GLOBAL AND LOCAL ISSUES

FROM THE ASPECTS OF LAW AND ECONOMY

9TH BATTHYÁNY SUMMER SCHOOL
PROCEEDINGS

B·L·SZ·K

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Preface

Dear Readers,

You are holding in your hands a publication, which is a collective work of the lecturers and participants of the 9th Batthyány Summer School, which was held from 13th to 19th July 2014, in Győr, Hungary, organised by the Batthyány Lajos College.

The Batthyány Summer School is open for university students, doctoral students and young researchers, who seek an opportunity to spend a week in a Visegrád country in an inspiring international environment. This program is a mixture of academic, social, cultural and free-time activities. Such a platform for scientific debate beyond the boundaries of one country contributes to the global view on social sciences, which is so important in current days.

The participants of the 9th Batthyány Summer School could listen to lectures given by famous experts of the legal, political, economic science, and sociology also. This year the lectures focused on the global and local issues of the 21st century, from the point of view of law, economy and other social sciences. The topics included the sustainable development, the challenges of the international relations, the challenges of the European Union and the challenges of the state in the 21st century.

Besides the academic program, the participants had the chance to learn about the rich cultural heritage of the city of Győr, Hungary and the Central-European region. The program included sightseeing trips, cultural events as well. The visit to the thousand-year-old Abbey of Pannonhalma, is always one of the most popular activity of the Summer School.

On the so-called Cultural Evenings, participants from each country showed the others the cultural, historical, natural beauties of their country, possibly the musical, singing and dancing traditions as well. These events help the participants understand other cultures, find the endless richness of diversity in each other, and thus develop tolerance, and a better dialogue of cultures.

Honour and obeisance behoves to the organisers of the 9th Batthyány Summer School: *Laura Hegedűs, Csilla Gömbös, Georgina Sarlós and Petra Ujvári*.

Contributions contained in this collection reflect all those features.

dr. János Kálmán
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The Transatlantic Trade and Investment Partnership – The Revival of Bilateralism?

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Abstract
The trade negotiations between the EU and the US on the Transatlantic Trade and Investment Partnership (T-TIP) are obviously showing that the regulation of international economic and trade relations is tending to go off the track of multilateralism and switch to the bilateral regulation of international trade between the two major economic blocs of the world. Moreover, the T-TIP might overstep the borders of the multilateral framework of the trade liberalization, doing far more than merely to eliminate the already low average tariffs and targets the non-tariff barriers that are typical trade obstacles for the relations between the well-developed industrial nations. The main aim of the present paper is to analyze the characteristics of this bilateral segment of world trade, provide a general examination of the trade relations between the EU and US in the light of the EU negotiation mandate.

Keywords: *Transatlantic Trade and Investment Partnership, Bilateral trade agreements, Trade and Environment, Foreign direct investments*

JEL classification: *K33; F21, Q56*

1. INTRODUCTION

The trade negotiations between the EU and the US on the Transatlantic Trade and Investment Partnership (T-TIP) has been launched last year, aiming the most ambitious – 'comprehensive' (Barroso)[1] and 'high-standard' (Obama)[2] – trade

[1] "A future deal will give a strong boost to our economies on both sides of the Atlantic. It will be a comprehensive agreement going beyond tariffs, by integrating markets and removing barriers. It is estimated that, when this agreement is up and running, the European economy will get a stimulus of half a per cent of our GDP – which translates into tens of billions of euros every year and tens of thousands of new jobs." Speech of José Manuel Durão Barroso, former President of the European Commission. *See* BARROSO, JOSÉ MANUEL DURÃO: *Statement on the Transatlantic Trade and Investment Partnership*. Joint press conference, Brussels (13 February 2013), available at: http://europa.eu/rapid/press-release_SPEECH-13-121_en.htm [cit. 2014-12-19].

[2] "Promoting growth, creating jobs, strengthening the middle class-these are the principles that animate President Obama's economic policies, including this Administration's trade

agreement ever attempted, due to both its scale and its significance for the transatlantic relationship between the European Union and the United States. Moreover, this time the chances of success of the agreement seem more feasible than ever. From an economic point of view, the growth is weak equally in the EU and the US, however, the monetary and fiscal policy instruments are largely exhausted.[3] The trade growth has been slow-moving because of the effects of the financial crisis of 2008–2009 and subsidy and regulatory policies that impede commercial activity.[4] Structural reforms are demanded in both regions, from which the prospect of economic growth is expected. Moreover, both EU and US have widely lost market shares in the last two decades. Therefore, the liberalization of bilateral trade relations could increase their ability to compete with the emerging economies.

On the other hand, from the perspective of the international economic law, the negotiations on the T-TIP are showing that the regulation of international economic and trade relations is tending to go off the track of multilateralism and switch obviously to the bilateral regulation of international trade between the two major economic blocs of the world. Moreover, the T-TIP could overstep the borders of the multilateral framework of the trade liberalization, doing far more than merely to eliminate the already low average tariffs and targets the non-tariff barriers as well, which are typical trade obstacles for the relations between the well-developed industrial nations.[5]

The main aim of the present paper is to analyze the characteristics of this bilateral segment of world trade from the perspective of the international economic law. The paper starts with a general examination of the bilateral trade relations between the EU and US, then, it goes over the EU negotiation mandate, highlighting two specific and disputed fields, the trade and environment, and the investment provisions.

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policy. As President Obama said […], T-TIP can be a success if »we can achieve the kind of high-standard, comprehensive agreement that the global trading system is looking to us to develop.«" Michael Froman, the U. S. Trade Representative cited president Obama in his speech, *see* FROMAN, MICHAEL: Remarks at the Transatlantic Trade and Investment Partnership First Round Opening Plenary (July 8, 2013), in *Law and Business Review of the Americas*, Vol. 19. (2013), 135-136.

[3] *See* FELBERMAYR, GABRIEL J. – LARCH, MARIO: The Transatlantic Trade and Investment Partnership (TTIP): Potentials, Problems and Perspectives, in *CESifo Forum*, Vol. 14. No. 2. (2013), 49-60.

[4] SCHOTT, JEFFREY J. – CIMINO, CATHLEEN: Keys to negotiating the transatlantic trade and investment partnership, in *Intereconomics,* Vol. 48. No. 4. (2013), 263-264.

[5] According to the EU Commission's document, it is actually an average of 4 %, see: Recommendation for a Council Decision authorizing the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America. COM(12.3.2013) 136 final. There are some tariffs peaks for sensitive products on both sides of the Atlantic, e.g. tobacco, textiles and clothing, sugar, footwear, dairy products and some vegetables.

2. THE RISE OF BILATERALISM AND THE EU-US TRADE NEGOTIATIONS

"We are living in a trading environment of bilateralism" – Abbott has admitted already in 2007, and made attempts to examine the possible consequences of the rising bilateral trends in the EU trade policy.[6] The current EU–US negotiations can be regarded also a part of this tendency, which is now suggesting that the significant trading countries or trade blocs, like the European Union are seeking more frequently the opportunities in the bilateral trade negotiations, instead of bringing the even extending trade agenda to multilateral level. In more concrete terms, it means that the postponement of the Doha Round has somewhat weakened the desire for multilateral trade agreements,[7] and bilateral agreements, or regional integrations seem to be back in favor.[8] The advantages of the revival of bilateralism are quite palpable: while multilateral negotiations are more comprehensive and beneficial at global level, bilateral agreements are faster, and the countries involved can focus purely on their requirements without having to build common negotiating objectives among blocs of countries.[9] Moreover, achievements from bilateral negotiations can be accomplished gradually, and bilateral negotiations also enable countries to give more reflections on the regional and socio-political conditions of the negotiating parties, which can pave the way to reach compromises on 'tailor-made' agreements. This feature is hardly feasible in multilateral negotiations.

In terms of the trade statistics, the EU, and the US have already the largest bilateral trade relationship in the world. Each is the other's largest export market, and the investment relations between the two trade blocs are also significant. The US–EU bilateral trade in goods and services totals approximately 1000 billion US dollars annually, and the US and the EU are also heavily investing in each other's market (almost 3000-4000 billion US dollars a year).[10] In other terms, the US invests considerably more in the EU than in all of Asia – three times more according to the European Commission – while the EU invests considerably more in the US than in China and India combined – eight times more.[11]

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[6] ABBOTT, FREDERICK M.: A new dominant trade species emerges: Is bilateralism a threat? in *Journal of International Economic Law*, Vol. 10. No. 3. (2007), 571-583.

[7] BARUA, AKRUR – BANDYOPADHYAY, SUNANDAN: Revival in international trade and the resurgence of bilateralism, in *Global Economic Outlook*, No. 2. (2014), 60. Available at: http://dupress.com/articles/global-economic-outlook-q2-2014-revival-in-international-trade-and-the-resurgence-of-bilateralism/ [cit. 2014-12-19].

[8] *Cf.* PARDAVI LÁSZLÓ: *A globális gazdaság vámjogának alapkérdései (különös tekintettel a preferenciális szerződésekre)* [Main questions of the global economy's customs law (with specific regard to the preferential agreements)], Dissertation (manuscript), 2014, Széchenyi István University, Győr, 55.

[9] BARUA – BANDYOPADHYAY: *op. cit.* 60-61.

[10] SCHOTT – CIMINO: *op. cit.* 263.

[11] *See* trade policy website of the European Commission, available at http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/ [cit. 2014-12-19].

The T-TIP is not the first attempt to conclude an EU-US bilateral trade agreement. Between 1994 and 1996, a Transatlantic Free Trade Area (TAFTA) was under discussion, but formal negotiations were never started,[12] because the priority at that time was to ensure the stability of the newly formed World Trade Organization (WTO). The current negotiations are rooted in a summit meeting held on 28 November 2011, when Commission President José Manuel Barroso, EU President Herman Van Rompuy and US President Barack Obama established the High Level Working Group on Jobs and Growth (HLWG). The task of the Group was to identify policy measures, which are capable of increasing trade and investment between the two major economic areas, the United States, and the European Union.[13] The HLWG has issued an interim report in 2012, which referred to the conclusion of a bilateral trade agreement as the best policy option. The final report has been adopted on 13 February 2013,[14] which recommended to open negotiations for a Free Trade Agreement of the EU with the United States. The opening of the negotiations was cordially announced by US President Obama and EU Commission President Barroso. According to the report, the subject of the negotiations shall be the liberalization of agricultural products, industrial goods, services, of public procurement and investments as well as a regulation of intellectual property rights.

3. THE EU'S MANDATE AND THE 'RED-HOT' ISSUES OF THE NEGOTIATIONS

3.1. Obscurity over the EU negotiation mandate and the main objectives of the T-TIP

The European Commission has elaborated the framework of the mandate for the negotiation in March 2013, however only its summary has been published.[15] According to the frequently criticized EU practice, in the field of external trade,

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[12] WRÓBEL, ANNA: Multilateralism or bilateralism: The EU trade policy in an age of the WTO crisis, in *Ekonomika,* Vol. 92. No. 3. (2013), 20.

[13] The bilateral trade relationship is extremely important for both partners. The EU is first trading partner of the US (17.6% in trade in goods), and the US is the EU's second largest trading partner with 13.9% in trade in goods. Together the EU and the US account for approx. 50% of global GDP, 1/3 of total world trade. Bilateral trade volume of goods and services amounted to 702.6bn euro (2011), bilateral investment stock was 2.394 trillion euro (2011). *See* Commission Staff Working Document – Executive Summary of the Impact Assessment on the Future of the EU-US Trade Relations, SWD(12.3.2013) 69 final, 2.

[14] Final Report High Level Working Group on Jobs and Growth (February 11, 2013), available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf [cit. 2014-12-19].

[15] Member States endorse EU-US trade and investment negotiations, DG Trade News Archive (14 June 2013), available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=918 [cit. 2014-12-19].

the whole text of the negotiating mandate is never published, as it is always submitted to the Council and the Parliament as restricted – i.e. confidential – document. As a result, officially we shouldn't know further information than the above-mentioned summary and some other clarifications made public by the European Commission. Not surprisingly, however, the negotiation mandate classified as 'restricted document' has been leaked quickly, and it is accessible on the Internet even today. In late November 2014, the Commission has changed its policy regarding the 'secrecy' of international trade negotiation and made commitments to conduct a more transparent trade policy and provide more space for public participation.[16]

However, some 'hints' can help to cover up the objectives of the negotiations. As the name of the preparatory body of the negotiations suggests ('High Level Working Group on *Jobs and Growth'*), the overriding policy objectives of the T-TIP is to create more jobs and boosting economic growth. The expected impacts were analyzed in a commissioned study published in 2013,[17] which have estimated the overall economic impacts,[18] as well as the sectorial impacts[19] of the eventual conclusion of an ambitious T-TIP between EU and US. However, from legal and regulatory point of view the most important question is that how these economic gains arise? According to the 2013 study of CEPR, the key part of the liberalization within the prospective T-TIP will be the reduction of non-tariff barriers, it will be a key part of the transatlantic liberalization. The study has concluded that the majority – as much as 80% – of the total potential gains might come from cutting costs imposed by trade bureaucracy and regulations, as well as from liberalizing trade in services and public procurement.[20]

In addition to that, according to the short texts, and other summarizing documents brought out by the Commission, at least the directions of the

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[16] To be more precise, the Commission was pressurized by the Ombudsman and the CJEU in order to involve the public into the decisions on international trade issues. *See* especially, C-350/12 P. Council versus in't Veld, ECLI:EU:C:2014:2039.0.

[17] Centre for Economic Policy Research (CEPR) for European Commission – Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment (March 2013; hereinafter: CEPR assessment paper), available at http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf [cit. 2014-12-19]. The study suggested, that an ambitious agreement could bring significant economic gains as a whole for the EU (€119 billion a year) and US (€95 billion a year).This translates to an extra €545 in disposable income each year for a family of 4 in the EU, on average, and €655 per family in the US.

[18] It is also interesting the benefits for the EU and US would not be at the expense of the rest of the world. On the contrary, liberalizing trade between the EU and the US would have a positive impact on worldwide trade and incomes, increasing global income by almost €100 billion.

[19] Income gains are a result of increased trade. EU exports to the US would go up by 28%, equivalent to an additional €187 billion worth of exports of EU goods and services. Overall, total exports would increase 6% in the EU and 8% in the US.

[20] *See* Independent study outlines benefits of EU-US trade agreement, European Commission, MEMO/13/211 (12 March 2013), available at: http://europa.eu/rapid/press-release_MEMO-13-211_en.htm [cit. 2014-12-19].

negotiations can be already seen. In terms of that, the objectives of the negotiations cover two big areas and other miscellaneous issues.

Firstly, the EU is trying to put the questions of the market access on the agenda. The market access encompasses the following main topics:

- removing tariffs on transatlantic trade in industrial and agricultural products;
- reconciling the EU and the US approaches to rules of origin, which are used to determine the origin of a product for the purpose of trade rules;
- discussing the question of the Trade Defence Measures, namely, the EU wants to establish a regular dialog with the US on anti-dumping and anti-subsidy measures;
- opening up more access for transatlantic trade in services, at both federal and sub-federal level, and ensuring that European professional qualifications can be recognized in the US;
- securing investment liberalization at both federal and sub-federal level and potentially, to establish investment protection provisions;
- providing access to government procurement markets at all levels of US government.

The second big issue is the elimination of the regulatory trade barriers. This term refers to a variety of trade obstacles, which can take different forms. In general, two main categories are covered with the term 'non-tariff-barriers.' Firstly, it includes the whole range of quantitative restrictions that directly restrict market access (e.g. import quotas), and secondly, it covers regulations, which add to the cost of export into that market, e.g. domestic regulations requiring expensive reconfiguration of products, or adapting the technical parameters (environmental standards of cars, standards and product requirements of foods, administrative measures, e.g. price controls etc.). From the perspective of their effects, this category might cover, e.g. the need to have to allow products separately for both markets, often on the basis of different procedures and conditions for admission; different environmental, health or consumer protection policy standards: different industrial standards, packaging requirements and information or labelling obligations; regulation of access to public procurement procedures or economic development programs, such as the state export credit insurance, etc.[21] Therefore the terms refers typically to the so-called 'behind-the-border' barriers to trade.[22]

These differences in domestic regulations, technically, can be addressed by

[21] Expressive examples are examined by Lester and Barbee, illustrating how fruit and vegetable product can sizes, or car headlights standards can operate as regulatory trade barriers, *see* LESTER, SIMON – BARBEE. INU: The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership, in *Journal of International Economic Law*, Vol. 16. No. 4. (2013), 848.

[22] *See* SADIKOV, AZIM: Border and Behind-the-Border Trade Barriers and Country Exports, in *IMF Working Paper* (WP/07/292), December 2007. Available at: https://www.imf.org/external/pubs/ft/wp/2007/wp07292.pdf [cit. 2014-12-19].

three major approaches.[23] The first method is the unification, which provides a tool for establishing the same requirements in all contracting countries. However, the unification has its limitations; namely, if strong industrial actors are competing in the market at stake, setting common standards is much more than difficult. However, it is not impossible, even today unified standards are working in several areas, like telecommunication, IT technologies, automotive industry, or international aviation and maritime transport. Secondly, the harmonization implies the alignment of regulations to a single best practice. Usually a voluntary agreement, harmonization can be based on a reference to international standards from a standard-setting body, or simply involve coordination among nations. Countries agree, in general to converge on a single standard or regulation. This is usually the most difficult way to achieve regulatory cooperation, in part because countries are reluctant to adjust their standards, and also because the harmonization of standards requires complete consensus. Thirdly, the principle of mutual recognition can also help to eliminate the regulatory trade barriers; it is especially useful in eliminating duplicative testing and certification processes.[24]

All of these approaches would facilitate trade by reducing the regulatory hurdles faced by prospective exporters both sides, in that they would save them the trouble of complying and/or demonstrating that they have complied with, a different regulatory regime. The question arises, however, how the EU and US can find a compromise on these issues. Probably, the solution should simply be to remove regulatory divergences that are accidental or serve no purpose. However, it is inevitable that both negotiating parties must accept some inefficiency and higher costs.[25]

In addition to the market access, and the regulatory trade barriers, the objectives of the EU encompass other particular and colorful issues, such as the intellectual property rights,[26] customs and trade facilitation, trade in energy and raw materials, trade-related aspects of small and medium-sized enterprises, state-owned enterprises, or trade and environment, and the inclusion of investment arbitration clauses.

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[23] LESTER, SIMON: Tackling Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership, in CARDOSO, DANIEL (et. al., ed.): *Transatlantic Colossus – Global Contributions to Broaden the Debate on the EU-US Free Trade Agreement*, 2013, Berlin Forum on Global Politics, Berlin, 84.

[24] Both the EU and the US have already concluded Mutual Recognition Agreements (MRAs), and even the EU and the US has common agreement on specific issues. The MRAs have the objective of promoting trade in goods between the contracting parties by facilitating market access. They are, in general, bilateral agreements, and aim to benefit industry by providing easier access to conformity assessment. The EU has currently MRA with USA, and Australia, Canada, Japan, New Zealand, Switzerland.

[25] *See* Lester's example: if a car producer wants to sell vehicles in the United Kingdom, it must account for the UK's use of left-hand drive traffic. LESTER – BARBEE: *op. cit.* 856.

[26] The main objective here is to reconcile different US and EU approaches to specific issues, such as protection for Geographical Indications, which is vital in several EU made products, e.g. Tokaji vine, or parma ham.

It would not be feasible to extend the analysis to the whole range of the covered topics, however, we refer to specific examples, which shed light on the particularity of the European perspective and can give illustration of issues – 'red-hot issues' –, over which the negotiating parties have considerably divergent visions. The first example focuses on the trade and environment issues, the second will examine the debate on the investment arbitration.

3.2. Example 1: Trade and environment on the agenda of the transatlantic negotiations

The role and stance of the European Union to the 'Trade and Environment' debate,[27] comparing with the US position, represents a very strong commitment to the real inclusion of environmental concerns into the legal framework of the world trade. From the perspective of the ongoing negotiation on a transatlantic free trade and investment partnership agreement, it means that a successful compromise can be reached only if the striking divergence between the positions of the parties can be reconciled. However, it is hard to pave the way to a mutually acceptable agreement not only because of the big differences in the positions of the parties, but also because of their specific interest. At the current stage of the negotiations it is hardly possible to foresee, which compromise could be found regarding the disputed issues, in which the EU has expressed crucial interest in the last two decades (from the past e.g. GMOs, hormone treated-beef and pork, chlorine-sterilized chicken, or quite recent disagreements on the so-called 'fracking' shale gas reserves).

However, is the reconciliation of these positions really required? On the one hand, technically, it is not, in other terms an agreement could be concluded without real inclusion of 'bridges' between the trade and environmental concerns. On the other hand, the chance of the ratification of such a treaty would be precious little. The specificity of the EU's position to the 'Trade and Environment' issues has its roots not only in the EU law, but also in a kind of European sensitivity to environmental concerns. Therefore an agreement without the real inclusions would

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[27] *See* for 'Trade and Environment' debate, ARAYA, MONICA – FIGUERES, JOSE MARIA – SALAZAR-XIRINACHS, JOSE M.: Trade and Environment in the World Trade Organization: The Need for a Constructive Dialogue, in SAMPSON, GARY (ed.): *The Role of the WTO in Global Governance*, 2001, United Nations University Press, New York, 156; SANTARIUS, TILMAN (et al.): *Balancing Trade and Environment: An Ecological Reform of the WTO as a Challenge in Sustainable Global Governance*, 2004, Wuppertal Institute for Climate, Environment and Energy, Wuppertal, 18; KESERŰ, BARNA ARNOLD: A fenntartható fejlődés a GATT-WTO normarendszer tükrében [The sustainable development in the light of the GATT-WTO law], *Diskurzus*, Special Edition (2013), 34-41; KESERŰ, BARNA ARNOLD: Review on the Role of Green Technologies in Hungarian Policies Concerning Sustainability, in KÁLMÁN, JÁNOS (ed.): *Legal Studies on the Contemporary Hungarian Legal System*, 2014, Universitas-Győr Nonprofit Kft., Győr, 190-223; VÍG, ZOLTÁN: Szabadkereskedelem és környezetvédelem: a WTO Vitarendezési Testületének gyakorlata [Free trade and environment: the case law of the WTO Dispute Settlement Body], in CSEHI, ZOLTÁN – RAFFAI, KATALIN (ed.): *Állam és magánjog* [State and private law], 2014, Pázmány Press, Budapest, 427-438.

be politically unacceptable in Europe. Over this, the question can be raised finally, what kind of compromise would mean a real solution, which can bring the concerns of trade as well as of the environment together. Essentially, four basic concerns could be highlighted, which are pivotal elements of an 'environmentally conscious' trade agreement.

First an 'environmentally conscious' trade agreement sets down the most important, environmentally relevant principles and objectives and makes clear the relationship between these principles and the principles of the free trade. It is important to ensure that these principles and objectives have legal effects as well (e.g. as tools of the interpretation in the dispute settlements etc.), and that the principles of the free trade should not overrule the environmental principles and objectives. The principle structure of the EU funding treaties furnishes a good instance of that solution, when introducing a clear stucture between the environmental concerns, as the general principle of the EU's external activities, and the free trade and liberalization, as principles of the Common Commercial Policy. The negation mandate of the European Union is a good base towards this compromise, but at this time, the details in this regard are not clear. According to the public summary of the mandate, this part of the agreement (e.g. its preamble) should express the commitment to sustainable development and the contribution of international trade to sustainable development "[…] in its economic, social and environmental dimensions, including economic development, full and productive employment and decent work for all as well as the protection and preservation of the environment and natural resources […]."[28] Questionable is, however, the notion of 'sustainable development'. If we interpret this reference in context with the EU law, the proposition of the EU is that the agreement should recognize the sustainable development as an overarching objective, as well as the aim of the parties at promoting high levels of protection for the environment. In this regard, the mandate emphasizes a specific objective as well. In terms of that the Agreement should also recognize that the Parties will not encourage trade or foreign direct investment by lowering domestic environmental standards. In other words, the agreement should prevent the 'race to the bottom' effect, which could lead to sinking the level of protection in the contracting parties.

Second, the agreement should also cover substantive provisions, which enables the parties to introduce measures with the intention to achive environmental objectives. However, the real question is whether also the guarantees should be established, which can prevent the parties from introducing illicit discriminatory measures in this way. In this regard the mandate is not clear enough, it refers only general statements which are in line with the proposed principles and objectives, but the material content of this chapter is questionable. The mandate stresses only that the separate chapter of 'Trade and sustainable development' will include commitments by both parties in terms of the trade and

[28] *See* Recommendation for a Council Decision authorizing the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America. COM (12.3.2013) 136, paragraph 6.

sustainable development. Consideration will be given to measures to facilitate and promote trade in environmentally friendly and resource-efficient goods, services and technologies, including through green public procurement and to support informed purchasing choices by consumers. Besides the Agreement will also include provisions to promote adherence to and effective implementation of internationally agreed standards and agreements in the labor and environmental domain as a necessary condition for sustainable development,[29] end the importance of implementation and enforcement of domestic legislation on labor and environment should be stressed as well. It should also include provisions in support of internationally recognized standards of corporate social responsibility, as well as of the conservation, sustainable management and promotion of trade in legally obtained and sustainable natural resources, such as timber, wildlife or fisheries' resources. The future Agreement will foresee the monitoring of the implementation of these provisions through a mechanism including civil society participation, as well as one to address any disputes.

It should be also noted that the mandate refers, among the market access rules, to the general exceptions under the WTO law, noting that the agreement should have a general exception clause based on Articles XX and XXI GATT and Articles XIV and XIVbis GATS. In the context with the non-tariff barriers, the agreement should also reflect on the specificity of Sanitary and phytosanitary measures (SPS). According to the mandate, on SPS measures, the negotiations shall follow the former negotiating directives of the EU.[30] In terms of that, the parties shall establish provisions that build upon the WTO SPS Agreement and on the provisions of the existing veterinary agreement, introduce disciplines as regards plant health and set up a bilateral forum for improved dialogue and cooperation on SPS issues. Moreover the chapter on the SPS measures should be based on "[…] the key principles of the WTO SPS Agreement, including the requirement that each side's SPS measures be based on science and on international standards or scientific risk assessments, applied only to the extent necessary to protect human, animal, or plant life or health, and developed in a transparent manner, without undue delay […]."[31] In addition to that the proposed agreement should also touch upon the technical regulations, which is also an important regulatory area from an environmental perspective. In line with the WTO Agreement on Technical Barriers to Trade (TBT), the EU's mandate foresees also provision. The objectives of these provisions would be to generate greater openness, transparency and convergence in regulatory approaches and requirements and related standards-development processes, as well as, inter alia, to reduce burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies, and enhance cooperation on conformity assessment and standardization issues globally.

Third, the essential element of such an agreement is also a dispute resolution system, which can effectively reconcile the disagreements of the contracting

[29] Recommendation for a Council Decision… COM (12.3.2013) 136, paragraph 25.
[30] Adopted by the Council on 20 February 1995, *see* Council Doc. 4976/95.
[31] *See* Recommendation for a Council Decision… COM (12.3.2013) 136, paragraph 18.

parties. In this regard the main point is that the proposed the dispute resolution procedure should be applied to the 'Trade and Sustainable Development' chapter. In other terms, the agreement has to express clearly that the same implementation requirements are to be applied to this chapter as for all other content of the agreement. The EU mandate touches upon the question of the dispute resolution but it is silent on its possible extent. Therefore, it is still unknown, how these requirements will be applied to the trade and environmental matters.

Finally, the fourth requirement is that a trade agreement which takes into consideration the environmental interest should make clear its relationship to the multilateral environmental agreements. One option could be that the most important relevant agreements previously concluded by the EU[32] are to be listed explicitly in the text agreement. This concern is totally in compliance with the EU commitments to these issues, as it was mentioned before, the EU has intended to make provision regarding the multilateral environmental agreements already in the course of the Uruguay round. However, the current and publicly accessible information on the EU mandate is silent on this issue.

3.2. Example 2: Investor-State Dispute Resolution in the T-TIP

As the title of the T-TIP suggests, it will contain provisions regarding the investment activities as well. A typical feature of the investment treaties is the set of rules providing mutual protection for investors, including specialized mechanism of dispute resolution (Investor-State Dispute Resolution – ISDS). The ISDS can be regarded as a general 'guarantee' of the agreement that entitles the investors to initiate procedures directly against the host state, if it is deemed to breach the obligations arising from the agreement. The main reason of the ISDS clauses in the investment treaties is to provide an investor-friendly environment and encourage the foreign investments in the participating countries. However, the ISDS is recently in center of debates, specifically in the European Union. Problematic is not only the ongoing negotiation on T-TIP, but we can currently also observe a competence struggle between the European Union and its Member States. It is because the Treaty of Lisbon established the framework of the exclusive competence in the field of the foreign direct investments, however, the more than 1000 bilateral treaties previously concluded by the Member States could not yet replaced by new Treaties negotiated by the European Union, therefore the Member States are allowed to maintain their old investment treaties and relationships for a transitory period.[33] The European Commission is wholly

[32] The most significant agreements are as follows: Montreal Protocol on Ozone Depleting Substances, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Stockholm Convention on Persistent Organic Pollutants, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity, Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticide.

[33] *See* 1219/2012/EU European Parliament and Council Regulation (12th December 2012) establishing transitional arrangements for bilateral investment agreements between

concerned over the application of the new Union competence and it clearly wants to uphold this issue on the agenda of the T-TIP negotiations in spite of the weighty public opposition. Consequently, the T-TIP seems to be a 'pilot project' of the Commission, which might indicate the particularity of the competence division between the Union and the Members States and have a long-term effect on the EU investment policy, hoping, that the T-TIP would serve as a model agreement for the future negotiations, thus the T-TIP would have precedent value in this respect.

However, neither all Member States nor the academia are convinced about the necessity of the investment provisions. Among the EU Member States, Germany has expressed the harshest criticisms on the necessity of the investment chapter and of ISDS provisions within the T-TIP, highlighting a several concerns about the inclusion of investment protection provisions. It was argued, that these provisions might lead to litigious activity against EU member states by US investors, which observation was based on the empiric experiences, which are showing, that that US had launched by far the largest number of ISDS claims and were supported by "equally litigious" US law firms, who "dominate the global arbitration business.[34]

In addition, the academia has publicly criticized the proposed ISDS clause in T-TIP as well. The worldwide known international law professor, Martti Koskenniemi has highlighted a number of concerns that are to be considered, if the EU would decide to put the question on the negotiation agenda.[35] Firstly, he remarked, that the ISDS clause is not adequate in the USA-EU relationship. It is because corporations investing in unstable, typically non-democratic economies demand investment protection regulations, however the EU and the EU member states are based on the principle of democracy and rule of law. Secondly, he criticized the method of investment arbitration as well, underlining the weaknesses of the current models of dispute settlements, specifically the World Bank's International Centre for Settlement of Investment Disputes (ICSID). Koskenniemi highlighted, that over a half of the disputes brought to the ICSID have been resolved by 15 lawyers, who has the possibility to represent also parties in the procedures, and since the body has no permanent composition, its rulings lack cohesion and coherency. Koskenniemi also referred to the assumption, which

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Member States and third countries. It is worth noting, that eight member states have own bilateral investment treaty also with the United States, therefore the T-TIP would replace all these existing individual Bilateral Investment Treaties (BITs) between the US and the Member States concerned.

[34] According to the United Nations Conference on Trade and Development, of the 247 concluded cases known by the end of 2013, around 43% were decided in the state's favor and 31% in favor of the investor. The rest (26%) were settled. TTIP and the Arbitration Clause, in *Euractiv Special Report* (8–12 December 2014), 1. Available at: http://www.euractiv.com/files/euractiv_special_report_-_ttip_and_the_arbitration_clause.pdf [cit. 2014-12-19].

[35] *See* Professor: Finland's legislative power may be in jeopardy, in *Helsinki Times* (15 Dec 2013), available at: http://www.helsinkitimes.fi/finland/finland-news/domestic/8717-professor-finland-s-legislative-power-may-be-in-jeopardy.html [cit. 2014-12-19].

governs this judicial body, namely that all investors act in good faith (*bona fide*), therefore, investors acting in *mala fide* are not accounted for. If the T-TIP will establish a similar body similar, law firms will wrangle on every possible clause of international legislation. Thirdly, he noted, that such disputes generally arise in the fields, which are strictly regulated by the state. For example a foreign mining company could, initiate legal action against an EU Member State for restricting its operations. He refers to the case of Tobacco company Philip Morris, in turn, initiated legal action against Australia after it decreed that cancerous lungs be imprinted on cigarette packs.

Besides it is notable, that also a formal 'academic opposition' has been launched in July 2014.[36] A group of 120 academic experts[37] in trade and investment law, EU law, international law and human rights, constitutional law, private law, political economy and other fields has spoken out against planned provisions on ISDS in T-TIP. The action coordinated by the University of Kent, has been a contribution to the public consultation announced by the European Commission.[38] The expert group criticized the Commission for failing to make a plausible case for the need for investment protection provisions in T-TIP in the first place, and for excluding views on their desirability from the consultation exercise. Based on the consultation document published by the Commission, the expert group found that the proposed text, amongst other shortcomings, specifically

- allows for unwarranted discretion for arbitration tribunals in the application of various 'necessity' tests;
- fails to exclude acquisitions of sovereign debt instruments from the scope of the Treaty;
- allows anyone with a substantial business activity in the home state who holds any 'interest' in an enterprise in the host state to bring a claim;
- fails to spell out legal duties of investors in host states;
- fails to control the expansion of investment arbitration to purely contractual claims;

[36] Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP), available at: https://www.kent.ac.uk/law/isds_treaty_consultation.html [cit. 2014-12-19]. The submission was written by Peter Muchlinski (SOAS School of Law), Horatia Muir Watt (Sciences Po Law School), Harm Schepel (Kent Law School), and Gus van Harten (Osgoode Hall Law School).

[37] Public consultation on investor-state arbitration in TTIP – Comment, available at: https://www.kent.ac.uk/law/downloads/ttip_isds_public_consultation_final.pdf [cit. 2014-12-19].

[38] *See* Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), European Commission, available at: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 [cit. 2014-12-19].

- fails to protect the 'right to regulate' as a general right and as a component of the Fair and Equitable Treatment (FET) and Expropriation standards of protection of investors;
- fails to further the stated principle of favoring domestic court proceedings, and
- fails to regulate conflicts of interest in the arbitration process.

Although the scholars emphasized that the proposed text has been rather better than many investment treaties, they added that "the nature of the problems associated with investor-state arbitration is not quite as straightforward as the Commission presents it. In a strange cat-and-mouse game, the Commission's objective seems to be to 'outwit' arbitrators by closing down 'loopholes', eradicating discretion, and putting in place firm 'rules' on transparency of proceedings and impartiality of arbitrators."[39] Proponents of ISDS have suggested that the proposed provisions in T-TIP may serve as a 'Gold standard' for the European Union's use of its new competences regarding foreign direct investment under the Common Commercial Policy. The scholars show this claim to be misleading at best, and expressed the hope that the current controversy over ISDS in T-TIP will prompt broad and serious debate about a sensible EU policy on existing and new investment Treaties in accordance with the values of Articles 2 and 3 of the Treaty on European Union that the Union is to promote in its relations with the wider world.

The Commission completed the public consultation[40] and is preparing an imminent report on the use of ISDS in T-TIP, which will supposedly re-ignite the debate between the EU negotiators who favor pushing ahead with an arbitration clause in the future agreement, and the broad coalition of opponents. The whole report is expected to be published in December 2014 or January 2015, therefore, the explosive debate is still not over.

4. CONCLUDING REMARKS

As the above analysis has shown, the negotiation on the T-TIP is based on strong economic arguments, namely, since both the EU and the US are facing decreasing world market shares and ability to compete with the emerging economies, the biggest motivation and perspective for the future agreement is the enhancement of

[39] Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP), available at: https://www.kent.ac.uk/law/isds_treaty_consultation.html [cit. 2014-12-19].

[40] The Commission, surprisingly, has received approx. 150.000 contributions. See Preliminary report (statistical overview) – Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), European Commission, available at: http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf [cit. 2014-12-19].

the bilateral trade relations. Consequently, the T-TIP as free trade agreement will form an exemption pursuant to GATT Article XXIV, in other terms, the agreement will apply 'legal discrimination' against the outside world. From this point of view, it seems to be not an exaggeration to regard the T-TIP as a potential 'economic NATO.'[41]

Therefore, the first concluding question is whether the T-TIP would mean really a threat for the third countries, specifically for the emerging markets. It is important that the customs duties towards the majority of the third countries, first of all, all WTO members, are low as the same way as it is insignificant in the EU-US relation. The second component is the likely effects of standards and regulatory barriers, if the T-TIP will pay the way for harmonization and mutual recognition. However, if also the third countries will introduce and apply these standards, they will not face discriminatory effects.

The second question is how the T-TIP would affect the multilateral negotiations within the WTO. It is interesting not only from the perspective of the T-TIP, because both the EU and the US have recently opened and concluded negotiations on a number of bilateral trade agreements. Presumably, the bilateral trade negotiations and the 'revival of bilateralism', as the title of this paper suggests, is not itself the hindrance of the future multilateral talks within the WTO. It is rather a consequence of several changes that occurred in the international economic law and world trade in the last few decades. It means that the GATT-WTO system lifted international trade barriers of various kinds in eight successful negotiation rounds effectively, which covered predominantly the traditional trade measures, like customs tariffs. Due to the successful liberalization agenda, the customs tariffs are fallen to a current historically low level. Though, it is relatively easy to lower the tariff barriers, which are generating low welfare gains, in comparison to the high level non-tariff barriers, which are very difficult to address among the 160 members of the WTO and find a mutually acceptable agreement on these issues. Probably, it is because the Doha Round is still not closed. However, it is expected the T-TIP should not weaken neither the EU's nor the US' commitment to the WTO and a strong multilateral global agreement, and the T-TIP may indeed offer considerable template for future multilateral trade negotiations.[42] As a consequence, the regulatory models and methods of the T-TIP would important not only for their impact on the EU and US alone, but also for the multilateral trade negotiations.

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[41] It is not known who introduced this term first time, but even the policy papers of the Atlantic Council characterized the future agreement with using this language, *see* GRAY, C. BOYDEN: An Economic NATO: A New Alliance for a New Global Order, in *Atlantic Council Issue Brief* (February 2013) 1.

[42] Not mention here the potential for the future bilateral agreements in terms of Baldwin's domino effect theory. *See* BALDWIN, RICHARD: A domino theory of regionalism, in BHAGWATI, JAGDISH – KRISHNA, PRAVIN – PANAGARIYA, ARVIND: *Trading blocs: Alternative approaches to analyzing preferential trade agreements*, 1999, MIT Press, Cambridge, 479-502.

Thirdly, it is also obvious that the major benefits from T-TIP will come from the regulatory field and from the elimination of non-tariff barriers. Even if the chance of removal of regulatory trade barriers is every so often underestimated, mostly because of the strong 'self-confidence' of the EU and US legislators, it is worth noting, that even today converging tendencies are palpable in the relation of the US and EU legal order. The literature is analyzing the so-called Brussels effect and demonstrates how the EU regulations are occupying e.g. the US environmental law.[43] The EU seems to be a powerful actor in regulating the global markets, therefore, it is likely that the negotiation on regulatory trade barriers will not hinder both parties to find a compromise.

Finally, as the two case-studies from the negotiation agenda – the environment and the investment – have illustrated, some topics can raise significant public concern on both sides of the Atlantic. It is essential that the negotiating parties, especially the European Commission from the EU side, address the public interest and conduct a transparent dialog on these issues. Public participation and more transparency could play an important role in facilitating these debated issues. It is the only way to lay the foundation of democratic legitimacy of the future agreement.

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Sustainable Development and its Principles

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Abstract
Today, the objective of sustainable development is acclaimed by almost all international organizations, national governments, and also private enterprises. This general consensus seems mainly to rest upon the vague substance of the terms 'sustainable development' and 'sustainability' themselves, which leave much room for interpretation.
Different definitions of 'sustainable development' or 'sustainability', often general and vague, lead one to question how these terms can be of any practical value. In this article, I do not attempt to provide a single definition or single acceptable approach to sustainable development or sustainability. My intention is to point out that sustainable development (sustainability) is not a (key) principle, especially not a principle of environmental law. It is rather a fundamental and overarching objective, aiming to continuously improve the quality of life and well-being for present and future generations, by linking economic development, social justice and environmental protection. It is not a principle, but is has its own principles, and I am convinced that the real solutions of our current problems are embedded in the principles of sustainable development.

Keywords: *Sustainable development, sustainability, principles.*

1. THE ENVIRONMENTAL ROOTS OF SUSTAINABLE DEVELOPMENT

The basic idea behind sustainable development is not new, especially among traditional or indigenous societies. Since the industrial revolution, human actions have gradually become the main driver of global environmental change. In earlier centuries when physical survival was often the highest imperative, human population and densities were lower, technologies were simpler and their byproducts more benign. The use of steam power facilitated the concentration of factories in cities; environmental pollution was the inevitable by-product of industrial activities, experienced on a greater scale and in a more complex and concentrated form, than ever before. The spread of industrialization, followed by the development of science and technology, and the exponential growth of the population have put unprecedented stress on the environmental systems on which life depends.

Pollution due to human activities on a local scale has been around for a very long time. Degradation and deterioration of the environment started from the prehistoric times when man created the first fires. As early as the first quarter of the 19th century the environmental effects of intense economic growth became

apparent. The industrial revolution, the emergence of great factories and consumption of fossil fuels gave rise to unprecedented air pollution, a large volume of chemical discharges, and a growing load of untreated human waste.

Environmental pollution became a popular issue after World War II, due to radioactive fallout from atomic warfare and testing sometimes near inhabited areas, especially in the earlier stages of their development. What is relatively new and what has been giving rise to much current environmental concern since the end of the 1950s is the existence of human activities which lead to pollution on the global scale. Unprecedented growth in human numbers and accompanying increase in usage of natural resources is linked to threats to the global ecosystem.[1]

In the United States, pollution began to draw major public attention between the mid-1950s and early 1970s. The theory of sustainability has it roots in the 1960s environmental movement when global environmental problems came into focus.

In 1962, an American biologist, Rachel Carson published a famous book titled "Silent Spring". The book's legacy was to produce a far greater awareness of environmental issues. The book suggested that the indiscriminate use of DDT and other pesticides without fully understanding their effects on the environment was a threat to wildlife, particularly birds. The agricultural use of DDT[2] questioned the logic of releasing large amounts of chemicals into the environment. The resulting public concern led to the creation of the US Environmental Protection Agency (EPA) in 1970.

In the 1970s the environmental movement gained rapid speed around the world. Environmentalists have seen a false trade-off between environmental protection and economic growth. To protect the environment from the adverse effects of pollution, many countries worldwide have enacted national legislation to regulate various types of environmental pollution. Public policies were problem specific: air, water and land pollution were examined as distinct subjects.

Nowadays there's a growing consensus in national governments and international organisations that it is impossible to separate economic issues from environment issues. Many forms of development erode the environmental resources upon which they must be based, and environmental degradation can undermine economic development.

The general 'environmental' element of sustainable development is the most fundamental aspect of the concept. The protection of the environment is a long-term activity, providing the basis for developing environment policy across all

[1] The term ecosystem was coined in 1930 by Roy Clapham, to denote the physical and biological components of an environment considered in relation to each other as a unit. British ecologist Arthur Tansley later refined the term, describing it as the interactive system established between biocoenosis (a group of living creatures) and their biotope (the environment in which they live).

[2] The abbreviation DDT stands for dichlorodiphenyltrichloroethane. During and after World War II, DDT became an extremely popular insecticide. By the early 1970s, however, serious questions were being raised about its environmental effects. DDT was first banned in Hungary in 1968.

environmental topics, including *inter alia* accelerating climate change, deterioration of our eco-systems and increasing overuse of natural resources. Environmental policies are designed to have positive impacts on the state of the environment in the future, but the timeframes are always too short to cover policy formulation, adoption and implementation in several areas because of the need for more information or because of other obstacles.

2. THE EMERGENCE OF SUSTAINABILITY

While numerous governments and other domestic actors have pressed the sustainable development goal in many countries, the impetus toward governmental adoption of the concept in all countries has been a direct result of international discussion, debate and pressure. The origins of sustainable development are usually identified in the Stockholm conference of 1972, which sought to emphasise links between human development and environmental protection. 42 years ago, the participants of the United Nations Conference on Man and Environment agreed on the urgent need to respond to the problem of environmental degradation and deterioration. This was the first of a series of world environmental conferences under the auspices of the United Nations, and a turning point in the development of international environmental policy and law.[3]

The Stockholm Conference focused the world's attention on actions to protect the ecosystems. It bought together the world: thousands of participants, including heads of State and Government, national delegates and leaders from non-governmental organizations (NGOs), businesses and other stakeholders. The Stockholm Conference also had a real impact on the development of EU environment policy: the Environmental and Consumer Protection Directorate was set up, and the first Environmental Action Program was adopted in 1973 by the European Community (that later became the European Union).

The rest of the 1970s and the 1980s witnessed the accumulation of many environmental instruments. Some of these instruments have played an important role in defining environmental problems in a global or a regional setting. Little, however, was done in the succeeding years to integrate environmental concerns into national economic planning and decision-making. Overall, the environment continued to deteriorate, and such problems as ozone depletion, global warming and water pollution grew more serious, while the destruction of natural resources accelerated at an alarming rate.

Since at least the early 1980s, sustainable development has been a fashionable

[3] The next summits took place in Rio de Janeiro (Brazil) in 1992, in Johannesburg (South Africa) in 2002, and in Rio again, in 2012. Unfortunately, the international community could not embrace the priority of strengthening global environmental governance at the Rio+20 UN Conference on Sustainable Development. One of the most important outcomes of Rio+20 is the new aim of creating a framework for global goals and indicators – Sustainable Development Goals (SDGs) – which build on the current Millennium Development Goals (MDGs).

concept in environmental discourse, and an important element of international cooperation. By 1983, when the UN set up the World Commission on Environment and Development (WCED), environmental degradation, which had been seen as a side effect of industrial wealth with only a limited impact, was understood to be a matter of survival for developing nations. Led by Gro Harlem Brundtland of Norway, the Commission put forward the concept of sustainable development as an alternative approach to one simply based on economic growth. The member of the Commission explored the possibility of reconciling demands for development from developing countries with demands for environmental protection, primarily from rich industrialised countries.

The Commission was an independent body, linked to but outside the control of governments and the UN system. The Commission's mandate gave it three objectives:

- to re-examine the critical environment and development issues and to formulate realistic proposals for dealing with them;
- to propose new forms of international cooperation on these issues that will influence policies and events in the direction of needed changes; and
- to raise the levels of understanding and commitment to action of individuals, voluntary organizations, businesses, institutes, and governments.[4]

The World Commission on Environment and Development first met in October 1984, and published its seminal work on sustainable development, 'Our Common Future'[5] (the 'Brundtland Report') 900 days later, in April 1987. The Brundtland Report was an extraordinarily optimistic piece of work: it brought many formerly opposing positions, particularly growth and environmental protection, into agreement around the same ideas.[6] In the wake of the Report and the UN General Assembly Resolution adopting the report, the UN General Assembly called for the UN Conference on Environment and Development (UNCED).

In the case of sustainable development the history of the UNCED programme transpired largely outside of the realm of normal domestic politics. The number of actors involved was both very small and very professional, consisting predominantly of representatives of one or two governmental ministries and NGOs for environment and development. The specification of the programme took place over a period of five years (1987–92), mostly within closed committee sessions or working conferences for specially invited and certified representatives. The key issues of negotiation and the specifics of the draft documents were known to relatively few people, and the vast majority of sub-policies were formulated as

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4 AN OVERVIEW BY THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, available at: http://www.un-documents.net/ocf-ov.htm#I.3 [cit. 2014-07-20].

5 World Commission on Environment and Development (WCED): *Our Common Future,* 1987, Oxford University Press, Oxford.

6 HOLDER, JANE – LEE, MARIA: *Environmental Protection, Law and Policy – Text and Materials,* Second Edition, 2007, Cambridge University Press, Cambridge, 220.

relatively abstract goals. Representatives from political parties were hardly ever represented as such, and the key issues being discussed and negotiated at the international level were generally not introduced into elections.[7]

The primary goals of the next UN Summit were to come to an understanding of "development" that would support socio-economic development and prevent the continued deterioration of the environment, and to lay a foundation for a global partnership between the developing and the more industrialized countries, based on mutual needs and common interests, that would ensure a healthy future for the planet. Consequently, a high level world conference was held in 1992 (the Rio 'Earth Summit'), where – in view of the fact that global economic, social and environmental processes that are in close interaction with one another, are threatening societies' development in a longer run – national governments adopted three major agreements aimed at changing the traditional approach to development:

- Agenda 21 (a comprehensive programme of action for global action in all areas of sustainable development);
- The Rio Declaration on Environment and Development (a series of principles defining the rights and responsibilities of States);
- The Statement of Forest Principles (a set of principles to underlie the sustainable management of forests worldwide).

In addition, two legally binding Conventions aimed at preventing global climate change and the eradication of the diversity of biological species were opened for signature at the Summit, giving high profile to these efforts:

- The United Nations Framework Convention on Climate Change (UNFCCC), and
- The Convention on Biological Diversity (CBD).

UNCED was heralded as a 'paradigm shift' from international environmental law to the international law of sustainable development. Although references to „sustainable development" and international law abound in Agenda 21, none of the formulations apparently follows that of Principle 27 ("international law in the field of sustainable development"),[8] and there remain occasional references to "international environmental law".[9] Whether the variable terminology arises by accident or design is unclear. Anecdotal evidence suggests that the head of the Brazilian delegation persuaded Working Group III of UNCED's Preparatory Committee to replace every reference in Agenda 21 to "international environmental law" to "international law in the field of sustainable development".[10]

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[7] LAFFERTY, WILLIAM M. (ed.): *Governance for Sustainable Development – The Challenge of Adapting Form to Function,* 2004, Edward Elgar Publishing, London, 17-18.

[8] Rio Declaration on Environment and Development, Principle 27; Report of the UN Conference on Environment and Development ("UNCED Report"), A/CONF.151/26/Rev.l (vol. II), 3; 31 I.L.M. 874 (1992).

[9] Agenda 21, para. 39.2

[10] The diplomat, Pedro Motta Pinto Coelho, apparently remarked that this change would

It can also be observed that in the recent decades the concept of sustainable development featured both in agreements on economic cooperation and conventions adopted for the protection of the environment. We may discern an interesting tendency, according to which the concept of sustainable development opens the door to the enforcement of environmental considerations in economic agreements, while in the case of environmental treaties, the legal institution of sustainable development guarantees not only the protection of the environment, but also the satisfaction of the basic human needs, the fight against poverty and safeguarding the possibilities for development.[11]

Nevertheless, the 1992 Earth Summit was a landmark achievement in integrating environmental, economic and social concerns into a single policy framework. After the Rio Conference, concepts such as sustainable development sounded initially like principles deprived of concrete content. The concept of sustainable development and the proposals set out in Agenda 21 have since been expanded and strengthened at several major UN conferences.

3. SUSTAINABLE DEVELOPMENT OR SUSTAINABILITY?

The interaction between economy and the environment that supports it lies at the core of sustainable development. In its essence, sustainable development is about reducing the overall (global) pressures on life-support systems and natural resources resulting from the 'drivers' of development. Such drivers are principally related to economic activity.

The relationship between economic development and environmental degradation was first placed on the international agenda in 1972, at the UN Conference on the Human environment, held in Stockholm. After the Conference, Governments set up the United Nations Environment Programme (UNEP), which today continues to act as a global catalyst for action to protect the global environment.

The term "sustainable development" has been included in the Rio Declaration on Environment and Development (1992) to denote the need to balance environmental and development considerations. The original articulation and the most widely quoted 'definition' of sustainable development comes from the Brundtland Report, according to which sustainable development means development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[12] The definition contains within it two key concepts:

"keep you lawyers busy well into the 21st century"); *see* SAND, PETER: UNCED and the Development of International Environmental Law, in *Yearbook of International Environmental Law,* Vol. 3 (1992), 17.

[11] SZABÓ, MARCEL: A fenntartható fejlődés koncepciója a nemzetközi jogban [The Concept of Sustainable Development in International Law], in SZABÓ, MARCEL (ed.): *Ünnepi kötet Gál Gyula tiszteletére* [Liber Amicorum Gál Gyula], 2011, Európa Nostra, 171.

[12] WCED: *op. cit.* 43.

- the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

From the late 1980s until the second half of the 1990s the formulation of environmental policy plans and strategies was the dominant approach to implementing sustainable development domestically. Sustainable development was mainly understood by policymakers in the sense of 'environmentally' or 'ecologically' sustainable development. This understanding of sustainable development gradually changed in the late 1990s and the early 2000s to include economic and social goals on an equal footing. As a result, comprehensive sustainable development strategies increasingly replaced the more environmentally focused plans and strategies.

In 2002, sustainable development was further articulated as having three pillars, namely: economic development, social development, and environmental protection. This means that the concept of sustainable development aims to continuously improve the quality of life and well-being for present and future generations, by linking economic development, protection of the environment and social justice. The social and economic pillars are as important as the environmental pillar.

The desired future state conjured by a policy of sustainable development is long term and dynamically changing. Rather than seeking a stable equilibrium, sustainable development is a dynamic concept, recognising that changes are inherent to human societies.[13] The term "sustainable development" has been decried by some as devoid of content, as a concept used to express different and often disparate worldviews.[14]

Despite these misgivings, however, the expression has assisted in reconciling in one phrase what before seemed irreconcilable – namely, environmental protection and development. Sustainable development has put on the negotiating table issues of economic and social development that are prerequisites for the quality of life and environmental protection. It is interesting to see how sustainable development has been used in local communities to articulate goals and indicators for future development, such as the goals of equity, economic vitality, strong community, quality of education, good government, decent housing, healthy people, efficient transport and land-use, protected natural resources, and minimal pollution and waste.

The concept of sustainable development should be distinguished from that of sustainability, despite of the fact that the main problem regarding the evaluation of sustainable development is that neither the real meaning of sustainable

[13] Measuring progress towards a more sustainable Europe, 2007 monitoring report of the EU sustainable development strategy, 2007, European Communities, 7.

[14] And this is true, to some extent, as developed countries have used the concept to underline the importance of environmental values, whereas developing countries have used it to support their right to development.

development has been come to stay. ‘Sustainability’ is a property of a system, whereby it is maintained in a particular state through time. The concept of sustainable development refers to a long-term process involving change or development. Sustainable development aims to ‘achieve continuous improvement of quality of life’, and the focus is therefore on sustaining the process of improving human well-being.[15]

Another famous definition of sustainability was adopted by the World’s Scientific Academies in Tokyo, May 2000: “Sustainability implies meeting current human needs while preserving the environment and natural resources needed by future generations.”[16] To preserve human well-being over the long term, people need to move toward new ways of meeting human needs, adopting consumption and production patterns that maintain the Earth’s life support systems and safeguard the resources needed by future generations.

Similarly, the Hungarian National Council for Sustainable Development emphasizes that “the essence of sustainability is to establish a system of relations – a culture – in which people, in their relations established with each other and the environment, do not deplete but preserve resources for the future. Sustainability is in search for this proper system of relations, to allow for the next generations to also be able to meet their needs.”[17]

Over the past decades innumerable definitions of sustainable development have been proposed. It is obvious that the integration of environmental protection into the concept of sustainable development tends to make environmental objectives (more or less) easily attainable. But the usage of the concept of sustainable development remains somewhat vague. From the beginning, a disagreement has existed as to the precise meaning of the concept. There are numerous mentions of the adjective ‘sustainable’ (sustainable growth, sustainable business solutions, sustainable mobility, sustainable tourism, etc.). Moreover, sustainable development’ and ‘sustainability’ are often misused terms. They are popularly used to describe a wide variety of activities which may not necessarily be “sustainable” in the long term.

It is not necessary here to go into the issue of ‘weak’ vs ‘strong’ sustainability. I just mention that proponents of the weak sustainability view argue that there is essentially no inherent difference between natural and other forms of capital. Maintaining and enhancing the total stock of all capital (physical, human, etc.) alone is sufficient to attain sustainable development. In contrast, according to the strong sustainability view, there is inherent difference between natural and other forms of capital, physical or human capital cannot substitute for all the environmental resources comprising the natural capital stock, or all of the

[15] Sustainable development in the European Union, 2011 monitoring report of the EU sustainable development strategy, 2011, European Union, 11.

[16] IAP Statement on Transition to Sustainability, available at: http://www.interacademies.net/10878/13933.aspx [cit. 2014-08-11].

[17] In search for the future. Summary report of the National Council for Sustainable Development for Hungarian Society, 9-10.

ecological services performed by nature.[18]

Finally, it is worth mentioning that sustainability itself is not an endpoint. It is rather an ideal toward which we strive. It has many interrelated dimensions (e.g., ecological, economic, social, political, and epistemological) and calls for a holistic, interdisciplinary and participatory approach.

Official documents often emphasize three types of sustainability:

- environmental sustainability means the conservation of our natural values, so that also our children can enjoy them;
- economic sustainability in turn means that we do not have to pay more taxes to ensure the successful operation of the results of development;
- social sustainability means that we have to assist more and more people to care for themselves and take responsibility for the country as a whole.

To put the issue in the context of an integrated approach to sustainable development, the challenge is how the environmental objective of reduced pollution can best be integrated with economic policy objectives of maintaining levels of output and employment which will enable the needs of the population to be met, consistent with the goal of social sustainability.

Nevertheless, achieving sustainable development is no easy task. 'Sustainable development' is like 'democracy', 'freedom' and other high-minded terms: it is universally desired, diversely understood, and extremely difficult to achieve, because the interactions among economic, social and environmental concerns are extremely complex and unpredictable. Sustainability poses the challenge of determining whether we can hope to see the current level of well-being at least maintained for future generations, or whether the most likely scenario is that it will decline. It is no longer a question of measuring the present, but of predicting the future.[19]

4. THE PRINCIPLES OF SUSTAINABLE DEVELOPMENT

Environmental policies traditionally cover a wide range of issues related to sustainable development, and contribute to raising awareness of the opportunities and challenges lying ahead. The basic principles of the horizontal strategies on sustainable development (SDSs) make it possible to harmonise the various sectoral and development strategies with SDSs, and they also provide a general type of guidance for determining the SDSs' priorities, more specifically defined goals and tasks, the frameworks and means of implementation, in a coordinated and harmonised way.

In my opinion, sustainable development is not a principle, but it has several

[18] BAKER, SUSAN: *Sustainable Development,* 2006, Routledge, London and New York, 29-35.

[19] STIGLITZ, JOSEPH E. – SEN, AMARTYA – FITOUSSI, JEAN-PAUL (eds.): *Report by the Commission on the Measurement of Economic Performance and Social Progress,* 61. Available at: http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf [cit. 2014-08-11].

principles. This may sound trivial, but most of the existing approaches fail to adopt this approach, leading to potentially confusing messages. For instance, confusion may arise when one tries to define sustainable development as a principle of environmental policy and/or environmental law.

The principles of sustainable development have been formulated, clarified, and adopted at the highest levels by the relevant bodies of both the UN and the EU. On account of their national relevance the following should be highlighted from the complete set of principles:

4.1. The principle of holistic approach

Things must be viewed as a system of inter-related elements, the elements themselves also being systems interacting with one another. Any intervention may trigger ripple effects even in remote systems. So local challenges can be adequately addressed relying on the knowledge of the wider environment and global trends alike.

4.2. Principle of intra-generation and inter-generation solidarity

The interests of sustainable development are focused on people. Sustainable development is not about maintaining a good quality of life for just one generation, but rather about passing the ability to realize a good quality of life from generation to generation.

4.3. The principle of sustainable management of resources

Sustainable management of resources with a view to the limitations of the carrying capacity of the environment; by using natural resources in a prudent and thrifty way it preserves resources required for future development. Biodiversity is also a natural resource and we attach high priority to its conservation.

4.4. The principle of social justice

The right to adequate conditions for living must be recognised and fundamental human rights must be guaranteed for all. All people should have equal opportunities for acquiring knowledge and skills required to become a worthy member of society.

4.5. The principle of integration

In the course of elaborating, evaluating, and implementing sectoral policies, plans, and programmes, economic, social, and environmental considerations and their relationships must also be taken into account to ensure that they can mutually reinforce each other. Local, regional, and national activities must be coordinated.

4.6. The principle of precaution and prevention

The precautionary approach means that wherever the possibility of severe or irreversible damage is perceived, lack of complete scientific certainty may not be used as an excuse for delaying effective action to prevent damage to the environment or endangering human health; i.e. action must be taken in view of the gravity of the perceived threat. Human activities must be planned and carried out

in line with this precautionary principle and activities damaging or polluting the environment endangering natural systems and human health must be prevented and – where it is not possible – reduced, and finally, damages must be restored to their original state as far as possible.

4.7. The polluter pays principle

Prices must reflect the real costs paid by society for activities involved in consumption and production as well as for their impacts, including the costs of using natural resources. Those engaged in activities damaging/polluting the environment must pay for damage caused to human health or the environment.

4.8. The principle of utilising local resources

Efforts should be made to supply the needs of communities on a local level, from local resources. Local features and diversity should be preserved. Preservation and sustainable utilisation of the man-made environment and the cultural heritage are also very important tasks.

4.9. The principle of public participation

Adequate access to information affecting social/economic life and the environment, to information on decision-making processes must be provided for all. People's knowledge about sustainable development, its social/economic and environmental implications, and about sustainable solutions and approaches must be clarified and enhanced. Public participation in decision making should be strengthened.

4.10. The principle of social responsibility

To enable sustainable development and to make higher quality of life possible, unsustainable patterns of production and consumption must be changed. Businesses' social responsibility must be strengthened, along with cooperation between the private and the public sector.[20]

I agree with the doyen of European environmental law, Professor Ludwig Krämer who claims positively that sustainable development is rather a guideline to political action than an actual legal concept.[21] In my opinion, the principles of integration, prevention and precaution, or public participation are the principles of environmental policy and law, such as the famous polluter pays principle, the principle of rectification at source or the need for international cooperation and partnership.[22]

In the past couple of years a number of general principles of environmental law have also emerged, or are emerging. Basically they are general guidelines that have some indirect legal significance. Instead of repeating these legal principles, we can mention three other principles of sustainable development:

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[20] National Sustainable Development Strategy of Hungary, June 2007, 3-4.

[21] KRÄMER, LUDWIG: *Az Európai Unió környezeti joga* [EU Environmental Law], 2011, Dialóg Campus Kiadó, Budapest-Pécs, 36.

[22] Most of them are included in the 2007 Lisbon Treaty.

4.11. Respect for all other forms of life

Every form of life on earth is an important part of this living entity. Human beings are members of a global community of life and they share a common mission and responsibility for the future of our planet.

4.12. Satisfaction of basic physical needs (water, food, shelter and other requirements for life and dignity) for everyone

Limits and enoughness are the two most widely ignored components of sustainability. We have to separate need from want, and thereby learn when enough is, in fact, enough.

4.13. Access to knowledge

Knowledge has always been crucial to human development. Knowledge is essential for so many human activities and values, including freedom, the exercise of political power, and economic, social and personal development. The knowledge gap can be narrowed by education, awareness raising, and share of innovations, exchange of best practices and other measures.

5. SUSTAINABLE DEVELOPMENT IN THE EU

In Europe, the current rate of progress observed over the past few decades in addressing environmental issues is insufficient, too. We can identify successes and improvements (recycling, bathing water quality, reduction of greenhouse gas emissions, etc.), but also register old legacies that need further effort such as, in particular, air pollution, water issues and contaminated sites. New threats call for coherent strategies and integrated measures at all levels, such as persistent chemicals in the environment, biodiversity loss and climate change.

Many individual improvements could be identified in different regions for different issues, but the overall picture is not one of progress.[23] Some local and global thresholds are being crossed; negative environmental trends could lead to dramatic and irreversible damage to some ecosystems and services, and contribute to the degradation of the environment up to the point of no return. Public concern continues to be high, and urgent action is needed to protect the environment, particularly halting loss of biodiversity, preserving natural resources that are under pressure and protecting public health.

The EU is a leading force in the world in taking action on environmental sustainability in order to move towards a sustainable development path. The EU always repeats its commitment to addressing climate change internally and on an international scale, to promoting environmental sustainability, to reducing dependence on external resources and to ensuring the competitiveness of European economies.

[23] The European Environment – State and Outlook 2010, European Environment Agency, 2010.

Sustainable development is a fundamental goal of the European Union, enshrined in the EU Treaties since 1997. The European Union was a strong supporter of the Declaration at the 1992 United Nations Earth Summit in Rio de Janeiro. At the 'Rio + 5' follow up conference, the European Union and its Member States committed themselves to adopt SDSs. As a result of this, the Amsterdam Treaty, signed in 1997, introduced sustainable development as a core objective of the European Union as set out in Articles 2, 3 and 6 of the EC Treaty. In 2001, the European Union adopted its sustainable development strategy (EU SDS) in Gothenburg that was renewed in June 2006 and July 2009.[24] In 2002, the external dimension of the Strategy was added by the European Council in Barcelona and the EU was active in supporting the conclusions of the World Summit on Sustainable Development in Johannesburg.[25]

The EU SDS defines objectives and targets intended to put the European Union on a path towards sustainable development. The EU SDS aims for the continuous improvement of quality of life for current and future generations, by linking economic development, protection of the environment and social justice, and bringing together the many strands of economic, social and environmental policy under one overarching objective.

Measuring progress towards sustainable development is an integral part of the EU SDS. Regularly adopted monitoring reports of the EU are based on a set of sustainable development indicators (EU SDIs).

The EU examines the following SDI themes:

1) Socioeconomic development,
2) Sustainable consumption and production,
3) Social inclusion,
4) Demographic changes,
5) Public health,
6) Climate change and energy,
7) Sustainable transport,
8) Natural resources,
9) Global partnership,
10) Good governance.

There are several indicators within the individual themes of the EU SDI set, but the European Union has identified 12 of them as headline indicators:

1) Real GDP per capita,
2) Resource productivity,
3) People at risk of poverty or social exclusion,
4) Employment rate of older workers,
5) Life expectancy at birth,

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[24] See the website of the European Commission on Sustainable Development, available at: http://ec.europa.eu/environment/eussd/ [cit. 2014-07-01].

[25] *See* HORVÁTH, ZSUZSANNA: Greening Production and Consumption: Towards Sustainability in the EU Integrated Product Policy, in REBREANU, VERONICA (ed.): *Sustainable Development: Utopia or Reality?* 2010, SC Editura Sfrea SRL, Cluj-Napoca, 146-156.

6) Greenhouse gas emissions,
7) Share of renewable energy in gross final energy consumption,
8) Primary energy consumption,
9) Energy consumption of transport relative to GDP,
10) Common bird index (Abundance of common birds),
11) Fish catches from stocks outside safe biological limits,
12) Official Development Assistance.[26]

It is very complicated to measure to what extent the EU is on track to achieving the concrete goals for sustainability. We need to look at the whole picture, and see the parts holistically. These headline indicators are intended to give an overall picture of whether the EU has achieved progress towards sustainable development in terms of the objectives and targets defined in the EU SDS. The evaluation of progress since 2000 based on these headline indicators shows a rather mixed picture.[27] Detailed assessments show that the EU is moving in a moderately unfavourable direction.

Within the context of the European Union, there's a real contradiction between the EU's primary market-oriented function and the demands of sustainable development. There's a traditional hierarchy of policy objectives, where environmental interests historically have tended to be ranked below issues of economics and finance. Furthermore the principal connotation of the term when used is usually with a reference to 'sustainable growth' in this context.[28] In accordance with sustainable growth, three priorities have been identified by the EU to contribute to objectives and targets of the Europe 2020[29] Strategy:

- a low-carbon economy (focus on investments in energy efficiency, buildings, renewables and clean transport);
- ecosystem services and biodiversity (focus on preserving and maximising the potential of the natural environment);
- ecoinnovation (focus on mobilising innovation partnerships and information technology).

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[26] Good governance contains no headline indicator as no indicator is considered to be sufficiently robust and policy relevant to provide a comprehensive overview.

[27] Sustainable development in the European Union, 2013 monitoring report of the EU sustainable development strategy, 2013, European Union, 8.

[28] In 1992, when the term 'environment' was included into the key Articles 2 and 3 of the EC Treaty for the first time, which set out the objectives and activities of the Community, Article 2 referred to 'the promotion (…) of a harmonious and balanced development of activities, sustainable and non-inflationary growth respecting the environment'. The incorporation of an environmental objective was certainly of great political significance, but the formulation 'sustainable growth' was criticized as being marginally weaker than that of 'sustainable development'. *See* JANS, JAN H. – VEDDER, HANS H. B.: *European Environmental Law,* Third edition, 2008, Europa Law Publishing, 7.

[29] The Europe 2020 Strategy, adopted by the European Council in June 2010, builds on lessons learned from the earlier Lisbon Strategy of the EU, recognising its strengths but addressing its weaknesses. The objective of Europe 2020 is to turn the EU into a smart, sustainable and inclusive economy, delivering high levels of employment, productivity and social cohesion.

We can only hope that current policy making and future trends will make EU environment policy more effective in protecting the environment and in the pursuit of sustainable development. The European integration – a regional economic integration organisation which has its roots in hard industrial cooperation – has to realize that sustainable development is not only a necessity, but also an exceptional opportunity for the European economy. Air, water, land, species, soil and seas are amongst the natural resources that are crucial to our well-being and also to our economic prospects. Natural capital is a major source of economic development; preserving ecosystems leads to jobs and socio-economic development.

6. A GLIMPSE INTO THE FUTURE

We should not delude ourselves into believing that we live in a sustainable world. Today we are living through a period of rapid change and deep disturbance. Many ecological processes are not sustained: a broad range of species is threatened by extinction, whole ecosystems are at risk, and furthermore, climate change is becoming the most challenging threat to human life. We still do not recognize the great value of many environmental systems as we are not conscious of the importance of natural ecosystems to modern societies. Moreover, we place too little value on the future, and many of the benefits from environmental protection, from sustainable economic and social organization, are far into the future.

Over the past decades, the escalating economic and ecological damage costs of not investing in environmental protection and improvement have been repeatedly demonstrated. At this point in time, when the world does not yet show clear signs of recovery from the economic and financial crisis and is facing food and energy crises, climate change and threats to social cohesion and security, it is more than ever important to have a coherent and long-term vision for our future development.

While there are considerable differences of opinion as to what an effective implementation of achieving sustainability entails, there can be little doubt that the ambitions enunciated in Rio – prefigured by the Brundtland Report (WCED) in 1987 – involve significant changes in current patterns of development, production, consumption and behaviour. Sustainable development is necessary because 'over-development' in the richest countries and 'under-development' in the poorest countries is causing harm to local, regional and global life-support systems. A global population even of the current size cannot adopt "Western" lifestyles without destroying the ecosystems of the planet.

Countries vary greatly in their demonstrated willingness and ability to address the sustainable development challenge. It seems that the likelihood of achieving a common understanding of 'sustainable development' or 'sustainability' is even more remote than ever. The present system of international relations and law can hardly be expected to master the complex challenges which will have to be balanced in the quest to attain sustainability. But they are now being addressed holistically for the first time as a result of the emergence of the concept of sustainable development. Sustainable development should, therefore, be seen as a

continuous learning process, where appropriate answers and solutions may change as our experience increases.

Unfortunately, there is no sane alternative. As Simon Dresner argues: "the alternative to the pursuit of sustainability is to continue along the present path of unsustainability, leading to disaster."[30] This challenge calls for nothing less than a shift in our collective worldview from the narrowness and linearity of techno-optimism and political-economic short-termism to embrace a much more systemic and future-oriented perspective.

It is increasingly clear that in the next decades the pressure for change will unavoidably grow; life on Earth will collapse if current patterns of production and consumption continue. An environmental disaster may be looming within the lifetime of the present, and certainly within the lifetime of the next generation. We have to survive in a hostile environment – destroyed by ourselves –, and to improve living conditions for future generations. Traditional expert-driven, top-down approaches to problem solving are not flexible enough to address complex, non-linear changes in the Earth System effectively.

In order to stop self-destruction, a U-turn in human behaviour and the way of our use of planet Earth should be implemented immediately.[31] The changes in human attitudes depend on both appropriate legislation and non-legal measures (education, debate, campaigns, etc.). A real paradigm shift would be crucial to the future of mankind.[32] Individuals who accept personal responsibility for the consequences of their thoughts, choices, and actions form the basis of sustainability.[33] Peoples of the Earth have to find ways to work together to raise the level of our collective consciousness to the point where we can move steadily toward sustainability, to sustain the dignity of being human. To achieve the needed changes, the next few years are going to be crucial.

Last but not least, environmental deterioration can lead to conflict between states and instability in the international order.[34] Although the "Cold War" came to an end during preparations for UNCED, other conflicts emerged, largely between developed and developing countries. These conflicts have revolved around the interplay between environmental measures, economic competition, and international trade and investment flows; the developing countries' insistence on their right to develop economically; and disagreements about how the burden of taking action to deal with common environmental concerns should be borne. As environmental obligations increasingly address fundamental economic interests

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[30] DRESNER, SIMON: *The principles of sustainability,* 2002, Earthscan Publications, London, 173.

[31] *See* for example, EHRLICH, PAUL R. – EHRLICH, ANNE H.: *The betrayal of science and reason: how anti-environmental rhetoric threatens our future,* 1996, Island Press, Washington DC.

[32] Just how fundamental a paradigm shift is, of course, another highly contentious topic.

[33] Sustainable development requires us to manage the only thing we can manage – ourselves.

[34] *See* SZABÓ, JÁNOS: *Fenntarthatóság, kockázatok, biztonság* [Sustainability, Risks, Security], 2007, Zrínyi Kiadó, Budapest.

and needs, actors which do not comply with their environmental obligations are perceived to gain unfair and perhaps unlawful, economic advantage from their environmentally harmful activities in relation to those actors which are complying with their obligations.

The growing demands of states and those subject to their jurisdiction for access to natural resources, coupled with a finite available resource base, provide the conditions for increasing conflict over access to natural resources. It seems unlikely that the quest for ever-increasing growth can continue unchecked without causing serious negative effects – and those effects might come sooner than we think…

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If Ecological Footprint is Not the Answer, What is the Question?

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Abstract
The appreciation of ecological footprint has been increasing since the study of 'Stiglitz – Sen – Fitoussi'.[1] At the same time, due to the methodological and standardized problems and the shortcomings of data collection, its accuracy can be questioned. In our study we were looking for countries with structurally different from the average ecological footprints, with the help of cluster analysis, in a database used by calculating the ecological footprint index of Global Footprint Network. Comparing the data of two certain years, we are trying to find an answer for the question if outlier data could be traced back to professional reasons of data collecting problems. The consequences of faulty and unreliable data can not lead to the expected results; it can make the situation even worse. The most essential result of our study can be the correction of failures of the database and establishing a reasoned statistical background for better decisions.

Keywords: *ecological footprint, fishing ground footprint, Gambia, grazing land footprint, hierarchical cluster*

JEL classification: *Q01*

1. INTRODUCTION

One of the most significant economic and economic-policy tasks of recent years is

[1] STIGLITZ, JOSEPH E. – SEN, AMARTYA – FITOUSSI, JEAN-PAUL (eds.): *Report by the Commission on the Measurement of Economic Performance and Social Progress.*, Available at: http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf [cit. 2014-06-11].

the reform, the correction and the completion of the GDP, which is a macro-economic production index. Some researchers even consider the malfunction of GDP as a sign of the total failure the current mainstream economic theory and call for a new economic paradigm,[2] because less comprehensive, operative tools does not seem to improve the situation significantly.[3] The researchers tried to replace the GDP, but so far none of them were successful,[4] GDP and the other SNA indicators are still in the center of the dialogue.[5] The development of national accounts was set in many ways due to the concerns related to environmental problems caused by the increasing economy from the 1970s.[6] It should also be noted that this approach of development had a powerful impact on land use. This case stimulates scientific study of urban structures[7] and scientific debates on the sustainability of these areas.[8] Researchers have developed several indicators in the past decades as a result of the improvement of additional GDP-based or substituting alternative indicators. One of the most completed overview of the findings of recent years can be found in the article of Bleys.[9] The author is not willing to determine the exact number of alternative indicators however, Brent Bleys presents almost 200 indicators and various opportunities for their use in clustering methods. The study of Vackár[10] is outstanding; preparing examinations

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[3] TÓTH, GERGELY: *Környezeti teljesítményértékelés*, 2001, KÖVET, Budapest.

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[6] LAWN, PHILIP: A stock-take of green national accounting initiatives, in *Social Indicators Research*, Vol. 80. Issue 2. (2007), 427-460.

[7] GDP can also be used for revealing spatial economic concentrations and examining urban structures. *See* SZABÓ, DÁNIEL RÓBERT: Policentrikus Magyarország: Problémák és lehetséges stratégiák, in KARLOVITZ, JÁNOS TIBOR (ed.): Kulturális és társadalmi sokszínűség a változó gazdasági környezetben, 2014, International Research Institute, Komárno, 18-25.

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aiming at exploring the connections among indicators in a correlation matrix of 27 alternative indicators. Detailed analysis about the relation among GDP, ecological footprint and happiness can be read in the article of Kocsis,[11] in which the influences and consequences of various developmental ways for Hungary are outlined. The environmental sustainability would often requires the decrease of the GDP per capita in the so-called developed countries among the possible and positive future prospects. Various indicators are important on a global level, but we think that it could be also on a macro regional level too, for example the interpretation of the indicators could be also important in the cohesion policy of the EU. Also the local actors (civil organisations, firms, etc.) can contribute to the success of the cohesion policy,[12] so they can also contribute to the utilizations of the indicators by a wide range of the actors.

Researchers have been applying and developing one of the most well-known alternative indicator, eco-footprint for 20 years. The appreciation of the footprint has been increasing since the study of Stiglitz – Sen – Fitoussi. At the same time, due to the methodological and standardized problems and the shortcomings of data collection, its accuracy can be questioned. In recent years, several assessments and criticisms have been published about the research of Stiglitz, mainly as a result of social studies.[13]

Ecological footprint (EF)

The Ecological Footprint means that how much productive field is needed for a human society to maintain itself and to process the manufactured waste beside a given technological development. The measurement unit of the Ecological Footprint is the global hectare/person (gha). Footprint tendencies show the impossibility of sustaining long term economic growth. We have long been aware of the overconsumption of developed countries, but the 'under-consumption' of lesser developed countries used to compensate for this. Even in 1960, bio-capacity – the output from biologically valuable land – was 2-3 times greater than that is consumed per person globally. According to the opinion of the European Commission, ecological footprint and carbon-dioxide footprint are together those environmental indexes, which can fill the role of an overall environmental index, however, the circle of their application is restricted. We can download the ecological footprint data of 142 countries from the homepage of the Global Footprint Network and estimations for further 9 countries can be found in the database, including the calculation of the Happy Planet Index. The most widespread criticism against Ecological Footprint Index is that it does not contain

cross-national comparison, in *Ecological Indicators,* Vol. 16. (2012), 40-46.

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neither social factors nor people's satisfaction. This index is not suitable for catching all the aspects of sustainability although it is often mentioned among the sustainability indicators. However, this criticism is irrelevant since the creators of the ecological footprint have never claimed that, for instance, it would be a composite indicator, such as the HDI or ESI, which include more pillars of sustainability. The Ecological Footprint gives information about the application of hypothetic area, it does not promise anything more or less.[14] The Ecological Footprint is applied on more levels from the beginning of measurement by its creators.[15] Besides global evaluation in order to compare the spatial demands of the consumption with the disposable biological capacity they also use national, regional, settling and individual EF indicators. The general recognition of this index differs considerably in different application areas while the global EF is considered to be the best index of the „sustainability"[16] its spatial application is criticised from more sides. For this reason, the national use of Ecological Footprint must be treated with increased caution. The values of this indicator are more than 0, although it does not have a top limit. The smaller the value of the index is, the more favourable the case is.

The Global Footprint Network[17] (GFN) applies the ecological footprint (EF) for countries and the whole world. The national results as well as global trends can be downloaded by land-use categories from the website of the institution. The GFN prepares guidelines and information for the calculation.[18;19] We are able to establish homogeneous groups based on the components of ecological footprint as well as on the relationship between the ecological footprint and bio-capacity. The footprint structure is fundamentally determined by the characteristics of living style as well as the geographical and financial situation of the country, so certain groups of countries are well-defined regarding geographical and income perspectives.

One of the most significant critics of the territorial application of the index is

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[14] CSUTORA, MÁRIA: Az ökológiai lábnyom számításának módszertani alapjai, in CSUTORA, MÁRIA (ed): *Az ökológiai lábnyom ökonómiája*, 2011, Aula Kiadó, Budapest, 12.

[15] REES, WILLIAM – WACKERNAGEL, MATHIS: Urban ecological footprints: why cities cannot be sustainable and why they are a key to sustainability, in *Environ Impact Assess,* Rev. 16. (1996), 223-248.

[16] STIGLITZ – SEN – FITOUSSI: *op. cit.* 70-72.

[17] You can find detailed information about the institution and co-operation possibilities as well as about the publications related to GFN: www.footprintnetwork.org.

[18] KITZES, JUSTIN – GALLI, ALESSANDRO – RIZK, SARAH – REED, ANDERS – WACKERNAGEL, MATHIS: *Guidebook to the National Footprint Accounts*. 2008, Global Footprint Network, Oakland, available at: http://www.footprintnetwork.org/en/index.php /GFN/page/methodology [cit. 2014-06-11].

[19] EWING, BRAD – REED, ANDERS – GALLI, ALESSANDRO – KITZES, JUSTIN – WACKERNAGEL, MATHIS: *Calculation methodology for the National Footprint Accounts,* 2010, Global Footprint Network, Oakland, available at: http://www.footprintnetwork .org/images/uploads/National_Footprint_Accounts_Method_Paper_2010.pdf [cit. 2014-06-11].

that the borders of the countries were established based on geo-political and cultural aspects. For this reason, these do not or not by all means have environmental meaning; that is why they usually divide connecting ecosystems. In this aspect, the EF calculation within the natural borders is applicable for straighter conclusion. At the same time, nations are the largest decision-making body, so environmental intervention can be done in the first place in this frame. For this reason, one of the suggestions of the spatial calculation's critics is that the index should not be used in spatial instead of temporal analyses: 'The per capita EF is neither very informative about the spatial distribution of the impacts nor the causes of environmental pressure'.[20]

In our study we are examining the extreme outlier data included in the GFN database for 2010 and 2011. We are looking for those countries whose ecological footprint structure differs significantly from the average value. Comparing the data of two years, we are trying to find answers for the question if the outlier data can be traced back to professional reasons or data collecting problems.

2. MATERIAL AND METHOD

The GFN database gives the ecological footprint of certain countries between 1961 and 2008 (Table 1). The increase of EF has gone with the transformation of the structure, which means that the carbon footprint has increased fivefold and the carbon-dioxide emission is responsible for more than half of the EF presently. Behind the seemed unambiguous global tendency, significant individual national differences can be realized.

We conducted our analyses with the application of IBM SPSS20 programme package and we relied on the database analyses manual of Sajtos and Mitev[21] by selecting the methods and assessment of the results. The ranking was performed with the help of cluster analyses.

[20] VAN DER BERGH, JEROEN C. J. M. – VERBRUGGEN, HARMEN: Spatial sustainability, trade and indicators: an evaluation of the 'ecological footprint', in *Ecological Economics*, Vol. 29. Issue 1. (1999), 61-72.

[21] SAJTOS, LÁSZLÓ – MITEV, ARIEL: *SPSS kutatási és adatelemzési kézikönyv*, 2007, Alinea Kiadó, Budapest.

The ingredients and the ecological footprint	*1961*	*1965*	*1970*	*1975*	*1980*	*1985*	*1990*	*1995*	*2000*	*2005*	*2008*
EF	**2.4**	**2.5**	**2.8**	**2.8**	**2.8**	**2.6**	**2.7**	**2.6**	**2.5**	**2.6**	**2.7**
cropland footprint (cr)	1.1	1.1	1.0	0.9	0.8	0.8	0.7	0.7	0.6	0.6	0.6
grazing land footprint (gr)	0.4	0.4	0.3	0.3	0.3	0.2	0.2	0.2	0.2	0.2	0.2
forest footprint (fo)	0.4	0.4	0.4	0.4	0.4	0.3	0.3	0.3	0.3	0.3	0.3
fishing ground footprint (fi)	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
carbon footprint (ca)	0.3	0.5	0.9	1.0	1.1	1.1	1.2	1.2	1.2	1.4	1.5
built-up land footprint (bu)	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1

Table 1: The structure and size of global ecological footprint between 1961 and 2008 (global hectare (gha) / person).[22]

According to our hypothesis, the failures in the database of the ecological footprint indicator can be discovered with statistical methods (in the first place, with the help of hierarchical and non-hierarchical cluster examination). We are able to establish homogeneous groups based on the components of ecological footprint, as well as on the relationship between the ecological footprint and bio-capacity. The footprint structure is fundamentally determined by the characteristics of living style as well as the geographical and financial situation of the country, so certain country groups are well-defined regarding geographical and income perspectives. We apply vectors inclinations to compare the structures of ecological footprint of the countries within the relevant groups. With this examination, we are able to determine if the structures of the ecological footprint of the countries ranked in the given group resemble more the groups or the average.

We applied GFN database for 2010 and 2011 for our research. We used graphic method, boxplot diagram for mapping the outliers. Then in the second part of our research we discovered that a linear relationship can be realized among the six ingredients of EF in pairs. We indicated the values of Pearson's correlation coefficient in correlation matrix (Table 2). Since cluster-analysis is very sensitive to the appearance of outliers, we checked the outstanding data with the nearest neighbour method before every examination and excluded these values further on. From the perspective of assessment of the results, it is important that we did not exclude the outstanding values of certain data although those, which would have created single group. The data applied in the study are measured on same metrical scale for this reason we used non-standardized data. In co-operation with two independent variables trio, as well as five variables-we excluded the cropland footprint because of the strong multi-collinear method-, we conducted hierarchical cluster analyses with analyses of variance: with the 'Nearest neighbour' and Ward's methods. Clustering was performed, in cases when it was necessary, with K-means cluster, and not with hierarchical method, which was followed by summarizing the results with analysis of contingency tables.

[22] In the following we are going to refer to the abbreviation in brackets in the table as territorial categories. Source: Database of GFN in the 2011 edition.

The aim of conducting cluster-analyses in the first place was not to limit the country teams with similar characteristics, however, to identify the outstanding values as well as the outlier ones.

3. FINDINGS

Based on the statistical data of 150 countries, Table 2 shows the formation of linear correlation coefficient of the components of the ecological footprint. Pearson's correlation coefficients marked in the cells show significant relationship between certain components of ecological footprint while others are independent. Since strong relationship cannot be noticed anywhere, in principle, there is nothing to prevent us from withdrawing all of the variables from the cluster-analyses. Table 2 shows the examination of the 2010 edition database, however, the investigation of the 2011 edition shows similar results.

EF ingredients[23]	*cr*	*gr*	*fo*	*fi*	*ca*	*bu*
cr	x	x	x	x	x	x
gr	-0.23	x	x	x	x	x
fo	**0.334**	0.023	x	x	x	x
fi	**0.273**	-0.101	0.214	x	x	x
ca	**0.641**	0.008	**0.277**	**0.231**	x	x
bu	**0.601**	-0.008	**0.293**	0.114	**0.352**	x

Table 2: The matrix of correlation coefficient from Pearson.[23]

We conducted our first cluster analysis in our research with five variables, however we did it with three variables in our second study.

In our first examination, due to the stronger than mid-range relationship between cr and ca, as well as the cr and bu variables, we conducted the examination with 5 variables excluding cr. The outliers – revealed with nearest neighbour method – are: regarding the data of 2010 edition year, Mongolia; Uruguay; Australia; Qatar and United Arab Emirates, we received similar results with the use of database in 2011 edition,the results made with similar methods are also similar however, Kuwait presents among the outliers instead of Australia. We examined the cluster-analyses of three-four, and five cluster solutions without outlier values, nevertheless none of them provided appropriate result, the grouping of countries cannot be performed clearly based on the examined variables.

Based on independent variables trios (gr, fi, fo and fi, gr, bu) they canbe separated in pairs. Continuing our examination, in order to eliminate the deviations because of correlation (Table 2), we repeated the analyses with the two variables group as well.

In our second study, we performed cluster-analyses with the use of gr, fi, and

[23] Source: Own examination based on GFN 2007, 2010 edition.

fo variables and we excluded Mongolia and Uruguay as they proven to be outliers according to the nearest neighbour method. Regarding the method of Ward, used by the first case (the examination was done by 3-7 clusters), we did not receive any appreciable results. Neither the nearest neighbour method analyses, nor the K-means hierarchical cluster-analyses brought solutions in this question.

Ward's method (gr, fi, bu) 2010		***gr***	***fi***	***bu***
1	Mean	0.166	0.010	0.072
	N	112	112	112
	StDev	0.119	0.099	0.053
2	Mean	0.723	0.059	0.093
	N	18	18	18
	StDev	0.188	0.073	0.096
3	Mean	0.138	1.963	0.040
	N	3	3	3
	StDev	0.066	0.206	0.039
4	Mean	1.639	0.081	0.045
	N	3	3	3
	StDev	1.136	0.077	0.022
5	Mean	1.161	0.726	0.114
	N	14	14	14
	StDev	1.189	0.291	0.067
Total	Mean	0.261	0.190	0.077
	N	150	150	150
	StDev	0.300	0.338	0.061

Table 3: Clusters (5 clusters solution).[24]

We continued the examination with the other three independent trio variables (fi; gr; bu) after excluding the outliers (Mongolia, Uruguay), as a result of hierarchical cluster-analyses as well as Ward's method, based on the database of 2010 year, we came to similar conclusions (Table 3). The best seemed to be to list the countries into five clusters, according to two methods, three clusters were completely the same, in which a three member group was established, including the Gambia, Mauritius and Norway. This group, which is considered to be stable, has not been established in 2011.

4. RESULTS

Revealed during our analyses, in all three cases Mongolia and Uruguay can be found among the outliers in both examined years. We were looking for the reasons for this while examining the structure of the ecological footprint of these two countries.

[24] Source: Based on the database of GFN 2007, 2010 edition.

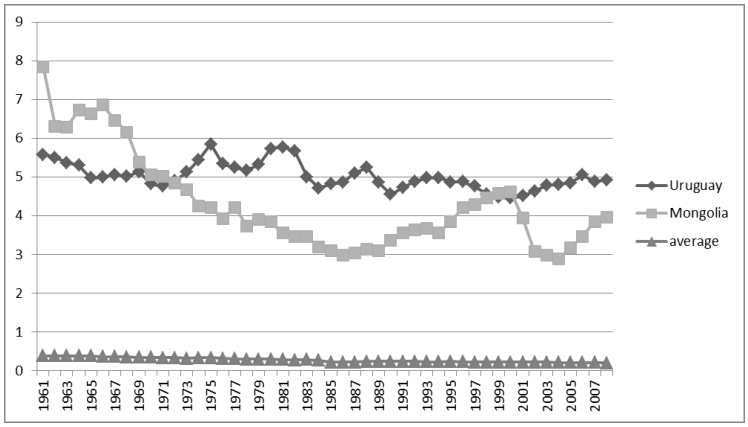

Figure 1: Times series of grazing land footprint (gha/person).[25]

Based on Table 1 the most significant ingredient of the average ecological footprint[26] is the carbon footprint (and the grazing-land footprint) account for10 % of the whole footprint. On the contrary, the grazing-land footprint of the ecological footprint of Mongolia is 70% and of Uruguay is 60%, which are considered to be extreme outliers. Their grazing-land footprint means 10 times of the world average and this also means to be extreme outlier (Figure 1).

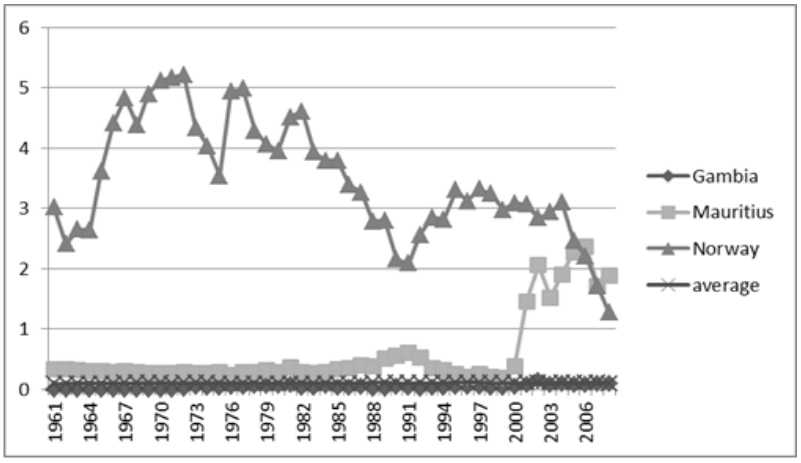

Figure 2: Time series of fishing ground footprint (gha/person).[27]

Based on the cluster-analyses conducted on the data of 2011 year, the group

[25] Source: Based on the database of GFN of 2011 year of own edition.
[26] There are some small differences between the arithmetic average of the national data shown here – in other words the "average ecological footprint" and the structure and the size of the global ecological footprint outlined in Table 1 – due to methodological reasons.
[27] Source: Based on the database of GFN of 2011 year of own edition.

with invariant and homogenous characteristics are proven to be interesting due to the differences of its members. The reason for this lays in the structure of ecological footprint since we can realize that Gambia, Mauritius and Norway with remarkably different geographical, cultural and economical characteristics have one common feature (Figure 2); their fishing-ground footprint includes 38-58% of their own footprint.

This prominently high fishing-ground footprint value is 9-11 times more than the world average. Examining the database of 2011year, Gambia cannot be discovered among the extreme outliers, even its fishing-ground footprint is the same as the world average – 0.1 gha/person – according to the database.

	average	***Gambia***	***Mauritius***	***Norway***
average	x	1.155	x	x
Gambia	1.155	x	x	x
Mauritius	0.705	0.540	x	x
Norway	0.755	0.454	0.266	x
	Norway	Denmark	Sweden	Finland
Norway	x	x	x	x
Denmark	0.684	x	x	x
Sweden	0.781	0.466	x	x
Finland	0.884	0.415	0.468	x

Table 4: Angle of vectors (Radian).[28]

The smaller the angle of the vector, the closer they are to each other's structure (pairwise is calculated). Therefore, the Norwegian EF structure closely resembles the structure of Gambia, such as Sweden. This fact might indicate serious inconsistencies in the database (Table 4).

5. CONCLUSIONS

While it is said to be the best indicator of „unsustainability"[29] on global level,[30] the appreciation of the ecological footprint indicator considerably varies in different application areas, its spatial application is criticized from many angles.[31;32]

[28] Source: Database of GFN in 2011 edition.

[29] TÓTH GERGELY – SZIGETI CECÍLIA: Az emberiség ökolábnyoma Kr.e. 10.000-től napjainkig. *LV. Georgikon Napok*, Pannon Egyetem, Georgikon Kar, September 26-27, 2013. Keszthely, available at: http://napok.georgikon.hu/cikkadatbazis-2012-2013/doc_view/121-toth-gergely-szigeti-cecilia-az-emberiseg-okolabnyoma-kr-e-10-000-tol-napjainkig [cit. 2014-06-11].

[30] STIGLITZ – SEN – FITOUSSI: *op. cit.* 70-72.

[31] VAN DER BERGH – VERBRUGGEN: *op. cit.* 61-72.

[32] MCDONALD, GARRY W. – PATTERSON, MURRAY G.: Ecological Footprints and

However, the connecting studies have not examined the whole database of the developing Global Footprint Network indicator, so the critical statements as well as the applications have been conducted without screening the outliers. According to our study, the majority of the countries (112 out of 150) can be described with an average EF structure, in other words, we can come to appropriate conclusion about the ecological footprint structure of certain countries from the average ecological footprint structure. However, there are some well-limited small groups, which have EF structure that significantly differs from the average. Since the consumption system of a given country is reflected in the ecological footprint, according to our anticipation, the structure of the ecological footprint of countries, which are close to each other geographically and culturally, will also resemble each other. Mongolia and Uruguay form stable and separated group because of their essential grazing land footprint, independently from the year of the study or the method. With the economic reforms and the dramatic change in the external environment for Mongolia, the dualistic economic system, that had been dominant over the past decades of central planning, is being severely undermined. In part, this is not negative as the large traditional livestock sector was 'drained' for resources, which were transferred to the modern sector.[33] For this reason we consider it reasonable to examine their consumption structure and characteristics in detail later.In case of the other three members group, the outstanding values can traced back to other reasons. Presumably, the consumption structure of Mauritius, the African Gambia and the north-European Norway differs from each other considerably. The common feature is considered to be the fishing-ground ecological footprint of the 2010 edition, which exceeds remarkably the average in all three countries, however by examining the database of 2011 edition, the fishing-ground ecological footprint of Gambia is corresponding to the world average. The reason for establishing cluster in 2010 edition can be found in the deviations of the methods of calculating the fishing-ground ecological footprint, which can strongly query the commensurability and reliability of the database.

In the NFA 2011, a source data cleaning algorithm was implemented different to the algorithm used in NFA 2010. The new algorithm is used to reduce spikes and troughs and inconsistencies in the reported time series of source data sets. The new algorithm excludes data points that are beyond a fixed distance from the median value of the reference time series data. Table 5 contain an ordinal ranking of countries by Footprint respectively, as well as a comparison with values from the previous NFA 2010 Edition. Methodological differences between editions can be demonstrated by looking at the change in absolute EFand biocapacity, and by looking at changes in country rankings for these two indicators. For the year 2007 – the most recent year covered by both NFA 2011 and NFA 2010 Editions – there were seven countries whose rank in EF per capita changed more than 15 places (one of them: Gambia).

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interdependencies of New Zealand regions (analysis), in *Ecological Economics,* Vol. 50. Issue 1-2. (2004), 49-67.

[33] SPOOR, MAX: Mongolia: Agrarian Crisis in the Transition to a Market Economy, in *Europe-Asia Studies*, Vol. 48. No. 4. (1996), 615-628.

	Ecological footprint 2008 (2011 edition) gha/capita (a)	*Ecological footprint 2007 (2010 edition) gha/capita (b)*	*Ecological footprint 2007 (2011 edition) gha/capita (c)*	*rank(a)*	*rank (b)*	*rank (c)*	*b-c*	*c-a*
Gambia	1.41	3.45	1.38	112	51	107	**-56**	-5
Mauritius	4.55	4.26	4.39	33	44	36	8	3
Norway	4.77	5.56	5.25	26	19	23	-4	-3

Table 5: NFA 2010 and NFA 2011 Editions comparison: Ecological Footprint data table.[34]

Our suggestion is that the statistical examination of the database (filtering the extreme outliers) should be followed by professional control and the final data chart should be conducted as a result of this. Consequences and political decisions based on faulty and unreliable data can not lead to the expected results; it can make the situation even worse. The most essential result of our study can be the correction of failures of the database the establishment of the statistical background for more established consequences.

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The EU's Future Enlargement and its Challenges

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Abstract
In this study, basic challenges of the EU's enlargement will be discussed. It will be argued that there are mainly three challenges. The first challenge, that is, building peace throughout Europe, is also one of the greatest visions of the founding fathers of the then EU. The second challenge is related to the lack of good performance related to the principles of "good" governance. Finally, the third challenge includes economic governance and the weak competitive power of the candidate and potentially candidate countries. All in all, in this study, the EU's current motto will be presented as a key challenge of the EU's future enlargement: "United in diversity."

Keywords: *EU Enlargement, candidate countries, potential candidate countries, good governance, competitiveness*

JEL classification: *F6, N44*

1. INTRODUCTION

The aim of this article is to explain the basic challenges of the EU's future enlargement.[1] The focus will be on the three challenges: 1. Peace, 2. "good" governance, and 3. economic governance including competitiveness. It will be argued that there is a great difference not only for the countries expected to join the EU in the future, but also for those who are already in the EU. That is why, the EU's motto explains both the vision and the greatest challenge of the EU: "*United in diversity*".

At this point, it should be underlined that these challenges and problems are not only specific to the current and future enlargement process, that is to say, they have been more or less present since the EU's first enlargement. The current and future widening process can only make these challenges more intense, complicated and hard to manage. Nevertheless thanks to the lessons drawn from the past experience embodied in conditionality and accession criteria (such as the Copenhagen Criteria, administrative capacity, absorption capacity etc.), the EU can handle and overcome this complex enlargement process.

[1] By future enlargement of the EU, the study means both candidate countries (Albania, The former Yugoslav Republic of Macedonia, Montenegro, Serbia, and Turkey) and potential candidate countries (Bosnia and Herzegovina and Kosovo) as of October 2013.

2. PEACE AS MISSION, VISION AND CHALLENGE

It is possible to argue that the first and foremost challenge of the EU enlargement is to keep peace alive. That is why, in this study, peace in Europe will also be presented as both mission and vision of the EU. It is considered a mission because one of the reasons for the existence or *raison d'être* of the foundation of The European Coal and Steel Community (ECSC) and/or the European Economic Community (EEC) was to establish peace. The reason why the founding fathers preferred to use an economic medium can be explained with reference to neofunctionalism, which argues that the economy has a spillover effect into other areas for the sake of paving the way for the political union. Indeed, history shows that both military and political union efforts have failed, and that the only successful attempt was in the realm of economic cooperation.[2] Therefore, considering Monnet and other founding fathers' ideal future, it is possible to argue that peace in Europe was the EU's vision.

Having a vision is of crucial importance because only then it would be possible to take systematic actions to mobilize all necessary resources. Vision is a destination to go, and if no one knows where to go, then a person or an institution is bound to drift away.

The classic novel of Charles Lutwidge Dodgson and famous Disney cartoon "*Alice in Wonderland*" contains an important message of strategic management regarding having an aim. Once Alice reaches a road leading to two different paths, she asks the Cheshire cat which way she should go. The Cheshire cat's answer is the same as that of strategic management: "*That depends a good deal on where you want to get to*."

Alfred Chandler was one of the first people to realize the importance of determining long-term goals. According to Chandler, what needs to be done is to allocate necessary (physical, financial, intellectual, human etc.) resources for the sake of a common vision.[3]

It is a fact that there is a gap between the current situation (or the *status quo*) and the ideal future. At this point, the current situation needs to be changed. One of the key questions related to the change is as follows: Should we take the current situation or the ideal future as a reference point? While the first option brings us to a realist but conservative[4] vision based on current limitations, by adopting the second approach, it is possible to come up with a "visionary" vision without limitations. Taking the *status quo* as a reference point may bring marginal or incremental change, but having a visionary ideal may result in fundamental and radical change.

Although there is no final answer to this question, Jean Monnet and other founding fathers have chosen the second option and they preferred to be a game

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[2] KJAER, ANNE METTE: *Governance*, 2004, Polity, UK, 99-122.

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[4] The meaning of conservative here has nothing to do with conservatism.

changer. They did not limit themselves and they "*demanded the impossible*": Peace in Europe. For the founding fathers, the ideal future was not an economic union, but rather a political union; they thought that only a political union could bring peace. This was the gap expected to be fulfilled by Jean Monnet and other founding fathers. They dreamed of a peaceful and prosperous Europe. Jean Monnet was one of them: "*Continue, continue, there is no future for the people of Europe other than in union… Peace can be founded only on equality of rights*."

This is the key point which links vision to the challenges: Having such a visionary ideal can simultaneously be presented as a challenge. It is a great challenge not only because it is hard to achieve, it may take time or even it may not be realized during an average lifetime. Convincing other people to fight for your cause and your vision is also a challenge. European Union is not an exception. The "peace in Europe" idea was a "visionary" vision considering two world wars and others. This was a vision which could not be limited to five years or even their lifetime. Their dream was not a temporary peace, but a "*perpetual peace*," as Kant would say. The founding fathers wanted to establish an eternal peace, rather than a truce.

It is exactly the same with that of Kant who wanted and dreamed about perpetual peace as early as 1795. According to Kant, "*no treaty of peace shall be held valid in which there is tacitly reserved matter for a future war*" because, "*otherwise a treaty would be only a truce, a suspension of hostilities but not peace, which means the end of all hostilities – so much so that even to attach the word 'perpetual' to it is a dubious pleonasm*."

It should be noted that Kant's liberal optimism clashed with Lenin's socialist realism in 1915. Lenin was sure that perpetual peace was not possible within the system of capitalism. The only possible unity of those capitalist states, for Lenin, could be war and colonialism based on brutal force:

> "*A United States of Europe under capitalism is tantamount to an agreement on the partition of colonies. Under capitalism, however, no other basis and no other principle of division are possible except force. Under capitalism, there are no other means of restoring the periodically disturbed equilibrium than crises in industry and wars in politics.*"

All in all, the founding fathers of the EU have seen two world wars, so they had every reason to be hesitant about the peace, but they did not choose to be pessimistic about the future of Europe. They were not satisfied with the then "warfare" *status quo*. There was a gap between the *status quo* and the ideal future, and they have chosen to take their ideal future as a reference point to change the *status quo*. They wanted to change it. They preferred to be a game changer as previously mentioned.

El-Agraa explains the case as follows:

> "*The founding fathers dreamed of the creation of a United States of Europe. This was because they believed that there was no other means of putting an end to the continent's woeful history of conflict, bloodshed and suffering – that is, they saw unity as the only way to achieve eternal peace in*

a continent with a long history of deep divisions and devastating wars."[5]

Although neither founding fathers nor their current colleagues could achieve the United States of Europe, the EU has been relatively successful in bringing peace in the EU borders.[6] Despite its symbolic and political character, the Nobel Peace Prize should be read as a reward for the founding fathers' visionary ideal of peace. The award of the Nobel Peace Prize is a symbol that the EU has been doing the right thing since its inception in building peace in Europe. There is more than one reason why the Nobel Peace Prize was given to the EU. All of them are related to the making of a peaceful Europe. First of all, the EU was able to transform hostile relations between Germany and France into a partnership. Secondly enlargement was seen as an important tool to widen and strengthen democratic transition, especially for Greece, Spain, Portugal and other ex-communist countries. Thirdly, the EU's future enlargement process was also seen as reconciliation among those countries that have been in conflict with each other. Finally, Turkey's inclusion in the membership process was also read by the committee as part of the advancement of democracy and human rights.

This prize shows that enlargement has been an integral part of the peace project and it also shows that peace is also one of the biggest challenges of the EU. Currently the EU is trying to "*deal with bilateral issues and overcoming the legacy of the past*."[7] It is a hard challenge but at least a few positive steps have been taken so far, such as the historic agreement between Belgrade and Prisitina agreed on 19 April 2013, or a public apology expressed by Serbia's President Tomislav Nikolic "*for crimes committed in Bosnia and Herzegovina."* The name issue between FYR of Macedonia and Greece is another important challenge which needs to be solved. The EU is aware of these problems; that is why "*in the case of the countries of the Western Balkans additional conditions for membership, were set out in the so-called 'Stabilisation and Association process', mostly relating to regional cooperation and good neighbourly relations*."[8]

3. GOOD GOVERNANCE

Another important challenge is related to governance comprehension.[9] It should

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[5] EL-AGRAA, ALI M.: *The European Union: Economics and Policies*, 2011, Cambridge University Press, UK, 423.

[6] This proposition cannot be generalized to the European continent.

[7] EUROPEAN COMMISSION, *Enlargement Strategy and Main Challenges 2013-2014*, 2013, Brussels, 12, available at: http://ec.europa.eu/enlargement/pdf/key_documents /2013/package/ strategy_paper_2013_en.pdf [cit. 2014-10-03].

[8] For further information on enlargement and conditions for membership, *see*: http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm [cit. 2013-10-03]

[9] For a discussion on the term governance, *see* RHODES, ROD A. W: The New Governance: Governing without Government, in *Political Studies*, Vol. 44. Issue 4. (1996), 652-667, and KJAER: *op. cit.*

be underlined that the term governance is different from the term government. Governance is something broader than government, because it includes non-state actors, implying that government is not the only and dominant actor anymore. It is not the single actor because there are many other levels ranging from EU level to the citizens. So, as Kjaer argues "*the relationship between public and private is blurred and government is not the single dominant actor that can unilaterally impose its will*."[10] Multi-level governance[11] comprehension can be given as an example. Apart from, sub-national levels, even European citizens do have a chance to be involved in the policy making process considering "citizen initiative." If one million signatures from at least seven countries could be obtained, the European Commission "may" propose legislation based on the European citizen's initiative.

As Leftwich argues there are at least three possible components or levels of good governance. As is explained above, first of all, the systemic use is that it is wider than government and it refers to "*a looser and wider distribution of*" both political and economic power. Secondly, politically, it refers to a legitimate and democratic "Western" state based on democratic principles such as democratic polity, separation of power, checks and balance system, regular elections etc. Finally, from an administrative point of view, it refers to "*an efficient, open, accountable and audited public service*" including "*independent judicial system to uphold law and resolve disputes arising in a largely free market economy*."[12] According to Leftwich, the latest use, that is, administrative use of governance is especially the one employed by the World Bank.

Although the definition of these principles may differ from different organizations such as World Bank, OECD or the EU, the WB perspective, as an initiator of the term, explains the use of governance in a brief way as follows:

> "*Governance consists of the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them.*"[13]

In this context, good governance can be read as a version of classical liberalism or "*model of a liberal-democratic polity*".[14] What needs to be done in good governance is to create a self-regulating civil society and market economy apart from efficient and effective governments. Originally the term good

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[10] KJAER: *op. cit.* 7, 14.

[11] HOOGHE, LIESBET – MARKS, GARY: Unravelling the Central State, but How? Types of Multi-Level Governance, in *The American Political Science Review*, Vol. 97. No. 2. (May, 2003), 233-243.

[12] LEFTWICH, ADRIAN: Governance, democracy and development in the Third World, in *Third World Quarterly*, Vol. 14. Issue 3. (1993), 611.

[13] For a definition and components of governance by World Bank, *see*: http://info.worldbank.org/governance/wgi/index.aspx#home [cit. 2013-10-03].

[14] LEFTWICH: *op. cit.* 605.

governance was proposed as a kind of solution to both democratic and administrative problems of Sub-Saharan African countries by the WB in 1989, but currently the WB indicators are not limited to them.

There are six criteria of the WB "good" governance.

1) *Voice and Accountability;*
2) *Political Stability and Absence of Violence;*
3) *Government Effectiveness;*
4) *Regulatory Quality;*
5) *Rule of Law;*
6) *Control of Corruption.*

Table 1 shows that future enlargement will be even more challenging than the latest enlargement process considering lower average good governance points. Although Bulgaria, Croatia and Romania's average performance are worse than the Nordic countries, potential candidate and candidates countries are even worse than the newcomers of the EU. Another interesting fact is that although Bulgaria and Romania are in the EU, except for "voice and accountability" and "political stability and absence of violence" criteria, their performance is worse than or similar to Turkey. Montenegro's average is very close to that of Romania and Bulgaria. What is also clear from the table is that "political stability and absence of violence" criterion should be ameliorated and developed for the countries involved in the future enlargement process.

4. ECONOMIC GOVERNANCE AND COMPETITIVENESS

Governance does have an economic dimension. It is important for the EU because, as was explained above, considering the history of the then EU, the economic union was relatively a success story. It is a fact that economic governance itself is part of the Copenhagen Criteria: "*a functioning market economy and the capacity to cope with competition and market forces in the EU*." The basic challenge here starts with this criterion because according to the European Commission, "*while Turkey is a functioning market economy, no Western Balkan enlargement country enjoys this status*."[15]

Another challenge can be seen in terms of the Convergence Criteria or the Maastricht Criteria which needs to be satisfied after membership, since an opt-out option will not be given to the newcomers. In the future, members of the EU who are not part of the Euro-zone except for Denmark and the UK, should set a target date. However, only Lithuania and Romania have set a target date for the adoption of the Euro so far.[16]

[15] EUROPEAN COMMISSION: *op. cit.*

[16] Bulgaria, Croatia, Czech Republic, Hungary, Poland and Sweden should also determine the target date, but they haven't set it so far.

Selected Macroeconomic Indicators					
			Selected Maastricht Criteria		
	GDP Growth	*Unemployment*	*Consumer-Price Index*	*General Government Balance*	*General Government Gross Debt*
	Macroeconomic Performance Indicators				
EU28[(1)]	0,1	10,8	1,5	-3,3	87,1
EU 18[(1)]	-0,4	12,0	1,3	-3,0	92,6
Albania[(2)]	0,7	16,2	1,9	-4,9[(4)]	65,2[(4)]
Bosnia and Herzegovina[(2)]	1,2	44,5	-0,1	-2,2[(4)]	45,1[(4)]
Macedonia[(3)]	3,1	29,0	2,8	-4,1	36
Montenegro[(3)]	3,5	19,5	2,2	-2,6	58,0
Serbia[(3)]	2,5	22,1	7,8	-5,0	63,7
Turkey[(3)]	4,0	9,8	7,5	-1,6	36,3
Kosovo[(2)]	2,5	30,9	1,9	-2,6[(4) (5)]	8,3[(4) (5)]

Table 2: Selected Macroeconomic Indicators, 2013.[17]

As table 2 indicates, what is promising for the future enlargement is that GDP growth, government balance and government debt are relatively better than the EU28 average. Considering some of the selected Maastricht Criteria, it is seen that only Bosnia and Herzegovina could pass the criteria concerned. It should also be underscored that Kosovo and Montenegro have already adopted the Euro as their currency. Albania and Serbia are the countries lagging behind who could not pass all of the selected criteria. As for Macedonia, there is a need for amelioration regarding inflation rate and government balance. As to Turkey, only inflation rate seems problematic considering its better position in terms of government balance and debt.

Apart from the Maastricht criteria, macroeconomic performance of the countries gives an alert of an immediate challenge considering the unemployment

[17] Source:

* Grey areas show that the Maastricht Criteria could not be achieved.

(1) Eurostat.

(2) IMF, World Economic Outlook, 2014. Available at: http://www.imf.org/external/pubs/ft/weo/2014/01/pdf/text.pdf [cit. 2014-10-03].

(3) European Commission, European Economic Forecast, Spring, 2014. Available at: http://ec.europa.eu/economy_finance/publications/european_economy/2014/ee3_en.htm [cit. 2014-10-03].

(4) European Commission, EU Candidate & Potential Candidate Countries' Economic Quarterly, 2014. Available at: http://ec.europa.eu/economy_finance/db_indicators/cpaceq/documents/cceq_2014_q2_en.pdf [cit. 2014-10-03].

(5) 2013 data is NA. Instead, 2012 data are shown in the table for Kosovo in terms of general government balance and general government gross debt.

rate. When compared to the EU average, it is highly problematic for the countries concerned except for Turkey: "*Structural reforms need to be prioritised and competitiveness enhanced in order to support fiscal consolidation, tackle high external imbalances as well as high unemployment in all countries, averaging over 20% in the Western Balkans.*"[18]

The Global Competitiveness Index 2013–2014 rankings	
Future Enlargement	
Albania	95
Bosnia and Herzegovina	87
Kosovo	-
Macedonia, FYR,	73
Montenegro	67
Turkey	44
Serbia	101
Benchmarking	
Bulgaria	57
Croatia	75
Romania	76
Finland	3
Germany	4
Sweden	6

Table 3: The Global Competitiveness Index 2013–2014 rankings.[19]

The World Economic Forum's "*Global Competitiveness Index*" 2013–2014 rankings in table 3 show that the problem is not only related to the unemployment rate. There is another urgent problem regarding their competitive power. Although Turkey seems the most competitive country when compared to the latest enlargement countries and the future enlarging countries, there is a great difference when compared to the members of the EU especially Finland, Germany and Sweden, in that, these three countries are the EU's most competitive ones.

The difference between the countries can be seen easily in the index with reference to their economic development stage. For example, candidate and potential candidate countries, except for Turkey, are placed under the "stage two: efficiency-driven economies," while countries such as Germany, Sweden, Denmark and Finland are placed under the "third stage: innovation-driven economies." Turkey finds itself a place in-between them: the transition stage.

5. CONCLUSION

Considering the challenges, it is out of question not to argue that both current members and future members do have a significant diversity. Not only their

[18] EUROPEAN COMMISSION: *op. cit.* 4.
[19] Source: World Economic Forum, available at: http://www.weforum.org/reports/global-competitivene ss-report-2013-2014 [cit. 2014-10-03].

economy, but also their governance levels are diverse. That is why the motto of the EU is highly suitable for the EU: "United in diversity." The EU will be united but that does not mean that it will omit differences including economy, culture, traditions and languages etc. That is why, the motto gives us the clue of the basic challenge: To keep the EU united in spite of the members' and candidates' great and significant difference.

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Table 1: World Bank Governance Indicators for Selected Countries, 2013							
Country	*Voice and Accountability*	*Political Stability and Absence of Violence*	*Government Effectiveness*	*Rule of Law*	*Regulatory Quality*	*Control of Corruption*	*Average*
Future Enlargement							
ALBANIA	51,18	48,34	43,54	35,55	57,42	25,84	*43,65*
BOSNIA AND HERZEGOVINA	43,13	36,02	39,23	30,24	50,72	52,15	*45,25*
KOSOVO	40,28	18,01	40,67	36,02	52,63	30,62	*36,37*
MACEDONIA, FYR	46,92	35,07	53,11	49,29	61,24	59,33	*50,83*
MONTENEGRO	55,92	63,51	59,81	54,03	53,59	51,20	*56,34*
TURKEY	40,76	11,85	65,55	55,92	65,07	61,72	*50,15*
SERBIA	56,87	42,65	50,24	44,55	51,20	50,72	*49,37*
Average	*47,87*	*36,49*	*50,31*	*46,51*	*55,98*	*47,37*	*47,42*
Benchmarking: Latest Enlargements							
BULGARIA	58,29	54,50	59,33	51,18	67,94	49,76	*56,83*
CROATIA	63,03	66,35	70,81	60,19	66,03	61,24	*64,61*
ROMANIA	57,35	52,61	52,63	56,40	69,38	52,63	*56,83*
Average	*59,56*	*57,82*	*60,92*	*55,92*	*67,78*	*54,54*	*59,43*
Benchmarking: The Nordic Members							
DENMARK	99,53	78,20	99,04	98,58	97,61	100,00	*95,49*
FINLAND	97,16	97,16	100,00	99,05	98,56	98,09	*98,34*
SWEDEN	99,05	90,52	98,56	99,53	99,04	99,04	*97,62*
Average	*98,58*	*88,63*	*99,20*	*99,05*	*98,40*	*99,04*	*97,15*

Table 1: World Bank Governance Indicatiors for selected countries, 2013.[20]

[20] Source: http://info.worldbank.org/governance/wgi/index.aspx#home [cit. 2014-10-03].

Paternalism and Public Policy

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Abstract
The article explores the issue of paternalism from both a definitional and justificatory aspect. It presents some of the problems related to the definition of the concept and then investigates elements that could be taken into account in the justification of paternalistic public policies. The author describes various failures in human reasoning identified in economics literature (technical inability, weakness of will, emotional decision-making, lack of experience). Paternalistic public policies might be justifiable with reference to these reasoning-failures. Finally, the issue of libertarian paternalism is discussed as a relatively mild, less-coercive method of state intervention.

Keywords: *paternalism, public policy, libertarian paternalism, autonomy, self-harm.*

1. INTRODUCTION

The phenomenon of paternalism permeates public relations and private life as well.[1] Take, for instance, the case of a benevolent father who prohibits his children to play outdoors on a freezing winter day because he is afraid that they will catch a cold. The state – analogously to a benevolent father – may prescribe the compulsory use of seat belts or prohibit the use of dangerous narcotics to protect citizens from the harmful consequences of their own poor decisions. For sure, benevolent intentions matter, but there is a strong, commonly accepted liberal presumption against someone else, including the state and its agents, determining the right course of action for a competent individual. Thus, it seems centrally important to determine relevant arguments that can be used to justify legal paternalism in democratic societies. In what follows, I will examine various aspects that need to be taken into account when justifying paternalistic public policies. The article starts with a conceptual analysis of paternalism including the identification of possible definitional elements. In the second part, I proceed to justificatory issues. I introduce the consequentialist and the autonomy-based approaches to justification and examine why and under what circumstances the state should be seen as a better decision-maker than the individual. In the final part,

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I explore how policy-makers can use the non-coercive methods of libertarian paternalism to 'nudge' people to make better (i.e. more beneficial and less self-harming) decisions in their everyday lives.

2. CONCEPTUAL ISSUES

There have been many attempts to define paternalism.[2] Paternalism is not a 'natural kind'[3] and – seeing the huge amount of complex and often conflicting definitions – one is tempted to give a stipulative definition of the concept.[4] Presumably, this would preclude possible debates over the definition's correctness because stipulative definitions are arbitrary in the sense that they assign a meaning to a word for the first time.[5] However, the word 'paternalism' has acquired a meaning in ordinary language use and it seems necessary to test the meaning of definitions against the colloquial meaning of the word – even if this is quite vague and uncertain. This correspondence is important but a 'good' definition will have to satisfy a number of other expectations as well; a definition will be judged according to e.g. its consistency, its context and the set of problems it is used to clarify and resolve.[6]

The word 'paternalism' carries negative connotations and it is often considered to be morally wrong. People are regularly criticized for being too paternalistic and public policies are frequently attacked under the banner of anti-paternalism by political opponents. The two most common explanations given for the concept's negative normative content are the impermissible intentions behind

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[2] A complex definition given by Gerald Dworkin looks like the following. 'X acts paternalistically towards Y by doing (or omitting) Z if and only if: (1) Z (or its omission) interferes with the liberty or autonomy of Y; (2) X does so without the consent of Y; (3) X does so just because doing Z will improve the welfare of Y, or in some way promote the interests, values, or good of Y.' DWORKIN, GERALD: Defining Paternalism, in COONS, CHRISTIAN – WEBER, MICHAEL (ed.): *Paternalism – Theory and Practice,* 2013, Cambridge University Press, Cambridge, 29. The same definition appears under the 'Paternalism' entry of the Stanford Encyclopedia of Philosophy. DWORKIN, GERALD: Paternalism, in *The Stanford Encyclopedia of Philosophy*, Summer 2014 Edition, EDWARD N. ZALTA (ed.), available at: http://plato.stanford.edu/archives/sum2014/entries/paternalism/ [cit. 2014-12-03].

[3] DWORKIN (2013): *op. cit.* 38. According to the Stanford Encyclopedia of Philosophy, a 'kind is *natural* is to say that it corresponds to a grouping or ordering that does not depend on humans.' BIRD, ALEXANDER – TOBIN, EMMA: Natural Kinds, in ZALTA, EDWARD N. (ed.): *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), available at: http://plato. stanford.edu/archives/win2012/entries/natural-kinds/ [cit. 2014-12-03].

[4] DWORKIN (2013): *op. cit.* 31.

[5] HURLEY, PATRICK J.: *A Concise Introduction to Logic,* 2006, ninth edition, Thomson Wadsworth, 88.

[6] DWORKIN (2013): *op. cit.* 25.

paternalism and its coercive character.[7] It seems to me that the violation of autonomy is implicitly associated with most paternalistic interventions[8] and any definition that retains autonomy as a central element already implies something for the justification of the concept. Consequently, it is not merely a theoretical question how someone defines paternalism: if something qualifies as paternalism, chances are high that it will be subject to a more rigorous scrutiny. It might be easier to accept an intervention that is not labelled as 'paternalism' because it falls outside the scope of definition.

Gerald Dworkin, in his latest contribution, gives an excellent overview of the different dimensions along which definitions of paternalism might vary (e.g. outcomes vs. motives, motives vs. reasons, acts vs. omissions, violation of autonomy, etc.).[9] Most definitions seem to share the same fundamental concepts but place emphasis on different dimensions. My understanding is that paternalism can be conceptualized with the help of two additional concepts: autonomy and benevolence. Roughly, paternalism can be defined as interference with someone's autonomy in order to protect this person from self-induced harm and/or to promote his benefit. I believe that we cannot and should not strive for a 'perfect' definition: a rough definition, such as this, might be useful to circumscribe the area of examination but it cannot be complete without giving a settled definition of the other concepts (autonomy, benevolence, harm, benefit, etc.).

An important question that needs clarification is what the term 'paternalism' is predicated of: acts, people, institutions, motives, legal regulations, policies can all be paternalistic. People act paternalistically in private relations, for example a husband who hides the sleeping pills from his suicidal and depressed wife. Legal regulations that allow the sectioning of potentially self-harming mentally ill patients also have a paternalistic character. Yet, the two scenarios are quite different from each other. John Kultgen talks about public and private paternalism in this respect and warns us that justified forms of public paternalism might not exactly parallel justified cases of personal paternalism.[10] Abstract legal regulations treat people in a standardized way and they are less responsive to individual circumstances. Thus, it seems that the justification of paternalistic public policies and legal regulations requires 'more' than a single act of private paternalism e.g. from the perspective of democratic accountability. In what follows, I try to explore elements that need to be taken into account when justifying paternalistic public policies.

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[7] CORNELL, NICOLAS: A Third Theory of Paternalism, in *Michigan Law Review,* Vol. 113. forthcoming (2015). Paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456419 [cit. 2014-12-03].

[8] It is a debated question whether the violation of autonomy is a necessary element of paternalism. DWORKIN (2013): *op. cit.* 27.

[9] Ibid. 26-28.

[10] KULTGEN, JOHN: *Autonomy and Intervention – Parentalism in the Caring Life*, 1995, Oxford University Press, New York, 161.

3. JUSTIFYING PATERNALISTIC PUBLIC POLICIES

Due to the interference with individual autonomy, paternalism is a 'frightening prospect' for many.[11] However, most people do not deny that paternalism might be justifiable, or even necessary in certain situations.[12] The two major factors that are generally taken into account when it comes to the justification of paternalism are the beneficent consequences of the intervention and the autonomy of the person subjected to paternalism. Put it very simply, it seems that the more beneficent and the less intrusive a paternalistic intervention, the easier it is to accept it as morally non-problematic.

Autonomy-based approaches are friendlier to 'softer' forms of paternalism that do not interfere with the decision-making of individuals – often because the given person is incapable of making fully autonomous decisions in the first place, either due to mental incapacity or the lack of relevant information that would be necessary to make a fully informed decision. A major distinction, from the perspective of autonomy-based justifications, is the distinction between hard and soft paternalism. In Joel Feinberg's terminology, hard paternalism advocates coercion to protect competent adults against their voluntary self-harming choices. Soft paternalism, on the other hand, allows protection from self-regarding harmful conduct, if 'the conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish if it is voluntary or not'.[13] Feinberg's proposition that soft paternalism is acceptable while hard paternalism is not seems to correspond to our basic moral intuitions as an 'ethical minimum': there is nothing wrong with stopping a child or a mentally ill person from harming himself or herself, while the same is not necessarily true for competent adults making voluntary self-harming decisions. Thus, Feinberg's account of paternalism roughly comes down to the question what makes a choice 'substantially' voluntary or nonvoluntary. Voluntariness, however, seems to be an elusive concept, partly because it is tied to other complex, vague and often contested concepts as mental capacity and human rationality.[14] For example, seemingly irrational self-harming

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[11] CONLY, SARAH: *Against Autonomy – Justifying Coercive Paternalism,* 2013, Cambridge University Press, Cambridge, 182.

[12] The approach of 'absolute anti-paternalism' contends that paternalism is never justified and imposes a blanket prohibition on all forms of paternalistic interventions. KULTGEN: ***op. cit.*** 132. I tend to agree with Conly that those who reject all forms of paternalistic constraints may have 'a quite unrealistic picture of human ability' (i.e. the presumption that people are always capable of making perfect choices) and a 'morally unjustified sense that people deserve to suffer for their own mistakes'. CONLY: ***op cit.*** 182. Even John Stuart Mill, often considered the 'greatest enemy' of paternalism admits certain exceptions to the 'harm principle'. See e.g. Mill's example about crossing an unsafe bridge in Chapter V of *On Liberty*.

[13] FEINBERG, JOEL: *The Moral Limits of the Criminal Law – Harm to Self,* 1986, Oxford University Press, New York, 12.

[14] The traditional view of human rationality is increasingly challenged in light of the

choices might be explained with the different values and personal preferences of people;[15] they are not necessarily attributable to errors in someone's reasoning capacities.

Consequentialist justifications focus on the outcome of paternalistic interventions. This means that paternalism is morally justifiable if it leads to 'good' consequences for the paternalised person or – in other words – if it serves his or her 'best interests'. The question is how to determine what is actually 'good' for the individual: some claim that there are objective elements of well-being that every human being wants to possess (e.g. health) while others claim that these elements are essentially subjective and it is only someone's revealed preferences that should be promoted through paternalism.[16]

When it comes to the justification of paternalism in practice (particularly state-implemented public policies), we cannot limit ourselves to merely one of the previously mentioned models. I will consider a few elements that seem to complicate the picture. (1) Consequences and respect for individual autonomy are usually both taken into account when evaluating the acceptability of paternalistic interventions. It seems to me that neither approach has a fixed priority over the other but priority varies on a case-by-case basis. Consequences often 'relativize' other considerations when it comes to public policies and legislation but autonomy can be thought of as constituting a 'deontological side-constraint' that reference to consequences cannot override.[17] The question is how to strike a balance between the two values and through what kind of democratic process is it possible to persuade people about the correctness of a paternalistic state action. (2) The rationale behind a paternalistic action is often 'mixed' in the sense that the actor might have motives other than benevolent protection to act paternalistically. This is particularly true for the state that has to take into account multiple reasons when regulating complex social issues (e.g. protection of the individual, protection of others, public order, morals, etc.). Actually, it seems that there are very few unmixed cases of paternalism. Even in an apparently 'pure' case (e.g. prescribing motorcyclists to wear crash helmets), one can refer to the indirect harm caused to other members of society (e.g. by the additional social security expenses that incur

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findings of cognitive psychology and behavioural economics (*cf.* the issue of libertarian paternalism later in this article). Mental capacity is also a contested concept: the line between capacity and incapacity often seems vague and arbitrary.

[15] The classical example here is the example of Jehovah's Witnesses (Christian Scientists) who reject blood transfusions for religious reasons even in life-threatening emergencies. Their choice seems irrational from an external perspective but it is questionable whether blood transfusions can be forcibly administered to them. *See* e.g. DWORKIN, GERALD: Paternalism, in *The Monist,* Vol. 56. No. 1. (1972), 66.

[16] Dan Brock distinguishes between 'desire' and 'ideal' theories of good that roughly corresponds to the subjectivist-objectivist distinction. BROCK, DAN: Paternalism and Promoting the Good, in SARTORIUS, ROLF (ed.): *Paternalism,* 1983, University of Minnesota Press, Minneapolis, 250.

[17] Similarly to Ronald Dworkin's idea that rights should be conceived as 'trumps' that have priority over non-right based social objectives.

in case of an accident).[18] (3) The state as a paternalistic actor has different characteristics than an 'ordinary person' acting paternalistically in the private domain. The state, as mentioned before, is more 'distant' from the paternalistic situation and intervenes through abstract regulations that leave less space for appreciating the particularities of each case. On the other hand, there are certain factors that make the state a 'wiser' decision-maker than the individual. These are explored in the following paragraphs

Bill New examines the justification of paternalistic public policies in economics terms.[19] He argues that contrary to the traditional liberal theory, the state may sometimes be a better judge of welfare than the person himself.[20] It is possible to identify failures in human reasoning and it seems that the state and its officials might be able to reason better in certain situations.[21] New distinguishes four such failures. First, individuals might make sub-optimal choices because the amount of information needed is so great or because the 'causal connections between choice and outcome are difficult to make'.[22] Human intellect is limited and this leads to a 'technical inability' to make good decisions in complex situations. Secondly, people neglect to act in accordance with their best interests (i.e. long term preferences) due to weakness of will (*akrasia*) – consider the example of a heroine addict who wants to stop using the drug but cannot do so because of his addiction. Thirdly, humans are often prone to emotional decision-making, for example 'becoming attached to making certain choices, such as following a habitual route to work, even if it is longer or less attractive than an alternative one'.[23] Finally, people sometimes lack first-hand experience with respect to the consequences of their potentially self-harming decisions; even though most smokers have an 'abstract' knowledge of the harmful consequences of cigarettes, they do not have experience of the pain and suffering that smoking-related illnesses will potentially cause to them.

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[18] This issue is closely related to the distinction between self-regarding and other-regarding acts.

[19] NEW, BILL: Paternalism and Public Policy, in *Economics and Philosophy,* Vol. 15. Issue 1. (1999), 63. The article is also included in the appendix of New's doctoral thesis available at http://etheses.lse.ac.uk/833/1/New_Justifying_state_interventions_the_case_of_paternalism.pdf [cit. 2014-12-03]. Page numbers in the footnotes refer to this version of the article.

[20] According to Mill's assumption, the individual always knows best what is good for him, therefore any external intervention aimed at improving someone's welfare is likely to be a failure.

[21] Paternalistic state policies are aimed at correcting failures in human reasoning. State policies can also be aimed at correcting market failures. Inadequate or imperfect information is a standard source of market failure, therefore New argues that state interventions aimed at correcting imperfect distribution of information are not paternalistic. This is contrary to the traditional view that considers inadequate information as a reason for paternalism. NEW: *op.cit.* 249-251.

[22] Ibid. 251.

[23] Ibid.

New argues that the state is less susceptible to such failures in reasoning and a paternalistic state policy can be justified if it is shown to produce better outcome than individual choice and if the increase in welfare is sufficient to compensate for the violation of autonomy that the intervention entails.[24] The state can be considered to be more impartial ('phlegmatic') than an individual and therefore more resistant to temptation, weakness of will and emotional decision-making: choosing between a luxurious holiday in the present and saving for retirement in the future is obviously less difficult for the 'impartial' state than for the person concerned. New claims that the state and its employees also have a wider perspective when it comes to experiences related to possibly self-harming activities. Although public employees (e.g. doctors, nurses, etc.) do not experience directly the negative effects of not wearing a seat belt, they are still in a better position to make a judgment on the harmful consequences of accidents and the prudence of seat belt wearing than ordinary drivers. Finally, relating to the technical inability of individuals to make decisions in complex situations, the state has the advantage to employ experts who can devote themselves to the problem full-time. With the help of the experts, the state has a better knowledge of the situation than ordinary citizens.

Response to New's article further nuances the conditions of acceptable state paternalism.[25] Authors argue that it is important to distinguish between those who know that they suffer from a failure of reasoning and those who do not. The 'sophisticated akratic' knows that he faces weakness of will in certain situations and he will probably adopt some form of pre-commitment strategy to deal with the problem.[26] State intervention is necessary only for the 'myopic akratic', the person who is unaware that weakness of will constitutes a problem for him. The same stands for people's technical inability to make decisions in complex situations. Those who realise their technical inability will hire experts to help with unfamiliar or complex decisions (e.g. medical, legal or investment decisions).[27] State paternalism is necessary for those 'who do not know that they do not know enough' – the difficult question is how to distinguish the former group from the latter in a 'blanket' public policy regulation.

A somewhat similar requirement has been articulated by Thomas and Buckmaster when arguing that an appropriate paternalistic policy should always 'discriminate between those for whom paternalism is deemed necessary and those for whom it is not'.[28] This practically means that paternalism should be limited as

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[24] Ibid. 257.

[25] LEONARD, THOMAS C. – GOLDFARB, ROBERT S. – SURANOVIC, STEVEN M.: New on Paternalism and Public Policy, in *Economics and Philosophy,* Vol.16. No. 2. (2000), 323.

[26] E.g. entering into a Ulysses contract in advance and making sure that the self-harming option is not available to the person when the tempting situation develops. Ibid. 326.

[27] Ibid. 327.

[28] THOMAS, MATTHEW – BUCKMASTER, LUKE: Paternalism in social policy – when it is justifiable? in *Parliament of Australia, Department of Parliamentary Services Research paper*, No. 8. (2010-2011), 18.

much as possible to those who are benefited by the restriction: instances of 'impure' paternalism involving the restriction of others besides those who are benefited should be kept to a minimum.[29] Proportionality, accountability and efficacy are also important principles when evaluating paternalistic policies. Proportionality requires that an intervention is the minimum necessary to achieve the intended aim of the policy. Accountability means that paternalistic interventions shall be transparent to the person subjected to the intervention. This is particularly important in cases of 'libertarian paternalism' that operate by modifying choice-architecture often in a way that is not obvious to the paternalised person. Efficacy implies that the paternalistic intervention is efficient in producing the intended outcomes. Although there seems to be a general consensus that social policies must be evidence-based, it is not entirely clear what evidence shall be considered when determining the efficacy of paternalistic policies.[30]

To sum up, paternalistic public policies can be justified on a consequentialist basis by reference to the fact that the state is sometimes in a better position to assess what is good for the individual than the individual himself. The state, being more detached ('phlegmatic') and having a wider perspective than the individual, is less vulnerable to certain reasoning-failures. It is also necessary that the intervention be proportionate, efficient (evidence-based) and accountable to the state. Thus, a paternalistic state policy can be justified if it is shown to produce better outcome than individual choice and if the increase in welfare is sufficient to compensate for the violation of autonomy that the intervention entails.[31] However, paternalistic interventions sometimes have unintended negative consequences that complicate this picture. For example, paternalism can cause people to undertake riskier activities because they will act under the (true or false) assumption that they are protected against their own self-harming actions. This is called 'moral hazard' in economics literature.[32]

4. LIBERTARIAN PATERNALISM

Libertarian paternalism is a relatively 'soft', non-coercive form of paternalism.[33]

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[29] Pure and impure paternalism is also called direct and indirect paternalism. A ban on the sale of cigarettes is impure (indirect) paternalism because it limits cigarette manufacturers besides smokers whose benefit is originally intended to be promoted by the prohibition. Gerald Dworkin argues that indirect paternalism requires stronger justification because it involves third-parties 'who are losing a portion of their liberty and they do not even have the solace of having it done in their own interest'. DWORKIN (1972): *op. cit*. 64.

[30] THOMAS – BUCKMASTER: *op. cit.* 22-25.

[31] NEW: *op.cit.* 257.

[32] THOMAS – BUCKMASTER: *op. cit.*7-8.

[33] The adjective 'libertarian' refers to the non-coercive and liberty-preserving character of this form of paternalism. SUNSTEIN, CASS – THALER, RICHARD: *Nudge – Improving Decisions About Health, Wealth and Happiness,* 2009, Penguin, London, 5.

Advocates of the approach, Cass Sunstein and Richard Thaler start off from the premise that humans are not fully rational choosers and do not always act in their own best interests. Taking into account the findings of cognitive psychology and behavioural economics, it is possible to exploit individual cognitive biases and create regulations that 'nudge' people to make better, i.e. more beneficial and less self-harming decisions. Proponents of libertarian paternalism claim that it is an effective, relatively cheap but less intrusive method to promote people's welfare than traditional forms of paternalism. The idea has received considerable public attention in recent years and has been endorsed by official government politics both in the United Kingdom and the United States.[34] However, libertarian paternalism has also been criticised for its alleged ineffectiveness and for the moral, political and legal risks it may carry (e.g. slippery slope to hard paternalism, lack of transparency, lack of neutrality, etc.).[35]

Libertarian paternalist public policies are based on the idea that instead of forcibly taking away self-harming options from people, it is better to present them available choices in a way that they will make 'better' choices themselves. If policy-makers are aware of weaknesses of human decision-making, they can modify 'choice-architecture' so that results are more beneficial to individuals. One such cognitive bias, the so-called *status quo* bias refers to people's inertia not to change the current state of affairs. This means, for example, that changing the default position from non-enrolment to automatic enrolment will have a significant impact on the number of people enrolled to a savings scheme. Another approach focuses on changing the physical environment where choices take place: removing candies and soft drinks from supermarket checkouts ensures that people do not 'give in to temptation' and buy sweets while waiting in the checkout line. People, however, remain free to choose in these cases – it is only that they are more likely to choose an option that is more conducive to their welfare. The efficiency of these interventions is not necessarily high, but the costs of implementing such policies tend to be low as well.

The welfare state is often described as having a paternalistic character. It is true that a state which is preoccupied with the welfare of its citizens will sanction policies that do not only increase welfare through redistribution (i.e. increasing someone's welfare at the expense of others) but also policies that 'compel citizens to undertake or abstain from activities that affect that citizen alone'.[36]

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[34] The Behavioural Insights Team was set up in 2010 by the Cameron administration with the aim to 'help Government departments think about non-regulatory means of achieving behaviour change'. *See Report on Behaviour Change* (Science and Technology Select Committee, House of Lords, 2011) 33. The Office of Information and Regulatory Affairs (OIRA), headed by Cass Sunstein, has similar functions in the US when reviewing draft regulations and overseeing the implementation of government-wide policies.

[35] For an overview of the most frequent objections, *see* SUNSTEIN – THALER: *op. cit.* 235-252. *See* also WHITMAN, GLEN: *The Rise of the New Paternalism*, available at http://www.cato-unbound.org/2010/04/05/glen-whitman/rise-new-paternalism [cit. 2014-12-03].

[36] NEW: *op. cit*. 244.

Redistributive policies are not paternalistic in the strict sense of the word, although some of them can be perceived as 'insurance schemes' that will protect a person's future self from the full consequences of certain unwise or self-harming decisions in the present. Most public pension systems serve mixed purposes in the sense that they are partly based on the idea of social solidarity but also have a paternalistic character i.e. they compel people to take care about their own retirement in advance. The increasing transformation of pay-as-you-go pension schemes to defined contribution plans seems to place social solidarity increasingly in the background and paternalism in the foreground.[37] As we have previously seen, such paternalism might be justified by reference to the 'myopic akrasia' of decision-makers[38] but countries that wish to avoid hard paternalism leave it for the individual to join a pension plan.

In order to create sustainable pension systems, it seems crucial to identify methods that can non-coercively increase participation in voluntary pension schemes. This is extremely important for countries that do not require people to make mandatory pension contributions (e.g. the United States). Hybrid systems, like Hungary, can also make use of such methods in order to strengthen their non-mandatory, private savings based pillar. Libertarian paternalism has come up with possible solutions in this respect. The first one proposes changing the default rule from non-enrolment to automatic enrolment. Although such regulation does not violate autonomy (people remain free to opt-out later), it drastically increases the number of participating employees, since most of them will probably not opt-out after being enrolled.[39] Alternatively to automatic enrolment, participation can also be increased by making enrolment administratively easier or 'forcing' employees to actively make a choice between enrolment and non-enrolment when first hired. An additional issue – since most participants do not save enough – is how to get people increase their savings contribution. A possible solution is provided by 'The Save More Tomorrow' program, developed by Richard Thaler and Shlomo Benartzi, which aims to increase pension contributions by asking participants to commit themselves, in advance, to the raise of their pension contributions whenever they get a pay rise.[40] Finally, offering tax deductions can also make

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[37] Pay-as-you-go pension schemes – often characteristic to welfare states following the Bismarckian model – are funded by compulsory contributions. The contributions are not capitalized but they are spent immediately to cover payments for current pensioners. In defined contribution schemes contributions are paid into an individual account for each member. On retirement, the member is eligible to receive the accumulated capital and its returns. *See*, e.g. NATALI, DAVID – RHODES, MARTIN: The New Politics of the Bismarckian Welfare State: Pension Reforms in Continental Europe, in *EUI Working Papers* SPS No. 2004/10. 2.

[38] *Cf.* NEW: *op. cit*. 253; LEONARD – GOLDFARB – SURANOVIC: *op.cit.* 325.

[39] Sunstein and Thaler refer to statistics according to which participation rates in one pension plan under the opt-in approach were only 20 percent after three months of employment. After switching to automatic enrolment, enrolment of new employees jumped to 90 percent immediately. *See* SUNSTEIN – THALER: *op.cit*. (2009) 117-118.

[40] SUNSTEIN – THALER: *op.cit*. (2009) 22-125. *See* also THALER, RICHARD – BENARTZI,

pension savings more attractive to people. Financial incentives are relatively soft instances of paternalism but they do not fall within the ambit of libertarian paternalism.

Sarah Conly criticizes 'softer' forms of paternalism for being too costly and inefficient.[41] She claims that people sometimes continue to choose the 'wrong thing' despite all efforts of nudging, incentives or education. In the case of smoking, for example, she argues that an outright prohibition would be desirable instead of spending money on 'softer' but rather ineffective measures such as advertising or education. Conly identifies four criteria that acceptable forms of coercive paternalism must satisfy.[42] (1) The activity to be prevented must be opposed to our long-term ends. Applying this criterion to the question of smoking, one can say that the harmful consequences, including the possibility of serious illnesses and premature death, are at odds with the fulfilment of someone's long-term goals. (2) Coercive measures have to be effective. Since the majority of people accept cigarettes as genuinely dangerous substances, Conly argues that the prohibition of smoking would be more effective than the prohibition of alcohol was in the 1920ies in the US. (3) The benefits must be greater than costs. It might be argued that society, overall, would be better off without cigarettes; costs would reduce overtime because smokers who initially suffer from the lack of cigarettes will feel better as their addiction fades. (4) The measure in question needs to be the *most* efficient way to prevent the activity. Conly claims that 'softer' methods against smoking (e.g. education, raising of prices) did not work sufficiently. Although the rate of smokers has gone down, more than 20 percent of Americans continue to smoke which shows the inefficiency of 'soft' methods. Still, the full prohibition of smoking seems relatively controversial. However, there are other cases when coercion and prohibition seems easier to accept (e.g. ban on trans-fats).[43]

5. CONCLUSION

We can draw the following conclusions concerning the issue of paternalism in the public sphere. First of all, it is important to make a distinction between state paternalism (legal paternalism) and private paternalism. Although both seem to share similar basic elements (i.e. they can be understood as interventions to a person's autonomy in order to prevent harm to that person or promote his or her benefit), the state has special characteristics that needs to be taken into account when justifying paternalistic public policies. For the sake of conceptual clarity, it should be emphasized that not all public welfare policies are paternalistic in the

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SHLOMO: Save More Tomorrow: Using Behavioural Economics to Increase Employee Savings, in *Journal of Political Economym* Vol. 112. No. 1. (2004), 164, available at http://faculty.chicagobooth.edu/Richard.Thaler/research/pdf/SMarTJPE.pdf [cit. 2014-12-03].

[41] CONLY: *op.cit.* 149.

[42] Ibid. 150-152.

[43] Ibid. 152-155.

strict sense of the word. Redistributive policies are only 'paternalistic' inasmuch as they are aimed at taking care of the weak but they do not necessarily protect people from self-harming or unwise decisions.

The two major approaches to the justification of paternalism are the autonomy-based and the consequentialist models. In practice, both autonomy-based and consequentialist arguments are considered; a general understanding is that autonomy constitutes a 'deontological side-constraint' to consequentialist considerations. Paternalistic public policies are justifiable in situations where it is apparent that the state knows better what is good for the individual than the individual himself; such situations can be the result of different failures in human reasoning to which the state and its agents are less vulnerable to. Libertarian paternalism is also built on certain 'irrationalities' in human behavior. It seems that these interventions are more easily accepted than traditional paternalistic interventions because they are less restrictive to individual freedom of choice.

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Beyond the Concept of Law. Neo-constitutionalism: Towards an Innovating Theory of Legal Reasoning, Crossing Constitutional Interpretation and Analytical Jurisprudence

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Abstract
Rights are, without a doubt, the most outstanding feature of contemporary legal systems. It can be argued that since the middle of the past century we are immersed in a culture of rights. "Neo-constitutionalism" is one among other such concepts that has been used to designate and study this phenomenon. The hypothesis we will attempt to address in this paper is that some of the central characters of our culture of rights, here termed as neo-constitutionalism, cannot be explained consistently without an explicit reference to natural law.
Is neo-constitutionalism a «third philosophy of law», beyond natural law and legal positivism? We will specifically examine the connection between the assertion that there exist natural law principles of justice and the following characteristics of our culture of rights: the recognition of rights; the reference of state or national legal systems to supranational legal systems; constitutions as a result of a network of principles and rules; the principle of proportionality; and the principle of reasonableness. While the first three characteristics constitute the structure of any neo-constitutional practice, the two latter ones are features of the processes of legal reception and legal allocation of rights in such a legal practice.
Therefore, we will distinguish between three forms of neo-constitutionalism: as a theory of law; as an ideology of law; as a method of analysis of law.

Keywords: *Analytical legal theory of norms, balancing, constitutional argumentation and interpretation, defeasibility, democracy, Genoa Realism, legal reasoning analysis, neo-constitutionalism, principles of proportionality and of reasonableness.*

«Description maybe description, even if it is an evaluation».
Herbert Hart, The Concept of Law.

«Death has dominion because it is not only the start of nothing but the end of everything, and how we think and talk about dying (the emphasis we put on dying with 'dignity') shows how important it is that life ends appropriately, that death keeps faith with the way we have lived it».
Ronald Dworkin (1931-2013).

«If men were angels, no Government would be necessary».
James Madison, The Federalist; and then Jerome Frank, If men were angels.

«This is a Court of law; not a Court of justice. The rule of joy
and the law of duty seem to me all one».
Oliver Wendell Holmes, The Common Law.

1. INTRODUCTION: SOME REALISM ABOUT «GENOVA LEGAL REALISM »

Neo-constitutionalism is a term recently suggested in legal and political philosophy to label what appears as a new perspective to look at and to discuss of law, of its ontological, phenomenological and epistemological dimension; i.e.: of its forms of identification, application and cognition.

Namely, the term *neo-constitutionalism* has been proposed and first used by some exponents of the Genoa School of Law («Tarello Institute for Legal Philosophy»)[1] to capture and to account for what, despite any difference in the arguments adopted and/or in the tenets maintained, emerges as a common assumption in the last two or three decades writings by legal and political philosophers as Ronald Dworkin, Robert Alexy, Carlos Nino, and, in Italy, Luigi Ferrajoli and Gustavo Zagrebelsky.

(Separately necessary, but jointly sufficient, conditions for the existence of a school of thought are: some headquarters; one or more founding fathers; a lot of disciples; a Word to be spread. In fact, Genoa Realism satisfies all these conditions. The headquarters are just in Genoa, Italy, in the old «Legal Culture Department». The founding father was Giovanni Tarello,[2] Italy's foremost philosopher and

[1] «Tarello Institute for Legal Philosophy» is one of the world's leading centres for legal research and education. The works are focused on topics in analytical legal theory and philosophy of positive law, constitutional democracy, human rights, bioethics, sociology of law and history of European legal culture. The library in Balbi Street has an outstanding collection of works in legal philosophy. Most of it is in English, Spanish and Italian, though we also have numerous publications in French and German.
As for the present theme *cf.* BARBERIS, MAURO: Metaetica del costituzionalismo, in *Diritto e questioni pubbliche,* No. 11. (2011) 135-156; BARBERIS, MAURO (2000a): *Filosofia del diritto. Un'introduzione storica*, 2000, il Mulino, Bologna; BARBERIS, MAURO (2000b): Neocostituzionalismo, democrazia e imperialismo della morale, in *Ragion Pratica,* Vol. 14. (2000), 147-162; COMANDUCCI, PAOLO: Il positivismo giuridico: un tentativo di bilancio, in *Sudi in onore di Franca De Marini,* 1999, Milano, Giuffrè, 125-134.; COMANDUCCI, PAOLO: Neo-constitutionalism: an attempt at classification, in *Associations* (in print). See also POZZOLO, SUSANNA (1998). Neoconstitucionalismo y especificidad de la interpretación constitucional, in *Doxa*, Vol. 2. No. 21. 355-370; POZZOLO, SUSANNA: *Neocostituzionalismo e positivismo giuridico*, 2001, Torino, Giappichelli.
[2] The founder of the School was unquestionably Giovanni Tarello (Genoa, October 4, 1934 – April 20, 1987). He would regularly strike people since the start as a born story-teller, with a very personal sense of humour. Here we cannot analyze, even less interpret, his large and multi-faceted body of work. In it, with remarkable versatility, he managed to combine legal theory with history of institutions, sociology of law, and legal dogmatics, too.
He was largely a man from a time in which specialization was not yet an inescapable destiny for a philosopher of law: he was, at the same time, jurist, historian, sociologist, and

historian of law. Disciples are by now a legion, but the more distinctive theoretical contributions – seen as different from historical and sociological[3] ones – have been provided, until now,[4] by the very contributors to the studies on neo-constitutionalism: Riccardo Guastini (actually he is the Director of new «Tarello Institute for Legal Philosophy»);[5] Paolo Comanducci (the representative of Genoa's School who is better known in Latin America was elected Chancellor of

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legal theorist as well. The results of these many research interests are documented, above all, by the many papers he published in the very first years of the *Materiali per una storia della cultura giuridica* – originally a scholarly yearbook, soon to become a journal with the Publishing House "Il Mulino" (Bologna), Tarello's lifelong editorial partner. But also his posthumous essays (1988) are a telling testimony. Indeed, his work constantly succeeded in reaching a unitary character – a remarkable feat, given these variety of themes and modes of analysis.

The paramount problem is maybe that «Genoa Realism» originated from Tarello pioneering inquiries, and methods on many specific themes: the history of the codification of law, the theory of the normative language and of its interpretation, the sociology of law and its methods, and so forth.

If we really want to be able to identify one essential strand, in this body of work, we must think of the central role of interpretation (TARELLO, GIOVANNI: *L'interpretazione della legge*, 1980, Milano, Giuffrè). Such a central role was foreshadowed in 1972, but is explicitly stated in 1974. This is the very first formulation of what came to be known as the sceptical standpoint of the Genoa School: norms are but dependent variables of the interpretation of legal texts. This approach was further substantiated in 1976 – a large book project that did not go beyond the first volume – by showing how jurists and legal experts in general have traditionally taken part in the production of law. Before the codification of law in the 18th and 19th century (*see* TARELLO, GIOVANNI: *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, 1976, Bologna, Il Mulino), interpretation was achieved through *interpretatio* (an activity comprehensive of gap's integration and of legal construction generally), in later times, through the activity of interpretation in the strict sense. The thesis found its conclusive articulation in 1980 (TARELLO (1980): *op. cit.*), where interpretation is integrated in a theory of legal reasoning at large. It is at this juncture that the disciples set in.

I reminded the genius of Tarello during a beautiful evening spent – as usually occurs every year, during the night of August 10th, Saint Lawrence, the patron saint of Vignole Borbera, the little village in which I live –, together with my parents, Carlo Malaspina, his wife Franca Fossati and their family. In the end of the Sixties the last two passed the exam of Philosophy of Law just under the direction of Tarello).

[3] Among sociologists and social philosophers, Giorgio Rebuffa, Franco Lombardi, Riccardo Motta, Realino Marra, Mariangela Ripoli, Paolo Becchi, Monica Raiteri, Isabel Fanlo y Cortés can not be forgotten, as well as a Tarello's colleague: Silvana Castignone (Novara, August 14, 1931).

[4] Among younger legal theorist, we must remember Giulio Itzcovich, Nicola Muffato and Francesca Poggi can not be forgotten. Among the scholars who are or was nearer to the School, Michel Troper, Flavio Baroncelli, Letizia Gianformaggio, Tecla Mazzarese, Gianpaolo Parodi, Cristina Redondo, Bruno Celano, Enrico Diciotti, Giorgio Pino, Jordi Ferrer, Rafael Escudero can not be forgotten.

[5] See below § 3.1. in the present essay.

the University of Genoa on July 11, 2014);[6] Mauro Barberis;[7] Pierluigi Chiassoni

[6] As for the neo-constitutionalism debate, Comanducci contributed, along with Pozzolo and Mauro Barberis to the proposal of the very label «neo-constitutionalism» – a label, and no more than this, to be applied to many and different authors (Dworkin, Alexy, maybe Carlos Nino, Atienza and Ruiz Manero) representing a «third» theory of law beyond natural law and legal positivism. Comanducci, who is an updated methodological legal positivist, does not share the opinion of many who, also within the school, would rather see neo-constitutionalism as a mere «constitutionalistic» variant of the millenary natural law tradition – on the contrary, it sees it as an evolution of positivist tradition too (COMANDUCCI (2001): *op. cit.*). As a third example of Comanducci's moderate stance, I cite his role in the debate (both inside and outside the School) on Genoa-style interpretive scepticism. He sometimes embraced a by now widespread tendency to read, on a metatheoretic level, the School's legal realism as a more complex theory, progressively distancing itself from Tarello's hard scepticism and thus approaching the Hartian mixed or eclectic theory.

[7] *Cf.* BARBERIS, MAURO: Genoa's Realism: a Guide for Perplexed, in *Revista Brasileira de Filosofia,* 2013, RBF, 240-252. In BARBERIS (2011): *op. cit.,* today's metaethics faces more specific questions than moral objectivity debated in XX Century: e. g., the problem of constitutional interpretation discussed in this work. First section, on the tracks of David Hume, Friedrich Nietzsche and Michel Foucault, tries to imagine an other metaethics: an evolutionary, genealogic, and legally oriented one. Second section criticizes the idea, often shared by moral philosophers and legal theorists, that the role of law and constitution in division of ethical work must be only application of morals. Third section, finally, sketches a constitutional metaethics: an objectivist, pluralistic and relativistic answer to methodological questions on constitutional interpretation.

See also BARBERIS, MAURO: Law and Morality Today, in *Revus* 16, 2012, 55-93. Four philosophies of law are compared and discussed in this paper: natural law, legal positivism, legal realism, ans neo-constitutionalism. Each of them is defined upon its answers to three questions: one regards objectivity or subjectivity of ethical (i.e. moral, political, legal) value judgments, another one refers to legal interpretation, and the main one to the relationships between law and morality. Natural Law is thus characterized by a) ethical objectivism, b) interpretive formalism, and c) the idea that law and morality are necessarily connected. Positivism stands for 1) ethical subjectivism, 2) mixed theory of legal interpretation, and c) the separability thesis. Legal realism – which is, to some extent, a mere radicalization of positivistic views – is cauterized by a) ethical subjectivism, b) interpretive skepticism, and c) the separation thesis.

Neo-constitutionalism holds 1) ethical objectivism, 2) interpretive formalism, and 3) the view that law and morality are anyhow connected in a constitutional state (thus making the debate between natural law and positivism outdated). Each of the four philosophies of law is then articulated into its respective theoretical, methodological and ideological aspects. This is how the author points to certain similarities between the opposite standpoints, and to some plurality of views inside of every one of them. He stresses furthermore the challenges for particular views on law and morality with the final analysis of three interpretations of the separability thesis – given by inclusive, exclusive and normative positivists.

In BARBERIS, MAURO: Neo-constitutionalsm: Third Philosophy of Law, in *Rivista di Filosofia del Diritto – Journal of Legal Philosophy,* 1/2014, 153-164, there is the meaning of a «third philosophy of law», other than natural law and legal positivism, which Barberis

(the Director of the "Master in Global Rule of Law & Constitutional Democracy", with Master courses can be attended, since 2011, in the Imperia Campus); Susanna Pozzolo;[8] Giovanni Battista Ratti and Giovanni Damele. Finally, the Word-To-Be-Spread is an interpretation – centered, but realistically – minded, theory of law, and a corresponding analysis of jurisprudence – in fact, a form of legal realism).

That is to say, to put it roughly, the assumption along which the very notion of law together with its forms of identification, application and cognition (i.e., in its ontological, phenomenological, and epistemological dimension) requires to be radically revisited because of the prominent role and pervasive influence fundamental rights have been acquiring since the conclusion of the second world war both in the domestic law of an ever increasing number of (western) countries and in international law. In other words, the assumption is that fundamental rights have been so deeply affecting law in all its major aspects, to justify the need and to urge the claim for a new understanding of its notion.[9]

The suggestion to name neo-constitutionalism the demand for such a new understanding of the notion of law is captivating. Simple and plain as it sounds, the term neo-constitutionalism in fact both recalls constitutionalism as the immediate antecedent of the demand dealt with and acknowledges what in such a demand can be taken to be distinguishing and innovative.[10]

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labels neo-constitutionalism, and others describe as constitutionalism, nonpositivism, theory of law as integrity or as interpretation, inclusive positivism, postpositivism, and so on. This paper distinguishes neo-constitutionalism from constitutionalism, old and new; in the following three sections it reconstructs neo-constitutionalist stances on law-moral problem, theory of norms, and legal reasoning analysis.

[8] Susanna Pozzolo (born 1967) is now working also on political philosophy, but she is, since 1999, well-known for coining the label «neo-constitutionalism», now widely employed by almost the whole «Latin» scholarship in order to characterize what can be seen as the «mainstream» trend in contemporary legal philosophy. Pozzolo introduced this label in her contribution to an international conference in Argentina (POZZOLO (1998) (2004), *op. cit.*,). Interestingly enough, however, we can by now apply the label also to authors (such as inclusive or critical positivists or postpositivists as well), who, in particular in English-speaking world, would rather ignore or reject it – the names of Neil MacCormick, Gustavo Zagrebelsky and Luigi Ferrajoli are the first which come to mind. But one has to insist that the label cannot absolutely apply to its own originators (Pozzolo, Comanducci and Barberis), who always used it in order to criticize a variety of positions, which of course they took seriously, but could not in any way endorse.

[9] Though on the base of not always coincident arguments, a worried warning on the most recent apparent crisis of the protection of fundamental rights as a leading principle of domestic and international law has been raised, e.g., by ALLEGRETTI, UMBERTO: *Diritti e stato nella mondializzazione*, 2002, Troina (En), Città aperta, 127-197; BONANATE, LUIGI: La politica interna del mondo, in *Teoria politica,* Vol. 17. No. 1. (2001), 3-25; FERRAJOLI, LUIGI: I fondamenti dei diritti fondamentali, in *Teoria Politica*, Vol. 16. No. 3. (2000) 41-113; MAZZARESE, TECLA: *Is the age of rights to a turn?* Paper presented at „*Fundamental Aspects of Human Rights. A Symposium*", Helsinki, 22-23 February 2002.

[10] The standpoint by BARBERIS (2000b): *op. cit.,* 147-162, can be taken to be paradigmatic of such a view, namely: „neo-constitutionalism differs from inclusive legal positivism just

The other way round, the quite dominant opinion on the way to perceive what can be referred to as an expression of neo-constitutionalism, far from being captivating, appears restrictive if not even misleading. Namely, what appears restrictive if not even misleading is the opinion according to which neo-constitutionalism, despite any difference in the way it may happen to be phrased and argued for, is mainly, if not exclusively, a form of natural law; i.e., one of the different forms natural law has been given as the time goes by.

Despite such a widespread dominant opinion, actually there is no reason why neo-constitutionalism shouldn't be conceived of as a form of positive law rather than as a form of natural law. To the contrary, it seems sound to maintain that, both as a matter of fact and as a matter of law, neo-constitutionalism deserves and requires a legal positivist reading in order to account for its true distinguishing feature: the demand for a new definition of the notion of law[11] because of the radical changes a great number of positive legal systems have been going through since the statement and the protection of fundamental rights have been taken to be their grounding constitutive components; i.e., since fundamental rights have been acquiring a prominent and pervasive influence in affecting them in all their major aspects.

The recognition of human rights is, without a doubt, the most outstanding feature of contemporary legal systems. It can be argued that since the middle of the past century we are immersed in a culture of rights.[12] Neo-constitutionalism is one among many concepts that has been used to designate and study this phenomenon.[13] The hypothesis we will address in this paper is that some of the

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because it maintains the natural law thesis of the (identificative) necessary connection between law and morals; it differs from the traditional natural law, getting closer to inclusive legal positivism, insofar as it places such a connection at the level of fundamental or constitutional principles".

[11] MAZZARESE, TECLA: Towards a Positivist reading of Neo-constitutionalism, in *Jura Gentium-Rivista di Filosofia del diritto internazionale e della politica globale*, 18, (2008) 345-364.

[12] Though not always explicitly stated nor similarly defended, the need to think and define from anew the forms of identification, application and cognition of law because of the role fundamental rights have been acquiring in many contemporary positive legal systems is recurrent in the literature on neo-constitutionalism. In particular, one of its explicit and most determined formulation is spelt out by Ferrajoli who writes of constitutionalism (Ferrajoli himself does not use the term neo-constitutionalism) as a new paradigm of law as contrasted both with what he terms the pre-modern paradigm of law (judicial and doctrinal in character) and the modern paradigm of positive law (legislative in character). *Cf.*, e.g., FERRAJOLI, LUIGI: Per una sfera pubblica del mondo, in *Teoria politica*, Vol. 17. No. 3. (2001) 3-21.

[13] Material criteria of identification are not ignored by legal positivists. To the contrary, since the 1934 edition of his *Reine Rechtslehre*, Kelsen writes: „the essential function of the constitution consists in governing the organs and process of general law creation, that is, of legislation. In addition, the constitution may determine the content of future statutes, a task not infrequently undertaken by positive-law constitutions, in that they prescribe or

central characters of our culture of rights,[14] here referred to as "neo-constitutionalism," cannot be explained consistently without a reference to natural law.

In order to avoid any confusion that may arise in this paper I would like to stress the dual meanings attached to the terms 'constitutionalism' and 'neo-constitutionalism'. A primary meaning of both lexemes is one of a theory and/or ideology and/or method of analysis applied to law. A secondary meaning of both terms indicates some structural elements of a legal and political system, which are described and explained by (neo) constitutionalism as theory or which satisfy the requirements of (neo) constitutionalism as ideology. It is in this second meaning that 'constitutionalism' and 'neo-constitutionalism' designate a constitutional model, namely that collection of normative and institutional mechanisms realised in a historically determined legal-political system[15] which limit the powers of the

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preclude certain content. The catalogue of civil rights and liberties, a typical component of modern constitutions, is essentially a negative determination of this kind. Constitutional guarantees of equality before the law, of individual liberty, of freedom of conscience, and so on are nothing but proscriptions of statutes that treat citizens unequally in certain respects or that interfere with certain liberties". The quotation is from the English translation, 64-65. KELSEN, HANS: *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, 1934, Deuticke, Wien. [English translation by B. PAULSON, LITSCHEWSKI – PAULSON, STANLEY L.: *Introduction to the Problems of Legal Theory*, 1992, Clarendon Press, Oxford.]

Nor material criteria of identification are disregarded by ROSS, ALF: *On Law and Justice*, 1958, Stevens, London, 78-81, and ROSS, ALF: *Directives and Norms*, 1968, Routledge and Kegan Paul, London, 96; when taking into account *material* rules of competence as well as *personal* and *procedural* ones. Nevertheless, though far from being ignored, material criteria of identification have not been paid any special attention, nor acknowledged any peculiar import in affecting and conditioning legal systems way of functioning.

[14] Great emphasis on constitutional fundamental rights as material criteria of identification is devoted, e.g., by FERRAJOLI, LUIGI: Lo stato di diritto fra passato e futuro, in COSTA, PIETRO – ZOLO, DANILO (ed.): *Lo stato di diritto. Storia, teoria, critica*, 2002, Feltrinelli, Milano, 349-386. See also PALOMBELLA, GIANLUIGI: *L'autorità dei diritti*, 2002, Laterza, Roma-Bari, 7 and 23-29. Focusing more on the problem of the identification (and interpretation) of the constitutional rules than on the problem of the identification (and interpretation) of the statutory rules coping with the material criteria of validity, the topic is dealt with at length by the contributions to ALEXANDER, LARRY (ed.): *Constitutionalism. Philosophical Foundations*, 1998, Cambridge, Cambridge University Press.

[15] With regard to domestic law, insofar as the Italian legal system is concerned, a critical overview of shortcomings and deficiencies concerning the judicial protection of fundamental rights is provided by TARUFFO, MICHELE: Diritti fondamentali, tutela giurisdizionale e alternative, in MAZZARESE, TELCA (ed.): *Neocostituzionalismo e tutela (sovra)nazione dei diritti fondamentali*, 2002, Giappichelli, Torino. With regard to international law, a rich exemplification of the limits met in securing legal implementation and judicial protection of fundamental rights is offered by CASSESE, ANTONIO: *I diritti umani nel mondo contemporaneo,* 1994, Laterza, Roma-Bari.

State and/or protect fundamental rights.[16]

The foregoing introductory remarks (meant to make clear the reason why of the claim for a new understanding of the notion of law) lead to a preliminary distinction about the term neo-constitutionalism and its possible uses. Namely, they lead to distinguish what might either be taken to amount to three different notions of neo-constitutionalism, or, perhaps even more convincingly, to what might rather be conceived of as a threefold significance (import) of one and the same notion.

Being more precise, the term neo-constitutionalism can be used, first, in the language of jurists to refer to legal systems where a catalogue of fundamental rights has been expressly laid down in the constitution and/or in constitutional amendments, and where such a catalogue has been supplemented with a variety of legal devices, different as the case may be, to further their implementation and/or to grant them legal protection. Such an use of the term simply refers to a distinguishing feature which some legal systems may happen to possess; that is to say, it simply refers to a (possible) component of positive law and/or to its corresponding notion in legal dogmatics.[17]

Second, the term neo-constitutionalism can be used in the language of legal theorists and philosophers to refer to a new paradigm of law together with its modalities of (judicial) application and forms of cognition. Such an use of the term does not refer just to a (possible) component of positive law and/or to its corresponding notion in legal dogmatics. It rather refers to an explicative model which (positive) law can be given because of the way legal systems may happen

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[16] That is to say that the validity of a domestic provision might be challenged and/or its interpretation affected by making reference to fundamental rights listed in regional and/or international declarations, charters and covenants, though not included in domestic law. Further, a query not coincident with such an eventual practice is the problem as to whether to conceive of any catalogue might happen to be written down in a legal system, be it domestic, regional or international, as open or closed; that is to say, the problem as to whether to understand it as a mere exemplification rather than a sort of utterly definitive list of what rights are to be legally and judicially protected.
Arguments in favour of the open character of any such a catalogue can be found, beside any natural law attitude, in positive constitutional provisions. That is so, e.g., with the IX amendment of the United States Constitution: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", or else with art. 2 of the Italian Constitution: "The Republic recognizes and protects the inviolable human rights...". Insofar as the Italian Constitution and its art. 2 are concerned, the query is dealt with, e.g., by PACE, ALESSANDRO: *Metodi interpretativi e costituzionalismo*, in *Quaderni costituzionali*, Vol. 21. No. 1. (2001), 35-61. Further, *cf.*, GUASTINI, RICCARDO: *Teoria e dogmatica delle fonti*, 1998b, Giuffrè, Milano, 343-344.

[17] This can be taken to be the case, though his main concern is not the definition of the notion of constitutionalism, with GUASTINI, RICCARDO: *La "costituzi-onalizzazione" dell'ordinamento italiano*, in *Ragion Pratica*, Vol. 6. No. 11. (1998a), 185-206, when providing a list of what he terms "conditions of constitutionalization".

to be figured out.[18]

Third, the term neo-constitutionalism can be used in the language of legal and/or political and/or moral philosophers to refer to law as it should be because of the law as it is; that is to say because of the principles and the values which it explicitly states: the fundamental rights, the principles and values which are within, nor without it.[19] Such an use of the term does not refer just to a (possible) component of positive law and/or to its corresponding notion in legal dogmatics. Nor it refers just to an explicative model of particular (positive) legal systems. Rather, such an use of the term refers to an axiological-normative model of law.

Three different notions, perhaps. Or, rather, perhaps a threefold significance and import of one and the same notion: empirical and descriptive in its significance and import, when the term is used in the language of jurists and/or legal dogmaticians; reconstructive and explicative in its significance and import, when the term is used in the language of legal philosophers and theorists; axiological and normative in its significance and import when the term is used in the language of legal, political or moral philosophers.[20]

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[18] That is the way it is, with FERRAJOLI, LUIGI: La pragmatica della teoria del diritto, in COMANDUCCI, PAOLO – GUASTINI, RICARDO (ed.): *Analisi e diritto 2014*, 2014, Giappichelli, Torino (in print). Further, though not always as manifestly vindicated and purported as in Ferrajoli's works, that is also the case, e.g., with ZAGREBELSKY, GUSTAVO: *Il diritto mite. Legge diritti giustizia*, 1992, Einaudi, Torino; PALOMBELLA: *op. cit.,* 136; Atienza, Manuel: *El sentido del Derecho*, 2001, Ariel, Barcelona, 309-310; ATIENZA, MANUEL: Legal Reasoning and Constitutional State, in *Associations* (in print).

[19] A similar understanding of the notion occurs in FERRAJOLI, LUIGI: I fondamenti dei diritti fondamentali, in *Teoria Politica*, Vol. 16. No. 3. (2000), 41-113, when maintaining that the new paradigm of constitutionalism "represents a completion not only of the rule of law but also of the very legal positivism [...] since the change it has led to, has provided legitimacy with a twofold artificial and positive character: not only of the law as it *is*, i.e. of its conditions of existence, but also of the law as it *ought to be*, i.e. of its conditions of validity made constitutionally positive them too, as law on the law, in the forms of legal limits and constraints on its production" (author's italics, the English translation is mine).
Further, *cf.* also RAZ, JOSEPH: Legal Rights, in *Oxford Journal of Legal Studies*, Vol. 4. No. 1. (1984), 1-21, when stating: "Legal rights can be legal reasons for legal change. They are grounds for developing the law in certain directions. Because of their dynamic aspect legal rights cannot be reduced, as has often been suggested, to the legal duties which they justify. To do so is to overlook their role as reasons for changing and developing the law" (p. 15), and "Legal rights [...] are legal reasons for developing the law by creating further rights and duties where doing so is desirable in order to protect the interests on which the justifying rights are based" (p. 18).

[20] Such a deficiency has been denounced from a variety of perspectives. From a theoretical perspective, it constitutes the main concern of those who concentrate on the difficulties of the identification and/or judicial implementation of fundamental rights because of the interpretative difficulties their formulations can give rise to: that is the case, e.g., with BOBBIO, NORBERTO: (1968). Presente e avvenire dei diritti dell'uomo, in *La comunità internazionale*, Vol. 23. 3-18. English translation by CAMERON, A.: Human Rights Now and in the Future, in BOBBIO, NORBERTO: *The Age of Rights,* 1996, Polity Press,

2. MODERN CONSTITUTIONALISM

Modern constitutionalism intended as legal ideology can be presented in the form of three dichotomies. The first is connected to the objectives and ambitions of constitutionalism. The second is related to those institutional means through which the realisation of the objectives of constitutionalism is sought. The third concerns the political means of realising the objectives of constitutionalism.

The first dichotomy is between weak and strong constitutionalism.

a) Weak constitutionalism is the ideology which requires a constitution only to limit existing powers, without necessarily foreseeing the specific defence of fundamental rights. Strong or liberal constitutionalism demands a constitution which is able to guarantee fundamental rights and liberties in face of state powers.

b) The second dichotomy is between the constitutionalism of checks and balances and that of rules. I refer to and adopt the distinction made by Bernard Manin.[21]

Cambridge, 12-31; MAZZARESE, TECLA: (1993). Judicial Implementation of Fundamental Rights: Three Sorts of Problem, in KARLSSON, M. M. – JONSSON, O. P. – ERYNJARSDOTTIR, E. M. (ed.): *Recht, Gerechtigkeit und der Staat*, 1993, Duncker und Humblot, Berlin, 203-214; KOSKENNIEMI, MARTTI: The Effect of Rights on Political Culture, in ALSTON, PHILIP (ed.): *The EU and Human Rights*, 1999, Oxford University Press, Oxford, 99-116.
From a (meta)ethical perspective, it constitutes the main concern of those who doubt any alleged universality of fundamental rights because of the differing values of different cultures and/or ideologies and/or religions: that is the case, despite any distinguishing feature of different trends, with the advocates of multiculturalism and/or of (political) realism and/or of the gender theory. From a political perspective, it constitutes the main concern of those who maintain that their legal positivization deprives fundamental rights of their political innovative potentiality: that is mainly the case, e.g., with the adherents of the so called critical legal studies movement. *Cf.*, e.g., MCILAWAIN, CHARLES HOWARD: *Constitutionalism: Ancient and Modern*, 1947, Cornell University Press, New York; SARTORI, GIOVANNI: Constitutionalism: a Preliminary Discussion, in *American Political Science Review,* Vol. 56. No. 4. (1962), 853-864; TROPER, MICHEL: Il concetto di costituzionalismo e la moderna teoria del diritto, in *Materiali per una storia della cultura giuridica 18*, (1988), 61-81; FLORIDIA, GIUSEPPE G.: *La costituzione dei moderni. Profili tecnici di storia costituzionale. I Dal Medioevo inglese al 1791*, 1991, Giappichelli, Torino; DOGLIANI, MARIO: *Introduzione al diritto costituzionale*, 1994, il Mulino, Bologna; and MORESO, JOSÉ JUAN: In Defense of Inclusive Legal Positivism, in CHIASSONI, PIERLUIGI (ed.): *The Legal Ought*, 2001, Giappichelli, Torino, 37-63.

[21] *Cf.* MANIN, BERNARD: *The Principles of Representative Government,* 1997, Cambridge, University Press Cambridge; MANIN, BERNARD: On Legitimacy and Political Deliberation, in *Political Theory,* Vol. 15. No. 3. (1987), 338-368; MANIN, BERNARD – PREZEWORSKI, ADAM – STOKES, SUSAN: Elections and representation, in MANIN, BERNARD – PREZEWORSKI, ADAM – STOKES, SUSAN (ed.): *Democracy, Accountability, and Representation,* 1999, Cambridge University Press, Cambridge.
See SCHAUER, FREDERICK: *Playing by the Rules,* 2002, Clarendon Press, Oxford, 171-184; SCHAUER, FREDERICK: Balancing, Subsumption, and the Constraining Role of Legal Text, in *Law & Ethics of Human Rights*, Vol. 4. Issue 1. (2010), 34-45; SCHAUER, FREDERICK:

The constitutionalism of checks and balances is the ideology which, in order to limit the powers and/or guarantee fundamental rights, posits an institutional system in which these checks and balances are present. Clearly, Montesquieu's theory is the main doctrinal source for this type of constitutionalism.[22]

The constitutionalism of rules is the ideology which, in order to limit powers and to guarantee fundamental rights, sees a hierarchical relationship between a range of fundamental liberties and the power of the State in which the former has a chronological and an axiological priority over the latter. A collection of fundamental rules (a constitution or a charter of rights) must prevent the State's intruding into this sphere. The constitutionalism of rules could also be called, as Manin proposes,[23] market constitutionalism if one were to highlight the importance

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Balancing, Subsumption, and the Constraining Role of Legal Text, in KLATT, MATTHIAS (ed.): *Institutional Reason: The Jurisprudence of Robert Alexy,* 2012, Oxford University Press, Oxford, 307-316; SCHAUER, FREDERICK: *Thinking Like a Lawyer: A New Introduction to Legal Reasoning,* 2013, Harvard University Press, Harvard.

I had the pleasure to meet and to discuss with Frederick Schauer (Distinguished Professor of Constitutional Law at the University of Virginia – Charlottesville, U.S.A.) when he explained his theories during the residential courses of "Master Global Rule of Law and Constitutional Democracy", taught on Genoa University's Campus in Imperia, on February 12, 2013. He was one of the teachers of the course "Constitutional Rights & Multiculturalism".

I visited the School of Law of the University of Virginia together with Charles Strauss, a former judge for the 22nd Judicial Circuit in Danville, at Pittsylvania County, Virginia. I was housed in his house in Chatham in March 2012, because I was a "Team Member" of *Rotary International Group Study Exchange 2012.* I had the opportunity to visit a part of Tennessee and almost the whole Commonwealth of Virginia, and the White House, too; I knew a lot of friends, Lawyers, Judges, Sheriffs Officers, Professors.

A special "thanks" to the Italian and American Rotary Foundation for the splendid and unique forty days we spent together. But a very special "thank you" also to Lawyer Jeffrey Van Dooren and to his family for the final period in which he housed me in his house in Salem; can not be also forgotten the consorts Jim and Janet Johnson, as well as Attorney at Law Stephanie Cox (Firm "Spicer, Frank & Cox" in Blacksburg, Virginia) after my visit to the Campus of Virginia Polytechnic Institute (Virginia Tech). Now all that people and places belong to me, as well as I belong to them.

[22] TARELLO: *op. cit.*, 311-342.

[23] MANIN (1997): *op. cit.*, 25-31. Bernard Manin (Marseille, April 19, 1951), is Professor of Politics at Institut d'Etudes Politiques (Paris); M.A. 1974 (political science), Paris I. Pantheon-Sorbonne and Ecole Normale Supérieure (Paris). He reminds us that the Athenian Assembly, which often exemplifies direct forms of democracy, had only limited powers. According to Manin, the practice of selecting magistrates by lottery is what separates representative democracies from so-called direct democracies. Consequently, Manin argues that the methods of selecting public officials are crucial to understanding what makes representative governments democratic. He identifies four principles distinctive of representative government: 1) shose who govern are appointed by election at regular intervals; 2) the decision-making of those who govern retains a degree of independence from the wishes of the electorate; 3) those who are governed may give expression to their opinions and political wishes without these being subject of the control

given by liberal constitutionalism from the beginning of the 19th century to property rights and contractual freedom. The principal cultural source of this type of constitutionalism is, in my opinion, 18th century rationalist and voluntaristic natural law doctrine.

c) The third dichotomy is that between reformist and revolutionary constitutionalism.

Reformist constitutionalism is the ideology which demands that the existing power should concede to, or agree to negotiate, the drawing up of a constitution.

Revolutionary constitutionalism proposes the destruction of the existing power and/or requires that the new revolutionary power should prepare a constitution.

The following relationships existing between the single elements making up the three dichotomies can be foreseen:

- Reformist and revolutionary constitutionalism are mutually incompatible;
- there is a unidirectional relationship between strong and weak constitutionalism: strong constitutionalism includes weak constitutionalism whereas the weaker form does not necessarily imply the stronger form;
- the constitutionalism of rules is incompatible with weak constitutionalism ;
- the constitutionalism of checks and balances, and the constitutionalism of rules are instrumental with regards to strong constitutionalism.[24]

It is more difficult to outline the relationship between the constitutionalism of

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of those who govern; and 4) public decisions undergo the trial of debate. For Manin, historical democratic practices hold important lessons for determining whether representative institutions are democratic.

While it is clear that representative institutions are vital institutional components of democratic institutions, much more needs to be said about the meaning of democratic representation. In particular, it is important not to presume that all acts of representation are equally democratic. After all, not all acts of representation within a representative democracy are necessarily instances of democratic representation.

[24] As Sartori himself points out [SARTORI, GIOVANNI: Costituzione, in SARTORI, GIOVANNI: *Elementi di teoria politica*, 1987, il Mulino, Bologna, 11-24], the following threefold distinction recalls the distinction drawn by LOEWENSTEIN, KARL: *Political Power and the Governmental Process*, 1957, University of Chicago, Chicago. Such a threefold distinction which, following Loewenstein, is adopted by Sartori, is not, clearly enough, exhaustive of all the possible notions of constitution which can be, and to a large extent, have already been distinguished. For a carefully, multidimensional overview of such a variety of notions, *cf.* FLORIDIA, GIUSEPPE G.: 'Costituzione': il nome e le cose, in COMANDUCCI, PAOLO – GUASTINI, RICCARDO (ed.): *Analisi e diritto 1994*, Giappichelli, Torino, 131-152. Further, *cf.* also, e.g., DOGLIANI, *op. cit.*, 11-30; GUASTINI, RICCARDO: *Lezioni di teoria costituzionale*, 2001, Giappichelli, Torino, 307-321. Needless to be remarked that the net of (relationships among the) different notions of constitution provides one more reason, beside those ones already listed in the text, for the plurality of possible understandings of constitutionalism.

checks and balances and the constitutionalism of rules. Both appear to be either complementary or incompatible. I believe this surprising statement can be explained if one points out that the constitutionalism of rules has always been associated with the idea of the popular origins of sovereignty, whilst this has not always been the case with the constitutionalism of checks and balances. Therefore the two constitutionalisms are complementary if both presuppose popular sovereignty; they are incompatible if this is not the case.

In the first case, the constitutionalism of checks and balances is conceived as an ideology which requires a complex separation of powers. State powers are delegated, separated and limited step-by-step in order to guarantee the basic individual rights of popular sovereignty. Power is here simply the function of the State: it is legitimate in that it represents the whole population and/or because this power is enacted in the name of the people.

In the second case, the constitutionalism of checks and balances is conceived exactly as in Montesquieu's doctrine related to monarchical government. The checks and balances are put in place between those bodies which represent the different interests of different groups and social classes: the court, the aristocracy, the clergy, the bourgeoisie, etc. Sovereignty belongs to the State in the person of the king: institutional equilibrium reflects social and political equilibrium and guarantees certain limited individual freedoms. The principal function of the constitution is not to assure individual and universal rights but to sanction legally a political compromise stipulated amongst factions fighting to maintain or obtain power.

In this way it is hoped that a conceptual structure has been put in place which allows, on one hand, for the distinction between the constitutionalism of the 18th and 19th centuries and contemporary neo-constitutionalism, and, on the other, a detailed analysis of the differing forms of constitutionalism which developed in Europe up to the Second World War.

3. THEORETICAL, IDEOLOGICAL AND METHODOLOGICAL NEO-CONSTITUTIONALISM

At this stage I will turn to an analysis of contemporary neo-constitutionalism. Bobbio's distinction[25] of three types or meanings of legal positivism is well

[25] Norberto Bobbio, who has died aged 94 (Turin, October 18, 1909 – Turin, January 9, 2004 but buried in Rivalta Bormida -AL-), was Italy's leading legal and political philosopher, Senator for life and one of the most authoritative figures in his country's politics. His status was marked by the Italian president's immediate departure for Turin to be among the first mourners, and an extensive discussion of his writing in the media.
Bobbio had taken degrees in jurisprudence and philosophy at Turin. His first book, *The Phenomenological Turn In Social And Legal Philosophy* (1934, Einaudi, Torino), had been followed by a monograph on *The Use Of Analogy In Legal Logic* (1938, Einaudi, Torino). He set himself the task of elaborating a general theory of the practice and validity of law,

known.[26] It is convenient at this point to create a similar classification, albeit somewhat forced, for the three different forms of neo-constitutionalism – theoretical, ideological and methodological. In this way, the critical comparison between homogenous types of positivism and, respectively, neo-constitutionalism will be more useful.

The use of this three-way division allows us also to show the differences

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breaking with the attempts of most contemporary Italian philosophers to offer a speculative philosophy of the idea and morality of law. In elaborating his version of legal positivism, Bobbio drew on the writings of Hans Kelsen, whose work he had come across as early as 1932. This research ultimately bore fruit in a number of books based on his Turin lectures, of which the most important are *A Theory Of Judicial Norms* (1958, Giappichelli, Torino) and A *Theory Of The Legal Order* (1960, Giappichelli, Torino), and studies of Locke, Kant and legal positivism. Between 1955 and 1970, he also published three collections of essays. These writings had a similar place in Italian academic legal circles to the work of H.L.A. Hart, the late Oxford professor of jurisprudence, and both men, at different times, expressed their mutual esteem for each other to me.

Bobbio's legal studies fed into his political writings. Influenced again by Kelsen, he adopted a procedural view of democracy as consisting of certain minimal „rules of the game", such as regular elections, free competition between parties, equal votes and majority rule. His theory was enriched by a strong, realist current, deriving partly from Hobbes and partly from the Italian pioneers of political science, such as Gaetano Mosca and Vilfredo Pareto (whose reputation he did much to resurrect). He had produced the first Italian edition of Hobbes's *De Cive* in 1948 (Giuffrè, Milano), and later dedicated numerous studies to the English philosopher, a collection of which were published in 1989 (and appeared in English a couple of years later). He drew on Hobbes to modify what he now saw as unsatisfactory elements of his earlier Kelsenism.

Bobbio regarded Kelsen as caught uncomfortably between a purely formal account of law and a substantive position grounded in what he called the „basic norm" underlying all law. The missing dimension was the institutional context of law-making, and its relationship to the exercise of power. Unlike earlier legal positivists, such as John Austin, Bobbio did not thereby equate law with the commands of the sovereign; his point was rather that law and rights were best conceived as a historical achievement belonging to a particular form of state.

Bobbio's shift from a pure theory of law to a concern with its political embodiment was marked by his moving to a chair in the newly created faculty of political science in Turin in 1972, where he remained until the then statutory retirement age of 75 in 1984. The essays from this period were later collected as *The Future Of Democracy: A Defence Of The Rules Of The Game* (1984, Einaudi, Torino) – to my mind, the most original of his books – *State, Government And Society* (1985, Einaudi, Torino) and *The Age Of Rights* (1990, Giappichelli, Torino), all of which appeared in English.

He was a passionate critic of nuclear weapons, which he saw as making war intrinsically unjust, and a member of the Bertrand Russell Foundation. His writings on this issue were collected in the volumes *The Problem Of War And The Roads To Peace* (1979, Giappichelli, Torino).

[26] The threefold distinction of legal positivism as (a) an approach to (i.e., a methodology), (b) an ideology, and (c) a theory of law is drawn by BOBBIO, NORBERTO: Sul positivismo giuridico, in *Rivista di filosofia*, Vol. 52. (1961), 14-34.

which exist between constitutionalism and neo-constitutionalism. Constitutionalism, as considered previously in this paper, is fundamentally an ideology which aims at limiting power and defending a sphere of natural liberties or fundamental rights. This ideology, on one hand, usually has as a backdrop the doctrine of natural law (despite there being no reason why this should be so), which maintains the view that there is a connection between law and morals; on the other hand, it is in conflict with ideological positivism. Constitutionalism is not, however, significant as a theory of law: the dominant theory of the 19th century and the first part of the 20th century was undoubtedly positivist and I do not believe that constitutionalism has ever attempted to contrast this situation with a competing theoretical proposal.

Neo-constitutionalism does not present itself only as an ideology, with a related methodology but also and explicitly as a rival to positivist theory.

3.1. Theoretical neo-constitutionalism

Neo-constitutionalism, as a theory of law, aims at describing the results of 'constitutionalisation', namely that process which has brought about a change in contemporary legal systems in comparison to those which existed prior to the full application of the process itself.

In many European legal systems there has been a progressive constitutionalisation of law, especially in the second half of the 20th century. The process ends with the constitution's saturation of law: constitutionalised law is characterised by an invasive nature which conditions legislation, legal theory and doctrine as well as the behaviour of political actors. This process is gradual: a legal system can, in fact, be constitutionalised to a greater or lesser extent. Following Guastini,[27] the principal conditions of constitutionalisation are the following:

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[27] GUASTINI (2001): *op. cit.* 301. The internationally best known and most influential member of the Genoa School of Law (see footnote n. 1) is doubtless Riccardo Guastini (Genoa, January 25, 1946), a Giovanni Tarello's scholar who has already had three philosophical lives. In his first life, Guastini wrote on Marx's and Marxism's legal lexicon; during the second one, he was active teaching, and writing on, Italian Constitutional Law; and, in the third one, he developed a general theory of law which is original with respect to Tarello's. It is first of all a theory in the tradition of analytic (Oxford-Cambridge) philosophy, but it also puts to a new use Hans Kelsen's conception of meanings' framework (*Rahmenlehre*) of legal dispositions. Among contemporary legal analysts, the «third» Guastini chooses as masters and friends the representatives of the Argentinian School – see the journal *Analisi e diritto*, founded by him with Paolo Comanducci in 1990 and now edited by Marcial Pons, as well as the collection of books by the same name, published by Giappichelli Publishing House, Italy, which put out, until now, more than one hundred titles. Interestingly, Guastini's theory is as moderately sceptical as Tarello's was radical: it is not the interpreter who «creates» norms, rathers he picks them out from within the framework of meanings provided by formulation of legal texts. Since the «second» Guastini, finally, such a legal theory focuses on the processes of «constitutionalization» of law.

With this particular expression, Guastini understands a process currently under way in civil

1. the existence of a rigid constitution, which incorporates fundamental rights;
2. jurisdictional guarantees of the constitution;
3. the binding force of the constitution (constitution as a body of preceptive rather than programmatic norms);
4. the 'over-interpretation' of the constitution (extensive interpretation generates implicit principles);
5. the direct application of constitutional norms also in order to regulate relations between private individuals;
6. the interpretation of statutes makes the same adequate to the constitutional framework in which they are set.

The model of legal system which emerges from the reconstruction of neo-constitutionalism[28] is characterised by, in addition to the pervasiveness of the constitution, the positivisation of a catalogue of fundamental rights which range from the inclusion within the constitution of principles and rules to certain peculiarities of interpretation and application of constitutional norms regarding the interpretation and application of statutes. As a theory, neo-constitutionalism represents, therefore, an alternative to the traditional theory of legal positivism: the transformations which the object of the analysis undergo mean that traditional legal positivism no longer reflects the real situation of contemporary legal systems. In particular, statism, legal-centrism and interpretive formalism, three key features of

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law legal cultures, but also constantly present in European and International Law – judges and jurists constantly re-interpret the whole of the law in force in terms of the principles derived or constructed starting by rigid and warranted-by-judicial-review constitutions. In such a process a key role is just played by principles, which Guastini sets apart from rules in a more articulated way than the early Dworkin, Robert Alexy, Atienza and Ruiz Manero, and so on. Rules *and* principles are, to him, norms, i.e. meanings of legal provisions which can be interpreted either as rules, or as principles, or as both. Both rules directly apply to real cases, by a sort of specific subsumption, whereas principles are applied only in the sense that rules are derived from them, through a concretization process maybe analogous to generic subsumption (as to such a terminology, different from Guastini's one, cfr. BULYGIN (2005): *op. cit.*). The rules/principles distinction was often criticized – the very reasons of such criticism, however, allow us to grasp the original import of the distinction itself. Such a distinction could be criticized by the point of view of such logico-structural theories of norms as Alchourrón and Bulygin's. From the standpoint of a phenomenological-functional analysis, however, Guastini's distinction comes out unscathed, as it explains constitutional interpretation much better. The same distinction could be criticized for its allegedly «weak», or «non-dichotomic», character, as some norms can be seen both as rules and as principles: and yet it still provides a working distinction.

Finally, it is sometimes said that such a distinction in fact endangers the very normativity of principles, since it sees them as not directly applicable to concrete reality. But, one must reply, it is a matter of fact that constitutional principles as such are typically less normative – or more abstract – than the statutory rules – in fact, they would be always at risk of go unapplied without constitutional rigidity and judicial review.

[28] GUASTINI (2001): *op. cit.* 314.

19th century legal positivism, today no longer appear sustainable.[29]

One must also observe that theoretical neo-constitutionalism – which is characterised also and above all by focusing its analysis on the structure and role which, in contemporary legal systems, the constitutional document possesses[30] – adopts at times as its object of analysis that which elsewhere I have defined either as the 'descriptive model of the constitution as a norm' or the 'axiological model of the constitution as a norm'.

In the first model, 'constitution' designates a body of positive legal rules, expressed in the form of a document or conventionally accepted unwritten laws, which are, with regards to other legal rules, fundamental (and therefore representing the foundations of the entire legal system and/or hierarchically superior to other rules).

In the second model, 'constitution' designates a body of positive legal rules, expressed in the form of a document or conventionally accepted unwritten laws, which are, with regards to other legal rules, fundamental (and therefore representing the foundations of the entire legal system and/or hierarchically superior to other rules) – and so far this is identical to the first model – 'on condition that they have a determined content to which a specific value is attributed'. In this model, as Dogliani[31] states, the constitution is 'imbued with an intrinsic value: the constitution is a value itself'.

One of the distinguishing characteristics of theoretical neo-constitutionalism (distinguishing it from traditional legal positivism) is without doubt the view according to which constitutional interpretation, as a result of the constitutionalisation of law process, today reveals some distinctive characteristics in comparison to the statutory interpretation. These particular characteristics however assume a different form according to who adopts one constitutional model or the other. In the light of the fact that, in my opinion, wherever the axiological

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[29] Reference to the logic of approximate reasoning (*fuzzy logic*) as contrasted with the deductive classical logic account for the distinguishing features of the neo-constitutional view on judicial decision-making may sound provocative, at least insofar as a natural law understanding of neo-constitutionalism is concerned. Namely, that is so since, despite its claim for the material justice of judicial decision as opposed to any alleged positivist formalism, the natural law understanding of neo-constitutionalism would never renounce to the contention for the ultimate rational objectivity of practical reasoning. On the logic of approximate reasoning (fuzzy logic) and judicial decision-making, *cf.* MAZZARESE, TELCA: *Forme di razionalità delle decisioni giudiziali*, 1996, Giappichelli, Torino, 222-229.

[30] As SARTORI (1987): *op. cit.* 18, writes: "historically, constitution was an "empty" term which constitutionalism has taken possession of in XVIII century to account for the idea of the rule of law (not of men) through the limits of law. The term was defined from anew, adapted and appreciated not because it was meaning just "political order", but because it was referring to that peculiar political order which rather than simply "shaping" was also *limiting* governmental action" (author's italics); the English translation is mine. In a similar, though not coincident way, *cf.* also SARTORI, GIOVANNI: Constitutionalism: a Preliminary Discussion, in *American Political Science Review,* Vol. 61. Issue 4. (1962) 853-864.

[31] DOGLIANI: *op. cit.* 122.

model of the constitution as a norm is adopted, neo-constitutionalism appears not as a theory of law rather as an ideology, I will illustrate in the following section dedicated to ideological neo-constitutionalism the corresponding doctrine of constitutional interpretation.

Those who adopt however the descriptive model of constitution as a norm hold that the constitution shares at least one characteristic in common with statutes: both are normative documents. Who adopts such a model, therefore, usually views constitutional interpretation as a form of legal interpretation, the latter being generally defined as the attributing of meaning to a normative text. In effect, one can find in the recent literature a tendency to distinguish peculiarities of constitutional interpretation with regards to the statutory interpretation on the basis of degrees rather than qualitatively. Within this shared position, however, amongst writers there are visible differences of degree, which stems from the fact that some writers from a moderate external perspective take into account the interpretive activity of constitutional courts, the latter in turn appearing often to prefer the axiological rather than the descriptive model of the constitution.

3.2. Ideological neo-constitutionalism

Presented (also) in the form of an ideology, neo-constitutionalism tends in part to be distinguished from constitutional ideology in that its relegates to a secondary role the limitation of state power – which was absolutely central in 18th and 19th century constitutionalism – posing as its prime objective the guarantee of fundamental rights. This change in priorities can easily be explained by the fact that state power, in contemporary democratic systems, is no longer viewed with fear and suspicion by neo-constitutionalist ideology. Indeed, neo-constitutionalism is characterised by its support for the constitutionalised and democratic model of rule of law;[32] a model which progressively became a benchmark in the West and which continues to expand its influence throughout the world.[33]

Ideological neo-constitutionalism does not limit itself to describing the results of constitutionalisation but it evaluates them positively, proposing their defence and possible extension. In particular, it underlines the importance of institutional mechanisms which protect fundamental rights – we could at this stage talk of 'neo-constitutionalism of checks and balances'. What is more, it stresses the need for legislative and judiciary activity which primarily aims at the enactment and guarantee of fundamental rights foreseen in the constitution – we could at this stage talk of 'neo-constitutionalism of rules'.

Given that some of its champions (for instance, Alexy, Dworkin[34] and

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[32] A similar tenet is assumed by TARELLO: *op. cit.* 124, when stating: "Great Britain hasn't had any codification: neither a constitutional one (despite, or perhaps just because of its precocious constitutionalization), nor of any other branch of law."

[33] ALEXANDER, *op. cit.*

[34] Following DWORKIN, RONALD: *Taking Rights Seriously*, 1977, Harvard University Press, Cambridge, Mass., such a contention is often given a quite strong antipositivist import. That is the case, e.g., despite any difference in the arguments adopted, with ALEXY,

Zagrebelsky) sustain that in contemporary democratic and constitutionalised systems there is a necessary link between law and morals, ideological neo-constitutionalism is inclined to believe that a moral obligation of obedience can today exist with regards to the constitution and constitutionally compatible statutes. It is in this specific sense that ideological neo-constitutionalism can be considered a modern-day variant of 19th century ideological positivism, which preached the moral obligation of obedience to the law.

As ideological neo-constitutionalism adopts the axiological model of the constitution as a norm (mentioned above), it generally highlights the radically different nature of, firstly, the interpretation of the constitution in comparison to the statutory interpretation, and, secondly, the application of the constitution with regards to the application of statutes. These shifts in emphasis derive from the diversity which exists between constitution and statutes and become evident above all in the interpretive techniques used. A clear case in point is Ronald Dworkin[35]

ROBERT: *Theorie der Grundrechte*, 1985, Nomos, Baden-Baden; ZAGREBELSKY: *op. cit*. 192, and ATIENZA: *op. cit.* 12-16. Nevertheless, nothing prevents that the same contention be accounted for in positivist terms. To be sure, the alleged ultimate moral character of fundamental rights and legal principles affecting and/or grounding judicial reasoning and decision-making is far from being obvious and plain.

[35] DWORKIN, RONALD: *The Moral Reading of the Constitution,* 1996, Harvard University Press, Cambridge. In this book there is a particular way of reading and enforcing a political constitution, which Dworkin called the *moral* reading. Most contemporary constitutions declare individual rights against the government in very broad and abstract language, like the First Amendment of the United States Constitution, which provides that Congress shall make no law abridging "the freedom of speech." The moral reading proposes that we all – judges, lawyers, citizens –interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. The First Amendment, for example, recognizes a moral principle – that it is wrong for government to censor or control what individual citizens say or publish – and incorporates it into American law. So when some novel or controversial constitutional issue arises – about whether, for instance, the First Amendment permits laws against pornography – people who form an opinion must decide how an abstract moral principle is best understood. They must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography.

Presidents Ronald Reagan and George Bush were both intense in their outrage at the Supreme Court's "usurpation" of the people's privileges. They said they were determined to appoint judges who would respect rather than defy the people's will. In particular, they (and the platform on which they ran for the presidency) denounced the Court's 1973 *Roe* v. *Wade* decision protecting abortion rights, and promised that their appointees would reverse it. But when the opportunity to do so came, three of the justice Reagan and Bush had appointed between them voted, surprisingly, not only to retain that decision in force, but to provide a legal basis for it that much more explicitly adopted and relied on a moral reading of the Constitution. The expectations of politicians who appoint judges are often defeated in that way, because the politicians fail to appreciate how thoroughly the moral reading, which they say they deplore, is actually embedded in constitutional practice. Its

and his *The Moral Reading of the Constitution.*

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role remains hidden when a judge's own convictions support the legislation whose constitutionality is in doubt – when a justice thinks it morally permissible for the majority to criminalize abortion, for example. But the ubiquity of the moral reading becomes evident when some judge's convictions of principle – identified, tested, and perhaps altered by experience and argument – bend in an opposite direction, because then enforcing the Constitution must mean, for that judge, telling the majority that it cannot have what it wants.

Senate hearings considering Supreme Court nominations tend toward the same confusion. These events are now thoroughly researched and widely reported by the press, and they are often televised. They offer a superb opportunity for the public to participate in the constitutional process. But the mismatch between actual practice and conventional theory cheats the occasion of much of its potential value. (The hearings provoked by President Bush's nomination of Judge Clarence Thomas to the Supreme Court, are a clear example.) Nominees and legislators all pretend that hard constitutional cases can be decided in a morally neutral way, by just keeping faith with the "text" of the document, so that it would be inappropriate to ask the nominee any questions about his or her own political morality. (It is ironic that Justice Thomas, in the years before his nomination, gave more explicit support to the moral reading than almost any other well-known constitutional lawyer has; he insisted that conservatives should embrace that interpretive strategy and harness it to a conservative morality.) Any endorsement of the moral reading – any sign of weakness for the view that constitutional clauses are moral principles that must be applied through the exercise of moral judgment – would be suicidal for the nominee and embarrassing for his questioners. In recent years, only the hearings that culminated in the defeat of Robert Bork seriously explored issues of constitutional principle, and they did so only because Judge Bork's opinions about constitutional law were so obviously the product of a radical political morality that his convictions could not be ignored. In the confirmation proceedings of the present Justices Anthony Kennedy, David Souter, Thomas, Ruth Bader Ginsburg, and Stephen Breyer, however, the old fiction was once again given shameful pride of place.

Dworkin (Worcester, Massachusetts, U.S.A., December 11, 1931 – London, February 14, 2013), was an American philosopher and scholar of constitutional law. He was Frank Henry Sommer Professor of Law and Philosophy at New York University and Professor of Jurisprudence at University College London, and had taught previously at Yale Law School and the University of Oxford. An influential contributor to both philosophy of law and political philosophy, Dworkin received the «2007 Holberg International Memorial Prize» in the Humanities for „his pioneering scholarly work" of „worldwide impact."According to a survey in *The Journal of Legal Studies*, Dworkin was the second most-cited American legal scholar of the twentieth century.

His theory of law as integrity, in which judges interpret the law in terms of consistent and communal moral principles, especially justice and fairness, is among the most influential contemporary theories about the nature of law. Dworkin advocated a „moral reading" of the United States Constitution, and an interpretivist approach to law and morality. He was a frequent commentator on contemporary political and legal issues, particularly those concerning the Supreme Court of the United States, often in the pages of *The New York Review of Books*.

3.3. Methodological neo-constitutionalism

Some variants of neo-constitutionalism, particularly those which present themselves (also) as an ideology, presuppose a methodological position which I shall define 'methodological neo-constitutionalism'. The reference is clearly to authors such as Alexy and Dworkin.

Such a definition makes explicit reference to, and is in contrast with, methodological or conceptual positivism, which supports the position that it is always possible to identify and describe the law as it is and, therefore, to distinguish it from the law as it should be. This position has at least two corollaries: the hypothesis of the social sources of law, and that which sees no necessary connection between law and morals. In my opinion the positivist position has at least one condition: the acceptance of the crucial semantic distinction between *is* and *ought* as a way of distinguishing between describing and evaluating-prescribing. It does not have, however, as a condition in the moral debate the non-cognitivist meta-ethical position; or at least not necessarily, although in fact many positivist theorists are non-cognitivists and the majority of positivism's critics are cognitivists.

Methodological neo-constitutionalism sustains on the contrary – at least with regards to situations of constitutionalised law, where constitutional principles and fundamental rights are hypothesised as representing a bridge between law and morals – the position of a necessary identifying and/or justificatory connection between law and morals.

4. SOME CRITICAL OBSERVATIONS

In part three I will attempt to identify certain weaknesses in the ideological and methodological approaches of neo-constitutionalism. Such criticisms will not be aimed at theoretical neo-constitutionalism as I believe this approach handles more effectively the structure and workings of contemporary legal systems in comparison to the solutions proposed by traditional legal positivism. On the other hand, theoretical neo-constitutionalism, if it accepts the view of the solely contingent connection between law and morals, it is no way incompatible with methodological positivism. Indeed, one could say that it is its legitimate offspring. In the light of today's (partial) changes in the models of the State and of law developed in the 19th and early 20th centuries, the neo-constitutionalist theory of law is nothing other than today's version of legal positivism.[36]

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[36] See PETTIT, PHILIP: *Republicanism: A Theory of Freedom and Government*, 1999, Oxford University Press, Oxford. (Born 1945, Ballygar, County Galway, Ireland), is an Irish philosopher and political theorist. He is Laurence Rockefeller University Professor of Politics and Human Values at Princeton University.
Republicanism is the old/new kid on the political theory block. It is as old as Aristotle, Cicero, Machiavelli, Milton, Harrington, Montesquieu, Rousseau, Madison and Adams, and yet as new as the revival spearheaded by the intellectual historian Quentin Skinner and

the philosopher Philip Pettit. We need to distinguish „old" and „new" republicanism partly because liberalism largely displaced it in the 19th and 20th centuries in Anglophone nations and partly because contemporary republicanism is *liberal* in that it accepts moral individualism, value pluralism, and an instrumental view of political life. There are two strands of old republicanism: one represented by Aristotle's concern for the good life to be realized in and through participation in self-governing communities, the other a neo-Roman tradition that emphasizes freedom (or independence) from the arbitrary will of an „alien power" under the rule of law. If Michael Sandel and Charles Taylor represent contemporary neo-Athenian interpretations of republicanism, Skinner and Pettit represent neo-Roman contemporary interpretations. This splendid anthology of ten original essays concentrates solely on the latter, with special emphasis on the thought of Skinner and Pettit. Pettit's republicanism consists of two theses. The first, as already noted, is that there can be unfreedom without actual interference. The bare possibility of interference is enough. To this Pettit adds a second thesis: interference as such need not compromise freedom. Interference isn't domination when it isn't arbitrary, and it isn't arbitrary provided it tracks our „avowed interests". This is typically assured by living in a political community governed by the rule of law. So a state can levy taxes, impose coercive laws, and even imprison without diminishing one's freedom. Provided that the state seeks ends and employs means derived from the common, recognizable interests of its citizens, the most that can be said is that citizens are nonfree if, say, they are imprisoned for violating just laws, not that they are unfree. Skinner accepts the first thesis, but not the second. Both theses have their critics.

This is the first full-length presentation of a republican alternative to the liberal and communitarian theories that have dominated political philosophy in recent years. The latest addition to the acclaimed *Oxford Political Theory* series, Pettit's eloquent and compelling account opens with an examination of the traditional republican conception of freedom as non-domination, contrasting this with established negative and positive views of liberty. The first part of the book traces the rise and decline of this conception, displays its many attractions, and makes a case for why it should still be regarded as a central political ideal. The second part of the book looks at what the implementation of the ideal would require with regard to substantive policy-making, constitutional and democratic design, regulatory control and the relation between state and civil society. Prominent in this account is a novel concept of democracy, under which government is exposed to systematic contestation, and a vision of state-societal relations founded upon civility and trust. Pettit's powerful and insightful new work offers not only a unified, theoretical overview of the many strands of republican ideas, but also a new and sophisticated perspective on studies in related fields including the history of ideas, jurisprudence, and criminology.

This very interesting book is a systematic attempt to use a traditional view of liberty as the basis for modern, pluralistic states. Like many, Pettit begins with Berlin's famous, though ambiguous, distinction between positive and negative liberty. He wants a formulation of liberty that captures some of the intuitive attractions of liberty in its negative, non-interference, form. He wants also to avoid some of the defects of liberty as non-interference in which liberty is „Freedom of the pike is death for the minnows (BERLIN, ISAIAH: Two Concepts of Liberty, in BERLIN, ISAIAH: *Four Essays on Liberty*, 1969, Oxford University Press, Oxford)." Pettit's solution is the concept of liberty as non-domination. This is a traditional view associated with the republican tradition that begins in the city states of Renaissance Italy, particularly with Machiavelli, is transmitted in the Anglophone world by 17th century republican theorists like Harrington, and reaches its importance in the 18th

century with the writings of dissident British Whig intellectuals, Montesquieu, and Americans like Paine and Madison. In this version of liberty, there is strong emphasis on individual rights and freedoms, but in contrast to the libertarian ideal of liberty as non-interference, the state is authorized, indeed, encouraged to promote government and policies that prevent domination of individuals by others.

The republican notion of 'domination' is similar to the Marxist notion of 'exploitation' in that the traditional republicans saw that slaves, servants or subjects, who felt obligated to ingratiate themselves with those of "power", were well aware of the control being exercised by those individuals. As well, the Marxist theory that slaves were exploited because they were forced to work for someone without receiving full compensation for their labor and the products of their labor were forcibly appropriated by someone else, were equally aware of the exploitation. In both scenarios, although these individuals were fully aware of being in the control of others, they were not "free" to choose otherwise.

According to Pettit, citizens lack political freedom as long as governmental authorities have the standing power to interfere with a citizen's liberty at their unfettered discretion and without having to pay heed to the interests of the governed. This is conceptual. As with the case of the United States style judicial review, citizens are protected against such domination to the extent that they are empowered to force authorities to justify their decisions in terms of the public good and to decide in the ways that make every effort to pay heed to the legitimate interests of all governed. Since the ability to appeal to a court endowed with the power of constitutional review appears to be a potent mechanism of civic empowerment in the face of potentially arbitrary governmental decision making, the ideal of freedom as non-domination conflicts with the institution of judicial review. To achieve non-domination it would be necessary reject any form of legal constitutionalism characterized by entrenched constitutions and judicial review. Therefore, I believe, constitutionalism would not become inimical of liberty.

The republicanism conception of freedom as non-domination is considered to be the basis for which the state will identify the architecture it should display and the agenda it should further. In other words, in my opinion I understand that the state should do everything possible to establish a social order in which individual citizens can enjoy independence and escape subjection to the arbitrary power of others. It should act in pursuit of its agenda without infringing on people's freedom as non-domination. It will allow for the coercive interventions of the state (i.e., imposing laws and taxes), but will not take away from the people's freedom as long as they are subject to the checks that would make them non-arbitrary and non-dominating. This relates to the rule of law where citizens respect the law for its own sake and make a point of taking part in public life in order to ensure their own needs and concerns are heard, whereby the laws will be just, instead of serving particular interests and private concentrations of power.

I agree with the republicans' idea that freedom cannot exist with domination, but it can exist with interference as there is the potential that people may not actually suffer interference from those who dominate them. Pettit believes that we are free to the extent that we do not find ourselves under the domination of others, subject to their will and exposed to the vicissitudes of their desires. From this perspective, freedom consists in the absence of conditions which are thought to diminish our possibilities of action. I agree that this idea of freedom is substantially different to that of freedom as non-interference, because freedom of non-interference assumes that there is an outside control present when there is active interference as in the case of coercion or manipulation. The liberal notion of freedom cannot be reduced to the notion of non-interference, because in such instances as

4.1. Ideological neo-constitutionalism

Ideological neo-constitutionalism is open to all those criticisms which Bobbio[37] and other writers such as Nino[38] expressed against ideological positivism. Here I will limit my criticisms only to what appears to me as a dangerous consequence of such an ideology: the reduction of certainty of the law which derives from the 'balancing' of constitutional principles and the 'moral' interpretation of the constitution.

As is well known, Dworkin, one of the leading exponents of neo-constitutionalist ideology, supports the view according to which a legal system formed both by rules and by fundamental principles, rooted in an objective set of moral norms, is, or can tend to be, totally determined (the famous proposal of the one right answer). In this way, I believe, Dworkin fails to distinguish both between an *ex ante* and *ex post* determinacy, and between the theoretical problem of knowing the legal consequences of actions and the practical problem of justifying legal decisions.

From a theoretical point of view, which is the one adopted here, and leaving to one side the question of *ex post* determinacy, the sole question of interest is that of *ex ante* determinacy: what is the effect of the configuration of principles in an *ex ante* determinacy/indeterminacy? From this point of view, Dworkin's answer is unacceptable, given that the configuration of principles, which are a *species* of the norms *genus*, cannot totally eliminate the structural, linguistic and subjective causes of the partial indeterminacy of law. However, we can ask whether they can be reduced.

I believe that this indeterminacy could possibly be reduced if at least the following conditions were fixed: 1) were there to exist objective, known morals followed by judges (or, which is the same, there existed positive, known morals followed by judges); 2) were judges always to follow Dworkin's (or Alexy's) prescriptions and to construct an integrated system of law and morals, internally

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tax codes, no matter how meritorious in other respects, they do affect people's freedom in just the same way as the interference as a criminal.
I had the pleasure to meet and to discuss with Philip Pettit during the two days long "11th Pavia Graduate Conference in Political Philosophy" in the Faculty of Political Sciences of the University of Pavia (Italy) on September 12, 2013.

[37] BOBBIO, NORBERTO: Alcuni argomenti contro il diritto naturale, in *Rivista di diritto civile,* Vol. 4, (1958) 253-263; BOBBIO, NORBERTO: *Il positivismo giuridico*, 1996, (2nd ed.) Giappichelli, Torino, (1st ed. 1961); BOBBIO, NORBERTO: L'età dei diritti, in BOBBIO, NORBERTO: *Il terzo assente. Saggi e discorsi sulla pace e sulla guerra,* 1987, (2nd ed.) Edizioni Sonda, Einaudi, Torino, 112-125; BOBBIO, NORBERTO: Presentazione, in PECES-BARBA, GREGORIO: *Teoria dei diritti fondamentali*, 1993, Giuffré, Milano, v-viii.

[38] NINO, CARLOS SANTIAGO: *Introducción al análisis del derecho*, 1983, Ariel, Barcelona, 27-28. Such a characterization of the ultimate kernel of any form of natural law makes debatable the recent and widespreading attitude to speak of and delineate hybrid forms of „inclusive", rather than „soft" or „critical" positivism; that is to say forms of alleged positivism which, as it is with natural law, take into account (the possibility of) morals as a source of law.

consistent in such a way that, with the aid of principles, they could choose for every case the right or correct solution, or at least the best. On these conditions the issuing of principles on the part of the legislator, or the configuration of principles on the part of judges and legal doctrine, could reduce the *ex ante* indeterminacy of law.

However, in reality these conditions do not exist. The situation is as it is not for controversial meta-ethical reasons, which affirm the inexistence of objective morals, but for factual reasons. In fact: a) even supposing that they exist, objective morals are not known or accepted by all judges; b) positive morals accepted by all judges do not exist in our society (our societies are increasingly characterised by ethical pluralism); c) judges' decisions are temporal inconsistent and judges do not construct a consistent system of law and morals to resolve cases; d) judges do not always reason and decide rationally (whatever meaning we wish to give this word, even the weakest).

In real and non-ideal conditions, the configuration of principles can help judges to find always an *ex post* justification for their decisions; this configuration appears though not to reduce but increase the *ex ante* indeterminacy of law. In my opinion this is for three main reasons:

1) one of the most common characteristics of norms which are configured as principles is their greater vagueness with regards to other norms and, therefore, this characteristic increases rather than reduces *ex ante* indeterminacy;

2) consequently, the issuing and configuration of principles in absence of a common set of morals increases the discretion at the disposal of a judge, who can decide cases by making reference to their own subjective conceptions of justice and also this clearly increases *ex ante* indeterminacy;

3) the peculiar way of applying norms configured as principles, namely balancing principles case by case, without a stable and general hierarchy between principles, increases the discretion of judges and the *ex ante* indeterminacy of law.

At this stage in the discussion I do not want to suggest that there are no good reasons for issuing principles, or configuring them or balancing them. I believe there are valid reasons for doing so.

I do not believe, however, that in the present situation, issuing or configuring principles, or balancing them case by case are activities which directly pursue (as Dworkin appears to believe) the value of certainty in law. These activities, in my opinion, follow other objectives which can be, according to differing points of view, equally or even more worthy of praise: for instance, the updating of law to respond to social change, 'wholesale' decision-making, the offering of general criteria to lower-level bodies, establishing goals for social reform, delegating the power to determine the content of law,[39] that is to say, in general, the hetero- and/or self-attribution to judges of a part of normative power, etc..

[39] Mainly confined to public domestic law, such a one-sided political reading of constitutionalism is exemplified by MATTEUCCI, NICOLA: Positivismo giuridico e costituzionalismo, in *Rivista trimestrale di diritto e procedura civile,* Vol. 17. (1963), 985-1100.

4.2. Methodological neo-constitutionalism and constitutional methodology

In opposition to methodological neo-constitutionalism (which considers constitutional principles as a bridge between law and morals), I will limit my comments to reiterating the validity of the justificatory non-connection between law and morals.

The neo-constitutionalist thesis is that any legal decision, and in particular judicial decisions, is justified if it derives, in the last instance, from a moral norm.

I interpret here this thesis as an answer to a normative problem ('Which norm must found or justify judicial decision-making?'), and in any case the thesis itself takes on a normative nature ('A moral norm must found or justify judicial decision-making').

Clearly the argument of justificatory connection could be interpreted in another way: either as an answer to an empirical problem ('Which norms in fact, in a determined context, found or justify judicial decision-making?'), or as an answer to a theoretical question ('In an explanatory model of judiciary motivation, which norms found or justify judicial decision-making?').[40] I believe that, if we

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[40] *See* SEARLE, JOHN: *Making the Social World: The Structure of Human Civilization*, 2010, Oxford University Press, Oxford. This book is useful to readers familiar with Searle's work in the philosophy of language and the philosophy of mind, but unacquainted with, and curious to learn about, the 'philosophy of society' that he has been busy building since the mid-nineties. It collects a selection of some of the papers presented during the "Spring School and the International Conference Making the Social World" that took place on 7-9 June 2011 at the Università Vita-Salute San Raffaele, Milan, Italy. (I attended this very interesting event).

Such readers are offered a lengthy exposition (Chapters 1, 3, 5) of an updated version of the account of institutional facts that was the main theme of Searle's *The Construction of Social Reality* (1995), as well as shorter discussions of what Searle perceives as the implications of his account of institutions on issues pertaining to rational action, free will, political power, and human rights (Chapters 6, 7, 8). The book will also be useful to readers who have developed an interest in Searle's account of institutional reality while lacking sufficient exposure to his philosophies of mind and language, since it includes brief overviews (Chapters 2, 4) of his extensive work in these fields, which he presents as providing the foundations of his account of society. Readers already familiar with Searle's major works on mind, language, and society will probably be mainly interested in considering whether the account of institutional facts he currently adopts differs significantly from the one he had originally proposed, and, if so, whether it places him in a better position than before to attain his stated goals.

Common to Searle's old and new accounts is a conception of institutional facts according to which such a fact (a) cannot exist unless a community collectively accepts it as existing; (b) requires the assignment to an entity of a „status function" (that is, of a function that an entity can only have by virtue of collective recognition, and not merely by virtue of whatever properties it might have prior to such recognition); and (c) characteristically generates, once in existence, „deontic powers" (in particular, rights and obligations) within the community whose behaviour brings it to existence.

One difference between Searle's old and new accounts is that the generation of „deontic

interpreted the argument from a descriptivist perspective, this reply would be false (in contemporary legal systems, judicial decisions are motivated according to legal rather than moral norms). If we interpreted the question from a theoretical standpoint, this answer would I believe be a tautology: by definition every final justification, in the practical domain, is assumed to be made up by a moral norm,

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powers" is now taken to be a universal consequence, and not merely, as was previously the case, a nearly universal consequence, of an institutional fact's creation. But the main difference between the old and new accounts has to do with the way in which Searle proposes to combine theses (a) and (b) above in providing an explanation of an institutional fact's creation. On the old account, the creation of institutional facts was invariably supposed to be the immediate result of the collective acceptance, within a community, of linguistically expressible „constitutive rules" that specify conditions under which status functions of various sorts are assignable to entities of various sorts. On the new account, the collective acceptance of such constitutive rules remains one but is not the only source from which institutional reality is supposed to spring; the other supposed source is the collective acceptance of speech acts of declaration, whereby entities come to possess status functions just by being represented as having those functions, even in the absence of antecedently available constitutive rules regulating those functions' assignment.

Searle, however, believes that there must be a single fundamental principle underlying the creation of all institutional facts, and so does not rest content with these two seemingly disparate sources. In an attempt to theoretically unify them, he recalls his assumption that, in order to be institutionally effective, constitutive rules have to be linguistically expressible, and reinterprets linguistically expressed constitutive rules that are institutionally effective as *themselves* speech acts of declaration of a special kind, namely as „standing declarations" (13, 96-7). He therefore concludes that all of institutional reality derives from the collective acceptance of declarational speech acts (whether „standing" or not „standing") that concern the assignment of status functions to entities (and he accordingly calls the acts in question „status function declarations"). Searle clearly regards his proposal to provide a unified account of institutions by tracing their origins to declarational speech acts as the book's most significant contribution:

Now, the problems previously raised suggest that, even in this considerably weakened form, Searle's position would be unsatisfactory. But independently of that, the fact that the position Searle is finally led to embrace is so weakened should itself have given him pause, in view of his strongly voiced opinion, presented as the guiding methodological principle of his enterprise, that it is „implausible to suppose that we would use a series of logically independent mechanisms for creating institutional facts". If that is implausible, then embracing the weakened position is itself implausible, since embracing it amounts to accepting that, apart from the declarational mechanism allegedly responsible for the creation of non-linguistic institutions, there must be one or more independent (and so far unspecified) mechanisms responsible for the creation of linguistic ones. It would seem, then, that anyone who takes the extent of institutional reality to be the same as Searle takes it be, and who is committed to discovering the „single mechanism" underlying its creation that Searle has been searching in this book, must begin a new search.

See also SEARLE, JOHN: *The Construction of Social Reality*, 1995, Free Press, New York; SEARLE, JOHN: *Mind, Language, and Society: Doing Philosophy in the Real World*, 1999, Basic Books, New York; SEARLE, JOHN: *Rationality in Action,* 2001, MIT Press, Cambridge, Mass.

therefore also the final justification of a judicial decision is made up by a moral norm (despite there being intermediate justifications which could be defined as legal).

If we concentrate therefore solely on the normative question, we have to ask which type of moral norm would be the one which should found or justify, in the last instance, a judicial decision (assuming the latter as a paradigmatic case of legal decision-making).

I envisage at least four possible solutions:

(1) one is dealing with a true and objective moral norm (in the sense in which it corresponds to moral 'facts');

(2) one is dealing with a rational and objective moral norm (in the sense to which it would be accepted by part of a rational audience);

(3) one is dealing with a subjectively chosen moral norm;

(4) one is dealing with an inter-subjectively accepted moral norm.

The first two solutions are objectivist, the last two, subjectivist. In the first solution, the moral norm is subject-independent, whilst in the others it is subject-dependent, albeit in differing forms. The first two solutions make reference to critical morals, the third to individual morals, the fourth to positive morals.

If we take the judge's point of view, according to the proponents of the necessary and justificatory connection between law and morals, he should reach the solution to the question via a moral norm, on which his decision would be based. One is forced to ask however 'moral' in which sense?

The first solution presents extremely serious ontological (duplication of the world) and epistemological problems. The latter above all would mean that the judge would choose a norm which he *believes* to be moral. Consequently, the first solution is reducible to the third.[41]

The second solution does not present the same ontological problems as the first but does present serious epistemological ones: principally not because of the impossibility of a judge's finding the moral norm on which to base his decision according to the procedural or substantial rules of a moral theory (despite their being epistemological problems within each theory: it is not a coincidence that procedural theories often do not offer rational 'moral codes'), but because there are varying and divergent moral theories from which the judge must choose. Therefore, the second solution is also reducible to the third.

An acceptance of the third solution would be equivalent to proposing the complete freedom for judges in the way in which they found and justify their decisions. Statutes and constitutional law would become, from the judge's point of view, superfluous: the justificatory step which consists in founding a decision in the law is either useless (since the law conforms to the moral norm) or is forbidden (since the law is contrary to the moral norm). The certainty of the law would be exclusively dependant on the moral conscience of each judge: given that judges should base their decisions on universal moral norms, they should therefore use in

[41] A similar contention occurs in PACE: *op. cit.* 41-42.

a consistent way these norms on which to base their future decisions.[42] Temporal consistency in the decision-making of each judge (even accepting that it is possible: a judge can always review his own moral system if he believes the has committed errors in the past) does not appear sufficient to guarantee the necessary degree of predictability of both the legal consequences which stem from legal actions and the resolution of conflicts (which, according to conventional wisdom, represent two of the most important objectives of legal institutions).

However, this solution (and the first and second solutions which are reducible to it) could have a smaller scope. Instead of affirming that the last instance justification of judicial decision-making should be based on a moral norm, it could be interpreted in the following, more limited manner: on every occasion in which a judge has to make a choice amongst competing solutions – interpretive or in fact – which are all valid from a legal point of view, he has to choose that option which is justified by a moral norm (and not by a methodological principle, personal interest, a norm deriving from positive morals, a criteria shared by legal culture, etc.), at least in the last instance.

Even with its reduced scope, this 'moralist' thesis of neo-constitutionalism poses some problems: if a judge's choices are justified by his moral *beliefs* (and not by a methodological principle, personal interest, a norm deriving from positive morals, a criteria shared by legal culture, etc.), nothing stops such beliefs from being morally unacceptable, or in contrast to the moral values shared by the community, or contrary to the criteria accepted by legal culture, etc. What then would be the reason which pushes judges to justify their decisions in this way? Since, *ceteris paribus*, the justification of a judicial decision based on a moral norm chosen by the judge signifies a heightened degree of legal indeterminacy in comparison to other types of justification (relative and not absolute), I can see no reasons for attributing a general preference to a 'moral' justification rather other possible types.

The fourth choice (the judge as 'sociologist' of positive morals) also generates epistemological problems for the judge, albeit less serious than in the previous solutions. Judges, in fact, do not generally have the instruments necessary for identifying a country's norms of positive morals. In addition, if the epistemological problems are excessively serious, here too the fourth solution would be reducible to the third.

Even supposing that judges can at times overcome epistemological problems,

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[42] *Cf.*, e.g., RAZ: *op. cit.* where the contention is maintained that legal rights can be accounted for on the base of the so-called «Sources Thesis», i.e. the thesis according to which: „the existence and the contents of the law can be determined without resorting to any moral arguments" (p. 10). To be sure, Raz appears sceptical on the very notion 'fundamental human rights' can be taken to term. Thus, after having mentioned and characterized some different types of rights, in a somewhat detached way, he adds: „People who believe in fundamental human rights usually believe that these rights do not derive from social practices which recognize and implement them even where such practices exist. They further believe that people have such rights even in societies in which the rights are neither recognized nor respected" (p. 2).

two types of problems remain:

(a) the first is that there is no moral homogeneity in a society in the form of widely shared moral norms (this is usually the case in contemporary societies);

(b) the second is that such widely shared moral norms are already incorporated in rules or legal principles.

In the first case, the fourth solution is reducible to the third (the judge has to choose the moral norm he prefers). In the second case – apparently often hypothesised by neo-constitutionalists – the moral justification is co-extensive to the legal justification and becomes totally useless.

In cases where justification based on a moral norm is possible and not useless, the fourth solution implies that the judge will decide and justify his decision by basing it, in the last instance, on a norm derived from positive morals. Despite the fact that this solution in no way guarantees the moral correctness of the legal justification (positive morals, in fact, could well be in contrast with critical morals, and we are not in a position to know), it does appear wise to adopt it in many occasions in which those procedures which allow for the conversion of shared moral norms into law do not work, or do not work well (dictatorships, domination by small groups, manipulation of consensus, etc.). This solution would assign judges a 'democratic' role enabling them to compensate for weaknesses in the democratic workings and to 'transform' positive morals into law.

In situations, however, in which the democratic workings related to the formation of law in fact work satisfactorily,[43] this solution favours a particular version (addressed to judges and not only to legislators, as proposed mainly by the advocates of the *enforcement of morals*) of the position according to which the law must make positive morals binding. From my moral point of view, which in a certain sense could be defined as liberal, this position is open to the widely known objections forwarded by Hart[44] in his debate with Lord Devlin and with Ronald Dworkin.[45]

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[43] *Cf.* FERRAJOLI, LUIGI: Diritti fondamentali, in *Teoria Politica*, Vol. 14. No. 2. (1998), 3-33. [English translation: Fundamental Rights, in PINTORE, ANNA – JORI, MARIO (ed.): *Italian Debate on Fundamental Rights.* Monographic issue of *International Journal for the Semiotics of Law*, Vol. 14. No. 1. (2001), 1-33, 1-106]. What Ferrajoli strongly regrets to KELSEN, HANS: *General Theory of Law and State*, 1945, Harvard University Press, Cambridge, Mass., 161: „Just as everything King Midas touched turned into gold, everything to which the law refers becomes law, i.e., something legally existing"] and to his *Reine Rechtslehre* is the very conception of validity as the specific existence of a legal norm, i.e. the lack of the distinction between existence and validity which in Ferrajoli's view provides a distinguishing feature of what he conceives of as the new legal paradigm of „democratic constitutionalism".

[44] CHAISSONI, PIERLUIGI: *Utopia della ragione analitica. Origini, oggetti e metodi della filosofia del diritto positivo,* 2009, Giappichelli, Torino, 11-33; CHAISSONI, PIERLUIGI: *L'indirizzo analitico nella filosofia del diritto. Da Bentham a Kelsen,* 2008, Giappichelli, Torino, 25-41; CHAISSONI, PIERLUIGI (ed.): *The Legal Ought,* 2001, Giappichelli, Torino.

[45] SHAPIRO, SCOTT J.: The "Hart-Dworkin" Debate: A Short Guide for the Perplexed, in

Public Law and Legal Theory Working Paper Series, No. 77 (2007), available at SSRN: http://ssrn.com/abstract=968657 [cit. 2014-07-30]; SHAPIRO, SCOTT J.: On Hart's Way Out, in COLEMAN, JULES (ed.): *Hart's Postscript: Essays on the Postscript to the Concept of Law,* 2001, Oxford University Press Oxford; SHAPIRO, SCOTT J.: Law, Morality and the Guidance of Conduct, in *Legal Theory,* Vol. 6. Issue 2. (2000), 127-170; SHAPIRO, SCOTT J.: *Legality,* 2011, Harvard University Press, Cambridge, Mass. *See* also KRAMER, MATTHEW: Throwing Light on the Role that Moral Principles Play in the Law, in *Legal Theory,* Vol. 8. Issue 1. (2002), 115-143.

But firstly, as for the epistemological debate between Hart and his rival Dworkin, as well known, *see* HART, HERBERT L. A.: *The Concept of Law,* 1994, Clarendon Press, Oxford, (1961 first edition; 1994 second edition). Published posthumously, the second edition of *The Concept of Law* contains one important addition to the first edition, a substantial *Postscript*, in which Hart reflects upon some of the central concerns that have been expressed about the book since its publication in 1961. The *Postscript* is especially noteworthy because it contains Hart's only sustained response to the objections pressed by his foremost critic, Ronald Dworkin, who succeeded him to the Chair of Jurisprudence at Oxford in 1969. The *Postscript*, edited by Penelope A. Bulloch and Joseph Raz, focuses on a range of issues covering both Hart's substantive view and his methodological commitments. In particular, Hart endorses Inclusive Legal Positivism, asserts that his is a methodology of descriptive jurisprudence which he contrasts with Dworkin's normative jurisprudence or interpretivism, while denying that his theory of law has a semantic underpinning.

The Concept of Law was published in 1961; Hart long wanted to add a postscript responding to reactions to his work, but the postscript was unfinished when he died. The editors of the book published the most finished parts of the postscript but the drafts were not meant to be final.

In the *Postscript*, Hart notes that he wants to focus in detail on the criticisms of his view advanced by Ronald Dworkin and in a second section addresses a number of other critics; the second section was too undeveloped at the time of Hart's death for the editors to include in the book; thus the postscript wholly focuses on Dworkin's views. The reader's purpose in studying the guide may not rely on the details of the Dworkin-Hart dispute; discussions of these debates have been reviewed in the secondary literature.

Cf. COLEMAN: *op. cit.* The essays in this collection address each of these issues in a sustained way. The book contains discussions of Hart's semantic commitments, his rejection of a normative jurisprudence as well as the extent to which he can embrace Inclusive Legal Positivism in a way that is consistent with his other stated positions. The book's contributors include the leading advocates of alternative schools of Positivist jurisprudence, important contributors to the methodogical disputes in jurisprudence and noted experts on the relationship of philosophy of language to jurisprudence.

It has been argued that Hart had redefined the domain of jurisprudence and moreover established it as a philosophical inquiry of the „nature" or „concept" of law. He is considered the „world's foremost legal philosopher in the twentieth century". Many of Hart's former students became important legal, moral, and political philosophers, including Brian Barry, John Finnis, John Gardner, Kent Greenawalt, Neil MacCormick, William Twining, Chin Liew Ten, Joseph Raz and Ronald Dworkin. Hart also had a strong influence on the young John Rawls in the 1950s, when Rawls was a visiting scholar at Oxford shortly after finishing his PhD.

See also DAN, PRIEL: H.L.A. Hart and the Invention of Legal Philosophy, in *Problema*,

5. THE JUSTIFICATION: PRINCIPLE OF PROPORTIONALITY V. PRINCIPLE OF REASONABLENESS

The «principle of proportionality» refers without a doubt to evaluative instances that are situated beyond the domain of both the text of the norms under constitutional control, and the text of the constitution itself. This reference to a meta-positive instance is shown, at least, in the following two items: first, in the grounds for justifying the principle itself. Why is proportionality or reasonableness a constitutional principle? How are we to justify this constitutional requirement? Except at the cost of circularity, this question cannot be answered from the perspective of the constitution in question. Second, it becomes apparent in each of the sub-principles that frame the principle, since all of them refer to ends – although from perspectives that do not entirely coincide – whose determination cannot be reduced to an internal analysis of the norms.[46]

A second feature of the dynamics of the "culture of rights" in which we are immersed is the «principle of reasonableness». In the 19th century, the dominant trend concerning the description of legal interpretation was "legal formalism." This, in a very short synthesis, could be described as a theory which attempts to reduce the adjudication of law to deductive logic. In the 20th century, however, it was soon perceived that in order to establish the facts in each of the cases a judge must resolve and determine the applicable norms, requiring a decision to be made between various alternatives that are, *prima facie*, formally correct.[47]

In effect, legal operators are compelled, on the one hand, to reconstruct the facts in a case, and this implies choosing: a) the legally relevant facts within a framework of facts, b) the legal means of evidence, and c) the most convincing evidence. On the other hand, judges and lawyers[48] are faced with the need to: a)

Vol. 7. No. 5. (2011), 301-323; MULLENDER, RICHARD: Nicola Lacey. A Life of H.L.A. Hart: the Nightmare and the Noble Dream – H.L.A. Hart in Anglo-American Context, in *Web Journal of Current Legal Issues* (review 2007), 2004, Oxford University Press, Oxford; SCHAUER, FREDERICK: (Re)Taking Hart, in *Harvard Law Review*, Vol. 119. Issue 3. (2006), 852-883; REDONDO, MARIA CRISTINA: (ed.), Il "Postscript" di H. L. A. Hart, monographic issue, in *Ragion pratica*, Vol. 21 (2003), 347-360; LEITER, BRIAN: Beyond the Hart/Dworkin Debate: the Methodology Problem in Jurisprudence, in LEITER, BRIAN: *Naturalizing Jurisprudence*, 2007, Oxford University Press, Oxford, 153-181. A very update and innovative contribution is FIGUEROA, RUBIO SEBASTIÁN (ed.): *Hart en la teoría del derecho contemporánea. A 50 años de El concepto de derecho,* 2014, Universidad Diego Portales, Santiago de Chile.

[46] CIANCIARDO, JUAN: The Principle of Proportionality: The Challenges of Human Rights, in *Journal of Civil Law Studies*, Vol. 3. Issue 1. (2010), 177-186.

[47] ALEXY, ROBERT: *A theory of constitutional rights,* 2002, Oxford University Press, 69, 414; BERNAL, PULINDO CARLOS: *El principio de proporcionalidad y los derechos fundamentales,* 2003, Centro de Estudios Políticos y Constitucionales, Bogotà.

[48] PAINTER, SUZANNE: Improving the Teaching of School Law: A Call for Dialogue, in *Brigham Young University Education & Law Journal,* Issue 2. (2001), 213.

choose the applicable norms, b) choose the method or methods of interpretation with which they will apply the norms, and c) choose the results towards which these methods of interpretation lead.

These factual and normative choices raise the obvious question about the right criteria according to which they should be decided. While legal theories in the past century[49] oscillated between, on the one hand, the practical conflation between discretion and unreasonableness, and, on the other hand, the practical negation of discretion or reasonableness, comparative constitutional analysis has come gradually to answer this question with the principle of reasonableness, as a counterpart to arbitrariness, expressly proscribed by some constitutions, as is the case, for example, of article 9.3. of the Spanish Constitution.

The justification and content of the principle of reasonableness raises questions analogous to those posed by the principles of proportionality: why reasonableness, and not the lack of reasonableness? How does one justify the use of this principle? Furthermore, which are the reasons that justify the establishment of facts and the determination of norms, and what are the grounds for these reasons? They cannot originate in the norms themselves because, once again, this would be circular. In other words, because the problem that must be dealt with consists of determining that which is not already determined by the norms themselves, the solution cannot lie in them but in something outside them, although connected with them.

5.1. Between constitutional interpretation and «textualism»

Constitutional *interpretation*, or constitutional *construction*, the term more often used by the Founders, is the process by which meanings are assigned to words in a constitution, to enable legal decisions to be made that are justified by it. Some scholars distinguish between „interpretation" – assigning meanings based on the meanings in other usages of the terms by those the writers and their readers had probably read, and „construction" – inferring the meaning from a broader set of evidence, such as the structure of the complete document from which one can discern the function of various parts, discussion by the drafters or ratifiers during debate leading to adoption („legislative history"), the background of controversies in which the terms were used that indicate the concerns and expectations of the drafters and ratifiers, alternative wordings and their meanings accepted or rejected at different points in development, and indications of meanings that can be inferred from what is *not* said, among other methods of analysis.

There is also a question of whether the meanings should be taken from the public meanings shared among the literate populace, the private meanings used among the drafters and ratifiers that might not have been widely shared, or the public legal meanings of terms that were best known by more advanced legal scholars of the time. Most of the U.S. Constitution appears to have been written to

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[49] A recognition in PECZENIK, ALEXANDER: *On law and reason,* 2009, Springer, London. *See* also CORTEN, OLIVER: The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradictions, in *The International and Comparative Law Quarterly*, Vol. 48. No. 3. (1999), 613-625.

be understood by ordinary people of that era, although people then were much more literate in the law than people are now. However, many of its words and phrases are fairly deep legal terms that were only well understood by a few of the legally educated Founders, even though the general population probably had a rudimentary understanding of them.

«*Textualism* or *Originalism*», as defended by Justice Antonin Scalia[50] of the

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[50] Antonin Gregory Scalia (Trenton, New Jersey, March 11, 1936). His father, Salvatore Eugene Scalia, was a Sicilian immigrant, graduate student and clerk at the time of his son's birth, who later became a professor of Romance languages at Brookiln College. His mother, Catherine Scalia (*née* Panaro), was born in Trenton to Italian immigrant parents, and worked as an elementary school teacher.

Scalia began his legal career at Jones, Day, Cockley and Reavis in Cleveland, Ohio, where he worked from 1961 to 1967. He was highly regarded at Jones Day and would most likely have made partner, but later stated he had long intended to teach. He became a Professor of Law at the University of Virginia in 1967, moving his family to Charlottesville, Virginia. After four years in Charlottesville, in 1971, Scalia entered public service. President Richard Nixon appointed him as the general counsel for the Office of Telecommunications Policy, where one of his principal assignments was to formulate federal policy for the growth of cable television. From 1972 to 1974, he was the chairman of the Administrative Conference of the United States, a small indepenent agency that sought to improve the functioning of the federal bureaucracy. In mid-1974, Nixon nominated him as Assistant Attorney General for the Office of Legal Counsel. After Nixon's resignation, the nomination was continued by President Gerald Ford, and Scalia was confirmed by the Senate on August 22, 1974.

In the aftermath of Watergate, the Ford administration was engaged in a number of conflicts with Congress. Scalia repeatedly testified before congressional committees, defending Ford administration assertions of executive privilege in refusing to turn over documents. Within the administration, Scalia advocated a presidential veto for a bill to amend the Freedom of Information Act, greatly increasing its scope. Scalia's view prevailed and Ford vetoed the bill, but Congress overrode it. In early 1976, Scalia argued his only case before the Supreme Court, *Alfred Dunhill of London, Inc. v. Republic of Cuba*. Scalia, on behalf of the U.S. government, argued in support of Dunhill, and that position was successful. Following Ford's defeat by President Jimmy Carter, Scalia worked for several months at the American Enterprise Institute. He then returned to academia, taking up residence at the University of Chicago Law School from 1977 to 1982, though he spent one year as a visiting professor at Stanford Law School. In 1981, he became the first faculty adviser for the University of Chicago's chapter of the newly founded Federalist Society.

When Ronald Reagan was elected President in November 1980, Scalia hoped for a major position in the new administration. He was interviewed for the position of Solicitor General of the United States, but the position went to Rex E. Lee, to Scalia's great disappointment. Scalia was offered a seat on the Chicago-based United States Court of Appeals for the Seventh Circuit in early 1982, but declined it, hoping to be appointed to the highly influential United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Later that year, Reagan offered Scalia a seat on the D.C. Circuit, which Scalia accepted. He was confirmed by the United States Senate on August 5, 1982, and was sworn in on August 17, 1982.

On the D.C. Circuit, Scalia built a conservative record, while winning applause in legal

U.S. Supreme Court, is a normative doctrine of method according to which the judicial interpretation of statutes and of the Constitution should aim at establishing the original meaning of the text. Textualism in the strict sense is unpopular not only among most judges but also among philosophers and theologians. In philosophy, textualism was denounced as hopelessly naive by authors such as Martin Heidegger, Hans-Georg Gadamer, and their American followers. In theology, textualism is not a viable option for believers who want both to accept as true the text of their holy book and to endorse the results of modern science and historical scholarship. I argue that textualism is the only valid methodology of interpretation both in philosophy and in theology. For the judicial interpretation and application of statutes and constitutions, however, textualism cannot be more than one methodological topos among many. We also have to accept other topoi, such as the topos that the system of statutes and treatises should form a consistent whole, and these other topoi cannot be considered as part and parcel of textualism in the strict sense. It follows that the difference between a tenable sophisticated version of textualism as a methodology of judicial interpretation and the so-called doctrine of the "Living Constitution" is one of degree and emphasis only. Justice Scalia's simple version of textualism is a political ideology rather than a valid methodology of judicial interpretation.[51]

Scalia and Garner contend that textual originalism was the dominant American method of judicial interpretation until the middle of the twentieth century.[52] The only evidence they provide, however, consists of quotations from

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circles for powerful, witty legal writing, which was often critical of the Supreme Court precedents he felt bound as a lower-court judge to follow. Justice Scalia has called himself in print a "faint-hearted originalist." It seems he means the adjective at least as sincerely as he means the noun.

[51] In SCALIA, ANTONIN: *A Matter of Interpretation,* 1997, Princeton University Press, Princeton, the Judge describes his adherence to *textualism.* Textualism means interpreting the text of written law without going beyond the intent of those legislators who made the law. He writes that judges have no authority to pursue „broader purposes." He describes this as not „strict constructionism." Strict constructionism, he writes, is „a degraded form of textualism that brings the whole philosophy [of textualism] into disrepute." A strict constructionist might rule that use of a gun in a crime includes trading the gun for cocaine rather than as a weapon. Scalia takes a common sense approach to language rather than a strict interpretation. If it is said that someone uses a cane it is suggested that he walks with a cane rather than his having „hung his grandfather's antique cane as a decoration in the hallway." In textual interpretation, writes Scalia, „context is everything".

[52] In SCALIA, ANTONIN – BARNER, BRIAN: *Reading Law: The Interpretation of Legal Texts,* 2012, West Publishing Company, College & School Division, the two authors say that judges like to say that all they do when they interpret a constitutional or statutory provision is apply, to the facts of the particular case, law that has been given to them. They do not make law: that is the job of legislators, and for the authors and ratifiers of constitutions. They are not Apollo; they are his oracle. They are passive interpreters. Their role is semantic.

The passive view of the judicial role is aggressively defended in this new book by Justice

judges and jurists, such as William Blackstone, John Marshall, and Oliver Wendell Holmes, who wrote before 1950. Yet none of those illuminati, while respectful of statutory and constitutional text, as any responsible lawyer would be, was a textual originalist. All were, famously, "loose constructionists".[53]

It is possible to glean from judges who actually are loose constructionists the occasional paean to textualism, but it is naïve to think that judges believe everything they say, especially when speaking ex cathedra (that is, in their judicial opinions). Judges tend to deny the creative – the legislative – dimension of judging, important as it is in our system, because they do not want to give the impression that they are competing with legislators, or engaged in anything but the politically unthreatening activity of objective, literal-minded interpretation, using arcane tools of legal analysis. The fact that loose constructionists sometimes publicly endorse textualism is evidence only that judges are, for strategic reasons, often not candid.[54]

A problem that undermines their entire approach is the authors' lack of a consistent commitment to textual originalism. They endorse fifty-seven "canons of construction," or interpretive principles, and in their variety and frequent ambiguity these "canons" provide them with all the room needed to generate the outcome that favors Justice Scalia's strongly felt views on such matters as abortion, homosexuality, illegal immigration, states' rights, the death penalty, and guns. Yet in further obeisance to the dictionary Scalia and Garner commend a court for having ordered the acquittal of a person who had fired a gun inside a building and

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Antonin Scalia and the legal lexicographer Bryan Garner. They advocate what is best described as textual originalism, because they want judges to "look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extra-textually derived purposes and the desirability of the fair reading's anticipated consequences." This austere interpretive method leads to a heavy emphasis on dictionary meanings, in disregard of a wise warning issued by Judge Frank Easterbrook, who though himself a self-declared textualist advises that "the choice among meanings [of words in statutes] must have a footing more solid than a dictionary – which is a museum of words, an historical catalog rather than a means to decode the work of legislatures."

Scalia and Garner reject (before they later accept) Easterbrook's warning. Does an ordinance that says that "no person may bring a vehicle into the park" apply to an ambulance that enters the park to save a person's life? For Scalia and Garner, the answer is yes. After all, an ambulance is a vehicle – any dictionary will tell you that. If the authors of the ordinance wanted to make an exception for ambulances, they should have said so. And perverse results are a small price to pay for the objectivity that textual originalism offers (new dictionaries for new texts, old dictionaries for old ones). But Scalia and Garner later retreat in the ambulance case, and their retreat is consistent with a pattern of equivocation exhibited throughout their book.

[53] BISKUPIC, JOAN: *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia*, 2009, Sarah Crichton Books.

[54] RING, KEVIN: *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice*, 2004, Regnery Publishing, Inc.

been charged with the crime of shooting "from any location into any occupied structure." They say that the court correctly decided the case (Commonwealth *v*. McCoy) on the basis of the dictionary definition of "into." They misread the court's opinion. The opinion calls the entire expression "from any location into any occupied structure" ambiguous: while "into" implies that the shooter was outside, "from any location" implies that he could be anywhere, and therefore inside. The court went on to decide the case on other grounds. There is a common thread to the cases that Scalia and Garner discuss. Judges discuss the meanings of words and sometimes look for those meanings in dictionaries. But judges who consult dictionaries also consider the range of commonsensical but non-textual clues to meaning that come naturally to readers trying to solve an interpretive puzzle. How many readers of Scalia and Garner's massive tome will do what I have done – read the opinions cited in their footnotes and discover that in discussing the opinions they give distorted impressions of how judges actually interpret legal texts?

Scalia and Garner defend the canon of construction that counsels judges to avoid interpreting a statute in a way that will render it unconstitutional, declaring that this canon is good "judicial policy." Judicial policy is the antithesis of textual originalism. They note that "many established principles of interpretation are less plausibly based on a reasonable assessment of meaning than on grounds of policy adopted by the courts" – and they applaud those principles, too.[55] They approve the principle that statutes dealing with the same subject should "if possible be interpreted harmoniously," a principle they deem "based upon a realistic assessment of what the legislature ought to have meant," which in turn derives from the "sound principles…that the body of the law should make sense, and…that it is the responsibility of the courts, within the permissible meanings of the text, to make it so". In other words, judges should be realistic, should impose right reason on legislators, should in short clean up after the legislators.[56] Another interpretive principle that Scalia and Garner approve is the presumption against the implied repeal of state statutes by federal statutes. They base this "on an assumption of what Congress, in our federal system, would or should normally desire." What Congress would desire? What Congress should desire? Is this textualism, too?

6. THE SEARCH FOR A SOLUTION: «BALANCING CONSTITUTIONAL RIGHTS»

A few years ago, Robert Alexy[57] explained that a normative system is not a legal

[55] ROSSUM, RALPH: *Antonin Scalia's Jurisprudence: Text and Tradition*, 2006, University Press of Kansas.

[56] STAAB, JAMES: *The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court*, 2006, Rowman & Littlefield. *See* also TOOBIN, JEFFREY: *The Nine: Inside the Secret World of the Supreme Court* (revised ed.), 2008, Anchor Books; TUSHNET, MARK: *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (revised ed.), 2006, W.W. Norton & Co.

[57] Robert Alexy (September 9, 1945 in Oldenburg, Germany) is a jurist and a legal

system unless it formulates a "claim of correctness".[58] This occurs when governmental authorities act with the assumption that what they are doing is correct, regardless of whether it is actually entirely so. According to Alexy, when this assumption is not formulated, and when those who govern only take a personal or a class advantage with their power, practice of the law does not amount to a legal system.

Yet it seems evident that not just any content allocated to that which is assumed as correct will attain legality for a normative system. For this reason, Alexy complements his thesis on correctness with a reference to ius-fundamental principles. The correctness of the assumption of a government's actions is basically expressed through its reference to fundamental rights.

What does this mean? When does a State recognize, identify, protect, and promote rights? When does it put forth its "politics of rights" as imposed by its constitution? Or, in other words, how can human rights be consistently conceptualized, indexed, justified, and interpreted? In the preceding account, each

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philosopher. He studied law and philosophy at the University of Göttingen. He received his PhD in 1976 with the dissertation *A Theory of Legal Argumentation*, and he achieved his Habilitation in 1984 with a *Theory of Constitutional Rights*.

Alexy is a professor at the University of Kiel and in 2002 he was appointed to the Academy of Sciences and Humanities at the University of Göttingen. In 2010 he was awarded the Order of Merit of the Federal Republic of Germany.

Alexy's definition of law looks like a mix of Kelsen's normativism (which was an influential version of legal positivism) and Radbruch's legal naturalism (Alexy, 2002), but Alexy's theory of argumentation (Alexy, 1983) puts him very close to legal interpretivism. His *A Theory of Legal Argumentation* presents some questions: what is to be understood by 'rational legal argument'? To what extent can legal reasoning be rational? Is the demand for rationality in legal affairs justified? And what are the criteria of rationality in legal reasoning? The answer to these questions is not only of interest to legal theorists and philosophers of law. They are pressing issues for practising lawyers, and a matter of concern for every citizen active in the public arena. Not only the standing of academic law as a scientific discipline, but also the legitimacy of judicial decisions depends on the possibility of rational legal argumentation.

A theory of legal reasoning which tries to answer these questions pre-supposes a theory of general practical reasoning. This theory is the subject matter of the first two parts of the book. The result is a theory of general practical discourse which rests on insights of both Anglo-Saxon and German philosophy. It forms the basis of the theory of rational legal discourse, which is developed in the third part of this book.

[58] ALEXY, ROBERT: *Begriff und geltung des rechts (The Concept and Validity of the Law*), 2005, Karl Alber, Freiburg und München; and ALEXY, ROBERT: On the Concept and the Nature of Law, in *Ratio Juris*, Vol. 21. Issue. 3. (2008), 281-299. *See* also BULYGIN, EUGENIO: Alexy's Thesis of the Necessary Connection between Law and Morality, in *Ratio Juris,* Vol. 13. Issue 2. (2000), 133-137; and ALEXY, ROBERT: On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique, in *Ratio Juris,* Vol. 13. Issue 2. (2000), 138-147. *See* also GARDNER, JOHN How Law Claims, What Law Claims, in KLATT, MATTHIAS (ed.): *Institutionalized Reason. The Jurisprudence of Robert Alexy,* 2012, Oxford University Press, Oxford, 29-44.

of the problems being dealt with has directly involved these questions. The answer to such questions necessarily requires appealing to instances beyond the legal texts where rights are recognized, as I have attempted to demonstrate here in general terms.

It could be thought, together with Norberto Bobbio,[59] that the suggested element is a consensus, in which the basis of human rights could be found and the place where semantic indecisiveness could be resolved when interpreting them.[60] Yet there is an argument which destroys all the appeal of this alternative: human rights discourse has been presented historically as the limit to what is "able to be settled by agreement," or to paraphrase the German Constitutional Court, the "limit of limits" that consensus (including democratic consensus) can legitimately impose upon the freedom of human actions. In other words, if the meaning of rights depends on consensus, these rights are devoid of meaning. The solution, thus, must be found elsewhere.[61]

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[59] BOBBIO, NORBERTO: El fundamento de los derechos humanos, in DÍAZ, RAMÓN SORIANO – CABRERA, CARLOS ALARCÓN – MOLINA, JUAN MORA (ed.): *Diccionario crítico de los derechos humanos,* 2000, Universidad Internacional de Andalucía, Sede Iberoamericana de la Rábida.

[60] Just an empirical collation will suffice to show the lack of coincidence among the catalogues of fundamental rights acknowledged in domestic law of different countries and/or in regional and international declarations, charters and covenants. Similarly, as, e.g., BOBBIO (1958): *op. cit.,* and ROSS (1958): *op. cit.* 258-267 emphasize, just an inspection will suffice to show the lack of coincidence among the lists of which natural and/or moral rights different exponents of natural law maintain to deserve protection. Needless any exemplification of these two statements. Nevertheless, it might be worth reminding the complex network of political disagreements and ideological tensions standing behind the approval of the 1948 Universal Declaration of Human Rights, or, more recently, the political disagreements and the ideological tensions standing behind the approval of 2000 Nizza Charter. With regard to the 1948 Declaration, *cf.* eg., CASSESE (1994): *op. cit.* 21-49, and with regard to 2000 Nizza Charter, *cf.*, e.g., MANZELLA, ANDREA – MELOGRANI, PIERO – PACIOTTI, ELENA – ROGOTÁ, STEFANO: *Riscrivere i diritti in Europa,* 2001, il Mulino, Bologna.

[61] In a rather different perspective, Bobbio's threefold distinction on legal positivism (see above § 3), has already been referred to when dealing with (the actual form of) constitutionalism by TROPER (1988): *op. cit.* and PRIETO SANCHÍS, LUIS: *Constitucionalismo y positivism*, 1997, Fontamara, Mèxico, and when dealing with neo-constitutionalism by COMANDUCCI: *op. cit.* (in print). Though not in a completely coincident way, Troper, Prieto Sanchís and Comanducci, each of them, draws a symmetrically parallel distinction to the one suggested by Bobbio in order to confront and to underline the terms of the contrast between legal positivism and (neo)constitutionalism insofar as either of them is conceived of, respectively, as a methodology, an ideology or a theory of law. On the contrary, what is suggested above in the text is that the threefold way to conceive of legal positivism is compatible with, and can provide a satisfactory understanding of neo-constitutionalism; that is to say it is meant not to show that legal positivism and neo-constitutionalism contrast with each other, but, the other way round, that neo-constitutionalism can be given a positivist reading.

The question, however, is *where*? What has been presented here so far supports the proposal of a possible answer that lies in the following: all current legal systems formulate not one but two assumptions. On the one hand, the claim to correctness as postulated by Alexy, and on the other hand, a claim to moral objectivity, found implicitly in the defense of principles. Without one or the other, the discourse of rights turns into self-reference and, for this reason, becomes groundless and unintelligible.

A reply could be given by an Alexis's scholar: Carlos Bernal Pulido.[62] In the global legal world, it is becoming increasingly recognized that every modern legal system is made up of two basic kinds of norms:[63] *rules* and *principles*. These are applied by means of two different procedures: *subsumption* and *balancing*. While

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See also LUZZATI, CLAUDIO: *Principi e princìpi. La genericità nel diritto,* 2012, Giappichelli, Torino. The author, trying to criticize the Alexy's and Bernal Pulido's opinions, makes an effort to explain that lack of specification is a phenomenon that should not be confused with vagueness. Whereas vagueness is a problem of borderline cases and whenever it occurs we are intrinsically uncertain whether a sentence is true or not, lack of specificity is a quite different phenomenon. If a sentence is specific to a very low degree it is highly probable that it will be true; however such a sentence is unable to distinguish between different cases: it is like a lump of putty which hits the bull's eye flattening out all over it. Legal principles deal with lack of specificity, even if not all unspecific norms can be defined as principles. In fact, according to the author's view, what makes of a principle a principle is mainly the use of such a norm to justify other standards. *Cf.* LUZZATI, CLAUDIO: Vagueness (of Legal Language), in *The Encyclopedia of Language and Linguistics*, 1993, Pergamon Press, Oxford – New York – Seul –Tokio, Vol. 4. 2086-2091; LUZZATI, CLAUDIO: *Il formalismo dei diritti,* in *Etica & Politica / Ethics & Politics*, Vol. 15. No. 1. (2013), 52-86.

[62] Carlos Bernal Pulido (Bogotà, July 11, 1974), is an Associate Professor at Macquarie Law School (Sydney, Australia). He has research interests in the fields of constitutional comparative law, jurisprudence, and torts. He has published widely in all these fields in 7 different languages. His qualifications include a LL.B. from the University Externado of Colombia (Bogota) (1996), a S.J.D. from the University of Salamanca (Spain) (2001) and a M.A. (2008) and a Ph.D. in Philosophy (2011) from the University of Florida (U.S.A). He has delivered guest lectures and presented papers in more than 20 countries.

[63] Every modern legal system is made up of two basic kinds of norms: rules and principles. These are applied by means of two different procedures: subsumption and balancing. While rules apply by means of subsumption, balancing is the means of applying principles. Balancing has therefore become an essential methodological criterion for adjudication, especially of constitutional rights. However, balancing is at the heart of many theoretical and practical discussions. One of the most important questions is whether balancing is a rational procedure for applying norms. The aim of Bernal Pulido's books is to consider whether this is the case. To achieve this aim, his works reflect on why the rationality of balancing is in doubt, and to what extent balancing can be rational, and how this can be possible. The *weight formula* proposed by Robert Alexy is analysed as a model which, in spite of its limits, solves the philosophical and constitutional problems about the rationality of balancing to the greatest extent possible. *Cf.* BERNAL-PULIDO, CARLOS: The Drama of Law as a Collective Play, in *This Century,* Issue 2. (2013a), 8-15.

rules apply by means of subsumption, balancing is the means of applying principles. Balancing has therefore become an essential methodological criterion for adjudication, especially of constitutional rights.[64]

The concept of balancing is at the heart of many theoretical and practical discussions. One of the most important questions is whether balancing is a rational procedure for applying norms or a mere rhetorical device, one that is useful for justifying any judicial decision whatever. This is a juridico-philosophical question. It has a major bearing on a second question, which is relevant from the point of view of constitutional law: the question of the legitimacy of the judge as balancer. More than one renowned author has stated that balancing is nothing more than an arbitrary and rash Solomonic settlement, that the judge therefore does not have sufficient constitutional standing to apply principles from this standpoint, and that when he does so, he unduly restricts and even usurps other powers enshrined in the constitution.[65]

According to the critics, balancing is irrational for several reasons. Following Bernal Pulido's opinion, the most prominent of these critics refer to the lack of precision, the incommensurability, and the lack of predictability of balancing.

The first objection claims that balancing is no more than a rhetorical formula or a technique for exercising power that lacks a clear concept and precise legal structure. The objection states that there are no objective legal criteria which could be binding on the judge for balancing and useful for controlling judicial decisions where balancing is brought into play. From this point of view, balancing is a formal and empty structure, based only on the subjective, ideological and empirical appraisals of the judge. The scales for balancing are subjective appraisals by the judge. Therefore, balancing cannot lead to a single correct answer.[66]

The second objection states that balancing is irrational because it entails a comparison of two measures which, due to their radical differences, cannot be compared. Incommensurability arises in balancing, for there is no organisation into a hierarchy or a common measure that makes it possible for the weight of the relevant principles to be determined. In the field of principles, there is no "unit of measure", nor it there a "common currency for making possible a comparison" between principles.[67]

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[64] BERNAL-PULIDO, CARLOS: Is Tort Law a Practice of Corrective Justice? in *Diritto e Questioni Pubbliche*, Vol. 12. (2012), 1-23. See also SCHAUER (2012): ***op. cit.***

[65] BERNAL-PULIDO, CARLOS: *El neoconstitucionalismo a debate (Arguing about the New Constitutionalism*) (in Spanish), 2006, Universidad Externado de Colombia, Bogotá, 1st. Edition, 74.

[66] BERNAL-PULIDO, CARLOS: *El derecho de los derechos (Rights' Law)*, 2007, Universidad Externado de Colombia, Bogotá, (1st. Edition, and 1st. and 2nd. Reprints) 2005, (3th. Reprint) 417.

[67] BERNAL-PULIDO, CARLOS: *El Principio de Proporcionalidad y los Derechos Fundamentales (The Principle of Proportionality and Constitutional Rights)*, 2008, Centro de Estudios Políticos y Constitucionales, Madrid, 2003 (1st. Edition), 872 pp., 2005 (2nd. Edition), 875 pp., 2008 (3th Edition), 883 pp., English edition in preparation.

The final criticism maintains that balancing is irrational because its result cannot be predicted. Every result of balancing is individual. It depends on the circumstances of the case, not on general criteria. Judicial decisions that stem from balancing therefore conform to an ad hoc case law, which tends to magnify the justice of the single case while sacrificing certainty, coherence and the generality of law.[68] There is a link between these three objections. The result of balancing cannot be predicted owing to its lack of precision, and the main reason for the lack of precision is the fact that there is no a common measure that makes it possible to determine the weight of the relevant principles.

7. MY PERSONAL CONCLUSIONS

Balancing continues to provoke controversy among judges and legal scholars. Critics believe that it gives judges too much discretion and amounts to a usurpation of the legislative function. They contend that balancing is an ambiguous and arbitrary methodology for measuring unequal interests against each other, which results in unpredictable decision making. While proponents, such as U.S. Supreme Court Justice Sandra Day O'Connor, argue that balancing is „the sounder approach – the approach more consistent with our role as judges to decide each case on its individual merits – is to apply a test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular interest asserted by the State before us is compelling."

How can balancing ever be dissociated from lawmaking, when it comes to constitutional adjudication? A basic task of constitutional judges is to resolve legal disputes between two parties pleading a constitutional norm or value against the other. Most judges are disinclined to build constitutional hierarchies of norms. Instead, they usually proclaim that no right is absolute, which then propels them into a balancing mode. In balancing situations, it is context that varies, and it is the judge's evaluation of the circumstances, facts, and policy considerations that determines the outcome of a case.

In *Theory of Constitutional Rights*, Robert Alexy contends that rules "contain fixed points in the field of the factually and legally possible," therefore; a rule is a norm that is either "fulfilled or not." However, principles are norms that "require that something be realized to the greatest extent possible given the legal and factual possibilities". This distinction makes a difference in adjudication, because a conflict between two rules may be resolved by giving primacy to, invalidating, or establishing an "appropriate exception" to one rule in relation to the other. Whereas, a conflict between two principles can only be managed through balancing – where the judge finds that one principle outweighs the other, given a particular set of circumstances. Alexy believes that conflicts of rules are played

[68] As for all those aspects, *see* also BERNAL-PULIDO, CARLOS: Unconstitutional Constitutional Amendments in the case Study of Colombia: An analysis of the Justification and Meaning of the Constitutional Replacement Doctrine, in *International Journal of Constitutional Law*, Vol. 11. No. 2. (2013b), 339.

out at the level of validity, where "competitions between principles are played out in the dimension of weight."

Bernal Pulido explains that critics believe balancing is irrational for multiple reasons. However, the most widely noted are a lack of precision, incommensurability and lack of predictability. For those who claim constitutional rights and competing principles are incommensurable, Alexy maintains that the triadic scale (light, moderate, serious) he developed provides a solution.

Even though Alexy provides a rationalization for balancing as a procedure, he does acknowledge that the question of what relative weight judges should give to opposed principles, in any given dispute, falls outside of his theory. However, from my point of view, Alexy's procedure does, nonetheless, allow for the understanding that balancing does generate a particular form of argumentation and places the judge under an obligation to justify his/her decisions in terms of certain constraints. Thus, to the extent that judges actually search for solutions absent of harm and actually look to comply with the law of balancing, balancing is less susceptible to the accusation that it proceeds without rational criteria and is no more than a means to bundle a court's unconstrained policy choices.

Grègoire Webber[69] notes John Finnis' opinion[70] that without an identified

[69] WEBBER, GRÉGOIRE: *The Negotiable Constitution. On the Limitation of Rights,* 2010, Cambridge University Press, Cambridge. In matters of rights, constitutions tend to avoid settling controversies. With few exceptions, rights are formulated in open-ended language, seeking consensus on an abstraction without purporting to resolve the many moral-political questions implicated by rights. The resulting view has been that rights extend everywhere but are everywhere infringed by legislation seeking to resolve the very moral-political questions the constitution seeks to avoid. The Negotiable Constitution challenges this view. Arguing that underspecified rights call for greater specification, Grégoire C. N. Webber draws on limitation clauses common to most bills of rights to develop a new understanding of the relationship between rights and legislation. The legislature is situated as a key constitutional actor tasked with completing the specification of constitutional rights. In turn, because the constitutional project is incomplete with regards to rights, it is open to being re-negotiated by legislation struggling with the very moral-political questions left underdetermined at the constitutional level.

[70] FINNIS, JOHN: *Human Rights and Common Good: Collected Essays Volume III,* 2011, Oxford University Press, Oxford. This volume collects twenty-two published and unpublished chapters on a variety of topics related directly to human rights, justice, and the common good. The first nine date from 1970 through to 2007. They begin with a study – in dialectic with Dworkin's earlier lecture on the same themes – of the bearing of contemporary legal and political theory on the incorporation of a declaration of rights and freedoms in British law. There follow chapters on place of rights, and of duties to oneself, in Kant's moral and legal theory and some contemporary interpreters of Kant; on the application classical conceptions of distributive justice to modern problems; on the emergence of the ideal of government limited by, inter alia, respect for human rights, and contemporary distortions of the ideal that are proposed by Rawls, Dworkin, and followers of theirs (not least in relation to marriage); on the place of civic virtues and respect for diverse persons in constitutional order; and two chapters on the great question of migration rights and the legitimacy of national boundaries preventing free and equal migration. Part

common measure, the principle of proportionality cannot direct reason to an answer. It can only assist reason in choosing between two incommensurables. Bernal Pulido shows us how Alexy's *weight formula*,[71] developed as a complement to the rule of balancing, not only allows for the determining the concrete weight of

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Two groups three chapters on the justice of punishment, concluding with the mature statement of retribution's place as punishment's formative justifying aim, in engagement especially with Nietzsche's 'genealogy of morals'. Part Three surveys just way theory in its historic development and current shape. Parts Four, Five, and Six each group three chapters: on autonomy, justice, and euthanasia; on autonomy, justice, and human reproduction; and on marriage in its relation to justice and the common good.

[71] The "weight formula" is thus proposed as a developed complement to the rule of balancing, which Alexy states on the basis of a classical formulation of the third limb of the proportionality principle, or proportionality in the narrow sense, in German constitutional law. However, it seems to Bernal Pulido that the weight formula, as described by Alexy, calls for a new law of balancing. The aim of the weight formula is to establish "a conditional relation of precedence between the principles in the light of the circumstances of the case". The key observation is that the relation of precedence is not determined by means of merely comparing the importance of the principles in the case at hand ("the degree of non-satisfaction of, or detriment to, one principle" and "the importance of satisfying the other"), but by means of a wider operation which includes reference to their abstract weight and to the reliability of the empirical assumptions relating to the importance of the principles. That is, the weight formula is a reformulation of the basic insight behind the original law of balancing which is more sophisticated in analytical terms in that it renders explicit the need to consider two more variables, namely, abstract weight and reliability of the empirical assumptions.

This formula seeks to reflect the main normative and empirical variables that are relevant for balancing. It is accordingly a very complex model, one that gives rise to the objection that application would seem not to be obviously straight forward. However, it should be said that the model is complex because the application of principles is a highly complex procedure. Moreover, the weight formula is not an algorithmic procedure that can guarantee the only correct answer in all cases. Quite the contrary, for it has diverse rationality limits that give the judge room to exercise discretion. His ideology and appraisals play an important role here. Nevertheless, this fact does not reduce the rationality and usefulness of the formula. The weight formula is a clear procedure even when its limits are borne in mind. It offers for balancing, a clear concept and a precise legal structure, that are free of all contradiction. In this structure, the triadic scale is the common measure for determining the weight of the relevant principles. The weigh formula is also a determinate structure that clarifies the different, relevant balancing variables. It therefore enables the result of balancing to be correctly justified in the law. Through this formula, justification can be stated in conceptually clear and consistent terms, with complete and saturated premises, and with logic and the burdens of argumentation respected. The weight formula gives expression to every element that the judge ought to take into account and every decision that should be justified. In legal practice, these judicial decisions make up a network of precedents that allow principles to be applied in a consistent and coherent manner, with the result that balancing is predictable. Finally, the weight formula is a very good example of how practical problems in constitutional law can be solved with the help of juridico-philosophical considerations. *Cf.* ALEXY (2002): *op. cit.* 122-158.

principles in light of the circumstances of a case, but also their abstract weight and empirical assumptions relating to the importance of those principles. Bernal Pulido also reminds us of John Rawls' view[72] when referring to the meaning of relevant positions of principles- the more connected with the moral capacities of the person of position of a principle is, the more importance should be attributed to the principle.

David Beatty asserts in *Ultimate Rule of Law,*[73] that by carefully studying the

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[72] RAWLS, JOHN: *A Theory of Justice,* 1971, Harvard University Press. This is a work of political philosophy and ethic, originally published in 1971 and revised in both 1975 (for the translated editions) and 1999. In *A Theory of Justice*, Rawls attempts to solve the problem of distributive justice (the socially just distribution of goods in a society) by utilising a variant of the familiar device of the social contract. The resultant theory is known as "Justice as Fairness", from which Rawls derives his two principles of justice: *the liberty principle* and *the difference principle*. In *A Theory of Justice,* Rawls argues for a principled reconciliation of liberty and equality. Central to this effort is an account of the circumstances of justice, inspired by David Hume, and a fair choice situation for parties facing such circumstances, similar to some of Immanuel Kant's views. Principles of justice are sought to guide the conduct of the parties. These parties are recognized to face moderate scarcity, and they are neither naturally altruistic nor purely egoistic. They have ends which they seek to advance, but prefer to advance them through cooperation with others on mutually acceptable terms. Rawls offers a model of a fair choice situation (the original position with its veil of ignorance) within which parties would hypothetically choose mutually acceptable principles of justice. Under such constraints, Rawls believes that parties would find his favoured principles of justice to be especially attractive, winning out over varied alternatives, including utilitarian and right-libertarian accounts.

[73] BEATTY, DAVIS: *The Ultimate Rule of Law*, 2004, Oxford University Press, New York. „Proportionality" analysis is becoming a term of art in constitutional law. If we have not heard of it, that is because the concept has received far more elaboration and evaluation outside of the United States. One of the leading proponents of proportionality analysis in constitutional law is the Canadian legal scholar, David M. Beatty. For the last decade, Beatty has pursued a vision of comparative constitutional study as revealing „timeless" or „universal" ideals of proportionality and rationality in constitutional adjudication around the world. In his latest book, *The Ultimate Rule of Law*, he advances the argument that constitutional courts around the world are, and should be, turning away from a focus on „interpretation" and instead concentrate on applying the principle of proportionality to measure the constitutionality of challenged government actions.

As Beatty shows, in Canada, Germany, the European Court of Human Rights, India, Ireland, South Africa, and on occasion even in the United States, courts or tribunals invoke the basic concept of proportionality not only to review the propriety of sanctions, but also to measure the legality of a wide range of government conduct through some form of means-ends analyses. In a number of countries, proportionality analysis is treated as a general principle of public law, applicable not only to constitutional law, but also to administrative and even to international law questions. Although means-end analyses are found in a wide swathe of constitutional doctrine in many tribunals, a distinguishing feature of proportionality analysis is its eschewal of doctrinal sub-categories, its commitment to returning to foundational questions of constitutional purpose in structuring analyses of challenges to government action, and its requirement that the government come forward

facts of the case, judges are able to determine proportionality objectively. Although, Beatty sees balancing as "subjective" based on a calculation of costs and benefits – a process of cataloging and quantifying factors and a comparison of incommensurable –, at times he uses balancing "vocabulary" when describing his principle of proportionality. He maintains that "proportionality is an essential, unavoidable part of every constitutional text and a universal criterion of constitutionality". As Webber noted, Beatty contends that "proportionality request judges to assess the legitimacy of whatever law or regulation or rulings is before them from the perspective of those who reap its greatest benefits and those who stand to lose the most." Thus a balancing perspective.

The U.S. Supreme Court uses a balancing approach most often to decide cases where constitutionally protected individual rights conflict with governmental

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with justifications for statutes that infringe on protected rights.

Beatty is primarily concerned with versions of proportionality analysis which, like the Canadian or German approaches, consider not only rationality and availability of other alternatives, but proportionality in the „strict sense" of some degree of fit between the harm that some endure, or the intrusions some suffer, in order to create a legitimate benefit for others. Beatty is quite persuasive as to the pervasiveness of the phenomena of such proportionality analysis, both the Canadian version and others used by the European Court of Human Rights, the Indian Supreme Court, the German Federal Constitutional Court, and a number of other influential constitutional tribunals. He provides examples in three major areas of constitutional law – religious liberty, gender and racial equality, and positive welfare rights – to illustrate courts' concerns for the proportionality of government actions that impose special burdens on some and, increasingly, for the proportionality, or fairness, of government efforts to provide assistance or opportunities.

But Beatty's ambitions are not merely descriptive. First, in the course of description Beatty develops what one might call a „best practices" approach to proportionality analysis. For Beatty, the best version of proportionality analysis is one that relies on pragmatic, empirically contextualized reasoning. It seeks to view legal issues through the perspectives of those most benefitted and most burdened by challenged action, while generally accepting a wide range of legitimate government ends. These are the tools of proportionality analysis, „properly enforced" (p. 166). Adherence to these practices, he argues, means that proportionality analysis meets criteria for neutrality and objectivity in constitutional adjudication.

Second, Beatty argues that such proportionality analysis, rather than interpretation of constitutional texts, should be seen as the fundamental tool of normatively responsible judicial review in self-governing democratic polities. Much of the hard work of constitutional adjudication, he argues, turns on the question of government justification of its actions, an inquiry best guided by the norms of proportionality analysis. Moreover, proportionality analysis would yield a more determinate and impartial form of constitutionalism than a focus on interpretation of constitutional provisions under any of the leading schools of interpretation. Rather than focusing on interpreting a constitution within its historic traditions, or considering questions of institutional role or deference, constitutional judges should carefully scrutinize the facts to determine whether, in light of the governmental purposes intended to be served, the challenged act or action appropriately accommodates the interests of those most affected or concerned. In so arguing, Beatty dispenses not only with „interpretation" but (at times) with „rights" (p. 171). Justification of challenged government action becomes the focus of analysis.

interests. One landmark constitutional case decided in this manner, was ROE v. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 47 (1973), which legalized abortion. In reaching its decision, the Court found that in the first trimester of pregnancy, a woman's right to privacy outweighed the State's interest in protecting health, but in the later stages of pregnancy, the State's interest gradually outweighed the woman's.

From my perspective, a balancing court can give some measure of coherence to adjudication by developing stable procedures for arriving at decisions. To the extent that it is successful, these procedures could take on some of the systematizing functions of precedent more broadly. A court could declare that rights are absolute, or that one right must always prevail over other constitutional values, including other rights provisions. Creating such hierarchies would almost constitutionalize winners and losers. In so far as judges gave reasons for having conferring a higher status on one value relative to another, they have in fact balanced.

Balancing makes clear that each party is pleading a constitutionally legitimate norm or value and that the court holds each of these interests in equally high esteem. Determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations. However, in my opinion, Alexy's triadic scale and weight formula are proven effective tools that allow for an objective constitutional adjudication.

When properly executed, balancing requires courts to acknowledge and defend – honestly and openly – the policy choices that they make when they make constitutional choices. Most certainly, is not a magic wand for judges to wave to make all of the political dilemmas of rights review disappear. Indeed, waving such a wand would expose rights adjudication for what it is: constitutionally-based lawmaking. Nonetheless, I believe balancing offers the best position currently available for judges seeking to rationalize and defend rights review, given certain strategic considerations, the structure of modern rights provisions, and the precepts of contemporary constitutionalism.

It is my opinion that balancing helps judges manage disputes that take a particular form, but does not dictate correct answers to legal problems. It provides a set of relatively stable, off-the-shelf, solutions to a set of generic dilemmas faced by the constitutional judge. Therefore, I do see balancing as an appropriate criterion for constitutional argumentation.[74]

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[74] I wrote all these final conclusions in occasion of the course "Constitutional Argumentation", to the bosom of "Master Global Rule of Law and Constitutional Democracy", issued by the Faculty of Law of the University of Genoa (Italy), A.A. 2012/2013. I had the pleasure to meet and to discuss with Carlos Bernal Pulido, teacher of the course mentioned, when he explained his theories in this University on April 24, 2014. But the present essay is chiefly dedicated to Ronald Dworkin (December 11, 1931 – February 14, 2013), *in memoriam.*

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A Possible Tax Incentive in Latvia: Introduction of Intellectual Property Box Regime

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Abstract
Intellectual Property (IP) Box regime is a relatively new tax incentive targeted at the income deriving from intellectual property and provides either a reduced tax rate or a partial exemption of tax for the income which is generated from IP. Currently eleven EEA member states have introduced an IP Box, mainly in order to incentivise investment in research and development (R&D) and innovation. Latvia currently has one of the lowest rates of investment in R&D amongst all EU member states, thus Latvia should seriously consider the introduction of IP Box, especially since it might positively impact economic growth and success of the country.

Keywords: *Intellectual Property (IP) Box, tax incentive, R&D, Latvia*.

JEL classification: *H25*.

1. INTRODUCTION

1.1. Introduction to the Intellectual Property Boxes

This paper aims at exploring the possibility of introducing Intellectual Property (IP) Box regime in Latvia.

IP Box regime is a relatively new-to-the-world tax incentive – most countries have introduced it in the last ten years – which is aimed at incentivising investment in research and development (R&D) and innovation. IP Box regime is targeted at the income which derives from intellectual property – in most countries patents in particular – and it offers either a reduced tax rate for IP income or a partial exemption of tax for the income which is generated from IP. It has been given the unusual name of a 'Box' regime due to the fact that the pioneering countries, which introduced this tax incentive, had a box to tick in tax forms to be submitted to their

national state revenue offices.[1] IP Boxes vary across countries with regard to what type of IP qualifies in order to receive the tax benefit, whether only existing or also acquired IP qualifies, what type of income qualifies and a number of other factors. Therefore, a common reader may have heard such names for this regime as a Patent Box (in countries where only patents qualify for the tax relief, for example, the UK), License Box (in countries where the qualifying IP has to be licensed, for example, the Swiss Canton of Nidwalden) and Innovation Box (in countries where the regime has gone as far as to include products and services that cannot be registered as patents or trademarks, for example, the Netherlands).[2] For uniformity, all of these regimes will be included in the term 'IP Box' in this paper.

Currently even such large players of the world's economy as China have adopted IP Box regime. Eleven European Economic Area members have IP Boxes, of which nine are European Union (EU) member states.[3] Due to the limited scope of this paper and special circumstances underlying tax incentives in Europe (such as the free movement of goods, services and workforce as a general principle of EU) that distinguish European countries from the rest of the world, the paper will focus on the EU context.

1.2. Reasons underlying the introduction of IP Boxes

The two main reasons underlying the introduction of IP Boxes in as many as eleven countries in Europe are, first, the need for the EU member states to comply with EU general strategic plans (currently – Europe 2020, in the past – Lisbon Strategy and objectives developed in Barcelona summit) and, second, the realization that R&D and innovation are significant factors for the overall national economic growth and success.

The underlying objective of the Lisbon Strategy – a plan for the development of EU's economy between years 2000 and 2010, which was adopted already fourteen years ago – was to make the EU the most competitive economy in the world by focusing on innovation and research and development (R&D) and by making EU's economy increasingly more and more knowledge-based.[4] In line with the Lisbon Strategy there were further objectives developed in the EU summit that took place in Barcelona in 2002, of which one of the most notable ones was to raise investment in the EU to 3% of EU's GDP by 2010.[5] This aim was repeatedly

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[5] Barcelona European Council on 15th and 16th of March 2002. Presidency conclusions.

included in the current EU's strategic plan, namely Europe 2020, due to not having been achieved.[6] Therefore, EU member states have had to invent new strategies and incentivises that would help them to comply with these requirements since their low investment indicators proved that the situation will not change without a suitable government interference.

But, of course, a mere desire to comply with EU strategic plans has not been the main reason for the creation of IP Boxes. European countries that have introduced the new tax regime have not done so simply in order to raise investment in R&D to some arbitrary number. Most of the economic models and theories show that the raise in R&D and innovation practices leads to a number of positive changes in national economies, such as increase in high-skilled jobs, manufacturing of high-value products, supply of sophisticated services and others, which subsequently lead to an economic growth. This view is supported by the Organisation for Economic Co-Operation and Development (OECD).[7] Additionally, some economists, for example R. D. Atkinson, go as far as to claim that in fact every modern tax code should explicitly focus on creating opportunities for the increase in investment in R&D and innovation.[8]

1.3. Advantages and disadvantages of IP Boxes

The main advantage of IP Box lies in its difference with other R&D incentivises, such as R&D tax credits and direct R&D funding. IP Box affects the 'output' side of the research conducts – company's income deriving from IP – while tax credits and direct funding affects the 'input' side – company's expenditures related to R&D. Hence, IP Boxes incentivise firms to commercialize their IP rather than merely conduct research and innovation projects that do not lead to a creation of products or services that can be sold. The commercialization of IP positively impacts other processes in nation's economy – usually registered parents are further manufactured which leads to an increase in production of high-value products, raise in high-wage jobs and other factors that helps shifting national economy to a knowledge-based one. Non-commercialized R&D activities do not necessarily lead to the same results.

Further, IP Boxes help to reduce the financial risks that firms incur when they want to invest in innovation. Investing in R&D projects is risky since the outcome of the research cannot be predicted beforehand. Therefore, R&D and innovation

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Available at: http://ec.europa.eu/invest-in-research/pdf/download_en/barcelona_european_council.pdf [cit. 2014-09-20].

[6] Europe 2020: a strategy for smart, sustainable and inclusive growth. Communication from the Commission. Available at: http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf [cit. 2014-09-20].

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[8] ATKINSON, ROBERT D.: Effective Corporate Tax Reform in the Global Innovation Economy, report by *The Information Technology & Innovation Foundation*, 2009.

needs government-supported tax incentives more than many other business fields. IP Box is a successful tool which encourages firms to undertake investing. R&D tax credits and direct funding may have the same advantage, however they encourage investing in earlier stages of research while IP Boxes – in later stages of research. Therefore, these tax initiatives can successfully co-exist.

Another advantage is that, being first and foremost a tax incentive, which in some countries attains a rather high level of complexity, IP Box impacts not only investment in innovation and R&D in the country, but also creates a different climate for the operation of R&D and innovation companies and changes country's tax profits both in structure and in size. Therefore, a considerable amount of changes take place in country's economy when it opts for the introduction of IP boxes affecting both public and private sector. Together with a favourable corporate income tax rates, appropriate climate for the registration of new companies and a number of other factors, IP Boxes helps European countries to attract foreign companies and their subsidiaries, compete with offshore systems and with such knowledge-based economies as China, the USA and Canada, overall proving to be noticeable players in the international tax competition.

The aforementioned advantage, however, shows one of the disadvantages of the IP Box, which is that IP Box is only one factor of a series of elements which lead to the economic growth and success of a country. When introducing IP Box regime, governments must also think of other changes needed in state's legislation, administrative and economic structure, etc., which would make the particular country convenient for R&D and other business conducts.

Another disadvantage lies in the limited application of the IP Box. In most countries only income deriving from registered patents is eligible for the reduced tax, although including software, business know-how, secret manufacturing processes and other forms of IP would be far more beneficial for the overall economic success and interests of the society in the country.

Further, the disadvantage of IP Box regime in EU member states is that it would be beneficial for the countries to require that R&D and innovation activities which are related to the income that enjoys the reduced tax rate are performed in the particular country.[9] However, due to the EU principle that requires a free movement of goods, services and workforce, it cannot be done. This reduces the overall benefits of the IP Box in a single EU member state while not affecting the positive effects of IP Boxes on the whole EU and EEA economy.

Lastly, there is an ongoing debate in the EU Code of Conduct group discussing whether IP Boxes constitute state aid, which is prohibited by Article 107 under the Treaty on the Function of the EU. While it is unlikely that IP Boxes will be regarded as a state aid in the EU, the countries considering to introduce this tax regime have to consider the risks this might create.

[9] ATKINSON, ROBERT D. – ANDES, SCOTT: Patent boxes: innovation in tax policy and tax policy for innovation, report by *The Information Technology and Innovation Foundation*, 2011.

1.4. Introducing IP Box in Latvia

This paper focuses on trying to confirm the hypothesis that the introduction of IP Box regime in Latvia would increase the investment in R&D and innovation and would positively impact other components that pattern the overall economic success of the country.

Latvia aims to reach 1.5% of its GDP large investment in R&D by 2020, as is set out in the Guidelines on National Industrial Policy of Latvia 2014-2020.[10] Yet the indicator in 2012 has only been 0.66%[11], thus not reaching even half of this aim. As of July 1, 2014 Latvia has introduced R&D tax credit, which is the only R&D related tax incentive in the country. While it will take years to observe the impact of this tax initiative, the experience of other European countries suggest that the new incentive will not be sufficient to help Latvia achieving its goals.

Additionally, together with relatively low corporate income tax (CIT) rate of 15%, residence permit initiative and other government supported strategies, the introduction of IP Box may positively impact the operation of both local and foreign companies in Latvia. These allegations will be analysed in the third Section of this paper.

The rest of the paper is organized as follows: Section 2 overviews selected existing IP Boxes in Europe, thus allowing to observe different aspects of the tax regime that shall be considered when opting for IP Box in Latvia. Section 3 consists of the analysis about the possible introduction of IP Box in Latvia and Section 4 is constituted of concluding remarks.

2. OVERVIEW OF SELECTED IP BOXES IN EUROPE

2.1. Selected countries and introductory remarks

Malta, The United Kingdom and the Netherlands have been chosen as the three EU member states to overview in this section, each selected due to a certain distinct feature of each country's IP Box regime that distinguish it from others. Malta's IP Box tax rate is 0%, The United Kingdom's IP Box can be regarded as a 'typical Patent Box', while the IP Box regime in the Netherlands includes a wide range of IP thus being considered an 'Innovation Box' and having achieved a new level of this tax incentive.

2.2. Malta

Malta's IP Box rate of 0% comes of little surprise since the country is generally

[10] Nacionālās industriālās politikas pamatnostādnes 2014.-2020. gadam [the Guidelines on National Industrial Policy of Latvia 2014-2020], Ministru kabineta 2013. gada 28. jūnija rīkojums Nr. 282.

[11] Provisional. Eurostat table on Gross Domestic Expenditure on R&D. Available at: http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcode=t2020_20&tableSelection=1 [cit. 2014-09-20].

recognized as being a tax haven.[12] Malta's CIT rate is 35%, however the country has an imputation system of taxation in place. This means that most of the Maltese companies can apply for a tax refund that makes the national CIT rate turn in an effective rate of only 5%, which is the lowest CIT rate in the EU.[13] Thus, a tax exemption for IP, which was introduced in 2010, seems to be yet another Maltese incentive to make the country into one of the most attractive tax jurisdictions in the world.

Types of IP that qualify for the tax exemption under IP Box regime include patents, as well as copyrights and trademarks associated with the qualifying patents. Therefore, software and databases are exempt from CIT in Malta which is rarely a case in other countries where IP Box regime has been introduced. The main requirement for a patent to qualify for IP Box tax rate is that it shall be a product of either a fundamental, industrial or experimental research. However, the corresponding R&D associated with the creation of a patent can take place anywhere in the world. In addition, the patent can be registered in countries outside of Malta as well, provided that it can be patentable under Maltese laws. Further, Malta's IP Box applies also for those patents, copyrights and trademarks which were registered before the introduction of the new tax incentive and, in addition, companies that have acquired their IP rather than created it themselves, can apply for the tax exemption as well. As regards the qualifying income, the provisions of Maltese law states that "royalties and similar income" deriving from IP can be exempt from CIT, thus allowing companies to apply 0% tax rate to an income which is generally interpreted in a rather broad way.[14]

2.3. The United Kingdom

The United Kingdom (UK) opted for the IP Box regime as recently as in April 2013. The reduced tax rate is 10% which is 11 percentage points less when compared to a CIT rate, which is currently set at 21%.[15] However, the new tax incentive is being introduced gradually in five phases allowing companies to apply 10% tax rate to only 60% of income deriving from IP in 2013 and then raising this percentage by 10% every year up until 2017 when firms will be able to apply the reduced tax rate to all income qualifying for the IP Box tax rate.

The types of IP qualifying for the reduced tax rate are patents that are registered in European patent offices, supplementary protection certificates and veterinary, medical and plant protection certificates. The UK has chosen a "development" and "active ownership" conditions for the companies that tend to apply a reduced tax rate for their income deriving from IP, namely, firms must have played a certain role in the development of a patent thus acquired IP cannot qualify for a 10% tax rate. The UK hopes to incentivise actual R&D and innovation

[12] While there is no universal list of tax havens to support this allegation, this claim is not only supported by a general belief amongst tax advisers but also by surveys and working papers by OECD and other international organisations.
[13] Malta: The IP and R&D jurisdiction. Deloitte Malta. August, 2012.
[14] Ibid.
[15] Source: IBFD Tax Research Platform.

activities with these requirements rather than promote simple buying and selling of IP from company to company in order to reduce the tax burden. Although firms that can benefit from this tax incentive generally have to be either UK-based or UK permanent establishments, the patents can also be owned by non-UK resident companies in case if the firm is a member of a group, in which another firm owns the patent. Thus, benefits of the UK's IP Box can be used not only by local, but foreign firms as well. In the same way as Malta's IP Box, the UK's tax incentive is applicable not only to patents registered after the introduction of IP Box, but also before 2013. Further, similarly to Malta's IP Box, the UK's IP Box regime also maintains a broad definition of qualifying income stating that all relevant income deriving from IP qualifies for the reduced tax rate. The calculation of the qualifying income differs from Maltese one, though, since in the UK IP Box tax rate applies to net income, which is calculated using a specific formula which is stated in the provisions of national law.[16]

2.4. The Netherlands

The Netherlands introduced its IP Box regime in 2007 when it in many ways resembled the UK's 'typical Patent Box' with the reduced tax rate being set at 10% and patents being the main type of qualifying IP. However, in 2010 the Netherlands decided to further develop the new tax incentive by making it even more attractive to R&D and innovation firms. IP Box tax rate was reduced to 5% and new types of qualifying income were included thus making the Netherlands IP Box into what is now known worldwide as an 'Innovation Box'. This IP Box rate is one of the lowest in the world, in addition being 20 percentage points less than current the Netherlands CIT.

Types of IP qualifying for IP Box tax rate are patents that are registered anywhere in the world and IP which has resulted from R&D activities but cannot be patentable according to universal standards, for example, software, trade secrets, manufacturing processes, scientific models and others. For such intellectual property R&D certificate, which is granted by the authorities of the Netherlands, must be gained. While both resident and non-resident companies can use benefits of the regime, the IP Box is aimed at local firms more than foreign since there is a requirement that a Dutch company is responsible for most of R&D activities associated with the patent or non-patentable IP. In addition, in case of non-patentable IP, at least half of respective R&D activities must be conducted in the Netherlands rather than abroad. Thus, the Netherlands has aimed to incentivise local R&D and innovation development with the introduction of their IP Box. Unlike in Malta and the UK, there is a time limit set for qualifying IP in the Netherlands – it must have become a business asset after the end of 2006; IP registered before the end of 2006 cannot qualify for the reduced tax rate. Further, similar to the case of UK's IP Box, the net income deriving from IP is taxed at a reduced rate of 5%.[17]

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[16] Guidance on the Patent Box Regime. Patentise. December, 2012.

[17] European Patent Box Regimes. Japan External Trade Organisation. Pricewaterhouse Coopers LLP. April, 2013.

2.5. Comparison of selected IP Boxes

It can be deduced from the descriptions above that while each of the selected countries has incorporated certain special features and focus areas into their IP Box regimes, all three IP Boxes maintain similar fundamentals.

First of all, IP Box tax rate is significantly lower than CIT rate in all selected countries. Secondly, all of selected IP Boxes focus on IP that is associated with R&D activities and innovation rather than IP of any kind. In this respect the UK and the Netherlands have additional requirements regarding the location of qualifying companies in order to primarily foster local R&D. Thirdly, all three countries have a relatively wide definition for the qualifying income and have chosen not to put a cap on the amount of income that can benefit from the IP Box tax rate thus making this tax incentive accessible for more companies than might seem from the first sight.

However, selected IP Boxes reveal differences as well. Malta has opted for an extreme IP Box regime offering a full tax exemption for the qualifying IP, in addition not putting any constraints on the location where patents are registered and where the respective R&D activities take place. Further, the UK's IP Box is being introduced in phases, has a special formula for a calculation of the qualifying income and requires companies to have actively taken part in the creation of qualifying IP. Finally, the Netherlands has chosen to include non-patentable IP in its tax incentive, focus its IP Box on local firms more than foreign and, unlike Malta and the Netherlands, does not qualify all IP regardless of the registration of it in the patent office.

3. INTRODUCING IP BOX IN LATVIA

3.1. Current taxation and protection of IP

Currently there is no special taxation of income deriving from IP in Latvia, thus the respective income is taxed at a corporate income tax rate, which is 15% for both resident and non-resident companies except for companies that qualify for a micro-enterprise status. Micro-enterprises (which are firms with a turnover of less than 100 000 EUR a year that in addition to this rule have to comply with other requirements stated in national law) have to pay a micro-enterprise tax at a rate of 9% of company's turnover instead of a CIT. Latvia's CIT is the third lowest in the EU with EU's average corporate income tax rate being set at 22%.[18] The average IP Box tax rate in EU countries is 8% with two countries – France and Spain – having IP Box rate equal to Latvia's CIT rate.[19] Thus, on EU scale Latvia's tax regime can be regarded as attractive for the income deriving from IP in spite of having no special tax incentive for that.

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[18] Source: IBFD Tax Research Platform. EU's average CIT was calculated without surcharges; in countries where several CIT rates are applied, the most widely applicable rate was used in calculation.

[19] EVERS – MILLER – SPENGEL: op. cit.

While having no tax incentive for the income deriving from IP, Latvia has an initiative regarding R&D expenditures, which essentially is a R&D tax credit in its nature. Firms can subtract three times of their investment in R&D activities from the income that is liable for a corporate income tax. This initiative came into force only as recently as in July 2014 with R&D tax credit being only half of its current size before this date. Amendments in the Law on Corporate Income Tax not only included raise in R&D tax break but also clarified definitions and scope of R&D activities thus showing that Latvian government is increasingly placing focus on how to incentivise innovation in the country.

Patents, trademarks and designs can be registered in the Patent Office of the Republic of Latvia and are protected by national laws. These types of IP are protected by Law on Patents, Law on Trademarks and Indications of Geographical Origin, Law on Designs and several regulations issued by the Cabinet of Ministers. In addition to this, IP in Latvia is protected by provisions of international conventions that Latvia is a party to. Thus, applicants may file international application for the protection of their invention by using the Patent Cooperation Treaty (PCT) system, by filing an application to the European Patent Office (EPO) or the Office for the Harmonisation in the Internal Market (OHIM), or using other international means. Additionally, as an EU member state, Latvia has to conform to the general principles of the Union, such as free movement of goods and services, and thus has to protect IP registered in other EU member states in the same way as nationally registered IP.

3.2. Current development of R&D and innovation

According to the Guidelines on National Industrial Policy of Latvia 2014-2020, which have been set out by the Ministry of Economics of the Republic of Latvia, Latvia's plan is to support and complement the general objectives of EU, which were described in Section 1 of this paper. Latvia intends to increasingly shift its economy to knowledge-based one by modernizing its industry and producing sophisticated goods and services.[20] As was described in Section 1, reaching an overall 1.5% large investment of national GDP in R&D and innovation fields by 2020 would be a positive indicator which would show that Latvia's economy is successfully growing and developing in the planned way.

However, current indicators of the development of R&D and innovation in Latvia are one of the worst in EU. Only three EU member states currently have a lower rate of gross domestic expenditure on R&D than Latvia with Latvia's investment in R&D being only 32% of the overall EU indicator.[21] Latvia has the lowest share of government budget appropriations or outlays on R&D in the EU with Latvia's rate set at only 0.4% while overall EU's rate having been 1.42% in

[20] Nacionālās industriālās politikas pamatnostādnes 2014.-2020. gadam.

[21] Indicator for year 2012. Eurostat table on Gross Domestic Expenditure on R&D. Available at: http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=0&language=en&pcode=t2020_20 [cit. 2014-09-20].

2012.[22] Latvia has the second lowest indicator of R&D personnel in the EU not reaching even half of the overall EU rate.[23] Total researchers in business enterprise sector in Latvia constitute only 14% of all researchers in the country thus showing that R&D activities take place mainly in government and higher education sectors rather than corporate sector. In comparison, the respective indicator in the EU is much higher – 37%.[24] Thus Latvia is generally unable to compete in R&D and innovation fields with not only those EU countries that have introduced IP Box regime, R&D tax credits or other R&D related initiatives but also with other EU member states regardless of their R&D tax incentives.

As regards the products of R&D, that is, essentially the creation of intellectual property, Latvia ranks 34 out of 143 in the Global Innovation Ranking 2014.[25] Latvia ranked 49 in relation to patent grants, 55 with regard to trademark registration and 43 in industrial design registration in 2012[26], lagging behind 8 out of 9 EU countries that have introduced IP Box regime and, in addition to that, also most of other EU member states.

Additionally, there are few other indicators which show negative aspects of the development of R&D and innovation in Latvia, for example, only 15 out of 150 Latvian scientific institutes were acknowledged to be competitive on a worldwide basis in a recent assessment conducted by the Ministry of Education and Science.[27]

However, several indicators show that Latvia has the necessary resources to be able to develop its R&D and successfully compete with other EU member states. The share of the population aged 30-34 years who have successfully completed university or university-like education is higher in Latvia than in the EU on average and even exceeds Europe 2020 target[28], which means that the population of Latvia is highly-educated and thus can offer a suitable workforce for innovation related fields. Slowly but steadily Latvia presents itself on the

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[22] Eurostat table on Share of government budget appropriations or outlays on research and development. Available at: http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tsc00007 [cit. 2014-09-20].

[23] Indicator for 2012. Eurostat table on Research and development personnel, by sectors of performance. Available at: http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tsc00002 [cit. 2014-09-20].

[24] Indicator for 2011. Eurostat table on Total researchers, by sectors of performance. Available at: http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tsc00003&language=en [cit. 2014-09-20].

[25] The Global Innovation Index 2014. Available at: http://www.globalinnovationindex.org/content.aspx?page=data-analysis [cit. 2014-09-20].

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[27] Zinātnisko institūciju novērtējums [Assessment of scientific institutes in Latvia]. Available at: http://izm.izm.gov.lv/ZI-novertejums.html [cit. 2014-09-20].

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international scene as a country with rapidly growing business area of information technologies (IT) – Latvia has the sixth fastest average Internet connection speed in the world[29] and its potential in IT has been recognized by global technology services, banks and consultant companies which set up their outsourcing centres in the country.

3.3. Advantages arising from introduction of IP Box regime and other considerations

It can be deduced from descriptions in the two subsections above that Latvia has a pressing need regarding the introduction of new government-supported strategies that would increase R&D activities, investment in R&D and innovation, raise the number of registered IP and provide solution to other aforementioned issues. While the introduction of IP Box regime is not the only possible strategy to undertake in order to solve these problems, the described ratios and indicators show that it is unlikely that a simpler and narrower incentive would be sufficient in Latvia's case. Although the advantages of IP Boxes were already discussed in Section 1, it is important to emphasize in the case of Latvia that this special tax incentive not only has direct but also indirect effects which can positively impact economic and social components of the country. The key feature of IP Box incentive is that it is focused on commercialization of IP and increase in income deriving from it. Thus, the introduction of IP Box can, as an example, make Latvia's country image more attractive, increase regulatory quality, incentivise formation of subsidiaries and branches of foreign companies in Latvia, spur manufacturing of products which have been registered as patents through regime, etc.

Thus, even though Latvia's CIT rate is one of the most competitive ones in the EU, Latvia remains to be amongst the countries with high shadow economies. In the World Bank's report Latvia was listed as 53rd smallest shadow economy amongst 120 economies in the world between 1999 and 2007, thus indicating that it has one of the highest shadow economies amongst EU member states.[30] Therefore, one can create such a model: even if Latvia chose to introduce an IP Box with a relatively high tax rate when compared to its CIT rate, for example, half of the current CIT rate, that is, 7.5%, then Latvia's IP Box rate would be the sixth lowest amongst EU IP Box rates (see Figure 1 below). Hence, one can predict that such tax regime would incentivise compliance with tax regulations on a local level and would attract foreign investment from other EU member states.

[29] Akamai's State of the Internet. Q1 2014 Report. Volume 7, number 1. Available at: http://www.akamai.com/dl/akamai/akamai-soti-q114.pdf?WT.mc_id=soti_Q114 [cit. 2014-09-20].

[30] SCHNEIDER, FRIEDRICH – BUEHN, ANDREAS – MONTENEGRO, CLAUDIO E.: Shadow Economies All over the World. New Estimates for 162 Countries from 1999 to 2007, in *Policy Research Working Paper*, No. 5356. (2010).

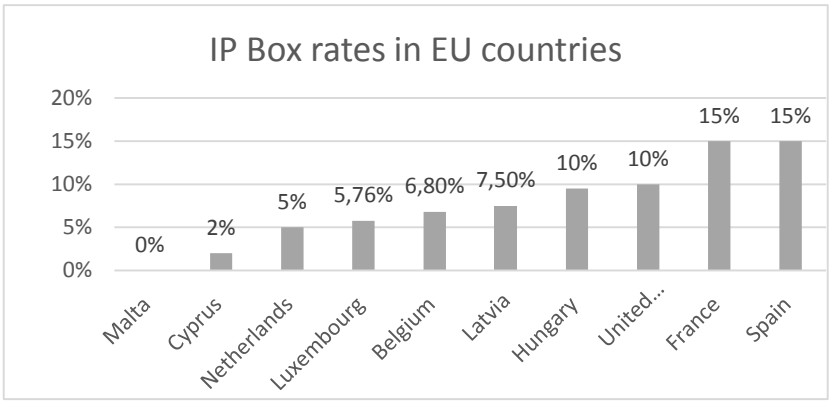

Figure 1: IP Box rates in EU countries. Latvia does not have an IP Box regime and is included in the graph for comparative purposes.[31]

Further, the introduction of IP Boxes would require changes in legislation. While at first this might seem like a burden to businesses since they would have to comply with new provisions of law, it could be a great possibility for Latvia to increase its regulatory quality and enforcement of the rule of law. It would be an opportunity to clarify the regulatory framework regarding R&D and innovation and, in addition to this, also related fields, for example, ones regulated by the Commercial Law, Law on the Micro-enterprise Tax, Law on the Corporate Income Tax and others since the tax system would change. Regulatory quality and enforcement of the rule of law have long been known as important factors which companies consider when choosing a certain business action or overall strategy. Figure 2 (see below) shows that all EU member states that have IP Box regime, except for Hungary, have higher Worldwide Governance Scores in both of these areas than Latvia. Thus, if Latvia opted for an IP Box and, in addition, managed to raise firms' beliefs in Latvia as a country with a clear and trustable system of legal enactments, companies would be incentivised to undertake investment in R&D that they would not have had undertaken without the new regulations.

[31] Source: EVERS – MILLER – SPENGEL: op. cit.

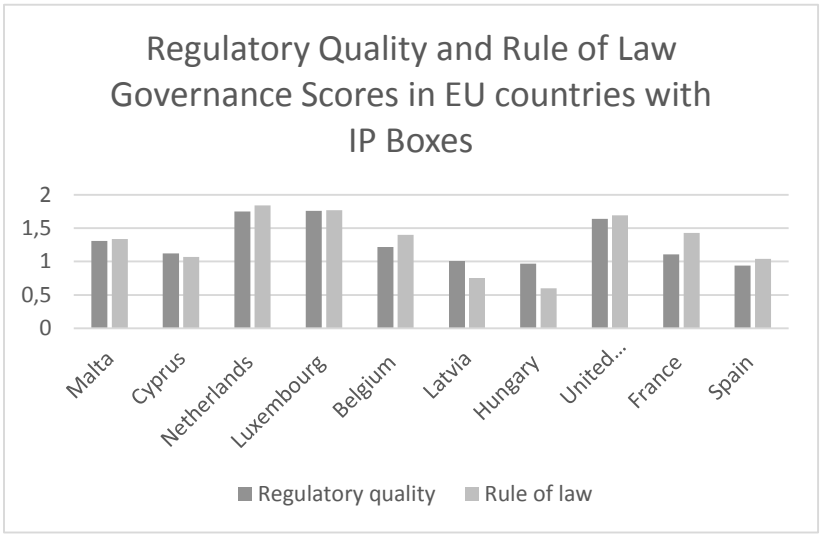

Figure 2: Regulatory Quality and Rule of Law Governance Score in EU countries with IP Boxes (in the range -2.5 to 2.5; data for year 2012). Latvia does not have an IP Box regime and is included in the graph for comparative purposes. Source: Worldwide Governance Indicators.[32]

However, it must be noted that the scope of this paper and available statistical data does not allow to unambiguously state that the introduction of IP Box in Latvia would be advantageous and lead to positive effects described in this paper. IP Boxes are too new of an incentive to give enough statistical data which would either prove or reject the hypothesis that it raises investment in R&D and is a more effective incentive than R&D tax credits, direct funding or others. Additionally, the quantitative considerations regarding possible correlation with other positive effects on Latvia's economy arising from the introduction of IP Box regime maintain certain ambiguities as well. Nevertheless, none of the EU countries that have introduced the IP Box regime in the recent years has opted for a termination of it or publicly called it an unsuccessful tax incentive, therefore it remains to be a tax initiative to consider also for Latvia.

4. CONCLUSION

IP Box is a relatively new tax incentive which offers a reduced tax rate for IP income or a partial exemption of tax for the income which is generated from IP and is aimed at incentivising investment in R&D and innovation. Currently eleven countries in Europe have introduced this special tax regime with the reduced tax rates ranging from 0 to 15%, thus in most of the countries being set at significantly

[32] Available at: http://info.worldbank.org/governance/wgi/index.aspx#reports [cit. 2014-09-20].

lower rates than national CITs. Unlike other R&D and innovation related incentives, IP Boxes are targeted at the income rather than expenses thus incentivising commercialization of IP, which is the driver for economic growth and success since it positively impacts employment and manufacturing of high-value products.

In most of EU member states, the application of IP Box tax rate is limited to patents, however some countries offer this tax incentive to trademarks, designs and non-patentable IP as well. Some countries, such as the Netherlands and the UK, have put constraints on the location of companies that can apply for the reduced tax rate in order to incentivise local R&D. However, this can only been done to the extent that does not violate the principles of free movement of goods, services and competition in the EU.

The introduction of IP Box in Latvia would be beneficial since all R&D related indicators in Latvia are on average much lower than in the EU. Latvia aims to reach investment in R&D in the amount of 1.5% of national GDP by 2020, however the only nation-wide initiative related to innovation has been R&D tax credit, which was introduced only this year. Thus Latvian government has to take a rapid action in order to achieve its own plans. It is very likely that the introduction of IP Box in Latvia would positively impact national economy by attracting foreign investment, raising belief in a fair tax system and regulatory quality, creating new R&D related workplaces and developing knowledge-based manufacturing.

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Do or Pretend? Thoughts about the Defence Economic Relations of the European Security and Defence Policy

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Abstract
This paper shows the historical envrionment, the results and the problems of the defense aspect of the european integration. The author points out, that the defense integration is difficult not only on the field of capabilites, but on the area of armament and researches too. The study aims to draw attention to the fact, that the further strengthening of the european integration and the future of European Union are significantly based on the question of defense integration.

Keywords: *defense integration, European Union, armament industry, European Defense Agency*

JEL classification: *K39*

1. INTRODUCTION

The fact that the weakest and most critical point, defense- and security politics of the European integration is essencial for world power cues, furthermore the development of joint defense- and security is a long known matter. However it is worth to reflect on this matter from an unusual aspect, namely how do the issues of the more advanced economical integration appear on the horizon of defense- and security politics.[1] If this sector means a serious challenge in the foregoer

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The study exclusively presents the writer's point of view; those cannot be regarded as standpoints of the institution where the writer is employed.
The writer's research was conducted among the frames of the National Program of Excellence – a convergence program, an important project for developing and operating a system that ensures personal support for national students and researchers; identification nr. TÁMOP-4.2.4.A/2-11/1-2012-0001. The project is being realized with the support of the European Union, with the European Social Fund's co-financing.
[1] Next to the political references it would be reasonable to analyze the aquisitional, armaments industrial and logistical reality in another study. About the changes of this and it 21st century questions see: VARGA, LÁSZLÓ – TURCSÁNYI, KÁROLY: *A brit védelmi*

economical integraiton, then consequences can be drawn about the political integration, broader in point of the EU's defense matters and it's whole future.

This domain induces actual and critical questions for years, that is amplified by every characteristic of the postjaltan internation environment, together with the economical world-wide crisis and the effects and processes generated by it, which is their own duality point at the invigoration of the state's role once again, as much as they create an opportunity to the political integration's recruitment.

2. THE PANORAMA OF TWO AND A HALF DECADES: POSTJALTAN ENVIRONMENT AND WORLD CRISIS

„Nowadays to say that we live in a transition between an old, dying and a new, unborn world order counts as a cliche"[2] still this is the reality. The previous world order, in other words the so called jaltan world order ended, as most of its essential criteras disappeard. This of course has different effect in regerd to geopolitical and world power matters and has different effects on economical and research segments. However the differences are important between these diverse effects and domains, sithence after the end of the jaltan order the world economy, as a world order without the barrier of bipolar superpowers – but with still present partially nation-state limits – could become whole and create a very complex global network. To revise the events of the last period from the viewpoint of the study's subject, it is imperative to look at the changes on the world order's level which acted significantly in point of the economical order too.

„The jaltan setting was unparalled in history. This world order wasn't created by a single empire's hegemony or generated by states of broadly equal in power size multi-actor balance sport, instead it was established by the agreement of two nations that were militarily far more powerful than the others. Their direct impact, or rather influence expanded to the whole world not only figuratively but literally."[3] Therefore what ended is a global order that was based on the military, troubled on the surface but based on an unspoken agreement, built on an arms race

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beszerzések reformja [The reform of british defense procurement], 2003, Zrínyi Miklós Nemzetvédelmi Egyetem Egyetemi Kiadó, Budapest. VARGA, LÁSZLÓ – TURCSÁNYI, KÁROLY: *Az amerikai védelmi beszerzések reformja* [The reform of american defense procurement], 2003, Zrínyi Miklós Egyetem Egyetemi Kiadó, Budapest. TURCSÁNYI, KÁROLY – HEGEDŰS, ERNŐ: A nagy távolságú (stratégiai) légi szállítás perspektivikus kérdései I. rész [The perspectival questions of long-range (strategic) airlifting, Part I], in *Katonai Logisztika,* Vol. 20. No. 4. (2012), 65-97.; TURCSÁNYI, KÁROLY – HEGEDŰS, ERNŐ: A nagy távolságú (stratégiai) légi szállítás perspektivikus kérdései II. rész [The perspectival questions of long-range (strategic) airlifting, Part II], in *Katonai Logisztika,* Vol. 20. No. 1. (2013), 62-87.

[2] MEZŐ, FERENC: A geopolitika formaváltozásai [The formchanging of geopolitics], in *Politikatudományi Szemle,* Vol. 15. No. 4. (2006), 75.

[3] GALLÓ, BÉLA: *A túlélés tudománya* [The science of surviving], 2000, Helikon kiadó, Budapest, 7.

and antagonistical opposition, which expanded to the whole world, notedly to given spheres of interest that gave mandate to act on their border. In my opinion this international power structure, in other word this world order was the first truly global world order in the history of humanity, which could own the real completeness of globality.[4] Consequently this world order was historically unique, and it is a fact that it ended, it is not clarified until this day that what kind of order comes after the transition or interregnum it left behind. It is questionable too that the forming new system will be able to own the characteristics essential to the wholeness of global world order similar to the jaltan.

The issue of the jaltan heritage may work out any way soever, it is sure that „a new, world order is forming that is very different from the jaltan. And if we don't close our eyes before the North Atlantic events […] we have to discover that on global levels the North-South […] conflict becomes more and more determinative. […] But it is at least this evident the fact that with the disappearance of the great enemy […] the weak point of the victors became increasingly obvious."[5]

It is a sad historical fact that the world haven't become more peaceful, predictable and more conflict-free with the break-up of the eastern block. The similarly important realization follows from it, that fundamental transformations take place in the circumstances that supporting the approaches until now, accordingly it is partially really true, „that it is typical to this new era that the power spreads over from the states to new actors"[6] In point of the changes it has proven true that there is not reason to exaggerations and euphoria. It is true the same way to the democracy's and liberal-capitalism's triumph as in point of the non-statal actors. The topic of this study levels to that domain in which the state's importance is still exclusive, and the so called revolutionary or at least historical postjaltan changes appear to be relative and partial.

It is proven true until today that several states' cooperative action is needed to hold the global peace and security on a relative level, as the fact too that the rivalism between the world powers is still exists, in which the United States of America is hegemon but not peak hegemon, since the thesis according to which the „USA transformed only in a century (…) into a power that can enforce its will anywhere on the world and its influence reaches anywhere in the world, first in the history."[7]

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[4] The previous „world orders" were only orders of continents, or world orders without the technical, economical and militry completeness, which existed only in the foregorund of the decisive hegemon sample in longer-shorther historical periods. I consider like this the age of Roman Empire, the perios of German-Roman Empire's strneght, and the Dutch- and then the English navaly hegemony.

[5] GALLÓ (2000): op. cit. 8.

[6] ZAKARIA, FAREED: *A posztamerikai világ* [The postameican world], 2009, Gondolat kiadó, Budapest, 33.

[7] BRZEZINSKI, ZBIGNIEW: *A nagy sakktábla* [The great chesstable], 1999, Európa kiadó, Budapest, 9.

With Zakaria Fareed's ideas placed in a somewhat different environment, we could say that the world called postamerican by him is „not about the fall of America, but about the rise of the others",[8] as Russia looks to be rising again, China may have began an unstoppable upswing, and next to all these, because of the EU's economical invigoration, the first steps were on the way to the power-political independence. If next to these peak actors we draw up the South American integration efforts or India's rising weight, then it is distinct that we live in a difficultly forecastable, and diffuse relation rich transient period. This multi-stakeholder aspect was made more complex and fearsome by the events of 11 september and the terrorist attacks followed by it, furthermore by the different modern security threats. As primarily we can say because of the international terrorism's attacks and their aftermath in Afghanistan and Iraq that „...the United States of America is in difficult situation, its myth of invulnerability shattered and its government undertook impractical tasks alone"[9]

The undertakeing of impractical taks brought a wide range of crises with itself. On the one part „Washington's intervention in Iraq caused a crisis in the North Atlantic Treaty. Germany and France disapproved of the one-sided american move.."[10] On the other part the war against terrorism and its security action made a serious chip on the constitutionality's requirements of predominancy. Thirdly this challenge pointed out again the importance of states' defense nature and the weight of the defense sector. Furthermore this kind of „crusade" somewhat divided the attention and on the level of common frame of mind the realisation of the economical world crisis became much more sudden too, which opened the way to the strenghtening of another field of statal intervention.

Accordingly the last ten years brough serious and remarkable changes on the field of the world politics and then to the world economy too, what together means a great challenge and numerous oppurtunities in the same time[11] for the european integration. The sum of oppurtunities reside in that, the legal and political integration shows a resolution for the tasks that burden – in some cases exceed – the nationstates in themselves. Several effective precedents appear for this in

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[8] ZAKARIA: op. cit. 31.

[9] DEÁK, PÉTER: *Biztonságpolitika a hétköznapokban* [Securitypolicies in the weekdays], 2009, Zrínyi kiadó, Budapest, 38.

[10] NAGY, LÁSZLÓ – RÁCZ, LAJOS: Nemzetközi erőközpontok a 21. század elején [International power centers in the beginning of the 21st century], in *Hadtudomány,* Vol. 18. No. 1. (2008), 75.

[11] Several analist of the European Union explained this:, *see*: „…the financial crysis is a risk and an opportunity in the same time for the European defense sector. On the one hand it looks reasonable the the decreasing budgets increase the cooprationg pressure for the member-states, and this way they solve the EU's problems regarding the defense industry and the trade development and structural conversion. On the other hand in spite of decade long speeches and initiations for more cooperation and less national interest, to the European Union's defense issues the national privilege is characteristical." – Direcorate General for External Policies, Policy Department: *The Impact of the Financial Crisis on Eurpean Defence*, 2011, SEDE, 14.

respect to research and economy. In the research field great steps were made towards the unifiacation of the intellectual property's law. „The law of intellectual property is one of the most widely, even internationally harmonized law area, this harmonization looks back to more than a hundred years history „„[12] and the experience it generated was used to ensure the harmonization on the Union's level for the research and developement. More intensive and dynamic changes can be revealed among the political integration's economically determined changes in regard to the money-markets' union control, as the world economical crisis generated by the credit crunch acted with such force on this filed, that opened the way for efficient changes for the union level.[13]

However next to the opportunities numerous challenges line up, these reside in that, it has to form actual abilities, next to the existing or the planned ones in numerous areas for the political aims and institutional frames to deepen the political integration. This is especially true in point of defense, it follows from this, that to the armaments industry and defense research and development too. The defense sector appears to be quite difficult area in this aspect, what on one hand can be justified by it's special political relations, on the other hand by it's special status in economy's order.

In its essence the extant – and the altering – power structure appears to be difficultly understandable, or at least hardly analysable and forecastable, as it were: „The international world of the early XXI. century, the increasing number of actors, the world disarrangement and world disorder offers even complex orientation alternatives than ever before."[14]

Compared to this the economical environment is prima facie more easily understandable insomuch that the world ecomony as world order with the decomposition of the bipolar could expand and become global without changing the political field and without political barriers.[15] As Wallerstein said: „The modern world order is world economical order – as much today as always in its history.

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[12] KESERŰ, BARNA ARNOLD: Adalékok a védjegyátruházás jogi megítéléséhez, I. rész, [Contributions to the legal judgement of trade mark assignment, Part I.], in *Iparjogvédelmi és Szerzői Jogi Szemle*, Vol. 7. No. 5. (2012), 17.

[13] *See* KÁLMÁN, JÁNOS: Toward the European Federation?: Reform processes in financial stability system of the European Union, especially to the early concept of European Bankunion, in *US-China Law Review*, Vol. 10. No. 1. (2013), 46-67; KÁLMÁN, JÁNOS: In the Name of the Integration – The Reform of the Financial Supervisory System of the European Union, in *International Relations Quarterly*, Vol. 5. No. 2. (Summer 2014). Available at: http://www.southeast-europe.org/pdf/18 /dke_18_a_eu_Kalman-Janos_The-Reform%20of-Financial-Supervisory-System-of-the-European-Union.pdf [cit. 2012-10-04].

[14] GALLÓ, BÉLA: *Az újkapitalizmus régi világa* [The old world of newcapitalism], 2010, Napvilág kiadó, Budapest, 14.

[15] „In the last part of the 20th century the unity of worldcapitalism was restored and the capitalis became a whole systeam again." SIMAI, MIHÁLY: *A világgazdaság a XXI. század forgatagában* [The worldeconomy in the vortex of 21st century], 2008, Akadémiai kiadó, Budapest, 26.

[…] One of the determinative attribute of the world economical orders is that, they are not bracketed by some kind of unified political structure. Instead of this, numerous political orders exist next to each other in the world economical order, which are connected by the net of loose interstate connections in our modern world structure."[16]

The global economical relations are moved by the clear economical interests in the centrum-halfperiphery-periphery relations system, and like this the economical connections and the research and development can cover the whole world like a network. This image is absolutely true only on the first approach, as the armaments industry and the defense research and development is that is attached to the states primarily and decisively builds on given states' order and claim, or at least well capturable national sphere of interest.[17]

Naturally the economical crisis affected the defense sector daintly too, as it amplified the states' existing tendencies, which bring forth the reduction of defense budget at any time. From Europe's point of view this is a double-edged phenomenon, as few of the EU states can be viewed as militarly weighty and the extant situation has additional negative effects on the not certainly satisfactory abilities, meanwhile the EU couldn't relieve the states even on a short term, even if they devoted themselves to this level of political integration to the pressure of the crisis. The most notable effect of the crisis' pressure would be the actual decision and the beginning of slow contruction. Th national fixity of the armaments industry appears much harder in respect to the EU, as the more developed states concerned by this market have a strong interest in keeping and strengthening their own armaments industry. Considering this market the EU has to do some basic unionisation steps, except the investment politics needed for occurrent unification. I could word the latter after all, that in pont of the armaments indunstry and this market's research and developent the EU should act qu. as astate. In respect ot the armaments industry it looks like the usual integration routine with instituion-building, and waiting for the right political moment. It is needed on this field to enchance the political integration, to build up the truly effective institutional background and to gently form the economical backgrount and the investment palette to reach slow but real successes, which could establish the developement of real union defence capabilities on the field of armaments industry.

3. EU EFFORTS IN THE DEFENCE SECTOR

„On 17 May 2004 the European Union's Council approved the 2010 Headline

[16] WALLERSTEIN, IMMANUEL: *Bevezetés a világrendszer-elméletbe* [Introduction to World-system analysis], 2010, L'Harmattan, Budapest, 57.

[17] To clarify, the main orderer of the american defense industrial companies is the United States of America, so they set their action and development profile for the insterests of the USA, because next to the orders of the States they count on the most immmediate allies and significant national dotation.

Goal, which reflects the objectives of the European Security Strategy and higlitedly emphasizes the qualitative improvement of capabilitiesand the quick reaction ability."[18] On 12 of July in the same year „the Council decided next to a joint action to create the European Defence Agency"[19], then at the end of November they decided about the creation of EU combat teams and finally as the ending of the year 2004 „the EU's military mission stared in Bosnia and Herzegovina (EUFOR Althea) as the continuation of SFOR activity"[20]

Sadly we have to say that after 2004 the Union had to face serious dilemmas – on this field too –, and the idea of division between the more and less developed areas emerged along with the thesis of the defence integration's core principled fortification. To the latter the European Security and Denfece Union's Belgian, French, Luxembourgish and German conception was the example, wich previsedan increased defence integration, in wich not all EU states would be necessarily partner. On the one hand this clustering would have redefined the Petersberg tasks[21] and the requirements and roles connected with its assumption, on the other hand it would have acutely increase the defence chatacter as if it were a „hard core" inside the EU. This two-speed plan, that can be related to the European conception, was only one of the clouded ideas after 2004.

Hovewer after 2004 the European Security and Defence instituion extended almost constantly both in agency and in qualification (see the European Security and Defence Academy), in some measure by the fulfilment of the constitutional procedure's partial results, and underkaen missons were ongoing too, the Joint Security and Defence Poilicy (henceforth: JSDP) got in the shadows of the hardnesses of mass enlargement, but even more in the shadows of the international events. It is true that the Italian presidentship accepted the European Security Strategy, which can be interpreted as additional big landmark, as well as serious decisions were made against organized crime and terrorism, and the protection of the borders, still the Iraqi war and with it the depraved transatlantic were what became decisive.

Certainly this overshadowed state, that was replaced by the economical crisis

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[18] *European Security and Defence Policy 1999-2009*, ESDP Newsletter Special Issue 2009., available: http://www.iss.europa.eu/publications/detail/article/esdp-newsletter-special-issue-esdp10/ [cit. 2011-08-24].

[19] Ibid.

[20] Ibid.

[21] These arrangement were expanded by the Petersberg declaration in 1992, which stated by law the frames of the european defense and security organisation, and it adverted these functions to the WEU's sphere of action: (1) peacekeeping, (2) humanitarian actions, (3) rescue actions, (4) crysis-mangement, (5) security roles regarding conflict prevention.
The Petersberg head stated that the WEU is authorized to partially requisite the NATO forces disposed by the member-states, and the development of required military abilities has to be started immediately, the creatio nand realization of „'the forces offered to cooperation with' program', in which the member-states can command forces to particular tasks, and missons. *See* BABOS, TIBOR: *Az európai biztonság öt központi pillére* [The five central pillar of european security], 2007, Zrínyi kiadó, Budapest, 116-117.

in 2008 and lately by the answers given to it, does not mean the break of developement. It can be valued as a positive sign that „the European Defence Agency was created by the joint action of the Council of Ministers with the purpose to (1) improve the defence capabilities, especially the crisis management of the EU; (2) move fordward the armament collaboration of the Union; (3) establish the EU's defence industrial and technological foundations and to create a competitive European defence equipment market; (4) support the research to establish Europe's defence industrial and technological potential."[22]

Moreover it is important to state, that the JSDP wich gives the independent pillar, the body of common foreign and internal politics, operated and bloomed on a missional level, as „in 2005 the EU took over the command of the stabilisation forces stationed in Bosnia-Herzegovina. These were followed later by short term missions in Africa, Asia and in the Middle East. In the May of 2007 the EU started a police mission for 3 years in Afghanistan, and it stationed a militry force with more than three thousand men in borderland of Chad and Middle-Africa at the beginning of 2008 to provide protection for the refugees who had to abandon their homeland because of the battles in the neighbouring Darfur region. The Union carried out a naval misson for the first time in 2008. The goal of the misson was to provide protection from the pirates for the ships delivering food aid to the country."[23] These and especially the naval missions were followed by others.[24] and are followed by until today, for which the most essential organisational developmenents slowly come to fruition expanded by the effort to harmoize the european armaments industry products and the market.

Besides the always returning criticism is well known in point of the JSDP, that the – political – organizational structure was given and readied before Lisboa, partial results pre-existed, but in military manner first the 2003 offering and then the setting of offering for 2010, was that did not live up to the expectations from the point of view of function and operability. The critics lay it down again and again, that the EU repeats its own failures again and again when it creates the institutional and organiztaional settings, but forgets to assign the tasks and executive capacity, or creates it faultly.[25]

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[22] Európai Védelmi Ügynökség, available: http://europa.eu/agencies/security_agencies /eda/index_hu.htm [cit. 2011-05-10].

[23] Közös Kül- és Biztonságpolitika, available: http://europa.eu/pol/cfsp/index_hu.htm [cit. 2011-05-10].

[24] *See* TARDY, THIERRY: EU-UN cooperation in peacekeeping: a promising relationship in a constrained environment, in ORTEGA, MARTIN (ed.): *The European Union and the United Nations*, 2005, Partners in Effective Multilateralism, Chaillot Paper No. 78.; GAZDAG, FERENC*: Az Európai Unió közös kül- és biztonságpolitikája* [The Common Foreign- and Security Policies of the European Union], 2000, Osiris Kiadó, Budapest; VAN HEGELSOM, GERT-JAN: External action of the European Union, in *Collegium,* No. 34, (2006); BABOS, TIBOR: *Az európai biztonság öt központi pillére* [The five central pillar of european security], 2007, Zrínyi kiadó, Budapest.

[25] *See* GÁLIK, ZOLTÁN: A közös európai kül- és biztonságpolitika történelmi tapasztalatai és a Lisszaboni Szerződés [The historical experience of the european common foreing- and

In accordance with some observations in point of the suggested and real flaws – accordint to my standpoint it is relevant – the Lisbon Treaty could not make a beaktrough on the field of JSDP, although it is uquestionable, that it brought revolutionary changes in point of the Common Domestic and Foreign Policy (henceforth: CDFP) with the new organizational, agency and importance rating, and with the termination of the pillar system and CDFP'S integration into politics. On the whole I think that despite the succesful reforms[26] on the field of foreign policy, Lisbon made only technical changes in point of JSDP and made only declarative messages to the future.

After all we have to highlight the European Defense Agency as an accomplishment in the negative characterization, which is the most important among the agencies falling under the head of the JSDP. The main taks of the agency created by the joint countenance on 12 july 2014 and which is seated in brussels is to „support the endeveaors of the states and the council made to improve the european defense capabilities and the decisions made on the field of crisis management, and the maintenance of the european security and defense policy's current form and it's developement in the future."[27] The joint decision was changed to a regulation on 12 july 2011, thus indicated by the leaders of the EU the intention to support and consolidate the Agency. It was decisive in the creation of the agency that the members of the Union „conventionally spend less on defense expenses and research and developement on the field of armaments industry. The high level of fragmentation makes the efficiency improvemets of the European armaments industry much more difficult. The aim of the agency's creation was to improve and synchronize the development of states' defense capabilities, the promotion of military preparations, to keep an eye on the industrial and technological defense

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secutiry policies and the Treaty of Lisbon], in *Grotius*, available at: http://www.grotius.hu/doc/pub/MVVYUP/73%20galik%20zoltan.pdf [cit. 2010-05-08].

[26] *See* GÖMBÖS, CSILLA: *Két év távlatából: Az Európai Külügyi Szolgálat* [After two years: The European Foreing Service], in KÁLMÁN, JÁNOS (ed.): *Quot capita, tot sententiae, a Batthyány Lajos Szakkollégium Tanulmánykötete II*. [Quot capita tot sententiae, Studies of Batthyány Lajos College II.], 2013, Batthyány Lajos Szakkollégium, Győr; GÖMBÖS, CSILLA: *Egység az átláthatatlanságban?* [Unity in opacity?], in FARKAS, ÁDÁM – NÉMETH, IMRE – KONCZOSNÉ SZOMBATHELYI, MÁRTA – SZABADOS, ESZTER (ed.): *Optimi Nostri, Díjnyertes Állam- és Jogtudományi Diákköri Dolgozatok 2013* [Optimi Nostri, Award-winning student circle papers from Law and Political Sciences 2013.], 2013, Universitas-Győr Nonprofit Kft., Győr; KISS, J. LÁSZLÓ: *Európai Külügyi Szolgálat, avagy lehet-e global payerből global player?* [European Foreign Service, could become a global payer to a global player], in *Magyar Külügyi Intézet, Tanulmányok*, No. 1. (2011); BROK, ELMAR: *Prejudices, Challenges and Potential: an Impartial Analysis of the European External Action Service*, available at: http://www.robert-schuman.eu/doc/questions_europe/qe-199-en.pdf [cit. 2012-10-04]; GRAHAM, AVERY: *The EU's External Action Service: new actor on the scene*, available at: http://www.epc.eu/docu ments/uploads/pub_1223_the_euro pean_external_action_service__new_actor_on_the_scene.pdf [cit. 2012-10-04].

[27] Missions and functions, available at: http://www.eda.europa.eu/aboutus/whatwedo/missionandfunctions [cit. 2011-09-02].

market of Europe, as well as on the support of research and developement of the armaments industry."[28] The angency becomes decisive with this, as it coordinates between armaments indusrty's companies, as well as it does among the member-states who appear on the market as customers, and completes this with providing information for the memeber-states and performing advisory and expert tasks. This intgrated approach contributes to the unified improvement of capabilities, where supply and demand will connect optimmally to save time and expense. Hovewer beyond the cooperation the agency's operation and approach gives a change to reshape the industrial sturcture and to form a continental armaments industrial market.[29]

Since the establishment of the agency – thanks to the agency itself too – different regulational and declarative steps were made, which pointed toward the unfication, although with the „overpondered advance" peculiar to political integration. From these we could firstly emphasize the Green Book of Public Purchase of National Defense[30] fo 2004 based on „Towards a European Union Defence Equipment Policy"[31] titled Communication from the Commission of 2003, which points out that it wishes to contribute to the the gradual development of „European Defence Equipment Market" (EDEM), which is the creation of a more transparent and relatively more open market between the member-states, which – with respecting the characteristics of the economical sector – would improve it's economical effectiveness. The progress towards the Europe sized market has key role in the improvement of European economical sectors' competitiveness, in providing better distribution of national defense connected funds and in the cause of supporting the Unions military capacity developement, in the scope of the Joint Security and Defense Policy (JSDP)"[32]

The Green Book pointed out in the same time the characteristics that lie in the armaments industry, and to the fact that the unification is essential to this market too, so much to the whole economical integration as in regard to the strenghtening of the political integration's real capability development. This effort – which was indicated by the GreenBook's statements – was followed by actual decisions. from these „A strategy for a stronger and more competitive European defence industry",[33] that was accepted by the member-states, and the „The Code of Best

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[28] KENDE, TAMÁS – SZŰCS, TAMÁS (ed.): *Bevezetés az Európai Unió Politikáiba* [Introduction to policies of European Union], 2009., Osiris kiadó , Budapest, 764.

[29] Missions and functions, available at: http://www.eda.europa.eu/aboutus/whatwedo/missionandfunctions [cit. 2011-09-02].

[30] COM(2004) 608, Zöld Könyv – A honvédelem közbeszerzése [Green Paper – Defence procurement], Brüsszel.

[31] COM(2003) 113, Communication from the Commission of 11 March 2003: Towards a European Union Defence Equipment Policy.

[32] COM(2004) 608, 3.

[33] The Code of Conduct on defence procurement of the EU Member States participating in the European Defence Agency. Brussels, 21 November 2005.

Practice in the Supply Chain"[34] of 2006 has to be highlited. These policies, that were accepted by the member-states, were pointing toward the union of the purchase side, of course these can't be called breakthroughs because of the political bargain processes, particularly not if we take into account that these were followed by the specification of the „Treaty in the field of defence procurement"[35] in 2006, which again pointed out the characetristics of the defense industry and reinforced the political obstacles that hindered the creation of the Europen defense market.

The exception specification was reasonlike, yet from the integration's point of view it was still valued as step back, and its weight was felt by the Union's decision makers too. Because of this in 2007 they released a strategical communication with the tilte of „A strategy for a stronger and more competitive European defence industry",[36] in which they schedule the conditions and tasks of the unification of the european defense industry. This strategy – which was created only in the form of a communication – did not complete – not even partially – until today. After this the defense market's relations were mainly affected by the decisions in connection with the security strategy, like the decision concerning weapon commerce, which neither can be called particular successes.

So the passed time shows, as if the forming of unified European defence market stopped, and this establishes assumptions in connection with the creation of the unified European defense capabilities, namely with the political integration's further strengthening. From the point of view of the integration these negative assumptions can not be neutralized by the mission activities, nor the institutional changes experienced on the field of foreign service, especially not because the numers concerning the defense market show fragmentation rather than integration.

On the one hand we can tell, that the Union's armaments industry is almost 90% concentrated in the six most powerful industrial memeber-states, namely in the United Kingdom, France, Germany, Italy, Spain and Sweden. On the other hand however we can see that in the region there are more than 2000 companies and more than 80 000 suppliers are registered. Next to the more significant industrial states, it is typical to the smaller states that they give home for numerous armaments industrial companies. The fragmentation is well shown by that, from the worlds 20 leading armaments indurtial companies there is only 5 european, while from the 100 biggest firms approximately 33. This question's highlighted economical significance is well pointed out by the fact that there are more than 700 000 people in Europe who work for purely armamtents industrial companies,

[34] The Code of Best Practice in the Supply Chain, Approved by the Aerospace and Defence Industries Association of Europe (ASD) on 27 April 2006 and agreed by the EU Member States participating in the European Defence Agency.

[35] COM(2006) 779, Commission interpretative communication of 7 December 2006 on the application of Article 296 of the Treaty in the field of defence procurement.

[36] COM(2007) 764, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 5 December 2007 – A strategy for a stronger and more competitive European defence industry.

while there are more than one and a half million people working for suppliers. Next to these numbers, it is worth to think about the income of the industry, which immediately shows why are some states so attached to maintaining national control and try to slow the unification.[37]

Probably by recognizing this too the Union's leaders decided that after their last successful expressly security and defense politics themed conferecnce in 2008[38] they sit down to the conference table for the sake of the JSDP's improvement on 19-20 December 2013. According to expert analisyses this discussion did not bring a breakthrough again. As Tamas Csiki writes: „In the light of all this we can tell, that the significance of the 19-20 December summit meeting was mainly procedural and communicational, because it draw the European decision makers' and somewhat the public opinion's attention to joint security and defense policy again. In the particulat problematic areas partial successes were born, which could help the continuation of already started processes and the fulfilment of programs, but it wasn't a breakthrough – and it can't be expected, until the necessary political will does not appear from the member-state's part."[39]

4. SUMMARY AND PROPOSITION

The future of the political integration and with it the European Union depends mainly on the unification of the defense sector, and then on the Union's joint defense capabilites created by the support of common defense industry. The harmonization of this field in fact belongs to the classical question of suverenity, since in one respect the states should have to – at least partially – give up the national control over the defense market, and after that they should support such a unified European defense investment policy, that could carry out an integrated market- and capability development. For this firstly it is necessary to create the appropriate regulation environment, secondly the budget frame for the developement should be at their disposal, thirdly it is necessary to further develop the institutional stucture to effectively supply the new aims. With all these, a harmonized capability upgrade could start in relation with the Union.

However next to the permanent and resounding successes the biggest question would still be open, namely that the memeber-states are willing to hand the key questions of defense to Union level, or insted of this they would create an effective

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[37] *See* SIMAI, MIHÁLY: A korszerű haderőfejlesztés nemzetközi tendenciái (2. rész) [International trends of modern army developement (Part II.)], in *Hadtudomány*, Vol. 22. No. 1-2. (2012), 4-18.

[38] Although in 2012 a meeting was held to strengthen the prvious decisions, but the experts stated about this that it didn't mean any meaningful advance. *See* CSIKI, TAMÁS: *Az Európai Tanács közös biztonság- és védelempolitikai csúcstalálkozójának háttere és eredményének értékelése* [The background and the rating of the defense- and security political summit of European Council], available at: http://nit.uni-nke.hu/downloads/Elemzesek/2014/SVKK_Elemzesek_2014_1.pdf [cit. 2014-04-16].

[39] Ibid.

offer based system and with this reject the idea of „Europe-state" once and for all.

In my opinion we have to realize, that there are unconcealable differences bettween the European military forces since the enlargement of 2004, which makes the operation of the literal European army impossible, and this can not be helped by the expectations towards the member-states, since the army development is rather costly activity, and in the current economical situation it is an uncompleteable task for the member-states in point. This problem could be solved on one part by the strenghtening of th European Defense Agency and the real unification of the European defense market, in which the Agency would not only coordinate the connection between the companies and the customer member-states, but it would appear on the market as the Union's sales executive, or it would operate as supervising institute of the a possibly establishable – partly member – state sponsored – European company group. By my conception the Union does not only need an unifying armaments industrial market, but it should accelerate the process by the joint action of its member-states with an Union armaments industrial company group. On the one hand I think the extension of the ATHENA sponsor program would by justified, or the creation of an independent European military capability improvement fund, which would sponsor the military improvement of member-states that assumes an obligaton – for example increased ready time battlegoup or EUFOR participation –, on the other hand to provide the funding of missing capabilitesfor member-states, for example by acquisition of new transport vehicles, but on Union level.

To sum it up I have to say, that a serious change in approach has to be made to strengthen the defense – and with it the political – integration and its succesful future. This could be an unfamiliar expectation in the current – newer – historical happy and peaceful days, but it can not be forgotten, that all the successes and results which realized in the integration, after all are viewed from the aspect of survival are standing on the foundation of defense capabilites, just as the state's functioning, and at present these capabilities are on nation-state level and very many-sided, as viewed from Union level they are rather fragmented.

So firstly the defense sector and capabilities has to be treated on their place, secondly solutions has to be produced which keep the advantages that are typical to the integration and the support of the undeveloped, thirdly on the defense line priority has to be given to the market and research and developement integration. Moreover I think on middle-distance the member-state offering system and their suverenity has to be respected, but on the long run a position has to be taken in the the suverenity vs. „Europe-state" question.

To simplify, in the territory of defense decision has to be made: Europe want to do or only to pretend?

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The European Union's Procedure for Concluding International Agreements after the Treaty of Lisbon

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Abstract
Due to the Treaty of Lisbon, the European Union (EU) could be more unified and more determined actor in the international area. The present paper examines the procedure for concluding of the EU, mainly based on provisions of the Treaty of Lisbon. The EU, as the legal person of international law, possesses rights and obligations, which is also manifested in the conclusion of international agreements. So it is important to put emphasis on the examination of those provisions which provide legal basis for concluding various international treaties by the EU, and in given circumstances establish the EU's competence. In this respect it would be analysed what kind of external competences belong to the EU. Furthermore, this paper gives some significant phase of the constructing procedure of the EU.

Keywords: *EU's procedure for concluding agreements, EU's external competences, EU's legal personality*

1. INTRODUCTION

The Treaty of Lisbon serves as a significant milestone regarding the European integration, especially in connection with the European Union's more determined performance and representation on international area. The Treaty of Lisbon vests legal personality to the European Union[1] so thus the EU is undoubtedly the legal person of international law. Due to the explicit granting of legal personality of the EU, it possesses rights and obligations, which is also manifested in the conclusion of international agreements.

Concerning the Communities, the founding Treaties have previously contained provisions on the procedure for concluding agreements of the European Communities (EC) as well, and during the progress of integration, almost all modifying treaties (Maastricht, Amsterdam, Nice) amended provisions connected

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[1] Article 47. The Treaty on European Union (Lisbon, 2007), hereafter "TEU".

to this topic, just like the currently operative Treaty of Lisbon.[2] However, as regards the gradually stronger international appearance of the EU, it is worth analyzing what kind of changes the Treaty of Lisbon has brought about in the EU's previous procedure for concluding agreements. It is especially important examine how the new position– the High Representative of the Union for Foreign Affairs and Security Policy – established by the Treaty of Lisbon joins and what role it plays in the EU's process to conclude international agreements. Furthermore, the reinforcing role of the European Parliament (hereafter "EP") in this procedural order should be emphasized.

An important fact must be mentioned that modifications of the EU's procedure for concluding agreements have inseparable connection with the gradual widening of the EC/EU's competences. One of the EU's competences is a sensitive, problematic area itself, not even mentioning the conclusion of international treaties. Hence, it is an unavoidable question that in which cases the European Communities, and then with the deepening of the integration of the European Union, has had the sphere of competence to enter into international agreements. In aware of the fact, the EU does not have competences covering the wide-scale area, it can only proceed according to authorizing provisions of treaties (that is the conferral of powers). So it is important to put emphasis on the examination of those provisions which provide legal basis for concluding various international treaties by the EU, and in given circumstances establish the EU's competence. Based on all these, the EU's external competences (explicit and implied) are also worth analyzing.

2. Legal Personality of the EU and Power to Conclude Agreements

Due to the Treaty of Lisbon the EU has more determined competences to act on the international area. First of all, Article 47 of the Treaty on European Union explicitly recognizes that *"the Union shall have legal personality*". Thus, as its Member States, the EU has ability to exercise rights in international legal affairs and enter into obligations of its objectives.[3] According to that the EU can enter into agreements with third countries and international organizations, and it can be held accountable under international law if it contravenes its obligations and take action where its rights are infringed. "*If a Union institution concludes an agreement, it will be binding on the Union and it will be liable for its performance. So international capacities of the EU are governed by the rules of international law, however, the division of powers between the EU and its Member States is a matter*

[2] Articles 216 and 218. The Treaty on the Functioning of the European Union (Lisbon, 2007), hereafter "TFEU".

[3] Judgement of the Court of Justice of 31 March 1971. The Commission vs. The Council. Case C-22/70. Furthermore Judgement of the Court of Justice of 14 July 1976. Kramer en Bais. Case C-3/76, Joined Cases C-4/76, C-6/76.

of Union law."[4]

After the Treaty of Lisbon entered into force, Article 1 of TEU provides that the EU replaces and succeeds the European Community. Whereas before the founding Treaties did not expressly endow the EU as whole with legal personality, only expressly conferred legal personality on the European Community and the European Atomic Energy Community.[5] [6] In 1992, the European Union was set up by the Maastricht Treaty; however, this Treaty was silent on its legal personality, no provision on the legal personality of the Union was inserted. Aside from Article 281 of TEC (consolidated version amended by the Treaty of Amsterdam), which declared the legal capacity of the Community, there were no such provisions in TEU in connection with the Union. Nor were any provisions regarding the conclusion of international agreements by the Union, whereas capacity to conclude treaties is clearly one of the defining features of international legal personality. It seemed to be directed towards establishing whether there is some type of constitutional/international law barrier to EU action under international law in second and third pillar matters. All these shortcomings of the Maastricht Treaty created opportunity for great legal debates on this topic.[7] However, defining the EU's legal capacity became more and more important, its international sphere of action continuously widened and increased, its international performance became more significant. (For example it opened its delegations in third countries, sent deputies and observant to areas of various conflicts.)

The question of the EU's legal personality was not obviously solved by the Treaty of Amsterdam in 1999, although, Article 24 of TEU was inserted by the Treaty of Amsterdam, which is itself one development in a long debate about the EU' international legal personality. As time goes by, after the Treaty of Amsterdam, the debate seems ever more irrelevant, in the light of its Article 24*: „When it is necessary to conclude an agreement with one or more States or international organizations in implementation of this Title, the Council, acting unanimously, may authorize the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them."* Thanks to this above mentioned provision of the Treaty of Amsterdam the Council has the competence to conclude agreements with third countries and international organizations. So, before the Treaty of Lisbon the Council has already

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[4] LENAERT, KOEN – NUFFEL, PIET VAN (ed.): *European Union Law,* 2011, Sweet and Maxwell, London, 952.

[5] Article 281. Treaty on the European Community; Article 184. Treaty establishing the European Atomic Energy Community (EURATOM).

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[7] *Ibid*. 195-203.

concluded agreements on behalf of the Union, which means the EU had already been displayed as a participating party bound by the agreements.

After entry into force of the Treaty of Lisbon the question about the legal personality of the EU was definitely answered. On the one hand, Article 1 of TFEU rules that the Union replaces and succeeds the European Community. "*Therefore, the EU will exercise all rights and assume all the obligations of the European Community, including its status in international organisations, whilst continuing to exercise existing rights and assume obligations of the EU. In particular, the EU will succeed to all agreements concluded and all commitments made by the European Community with other organisations and to all agreements and commitments adopted within organisations and that are binding upon the European Community*."[8]

3. THE EXTERNAL POWERS OF THE UNION – IN THE NET OF COMPETENCES

The above written overview was necessary to see that the ability to conclude agreements is the one of the indispensable and recognized manifestations of the international legal personality. However, the EU's ability to act, just like entering into international treaties, does not directly come from having a legal personality. Exactly norms of competences are needed in order to act on international area, which on the one hand, determine competencies, on the other hand, mark their limits. The area of the EU's spheres of competences is a sensitive, problematic area in itself, not to mention cases of entering into international treaties. Regarding the subject of present study it is really important to analyze in what cases the EU has competences to enter into international treaties.

In respect that the EU does not have competence covering every area, it can only proceed according to treaties' certain authorizing provisions (the principle of conferral). Hence, the Treaty of Lisbon has further elaborated the principle of conferral, as stated in Article 4 (1) and Article 5 (1) and (2) of TEU. Based on these, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States." Furthermore, the Treaty of Lisbon details taxatively the competences which can be found in Articles 2-6 of TFEU and due to these provisions, it can be read/determined whether the EU's given external competence belongs to the exclusive or to the shared group.

There are two possible aspects to assortment the EU's external competences. On the one hand, we can differentiate these competences according to that they either belong to the exclusive or to the shared/complementary competence of the given external competence of the EU. On the other hand, the other grouping of external competences is done according to whether Treaties expressly provides on

[8] EMERSON, MICHAEL – BALFOUR, ROSA – CORTHAUT, TIM (et al.): *Upgrading the EU's Role as Global Actor. Institutions, Law and the Restructuring of European Diplomacy,* 2011, Centre for European Policy Studies, Brussels, 21.

concluding international treaties, or not. In the first case we can refer to express external competences/external competence. In the second case there is lacking of the explicit provision to the entering into international treaties, however the concluding agreements is still necessary for reaching the aims set in the Treaties. So in such cases we can talk about so called „implied" external competences.[9]

Concerning the Communities, founding treaties have previously contained provisions on the procedure for concluding agreements by the European Communities, as well and in connection with the progress of integration, almost all modifying treaties (Maastricht, Amsterdam and Nice) modified provisions connected to this topic, just like the currently operative Treaty of Lisbon (Articles 216 and 218of TFEU). However, as regards the gradually stronger international appearance of the EU, it is worth investigating what kind of changes the Treaty of Lisbon has brought about in the EU's previous procedure for concluding international agreements.

Before the Treaty of Lisbon, Article 300 of the Treaty of the European Community at the same time contained the declaration of public competence referring to entering into international agreements and its inner rules referring to the process of public law.[10] With the entering into force of the Treaty of Lisbon, this 'old' provision became separated and now, Article 216 of TFEU especially determines the cases when the EU can enter into international agreements, while Article 218 of TFEU regulates the process of entering into agreements.

3.1. Typing of explicit Union competences (express external competences)

The EU possesses explicit external competence when the Treaties expressly empower the Union to conclude international agreements. They give the legal basis for this kind of action. This is reflected in Article 216 of TFEU, which states that the *„Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide".*[11] In a limited number of cases, the Treaty of Lisbon provides an *explicit* competence to the EU to act externally. In the light of this, the EU has special competence set in the founding treaty among others, in the following areas:

- a common commercial policy (Articles 206-207 of TFEU);
- association agreements (Article 217 of TFEU);

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[9] KAJTÁR, GÁBOR: 216. cikk, in OSZTOVITS, ANDRÁS (ed.). *Az Európai Unióról és az Európai Unió működéséről szóló szerződések Magyarázata 3*. [Explanation of the Treaty on European Union and the Treaty on the Functioning of the European Union 3.], 2011, Complex Kiadó, Budapest, 2671-2674. Furthermore Judgement of the Court of Justice of 31 March 1971. The Commission vs. the Council (ERTA). Case C-22/70.

[10] *See* KOUTRAKOS, PANOS. *EU International Relations Law,* 2006, Hart Publishing, Oxford, 138-181.

[11] WOUTERS, JAN – COPPENS, DOMINIC – DE MEESTER, BART: The European Union's External Relations after the Lisbon Treaty, in GRILLER, STEFAN – ZILLER, JACQUES (ed.): *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* 2008, Springer – Wien – New York, 169.

- an exchange-rate system for the euro in relation to non-Union currencies {Article 219 para. (1) of TFEU}.

For example, the common commercial policy belongs to the exclusive competence of the EU. This means that member states cannot enter into international agreements on these areas anymore, only the EU is eligible to do so. However the conclusion of the association agreements belongs to the share competence of the EU.[12]

In addition, the Union is empowered to conclude agreements by the explicit provisions of the Treaties:

- the research and technological development {Article 186 of TFEU};
- the economic, financial and technical cooperation with third countries {Article 212 para. (3) of TFEU};
- the environment {Article of 191 para. (4) of TFEU};
- the development cooperation {Article 209 para. (2) of TFEU}; and
- the humanitarian aid {Article 214 para. (4) of TFEU}.

The EU can exercise these external competences even in respect of matters which are not yet subject of rules at Union level. In these areas, both the Union and Member States may cooperate with third countries or international organisations. Article 4 para. (4) of TFEU clarifies that the nature of these Union competences is 'shared' but the specialty is that their exercise by the Union does not prevent Member States from exercising their own competences in these fields.[13] "*The Union's competence in this regard does not detract from Member States' own powers to negotiate in international fora and conclude international agreements, although, Union action will reduce the scope for action on behalf of Member States, in view of the principle of primacy.*"[14]

At this point, it is worth to mention that there are such mixed- agreements where a field falls within the competence of both the Union and Member States, so the Union's external action is categorised as mixed. These kinds of agreements cause various problems regarding international law, Union law and practice.[15]

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[12] It is important to mention within the framework of common commercial policy, that the analysis of competency questions between the EU and its Member States would require a separate research, with relation to WTO/GATT agreements. Hence, regarding the complexity of this theme, the current research does not deal with it.

[13] WOUTERS – COPPENS – MEESTER: *op. cit.* 168-170.

[14] LENAERT – VAN NUFFEL: *op. cit.* 1015.

[15] The interpretation and analyse of such agreements would go beyond the limits of this study. Connecting to the framework of explicit treaty-making power, we have to mention that the Union is allowed to conclude international agreements with one or more States or international organisations in the Common Foreign and Security Policy area (Article 37 of TEU). The nature of the Union's competence in the field of CFSP is not well defined and might be best categorised as a kind of '*sui generis*' competence or shared competence without pre-emption. See WOUTERS – COPPENS – MEESTER: *op. cit.* 169.

3.2. Implied external competence

In determining the grouping of the EU's external competences, the case law of the Court of the EU has a decisive role. The external competences of the Union have mainly been clarified in the European Court of Justice (hereafter ECJ) case law.[16]

The previous case law of ECJ highlighted that the Union may conclude international agreements not only in those cases where the Treaties or a legally binding Union act provides so but instead, it can rule without explicit procedure for concluding conclusion authorisation, with so called implied external competences.[17]

So, Article 216 of TFEU ensures 3 further possibilities to conclude entering into international agreements:

- „where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties;
- or is provided for in a legally binding Union act;
- or is likely to affect common rules or alter their scope."

This Treaty provision codifies the external powers which – according to long-standing case law of the European Court of Justice – flow implicitly from the Treaties and secondary Union law. It is known as the „implied treaty-making power" of the EU.[18]

Based on the case law of ECJ, regarding to the judgment of AETR-case,[19] generally, it can be said that this kind of implied external competence is parallel with every existing inner competence. So, there is a parallelism of internal and external competences: if the internal competence has been exercised, an external competence follows.[20] This creating law interpretation of ECJ on implied express competence is also included in the Treaty of Lisbon. Hence, according to Article 3 para. (2) of TFEU: *„The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."*

The significant element of the above-mentioned provision could be found in Article 216 of TFEU referring to that the EU can enter into agreements if it "*is likely to affect common rules or alter their scope."* In connection with the AETR judgment, member states cannot assume international obligations on those areas

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[16] However, there is no possibility in current study to present numerous legal cases.

[17] Judgement of the Court of Justice of 31 March 1971. The Commission vs. the Council (ERTA). Case C-22/70.

[18] LENAERT – VAN NUFFEL: *op. cit*. 1016.

[19] Judgement of the Court of Justice of 31 March 1971. The Commission vs. The Council (ERTA). Case C-22/70.

[20] VÁRNAY, ERNŐ – PAPP, MÓNIKA (ed.). *Az Európai Unió joga* [The European Union Law], 2010, Complex Kiadó, Budapest, 223-228.

where the EU has already practiced its competences as it would have effect on public policy and would lead to their modification. Hence, states' such behavior would endanger the realization of public policy. (This also comes from the Article 4 para. (3) of TEU.)[21]

Article 216 of TFEU refers to the other case also from the legal practice of competent courts, when the Union has external competence because its internal competence may only be effectively exercised together with an external competence. This corresponds to the situation where an international agreement of the Union is *„necessary to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties"*.

Furthermore the Article 216 of TFEU determines it as the third issue that the EU can even enter into international treaties without special external competence, ifit is provided for in a legally binding Union act/normative instrument. It is important that its pre-condition the EU has competence to accept such a secondary legal source which serves as the legal base for the concluding of the international agreement. In that case, if the Treaties have not provided the necessary powers, then the Article 352of TFEU ensures supplementary competence for the EU, where the action by the Union proves necessary, "*within the framework of the Union's policies, one of the objectives referred to in the Treaties*."[22] However, this article by no means can be applied in order to accept such provisions which effect would result in the modification of Agreements.[23]

3.3. Who is obliged by obligations?

It is an important and complex question that who is obliged by the obligations, which are assumed by the EU through the different kind of international agreements. Article 216 para. (2) of TFEU declares that *„Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."* According to this text, if a Member State would breach the given agreement with legal or other factors (action), then it is considered as the violation of Union law, for which the Member State can be held responsible. In judgment of ECJ of 26 October 1982, in connection with Kupferberg case[24] the ECJ declared that Member States have responsibility regarding their obligations with third parties by the EU (formerly: the Communities).

Based on the above mentioned reasons the determination of the areas where the EU has competences to enter into international treaties is complex and complicated. Having special regard to that the question of legal personality and

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[21] KAJTÁR: *op. cit.* 2673.

[22] Article 352 TFEU.

[23] *See* KAJTÁR, GÁBOR. 352. cikk [Article 352], in OSZTOVICS, ANDRÁS (ed.): *Az Európai Unióról és az Európai Unió működéséről szóló szerződések Magyarázata 3* [Explanation of the Treaty on European Union and the Treaty on the Functioning of the European Union 3], 2011, Complex Kiadó, Budapest, 3337-3344.

[24] Judgement of the Court of Justice of 26 October 1982. Hauptzollamt Mainz vs. C.A. Kupferberg. Case 104/81.

competency problems strongly connected to entering into make this issue even more complicated. It is not by chance that the numerous case law of ECJ are normative and decisive, which analysis would be as a separate whole paper.[25]

4. PROCESS OF THE CONCLUDING INTERNATIONAL AGREEMENTS[26]

Now, that I have broadly presented the EU's spheres of competences regarding to conclude international treaties, let me examine how the EU's contractual procedures operate. As I have already mentioned, Article 216 and 218 of TEU can be regarded as successors of Article 300 of TEC, which previous ones contain rules regarding to conclude into international treaties referring to Union institutions and member states. Its scope covers all such bilateral and multilateral international agreements which are concluded by the EU with other Member States and international organizations, and also agreements between the EU and member states.

Article 218 of TFEU regulates the process of entering into agreements, during 11 paragraphs, however, not in full detail.[27] In this procedure, the European Commission, the Council of the European Union and the High Representative of the Union for Foreign Affairs and Security policy have significant part; also, the European Parliament has increasing part in it.

The first phase of the procedure for concluding is the *authorization to start negotiations*. In the framework of this phase, the Commission or the High Representative makes suggestions to the Council having been convinced on the necessity of the planned agreement. Based on the suggestion, the Council authorizes the Committee and exclusively or mostly the High Representative in a resolution for initiating negotiations in cases of common foreign and security policy. The appointed main negotiator has the main role during the negotiations; however, one has to continually consult with special committees appointed by the Council, and has to negotiate along directives set by the Council. Therefore it can be stated that the Council has a main role to start the procedure of concluding agreements.

After the negotiations, Council decision is needed to sign the agreement.[28] Following this, there are two options to recognize the agreement as obligatory: i)

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[25] In this study the author does not intend to mention debates, problems connected to the obligatory nature of these agreements, on the place of international agreements in the EU's hierarchy, and besides, the scale of mixed agreements is unlimited.

[26] *See* KAJTÁR, GÁBOR: 218. cikk [Article 218], in OSZTOVICS, ANDRÁS (ed.): *Az Európai Unióról és az Európai Unió működéséről szóló szerződések Magyarázata 3* [Explanation of the Treaty on European Union and the Treaty on the Functioning of the European Union 3], 2011, Complex Kiadó, Budapest, 2677-2685.

[27] It would be quite long to analyse the elements of this provision, hence, in the framework of this paper the author would only like to focus on the most significant points in connection with the narrow field of interpretation.

[28] Art. 218 para. (5) TFEU.

the first is when the signature of agreement happens at the same time of the signature of agreement); while ii) the other option is that a Council decision is required to recognize agreements as obligatory. Until agreements enter into effect, the EU has to stay away from those actions which would stymie the agreement's subject and aim.

In those cases when the Council accepts agreements as obligatory with a regulation, its regulation is created upon the suggestion of the Commission and the High Representative. It is important that before accepting the regulation, it has to adequately cooperate with the European Parliament. There are detailed rules referring to this, as well. It is important to highlight the voting of the Council during this procedure, that the rules are always the same as rules to be applied in cases or authorizing the Commission or the High Representative. According to main rule, the Council decides with qualified majority but in certain determined cases consensual decision is needed.[29]

Who signs the agreement? Mostly, the Council authorizes the actual EU Presidency to decide who shall sign the agreement on the part of the EU. Hence, in most cases the 1-1 representative of the EU Presidencies and/or the Commission signs the agreement.

The entries into force of the agreements concluded by the EU are regulated by the general rules of international law. That is, an agreement does not automatically enter into force when it is recognized as obligatory by the EU or by a third state regarding them. Usually, they take regulations of the 1969 Vienna Convention on the Law of Treaties into consideration, especially its Article 24.[30]

In respect of the role of the European Parliament, it could be said the definite increasing role of the EP. Before the Treaty of Lisbon, the EP had no formal role during the negotiations on an international agreement. However, a Framework Agreement had been concluded between the Commission and the Parliament that provided for exchange of information between both institutions.[31] Due to the Treaty of Lisbon, the Council at least always consults with the European Parliament before agreements. However, it is not obliged to take the EP's opinion into account, in some cases; EP's agreement is needed to make Council decisions.[32] The significance of EP's role is important in agreements connected to the budget.

The above mentioned process means a smooth process regarding the Union entering into agreements, however, this process is not always so easy. Temporary applications are used many times, the modification of these agreements is also regular and there are cases when these agreements are suspended or ceased.[33]

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[29] Art. 218 para. (8) TFEU.
[30] Art. 24. Vienna Convention on the Law of Treaties (Vienna, 1969).
[31] WOUTERS – COPPENS – MEESTER: *op. cit.* 183-184.
[32] *See* Art. 218 para. (6) TFEU.
[33] Regarding this case, Art. 218 of TFEU also contains detailed rules.

5. SUMMARY

This paper analyzed the European Union's procedure for concluding international agreements after the Treaty of Lisbon. Thanks to the Lisbon Treaty the EU is undoubtedly the legal person of international law. Regarding that, the one of the indispensable and recognized manifestations of the legal personality is the ability to enter into treaties which contain rights and obligations that can be justified according to rules of international public law. The EU has ability to conclude agreements according to reach of the aims set out in Treaties. This EU's ability manifests in its external powers. In this respect the present study examines the EU's express and implied external competences to conclude agreements.

Before the Treaty of Lisbon, Article 300 of TEC contained in the same provision the competences referring to entering into international agreements and its inner rules referring to the process of the concluding agreements. With the entry into force of the Lisbon Treaty, this old provision became separated and now, Article 216 of TFEU especially determines the cases when the EU has competences to conclude international agreements, while Article 218 of TFEU regulates the process of entering into agreements. Regarding this separation of the former provision, the paper does not place only great emphasis on the external competences of the EU, but also analyses the procedure of the conclusion according to the role of the new post, namely the High Representative of the Union for Foreign Affairs and Security Policy, in this process. Furthermore this study emphasizes the increasing role of the European Parliament, which is also a new element in this EU's procedure for concluding agreements Regarding these reforms and other significant reforms of the Treaty of Lisbon, it would be possible the realisation of the EU's more unified and more efficient appearance on international area and the realisation of the European Union's values and interests.

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The Global Corruption and the Anti-corruption Documents – Few Minds about the OECD's Anti-bribery Convention and the U.S. Foreign Corrupt Practices Act and Their Impact on the Hungarian Legal System

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Abstract
With this study I would like to present two anti-corruption acts. This documents has a big influence to the European and non-European countries also. In this study I will try to focus to the points of the documents, so we will see the similarities and the differences between these anti-corruption documents. Both of the documents create difficult questions, for instance: how if two countries has jurisdiction to investigate a case at the same time, which sanctions need to use etc. The documents not just influence the countries, but each other's to.

Keywords*: anti-bribery convention, anti-corruption, FCPA, OECD*

JEL Classification*: K33*

1. INTRODUCTION

Corruption is a global problem since the beginning. We have to fight against it, not just because it is bad shape but because it proves the ruin of the society. But how can we do this? Do an independent administrative member which can use sanctions or hope that it will stop of oneself? Maybe the first one, but hoping will not work. We do not have answers to the questions. However, this is our target to find answers to the questions somewhere. However, on the other hand, we also need an act. Some countries have a very strong anti-corruption act. To give you an example, here are U.S. Foreign Corrupt Practices Act and U.K. Bribery act. I think without an act and a strong organisational background the fight against bribery is more difficult because there is nothing in the government's power.

However, some people do not know that Hungary is part of an anti-corruption convention. Yes, this is a convention and not an own Hungarian legislation. The main aim of this study is to provide insight in this not commonly known convention, by introducing the regulations main aspects through questioning its everyday usability and general usefulness. Firstly, I am going to write about corruption. After that I would like to present the Convention, not the whole, only

its most important parts. Also I would like to present the role and activities of Transparency International in this matter, particularly regarding the fight against the international corruption. Why? Because it is a good initiation that both young and both old people fight together against the corruption all over the world, because they want something impossible: a world without bribery and fraud. In Hungary, the object of the corruption (the U.S. FCPA, OECD, U.K. Bribery Act) is not processed or not known; the literature on it is deficient. I would like to put forward that Hungarian literature and books are few in number and it is especially the internet that helps us to find information. This is the reason that sources were almost without exception retrieved from the internet. This study is a summary to give few ideas to do the system better.

2. WHAT IS CORRUPTION?

The nature of corruption is more or less known for every one of us, someone knows when experiences it, but to give an exact definition of the phenomena turns out to be quite a challenge. On the one hand, there are many useful and interesting definitions which can explain the meaning of corruption. On the other hand, there are so many inaccurate and misleading definitions. Because of this I only want to describe a few of them. Firstly, we can read about corruption on the site of Transparency International U.K.: *"Corruption is the abuse of entrusted power for private gain. It hurts everyone whose life, livelihood or happiness depends on the integrity of people in a position of authority. Corruption holds back economic development, prevents a free market operating for businesses and consumers, and further exploits already marginalised groups."*[1]

The next one is also a definition of Transparency International, which can be found on the global site of T.I.: *„Corruption is the abuse of entrusted power for private gain. Corruption is when a family has to choose between paying a bribe so that a doctor will see its sick child, and putting food on the table. Corruption is when thousands of people die in an earthquake beneath collapsed buildings because safety inspectors were bought off. Corruption is when bureaucrats steal public money to buy mansions and cars instead of investing it in low-cost housing and public transport. Corruption has many forms. It causes sleepless nights for millions of people – but too often not for the corrupt. Transparency International is working to change that."*[2] Both of them try to help imagining (with examples) what „corruption" means. I believe that this few instances shows us that the forma of the corruption appear in different way but the essence is the same. We can use examples, we can make a definition with 4-5 sentences but this will be deficient. The area of corruption is too big to be defined and mainly to be controlled. This is not impossible but without the society, the government is helpless.

[1] Transparency International U.K. – Corruption, available at: http://www.transparency.org.uk/corruption [cit. 2014-01-31].

[2] Transparency International – Global coalition against corruption, available at: http://www.timetowakeup.org/main/home [cit. 2014-01-31].

However, there is a more serious problem: politicians, the government, doctors and so on. In the beginning my opinion was the main problem in Hungary is that we do not have an anti-corruption act which can help us to fight against corruption. But after I compared the U.S. Foreign Corrupt Practices Act with the Hungarian criminal code I realized that the Hungarian legislation is right and what is more. There were a number of definitions and technical terms which were the same in both act. This means that we have to search the problem not in the legislation but in the lack of the organisation of the Hungarian system. But this object is not this study's topic. Nevertheless, that Hungary is the member of the OECD, so the convention is also in force in Hungary, the practice is not the best, because of the lack of the sufficient organisations.

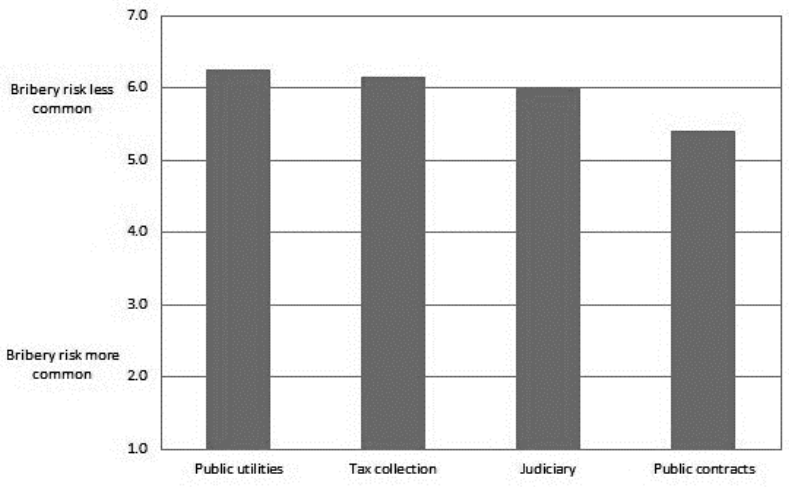

Table 1: Average perceived level of bribery risk in selected government activities in OECD countries (2006).[3]

In this study I will collect those provisions which in some way still contribute to the fight against corruption. Let us continue the thinking about the meaning of corruption. Therewith, that somewhere the corruption is rise in line with this the public resources from important priorities like as health and education be weaker and do not get enough money to develop. Corruption is bad not just for the society but also bad for businesses. Corruption is anti-competitive, there are so many disadvantages which are caused for the honest businesses whose do not pay bribes. The main problem that if somebody live with the chance and bribe, these shapes will be an unended circle. He will offer money again, and the other party will do his assignments just if he gets money. In the long run, it will not work. If the bribed

[3] Source: Integrity in Public Procurement, available at: http://www.oecd.org/gov/ethics/integrityin publicprocurement.htm [cit. 2014-10-25].

people doing his assignments just for more money the honest and poorer people could not race with this.

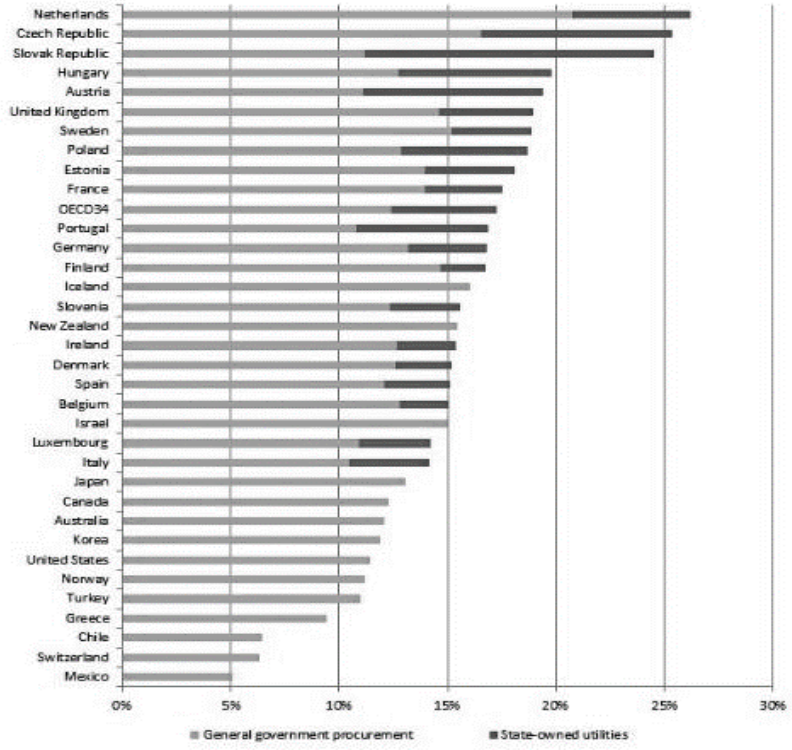

Table 2: General government and state-owned utilities procurement in selected OECD countries as a percentage of GDP (2008).[4]

First of all, I am going to present OECD's anti-bribery convention and I would also like to present Transparency International.

3. THE OECD

The OECD is very important in the process of fighting against corruption. In this organization there are lots of members who accepted the Convention, so in these countries the Convention has a very strong power. Otherwise, in the majority of the countries the Convention is the only legislation connected to bribery. Now, let us see how the organization was created. The OECD's forbear was the Organisation for European Economic Cooperation (OEEC) which was established

[4] Source: fighting corruption in the public sector, http://www.oecd.org/gov/ethics/integrity inpublicprocurement.htm [cit. 2014-10-25].

in 1948. During the years the cases showed the organisation is work. A few years later Canada and the US joined OEEC members in signing the new OECD Convention on 14 December 1960. On 30 September 1961, the Organisation for Economic Co-operation and Development (OECD) was born when the Convention came into force. At the beginning of the study I mentioned U.S. FCPA. Not by accident. The Convention created it because of the American Congress. This was a very important moment, because both of these documents impress each other during the years, so we can see many similar, or same ideas, definitions and technical terms in these documents.

In 1988, the American Congress suggested that the President negotiate an international treaty with members of the Organisations for Economic Co-operation and Development to make an anti-bribery convention to stop the bribe in the international business transactions by many of the United States' partners. The negotiations was successful so the Convention on Combating Bribery for Foreign Officials in International Business Transactions (Anti-Bribery Convention) was born, which put a very important require for the parties: to make it a crime to bribe foreign officials.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed in December 1997 and came into force in February 1999. It has since been ratified by all 30 OECD member countries and by seven non-member States (Argentina, Brazil, Bulgaria, Chile, Estonia, Slovenia and South Africa). Both the Convention and FCPA were modified many times. They influenced each other's development. This is why it is important to know about the „acts". However, the relationship between the Convention and FCPA will be elaborated on in another study.

4. THE ANTI-BRIBERY CONVENTION

The Anti-Bribery Convention consists of 18 parts:

- *Preamble;*
- *Article 1 The Offence of Bribery of Foreign Public Officials;*
- *Article 2 Responsibility of Legal Persons;*
- *Article 3 Sanctions;*
- *Article 4 Jurisdiction;*
- *Article 5 Enforcement;*
- *Article 6 Statute of Limitations;*
- *Article 7 Money Laundering;*
- *Article 8 Accounting;*
- *Article 9 Mutual Legal Assistance;*
- *Article 10 Extradition;*
- *Article 11 Responsible Authorities;*
- *Article 12 Monitoring and Follow-up;*
- *Article 13 Signature and Accession;*
- *Article 14 Ratification and Depositary;*

- *Article 15 Entry into Force;*
- *Article 16 Amendment;*
- *Article 17 Withdrawal.*

Before we discuss the main articles in detail, let us see some information on the OECD Working Group on Bribery. This Group has an outstanding role. This Group monitors the members and also tries to enforce the Convention. The 34 OECD member countries (including the United States) and five non-OECD member countries (Argentina, Brazil, Bulgaria, the Russian Federation, and South Africa) are members of the OECD Working Group on Bribery (Working Group). Its members meet quarterly to review and monitor implementation of the Anti-Bribery Convention by member states around the world. Periodically each party undergoes a monitoring system. This *monitoring system is consist of three phases. "The Phase 1 review includes an in-depth assessment of each country's domestic laws implementing the Convention. The Phase 2 review examines the effectiveness of each country's laws and anti-bribery efforts. The final phase is a permanent cycle of peer review (the first cycle of which is referred to as the Phase 3 review) that evaluates a country's enforcement actions and results, as well as the country's efforts to address weaknesses identified during the Phase 2 review."*[5]

5. SEVERAL ARTICLES IN GENERAL FROM THE ANTI-BRIBERY CONVENTION

5.1. Article 1 The Offence of Bribery of Foreign Public Officials

In the first article, the Convention declares as we talked about it, that each party have to make it a crime to bribe foreign officials. Furthermore, the Convention defines a few terms for us. Firstly, *„foreign public official" means any person holding a legislative, administrative or judicial office in a foreign country, whether appointed or elected."*[6] *The next term is „foreign country" which „includes all levels and subdivisions of government, from national to local."*[7] This article is traditional because it clarifies the basic concepts.

5.2. Article 3 Sanctions

When there is a crime, we also need sanctions to react to it. The Convention declares the requirements for the penalties: effective, proportionate and dissuasive criminal penalties. The penalties have to be comparable to that applicable to the bribery of the Party's own public officials The Convention gives guidelines and leaves it to the members how they want to punish. This is not necessarily good. The legal systems in Europe and in the other countries of the world is very

[5] A Resource Guide to the U.S. Foreign Corrupt Practices Act – By the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, available at: http://www.justice.gov/criminal/fraud/fcpa/guide.pdf [cit. 2014-02-14].
[6] Ibid. 7.
[7] Ibid. 7.

different. Some are stricter and some are simply weak. For example in the United States, the FCPA working good, but it can because the Act declares the penalties and the definitions concretely. On the other way, for instance, in an African country, where is a totalitarian system, this never going to work.

5.3. Article 4 Jurisdiction

Jurisdiction is always an interesting part of the acts. Maybe, this is the most important part of the Convention because this article helps members to know who has the right to conduct proceedings. The territorial basis of jurisdiction should be interpreted broadly so that an extensive physical connection with bribery act is not required. The conflict of jurisdiction used to be a problem but the Convention helps members to decide on jurisdiction.

5.4. Article 9 Mutual Legal Assistance

The Convention very nicely and specifically describes mutual legal assistance. "*Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person.*"[8]

5.5. Article 10 Extradition

Regarding extradition, the Convention mentions it simply. It does not declare the exact process but leaves it to the parties, especially to the extradition treaties between them.

5.6. Article 12 Monitoring and Follow-up

As I have already said, the OECD Working Group on Bribery's work is very important. This Group has an outstanding role. This Group monitors members and also tries to enforce the Convention. Monitoring is one of the most significant parts in the fight against corruption. None of the laws can prevail if organizations or people do not monitor the compliance of the law. This helps us to understand that Transparency International is good for the society and also for the government and in any case should be supported. In the next part of the study, I am going to present Transparency International.

6. THE GOALS OF THE TRANSPARENCY INTERNATIONAL CONNECTION WITH THE OECD

The dream is a world without corruption. A world, where governments, businesses,

[8] Convention on combating bribery of foreign public officials in international business transactions and Related Documents, available at: http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf 7 [cit. 2014-02-15].

civil societies and the daily life of people are free from corruption. Transparency International was created in 1993. There are 100 countries in the coalition. Much remains to be done to stop corruption, but much has also been achieved, including for instance the creation of international anti-corruption conventions. Transparency International is a politically non-partisan organisation. T.I. have more than 60 national organisations around the world, which have formed TI National Chapters. The National Chapters are a clustering of leading citizens in private and public life. TI has campaigned for international action to put off foreign bribery – and not just the criminalisation of bribery. *"The drama unfolding in the OECD framework is an important element, but only one element, on the broad global anti-corruption stage."*[9]

7. CONCLUSION

As we have seen, there is a very complex system against corruption. We have a Convention, which is a contract between the parties. We also have a Group, which continuously monitors the countries in order that they shall enforce the Convention. In my opinion, the most successful initiative is Transparency International. They make regular reports, investigations. Let us not forget that we also have a criminal law book which harshly punishes corruption, but the main problem is that this is not detailed enough. I will continue to urge the creation of an anti-corruption law. But maybe we are not prepared for this. We have to search the solution in people and in the society. There are many possibilities to make a country without corruption. But this is a different case. The corruption, the bad is root in the society, in every people. There is not enough the legislation. This is why I presented the T.I., this organisation working for a better world more than 20 years, and he can reached very important results. The cases of the corruption is all-important the publicity. Perhaps, the T.I. has not got the scope to judge, but it has got the society's attention, and those whose want a world without bribe and fraud. Until people do not say that corruption „is bad", anti-corruption acts will not work.

With this study I wanted to make a short summary the two, maybe the most important documents about the anti-corruption. These have a big influence to the European and to the non-European countries legal systems also. As we saw, both the OECD's Convent, both the U.S. FCPA were influenced to the Hungarian legislation, which caused that Hungary have a strong anti-corruption part in the Hungarian criminal code (2011. C.), but it will never work, if the organisational background inadequate.

[9] OECD Anti-Corruption Convention leaves critical questions still open, available at: http://www.transparency.org/news/pressrelease/oecd_anti_corruption_convention_leaves_critical_questions_still_open [cit. 2014-02-10].

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Issues of Homelessness

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"These men ask for just the same thing: fairness, and fairness only. This is, so far as in my power, they, and all others, shall have."

(Abraham Lincoln)

Abstract
During my research I would like to draw attention to one of the society's major problems, homelessness, which is closely connected to the freedom of movement. As the profile of homeless people went through a change in both Europe and Hungary, I believe solutions have to be found to tackle the situation.
Whereas previously the majority of the homeless was middle-aged men, who were struggling with alcohol and drug problems and left closed institutions (psychiatry, jail, etc.) without permanent residence or job, nowadays several families with children, women and young adults can be found among the homeless. The increase in the costs of living, utility costs and the interests of foreign currency loans made it more difficult to maintain a home for people with low income. Families may fall apart and the number of homeless people will increase.
The situation of the homeless and the related legislation pose a huge challenge for all the countries in Europe. The number of people living on the streets is increasing in Hungary and in the neighbouring countries as well. Unfortunately, almost no attention is paid to prevention. The government intervenes only when people have already lost their homes and have to live on the streets and thus their safety or health are endangered. However, the problems never begin on the streets, they only end there. This situation must be legally solved through responsible actions, adequate supply systems and redeeming mechanisms.
In this paper I introduce the current situation of the homeless in Hungary, the previous measures taken and the Decisions of the Constitutional Court. My aim is to draw attention to the seriousness and the possible consequences of the issue.
The administrative proposals which consider the stay of the homeless in public areas as an issue of city image hold the risk to contradict the right to human dignity. The legislation explicitly lists what activities can be carried out in public areas and leaves the decision whether to sanction habitual residence in public areas to the local government.

Keywords: *homelessness, homeless situation, legislation.*

1. THEORETICAL BACKGROUND

1.1. Introduction

One of the hottest social issues these days is the problem of homelessness. It is a problem need to be solved not only in Hungary but also nearly in all European countries.

The main question of the issue I deal with is whether the prosecution or the punishment of the homeless solves any of the related problems (or even one them). In other words, would it eliminate homelessness if the authorities persecuted the homeless people?

The problem of homelessness is not only the problem of the individual. In reality, it is a social problem affecting the whole population. It would be necessary to find solutions to address and eliminate this situation. When dealing with the problem of homelessness, the legal regulation of associated issues poses a major challenge. The number of people living on the street continues to increase. Solving the situation by the rule of law is possible and necessary by providing appropriate supply systems and exit mechanisms.

In the first part of my work, the legal decisions of the Constitutional Court concerning situation of the homeless are expounded. Any administrative proposal or sanction dedicated to address the problem of homeless people, especially those which refer to the issue in a way that the homeless living in public spaces ruin the image of the city, has the risk of an anomaly associated with the right to human dignity.

The Act of Offence provides an itemized lists of what behaviours can be continued in public areas. Municipalities are free to decide whether to impose sanctions e.g. for residing in public places habitually or not.

1.2. The definition of the homeless

The first question is the legal concept of the homeless. The Social Act gives the definition of the homeless in two different ways:

According to the first definition, which is the administrative type: “Homeless is a person who does not have a registered place of residence, except for those whose registered place of residence is a homeless shelter.” As it follows from the above definition „in the social case management procedures of the homeless, the body has social competence the area of which is declared as a place of residence by the statement of the (concerned) homeless at the time of the use of the supply.”

In case of providing financial and natural service, local governments should act according to this definition.

The second definition of the Act – the supply type definition defines the term in the following way: „The person should be considered homeless who spends their nights in public places or in premises not for the purpose of housing.”

Under this definition „Local authorities, irrespective of their competence, required to provide temporary support/assistance/aid, meal/food and accommodation if the lack of these needs would threat the lives or the physical

integrity of those in need."

The Social Act links this definition to the provision of personal care for homeless people. In other words, the government is required to apply this definition if it provides personal care by providing shelters, night shelters or temporary accommodation. This also means that territorial jurisdiction of residence or last residence cannot be a condition when using these benefits.[1]

1.3. Public land

According to the Act LXIII of 1999: "Any state-or local government-owned land which can be used according to its intended purpose... furthermore, those private areas which can be used under the same condition are considered public land."[2] As for the Regulation of the Municipal Assembly,[3] the public areas of Budapest „basically serve for the goals of the community and under the same terms and conditions these are available for anyone to achieve these goals."

According to this:

(1) Public land can be used freely according to its intended purpose;

(2) The use of public land should not impair the rights of others with similar objectives;

(3) The use of the public land differs from its intended purpose if the use of the public area or just the use of a specified part of it prevents others from its proper use in the manner mentioned in this regulation.

In other words, public land can be used in an improper way as well, but this requires special permission from local governments so you have to pay for it.

2. LEGAL REGULATION

2.1. Does law take us forward?

Unfortunately, experience shows that legal approach is quite insensitive to the depth of the problem, in many cases, it even prevents the effective work. Although, the former situation has not changed much by improving the situation of the homeless and by introducing new regulations designed to help them. The Social Act and regulations of the local authorities contain conflicting provisions often, which leads to a total disfunctionality.

As Hungary is a state party of most human rights conventions (more than a hundred...), the current government is committed to guarantee the right to adequate housing equally, including homeless people as well, without discrimination even if it is not included in the Constitution explicitely/expressis verbis.

No. 4 statement of the Convenant on Economic, Social and Cultural Rights (ICESCR) containes the details of the obligations of the states regarding the right to proper housing.

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[1] Act III of 1993 on social administration and social benefits.

[2] Act LXIII of 1999 on the public space surveillance, Art. 27.

[3] Degree of the Municipal Assembly 59/1995. (X. 20.).

In the 12th paragraph of the resolution, the committee points to the fact that "although the proper way of the practical implementation of the right to adequate housing differs in each signatory country inevitably, the Covenant requires clearly that each State should take the necessary steps in order to achieve this goal." It requires the establishment of a national housing strategy in all cases.

2.2. The homeless in the Fundamental Law

Article XXVII para. (1) of the Hungarian Fundamental Law says that everyone staying lawfully in the territory of Hungary shall have the right to move freely and to freely choose his or her place of stay.

Under the Article 8 of the Fourth Amendment to Hungary's Fundamental Law, the following provision shall replace Article XXII of the Fundamental Law:

> *(1) Hungary shall strive to provide the conditions for housing with human dignity and to guarantee access to public services for everyone.*
>
> *(2) The State and local governments shall contribute to creating the conditions for housing with human dignity by striving to guarantee housing for every homeless person.*
>
> *(3) An Act of Parliament or local government decree may outlaw the use of certain public space for habitation in order to preserve the public order, public safety, public health and cultural values.*

2.3. Legitimate illegality?

When the fourth amendment of the Fundamental Law of Hungary came into force, the Constitution of Hungary came into conflict with itself.

The Amendment of the Constitution (Article 8) also states that any regulation made by the local government can declare the habitual use of public place (as an) unlawful (action). Simply, the local government may restrict some basic constitutional rights of certain citizens, namely the right to freedom of movement and the choice of residence.

One of the most controversial points of the Fourth amendment of the Hungarian Fundamental Law concerning the homeless. A serious consequence of the amendment is that more judicial decision or interpretation of the law can be even contradictory at the same time. Some provisions can be legally challanged.

According to Amnesty International, it is particularly worrying that the proposal of the Amendment of the Constitution (Article 8) makes it possible to criminalize the habitual use of public place by law or by local regulations because it contradicts to the international obligations of Hungary. The state should guarantee the right to adequate housing equally for everyone.

The problem is not the restriction itself but the fact that the Fundamental Law declares that fundamental rights and duties may be regulated only by law, but even that should not restrict the essential content of fundamental rights. This is a cornerstone of the rule of law as in this way governance with decrees can be prevented.

The Constitutional Court has repeatedly held the view that in relation to a fundamental right the regulation by decrees is constitutional only in case of an indirect and remote correlation. Municipal regulations concerning homelessness

issues are most likely to affect the constitutional and fundamental rights closer and in a more direct way, they would not stand the test of constitutionality. The Fundamental Law is not aimed to have a constitutional level of solution to all fields and problems of life and society. It is enough to set out only basic rights and duties in the Fundamental Law, since the establishment of detailed rules and laws has to be carried out on the level of parliamentary legislation. Before the Fourth Amendment, rules concerning the problem has been set in the Constitution.

According to the text of the Constitution: "Hungary shall strive to provide the conditions for housing with human dignity and to guarantee access to public services for everyone."

2.4. The Constitution is not a game

The constitution of a country records in writing the fundamental values of the people living there. We cannot allow that cruelty to and prosecution of the poor and the vulnerable become a fundamental value in Hungary.

Hungary formally ensures equal rights. However, homeless people are not able to exercise their rights similar to people in better positions.

However, by declaring living in public areas a petty offence by the Municipal Assembly and by the National Assembly as well in the spring of 2011, it is homelessness that became unlawful.

Banning homeless people from public places violates their fundamental human rights and human dignity, as well as the right to freedom of movement and free choice of residence.

It can be considered unconstitutional. It would restrict their right to free decision-making and their freedom of action without meeting the requirements of the Constitutional-test. According to the current practice of the Constitutional Court, the State should limit fundamental rights only if the protection or the enforcement of other fundamental rights or other constitutional values cannot be achieved by any other ways.

In order to be constitutional, a constitutional restriction must fulfill the requirements of the so-called „necessity-appropriateness" test. The legislature is required to apply the weakest means appropriate for achieving the objective of the limitation.

According to the practice of the Constitutional Court, a reference to an abstract public interest or to an increase of the efficiency of public safety is not adequate grounds for limiting the fundamental constitutional rights.

The Constitutional Court has already explained at the time of the constitutional foundation of rule of law that dignity is associated with human life inherently and it is indivisible and unrestrictable, and therefore it is equal for all people. [...] Human dignity and life is untouchable, undisputable for everyone equally regardless of their physical and spiritual level of development or condition.

3. THE SITUATION OF THE HOMELESS IN VIEW OF THE DECISION OF THE CONSTITUTIONAL COURT

3.1. Constitutional Court Decision 176/2011. (XII. 29.)

The Constitutional Court has repeatedly dealt with the limitation of the rights of the homeless. In the first case, the Parliamentary Commissioner for Civil Rights initiated the examination of the constitutionality of the (Art. 14 para. (2)) of the regulation of Kaposvár Municipality because this regulation declares rummaging through garbage as an offence.

Although, according to the commissioner, the regulation is unconstitutional.

The commissioner argues that the regulation restricts rummaging through garbage without any reasonable grounds, however it does not target a group expressis verbis, and it stigmatizes and discriminates people living below the poverty line because it relates to them, so the regulation violates the freedoms and equality of opportunity of these groups.

The Commissioner turned to Kaposvár county town in order to repeal the objected decree but that did not happen, so he turned to the Constitutional Court, which examined what kind of attitude can be declared as an offence by a local governmental decree. An activity declared as a petty offence by the local government must be in accordance with major goals and principles of different regulations.

According to the challenged ordinance: those who effuse rubbish or rummage through garbage at the littery placed in public areas commit an offence and can be punished by a maximum of thirty thousand (30,000) HUF fine.

According to the Kaposvár notary, the decree was necessary because of the maintenance of the public peace and public health.

Contrary to this, according to a higher level regulation, if someone effuses rubbish or rummages through garbage in containers, commits an offence in a public health point of view, which is punishable by up to 50,000 HUF fine. Thus, the regulation of the local government is needless, since the qualification of littering is regulated by a higher regulation.

The Constitutional Court ruled that the local government must not impose sanctions because rubbish is considered ownerless as the contents of the waste container can be picked up by anyone. The fact that someone puts garbage into the container expresses that they dispose it, because they do not need it. Therefore, rummaging through garbage must not be sanctioned because it is not an illegal conduct. So the local government exceeded its legislative competence by sanctioning "getting out garbage of the container".

Finally, the Constitutional Court examined whether rummaging through garbage can be declared as a petty offence or not.

According to the Ombudsman, sanctioning rummaging through garbage is also unconstitutional because there is no constitutional limitation of such activities. Since the „valuable" things removed from containers as a result of rummaging through garbage are taken away and not littered, the action does not cause any pollution. Although, if the concerned person litters, (s)he is responsible for this

action.

The Constitutional Court thought that rummaging through garbage is an involuntary action that arises from existential reasons as those doing so are poor, needy people, who can ensure conditions to survive, only in this way, that is why that action should not be sanctioned and the State must ensure respect for human dignity.

The state has a compulsory obligation to provide assistance for the socially disadvantaged by creating or founding institutions, etc. but those who do not take advantage of this help, for example, they need to have access to the vital things by means of rummaging through garbage. The local government, therefore, exceeded its legislative powers again.

Finally, the Constitutional Court examined whether the regulation violates the conditions of equality or not.

According to the Commissioner, it violates that because the decree stigmatizes an excluded group, which is considered an indirect discrimination.

The Constitutional court ruled that the impugned section of the local government decree was unconstitutional and therefore annulled it.[4]

3.2. Constitutional Court decision 38/2012. (XI. 14.)

There is another decision of the Constitutional Court also dealing with the homeless.

It was also Máté Szabó, the ombudsman, who initiated an action for constitutional review of laws declaring living on public areas habitually a petty offence and those who commit this offence can be fined or detentioned.

Some of the main points of the regulation on the use of public places and public areas of the capital city are contrary to the requirement of the principle of the rule of law and violate the right to human dignity. The usage of public land for the purpose of living there habitually is declared a petty offence.

For those homeless people who live in the public place, this is a very serious crisis situation, which is due to various constraints, and it is rarely a consequence of a conscious or thoughtful free choice. Homeless people have lost their homes and have no opportunity to resolve their housing, so the absence of a real alternative forces them to live in public places – as that is the only open public area.

According to the Ombudsman, a priori there is no place for them to go to, so they are forced to reside habitually in public areas that is why sanctioning this situation is in conflict with their human dignity. Homelessness does not infringe the rights of third parties/others, so it should not be threatened by such a disadvantage. He considers fine unsuitable because it is not deterrent.[5]

[4] Decision 176/2011. (XII. 29.) Constitutional Court.
[5] Decision 38/2012. (XI. 14.) Constitutional Court.

4. NO ROOF = NO RIGHTS?

4.1. Legislation leading to illegality

Parliament, local governments and particularly concerned metropolitan and district municipalities (most of the homeless people live in the capital) considered the introduction of strict rules and regulations as a successful way to handle the issues of homelessness.

Examining former and current legislation and regulations, it is clear that harassing begging or begging with children was prohibited before 2010, as well.

Intervention by the state had a turn again concerning the homeless when legislators interfered with the issue in statutory level.

This provided an opportunity for local governments to declare the improper use of public areas a petty offence. According to the concerned amendment of the Act of Offence, fine and imprisonment can be imposed for offences.

The Ministry of Home Affairs attempted to set up some „surviving spots" for the homeless by larger municipalities in February in 2011 but these attempts were unsuccessful. However, in spring, 2011, the Metropolitan Municipality took advantage of the amendments of 2010 and made a local regulation in which homelessness (in public areas) was declared as an offence. In November 2011, the National Assembly adopted a new bill in which declared „habitual residence in public places" a punishable offence for which imprisonment or a fine of up to 150 thousand HUF can be imposed if someone violated the prohibitive municipal regulations repeatedly.

On the 23th of December in 2011, the Parliament accepted the new Act of Offence, which was to punish homelessness throughout the country.

On 12th of November 2012, the Constitutional Court declared the provision of the Act of Offence – which sanction living in public areas habitually – unconstitutional and annulled it due to the actions of the ombudsman. The committee also annulled those statutory provisions, which have authorized local governments to impose a fine or apply confiscation as a punishment of antisocial behaviour by regulations.

Finally, on March 11, 2013, the Parliament adopted the Fourth Amendment to Hungary's Fundamental Law and with this action it is included in the constitution that „An Act of Parliament or local government decree may outlaw the use of certain public space for habitation in order to preserve the public order, public safety, public health and cultural values."[6] Since according to the majority of the Constitutional Court, the contents of the Amendment to Hungary's Fundamental Law cannot be reviewed by them, this situation had a serious and lasting effect on the constitutional condition of the homeless.

4.2. International judgement of the Hungarian situation

Despite international pressure and protests at home, the Hungarian Parliament has voted in a constitutional reform which not only inscribed the criminalisation of

[6] Fourth amendment to Hungary's Fundamental Law.

homelessness in the country's Constitution but also made it possible to ban people from habitually residing in public places and to fine them.

The constitutional amendment, which criminalizes homelessness, has been abolished by the Constitutional Court stating that criminalising homelessness is unconstitutional, as it violates fundamental human rights and human dignity. Including prosecution of homeless people for living in public spaces into the law is unconstitutional. Neither the removal of homeless persons from public premises, nor urging them to take up social assistance may be considered a legitimate constitutional aim.

"Homelessness is a social problem that should be dealt with by the state by means of social intervention and social assistance rather than punishment. It is incompatible with the protection of human dignity as enshrined in Article II of the Fundamental Law to declare homeless persons dangerous to the society and punish them."[7]

Hungary has been called on to veto the amendment criminalising homelessness which makes it possible to imprison or fine those who sleep on streets. This proposed constitutional amendment clearly violates the spirit of the many international human rights treaties to which Hungary is signatory.

Members of FEANTSA (European Federation of National Organisations Working with the Homeless), which is an umbrella of not-for-profit organisations which participate in or contribute to the fight against homelessness in Europe, are alarmed by the regulations of the Hungarian authorities. This organization is the only major European network focusing exclusively on homelessness at European level. They are alarmed by the Hungarian government's campaign to punish and imprison homeless people who are unable to find or afford accommodation. It is quite shocking that over the past two years, the Hungarian government has used the legal system to systematically target vulnerable people living in extreme poverty. There is a lack of affordable housing in Hungary and people who are homeless have nowhere to go.

"Criminalising homeless people is not the answer. Punitive measures, which stigmatise and criminalise homeless people, are cruel, since they punish the most vulnerable. These measures, whether they be fines that are absolutely unaffordable for people who have no means, or convictions for misdemeanors and other administrative offences, make it even more difficult for people to emerge from situations of extreme poverty. People face additional stigma, huge bureaucratic burdens and debts when attempting to re-integrate into society and the labour market. Criminalisation measures are also ineffective, since they aim to move the visible problem of homelessness out of view rather than offering any real solution."

The solution should be an integrated homelessness strategy, which offers real housing options for homeless people, either in social rental properties or in supported housing on the private rental market can be successful and affordable, even in times of economic crisis. The main argument for this opinion is: „These

[7] European Federation of National Organisations Working With the Homeless Press Release – 13th March 2013 For Immediate Release FEANTSA Deeply Concerned by Constitutional Amendment Criminalising Homelessness.

strategies are not more expensive than using police and the justice system to fine, arrest and imprison homeless people and they work."

FEANTSA, and its members urge the Hungarian government to withdraw its proposed amendment which will open the door to human rights violations in the Hungarian constitution. Instead, Hungary was called on to work towards developing an integrated homelessness strategy as a positive and effective way of putting an end to this unacceptable situation.[8]

4.3. Ruthless power – destructive consequences

Over the past two years, there was a change of attitude in the management of homelessness by the state and local governments in Hungary; instead of a social or an administrative problem the issues of homelessness have become a criminal-legal question.

The government provides power for municipalities to criminalize homeless people in many ways. There is an Act according to which living in public places habitually as well as the construction of a cottage in a public land without a permission is punishable. It was done despite the fact that in Hungary there is no adequate social housing policy and people cannot exercise their rights to possessing proper housing. The state responsibility is realised in the effort that the homeless are forced to live in shelters – act enforced even by law enforcement tools. The current Hungarian politics misses the ambition to find a socio- political solution to the problem of homelessness.

Huts and tents of those homeless who try to create own, independent „homey" conditions are dismantled. The authorities try „to solve" the problem by moving the visible problem of homelessness out of view. There is something particularly cruel in the way how the government has been working on the prosecution of homeless people over the past two years; and this cruelty appears not only in the legislative level but also in practice.

4.4. Punishment or fair judgement?

Contrary to this situation, the Constitutional Court stated in its decision that homelessness is a social problem so instead of punishing them, the state should deal with social intervention and provide social aid and support.

Thus, – the Constitutional Court says – it violates the right to human dignity if the homeless are considered to be dangerous to the society or considered as criminals. To penalise those who have lost their houses is not humane. Homeless people live on public places but doing so they do not infringe the rights of others, do not cause any harm and they do not commit other unlawful actions.

According to the committee, the human dignity of the individual and the freedom of action cannot be reconciled with the fact that the state enforces anybody to the use of services by punishment.

Last but not least, homelessness is a social problem so solving the problem by

[8] European Federation of National Organisations Working With the Homeless Press Release – 4 March 2013 For Immediate Release – Statement Against the Continued Persecution and Criminalisation of Homeless People in Hungary

penalising it is not only inappropriate, but also pointless. These homeless people got to this position because they cannot resolve their housing due to lack of income, thus, they are not able to pay the fine. If we accepted that a person in an unworthy position does not have a human dignity to be protected, we would question human dignity and equality itself.

Anyone at any time can get involved in an indignity. We do not need an economic crisis for this to happen, an unexpected life tragedy might be sufficient to make somebody homeless. Homelessness and living on the streets is not a matter of the choice of the individual, but also it is a kind of deviance. – Besides, there are the ranges of differences in individual cases – so dealing with it might cause a dilemma and a lot of conflicting views and interests. Obviously, neither sleeping on the streets nor rummaging through garbage may not be 'rights', anyway, they have never been and nobody wants to achieve that.[9]

5. A POSSIBLE WAY TO SOLUTION

As the problem of homelessness is a multi-dimensional problem, solutions and efforts to reintegrate homeless people into the society also need to be enforced in several areas simultaneously. Different ideas, opinions and ways can be and should be considered and supported to achieve success.

The public opinion should be revealed also. Policy makers consider it inevitable to find solutions to the prevention of homelessness, to release the difficulties of the homeless and to help them in the housing while respecting and guaranteeing the requirement of an equal dignity.

Provision of adequate housing is a key component/element of reintegration.

Access to a number of good quality and affordable housing for the marginalized population would be necessarily important. Furthermore, politics on employment, housing and expenditure on health should be revised and reconsidered as well. It is important that other areas associated with homelessness should be consistent with current policies and measures with the effort to eliminate homelessness, and should not generate a regular supply of the homeless population.

It is important to act against the social perception that homelessness is only the problem of the individual, as it is a social problem affecting the whole population.

Instead of punishing and placing the homeless in mass accommodation shelters, the solution would be the prevention of rooflessness and facilitating the access to housing for those who have been unhoused.

Issues of homelessness should be dealt together with social and housing policies instead of using law enforcement exclusively. Furthermore, ensuring the

[9] BORZA, BEÁTA – CSIKÓS, TÍMEA – KISS, BERNADETT (et. al.): A hajléktalan lét, in HAJAS, BARNABÁS – SZABÓ, MÁTÉ (ed.): *Pajzsuk a törvény. Rászoruló csoportok az ombudsmani jogvédelemben* [Their shield is the law. The Ombudsman's protection for vulnerable groups], 2013, Alapvető Jogok Biztosának Hivatala, Budapest, 337-338.

cooperation of local authorities and efficient governmental programs are needed. This cooperation would facilitate their social integration and settle their situation instead of criminalization of homeless and displacement them from the street.

Comprehensive housing and social policy reform is needed to manage the issue of homelessness; e.g. Acts should contain an enforceable right to housing.

Measures taken in the following areas are also necessary; an extended social housing network, significantly increased housing subsidies, widespread, effective debt management, moreover a social service system that works on helping its customers to be re-housed soon, and finally, putting a greater emphasis on prevention rather than post-compensation.

Nobody should have the purpose to – especially not the Parliament that helps so much for those who are in danger of losing their home due to foreign currency loans – more people live on the street or in a cottage, but we should have the purpose to have real solutions to the housing crisis. Either the development of the local governmental rental property and the use of empty houses or the renovation of the houses in bad condition and making them habitable would be the solution to this problem.

All upcoming governments should seek to alleviate homelessness, reduce the number of homeless people, to ease the housing crisis situations. The method of allocation housing and the access to housing opportunities should be improved. These efforts, however, limited by the course of the current budgetary constraints, which can be grouped into two categories: achievable steps with or without out increasing the reverse current resources.

Although, it is true that it is not the government that is responsible for the elimination of homelessness in whole or for every aspect of the situation.

Wide social cooperation and social professional initiative is necessary for the gradual elimination of homelessness. Housing and housing retention, furthermore, conversion of the regulation concerning the homeless is that requires governmental actions. Such integrated systems in which the government, local governments, social service providers and operators are working together are required in each area of intervention.[10]

6. CONCLUSION

The most important is that homeless people should not be treated as criminals. I am convinced that direct assistance can only be successful and efficient by the collaboration of various organisations and people. It is strongly important to emphasize the respect of the human dignity, the equitable recognition of the autonomous and responsible decision-making capabilities, furthermore, the

[10] GYŐRI, PÉTER – MARÓTHY, MÁRTA*: Merre tovább?* Egy nemzeti hajléktalanügyi stratégia lehetséges keretei. Szakértői javaslat a Magyar Köztársaság Kormánya részére [Where to go? A possible framework of a national homelessness strategy. An expert proposal for the Government of the Republic of Hungary], in *Pro Domo Füzetek,* No. 1. (2008), 10.

expression and the protection of the rights of the homeless or the people threatened with such a situation. It is also indispensable to prevent the development of such situations, in other words, to prevent people becoming homeless.

The state always had, and now it also has a constitutional way to – not really constitutional law, but rather implemented a kind of paradigm shift in approach – become an active ally of the citizen instead of being a passive assistant. The role of the ombudsman can be defined as an incentive to act as a professional and as a consistent critic who shows the arguments in favour of participation and coordinates the process.

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[2] GYŐRI, PÉTER – MARÓTHY, MÁRTA: Merre tovább? Egy nemzeti hajléktalanügyi stratégia lehetséges keretei. Szakértői javaslat a Magyar Köztársaság Kormánya részére [Where to go? A possible framework of a national homelessness strategy. An expert proposal for the Government of the Republic of Hungary], in *Pro Domo Füzetek,* No. 1. (2008).

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The ESMA Case and Its Impact on the Legal Framework of the European Agencies

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Abstract
After the crisis, the European Union's legislative activity in connection with the regulation and supervision of the financial market was characterized with strong task- and competence centralization endeavours and is still characterized with it in secondary (but not primary) law. That is exactly why the most complicated and most significant question is that among what limitations these endeavours can prevail from legal point of view. The article analyses the notion of the measures for approximation in the European law, the applicability of Article 290 and 291 TFEU and the reinterpretation of the Meroni doctrine in the context of the current case law of the European Court of Justice.

Keywords: *ESMA, European agencies, legal basis, Meroni, Article 290 and 291 TFEU.*

JEL classification: *G18, G20, G28, K23, P48.*

1. INTRODUCTION

After the crisis, the European Union's legislative activity in connection with the regulation and supervision of the financial market was characterized with strong task- and competence centralization endeavours and is still characterized with it in secondary (but not primary) law. That is exactly why the most complicated and most significant question is that among what limitations these endeavours can prevail from legal point of view. What heights can centralization, or nicely expressed, integration can achieve among legal frames? What is that point after which the integration surpasses the framework of current foundation treaties?

Centralization's (integration's) margin, borders are set by the rules of primary law on delegation of competences and by the case law of the European Court of Justice (hereinafter: ECJ). Article 5 of the Treaty on European Union (hereinafter: TEU) says that – as one of the most significant rules of the European Union common law – the limits of Union competences are governed by the *principle of conferral*. According to the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Every such competence which Treaties have not conferred to the Union, remain at member states. Hence, the

principle expresses that Member States further remain the lords of the Treaties; they continue to be holders of national sovereignty.[1] It comes from the principle of conferral that every secondary legal act must have a legal basis in specific Treaty articles, or primary European law. The ECJ review the legality of legislative acts and if the legislator chose the act's legal basis wrong (*ultra vires*) the Court declare the act concerned to be void, based on Article 263 and 264 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). It is another significant question in connection with the delegation of competences that who do Member States transfer part of their competences to, hence, according to Article 17 TEU, the *Commission ensure* the application of the Treaties, and of measures adopted by the institutions pursuant to them. (…) It shall exercise coordinating, *executive and management functions*, as laid down in the Treaties. That is – as a quasi-separation of powers rule – Article 17 TEU appoints the Commission for the implementation of (primary and secondary) Union law, along determined conditions.

Simultaneously with the widening of the European Union's tasks, the level of bodies under the European institutions was formed, from which I have to highlight the diffuse system of the so called *European agencies*. As a reaction to organizational expansion, the *second level* of *delegation of competences* has been formed – among the principle of conferral –, which can also be understood as delegation of competences inside the organizational system of the Union. We can distinguish two cases on this level. On the one hand, we can distinguish competences delegated to the Commission by Union legislators, on the other hand, the delegation of those competences which were originally delegated to the Commission by the Treaties.[2] The first case is handled by Article 290 and 291 TFEU. Primary law does not rule on the conditions of the second case, its rules were formed by case laws of the ECJ (the so called *Meroni-doctrine*).

The limits of centralization (integration) endeavours are partly determined by the principle of conferral – according to which the Union can only practice such competences which were transferred to it by member states through the foundation treaties, via limiting their own sovereignty – and as its outcome, the existence of an adequate legal basis necessary for secondary legislation. On the other hand, centralization's (integration's) limits are the frames of delegation of competences among the European Union bodies written in Articles 290 and 291 TFEU, connecting to which the primary question is whether it can be regarded as a closed delegation system or not. On the third part, the court case law referring to the delegation of Commission competences also limits the deepening of integration among legal frameworks. The extent of the European financial supervisory architecture formed as the effect of the crisis was affected by all three limitations and the court's interpretation – as I am going to elaborate on it – *strongly widened the legal limits of competences' centralization in the name of integration*.

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[1] VÁRNAY, ERNŐ – PAPP, MÓNIKA: *Az Európai Unió joga*, 2010, Complex, Budapest, 183.
[2] LAFARGE, FRANCOIS: The legal basis and the legal constraints of EU agencies (and the transformation of the executive function in the EU), in ONGARNO, E. (ed.): *EU Agencies*, 2013, Palgrave MacMillan. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249873 [cit. 2014-07-21].

The permissibility of the European financial supervisory system's reformation via Union law became questionable by the United Kingdom of Great Britain and Northern Ireland in front of the ECJ, in its action aiming at the annulation of ESMA competence connecting to short selling. Despite that in the action of Great Britain questioned the legal limits of centralization endeavours in connection with only one competence rule – and not in connection with the whole new supervisory system –, the ECJ's decision is a *milestone* regarding the above mentioned limits.

2. THE ESMA CASE'S BACKGROUND IN SHORT

Investigating short selling's legal background, we can realize that prior to the economic crisis there was no Union legislation and Member State legislations showed considerably various pictures.[3] In September 2008, in the height of the financial crisis – in a so called reaction panic –, more Union Member States and the USA's competent authorities accepted measures for restricting or banning short selling.[4]

The current fragmented approach to short selling and credit default swaps limits the effectiveness of supervision and the measures imposed and results in regulatory arbitrage. It may also create confusion in markets and costs and difficulties for market participants.[5]

Recognizing the further systemic risks hidden in the different regulations, Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (hereinafter: Short selling Reg.) was born on the recommendation of the Commission. The Short selling Reg. tries to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regard to the financial markets, and to ensure a high level of consumer and investor protection, it is therefore appropriate to lay down a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps and to ensure greater coordination and consistency between Member States where measures have to be taken in exceptional circumstances.[6]

According to Article 28 of Short selling Reg., in case of exceptional circumstances, ESMA can order increased *information obligation* for natural or legal persons having net short positions in relation to specific financial instrument

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[3] *See* PAYNE, JENNIFER: The Regulation of Short Selling and Its Reforms in Europe, in *European Business Organization Law Review*, Vol. 13. Issue 3. (2012), 429.

[4] BEBER, ALESSANDRO – PAGANO, MARCO: Short-Selling Bans Around the World: Evidence from the 2007–09 Crisis, in *The Journal of Finance*, Vol. 68. Issue 1. (2013), 343.

[5] *See* COM (2010) 482 Proposal for a regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps, 2.

[6] *See* Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (hereinafter: Short selling Reg.) preamble point 2.

or class of financial instruments, and in case of exceptional circumstances, it can *prohibit or impose conditions on,* the entry by natural or legal persons into a short sale or a transaction.

The ESMA can exclusively make these measures if a) the measures address a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union and there are *cross-border implications*; and b) no competent authority has taken measures to address the threat or one or more of the competent authorities have taken measures that *do not adequately address the threat*. The competence set in Article 28 of Short selling Reg. is hierarchically superior to Member State authorities' decisions as *measures accepted* by ESMA according to this article are *prevail over any previous measure taken by a competent authorities.*

The United Kingdom (in this part furthermore referred to as Applicant) handed in an action to the ECJ on 1st June 2012, in which it requested the annulation of Article 28 of Short selling Reg. based on Article 263 TFEU. In the action, the Applicant named four pleas in law, which – according to it – give basis to annulations of ESMA's intervention powers in exceptional circumstances.

In the action the Applicant referred to that *firstly*, Article 28 of Short selling Reg. is contrary to the second principle established by the Court of Justice in the Meroni case,[7] because when ESMA is required to take action under Article 28 entail a large measure of discretion. *Secondly*, Article 28 purports to empower ESMA to impose measures of general application which have the force of law, contrary to the Court's decision in Case Romano.[8] *Thirdly*, Article 28 purports to confer on ESMA a power to adopt non-legislative acts of general application, whereas in the light of Articles 290 and 291 TFEU, the Council has no authority under the Treaties to delegate such a power to a mere agency outside of these provisions.. Finally, *fourthly*, if and to the extent that Article 28 were interpreted as empowering ESMA to take individual measures directed at natural or legal persons, it would be ultra vires Article 114 TFEU.

As *Balázs Fekete* also highlights, „the following conviction in the focus point of the Applicants was that Article 28 provides such a wide discretional competence to ESMA, which delegation is against the law because of certain foundation treaty rules and because of the existing ECJ case law."[9] Besides the validity of the concrete competence, the ECJ has to form an opinion in all above mentioned theoretically significant interpretation of law that mark the limits of centralization,

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[7] Judgment of the Court of 13 June 1958. *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*. Case 9/56.

[8] Judgment of the Court (First Chamber) of 14 May 1981. *Giuseppe Romano v Institut national d'assurance maladie-invalidité*. Reference for a preliminary ruling: Tribunal du travail de Bruxelles – Belgium. Social security – Applicable exchange rate. Case 98/80.

[9] FEKETE, BALÁZS: *Az Európai Értékpapír-piaci Hatóság rendkívüli válsághelyzetben alkalmazható beavatkozási hatásköre nem ellentétes az uniós jogrend követelményeivel*, Lendület HPOPs Kutatócsoport, 2014. Available at: http://hpops.tk.mta.hu/blog/2014/02/europai-ertekpapir-piaci-hatosag [cit. 2014-07-21].

the ESMA case's *systemic importance* originates from this.[10] These theoretically significant questions are going to be investigated via following the study's logical order, not according to the order of the Judgement.[11]

3. IN THE NAME OF THE INTEGRATION

3.1. The question of legal basis and the notion of the measures for approximation

Hence, the first theoretically significant question referred to the interpretation of the notion of the measures for approximation and Article 114 TFEU determined as the legal basis of the competence included in Article 28 of Short selling Reg. Based on Article 114 TFEU – which Article is also the legal basis of the formation of the ESFS and the SRM –, *save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

According to the Applicant, Article 28 of Short selling Reg. is not intended to authorise ESMA to take individual measures directed at natural or legal persons. On the contrary, measures that may be adopted under that provision are of general application. Furthermore, he Applicant considers that, if, however, Article 28 of Short selling Reg. is to be regarded as authorising ESMA to direct decisions at natural or legal persons, that provision is *ultra vires* Article 114 TFEU. That provision does not empower the EU legislature to take individual decisions that are not of general application or to delegate to the Commission or a Union agency the power to adopt such decisions. Hence, the theoretically significant question can be asked in a way that whether those decisions addressed to financial institutions which have prevail over any previous measure taken by a competent authorities can be regarded as measures for approximation according to Article 114 TFEU or not. The theoretical significance of the question is showed by that the advocate general (*Niilo Jääskinen*) acting in the case and the court has different theoretical standpoints.

In the Advocate General's opinion,[12] referring to judgement made in the

[10] MARJOSOLA, HEIKKI: Case C-270/12 (UK v Parliament and Council) – Stress Testing Constitutional resilience of the Powers of EU Financial Supervisory Authorities – A Critical Assessment of the Advocate General's Opinion, in *EUI Working Paper Law* 2014/02, 4.

[11] Judgment of the Court (Grand Chamber) of 22 January 2014. *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*. C-270/12. (hereinafter: Judgement)

[12] Opinion of Advocate General, 12 September 2013. *United Kingdom of Great Britain and*

ENISA case,[13] he ascertained upon the court case law that the EU legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation 'in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate'. Furthermore, it is important that in the ENISA case the ECJ ruled that nothing in the wording of Article 114 TFEU implies that the addressees of the measures adopted by the EU legislature on the basis of that provision can only be Member States. Hence, Article 114 TFEU provides legal basis for that addressees of acts accepted upon this can even be natural or legal persons. The Advocate General determined *that the decision making powers of ESMA under Article 28 of Short selling Reg. bear little resemblance to the measures described by the Court in these important passages of the ENISA ruling.* First of all, *measures* based on Article 28 of Short selling Reg. are *legally binding*, while the Court investigated non-legally binding measures in the ENISA case. While this is not objectionable in and of itself, it is difficult to envisage how the exercise of a power under Article 28 of Short selling Reg. could contribute to harmonisation of the kind described by the Court in *ENISA*. Rather *its function is to lift implementation powers* contained in Article 18, 20 and 22 of Short selling Reg. *from the national level to the EU level* when there is disagreement between ESMA and the competent national authority or between national authorities.[14] Hence, the Advocate laid down that *the outcome of the activation* of ESMA's powers under Article 28 of Short selling Reg. *is not harmonisation, or the adoption of uniform practice at the level of the Member States*, but the replacement of national decision making with EU level decision making.[15]

The ECJ, deviating from the Advocate General's opinion investigated whether the two conditions in Article 114 TFEU prevail with relation to Article 28 of Short selling Reg. So the ECJ analysed that, on the one hand, whether the measures according to Article 28 of Short selling Reg. *comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States* and, on the other hand, *have as its object the establishment and functioning of the internal market*.

Northern Ireland v European Parliament and Council of the European Union. C-270/12. (hereinafter: Opinion).

[13] Judgment of the Court (Grand Chamber) of 2 May 2006. *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*. Case C-217/04.

[14] Opinion point 50.

[15] The Advocate General marked that the Article 352 TFEU could be an adequate legal basis for the competences delegated to the ESMA with the Article 28 of Short selling Reg. With this legal basis the problem is that the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament to adopt the appropriate measures.

The ECJ first determined that by the expression 'measures for the approximation', the authors of the TFEU intended to confer on the Union legislature, depending on the general context and the specific circumstances of the matter to be harmonised, discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features.[16] Regarding this, the ECJ has held in that regard that such discretion may be used *in particular to choose the most appropriate method of harmonisation* where the proposed approximation requires highly technical and specialist analyses to be made and developments in a specific field to be taken into account.[17] Continuing the Court's argumentation, accordingly, the EU legislature, in its choice of method of harmonisation and, taking account of the discretion it enjoys with regard to the measures provided for under Article 114 TFEU, *may delegate to a Union body, office or agency powers for the implementation of the harmonisation sought. That is the case in particular where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately*.[18]

The ECJ makes clear that the aim of the orderly functioning and integrity of the financial markets or the stability of the financial system in the EU includes the establishment of an appropriate mechanism which would *enable measures to be adopted throughout the EU which may take the form*, where necessary, o*f decisions directed at certain participants in those markets.*[19] The EU legislature therefore considered it appropriate to lay down a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps and to ensure greater coordination and consistency between Member States where measures have to be taken in exceptional circumstances. Therefore, the harmonisation of the rules governing such transactions is intended to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States.[20] Taking all these into account, in the ECJ interpretation, competence set in Article 28 of Short selling Reg. corresponds to criterion written in Article 114 TFEU.

The significance of the decision in connection with the centralization's borders can be traced in that according to the ECJ's interpretation Union bodies' practice of their competences is based on such general, Union interests which in nature and in quality differ from the individual Member State interests and cannot

[16] Judgement point 102.
[17] Judgement point 103.
[18] Judgement point 105.
[19] RAPASSI, RENÉ: Assessment of the Judgement of the European Court of Justice in Case 270/12, United Kingdom v Council and European Parliament. Impact of this judgement on the proposal of the SRM regulation. Available at: http://www.sven-giegold.de/wp-content/uploads/2014/01/Assessment-ECJ-Case-C-270-12-and-relevance-for-the-SRM1.pdf [cit. 2014-07-21].
[20] Judgement point 114.

be realized exclusively with the cooperation of Member State authorities.[21] Therefore, competences ensuring direct Union intervention (supervision) are compatible with Article 114 TFEU in connection with the significantly integrated European financial markets, and – in opposition with the Advocate General's opinion which tried to set up limits for the application of the notion of „measures for approximation" –, unanimous decision making set in Article 352 TFEU is not necessary for them. Such interpretation of Article 114 TFEU gives way (not only) to the further integration of financial market's European supervisory system. Besides, such wide interpretation creates the risk that the scope of „measures for approximation" could be expanded almost indefinitely, depriving of Article 114 TFEU inherent limits and thus the principle of legality can be violated.[22]

3.2. The interpretation of Articles 290 and 291 TFEU

According to the argumentation of the United Kingdom, because of that Articles 290 TFEU and 291 TFEU circumscribe the circumstances in which certain powers may be given to the Commission, the Council has no authority under the Treaties to delegate powers such as those provided for in Article 28 of Short selling Reg. to an EU agency. Therefore, the ECJ had to take a side in that whether legal framework entering into the place of so called comitology with the Treaty of Lisbon mean a closed system or not. Whether creators of TFEU wished to create such an only legal framework in Articles 290 and 291 TFEU which only makes the delegation of certain competences exclusively – in special cases for the Council – for the Commission possible, or the Union legislator have other systems of delegation such competences to Union organizations or authorities.

"The practice of delegated competences and the taking of adequate executive measures are indispensable tools of the enforcement of Union law, which suppose the unified interpretation of the TFEU's new regulations".[23] Based on Article 290 TFEU a legislative act may delegate to *the Commission* the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. Article 291 para. 1 TFEU lies down that Member States shall adopt all measures of national law necessary to implement legally binding Union acts. Para. 2 says that where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council. By Article 290 the Commission can only be authorized to accept acts with general application, while according to Article 291 the Commission (in certain cases the Council) can also apply individual measures and acts with general application for the sake of unified implementation of the legally binding Union

[21] FEKETE: *op. cit*.
[22] BABIS, VALIA: The Power to Ban Short-Selling: The Beginning of a New Era for EU Agencies? in *Legal Studies Research Paper Series*, No. 27/2014. 2.
[23] OSZTOVITS, ANDRÁS (ed.): *Az Európai Unióról és az Európai Unió Működéséről szóló Szerződések magyarázata 3*. 2011, Complex, Budapest, 3099.

acts.[24] The main constitutional concern relating to Article 290 TFEU delegated acts appertains to democratic accountability. In contrast, the main constitutional focus in relation to Article 291 TFEU implementing acts relates to respect for the primary competence of the Member States with respect to implementation of EU law, and the institutional balance between the Council and the Commission when they assume implementing roles.[25]

Continuing the train of thoughts, it is important to highlight that regarding Article 291 a European authority cannot be the addressee of an executive competence *expressis verbis*. The opinion of the Advocate General also took it into consideration, as is says that Article 291 TFEU, like Article 290 TFEU, does not refer to agencies as subjects on whom implementing powers can be conferred at the EU level. However, given that implementing powers do not extend to amending or supplementing legislative acts with new elements, fundamental constitutional principles do not in my opinion prevent the legislator from conferring such powers on agencies as a midway solution between vesting implementing authority in either the Commission or the Council, on the one hand, or leaving it to the Member States, on the other.[26] This argumentation was taken over by the ECJ as well. In the Judgement the ECJ noted in that regard that, while the treaties do not contain any provision – hence, neither do Articles 290 and 291 TFEU – to the effect that powers may be conferred on a Union body, office or agency, a number of provisions in the TFEU none the less presuppose that such a possibility exists.[27] Under Article 263 TFEU, the Union bodies whose acts may be subject to judicial review by the Court include the 'bodies, offices' and 'agencies' of the Union. The rules governing actions for failure to act are applicable to those bodies pursuant to Article 265 TFEU. Article 267 TFEU provides that the courts and tribunals of the Member States may refer questions concerning the validity and interpretation of the acts of such bodies to the Court. Such acts may also be the subject of a plea of illegality pursuant to Article 277 TFEU.[28]

The ECJ noted that Article 28 Short selling Reg. vests ESMA with certain decision-making powers in an area which requires the deployment of specific technical and professional expertise. However, that conferral of powers does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU, but cannot be considered in isolation. On the contrary, that provision must be perceived as forming part of a series of rules designed to endow the competent national authorities and ESMA with powers of intervention to cope with adverse developments which threaten financial stability within the Union and market confidence. The ECJ deducted that from this rough argumentation that Article 28 of Short selling Reg. read in conjunction with the other regulatory instruments adopted in that field identified above, cannot be regarded as undermining the rules

[24] OSZTOVITS: *op. cit*. 3105-3106.
[25] Opinion point 83.
[26] Opinion point 86.
[27] Judgement point 79.
[28] Judgement point 80.

governing the delegation of powers laid down in Articles 290 TFEU and 291 TFEU.[29]

Defects of the ECJ's argumentation probably come from that in spite that it agreed with the Advocate General's argumentation, it did not wish to make it as part of the Judgement. According to the Advocate General's argumentation, Article 28 of Short selling Reg. does not violate Articles 290 and 291 TFEU because it delegated the intervention competence to ESMA directly with the legislative act of the Union's legislator – *choosing the solution outside Articles 290 and 291 TFEU*. The EU legislature is not acting as a 'delegating authority' when it confers implementing powers on institutions, agents, or other bodies of the Union, but *a constitutional actor exercising its own legislative competence*, as conferred on it by the higher constitutional charter, i.e. the Lisbon Treaty.[30]

According to Articles 290 and 291 TFEU the addressee of transfer may only be the Commission – in some cases based on Article 291 the Council –, however, we can deduct it from the argumentation of the judgement that according to the ECJ's interpretation, the legal framework formed in Articles 290 and 291 TFEU cannot be regarded as the only system with which competences can be delegate to any European body. With this argumentation, the ECJ stated not less than *that European agencies actually mean the alternative of the implementation of Union law besides Member States and implementation by the European institutions*, even if *expressis verbis does not come from the text of founding treaties*. Among the framework of the Meroni-doctrine, which I am going to elaborate on in the next point, in areas requiring special competencies, the Union legislator can delegate regulative and executive competencies to European agencies having special competency. Based on these, the ECJ distinguish the delegation of powers to EU agencies that is only indirectly recognised in the Treaties, from the explicit delegation of powers to the European Commission under Article 290 and 291 TFEU.[31]

3.3. The reinterpretation of the Meroni-doctrine

The essence of the Meroni judgement[32] is that the Court differentiated between clearly defined executive powers and discretionary powers having wide margin of discretion. The previous ones can be conferred, while the latter ones were qualified as non-conferrable.

In the Meroni-case the Court set those criteria with which fulfilment delegation of competences is allowed. Based on these, the delegator can only delegate competences to administrative agencies if: *(1) a delegating authority cannot confer upon the authority receiving the delegation powers different from*

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[29] Judgement point 80.
[30] Opinion point 91.
[31] PELKMANS, JACQUES – SIMONCINI, MARTA: Mellowing Meroni: How ESMA can help build the single market, in *CEPS Commentary*, 3. Available at: http://www.ceps.eu/book/mellowing-meroni-how-esma-can-help-build-single-market [cit. 2014-07-21].
[32] *See* KOEN, LENAERTS: Regulating the regulatory process: Delegation of powers in the European Community, in *European Law Review*, Vol. 18. No. 1. (1993), 30.

those which it has itself received under the treaty (general principle); *(2) such a delegation of powers can only involve clearly defined executive powers, the use of which must be entirely subject to the supervision of the delegator*; *(3) a delegation of powers cannot be presumed, even when empowered to delegate its powers the delegating authority must take an express decision transferring them*; *(4)* the transfer must not disturb the institutional balance between European institutions.

The judgment of the Meroni-case was further supplemented by several later judgements, which together form the so called Meroni-doctrine.[33] The framework of the delegation of competences became complete with the Romano case, as the ECJ, within the framework of the EEC Treaty in connection with a Union organization set the general prohibition of legislative competences' further delegation, the prohibition of the delegation of powers having wide margin of discretion, and it determined the necessary system of criterion regarding every other cases of delegation of powers.

The strict system of conditions set up in the Meroni-case and the prohibition of the delegation of powers having wide margin of discretion has stood for fifty years as constitutional limits to delegation,[34] which prohibition continuously became flexible in the court' case law[35] since the formation of the new type of European authorities. The ESMA case allowed the ECJ to summarize and reinterpret the Meroni-doctrine's strict rules in the context of the introduced Treaty of Lisbon.[36]

As the first step, the ECJ noticed that the bodies in question in *Meroni* case were entities governed by private law, whereas ESMA is a European Union entity, created by the EU legislature.[37] As the second step the court stated that unlike the case of the powers delegated to the bodies concerned in *Meroni* case, the exercise of the powers under Article 28 of Short selling Reg. is circumscribed by various conditions and criteria which limit ESMA's discretion.[38] Finally the ESJ noted that contrary to the applicant's claims, those powers do not, therefore, imply that ESMA is vested with a 'very large measure of discretion' that is incompatible with the

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[33] *See* for more details KÁLMÁN, JÁNOS: A tilalomtól a rugalmas értelmezésig, avagy a hatáskör-átruházás az Európai Unió Bíróságának joggyakorlatában, in KECSKÉS, GÁBOR (ed.): *Doktori műhelytanulmányok 2014*, Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola, Győr, 2014 (forthcoming).

[34] CRAIG, PAUL: *EU Administrative Law*, 2012, Oxford University Press, Oxford, 155.

[35] About the process *see* for more details KÁLMÁN (2014): *op. cit.*

[36] Under Article 263 TFEU, the Union bodies whose acts may be subject to judicial review by the Court include the 'bodies, offices' and 'agencies' of the Union. The rules governing actions for failure to act are applicable to those bodies pursuant to Article 265 TFEU. Article 267 TFEU provides that the courts and tribunals of the Member States may refer questions concerning the validity and interpretation of the acts of such bodies to the Court. Such acts may also be the subject of a plea of illegality pursuant to Article 277 TFEU. *So the judicial control over the European agencies become full, which was completely lacking at the time of the Meroni judgement.*

[37] Judgement point 43.

[38] Judgement point 45.

TFEU for the purpose of that judgment.[39]

The new Meroni-doctrine referring to the delegation of competences can be built up from the judgement's reasoning – with regards to what has been included in the Advocate General's opinion. Based on this, *competences having wide margin of discretion can be delegated to other Union organization than the Commission if (1) this organization is a European Union entity, created by the EU legislature (point 43), (2) the exercise of the powers are circumscribed by various conditions and criteria which limit the discretion (point 45), and (3) the exercise of the delegated powers are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority (point 53.).* It is important to highlight that competences delegated via this way include individual decisions and measures with general application, too.

Hence, it can be seen that the ECJ strongly reinterpreted the framework of delegation of competences, taking the wide formation of the ECJ review into account, which – together with literature opinions[40] – makes the maintenance of strict conditions laid down by the Meroni-doctrine useless. At the same time, the Court discarded the difference between clearly defined executive powers and discretionary powers having wide margin of discretion, with that it resolved the prohibition of the delegation of powers having wide margin of discretion. Several representative of the literature welcomed the reinterpretation of the Meroni-doctrine, as the new framework suits the Union's current improvement more.[41]

4. CONCLUSIONS

The ESFS was formed as the first step of the European Union's reform process, "compelled" by the economic crisis. However, the banking system's bailout packages raised government debt to such levels which led to sovereign credit crisis and the deflection of the Euro. Hence, reform processes continued to move towards the more and deeper integration, putting the question: what kind of Europe do we want? Do we want the United States of Europe with federal organization or the Europe of Nations with strengthened Member State position, without political integration? We can list several reasons pro and contra all future plans, however, with the analysis of institutional changes it becomes clear that the formation of the Banking Union is not followed by the weakening of Union competencies but by its drastic strengthening. The introduction of the Banking Union, and primarily the SRM, its second pillar cannot reach its aim without adequate financial background, hence, the further deepening of integration is needed with the approach of fiscal policy, which is direct consequence and wish is the remedy of the lack of democratic legitimacy, which shows into the direction of political union. We can quarrel on the European Union's future, but decision makers have already voted

[39] Judgement point 54.

[40] VOS, ELLEN: Reforming the European Commission: What role to play for EU agencies? in *Common Market Law Review*, Vol. 37. No. 5. (2000), 1123-1124.

[41] *See* BABIS: *op. cit.* 2.; PELKMANS – SIMONCINI: *op. cit*. 6.

for one way with the introduction of reform processes. In the deepening of integration the ECJ does a good job, and as it elaborated on it in its study, they widened the founding treaties' regulations to the widest in order to maintain the reform processes. We cannot solve every question with the integration-friendly interpretation but the principle of legality has to be blocked against the unlimited widening of founding treaties' regulations mainly Article 114 of TFEU which is the seed of reforms. The European Union is further based on the principle of conferral, as it cannot be regarded as a sovereign state, hence, for the sake of ensuring the new institutional reforms' stability – before further reforms – their treaty base must be laid down.

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Reorganization of the Hungarian Regional Public Administration – in the Centre: District Offices

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Abstract
In my study I present a significant part of the Hungarian public administration's reorganization, the process of the formation of district public administrational level and district offices. In its frame, I draw a picture on the main characteristics of council district system which can be regarded as current district offices' historical predecessor, and I also provide information on the circumstances of the termination of district offices operating in the council system. Following this, via stepping to the present through the past, I review the theoretical bases of the formation of the modern district public administrational level, the main stages of the formation of district offices, including basic rules referring to "district agreements" to be entered into by municipal and county government offices and settlement local self-governments. After this, I provide information on district offices as sub-offices of municipal and county government offices; analyse district office's organization, task- and competence sphere and their management and leadership characteristics. As the closure of the study, I review experiences conducted from the operation of the district offices so far and present recommendations on the development of district offices

Keywords: *district offices, metropolitan and county government offices, regional public administration, reorganization*

1. INTRODUCTION

When the new Government was formed in 2010, the regional level of public administration's state administration subsystem was characterized by a great deal of fragmentation and organizational variety. If we made a snapshot of regional state administration at the time of the 2010 change of government, we would see that among regional state administration organs there were organs of general competence (regional state administration authorities) and of special competence (such as county land registries), if we investigated competency and operational area, we would see regional organs (regional administration of national pension), county organs (such as county office of justice) and organs operating with special competency (such as national park directorate). This diversity was increased by that some state administration organs with special competence operated organizational units of regional competence under county level (such as regional

land registry).[1] Besides the above mentioned diversity of regional state administration organs, a further specialty of the regional level was that certain organs acting independently from one another with the budget insured to them and used human resources 'freely' among legal frames, operated next to the weak coordination competence of regional state administration offices.

These disintegration processes could not be stopped by the always strengthening integration endeavours[2] either, up until 2010, when the new Government started to reorganize the Hungarian public administration.

As the first step of the public administration reform, metropolitan and county public administration offices[3] were formed – again – with the effect of 1st September 2010, terminating regional state administration offices and as their legal successors. Simultaneously, the unconstitutional situation[4] born with the formation of regional state administration offices – or rather their legal precursor, regional public administration offices – also terminated. The second step of the reform was the formation of metropolitan and county government offices as the Government's regional state administration organs of general competence, which legal base is given by Act CXXXVI of 2010 (furthermore referred to as Khtv.) on law amendments connected to the formation of metropolitan and county government offices and regional integration, and Government Decree nr. 288/2010. (XII. 23.) on metropolitan and county government offices. Metropolitan and county government offices were formed on the base of metropolitan and county public administration offices, as their general successor. Furthermore, a significant part of the until then mainly individually operating regional state administration organs became organizational units – special administration units – of metropolitan and county government offices through integration. As regards regional state administration organs falling outside of the integration – except National Tax and

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[1] GYURITA, ERZSÉBET RITA: Reformok a területi államigazgatás szervezetében 2010-2013 között [Reforms in the regional state administration organization between 2010 and 2013], in PATYI, ANDRÁS – LAPSÁNSZKY, ANDRÁS (ed.): *Rendszerváltás, demokrácia és államreform az elmúlt 25 évben. Ünnepi kötet Verebélyi Imre 70. születésnapja tiszteletére* [Transition, democracy and state reform in the past 25 years. Festive volume for the 70th Birthday of Imre Verebélyi], 2014, Complex Kiadó, Budapest, 175. *See* also: GYURITA, RITA – HULKÓ, GÁBOR – KÁLMÁN, JÁNOS – TÓTH, TAMARA: The Organisation of the Hungarian Public Administration, in SMUK, PÉTER (ed.): *Transformation of the Hungarian Legal System 2010-2013*, 2013, Complex, Budapest, 155-184.

[2] The detailed analysis of government decrees referring to the integration attempts see: ZÖLD-NAGY, VIKTÓRIA – VIRÁG, RUDOLF: *A területi államigazgatás integrációja* [Regional state administration's integration], 2013, Nemzeti Közszolgálati és Tankönyvkiadó, Budapest, 35-48, 52-57.

[3] Metropolitan and county public administration authorities were formed by Government decree 214/2010. (VII. 9.) on metropolitan and county public administration authorities.

[4] See the presentation of the unconstitutional situation born upon the formation of regional public administration authorities in details: VEREBÉLYI, IMRE: Válságban a magyar középszintű közigazgatás, quo vadis? [In crisis the hungarian middle level public administration, quo vadis?], in *Új Magyar Közigazgatás*, Vol. 1. No. 2. (2008), 1-5.

Customs Administration Directorate and law enforcement organs[5] –, the metropolitan and county government office practices coordination and investigative rights. Metropolitan and county government offices started their operation on 1st January, 2011. It is important to highlight that government windows[6] that is, integrated governmental customer services were formed at that time as inner organizational units – with tighter task- and competence sphere – of metropolitan and county government offices' general office.

The Government set the formation of a good state as its objective, for which completion it launched two further significant administration programs in 2011, besides the public administration reform: juridical reform and reform of local self-governments.

The Magyary Zoltán Public Administration Development Programme (furthermore referred to as Magyary Programme) was elaborated in 2011, which on the one hand set down the legitimacy and results of the reform started in 2010, on the other hand, appointed the public administration reform's further main tasks. The Magyary Programme also elaborates on the characteristics of the good state, according to which „the State creates a lawful and equitable balance between a number of interests and needs, allowing the enforcement of claims in this way and provides protection. On the other hand, the State proceeds with due responsibility in the interest of the protection and preservation of the nation's natural and cultural heritage. On the third part, the only self-interest of the State is that it should, under any circumstances and effectively, be able to enforce the above two elements of the common good; in other words, the State should create an effective rule of law, therefore should provide the functioning of its institutions, and should provide the honouring and accountability of individual and collective rights."

The Magyary Programme defines the complete renovation of regional public administration as the most significant part of the public administration's innovation. The Government arrived to the next significant step of the renovation of regional public administration in 2013, as district offices started their operation as sub-offices of metropolitan and county government offices on 1st January. As it was worded in the 2012 publication of the Magyary Programme, „the purpose of the Government is to create contemporary, modern-age administrative districts which contribute to the coming into being of a system that operates at lower social costs than today's public administration".

In my study I would like to present the circumstances of the formation of district offices as well as significant characteristics of their organization and operation.

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[5] Metropolitan and county government offices only practice coordination tethers over law enforcement organs.

[6] See the formation, organization and operation of metropolitan and county government offices in GYURITA, ERZSÉBET RITA: A fővárosi és megyei kormányhivatal [The metropolitan and county government office], in *Új Magyar Közigazgatás*, Vol. 7. No. 2. (2014), 8-19.

2. HISTORY – DISTRICTS IN THE SYSTEM OF COUNCIL

Via investigating the history of Hungary's state structure, we can see that districts as regional organizational units[7] placed between the level of county and settlement, as a basic regional unit of Hungarian public administration has continuously been present in the Hungarian state's history from the 15th century – except twenty-eight years – and has had a decisive role during the completion of public administration tasks.[8] Unfortunately, the study's extent limitations do not allow me to provide a comprehensive picture of the history of the institution of districts[9] but I have to mention the district organization operating in the system of council prior to the transition, which can also be regarded as the „ancestor" of the current structure of districts.

Article 29 of the Constitution[10] accepted in 1949 (furthermore referred to as Constitution) stated that the People's Republic of Hungary consists of counties, districts, towns and villages from state administration point of view. According to paragraph 30 of the Constitution, the state power's local organs are county council, district council, village council and town district council.[11] Hence, district was determined as a constitutional regional level.

Detailed rules on the organization and operation of local councils – as elected organs – can be found in Act I. of 1950 (furthermore referred to as: the first council law) on local councils. At that time, district council's operation sphere expanded to all towns and villages, however, with the individual decision of the council of ministers, certain bigger towns were subtracted from the authority of county and district council.[12]

Act X of 1954 on councils (furthermore referred to as: the second council law) altered the regional fragmentation, based on which all towns were subtracted from the authority of the district council and towns with county and district rights were formed.[13]

Act I of 1971 on councils (furthermore referred to as: the third council law) brought about a significant change with regards to the district level of public administration as it terminated district council organs and institutionalized district offices. District councils, as unified, individual organs of the county council's executive committee, carried out state administration tasks belonging to the competence of the council with relation to those villages which were not qualified

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[7] ZÖLD-NAGY – VIRÁG: *op. cit.* 19.

[8] IVANCSICS, IMRE – TÓTH, JÓZSEF: A járások múltjáról és lehetséges jövőjéről [On the history of district and on their possible future], in: *Területi Statisztika*, Vol. 15. Issue 1. (2012), 6.

[9] Ibid. 6-33, makes a complete review of the institution's history in this theme.

[10] Act XX. of 1949 on the Constitution of the Hungarian Republic.

[11] IVANCSICS – TÓTH: op. cit. 9, Act XX. of 1949 on the Constitution of the Hungarian Republic, Art. 29 and Art. 30.

[12] IVANCSICS – TÓTH: *op. cit.* 10.

[13] Ibid. 11.

as suburban villages. As for suburban villages, competences of the district office or its head were practiced by special administration organs and the secretary of the town council's executive committee.[14]

The application of the suburban model continuously spread in the 1980s.[15] Finally, the system of district offices was terminated with the effect of 1st January 1984 and was replaced by the new administration system, the suburban administration. Though, it is interesting that 83 districts and 61 suburban administrational units existed before the reorganization, while 179 new suburbans were formed after the reorganization.[16]

3. THEORETICAL BASES OF THE FORMATION OF DISTRICT OFFICES

The basic objectives determining the directions of the public administration's reorganization and the formation of the Good State are written in the Magyary Programme (furthermore referred to as Magyary Programme 11.0), drafted by the Ministry of Public Administration and Justice in 2011. The formation of district state administration and simultaneously with it, local self-government reforms were already marked as tasks to accomplish in Magyary Programme 11.0, as a result of which the partition of local public affairs and state administration affairs between district offices and village local governments is being realized.[17]

After the formation of district as state administration level, upon the wish of the Government, the Ministry of Public Administration and Justice took the necessary steps for creating scientific basis[18] for districts and the formation of district offices.[19]

As the result of the theoretical preparation work, the Government, as a formal decision, published Government decree 1299/2011. (IX. 1.) (furthermore referred to as Government decree) on the formation of districts, determining the formation of districts. Point 1 of the Government decree sets the more effective, more inexpensive and client centred regional state administration as the objective of the district system. Furthermore, the Government decree also recorded the conceptual principles regarding the formation of districts. The Government decree obviously stated that districts must be formed with 1st January 2013. Besides setting the date, we can put the organizational principles and expectations of the Government decree into four main groups:

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[14] Art. 66 of the Act of 1971 on councils.
[15] ZÖLD-NAGY – VIRÁG: *op. cit.* 19.
[16] IVANCSICS – TÓTH: *op. cit.* 12.
[17] Magyary Zoltán Public Administration Development Programme (MP 11.0) 25. available at: http://magyaryprogram.kormany.hu/admin/download/d/2c/40000/Magyary%20kozig%20fejlesztesi%20program%202012%20A4.pdf [cit. 2014-06-01].
[18] The Ministry of Public Administration entrusted the HÉFTA Research Institute with the carrying out of preparatory tasks. The study can be retrieved from: http://hetfa.hu/terhasznalatvizsgalat/ [cit. 2014-06-01].
[19] ZÖLD-NAGY – VIRÁG: *op. cit*. 170.

a) principles to follow during determining districts' regional extension and competence area;
b) principles referring to selecting districts' seat;
c) principle of the distribution of local self-government and state administration tasks;
d) principles referring to districts offices' organizational system and their physical realization.

4. FORMATION OF DISTRICT OFFICES

On 25th June 2012, the Parliament created Act XCIII of 2012 (furthermore referred to as District law) on the formation of districts and the modification of laws connected to it, which Act determined the legal frames of the formation of districts and transferred the law amendments[20] necessary for the reorganization of tasks. During the formation of districts, the District law justified it as a primary standpoint that the newly formed district offices shall be formed on the base of local self-governments 'assets and human resources ensuring the completion of tasks taken over from the local government, and on the base of metropolitan and county government offices' sub-offices, hence, the central budget shall be less burdened by the introduction of the new lower-middle public administration level, therefore, not only the operation but the formation shall also be done in an inexpensive way. As for human resources, it is significant to note that only those public officials could be transferred from village local self-governments who met the conditions necessary for fulfilling the tasks.[21] I must note that with regards to certain village local self-governments the first thing to determine was the number of positions of the staff complement of the mayor's office to be taken over by the given metropolitan and county government office in the ratio of the transferred task- and competence circles. Hence, the staff complement of district offices was not influenced by the circumstance that certain public officials did not meet the qualification conditions, or the village self-government decided not to give any public officials, as in these cases metropolitan and county government offices took over empty positions which could be freely filled among legal frames. It can be seen that therefore person and position was separated from each other. The self-government assets serving the completion of tasks was taken to the metropolitan and county government offices' free utilization,[22] the legal relation of the public officials who were taken over became governmental service relation by the power of law.[23] Details of the transfer of positions and self-government assets serving the completion of tasks transferred from local self-governments was completed by the

[20] ZÖLD-NAGY – VIRÁG: *op. cit.* 182.
[21] The applicable qualification conditions are determined in Government decree 29/2012. (III. 7.) on the qualification conditions of public officials.
[22] District law, Art. 2. para. (1).
[23] District law, Art. 7. para. (3).

agreement between metropolitan and county government offices and village self-governments. The agreements had to be conducted until 31st October 2012.[24] In cases if it did not happen at all or not adequately happened, the agreement was done between the given metropolitan and county government office with a decree, and it decided on unsettled questions of the agreement with a decree.[25] There was no place for further legal remedy against this metropolitan and county government office decree in the public administration organization, the affected village self-government could hand in judicial supervision request against it.

Government decree 218/2012 (VIII. 13.) (furthermore referred to as District government decree) formed as an executive decree of the District law had the sample[26] of agreement between metropolitan and county government offices and village self-governments, and the detailed rules of concluding agreements and the handover of self-governments' assets.

The District government decree appointed[27] the competence area of district offices and determined their organizational structure. Based on the regulation, 23 district offices in Budapest and 175 district offices in the counties could start their operation on 1st January 2013.

5. LEGAL BASE OF DISTRICT OFFICES

The District law – among others – modified the Khtv., which hence determined district offices' place in the system of metropolitan and county government offices, set the rules of competence practicing and finalized the practice of employers' rights.[28]

According to Khtv., district offices operate as sub-offices of county government offices, and district offices operate as sub-offices of the metropolitan government office.[29] Based on the regulation by law, district offices – similarly to special administration organs – became metropolitan and county government offices' organizational units with individual task- and competence sphere with that functional tasks[30] ensuring district offices' operation are carried out by the general office of metropolitan and county government office. This solution ensured the operation-financial advantages coming from the unified organization with regards to district offices, too.[31]

District offices' organizational structure follows the organizational structure of metropolitan and county government offices, according to which the district

[24] District law, Art. 5. para. (2).
[25] District law, Art. 5. para. (5).
[26] District government decree's appendix 2 contains the text of the agreement.
[27] The District government decree's appendix 2 contains district office's competence area.
[28] ZÖLD-NAGY – VIRÁG: *op. cit*. 186.
[29] Khtv. Art. 20/A. para. (1)-(2).
[30] The determination of functional tasks is written in Art. 1 of the District Law.
[31] ZÖLD-NAGY – VIRÁG: *op. cit.* 186.

office consists of the district general office led by the head of the district office (furthermore referred to as district general office) and specialised district organs.[32]

As regards the organizational structure of the district general office, KIM order nr. 3/2013. (I. 18.) (furthermore referred to as KIM order) on organizational and operational structure of metropolitan and county government offices has resolutions. Based on the KIM order's investigation, it can be concluded that the district general office characteristically consists of an *authority department* and the *department of the office of government issued documents*. In case of district offices with greater number, a *department supporting operation* has also been formed in frames of the district general office for carrying out certain functional tasks.[33] Government windows with extended competences[34] were formed in 2014 as the newer stage of the public administration reform (furthermore referred to as district government windows), which windows started their operation as the district general office's organizational units. In connection with district government windows we must notice that they were formed from the merging of departments of the office of government issued documents and those government offices which previously operated as organizational units of metropolitan and county government offices' general office. In the new type of government offices one can arrange cases belonging to the sphere of the office of government issued documents and cases belonging to previous government offices' task and competence sphere, as well as cases of special administration organs' task- and competence sphere (such as true copy of title deed). Not all district offices have such new-type of government windows yet, their formation is continuous. Currently, office of government issued documents and *department of government windows* can simultaneously operate next to each other.

The following specialised district organs operate as organizational units of district offices:

a) *district public trust office* for carrying out child protection and guardian tasks;

b) district construction office to carry out construction supervision authority and certain legally determined construction authority tasks;

c) *district building control and heritage protection authority* for carrying out construction supervision, certain legally determined construction authority tasks and cultural heritage protection authority tasks;

d) the *district office's special administration organ of Animal Health and Food Control* for carrying out food safety, food quality-supervisory, fodder-supervisory, food chain-supervisory and animal health tasks;

e) *district land registry* for carrying out property and ground formation tasks;

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[32] Khtv. Art. 20/A. para. (3).

[33] ZÖLD-NAGY – VIRÁG: *op. cit.* 212.

[34] Government decree 515/2013. (XII. 30.) on government windows introduces the "second generation" government windows.

f) *district land registry's labour sub-office* for carrying out employment, work force tasks;

g) *district public health institution* for carrying out public health tasks.[35]

According to para. (2) of the District government decree's Art. 2, the government decree can name other state administration organizations as the district authority's special administration organ. However, this has not happened since the setting up of district offices. It is important to highlight that not all district special administration organs have been formed in all district offices. It is only the district public trust office that operates in every district. Characteristically, all district organs can be found in bigger district offices and they practice their tasks and competence sphere expanded over more districts.

The fact that administration shall not fall further from citizens was a highly justifiable principle at the formation of district offices. To that end, the institution of sub-offices and case assistant has been formed. The District government decree states that the district office can carry out its tasks through sub-offices and case assistants with regards to villages belonging to its competence.[36] Sub-offices are district offices' individual inner organizational units, where the district office holds permanent administration. In those settlements where the district office does not operate sub-offices but still wishes to ensure the possibility of local administration, district office's case assistants may act. Details of the settlement case assistant service are set in the agreement conducted between metropolitan and county government offices and settlement local self-governments.[37]

6. DISTRICT OFFICE'S DIRECTION AND LEADERSHIP

6.1. District office's direction

The district office's direction is greatly similar to the leadership structure of metropolitan and county government offices, as the head of the district office can be regarded as a political leader to the extent that his/her appointment's condition is higher education and at least five-year public administration experience, however, in his/her case Khtv. accepts parliamentarian activity, chair of county assembly and fulfilling the role of a mayor as public administration experience.[38] It is a difference though that district office heads' charge is not connected to any governmental cycle.[39] The head of the district office is appointed and exempted by the minister upon the recommendation of the Government Commissioner. Employer rights over the head of the district office – expect appointment and exemption – are practiced by the Government Commissioner.[40]

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[35] District government decree, Art. 2. para. (1).
[36] District government decree, Art. 1. para. (1).
[37] ZÖLD-NAGY – VIRÁG: *op. cit.* 223-224.
[38] Khtv. Art. 20/D. para. (2).
[39] FAZEKAS, MARIANNA: *Közigazgatási jog, Általános rész I.* [Public administration law – General part I.], 2014, ELTE Eötvös Kiadó, Budapest, 202-203.
[40] Khtv. Art. 20/D., para. (1).

The head of the district office is substituted by the assistant-head of district office. Theoretically, the assistant-head of district office is the district office's administrative professional leader, as one can be appointed as assistant-head of district office if s/he has basic degree and public administration management qualification, basic degree and international public administration management qualification, master degree and graduate public administration manager qualification, master degree and graduate European and international public administration management qualification, graduate jurist qualification achieved at master degree and at least basic degree and economist qualification.[41] The assistant-head of district office is appointed and his/her legal relation is terminated by the Government Commissioner upon the recommendation of the head of the district office. Employer rights over the assistant-head of district office – expect appointment, termination of legal relation, initiation of disciplinary proceeding and cutting disciplinary penalty – is practiced by the head of the district office.[42]

Having regard to that district offices are organizational units of the metropolitan and county government offices which operate as a unified budgetary organization, and to that they are only individual regarding their task- and competence sphere, the organizational leader entitlements of the head of the district office are quite limited. Most of the organizational tasks are practiced by the Government Commissioner.[43] In this sphere, the head of district office has the widest room for manoeuvre regarding employer rights, which is only limited in a way that regarding the appointment and termination of the district office's government official, the Government Commissioner has the right to object. On the person to be appointed or terminated as the district office's government official, the head of the district office – in case of specialised district organ after having consulted with the head of the specialised district organ – informs the Government Commissioner who can object against the person to be appointed or against his/her termination within fifteen days after having received the information. The objected person cannot be appointed as government official, or cannot be terminated.[44]

The employer right over the head of the specialised district organ means an exception from the main rule, as the head of the specialised district organ is appointed by the head of the county special administration organ upon the recommendation of the head of district office – if the government decree does not make an exception – and s/he practices the employer rights connected to his/her appointment. On the person to be appointed or terminated as the head of the specialised district organ, the head of the county special administration organ informs the Government Commissioner who can object against the person to be appointed or against the termination within fifteen days after having received the information. The objected person cannot be appointed as head of the specialised district organ, or cannot be terminated.[45]

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[41] Khtv. Art. 20/E, para. (2).
[42] Khtv. Art. 20/D. para. (1).
[43] FAZEKAS: *op. cit.* 204.
[44] Khtv. Art.20/B.
[45] Khtv. Art. 20/F.

The head of district office, the assistant-head of district office and the head of the specialised district organ are government officials appointed for an unlimited period.

6.2. The district office's leadership

A similar structure is present in district offices like the one in metropolitan and county government offices' double (parted) leadership. The difference is that – according to the previous point – the Government Commissioner has organizational management tether over district offices. In practice it means the functional carrying out of tasks that ensure the operation of district offices (such as appointments, practising the right to object in case of exemption, practising covenant for the charge of the government office in case of procurement ensuring the district office's carrying out of tasks, approving the district general office's order of business; etc.).

Besides organizational leadership entitlements, the professional leadership tether over district offices has also been institutionalized. The professional leadership's essence is that the given branch's responsibility for the carrying out of professional task and the determining of professional requirements remains.[46] Professional leadership's legal tools are especially a) annulation of decision, order for carrying out of a new procedure, if needed, b) decision's precursory or follow-up approval in legally determined cases, c) issue individual order for the carrying out of tasks or complementing a default, d) obliging for a report or statement.[47] Professional leadership over district offices parts with relation to organizations having the given task sphere according to the followings:

a) with regards to state administration cases belonging to the sphere of the district general office, the professional leadership tethers are practiced by the Government Commissioner;

b) with regards to tasks carried out by the office of government issued documents operating in the district general office for reporting and accounting, the tether is practiced by the Public Administration and Electronic Public Services Central Authority's chair;

c) the professional leadership of social tasks belonging to the sphere of the district general office is carried out by the metropolitan and county government office's social and public trust office;

d) with regards to specialised district organs, the chair of the county special administration organ carrying out the professional leadership is entitled to practice the professional leadership tethers.[48]

7. DISTRICT OFFICE'S TASK- AND COMPETENCE SPHERE

Having regard to that according to basic principles determined by the Government,

[46] ZÖLD-NAGY – VIRÁG: *op. cit.* 243.
[47] District government decree, Art. 3. para. (1).
[48] District government decree, Art. 3.

district offices' most important task is to carry out state administration tasks below county level, district offices' – also meaning specialised district organs – task- and competence sphere consisted of the following elements:

a) authority cases belonging to the sphere of the notary – exceptionally the mayor, or the administrator of the mayor's office;
b) affairs belonging to the task- and competence sphere of metropolitan and county government office's special administration organs' subregional and district sub-offices.[49]

Significant differences prevail during the actual realization of the original idea of competence-division, as the complete transfer of state administration authority tethers being in the competence of notary has not happened yet, hence, a very mixed and complicated system has been formed in the area of practicing lower level state administration authority tethers.[50]

Besides some insignificant tethers (such as approval of circus menagerie), legislators put significant areas into the task- and competence sphere of district offices, especially from the point of view of metropolitan notaries. There has also been a tether-distribution in certain field of social administration. Furthermore, the district office became the general misdemeanour authority.[51] Listing it one by one, the following cases were transferred from the notary to the task- and competence sphere of the district office based on legislations made until the end of 2012:

a) tasks of the office of government issued documents;
b) certain public trust and child protection tasks;
c) certain social administration tasks;
d) family support cases;
e) public education tasks;
f) right of asylum cases;
g) authorization of sole proprietorship activity;
h) certain communal-type cases (such as cemetery authorization);
i) certain animal health tasks (such as authorization of animal shelter);
j) misdemeanour tasks;
k) management of local protection committees;
l) certain water, environmental protection tasks;

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[49] ZÖLD-NAGY – VIRÁG: *op. cit.* 205.

[50] The transfer of the notary's state administration task- and competence sphere to district offices in connection with the formation of district (metropolitan district) offices was regulated in Government decree 174/2012. (VII. 26.) on the modification of certain government decrees. Further tether-installation in connection with the formation of district (metropolitan district) offices was carried out by Government decree 296/2012. (X. 17.) on the modification of certain government decrees.

[51] FÁBIÁN, ADRIÁN – BENCSIK, ANDRÁS: Régi és új szereplők a területi államigazgatásban: járási hivatalok és kormányablakok [Old and new actors in the regional state administration: district offices and government windows], in *Új Magyar Közigazgatás*, Vol. 7. No. 2. (2014), 22.

m) construction supervision, certain construction authority tasks.[52]

The keeping of the mixed system of the lower level state administration authority's task- and competence spheres was explained by the Government with that those task- and competence spheres could not be transferred to the district office with regards to which the adequate practice of competence requires a more detailed local knowledge of local characteristics and local regulations.[53]

As I have already mentioned it in point 6., from 1st January 2014, with Government decree 515/2013. (XII. 30.) on government windows (furthermore referred to as GW Government decree) entering into effect, the possibility for the formation of government windows with extended task sphere became possible, which government windows now operate as the district general office's inner organizational units.[54] Hence, the district office's task- and competence sphere was expanded with the task- and competence sphere of government windows, which can be grouped according to the followings:

a) cases carried out in their own competence sphere;
b) cases to be carried out as a contributory authority;
c) providing guiding information; and
d) general provision of information without having regard to competence sphere and authority.

8. SUMMARY

As I have already elaborated on it, some differences prevail between the original ideas on the formation of district offices and their actual realization – especially with regards to the formation of task- and competence sphere –, however, we cannot question the achieved successes of the formation and operation of district offices. The formation of district offices was a huge task in the life of metropolitan and county government offices, still, district offices started their operation without any trouble on 1st January 2013. It is important to highlight that there has been smaller fixes in district offices but there has been no need for significant changes, which perfectly signals their stabile construction.

It can also be valued as a great success that citizens basically welcomed the formation of the new district office and the client-centred, service provider type of public administration, which is a significant objective of the public administration's reorganization and is being more and more realized.

Regarding district office's future, the direction of its improvement arose as a question. Numerous governmental ideas have born in connection with it. According to one proposal, in case of a possible, further governmental integration,

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[52] Magyary Zoltán Public Administration Development Programme (MP 11.0) 26. available at: http://magyaryprogram.kormany.hu/admin/download/d/2c/40000/Magyary%20kozig%20fejlesztesi%20program%202012%20A4.pdf [cit. 2014-06-01].

[53] White Book for the review of the regional state administration system and regional state administration competences. 31st August 2013. 16.

[54] GW Government decree Art. 1. para. (1).

the integration of the newly integrated regional state administration organs' district authority organizational units, the district office's individual organizational unit shall be accomplished. There was also a proposal regarding that based on the experiences so far, districts' area shall be investigated, and if needed, their border shall be modified – even through possible contraction – in order to reach a more effective public administration operation.

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Principles of the Hungarian Public Media Service

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Abstract
This article is a brief summary of the fundamental principles of Hungarian public media services. The reader can get an overall picture about the main moral and ethical rules on public media services in Hungary. These principles are mainly determined in Act CLXXXV of 2010 on Media Services and Mass Media, and the Code of Public Media Services. In this article I try to take a closer look at how Hungarian public media services work, based especially on these principles, and what these principles mean actually.

Keywords: *Hungary, media law, public media service, principles.*

JEL classification: *K39*

1. INTRODUCTION

In 2010, a new Media Act was adopted by the Hungarian Parliament: Act CLXXXV of 2010 on Media Services and Mass Media.[1] This Act describes and defines the main features and fundamental principles of Hungarian public media services. These features and principles are not new in the Hungarian legislative system, however, they are very important not only in Hungary but in every democratic state.[2] In this article I try to take a closer look at how Hungarian public media services work, based especially on these principles.

Why are these principles so important? Are they useful actually, or are they just of a bunch of guidelines which don't work in real life? It is not a simple question but I think time will give the answer to this, too. Let's be optimistic about this because, in my opinion, these principles shouldn't be ignored and they have a message both to the citizens and the Hungarian Parliament.

[1] Along with the Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content.

[2] To get a more detailed picture about the history of fundamental rights in the Hungarian legislative system *see* KUKORELLI, ISTVÁN: *Tradíció és modernizáció a magyar alkotmányjogban* [Tradition and modernization in the Hungarian Constitutional Law], 2006, Századvég Kiadó, Budapest, 11-19.

2. THE PRINCIPLES

The fundamental principles of the Hungarian public media services are not only determined in Act CLXXXV of 2010 on Media Services and Mass Media (hereinafter: Media Act). Another source is the Code of Public Media Services (hereinafter: Code). This document is not a source of law, it is a fundamental guide to refine and explain the features and objectives defined in the Media Act. As the Media Act, also the Code determines and describes the fundamental principles and explains them in details. So, let's take a closer look at the actual principles and what they mean actually:[3]

2.1. The fundamental principles of independence from political parties and political organisations

The independence of public media services is one of the most important tasks to fulfil. Public media services generally serve the citizens and not political parties or organisations. Separating public media services from them ensures that the public media should not be just a marketing or propaganda tool for the current governing party. It goes without saying that the citizens should be informed enough about political events and that they can build their own opinion about politics-related topics. Therefore, it is mandatory, that the information provided by public media services should be balanced and manifold. Public media services must not accept grants or any kind of money from political parties or organisations. Even in the period before elections, they publish the advertisements of political parties for free and in an equal timeframe for all participants.

2.2. The principles regarding diversity, objectivity and balanced nature of news and timely political programmes, the presentation of disputed issues and the diversity of opinions and views

Presenting truthful, objective and timely information to the audience about significant events is one of the main goals of public media services.[4] As said before, Hungarian citizens have the right to build their own opinion and they can do it only if they have the opportunity to get the relevant information on topics they are interested in. Diversity in the information flow is also very important because people are not the same and choosing among various opinions is not only a right but it is also a responsibility for each citizen.

2.3. The criteria for supporting and sustaining the mother-tongue culture

Globalisation has also taken its toll on national languages. Life gets always faster and faster and the linguistic culture of each country is affected by globalisation in some ways. The original languages of traditional nations are declining; more and more foreign expressions show up in languages, foreign terms are used much more

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

[4] More detailed information about this very important criteria: Decision 1/2007. (I. 8) Constitutional Court about the criteria of balance.

than it is necessary and grammar errors plague everyday conversations. Slang and one-dimensional communication only make it worse. Public media service providers have a chance to slow down this process because their services affect a large part of society and they can reach and influence people like none else, besides, of course, other media providers. It's sad to say but commercial media providers are more interested in making profit and being „hip and trendy" than sustaining the mother tongue culture. Therefore, public media's responsibility is enormous: they should communicate the right usage of words and correct grammar, present the many dimensions of the beautiful Hungarian language.

2.4. The principles of presenting the culture and life of national and ethnic minorities in Hungary

Every democratic state must protect and support their national and ethnic minorities within the borders of their territory. These minorities are considered as state-constituent factors, so strengthening and presenting their culture and identities form a highly ranked principle in the regulation of the media.[5] To support these goals, public media service providers dedicate scheduled time to minorities at national and local levels and make programmes that present the life and the most important events related to each group. This is also an important tool to sustain the unique culture and native language of minorities in Hungary.

2.5. The principles of presenting cultural, scientific, ideological and religious diversity

An independent public media service provider cannot afford to present one-sided programmes to their audience. The diversity and balanced coverage of positions is also required when presenting religious, ideological, scientific and cultural events. As it is said before, public media encourage all their viewers to build their own opinions and that can only come true if public media service providers fulfil their missions to bring correct and balanced information to their audiences.[6]

2.6. The principles of performing tasks with regard to the protection of minors

The protection of minors is a very interesting topic and often a subject of debate because this is a special group of the audience. The children's lack of experience, their credulity and the fact that media have an alleged influence on them create a need for multi-level protection. The protection of minors is governed by legislation and media self-regulation. The most common thing you can see on audiovisual programmes is a little circle on the screen where this sign tells you which age-group of children the programme in question is appropriate to.

2.7. Tasks in the field of education

Public media constitute a powerful tool in the education of citizens. Therefore, it is very important to provide content for educational purposes and to provide

[5] Also a high priority in the Fundamental Law of Hungary (Art. XXIX.).

[6] This is not just a goal of public media services, it is also a right of the citizens, *see* SÁRI, JÁNOS: *Alapjogok II.* [Fundamental rights II], 2000, Osiris Kiadó, Budapest, 228-232.

programmes in foreign languages in order to provide the audience with foreign language education. The life of Hungarian universities and colleges should be presented both in- and outside the borders of Hungary.

2.8. Tasks in the field of the coverage of sports

Supporting the Olympic ideal and healthy lifestyle is a highly ranked task for Hungarian public media services. Major sport events and not only the competitive, but student and leisure sports should be presented as well. Owing to the presentation of para-sports events, this goal can be reached better, and in this case, public media service providers have even more responsibility because commercial media service providers don't often show para-sports events because of their low popularity.

2.9. The respect for personal and human rights

Respecting personal and human rights pursuant to the Constitutional Law of Hungary, the ECHR and the EU Audiovisual Services Directive[7] is one of the main features of Hungarian public media services. Which are the most important fields, which these provisions try to protect? Fundamental personal rights; the freedom of thoughts, opinions, religions; privacy of private and family life; the right to good reputation; the rights of the ethnics and minorities.[8] Public media services can't reach their goals if any of these rights are violated; should it happen, a press correction can be required.

2.10. Programming principles related to people with disabilities

Disabled people have their rights, too, and they deserve a bit more attention than other people. The social integration of these people is also an important mission. To fulfil that, Hungarian public media services provide special programmes to people with disabilities and also to other groups of the audience like minors, elderly people, less educated people and other members of disadvantaged groups.

2.11. The promotion of environmental and health consciousness

The rights related to the environment and health belong to the 3rd generation of human rights.[9] To support these rights, Hungarian public media services provide timely and correct information on the latest developments in these fields. An important goal is to encourage people to live in a healthy way and protect their environment so as to maintain sustainable development.

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[7] Directive 2010/13/EU of the European Parliament and of the Council.

[8] For intresting examples and regulation on national and international level *see* HALMAI, GÁBOR: *Kommunikációs jogok* [Communication rights], 2002, Új Mandátum Könyvkiadó, Budapest, 114-201.

[9] For various case-law decisions related to human rights and media law *see* HALMAI, GÁBOR (ed.): *Alkotmánybírósági esetjog* [Case Law of the Constitutional Court], 2007, Complex Kiadó, Budapest.

2.12. Provision of regional and local content

The public media services in Hungary provide information not only on national, but regional and local levels, too. This is important to keep citizens informed about the nationwide and the neighbouring events. To be informed enough about the events in the closer society helps building integrity and relationships as well. Therefore, public media service providers in Hungary have regional studios where local and regional programmes are produced about the main events of the region in question.

2.13. The principles of keeping members of the Hungarian nation living outside its borders appropriately informed and also of providing appropriate information about them

As it is known, Hungary has a special history and millions of Hungarians live outside the borders of the state in the neighbouring countries. Hungarian public media services take responsibility for them and function as a bridge to keep the integrity of the whole Hungarian nation intact. This task has two sides; to provide information to the Hungarian minorities in other countries about the main events and also to show Hungarian citizens living in Hungary what is happening to Hungarian communities abroad.

2.14. The principles relating to the extent and guarantees of the autonomy and responsibility of producers and programmers employed by the public media service system and to the guarantees of their participation in defining the principles of programme production, ordering and editing

The strict rules and principles in the world of public media services are not always easy to comply with. Sometimes the work and programmes produce conflicts of interests because the media always affect also the political sphere. To be able to work independently, in compliance with the relevant law and the ethical codes and people working in this field must have some kind of autonomy, just to guarantee their independence and objectivity.[10]

2.15. The principles of formulating basic rules of conflicts of interest, other than those provided for by law, applying to staff members, with special regard to those employed in relation to news and political programmes

As mentioned before, the independence and the objectivity are highly ranked requirements for the staff that work in public media services. This criterion is even higher in the field of news and political programmes because it may be the most closely watched part of public media services. Therefore, those participating in this area have even higher ethical norms to follow than other staff members. We can find a special regulation here, the most immanent and important feature is that these employees can't take any grants, or take part in politics-related events or organisations.

[10] To understand the core of this matter *see* HALMAI: *op. cit.* (2002), 54-68.

2.16. The principles relating to ethical norms governing the broadcasting of commercial communications and advertising activities

Commercial speech and communication is a profit-oriented form of communication, speaking directly to the audience. Advertising has more levels of regulation:[11] International directives, general acts, special acts and ethical codes. The Media Act serves as a general act alongside them.[12] It is very important to follow the regulation of these multi-level legislations because in commercial media, these rules are sometimes set aside for the sake of profit.

2.17. The principles of publishing public service announcements and political advertisements

They are tricky principles. Being independent and provide politically correct, timely, and balanced information about political events and opinions is even hard in „peace time", not to mention the period before elections. The public media service providers aren't allowed to publish any kinds of political announcement or advertisement only in periods preceding the elections. To stay independent and balanced, participants of a given election get the same amount of advertising time, the same time-frames between the given days (mixed), and the providers can't take money or any compensation time for the publishing.

2.18. Communications with viewers and listeners

The public media services are not institutes for themselves; they are created to serve the audience, the citizens of Hungary, and the members of the Hungarian Nation living outside of the borders. Therefore, it is very important to keep in touch with them, to get feedback about the work done by public media services. The needs and opinion of the viewers and listeners provide useful information so as to make public media services even better. Beside this, the permanent control of the civil society is also a guaranty to reach the goals which are set for Hungarian public media services.

3. SUMMARY

Finally, this is a brief summary of the fundamental principles of Hungarian public media services. Of course, this article could (hopefully) only bring a little insight into these topics; maybe a whole book would be needed to cover this field comprehensively.[13] There were some questions at the beginning of this article, so

[11] Multi-level regulation is common for the Hungarian legislative system, *see* PATYI, ANDRÁS – VARGA, ZS. ANDRÁS: *Általános közigazgatási jog* [General Administrative Law], 2009, 2010, Dialóg Campus Kiadó, Budapest-Pécs, 99-108.

[12] For specific legislation and detailed ethical rules *see* Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities; Hungarian Code of Advertising Ethics.

[13] And there are right away two of them: KOLTAY, ANDRÁS – NYAKAS, LEVENTE (ed.): *A*

I try to answer them: I think these rules and restrictions are important, they need to be followed because they are unavoidable in any democratic state and I also think that most of them will be complied to. As I have said, time will tell us everything. I hope that the reader could get an overall picture about the main moral and ethical rules on public media services in Hungary.

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Stability as Property of Constitution: Russian Experience

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Abstract
Stability is one of the basic juridical properties of constitution. The main way to ensure stability of a constitution is a special complicated procedure for changing it. The Russian constitution was approved on December 12, 1993 at a referendum. So, like most of the constitutions in Central and Eastern Europe it is just over twenty years old. The Russian constitution can be called especially rigid and mixed with regard to the methods of its changes. To this date there have been thirty three drafts of amendments to the Constitution. Only three bills have been approved by the Parliament and have passed the ratification in the regions.

Keywords: *amendments to constitution, constitution, Russia*

JEL classification: *K40*

1. INTRODUCTION

Last year, in 2013 we celebrated the 20th anniversary of our Constitution.[1] That was a chance to assess quality of this document. Scientific and political circles had a very hot discussion whether to change the Constitution or not. Supporters of renewal of the Constitution claim that the Constitution must be dynamical and meet the changing public relations. Besides, they pay attention to drawbacks of the 1993 Constitution content (especially, to a strong role of the Russian President). Opponents to the changes say about a necessity of stability and respect to the Constitution, setting an example of the USA, because twenty years is a small period for a constitution.[2] And potential of the 1993 Constitution is yet to be fully achieved!

If we look at the experience of the largest countries of the continental Europe,

[1] Constitution of the Russian Federation (adopted at national voting on December 12, 1993) (considering the amendments introduced by the Laws of the Russian Federation on amendments to the Constitution of the Russian Federation of December 30, 2008 no. 6-FKZ, December 30, 2008 no. 7-FKZ, February 5, 2014 no. 2-FKZ), available at: http://constitution.garant.ru/ [cit. 2014-06-25].

[2] Torkunov, Anatoly: *20 лет для Конституции не срок* [20 years for the Constitution are not a term], 2013, available at: http://www.rg.ru/2013/09/18/konstituciya.html [cit. 2014-06-25].

which anyway are close to our country, recently they have been changing their constitutions rather actively. In 2008 at the time of Nicolas Sarkozy there were amendments and additions made to 64 articles of the French Constitution. In 2006 Federal Republic of Germany considerably updated the articles on distribution of powers between the federation and its members. The best example is Hungary that passed a new Constitution three years ago.

2. PROCEDURE FOR AMENDING THE CONSTITUTION

The 1993 Russian constitution can be called especially rigid and mixed with regard to the methods of its changes. It means that different chapters are changed by two different and rather complicated procedures. The Chapter 9 regulates them. Proposals on amendments to the Constitution may be submitted by the President of the Russian Federation, the Federation Council, the State Duma, the Government, the legislative (representative) bodies of the subjects of the Russian Federation, and also by groups of the deputies of the State Duma.

To change the three protected Chapters (Chapter 1 on the main principles, Chapter 2 on human rights and Chapter 9 itself on constitutional amendments) it requires not only to get a consent of the majority of deputies of the both chambers of the Parliament, but also to convene a Constitutional Assembly, which drafts a new constitution and can pass it by itself or submit it to the popular vote. So far there is no law about such a Constitutional Assembly, all know why: this trick allows to ensure stability of the protected chapters of the Constitution (though there are a few drafts in academic circles).

To change the rest of the Constitution chapters (from the 3rd to the 8th which are devoted to the federative structure, the President, the Parliament, the government, courts, local self-government) there is another procedure, also rather complicated. Amendments are approved again by the both chambers of the Parliament, but after that they must be ratified by two thirds of the Russian Federation subjects. Thus, to make a change or an addition to any chapter of the Constitution it is required to get consent of a wide circle of people, this also facilitates stability of the Constitution.

3. PRACTICE OF AMENDING THE CONSTITUTION

3.1. Initiators of the amendments

If we have a look at the practice of amendments to the Russian constitution we can see the following specific features. To this date there have been thirty three drafts of amendments to the Constitution.

If we look at initiators of the constitutional amendments we will see that most of the drafts (15 – almost a half) were submitted by the legislative bodies of the Russian subjects (we will refer to them as legislative assemblies, though they also have other names; a federative structure of Russia is very complex; the largest

territory in the world, multinational composition; this is a separate subject for research and an important factor of influence on the entire life of the country). One third of these suggestions (5 out of 15) were made by Sakhalin region, 2 – by Ivanov region, 1 – by Tatarstan Republic, Moscow region, Altai region, Tyumen region, Volgograd region, Smolensk region, Tambov region, Astrakhan region each (in total, 10 subjects out of 85 took part in this process).

A bit fewer amendment drafts to the Constitution were proposed by the deputies of the State Duma (12, which is rather logical, because they have to deal with legislation on a day-to-day basis). And 3 suggestions were received from the Federation Council and the President of Russia each. One can take a guess whose suggestions after all were accepted.

3.2. Content of the amendments

As for the content of the drafts it can be said that almost all of them (with a rare exception) concern state authorities and do not affect basics of the social order or human rights. It can be explained by an extremely complicated procedure for changing and adding to these chapters of the Constitution. Moreover, rights and freedoms enshrined in the Constitution to the full extent comply with international standards. But on the other hand, it can be explained by inattentiveness of federal and regional deputies to the society and human rights, unlike struggle for power (pulling-over of power between the Parliament, the President and their supporting parties).

In total 28 articles of the Constitution were suggested to be changed (out of 137). One can distinguish three characteristic groups of suggestions about changes.

3.2.1. Form of state rule

The form of state rule itself is not indicated in the Russian Constitution (except that it is a republic, of course). Review of constitutional provisions shows that the Russian Federation is a mixed republic with a dominating President (some scientists call it the presidential or even super-presidential, but this is not correct). The President is elected by the people. The government is formed by the President together with the Parliament and is accountable to them both. The Parliament can be dissolved.

Initiators of the amendments suggest to weaken the role of the President and consequently to strengthen the role of the Parliament primarily with regard to the government and control over its activity. For example, authors of three drafts suggested to provide to the State Duma the right to give consent not only to a candidacy of the prime-minister (as it does now), but also of a number of the main ministers (internal affairs, foreign affairs, defense, etc.), as well as to introduce an individual non-confidence vote to a certain minister (now it is impossible; today we have only a joint non-confidence vote when the President fully decides upon its outcome). Besides that it was suggested to include into the Constitution a provision about a right of the chambers to carry out parliamentary investigations (not so long ago there was a federal law passed on this issue, but the Constitution does not give such a right to the chambers). In general, the idea was to strengthen control of the Parliament over the government.

3.2.2. Public Prosecutor's Office position

Traditionally since the Soviet time the Russian Prosecutor's Office has been a very strong supervising authority with wide powers. Besides the functions of supporting the prosecution in courts and supervising prisons, it has kept a function which is absent in the western countries and which was abandoned by most of the Eastern European countries when they moved to democracy. This is a function of general supervision over statutory compliance of all public bodies. It was inherent to the Soviet totalitarian system.

In the Russian constitution only one article about the Prosecutor's Office can be found in Chapter 7 «Judicial power». One can agree that this is not a very fortunate statutory resolution. It is suggested to have the Prosecutor's Office in the title of this chapter, and also to provide to the Prosecutor General the right of legislative initiative and the right to apply to the Constitutional Court.

3.2.3. Territorial issue

As we said before it is very critical for Russia (as for any other state). It has significance not only due to the recent Ukrainian events and joining of Crimea and Sevastopol' to Russia, but first of all due to the Chechen wars and existing tension in the Northern Caucasian region. It was suggested (three times! in 1995, 1998) to provide to the upper chamber of the Parliament (the Federation Council) the right to give consent to the President to use of armed forces not only outside the country (as stated by the Constitution), but also on the territory of the Russian Federation to ensure sovereignty and national integrity of the Russian Federation, protection of rights and freedoms of humans and citizens. Hence the inviolability of the territory of Russia was underlined.

As for human rights, twice (!) it was suggested to change only Article 43 of the Constitution about the right for education.

3.3. Consideration of the amendments

As for the time of the suggested drafts of the Constitution amendments, we can note that the most number of the initiatives had been submitted until 2000 (when V. Putin was elected the President). The most number of initiatives (17) were finally declined in 2013, this was done obviously to the 10th anniversary of the Constitution. The most common way to complete the constitutional process is to decline the draft bill in the State Duma or to return it to its author due to non-compliance with requirements of the Constitution and the State Duma Regulations.

The longest time of consideration (15 years) was devoted to an amendment about strengthening of parliamentary control over the government. The shortest and the most successful consideration was two months. And the happy author of these amendments was the President of the Russian Federation.

4. ADOPTED AMENDMENTS TO THE CONSTITUTION

In November 2008 the President D. Medvedev unexpectedly for many people

submitted two draft bills about amendments to the Constitution, and the Parliament approved them already on December 30 the same year. The first amendment increased the terms of office of the Parliament and the President: the State Duma from 4 to 5 years; the President from 4 to 6 years. Thus, if previously two presidential terms in a row totaled 8 years, now it is 12 years (this is a lot; there were suggestions to make it 7 years!).[3]

The second amendment insignificantly strengthened controlling powers of the State Duma: annual reports of the government to the State Duma about the performance results were introduced, including on issues raised by the Duma itself. We should note that it is not enough. For example, after hearing of the report the State Duma could hold debates and raise a question about approval or disapproval of the government policy (in fact, about confidence or non-confidence to the government).[4]

The last, third amendment to the Russian constitution was also passed very quickly and unexpectedly upon an initiative of the President (V. Putin) in February of this year. It caused turbulent debates in a legal community, especially among the civilists. It abolished the Supreme Arbitration Court and subordinated a system of the arbitration courts to the Supreme Court.[5]

To make the picture complete, it must be said that there is one more category of making amendments to the Constitution – resulting from emergence of a new subject of Russia or a change of a name of the subject. Upon 1995 Ruling of the Constitutional court new names into the Constitution text (into Article 65, which lists all the subjects of the Russian Federation) are introduced by the President by his decree (it is also a rather arguable decision).[6] So, strictly speaking the latest amendment to the Russian constitution was inclusion of words about Crimea and Sevastopol' as new constituent entities in the composition of the Russian Federation into Article 65.[7]

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[7] Federal Constitutional Law no. 6-FKZ of March 21, 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

5. CONSTITUTIONAL COURT

Speaking about the Constitutional court of the Russian Federation and stability and dynamism of constitution (looking back on the beginning of this article), it must be mentioned that in a sense the Court promotes both thanks to its rulings, especially in respect of the Constitution interpretation. In total, the Court interpreted the Constitution eleven times (from 1995 to 2000 – look at that year again!). Interpretation mostly touched upon the articles on the highest state authorities, federative structure, changes to the Constitution and not basics of the state rule, human rights and freedoms.

6. CONCLUSION

What conclusion can we draw with regard to this essay? Twenty years are a very short period to change a constitution. As a first step it is necessary that all wonderful ideas embodied in the Russian Constitution on numerous human rights, democratic principles, etc. shall be translated into life and become a part of a daily life of every person or a state authority[8].

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Ownership Right, Real Estate Management and Fulfilling Public Tasks in Relation to the National Roads as Real Estates

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Abstract
In Hungary, around 75% of the whole road traffic take place on the more than 31,000 km-long national network of public roads.[1] In my thesis, I am attempting to present this huge mass of property as real estate from three various aspects. After placing, categorising transportation management in the legal system, I wish to present these special real estates – constituting part of the national assets – from the aspects of ownership rights, asset management and fulfilling public tasks. I am giving an overview of the organisations representing three aspects but which operate based on the same principles and which wish to achieve the same objectives. In the end, by taking a practical example, I would like to show that – unfortunately – reality is sometimes different from the condition provided for by legal statutes.

Keywords: *asset management, fulfilling public tasks, ownership rights, transportation management*

1. TRANSPORTATION MANAGEMENT

Transportation management is a special field from the aspect of the theory of public administration law. However, the legal institutions relating to transportation can be found indirectly in almost all areas of law. Examples could be especially but not limited to civil law which regulates delivery services, transportation and insurance in independent contracts, or labour law with special legal regulations relating to the employees working in transportation, financial law regulating state expenses that can be spent on transportation, taxes generated by transportation and other revenues for the State. The Penal Code has a whole chapter on transportation crimes; and in the 21st century the laws on environmental protection are intended to provide the environment with protection from pollution caused by transportation.

Within transportation public administration two areas can be distinguished from each other clearly. When providing transportation as a public service, it is the

[1] VÁCZI, VINCENT: The Public Road Network Management is Uniform, in *The Safety of Transportation*, special issue (December 2013.) 41.

State that provides certain transportation activities that is to say it fulfils a public task. At the same time, transportation politics has to shape and operate transportation order and harmonise the activities, proportion of citizens, organisations and institutions that participate in transportation. Within transportation politics, activities serving transportation constitute a separate category which includes the construction, maintenance, development of the transportation infrastructure and the economic, organisational structure and operation of organisations providing transportation services. The other sub-category includes the legal and public administration and authority tools serving transportation activities such as the institutions of the state budget serving transportation, establishing the legal order of transportation, specifying the tasks of authority direction, its operation and in the end, the activities of international organisations connected to transportation.[2]

Road transportation – in addition to water, railway, air, line and local transportation – plays an outstanding role within transportation management based on the categories adapted to the basic tool system of transportation engineering. In Hungary, the road network is composed of public roads and private roads that are not closed from public transportation pursuant to the currently effective legal regulations. Public roads can be either national or local public roads based on the nature of transportation taking place on them, the quality of the roads, transportation load and composition of the transportation. As the notion is defined in the law on national assets, the national public road is a public road serving mainly motor vehicle transportation, having solid cover, that makes part of an hierarchical system (high-speed road, public road, subsidiary road), that is managed based on uniform public road management principles that creates transportation links between the local road network of localities and with the logistical connection points of railway, water and air transportation that cannot be reached via the local road networks.[3]

2. ASPECT MODES

2.1. Ownership right

If the page of title deeds of the real estate named national public road is considered, then its second part that specifies the beneficiaries, includes almost the same records. National public roads constitute the property of the Hungarian State and they constitute parts of national assets. National assets – except for some of them as per the legal regulations – shall not be sold, shall not be encumbered, shall not be provided as security and no shared property can be established on them. Its basic purpose is to ensure fulfilling the public task. The legal regulation referred to above

[2] LÖVÉTEI, ISTVÁN: A közlekedési igazgatás. [Transportation Administration], in FICZERE, LAJOS – FORGÁCS, IMRE (ed.): *Magyar közigazgatási jog* [Hungarian Public Administration Law], 2004, Osiris Kiadó, Budapest, 162.
[3] Act CXCVI of 2011 on the law on national assets Art. 3. para. (1) point 13.

states that the national assets must be treated in a liable way and suitably to their purpose. National asset management is liable to operate, preserve the value of, utilise, increase the national assets suitably to their intended purpose as it is in harmony with the current load-bearing ability of the state, local government, primarily necessary for fulfilling public tasks and current social needs, based on uniform principles, in transparent, efficient and cost-saving ways and furthermore, to sell assets that become unnecessary from the aspect of fulfilling the state's or the local government's tasks.

The public tasks fulfilled by the State that is to say the maintenance, operation and development of national roads are realised on the infrastructure network constituting part of the public assets. The State enjoys a monopolistic position in this area which is justified by the huge volume of investments and the irrationality of factors expected by market competition conditions (e.g. parallel railway lines or just motorways). It is the clear consequence of monopolistic services that the transportation infrastructure is subject to stricter regulation and control of such services. The essential of the control is that no one can be excluded of the service that is to say of circulating on the road just for economic reasons.

The State, as the owner, exercises its partial rights arising from the ownership right via its organs established for that purpose. The first organ is the Hungarian National Asset Management Co. Ltd. by shares (hereinafter: MNV Zrt.), which plays a primary role in the coordinate system of the national assets (real estates, chattels, land, companies, special asset elements) and asset managers (MNV Zrt., Hungarian Development Bank, National Land Fund, the organs of the central budget, local governments). From the aspect of my subject matter, the most important task of MNV Zrt. is to exploit the national assets subject to its exercising the ownership right via direct or civil-law contracts. MNV Zrt. started its operation on the 1st January 2008 owing to the amalgamation of – the State Privatisation and Asset Management Co. Ltd. by shares, the Budget Asset Directorate and the National Land Fund Management Organisation – as their legal successor. Its establishment created the organisational conditions necessary for making the ownership aspect uniform regarding the national assets.[4] At the time of its establishment, the owner's statements could be issued as a result of a complicated and mainly lengthy procedure. Later on, however, the bureaucratic system became more flexible, exercising the rights of the owner became smoother via concluding asset management contracts with other asset management organisations or by empowering them regarding specified groups of matters.

2.2. Asset management

By reading further the page of title deeds of the national public road as real estate, there the asset manager is Transportation Development Co-ordination Centre (hereinafter: KKK). Its history goes back to 1989 when the Country-wide Public Road Chief Directorate was established, which was named Road Management and Co-ordination Directorate until its termination of the 1st June 1996. The budget

[4] Available at: http://www.mnvzrt.hu/bemutatkozas/mnv_zrt.html [cit. 2014-08-27].

organ established under the same denomination has been named Transportation Development Co-ordination Centre since the 1st January 2007. KKK is central economic budget organ operating independently with country-wide competence, which is the background institution of the National Ministry of Development) (hereinafter: NFM). Its primary tasks are managing the financing of the road network and coordinating the transportation profession. It provides professional preparation and information background for work going in the Ministry and other background institutions. The institution is the centre of the coordination activities of transportation development: it coordinates the activities of scientific and non-government organisation working on the development of transportation infrastructure and transfers the results of their work to NFM, orientates the work of organisations participating and realising infrastructure development projects, guarantees the success, legality and efficiency of transportation infrastructure development projects. Upon request, KKK issues real estate manager's approvals and owner's approvals as well in connection with MNV Zrt as a result of the process described before in the subject matter of interventions affecting the assets managed by itself by providing green light to network development.

2.3. Fulfilling Public Tasks

In our country, the trustee of managing country-wide public roads is Hungarian Public Road Not for Profit Co. Ltd. by shares (hereinafter: MK). Though, the page of title deeds does not include the public road manager because it fulfils its tasks pursuant to legal regulations and a contract concluded with KKK. The legal predecessor of the public road managing company, Hungarian Public Road Public Utility Company was established by the Ministry of Transportation, Communication and Energy by amalgamating 19 department public road managing public utility companies into the State Public Road and Information Public Utility Company. Hungarian Public Road Public Utility Company 2009. was transformed into a company limited by shares by the turning date of 31st March 2009 which started its operation from the 1st April 2009.

The Hungarian State is the founder and shareholder of Hungarian Public Roads Not for Profit Co. Ltd. by shares. The Hungarian Development Bank Co. Ltd. by Shares exercises the shareholder's and owner's rights due to it as the primary legal entity. In the sense of company law, MK is a one-person not for profit public utility company limited by shares. When deploying its public utility activities, the company fulfils public tasks, which must be ensured by the ministry managed by the minister liable for transportation as a state organ regarding the country-wide public roads owned by the Hungarian State. By acting in its public road managing quality, MK deploys the activities relating to road, bridge, tunnel development, maintenance and operation of country-wide public roads that is to say activities connected to the public task. The Hungarian Public Roads Not for Profit Co. Ltd. by shares records its revenues and costs, expenses separately arising from each of its activities belonging to its basic purpose, and within them, its public utility activities and economic-enterprising activities. In addition to its public tasks, Hungarian Public Roads Not for Profit Co. Ltd. by shares deploys also

economic-enterprising activities, however, strictly in order to complete public utility tasks or tasks harmonising its basic objectives specified in its Establishment Instrument and by not endangering them. The organisation shall not distribute its profits of its economic activities but it shall spend the profit to its public utility activities.

Hungarian Public Roads Not for Profit Co. Ltd. by shares has a special place in the organisation system of Hungarian state administration. MK does not qualify as an authority. The headquarters of the organisation that has vertical and horizontal sections are located in Budapest and its divisions fulfil the daily tasks in all counties. The actual road management activity is deployed by the more than 160 operation engineering centres belonging to the operation and maintenance departments of the county divisions.

On the 1st November 2013 an important organisational transformation took place in the company's history: the State Motorway Management Co. Ltd. by shares merged with Hungarian Public Roads Not for Profit Co. Ltd. by shares. This meant that the public road management company took over assets worth around twenty billion forints and more than seven hundred employees. Therefore, Hungarian Public Roads Not for Profit Co. Ltd. by shares fulfils all the road management tasks in addition to the franchised motorway sections, private road networks and municipality roads. Owing to the above, the Company has become one of the top ten state enterprises of Hungary.

3. A PRACTICAL PROBLEM

Regarding, however, the condition of country-wide public roads in the register of title deeds, reality does not show the theoretical image described here in each case. Let us examine through a practical example what the problem can be? The law on public road transportation defines clearly what the territory of the road covers: the area between the road borders and the part of land belonging to the road. At the same time, the border of the road is its external edge – including the elevated curb, the road embankment, the back-slope, the drainage ditch, channel or other draining facilities.[5] But in the register of title deeds the area of the national public road is „from wall to wall" that is to say the pavement or the cycle track by the road constitutes its part whereas these latter ones must be the ownership of the local government and therefore, must be managed by an operating organ of the local government. All the above can lead to several misunderstandings and unreasonable lengthy procedures. When, for example, a citizen using the pavement dislocates his/her ankle because of the uneven asphalt surface and as a consequence, the citizen must go on sick-leave, then the Country-wide Health Insurance Fund often wishes to collect the amount paid to the charge of the health insurance auxiliary system from the public road managing organ. This problem is much more complicated where it is not only the status shown in the register of title deeds which is not identical with the actual management relations but in addition, the area

[5] Act I of 1988 on the law on public road transportation Art. 47.

constituting part of the real estate but falling outside the area of the public road remains without a „master", that is to say, no one manages it. Fortunately, this situation occurs only very seldom.

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Changed Rules of Data Protection and Private Policy in New Hungarian Civil Law Parallel with Regulation of EU

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Abstract
The main principles of data protection and private policy are changed particularly in Hungary March 15, 2014, because the new Hungarian Civil Code entered into force at this point. A number of principles of data protection and private policy transformed by the rules of new Civil Code of Hungary. Both of the theoretical and practical lawyers (who dealing with data protection and privacy rights) faced with these changes occurred in all of substantive law, procedure law and law-consequence also. The new practice evolving is the proposition of courts, which are able to do it through theirs' judgment. The consummation of this paper is the showing of possible solutions.

Keywords: *new principle of private policy in Hungary*

1. INTRODUCTION

At first, it is worth asking the question, what is the reason of the new principles of data protection and private policy in Hungary. According to me, the reasons of these are searchable the changing of source of rules of civil law and in conjunction with the new Civil Code[1] the new data protection act.[2] New rules and principles introduced in Hungarian law system by changing of both of these acts.

Secondary, necessary to exam the real contains of the old and new acts and differences between them especially. We can try to find the answers following questions on these bases; what is the reason of new principles of private policy and data protection actually? The new acts or new practice of the courts, or both of them?

The answers of these questions searchable in all of these legal conditions and interaction with each others. Firstly, the new acts – which had private policy

[1] Act V of 2013 on Civil Code.
[2] Act CXII of 2011 on right to informational self-determination and freedom of information.

contents – started the new (law) attitude of mind of data protection and private policy, than the theoretical and practical lawyers went on form the new practice adjusting both of new acts and law tradition of this area of law. The area of data protection and private policy has approximately twenty-four-year old (law) tradition[3] and the legislator and the lawyers want to follow – better to say – to develop this tradition, but changing fundamentally not. This is indicated by the fact that the new act on right to informational self-determination and freedom of information inured January 1 2012 and the old Civil Code enforced and new entered into force March 15, 2013. This fact shows that, the overlapping between the enforcing of Civil Codes and informational act has not caused problems of system of area of data protection and private policy. All of acts were able to operate parallel with each others.

I would like to analyse develop of data protection and private policy, so at first I show the rules of private policy of old Civil Code, secondary the new. Then the describing of new right to informational self-determination and freedom of information follows. Finally, I review the principles of European Union shortly.

2. THE DATA PROTECTION AND PRIVATE POLICY PRINCIPLES OF THE OLD CIVIL CODE [4]

This act had not contained the detailed rules of private policy and data protection. The general rules enabled the vindication of compensation in the case of injury of data protection and private policy.

There was on mode of this vindication of compensation by the old Civil Code of Hungary. This was the non-pecuniary damages. If the privacy of person was violated, he could require non-pecuniary damages from the contravener. The problem of this system was following; the insulted had to argue the damage and the extent of it. The fact of injury of private policy was not enough to validation of non-pecuniary damages. It meant, that the data protection and private policy were not affirmed as a value per se. Furthermore, the injury of private policy and personal data had not meant damage and eventuated compensation per se.

3. THE DATA PROTECTION AND PRIVATE POLICY PRINCIPLES OF THE NEW CODE CIVIL

At first, we have to say about the main basic of private policy, the rules of Fundamental law of Hungary.[5] By this act, the right of personal data protection

[3] The time of regime change of Hungary is 1990, when the democratic system created and the private policy had been recognized by state.
[4] Act IV of 1959 on Civil Code.
[5] It is the new Constitution of Hungary, entered into force January, 1 2012.

and right of cognition of data of public interest are authenticated[6] and the emergence of law of personal data protection and cognition of data of public are saved by Hungarian National Authority for Data Protection and Freedom of Information.[7] Secondary, other rules about the private policy had entered into force, so the system of data protection of new Civil Code had built step by step on the basis of main acts of this area. The new Civil Code contains the principles about private policy partly, the sources of this rules are in these acts cumulatively.

The new Civil Code regulates the protection of individual right two levels. One of them is the enumeration of the individual rights, but it is not complete, only illustrative.[8] One form of injury of individual right is a violation of right to privacy and protection of personal data. Other of them is the exact rules of consequence of injury of these.

The consequences of the injury of individual rights in Civil Code show the importance of this area by the legislator. On the other hand new legal instrument is instituted by the Civil Code. This is the injury paid.[9] Instead of the rules of old Civil Code of Hungary, According to the injury paid, the damnification of personal rights means damage per se, and the contravener have to pay only because the action. "The injury paid an indirect consideration of damnification of personal rights by property in satisfaction and private legal punishment at the same time.[10]

The new system of data protection and private policy is very interesting, because it builds on the basic of old system partly. The legal continuity guaranteed, because in the case of damnification of private policy, the harmed can require injury paid, and then if he has damage to property by the damnification of private policy, the harmed can demand non-pecuniary damages.

The possibilities of harmed are contained by the new Civil Code of Hungary and the Act CXII of 2011 on right to informational self-determination and freedom of information. The main elements of system of data protection and private policy are determined by these acts.

The possibilities of harmed by the act on right to informational self-determination and freedom of information;[11] protest to personal data management, turn right to court to ask stopping infringement, to restore the original, turn right to Hungarian National Authority for Data Protection and Freedom of Information to ask the data protection authority procedures. Anybody can initiate the procedure of the Authority for free, by reason of the injuria (or imminent danger of injuria) of personal data, or right to knowledge of public interest items. The Authority has right to inspect documents, enter room, anyone to request information orally and in writing, and conduct assay invite in the procedure.[12] The Authority depends on

[6] Fundamental law of Hungary Art. VI. para. (2).
[7] Fundamental law of Hungary Art. VI. para. (3).
[8] New Civil Code of Hungary Art. 2:42. para. (2).
[9] New Civil Code Art. 2:52.
[10] Commentary of new Civil Code.
[11] Art. 22. and Art. 52-60.
[12] Act CXII of 2011 on right to informational self-determination and freedom of

the result of procedure can do the follows: calls to remedy grievance or eliminate, make recommendations to the supervisor of offending organ, to action official data protection procedure.[13] At the end, the Authority is able to bring an action to follow the procedure of writ of Authority.[14]

The main possibilities of harmed by the new Civil Code of Hungary are the injury paid and non-pecuniary damages. As for me, a special rule of procedure of prosecutor is very important new element of private policy. In the case of injury of individual laws, which contrary to public interest, the prosecutor is able to enter an action with victim's consent.[15]

Parallel with rules of Civil Code, the Criminal Code of Hungary[16] contains many elements of personal data protection. For example, specifies the misuse of personal and public data.[17]

Summary, we can talk about a related well-structured system of data protection and private policy of Hungary, in which the different acts are able to complete each others.

4. THE PRACTICE OF THE HUNGARY AND EUROPAIN UNION

I would like to write about the legal practice of Curia of Hungary and Constitutional Court of Hungary and European Court of Human Rights in this chapter. At first, we can conclude that the development of legal practice these courts are equivalent in the recent times. There is not significance differences judgement of these courts.

Both of decision of European Court of Human Rights[18] and Constitution Court of Hungary[19] declare the liability of the operator of the website for comments.

The decision[20] of Constitutional Court of Hungary destroyed the rules of legitimate public interest of new Civil Code, because basic lawlessness. By this decision the legitimate public interest is an indefinable concept, so it must not use in the area of data protection and private policy.

information Art. 54. para (1).

[13] Act CXII of 2011 on right to informational self-determination and freedom of information Art. 55.

[14] Act CXII of 2011 on right to informational self-determination and freedom of information Art. 64.

[15] New Civil Code Art. 2:54. para. (4).

[16] Act C of 2012 on Criminal Code.

[17] Act C of 2012 on Criminal Code Art. 219-220.

[18] Case of Delfi v. Estonia.

[19] Decision 19/2014. (V. 30.) on the procedure of the Constitutional Court.

[20] Decision 7/2014. (III. 7.) on the procedure of the Constitutional Court.

5. SUMMARY

We can say that the system of data protection and private policy of Hungary has developed along with practice of European Union. Many new acts have come into effect recently, and these are able to control properly the area of data protection in Hungary. This is evidenced that the Hungarian and EU courts make the same decisions.

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10 Years in European Union – Infrastructure Development on the Example on Krakow City

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Abstract
The 1st May 2014 it has been 10 years of Polish participation in the European Union. This past decade has brought significant development in Poland. It is because of grants from EU. Poland has gained in European integration both globally and regionally at the local government level. A good example of this is the region – Małopolska – literally called Little Poland with its main city – Krakow.
During these 10 years there had been circa 200 projects worth about 550 million €. European funds affect the development of almost every aspect of life. For instance in terms of road investment, public transport, municipal management as well as non-investment projects, so-called soft investments in the form of education, social assistance and social integration, culture and tourism.

Keywords: *infrastructure development, Krakow in European Union, public infrastructure.*

1. INTRODUCTION

Ten years ago, 1st May 2004 Poland with other nine countries: Lithuania, Latvia, Estonia, Czech Republic, Slovakia, Hungary, Slovenia, Cyprus and Malta became members of European Union. The past decade has brought significant development in Poland. This changes occur in the form of infrastructure and non-investment projects, so called soft investments. This improvement has been seen on the example on the second largest city in Poland – Krakow. Last ten years was a very good period for Krakow city. Krakow has never developed so quickly in its history before. This effect would not be so spectacular without financial support from European Union grants. One of the report[1] says that the most visible effects of Polish membership in the European Union are investments financed from EU

[1] 10 years of Polish presence in the EU – the benefits and costs. For whom EU money? About the use of EU subsidies by the Malopolska entrepreneurs and local governments *see* http://webcache.googleusercontent.com/search?q=cache:LDy5mE3sJLg J:jakaunia.pl/wp-content/uploads/2013/10/Prezentacja-04.10.2013-Krak%25C3%25B3w-.pptx+&cd=10&hl=pl&ct=clnk&gl=pl&client=firefox-a [cit. 2014-07-28].

funds. Virtually every municipality has modernized some way, built a sewage system and sewage treatment plant, renovated community center or school because of EU subsidies.

There are many aspects of life we can be proud of because of participation in European Union. Of course there are disadvantages, as everywhere, but we cannot deny the visible effects, which have positive impact on life in Krakow. It is better for life to live in well-organized three-dimensional and social sphere.

The most visible result is that Krakow is considered as the city with the best municipal management in Poland. This is owed of EU funds too. These grants were parts of projects in the form of financial support according to wastewater treatment plant or network plumbing. Moreover these effects are seen now in new modern rolling stock, modernization, new tram and road infrastructure. Other examples equal important are social integration and social assistance for unemployed, people with disabilities or families that need social support.

All projects are described on special website[2], where everybody who are interested in EU funds in Krakow or Lesser Poland can acquire needed information. Moreover there are further plans for next planned years, so it proves and provides continuously development.

2. 10TH ANNIVERSARY IN KRAKOW

From the beginning of 2014 were held a lot of meetings, debates and exhibitions devoted to Polish association in the European Union. Many information appeared in the local press, radio, television and the Internet. Krakow's authority and residents had a lot to say in this topic. Everything was done to increase the awareness about the benefits derived from Polish membership and the nearest region.

Round, 10th anniversary of Polish accession to the European Union was a good opportunity to reflect on. Especially when it comes to what Lesser Poland District gained from European founds[3]. Moreover this topic is very up to date and provokes many discussions, particularly in the political sphere and those taking place at Krakow's universities. The themes are the Polish integration and achievements in the past decade, as well as a future plans for the 2014-2024[4] years. Beside casual discussions there was picnic on the Main Square in Krakow. The Krakow City organized it in May, 1st under the title '10 Polish years in the

[2] European Funds for Malopolska (Lesser Poland), available at: http://www.fundusze.malopolska.pl/Strony/default.aspx [cit. 2014-07-28].

[3] 10 years in the European Union: what has changed in the Lesser Poland? Avalibale at: http://www.ra diokrakow.pl/www/index.nsf/ID/JGAA-9JPBB4 [cit. 2014-07-28].

[4] About ten years of Polish membership in the European Union at the Jagiellonian University. Available at: http://rodm-krakow.pl/o-dziesiecioleciu-latach-czlonkostwa-polski-w-unii-eur opejskiej-na-uniwersytecie-jagiellonskim/ [cit. 2014-07-28].

European Union'.[5] Very popular was special exhibition[6] that showed all the biggest and the most important achivements supported by funds from EU.

3. KRAKOW'S PLACE IN POLAND AND THE CLOSEST REGION

Poland is situated on the central Europe and borders with Russian Federation, Lithuania, Belarus, Ukraine, Slovakia, Czech Republic and Germany. Total area of land is 312 685 km^2 and this making Poland the 9th largest country in Europe. Poland has a population of 35,8 million people. The majority of them live in urban areas (61% people). The official language is Polish. Because of tourist industry the knowledge of English is common. The official currency is the Polish zloty (PLN). Poland is not in Euro Zone which actually makes this country relatively not expensive compared to the West countries of Europe.[7]

3.1. Krakow – general characteristics

To understand the Krakow's role in Poland and closest region, there is a need to depict main characteristics of the most important levels of life in this city. Because as it was mentioned at the beginning, almost every aspect of life in Krakow was supported by European Union funds.

Krakow is the second biggest city in Poland with 750 000 inhabitants nowadays. Just after the capital –Warsaw – which is the biggest Polish city with 1,7 million people now. Krakow as one of the oldest Polish city situated just on the Vistula River has been one of the leading centers of Polish academic, cultural and artistic place. What is more, it is one of Poland's most important economic hubs. These elements create that city is a very important center in Poland.

Krakow is located on the Southern part of Poland. The city is situated in a valley at the foot of the Carpathian Mountains, about 219 m above sea level. Krakow has good location, because of the Jurassic Rock Upland to the North and the Tatra Mountains to the South. Rich nature reserves due to ecological value places make this area full of plant and animal wildlife in the middle of diversified landscape. Also many endemic species can be found here.

From the tourist side, Krakow is the major tourist spot of Poland. This one thousand year old city is Poland former capital, former seat of Polish kings. The entire medieval land of whole Krakow Old Town which is a UNESCO treasure has been preserved. The city is famous because of the Wawel Royal Hill with the castle

[5] Picnic '10 Polish years in the European Union' in Krakow, available at: http://www.10latwue.pl/atrakcje/piknik-10-lat-polski-w-unii-europejskiej-w-krakowie/ [cit. 2014-07-28].

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[7] Poland and its tourist attractions, available at: http://www.youtube.com/watch?v=4xXHTjwhDlQ&feature=youtu.be [cit. 2014-07-25].

and Cathedral. Both excellent examples of renaissance architecture. Other key sights are located in the Market Square. The largest medieval square in Europe. It is surrounded by historic town houses.[8]

There is no doubt that Krakow is a major educational place. Twelve institutions of higher education offer multiple courses in the city.[9] For a special attention deserve two universities. Humanities and technical one. Jagiellonian University – the humanities university and AGH University of Science and Technology – the technical university are the biggest and one of the leading researches centers in Poland.

Krakow is unofficial cultural capital of Poland and was named the official European Capital of Culture for the year 2000[10] by the European Union. Kraków's 28 museums are separated into the national and municipal museums. The city also has a number of art collections and public art galleries. It is worth to mention about the Rynek Underground Museum,[11] situated under the Main Square. It is very modern museum where visitors can see more than one thousand years of history through its real streets and artefacts. Just next to museums there are many cultural indoor and outdoor events. It is obvious that these are film festivals, theaters and music one.

3.2. Małopolska – 'Little Poland'

'Little Poland' is literally name of Polish world 'Małoplska'. 'Małoplska' means the historic region with the biggest city on this area – capital – Krakow (picture 1). Other proper names are Lesser Poland District in English or Polonia Minor in Latin. According to a Polish custom, whenever a new village was formed next to an older one, the name of the new entity was presented with an adjective little (or lesser). While the old village was described as grater. It means, that this new name was born to distinguish old province, the cradle of the Polish state, the older Greater Poland, from the younger sister situated on the South.

Lesser Poland with Krakow as its capital acquired new possibilities to improve infrastructure, create new ways for investments and new investors, encourage tourists to visit interesting and unique venues from UNESCO list for instance. On the area of Lesser Poland there are five UNESCO objects:[12] Historic Centre of Krakow; Wieliczka and Bochnia Royal Salt Mine; Auschwitz Birkenau German Nazi Concentration and Extermination Camp; Kalwaria Zebrzydowska the Mannerist Architecture and Park Landscape Complex and Pilgrimage Park; Wooden Churches of Southern Lesser Poland. Possession of these pearls of World

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[8] Poland and its tourist attractions, available at: http://www.youtube.com/watch ?v=4xXHTjwhDl Q&feature=youtu.be [cit. 2014-07-25].

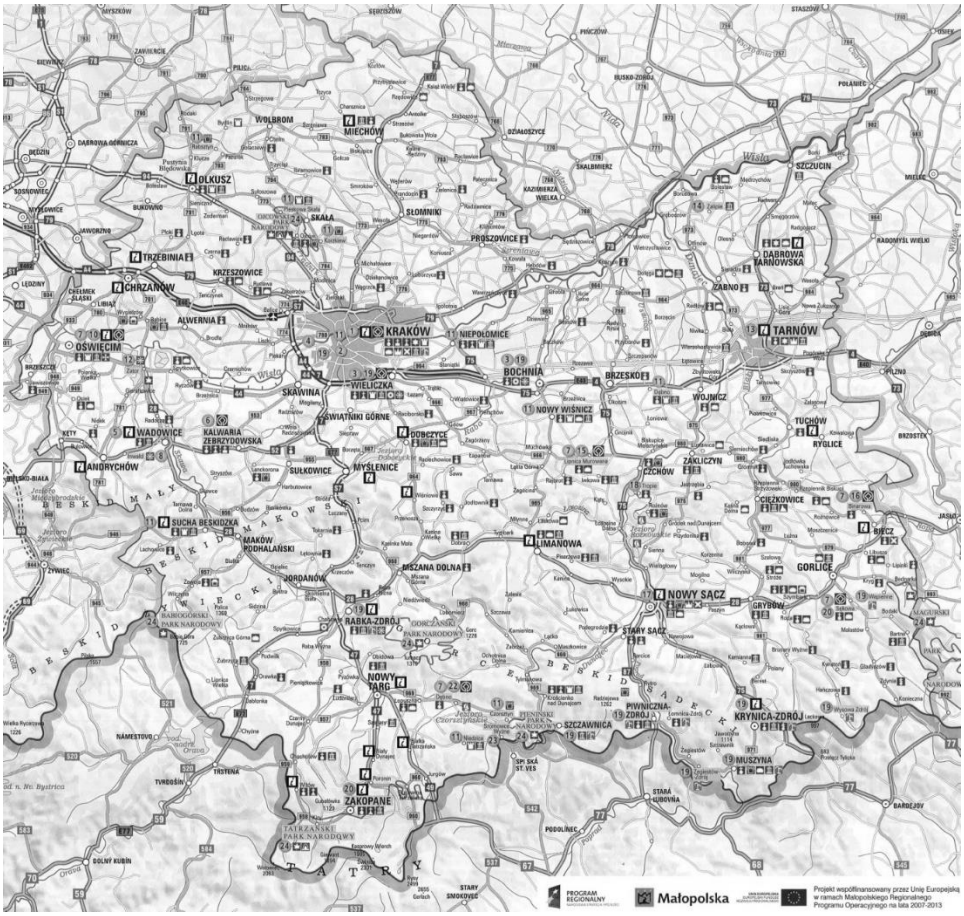
[9] Information about Krakow, available at: http://www.meta-online.com/pl/informacje/ informacje-o-krakowie/ [cit. 2014-08-23].

[10] European cities of culture for the year 2000. A wealth of urban cultures for celebrating the turn of the century *see* http://www.krakow2000.pl/acceraport.pdf [cit. 2014-08-23].

[11] Rynek Underground Museum, available at: http://www.mhk.pl/branches/rynek-underground [cit. 2014-07-28].

[12] World Heritage List, available at: http://whc.unesco.org/en/list/ [cit. 2014-07-27].

Heritage undertakes to care for it, promoting these objects and maintenance of appropriate level of this heritage.



Picture 1. Lesser Poland District – Małopolska – Little Poland – Polonia Minor
Source: www.visitmalopolska.pl

Małopolska region has a very important and wide extended transportation network. It contains roads, airports and railroads with local, national and international statuses. According the roads, through Lesser Poland cross several European roads with numbers:[13] E40 (from West to East across whole Europe), E77 (from North to South to border with Slovakia in Chyżne), and others e.g. E30, E371, E372, E462, E75. With respect to airports, Lesser Poland has it two. One of it is situated next to Krakow i.e. John Paul II International Airport Kraków – Balice. This is the second biggest airport in Poland after this situated in Polish capital. The second one in Małopolska region is Katowice International Airport next to Katowice city. Except mentioned possibilities of travelling, there are

[13] Lesser Poland. Transport Roads *see* http://en.wikipedia.org/wiki/Lesser_Poland [cit. 2014-07-26].

railways with European connections too. These transportation also has gained opportunity from diversified grants and visible forms and more comfortable conditions are seen now or can be seen soon.

Krakow with its both historic and administrative regions called 'Małopolska' had gained the new opportunities due to the dynamic development with respect to EU funds. It is natural order of life that adjacent region with main city attract more opportunities and new paths of development. And the next success is, that this development can be named as sustainable.

4. INFRASTRUCTURE DEVELOPMENT

There are many examples of development in aspect of public infrastructure in Krakow. The best known, the most important and visible facilities can be divided into two groups. First one is municipal management and the second one is public transport. Inhabitants of Krakow city can be proud of improvement specifically seen in the form of municipal management.

During last ten years Krakow has received 2,311 billion PLN (about 550 million €). Simultaneously it has to be maintained, that there is one basic condition to receive any grant from EU. It is own contribution. That is why the local government in Krakow had to pay more than 2 billion PLN (c.476 million €). According to statement of Krakow's president Jacek Majchrowski, he claims that taking into account financial possibilities of own contribution, local authorities have used EU assistance in one hundred percents.[14]

4.1. *Municipal management*

Environmental protection is a serious problem nowadays. That is why this issue is considered to be proper treated by authorities in urban management.

Sphere that is referred to municipal management in Krakow is the best functioning in this field in Poland. It has been achieved because of European Union grants. Under this assistance it was possible construction of wastewater treatment plant in Płaszów. From these founds benefits also heating network for its modernization. Other very important examples are network plumbing modernization or municipal landfill Barycz.

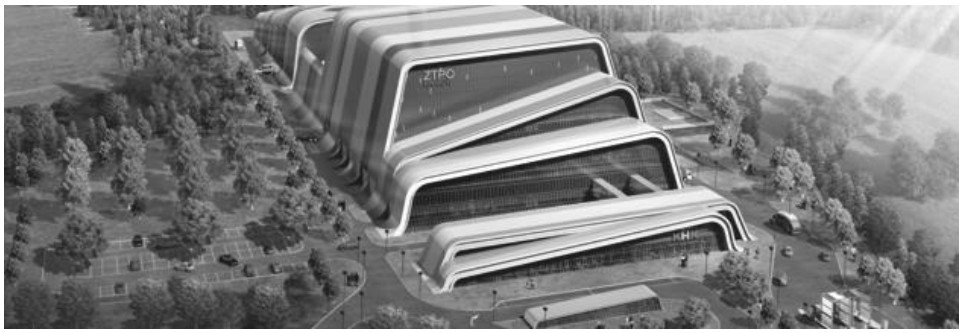
[14] KLEJBUK-GOŹDZIALSKA, BEATA: 10 years in EU, in *Dwutygodnik Miejski Kraków*, No. 8. (2014), 11.

Picture 2. Lamusownia – modern waste facility.[15]

For a special attention deserves Lamusownia (picture 2). This is the name of modern waste facility. It is special place in Krakow, where its residents can for free, and small business can for low fee get rid of almost all of segregated waste. This waste usage stores bulky waste such as furniture, computers or televisions, unusual wastes such as paints, glues, batteries, etc. It is that place, in which for each type of waste are separate containers. Important thing is, that the waste is collected until the container is full. People can bring here the waste from Monday to Saturday during all year. Generally it can be concluded that this is investment in a better life in a clean Krakow. Just a little bit of awareness and good willingness are enough to drive waste to proper place – Lamusownia, rather than through the soil and water to our stomachs, or by stoves and chimneys into our lungs. This steps enhance the chance that going on a trip or picnic, we avoid the countryside of illegal dumps.[16]

Another great project that European Union money has improved in municipal management in Krakow is eco incineration plant (picture 3). This object is under construction now from 2008 and will be opened in 2015. That investment will complement the system of public utilities in the city and at the same time will be a source of energy for the city. The Programme of Municipal Waste Management in Krakow is implemented under the Operational Programme Infrastructure and Environment. Priority is waste management and protection of the earth's surface. This is measure 2.1.: Complex projects related to municipal waste management with particular emphasis on hazardous waste.[17]

[15] Source: http://www.lamusownia.krakow.pl/ [cit. 2014-07-28].
[16] Lamusowania – main page, available at: http://lamusownia.krakow.pl/ [cit. 2014-07-28].
[17] Eco incineration plant – main page available at: http://www.spalarnia.krakow.pl/ [cit. 2014-07-28].



Picture 3. Eco incineration plant[18]

The project aims are to build the missing installation system for processing municipal waste, i.e. the Department of Waste Thermal Treatment. This plant will constitute one of the most important elements of the waste management system and will be an integral part of it.

4.2. Public transport

Krakow with students living here during academic year is almost one million city. It can be seen during those studying months. Public transport with diverse shifting possibilities from one place to another is a very important task. People choose their place for living there, where are provided good proximity of communication facilities and velocity of mobility for their destination.

Support from EU grants can be seen in modern rolling stock and new tram roads and other roads investments. With respect to modern rolling stock, these are for example low-floor, ecological trams and new busses. That vehicles are designed specifically for disabled people. What is more and very convenient, these objects have air conditioning system and monitoring one. Providing safety for travelers is very up to date task for local authorities.

In Krakow there are two new tram routes: one line leads to Small Plaszow and the second one to Ruczaj. These areas was poorly connected with the rest of the city. Now not only there are new tram lines, but also all surrounded infrastructure, that involving new pavements on road, for passers and routs for cyclists. Everything is designed in a modern and fashionable way.

Such big city needs also vast road network and diverse ways of possibilities to avoid traffic jams or unnecessarily driving up in busy location such as big jounctions or roundabouts. As a alternate road in Krakow, it Southern part is bypass. It is part of highway number A4 that passing from East to West of Poland. Moreover this construction allows for removal of heavy transport from the centre. Another important road and bridge construction is roundabout called Victims of Katyn. It is three-storeys roundabout which improve communications in the Northern part of Krakow. Next good example of improving traffic problem is flyover above the Nowohucka street. Those who drive just straight ahead do not have to cross through big crossroad, they just can go above it during a few seconds.

[18] Source: http://www.spalarnia.krakow.pl/ [cit. 2014-07-28].

For those people, who prefer going by foot or riding their bicycle there is also modern and interesting new way. This footbridge is destined only for pedestrians and cyclists and connects two Krakow's districts above the Vistula River. During night, this bridge is easy to see owing to colorful lights between Kazimierz District and Podgórze one.

People, who travel by plane from John Paul II International Airport, have some inconveniences now. The second busiest airport in Poland is located near Krakow, in the village named Balice, has its extension now. The airport was opened for civil aviation in 1964 and was renamed in honour of Pope John Paul II in 1995. The airport has two passenger terminals, for international and domestic flights, as well as a cargo terminal. Now there are construction works and this investment will be finished in 2015. The investment is estimated at 600 million PLN (c. 142 million €) with 200 million PLN (c. 47,6 million €) coming from EU fund.[19]

To sum up the public transport issue, it has to be noticed that there were also other investments. It were fast agglomeration rail or railway and bus station modernization, etc. All those examples of infrastructure facilities are strongly needed. It is important that second biggest city in Poland has an extensive communication network. All mentioned projects were supported by EU funds.

5. SOFT INVESTMENTS

Soft skills are personality traits. These skills consist of communication, assertiveness, creativity, resistance to stress, leadership competencies, the ability to cooperate with others and work independently and time management skills. Soft skills we learn at home, we acquire it also in the process of learning and future professional career.[20]

One can think of soft skills, whether are crucial for employers. It is now desirable the same as university degree or professional experience in the labour market nowadays. Soft skills are also the point of view of today's style of living and working with people. It seems to be very important these days. It allows to conclude whether the candidate is suitable for the proposed position, not only as to its substance, but also whether employee will fit into the image of a company, or find a group of other employees, or whether employee will be able to attract new customers.

Soft skills are useful not only at work but also in every other of life. It helps us to function in society, due to development of our image, make new friends, pursue its objectives or even organizing time, which we have less and less nowadays. Without no doubt it is worth to pay attention to develop and improve these skills.

In this article the concept of soft investment refers to social programs, which

[19] John Paul II International Airport, Krakow, Poland. *See* http://www.airport-technology.com/projects/john-paul-international-airport-krakow-poland/ [cit. 2014-07-28].

[20] Miękkie i twarde kompetencje – o co w tym chodzi? *See* http://gadzetomania.pl/2010/11/09/miekkie-i-twarde-kompetencje-o-co-w-tym-chodzi [cit. 2014-08-10].

are funded by the European Union. These programs can be considered as an investments. It is connected with improving people qualifications and promoting social initiatives for the future. And that future will provide positive results for sure.

5.1. Culture

Krakow has a lot to say in the sphere of cultural events. It is here, where films festival, theater and music one take place every year. Krakow is one of the most important city in Poland in cultural sphere. That is why the EU funds reached many important occurrence here.

Film Music Festival is an annual event, which two editions in 2009 and 2011 were financed from European funds. The Opera Rara is a year-round cycle opera based on ambitious productions from the stages of the most famous opera houses in Italy, France, Britain and Germany. Next example are series of Krakow Nights: Museum Krakow Night, Sacral Krakow Night or Poetic Krakow Night and many others. These nights were supported by the EU from 2009 to 2012 editions.

For those who want to spend their time close to culture in museum, can visit modern just established new museums i.e. Museum of Modern Art or Rynek Underground Museum of medieval Krakow. A few museums were modernized. These are e.g. Museum of the Home Army, multimedia and interactive place with the knowledge full of Polish history of World War II. Other objects are theaters with one of the most important one is People's Theatre in Nowa Huta.[21]

These mentioned objects are prominent, because they represent Polish culture that is intertwined with the Polish history and regional folklore.

5.2. Social assistance

EU funds supported projects in the field of social integration, improving employability and increasing professional activity unemployed people.

For example, the project '*Different paths, one goal*' is directed to unemployed and offers them the opportunity to participate in various training courses, internships, assistance guidance counselors or one-time grants for establishing their own business.

Within the framework of social integration have been implemented standards in the field of social work specialist counseling for people with disabilities and their families. That help was offered for families experiencing violence.

Interesting project was the *'StreetWork'* which aim was to improve the social integration of young people aged 15-25, by improving their functioning in school and family. Within the project there were workshops on addiction prevention, healthy lifestyle and the ability to function in a group. Street workers were organized leisure activities such as '*Days of work*', '*Graffiti workshop*', football tournaments and film screenings such as *'Summer Cinema'*.

Because of these social assistance projects many people in Krakow had

[21] DŁUGOSZ, ANNA: 10 years in EU for Krakow, in *Dwutygodnik Miejski Kraków*, No. 9. (2014), 4-6.

opportunity to stand face to face with national and international culture in museums, theaters, operas and films festivals. For many of them founds gave them chance for better life because of work assistance. For poor families or families with proper functioning disorders it was very important, hope of better tomorrow.

5.3. Education

Krakow as a part of projects from European funds tries to provide children and youngsters needs at every stage of education.

The *'I'll be back'* project is a program that helps return to work after a break related to childbirth. It is dedicated to young mothers (or fathers), that have problem with re-employment after maternity or paternity leave. This support is very important now, because first of all it helps young parents to provide them work and then material support for young families.

In primary and secondary schools have been implemented projects based on innovative syllabuses, especially of mathematics and natural sciences. This step should conduct to equal educational opportunities. Moreover appeared learning individualization of extra lessons in English or research groups in mathematics and natural sciences. All to meet different children's needs in schools. The projects also supported talented students in the form of scholarships.

From EU funds have also been renovated school buildings and classrooms. It included new educational equipment and new facilities.

6. CONCLUSIONS

During Polish participation in European Union from 2004 till this 2014 year it should be seen positive development in infrastructure and soft investments described in this article. Krakow's authorities acquired actively money for local investments. Well known and seen are mostly transportation and road investment projects. But there are many social projects in form of soft investments that focus on individual needs Krakow's inhabitants.

Krakow's president Jacek Majchrowski said[22] that the passing decade of Polish membership in European Union opened up an opportunity for development, and Krakow's authorities full exploited that opportunity. In Krakow, we are witnessed the changes which would have never occurred in such rapid pace. Without EU funds there would not be numerous of project created at that time in Krakow.

[22] 10 Polish years in the European Union – an open letter of Krakow's President, available at: http://krk.fm/10-lat-polski-w-unii-europejskiej-list-prezydenta-krakowa [cit. 2014-07-28].

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