towards the political elite after the regime change, but especially from the late years of the Gyurcsány-government (2006) and onwards. It is rather a political question: right wing newspapers tend to focus on corruptions when left leaning parties are ruling. And other way around, left leaning products have sharp eyes on corruption in times of right wing governments. Since an important source of public money is EU funds, and most of the public money for economic and social development programmes has come from EU funds, it is not surprising that the distribution of EU funds is highly affected by corruption. In addition, politicians are perceived as very corrupt persons regardless of their political affiliations as public opinion polls suggest. Left leaning politicians are also considered as corrupt as the members of the current government”.

According to Polyák (2016),⁷⁷ the subsidies of EU funds are the main source of Hungarian developments in recent years. It is also a generally known fact according to him that this money forms the most important source of power for oligarchs. In response, *HVG* is consequently critical towards the government as it has a strong editorial team. The case of *MNO* is much more interesting. The paper is owned by the former most influential oligarch in the country and it had been quite friendly with the government until the elections in 2014. After these elections, PM Orbán decided to break ties with this oligarch (Simicska) and build a network of new but weaker, oligarchs. Consequently, the media outlets owned by Simicska became critical (but still keeping right-wing) towards the government.

Interestingly enough, a team of journalists from the new Hungarian investigative journalism project called *Direkt36* investigated some cases of misappropriating EU funds by the persistent oligarchic regime, and one of their stories, related to Orbán’s son-in-law, was nominated for the European Press Prize.⁷⁸

⁷⁵ Németh, Erzsébet – Körmendi, Gábor – Kiss, Beatrix: The media’s impact on corruption and its social judgement. *Public Finance Quarterly*, Vol. 56 (2011) No. 1, pp. 58–66.

⁷⁶ E-mail correspondence with Dr. Gabriella Szabó, research fellow at the Centre for Social Sciences, Hungarian Academy of Sciences, Budapest, Hungary, April 20, 2016.

⁷⁷ E-mail correspondence with Dr. Gábor Polyák, an associate professor at the University of Pécs, Hungary, April 20, 2016.

⁷⁸ See <http://www.direkt36.hu/en/2016/01/28/tiborc-z-hatralepett-de-regi-uzletarsa-felbukkantobb-nagy-allami-projektben/>

7. Correlations between General Coverage of EU (European) Topics and EU funds Coverage

Our analysis suggests rather chaotic or, at least, comparatively unsystematic coverage of corruption and misuse of EU funds in the selected newspapers and countries. Although some patterns emerged throughout the sample, they were generally rather weak or blurred. We have thus attempted to explore whether the perplexity of EU funds coverage might be explained by using a more generic pattern, i.e. how the media cover the EU or European issues in general. As Vreese (2001)⁷⁹ suggested, media coverage of European affairs is cyclical, peaking during the events but hardly visible before and after them. Moreover, news organizations differ in their editorial policy and the degree of their effort invested in covering the events. For example, the British (and Dutch) public broadcasters exerted greater discretion in their choice of issues to cover, and they also assumed a proactive agenda-setting role in comparison to their private counterparts. It thereby seems to be correct to claim that public and private ownership also impacts the coverage of EU issues to a certain extent. In contrast, cyclical aspect of news reporting on EU funds was difficult to detect due to small number of cases. Yet it is likely that there are cycles of reporting related either to political cycles (after elections) or to big corruption scandals (when a scandal can initiate a wave of reporting on an issue). This can be indirectly confirmed by Gleissner's and Vreese's (2005)⁸⁰ findings on media coverage of the Convention's preparation of the EU Constitution in selected news media from the UK, Germany and the Netherlands. Their findings suggested that (a) this issue entered and vanished from the media agenda very swiftly, (b) the style of reports predominantly showed it from a negative angle, and (c) the issue was reported from the European (i.e. broader) perspective. The authors of this study explained these results as predominantly stemming from the relations of journalists with EU institutions, position of their home news organizations, and their perception of what the audience would prefer. Firmstone's (2008)⁸¹ study (which also included *The Financial Times* in the sample) argued that the EU remain unreported due to its position as a polity in its own right, and the EU issues are thus predominantly covered from an external point of view in consequence of the diverse range of approaches adopted

⁷⁹ Vreese, Claes H. de: Europe' in the News A Cross-National Comparative Study of the News Coverage of Key EU Events. *European Union Politics*, Vol. 2 (2001) No. 3, pp. 283–307.

⁸⁰ Gleissner, Martin – Vreese, Claes H. de: News about the EU Constitution Journalistic challenges and media portrayal of the European Union. *Constitution Journalism*, Vol. 6 (2005) No. 2, pp. 221–224.

⁸¹ Firmstone, Julie: Approaches of the transnational press to reporting Europe. *Journalism*, Vol. 9 (2008) No. 4, pp. 423–442.

by transnational newspapers. Zografova, Bakalova and Mizova (2012)⁸² argued that a country-specific (rather than a unified) pattern of media reporting prevails in Europe. Their study also outlined a significant interdependency between the type of EU membership (old, new and non-member states) and actual articulation of the cases discussed. Nevertheless, Statham (2008)⁸³ reported on a limited yet clearly emerging “Europeanization” of journalism, which is carried out by transnational newspapers focussed on specialist audiences and, to a limited extent, by European correspondents writing for the national press.

In summary, it seems that chaotic or, at least, comparatively unsystematic way coverage of EU funds emerging from our sample in fact reflects more general trends pervading the general coverage of EU and European issues. The factors that can explain the differences in coverage include (a) the media ownership—but not so much public vs. private media (anyway, no public media appeared in our sample, so we could not compare) but what mattered was private media under control of local oligarchs or indirectly under control of government and/or with specific ideology (the Hungarian case, in the past also the Italian case), followed by (b) presence of transnational and/or business and/or elite/quality newspapers which generally pay more attention to EU issues (the most distinctive one, *The Financial Times*, was included in our sample as well as some business/economy/elite dailies, although these presented a rather weak correlations, and differences in coverage were more visible at a national level), (c) editorial policy and the degree of their effort invested in covering the events (to a large degree influenced by vested interests in some countries, namely Hungary, and with anti-EU rhetoric in the UK), and, finally, (d) membership position of a country in the EU (old, new or non-member). Considering the last criterion, the differences in our sample have been paradoxically noted in the focus of the news coverage: the media from “old” EU countries, the UK and France, reported on a misuse of EU funds mostly as it was a purely external issue, whereas the media from “new” EU countries, Hungary and Slovakia, and especially Romania, almost exclusively covered it from a domestic angle. However, some other countries with various accession data of EU membership such as Italy and Latvia showed mixed results in this regard.

⁸² Zografova, Yolanda – Bakalova, Diana – Mizova, Bistra: Media Reporting Patterns in Europe. The Cases of Construction of the EU and Reform Treaty. *Javnost—The Public: Journal of the European Institute for Communication and Culture*, Vol. 19 (2012) No. 1, pp. 67–84.

⁸³ Statham, Paul: Making Europe news How journalists view their role and media performance. *Journalism*, Vol. 9 (2008) No. 4, pp. 398–422.

8. Conclusion

Overall, the results suggest only a weak correlation between freedom of the press in a particular country and actual perception of corruption by its citizens. Occasionally, like in the Italian case, the correlation seems to work (for some time) in a completely opposite direction. The correlation also appears to be rather postponed, i.e. the general perception of corruption increases some time after media freedom worsens. Furthermore, our research seems to confirm previous findings that freedom of the press and, consequently, coverage of corruption is more prone to be influenced by political and economic pressures than via direct impact of media legislation.

No direct correlation exists between the perception of corruption in politics and the public sector (mostly as projected by media coverage), and trust in the media reporting on corruption in a given country. Some countries have perceived a low level of corruption and, at the same time, high trust in the media's coverage of corruption, such as the UK. Yet there are countries that have high levels of corruption, but the faith in the media's handling of corruption cases can still be among the highest, such as is the situation in Romania.

Also, there is no correlation between allocated money and the frequency of reporting on suspicions or evidence of fraud related to EU funds in the six analysed countries. The British press covered EU money (but mostly focusing directly on events in Brussels) more often than the French press, although the UK received about half of the amount of EU funds as did France. In general, *The Financial Times* proved its reputation as the "newspaper of record" in this field as well. Yet this higher coverage by *The Financial Times* was to a large degree influenced by a special long-term project.

Comparatively, all quality newspapers reported enough on misuse or stealing of EU funds in Slovakia. Nevertheless, Slovakia's case of sudden deterioration of press freedom in the middle of our research period (although still remaining on a relatively good level) can generally serve as a good example of the palpable dependence of this factor on both governmental shifts and changes in media ownership.

Latvian newspapers devoted twice as many articles to EU funds than did the Romanian ones (or about the same number when considering the smaller Romanian sample), although Romania received three times more money from EU funds than Latvia. However, the media in both countries (as well as, to a degree, in Italy) face many internal regulatory and financial problems that hinder their proper functioning. This partly explains the significant differences in their coverage of specialised topics such as EU funds.

The topic of EU funds were both heavily covered and heavily politicised in Hungary. Moreover, the Hungarian media coverage of EU funds until recently, has reflected mostly the priorities of print media owners (or editors) and their ideologically biased editorial policies.

Romanian print media, although generally trusted by the public in performing this task, seemed to report very little on the misuse of EU funds. Considering that Romania was perceived on average as the most corrupt country in our sample, this issue remains puzzling.

The role of the media in covering corruption is much more complex than we initially believed. A general trend, however, seems to exist among the analysed countries; whilst the media in the UK and France almost ignored local occurrences of EU funds-related corruption scandals (or were there none?), the media in the new EU member states, especially Hungary and Slovakia, considered it an important issue at both national and local level. Italy and Latvia represent the in-between cases, where at least half of the media included in our sample significantly covered national and local scandals.

Overall, since EU funds involve substantial amounts of money, and assuming that only a small fraction of corruption scandals and misappropriation of the money has been revealed, the media coverage still poorly reflected this issue in statistical terms. However, the failure does not appear to lie only within the media industry but often comes, first of all, from the authorities⁸⁴ or owners. This can be seen in the separate chapter on the situation in Hungary, where the watch-dog role of local media seems to be outdone by the vested interests of oligarchs and less so by harsh media legislation. Nonetheless, some media (e.g. *The Financial Times*) devoted substantial effort to investigate EU fund issues, and some of the major corruption scandals that were made public via the media across the countries of our interest were indeed related to misappropriations of these funds.

As hinted above, the last tentative conclusion of this study is that the various indicators used to measure and compare international perception of corruption and its reporting by the media should be rethought again since some of these, such as the ones used by Brunetti and Weder (2003)⁸⁵ or Ahrend (2002)⁸⁶ are clearly based on correct but too broad indicators, while the widely used WJS⁸⁷ is based on only one flawed indicator. In other words, freedom of the media is important, but the broader parameter of economic (especially type of media ownership) and political freedoms (a general freedom, not necessarily narrowed to the media-related one,

⁸⁴ See Bouda, Petr – Deščíková, Radana – Fadrný, Martin – Filipcová, Beáta: *Public money and corruption risks. A comparative analysis. The risks of system political corruption in the management of EU funds and state-owned enterprises in the Czech Republic, Slovakia and Poland*. Published by Frank Bold, 2013. URL http://frankbold.org/sites/default/files/publikace/public_money_and_corruption_risks.pdf

⁸⁵ Brunetti, A. – Weder, B.: A free press is bad news for corruption. *Journal of Public Economics*, Vol. 87, (2003), pp. 1801–1824. DOI: 10.1016/S0047-2727(01)00186-4

⁸⁶ Ahrend, Rudiger: *Press Freedom, Human Capital and Corruption*. Delta Working Paper Series, No. 2002–2011. Delta, Paris, 2002.

⁸⁷ See <http://www.worldsofjournalism.org/pilot.htm>

which is, moreover, calculated on possibly biased perceptions) are more important than media regulation itself. Therefore, one of the side issues discussed in this article concerned the ownership of the press, which apparently still plays an important role in the media (non)coverage or biased coverage of corruption accusations related (not only) to EU funds. This was typically noticed in the case of Hungary as a negative example, while the Slovak case of quality newspapers is more complex (Pravda reported fairly critically on this issue until it changed owners in 2010), and possibly, the intriguing focus of the British and French media coverage in which the quality newspapers are indeed critical yet more "outward" looking in their reporting on corruption related to EU funds.

PÉTER SMUK

Constitutional Approach to Public Financing of Political Parties and Election Campaigns

1. Costs of Democracy

Democratic processes pose several types of costs on the members of a political community. These will surely occur when citizens' *participation* is expected (spending time on participating at elections and making decisions; travelling to polling places; gathering information for conscious or rational decision; engagement in discussions on issues of public concern, etc.); when the polity's established *institutes* are to be financed from the public budget (among others, democratic processes need well organized political forums/arenas; state powers divided/separated; and state incomes lost by respecting individuals' privacy) and finally in mass democratic communities there should be effective *intermediaries* between state and citizens (like political parties and the media). When comparing the central budgets of a dictatorship and an average democratic regime, one fact easily becomes clear: the public funding of political parties. Democratic systems usually cannot exist without substantial contribution of political parties as intermediaries between citizens and state. Through the central state budget of a democratic government citizens (tax payers) usually spend a considerable amount of money to fund certain functions of parties.

In this paper I give an overview on the basic issues of party financing, focusing on the constitutional problems of the *public* financing thereof. As we can regard electoral periods as the most frequent and expensive intervals of democratic processes, and the participation of political parties is also a fundamental feature of electioneering, we have a look at campaign financing as well. This study is based on standards and examples of Western democracies, referring also to Central and Eastern European, including Hungarian practices.

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2. Funding the functions of political parties

2.1. POLITICAL ENTITIES WITH FAVOURABLE FUNCTIONS

For this paper, I accept the definition of political party, drawn up by Venice Commission as follows: “a free association of persons, one of the aims of which is to participate in the management of public affairs, including through the presentation of candidates to free and democratic elections”¹

Existence of political parties can be funded by guaranteeing the fundamental rights and freedoms of association and expression; while several constitutions already provides explicit guarantees for establishing political parties and party pluralism. Given the political efficiency of organized politics parties became inevitable actors in democratic systems; and given their—at least formal—existing can veil anti-democratic features, they are often tolerated organizations even in authoritarian regimes. Following some disgust of public law, parties are already recognized by law and their establishing as well as functioning are usually guaranteed by constitutions.

General functions of political parties show that parties are inevitable parts of representative democracy. Critics of malfunctioning political parties also target representative democracy, demonstrating that essential role. Political parties perform the following functions in democratic processes:

*Formation of public opinion and the people’s political will.*² Political parties are intermediaries between state and citizens. They circulate information on democratic processes, legislative agenda, proposals, public issues, etc., while gathering information from the citizens and transforming it for political procedures. Freedom of expression and flow of information thus creates the “lifeblood of democracy”,³ which is reinforced many times by the European Court of Human Rights as well. As the United Nations Human Rights Committee also pointed out, “the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to

¹ *Guidelines on Political Party Regulation*. By OSCE/ODIHR and Venice Commission. Adopted by the Venice Commission, 2010. CDL-AD(2010)024. p. 8.

² According to the German Grundgesetz Art. 21.1. “Political parties shall participate in the formation of the political will of the people”; echoed by the new Fundamental Law of Hungary Art VIII.3.: “Political parties shall participate in the formation and expression of the will of the people”.

³ The words of Lord Steyn are cited in: Turpin, Colin – Tomkins, Adam: *British Government and the Constitution: Text and Materials*. Cambridge University Press, 2007. p. 773.

criticize and oppose, to publish political material, to campaign for election and to advertise political ideas”⁴

Intermediaries. Political parties canalize, integrate and represent conflicts, interests, information and endeavours of different nature from and towards society. Parties also need to mobilize citizens for their support at elections when the former performance and future ideas of parties and candidates are to be assessed. In a representative democracy, voters and members of the political community entrust and mandate representatives with carrying out political functions (decision-making, governing, daily management of public affairs). The idea of a totally politics-involved society implies serious and substantial problems; as far as privacy and public life has been separated and citizens can rarely undertake the costs of daily engagement in politics. Introduction of certain corrections of representation and elements of direct, participatory or grassroots-democracy is an evergreen popular demand; even the contribution of political parties thereto could be institutionalized too.

Recruiting leaders. Electing and training better leaders in higher or lower positions increase not only the efficiency of state organs and political system but also contributes to the legitimation of political processes. On the one hand political carrier-routes lead to higher public positions usually via political parties; on the other, a party intending to govern a country shall demonstrate its capacities in terms of personnel too. Parties mainly carry out this function by their core functioning (experience may be obtained by internal politics and management) or via training or other scientific programs, scholarships, etc. usually organized and financed by party foundations. It is rather rare to reach high public offices without any assistance of political parties; these offices are those that are incompatible with party membership or are of professional nature (e.g. ordinary judges).

Decision making, governing. Decision-making functions are carried out in internal organs of parties and also in state bodies of representation (legislatures, local governments); parties on government and also in opposition perform these functions. They must give programs or direction to society and should show ability to implement them if they intend to obtain governing positions. Capacities in terms of personnel, policies, expertise must be building up for this sake. Oppositional parties are also in decision-making position for example in the case of issues that are to be resolved by a qualified majority voting. While in opposition, parties basically compete for the attention of citizens, creating and offering alternatives, policies, etc.

Scrutiny. Party competition itself guarantees that racing parties control each other and exploit the faults or illegal acts of others as intensively as possible. By its

⁴Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), par. 26.

very nature the competition often creates more effective scrutiny as investigations performed by state authorities.

Constitutional recognition and public funding of political parties are strong statements over their functions; the preconception and the expectation behind these recognitions have the implicit message that the abovementioned (and some other) functions are favourable *and* ineluctable in democratic systems.⁵ On this basis—taking into consideration historical experiences too—several organs of constitutional and/or political nature have declared the necessity and benefits of political parties in democratic systems.

The *German Constitutional Court* was in the position to decide on the role of political parties—in the light of protecting democracy against radical parties—as early as in the 1950s. In the case of the Socialist Reich Party in 1952 it summarized its standpoint deduced from the *Grundgesetz*.

“German constitutions following World War I hardly mentioned political parties, although even that time ... political parties to a large extent determined democratic constitutional life. The reasons for this omission are manifold, but in the final analysis the cause lies in a democratic ideology that refused to recognize groups mediating between the free individual and the will of the entire people composed of the sum of individual wills and represented in Parliament by parliamentarians ‘as representatives of the entire people’ [...] The Basic Law abandoned this viewpoint and, more realistically, expressly recognizes parties as agents—even if not the sole ones—forming the political will of the people. The Basic Law’s attempt to regulate political parties encounters [a] problem [that] relates to the principle of democracy, which permits any political orientation to manifest itself in political parties, including—to be consistent—antidemocratic orientations. [...] In a free democratic state [...] freedom of political opinion and freedom of association—including political association—are guaranteed to individual citizens as basic rights. On the other hand, part of the nature of every democracy consists in the people exercising their supreme power in elections and voting. In the reality of the large modern state, however, this popular will can emerge only through parties as operating political units. Both fundamental ideas lead to the basic conclusion that the establishment and activity of political parties must not be restrained.”⁶

The *European Court of Human Rights* established in several decisions that “political parties had essential role in ensuring pluralism and proper functioning of democracy”. The Court held, protecting wide scope of party activities and programs, that “a political party, is not excluded from the protection afforded by the Conven-

⁵ See for further justifications Mersel, Yigal: The dissolution of political parties: The problem of internal democracy. *ICON*, Vol. 4 (2006) No. 1, pp. 89–91.

⁶ 2 BVerfGE 1 (1952), cited in: Kommers, Donald P. – Miller, Russell A.: *The Constitutional Jurisprudence of the Federal Republic of Germany*. Duke University Press, 2012. pp. 286–287.

tion simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions”⁷.

The role of political parties—although “at European level”—in this development and in democratic process in general has been declared in Article 191 of the Treaty establishing the European Community: “[p]olitical parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union”⁸. The Council and the Parliament of the *European Union* adopted a new regulation in 2014 on the funding of political parties on the European level, in which it reiterates the Union’s concept on the favourable features of cross-European party co-operations and the development of the European (level) political system. “Truly transnational European political parties and their affiliated European political foundations have a key role to play in articulating the voices of citizens at European level by bridging the gap between politics at national level and at Union level. European political parties and their affiliated European political foundations should be encouraged and assisted in their endeavour to provide a strong link between European civil society and the Union institutions, in particular the European Parliament.”⁹

2.2. FINANCING AND INCOMES OF MODERN POLITICAL PARTIES

Political parties’ budget is composed of various types of incomes.¹⁰ They may be structured, especially as far as the legal regulation is concerned. The main structuring dimension is the source of the incomes (private or public); while another aspect is the nature of benefits (money/cash or in-kind contributions). From the legal point of view, it is necessary to note that different organizations (legal entities like foundations, enterprises, etc.) may receive or spend money *in favour of* or *with regard to* political parties, although not necessarily being connected to them in terms of legal ties.

Private sources of financing are regularly and traditionally the membership fees and different types of contributions by persons. Any sources can be regarded as public funding where public (central or local governmental) budget provides payments to political parties or candidates; or authorities provide resources that other-

⁷ *Socialist Party and Others v. Turkey (1998)*

⁸ Later in Art 10.4 TEU also declares that “Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union”.

⁹ Regulation No 1141/2014 *on the statute and funding of European political parties and European political foundations*, Preamble (4)-(5).

¹⁰ CDL-AD(2010)024. pp. 35–40.; Biezen, Ingrid van: *Financing political parties and election campaigns—guidelines*. Council of Europe Publishing, Strasbourg, 2003.

wise could be reached only for financial compensation (e.g. free media airtime) or were unreachable for anybody (tax exemptions, special canvassing platforms, etc.).

Here we have room only for observing several constitutional aspects of party financing. Main issues are discussed about the barriers of private donations and the justification of public financing. As parties are formed on the basis of freedom of association, some kind of autonomy regarding their property and incomes shall be respected. Issues of private donors and contributions raises the intricate questions whether everybody could be a donor or these donations could be limited. Do these limits restrain anybody from exercising basic democratic rights or freedoms? Usually persons (including legal persons) may donate political parties, sometimes excluding foreigners or (at least partly) state owned companies, while the amount of donations are often restricted. The aim of such restrictions is basically to limit the concentration of private influence on party politics.

When restricting private contributions the fundamental right of freedom of expression may raise some concern. It is obvious that freedom of expression includes the right to donate certain political issues, organizations or candidates. While the US Supreme Court protected¹¹ this form of freedom of speech, the “European approach has been to accept restrictions to campaign expenditure on the grounds that freedom of expression does not entail the freedom to use wealth to get the less prosperous to listen to one’s views.”¹²

3. Public funding—allow it or not?

3.1. REASONS TO PROVIDE PUBLIC FUNDING

When focusing on public financing of political parties and candidates it is necessary to summarize the justification of such public spending. As we will see, these reasons (at least partly) are based on expectations pursuing various democratic and/or constitutional values. The main purposes of public funding can be summarized in the following way.

Enhancing political pluralism. For those parties that have wealthy supporters, longer traditions or are embedded in society it is easier to collect private donations. Small, new or non-mainstream parties suffer disadvantage in costly political competitions, public funding—although it usually depends on certain results of that parties—may help them to present their programmes, which creates a broader range of choices to voters.

¹¹ See among others the cases of *Buckley v. Valeo* (1976), *Citizens United v. FEC* (2010).

¹² Biezen p. 30.

Supporting favourable functions of political parties. In case we agree that political parties perform favourable functions to political community and state, it is logical that public budget should contribute to the functioning of these organizations. Public funding may generally finance the party organization (everyday functioning of the party), the parliamentary group of the party (functions performed in legislature) and the campaign activity before elections.¹³

Liberating parties from private donors. Money can distort democracy if popular representation is converted to money representation or representatives are influenced by certain wealthy private interests instead of public interest. These theoretical concerns are even more experienced in practice—by corruption and diverse intricate cases of party finance scandals. It is a regular expectation, if parties receive public funding and are liberated from collecting money to cover their continuously growing costs, they shall not hazard corruption (i.e. reward illegally the private donors of their campaign).

Ensuring equal opportunity at elections. Electioneering is in the centre of the activities of a political party. This is the moment when it can compete with its program, identity, alternatives; this is the moment when mandates and political power in state organs may be obtained. Based on the results of the elections, parties may receive further public funding; they can award their personnel with public offices and other goods. In modern politics, canvassing and media campaigns became extremely effective—and expensive. New, smaller parties or those that focus on unpopular issues may be handicapped. They cannot collect private donations and they were not in the position in the previous years to receive public funding to prepare for that competition. Omitting and disadvantaging these programmes, interests (parties) may cause distortion in popular representation. This justifies the public funding of the candidates in general, but of course, to a certain extent, because equal positions in terms of financial status cannot (or perhaps must not) be achieved.

Direct state support to political parties has been introduced also in Western democracies only recently. The table below shows the practice of some model countries. Regarding the new or Eastern democracies in Europe, public funding was provided as early as at the beginning of the post-communist era. In a new democratic system, not only equal legal positions shall be granted to political parties, but regulation must also deal with the legacy of the past. Legal successors of the former ruling parties, even if they have turned away from their anti-democratic political legacy, often enjoy several assets (real estates, membership, etc.) of their predecessors that are not available for new democratic parties.

¹³ Biezen p. 37–39.

Country	To Parliamentary Group	To Central Party Organization
Germany	1968	1959
Austria	1963	1975
Sweden	1965	1965
Italy	1974	1974
France	1989	1989
Netherlands	1964	1999
UK	1975	–
Switzerland	–	–

Introduction of public financing in several European countries¹⁴

3.2. HOW TO ALLOCATE PUBLIC RESOURCES

Following the enumeration of the reasons to provide state funding to political parties, we need to observe the principles and methods of distribution. Regulation pertaining to the distribution of public funds to political parties must meet constitutional principles just like in the case of the justification of financing.

Distribution must not result in discrimination of certain political views. Objective, fair and reasonable criteria should be applied. Allocation criteria usually lie on the results of a party at previous election(s); or in campaign period, legally equal candidates or political parties that fulfil several objective criteria receive funding. Smaller, anti-system (antidemocratic) parties may be uncomfortable for political community, but this issue should be handled via dissolution of such parties; withdrawing financial support¹⁵ appears inadequate means to turn down these parties.¹⁶

Concepts of equality and respecting efficiency. The role of thresholds. Objective and fair criteria are to prevent the system from substantial discrimination. However, political equality is challenged to a certain extent by various conditions that must be met by all the parties but are uneasy thresholds for new parties. Thresholds mean that regulation expects political parties to achieve a certain basis in society; in other words, they have to show up effectively without public funding, during the first

¹⁴ Biezen 34.

¹⁵ For claiming such actions see e.g. <http://www.politico.eu/article/manfred-weber-calls-for-de-funding-of-neo-fascist-political-group-alliance-for-peace-and-freedom/>

¹⁶ It is worth mentioning that Article 5 of the *Regulation (EC) No 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding* provides that in case these supra-national parties do not respect the fundamental values of the European Union (see Art. 2 of the TEU), the financial support may be withdrawn from them. But this regulation will be replaced by a new one from 2017, which provides that the European political party, breaching the fundamental values of the Art. 2 of the TEU, shall be removed from the register of the European political parties, and following this, will lose the capacity to receive financial support [Art. 27 of the already mentioned, *Regulation No 1141/2014*].

period of their operation. Thresholds—obtaining a certain percentage of votes or obtaining seat(s) in parliament at previous elections, etc.—have also the function to concentrate public funding, because smaller parties that receive funding benefit in a larger extent from state funding than from the votes and citizens' support. Venice Commission found these conditions as necessary:

“[...] party activities have to be financed, and equally financed, in as much as they contribute to the working of democratic institutions. This means that public resources may be limited only to ‘institutional’ parties, i.e., parties which are represented in Parliament, and therefore participate in the parliamentary activity. It is also obviously possible to extend this public funding to other parties which represent a ‘significant section of the electoral body’, or which ‘reach a certain threshold of votes’. But equality does not mean that all parties are entitled to public resources regardless of their real strength in a given society.”¹⁷

Considering private incomes and autonomy of parties. Maximums of funding. We should take into consideration that political parties were born of free association of citizens, traditionally their incomes are of private nature. Overwhelming state financing could make political parties dependent on state ties and may risk losing the necessary connection to electorate or society in general. That is why several legal systems provide ceilings or maximums for public funding. The German example is quite simple and strict, with the *Parteiengesetz* (Art. 18.5) stating that the amount of public funding must not exceed the sum of a party's annual “private” incomes.

These principles shall be applicable not only to public (budget) funding of parties, but also to other types of support. Among these, we can mention the financial support to political foundations of parties and in-kind contributions like free media airtime or tax exemptions. Before we turn to the public funding of election campaigns, I draw attention to some comparative data. It is a striking difference between party-budgets of Germany and Hungary that the lack of ceiling of state subsidies allows Hungarian parties to base their financial operation mainly on public funding.

¹⁷ *Report on the Participation of Political Parties in Elections*. Adopted by the Council for Democratic Elections, Venice, 2006. CDL-AD(2006)025, 25.

<i>Country</i>	<i>% to obtain at previous elections</i>	<i>Other condition</i>
Estonia	1	
Latvia	2	
Lithuania	3	
Poland	3	or min. 1 seat in parliament
Czech Rep.	3	(remuneration from 1.5%)
Slovakia	3	
Bulgaria	1	
Hungary	1	

Central European thresholds for public financing¹⁸

<i>Party</i>	<i>Membership dues</i>	<i>Public subsidies</i>	<i>Donations</i>	<i>Assessment of office-holders</i>	<i>Other revenue</i>
CDU	40.1	44.6	21.8	17.5	16.9
SPD	47.5	42.4	12.1	22.6	31.1
Green Party	8.0	13.8	4.8	7.7	2.5
FDP	7.4	13.6	6.6	3.3	3.3
Left Party	9.7	12.1	1.9	3.9	1.0
CSU	10.2	10.4	5.9	3.0	7.5

Revenues of parties represented in the German parliament (in million €) 2011¹⁹

<i>Party</i>	<i>Membership fees</i>	<i>Donations</i>	<i>Public subsidies</i>	<i>Total revenue</i>	<i>Position</i>
Fidesz	142	56	876	1,083	On government
KDNP	7.3	14	152	174	On government
Jobbik	4.5	60	476	545	Opposition
LMP	2.85	16	174	200	Opposition
MSZP	22	106	427	774	Opposition
MLP	0.152	2.7	58	61	Opposition
DK	25.8	29.8	132	205	Opposition

Revenues of parties represented in the Hungarian parliament (in million HUF) in 2015²⁰

¹⁸ Source: OSCE Country Reports 2010–2014.

¹⁹ Source: Parliamentary paper (Bundestags-Drucksache) No. 17/12340.

²⁰ Source: Report on the financial management of political parties in 2015, published in 2016 in the official journal of Hungary (*Magyar Közlöny*).

4. Campaign Finances

When observing campaign finances a researcher steps into a field of perplexing muddle; regulated financial transactions mix up with issues that are difficult to unravel. As we noted above, elections mean the focus point for political party competition; power, existence and future of elite being at stake. Private interests find an easy way to influence potential candidates and parties, which is to be controlled in order to prevent these interests from corrupting future governing parties. Meanwhile in the case of new parties, political pluralism and innovation of party system need to be protected against cartels of traditional forces. Public funding of candidates, electioneering and campaign activity of political parties may serve various goals. In this excursion to the specific field and period of party finances, we focus on the possible (and sensitive) contribution of state in campaign financing, only mentioning and elaborating on certain other aspects of campaign finances (control, transparency); examining these principles in the light of the new Hungarian regulation and the issue of providing free airtime in public service media.

It is essential to note that funding of candidates or party campaigns shall meet basically the same principles and criteria as those of the regular political party funding described above. State funding may be financial (prior or posterior to elections) or in-kind (canvassing opportunities or media airtime); funding regulation shall not be against the equal opportunities of candidates and competing parties, and shall provide guarantees for transparency and due reporting methods. Furthermore, United Nations Human Rights Committee, in General Comment No. 25, noted that “reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. The results of genuine elections should be respected and implemented.”²¹

4.1. CAMPAIGN FINANCE REGULATION IN HUNGARY

Here we observe the regulation in Hungary in details as a case study. The regulation pertaining to campaign financing was reshaped significantly before the 2014 elections.²² Since 1990 Hungarian political parties may receive annual state funding for their regular operation in case they obtained 1% of votes at the previous elections. On obtaining mandate(s) or reaching the parliamentary threshold (5%) they are entitled for further assistance—this aspect of party financing is still in force. While

²¹ Cited by CDL-AD(2010)024 [193].

²² See the new regulation: Act LXXXVII of 2013 on the transparency of the campaign costs of the election of the members of the Parliament.

the previous rules provided only 100 Million HUF for all the candidates, the new regulation is rather generous. In campaign, each individual candidate may receive 1 Million HUF public support for their electioneering, but they must repay it if they fail to obtain 2% of votes casted in their constituency (except the candidates of political parties that receive annual funding from the state budget). The effect of the generosity can be observed on the increasing number of candidates running for the mandates; this number is significantly above the previous figures (double in several constituencies). Candidates may waive to use this support in favour of their political party. Those political parties that were able to stand national party list for the elections and have candidates in each of the single-member constituencies are entitled to receive further funding—an extra 60% of the amount that can be spent legally (the number of obtainable mandates multiplied by 5 Million HUF).

Candidates and political parties by their candidates may spend 5 Million HUF on their own campaign activities. It is necessary to note that the campaign spending of different organizations (“independent” or “civil” associations, legal persons) and the government is not regulated, so there is no rule to forbid or at least to limit (or calculated together with the candidates’ costs they are campaigning for) these kind of campaign costs. The rule pertaining to political advertisement in media services incorporated in the Fundamental Law aimed to make campaigns cheaper.²³

Article IX (3) In the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements may only be published in media services free of charge, under conditions guaranteeing equal opportunities, laid down in a cardinal Act.

The effect of this provision resulted in an economic rationality, private media service providers did not broadcast any political ads, TV and radio campaigning was reduced to public service media in 2014.

Still lacking substantial control on campaign spending, Hungarian NGO watchdogs calculated the finances of major political parties in 2014.²⁴ If spending of government and “third party”²⁵ civil organisations has been taken into consideration too, it is a manifest result that political parties—especially the governing ones—exceed the spending ceiling. This obviously denies the expectation that justified the

²³ Transparency International supported this effort, see: http://transparency.hu/PART_ES_KAMPANYFINANSIROZAS

²⁴ See: <http://kepmutatas.hu/>

²⁵ “[...] money might [...] be channelled through party-related foundations, which are usually not subject to the same restrictions as political parties with regard to the size and origin of donations. They are therefore convenient instruments for ‘legalizing’ money obtained from publicly owned enterprises, foreign donors or large corporate sponsors.” See: Falguera, Elin – Jones, Samuel – Ohman, Magnus (eds.): *Funding of Political Parties and Election Campaigns. A Handbook on Political Finance*. International Institute for Democracy and Electoral Assistance (IDEA), Stockholm, 2014. p. 190.

increased amount of campaign support: political parties will not respect spending ceilings in case they have more comfortable public financial benefits.

The new Hungarian regulation on campaign financing raised two further issues as matters of principle. First, it provided generous support for the candidates. It could be welcomed in terms of enhancing equal chances; but in practice, it produced an increased number of candidates having no chance to get the mandate. Thus, as the opposition criticized the regulation, the funding resulted a pluralism that frittered the possible votes for the oppositional candidates. On the other hand, political ads disappeared from the most popular media services,²⁶ from the eyes of 90% of the voters, for economic reasons.

The argumentation of the Hungarian ombudsman in 2013 is worth mentioning here. He requested the Constitutional Court to declare the campaign financing regulation unconstitutional. Regarding the small amount of public support (only 100 Million HUF to be distributed among all the candidates) he stated that this tiny support forces candidates and political parties to violate laws, as it is simply impossible to carry out a decent campaign from this money. On the other hand, the small amount means that parties already in parliament are in a significantly better financial position compared to small and new parties. (The Court did not deliver a judgment on the merits because the regulation changed right in that time.)²⁷ But the merit of this constitutional argumentation is that there *shall* be financial support from the state for candidates. It is not only *acceptable* or justifiable that state provides financial funding to parties and candidates, but we can also *require* the state to do so. In order to meet the constitutional requirements stemming from the principle of equality (and pluralism and informed electorate and so on), does public budget have to spend on funding of parties and candidates? Is there a constitutional minimum for party funding? We could say that this shift would be a new stage in public financing of political parties. So far, constitutional law did not ignore the fact that parties are created by citizens on the basis of freedom of association. The compulsory funding of parties would mean that parties become more than political organizations competing for public power, but the somewhat clear distinction between state and parties would fade away; new political organizations were destined to obtain public financing. That is why campaign funding prior to elections is usually matched with posterior accounting, and in case the financed candidate does not meet any threshold of efficiency, public money shall be paid back. For smaller ones, this is almost as cruel as receiving nothing.²⁸

²⁶ Campaign could be followed in news programs though.

²⁷ See: Res. 3213/2014 of CC.

²⁸ With broad margins, the Venice Commission argues: “[p]ublic funding, by providing increased resources to political parties, can increase political pluralism. As such, it is reasonable for legislation to require a party to be representative of a minimum level of the electorate prior to receipt of funding. However, as the denial of public funding can lead to a decrease in pluralism and political alternatives,

4.2. PROVIDING FREE AIRTIME IN CAMPAIGN PERIODS AS MEANS OF PARTY FUNDING

As “contemporary societies are mainly ‘information’ societies: elections are fought in a very particular context, so that access to mass media is possibly the best instrument for parties to transmit their message to electors”.²⁹ Venice Commission also found that “[w]hile the allocation of free airtime on state-owned media is not legally mandated through international law, it is strongly recommended that such a provision be included in relevant legislation as a critical means of ensuring an informed electorate”.³⁰ Providing the service free of charge (which is a form of campaign financing) might promote the media appearance of small or new parties and the channelling of their opinions into the democratic discourse. Anyway, democratic processes are harmed by the outcome of the elections being basically determined by the amount of capital used to finance campaign activities. Regulations on election campaigns and the media generally provide for airtime or transmission time free of charge on public service (state) channels.³¹

In general, Venice Commission underlined the special status of the public service media: “[w]hile all media are expected to offer responsible and fair coverage, it is particularly incumbent upon state/public media to uphold more rigorous standards since they belong to all citizens”.³² The division and allocation of the limited airtime/transmission time should be made in a fair and non-discriminative manner based on transparent and objective criteria. Distribution must not result in discrimination

it is an accepted good practice to enact clear guidelines for how new parties may become eligible for funding and to extend public funding beyond parties represented in parliament. A generous system for the determination of eligibility should be considered to ensure that voters are given the political alternatives necessary for a real choice”. [CDL-AD(2010)024, 190]

²⁹ CDL-AD(2006)025, 34.

³⁰ *Guidelines on political party regulation*. By OSCE/ODIHR and Venice Commission, Venice, 2010. CDL-AD(2010)024, 147.

³¹ In a Central European perspective see: Latvia (Act on Campaigns, Articles 3–5), Lithuania (Act on Elections, Article 51), Poland (Election Code, Article 117), the Czech Republic (Act of Elections, Article 16 [4]), Romania (Elections Act, Article 38 [1]), Slovenia (Act on State Radio and Television, Article 12 [1]).

³² CDL-AD(2009)031, 22.

of certain political views.³³ In practice, equality refers both to the amount of time given and the timing and nature of such airtime allocations.³⁴

In this framework in Hungary the regulation of political advertising has taken several different ways recently due to amendments to the Fundamental Law adopted in 2013 and the new Act on Electoral Procedures implementing them (Fundamental Law IX (3), Electoral Procedures Act, Article 147). First, the constitutional provision stipulated that political advertising can only be published free of charge and the advertisements of organisations establishing a national list were to appear only in public service broadcasting. Later, the Parliament abolished this limitation with respect to public service media. The Hungarian Constitutional Court, as well as the Venice Commission, criticised the prohibition contained in the first version because depriving larger parties of the opportunity to buy advertising time in commercial channels results in diminishing the opportunities for the opposition in an environment where the government naturally has more chances to appear in the news. The Hungarian Constitutional Court concluded that the ban on commercial media in reaching the largest number of viewers is an unconstitutional (unfounded, unjustified) limitation of the freedom of voters to obtain information, as well as the freedom of political opinion during elections.³⁵

The rules of electoral procedure corresponding to the new solution were adopted only at the end of 2013 by the Parliament. The Fundamental Law Art IX (3), as we saw above, states that political advertisements may only be published in media services free of charge. The new Articles 147 and 147/A–147/F of the Electoral Procedure Act contain provisions on the obligations of the public and private media to broadcast political advertisements. These obligations include the obligation of commercial media service providers and press products to announce their advertising

³³ Anti-system, antidemocratic or other extreme, unconstitutional parties may be uncomfortable for political community, but this issue should be handled by different methods. Where applicable, the loss of a registration can be a sanction against these parties, followed by as a consequence the loss of the capacity to obtain public funding. CDL-AD(2010)024, 224. It is worth mentioning that Article 5 of the *Regulation (EC) No. 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding* provides that in case these supra-national parties do not respect the fundamental values of the European Union (see Art. 2 of the TEU), the financial support may be withdrawn from them. But this regulation will be replaced by a new one from 2017, which provides that a European political party breaching the fundamental values of the Art. 2 of the TEU shall be removed from the register of the European political parties, and as a result, will lose the capacity to receive financial support [Art. 27 of the *Regulation No. 1141/2014*].

³⁴ CDL-AD(2010)024, 181.

³⁵ Constitutional Court Decision No. 1/2013. (I.7.), 93–100: it annulled Article 151 of the new Act on the Electoral Procedure and the rule included in the Fundamental Law was adopted in response to this decision. The Venice Commission commented on the latter (CDL-AD(2013)012, 37-47.), saying that the European examples cited by the government do not constitute appropriate justification for the ban.

intentions and price lists by a deadline, otherwise they are not allowed to publish campaign advertising. Public service channels are to provide 600 minutes of airtime free of charge, which is divided by the National Elections Committee. A practical criticism of this solution is that although publishing campaign materials by commercial service providers is not prohibited, the offer of advertising airtime free of charge is likely to be limited for economic reasons.

5. Between wolves—principles and expectations

Constitutional principles guiding party funding regulations can be grouped into “better democracy” and “limiting the power of capital” or “preventing corruption”. These are usually expectations of public law—but as political parties live on the borders of power and regulation, implementation of legal requirements goes beyond jurisprudence. Not only dark side of capital and corruption explain this, but also the almost natural lack of confidential data on party finances.

<i>Better Democracy</i>	<i>Limiting the Power of Capital</i>
Equal Chances	(Spending and Funding) Limitations
Pluralism	Transparency
Informed electorate, Freedom of Expression	Accountability

Principles of party financing

Money can contribute to the well-functioning of democratic processes, but it can also distort representation, competition and legitimation too.³⁶ Regulating the influence of financial and in-kind contributions to political parties shall be in line with constitutional values and principles that have been changing in the last century. This progress is due to the facts that 1) politics need money, 2) parties and politicians are innovative enough to invent new channels for funding power and (their own) welfare. The political nature of thresholds, free speech and limitations, as well as the technical nature of accountability, transparency and supervising regulation meet the fundamental question of limited power, in terms of party-cartels too. Well-functioning party finance rules can be implemented in an environment where parties agree on the rules of the game, but this agreement may be achieved in order to create cartels: those already in representative bodies are protected by the thresholds that are in front of the new ones to enter the market. Referring to the patterns of a

³⁶ Rowbottom, Jacob: *Democracy Distorted: Wealth, Influence and Democratic Politics*. Cambridge University Press, 2010.

cartel-party-system³⁷ and to the Hungarian situation, it is at least a subject for explanation that the public funding in the budgets of the Hungarian political parties in the Parliament regularly exceeds 80%, and the party financing regulation has never been a central issue of political debates in legislation since 1990.

Parties as intermediaries between state and citizens when misusing financial resources basically misuse their power and distort representation in democratic polity. Critical approaches to their positions and “sins” often find the solution in looking for other alternatives of representative democracy. We limited our study to the constitutional issues of party finances, so shortly, let us be rather sceptic at this point: grass-root movements, direct-democratic or e-democratic institutional projects may change these democratic processes, but they only change the channels of money towards power and will not evidently prevent democracy from that evil.

³⁷ See for the basic introduction to the concept of cartel-parties: Katz, R. – Mair, P.: Changing models of party organization: The emergence of the cartel party. *Party Politics*, (1995) No. 1.

International Conflicts and the Export of Democracy

1. Introduction

Thesis: During the legal resolution of international conflicts, democratic theories different in time, space and culture clash with each other.

Method: Comparing democratic theories different in time, space and culture in the mirror of *ius post bellum*.

Aim: Researching the exportability of different democratic theories.

2. Democratic Theories and Democratization

A research of democracy and democratization can be started after the examination of the theory of democracy. Defining democracy or just finding the conditions of democracy is not an easy task. The first problem of the definition is selecting the appropriate method: how the necessary and sufficient elements of the democracy-concept can be chosen? According to Michael Saward, although at first glance induction seems to be the most obvious method, when we choose the generally accepted democratic states, and try to find their common characteristics, it is illogical to define democracy from a singular political unit (definitional fallacy). Etymological approach—"rule by the people"—cannot be accepted unambiguously because it has several historical explanations. The historical approach of democracy leads us to the categories of "popular control" and "political equality".¹ Saward's conclusion is that defining democracy is a political act.²

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¹ Saward, Michael: *Democraic Theory and Indices of Democratization*. In: Beetham David (ed.): *Defining and Measuring Democracy*. Sage Modern Politics, Vol. 36. Sage, London. p. 6. URL <http://oro.open.ac.uk/16187> (24 April 2016)

² *Op.cit.* p.7.

Franz Oppenheimer tries to solve the question with the antonym of democracy. In his opinion, the antonym of democracy is oligocracy, which means that a minority rules over the rest. The authority of the minority can be focused in a small group or one single person (monocracy). The legal form of the authority has secondary importance from this point of view.³

If every human being is equal, it means that human beings must equally share a special political respect. It means that all human beings have to have an equal capacity for self-determination, or to make life-plans.⁴

The critics of democracy argue that in reality, people are not manifestly equal: they have different capacities for self-determination and they differ in many other ways like taste, preferences, outlooks, beliefs, etc.⁵

A person or a minority group can be the leader of a political group without being democratically elected but based upon other foundations like age, sex, class, race, religion, military strength or knowledge. The main criterion is that one person or group having specified characteristics knows the proper political course for a community better than other people or groups.⁶

From the perspective of international conflict resolution, I would invoke a presentation by Larry Diamond, a professor of Stanford University, which was held on the 21st of January 2004 at the Hillah University (currently: University of Babylon) in Iraq. Diamond defined democracy by listing its main characteristics as follows:

1. A political system for choosing and replacing the government through free and fair elections.
2. The active participation of the people, as citizens, in politics and civic life.
3. Protection of the human rights of all citizens.
4. A rule of law, in which the laws and procedures apply equally to all citizens.⁷

During the process of legal resolution of international conflicts, this is the democracy that the people who belong to “Western civilization”—a category used in the meaning of Samuel P. Huntington—try to transmit, or export.⁸

At this point another problem was reached: even if we have good will, can we declare that we are infallible?

³ Oppenheimer, Franz: *A demokrácia* [Democracy]. Politzer Zsigmond és Fia Kiadó, Budapest, 1914. p. 5.

⁴ Seward *op.cit.* p. 8.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Diamond, Larry: *What is Democracy?* Presentation at the Hilla University, 21 January 2004.

URL <http://web.stanford.edu/~ldiamond/iraq/WhatsDemocracy012004.htm> (16 May 2016)

⁸ Huntington, Samuel P.: *The Clash of Civilizations and Remarking of the World Order*. Simon&Schuster, New York, 1996.

3. Fallibilism

The knowledge of fallibility is an important part of the discussion of democracy. It does not mean that we can never know the truth, but rather that we are never justified in behaving as if we know it. We always have to know that we might be wrong. Fallibilism is the acceptance of the fact that our knowledge is never absolute, but it always exists in a continuum of uncertainty.⁹

Fallibilism is a bridge between the superior knowledge and the contingent knowledge: most of our so called superior knowledge is a contingent knowledge at the same time, because generally it has a connection to a special, technical reality. Saward brings the example of a garage mechanic: it is obvious that a garage mechanic knows how to fix a car better than an average person. This is a superior knowledge and a contingent knowledge at the same time.¹⁰

It is coherent with the ideas of Plato, who says that dealing with political issues is not different from any other special knowledge or competence. The political reality is the reality of the contingent knowledge: those who hold the relevant abilities and skills will always be better than those, who do not.¹¹

4. Ius Post Bellum

The idea of *ius post bellum*—the legal transition and resolution of international conflicts and wars—gained importance and became explainable after World War II. Before 1945, the Postwar Law was exclusively the plenipotentiary and discretionary law of the winner party. (Some legal experts and historians think that this, and the lack of changing paradigms were the main reasons for the World War II, shortly after World War I ended.)¹²

Hugo Grotius (1625) in *De iure belli ac pacis* distinguished the main characteristics between the law of war situations and law of peace.¹³

The international conflicts of the 20th and 21st centuries demonstrated that the end of military operations is followed by an unstable, chaotic interval, and legal resolution comes after the end of this period. International law has not found answers for the problems of democratization process during this period. Right after armed forces stops the strategic and most of the tactic operations, questions of the extraterritoriality of human rights, responsibility of occupying forces, and role of

⁹ Saward *op.cit.* p. 9.

¹⁰ *Ibid.*

¹¹ Plato: *The Republic*.

¹² Tóth Benedek: A jog és a gazdaság megváltozó viszonyrendszere [Changing Relation between Law and Economy]. *Európai Jog*, (2013) No. 5, pp. 7–8.

¹³ URL http://www.constitution.org/gro/djbp_101.htm (18 May 2016)

international organizations, justice and reconciliation, establishing and operating democratic governmental system are exist under the umbrella of the normative category of *ius post bellum*.¹⁴

In short, *ius post bellum* is a self-delimitation of the winner in favour of long-term benefits: the minor “concessions” stabilize the situation at a level, where for the defeated it is not worth starting a new conflict.

5. The end of an international conflict

From the perspective of *ius post bellum*, the focus is on the first general legal acts and laws after the official end of military confrontations and strategic operations. I use the term “official end of military confrontations and strategic operations” on purpose. During an armed conflict when military operations are going on, we cannot talk about any kind of legal resolution. However, there is a well distinguishable period in international armed conflicts when major, strategic military operations are not expectable any more, but local, sporadic fights among groups with small arms, or attacks with improvised explosive devices (IED) are not rare at all. At this point, we can start to think about legal resolutions of the conflict, because strong internal security force, national guard or national military force can stop or minimize these sporadic events.

In Bosnia-Herzegovina after 1995 or in Iraq after 2004 numerous internal armed conflicts occurred among different entities or religious groups, but it was obvious that a strong pretension and possibility to live a normal life and stop aggression emerged among the population. The laws passed after this period—like the Iraqi constitution from 2005—were the results of the legal resolution of international conflicts, but these are beyond my research area because they belong to the sphere of comparative constitutional studies.

6. The export of democracy

The main question is how the system can be transformed from authority to democracy after the end of the armed part of the conflict. How can we avoid that the winner party represents exclusively its own interests, which would be a transition from one extreme to the other: How can we avoid that the victorious powers install a puppet government? Or how can we avoid that the previous regime gains power again?

¹⁴ Stahn, Carten – Kleffner, Jann K.: *Jus Post Bellum – Towards a Law of Transition from War to Peace*. TMC Asser Press, The Hague, 2008. p. V.

In the international conflicts after World War II, democracy, the export of democracy and the initiation of democracy became key elements in the resolution process. Before the conflict the “defence of democratic values”, after the conflict the “democratic settlement” became battle-cries in the media and in the rhetoric of—generally western oriented—countries involved in the conflict to support social acceptance of the intervention.

Why is social acceptance important in the Western culture? Democracy is the central element of western civilization. Because of the dominance of democracy-idea and the relative welfare of these states, pure economic advantages are not strong enough to build a stable social background for the political authority which decides on intervention. Without stable social background not only the success of the military intervention but the position of the political power comes under question: in western type democracy the government comes to power by the vote of the constituents.

Profane? During an armed conflict, the political authority invests the constituent and its relatives as human resources, and a significant part of the taxes of the citizens as material resources to gain economic advantages. In our prudish western civilization—and by the way, in the eastern also—justification of an intervention by economic interests is not acceptable. We cannot declare that human rights are more important in Iraq than in North-Korea just because there are a lot of oil in Iraq, while in North-Korea there is not even a drop; Iraq has no nuclear weapon, so it is a softer target than North-Korea.

In the western civilization the keywords are “democracy”, “human rights”, among them, “equality” is of high priority, or “freedom”, “torture and humiliating and degrading treatment”, “weapons of mass destruction”, “not peaceful use of nuclear energy”, “terrorism”, “financing terrorism”. These are the ideas we have to fight for or against (i.e.: “fight against terrorism”, “war on terrorism”).

In the eastern civilization, especially in the Muslim world these keywords are “sharia”, “Quran”, “Allah”, the “true religion”.

If a state intervenes into a conflict just because we want cheaper oil, it is not “appropriate” according to our own standards. It seems that we are acquisitive, and if we suffer losses in our human resources, it is more condemnable. On the other hand, if we want to “liberate people”, we are already on the moral side, we fight for a majestic, sacred goal, and our losses are heroes (... and by the way, we can fuel up cheaper for a good Sunday shopping with the kids). It means that we want to export our own views, our own democracy into other countries in the hope of economic advantages.

7. Culture and economy

In reality, international conflicts are based on economic and cultural causes. The cause of World War I was the appearance of new international economic and political actors (Germany, Italy, USA and Japan) who wanted their own share of colonial raw materials and markets.¹⁵

The conflicts of the second half of the 20th and the first decades of the 21st centuries occurred exactly there, where Huntington (1993) draw the borderlines and buffer-zones of different civilizations. From this point of view the Balkan Wars were not the mere fight for regional dominancy among Croats, Serbs and Bosnians, but a clash of western catholic, Slavic orthodox and Islamic civilizations.¹⁶ Cultural clashes interweaves with economic interests: in case of Yugoslavia, whether the pro-Russian Serbs, the pro-western Croats and the pro-Islamic Bosnians should dominate the region? According to the categories of Huntington (1996),¹⁷ the Balkan Wars were clashes among the Western, Orthodox and Islamic civilizations like nowadays for example the Syrian conflict. In Syria, the Orthodox civilization supports Assad; western civilization supports the “moderate opposition”, while radical Islam supports ISIS.

8. Oil and democracy

At the beginning of the 21st century, the interests of the USA dictates lower oil prices to support the industry and industrial investments. On the other hand, two third of the budget of the Russian Federation still based on the price of oil and the oil exploitation in Russia much more expensive than in the Arab World. (It is a result of a few coefficients, but the main factor is climate condition: Russian oil is exploited from frozen earth, the technology is behind the times, and exploitation cannot give a flexible response to the demands of world market. If, however, the demand declines, exploitation cannot be stopped, because restart would cause huge extra expenses.)

The ideological base of the war on Iraq in 2003 was the—unexisting—threat by Iraqi weapons of mass destruction and the—also unexisting—contact with Al-Qaeda. When it turned out that these motives were false, the Bush administration

¹⁵ Tóth *Ibid.*

¹⁶ Huntington, Samuel P.: *The Clash of Civilizations? Foreign Affairs*, Vol. 72 (1993) No. 3, pp. 22–49.

¹⁷ Huntington, Samuel P.: *The Clash of Civilizations and Remarking of the World Order*. Simon&Schuster, New York, 1996.

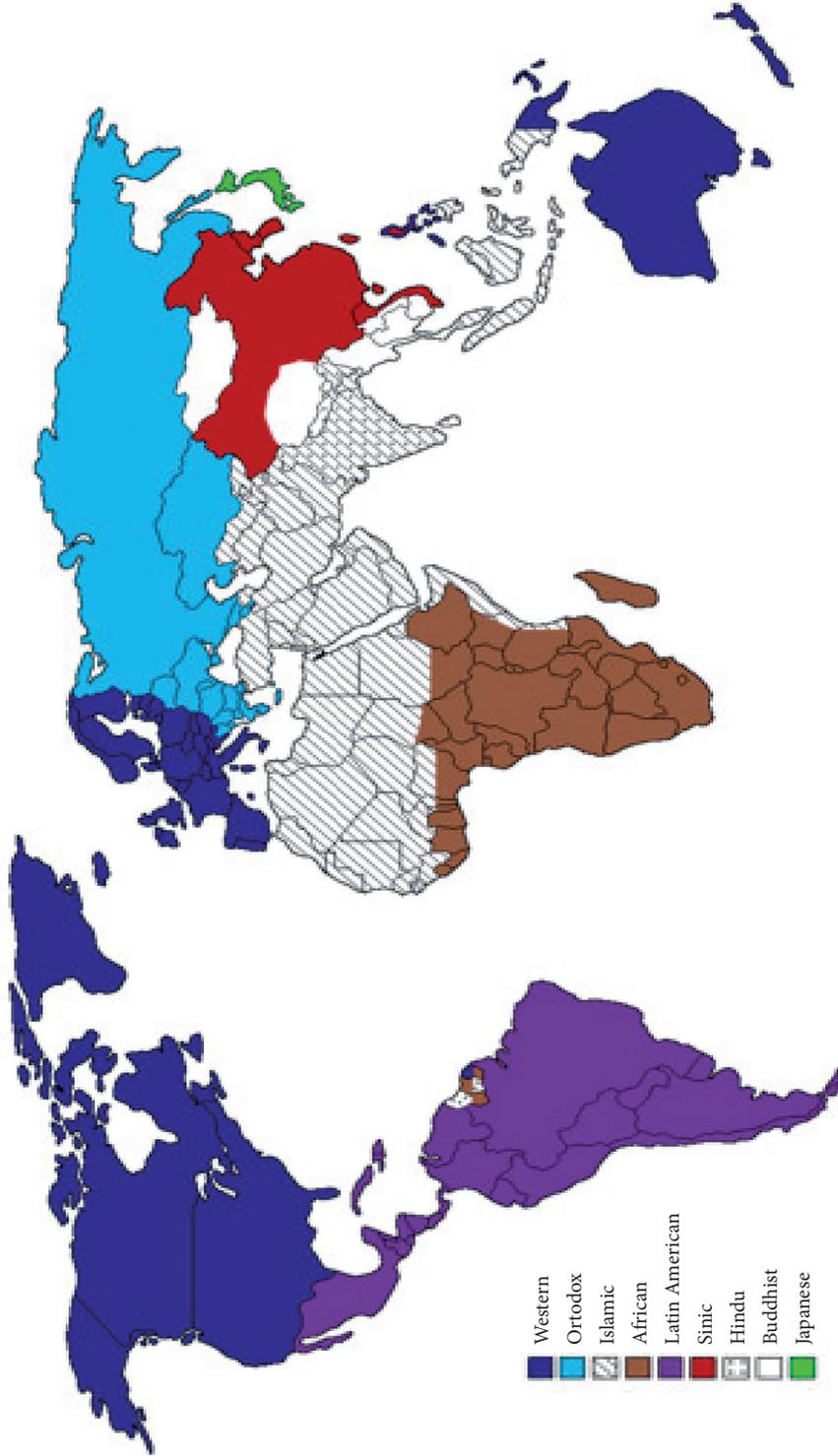


Diagram 1 The World of Civilizations: post 1990 scanned image Archived March 12, 2007, at the Wayback Machine. Source: Huntington, Samuel P.: *The Clash of Civilizations and Remaking of the World Order*. New York, Simon&Schuster, 1996.

started to communicate that ‘establishment of Iraqi democracy’ would have been the main goal of intervention from the first days of the war.

In November 2003 Bush vocalized that a failure of the Iraqi democracy would strengthen the terrorists of the world and extend the hazard on American citizens, and ruin the dream of millions in the region. As Bush said, a free and democratic Iraq in the centre of the Middle East could cause a ‘domino effect’ of democratic revolutions in the region.^{18*} As a matter of fact the main motive of the Iraqi war was the control of the oil price on the world market. According to Ishakan (2012) the Bush-doctrine was written in colonial style, where “civilized forces” try to liberate the barbarian non-western world from eastern despotism.¹⁹

During the time of “Arab Spring” the main motive was also the same: the price of oil and the orientation of Islamic governments (whether they support western or orthodox civilization). At the first glance, in Syria the case is about the “tyrannical” Assad supporters, the “moderate opposition” and the ISIS. In reality, Assad supports the orthodox civilization: the Russian fleet has an access to the Mediterranean Sea, because they can rent the port of Tartus. People from the “moderate opposition” belong to those who oppose this orthodox orientation and prefer western ties. The goals of Turkey are special: they want to re-establish the influence of the Ottoman Empire at least at an economic level, and at the same time, they want a radical solution to the “Kurd-problem”.

8.1. CASE STUDY—SYRIA

In 1971, Hafez Assad the former president of Syria signed a treaty with the Soviet Union about the establishment of a Soviet Navy base in Tartus (Syria),²⁰ which meant that Moscow gained an exit to the Mediterranean Sea. After the collapse of the Soviet Union, the navy of the Russian Federation as a successor continued to use the port. In 2000, Hafez Assad died and his son, Bashar Assad was elected to president. Bashar Assad loosened the dictatorial status, and the foreign assessment of Syria became better and better. In 2007, Israel attacked the Al Kibar nuclear object in Syria. According to Israel, Syria developed and tested nuclear weapons in Al Kibar. Syria denies the information and declared that the tests focused exclusively

¹⁸ Barbash, Fred: Iraq Part of ‘Global Democratic Revolution’. *The Washington Post*, 6 June 2003.; Ishakan, Benjamin: *Democracy in Iraq: History, Politics, Discourse*. Ashgate, London, 2012. p. 119. Personal note: In my mind “global democratic revolution” rimes a bit with “global communist revolution” or the slogan “Proletars of the world, unite!”

¹⁹ Ishakan, Benjamin: *Democracy in Iraq: History, Politics, Discourse*. Ashgate, London, 2012. p. 120.

²⁰ Сотрудничество Сирии и СССР в военно-морской области [Naval cooperation between Syria and the Soviet Union]. URL <http://alerozin.narod.ru/SyriaTartus.htm>

on peaceful use of nuclear energy. It is a fact that Syria refused to give permission to the International Atomic Energy Agency (IAEA) for local examination. In 2008, Syria—with the help of Turkey –started negotiations with Israel. In 2011, Syrian opposition impressed by the events in Egypt and the ‘Arab Spring’ organized demonstrations, which led the country into a civil war in 2013. The Syrian governmental forces, the Syrian opposition and the ISIS were involved in the fights. Assad, as the elected president of Syria asked for foreign military aid from Russia to stop violence.

Summary: According to the orthodox civilization Assad is the legitimate, elected president of Syria; according to the western civilization Assad is a dictator, like Milosevic was. Russia supports Assad (because of Tartus), the USA supports the “moderate opposition” (because of Tartus); the ISIS has its own goals. According to Russia, there is not any kind of “moderate opposition”, only Syrian governmental forces and terrorists (“whoever is not with me, it is against me” Matthew 12:30). According to the USA, Assad is a dictator; the moderate opposition wants to get rid of him, so the USA supports the moderate opposition and there are the terrorists of ISIS as a third party, who had to be defeated.

9. Democracy—but what kind of...?

At the beginning of a longer essay on democracy the first sentence should include the term ‘ancient Greece’. However, most definitions of democracy belong to a liberal or a civil republican scheme. Ishakan & Slaughter (2014) claim that liberal democracy is a minimalist and elitist model: the role of people is limited in electing their representatives. The civil republican democracy is a more inclusive and participative way of governance, where people involved directly in decision making.²¹ To emerge a democracy it is an essential but not sufficient assumption to have an entity on a territorially unit, with borders and a group of people defined as nation.²² Saward (1994) tries to examine some of the democracy definitions in his work.²³ In our case democracy means exclusively the western type of democracy—which is not homogenous either as we will see in the case of death penalty— an exportable social and cultural model which is acceptable and comfortable for western people. The Bush-doctrine of 2003 also made remarks on democracy. In Ishakan’s (2012) opinion the doctrine declares that the United State of America—in a broader sense

²¹ Ishakan, Benjamin – Slaughter, S.: Crisis and Democracy in the Twenty-First Century. In: Ishakan, B. – Slaughter, S (eds.): *Democracy and Crisis: Democratizing Governance in the Twenty-First Century*. Palgrave Macmillan, London, 2014. p. 4.

²² Saward *op. cit.* pp. 402–403. Cites: Ishakan–Slaughter *op. cit.* p. 4.

²³ Saward, Michael: Democratic Theory and Indices of Democratization. In: Beetham, David (ed.): *Defining and Measuring Democracy*. Sage Modern Politics, Vol. 36. Sage, London. pp. 6–24.

the western world—is the only legitimate successor of democracy, and it has the right to democratize non-western world even with military force or occupation.²⁴

The term of “democratization” has an interesting atmosphere. “Self-democratization” is an explainable term, because it refers to a voluntary decision of a group of people, while “democratization” is a process which is forced from outside. “Democratization” and the “right of democratization” presuppose an outer power, and it is a pre-condemned antagonism with self-determination and autonomy. It is a special paradox, but we can declare that those who are democrats do not have the right to democratize others.

9.1. CASE STUDY—IRAQ

According to Ishakan (2012), the opinions which refer to traditional barriers in the process of Iraqi democratization are mere orientalist ideologies.²⁵ Ishakan argues with the opinion of Rory Stewart, the vice-coordinator of Maysan Province in 2003–2004, who declared that in Iraq there is a lack of democratic potential.²⁶ Andrea Wimmer (2003), Daniel Byman (2003), Jamal Benomar (2004), Henry Kissinger and George Shultz (2005) shared Stewart opinion against Ishakan’s. According to Kissinger and Shultz “Iraq is a society riven by centuries of religious and ethnic conflicts; it has little or no experience with representative institutions”.²⁷

Ishakan argues that the demonstrations and the different media organs let the Iraqi people to vocalize their opinion in a fairly peaceful way which can be assumed as a first step of building democracy.²⁸ The author of this essay worked in Baghdad between February and August 2004. My personal opinion and experience was that the idea of democracy and the idea of Montesquieu about separation of cannot be explained to locals and it caused frustration and uncertainty.

9.2. CASE STUDY—UZBEKISTAN

The Hungarian R. Pharmacy Company wanted to expand in the post-soviet region. They used the Western-European model: they looked for a local firm with similar

²⁴ Ishakan *op. cit.* p. 120.

²⁵ Ishakan, Benjamin: *Democracy in Iraq: History, Politics, Discourse*. Ashgate, London, 2012. p. 121.

²⁶ Stewart, Rory: *Occupational Hazards: My Time Governing in Iraq*. Picador, Surrey, 2007. Cites: Ishakan *op. cit.* p. 121.

²⁷ Kissinger, Henry A. – Shultz, George P.: Results, Not Timetables, Matter in Iraq. *The Washington Post*, 25 January 2005. URL <http://www.washingtonpost.com/wp-dyn/articles/A33959-2005Jan24.html> (19 May 2016). Cites: Ishakan *op. cit.* p. 121.

²⁸ Ishakan *op. cit.* p. 143.

profile; signed a contract and started production and distribution. The firm became profitable. When they reached USD 8.5 million profit in local currency, they wanted to invest it in another country. But the Uzbek currency, (*som*) is not convertible, so they needed government decision to exchange it into USD. The Uzbek authorities did not give permit to convert *som* to USD. The Uzbek foreign trade minister, G. declared that R. Pharmacy Company did not choose the appropriate business model for expansion when they looked for a partner on their own. First they should have informed the Uzbek government about their plans, then the Uzbek authorities would have offered them an appropriate partner. In his answer Gy. Hungarian ambassador pointed out that one of the key elements of democratic values is the freedom of economy and as a part of it, the freedom of choosing business partners.

G. minister declared that in their opinion, offering a partner did not mean the limitation of economic freedom, quite the opposite: it is an extra guarantee for the foreign company, because the Uzbek authority offers a creditable partner. He added that Uzbekistan is a democratic country, but it has a special, Asian and Islamic-type democracy.

9.3. CASE STUDY—RUSSIAN FEDERATION

According to a 2014 Russian survey, 71% of the respondents think that public order must be kept even if it results that the basic principles of democracy are violated. 45% of the Russians think that public order is equal with political and economic stability; 47% think that democracy is equal with the freedom of thought, religion and media. 96% of the population of the Russian Federation thinks that it is legally correct that the Crimean Peninsula belongs to the Russian Federation.²⁹

9.4. CASE STUDY—USA, PEOPLE'S REPUBLIC OF CHINA, DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA

Who kills is a killer. According to the Amnesty International,³⁰ death penalty is a denial of human rights. It does not deter crime. It is irreversible, and—I refer to the chapter of fallibilism—mistakes happen. So the question can be raised: is a country democratic where death penalty exists? In 1764, Cesare Beccaria wrote *Dei delitti e delle pene* and he argued against death penalty as a useless, ineffective

²⁹ ВЦИОМ (2 May 2014). URL <http://universe-tss.su/main/politika/6194-vciom-rossiyane-ceny-at-poryadok-vyshe-chem-demokratiyu.html> and <http://www.rbc.ru/politics/03/04/2014/915512.shtml> (19 May 2016)

³⁰ URL <https://www.amnesty.org/en/what-we-do/death-penalty/>.

and inhuman act. Abolition is widely accepted in the world: in 102 states it is not a question anymore.³¹ In European democracy death penalty is unacceptable. In the western civilization only one country, the United States of America execute people (the fact is that 18 states of the USA has already abolished death penalty). Probably the democracy in the United States of America is too young and has not developed enough to reach the level of European democracy. Probably it is a cultural difference, but the sad and shameful fact is that in western civilization, in western democracy death penalty still exist. And can we say that China, or the Democratic People's Republic of Korea is democratic? Maybe, according to their standards, it is democratic but it can hardly be reconciled with western standards.

10. Summary

The problem of exporting democracy can be examined from two different points of views:

- 1.) Democracy version 1.0: We fully accept the theory of democracy, including the freedom of self-determination (i.e.: the right of people to self-determination). It means that democracy cannot be forced, people has to decide whether they want it or not, and if they want to live in democracy, they have to decide the contents of it. Society has to grow up for political and economic reforms alike. Historical experiments show that top-down attempts to change paradigms without social demand and base are seldom successful. (The reforms of Kemal Atatürk in Turkey are among the few exemptions, but the Iraqi, Bosnian, and Russian reform attempts—Peter I, Catharina II, or the current Russian attempts of import substitution—were absolute failures.) First and last, democracy can develop and evolve, but we cannot clone it.
- 2.) Democracy version 2.0: The other possible tracks, if we declare that we call “democracy” a social and political model that we—the representatives of the western civilization—think are acceptable and comfortable for us. Other values may jeopardize the existence of our own democratic values in the long run (the pinch of living-space and niche, where the democratic values are accepted). In this case, as prevention, it can be reasonable to spread the democratic values as a crusade to prevent other, more “combative” civilizations and values from sweeping away our values. Although, it is questionable whether we can still call this model democracy. Or is it just a special way of democracy? A western type democracy?

³¹ *Ibid.*

The legal resolution of an international conflict is a political evolution from military occupation towards political legitimacy.

The legal anthropology, the history of law, cultural history of law and comparative legal studies has priority importance in *ius post bellum*.

Democracy is a widely accepted term for a variable reality, which has its own evolution and its evolutionary path depending on space, time and culture. Democracy can be a philosophical or political term but is not a legal category. Determining a non-legal category with legal terms would hardly give us positive or useful results.

Hassin & Ishakan (2016) declared that the neo-liberal state building model in Iraq—at least in most of its details—were a complete failure.³² During the reconstruction, the minimalist and short term approach of neo-liberal state building model focuses on the governmental organizations and free trade. It tries to establish and strengthen military, police, legislation, central bank, taxation, healthcare and education.³³ Top-down paradigm means that rule of law, strengthening economy, (re)establishment of key governmental organizations have the most important role and this is the main assurance to avoid dictatorship and break humanitarian laws. This is the paradigm which was adopted in most of the international conflicts after World War II. (Especially in those where foreign authorities wanted to minimize their post-conflict commitments with the help of a preferable local government supported by foreign military force.)³⁴

According to the critics of neo-liberal state building model, this paradigm is not effective and it divides the society socially, ethnically, politically and ideologically.³⁵

If we want to reach an acceptable compromise, we have to study the legal anthropological conditions, legal historical development, legal cultural history of the states involved in the conflict, which means that in most cases we have to deal with religious, religious historical and religious legal problems as well. From an exclusively western point of view, we cannot decide what is important and what is not so important for the local people involved in the conflict. The science of comparative law has a key role in the process of conflict resolution in a legal way, because it can make comparison among the pre-conflict, the current and the required legal outcomes.

³² Hassin, Ahmed – Ishakan, Benjamin: The Failure of Neo-Liberal State Building in Iraq: Assessing Australia's Post-Conflict Reconstruction and Development Initiatives. *Australian Journal of Politics and History*, Vol. 62 (2016) No. 1, pp. 87–99.

³³ Fukuyama, Francis: *State Building: Governance and World Order in the 21st Century*. London, 2004. p. 159. Cite: Hassin–Ishakan *op. cit.* p. 89.

³⁴ Berger, Mark T.: From Nation Building to State Building: The Geopolitics of Development, the Nation-State System and the Changing Global Order. *Third World Quarterly*, Vol. 27 (2006) No. 1, pp. 5–25. Cite: Hassin–Ishakan *op. cit.* p. 89.

³⁵ Barbara, Julien: Rethinking Neo-Liberal State Building: Building Post-Conflict Development States. *Development in Practice*, Vol. 18 (2008) No. 3, pp. 307–318. Cites. Hassin–Ishakan *ibid.*

P.S.: The author of this essay feels lucky enough growing up in a European country with its cultural heritage. I feel comfortable in western democracy. If I have to choose among different civilizations, I choose the western one, without hesitation just because of its comfort. Inside the western civilization there are also subcategories, and if I have to choose among them, I vote for European democracy in place of North-American democracy for two simple reasons: with my European cultural background death penalty is unacceptable, while I do not see any problem with nudity. I speak about European democracy and not European Union democracy. I speak about a democracy theory, which is based on the Greek-Latin culture, the renaissance and Cesare Beccaria's idea about abolishing death penalty.

PÉTER VÁCZI

Costs of Democracy in Strasbourg

What is Worth: Observing Principles or Paying Compensations?

1. Introduction

According to Article 1 of the Statute of the Organization: “The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.” This declaration makes specific reference to the Council of Europe’s mission in maintaining and promoting human rights and fundamental freedoms as a way of achieving this “greater unity”. Having subscribed to the European Convention on Human Rights (hereinafter referred as “Convention”), Council of Europe member states have agreed to respect certain principles in the branch of civil, criminal and administrative law as well.

It seems, however, that observing certain principles is a huge challenge for Hungary not only nowadays but since the date of the ratification of the Convention, which was more than twenty years ago. What are these problematic fields of law, which led to thousands of applications to the European Court of Human Rights? In this paper, I will focus on two main principles, which are infringed by the Hungarian State so often, and to such an extent that it results in a mass of applications in Strasbourg. The first principle is the requirement of reasonable time limit, which declares that authorities shall act and perform their duties within a reasonable time. The second is prohibition of torture, stating that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

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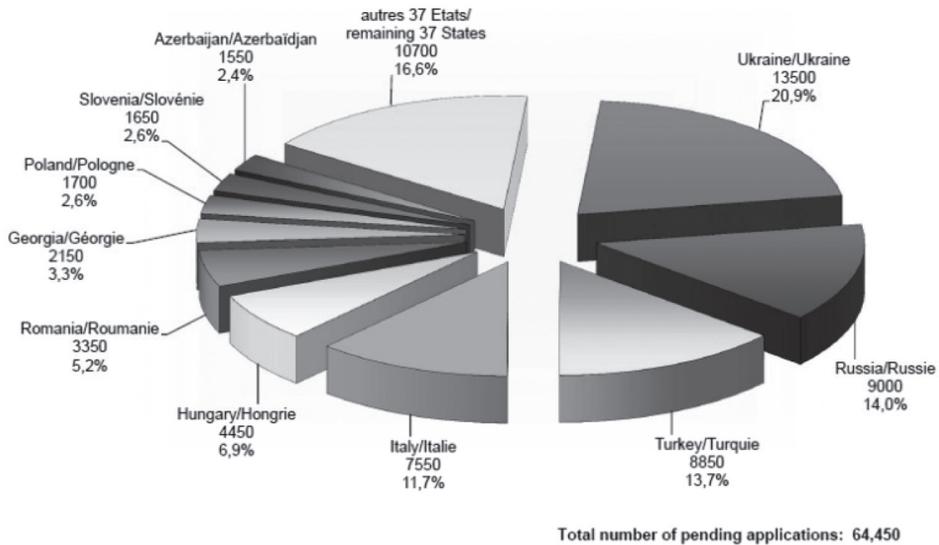


Diagram 1 Pending applications allocated to a judicial formation requêtes pendantes devant une formation judiciaire. 30 November 2015.

If we have a look at the statistics¹ on the case burden of the Court in 2015 regarding pending applications, we can clearly see that Hungary accounts for almost 7 % of the Court's burden, which is quite a high number, compared to its population. I have to underline the fact that this chart only shows those applications, which were allocated to a judicial formation. Those cases which ended in a friendly settlement (when the applicant and the government agree in a certain sum of compensation and struck out the case from the register) are not indicated here.

¹ Sources of all statistics shown in this paper: www.echr.coe.int

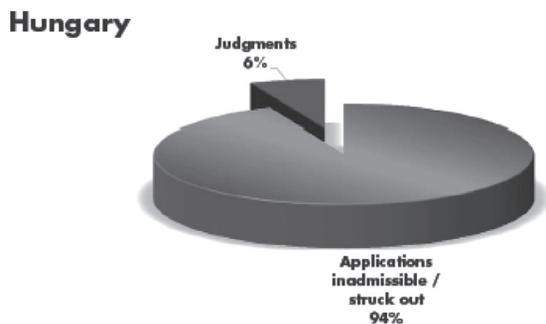


Diagram 2 Statistics on judgments by State (Hungary 1993–2010)²

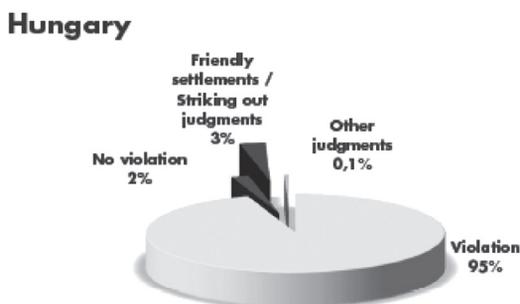


Diagram 3 Statistics on judgments by State (Hungary 1993–2010)³

When we are examining the applications from Hungary in the past three years, we can see that the Court dealt with 2,320 applications in 2014, of which 2,260 were declared inadmissible or struck out. (Unfortunately, we do not know the proportion within this set.) It delivered 50 judgments from 60 applications, and in 59 cases, there was a violation of the Convention.

² Judgments and decisions. URL www.echr.coe.int

³ Types of judgments. URL www.echr.coe.int

Applications processed in	2013	2014	2015*
Applications allocated to a judicial formation	991	2403	1539
Communicated to the Government	124	210	138
Applications decided:	1090	2320	916
- Declared inadmissible or struck out (Single Judge)	960	2203	851
- Declared inadmissible or struck out (Committee)	83	47	30
- Declared inadmissible or struck out (Chamber)	5	10	11
- Decided by judgment	42	60	24
Interim measures:	1	10	1
- Granted	0	0	0
- Refused (including out of scope)	1	10	1

* 1 January to 1 July 2015

Table 1 Processed applications from Hungary (2013–2015)

Now let's turn our attention to those main issues which cause the most problem for Hungary at the European Court on Human Rights.

2. Reasonable time limit—Gazsó v. Hungary

Article 6 (Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

What can be considered reasonable from this point of view? How long should citizens wait till the end of their cases?

It depends on many factors to decide what can be considered reasonable time in a certain case regarding the complexity of the case, the urgency of reaching a decision, the number of persons concerned, etc. The case law connecting to the European Convention on Human Rights shows the method to determine reasonable time. In administrative cases the use of this principle is supported by the “principle of silence” which means if an administrative authority fails to reach its decision within a reasonable time, another empowered authority may supervise this situation. In a civil or criminal procedure, however, there is no final deadline to finish a case.

Hungary

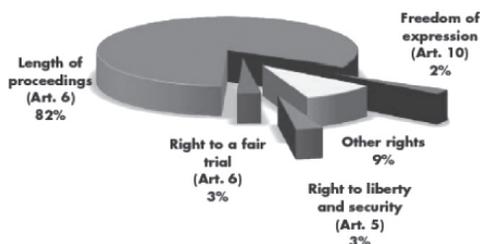


Diagram 4 Statistics on judgments by State (Hungary 1993–2010)
Subject-matter of violation judgments

The length of proceedings (in civil and criminal limbs as well) is the main deficit of procedural rules (or the judicial system) in Hungary. It can be seen on the diagram that the vast majority of the cases (82 %) derives from this issue. Keeping this in mind, it is not surprising that the Court applied a pilot-judgment procedure in the middle of 2015 underlining the fact that excessively long civil proceedings are a structural problem in Hungary.⁴ Before going into details, we have to clarify the institution of pilot judgment.

Over the past few years the Court has developed a new procedure to cater for the massive influx of applications concerning similar issues (“systemic or structural issues”) which arise from the non-conformity of domestic law with the Convention. The Court has thus recently implemented a procedure that consists of examining one or more applications of this kind, whilst adjourning its examination of similar cases. When it delivers its judgment in the pilot case, it calls on the government concerned to bring the domestic legislation into line with the Convention and indicates the general measures to be taken. It will then proceed to dispose of the adjourned similar cases in the light of the terms of the pilot judgment.

This certain case concerned Mr Gzásó’s complaint about the excessive length—more than six years—of litigation in a labour dispute. The Court held, unanimously, that there had been a violation of Article 6 § 1 (right to a fair hearing within a reasonable time) of the European Convention on Human Rights, and a violation of Article 13 (right to an effective remedy) read in conjunction with Article 6 § 1 of the Convention. The Court held that Hungary was to pay Mr Gzásó EUR 1,000 in respect of non-pecuniary damage and EUR 2,400 in respect of costs and expenses.

⁴ *Gzásó v. Hungary* (Application no. 48322/12.).

While the Court welcomed the Hungarian government's efforts (mostly inner judicial aims) to deal with excessive length of civil proceedings, it noted that it had already found in numerous cases that the length of civil proceedings in Hungary was excessive. From 1992 (Hungary's accession to the Convention system) to 1 May 2015, the Court had found a violation of the Convention concerning the excessive length of civil proceedings in more than 200 of its judgments (not counting the cases which ended in a friendly settlement). Furthermore, Hungary had failed to actually improve the situation, despite the Court's substantial and consistent case-law on the matter. As of May 2015, about 400 cases against Hungary stemming from the same issue had been pending before the Court. In these circumstances, the Court found that Mr Gázsó's situation had resulted from a practice incompatible with the Convention.

In view of the number of people affected by this issue and their need for speedy and appropriate redress, the Court decided to apply the pilot-judgment procedure, and held that Hungary had to introduce at the latest within one year from the date on which the Gázsó judgment became final, an effective domestic remedy regarding excessively long civil proceedings. The Court recalled that States could choose between two ways (or a combination of both): a remedy to expedite the proceedings and/or offering compensation. While the former was preferred as prevention against delay, the latter (a compensatory remedy) could be appropriate if proceedings had already been excessively long and in the absence of a preventive remedy.

The Court further decided to adjourn for one year the examination of any similar new cases introduced after the date on which the Gázsó judgment became final, pending the implementation of the relevant measures by Hungary.⁵

Turning our attention to national level, the principle is part of the Hungarian law, of course. The Hungarian Constitutional Court developed the requirement of reasonable time primarily regarding administration of justice. The interpretation of the requirement of fair trial in a broad sense includes the requirement of judging upon the case within a reasonable period of time, and it can justify the introduction of simplified forms of procedure, and in a certain scope of cases even out-of-hearing administration can be accepted. Still, the requirement of time-limits is only one of the elements of fair trial, and its enforcement shall not be exaggerated to the extreme: it shall not gain priority over other aspects of fair trial, and it shall never violate another fundamental right. The "time gained" by restricting the right to defence is no value significant enough to justify the limitation of constitutional rights and requirements. Such a consideration would be a merely practical attitude unworthy in respect of the constitutional operation of the judiciary system, contradicting

⁵ URL http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf

the court's obligation to examine the cases thoroughly, to weigh the evidence with circumspection, to explore all the aggravating and mitigating circumstances, and to adopt a just decision in line with the law.⁶

3. Prison conditions—Varga and others v. Hungary

Article 3 (Prohibition of torture)

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

While the length of the procedures is a permanent problem in Hungary, another epidemic reared its head in the past year. As it was issued by the Hungarian Government⁷ in the autumn of 2015, in the past five years the population of prisons rose by 50%. However, this governmental statistics is not fully consistent with another one.

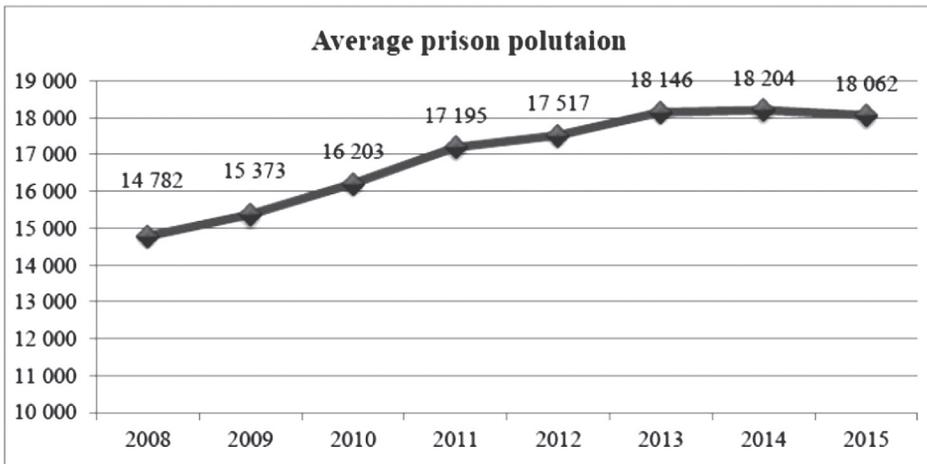


Diagram 5 Prison population (Hungary 2008–2015)

⁶ See Decision 20/2005. (V. 26.) of the Constitutional Court of Hungary.

⁷ URL <http://www.kormany.hu/hu/belugyminiszterium/parlamenti-allamtitkarsag/hirek/az-elmult-ot-evben-50-szazalekkal-nott-a-fogvatartottak-szama>.

<i>Number of inmates by gender and age</i>				
	<i>Total prisoner population</i>		<i>Juvenile prisoner (14-21 years of age)</i>	
<i>Male</i>	16 692	92.42%	1 272	95.21%
<i>Female</i>	1 370	7.58%	64	4.79%
<i>Total:</i>	18 062	100.00%	1 336	100.00%
			<i>Total: 7.39%</i>	

Review of Hungarian Prison Statistics 2015/1, Hungarian Prison Service (www.bh.gov.hu)

Table 2 Number of inmates by gender and age.

According to this statistics, the average size of the prison population shows a tendency of steady growth, however comparing the data of January 2014 (18,204) and January 2015 (18,062) a slight decrease can be observed in the number of inmates.⁸ This led to massive overcrowded institutions, which is a breach of the Convention.

<i>The 5 most crowded prisons (and their average overcrowding index)</i>	
<i>Jász-Nagykun-Szolnok County Remand Prison</i>	172.9%
<i>Heves County Remand Prison</i>	170.6%
<i>Balassagyarmat Strict and Medium Regime Prison</i>	165.4%
<i>Hajdú-Bihar County Remand Prison</i>	164.4%
<i>Budapest Strict and Medium Regime Prison</i>	163.3%

Table 3 The 5 most crowded prisons and their average overcrowding index

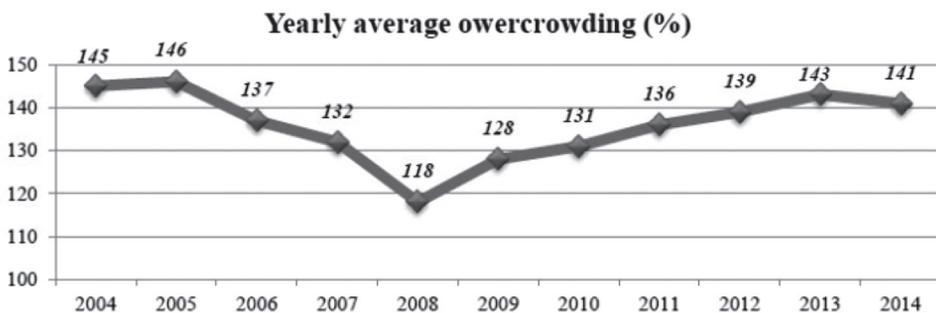


Diagram 6 Prisons yearly average overcrowding (%) (Hungary 2004–2014)

⁸ Review of Hungarian Prison Statistics 2015/1, Hungarian Prison Service. URL www.bh.gov.hu

The tables above show the five most crowded prisons, along with the percentage of overcrowding in the year 2014. The average of these indexes is 141% but it may be spotted that the values differ greatly, ranging from the optimal value (around 100%) to the extremely high 172.9%. The overcrowding of prisons is mainly caused by the changes in criminal law and the changes in capacity (restructuring institutions and establishing new places).

Overcrowding is a significant problem in many European countries and in Hungary, too, which needs to be solved. The Hungarian Prison Service wishes to meet these challenges by implementing a program that focuses on balancing overcrowding and by establishing new institutes and new places for inmates.⁹

Despite these efforts, the European Court of Human Rights applied a pilot-judgment procedure in the first quarter of 2015 declaring that Hungary must take measures to improve the problem of widespread overcrowding in prisons.¹⁰ The Court concluded that the limited personal space (less than three square meters) available to all six detainees in this case, aggravated by a lack of privacy when using the lavatory, inadequate sleeping arrangements, insect infestation, poor ventilation and restrictions on showers or time spent away from their cells, had amounted to degrading treatment.

The applicants' cases, other similar cases against Hungary in which the Court had also found violations of Article 3 and approximately 450 applications currently pending against Hungary concerning complaints about inadequate conditions of detention, originated in a widespread problem within the Hungarian prison system, justifying a pilot-judgment procedure because of the recurrent and persistent nature of the problems identified.

Bearing in mind that at the end of 2013 over 5,000 inmates held in Hungarian prisons were detained on remand, the Court indicated one main avenue for improvement, namely reducing the number of prisoners by using as widely as possible non-custodial punitive measures. The Court also found that the domestic remedies in Hungarian law suggested by the Government to complain about detention conditions, although accessible, were ineffective in practice. It therefore held that the Hungarian authorities should produce a timeframe, within six months of the date of this judgment becoming final, for putting in place an effective remedy or combination of remedies, both preventive and compensatory, to guarantee genuinely effective redress for violations of the European Convention originating in prison overcrowding. Pending implementation of the relevant measures by the State, the Court did not consider it appropriate at this stage to adjourn any similar pending

⁹ Review of Hungarian Prison Statistics 2015/1, Hungarian Prison Service. URL www.bh.gov.hu

¹⁰ *Varga and Others v. Hungary* (Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13)

cases, the processing of which would serve to remind Hungary of its obligations under the Convention.¹¹

On the abovementioned ground, the Court held that Hungary was to pay a total of EUR 12,150 for costs and expenses. This kind of compensation together with the latter mentioned ruling of the Court generated an avalanche among Hungarian prisoners; almost all of them applied to the Court causing a massive burden of cases for it. The six months deadline expired, so the only question is: how much will the grand total be?

4. Summary

After having a short overview of the Hungarian cases by the European Court of Human Right, we have to admit: Hungary has been found guilty in many times so one has to think about it: what to do after such sins. Change the practice or pay for the sins?

If the latter, from what sources? There are certain separated sums in the state budget, which shall cover such costs, but it could not be enough in extraordinary cases like the abovementioned torrent of compensations. There was a legislative intention in 2013 to include in the Constitution of Hungary that if an international court states the legal liability of Hungary, a common contribution (kind of an extra tax) could be established by the Parliament. However, this idea was not accepted, so we do not know how it would work.¹²

As we know, the principles listed in the European Convention on Human Rights have been further refined in several judgements of the Court. These rules and judgements do have legally binding effect on the states and governments, but the only sanction is financial sanction: the state has to pay just satisfaction to the injured party in respect of non-pecuniary damage as well as costs and expenses. *If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.*¹³ The Convention also declares the following: *The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.*¹⁴ Neither the Court, nor the Committee of

¹¹ URL <http://www.humanrightseurope.org/2015/03/court-hungary-must-take-action-against-prison-overcrowding/>

¹² URL <http://www.parlament.hu/irom39/09929/09929.pdf>

¹³ Article 41 of the European Convention on Human Rights (Just satisfaction)

¹⁴ Article 46 of the European Convention on Human Rights (Binding force and execution of judgements)

Ministers have any measure against the Contracting Party to force it to terminate the ground of the violation of the Convention, that is, in the present cases to shorten the length of the proceedings or to improve the prison conditions.

Before a melancholic mood would carry us with, there is still some hope. The rules and judgements do have, however, a moral and political effect on the state. This effect stems from two facts: first of all, it is difficult, albeit possible, for a government to totally ignore for a long period of time certain standards to which all or most of the other democratic states of the region pledge commitment; moreover, there can be an obvious problem with a government's good faith in case a government itself is among those who have not only participated in the negotiations of a text, but also voted for its adaptation in the form of a recommendation, if such government later on refuses to conform to its own appeal.

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AGNIESZKA LANGOWSKA

Economic Costs of Crimes

Economic analysis of law is a branch of legal science dealing with the study of law and its institutions with the use of methods appropriate for economic sciences.¹ In the case of crime, an economic analysis assumes that the particular person will commit an offence if the expected profit resulting from the commission of this act outweighs the profit, which could have been obtained if time and activities of that person were directed to legal activities. Classical economic concept is connected with the costs, which are understood as any circumstance which is the result of the decision made and which adversely affects the situation of the decision maker.²

The problem of the costs of crimes, which are understood as the negative consequences of that phenomenon, is one of the most important issues of modern criminology and criminal policy. First of all, their analysis would allow for adequate planning of the state budget expenditures in the field of internal security and the functioning of law enforcement agencies and judicial authority. Among the negative effects of crime, one can distinguish economic and social consequences. The author of this study focuses on economic costs because, even though this issue is extremely important for the state, in Poland, the studies in this field are modest and only partial.

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¹ Szczepaniec, Maria: *Teoria ekonomiczna w prawie karnym* [The Economic Theory in Criminal Law]. UKSW Publisher, Warszawa, 2012. p. 17.

² *Ibidem* p. 158.

Classification of the costs of crimes

Classification of the costs of crimes can be made in several ways. The commission of the prohibited act may have direct and indirect consequences, e.g. in the case of nutritional crimes, an injury to the individual will be considered as direct consequence and the loss of trust in the institutions supervising this branch of the market will be considered as an indirect consequence. The costs of crimes can also be analysed in the macro and micro scale. Macro scale refers to losses suffered by the whole society, while micro scale refers to the damage caused to a particular entity. The costs of crimes can also be qualified as those borne by the victims and those that are invested to combat and prevent this phenomenon, that is, expenses related to the operation of judicial authorities, including audit bodies.³

When assessing the costs of crimes, one should take into account the so-called “dark figure” of crime. This term implies the number of prohibited acts, which were actually committed but remained unrecorded. One can designate four areas thereof. The first one includes crimes on which law enforcement agencies were not informed, the second one includes crimes disclosed but the perpetrators were not detected, the third one includes crimes disclosed but the perpetrators, due to various reasons, were not accused or convicted, the fourth area includes crimes for the commitment of which the perpetrators were convicted, but not all of their illegal actions were known to law enforcement authorities.⁴

The image of crime covered by the “dark number” has several effects, including e.g. the recognition of a particular crime as too trivial to report it to the law enforcement agencies, fear against revenge of the perpetrator, number of law enforcement agencies and effectiveness of their operation, the lack of cooperation between the society and judicial authorities, unfounded refusal to initiate criminal proceedings.⁵ At the same time, it should be noted that solutions to these problems reduce the “dark number” of crimes.

In criminology, in order to determine the size of the “dark number” of crimes, methods such as experiment, participant observation and interview are used.⁶ According to B. Hołyst, attempts to determine its mathematical value have already been made. And so, for example, it was calculated that the degree of disclosure crimes connected with drug trafficking amounts only to 10%.⁷

³ Lernell, Leszek: *Zarys kryminologii ogólnej* [Overview of criminology]. PWN, Warszawa, 1978. pp. 235–236.

⁴ Hołyst, Brunon: *Kryminologia* [Criminology]. LexisNexis, Warszawa, 2007. pp. 104–105.

⁵ *Ibidem* pp. 104–107. Bułat, Kamil (etc.): *Kryminologia. Repetytorium* [Criminology. Compendium]. Wolters Kluwer Polska S.A., Warszawa, 2007. p. 81.

⁶ Bułat, Kamil *op. cit.* p. 81.

⁷ Hołyst, Brunon *op. cit.* p. 108.

The existence of the “dark number” of crimes implies the existence of the “dark number” of losses caused by them. Among other things, for this reason, it is not possible to calculate precisely the costs of crimes, and any attempts to undertake this task will always be treated as estimates. It is not a sufficient factor to relinquish the economic analysis, because even an estimated profit and loss account allows us to specify what action the state and the individual should take.

The issue of the economic costs of crimes is undoubtedly a complex issue, because the total cost consists of many elements. J. Czabański divided them into the following categories:

- 1) the costs of victimization,
- 2) the costs of individual security,
- 3) the costs of prudential behaviour.
- 4) the costs of the criminal justice system,
- 5) the costs of public prevention programs,
- 6) the costs associated with excessive deterrence,
- 7) the cost of providing justice,
- 8) the costs borne by imprisoned offenders (disputed in the doctrine)⁸
- 9) lasting effects affecting individuals and communities.⁹

The costs of crimes should also include expenses incurred as a result of incompetence, mistakes and errors of individuals or authorities.¹⁰

Due to the fact that the detailed description of each of the above mentioned categories of costs exceeds the scope of this study, the author focused on two of them. The first category, the discussion of which, in the opinion of the author, was necessary, considers the costs of victimization. This concept embraces both easily quantifiable costs, for example, the costs of damaged property, as well as those difficult to measure, e.g. the suffering of victims.¹¹ First of all, the author will consider possible ways to calculate the latter.

⁸ Szczepaniec, Maria *op. cit.* p. 162.

⁹ Czabański, Jacek: *Koszty przestępczości* [Costs of crime]. pp. 171–186. In: Czabański Jacek (ed.): *Bezpieczne państwo. Nowe trendy w polityce karnej* [Safe State. New trends in criminal policy]. Stowarzyszenie Katon, Kraków, 2006. pp. 172–173.

¹⁰ Wójcik, Jerzy: *Kryminologia. Współczesne aspekty* [Criminology. Contemporary aspects]. Wolters Kluwer S.A., Warszawa, 2014. p. 345.

¹¹ Czabański, Jacek *op. cit.* p. 172.

Difficult-to-quantify costs of victimization

There is no doubt that the assessment of human life, suffering, safety and environmental cleanliness is problematic. However, due to the assignment of certain values to these elements by the society, there is a need for their assessment. Their value is presented in monetary amounts.

There are three methods of estimating the immeasurable costs: lost production, the risk premium, the tendency to pay damages and judicial compensation. The method of lost production consists in determining how much of the potential production in the next period of life of an individual has been lost due to the crime. A significant disadvantage of this method is that in the case of retired people the value should be considered zero. In addition, this method uses an indicator of gross domestic product with all its limitations. “The risk premium” takes into account the profession performed by the individual. “Willingness to pay” is a type of survey in which people evaluate the damage themselves. The method of judicial compensation is connected with an estimation of the immeasurable costs by reference to the amounts awarded by the judges and by way of compensations. The use of this method, however, is a reversal of the tasks of economic and legal analysis, because the economy is designed to determine the proper level of compensation and the adjustment of the law to research results.¹² It should also be noted that compensations adjudicated by the Polish courts are relatively low, as they were in the range of approximately €2,400 to approximately €55,000 in the years 2010–2011.¹³

In 2010, attempts to estimate the *Value of statistical life* – VSL have been made by the Organisation for Economic Cooperation and Development (OECD). The accepted method of calculation was based on three values: the costs of compensation (including compensation paid by insurers), human capital (including production capacity and its loss) and a tendency to pay or acceptance. The calculation result allowed to determine that VSL amounted to an average of €2,515,295 in the year 2005. This value for the various entities was within the range between approximately €3,770 and €18,730,000.¹⁴ In Poland it amounted to €603,706 in the year 2006, while in the Czech Republic it amounted to €2,252,008 in the same period.¹⁵

¹² Czabański, Jacek: Przeliczenie ludzkiego życia na pieniądze [Conversion of human life on the money]. *Rzeczpospolita*, 2 October 2004, on-line version.

¹³ Daszewski, Aleksander: *Jak się kształtuje obecnie linia orzecznictwa sądowego w sprawach o zadośćuczynienie po śmierci najbliższego członka rodziny?* [How does the line of judicial decisions in cases for compensation after the death of an immediate family member form?]. URL www.rf.gov.pl (19 February 2016)

¹⁴ The calculation is the average exchange rate of the Polish National Bank for the last day of the calendar year.

¹⁵ *The value of statistical life: a meta-analysis*. OECD, 2010. pp. 5–14.

Considering the above calculation, police data collected in 2005–2014 shows the cost of victimization fluctuating between €283,900,000 (2014) and €544,400,000 (2007).¹⁶ These estimates relate only, as already indicated, to murders. Immeasurable costs will therefore be much higher after the inclusion of other crimes, e.g. causing grievous bodily harm or rape, as well as traffic accidents.

Easy-to-quantify costs of victimization

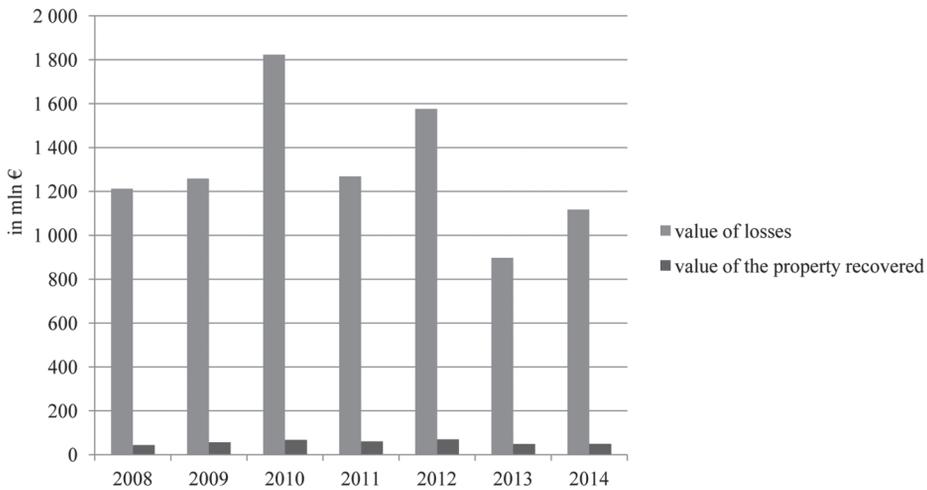
Institution that would deal with the issue of the analysis of the negative effects of crime has not been established in Poland until now. However, agencies operating within the structure of the Ministry of Interior gather and prepare a summary of their activities, which is (from the year 2008) published in a special report. Please be reminded that such data contain information only about the losses resulting from recorded crimes and they do not include the actual dimension of the criminal acts causing the damage.

In 2014, the value of the losses recorded by the police amounted to €1,116,993,681, which constitutes an increase of 28% in comparison to the losses determined in the year 2013. At the same time, it was lower than the calculated value of the damage in the previous years. The total amount of losses in the period from 2008 to 2014 amounted to over €9 billion. It is important to remark that losses connected with crimes amounted to 47.1% of total losses in the year 2014, and economic crime amounted to 51.7% of total losses.¹⁷

When analysing the problem of the costs of crimes, one should pay attention to the value of the property recovered by the police. Such data are important because it is obvious that the most effective form of fighting crime is depriving offenders of the benefits that were obtained from the crime. The effectiveness of law enforcement agencies in this area, however, is negligible in comparison with the amount of losses. In 2014, the Police recovered property worth approximately €48,238,301, which accounted for only 4.3% of the damages. The total value of the property recovered in the period from 2008 to 2014 amounted to €393,956,560.

¹⁶ In the years 2005–2014 the most homicides were found in 2007: 848, and the fewest in 2014: 526. URL statystyka.policja.pl (19 February 2016)

¹⁷ *Raport o stanie bezpieczeństwa w Polsce w 2014 r* [Report on the state of security in Poland in 2014]. Ministry of the Interior (Poland), 2015. pp. 239–240.



Source: Calculations based on data from the reports of the Ministry of the Interior

Diagram 1 The value of losses and recovered property in the period from 2008 to 2014.

In order to present the problem of the losses and the value of the property recovered, it is needed to cite an example. It is the simplest to refer to the crime of theft because it is the most associated with the loss of property. The following table shows the number of thefts identified by the police in the period from 2008 to 2014, as well as the rate of detection of the perpetrators of these crimes.

	<i>the number of detected thefts</i>	<i>the detection rate</i>
2014	183,362	28.9
2013	214,689	32
2012	230,751	33.5
2011	230,247	31.3
2010	220,455	29
2009	211,691	26.6
2008	214,414	26

Source: statystyka.policja.gov.pl (20 February 2016)

Table 1 The detection rate of crime

As can be seen from the table above, detection rate of crimes of theft ranged in the reporting period from 26 to 33.5. This means that the effectiveness of law enforcement agencies in this area is low. The situation is worse when we analyse only vehicle theft, where the detection rate in the period from 2008 to 2014 fluctuated from the level of 21 to 25.1. The effectiveness of the detection of the perpetrators of the

crime of theft is actually low, taking into account the detection rate, e.g. of the perpetrators of murders, which in 2004 was at the level above 90 and in 2014 at the level of 95.8.¹⁸ Low detection has an impact on the subsequent repossession of property. Failure to identify the perpetrator of a crime does not allow the compensation to the victim, as well as to the whole society, including the reimbursement of cost of law enforcement. Therefore, it is important to increase the effectiveness of the police in the prosecution of crimes against property.

The costs of the criminal justice system

The economic costs of crimes, which in fact cannot be avoided as long as there are crimes, are the costs of the criminal justice system. Justice system is broadly understood in this context by the author, because it also includes the public administration or any law enforcement, audit and surveillance institutions.

In Poland in 2014, the state allocated approximately € 2.5 billion from the state budget to the justice system,¹⁹ which accounted for approximately 3.3% of all budget expenditures. This sum is insignificant, and as already indicated above, it is impossible to reduce this cost. We should, however, prevent the unnecessary growth of not only the costs of the criminal justice system but the costs of its operation. The factors that cause unreasonable and additional costs of crimes are as follows:

- 1) weaknesses in the system and structures of authorities combatting crime,
- 2) low level of coordination of activities of state institutions,
- 3) low competence of officials,
- 4) legislative mess,
- 5) excessive bureaucracy.²⁰

Description of each of these elements is beyond the scope of this study, therefore, the author will discuss only the most important problems of the Polish system.

“Legislative storm”

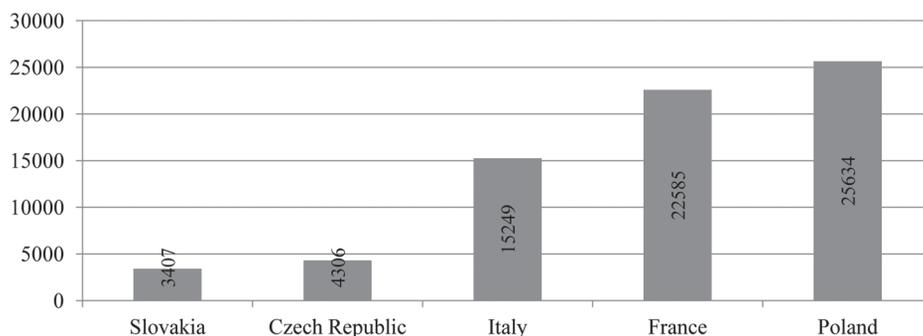
First of all, attention should be given to the defects of law applicable in Poland. Some provisions of law have been flagged in the report prepared by the company operating under the name Grant Thornton and entitled *Legal Environment Stability*

¹⁸ URL statystyka.policja.gov.pl (20 February 2016)

¹⁹ *The Budget Act for 2014 of 24th January 2014* (Dz. U. z 2014 r., poz. 162).

²⁰ Wójcik, Jerzy *op. cit.* p. 339.

Barometer.²¹ In the light of that report, 1,995 legal acts consisting of 25,634 pages came into force in Poland in the year 2014. It was calculated that consumers and entrepreneurs wanting to be up-to-date with existing rules, should familiarise themselves with 103 pages of legal acts every day and they will have to spend 3 hours and 26 minutes every day to do so. So it is impossible not only for the “ordinary” citizens of our country but also for the officials and lawyers who would be forced to spend half of their working time on reading new legal acts. An excess of legislation and the lack of stability of the law does not serve the country’s economy, because it makes it uncertain for foreign investors. Also, the report compared the speed of formation of law in Poland with the speed of formation of law in other European countries with a similar legal system. It turned out that our country, in a single year, adopted seven times more legal acts than Slovakia and six times more than the Czech Republic. A kind of “legislative storm” is therefore a serious problem, increasing the cost of the entire state.



Source: Grant Thornton Frąckowiak Sp. z o. o. Sp. k., *Barometr stabilności otoczenia prawnego w Polsce* [Legal Environment Stability Barometer]. URL www.barometrprawa.pl (20 February 2016)

Diagram 2 The newly established legal acts.

From the point of view of the problem of crimes, changes made in recent years in the field of criminal procedure are of crucial importance. In July 2015 there has been a substantial modification of the procedure in order to increase its adversarial processes, i.e. in order to reduce the possibility of interference of the court in the activities of the parties - the accuser and the accused. These changes were so big that they required a thorough preparation of all the organs of the state in order to implement them. Therefore, *vacatio legis* of the amendment of the most of the pro-

²¹ Grant Thornton Frąckowiak Sp. z o. o. Sp. k.: *Barometr stabilności otoczenia prawnego w Polsce* [Legal Environment Stability Barometer]. URL www.barometrprawa.pl (20 February 2016)

visions was determined for the period of nearly two years - the amending Act was passed on 27 September 2013.²² After the parliamentary elections dated 25 October 2015, the authority in Poland was changed. Ministry of Justice, which judged the reform negatively, announced deviation from the established concept of the criminal process and the return to the previous procedure, although not connected with the complete reverse of the changes. Finally, since 15 April 2016, the Act dated 11 March 2016 has become applicable²³ and it modifies the provisions introduced on 1 July 2015. Currently, Poland uses three criminal procedures: for the cases in which the indictment was filed until 30 June 2015, the provisions in force until that day are applicable; for the cases in which the indictment was filed between 30 June 2015 and 14 April 2016, the provisions in force in that period are applicable; while for the cases in which the indictment was filed after 14 April 2016, the provisions in force after that date are applicable. This situation is undoubtedly problematic and will affect the time of making decisions, because state organs must first adopt the new law, and then in each case individually determine which provisions are applicable.

Stability of the law is extremely important in the case of substantive criminal law. Due to its repressive nature, it is the branch of law having the biggest impact on the freedom of the individual. The entity must know for what actions it may be convicted and what penalty it may receive. Awareness of the possibility of incurring liability for specific offences specified in the Act strengthens the sense of security and confidence in the authorities. In Poland, the current criminal law is “shaky” as well as other areas of law. It is worth noting that the Criminal Code, which was in force in the period from 1932 to 1969,²⁴ was amended 12 times. The subsequent Criminal Code of 1969²⁵ was changed 23 times within 28 years of its existence. The Criminal Code of 1997²⁶ since its introduction until today has been amended 79 times, despite the fact that, in comparison to the time of existence of the previous criminal codes, the shortest time has passed since the date of its entry into force.²⁷

²² *The Act of 27 September 2013 amending the Act – Code of Criminal Procedure and other laws* (Dz. U. z 2013 r., poz. 1247).

²³ *The Act of 11 March 2016 amending the Act – Code of Criminal Procedure and other laws* (Dz. U. z 2016 r., poz. 437).

²⁴ *Ordinance of the President of Poland of 11 July 1932 – Criminal Code* (Dz. U. z 1932 r. Nr 60, poz. 571).

²⁵ *The Act of 19 April 1969 – Criminal Code* (Dz. U. z 1969 r. Nr 13 poz. 94).

²⁶ *The Act of 6 June 1997 – Criminal Code* (Dz. U. z 1997 r. Nr 88, poz. 553).

²⁷ This problem was highlighted by J. Warylewski in his paper: Why is the story not a recognized teacher for criminologists? Delivered at the conference: *History of justice. Alternative history of penalties*, Gdańsk, 22 April 2016.

Criminalization of certain deeds

Another issue is the criminalization of certain deeds. For example, it is illegal to terminate pregnancy with the consent of the pregnant woman, as well as to help in doing so. The offence is classified in article 152 of the Polish Criminal Code. Only in 2014 on the basis of this provision, 20 people were sentenced.²⁸ At the same time, the so-called “abortion tourism” is developing in Poland. Pregnant women travel to the countries where abortion is legal, in order to terminate their pregnancy. They travel to Germany, Austria, the Netherlands and Slovakia. Every year 150,000 Polish women terminate pregnancy outside the borders of Poland.²⁹ In this situation, it is worth considering the meaning of the existence of the crime of abortion. Since it is done legally in neighbouring countries, and Polish women take advantage of that, then it should be considered whether prosecution of this prohibited act in Poland is not only an increase of the costs of crimes. An unequivocal answer to this question can be given, however, only after a thorough examination of the problem. This issue is up-to-date in the light of recent events that have taken place in our country. A lively discussion was brought by the Foundation Pro - the right to life in connection with the draft law on tightening anti-abortion legislation. Without going into a detailed analysis of that, attention should be drawn to the elimination of the possibility of abortion in cases when it threatens the health of the pregnant woman, when medical findings indicate a high probability of severe and irreversible impairment of the fetus or an incurable illness threatening its life and if there is reasonable suspicion that the pregnancy was a result of a criminal act. At the same time, the appellant proposes penalisation for causing death of the fetus, including an unintentional one. These crimes were to be prosecuted *ex officio*.³⁰ In fact, such a solution can lead to the need to run the machinery of justice also in the cases of miscarriage, which is a trauma for the pregnant woman. If, however, when analysing the problem, we reject any moral views, and we take into account only the economic costs, there is no doubt that in the face of growing “abortion tourism”, the decriminalization of abortion will reduce such costs.

Nevertheless, criminal law should not be laid down solely on the basis of economics, because ultimately we would come to the conclusion that the prosecution of many crimes is unprofitable, and the victim should seek redress only through

²⁸ Sentenced adults by type of crime and punishment – the main crime, Ministry of Justice. URL www.ms.gov.pl

²⁹ Święchowicz, Małgorzata: *Turystyka aborcyjna kwitnie. Polki masowo przerywają ciążę za granicą* [Abortion tourism is booming. Polish women massively abort abroad]. 28 January 2014. URL www.polska.newsweek.pl (20 February 2016)

³⁰ Draft bill amending the *Act of 7 January 1993 on family planning, human embryo protection and conditions of permissibility of abortion and the Act of 6 June 1997 Criminal Code*. URL www.stopaborcji.pl (17 April 2016)

civil procedure. Prosecution of perpetrators causing particular social disapproval should remain within the competence of the state. Termination of pregnancy, according to a survey of 2006, was condemned by 58% of Poles,³¹ which constitutes the majority of the population. For these reasons, perhaps it should remain in the penal code. At the same time, however, this survey showed that marital infidelity was condemned by 86% of Poles, and it is not punishable.³²

Other problems

Another issue that is very often raised is connected with the overlapping of competencies of authorities. The crime of corruption in Poland is investigated by, e.g. Police, Internal Security Agency, Military Counter-intelligence Service and, finally, Central Anticorruption Bureau (CBA) which was specially established to fight corruption. The existence of the CBA, although it was founded in 2006, remains controversial. First of all, it should be considered whether another office created to prosecute only one type of crime does not unnecessarily increase the costs of activities of the State. It should be calculated whether the functioning of this entity has brought the expected benefits, i.e. contributing to the reduction of corruption, or maybe it is enough to equip police with appropriate instruments to combat corruption, e.g. by increasing the number of officers with appropriate qualifications. It should, however, be noted that CBA reports on their performance on a regular basis. This body does not only deal with the prosecution of corruption offences but also is responsible for a large number of anti-corruption public procurements and privatization projects. In 2014, CBA in the course of their duties has detected damages or exposures to damages to the property in the name of the Treasury of the value of more than €40 million. It secured property in a total amount of more than €8.6 million, i.e. approximately 21% of the value of the damage. It should be stressed that 34% of conducted proceedings was related to local governments³³ i.e. crimes occurring in the organs of the state, which should protect citizens and not work to their detriment.

Serious problems are also connected with the mistakes made by prosecutors and judges. The state budget is burdened, among other things, by compensations and

³¹ Szymanowska, Aleksandra: *Polacy wobec przestępstw i karania* [Poles opinion about crimes and punishment]. UW Publisher, Warszawa, 2008. p. 71.

³² *Ibidem* p. 86.

³³ CBA Report: *Informacja o wynikach działalności Centralnego Biura Antykorupcyjnego w 2014 roku* [Information about the results of operations of the Central Anti-Corruption Bureau in 2014]. Warszawa, 2015. pp. 3–4.

redress for wrongful conviction, detention order or temporary detention or arrest. In respect to the above, in the year 2014, the applicants were awarded with a total amount of €4,980,755 and in the year 2015 with €3,879,492.³⁴

Summary

The issue of the economic costs of crimes, as already indicated, is complex, but mainly unexplored. Even a short and cursory calculation presented above allows illustrating the size of the problem. Moreover, the economic analysis shows that this notion covers not only typical costs related to the phenomenon of crime such as those associated with the activities of the judicial system but also the costs borne by the society. In this article, the author, because of limited framework, only signalled the importance of the issue. Its precise and detailed exploration requires the commitment and cooperation of many entities, including law enforcement agencies and scientific institutions. Undoubtedly, the analysis of the phenomenon would allow for the proper allocation of financial resources for preventing and combating crime, and also would enable the targeting of society to necessary and appropriate actions needed to limit the potential damage.

³⁴ Wrongful arrest (art. 552 k.p.k.) – compensation and redress for the years 2000–2015, Ministry of Justice. URL www.ms.gov.pl

Social Cost of Criminal Punishment

1. Criminal Punishment in Democratic State

While discussing the cost of democracy, it is important to consider the cost caused by the enforcement of criminal law by the state, especially the cost of execution of criminal punishment. Crime is an inherent element of social reality. Since there is no way to eliminate it, the society as a whole has no other choice than to face the problem of dealing with those who disobey the law. Total elimination of criminal punishment is just as impossible as exclusion of punishment itself from educational systems socializing the members of society.¹

Criminal punishments have a long evolution. Beginning from the origins of different forms of tortures, physical punishments and death penalty in the past, to a catalogue of penalties used by most democratic countries nowadays, which includes the following punishments for criminal offenders: imprisonment, community service or work for the benefit of the community and also fines.

The purpose of criminal punishment is to serve the society not the offender.² Nevertheless, in a democratic state the criminal punishment must stand up to certain standards and expectations. The punishment must remain humanitarian and in agreement with the rights expressed in international acts and state constitutions. Convicts whose rights are ignored by the state seek for justice before international courts like the European Court of Human Rights (ECtHR): for example the Hungarian case *Varga and Others v. Hungary*.³ The case concerned widespread overcrowding in Hungarian detention facilities. ECtHR established that there have been

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¹ Hryniewicz-Lach, Elżbieta: *Kara kryminalna w świetle Konstytucji RP* [Criminal Punishment In The Light of Polish Constitution]. CH Beck, Warszawa, 2015. p. 452.

² *Ibidem* p. 410.

³ *Case of Varga and Others v. Hungary*, 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, Judgement (Second Section), 10 March 2015.

a violation of Article 3 (prohibition of inhuman and degrading treatment) of the European Convention on Human Rights,⁴ and a violation of Article 13 (right to an effective remedy) read in conjunction with Article 3 of the Convention.

2. Cost of Criminal Punishment—perspectives of analysis

As crime and criminal punishment are unavoidable in society, it is important to consider the cost of criminal punishment, which we all have, to pay for, and not only in economic terms. The purpose of this paper is to point out the crucial factors that should be taken into consideration while formulating an answer to the following question: how much does the criminal justice system in democratic countries really cost the society? Although, a very broad area of inquiry can be analysed at many different levels, it is worth trying to shed some light on this issue.

The cost surely depends on the kind of punishment. The execution of imprisonment is undoubtedly more expensive and demanding from the state and the society than the execution of fine. In addition, possible social side-effects of the execution of certain sanctions are different. Bearing that in mind, the distinction of certain kinds of criminal punishment in these very considerations is fully justified. Before getting to the actual analysis it is also important to consider that, the cost caused by criminal punishment can be analysed from different points of view. One can look at the cost of criminal law enforcement from the perspective of the state. However, there are more possible perspectives to examine the cost of criminal punishment. There is a point of view of those, who are the subject of the executed punishment—convicts. There is also the perspective of those citizens who obey the law, however, the fact that some members of the community do not and therefore there appears the need to use criminal punishment, influence their situation as well. Finally, there is a broader perspective from the point of view of the whole society. As far as the author of this article is concerned, this perspective includes both ones mentioned earlier because the convicts are also members of the bigger group, which we would identify as the society.

3. Economic cost of criminal punishment

Referring directly to the topic of this article it is also very important to mention that not all social cost of criminal punishment can be measured in certain amount of money. Nevertheless, the economic cost of punishment plays a great role in the

⁴The text of the *Convention and its Protocols* as well as the complete list of declarations and reservations are available online. URL www.conventions.coe.int (2 May 2016)

considerations on social cost. That is why there is a need to define an economically effective punishment. In short words, it would be such a sanction which embodies the basic rule stating that a rational offender will commit a crime on the condition that the profit from trespassing the law is bigger than the punishment multiplied by the probability of being caught and punished.⁵ So in order to estimate the cost of criminal punishment the concept of effectiveness should be used. The question of effectiveness of the punishment requires establishing at least two things. Firstly, whether a certain kind of criminal punishment analysed fulfils its purposes in an adequate way. The effectiveness of a criminal punishment in this aspect can be measured by the percentage of convicts who after serving their sentences commit crimes again and become repeat offenders. Secondly, there is a need to check if certain criminal punishment is a means of achieving the best possible effect with the least possible expenditure.

It is necessary to draw attention to the conflict appearing in the field of the criminal legal studies concerning the ideas of the effectiveness of criminal law and justice.⁶ In the calculations of profits and losses, the crucial function of criminal punishment, which states that the punishment should be just, cannot be forgotten. Nevertheless, it seems not impossible that an economically effective punishment can also be a just punishment.

4. The structure of criminal punishment in Poland

The majority of the examples and numbers appearing in the text will refer to Poland so the punishments analysed will be those, which are included in the Polish catalogue of penalties for criminal offenders. What does the structure of criminal sanctions in Poland look like?

According to the statistical data,⁷ 295,353 people were sentenced by Polish criminal courts in 2014. 21.4% of these convicts were sentenced to a fine, 11.2% of them—to community service and 67.4% were sentenced to imprisonment. Therefore, the structure of criminal punishment used by Polish criminal judges shows that the most frequently sentenced sanction is imprisonment—more than the half of the convicts in Poland are serving or are going to serve their sentences incarcerated. Moreover, it is important to emphasize the facts that from all the imprisonment

⁵ Szczepaniec, Maria: *Teoria ekonomiczna w prawie karnym* [The Economic Theory In Criminal Law]. Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, Warszawa, 2012. pp. 302–303.

⁶ *Ibidem* pp. 296–305.

⁷ *Prawomocne skazania osób dorosłych w latach 1946–2014* [Legally binding sentences of adults in the period of 1946–2014]. Ministerstwo Sprawiedliwości, Warszawa, 2015. p. 131. The publication is available at the website of Ministerstwo Sprawiedliwości [Ministry of Justice]. URL <https://isws.ms.gov.pl/baza-statystyczna/publikacje/>

sentences in 82.1% of all the cases sentences were conditionally suspended. To be more precise, it should be stated that the most frequently used criminal punishment for criminal offenders was conditionally suspended imprisonment sentence.

Despite the fact that the crime rate in Poland has been decreasing over the years, the number of people incarcerated significantly increased. One of the main causes of this paradoxical situation is the vast number of different forms of probation sentences, especially the abuse of the institution of conditional suspension of the sentenced penalty of imprisonment.⁸ Then the suspended sentences were ordered to execute. Consequently, this is also one of the main reasons causing the problem of overcrowded prisons in Poland. The index of prisonization in Poland is one of the highest in Europe.⁹ No wonder there are some cases in which convicts must wait in order to serve their sentence. In 2012 the imprisonment sentences of about 50,000 criminals were not executed.¹⁰

5. Social cost of imprisonment

While discussing imprisonment as a criminal punishment it is also worth discerning that the characteristic element that constitutes imprisonment is the limitation of one's personal freedom. However, the Polish name of this penalty states that a convict is deprived of his freedom, no one can be deprived of it totally. Nevertheless, it is the most severe form of freedom limitation. While considering the cost it takes, within the category of imprisonment, the following subcategories should be distinguished: life imprisonment (0.01% of all criminal sanctions sentenced in 2014), 25 years of imprisonment (0.02%) and the rest of the cases of temporal imprisonment.¹¹

The main argument against imprisonment sentence is that nowadays it is considered as ineffective sanction, which means that it does not prevent convicts from committing crimes again. Secondly, execution of imprisonment sentence is very expensive. In Polish realities in 2015 the cost of incarceration of one prisoner was

⁸ Mycka, Krzysztof – Kozłowski, Tomasz: Paradoxy polskiej polityki karnej, czyli jak zapełniamy więzienia nadużywając środków probacji [The paradoxes of the Polish criminal policy: how do we overcrowd prisons by overusing probation]. *Probacja* [Probation], (2013) No. II, pp. 7–9.

⁹ *Ibidem* p. 13.

¹⁰ Szymanowski, Teodor: Skazania na bezwzględne kary pozbawienia wolności jako następstwo nieefektywnej polityki karnej [Imprisonment in Poland as a consequence of ineffective criminal justice policy]. *Państwo i Prawo* [State and Law], (2014) No. 4, p. 91.

¹¹ According to *art. 37 Kodeksu karnego* [Polish Criminal Code], *Act of 6 June 1997* (Dz. U. 1997 no. 88 pos. 553), the imprisonment penalty takes from a month up to 15 years, it is meted out in months and years.

3,037 złoty per month.¹² The cost includes the expenses of penitentiary infrastructure and professional personnel. Those two aspects seem crucial for proper execution of the imprisonment sentence i.e. among other aims so that the prisoner would change his/her attitude towards legal system and could come back to society.

In contrast, it is claimed that prison has a destructive influence on the inmates.¹³ It has an impact on prisoner's personality. Isolation causes intellectual deterioration, emotional disorders and disintegration. The social consequences of incarceration usually involve breaking up of families, impoverishment of families in cases when the prisoner was the breadwinner of the family.

What is more, the conditions in prisons must stand up to the standards so that the punishment would remain humanitarian. For instance, in Polish overcrowded cells there occurs the problem of not enough space for one prisoner, while according to relevant regulations 3 m² should be provided for each prisoner.¹⁴ At the beginning of the article, it has been already stated that some of the prisoners allege the conditions of their detention had given rise to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights. Apart from the ECtHR case, *Varga and Others v. Hungary* mentioned earlier, another example could be the case of *Orchowski v. Poland*.¹⁵ ECtHR stated that there was a violation of Article 3 of the Convention. As a consequence Poland was to pay the applicant EUR 3,000 (three thousand euros) in respect of non-pecuniary damage and the costs and expenses, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention.

Not only is the penitentiary system expensive in economic terms, but also in the way the ex-convicts influence the society after leaving prison. Despite all the correction efforts, many convicts become repeat offenders and come back to prison again.

¹² *Roczna Informacja Statystyczna za rok 2015* [Annual Statistical Information for 2015]. Ministerstwo Sprawiedliwości, Centralny Zarząd Służby Więziennej, table 84, p. 75. Available on the website of Służba Więzienna [Prison Service]. URL <http://sw.gov.pl/Data/Files/001c169lidz/rok-2015.pdf>

¹³ Musioł, Sandra: Negatywne aspekty kary pozbawienia wolności [The negative aspects of imprisonment]. *Probacja* [Probation], (2013) No. IV, pp. 155–156.

¹⁴ Look *art. 110 § 2 Kodeksu karnego wykonawczego [Executive Criminal Code] Act of 6 June 1997* (Dz. U. no 90 pos. 557 with latter changes).

¹⁵ *Case of Orchowski v. Poland, 17885/04—Judgement (Fourth Section), 22 October 2009.*

<i>kind of punishment</i>	<i>convicts</i>	<i>repeat offenders</i>	<i>the participation of repeat offenders in the number of convicts (%)</i>
fine	63,073	143	0.23
community service	33,009	508	1.54
imprisonment (in general)	199,167	14,651	7.32
imprisonment with conditional suspension	163,534	3,609	2.21
imprisonment without conditional suspension	35,633	11,042	30.99
25 years of imprisonment	66	16	24.24
life imprisonment	23	2	8.69
punitive measures	10	1	10.00
in general	295,353	15,321	5.19

Source: statistical data of Polish Ministry of Justice. URL <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/> (15 April 2016)

Table 1 The participation of repeat offenders in the number of convicts sentenced to certain kinds of punishments in 2014 in Poland

From the data above the conclusion can be drawn that the penalty of imprisonment without conditional suspension prevents repeat offences in much smaller amount of cases than punishments not involving total isolation. In regard to fine and community service the low rate of recidivism is also worth emphasizing.

6. Alternatives to imprisonment

Considering all the cost and disadvantages of imprisonment, it is not surprising that there developed a need for creating some alternatives to incarceration and the future of criminal punishment seems to be going in the direction of developing non-custodial penalties. The execution of community service and fine is significantly cheaper for the state. What is more, it appears that the social drawbacks are not as serious as in the case of imprisonment. Non-custodial measures are not enough while dealing with aggravated offences or repeat offenders, though. However, they seem to be very effective for less serious crimes.

The usage of non-custodial penalties allows avoiding the stigmatization of convicts in the eyes of others. In regard to fine penalty there is also an opinion that it provides the offender anonymity.¹⁶ The advantages of fine as a criminal punishment

¹⁶ Hryniewicz-Lach, Elżbieta: *Kara kryminalna w świetle Konstytucji RP* [Criminal Punishment In The Light of Polish Constitution]. CH Beck, Warszawa, 2015. p. 322.

are the following. Firstly, the cost of its execution is quite low. Secondly, it allows avoiding the negative effects of imprisonment connected with demoralization of the inmates. Moreover, fine gives the possibility of making it suitable for the life situation and personal characteristics of the convict, which is called a progressive fine. Fine is also the only criminal punishment which does not interfere with the personal freedom of individuals.

From the point of view of the economic theory in criminal law, a fine surely has a great potential as both an effective and just tool to respond to crimes. It seems that in Polish justice system this potential of fine is still underestimated and not fully developed. The argument, which supports this idea, is the participation of fines in the structure of criminal penalties sentenced in Poland. To remind, the general percentage of fines in all the penalties is about 21%. Under the condition that the offender is homo oeconomicus, the criminal punishment measured in certain sum of money should fulfil the aims of individual prevention and persuade those who trespass the law of the unprofitability of crime. Additionally, in the reference to the society understood as a group of individuals who pursue the maximization of individual benefit and minimization of the loss, fine is also a very effective means of general prevention. It has been noted in the literature that sentencing and execution of fines can eventually lead to the rise of welfare in the society.¹⁷

On the other hand, fine is not a perfect criminal punishment. Its effectiveness surely depends on the material status of the society. For some individuals the obligation of paying a fine will cause more trouble than for others. The rich offenders may not even recognize it as a punishment.

While considering other non-custodial penalties, it should be marked that the aim of many judicial systems is to reduce the use of imprisonment and encourage judges to order community service.¹⁸ As early as in 1992 the Committee of Ministers to member states of the European Council adopted Recommendation No. R (92) 16 the European Rules on community sanctions and measures.¹⁹ According to Rule 55, community sanctions and measures shall be implemented in such a way that they are made as meaningful as possible to the offender and shall seek to contribute to personal and social development of relevance for adjustment in society. Methods of supervision and control shall serve these aims. It seems that this is a model how non-custodial penalties should be applied. The European Rules were later on developed in Recommendation Rec 2000 (22) of the Committee of Ministers to mem-

¹⁷ Szczepaniec, Maria: *Teoria ekonomiczna w prawie karnym* [The Economic Theory In Criminal Law]. Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, Warszawa, 2012. pp. 295–296.

¹⁸ McIvor, Gill et al.: Community service in Belgium, the Netherlands, Scotland and Spain: a comparative perspective. *European Journal of Probation*, Vol. 2 (2010) No.1, pp. 82–98.

¹⁹ Recommendation No. R (92) 16 of the Committee of Ministers to member states on the European Rules on community sanctions and measures (adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers' Deputies).

ber states on improving the implementation of the European Rules on Community sanctions and measures.²⁰

The main advantage of community service order or work for social purposes, which should be mentioned, is that it is a way in which offenders can truly contribute to the society and repay damages. It has a compensation character.²¹ What is more, it allows avoiding the negative aspects of incarceration and isolation. Moreover, the convict can experience the value of work.

There are many different forms of work for the benefit of the community developed in European countries.²² In Poland, community service is relatively rarely used. It constitutes only about 11% of all sentenced penalties, while for example in Spain the percentage of the use of community service reached 25.88% of all the criminal sanctions in 2008.²³ The regulation of this penalty in Poland has undergone significant changes recently delivered by the amendments from the 1 July 2015 and then from 15 April 2016, which basically reversed the changes made by the first mentioned amendment. Until 15 April 2016, Polish judges were able to choose from four different forms of restriction of freedom:

1. obligation of unpaid controlled work for social purposes for 20 to 40 hours per month;
2. obligation of the convict to stay in his/her place of permanent residence or in other appointed place with the use of electronic supervision system for maximally 60 hours per week and 12 hours per day (in view of the work conditions of the convict and other imposed obligations);
3. probation obligation (one or more), e.g. obligation of work, studying, undergoing therapy, going to rehab, refraining from drinking alcohol or other intoxicating substances, contacting the aggrieved party;
4. 10% to 25% deduction of the convict's salary per month for social purposes appointed by the court (during the time of deduction the convict must not terminate his/her employment contract).

²⁰ Recommendation Rec 2000 (22) of the Committee of Ministers to member states on improving the implementation of the European Rules on Community sanctions and measures (adopted by the Committee of Ministers on 29 November 2000 at the 731st meeting of the Ministers' Deputies).

²¹ Hryniewicz-Lach, Elżbieta: *Kara kryminalna w świetle Konstytucji RP* [Criminal Punishment In The Light of Polish Constitution]. CH Beck, Warszawa, 2015. p. 326.

²² Look Janus-Dębska, Anna: Praca na rzecz społeczności lokalnej w wybranych krajach europejskich [Community service in selected European countries]. *Probacja* [Probation], (2013) No. IV, pp. 125–153; McIvor, Gill et al.: Community service in Belgium, the Netherlands, Scotland and Spain: a comparative perspective. *European Journal of Probation*, Vol. 2 (2010) No. 1, pp. 82–98.

²³ Blay, Ester: 'It could be us': recent transformations in the use of community service as a punishment in Spain. *European Journal of Probation*, Vol. 2 (2010) No. 1, p. 72.

After 15 April 2016, the shape of the regulation of community service changed again. The most important changes were the exclusion of the possibility of the electronic supervision system as a form of community service and the elimination of the possibility of sentencing to probation obligation as a form of community service. Probation obligation has become only a possible additional element of the penalty of community service but it cannot be a form of punishment on its own. In turn, the electronic supervision system has become a form of execution of the imprisonment sentence, as it used to be before the amendment since the 1 July 2015.

The basic advantage of electronic supervision system as a criminal punishment is the fact that convicts can stay out of penitentiary unit and still remain under some form of control. Convicts serving their sentences with the use of electronic supervision system have a possibility to continue professional work or studies. Furthermore, they are not deprived of their surroundings. They can also maintain the bond with other people. Another argument for electronic supervision system is its cost. In Poland, the monthly cost of the execution of imprisonment sentence with the use of electronic supervision system is about 331 złoty.²⁴ It is also important to remember that the more convicts serve their sentences out of penitentiary units, the less serious the danger of overcrowded prisons is.

7. Conclusions

Summing up, the execution of criminal law imposes significant costs on society. Not only taxpayers should be aware of the fact how the administration of justice affect the budget, but also what the other social cost of criminal punishment is. Apart from economic cost, there are also other ways in which the society pays for the execution of penalties, which is not always measurable in a certain amount of money, though. Criminal punishments should serve society as a way of satisfying the social sense of justice. That is why the social cost of execution of criminal punishment ought to be limited to a minimum in order not to increase the cost already caused by the crime committed.²⁵

As it has been mentioned, imprisonment, which is nowadays a basic criminal sanction in the catalogue of penalties, has many flaws. It causes significant harms to the convicts and their families. What is more, it has been known of having destructing effects on convicts who become more demoralized after prison and often commit crimes again. In the light of all evident disadvantages of imprisonment, the alternative measures seem to be the right answer to the question of the future of

²⁴ URL www.dozorelektroniczny.gov.pl (2 May 2016)

²⁵ Hryniewicz-Lach, Elżbieta: *Kara kryminalna w świetle Konstytucji RP* [Criminal Punishment In The Light of Polish Constitution]. CH Beck, Warszawa, 2015. p. 411.

criminal punishment. The emphasis should be put especially on the development and improvement of the system of community service. The restriction of freedom understood as the work for social purposes not only has the potential of being an elastic criminal punishment, adequate to many different offences and types of offenders, but its proper use also guarantees a real contribution and recompensation for the society for the harms done.

The efforts made in order to improve the regulations of non-custodial penalties, especially the reform of community service order, seem to be justified. Nevertheless, the significant rise of the use of alternative measures has not been observed yet. Another conclusion that can be drawn from the considerations above is that it is worth paying attention to the social cost of criminal punishment. It is crucial to study them and observe how the reforms of criminal punishments will affect the administration of justice system in the long run.

ANNA KOREPINA

Conciliation Proceedings: Problems of Legal Regulation

Between the subjects of public authorities of various levels, differences often arise. Legal conflicts on any management problem connected with the fulfilment of powers of government agencies are at issue. The competency of the subjects of public authority to issue legal regulations and enter into agreements to delegate state powers, cooperate and coordinate their activities brings about such legal and administrative disputes.

Under the legislation of the Russian Federation, there are two ways—administrative and judicial—to settle disputes between public authorities. The first involves a superior officer or executive authority to resolve an issue. This could be the President of the Russian Federation, the Russian government, superior federal executive authority or superior officer.

Art. 85 of the Russian Constitution¹ proclaims the right of the President of the Russian Federation to use conciliation to resolve disputes between the public authorities of the Russian Federation and the government agencies of the constituent entities of the Russian Federation, as well as between the latter. Under art. 44 of the Federal Constitutional Law of 17 December 1997 No. 2-FKZ “On the Government of the Russian Federation”,² the highest executive authority of the Russian Federation within the limits of its power resolves disputes and eliminates disagreements between the federal executive bodies and executive bodies of the regions of the Rus-

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¹ *The Constitution of the Russian Federation* (approved by a nationwide vote on 12 December 1993) considering the amendments introduced by the Russian Federation laws on amendments to the Constitution dated 30 December 2008 N 6-ФКЗ, 30.12.2008 N 7-ФКЗ, 05.02.2014 N 2-ФКЗ. URL <http://www.constitution.ru/> (25 May 2014)

² *Collection of Laws of the Russian Federation*, 22 December 1997, No. 51, Art. 5712.

sian Federation. The Decree of the Government of the Russian Federation of 28 July 2005 No. 452 “[o]n standard regulation of the internal organization of federal bodies of executive power”³ fixes that disputes arising in the process of interaction of the Federal Ministry with its federal services and federal agencies under it are considered by the respective deputy minister on behalf of the federal minister. In case the disagreements are not solved, it is up to the federal minister to make a decision. The RF Government Decree of 5 December 2005 No. 725 “[o]n interaction and coordination of the executive authorities of the constituent entities of the Russian Federation and the territorial bodies of federal executive bodies”⁴ stipulates the conciliation procedure to resolve disputes between the federal territorial executive agencies and executive authorities of the constituent entities of the Russian Federation.

Despite the constitutional and legislative consolidation of the administrative regulation of possible disputes between subjects of public power, the conciliation procedure has not been defined by Russian law yet. In fact, the conciliation proceedings are the solutions of the dispute by its participants through negotiations or conciliation commissions made up from the representatives of the parties involved. However, the procedure of their organizing has never been fixed. Only a few Russian normative acts deal with some of the aspects of legal regulation of this issue.

Thus, in accordance with the RF Government Decree of 13 August 1997 No. 1009 “[o]n approval of rules of preparation of normative legal acts of federal executive authorities and their state registration”⁵ if there are disagreements on the draft of a normative legal act, a federal executive body responsible for its development takes efforts to have a discussion of the draft in question and identify the differences with the federal executive authorities involved with a view to find a mutually acceptable solution. If no agreement is reached, the federal executive authorities draw up the minutes of the conciliation meetings, which are signed by the heads of the respective federal executive bodies or by their deputies if the head of a federal executive body orders to do so.

The draft of a legal act, which still has some unresolved differences after the conciliation meetings, can be signed by the relevant federal executive superior and sent for the state registration to the Ministry of Justice. In the case of such a decision, the federal executive body shall notify the federal executive body, whose remarks have not been taken into account in the course of the conciliation meetings. The head of the latter is entitled to send the differences, the draft and the records of the conciliation meetings to the Deputy Prime Minister of the Government of the Russian

³ *Collection of Laws of the Russian Federation*, 1 August 2005, No. 31, Art. 3233.

⁴ *Collection of Laws of the Russian Federation*, 12 December 2005, No. 50, Art. 5311.

⁵ *Collection of Laws of the Russian Federation*, 18 August 1997, No. 33, Art. 3895.

Federation. The relevant government coordination and advisory committees may scrutinize the differences at their meetings.

The problem of legal registration of the conciliation proceedings has not been properly examined in the Russian legal literature. Concurrently, some scientists point a gap in the legislation on the subject in question. Furthermore, Y.M. Kozlov wrote “the conciliation proceedings are new and not yet regulated phenomena of administrative and jurisdictional character”.⁶ Y.A. Tikhomirov has suggested a partial solution of the problem saying that the decision to establish a conciliation commission shall specify the purpose, the panel of the representatives of the sides to the dispute, the commission’s rights to get the relevant information, the order of its work including the formalization of decisions in the format of a protocol.⁷

Certain steps to create a unified legal framework for conciliation proceedings in the Russian Federation were made in 1998, when a group of deputies of the State Duma of the Russian Federation introduced a bill of a federal law “[o]n procedure to reconcile differences and resolve disputes between the public authorities of the Russian Federation and bodies of state power of the regions of the Russian Federation”. The federal law was passed by the Resolution of the State Duma of the Russian Federation of 24th June 1999 No. 4225-II GD.⁸ However, the upper house of Russia’s parliament rejected it.

Considering the above, a judicial procedure enshrined in the Code of Administrative Procedure of the Russian Federation of 08 March 2015 No. 21-FZ⁹ must be considered to date a properly regulated procedure to resolve disputes between the public authorities of the Russian Federation. Under art. 21 of the above-mentioned procedure act the Supreme Court as a court of first instance hears cases to resolve disputes between the federal authorities and authorities of the constituent entities of the Russian Federation, referred to the Supreme Court by the President of the Russian Federation in conformity with art. 85 of the Constitution of the Russian Federation.

⁶ Alekhin, A. P. – Karmolitsky, A. A. – Kozlov Yu. M.: *Administrative Law of the Russian Federation. Textbook*. M. Publishing house Zertcalo, 1996. p. 313.

⁷ Tikhomirov, Y. A.: *The theory of competence*. 2001, pp. 330–331.

⁸ *Collection of Laws of the Russian Federation*, 12 July 1999, No. 28, Art. 3626.

⁹ *Collection of Laws of the Russian Federation*, 09 March 2015, No. 10, Art. 139.

OKSANA VASIL'EVA – MARINA MILOVANOVA

Migration Phenomenon in the Context of Democratic Integrity

The developing global political as well as an economic situation is rich in contradictions, problems and conflicts which usually have not so good impact upon the development of society in general and the government in particular. In this regard the problem of mass migration is considered to be one of these problems. The above mentioned dilemma has a significant influence on crime medium, economic environment and socio-demographic climate.

Semantically “migration” (lat. migratio, migro—cross) means a population shift. This term generally describes a three-dimensional motion of a wildlife as well as human population. Consequently we can say that «migration» can be viewed as a movement of one person, group of persons, ethnic cluster or particular community from one region to another in order to constantly or temporarily change their existing domicile. On the one hand “migration” is a natural and often necessary part of human life. It can positively influence staff resource redeployment, demographical level, curing the demographical gap and can be viewed as a sound condition for economic growth.

On the other hand, migration sometimes has a negative influence on politico-social and crime atmosphere, which is triggered by a potential capacity to illegally traverse state's borders and commit unlawful actions on its territory. This is especially uncomplicated if a state has “transparent” borders.

Today we can observe this unfortunate development in the European Union. Due to the incapability to control migration flow from the states with unstable political and economic situation, the European Union faced a grievous complication, which nullifies state development strategy.

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Aside from the aforementioned issues, it is a necessity to make the best accommodation possible and make adaptation process as painless as can be. In order to reach this noble goal the EU member states need to spend great amount of money, which can provoke a negative reaction in EU citizens. However, inability to do so can aggravate the crime climate.

Behind every migration process there exist a group of conditions, factors and causes. In this sense conditions can be defined as human environment. Conditions that influence migration flow is more or less factors. Those factors are of volatile nature and can have subjective and objective characteristics. Besides we can distinguish «positive» and «negative» causes of migration. Correlation between these aforementioned concepts can be represented as a sequence: condition—factor—effect.

Generally, all factors can be divided into three groups:

- political (the cause for such factors - serious contradictions between political groups during political remodelling)
- economic (condition for such factors will be a crisis of existing economic relations)
- ethno-cultural (determined by unpredictable rise of tension between different culture representatives or by religious component)

During the meeting between V. V. Putin and V. Orbán, which took place on 17 February 2001 in Novo-Ogarevo, parties noticed that the problem of migration is about government destabilisation which is caused by armed revolutions, aggressive economic expansion and various military actions.

Today under the influence of negative factors we can observe migration from states with unstable political, economic, socio-demographic conditions and from zones of military operations. Such uncontrolled migration is indeed a problem of an unprecedented nature. Aside from the fact that unbridled migrational influx puts existing democratic values under risk, it is also posing a genuine threat to governmental stability, since it can foment a genuine crime rise (e.g. theft, robbery, murder, rape, drugs distribution). Yet, the main threat is posed by the increasing possibility of terrorist attacks (i.e. recent attacks in Paris).

The existing conflict of interest is followed by migrational behaviour of different nationalities, their way of life, traditions, educational level, culture, religion and attitude towards European traditions. Since the migration flow mostly originates from Syria, Afghanistan, Pakistan, Libya, Sudan, Albania Eritrea it is safe to say that these people have disparate mentality.

It is a well-known trend and fact that every civilised society is striving to build a democracy and the EU along with Russian Federation are not exceptions. Acknowledgment of democratic ideas and procedures testifies the willingness to adhere to

the main principles of democracy (i.e. equity, equality, freedom and right for participation in State's political life).

Political experts, sociologists, jurists and economists often have a different view on the influence of migration. Nevertheless, it is clear that cultural divergence plays a significant role in acumen and perception of morality and democratic ideals. Although in a traditional religious and liberal belief system human rights concept takes a significant place, animosities are still common and sometimes can appear in a very critical form.

To successfully resolve the aforesaid complications a worldwide compromise should be reached. We should take into account differences in understanding human rights as well as basic morality, since democracy is a society's highest water mark. Similarly, we should thread carefully on such benevolent pursuit in contemplation of not to lose our own identity. In this regard, it is safe to say that under existing circumstances of globalisation such concept as migration defiantly changed the world's attitude towards human rights and national security. We must coordinate our efforts and resources for the sake of the whole world and democracy.

