GLOBALIZING WORLD

GLOBALIZING CHALLENGES

10TH BATTHYÁNY SUMMER SCHOOL
PROCEEDINGS

BLSZK

GLOBALIZING WORLD

GLOBALIZING CHALLENGES

10TH BATTHYÁNY SUMMER SCHOOL PROCEEDINGS

B·L·SZ·K

PUBLISHED BY

Lap Nyomda Kereskedelmi és Szolgáltató Kft.
2 Körkemence út, 9023 Győr, Hungary
email: info@lap-nyomda.hu
http://www.lap-nyomda.hu/

Cover is designed by *Barna Arnold Keserű.*

Printed and bound in Hungary by Lap Nyomda Kft., Győr.

ISBN (print): 978-963-12-5772-4

Libri Collegii de Batthyány

Editors:

GÖMBÖS, Csilla – KÁLMÁN, János – KESERŰ, Barna Arnold

Authors:

CHRONOWSKI, Nóra

DVOŘÁKOVÁ, Adéla

GLAVANITS, Judit

GÖMBÖS, Csilla

NYAKAS, Levente

MUZAFFAR, Haroon

STAVINOHOVÁ, Martina

The authors of the respective papers themselves are responsible for the content and for the language quality of the papers.

Manuscripts closed December 1, 2015.

E kötet az Emberi Erőforrások Minisztériuma megbízásából az Oktatáskutató és Fejlesztő Intézet és az Emberi Erőforrás Támogatáskezelő által meghirdetett NTP-SZKOLL-15-0031 kódszámú pályázati támogatásból valósult meg.

Kérjük személyi jövedelemadója 1 %-nak felajánlásával támogassa a Batthyány Lajos Szakkollégiumért Alapítvány működését!

Adószám: 18983034-1-08

EMBERI ERŐFORRÁSOK
MINISZTÉRIUMA

Contents

GLOBALISATION AND HUMAN RIGHTS – PROBLEMS AND CHALLENGES OF BUSINESS' RESPONSIBILITY

CHRONOWSKI, NÓRA

Eötvös Loránd University
Faculty of Law
Department for Constitutional Law
HAS CSS Institute for Legal Studies
Budapest, Hungary
chronowski.nora@ajk.elte.hu

Abstract
Globalisation is a fact, and it has inevitable influence on constitutional and human rights law. While the globalisation of business is a very fast movement, the constitutional human rights are far slowly "globalising", and their protection is still first and foremost the duty of the states. The dilemma for responsible business is how to respect and support human rights in complex social, political and economic contexts – particularly where these human rights are being violated. The main objective of business and human rights discussion is to expand somehow the international human rights obligations to multinational enterprises, transnational companies and other business entities. For the success of the business and human rights concept, which does not even belong to the international soft law to date, it is necessary to shift focus on non-state actors, NGOs and corporations as – at least – secondary subjects of international law.

Keywords: *global constitutionalism, human rights, state duty to protect, responsibility of business*

JEL classification: *K10*

1. INTRODUCTION: GLOBAL CONSTITUTIONALISM AND GLOBAL HUMAN RIGHTS

The concept of global constitutionalism accepts the convergence of national constitutional configurations in case of those states that share the same constitutional values, i.e. belong to the same constitutional families.[1] According to *Law* and *Versteeg*, this convergence is characterised by constitutional learning (i.e., in the course of attempting to learn from one another, countries are likely to imitate one another), constitutional competition (i.e., the need to attract and retain capital and skilled labor gives countries an incentive to offer similarly generous constitutional guarantees of personal and economic freedom), constitutional networks (i.e., reward countries for adopting the same type of constitutional regime that others have already adopted), and constitutional conformity (i.e., countries face pressures to conform to global constitutional norms in order to win acceptance and support).[2] The content of the national constitutions of democratic states converges in three aspects. First, they refuse the legislative supremacy – or the sovereignty of the parliament – and accept some form of the judicial (constitutional) review. Second, they are committed to the protection of fundamental human rights by prescribing explicit or implicit proportionality clauses. Third, they respect the rule of law guaranties.[3]

---

[1] LAW, DAVID S. – VERSTEEG, MILA: The Evolution and Ideology of Global Constitutionalism, in *Washington University in St. Louise, School of Law, Faculty Research Paper Series,* Paper No. 10-10-01, (2010), 7-10.

[2] Ibid. 11-24.

[3] TUSHNET, MARK: The Inevitable Globalization of Constitutional Law, in *Harvard Law School, Public Law & Legal Theory Working Paper*

The results or effects of globalisation in constitutional law are that one the one hand the core of the constitutional human rights can be identified as part of the majority of national constitutions, and on the other hand the growth of the generic rights became a general trend, in other words the rights creeped over the past decades.[4] This tendency must be influenced by the evolution of international human right law, i.e. constitutional fundamental rights and international human rights have strong interrelation – the latter are the basis of the former, because states do not enact the rights, but recognise them.

The core problem is how the individual's inviolable and unalienable fundamental rights can be guaranteed in a globalised community, if we presume that a kind of 'world democracy' may come into existence. In other words, as *Galgano* formulated, the question is how can the features of democracy, having developed within a national framework, be adapted to a post-state system of governance? [5] Surely essential is the access to effective fundamental right protection with efficient remedies for the legitimisation of international law and international public order.

Series, Paper No. 09-06 1-2. and : The Essence of Constitutionalism. Constitutionalism and Human Rights: America, Poland, and France, in THOMPSON, KENNETH W. – LUDWIKOWSKI, RETT R. (eds.): *A Bicentennial Colloquium at the Miller Center*, 1991, Lanham, MD: University Press of America, 3-41.

[4] Law and Versteeg has created a rights index composed of 56 constitutional human rights. While in 1946 the constitutions contained 19 rights in average, in 2006 this number has increased to 33, which means 70 % growth. LAW – VERSTEEG: *op. cit.* 31.

[5] GALGANO, FRANCESCO: *Globalizáció a jog tükrében* [Globalisation through the prism of law], 2006, HVG-ORAC, Budapest, 7, 9.

According to *Tomuschat*, the international community has attained the positive international protection of human rights in three theoretical and historical stages. The first step is reaching a consensus with respect to the necessity of protection and the scope of the rights to be protected. The second stage is international codification, putting it into a treaty and national adoption. The third stage is establishing and operating a mechanism for the enforcement of rights. Even the universalist approach admits that whilst the first two steps have, by and large, been taken successfully, the third – and perhaps most important phase – has not yet been accomplished.[6] In addition, the system of international protection has to be treated as a dynamic system; it has to be continuously adjusted to the changing state of global reality – handling terrorism, crime, human trafficking, child labour, flow of data, environmental disasters, pandemics, economic and financial crises, ethnic tensions, etc.

2. LIMITS OF GLOBALISATION: PROTECTION OF RIGHTS IS STILL A STATE DUTY

The system of international human rights protection may be criticized more harshly from a perhaps somewhat partialist and instrumentalist approach. It must keep in mind that beyond the trends of globalisation, universalism and constitutional convergence, also "reverse globalisation",[7] particularisation and constitutional divergence processes can also be observed in the global world. *Donnelly* pointed out that internationally recognised

[6] TOMUSCHAT, CHRISTIAN: *Human Rights: Between Realism and Idealism*, 2003, Oxford University Press, Oxford, 3.

[7] For the term, *see* BENHABIB, SEYLA: *Another Cosmopolitanism*, 2006, Oxford University Press, Oxford, 51.

human rights create obligations for states, and international organisations call upon states to account for their fulfilment. If everybody has the right to *x*, in contemporary international practice it means: every state is authorized to and responsible for the application and protection of the right to *x* in its own territory. The Universal Declaration of Human Rights is the common standard of achievements for all peoples and nations – and for the states representing them. Covenants create obligations only for states and the international human rights obligations of states exist only in relation to persons falling under their jurisdiction. Although human rights legal norms have internationalized, their transposition has remained almost exclusively national. Contemporary international and regional human rights regimes are supervisory mechanisms monitoring the relationship between states and individuals. They are not alternatives to the essentially state concept of human (fundamental) rights.[8]

For example, in Europe (within the framework of the Council of Europe) the European Court of Human Rights (ECtHR) examines the relationship between states and citizens or residents on the basis of subsidiarity. The position of the Inter-American Court of Human Rights is the same.[9] The central role of states in contemporary international human rights structures is also indisputable with respect to the content of recognized rights. The most important participatory rights are typically (though not generally) limited to citizens. There are several obligations – e.g.

[8] DONNELLY, JACK: The Relative Universality of Human Rights, in *Human Rights Quarterly*, Vol. 29, No. 2, (2007), 281-306.

[9] *See* also TÉVAR, NICOLÁS ZAMBRANA: Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations, in *Cuadernos de Derecho Transnacional*, Vol. 4, No. 2, (2012), 398-410, 403.

in the area of education and social safety – which may be undertaken only with respect to residents and they apply to aliens only if they fall under the jurisdiction of the state. Foreign states do not have an internationally recognized human right obligation, for instance, to protect victims of torture in another country. They are not free to go beyond the means of persuasion in the case of foreign victims of torture. Contemporary norms of sovereignty prohibit states from applying means of coercion abroad against torture or any other human right violation.[10]

3. GLOBAL CHALLENGES – HUMAN RIGHTS AND COMPANIES

As the UN Human Rights High Commissioner formulates the phenomenon in respect of business, "*The global developments over the past decades have seen non-state actors such as transnational corporations and other business entities play an increasingly important role both internationally, but also at the national and local levels. The growing reach and impact of business enterprises have given rise to a debate about the roles and responsibilities of such actors with regard to human rights. International human rights standards have traditionally been the responsibility of governments, aimed at regulating relations between the state and individuals.*"[11] In *Ruggie's* words, "*The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps*

[10] DONNELLY, JACK: *Universal Human Rights in Theory and Practice*, 2003, Cornell University Press, New York, 8, 14, 33-34.

[11] *See*: http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx [cit. 2015-10-20].

provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge."[12]

Business and human rights (BHR) is seemingly a recent movement, however its roots can be found in the concept of corporate social responsibility (CSR). The term "corporate social responsibility" came into common use in the late 1960s and early 1970s. CSR is a form of corporate self-regulation integrated into a business model. CSR policy functions as a built-in, self-regulating mechanism whereby a business monitors and ensures its active compliance with the spirit of the law, ethical standards, and international norms. Originally CSR was considered to be voluntary and distinct from law. Today the CSR normativity is increased by the influence of human rights law, labour rights, environmental and anti-corruption rules.[13] Thus BHR is not a completely new initiation, although still a recognised challenge since the late 1980's. In the last decades a range of research projects, books and articles applying multidisciplinary approach were devoted to the topic.[14] The main objective of BHR discussion

[12] RUGGIE, JOHN: Protect, Respect and Remedy – A Framework for Business and Human Rights, in *Innovations*, Vol. 3, No. 2, (2008), 189-212, 189.

[13] *See* also BUHMANN, KARIN: Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the 'Protect, Respect, Remedy UN Framework', in *International Law Research*, Vol. 1, No. 1, (2012), 88-102.

[14] *See e.g.* LEISINGER, KLAUS M.: Business and human rights, in KEINER, MARCO (ed.): *The Future of Sustainability*, 2006, Springer, 117-151.; FALK, RICHARD: Interpreting the Interaction of Global Markets and Human Rights, in BRYSK, ALISON (ed.): *Globalization and Human*

is to expand somehow the (international) human rights obligations to multinational enterprises (MNEs), transnational companies (TNCs) and other business entities. It is more than the CSR as softly tries to create enforceable duties for companies beyond the self-regulation, and establish the grounds of their accountability for human rights violations.

Many scholars pointed out that MNEs can infringe human rights directly or indirectly. The infringement is direct, if the enterprise uses child or forced labour, does not guarantee safety and health precautions, or establishes inhuman working conditions (like in sweatshops), discriminates on the bases of gender, race, sexual identity, belonging to ethnic, religious minority on the workplace, pollutes the environment, etc. Indirectly, typically

Rights, 2002, University of California Press, Berkeley – Los Angeles – London; WESCHKA, MARION: Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad? in *ZaöRV,* Vol. 66, (2006), 625-661.; WETTSTEIN, FLORIAN: *Multinational Corporations and Global Justice*, 2009, Stanford University Press, Stanford, California; JOSEPH, SARAH: *Corporations and Transnational Human Rights Litigation*, 2004, Hart Publishing, Oxford and Portland, Oregon; DINE, JANET: *Companies, International Trade and Human Rights*, 2007, CUP, Cambridge; MARES, RADU (ed.): *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, 2012, Martinus Nijhoff Publishers, Leiden, Boston; RUGGIE, JOHN G.: *Just Business: Multinational Corporations and Human Rights*, 2013, Norton, New York – London. *See* also Institute for Human Rights and Business, http://www.ihrb.org/ and Business & Human Rights Resource Center, http://www.business-humanrights.org/Home.

during armed conflicts or by supporting autocratic or totalitarian regimes MNEs can be complicit in or benefit from human rights violations committed by host states.[15]

At the same time, it also worth to keep in mind that the increased economic development goes hand in hand with improvement in human rights; and the role of the MNEs (their investments and operation) is inevitable in this respect. They not only contribute to the socioeconomic welfare but promote the efficient exercise of civil and political rights as well.[16]

This dual effect shall be taken into consideration in constructing the international and constitutional legal instruments in the field of accountability of business enterprises for human rights.

4. UN INSTRUMENTS FOR RESPONSIBLE BUSINESS

With the increased role of corporate actors, nationally and internationally, the issue of business' impact on the enjoyment of human rights has been placed on the agenda of the United Nations. Over the past decade, the UN human rights machinery has been

[15] WESCHKA: *op. cit.* 626-627.; WEISSBRODT, DAVID: Business and Human Rights, in *University of Cincinnati Law Review*, Vol. 74, (2005), 57-58.; LEISINGER: *op. cit.* 117ff.

[16] FALK: *op. cit.* 61. and MEYER, WILLIAM H.: *Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid, and Repression*, 1998, Praeger, Westport, 108.

considering the scope of business' human rights responsibilities and exploring ways for corporate actors to be accountable for the impact of their activities on human rights.[17]

For initiating universal attempts, instruments and strategies it was necessary to recognise that the human rights treaties just provide for indirect human rights responsibilities of businesses. The first efforts to define direct responsibilities of companies were more or less unsuccessful, or too 'soft', however good lessons to learn. Amongst these the drafts of the UN Commission on Transnational Corporations have to be mentioned that tried to create a code of conduct for companies from the 1970s,[18] as well as the OECD Guidelines[19] and ILO Tripartite Declaration[20] that promoted responsible business in their sphere of competence.[21]

[17] Business and human rights – UN High Commissioner for Human Rights. Available at: http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx [cit. 2015-10-20].

[18] *See* e.g., United Nations Draft International Code of Conduct on Transnational Corporations, 23 I.L.M 626 (1984).

[19] The OECD Guidelines for Multinational Enterprises are far reaching recommendations for responsible business conduct that 44 adhering governments – representing all regions of the world and accounting for 85% of foreign direct investment – encourage their enterprises to observe wherever they operate. The Guidelines were updated in 2011 for the fifth time since they were first adopted in 1976. *See* more at http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm [cit. 2015-10-20].

[20] The ILO's search for international guidelines in its sphere of competence resulted, in 1977, in the adoption by the ILO Governing Body, of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration). *See* http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm [cit. 2015-10-20].

[21] WEISSBRODT: *op. cit.* 62-63.

The UN Global Compact – a voluntary framework for responsible business with the objective of sustainable, stable and inclusive global economy – was proposed by Secretary-General *Kofi Annan* in 1999 and it was launched in 2000. It contains a set of legally non binding values on general human rights duties of businesses, labour standards, environmental protection and – since 2004 – anticorruption.[22] As UN Secretary-General *Ban Ki-moon* introduced the instrument, "*The Global Compact asks companies to embrace universal principles and to partner with the United Nations. It has grown to become a critical platform for the UN to engage effectively with enlightened global business.*"[23] A unique feature of the Global Compact is that participation not only commits the company as a whole, but specifically its leadership. However, its effect is limited because of the lack of clarity regarding the definitions and distinctions on the duties of

[22] The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption: Human Rights, Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses. Labour Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4: the elimination of all forms of forced and compulsory labour; Principle 5: the effective abolition of child labour; and Principle 6: the elimination of discrimination in respect of employment and occupation. Environment Principle 7: Businesses should support a precautionary approach to environmental challenges; Principle 8: undertake initiatives to promote greater environmental responsibility; and Principle 9: encourage the development and diffusion of environmentally friendly technologies. Anti-Corruption Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

[23] *See* http://www.unglobalcompact.org/ [cit. 2015-10-20].

businesses and states; furthermore there are neither clear standards for monitoring and evaluation of corporations' conduct, nor repercussions for failing to adhere to the principles.[24]

It is not accidental that there is no international convention on the basic human duties yet, as such an international obligation presumably would cause more damage than advantage to human rights law, providing governments with excuses to limit the exercise of human rights.[25] The human duties have fallen into two categories. The first category comprises 'vertical' duties in the relation of the individual and the state, which might be enforced by the government. The second category comprises horizontal duties in relations of the individual with other members of the society. Vertical duties usually appear in national constitutions, however separately from constitutional rights, i.e. the exercise of the rights is independent from the fulfilment of the duties. 'Horizontal' duties are usually not written into the constitution, as the constitution transforms these into vertical duties, as authorises the state to specify and enforce them, and thus intervene into the organic relations of the society. In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights – building upon the previous initiatives regarding corporate social responsibility – approved a draft declaration on human social responsibilities (i.e.,

[24] WEISSBRODT: *op. cit.* 63.; ARNOLD, DENIS G.: Transnational Corporations and the Duty to Respect Basic Human Rights, in *Business Ethics Quarterly*, Vol. 20, No. 3, (2010), 3-4. Available at: SSRN: http://ssrn.com/abstract=1612296 [cit. 2015-10-20]. *See* also http://www.unglobalcompact.org/AboutTheGC/index.html [cit. 2015-10-20].

[25] *See* KNOX, JOHN H.: Horizontal Human Rights Law, in *The American Journal of International Law*, Vol. 102, No. 1, (2008), 1-47, 1-3.

corporate human rights duties),[26] but finally the Human Rights Council (HRC) had not even considered the Norms. The draft was harshly criticised by the stakeholders because of its scope, vagueness, uncertain legal status and force, etc. As *Arnold* assessed, "*the Norms fail to provide a plausible and defensible account of those duties and in so doing undermine, rather than enhance, efforts to ensure that corporations contribute to the fulfilment of those basic human rights necessary for a decent standard of living for all.*"[27]

In 2005, *John Ruggie,* professor of Harvard University was appointed as a Special Representative to the Secretary-General of the United Nations (SRSG) with a mandate to investigate a number of important questions relating to the obligations of business for the realisation of fundamental rights. As *Knox* emphasized, that time the application of human rights law to corporations was highly contested: human rights groups (NGOs) and corporations differently approached whether corporations have, or should have, direct obligations under human rights law.[28] *Bilchitz* pointed out, that the mandate of the SRSG arose from the failure by the HRC a year earlier to adopt the above mentioned Norms, as many of the states was on the opinion that BHR issues deserve further

[26] Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003), available at: http://www1.umn.edu/humanrts/links/NormsApril2003.html [cit. 2015-08-02].

[27] ARNOLD: *op. cit.* 9. *See* also LEISINGER: *op. cit.* 2.

[28] KNOX, JOHN H.: The Ruggie Rules: Applying Human Rights Law to Corporations, in MARES, RADU (ed.): *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, 2012, Martinus Nijhoff Publishers, Leiden, Boston, 51-83, 51. Available also at http://www.globalgovernancewatch.org/docLib/20110829_Ruggie_Rules.pdf [cit. 2015-10-20].

investigation. The SRSG was initially appointed for a two year period and was provided with a broad mandate that defined the terms of reference for his activities.[29] The HRC endorsed unanimously Ruggie's reports, first in 2008 and finally in 2011. As *Mares* assessed, "While the Norms chose a more direct path to corporate accountability, to a large extent relying on international treaties and monitoring, and national regulations, the SRSG conceived a broader and less centralised template aimed at leveraging the responsibilities and roles of various social actors and relying on legal and other rationalities to move markets towards a more socially sustainable path."[30] The SRSG process created a reflexive law forum employing argumentative strategies and succeeded in generating a great consensus among the stakeholders. It was convincing enough for MNEs as well that a soft institutionalisation of business responsibilities for human rights would reduce economic risks flowing from business related human rights abuse.[31]

As a result of the SRSG's activity, there is now greater clarity about the respective roles and responsibilities of governments and business with regard to protection and respect for human rights. Most prominently, the emerging understanding and

[29] BILCHITZ, DAVID: The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations? in *SUR international journal on human rights*, Vol. 7, No. 12, June 2010, 199-229, 199-201. Available at: http://www.surjournal.org/eng/conteudos/pdf/12/miolo.pdf [cit. 2015-10-20].

[30] MARES, RADU: Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress, in MARES, RADU (ed.): *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, 2012, Martinus Nijhoff Publishers, Leiden, Boston, 1-50, 1.

[31] BUHMANN: *op. cit.* 98-99.

consensus have come as a result of the UN 'Protect, Respect and Remedy' Framework on human rights and business, which was elaborated by the SRSG. On 16 June 2011, the UN HRC endorsed Guiding Principles on Business and Human Rights for implementing the UN 'Protect, Respect and Remedy' Framework (hereinafter: the Framework), providing – for the first time – a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.[32] Along with the Framework, also Guiding Principles were issued to assist governments and corporations in the implementation.

The Framework rests on three pillars. The first is the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the state duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.[33]

---

[32] *See* http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx [cit. 2015-10-20].

[33] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary-General on the issue of human

5. LIMITS OF UN'S BHR CONCEPT

For the success of the BHR concept, which does not even belong to the international soft law to date, it is necessary to shift focus on non-state actors, NGOs and corporations as – at least – secondary subjects of international law. From this perspective was the Ruggie Framework criticized by *Bilchitz*, because considering the limits of international human rights law enforcement, corporations should have binding obligations for the realisation of fundamental rights. Non-binding instruments – such as the Framework – do not assist in the development of customary international law in the area of BHR and may even hamper progress. Corporations should not only respect human rights, i.e. avoid their violation, but also actively contribute to the realisation of human rights (positive duties).[34] Corporate accountability also cannot be effectively dealt with through existing methods; as *Vega, Mehra* and *Wong* stated, "*While [the Framework and the Guiding Principles] contain positive elements, they fall short of creating an effective mechanism for addressing the many corporate human rights violations that continue by not providing a remedy in the international arena when national systems are unavailable or ineffective.*"[35]

rights and transnational corporations and other business enterprises, John Ruggie, 21 March 2011.

[34] BILCHITZ: *op. cit.* 199ff.

[35] DE LA VEGA, CONNIE – MEHRA, AMOL – WONG, ALEXANDRA: Holding Businesses Accountable for Human Rights Violations – Recent Developments and Next Steps, in *Dialogue on Globalisation*, 2011, Friedrich Ebert Stiftung, 1. Available at: http://library.fes.de/pdf-files/iez/08264.pdf [cit. 2015-08-02].

Even in the European Union, which has an intensively evolving fundamental rights framework,[36] are significant obstacles that hamper the efficient application of the UN Framework for BHR. A conference on CSR was organised during the Swedish EU presidency in November 2009, where remarkable conclusions were drawn about the problems with the functioning of the UN Framework. In respect of the states' obligation to protect human rights, the incoherence of the Member States legislation (e.g. on issues of trade, investment, overseas development and corporate law) was seen as presenting a fairly uneven playing field within the Union of 27 states even before relations with other states, such as Brazil, Russia, India or China. The accountability mechanisms relating to the overseas operations of EU-domiciled companies was also mapped, and cited as an important first step in understanding some of the state-based gaps that might exist. In the field of corporate responsibility to respect, business requires states to play their appropriate role in order to help create additional demand. The issue of avoiding complicity in the human rights abuses perpetrated by others was also seen as being key feature here. As to the remedies, it was concluded that greater awareness of and adherence to existing international human rights mechanisms and greater access to effective remedies, both legal and non-legal is needed.[37] It can be added that also the national constitutions and

[36] CHRONOWSKI, NÓRA: Integration of European Human Rights Standard – the Accession of EU to the ECHR, in JASKIERNIA, JERZY (ed.): *Efektywność europejskiego systemu ochrony praw człowieka,* 2012, Adam Marszałek, Toruń, 957-975.

[37] Ministry for Foreign Affairs Sweden, Protect, Respect, Remedy – a Conference on Corporate Social Responsibility (CSR), Stockholm 10–11 November 2009, Conference Report, 5-8. Available at: http://www.ihrb.org/pdf/Protect_Respect_Remedy_Stockholm_Nov09_Conference_Report.pdf [cit. 2015-05-02].

constitutional jurisprudence should be more open to consequences of the global world order by giving up the regulative and applicative models related to and rooted in the traditional concept of state sovereignty.

International law holds states responsible for human rights violations, and not MNEs or TNCs. The states as duty bearers have to guarantee that business enterprises do not infringe the human rights in the territory where they operate. First and foremost the host state (where the MNE operates or the potential human rights violation occurs) should establish guarantees against the human rights violations by their national laws and law enforcement mechanism. However, because of the dominance and mobility of the MNEs, as well as the needs, means, economic interests or state of development of the given country, the offered human rights guarantees are often insufficient in the host state. E.g. it is very typical in developing countries that the governments fail to take actions against MNEs for human rights violations, because they need foreign investment, jobs, technical enterprise or they simply do not have resources (financials, legal procedures, non-corrupt judiciary, etc.) to sanction human rights abuses although would be willing to do so.[38] For these reasons, it is a logical step on the side of the victims of human rights violations caused by MNEs that they – seeking for redress and compensation – try to sue corporations for their activities performed abroad in the home states, i.e. in the country where the given business enterprise is domiciled. According to *Weschka*, it is true that home states are not currently liable in international human rights law for failing to prevent, punish, or otherwise regulate the delinquencies of their TNCs'

[38] WESCHKA: *op. cit.* 628-629., JOSEPH: *op. cit.* 9-10., TÉVAR: *op. cit.* 399-401.

overseas operations, but the home states have high human rights records, developed procedures, non-corrupt and functioning court system, and international law also "recognises the right of home states to exercise extraterritorial jurisdiction over their nationals committing wrongs abroad".[39] Thus the national courts have the chance to rule on MNEs' overseas human rights abuses, and enforce human rights norms 'horizontally'.

Numerous suits were filed mainly in common law countries, before United States, Canadian, Australian and United Kingdom courts against parent companies.[40] The most successful legal instrument for transnational human rights litigation seemed to be undoubtedly the US Alien Tort Statute (ATS) 1789 that had been dormant for nearly two centuries before lawyers began creatively using it in the 1980s to bring international human rights cases in US courts. The ATS grants jurisdiction to federal courts to hear tort claims by aliens alleging violations of the 'law of the nations'.[41] However, the ATS in itself cannot help to solve the problem of liability of the MNEs, because courts take several features into consideration in respect of transnational litigation, such as the doctrine of separation of powers, the state action doctrine, the political question, sovereign immunity and international comity considerations, the 'corporate veil' as well as *'forum non conveniens'*.[42]

[39] WESCHKA: *op. cit.* 629., *see* also JOSEPH: *op. cit.* 11-12.
[40] JOSEPH: *op. cit.* 15., DE SCHUTTER, OLIVIER: Transnational Corporations and Human Rights: An Introduction, in *Global Law Working Paper,* 01/05, Symposium – Transnational Corporations and Human Rights, NYU School of Law 7.
[41] TÉVAR: *op. cit.* 408., JOSEPH: *op. cit.* 10, 17.
[42] WESCHKA: *op. cit.* 629-631., TÉVAR: *op. cit.* 409.

In the landmark *Kiobel* decision (2013) the US courts greatly restricted the scope of ATS and limited the US courts jurisdiction in foreign human rights cases.[43] Petitioners, Nigerian nationals residing in the United States, filed suit in federal court under the Alien Tort Statute, alleging that respondents – certain Dutch, British, and Nigerian corporations – aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The ATS provides that *"[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*"[44] The District Court dismissed several of petitioners' claims, but on interlocutory appeal, the Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability.

US Court of Appeal for the Second Circuit ruled that the ATS is inapplicable to corporations because corporate liability is not a discernible norm of customary international law. The Supreme Court heard arguments over whether the Alien Tort Statute could apply to corporations, and later expanded the case to consider whether the law could be invoked in similar cases against anyone. The judgment finally was controlled by the 'presumption against extraterritoriality', which means that the Congress is presumed not to intend its statutes to apply outside the US unless it provides a 'clear indication' otherwise. The Supreme Court explained that, even where the claims 'touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application'.

[43] Kiobel v. Royal Dutch Petroleum Co., Decided April 17, 2013, 133 S. Ct. 1659 (U.S. 2013).
[44] 28 U.S.C. §1350.

The Court also discussed corporations, stating that corporations are often present in many countries, but a 'mere corporate presence' in the United States is insufficient.[45]

However, so long as at least some portion of the relevant conduct occurred within the US, ATS cases may still be sustainable. Altogether, the Kiobel decision makes it far more difficult for the human rights activists to sue US corporations based on the corporation's overseas activities.[46] As the post-Kiobel rulings of the US courts[47] show – although the door is not closed completely on using the ATS – plaintiffs can mostly rely on asserting parallel claims under federal laws that are expressly extraterritorial but limited to their own narrow circumstances.

[45] A few days after *Kiobel*, the Court vacated and remanded a Ninth Circuit decision that had allowed extraterritorial ATS claims to proceed [*Rio Tinto PLC v. Sarei*, 569 U.S. ---, 2013 WL 1704704 (April 22, 2013)]. In *Rio Tinto*, foreign plaintiffs sued foreign defendants who had 'substantial operations in this country', including 'assets of nearly $13 billion – 47% of which are located in North America'. Even this degree of corporate presence was not enough to overcome the presumption of extraterritoriality when the alleged torts had occurred outside the United States.

[46] SAMP, RICH: Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation, available at: http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/ [cit. 2014-08-23].

[47] *See Sarei v. Rio Tinto, Al-Shimari v. CACI or Balintulo v. Daimler* cases commented by SIMONS, MARCO: Post-Kiobel roundup: Apartheid case is not dismissed, but may soon be; some positive decisions from other courts (September 10, 2013), available at: http://www.earthrights.org/blog/post-kiobel-roundup-apartheid-case-not-dismissed-may-soon-be-some-positive-decisions-other [cit. 2014-02-13].

To sum up, BHR is still a policy instead of a legal framework, although by further development a really efficient instrument could it be as response to the challenges of globalisation on human rights. The limits of the United Nations' BHR concept are on the one hand the deficiencies of international human rights enforcement mechanisms, and on the other hand some constitutional dogmas on direct third party effect of human rights, the rigid and unimaginative application of international law by national courts, and excluding extraterritorial jurisdiction in human rights cases. Thus, for the success of "principled pragmatism"[48] of UN BHR Framework and policy, some paradigms of national constitutional law should be changed, or at least the domestic courts should make a better use of the constitutional convergence.

LIST OF REFERENCES

Books, chapters in a book, articles

[1] ARNOLD, DENIS G.: Transnational Corporations and the Duty to Respect Basic Human Rights, in *Business Ethics Quarterly,* Vol. 20, No. 3, (2010).

[2] BENHABIB, SEYLA: *Another Cosmopolitanism,* 2006, Oxford University Press, Oxford.

[48] For the term, *see* 'Just Business' – Ruggie on Business and Human Rights at the UN. http://businesshumanrightsireland.wordpress.com /2013/05/13/just-business-ruggie-on-business-and-human-rights-at-the-un/ [cit. 2015-10-20].

[3] BILCHITZ, DAVID: The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations? in *SUR international journal on human rights,* Vol. 7, No. 12, (2010), 199-229.

[4] BUHMANN, KARIN: Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the 'Protect, Respect, Remedy UN Framework', in *International Law Research,* Vol. 1, No. 1, (2012), 88-102.

[5] CHRONOWSKI, NÓRA: Integration of European Human Rights Standard – the Accession of EU to the ECHR, in JASKIERNIA, JERZY (ed.): *Efektywność europejskiego systemu ochrony praw człowieka,* 2012, Adam Marszałek, Toruń, 957-975.

[6] DE SCHUTTER, OLIVIER: Transnational Corporations and Human Rights: An Introduction, in *Global Law Working Paper,* 01/05, Symposium – Transnational Corporations and Human Rights, NYU School of Law.

[7] DINE, JANET: *Companies, International Trade and Human Rights,* 2007, CUP, Cambridge.

[8] DONNELLY, JACK: *Universal Human Rights in Theory and Practice,* 2003, Cornell University Press, New York.

[9] DONNELLY, JACK: The Relative Universality of Human Rights, in *Human Rights Quarterly,* Vol. 29, No. 2, (2007), 281-306.

[10] FALK, RICHARD: Interpreting the Interaction of Global Markets and Human Rights, in BRYSK, ALISON (ed.): *Globalization and Human Rights,* 2002, University of California Press, Berkeley – Los Angeles – London.

[11] GALGANO, FRANCESCO: *Globalizáció a jog tükrében* [Globalisation through the prism of law], 2006, HVG-ORAC, Budapest.

[12] : The Essence of Constitutionalism. Constitutionalism and Human Rights: America, Poland, and France, in THOMPSON, KENNETH W. – LUDWIKOWSKI, RETT R. (eds.): *A Bicentennial Colloquium at the Miller Center*, 1991, Lanham, MD: University Press of America, 3-41.

[13] JOSEPH, SARAH: *Corporations and Transnational Human Rights Litigation*, 2004, Hart Publishing, Oxford and Portland, Oregon.

[14] KNOX, JOHN H.: The Ruggie Rules: Applying Human Rights Law to Corporations, in MARES, RADU (ed.): *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, 2012, Martinus Nijhoff Publishers, Leiden, Boston, 51-83.

[15] KNOX, JOHN H.: Horizontal Human Rights Law, in *The American Journal of International Law*, Vol. 102, No. 1, (2008), 1-47.

[16] LAW, DAVID S. – VERSTEEG, MILA: The Evolution and Ideology of Global Constitutionalism, in *Washington University in St. Louise, School of Law, Faculty Research Paper Series*, Paper No. 10-10-01, (2010).

[17] LEISINGER, KLAUS M.: Business and human rights, in KEINER, MARCO (ed.): *The Future of Sustainability*, 2006, Springer, 117-151.

[18] MARES, RADU: Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress, in MARES, RADU (ed.): *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, 2012, Martinus Nijhoff Publishers, Leiden, Boston, 1-50.

[19] MEYER, WILLIAM H.: *Human Rights and International Political Economy in Third World Nations: Multinational*

Corporations, Foreign Aid, and Repression, 1998, Praeger, Westport.

[20] RUGGIE, JOHN G.: Protect, Respect and Remedy – A Framework for Business and Human Rights, in *Innovations*, Vol. 3, No. 2, (2008), 189-212.

[21] RUGGIE, JOHN G.: *Just Business: Multinational Corporations and Human Rights*, 2013, Norton, New York – London.

[22] TÉVAR, NICOLÁS ZAMBRANA: Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations, in *Cuadernos de Derecho Transnacional*, Vol. 4, No. 2, (2012), 398-410.

[23] TOMUSCHAT, CHRISTIAN: *Human Rights: Between Realism and Idealism*, 2003, Oxford University Press, Oxford.

[24] TUSHNET, MARK: The Inevitable Globalization of Constitutional Law, in *Harvard Law School, Public Law & Legal Theory Working Paper Series*, Paper No. 09-06.

[25] WEISSBRODT, DAVID: Business and Human Rights, in *University of Cincinnati Law Review*, Vol. 74, (2005), 55-73.

[26] WESCHKA, MARION: Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad? in *ZaöRV,* Vol. 66, (2006), 625-661.

[27] WETTSTEIN, FLORIAN: *Multinational Corporations and Global Justice*, 2009, Stanford University Press, Stanford, California.

Electronic sources

[1] DE LA VEGA, CONNIE – MEHRA, AMOL – WONG, ALEXANDRA: Holding Businesses Accountable for Human Rights Violations – Recent Developments and Next Steps, in *Dialogue on Globalisation,* 2011, Friedrich Ebert Stiftung, available at: http://library.fes.de/pdf-files/iez/08264.pdf [cit. 2015-08-02].

[2] Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003), available at: http://www1.umn.edu/humanrts/links/NormsApril2003.html [cit. 2015-08-02].

[3] Ministry for Foreign Affairs Sweden, Protect, Respect, Remedy – a Conference on Corporate Social Responsibility (CSR), Stockholm 10–11 November 2009, Conference Report, available at: http://www.ihrb.org/pdf/Protect_Respect_Remedy_Stockholm_Nov09_Conference_Report.pdf [cit. 2015-05-02].

[4] SAMP, RICH: Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation, available at: http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/ [cit. 2014-08-23].

[5] SIMONS, MARCO: Post-Kiobel roundup: Apartheid case is not dismissed, but may soon be; some positive decisions from other courts (September 10, 2013), available at: http://www.earthrights.org/blog/post-kiobel-roundup-apartheid-case-not-dismissed-may-soon-be-some-positive-decisions-other [cit. 2014-02-13].

Legal and other sources

[1] Alien Tort Statute, 28 U.S.C. §1350.

[2] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 21 March 2011.

[3] Kiobel v. Royal Dutch Petroleum Co., Decided April 17, 2013, 133 S. Ct. 1659 (U.S. 2013).

[4] Rio Tinto PLC v. Sarei, 569 U.S. ---, 2013 WL 1704704 (April 22, 2013).

[5] United Nations Draft International Code of Conduct on Transnational Corporations, 23 I.L.M 626 (1984).

THE SCOPE OF THE SOCIAL SECURITY COORDINATION IN THE EUROPEAN UNION

DVOŘÁKOVÁ, ADÉLA

Masaryk University
Faculty of Law, Department of International and European Law
Veveří 70, 611 80 Brno
Brno, Czech Republic
369850@mail.muni.cz

Abstract
The aim of this article is to evaluate the scope of application of the regulations concerning the coordination of the social security systems in the European Union. To achieve this objective, the article gives an overview of the main features and principles of the coordination system. After that attention is paid to the territorial, temporal, material and personal scope of application of the coordination regulation(s) as basic conditions of applicability of the coordination mechanism. The scope is evaluated at the end in order to point out the deficiencies of the system in this respect and to suggest where some changes might be considered to enhance its efficiency in practice.

Keywords*: coordination, freedom of movement, scope, social security*

JEL classification: *K33*

1. INTRODUCTION

Free movement of persons is a basic element of the internal market of the European Union. In these days this term does not include only free movement of workers, as it used to, but in order to ensure

efficient functioning of the internal market also other categories of persons have been included, whether economically active or non-active. As a consequence, the Union is entitled to adopt measures aiming at removing impediments of the free movement of persons.

One of such impediments is also the difference of the systems of the social security in different member states of the European Union. In some cases such a territorial limitation can cause loss, reduction or fragmentation of the claims of entitled persons, and thus unreasonable disadvantage of migrating persons, which results in restriction of the freedom to move freely within the territory of the Union. For these reasons the member states have delegated some of their powers in this field to the European Union in order to facilitate the convergence of the national legislations to the extent that ensures the freedom of movement as unlimited as possible.

This article will give a short overview of the legislation on the topic of the social security coordination. The aim is then to examine the conditions of applicability of the basic regulation No. 883/2004,[1] with special attention paid to its territorial and personal scope. In this regard, as will be shown below, there are still many unresolved questions and challenges for the legislators to deal with.

2. THE NEED OF COORDINATION

Social security is a field of law where very specific principles apply, which results mainly from the fact that each state has limited financial resources and different approaches to the manner how to allocate them. Among the most significant ones, the principle of membership allows only the people who have certain link, for

[1] Further referred to as „the current coordination regulation".

example its citizenship or domicile in its territory, to the state to participate in the system. The principles of solidarity and contribution express the need of the system to take care of its members. The ones in need are entitled to certain benefits, whereas the ones who are capable of taking care of themselves have the duty to contribute to the system. Finally, the result of the principle of territoriality is that a national system of social security applies to an individual in case that he has fulfilled criteria that have a territorial basis.[2]

The last mentioned causes the most trouble in practice, because, as follows from the general principle of sovereignty of states, each state determines the scope of its own legislation unilaterally. Given the fact that each state can use different territorial criteria, and in fact the states do so, and that each state can only regulate the scope of its own legislation and not the legislation of other states, in practice there are two categories of problematic situations that can occur.

The first situation is that as a result of the above mentioned a single person is covered by the national legislations of two states. Then we speak about a positive conflict. A negative conflict emerges when a person, although he has a certain territorial link to more states, is not covered by either of them.

Of course it is obvious that these conditions cannot cohabit with the idea of free movement of persons, because as long as they apply, the potentially migrating people are strongly discouraged

[2] VAN DER MEI, ANNE PIETER: *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits*, 2003, Hart Publishing, Oxford, 3-7.

from working abroad or just traveling to other member states. Without any coordination of the social security systems the dream of the freedom of movement would never have come true.

3. THE METHOD OF COORDINATION

To reach the goal of the free movement of persons certain measures must be taken to overcome the difficulties caused by the territoriality principle. In the law of the European Union there are practically two methods that can be considered. The first one, harmonization, requires modification of the national legislations in order to achieve common minimal standards in all the states, and coordination, which does not require any changes of the national legislations.

As the social security system is a fundamental element of a state's economy and decisions upon it are practically political decisions depending on a current policy applied by the state, the method of harmonization does not seem suitable for these purposes.[3]

Coordination, on the contrary, only delimits borders between respective national legislations in order to avoid positive or negative conflicts without the need to interfere in the inner structure of a particular social security system. The coordination provisions contain rules of conflict which determine the applicable legislation in a certain type of situations and rules of substance setting the basic general principles serving also as an interpretation guideline. Yet the rules of substance should never hinder the states

[3] *See* also the judgement of the Court of Justice of the European Union of 27 September 1988. O. *Lenoir vs. Caisse d'allocations familiales des Alpes-Maritimes*. Case C-313/86.

from determination of the types of schemes and conditions of their applicability, as well as they in all circumstances respect the differences between individual legislations.[4]

4. THE AIMS OF THE SOCIAL SECURITY COORDINATION

The basic goals that the coordination wants to reach can be defined as follows:

Firstly, in a situation when a single person has a territorial link to more states, it is necessary to determine the legislation applicable to that case to avoid overlaps or gaps between them.

As it follows from the general principles of the law of the European Union, the coordination provisions also contain anti-discrimination clauses to prevent the states from treating nationals of other states less favourably than their own citizens.

Finally, the coordination rules aim at overcoming the principle of territoriality in some other respects. Generally, the states are obliged to leave territorial criteria aside while determining whether the conditions of applicability of a scheme have been fulfilled, whether a person is entitled to a benefit and to which extent and whether he is entitled to be actually paid the benefit. For these purposes the periods of insurance obtained in each country cumulate and the states have the obligation to pay the benefits to the entitled persons no matter where their current residence is.

[4] Judgement of the Court of Justice of the European Union of 13 October 1977. *Fonds national de retraite des ouvriers mineurs vs. Giovanni Mura*. Case C-22/77.

5. COORDINATION IN THE LAW OF THE EUROPEAN UNION

The Union has been delegated powers by the member states in respect of coordination by the articles 48 and 21 of the Treaty on the Functioning of the European Union. Based on these articles several regulations have been adopted by the Union.

The most important regulation is the regulation 883/2004,[5] on the coordination of social security systems. This one is practically the basic one containing all the important provisions regarding the social security coordination. In addition to this one, there are several other regulations that are important for determining the scope of the coordination system.

The previous coordination regulation 1408/71[6] still applies in certain situations, although it was previously intended to be fully replaced by the current coordination regulation. The aim of enacting the new regulation was to make the coordination system more enforceable by simplifying it, because after 30 years of development, amendments and interpretation by the Court of Justice the previous regulation was not easily understandable anymore. This goal has been by a large part achieved, but regrettably the fact that both regulations still coexist together does not make the system any simpler. Another reason for adoption of the new regulation was the intention to extend the material and personal scope of the coordination system. Although the material

[5] 883/2004 Regulation of the European Parliament and the Council (24 April 2004) on the coordination of the social security systems.

[6] 1408/71 Regulation of the Council (14 June 1971) on the application of social security schemes to employed persons and their families moving within the Community. Further referred to as „the previous coordination regulation".

scope has been left almost unchanged, the personal scope has been successfully extended from working persons only to all economic categories of persons.

Furthermore, the regulations 859/2003[7] and 1231/2010[8] extend the personal scope of the two mentioned regulations also to the nationals of third countries.

6. THE CONDITIONS OF APPLICABILITY

The coordination system shall apply where there are two basic conditions fulfilled. The first of them is, naturally, the existence of a cross-border element. This requirement is logical, because without any relation of a certain situation to territories of more countries there would be no legislations that would need to be coordinated. The second one requires that the situation falls within territorial, temporal, material and personal scope of the coordination regulations.

[7] 859/2003 Council Regulation (14 May 2003) extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality. Further referred to as „the first extending regulation".

[8] 1231/2010 Regulation of the European Parliament and the Council (24 November 2010) extending Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality. Further referred to as „the second extending regulation".

6.1. THE EXISTENCE OF A CROSS-BORDER ELEMENT

Although no discussion about the necessity of the cross-border element is admissible, the topic of reverse discrimination sometimes raises questions. The fact that a person in a purely internal situation cannot invoke the coordination regulation can lead to a situation when a person in a similar position who happens to have connection to territories of two states ends up being treated in a more favourable manner than this person in a purely internal situation.

It is necessary to add that the Court of Justice[9] has generally accepted the reverse discrimination as an inevitable consequence of the application of the EU law. In fact, the solution of this problem is practically impossible to find, because where the cross-border element does not exist, an individual cannot invoke the law of the European Union, and therefore the EU law cannot offer any solution.

Some authors point out that discrimination of a person on the basis of the fact that he has not used his right of free movement may be contrary to national legislation of member states, or more precisely their constitutional law.[10] Yet it can be concluded that a decision of a national court in this sense is highly unlikely.

[9] Further referred to as the CJEU.

[10] JORENS, YVES (et. al.): *Key challenges for the social security coordination Regulations in the perspective of 2020*, 2013, available at: https://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D1573701%26langId%3Den&ei=MVWRVZjzKsPYyAOS8YH4Dg&usg=AFQjCNGWhKNkZc6i3nOM5nAMPpLgeqdb-w&bvm=bv.96783405,d.bGQ [cit. 2015-11-26].

6.2. THE TERRITORIAL SCOPE OF APPLICATION

The coordination mechanism applies not only in the territory of the European Union, but also in the territory of the states that form the European Economic Area with the EU[11] and in the territory of Switzerland (i.e. EFTA member states). In all these states the coordination mechanism applies, but with certain small differences, as will be shown in the following section.

6.3. THE TEMPORAL SCOPE OF APPLICATION

The temporal scope of application of the current coordination regulation is not really a matter for discussion. It dates from the 1st of May 2010 on. For the states outside the EU the date is a little bit different – for the states that constitute the European Economic Area together with the European Union it is the 1st of June 2012, for Switzerland it is the 1st of April 2012. Before these dates the coordination system still applied, but only under the old regulation.

6.4. THE MATERIAL SCOPE OF APPLICATION

The previous intention of the legislators while adopting the current coordination regulation was to replace the closed enumeration with a demonstrative one in order to make the system more flexible and capable of reflecting changes in trends and national legislations. However, in the end this approach remained without any wider support and thus the current regulation again contains a strict exhaustive enumeration of the branches of social security to which

[11] Iceland, Lichtenstein and Norway.

the coordination shall apply. Anyway, as a result of numerous differences between the national legislations, an interpretation of the Court of Justice is often needed.

The CJEU has chosen the functional conception for determining whether a certain benefit falls within the scope of the regulation. According to its jurisprudence for such an evaluation the constitutive elements of a certain benefit, especially the aim of the benefit and the conditions of entitlement, are the most important, no matter how the benefit is called and what is the opinion of the national authorities.[12]

The answer to the question whether a closed enumeration or rather a demonstrative one is better is not easy to give. It would indeed have been a more flexible solution to define the terms in a general way. Some authors also add that because according to the article 48 of the TFEU the Union shall adopt measures in the field of social security, it would be appropriate if the coordination regulation did not define scope in such a rigid way, but rather contained a more general term "social security".[13]

On the other hand, social security is quite a rigid field of law where turbulent changes are not very likely to happen. In this respect it is probably a better solution to leave the enumeration closed, which at least guarantees the persons a certain level of legal certainty.

What may cause some trouble is the wording of the article 3, according to which the coordination only applies to "legislation" concerning these branches of social security. Therefore, no

[12] Judgement of the Court of Justice of the European Union of 10 October 1996. *Joint cases Ingrid Hoever and Iris Zachow vs. Land Nordrhein-Westfalen*. Cases C-245/94 and C-312/94.

[13] PENNINGS, FRANS: *European social security law*, 2010, Intersentia, Antwerp, 50-51.

contractual provisions can be subject to coordination, unless they serve to fulfilment of an obligation imposed on an individual by law or are recognized as generally binding by a national authority which notifies the European Parliament and the Council of the European Union about it. Generally, any benefit based on a private agreement cannot be subject to coordination.

As a consequence of this provision, the collective agreements have been excluded from the scope of the coordination system (unless they have been pronounced to be generally binding by a state authority and notified). This makes the efficiency of the coordination system lower given the fact that in some countries significant part of the social security schemes is regulated by collective agreements. It would seem very convenient then if the approach to both types of legal regulation was to treat them in the same way.

In order to remove this impediment of a smooth functioning of the system the former proposal from the year 1998 contained a provision including the collective agreements recognized as generally binding by a state authority into the scope of the regulation with no need of official notification. However, it is also necessary to take into account the counter-arguments. In this case, because the collective agreements often contain many provisions giving the employees various benefits, the inclusion, because the general principle of only one legislation applies, would inevitably lead to a situation when a person working in two states would be covered only by one collective agreement and therefore would lose the benefits offered by the other collective agreement. Probably mainly for this reason the regulation has not been adopted in this form. Instead of that the article 6 of the recital to the regulation states that as both types of legal regulation deserve similar treatment, the notification duty should be considered the first step

leading to achievement of the goal of including the collective agreements in the scope of the regulation. An evaluation should be conducted after a certain period of time and in case that the results of this solution are satisfactory, the collective agreements shall be included without the need of notification in the future. The legislators thus opted for a compromise which does not include collective agreements in the scope of the coordination mechanism yet, but seems to be promising in this sense for future amendments.

Yet with respect to a very low number of states which have notified the EU about this and the fact that none of the collective agreements causes serious problems in real life, it is questionable whether such an evaluation is needed. A better compromise might be rather to include the collective agreements in the scope and leave the member states certain space for exceptions.[14]

6.5. THE PERSONAL SCOPE OF APPLICATION

The personal scope is the one that in reality causes the most trouble. In fact, it is very difficult to decide which groups of persons should be covered by the regulation and which should not. Although the concept of the coordination mechanism appeared already decades ago, there is still no wide consensus on this matter, especially when it comes to the nationals of third states and economically non-active persons.

This can be also deemed to be a weak point of the whole coordination system, which is then getting more complicated and therefore might discourage the people from enjoying their freedom of movement fully.

[14] *See* also PENNINGS: *op. cit.* 50.

For a better understanding of the personal scope it is suitable to start with the wording of the coordination regulation itself, according to which the regulation applies to nationals of the member states, stateless persons and refugees residing in a member state. The second requirement is that the person concerned has been subject to the legislation of one or more member states. Members of their families and their survivors are covered as well.[15]

For the purposes of the evaluation if a person is a national of a member state also the other states in whose territories the regulation applies – EFTA member states – must be considered member states. A national of a member state is a person who has a citizenship of one of the states or domicile in its territory.[16] Determinative in this sense is not the situation at the time of the claim but at the time when the conditions which a person has to fulfil in order to be entitled to a benefit have been met.[17]

Nevertheless, although the regulation itself contains this rule regarding the nationality requirement, there is another regulation, 1231/2010, which extends the scope of the current regulation to the nationals of third countries as well. However, there are some countries[18] which have refused to adopt this regulation; therefore for these states the requirement of nationality remains relevant.

[15] The regulation also applies to the survivors of persons who have been subejct to the legislation of one or more member states or stateless persons or refugees residing in tone of the member states.

[16] *See* also PENNINGS: *op. cit.* 36.

[17] Judgement of the Court of Justice of the European Union of 12 October 1978. *Tayeb Belbouab vs. Bundesknappschaft*. Case C-10/78.

[18] Denmark, Iceland, Lichtenstein, Norway, Switzerland and the United Kingdom.

The reason why the regulation 1231/10 has not been accepted by all the member states is that the EU could only base its authority to adopt this regulation on the article 79 of the TFEU, which gave the United Kingdom, Ireland and Denmark a possibility to opt-out. As the UK and Denmark decided to opt out, in these two countries the coordination regulation only applies to the nationals of the member states. Similarly, the states of EFTA also decided not to adopt this extending regulation.

Very similar situation had already happened before in the case of the previous coordination regulation. In that case it was only Denmark and the EFTA member states who refused to adopt the regulation 859/2003, which extended the scope of the previous regulation to the nationals of the third countries too.

The states have thus expressed reluctance to application of the coordination system to the third-country nationals. As at the times when the first extending regulation was adopted the coordination regulation only applied to economically active persons, those states who refused the first extending regulation, i.e. EFTA member states and Denmark, have done so for a simple unwillingness to provide the nationals of third countries with the benefits they could have if the coordination system applied to them. The second extending regulation, refused by these five states and also by the United Kingdom, was deemed to be even more problematic, because it extended the scope of the coordination regulation not only to economically active third-country nationals, but also to those who do not perform any economic activity.

This position is easily understandable as the application of coordination rules imposes obligations on states as well as it represents financial costs for them. It is obvious that the states then do not have much motivation to carry the burden only for the sake

of the nationals of non-EU countries, moreover when these people do not contribute to the state's economy with any economic activity.

This disunity of positions of the member states to the personal scope of application of the coordination regulation deserves a brief summary showing how it affects the lucidity and clarity of the system:

Those member states who adopted all the above mentioned regulations apply the current coordination regulation to both the nationals and non-nationals of member states. The United Kingdom, which refused only the second extending regulation, extending the scope to the economically on-active persons, applies the current coordination regulation to the nationals of member states, to those nationals of third countries who are economically active it still applies the previous coordination regulation and to the economically non-active third-country nationals it does not apply any of the coordination rules.

Those member states which have not adopted any of the extending regulations, apply the current coordination regulation to the nationals of member states, and to the nationals of third countries, irrespective of whether they are economically active or not, they do not apply any coordination provision.

It is then clear that due to this situation the goal of simplification of the system which the current regulation was intended to achieve has been partially thwarted. Although the wording of the regulation itself contributes to the clarity of the system and increases legal certainty, this effect is to a certain amount compensated by the uncertainty of the third-country nationals, who, as lay people, may have difficulties to understand the tangle of rules and thus not be aware of their own rights.

6.5.1. The Cross-border Element in Respect of the Third-country Nationals

The issue of the cross-border element is another issue that raises questions in respect to the third-country nationals. The problem emerges in the case of persons who come from third countries and then migrate within the EU territory. It is clear that when a third-country national migrates from a member state which applies the coordination regulation to him to a state which refused to extend the scope, he will not fall within the coordination system.

A more interesting question emerges when such a person travels in an opposite direction – from a member state which does not apply the coordination rules to him to a member state which has adopted all the regulations regarding coordination. As an example we can use a situation of a third-country national migrating from Denmark to the Czech Republic. The Czech Republic is one of the states that adopted the extending regulations; therefore it seems logical that it should apply the coordination provisions to such a person too. In fact, the interpretation of many member states[19] is that as Denmark did not adopt any of the extending regulations, in the cases of the third-country nationals migrating from Denmark this country is not considered a member state, therefore a basic condition of applicability – a cross-border element – is missing.

Regrettably there is no jurisprudence of the CJEU on this matter and even the opinions in literature differ. Nevertheless, according to the author's opinion the regulation itself gives certain clues that imply that this interpretation has no support in the law of the European Union.

[19] Besides the Czech Republic e. g. The Netherlands.

Firstly, the articles 18 and 19 of the recital of the second extending regulation 1231/10 should be mentioned, which state that Denmark and the United Kingdom do not participate in adoption of this regulation and therefore it is neither binding for them nor applicable in their territory. This is of course logical, as they could by no means be forced to be bound by the regulation when they decided to opt-out. Yet these articles only declare plainly that these states themselves shall not be bound by the regulation and do not say anything in respect to other countries. The article 12 then states that the regulation does not cover situations when only one member state is concerned, among others also the situation when a third-country national has a link only to one of the member states. If the regulation presumed that, in the example above, Denmark is not considered to be a member state, it would necessarily mean that it is considered to be a third country.

Yet it does not seem very probable that the European legislators would intend to call a member state a third country with no express declaration and no explanation provided.[20]

Another argument supporting the conclusion that the practice of the member states in this respect is not fully complying with the goals and principles of the European Union law is the article 8 of the recital, according to which a single coordination instrument should be used in order to avoid a situation where employers and social security bodies would have to manage complex legal and administrative situations concerning only a limited group of persons. In order to fulfil this goal of

[20] *See* also PENNINGS: *op. cit.* 41-42.
An opposite opinion based on the wording of the article 15 of the recital is provided for by Cornelissen: CORNELISSEN, ROB: Third-country nationals and the European coordination of social security, in *European Journal of Social Security*, Vol. 10, No. 4, (2008), 360.

simplification and unified approach it would be more convenient not to allow for more exceptions where a more suitable interpretation can be used. Moreover, when we consider the example of the United Kingdom, the problem becomes even more self-evident, because the interpretation of the United Kingdom as a third country for the purpose of the second extending regulation leads to a situation when an economically active person migrating from the United Kingdom to another member state falls within the scope of the previous coordination regulation and an economically non-active person in the same situation does not fall within the scope of the coordination mechanism at all. As a consequence the states which adopted all the regulations without any exceptions, although they in theory should replace the old coordination regulation with the new one, keep on applying the first mentioned to the situation of workers coming to their countries from the United Kingdom. This practice is clearly not in conformity with the goals of the extending regulations, nor in conformity with the general aims of the whole coordination system, which has been created with the objective to facilitate the free movement of persons within the territory of the European Union.

Finally, the article 2 of the recital to the extending regulation 1231/10 requires fair treatment of the third-country nationals residing legally in the territory of the Union and pronounces that an intensive integration policy should lead to granting them rights comparable to those of the member states nationals. Current practice of the national authorities is clearly contrary to this objective of fair treatment, because it leads to situations when a third-country national coming from one member state is treated differently by the national authorities from a national of the same country whose situation is different only in the aspect that he migrated from another member state. An example might be a

person migrating from Denmark to the Czech Republic, who does not fall within the scope of the coordination mechanism, and a person who comes to the Czech Republic from Austria, who can enjoy benefits following from the coordination mechanism. There is no legal basis in the law of the European Union whatsoever for treatment such persons differently, when the only difference is their link to different member states.

However, as was already mentioned above, the states are not motivated enough to extend the personal scope of coordination as much as possible, therefore without any case law of the Court of Justice the situation is not very likely to change.

7. CONCLUSION

Of course, the coordination mechanism has undergone a considerable evolution since its establishment in the 1950s. Given the complexity of the topic and the strength of the territoriality principle which emerges in this field, it should be considered a great success that the level of coordination and the functioning of the system are on such a high level nowadays.

Yet there are still many questions to be answered. As we could see, some issues are very hard to solve, especially due to the different approaches of some of the member states. Thus the regulation of the coordination of the social security systems will probably never be perfect. Anyway, there are still some challenges left for the legislators, who still have the possibility to improve the system by re-evaluation of the scope of application. In this way a higher certainty of migrating persons in the EU territory might be achieved and thus the freedom of movement might be strengthened even more.

LIST OF REFERENCES

Books, chapters in a book, articles

[1] CORNELISSEN, ROB: Third-country nationals and the European coordination of social security, in *European Journal of Social Security*, Vol. 10, No. 4, (2008), 347-371.

[2] PENNINGS, FRANS: *European social security law*, 2010, Intersentia, Antwerp.

[3] VAN DER MEI, ANNE PIETER: *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits*, 2003, Hart Publishing, Oxford.

Electronic sources

[1] JORENS, YVES (et. al.): *Key challenges for the social security coordination Regulations in the perspective of 2020*, 2013, available at: https://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D1573701%26langId%3Den&ei=MVWRVZjzKsPYyAOS8YH4Dg&usg=AFQjCNGWhKNkZc6i3nOM5nAMPpLgeqdbw&bvm=bv.96783405,d.bGQ [cit. 2015-11-26].

Legal and other sources

[1] 1408/71 Regulation of the Council (14 June 1971) on the application of social security schemes to employed persons and their families moving within the Community.

[2] 859/2003 Council Regulation (14 May 2003) extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

[3] 883/2004 Regulation of the European Parliament and the Council (24 April 2004) on the coordination of the social security systems.

[4] 1231/2010 Regulation of the European Parliament and the Council (24 November 2010) extending Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

[5] Judgement of the Court of Justice of the European Union of 13 October 1977. *Fonds national de retraite des ouvriers mineurs vs. Giovanni Mura*. Case C-22/77.

[6] Judgement of the Court of Justice of the European Union of 27 September 1988. *O. Lenoir vs. Caisse d'allocations familiales des Alpes-Maritimes*. Case C-313/86.

[7] Judgement of the Court of Justice of the European Union of 10 October 1996. *Joint cases Ingrid Hoever and Iris Zachow vs. Land Nordrhein-Westfalen*. Cases C-245/94 and C-312/94.

QIUS CUSTODIET IPSOS CUSTODES? LIMITS OF NATIONAL SUPERVISORY AUTHORITIES IN THE BRAND NEW FINANCIAL WORLD

GLAVANITS, JUDIT

Széchenyi István University
Faculty of Law and Political Sciences
Department for International Public and Private Law
Győr, Hungary
glavanitsjudit@gmail.com

Abstract

Since the 1990's the global capital movements in the world economy took new direction: the previous scruples of the activity of transnational companies have disappeared. The global phenomena of market-oriented liberal economic policies swept aside the formal objection and uncertainty against international working capital flows. The general conviction was that the markets are more effective regulators than governments, parallel with the confidence that transnational companies are the most successful forms of market efficiency. Then came the crisis of 2008, and since the Lehman Brothers has felt, the governments, specialists and scholars are searching for a better equilibrium of regulation of the financial markets. I am deeply concerned that we are just at the beginning of the road towards a better or at least safer global financial market.

The study is analyzing three levels of regulation of financial markets: (1) global, (2) regional and (3) national efforts made to avoid a next crisis. On the global scale, the IMF-FSB cooperation is examined, and among this the Early Warning Exercise. On the regional level the study compares the USA governmental regulation based on the Dodd Frank Act and the EU's legal instruments on preventing the upcoming crises, basically the European System of Financial Supervision. As for the national level, a

non-Eurozone member state's current regulation is analyzed (Hungary) to show how the global and regional sources can influence a national legislation.
The main point of the study is to show the contradiction in the method of data collection of the supervisory authorities. Despite of the urgent need of well-functioning early warning systems, the new institutions and procedures are determined to fail as a consequence of false data collection.

Keywords: *financial crisis, financial supervision, early warning system, shadow banking*

JEL classification: **G28, G32**

1. INTERNATIONAL SYSTEM OF FINANCIAL REGULATION AND SUPERVISION

1.1. THE GLOBAL FINANCIAL MARKETS

There is a genuine need for a well-developed financial system because of the great importance of the services it provides to firms and households. The financial system provides payment systems, channels saving into investment, allows smoothing of consumption over time, diversifies risk and allows corporate efficiency to be monitored. No country can afford to abandon the benefits of sophisticated financial systems, and the main parameters of financial regulation and supervision are anyway increasingly decided upon at the global level.[1]

[1] GYLFASON, THORVALDUR (et al.): *Nordics in a Global Crisis - Vulnerability and resilience*, 2010, ETLA, Helsinki, 245.

The ratio of the global influence on national regulation of financial markets are increasing as the financial sector's institutions and it's services are becoming global actors. The national financial markets' stability and vulnerability this way depends on regional and global effects. Economic globalization has enabled unprecedented levels of prosperity in advanced countries, it rests on shaky pillars. Unlike national markets, which tend to be supported by domestic regulatory and political institutions, global markets are only weakly embedded: no common antitrust authority, no global lender of last resort, no global regulator, no global safety net, and no global democracy – as Dani Rodrik appoints.[2]

Although the current financial crises' direct antecedent, the USA subprime crises started as a local crises, there is empirical evidence[3] of contagion in all markets with the US market through various channels. Specifically, the empirical results suggest that Japanese and European Monetary Union (EMU) markets have been directly affected from the crisis. However, while China's equity market has been mainly unaffected by the US subprime crisis, has been affected indirectly through Japan. Moreover, the Japanese equity market exhibits positive and significant spillovers effects with China and EMU, revealing an indirect volatility transmission channel of US subprime crisis. Pointing only on upper connections, we cannot state any more that a local crisis will for sure stay on

[2] RODRIK, DANI: *The Globalization Paradox. Democracy and the Future of the World Economy*, 2011, W.W. Norton Company, New York – London, XVI.

[3] DIMITRIOU, DIMITRIOS I. – SIMOS, THEODORE: Contagion Channels of the USA Subprime Financial Crisis Evidence from USA, EMU, China and Japan Equity Markets, in *Journal of Financial Economic Policy,* Vol. 5, No. 1, (2013), 61-71. Available at: SSRN: http://ssrn.com/abstract =22 48148 [cit. 2016-01-26].

local level – the financial world is so much globalized, that sole national (or even regional) authorities could not overcome or operate a financial crises by themselves.

In the recent years several regulatory bodies are working hard on a new "rulebook" for financial institutions. As a comparison it is worth to investigate the efforts made by the USA government, as a national regulator, and the EU as a regional regulator on this field. Both the EU and the US are implementing an improved regulatory environment. The approach has two main common objectives: first, decreasing the likelihood of a similar financial crisis re-occuring; and second, ensuring that the costs of any failure of financial institutions are not borne by taxpayers, but by the failing bank and the financial sector more generally. To this end, resolution procedures must ensure that even systemically relevant financial institutions can be allowed to fail in an orderly manner. The USA's Dodd-Frank Act (enacted in July 2010) represents the most important change to financial regulation in the US since the Great Depression: it impacts all federal supervisory agencies and affects all major aspects of the financial services industry. The EU, in spite of an early start through the broad endorsement of the de Larosière Report (February 2009), was lagging behind in terms of a paradigm shift in the European financial framework. However, in September 2010, the Economic and Financial Affairs Council (ECOFIN) endorsed an agreement with the European Parliament on the reform of the EU framework for financial supervision, introducing the new European System of Financial Supervision. This system consists of the European Systemic Risk Board (ESRB) and the three European Supervisory Authorities, European Securities & Markets Authority (ESMA)

based in Paris, the European Banking Authority (EBA) based in London and the European Insurance and Occupational Pensions Authority (EIOPA) based in Frankfurt.

Looking at the global level, also an increasing number of committees and boards, and relevant publications can be seen:

(1) The Bank for International Settlements has the "Committee on the Global Financial System" which is a central bank forum for the monitoring and examination of broad issues relating to financial markets and systems.

(2) In November 2008, the G20 asked the IMF and the Financial Stability Board (FSB) to collaborate on regular Early Warning Exercises (EWEs). The EWE assesses low-probability but high-impact risks to the global economy and identifies policies to mitigate them. It integrates macroeconomic and financial perspectives on systemic risks, drawing on a range of quantitative tools and broad-based consultations.

(3) In 2010 OECD launched a publication titled "Policy Framework for Effective and Efficient Financial Regulation – General Guidance and High-Level Checklist"… etc.

We can find common grounds in the work these global regulatory and advisory bodies: first, the aim is to avoid a next global crisis on the financial markets, and second they all urging more regulatory steps towards a complex and harmonized supervision of financial institutions. And there is one more common fact in all global documents amended after the crisis: they are telling nothing new, nothing we all did not know before 2007! Here we do not want to underestimate the significance of the new supervisory systems both in the EU and in other countries, which could for sure work more efficient than before, but nothing has changed in the financial intermediary system – basically.

1.2. GLOBALIZED ACTORS ON REGIONAL AND LOCAL PLAYING FIELDS

The Global Financial System (hereafter GFS) is an essential infrastructure to support the global economy, a central network to achieve the economy's potential at a world level. However, advantages in a crisis may turn to disadvantages: a foreign-owned bank hit by an adverse liquidity shock may reduce its cross-border lending. If this bank has overseas affiliates, it may also activate an internal capital market channel, reducing funding to affiliates abroad or actively transferring foreign funds in support to the head office balance sheet. The foreign-owned banks are not the only entities that may reduce lending in emerging markets. Domestically-owned banks may rely on external capital markets for funding local activities, with cross-border interbank borrowing being one of these external sources. Hence, domestically-owned banks also could end up with a balance sheet shock that reduces their own lending capacity. Indeed, the external capital markets of small host country banks can be quite volatile, leading to lending activity that is hostage to the boom and bust features of cross-border lending.[4]

Turning to the regulatory aspects, we can summarize, that the increasing cross-border nature of banking was not accompanied by a regulatory framework on the supranational level and this gap became clear during the crisis. While monetary policy and therefore unofficially the lender of last resort facilities were unified

[4] CETORELLI, NICOLA – GOLDBERG, LINDA S.: Global Banks and International Shock Transmission: Evidence from the Crisis, in *Federal Reserve Bank of New York Staff Reports*, No. 446, (May 2010).

within the euro area at the level of the European Central Bank (ECB), no similar institutional arrangement existed on the regulatory level.[5]

If we are looking at the global level, can we see the former mentioned FSB as a new hope? It is a formalized and empowered body, able to undertake a more proactive role within international regulatory system than its formal version, the Financial Stability Forum. The FSB's original Charter, which outlines the mandate of the organization and the duties of its member states, was amended at the G20 Los Cabos Summit in June 2012. Article 1 of the charter states: "*The Financial Stability Board (FSB) is established to coordinate at the international level the work of national financial authorities and international standard setting bodies (SSBs) in order to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies. In collaboration with the international financial institutions, the FSB will address vulnerabilities affecting financial systems in the interest of global financial stability*". (FSB Charter 2012, Article 1) Article 2 of the Charter outlines ten specific tasks for the Board to undertake in pursuit of this objective. The Board is to:

> (1) assess vulnerabilities affecting the global financial system and conceptualize ways to solve them;
>
> (2) promote coordination and information exchange among authorities;
>
> (3) monitor and advise on market developments and their implications for regulatory policy; (4) advise on and monitor best practice in meeting regulatory standards;

[5] ALLEN, FRANKLIN (et al.): *Cross-Border Banking in Europe: Implications for Financial Stability and Macroeconomic Policies*, 2011, Centre for Economic Policy Research, London, 40-41.

(5) undertake joint strategic reviews of the policy development work of the international standard-setting bodies;
(6) set guidelines for and support the establishment of supervisory colleges;
(7) support contingency planning for cross-border crisis management;
(8) collaborate with the International Monetary Fund (IMF) to conduct Early Warning Exercises;
(9) promote implementation of agreed commitments by members via monitoring, peer review and disclosure; and
(10) undertake any other tasks agreed by its Members within the framework of the Charter.

Ten tasks – all soft law instrument. However, this is still much more effort in crisis management than it was before 2008. If we are analyzing the 8th point, namely the Early Warning Exercise (EWE), it is clear, that both the IMF and the FSB is preparing its own list of vulnerabilities and possible threats, and presenting them at the Spring and Annual Meetings of IMF, on which the FSB and IMF each provide a 15-minute presentation to the IMF Council. According to an IMF source with intimate knowledge of the Exercise, 'the IMFC is properly scared when the List is presented' (anonymous 2012).[6] Indeed, part of the objective is to startle policymakers and make them realise that severe vulnerabilities, which they probably had not considered, could actually happen. The only discussion on the presentation takes place during a breakfast meeting that takes place the morning after the IMF and

[6] Quoted by: MOMANI, BESSMA (et. al.): Strengthening the Early Warning Exercise - Enhancing IMF and FSB coordination, in *World Economics*, Vol. 17, No. 3, (2013), 126.

FSB present their Lists to the IMFC. The breakfast is very informal, highly confidential and exceptionally exclusive, and after the discussions are finished, the participants will consult with their home countries' regulatory board and jurisdiction to mitigate domestic risks and to insulate themselves against external risks. Momani et al. pointed out, that there are so many differences between IMF and FSB working method, goal and staff, that it is questionable if these institutions can work together efficiently on a project. As they summarized, IMF staff (2.400 people altogether in the institution, mainly highly trained economists and a senior management), made tended to view the EWE as an opportunity to demonstrate their analytical capacity, both individually and organizationally. Conversely, the culture of the FSB (staff altogether 40 people, charged primarily with supporting the initiatives of their member states) is consensus based and generally risk averse, and is reflected in the cautious approach the organization takes in the preparation of the EWE.[7]

After all, the question remains: how would the upper mentioned EWE mechanism efficiently prevent the next crisis? Could these institutions collect the relevant data, and can they analyze them correctly, and if they can, what would happen then? Who will force the governments, central banks, supervisory institutions to make efforts avoiding the risks? What if more than one county's aligned activity is needed, and one of them is refusing the coordinated actions? What is national interest and global interest is in collision?

[7] Ibid. 129-130.

1.3. SUCCESS STORIES OF REGIONAL COOPERATION AFTER THE CRISIS

The Vienna Initiative (hereafter VI) established in 2009, offered the prospect of an alternative governance regime in the EU. The VI was formed to manage the fallout from the global crisis in the former socialist countries of Central and Eastern Europe (CEE) bringing together in an open and deliberative process the key stakeholders in the pan-European financial market, including transnational bank groups, fiscal authorities, regulators and central banks from home and host countries, the European Central Bank (as observer), the European Commission (EC), and several international financial institutions (IFIs). While each of these stakeholders had a manifest interest in a coordinated response, effective coordination required engineering to overcome the collective action problems they faced. One may ask if the VI is still needed when the EU has enacted so many new rules and institutions on stabilizing and supervising the financial market. The VI's success in managing the fallout from the global financial crisis in CEE raises the question whether it offers a viable framework for governing transnational financial markets not only in crisis, but as a continuous governance regime. The new EU regime, however, incorporates many of the old regime's defects. It does not – and, given its structural constraints, cannot – address the over- and under inclusiveness. It is designed for the European Union, not for countries outside, even though many banks based primary in a member state may have extensive operations outside the EU. Moreover, it gives all member states a voice in the newly created regulatory bodies irrespective of their relation to transnational banks. In fact, the hierarchical management structure created for

the new financial supervisors with a chairman and board44 favors representatives of influential EU countries irrespective of those countries' actual exposure to the risks of financial market integration. The same structural features make it unlikely that the new authorities will respond flexibly to new challenges as they arise. To the contrary, the emphasis on hierarchy and authority is more conducive to the implementation of standardized modes of governance than to innovation. Moreover, the EU's formal institutions have little leverage over national interests of member states in times of crisis. The EU creates no space for the type of open, multistakeholder forum that was critical for the VI in averting the crisis in CEE. Such a process greatly increases the pool of information and expertise from which solutions can be drawn, and it also affirms the role of private actors not only as targets of regulatory interventions, but as stakeholders in the governance of financial markets with rights and responsibilities.[8]

2. NEED FOR A NEW NARRATIVE?

2.1. CRISIS VS. GLOBALIZATION – BEFORE JUDGEMENT

Dani Rodrik, known as a theorist of globalizations states "we need a new narrative to shape the next stage of globalization".[9]

In 2005, IMF issued a study of the central theme that where a financial crisis emerges, regional supervisors should have systems in place to effectively respond to their country-specific

[8] PISTOR, KATHARINA: Governing Interdependent Financial Systems: Lessons from the Vienna Initiative, in *Columbia Law and Economics School Working Paper Series*, No. 396. (2011), 39-40.
[9] RODRIK: *op. cit.* XIII.

crises and — in the case of foreign operations and financial conglomerates — to collaborate comprehensively with other supervisory agencies and respective ministries to avert a regional crisis or address the immediate crisis at hand. For financial institutions to expand across borders without undermining regional and global financial stability, supervisory agencies must develop the capacity to collaboratively and collectively handle crises[10].

After the crisis, many people anticipated that the Western democracies would move swiftly to clean up the banking and finance mess, re-institute strong controls on the sector and seek reforms to restore it to its proper role as a facilitator of increased productivity and innovation in the real sector. This is what Sweden did when it reformed its financial system in the 1990s and what the USA did in the 1980s savings and loan crisis. This did not happen. Financial regulators have sought to limit the riskiness of big banks but the banks have pushed back with some success. As long as they can profit from leveraging and raising risks, they will seek to do so. For all the talk about systemic risk, there is neither the data to measure systemic risk to the system nor policies to prevent another implosion. The danger to the developed (and also the developing) countries comes from collateral damage to another Wall Street or London or even Shanghai meltdown. With the world not fully recovered from the Great Recession, the impact on small open economies would presumably be immense.[11]

[10] MAJAHA-JARTBY, JULIA – OLAFSSON, THORDUR: Regional Financial Conglomerates: A Case for Improved Supervision IMF Monetary and Financial Systems Department, in *IMF Working Paper*, WP/05/124 (June 2005), 5.

[11] FREEMAN, RICHARD B.: *Little Engines that Could: Can the Nordic economies maintain their renewed success?*, Sub-report 3., 2013, NordMod2030 – Fafo, 29.

We must see, that establishing and enforcing the previous methods are not efficient. Take the example of the regulatory tools for asset price bubbles first. The orthodox method of solving this problem is through interest rate policy. In particular, very low interest rates at a time when property prices are surging should be avoided. Once they have started, the question is whether interest rates should be raised to prick them. Different regions within these economies differ in terms of economic fundamentals and the rate of property price increases. Using interest rates to prick bubbles will not be so desirable because this will adversely affect the areas that do not have bubbles. The recent events in the euro area constitute a clear example. The interest rate policy followed by the European Central Bank was correct for countries like Germany, where there was no bubble, but it was inappropriate for Spain, where it contributed to the creation of the property bubble. A tighter policy may have been effective for preventing the bubble in Spain but at the cost of a recession or at least slower growth in some of the other countries. And this is only one case in connection with the global and regional crisis.

The globalization sharpened the question of financial trilemma: the three objectives of financial stability, cross-border banking and national financial supervision are not compatible – only two can work at the same time, one has to give. What if play with the idea of giving up national financial supervision, or at least a part of it?

In the case of European countries, we have to take into consideration the most recent statistical facts on the EU skepticism as well: not only the increasing power of the euro-skeptic parties in the European Parliament is shocking, but see the most recent case, the elections in the UK. Prime Minister Cameron's narrative is against the EU – and for the voters it seems to be working well. Not

speaking about a global level, only the regional – how would the policy makers of the EU under these circumstances be able to get through a revolutionary idea of globalized supervision over financial institutions?

2.2. GLOBAL ACTING - GLOBAL ACCOUNTABILITY?

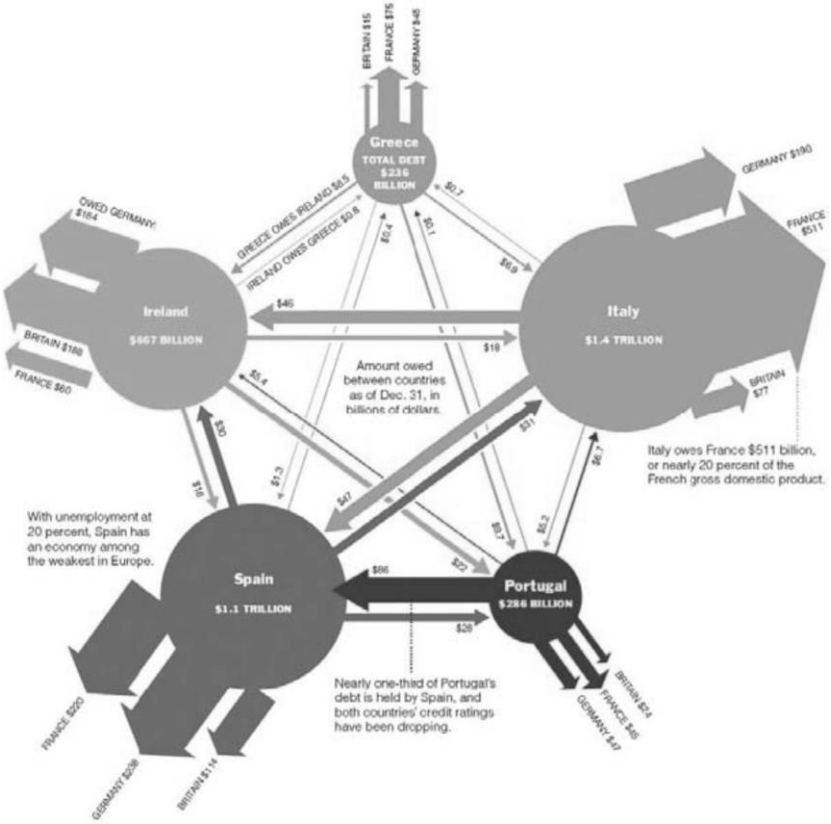
Underhill and Zhang stated in 2008 that financial globalization has considerably bolstered the position of private actors, rendered regulators more dependent on market interests, and strengthened the power of private agents to shape and set rules. These developments, often encouraged by states themselves, have increasingly aligned financial governance with the preferences of powerful market players, transforming the notion of the public interest in the international financial domain and posing fundamental problems of exclusion and democratic deficit[12]. Not only the private financial institutions are going global, but the states themselves as well. Masera points out[13] that Europe's banks and sovereign exposures are highly interconnected, according to BIS statistics. For years makert participants – including SIFIs (Systematically Important Financial Institutions) – had assumed that an implicit guarantee protected the sovereign debt of Euro-Area Member States. As the crisis showed, this presumption led to

[12] UNDERHILL, GEOFFREY, R. D. – XIAOKE ZHANG: Setting the rules: Private power, political underpinnings, and legitimacy in global monetary and financial governance, in *International Affairs*, Vol. 84, Issue 3 (2008), 536.

[13] MASERA, RAINER: Reforming financial systems after the crisis: a comparison of EU and USA, in *PSL Quarterly Review*, Vol. 63, Issue 255 (2010), 321.

a systematic underpricing of risks, which made debt cheaper to issue than it should have been.

Figure 1.
Interconnection of banks ans sovereign exposures in Europe, 2010. Source: New York Times and BIS, quoted by Masera (2010)



A couple of problems of globalized financial institutions come from the fact that national regulators care first and foremost about domestic depositors, domestic borrowers, domestic owners and, ultimately, domestic taxpayers. Ultimately, they are accountable to national governments and voters. This also has implications for supervisory focus. Until 2010, Western European supervisors focused mainly on the health of the parent banks and less on the health and imbalances of their subsidiaries in central and eastern Europe. [14]

Now if we are looking at (now, in 2015) the reformed regulatory and supervisory systems both local, regional and global level, the upper mentioned bias is still on the table.

2.3. QUIS CUSTODIET IPSOS CUSTODES?

Who will watch the wathmen? Bath, Caprio and Levine[15] published a data of bank regulation and supervision, and among other enthusiastic information, they asked in the survey if the supervisory institutions are legally liable for their actions. From the total answers of 142, only in 23 countries were the institutions liable. Here I chose some counties and their answers on prudential bank regulation and the enforcement.

[14] FRANKLIN (et. al.): *op. cit.* 41-42.

[15] BARTH, JAMES R. – CAPRIO JR., GERARD – LEVINE, ROSS: *Bank Regulation and Supervision in 180 Countries from 1999 to 2011*., 2013, NBER Working Paper No. 18733, available at: http://www.nber.org/papers/w18733.pdf [cit. 2015-12-01], 63-65.

Figure 2.
Prudential bank regulation and their enforcement
Source: Barth, Caprio and Levine 2013. p. 63-65.

Country	**If an infraction of any prudential regulation is found in the course of supervision, must it be reported?**	**Are there mandatory actions that the supervisor must take in these cases?**	**Are supervisors legally liable for their actions?**
Argentina	Yes	Yes	Yes
Austria	Yes	Yes	No
Belgium	Yes	No	No
Bhutan	Yes	Yes	Yes
Chile	Yes	Yes	Yes
Columbia	Yes	Yes	Yes
Cost Rica	Yes	Yes	Yes
Denmark	Yes	No	No
Ecuador	Yes	Yes	Yes
Estonia	Yes	No	No
Finland	No	Yes	No
France	Yes	No	No
Germany	Yes	Yes	No
Greece	No	No	No
Hungary	Yes	Yes	No
Ireland	Yes	Yes	No
Israel	No	No	No
Italy	Yes	No	Yes
Lithuania	No	No	Yes

Luxenbourg	Yes	Yes	No
Malta	Yes	No	No
Netherlands	No	No	No
Poland	Yes	No	No
Portugal	Yes	Yes	No
Romania	Yes	Yes	No
Slovakia	Yes	Yes	No
Slovenia	Yes	Yes	Yes
Spain	Yes	Yes	No
United Kingdom	Yes	No	No
United States	Yes	Yes	No
Answers total	**Yes: 127, No: 11, N/A: 4**	**Yes: 105, No: 33, N/A:4**	**Yes: 23, No: 118, N/A: 1**

I find it terrifying, that in the European Union only in three counties are the supervisors legally liable for their actions. It is also thought-provoking that in a county most influenced by the recent financial crisis, like Greece, if an infraction of a prudential regulation is found in the course of supervision, it must not be reported, not even any mandatory actions must be made. The same rule applies to Netherlands: no report, no consequences, no liability.

Taking only the upper answers to the scale: how can the EU countries trust in each other's supervisory institutions knowing that in certain cases not only a report is made on the fact of infringement? If our watchers are so much out of control, how to can we be sure, that the global institutions have the data they need to monitor the risks in the financial sector?

Data collection still remains an issue when evaluating the financial supervisory authorities. Here I should cite the case of Hungary, where in 2015 several supervisory "shocks" has

questioned the quality of the data given by the financial actors. In March 2015, Hungary's National Bank is still trying to estimate the fallout from its seizure of brokerage firm Quaestor. The Questor was the third security and investment firm to have its activities suspended within weeks. Investigators proved that it have invested scores of billions of euros more in bonds than it was allowed to under its bond insurance program. Earlier in February Hungarian Central Bank revoked the license of Buda-Cash and four small banks linked to it, saying the brokerage could not account for about 340 million euros of client cash. Still earlier, as a first domino, the supervisory authority also revoked the license of a smaller brokerage: Hungária Securities[16].

In these scandals thousands of people are affected. Every brokerage in question appears to have falsified data. Buda-Cash and Quaestor are accused of doctoring their IT systems, whereas Hungária Securities is said to have used the old-fashioned "exercise book" method for its fraud.

And these examples are only from Hungary. The Hungarian Central Bank's statistics forwarded to EU level were proved false data. Can we imagine, if these information may have come from a G20 country? How would it have affected the global financial stability?

The last point must be mentioned is the shadow banking system, and the unimaginable volume of false information arriving from those financial intermediaries affected by this market. Shadow banking is a phenomenon which has created high interest from a policy and research perspective as it represents one of the main sources of financial stability concerns. In broad terms,

[16] Data from the Hungarian National Bank's Press Releases. Available at: https://www.mnb.hu/felugyelet/felugyeleti-hirek [cit. 2015-12-12].

shadow banking can be described as credit intermediation involving entities and activities outside the regular banking system. This intermediation provides an alternative to bank funding but - as the financial crisis revealed - these non-bank entities could create high systemic risks to financial stability as this source of funding is mainly short-term (long-term credit extension based on short-term funding and leverage) and therefore more susceptible to runs[17]. We should add, that such credit intermediation activities by non-bank financial entities often generate benefits for the financial system and real economy, for example by providing alternative financing/funding to the economy and by creating competition in financial markets that may lead to innovation, efficient credit allocation and cost reduction. However, unlike other nonbank financial activities, these activities create the potential for "runs" by their investors, creditors and/or counterparties, and can be procyclical, hence may be potential sources of systemic instability. These non-bank credit intermediation activities may also create regulatory arbitrage opportunities as they are not subject to the same prudential regulation as banks yet they potentially create some of the same externalities in the financial system[18].

The OECD has also signed the problem declaring that the OECD is working on the improvement of statistics regarding institutional investors, which include insurance corporations and

[17] OECD: *Results of the survey on shadow banking*. COM/STD/DAF(2015)1, October 2015, available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM/STD/DAF(2015)1&docLanguage=En [cit. 2015-12-15].

[18] FBS: *Strengthening Oversight and Regulation of Shadow Banking Policy Framework for Strengthening Oversight and Regulation of Shadow Banking Entities*, available at: http://www.fsb.org/wp-content/uploads/r_130829c.pdf?page_moved=1 [cit. 2015-12-15], 8.

pension funds, as well as SPEs (special purpose entities). Such work, which is carried out by central banks as well as national statistical offices and other government agencies, will also respond to the requests of G-20 and other parties for the development of statistics on shadow banking. According to the OECD, in some countries central banks might not have official mandates to collect data for other financial corporations. Nevertheless, the involvement of central banks and their cooperation with national statistical offices and other government agencies is indispensable for filling the existing data gap in these areas[19].

3. CONCLUDING REMARKS

How far can the financial globalization go? As the upper research shows, there are significant differences even in the scope and liability of financial supervisors of the countries of the world. It is an undeniable fact, that companies are seeking the possibilities of settling down in countries with less "legal difficulties", and thanks to the Global Financial Market they can provide services worldwide – causing global financial threat worldwide. I am concerned that although the governments and regional, national and international regulators made efforts after the crisis to straighten the power of financial supervisory authorities, the current regulations will for sure not save us from a next crisis, as they did not move forward in the financial trilemma: we still wants all three, and none of it is working well enough.

[19] HAGINO, SATORU – CAVIERES, LILIANA: OECD financial statistics for measuring the structure and size of the shadow banking system, in *Proceedings of the Sixth IFC Conference on "Statistical issues and activities in a changing environment"*, 28-29 August 2012, Basel, 17.

As for the limits of global financial regulations, I see clouds in the sky – even in the EU. If counties are questioning the fundamental values of the EU and therefore preparing to jump out, and as long as the national politician elite are thinking only local, the global financial regulation stays a dream.

Though, there are signs of moving forward. The reforms of data collection – and it's mandatory use in practice – can be a solution for the disinformation in the financial field. I also believe that the widened and internationally connected system of national and international supervisory authorities may also have a positive effect on the financial system.

LIST OF REFERENCES

[1] ALLEN, FRANKLIN (et al.): *Cross-Border Banking in Europe: Implications for Financial Stability and Macroeconomic Policies*, 2011, Centre for Economic Policy Research, London.

[2] BARTH, JAMES R. - CAPRIO JR., GERARD – LEVINE, ROSS: *Bank Regulation and Supervision in 180 Countries from 1999 to 2011*., 2013, NBER Working Paper No. 18733, available at: http://www.nber.org/papers/w18733.pdf [cit. 2015-12-01].

[3] CETORELLI, NICOLA – GOLDBERG, LINDA S.: Global Banks and International Shock Transmission: Evidence from the Crisis, in *Federal Reserve Bank of New York Staff Reports*, No. 446, (May 2010), 1-41.

[4] DIMITRIOU, DIMITRIOS I. – SIMOS, THEODORE: Contagion Channels of the USA Subprime Financial Crisis Evidence from USA, EMU, China and Japan Equity Markets, in *Journal of Financial Economic Policy,* Vol. 5, No. 1, (2013), 61-71. Available at: SSRN: http://ssrn.com/abstract= 2248148 [cit. 2016-01-26].

[5] FREEMAN, RICHARD B.: *Little Engines that Could: Can the Nordic economies maintain their renewed success?*, Sub-report 3., 2013, NordMod2030 – Fafo.

[6] HAGINO, SATORU – CAVIERES, LILIANA: OECD financial statistics for measuring the structure and size of the shadow banking system, in *Proceedings of the Sixth IFC Conference on "Statistical issues and activities in a changing environment"*, 28-29 August 2012, Basel, 17.

[7] MAJAHA-JARTBY, JULIA – OLAFSSON, THORDUR: Regional Financial Conglomerates: A Case for Improved Supervision IMF Monetary and Financial Systems Department, in *IMF Working Paper*, WP/05/124 (June 2005), 1-43.

[8] MASERA, RAINER: Reforming financial systems after the crisis: a comparison of EU and USA, in *PSL Quarterly Review*, Vol. 63, Issue 255 (2010), 299-362.

[9] MOMANI, BESSMA (et. al.): Strengthening the Early Warning Exercise - Enhancing IMF and FSB coordination, in *World Economics*, Vol. 17, No. 3, (2013), 117-135.

[10] PISTOR, KATHARINA: Governing Interdependent Financial Systems: Lessons from the Vienna Initiative, in *Columbia Law and Economics School Working Paper Series*, No. 396. (2011), 1-45.

[11] RODRIK, DANI: *The Globalization Paradox. Democracy and the Future of the World Economy*, 2011, W.W. Norton Company, New York – London.

[12] GYLFASON, THORVALDUR (et al.): *Nordics in a Global Crisis - Vulnerability and resilience*, 2010, ETLA, Helsinki.

[13] UNDERHILL, GEOFFREY, R. D. – XIAOKE ZHANG: Setting the rules: Private power, political underpinnings, and legitimacy in global monetary and financial governance, in *International Affairs*, Vol. 84, Issue 3 (2008), 535-554.

INSTITUTIONAL SYSTEM OF THE HUNGARIAN FOREIGN ADMINISTRATION, WITH SPECIAL REGARDS TO THE MINISTRY OF FOREIGN AFFAIRS AND TRADE, FURTHERMORE THE TASKS AND COMPETENCES OF THE MINISTER OF FOREIGN AFFAIRS AND TRADE

GÖMBÖS, CSILLA

Széchenyi István University
Department of International Publicand Private Law
Győr, Hungary
e-mail: gombos.csilla89@gmail.com

Abstract

The study provides a short summary of the Hungarian foreign administration's institutional structure, more precisely, of its small segment/piece. In its frame I give an analysis of the organizational characteristics of the Ministry of Foreign Affairs and Trade and its most significant task and competence spheres connected to foreign affairs - having regard to that from the year of 2014, the current Ministry of Foreign Affairs and Trade is the successor of the previous Ministry of Foreign Affairs. Moreover, the study also examines the Ministry's leading minister with regards to his most important tasks and competences and his decision making competences.

Keywords: *foreign power, foreign public administration, foreign trade, foreign policy, Ministry of Foreign Affairs and Trade, minister of foreign affairs and trade, international relations*

JEL classification: *K33*

1. INTRODUCTION

Current study aims at giving an insight into the structure of Hungarian foreign administration, especially its characteristics. In general, I would like to give a comprehensive picture of Hungarian foreign administration's - as a special administration activity - certain significant, important actors, their decisive, peculiar tasks. It is also significant to mention the foreign power's conceptual frames, and its determination in foreign administration's (public) administration system, and its delimination from other administrative activities. It is the analyses of Hungarian foreign administration's institutional structure, primarily the essential tasks and competences and decision making competence of the minister of foreign affairs and trade that is presented after the previous one's presentation. This is followed by the institutional characteristics of the Ministry of Foreign Affairs and Trade led by the minister, having regard to that the current Ministry of Foreign Affairs and Trade - operating from 2014 - is the successor of the previous Ministry of Foreign Affairs.

2. FOREIGN POWER

Foreign power means the totality of those powers which refer to the formation of direct relationships of a state with other states and/or international legal entities. While in the era of absolute and constitutional monarchies the united foreign power was concentrated in the hands of reigns, by the time of modern democracies the previous uniformity of foreign power has ceased, it fell to its several functions and competences. As a result of it, foreign power splits among more constitutional bodies at the same time. The organization of foreign activity and its splitting among

certain constitutional bodies belongs to the inner sovereignty of each state. From constitutional point of view, foreign powers are mostly the followings: a) right to form and validate foreign policy; b) right to represent states on international areas; c) right to form, maintain and terminate diplomatic and consul relations; d) right to enter into international treaties; e) right to join international organizations; f) right to proclaim state of war, restoration of peace, as well as other international security policy decisions.[1]

3. CONCEPT AND CHARACTERISTICS OF FOREIGN PUBLIC ADMINISTRATION

Foreign affairs activity, as a special area of public administration, significantly differs from the other administration activities. First of all, the state's foreign activity primarily focuses on the validation

[1] Hungary's Basic Law divides these foreign competences among certain constitutional institutions. With regards to the various activities, current study only focuses on the Ministry of Foreign Affairs and Trade, as well as the task- and competence spheres of the minister of foreign affairs and trade. *See* more details: KISS, J. LÁSZLÓ: *Globalization and foreign policy: International system and theory in the millennium* [Globalizáció és külpolitika: Nemzetközi rendszer és elmélet az ezredfordulón], 2003, Teleki László Alapítvány, Budapest. Numerous Hungarian experts studying the foreign power, and the foreign policy, first of all we have to mention: KISS, J. LÁSZLÓ: *National identity and foreign policy in the Euro Atlantic area* [Nemzeti identitás és külpolitika az euroatlanti térségben], 2005, Teleki László Alapítvány, Budapest, and KISS, J. LÁSZLÓ: *Altering routes in the theory and analysis of foreign policy* [Változó utak a külpolitika elméletében és elemzésében], 2009, Osiris Kiadó, Budapest. Furthermore: MARTON, PÉTER: *The analysis of foreign policy; notions and methods for the discovery of foreign policy's sources* [A külpolitika elemzése. Fogalmak és módszerek a külpolitika forrásainak feltárására], 2013, Antall József Tudásközpont, Budapest.

of its respective/given national, governmental policy. As for foreign affairs, it is especially hard to delimit a government's political activity and the activity of managing public administration, as in this case (foreign) public administration in itself is of political nature. It is the practical validation of *foreign policy*: preparation, planning and execution of foreign policy decisions. The execution of foreign policy decisions are bases of further foreign policy decisions and governmental deliberation. In this context, on the administration of foreign affairs in the tighter sense we mean the professional activity of the Ministry of Foreign Affairs and Trade as it is primarily done by diplomatic tools and perhaps is also a harmonizing activity.[2]

Above these, foreign (public) administration activity also differs from other special public administration activities in that: a) it is delimited by international legal rules; b) having regard to that the state's previous international obligations (obligations coming from international treaties) limit foreign decisions, decisions of foreign special administration are mainly made with discretionary powers; c) foreign activity reflects states' inner negotiations among themselves; d) it cannot only be practiced in Hungary but in the territory of other states, too; e) such activity can only be done by a central administration organization, above others by the Ministry of Foreign Affairs and Trade and its foreign representations, as well as by other special ministries among frames set by law; no such

[2] *See* more details: HARGITAI, JÓZSEF: *International law in practice* [Nemzetközi jog a gyakorlatban], 2008, Magyar Közlöny Lap és Könyvkiadó, Budapest. *See* furthermore: *Public Administration Qualification Exam, Branch of Foreign- and Defense Policy*, 2015, National University of Public Service, Budapest.

activity exists on national regional level; f) exceptionally, authority activity prevails on consular areas in the case of foreign activity (authority-client relationship).

National bodies dealing with foreign representation can be put into two groups according to whether it is a body having seat in the territory of the state or it operates in the territory of another state. The first group consists of the president of the republic (head of state), the parliament, the government, the head of government, the ministry and minister responsible for foreign policy, as well as other special ministries and their special ministers. Various representative bodies operate outside the country boarder: diplomatic representations, consular representations, honorary consuls and permanent representations operating next to international organizations.[3]

4. MINISTRY OF FOREIGN AFFAIRS AND TRADE

4.1. MINISTER OF FOREIGN AFFAIRS AND TRADE

4.1.1. Tasks and competences of the Minister of Foreign Affairs and Trade

The Ministry of Foreign Affairs and Trade (furthermore referred to as Ministry) is Hungary's governmental body expressly carrying out foreign administration tasks. The Ministry in its current form was established during the 2014 governmental cycle as the legal successor of the Ministry of Foreign Affairs. Even the new name

[3] Due to content limitations, from inner-state bodes carrying out foreign activity current study especially focuses on the detailed analysis of the Ministry of Foreign Affairs and Trade and the minister of foreign affairs and trade's task and competence sphere.

of the Ministry emphatically signals that the segment of foreign economic affairs also plays a crucial part in the area of foreign affairs. In this sense besides the tasks and competences of foreign policy of the minister of foreign affairs and trade he also deals with foreign economic matters. These tasks and competences of the minister are regulated in detail in Government decree No. 152/2014. (VI.6.) on the tasks and competences of the members of the Government.[4]

Before I give a more detailed analysis of these tasks and competences, I have to mention that in the Government it is mainly the head of government[5]and the minister of foreign affairs and trade who have special tasks and competences in connection with foreign administration. However, with regards to that every sectorial ministry has its own international system of relations, almost all ministers carrying out special policy tasks (furthermore referred to as sectorial ministers) also deal with other foreign affairs – among determined legal frames. Other foreign activities of ministers are regulated in Government decree No. 152/2014. (VI. 6.).[6]

[4] Government decree No. 152/2014. (VI. 6.) 85-89. §. The task- and competences of the minister of foreign affairs and trade is regulated in the respective regulations of this Government decree.

[5] Such as, it is the head of government who determines the international activity of certain ministers. Also, the head of government's right of foreign representation is comprehensive; there is no need for its formal determination. *See*: Act XLIII. of 2010 on central state administration bodies and the legal status of members of the Government and secretaries.

[6] Present study does not present it. *See* this topic further: concerning regulations of Government decree No. 152/2014. (VI. 6.).

The minister of foreign affairs and trade (furthermore referred to as: minister) is the government's member who is responsible for foreign affairs and foreign policy. Hence, the minister's foreign responsibilities also cover the circle of foreign economic affairs and foreign policy tasks.

As for *foreign economic tasks*, the minister is also responsible for the followings:

a) preparation of rules referring to international development cooperation;
b) formation of the Government's foreign economic policy;
c) cooperation in the justification of Hungary's economic interests and trade-development activities connected to it, as well as cooperation in the formation of a favorable picture of Hungary;
d) preparation and coordination of strategic cooperative agreements entered into with other large enterprises;
e) management of the system of regional investment supports (judged by the individual decision of the Government);
f) managing tasks connected to twin-institutional programs;
g) ensuring the harmonization of international trade policy obligations and Hungarian legal regulation with regards to multilateral trade policy;
h) implementation, coordination and management of the Government's such policy with regards to international development cooperation;
i) coordination of government tasks in connection with the European Danube Strategy;

j) foreign economic diplomatic network's management, initiation of special diplomats' appointment and exemption.

The above mentioned tasks provide a detailed picture of the tasks and competences of the minister regarding Hungary's foreign economy. Besides all these, the minister also has several tasks and competences in the area of *foreign policy*, in this regards among others he is responsible for:

a) the preparation of legislature referring to a coherent foreign representation system, public officials' permanent foreign service, procedure of diplomatic prerogatives and exemptions, consul protection and the assignment and welcoming of honorary consuls, as well as humanitarian aid;

b) the Government's foreign-, safety and defense policy (recommendation for the Government's foreign-, safety and defense activity; managing governmental tasks coming from this, as well as coordination and supervision of its implementation; drafting of general questions of the Hungarian standpoint in connection with the viewpoint of the European Union, cooperation in its implementation; coordination of tasks on government level connected to the expansion policy of the European Union; representation of the Government in the negotiations of the Foreign Affairs Council of the European Union; the Government's information on the international and safety policy situation and Hungary's international relations);

c) coordination of a coherent governmental foreign policy (coherent system of foreign representation, network of special diplomats, management of cultural and scientific diplomatic relations, drafting of various international organizations' key concepts, supervision of their implementation; operation of a diplomatic delivery service);

d) representation of Hungary in foreign relations and international organizations (suggesting Hungarian standpoints to be presented; acknowledging nations, initiating, suspending, reconciling and terminating diplomatic and consul relations; forming and terminating honorary consul representations; appointing, exculpating leaders of foreign representations except the permanent representation to the EU, appointing and terminating main consuls);

e) management of the consular service (making decisions on the immunization of consular loan's payback, makes suggestions to the Government on assisting or evacuating Hungarian citizens' homecoming, gives permission for consul officials to carry outs certain notary tasks);

f) carrying out European Union tasks connected to certain tasks determined by legislature regarding travelling abroad, foreigners' arrival and stay (the minister especially carries out tasks in connection with diplomat and foreign service passports and manages visa provision activities, looks after the collection of visa fees);

g) coordination of procedures with international treaties (coordination of international agreement procedures, giving views on portfolio-agreements, drawing authorization documents, carrying out depositary tasks in the name of the Government, determining the date of international agreements' entry into force and termination, and operating Hungary's collection of agreements);
h) diplomatic protocol and the welcoming of foreign head of state and head of government;
i) determination of reciprocity based on international law, certain cases of legal aid;
j) preparing concerning legislatures in frames of European territorial cooperation alignment, taking care of public administration bodies' international cooperation's coordination, assisting territorial public administration's participation in international development cooperation;
k) coordinating and managing international humanitarian aid;
l) forming the rules referring to the operation of Permanent Representation.

4.1.2. Decision making competences of the minister of foreign affairs and trade

The most important tasks and competences of the minister of foreign affairs and trade could be summarized best in the above mentioned points. However, besides the mentioned Government decree, the Ministry statement no. 11/2015. (VI.19.) of the Organizational and Operational Regulations of the Ministry of

Foreign Affairs and Trade (furthermore referred to as OOR) also contains such regulations with regards to foreign activities which especially *belong to the competence of the minister*.[7]

The minister leads the ministry according to the frames of the Government's general policy. In this sense among and besides others the minister:

a) determines the ministry's organizational structure and the main rules of its operation, issues statements that are necessary for the operation of the ministry,
b) determines and approves the ministry's work plan and branch objectives,
c) approves the ministry's annual budget and annual account suggestion,
d) proposes to the president of the constitution according to rules set in legislature, and countersigns presidential resolutions,
e) decides on draft proposals addressed to the Government and the head of the constitution,
f) appoints and exempts main consuls,
g) appoints the head of honorary consular representation and decides on the withdrawal of appointment, appoints and exempts diplomatic and consular crew,
h) decides on the approval of award suggestion and on the bestowal of awards founded by him,
i) decides on the usage of humanitarian aid frame provided by the Government to the Ministry,

[7] Based on MFAT. 4-7. §. of statement No. 11/2015. (VI.19.) of the Organizational and Operational Regulations of the Ministry of Foreign Affairs and Trade (furthermore referred to as OOR).

j) decides on the issuance of diplomat passports and foreign service passports,

k) in his position as government commissioner the minister is also responsible for the harmonization of Hungarian-Chinese and Hungarian-Russian relations; he coordinates and supervises departments - especially the Chinese Main Department and Russia's main department's head – carrying out tasks connected to the Russian foreign affairs and trade relations; in this position he can give direct order to the head of Chinese Department and Russian Department,

l) appoints the head of the ministry's defense leader.

These decision spheres of the minister in some cases show overlap with the previously described regulations of the Government decree. The minister's exact and significant role is obvious in the area of the operating organizations (foreign representations - institutions, positions). Furthermore, the minister leads the activity of the state secretaries of the Ministry. Besides state secretaries, the head of cabinet and the ministerial commissioner's activity is also led by him. A cabinet operates for the assistant management of the minister's work and tasks.

In case the minister is hindered - if the OOR does not rule otherwise, according to the statements of the minister - the Parliamentary State Secretary substitutes him as the vice-minister.[8] In case the Parliamentary State Secretary is hindered, the substitution of the minister is done by the Minister of State for

[8] According to Act XLIII. of 2010. 37. §-on central state administration bodies and members of the Government and the legal status of state secretaries.

Economic Diplomacy, if the Minister of State for Economic Diplomacy is hindered, the Minister of State for Security Policy and International Cooperation acts, if the Minister of State for Security Policy and International Cooperation is hindered, the Minister of State for Cultural and Science Diplomacy acts.[9]

4.2. THE MINISTRY OF FOREIGN AFFAIRS AND TRADE'S ORGANIZATION[10]

Regarding the above mentioned it is obvious that the minister of foreign affairs and trade has wide-ranging and multi-layered tasks and competences, and also has other decision making competences with regards to foreign affairs (foreign economy and foreign policy). In order to perfectly and simultaneously carry out all these activities, there is a need for an effective official background apparat, machine. This function is done by the Ministry which current organizational structure and operation can be found in Ministry statement no. 11/2015. (VI. 19.) on the Organizational and Operational Regulations of the Ministry.[11] Main rules of the

[9] Compare with: except competences determined in 37. § (2). (Initiation of the head of constitution's measures, countersign of the head of constitution and participating in Parliamentary seatings are exceptions as with regards to these the Minister of Defense is entitled and obliged to substitute.)

[10] *See* the Organizational Structure of the Ministry of Foreign Affairs and Trade according to the OOR: http://www.kormany.hu/download/e/e9/40000/A%20K%C3%BClgazdas%C3%A1gi%20%C3%A9s%20K%C3%BCl%C3%BCgyminiszt%C3%A9rium%20organogramja.jpg, [cit. 2015-12-01].

[11] The organizational structure and operation of the Ministry is presented upon this legislature (however, we must highlight that due to content

Ministry's organization and operation are determined by the Minister, who also issues statements necessary for the operation of the ministry.

According to this OOR, the Ministry has two bigger operational organization spheres. On the one hand, there is a *Center* which consists of the Ministry's inland organizational units. On the other hand, there are *foreign representations* operating abroad which are Hungary's diplomatic representations, consul representations formed upon the decision of the Government. We can list the following bodies here: trade representations, offices and authorities, permanent representations, foreign Hungarian institutions operating under the effect of the previous organizations in the welcoming state and - based on international treaties or organizations - in third nations.[12]

With special regard to the Ministry's complicated, multi-layered foreign and inner tasks, the OOR divides the *Ministry's individual organizational units* into four bigger categories: a) *territorial departments* dealing with the maintenance of general international relations (such as China Department, Russian Department, North-American Department); b) a *professional department* dealing with all professional areas of international relations (such as International Legal Department, Department of International Organizations, Department of Mutual Foreign and Defense Policy, Department of Consulate and Citizenship); c) a functional department dealing with ensuring the ministry's operational conditions, organization and harmonization (such as

limitations the whole, detailed representation of the Ministry's organizational structure and operation cannot be done.).

[12] OOR. 1. § (4).

Department of Finance and accounting, Department of Personnel and Training, Department of Controlling); d) foreign representation(s).

These departments are further divided into smaller departments of legal status but not regarded as individual units.

A further individual organizational unit operating as a department is the Ministry Cabinet and the secretariat of national leaders, assisting the work and tasks of the minister.[13]

At the tasks and competences of the minister of foreign affairs and trade I have already mentioned that the minister manages the activity of the ministry's state secretaries, which state secretaries are the followings: Minister of State for Public Administration, Parliamentary State Secretary, Minister of State for Economic Diplomacy, Minister of State for Security Policy and International Cooperation, Minister of State for Cultural and Science Diplomacy.[14] The Minister has the possibility to appoint other state secretaries of the Ministry with regards to competences connected to the work of the Parliament.[15] With regards to all state secretaries we can say that they: a) arrange individual tasks upon the request of the Minister (drafting conceptions and solution proposals, representation and formation of the Ministry's standpoint); b) in close cooperation with the so called Department of Media, they carry out media representation according to the statements of the Minister; c) cooperate in the public policy foundation and implementation of the Minister's decision; d) coordinate strategic tasks' provision and formation of sectorial and sub-sectorial strategies that lay down the objectives and are

[13] OOR. 2. § (1)-(3).
[14] OOR. 11. §.
[15] OOR. 7. § (3).

connected to the Minister's tasks and governmental, sectorial responsibilities; e) carry out all tasks with which they are ensured by the Minister with permanent or temporary assignment; f) directly manage the activity of all leaders being under the effect of current Regulation.

Above the general information mentioned above, all state secretaries have their own tasks. The OOR lists the certain individual task of each state secretary in a separate chapter. Just to mention some tasks, the Minister of State for Public Administration - among others - manages the administrative organization of the Ministry, ensures its harmonized operation, participates in meetings of state secretaries of public administration, *follows* the operation of territorial and professional departments, prepares the annual diplomatic plan of the Ministry, *decides* on additional bestowal of rank and giving higher rank, as well as on appointing for foreign service, replacement between stations of those carrying out foreign service. The Parliamentary State Secretary also *makes suggestions* on the Government's foreign economic and foreign political strategy and *manages* the Ministry's tasks with regards to foreign affairs and foreign economy. The Minister of State for Economic Diplomacy also carries out tasks of managing, coordinating and supervising nature for mixed economic committees. He is responsible for the furtherance of frontier territories' cooperation, the realization of Strategy for the Danube Region and makes suggestions for the Government's foreign economic policy and supervises the network of foreign attaches. Among others, the Minister of State for Security Policy and International Cooperation is also responsible for general foreign and safety policy questions, global international organizations, human rights questions and Hungarian UN standpoints' formation. Furthermore, he also leads the trade group of Permanent

Representation and the EU Permanent Representation of Brussels working besides WTO. The Minister of State for Cultural and Science Diplomacy also carries out managing, preparing and supervising (professional) tasks, competences coming from his/her position.[16]

Besides state secretaries, further six vice-secretaries operate in the Ministry who look after the formation and representation of the Ministry's professional viewpoint, and also directly manage the activity of professional leaders working at their field, as well as represent the Ministry in connection with their field.[17]

5. CONCLUSION – SUMMARY

It is crucial to note that current study only analyses a small segment of Hungarian foreign administration's structure. The circle of state administration organizations participating in the activity of foreign administration is wide; we can differentiate between domestic organizations and organizations operating abroad (in foreign areas). The latter category consists of diplomatic representations, consul representations, consul representations led by honorary consuls, as well as international permanent representations. As for domestic organizations, we can list the Ministry of Foreign Affairs and Trade, the minister leading it, the Parliament, the Parliament's foreign committee, the president of the republic, and what is more, the government also carries out tasks and competences connected to foreign administration. The study's content limitations did not allow to fully represent all tasks and competences of foreign administration's actors, however, I aimed at providing a

[16] On state secretaries *see* further: OOR. 8-26. §.
[17] On vice-secretaries *see* further: OOR. 29-48. §.

comprehensive picture of the activity of the Ministry of Foreign Affairs and Trade and its leading minister, as well as other organizations connected to them.

LIST OF REFERENCES

Books

[1] HARGITAI, JÓZSEF: *International law in practice* [Nemzetközi jog a gyakorlatban], 2008, Magyar Közlöny Lap és Könyvkiadó, Budapest.

[2] KISS, J. LÁSZLÓ: *Globalization and foreign policy: International system and theory in the millennium* [Globalizáció és külpolitika: Nemzetközi rendszer és elmélet az ezredfordulón], 2003, Teleki László Alapítvány, Budapest.

[3] KISS, J. LÁSZLÓ: *National identity and foreign policy in the Euro Atlantic area* [Nemzeti identitás és külpolitika az euroatlanti térségben], 2005, Teleki László Alapítvány, Budapest.

[4] KISS, J. LÁSZLÓ: *Altering routes in the theory and analysis of foreign policy* [Változó utak a külpolitika elméletében és elemzésében], 2009, Osiris Kiadó, Budapest.

[5] MARTON, PÉTER: *The analysis of foreign policy; notions and methods for the discovery of foreign policy's sources* [A külpolitika elemzése. Fogalmak és módszerek a külpolitika forrásainak feltárására], 2013, Antall József Tudásközpont, Budapest.

Legal sources

[1] Act XLIII of 2010 on central state administration bodies and the legal status of members of the Government and secretaries.
[2] Government decree No. 152/2014. (VI. 6.) on the tasks and competences of the members of the Government.
[3] Decree No. 11/2015. (VI.19.) of the Organizational and Operational Regulations of the Ministry of Foreign Affairs and Trade.

LIMITS OF FREEDOM OF EXPRESSION HAVING REGARD TO THE EVENTS OF THE 21ST CENTURY

NYAKAS, LEVENTE

Institute for Media Studies
1088 Reviczky str. 5.
Budapest, Hungary
nyakas.levente@mtmi.hu

Abstract

This paper will follow the following course: First it will provide a short overview of the drastic changes of the communication environment that started in the world about a quarter of a century ago and which reinterpreted our previous notions of communication, freedom of the press and freedom of expression. This overview will help us understand the reasons behind the challenges related to free expression and freedom of the press. Second, we will have a look at the impacts of the communication environment having become global and convergent. Or more precisely, the problems themselves will be examined, which the different players of the communication environment had to face during the last nearly two decades, and which have to be faced even these days. Last but not least, the correlations between the freedom of expression and the freedom of religion will be inspected in more detail, as well as the debate on the possible restrictions of the latter, with a European outlook.

Keywords: *freedom of expression, press freedom, convergence, blasphemy.*

1. INTRODUCTION

I was invited to hold a lecture to highlight the problems and challenges that need to be faced by free expression in this new (global and convergent) communication landscape. And hence, this paper is based on that lecture. Within this subject, the invitation was focused, in particular, on the risks induced by the events of the 21st century.

Similarly to my position taken during the lecture, I think that it is quite difficult to define what qualifies as a significant, decisive event in terms of the future of free expression, since, on the one hand, there are striking, conspicuous events (such as terrorism) which are obvious for everyone, but on the other hand there are also such other events which are not apparent at all or just hardly noticeable (for example the lack of transparency of international self-regulating systems), but still have substantial impact on the enforcement and exercising of free expression, freedom of the press or the right to information.

Hence, a broad interpretation of the events would be justified as well, at the same time a detailed analysis of all of the issues would go well beyond the limits of this short paper. For that reason I decided that in this paper I will give an overview of certain issues and try to provide examples to describe them, whereas, on the other hand, I will refer to some literature to give some proper starting point to those students of the summer university who are more interested in the given subject. Therefore, this paper, in addition to the introduction, contains a general overview and then I will pick and highlight a single issue and elaborate on that in detail. The detailed topic is the issue of freedom of expression and freedom of religion, having due regard to the Paris events taking place earlier this year.

2. CHANGES OF THE COMMUNICATION ENVIRONMENT

Being born into the 21st century, we find the basic communication features (its global and convergent[1] nature) of our world as natural and accordingly, we use their benefits with the same ease. The hopes attached to and the supposed social benefits of this communication environment (i.e. the creation of an information society) were only mere visions on the table of European communication politicians two decades ago.[2]

Thanks to digital technology becoming generally widespread, we are now active users of the achievements of information society and can perform several activities simultaneously on a single device which formerly could not be done at all or could only be done on different, separate devices (e.g. telephone, mail, camera, radio, television) and via electronic telecommunication networks (e.g. post, cable, frequency and telephone networks).

[1] As for the notion of convergence, see Flew's definition: The interlinking of computing and ICTs, communication networks, and media content that has occurred with the development and popularisation of the Internet, and the convergent products, services and activities that have emerged in the digital media space. Many see this as simply the tip of the iceberg, since all aspects of institutional activity and social life—from art to business, government to journalism, health and education, and beyond—are increasingly conducted in this interactive digital media environment, across a plethora of networked ICT devices. FLEW, TERRY: *New Media: An Introduction*, 2008, Oxford University Press, Oxford, 22.

[2] *See* Europe and the global information society, Recommendations of the Bangemann Group to the European Council, 26 May 1994, and later, Green Paper on the convergence of the telecommunications, media and information technology sectors and the implications for regulation - Towards an approach for the information society COM(97) 623 final.

Probably the most expressive symbol of this digital based, convergent and global communication environment is the smart phone, since this device is present in every minute of our lives and we are free to decide what type of communication we use it for. As Günther Oettinger, European Commissioner for Digital Economy and Society put it at a conference: "We describe the world we live in as »Always On« – a world where we are constantly connected across various devices."[3]

This drastic change started during the second half of the 1980's,[4] when the spreading of satellite communication[5] opened up the communication and media space, formerly confined within state borders, and made them global. And this trend was fully unfolded by the emergence of the Internet and its widespread use.[6] Some of the more significant features of the drastic change of the communication environment is summarised in the below table. The term 'digital' is used to describe the current communication environment, whereas the period directly preceding it, being its antithesis, is termed as 'analogue'.

[3] Keynote at the Public Broadcasters International Conference, available at: https://ec.europa.eu/commission/2014-2019/oettinger/announcements/keynote-public-broadcasters-international-conference-0_en [cit. 2016-01-08].

[4] *Cf.* the different typings VAN CUILENBURG, JAN–MCQUAIL, DENIS: Media Policy Paradigm Shifts: Towards a New Communications Policy Paradigm, in *European Journal of Communication*, Vol 18, Issue 2, 181-207., PEREZ, CARLOTA: Technological revolutions and techno-economic paradigms, in *Cambridge Journal of Economics*, Vol. 34, Issue 1, 185-202.

[5] WHALEN, DAVID J.: Communications Satellites: Making the Global Village Possible, available at: http://history.nasa.gov/satcomhistory.html [cit. 2016-01-08].

[6] As for the history of the Internet *see* FLEW: *op. cit.*

Analogue	Digital
- linear - point - multi-point - centralised - local (national communication space) - scarcity (transmission platforms, devices, contents, etc.)	- non-linear - point - point - decentralized - global (cross-border communication space) - abundance (one convergent transmission platform, contents, devices)

During the analogue era, communication (private[7] or public (mass) communication[8]) was a process that was transparent and could be easily monitored, since it was performed on separate devices and was characterised by separate and scarcely available information distributing networks.[9] And this latter feature also meant that the state built and organised their operation and allocated the given scarce resource (such as frequency or telephone networks) in the form of a monopoly. Besides the distribution networks being separate and scarce, even the entry onto the market of public communication (in other words onto the marketplace of ideas) necessitated substantial resources, particularly in the case of radio and television, hence there were only very few players (media content providers) on the market, what is more, in most cases it was the State itself that could pursue such an activity in Europe.[10] In the analogue era, public communication could be most characterised

[7] Meaning: for example letters, phone calls.
[8] Meaning: communication performed by mass communication devices (radio, television).
[9] *See* the above mentioned networks.
[10] For example in the form of public service broadcasting.

by its linearity (being one-way and simultaneous) and its centralized nature, since information collected, produced and edited in professional editorial offices were transmitted to the masses (point - multi-point information flow) which offered only bare opportunities for feedback (e.g. letters to the editor, live phone calls). This model of media distribution is often called 'push media' since the consumer is 'forced' to choose from professionally pre-edited contents. In this way such a communication space was created that could be easily dominated and controlled by the specific players of the communication value chain.

The nature of communication had drastically changed with the emergence of satellite and cable and later the spread of the Internet and digital transmission becoming generally widespread. Distribution networks became equivalent since the 'common language' (digital transmission) allowed information and content (texts, images, sounds or their combination) to be distributed on any type of network (cable, satellite, terrestrial broadcasting, telephone lines, etc.). In this regard, the formerly mentioned scarcity was eliminated and hence entry onto the market of contents (the marketplace of ideas) broadcasted on these networks became easier as well. With the advance of the Internet, more and more kinds of non-linear (downloadable) services emerged, which in turn resulted in the increase of user activity and, accordingly, the interactivity of the communication environment and the growth of personal/interpersonal (point-point) communication. In this way users have become active participants of communication and are able to enter the public communication space more easily (they are able to create, send and publish contents) and hence communication has been decentralized to a certain extent. (Obviously no one can say that the formerly dominant professional centres of public communication have disappeared. Rather, they

strive to maintain their dominant role in the new environment as well, by transforming their former professionalism to other areas.[11]) It follows from the above mentioned changes that the published information are accessible anywhere in the world (globalization) which in turn strengthens the process of blurring the boundaries between private and public communication. All this clearly demonstrates that, contrary to the analogue environment, the flow of information is far less controllable as it used to be in the analogue days.

3. IMPACTS OF THE CHANGES OF THE COMMUNICATION ENVIRONMENT ON THE FREEDOM OF EXPRESSION AND THE FREEDOM OF THE PRESS

Above we briefly described the major characteristics of the change of the communication environment. In this chapter I wish to examine what impact these changes have on the specific players of the communication environment, what questions are induced related to their operation, and what problems do all these raise indirectly regarding the freedom of expression and the freedom of the press.

This scrutiny is built around two notions: transparency and controllability. The first notion tries to focus attention on those issues that arise from the fact that the process of communication is less clear and transparent in the new communication environment than in the analogue era. On the one hand, this originates from the

[11] Here, first and foremost, we have to think of the transformation of the communication and media markets (horizontal and vertical integration) *see* "The New Media Giants" chapter in CROTEAU, DAVID – HOYNES, WILLIAM: *The Business of Media: Corporate Media and the Public Interes*, 2001, Thousand Oaks, CA:Pine Forge, 71-107.

increased number of participants of public communication, and on the other hand from the globalized nature of communication. The second notion highlights those issues which centre around the fact that the route of and the impact generated by the published contents are less and less controllable (in other words: who can access the given content and what impact this content will have). We shall try to demonstrate these two sets of problems through the different players of the communication.

3.1. THE ISSUE OF TRANSPARENCY

Two distinct, conflicting expectations are expressed in the liberal democratic societies regarding the State in terms of guaranteeing of the freedom of expression. The basic starting point is that the best way to ensure the conditions of free expression is to prevent the State from interfering in the communication relations. By contrast, the State is also expected to make all legitimate[12] efforts to ensure that freedom of expression is not jeopardised and that a pluralistic communication system is maintained. Hence, the State should meet two contrary expectations simultaneously, play an active and a passive role, and this creates a rather ambivalent situation. And given the new, expanded communication space, the State has an even more difficult task in meeting these expectations, since in this new environment it is quite hard to identify the different players of the communication and media value chain,[13] to

[12] In connection with the legitimate areas of state interference in this regard, *see* for example: KELLER, PERRY: *European and International Media Law – Liberal Democracy, Trade and the New Media*, 2011, Oxford University Press, Oxford.

[13] PAGE, MARK – FIRTH, CHRISTOPHE: Internet Value Chain Economics available at: https://www.atkearney.com/paper/-/asset_publisher/ dVxv4

follow the process of communication, to envisage the potential impacts of the published contents, and to differentiate between private and public communication. Hence, in this convergent and global environment, it is much more difficult to draw the line between legitimate interference into freedom of expression and non-intervention. At the same time, the very same issue can be seen from another perspective too: where do the limits of state interference/restriction lie?

In our search for examples, we may stumble upon Turkey, where the State blocked access to Twitter in March 2014 after such secret sound recordings were leaked on Twitter prior to local elections that were allegedly proved Government corruption.[14] Access was blocked after Prime Minister Recep Tayyip Erdoğan gave some hints to it. This restriction evoked international outrage and Neelie Kroes, Vice-President of the European Commission, simply called it an act of censorship. The Turkish Government, in its defence, said that there was no other choice, but total blocking of access, since Twitter had failed to comply with the decisions of the Turkish courts requesting the removal of certain materials violating personality rights from the social media site.

Hz2h8bS/content/internet-value-chain-economics/10192 [cit. 2016-01-08].

[14] Turkey blocks use of Twitter after prime minister attacks social media site, *see* at http://www.theguardian.com/world/2014/mar/21/ turkey-blocks-twitter-prime-minister [cit. 2016-01-08].

Erdoğan's government blocks access to Twitter ahead of local vote, *see* at http://www.todayszaman.com/latest-news_erdogans-government-blocks-access-to-twitter-ahead-of-local-vote_342632.html [cit. 2016-01-08].

Similarly, one could refer to the Edward Snowden case as well,[15] revealing the wide scope of personal information collected by the US State based on secret service reasons.

We tend to forget that not only the State, but also the market participants themselves can limit free expression to a decisive extent. In this new communication environment, in particular with the rise of the Internet, the role of the intermediary service providers [16] (intermediaries) has grown, since these services became the bottleneck of access to information. This means that these intermediaries, due to their position, have the ability to force and impose their will on the other participants of the digital communication system, hence, for example, on both the parties offering and the parties consuming contents.[17]

[15] NSA collecting phone records of millions of Verizon customers daily, *see* at http://www.theguardian.com/world/2013/jun/06/nsa-phone-reco rd s-verizon-court-order, Edward Snowden: Leaks that exposed US spy programme, *see* at http://www.bbc.com/news/world-us-canada-23123964 [cit. 2016-01-08].

[16] I.e. for example search engines, Internet Service Providers (ISP), hosting providers, social media sites, etc.

[17] For the specific problems *see* for example VAN EIJK, NICO: Search Engines, the New Bottleneck for Content Access, in PREISSL, BRIGITTE – HAUCAP, JUSTUS – CURWEN, PETER (eds.): *Telecommunication Markets: Drivers and Impediments*, 2009, Springer Physica-Verlag HD, Heidelberg, 141-156.; BARTÓKI-GÖNCZY, BALÁZS: Attempts at the regulation of network neutrality in the United States and in the European Union – The route towards the "two-speed" Internet, in KOLTAY, ANDRÁS (ed.): *Media Freedom and Regulation in the New Media World*, 2014, Wolters Kluwer, Budapest, 117-156., FOSTER, ROBIN: *News Plurality in a Digital World*, July 2012, Reuters Institute for the Study of Journalism available at: http://reutersinstitute.politics.ox.ac.uk/publication/news-plurality-digital-world [cit. 2016-01-08].

To illustrate this with examples, just think of Facebook, that thanks to its more than 1 billion users, has become a global medium, hence its community standards,[18] which are required to be accepted for sake of use, regulate the activity (speech) of this many people. One could even go as far as to say that here the frameworks of international media regulations have been established. These community standards set the limits of free speech in terms of such domains that have so far been the traditional domains of national regulations, such as nudity, hate speech, offensive or aggressive communication, online bullying. Management of the reports related to the individual cases, as compared to State decisions on specific issues, is far from transparent since no one knows who and on what grounds adopts the decisions related to the objected contents. In other words, the basic guarantees are missing regarding these decisions limiting or, on the contrary, extending freedom of speech. Consequently, it is perplexing why Facebook decided that desecration of the Hungarian flag on a football shirt, prepared by a Romanian fan group for the Hungary-Romania qualifying match of the 2016 European Football Championship, did not violate the community standards.[19] Just as a comparison, UEFA, organising the match, being a European organisation and hence acting as an international self-regulatory body, announced zero tolerance and accordingly is taking extremely strict action against intolerant conduct, at all times.[20]

[18] Facebook Community standards: https://en-gb.facebook.com/policies/

[19] According to Facebook the Romanian shirt pissing on the Hungarian flag is not abusive, *see* at http://index.hu/sport/sportgeza/ 2015/06/26/nem_gyalaz_a_magyar_zaszlot_lehugyozo_roman_polo_a_facebook_szerint/ [cit. 2016-01-08].

[20] No to Racism, *see* at http://www.uefa.org/social-responsibility/respect/no-to-racism/index.html; *see* its former decision: Disciplinary

In connection with the bottleneck and the limitations to free expression, there are other examples, such as the policy of the most dominant search engine company, Google, related to the Chinese market, as the company rather agreed to comply with China's censorship policy, than to block their service entirely.[21]

Hence, the referred examples demonstrate that private interest (business interests) may easily override other objectives of public interest (such as action against hate speech).

Besides state and private players, the situation of journalists must also be covered. The journalists' role and activities are of crucial importance in terms of fulfilment of freedom of expression, since their work facilitate the enforcement of the others' right to information. In this new media landscape, where anyone can share information easily, there is another substantial question: who can be considered a journalist? Can anyone expressing their opinion about or holding and sharing information regarding current affairs (deserving public interest) be considered a journalist? The reason why this is such an important question is that numerous rights are attached to the profession of journalism, which are required for proper performance of the journalists' work. Of these, the protection of journalists' sources is of utmost importance. Besides, the journalist activity itself is posing numerous professional and ethical questions in each and every moment, to which a non-professional journalist is not prepared or they simply do not recognise these questions or they fail to take into account the detrimental impacts of the particular action. For example the

decision on Romania-Hungary match, *see* at http://www.uefa.com/uefaeuro/qualifiers/news/newsid=2174687.html [cit. 2016-01-08].

[21] Google China, *see* at https://en.wikipedia.org/wiki/Google_China [cit. 2016-01-08].

recommendation of the Committee of Ministers [22] adopted regarding these questions uses a quite broad definition for the notion of the journalist.[23]

A good example to illustrate this is the case of Glenn Greenwald, the journalist covering the Edward Snowden case, in connection with whom one might rightly ask: does the protection of journalists' sources extend to the journalist's close relatives as well?[24] The case of France Info radio[25] demonstrates how hard it is to report events of crisis.[26] Laurent Guimier, director of France Info radio mentioned in connection with the attack on the headquarters of Charlie Hebdo that terrorism created a completely new situation for journalism, in many respects. On the one hand, they had to work with many unconfirmed information, on the other hand, it followed from this that they had to add to each coverage that their coverage was based on unconfirmed information. All this with non-stop

[22] *See* Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies).

[23] Rec. No. R (2000) 7 „the term »journalist« means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication."

[24] Glenn Greenwald's partner detained at Heathrow airport for nine hours, *see* at http://www.theguardian.com/world/2013/aug/18/glenn-greenwald-guardian-partner-detained-heathrow [cit. 2016-01-08].

[25] EBU Member experts debate upholding freedom of expression in an era of terrorism and cyber-attacks, *see* at http://www3.ebu.ch/contents/news/2015/04/legal--public-affairs-assembly-e.html [cit. 2016-01-08].

[26] *See* Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis (Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies).

broadcasting (their editorial staff was continuously operating for 132 hours). The news production industry had to face a professional challenge in France: in a real time, highly sensitive 'breaking news type' media environment, how can/should one handle the enormous amount of materials rapidly produced on the Internet regarding the given event, which in turn is shared quickly on social media.

3.2. CONTROLLABILITY OF THE COMMUNICATION SPACE

It is the fundamental obligation of every State to coordinate the interests of the different social groups living on their territory. As Keller puts it: " (...) in its efforts to determine and enforce the boundaries of legitimate expression, the State must, within that sphere, also decide the rules for the co-existence of incompatible beliefs and ways of life. For this reason, the media state relationship is famously rife with the intractable problems of moral pluralism." [27] In the digital and convergent communication environment the biggest problem for the State lies in the handling of cross-border contents, which raises fundamental jurisdictional issues. Hence, the major question is this: how can the State enforce national/local laws in the event of an infringement? Lack of adequate and efficient law enforcement represents the biggest risk.

In the case of traditional media, the jurisdictional problems caused by cross-border contents are much easier to handle. This is well-demonstrated by the Al-Manar case, [28] where the satellite

[27] KELLER: *op. cit.* 10.

[28] EU Rules and Principles on Hate Broadcasts, available at: http://europa.eu/rapid/press-release_MEMO-05-98_en.htm [cit. 2016-01-08].

program broadcasted by a Lebanese media group, outside the EU, was inciting hatred, and its broadcasting could finally be terminated with a pan-European cooperation. However, law enforcement is highly problematic in the case of new Internet media outlets (intermediary service providers) established abroad. A good example of this is the website called kuruc.info, targeting the Hungarian market, containing hate speech, against which action could be made under Hungarian law, at the same time it is not possible to enforce the Hungarian regulatory decisions.

Similarly to the aforementioned, we could also examine the issue of liability for the infringing content from the viewpoint of the new media (the intermediary service providers). The most acute question troubling the new media could be put this way: who and to what extent can be made liable for the contents published by users on the sites operated by a given media outlet? This is the so-called comment-liability problem. The answer to the above outlined question greatly influences the quality of free expression and freedom of the press, since if the service provider is held liable automatically for the contents made available on its platform by others, then we have managed to restrict the enforcement of the above two civil liberties, since the media outlets, afraid of the possible legal sanctions, would discontinue the option of commenting or posting messages on forums.[29] This is an extremely important aspect to be underlined, since most people had expected that the age of Internet would bring us the fulfilment of the above mentioned two civil liberties, as it cheaply and quickly transmits to the people the information that in turn help the people form their

[29] In connection with this problem, *see* CHEUNG, ANNE S. Y.: Liability of Internet Host Providers in Defamation Actions: From Gatekeepers to Identifiers, in KOLTAY, ANDRÁS (ed.): *Media Freedom and Regulation in the New Media World*, 2014, Wolters Kluwer, Budapest, 289-308.

opinion about issues of public interest, and can express their related opinion easily. Given the above reasons, it is obvious why the decision made by the European Court of Human Rights in the Delfi case[30] generated such an uproar, when it was ruled that the online news portal was liable for the infringing comments published on its platform.

Last but not least, we should have a brief look at the users of the new media as well. As we have already mentioned in the introductory section, the new communication landscape is characterised by the users' activity, which means the publication of content generated by an enormous number of users. At the same time, users do not always envisage the proper consequences of publication, partly because of the lack of knowledge, and partly because the different forms of private and public communication are mixed in the new media. Once published on the Internet in any form, it is highly difficult to predict the future of the contents (who can access them? what will they do with them?) or their impact (how will they be received or interpreted in another group, cultural environment? what reactions will they invoke?). Essentially, once published, the user loses control over the content they published.

4. Free Expression vs. Freedom of Religion

Returning to the last thought of the previous section, we can draw the conclusion that any public speech/expression made in a global communication environment becomes universally accessible and available, and its impacts and the reactions given to it can hardly

[30] Case of Delfi As v. Estonia (Application No. 64569/09), available at: http://hudoc.echr.coe.int/eng?i=001-126635, [cit. 2016-01-08].

be predicted since no-one can have control over what type of cultural context the given content will be published and how it will be interpreted.

This observation is especially true for those opinions that are expressed with regard to religions or faith. The first time Europe had to face this issue in a really acute manner was some ten years ago when Jyllands-Posten, a Danish newspaper, published cartoons[31] which in turn generated worldwide reactions, and the resulting conflict claimed human lives as well. These events renewed the professional debate in the academic world concerning the interpretation of the relations between the two civil liberties. And this very debate was once again started all over again in the light of the Charlie Hebdo attack.[32]

4.1. THE CONCEPT OF THE SECULAR STATE

For the purpose of examining the relationship between freedom of religion and freedom of speech, it is worth having a brief look at the historical roots of perception of religions as well as its current status in Europe. One of the most important expressions helping to shed light on this problem is the concept of the secular state. Secular state was a historical answer to the bloody religious wars of the 17th century whereby the state tried to bring peace to the religiously divided societies. Though the Peace of Westphalia (1648) aimed to create religiously homogeneous communities and tried to keep religious pluralism at the minimum, still, during the

[31] ASSER, MARTIN: *What the Muhammad cartoons portray*, available at: http://news.bbc.co.uk/2/hi/middle_east/4693292.stm [cit. 2016-01-08].
[32] *Charlie Hebdo attack: Three days of terror*, available at: http://www.bbc.com/news/world-europe-30708237 [cit. 2016-01-08].

very same century, the principle of religious tolerance, as the most appropriate way of handling religious conflicts, became prevalent. Europe made her choice and started to transfer the issues related to religious truths more and more to the private sphere. The withdrawal of the state from this field meant that the state did not wish to make its stand in matters of the truths of religion/faith. However, this process of withdrawal was not uniform in all states. There are some states that have taken a neutral approach regarding the truths of faith of the different religions, but they recognised the social role of religions, however, other types of approaches evolved as well, that, in addition to being neutral, expressly denied the role religions have in society. France belongs to this latter group, and does not interfere with any religion related issues and, in turn, a similar approach is expected from the religions regarding the state duties.[33] However, in numerous European states, besides being neutral, the state recognises the different roles the churches have in society and accordingly these churches are present in the different state institutional systems. To sum up the basic characteristics of the secular state: (1) the state recognises the religious convictions,

[33] *See* for example the following case: French court orders removal of St John Paul II statue, *see* at: http://www.catholicherald.co.uk/news/2015/05/07/french-court-orders-removal-of-st-john-paul-ii-statue/ [cit. 2016-01-08].
A court at Rennes has ordered the removal of a statue of St John Paul II which it said violated the separation of Church and state. The court said „the problem was the location of the statue in the town square. Its dimensions and placement are "ostentatious" in character, the court said, and did not respect a 1905 law concerning the principle of laïcité and the divide of Church and state. The Ploërmel mayor, Patrick Le Diffon, said he will appeal against the court order, saying that it wasn't for the man of the Church but for the man of state that the monument was dedicated in a public square."

ensures their collective expression; (2) freedom of religion is protected under the constitution; (3) the state does not express its opinion on questions of religion. [34]

4.2. THE ISSUE OF PROTECTION OF RELIGIOUS CONVICTION

It follows from the aforementioned thoughts that the secular state guarantees the peaceful coexistence of the different religions on its territory. When viewed from the perspective of the religions, this means that the freedom of religion does not mean an unlimited right, but rather, religions need to face certain limitations, such as the criticism of religion, since the state does not force a single truth on society, but rather, it views all truths as equal. This is the direct consequence of value pluralism professed by the liberal state. As Keller puts it: "It is plain that a society that respects personal freedom must tolerate incommensurable beliefs and ways of life and, therefore, the liberal state must strive to be neutral between particular conceptions of the good."[35]

According to the liberal democratic literature, the extent of tolerable and acceptable criticism (hence the extent of tolerance) may depend on many things. But one of the significant factors in this is the extent by which the given religion strives for social recognition, and how much it participates in debates over issues of public interest. The more it does, the more it needs to tolerate stronger criticism. Based on these arguments, Dieter Grimm

[34] *Cf.* GRIMM, DIETER: Freedom of Speech in a Globalized World, in HARE, IVAN – WEINSTEIN, JAMES (eds.): *Extreme Speech and Democracy*, 2009, Oxford University Press, Oxford, 11-22., 18., ZUCCA, LORENZO: *A Secular Europe: Law and Religion in the European Constitutional Landscape,* 2012, Oxford University Press, Oxford, 3-5.
[35] KELLER: *op. cit.* 42-43.

highlighted the following major problems and proposed the following solutions. Can religious feelings be protected against speech offending them? If the answer was in the affirmative, this would mean that the public debate would be dependent on the sensitivity of the participants of the given debate. Another question emerges: all offensive, public speech should be protected then? No. Hate speech targeting a given group is not protected, the state protects the religious groups against violence. And this leads us immediately to another question: how can we separate public discourse from reprehensible speech? The answer is far from simple. It depends greatly on how the given state views the freedom of expression. Whereas in the US it is accepted that much more are required to be sacrificed at the altar of free expression in multi-cultural and multi-religious societies than in homogeneous societies, but in Europe, the attitude is right the opposite: they act much more prudently and discreetly which in turn allows a higher degree of restrictions in the field of freedom of speech for the sake of peaceful coexistence.[36]

In order to get a better grasp of the jurisprudence of the European Court of Human Rights (which will be examined below), we need to have a brief look at the reason behind the above mentioned difference. The above mentioned different approaches stem from the different perceptions of freedom of expression. The North-American liberal perception (i.e. the individualistic approach to free speech and expression and their supreme role among civil liberties) is contrasted with the European ideal of mutual tolerance, centred around the notion of human dignity,

[36] *Cf.* GRIMM: *op. cit.* (fn. 34.), Points 18-19., CRAM, IAN: The Danish Cartoons, Offensive Expression, and Democratic Legitimacy, in HARE, IVAN – WEINSTEIN, JAMES (eds.): *Extreme Speech and Democracy*, 2009, Oxford University Press, Oxford, 312-330., 313, 327-329.

which will always be a key and relevant issue in the culturally, religiously and ethnically diverse Europe. Any time mutual tolerance is at risk in Europe, it provides legal grounds for state interference and the legitimate limitation of civil liberties. Accordingly, Perry Keller drew the conclusion that: "It is also an idea that has set European human rights law at odds with developments in American constitutional law, in which the principle of liberty is given a greater role in limiting the influence of intolerance on the exercise of state power."[37]

4.3. Perception of Blasphemy in the Case Law of the ECtHR

And now, having completed the above brief theoretical overview, we shall examine the case law of the European Court of Human Rights (hereinafter as: the ECtHR) regarding the relationship between freedom of religion and freedom of speech.

4.3.1. Legal Grounds for the ECtHR Procedures

The respective practice of the ECtHR is based on Articles 10 and 9 of the ECHR. Article 10 (1) guarantees "the right to freedom of expression" [38], whereas Article 9 guarantees the freedom of religion[39] in Europe, within the jurisdiction of the states signing the

[37] Keller: *op. cit.* 390.

[38] ECHR Article 10(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas regardless of frontiers, and without interference by any public authority.

[39] ECHR Article 9(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in

Convention.[40] The legal grounds for restriction of free speech is specified under Article 10(2) and according to the practice of the ECtHR, out of the legitimate objectives listed therein, free speech can only be restricted for purpose of the "protection of the rights of others" (hence, in this case Article 9 of the ECHR).[41]

To clarify the grounds of the case law of the European Court of Human Rights, we have to examine the 'margin of appreciation' doctrine "granting individual states much liberty in interpreting ECHR freedom of expression criteria. The notion was coined by the ECtHR to grant state parties the necessary freedom in adopting the text of the convention to their local, historical and cultural needs."[42]

Hence, in the course of the procedure of the European Court of Human Rights, free speech can be restricted subject to the following criteria: such limitation (1) must be necessary in a democratic society, (2) must be in accordance with the applicable legislation, or must conform to the stipulations contained therein, and (3) it must be proportionate to the objective wished to be

public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

[40] *See* KULESZA, JOANNA: #JESUISCHARLIE. A véleménynyilvánítás szabadsága a globális média korában [#JESUISCHARLIE - Free expression in the age of global media], in *In Medias Res*, Vol. 2015, Issue 1, 62-79., 66.

[41] *See* TÖRÖK, BERNÁT: Védhetjük-e a vallás(os)okat a blaszfémiától? [Can we protect religions (religious people) from blasphemy?], in KOLTAY, ANDRÁS – TÖRÖK, BERNÁT (eds.): *Sajtószabadság és médiajog a 21. század elején* [Media Freedom and Media Law at the Beginning of the 21st century], 2014, Wolters Kluwer, Budapest, 188-211.

[42] KULESZA: *op. cit.* (fn. 40) 66.

achieved as a result of the restriction. These three criteria have to be interpreted with due consideration of the local culture and values (the margin of appreciation).[43]

4.3.2. The Case Law of the ECtHR

The ECtHR decisions can be broken down into two groups based on their results. Those decisions belong to the first group where no violation of Article 10 (freedom of expression) of the Convention was declared in respect of the restriction carried out by the Member State.

Out of these decisions, the *Otto-Preminger-Institut v Austria* case[44] can be considered as the most emblematic case of the ECtHR case law. According to the facts of the case, distribution of the film titled *Liebeskonzil* (Council in Heaven) was banned in advance by the Austrian authorities at the request of the Innsbruck diocese of the Roman Catholic Church. The film was announced to be screened in a private cinema for an adult audience. Copies of the film were seized and the public prosecutor instituted criminal proceedings, the charge was "disparaging religious doctrines" (*Herabwürdigung religiöser Lehren*).[45] The film was based on a play written in 1984, the author of which was prosecuted for blasphemy at that time. According to the judgement of the Austrian

[43] Ibid.

[44] Otto-Preminger-Institut v Austria (App No. 13470/87).

[45] Pursuant to Article 188 of the Austrian Penal Code, anyone who publicly defames and/or ridicules - giving rise to rightful indignation - a person or object respected by the church or religious community registered in the country and/or the dogma, the lawfully conducted ceremony or functioning institution of such church or religious community shall be considered as the perpetrator of a criminal act, and shall be sentenced up to six months of imprisonment or be imposed a fine."

Regional Court, artistic freedom cannot be unlimited, the film was provocative, and due to its anti-religious nature, the court had to decide in favour of other "legally protected interests" (freedom of religion and conscience).

On the one hand, the European Court of Human Rights stated that those who choose to exercise the freedom to manifest their religion must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 of the Convention to the holders of those beliefs and doctrines. The ECtHR accepted that the measures complained of by the applicant were based on provisions of the Austrian Penal Code, which have the purpose to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons. According to the ECtHR, pursuant to Article 10 para. 2, in the context of religious opinions and beliefs, there was an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore "do not contribute to any form of public debate capable of furthering progress in human affairs". This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any restriction imposed be proportionate to the legitimate aim pursued. As in the case of "morals" it is not possible to discern throughout Europe a uniform conception of the significance of religion in society. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible

interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference. The Court stated that the decisions of the Austrian Courts took into account the freedom of artistic expression guaranteed under Article 10, and did not overstep their margin of appreciation in this respect. No violation of Article 10 could therefore be found as far as the seizure of the film was concerned.

The European Court of Human Rights adopted a similar judgement in the *Wingrove v United Kingdom*[46] case as well. Here, the applicant objected that the British Board of Film Classification rejected the distribution on video-cassettes to the general public of the film entitled "Visions of Ecstasy" submitted by the applicant. The British Board of Film Classification expressed its concerns that the provocative and indecent portrayal of this religious theme would outrage and insult the feelings of believing Christians and hence the public distribution of the film would result that proceedings could be initiated against the makers of the film on the grounds of blasphemy. The applicant's appeal was dismissed on the grounds that the over-all tone and spirit of the film was totally indecent and without doubt, this portrayal would cause offence to the religious beliefs of Christians.

The European Court of Human Rights used similar arguments as in the *Otto-Preminger-Institut v Austria* case. Among others, the Court stated that blasphemy legislation was still in force in various European countries. And although it is true that the application of these laws has become increasingly rare and that

[46] Wingrove v the United Kingdom (App No. 17419/90).

several States have recently repealed them altogether, however, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the Member States to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention. A wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. As regards the content of the law itself, the Court observed that the English law of blasphemy did not prohibit the expression, in any form, of views hostile to the Christian religion or offensive to Christians. As the English courts have indicated, it is the manner in which views are advocated rather than the views themselves which the law seeks to control. The extent of insult to religious feelings must be significant. However, obviously, proper protection must be granted in every case when a high degree of profanation is involved.

The decision of the European Court of Human Rights in the *İ.A. v Turkey*[47] case falls into this same group as well. Here, the Istanbul public prosecutor charged the applicant with blasphemy through the publication of a novel contemplating issues of philosophy and theology. The court first sentenced the applicant to two years of imprisonment, which was later changed to a fine. The Court stated, among others, that a distinction must be made between offensive or provocative opinion, and opinion that constitutes an "abusive attack" against a religion. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the

[47] Case of İ.A. v. Turkey (Application No. 42571/98).

principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through certain passages of the book. The Court therefore considered that the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect the Court found that the measure may reasonably be held to have met a "pressing social need".

The other group of blasphemy related cases are made of cases that violate Article 10.

In the *Giniewski v France* [48] case the applicant objected that the French National Court convicted him under the offence of defamation for an article published in a national newspaper. The article written by the applicant used the papal encyclical "The Splendour of Truth" ("Veritatis Splendor") to criticise the Catholic Church. According to the applicant the attitude of the Catholic Church as the self-proclaimed "sole keeper of divine truth" and the manner in which the Jews are presented in the Old and New Testaments contributed to creating the conditions necessary for the Holocaust. The National Court ruled that the article offended the dignity of believers. At the same time, the European Court of Human Rights ruled that the applicant expressed his opinion in an important matter of public interest (to seek historical truth) and on the other hand the article was not an attack on Christianity as a whole. States have only a narrow margin of appreciation regarding the political speeches and the expressions made in terms of issues of public interest.

[48] Case of Giniewski v. France (Application No. 64016/00).

The European Court of Human Rights used similar arguments in the *Klein v Slovakia*[49] case as in the above cases. The applicant made an attack on the Slovak Archbishop regarding his statement made in the Slovak television in connection with the premier of the film titled "The People vs. Larry Flynt". In the television, the Archbishop said that Slovakia was a Catholic country, and therefore the appropriate measures must be taken to withdraw the blasphemous posters and ban the film and to hold accountable those who violated the laws. In his response, the applicant journalist, Mr. Klein criticised the Archbishop in a vulgar style. The article also mentioned that the Archbishop most probably co-operated with the secret police of the communist regime, therefore the applicant invited the Roman Catholic worshippers to leave the church. The journalist was convicted by the Slovakian Court of the offence of "Defamation of nation, race and belief" pursuant to the Slovak Penal Code. The first-instance court concluded, inter alia, that the journalist had defamed the highest representative of the Roman Catholic Church in Slovakia and had thereby offended the members of that church. The applicant's statement that he wondered why decent members of the church did not leave it had blatantly discredited and disparaged a group of citizens for their Catholic faith. That view was upheld by the court of appeal which found that, by the contents of the published article, the applicant had violated the rights, guaranteed by the Constitution, of a group of inhabitants of the Christian faith.

According to the European Court of Human Rights, the applicant's strongly worded pejorative opinion related exclusively to the person of a high representative of the Catholic Church in Slovakia, and the Court was not persuaded that by his statements

[49] Case of Klein v. Slovakia (Application No. 72208/01).

the applicant discredited and disparaged a sector of the population on account of their Catholic faith. The Court accepted the applicant's argument that the article neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith.

4.3.3. Conclusions Drawn from the ECtHR Practice

In summary, the following conclusions can be drawn regarding the decisions of the European Court of Human Rights. According to the European Court of Human Rights, freedom of expression can be restricted in the case of blasphemous speech (i.e. when the speech is offensive to religious conviction or when the speech attacks someone sacred for the believers[50]). This standpoint goes against the liberal democratic approach mentioned above in this paper, which allows restrictions of free expression only in case of hate speech. In fact, the European Court of Human Rights traces back this restriction to the lack of a common European norm, since it refers to the cultural differences between the states party to the Convention when it mentions that (similarly to morals) there is no common, uniform European perception or standard in terms of the social significance of religion either. Hence, in these cases, States have a larger margin of appreciation in restricting free expression. It must be noted though, that the European Court of Human Rights indirectly suggested in the *Wingrowe v United Kingdom* case that the future abolition of laws governing blasphemy in the different national regulations may create such a European consensus which declares that freedom of speech can no longer be restricted on the grounds of blasphemous speech.

[50] *See* TÖRÖK: *op. cit.* 204., 206.

However, without prejudice to the observations made in the previous paragraph, it should also be highlighted that the ECtHR has also recorded in its decisions that religious people must also tolerate criticism or even denial of their religious beliefs and even the propagation by others of doctrines hostile to their faith. Hence, not even religion can be exempt from criticism. The argument of a public debate capable of furthering progress in human affairs is also included in the respective reasoning of the Court. Therefore, the dilemma to be decided in connection with restriction of the freedom of speech is this: to what extent does critical speech further or serve the debate of public affairs? The ECtHR case law provides particularly widespread protection to political speech (actually it represents the core of it) and can be restricted only in very exceptional cases. One might draw the conclusion from this in terms of the ECtHR case law, that even speech offensive to religious convictions is protected, as long as such speech serves or furthers the debate on public affairs.[51]

Last but not least, we should have a brief look at the criticism expressed in terms of the practice of the margin of appreciation as well. Some criticise the ECtHR for the lack of evidence (empirical facts, method, etc.) on the condition and quantifiability of the prevailing moral order, which, among others, has been used as the basis for the above decisions. Whereas others complain and insist that in certain cases there would have been common European norms that could have provided a solution to settle the relationship between free speech and freedom of religion, still, the European Court of Human Rights had failed to stand by these norms.[52] There is an often cited criticism regarding the practice of margin of

[51] Ibid. 206.
[52] CRAM: *op. cit.* 318.

appreciation, namely that its application results in an apparent paradox: "a court's decision in one country may be recognized as a breach of the Convention by the ECtHR while a similar decision of another national court—intact with it." In other words, apparently no uniform interpretation of Article 10 can ever be reached since the different national practices will always have the priority.[53]

5. CONCLUSION

In this paper I tried to demonstrate the challenges that are posed by the characteristics of a convergent and global communication environment in terms of the freedom of expression and the freedom of the press. Though in many respects the new set of conditions of communication fulfilled and improved these civil liberties (just think of the increased number of speakers, an easier entry onto the marketplace of ideas), still, in many cases new restrictions were created that are often not even perceptible. Hence, out of the numerous problems, I chose to highlight one (namely: the relationship between free speech and freedom of religion) which although is not considered as a new phenomenon in itself, still, the relationship between these two civil liberties has been placed in a totally new context as a result of globalization of communication. Besides, it was also demonstrated above that there is no single true solution to settle the relationship between the two civil liberties, since the extent of restriction allowed in terms of the civil liberties is greatly dependent on the prevailing concept we have of free speech and freedom of religion, which, in turn, is strongly connected to the social and cultural characteristics of the given

[53] KULESZA: *op. cit.* 66-67.

state. Therefore, the ethnically and religiously diverse Europe must find the ways to settle the relationship between these two civil liberties under the new circumstances outlined above, in such a way that the core and essence of these liberties remain intact.

LIST OF REFERENCES

Books, chapters in a book, articles

[1] BARTÓKI-GÖNCZY, BALÁZS: Attempts at the regulation of network neutrality in the United States and in the European Union – The route towards the "two-speed" Internet, in KOLTAY, ANDRÁS (ed.): *Media Freedom and Regulation in the New Media World*, 2014, Wolters Kluwer, Budapest, 117-156.

[2] CHEUNG, ANNE S. Y.: Liability of Internet Host Providers in Defamation Actions: From Gatekeepers to Identifiers, in KOLTAY, ANDRÁS (ed.): *Media Freedom and Regulation in the New Media World*, 2014, Wolters Kluwer, Budapest, 289-308.

[3] CRAM, IAN: The Danish Cartoons, Offensive Expression, and Democratic Legitimacy, in HARE, IVAN – WEINSTEIN, JAMES (eds.): *Extreme Speech and Democracy*, 2009, Oxford University Press, Oxford, 312-330.

[4] CROTEAU, DAVID – HOYNES, WILLIAM: *The Business of Media: Corporate Media and the Public Interes*, 2001, Thousand Oaks, CA:Pine Forge.

[5] FLEW, TERRY: *New Media: An Introduction*, 2008, Oxford University Press, Oxford.

[6] GRIMM, DIETER: Freedom of Speech in a Globalized World, in HARE, IVAN – WEINSTEIN, JAMES (eds.): *Extreme Speech and Democracy*, 2009, Oxford University Press, Oxford, 11-22.

[7] KELLER, PERRY: *European and International Media Law – Liberal Democracy, Trade and the New Media*, 2011, Oxford University Press, Oxford.

[8] KULESZA, JOANNA: #JESUISCHARLIE. A véleménynyilvánítás szabadsága a globális média korában [#JESUISCHARLIE - Free expression in the age of global media], in *In Medias Res*, Vol. 2015, Issue 1, 62-79.

[9] PEREZ, CARLOTA: Technological revolutions and techno-economic paradigms, in *Cambridge Journal of Economics*, Vol. 34, Issue 1, 185-202.

[10] TÖRÖK, BERNÁT: Védhetjük-e a vallás(os)okat a blaszfémiától? [Can we protect religions (religious people) from blasphemy?], in KOLTAY, ANDRÁS – TÖRÖK, BERNÁT (eds.): *Sajtószabadság és médiajog a 21. század elején* [Media Freedom and Media Law at the Beginning of the 21st century], 2014, Wolters Kluwer, Budapest, 188-211.

[11] VAN CUILENBURG, JAN–MCQUAIL, DENIS: Media Policy Paradigm Shifts: Towards a New Communications Policy Paradigm, in *European Journal of Communication*, Vol 18, Issue 2, 181-207.

[12] VAN EIJK, NICO: Search Engines, the New Bottleneck for Content Access, in PREISSL, BRIGITTE – HAUCAP, JUSTUS – CURWEN, PETER (eds.): *Telecommunication Markets: Drivers and Impediments*, 2009, Springer Physica-Verlag HD, Heidelberg, 141-156.

[13] ZUCCA, LORENZO: *A Secular Europe: Law and Religion in the European Constitutional Landscape*, Oxford University Press, 2012., 3-5.

Electronic sources

[1] A Facebook szerint nem gyaláz a magyar zászlót lehugyozó román póló [According to Facebook the Romanian shirt pissing on the Hungarian flag is not abusive], 2015, available at: http://index.hu/sport/sportgeza/2015/06/26/nem_gyalaz_a_magyar_zaszlot_lehugyozo_roman_polo_a_facebook_szerint/ [cit. 2016-01-08.]

[2] Charlie Hebdo attack: Three days of terror, 2015, available at: http://www.bbc.com/news/world-europe-30708237 [cit. 2016-01-08.]

[3] EBU Member experts debate upholding freedom of expression in an era of terrorism and cyber-attacks, 2015, available at: http://www3.ebu.ch/contents/news/2015/04/legal--public-affairs-assembly-e.html [cit. 2016-01-08.]

[4] Edward Snowden: Leaks that exposed US spy programme, 2014, available at: http://www.bbc.com/news/world-us-canada-23123964 [cit. 2016-01-08.]

[5] Erdoğan's government blocks access to Twitter ahead of local vote, 2014, available at: http://www.todayszaman.com/latest-news_erdogans-government-blocks-access-to-twitter-ahead-of-local-vote_342632.html [cit. 2016-01-08.]

[6] EU Rules and Principles on Hate Broadcasts, 2005, available at: http://europa.eu/rapid/press-release_MEMO-05-98_en.htm [cit. 2016-01-08.]

[7] Facebook Community standards: https://en-gb.facebook.com/policies/

[8] FOSTER, ROBIN: *News Plurality in a Digital World*, July 2012, Reuters Institute for the Study of Journalism available at: http://reutersinstitute.politics.ox.ac.uk/publication/news-plurality-digital-world [cit. 2016-01-08.]

[9] French court orders removal of St John Paul II statue, 2015, available at: http://www.catholicherald.co.uk/news/2015/05/07/french-court-orders-removal-of-st-john-paul-ii-statue/ [cit. 2016-01-08.]

[10] Glenn Greenwald's partner detained at Heathrow airport for nine hours, 2013, available at: http://www.theguardian.com/world/2013/aug/18/glenn-greenwald-guardian-partner-detained-heathrow [cit. 2016-01-08.]

[11] Google China available at: https://en.wikipedia.org/wiki/Google_China [cit. 2016-01-08.]

[12] Keynote at the Public Broadcasters International Conference, 2015, available at: https://ec.europa.eu/commission/2014-2019/oettinger/announcements/keynote-public-broadcasters-international-conference-0_en [cit.2016-01-08.]

[13] ASSER, MARTIN: *What the Muhammad cartoons portray*, available at: http://news.bbc.co.uk/2/hi/middle_east/4693292.stm [cit. 2016-01-08]

[14] NSA collecting phone records of millions of Verizon customers daily, 2013, available at: http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order, [cit. 2016-01-08.]

[15] PAGE, MARK – FIRTH, CHRISTOPHE: Internet Value Chain Economics, 2010, available at: https://www.atkearney.com/paper/-/asset_publisher/dVxv4Hz2h8bS/content/internet-value-chain-econo mics/10192 [cit. 2016-01-08.]
[16] Turkey blocks use of Twitter after prime minister attacks social media site, 2014, available at: http://www.theguardian.com/world/2014/mar/21/turkey-blocks-twitter-prime-minister [cit. 2016-01-08.]
[17] WHALEN, DAVID J.: Communications Satellites: Making the Global Village Possible, available at: http://history.nasa.gov/satcomhistory.html [cit. 2016-01-08.]

Legal and other sources

Documents of the European Union

[1] Europe and the global information society, Recommendations of the Bangemann Group to the European Council, 26 May 1994.
[2] Green Paper on the convergence of the telecommunications, media and information technology sectors and the implications for regulation - Towards an approach for the information society COM(97) 623 final.

Documents of Council of European

[1] Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis (Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies).

[2] Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies).

European Court of Human Rights

[1] Case of Wingrove v the United Kingdom (App No. 17419/90).
[2] Case of Giniewski v. France (Application No. 64016/00).
[3] Case of İ.A. v. Turkey (Application No. 42571/98).
[4] Case of Klein v. Slovakia (Application No. 72208/01).
[5] Case of Otto-Preminger-Institut v Austria (App No. 13470/87).

HRM CHALLENGES THROUGH THE LENS OF GLOBALIZATION AND GLOBAL HUMAN RESOURCE STRATEGIES

MUZAFFAR, HAROON

Yıldırım Beyazit University
YBU Business School
Department of International Trade and Business
16, Güven Mahallesi, Cinnah Caddesi
Ankara, Turkey
e-mail: hmuzaffer@ybu.edu.tr

Abstract
We are living in the highly interconnected and integrated times. The interconnectedness and integration radically shrank the physical and virtual distances that catalysed the process of globalization. An important component of the globalization is the global firms which lies at the heart of the globalization process. Global firms considers the world as one market therefore, their strategic challenges are immense as compared to the domestic firms. Managing human resources globally is one of the strategic challenges which global firms face. This essay explored the human resource challenges faced by the global firms and provides the strategic orientations and tools available to the global firms in order to overcome these challenges.

Keywords: *Globalization, Global firms, Strategic human resource management*

JEL classification: *F60, L10, M12, O15*

1. INTRODUCTION

We are living in the times where borders, boundaries and physical barriers are eroding at a rapid pace. Both spatial and temporal movement is swift, easy and less cumbersome which has no parallel in recorded history. The easiness and swiftness in the physical movement is made possible by the advances in the field of the information and communication technology. These advances in the communication technologies contracted the distances and interconnected the individuals, communities and businesses at the frightening pace.

The process of interconnectedness and integration of the people and businesses around the globe became known as 'globalization'. This phenomenon of globalization affects the individual citizen, economy, business life, society and environment in different ways. To the individual citizen the most obvious benefits of the globalization are those which impact most directly on her/his daily activities: making a living, acquiring the necessities of life, providing for their children to sustain their future[1]. In a similar manner, globalization influences the national and local economies. A truly global economy is claimed to have emerged, or to be in the process of emerging. The global economy is controlled by uncontrollable market forces, and has 'global firms' as its principal economic actors and major agents of change[2].

[1] DICKEN, PETER: *Global shift: mapping the changing contours of the world economy,* 2011, Guilford Press, New York, 3.
[2] EDWARDS, TONY – REES, CHRIS: *International human resource management: globalization, national systems and multinational companies,* 2006, FT, Harlow, 5-6.

These firms do not bound by the national borders and they do not owe allegiance to a nation state. Global firms locate wherever in the market competitive advantage dictates.

The global firms are the result of disruption in the old economic system. Innovative methods of production, distribution and consumption are paving the way for new economic geographies, which provides the distinct competitive advantage to a global firm over its rivals. By capitalizing on the opportunities presented by the new global economy a global firm achieves competitive advantage by integrating and leveraging operations in an innovative way on worldwide scale.

Globalization presents firms not only with tantalizing opportunities but also challenges. On the one hand the scale and scope of the global firms provides them greater flexibility to manage and reconfigure their resources, however, on the other hand the management and reconfiguration of the resources at the global scale is an uphill task. As compared to other resources i.e., financial resources and physical resources the management of human resources at global scale is far challenging.

Global human resource management provides unique challenges for the management of a global firm. The global context adds extra complexity to the management of people beyond that found in a purely national setting. A global firm therefore has to examine the way in which they can manage their human resources across the different countries[3].

[3] BREWSTER, CHRIS – DICKMANN, MICHAEL – SPARROW, PAUL: A European perspective on IHRM: an introduction, in DICKMANN, MICHAEL – SPARROW, PAUL – BREWSTER, CHRIS (eds.): *International human resource management: a European perspective*, 2008, Routledge, London, 3-18.

When formulating and implementing the decisions regarding human resource management (HRM) at the global scale the management has to take into consideration a wide range of factors. These factors ranges from the management's philosophy to the different institutional, legal, and cultural circumstances. By taking into account these and other factors the global firm has to take strategic human resource decisions from a global perspective rather than a national one.

The major challenge for a global firm is to identify, formulate and implement the best HRM strategic decisions which provides the best fit between the firm's external environment and the company's overall strategic goals, HRM strategic decisions, and implementation of those decisions[4].

The focus of this study is on the global human resource strategy challenges and issues that global firms face and the strategic approaches to overcomes global human resource challenges. In order to get a better understanding of the global firms it's necessary to understand the concept of the globalization. Therefore, the next section is about the globalization and the major drivers of the globalization. The subsequent section explains the phenomenon of global firms. Next two sections are about the challenges of global HRM and the strategic approaches to overcome these challenges. Finally, the study concludes with the conclusions section.

[4] BEECHLER, SCHON – PUCIK, VLADIMIR – STEPHAN, JOHN – CAMPBELL, NIGEL: The transnational challenge: performance and expatriate presence in the overseas affiliates of Japanese MNCS, in ROEHL, TOM – BIRD, ALLAN (eds.): *Japanese Firms in Transition: Responding to the Globalization Challenge (Advances in International Management, Volume 17),* 2004, Emerald Group Publishing Limited, 215-242.

2. GLOBALIZATION

Globalization is a complex, confused and disputed concept. There is no consensual definition of globalization in the literature. However, the roots of the concept of the globalization can be traced back in the works of the nineteenth century thinkers, particularly in the ideas of Karl Marx[5]. Nonetheless, the term globalization got the real attention and importance towards the end of the second millennium.

The term "globalization" means many things to many people. Scholars from the different fields of knowledge define and explain the term within the context of their respective academic disciplines.

The focus of this study is on the consequences of globalization for the business firms therefore this study looks at the globalization from the perspective of the global economy and trade.

The global business world is now more integrated and interconnected than any other time in the history. Historically, the international trade and business was conducted through major trade routes (e.g. silk trade route) or between European nations and their colonies, however, modern transportation modes, the mobility and easy availability of finance and the lifting of international trade barriers led to the deep integration of the economic activities which led to the global economy where markets and businesses are highly interdependent.

In the context of increasing interconnectedness and integration of the world markets globalization may be defined as 'the growing interdependence of countries world-wide through the increasing volume and variety of cross-border transactions in

[5] DICKEN: *op. cit.* 2.

goods and services and of international capital flows, and also through the more rapid and widespread diffusion of technology'[6].

This definition encompasses the salient features of the globalization, however, its difficult to capture all the aspects of the globalization in one definition because globalization is a supercomplex series of multicentric, multiscalar, multi-temporal, multiform and multicausal processes[7]. In order to comprehend these complex and transformative processes of globalization it is essential to know the drivers behind the globalization.

2.1. DRIVERS OF GLOBALIZATION

Following are few of the drivers of the globalization:

2.1.1. Free trade

Last few decades witness the increasing volumes of trade between countries and within regions of the world because of liberal economic ideas. Global trade agreements such as World Trade Organization (WTO) and regional trade agreements such as the North American Free Trade Agreement (NAFTA) diminished the trade barriers and help to increase international trade. Further, governments at national and local level, through tax incentives and free trade zones are facilitating international businesses and trade.

[6] JOHNSON, DEBRA – TURNER, COLIN: *International business themes and issues in the modern global economy*, 2003, Routledge, London, 4.
[7] JESSOP, BOB: *The future of the capitalist state*, 2002, Polity, Cambridge, 113-114.

2.1.2. Finance and capital spread

Traditionally, because of heavily regulated finance sector it was very difficult for the firms to finance their global operations. However, as a result of the liberal economic ideas the deregulation of the financial sector and the rapid advancements in the information and communications technology enables the finance sector to support the global operations of the firms in an efficient and cost-effective manner.

2.1.3. Expeditious global communication

Tools of communication across the globe have become much easily accessible, speedy and cheaper. The penetration of the global mass media such as television, the internet and print media all spread information at an electric speed and is turning the world into a virtual village. This instantaneous and continuous interaction of the people around the globe is influencing the needs and wants of the people in a uniform manner. Firms have to respond to the global needs of the consumers by focusing on the global trends rather than national or local trends.

2.1.4. Social and cultural convergence

The advances in the communication technology and its diffusion are influencing the social behaviors and local cultures throughout the world. Individuals' social interactions and patterns are increasingly becoming global which leads to the changes in their consumption behavior. Similarly, local or national cultural values are highly influenced by the use of global communication technologies. These changes in the social and cultural values are resulting into social and cultural convergence across the boundaries. This social and cultural convergence provides the

emergence of the global consumer with common symbols, preferences and experiences. Global consumers lead to common global demands around the globe.

Above mentioned drivers and other drivers such as migration, increased travel and education provide the firms opportunity to expand their businesses globally.

Contrary to a general consensus about the drivers of the globalization there is a fierce debate about the level and impact of the globalizations. Scholars hold divergent views about how the globalization is changing the competitive landscape of the firms.

At one side of the spectrum is 'world is flat' argument[8] according to which we are living in a borderless world and there is no friction in the movement of the production factors in an apparently flat world. This view of the globalization suggests that consumer tastes, habits and needs are homogenized and global in nature, which are satisfied by the global firms with no allegiance to any particular country or community.

On the other end of the spectrum are the skeptics of the globalization. They hold the view that the phenomenon of globalization has been grossly exaggerated. Holders of this opinion argue that semi-globalization is the real state of the world today[9]. On the basis of the empirical evidence such as global phone calls, web traffic and investment around the world the skeptics of globalization assert that economy is not fully globalized and will still be regional niches in the world where local firms will still be powerful.

[8] FRIEDMAN, THOMAS L: *The world is flat: A brief history of the twenty-first century,* 2007, Farrar, Strauss and Giroux, New York, 50.
[9] GHEMAWAT, PANKAJ: Why the world isn't flat, in *Foreign Policy*, Vol. 2007, Issue 159, 54–60.

By taking into account these conflicting views we can say that reality lies somewhere between the two arguments. The factors such as erosion of the trade barriers, rapid advances in the communication technology and its diffusion and homogenization of culture are the globalized forces which are at work and driving the economy of world towards globalization. It is also true that world is not fully globalized due to the factors like digital divide, extreme poverty and lack of physical infrastructure.

It is evident that difference of opinion is not about the existence of the globalization of businesses it's about the level and influence of the global firms. Therefore, globalization is a reality and global firms are the globalization prodigies.

3. GLOBAL FIRMS

Global firms lie at the heart of the economic globalization. The global firms are acting as the locomotive of the economic integration by expanding their cross-border activities with an increase in cross-border integration of their production processes. The *Fortune* Global 500 provides a snapshot of the growing importance of the global firms in the world economy. The 2015 list shows that Fortune Global 500 employ 65 million people worldwide and top 550 global firms are represented by 36 countries. These firms generated $31.2 trillion in revenues and $1.7 trillion in profits in 2014.[10]

[10] *Fortune Global 500*, *see* at: http://fortune.com/global500/, [cit. 2015-10-01.]

The strategic decision to go global is not a luxury, which only a few big companies can afford instead to go global is an inescapable fact of life for most firms these days[11]. In a highly dynamic and competitive environment it is becoming very hard for the firms to remain competitive by operating within the national boundaries. This is not just true for large firms, but also for many small to medium size firms that find themselves operating in globalizing labor markets.

In order to gain the competitive advantage and to remain ahead of the competitors the firms shall sought creative and innovative ideas globally. The production facilities shall be located where costs are the lowest and products can be delivered to the user in the shortest time. Similarly, in order to build, configure and reconfigure the resources (financial, human) firms shall have a global perspective.

Firms that operate this way are referred to as "global"[12]. The global firm considers the world as one market. These firms research, produce, and market the services and products on a worldwide basis and utilize a business intelligence system capable of monitoring the globe for opportunities and threats.

For the global firms value, competitive advantage, and the strategic focus are global in relevance and this global perspective guide their efforts in any part of the world. This global strategic

[11] PERKINS, STEPHENS J: *Globalization: the people dimension: human resources strategies for global expansion*, 1999, Kogan Page Limited, London, 9.

[12] BARTLETT, CHRISTOPHER A. – GHOSHAL, SUMANTRA. *Managing across Borders: The Transnational Solution*, 1998, Harvard Business School Press, Boston, MA, 12.

perspective requires a strong corporate culture that transcends national boundaries and act as an adhesive that helps to bond the diverse operations.

Truly global firms do not negate the local context and conditions completely. In fact, they try to knit their units into flexible, web-like structures with a dual focus which is both global and local. This dual focus of the global firms makes the job of global managers complex. While making strategic decisions the global manager has to take into consideration a number of factors – in terms of geographic scope and cultural diversity and of balancing global and local agendas.

The global firms understand that opportunities in the global competitive landscape requires different strategic and competitive approaches. Therefore, the success of global firms depends in large part on the formulation and implementation of global strategy. Global strategy reflects the firm's short- and long-term responses to the challenges and opportunities offered by the global business environment. Global firms execute strategies to attract global customers, acquire global brand loyalty and deal effectively with a multitude of environmental concerns, such as competitors, suppliers, and scarce resources[13].

Different global strategic approaches represent a significant stretch of the firm's experience base, resources, and capabilities. This stretch is associated with the high costs. A strategic decision that may prove to be successful on the national or local level may prove to be a bad strategic decision if the management does not accurately foresee the political, legal, financial, socio-cultural and

[13] KNIGHT, GARY: Entrepreneurship and marketing strategy: the sme under globalization, in *Journal of International Marketing*, Vol. 8, Issue 2 (2000 Summer), 12-32.

technological risks resides in different global markets. The strategic failure at the global scale carries substantial financial and other costs in contrast to a local or national failure.

In order to overcome the challenges posed the globalization and to minimize the global strategic failures global firms have to leverage their capabilities, competences and resources from the local or national level into the global level. The most vital and important resource for a global firm is its human resource base because it's the people that makes the difference and create real value for the firm by combining and converting the other factors of production into a valuable product or service.

People are the firm's most valued assets, who individually and collectively contribute to the achievement of its strategic goals and objectives[14]. Therefore, it has been argued that firms with good HRM practices have higher profits and a better survival rate than do firms without these practices[15]. Consequently HRM, the management of work and people towards desired objectives, is a fundamental activity in any organization in which human beings are employed[16].

The concept of HRM from the perspective of a global firm gains more importance because of the diversity of their human resources. The challenges of global HRM don't just arise from the physical distances involved. The diversity in the human resources

[14] ARMSTRONG, MICHAEL: *Strategic human resource management: a guide to action*, 2008, Kogan Page Limited, London, 13.

[15] GUTHRIDGE, MATTHEW – ASMUS, KOMM B: Why multinationals struggle to manage talent, in *McKinsey Quarterly*, May 2008, 1–5.

[16] BOXALL, PETER – PURCELL, JOHN – WRIGHT, PATRICK: Human resource management scope, analysis, and significance, in BOXALL, PETER – PURCELL, JOHN – WRIGHT, PATRICK (eds.): *The Oxford handbokk of human resource management*, 2007, Oxford University Press, New York, 1-18.

may bring together best minds and talent but may not essentially bridge the psychic, social and cultural differences. The challenge for the global HRM is dealing with the social, political, legal, economic, and cultural differences among different national contexts and their people.

4. THE HRM CHALLENGES FACING GLOBAL FIRMS

HRM refers to the process of acquiring, training, appraising, and compensating employees, and of attending to their labor relations, health and safety, and fairness concerns[17]. The scale and scope of the HRM from a global perspective is broader than the HRM of a local or a national firm. Global HRM is the study and application of all human resource management activities as they impact the process of managing human resources in firms in the global environment.[18]

Firms operating only in a local or national context have luxury of operating in a relative stable political, legal, regulatory and cultural environment as compared to the global firms which operate in a highly dynamic and unpredictable global environment. For the domestic firms a basic central legal and regulatory framework helps produce a foreseeable set of legal and regulatory guidelines regarding issues such as staffing, compensation, job discrimination, labor relations, and safety and health.

A global firm does not enjoy the luxury of operating in a stabilized and homogenized environment. The human resource

[17] DRESSLER, GARY: *Fundamentals of human resource management*, 2014, Pearson, New York, 2.

[18] BRISCOE, DENNIS R. – SCHULER, RANDALL S. – CLAUS, LISBETH: *International human resource management: policies and practices for multinational enterprises*, 2009, Routledge, London, 20.

strategists of a global firm have to take into consideration different challenges while formulating and implementing the global human resource policies and practices.

4.1. Cultural Challenge

The most important and difficult challenge for the global HRM arises from the differences encountered in various cultures across the borders and within the global firms. Particular corporate culture of a global firm may vary significantly from a national culture. This conflict of culture can become a particularly salient challenge when management and the workforce show lack of sensitivity to these differences. This lack of sensitivity may result in making mistakes ranging from hiring the people to their personal interactions.

Cultures in which the people are embedded greatly influence their way of thinking, working and expectations. The employment concept, behavior towards job and expectations from the employment vary across different cultures. Cultural differences mean people react differently to the same or similar situations in different national contexts. For example, U.S. managers in one study were most concerned with getting the job done, and Chinese managers with maintaining a harmonious environment[19].

Hofstede's cultural dimensions provide a useful tool to understand the cultural differences across the globe. According to him societies differ in five values, which he calls power distance, individualism, masculinity, uncertainty avoidance, and long-term

[19] DRESSLER: *op. cit.* 441.

orientation. These dimensions may help the global human resource strategists to craft and implement the global human resource policies.

It is recognized that cultural diversity may be observed not only at national levels but also within a global firm. Global firms recruit and hire the employees from around the globe. The diverse nature of the workforce makes the global firm a multicultural firm. The cultural diversity in the workforce add the value to a global firm however, there are substantial costs associated with managing diversity poorly. When global firms do not manage cultural diversity well, there is more likelihood of turnover and absenteeism among minority groups. Additionally, global firms that do not manage cultural diversity in a proper manner may be in breach of legislative and regulatory guidelines and may bear associated costs. There are also indirect costs, such as the loss of reputation and inability to attract high-quality employees to the firm[20].

4.2. Legal and Regulatory Challenge

Global firms operate in a broad legal and regulatory environment. A big challenge for the global firms is to contend with the different employment laws and regulations contend in every country in which it operates, as well as conform to the current global standards of the employment[21].

[20] DE CIERI, HELEN: Transnational firms and cultural diversity, in BOXALL, PETER – PURCELL, JOHN – WRIGHT, PATRICK (eds.): The *Oxford handbokk of human resource management,* 2007, Oxford University Press, New York, 509-532.

[21] Currently very limited reference works are available about employment law from a global perspective.

The national legal and regulatory system has a significant impact on how people are employed; compensation policies; union issues; employment termination and retirement; and safety issues. Therefore, in order to overcome this legal and regulatory challenge global human resource strategist when conducting human resource planning is to understand the complexities of the laws and regulations in each of the countries where it operates and make sure that it is treating employer related issues legally.

The national legal and regulatory environment also influences the relationship between the management and workforce. In many European countries, works councils— formal, employee-elected groups of worker representatives—meet regularly with managers to discuss topics ranging from no-smoking policies to layoffs. Similarly, Co-determination is the rule in Germany and several other countries, which gives employees the legal right to a voice in setting firm policies[22].

Recently, global firms are increasingly started to use the non-traditional employment processes, such as online crowdsourcing. Since it's an emerging trend the laws and regulations are opaque regarding such recruiting methods. The opaqueness of the laws and regulations about the non-traditional employment process further increase the risks and pose a growing challenge for the global HRM.

Global firms overcome the legal and regulatory challenges by using one or more of the following approaches[23]:

- By comprehending the global labor laws and regulations that apply to the workforce relations of firms that operate globally. Laws and regulations

[22] DRESSLER: *op. cit.* 442.
[23] BRISCOE – SCHULER – CLAUS: *op. cit.* 106.

regarding international employment are developed by the ILO, the OECD and the EU.

- By thoroughly investigating the employment laws and practices in different countries before the start of the employment process, such as laws and rules regarding the hiring, firing and discrimination.
- By knowing whether the country enacts the extraterritorial laws and if yes then to which extent extraterritorial laws apply.

The above approaches shows that the global human resource managers must:

- Possess the knowledge of local and national laws and regulations. This knowledge will facilitate them to comply with the laws and regulations of the countries in which firm operates.
- Possess the knowledge of global labor laws and regulations, which will help them to comply with international employment standards and global regulations.
- Possess the knowledge of extraterritorial laws which will equip them with the capability to comply with the extraterritorial laws of their own country.

4.3. Economic Systems Challenge

Global firms operate in different economic systems around the world. The differences in economic systems influence the inter-country human resource strategies. Traditionally, economists identified three main types of economic systems: market, planned, and mixed. In the market economies individuals and firms allocate resources and production resources are privately owned and

governments play a relatively restrained role in deciding things such as what will be produced and sold, at what prices. The role of the government is to promote competition among firms and to ensure consumer protection. In planned economies, the government decides and plans what to produce and sell, at what price. In mixed economies, many industries are still under direct government control, while others make pricing and production decisions based on market demand[24].

All these economic systems have profound impact on the human resource practices and policies of a global firm. The real challenge for the global firms is to adjust and align their human resource policies according to the demands and contours of the economic system in which they operate.

The above mentioned global human resource challenges faced by the global firms shows that when firms address global HRM, they have not only to deal with a an array of practices, but, when considering how they want to formulate and implement their strategy, they may also face a range of policy and strategy issues. Global human resource challenges, therefore, requires a strategic approach from the top management of the global firm to overcome them. The strategic approach towards global human resource challenges has to explore how global HRM practices align with the global strategic goals and objectives. This strategic approach provides the global strategic coherence, which allows the management to manage its people in a cost-effective and efficient way in all the countries it operates.

[24] KEEGAN, WARREN J. – GREEN, MARK C.: *Global marketing*, 2013, Pearson, New York, 39-40.

5. STRATEGIC APPROACHES TO OVERCOME GLOBAL HUMAN RESOURCE CHALLENGES

The strategic approach to the global HRM can be refer as the pattern of planned human resource deployments and activities intended to enable the firm to achieve its global objectives[25]. The major focus of this approach is on aligning human resources with firm's global strategies. The strategic approach to global HRM take into account the firm's global strategic components, endogenous factors and exogenous factors that shape the issues, policy, practices and functions of HRM in global firms.

The strategic approach of a global firm towards the global HRM depends heavily on the top management's view of the world. Perlmutter (1969) is acknowledged as the leading theorist to propose that cognitive maps and mindsets of the top management of a firm shapes and influences the model of how firms organize globally[26]. According to Perlmutter there are three different types of global strategic approaches based on the top management's mindsets: ethnocentric, polycentric and geocentric. He adds a fourth approach regiocentric latterly. He argued that top management mindsets reflect the extent to which home, host, global or regional values are perceived as important and in turn influence the strategic posture of the global firms[27].

[25] WRIGHT, PATRICK M. – MCMAHAN, GARY C.: Theoretical perspectives for strategic human resource management, in *Journal of Management*, Vol. 18, Issue 2 (1992), 295-320.
[26] PERLMUTTER, HOWARD V.: The tortuous evolution of the multinational corporation, in *Columbia World Journal of Business*, Vol. 4, Issue 1 (1969), 9-18.
[27] BEARDWELL, JULIE – CLAYDON, TIM: *Human resource management a contemporary approach*, 2010, Pearson, UK, 657.

These approaches have been widely used in the human resource management literature to classify the different strategic orientations to the global HRM. The central strategic issue in a global firm's HRM is its strategic orientation towards the amount of control of the headquarters over subsidiary management and human resource practices and policies. These strategic orientations can be describes as follow[28]:

The ethnocentric mindset assumes that home country is superior to the rest of the world. This strategic orientation shows indifference towards the host country human resource practices and top management assumes that the human resource policies and strategies, which are successful in the home country, will also be successful in the host country. As a consequence, key strategic and managerial positions in subsidiaries are filled by expatriates from headquarters to establish and manage the subsidiary operations. This gives the headquarters a high degree of direct control over the subsidiaries' operations. Ethnocentric approach promotes control and centralization of human resource practices and policies.

The polycentric mindset is opposite of the ethnocentrism. This strategic orientation exhibits top management's belief or assumption that each country in which a firm operates is unique. This strategic orientation by taking into account the host country values and ways of operating allows each subsidiary to develop its own unique human resource policies and strategies in order to succeed. Therefore, the important managerial positions in the subsidiary are more likely to be filled by local employees and the headquarters is less interested in controlling and homogenizing the firm's culture.

[28] Ibid. 658.

The geocentric mindset views the entire world as a potential market and strives to develop integrated global strategies. The geocentric orientation represents a synthesis of ethnocentrism and polycentrism; it is a "worldview" that sees similarities and differences in markets and countries and seeks to create a global human resource strategy that is fully responsive to local needs and wants[29]. This global orientation with local values is not nationally specific but transcend national boundaries. According to the geocentric strategic orientation a global firm's human resource and policies include extensive use of expatriates and inpatriates[30] with a broad global sharing of human resource practices and adoption of the best practices, no matter their origins[31].

The regiocentric mindset focuses a region and region becomes the relevant geographic unit (e.g. Europe, America, and the Asia/Pacific Rim); management's goal is to develop an integrated HRM strategy on regional values and ways of operating. Global firms with regiocentric orientation are usually structured along regional geographical boundaries and mobility of the employees is between these regions. This approach allows some degree of integration, but recognises regional diversity. As a result, human resource managers in the foreign subsidiaries are preferably local and relatively independent from headquarters influence and supervision.

It has been argued that these strategic orientations correlate with the global human resource practices of the global firms. By using one of these strategic approaches or a combination of these

[29] KEEGAN – GREEN: *op. cit.* 18.
[30] Employees who are relocated from a foreign subsidiary or joint venture to the parent company in the headquarters country.
[31] BRISCOE – SCHULER – CLAUS: *op. cit.* 18-19.

strategic approaches global firms reaches to the strategic fit between the human resource strategies and the overall strategic objectives of the firm.

Strategic global HRM other important tasks are to strategically align staffing, training and compensation policies with the firm's overall objectives.

5.1. GLOBAL STAFFING STRATEGY

The major challenge of a global firm is the global recruitment. Global recruitment involves specifying what the assignment requires and what type of person is suitable for it, and how a firm can attract that person. There are four main staffing strategies a global firm can implement.

5.1.1. Local Staffing

In this staffing approach firms prefer to fire the people from the country in which the firm is operating. Local staffing is less costly in both expenses and training. Additionally, a local person may be more productive from the start, as he or she does not have to overcome the cultural challenges associated with an overseas employment. The prior knowledge of the culture and laws makes the assignment easy and enhances the motivation and productive capability of the employee.

5.1.2. Expatriate Staffing

A major reason for the expatriate staffing is that the firm can't find local candidates with the required technical qualifications. Therefore, firms recruit expatriates—either home-country or third-country nationals—for staffing. Another factor for the expatriate

staffing is the control. If the headquarters assume that home-country managers are knows firm's policies and culture more well are much better equipped to implement headquarters' policies then firms prefer expatriate staffing.

However, posting expatriates abroad has it's own downsides. It is expensive, security problems may discourage expats and returning expats often leave for other employers.

5.1.3 Hybrid Staffing

This is a policy of transferring a home-country national employee to a foreign subsidiary as a "permanent transferee." The employer here does not treat the employee (who assumedly wants to move abroad) as an expatriate, but instead as a local hire[32].

5.2. TRAINING STRATEGIES FOR GLOBAL EMPLOYEES

For a global firm it's human resources are may be the most important source of competitive advantage. However, human resources can only be used in a productive manner if they are properly and rightly trained for their assignments, therefore, the training of the workforce is vital for the success of a global firm.

Before sending an employee on a global assignment the global firms offer cross-cultural predeparture training programs. Generally, these training programs consist of readings, simulations, lectures and videos. The objective of these training programs is to provide the employees a forehand knowledge about the host country's social, political, economic and cultural conditions. These trainings allow the employee to comprehend how the different

[32] DRESSLER: *op. cit.* 443.

cultural values affect work values, expectations and communications. Moreover, such trainings help the employees to manage the social and cultural challenges.

Global firms understand that global challenges are continuous therefore many global firms provide ongoing training to their employees. They provide continuing in-country cross-cultural training. The ongoing training can be provided by rotating assignments to help overseas managers grow professionally. Some firms are using management development centers around the world where they provide training sessions to their managers at regular intervals.

Global firms are also experiencing the repatriate problems of their employees. Repatriation is the process of helping employees make the transition to their home country. Many returnees experience reverse culture shock upon returning home, which is a psychological phenomenon that may lead to feelings of disorientation, fear and helplessness. Repatriation problems may compel the employees to leave the firm after returning from an assignment, and to take their knowledge with them. To overcome this challenge firms are offering counseling and training to their employees. A firm may have a repatriation program consist of these steps[33].

First, the firm matches the expat and his or her family with a psychologist trained in repatriation issues. The psychologist meets with the family before they go abroad. The psychologist discusses the challenges they will face abroad, assesses with them how well they think they will adapt to their new culture, and stays in touch with them throughout their assignment. *Second,* the program makes sure that the employee always feels that he or she

[33] Ibid. 451.

is still "in the home-office loop." *Third,* once it's time for the expat employee and his or her family to return home, there's a formal repatriation service.

5.3. COMPENSATION AND REWARD STRATEGIES

Global compensation and reward system is complex because it deals with people relocating to different countries and are, thus, subject to different laws and regulations, cost-of living adjustments, taxation systems, exchange rate fluctuations, and varying inflation/deflation rates[34].

5.3.1. The Balance Sheet Approach

In order to overcome the cost of living across different countries the balance sheet approach for the compensation is widely used. This approach equalizes purchasing power across countries. For this purpose human resource managers look at the four main home-country groups of expenses—income taxes, housing, goods and services, and discretionary expenses (transportation payments, child support, and other such expenses). The human resource managers then estimate these expenses in the expatriate's home country and costs for the same items in the host country. The employer then pays differences. In this approach the base salary generally remains in the same range as the home-country salary, and an overseas premium might be paid to compensate the physical, social and cultural adjustments[35].

[34] BRISCOE – SCHULER – CLAUS: *op. cit.* 259-262.
[35] MARTOCCHIO, JOSEPH: *Strategic compensation,* 2006, Pearson, Upper Saddle River, NJ, 402-403.

The reward and compensation system of different global firms may vary, however, every compensation and reward system should take into consideration these features: (i) that the compensation practices in each geographic location must motivate the employee behaviors required to achieve its strategic goals; (ii) that the separate geographic area compensation plans are consistent with each other; and (iii) that the pay policies are responsive to local conditions[36].

6. CONCLUSION

The emerging pattern of the globalization is likely to involve a range of heterogeneous units in multiple, interwoven, and overlapping layers of interconnectedness. This interconnectedness in the economy gives rise to the global firms, which are facing global challenges. One such global challenge is the management of the human resources at the global scale.

This essay by using an integrative approach explored the human resource challenges faced by the global firms and provides the strategic orientations and tools available to the global firms in order to overcome these challenges. Global strategists by choosing a right strategic orientation and strategy tools can align the firm's overall strategic objectives with the global HRM strategies and get the strategic fit and flexibility, which is cornerstone of the global competitive advantage and success.

[36] WHITE, ROBIN: A strategic approach to building a consistent global rewards program, in *Compensation & Benefits Review*, Vol. 2005, July/August, 25.

LIST OF REFERENCES

Books, chapters in a book, articles

[1] ARMSTRONG, MICHAEL: *Strategic human resource management: a guide to action*, 2008, Kogan Page Limited, London.

[2] BARTLETT, CHRISTOPHER A. – GHOSHAL, SUMANTRA. *Managing across Borders: The Transnational Solution*, 1998, Harvard Business School Press, Boston, MA.

[3] BEARDWELL, JULIE – CLAYDON, TIM: *Human resource management a contemporary approach*, 2010, Pearson, UK.

[4] BEECHLER, SCHON – PUCIK, VLADIMIR – STEPHAN, JOHN – CAMPBELL, NIGEL: The transnational challenge: performance and expatriate presence in the overseas affiliates of Japanese MNCS, in ROEHL, TOM – BIRD, ALLAN (eds.): *Japanese Firms in Transition: Responding to the Globalization Challenge (Advances in International Management, Volume 17)*, 2004, Emerald Group Publishing Limited, 215-242.

[5] BOXALL, PETER – PURCELL, JOHN – WRIGHT, PATRICK: Human resource management scope, analysis, and significance, in BOXALL, PETER – PURCELL, JOHN – WRIGHT, PATRICK (eds.): *The Oxford handbokk of human resource management*, 2007, Oxford University Press, New York, 1-18.

[6] BREWSTER, CHRIS – DICKMANN, MICHAEL – SPARROW, PAUL: A European perspective on IHRM: an introduction, in DICKMANN, MICHAEL – SPARROW, PAUL – BREWSTER,

CHRIS (eds.): *International human resource management: a European perspective*, 2008, Routledge, London.

[7] BRISCOE, DENNIS R. – SCHULER, RANDALL S. – CLAUS, LISBETH: *International human resource management: policies and practices for multinational enterprises*, 2009, Routledge, London.

[8] DE CIERI, HELEN: Transnational firms and cultural diversity, in BOXALL, PETER – PURCELL, JOHN – WRIGHT, PATRICK (eds.): The *Oxford handbokk of human resource management*, 2007, Oxford University Press, New York, 509-532.

[9] DICKEN, PETER: *Global shift: mapping the changing contours of the world economy (6th ed.)*, 2011, Guilford Press, New York.

[10] DRESSLER, GARY: *Fundamentals of human resource management*, 2014, Pearson, New York.

[11] EDWARDS, TONY – REES, CHRIS: *International human resource management: globalization, national systems and multinational companies*, 2006, FT, Harlow.

[12] FRIEDMAN, THOMAS L: *The world is flat: A brief history of the twenty-first century*, 2007, Farrar, Strauss and Giroux, New York.

[13] GHEMAWAT, PANKAJ: Why the world isn't flat, in *Foreign Policy*, Vol. 2007, Issue 159, 54–60.

[14] GUTHRIDGE, MATTHEW – ASMUS, KOMM B: Why multinationals struggle to manage talent, in *McKinsey Quarterly*, May 2008, 1–5.

[15] JESSOP, BOB: *The future of the capitalist state*, 2002, Polity, Cambridge.

[16] JOHNSON, DEBRA – TURNER, COLIN: *International business themes and issues in the modern global economy*, 2003, Routledge, London.
[17] KEEGAN, WARREN J. – GREEN, MARK C.: *Global marketing*, 2013, Pearson, New York.
[18] KNIGHT, GARY: Entrepreneurship and marketing strategy: the sme under globalization, in *Journal of International Marketing*, Vol. 8, Issue 2 (2000 Summer), 12-32.
[19] MARTOCCHIO, JOSEPH: *Strategic compensation*, 2006, Pearson, Upper Saddle River, NJ.
[20] PERKINS, STEPHENS J: *Globalization: the people dimension: human resources strategies for global expansion*, 1999, Kogan Page Limited, London.
[21] PERLMUTTER, HOWARD V.: The tortuous evolution of the multinational corporation, in *Columbia World Journal of Business*, Vol. 4, Issue 1 (1969), 9-18.
[22] WHITE, ROBIN: A strategic approach to building a consistent global rewards program, in *Compensation & Benefits Review*, Vol. 2005, July/August.
[23] WRIGHT, PATRICK M. – MCMAHAN, GARY C.: Theoretical perspectives for strategic human resource management, in *Journal of Management*, Vol. 18, Issue 2 (1992), 295-320.

Electronic sources

[1] *Fortune Global 500*, see at http://fortune.com/global500/, [cit. 2015-10-01].

THIRD COUNTRY NATIONALS AS FAMILY MEMBERS OF EU CITIZENS AND MARRIAGES OF CONVENIENCE

STAVINOHOVÁ, MARTINA

Palacký University Olomouc
Faculty of Law
Tř. 17. listopadu 8
Olomouc, Czech Republic
martinastavinohova1@gmail.com

Abstract

Free movement of EU citizens would be restricted if this right was not guaranteed to their family members. However, as probably any status that is associated with some privileges even the status of a family member of a Union citizen tempts the potential abusers. One of the abusive behaviors that aims to circumvent national rules to obtain the unjustified advantages is a marriage of convenience. This paper deals with differences between a genuine marriage and a marriage of convenience, the relation between the marriage of convenience and the protection of the right to family life and the right to marital life, the investigation of the alleged marriages of convenience and measures which can be taken against the abusers. All of these examinations are done from a European Union perspective and a Czech one.

Keywords: *Czech Republic, free movement of persons, marriage of convenience, right to family life and right to marry, third country nationals as family members of EU citizens.*

1. INTRODUCTION

The free movement of persons together with the free movement of goods, the free movement of capital and the free movement of services constitute four freedoms of the internal market. The free movement of persons was originally related only to economically active persons such as workers, entrepreneurs and self-employed persons.

Directives adopted in the 90s extended the freedom to move and reside to other persons regardless of their economic status. In 1993, the Maastricht Treaty formally founded Union citizenship and confirmed the right of every EU citizen to move and reside freely within the territory of the Member States provided that this right is exercised in compliance with other conditions set forth in EU law.[1] Moreover, this citizens' right is guaranteed by the Charter of Fundamental Rights of the European Union.[2]

To enable EU citizens to enjoy this right fully, it was significant to provide it also for their family members because of the fact that the citizens would not so willingly move to another Member state without their family. The Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereinafter: the Directive) has consolidated previous directives and has ensured the right to move and residence not only to migrant EU citizens but also to their family members.

[1] Treaty on the Functioning of the European Union, article 20 para. 2. letter a) and article 21.

[2] Charter of Fundamental Rights of the European Union, article 45 para. 1.

When it comes to applicability of the Directive, it should be emphasized that it is limited to non-static EU citizens and their family members who join or accompany them to the host Member State. Family members may be of any nationality, not just of Member States of the European Union.[3] It means that even a third country national who marries a EU citizen may profit from the Directive if all requirements of EU law are met. In comparison to the third country nationals who are not family members of EU citizens, the family members are entitled to many benefits. For instance, they have legal claim to a rank of rights derived from their EU family members whereas the other third country nationals must rely on national immigration rules.[4] The third country family members of EU citizens have rights such as entering the host Member State[5], obtaining an entry visa[6] and residing in the host Member State for up to three months[7].

Not suprisingly, the better status of the third country family members of EU citizens is attractive to potential abusers of law. In this paper I am going to deal with one kind of the abusive conduct, namely a marriage of convenience that aims to obtain advantages associated with that status. The main questions include: How can a genuine marriage be distinguished from a marriage of

[3] L 158/77 Directive 2004/38/EC of the European Parliament and of the Council (29th April 2004) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC. 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, article 3 para. 1. (hereinafter: Directive)
[4] Ibid. point 6 of the Preamble.
[5] Ibid. article 5 para. 1.
[6] Ibid. article 5 para. 2.
[7] Ibid. article 6.

convenience? How is a marriage of convenience detected? How are persons prevented from getting engaged for marriages of convenience? How do Czech authorities combat marriages of convenience? Are the measures taken against the marriages of convenience contrary to the right to family life or the right to marry?

2. Right to Family Life and Right to Marry versus Marriage of Convenience

According to a Czech family law a marriage is a permanent relationship between a man and a woman which main purpose is to found a family and to upbring children properly.[8] This law was replaced by the second part of the New Czech Civil Code (č. 89/2012 Sb., in effect since 1st January 2014), which has approximately copied the definition of the marriage and added to the prime aims of the marriage foundation another one, which is a reciprocial support and assistance of the spouses.[9] This conception of intention of the marriage is more or less corresponding with the one of the genuine marriage stated in the Handbook, which also emphasizes the intention of permanent relationship and requires an

[8] Zákon č. 94/1963 Sb., o rodině, v posledním znění [Act No. 94/1963, Czech family law, in its latest version before its cancellation by the New Czech Civil Code on 1st January, 2014], § 1.
[9] Zákon č. 89/2012 Sb., občanský zákoník [Act No. 89/2012, New Czech Civil Code], § 655.

intention of an authentic marital life.[10] The question is whether the authentic marital life is the one, which is in compliance with the purposes mentioned in the Czech private law or something else.

It is significant to be aware of a separate assessment of a marriage in terms of the private law and of the public law. As a result of this, a same marriage may be valid with all its consequences in the private law and simultaneously circumventing the public law (especially hereinafter mentioned the Act on the residence) due to its purpose of obtaining permission for residency and thus the residence permit or the relevant application shall be refused.[11] The independent exercise of the private law and the public law is confirmed also in the New Czech Civil Code.[12]

At the EU level *the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.*[13] Similarly, the European

[10] SWD(2014) 284 final European Commission (26th September 2014, Brussels). Commission staff working document Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens Accompanying the document Communication to the European Parliament and to the Council Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, 10. (hereinafter: Handbook)

[11] Rozsudek Nejvyššího správního soudu ze dne 2. října 2013 [Judgment of the Supreme Administrative Court of the Czech Republic of 2 October 2013], No. 1 As 58/2013-43, point 25 and Rozsudek Nejvyššího správního soudu ze dne 22. dubna 2015 [Judgment of the Supreme Administrative Court of the Czech Republic of 22 April 2015], No. 6 Azs 32/2015-30, point 29.

[12] Zákon č. 89/2012 Sb., *op. cit*., § 1 para. 1.

[13] Charter of Fundamental Rights of the European Union, article 9.

Convention on Human Rights stipulates that *men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*[14] Moreover, the marriage should be in compliance with the EU law on the free movement of Union citizens.

There is no general legal definition of a family in the Czech legal system. However, some Czech laws have their own definitions of family members. When it comes to the Act on the Residence of Foreign Nationals in the Czech Republic (hereinafter: Act on Residence), a spouse is included among the family members of the EU citizens together with a registered partner[15], a parent if the EU citizen is under 21 years of age and if the parent supports him/her and they share a common household, his/her child younger than 21 years or such a child of the EU citizen, his/her dependent immediate ancestor or immediate descendant or such a relative of the EU citizen.[16] This definition of the family member of Union citizen corresponds with the definition in article 2 paragraph 2 of the Directive.

The Charter of Fundamental Rights and Freedoms of the Czech Republic guarantees the inviolability of privacy and equally as article 7 of the Charter of Fundamental rights of European Union as well as article 8 of the European Convention on Human Rights

[14] European Convention on Human Rights, article 12.
[15] Zákon č. 326/1999 Sb., o pobytu cizinců na území České republiky a o změně některých zákonů, ve znění pozdějších předpisů [Act No. 326/1999, Act on the Residence of Foreign Nationals in the Czech Republic, as subsequently amended], § 180f in conjunction with § 15a para. 1 letter a). (hereinafter: Act on the Residence)
[16] Ibid. § 15a para. 1.

stipulates that everyone has the right for protection of his/her private and family life.[17] This right may be restricted only if the law states so.[18]

Converse to the genuine marriage and its protections there is a marriage of convenience. Determination of what should be considered as a marriage of convenience has developed throughout history. In 1997, an unbinding resolution was adopted and defined the marriage of convenience as "*a marriage concluded between a national of a Member State or a third country national legally resident in a Member State and a third-country national, with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State"*[19].

In the Akrich judgment it was argued that marriages of convenience aiming to circumvent the provisions regarding the entry and residence of the third country nationals should be regarded as abuse of law.[20]

[17] Usnesení předsednictva České národní rady č. 2/1993 Sb., o vyhlášení Listiny základních práv a svobod jako součásti ústavního pořádku České republiky, jak vyplývá ze změny provedené ústavním zákonem č. 162/1998 Sb. [Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic No. 2/1993 Coll.], article 7 para. 1 and article 10 para. 2.
[18] Ibid. article 7 para. 1.
[19] C 382/1 Council Resolution (4th December 1997) on measures to be adopted on the combating of marriages of convenience. Point 1. (Hereinafter: Resolution 1997). For similar definition *see* Handbook, 8.
[20] Judgment of the Court of the European Union of 23rd September 2003. Secretary of State for the Home Department vs. Hacene Akrich. Case C-109/01, point 57.

Point 28 of the preamble of the Directive should also be mentioned which indicates that the marriage of convenience is a relationship concluded with the sole aim of acquiring admission or residence in the Member State and thus abuse of law[21]. The sole aim should be understood as not the only one purpose of the abusive conduct but as the predominant one. Besides the sole purpose, a marriage of convenience is characterized by artificial conduct and formal respect of law. The artificial conduct should be perceived as the abusive conduct which is a mere pretence of the intention to found a family and to lead an authentic marital life but in fact there is no such intention by the married couple. Formal respect of law signifies that the marriages of convenience are formally concluded in conformity with the relevant national law. Therefore, to detect the marriage of convenience it is more useful to concentrate on the intention of the relationship than to check its compliance with the law.[22]

The Czech Republic as a Member State of the European Union at first regarded the marriage of convenience as conduct against public order.[23] Later, this practice was abandoned by Czech courts.[24] Since its amendment in 2007, the Act on Residence has considered the marriage of convenience as a way of circumvention

[21] Directive, article 35.
[22] Handbook, 8-9.
[23] Rozsudek Nejvyššího správního soudu ze dne 16. května 2007 [Judgment of the Supreme Administrative Court of the Czech Republic of 16 May 2007], No. 2 As 78/2006-64.
[24] Usnesení rozšířeného senátu Nejvyššího správního soudu ze dne 26. července 2011 [Resolution of the Supreme Administrative Court of the Czech Republic (extended chamber) of 26 July 2011], No. 3 As 4/2010-151, point 58.

of the law[25] with the purpose of obtaining a short visa, temporary residence or permanent residence permission and thus this relationship breaches the law.[26] Even though there is no legal definition for the marriage of convenience, it is argued that the marriage of convenience is characterized by *the negative intention (not to lead a common family life as a married couple) and the positive intention (to circumvent the migration law).*[27]

Concerning the relation between a marriage of convenience and protection of a family life, the Supreme administrative court of the Czech Republic argues that it is usually not an inproportionate intervention to the right of family life guaranteed by the article 8 of the Convention if an application for a residence permission is not approved because of the circumvention of the Act on the Residence in a way of a marriage of convenience.[28] The point is

[25] Nález Ústavního soudu ze dne 1. dubna 2003 [Judgement of the Constitutional Court of the Czech Republic of 1 April 2003], No. II. ÚS 119/01: Circumvention of the law means that someone behaves in accordance with the law but aiming to reach the result which is unforeseeable and undesirable by the law.

[26] It is stipulated in this way which is in accord with the Directive by the zákon č. 379/2007 Sb., kterým se mění zákon o pobytu cizinců na území České republiky a některé další zákony [Act No. 379/2007Coll., which is amending the Act on the Residence and some other laws] which came into effect in 21st December 2007.

[27] ČIŽINSKÝ, PAVEL: *Příručka "Cizinecký zákon 2008- občané EU* (2008)" [Handbook "Act on Residence 2008 – Citizens of the EU (2008)"], available at: http://cizinci.poradna-prava.cz/folder05/obcan_eu.pdf [cit. 2015-09-29], chapter 5.3.3, translated by myself.

[28] Rozsudek Nejvyššího správního soudu ze dne 23. dubna 2015 [Judgment of the Supreme Administrative Court of the Czech Republic of 23 April 2015], No. 7 Azs 80/2015-31.

that in case of a marriage of convenience the spouses do not lead a real family life and thus their relationship cannot fall under article 8 of the Convention.[29]

3. INVESTIGATION OF THE MARRIAGE OF CONVENIENCE

There are no instructions in the Directive nor in the Act on the Residence what steps should national authorities be taking while they are investigating an alleged marriage of convenience. However, it has been emphasized that no systematic checks are allowed even though the first draft of the Resolution 1997 and some Member States required them.[30] The reason for a ban on systematic checks is that they may interfere with the private lives of the persons concerned.[31]

During the detection two basic burdens of proof are of use. The non- EU spouses shall prove that they are entitled to exercise the rights to free movement derived from their EU citizen spouses. To bear this burden they shall present relevant proof, otherwise the national authority may refuse to issue the requested entry visa or residence card.[32] On the other hand, it is up to the national authorities to prove that the marriage is of convenience. The spouses are required to co-operate with the authorities to dispel the

[29] Rozsudek Nejvyššího správního soudu ze dne 19. června 2014 [Judgment of the Supreme Administrative Court of the Czech Republic of 19 June 2014], No. 2 As 52/2013-69.
[30] Resolution 1997, preamble. For further information about the draft and Member states attitude on investigation of a marriage of convenience *see*: HART, BETTY DE: Introduction: The Marriage of Convenience in European Immigration Law, in *European Journal of Migration and Law*. Vol. 8, Issue 3. (2006), 253-256.
[31] Ibid. 255.
[32] Handbook, 26.

doubts about the genuineness of their marriage.[33] Provided that the spouses manage to present relevant evidence to dispel the suspicions, their marriage is considered to be a genuine one. If the spouses are not successful and the national authorities have reasonable doubts about the genuineness, the national authorities may proceed in their investigation of the marriage.[34]

During the investigation the national authorities should first try to identify if there are hints supporting absence of abuse and if it fails then they may examine hints for a marriage of convenience. This strategy is called the double-lock mechanism.[35]

Moreover, even if the national authorities observe hints of abuse, they should not automatically conclude that the marriage is of convenience. However, they should rather start a deeper investigation of the marriage and assess all circumstances of the case.[36]

3.1. HINTS

In the Resolution from 1997, factors are enumerated, which may support the decision that the marriage is not genuine: a matrimonial cohabitation is not maintained, no appropriate contribution to the responsibilities arising from the marriage, no common language,

[33] Ibid. 27.
[34] Ibid. 28.
[35] Ibid. 34.
[36] COM(2009) 313 final Commission of the European Communities (2nd July 2009, Brussels,). Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 17. (hereinafter: Communication)

no meeting before the marriage, discrepancies in spouses' statements about their personal details and information or about the circumstances of their first meeting, money has been given to ensure the marriage to be concluded, one or both of the spouses was/were previously included in marriages of convenience or residence anomalies. [37] In addition to these criteria the Communication of the Commission of 2 July 2009 adds that a family life was developed just when the exclusion order was adopted or that the couple divorced shortly after the third country national had obtained the right of residence. Moreover, the Communication comprises these hints for the conclusion of authenticity of the marriage: the third country national would have no problem acquiring the residency permission or he/she has already lawfully resided in the host Member State, long-term duration of marriage or a relationship before the marriage, a couple had a common domicile or household for a long time and a couple bear jointly the responsibility for a long-term legal or financial commitment.[38]

The Handbook also lists factors that indicate the genuineness of a marriage as mentioned also in the Communication and supplements two other hints, i.e. both spouses share and exercise parental responsibility for one or more children and those spouses who do not live together at least maintain regular and frequent contact.[39] Furthermore, the Handbook elaborates hints for abuse in more detail than the Resolution 1997 and the Communication. The hints in favour of a marriage of convenience are divided into a category of the pre-marriage phase, the wedding, applying for an

[37] Resolution 1997, point 2.
[38] Communication, 16-17.
[39] Handbook, 35-36.

entry visa or residence document, residence in the host Member State and end of the marriage.[40] Moreover, the Handbook specifies some general factors that are more likely to appear when the non-EU nationals or EU citizens are abusers. Hints related to the non-EU abusers include their previous unsuccessful entry or residence applications, close expiration of their legal residence in a Member State, their or their family member history of previous marriages of convenience or other forms of abuse or fraud. As for the EU citizen abusers as hints for abuse may serve their bad financial situation or their previous short marriages with non-EU nationals.[41]

3.2. INVESTIGATION TECHNIQUES

The Resolution of 1997 states as resources of information statements by the persons concerned or by third parties, written documentation, inquiries carried out, and a separate interview with each of the two spouses.[42] The Handbook adds community-based checks to these techniques.[43] The interviews with spouses are regarded as the most effective techniques. Before the interviews are held, the spouses are usually asked to fill out the questionnaries.[44] After the interviews it is effective to provide the spouses with the written record of the interviews thus they may check if it is correct, explain misunderstandings, amend or add anything.[45]

[40] To get more familiar with the hints *see* Handbook, 36-40.
[41] Handbook, 36.
[42] Resolution 1997, point 2.
[43] Handbook, 41.
[44] Ibid. 42-43.
[45] Ibid. 43.

The discrepancies in interviews of the spouses are often the main clues, which lead the national authorities to conclude that the marriage is of convenience. However, the problem with this technique lies in the possibility of spouses' subjective understanding or misunderstanding of the questions, which may cause the differences in their statements and thus the unjust decision of their guilt. The Supreme administrative court of the Czech Republic in several decisions acknowledges that the spouses frequently have subjective views of issues such as common friends, everyday relations of the couple and run of the household.[46] For instance, when it comes to the question about the last Christmas, it is not significant if one or both spouses did not recall all the presents but it is sufficient if they agree on some of them. Even the differences in how they spent the Christmas do not have to be a sign that they did not celebrate Christmas together. The reason why the spouses describe their Christmas differently may be caused by their different understanding of Christmas (according to the Orthodox calendar or the Czech one).[47] Therefore, to avoid improper decisions, the authorities should not focus on the trivial differences and should come to a conclusion of discrepancies in the statements only if they reasonably think that the spouses did not spend the events together.[48]

[46] Rozsudek Nejvyššího správního soudu ze dne 30. dubna 2014 [Judgment of the Supreme Administrative Court of the Czech Republic of 30 April 2014], No. 3 As 101/2013-34.
[47] Rozsudek Nejvyššího správního soudu ze dne 6. srpna 2015 [Judgment of the Supreme Administrative Court of the Czech Republic of 6 August 2015], No. 10 Azs 115/2015, point 31.
[48] Ibid. point 34 and 36.

3.3. MEASURES AGAINST MARRIAGES OF CONVENIENCE

According to the Directive the Member States are entitled to adopt necessary measures against abuse of rights and fraud, which may result in refusal, termination or withdrawal of any rights granted in compliance with the Directive.[49] This authority of the Member States was confirmed by the Metock judgment.[50] Measures should be efficient, nondiscriminatory and proportional but they may come from the private, administrative or criminal law.[51]

Any of the measures taken by the national authorities as a certain rule and its interpretation or application in a specific case prevents the application of some provisions of the Directive.[52]

However, all of these measures should also be in compliance with procedural guarantees – decisions should be reported to the person concerned in written form and their contents and consequences should be comprehensive for their addresees. Furthermore, decisions should inform their addressees about the court or administrative authority to which they can submit their appeals, the time limit for submission and alternatively time for abandoning the territory of the host EU country.[53] In addition, the persons concerned have access to judicial and alternatively administrative redress procedures in order to ensure that the

[49] Directive, point 28 of the preamble and article 35.
[50] Judgment of the Court of Justice of the European Union (Grand Chamber) of 25 July 2008. Metock and others vs. Minister for Justice, Equality and Law Reform. Case C-127/08, point 75.
[51] Communication, 19.
[52] Rozsudek Nejvyššího správního soudu ze dne 23. dubna 2015 [Judgment of the Supreme Administrative Court of the Czech Republic of 23 April 2015]. No. 7 Azs 80/2015-31.
[53] Directive, article 30 point 1 and 3.

decisions regarding them are reviewed.[54] In the redress procedure it is possible to assess legality of the decision, facts and corresponding circumstances.[55]

Spouses are also prevented from concluding marriages of convenience by provisions such as ones regarding maintenance of their rights after divorce, annulment of marriage, termination of registered partnership or death of the other spouse/partner. In the first three mentioned cases spouses/partners from the third countries are deprived of their right of residence provided that they do not fulfil any of the following conditions: 1) their relationship lasted at least three years and within this period at least one year in the host Member states, 2) the spouse has custody of the Union citizen's children, 3) it is justified by particularly difficult circumstances (e.g. when the spouse was a victim of domestic violence), or 4) if the spouse has the right of access to his/her minor child in the host Member State for a necessary period of time.[56] As concerns the case of the death of the EU spouse/partner, the spouse/partner from the third country may stay in the host Member state provided that he/she has resided there for at least one year before this event.[57] Moreover, in all aforementioned cases if these persons have not acquired the permanent residence before and want to be allowed to stay in the host Member State, they should prove that they are economically secure enough so as not to become a burden for the social assistance system in the host Member State during their period of residence and have comprehensive sickness

[54] Ibid. article 31 point 1.
[55] Ibid. article 31 point 3.
[56] Ibid. article 13 point 2.
[57] Ibid. article 12 point 2.

insurance cover in the host Member State, or are members of the family from a person fulfilling these criteria on condition that this family have already been constituted in the host Member State.[58]

The Act on the residence puts the marriage of convenience among the reasons for which the short visa shall not be granted[59], permission of temporary residence[60], permission of long-term residence[61] and permission of permanent residence shall not be granted or shall be revoked[62]. All these decisions restricting the residence of the third country family member of the Union citizen in the Czech Republic are taken in accord with Directive.[63]

For any of the aforementioned decisions by the Czech authorities the most significant is knowing whether the marriage is really one of convenience. In the course of this investigation it is important to not only search for the relevant evidence but also to be aware of the fact that it is necessary to assess the objective of the marriage throughtout the whole period of administrative procedure until the decision of the redress administrative authority because the marital life may develop over time. Therefore, it might happen that what was first a marriage of convenience changed over the course of the administrative procedure into a genuine marriage and thus the administrative authorities could not assess it as a

[58] Ibid. article 13 point 2.
[59] Act on the Residence, § 20 para 5 letter e).
[60] Ibid. § 87e para 1 letter c) and § 87f para 1.
[61] Ibid. § 46a para 2 letter j).
[62] Ibid. § 87k para 1 letter b) and § 87l para 1 letter c).
[63] For more information *see* particularly these provisions of the Act on the Residence: Article 20 para 6, article 46a para 2 and ,87f para 2 letters b) and c).

marriage of convenience.[64] However, the changes after the administrative procedure are usually of no relevance.[65] On the contrary, if the couple enters into a genuine marriage and then the marriage changes into a marriage of convenience, this marriage cannot be regarded as abusive one because the aim of the relationship is examined prior and at the moment of the marriage.

Possible criminal punishment should serve as a measure to discourage the EU citizen from getting involved in the marriage of convenience, which may be imposed provided that the facts of the case of the criminal act of assistance to get unjustified residence in the territory of the Czech Republic are accomplished. The most relevant is to prove that the Union citizen provided the assistance with the intent to gain unauthorized property or other profit.[66]

4. CONCLUSIONS

A marriage of convenience is differentiated from a genuine marriage primarily by its intention to acquire the abusive advantage of the entry and residence in the host Member State by circumventing the national immigration law. This kind of abusive relationship cannot be considered as a family or marital life and

[64] Rozsudek Nejvyššího správního soudu ze dne 31. srpna 2012 [Judgment of the Supreme Administrative Court of the Czech Republic of 31 August 2012], No. 5 As 104/2011-102.

[65] Rozsudek Nejvyššího správního soudu ze dne 7. listopadu 2013 [Judgment of the Supreme Administrative Court of the Czech Republic of 7 November 2013], No. 2 As 59/2013-33. Similarly: Rozsudek Nejvyššího správního soudu ze dne 23. dubna 2010 [Judgment of the Supreme Administrative Court of the Czech Republic of 23 April 2010], No. 5 As 14/2010-115.

[66] Zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů [Act No. 40/2009 Coll., Criminal Code, as subsequently amended], § 341.

thus it does not fall under the protection of the Convention. Therefore, the rejection of the residence permission does not infringe on the right of family life.

The investigation is triggered only if there is a suspicion that a marriage may be of convenience, which is in compliance with the prohibition of systematic checks. There is not a stated procedure of investigation by the law. However, to facilitate the detection and to make it at least a little equal in all the Member States, various EU documents were issued to offer some hints and investigation techniques, which could be of use during the investigation. Nevertheless, techniques of questionnaires and interviews tend to suffer of the important drawback that lies in the possibility of a subjective understanding of the questions by the spouses.

During the investigation the co-operation of the spouses and the national authorities is crucial. The spouses cannot be forced to co-operate. However, if there is only a set of persuasive evidence proving their guilt and the spouses are not willing to question them or provide other evidence then they are to face the negative consequences.

Provided that the circumvention of the law is proved, the Member States may take a rank of measures against wrongdoers. Concerning the Czech Republic, the third country national engaged in the marriage of convenience shall be deprived of his/her residence permit or his/her residence application shall be rejected. In addition, other facts that may discourage him/her from this abusive conduct is that he/she must stay married for a particular period of time if he/she wants to get the dreamt-of rights. Moreover, if his/her marriage is discovered to be of convenience, it serves as one of the hints for investigation in case he/she gets married to any of the EU citizens in the future.

The Czech law does not forget to punish also the Czech citizens who have assisted the third country nationals to acquire by a marriage of convenience unauthorized residence in the Czech Republic. The fundamental condition for punishment is that the citizen has acted with the purpose of acquiring unauthorized property or other profit. Incidentally, there may be terrible private law consequences of such a marriage for the Czech citizen such as indeptedness, which is, however, not the prime concern of this paper.

In conclusion, I believe that the most effective deterrent to this abusive conduct would be the assurance that all the marriages of convenience are detected and the proper measures on persons concerned are taken as quickly as possible. Having in mind the difficulty with proving that the marriage is circumventing the law, unfortunately the aforementioned deterrent is quite out of the question. However, a lot of things can be done to get at least closer to it. For instance, it requires that the authorities are inventive in the way that they e.g. alter the questions in the questionnaires and interviews. Simultaneously, the authorities need to behave humanly and be punctual which could be of use e.g. in cases of different answers, the same understanding by the spouses should be verified and they should have an opportunity to explain it, which I understand has been more or less done. Moreover, it might be useful to raise the public awareness of the potential negative implications (meaning also the ones coming from the private law) for the Czech (maybe even all EU) citizens.

LIST OF REFERENCES

Books, chapters in a book, articles

[1] HART, BETTY DE: Introduction: The Marriage of Convenience in European Immigration Law, in *European Journal of Migration and Law*. Vol. 8, Issue 3. (2006), 251-262.

Electronic sources

[1] ČIŽINSKÝ, PAVEL: *Příručka "Cizinecký zákon 2008- občané EU* (2008) [Handbook "Act on Residence 2008 – Citizens of the EU (2008)"], available at: http://cizinci.poradna-prava.cz/pravni-analyzy.html [cit. 2015-09-29].

Legal and other sources

[1] Charter of Fundamental Rights of the European Union.
[2] COM(2009) 313 final Commission of the European Communities (2 July 2009, Brussels,). Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
[3] C 382/1 Council Resolution (4 December 1997) on measures to be adopted on the combating of marriages of convenience.
[4] L 158/77 Directive 2004/38/EC of the Europen Parliament and of the Council (29th April 2004) on the right of citizens

of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[5] SWD(2014) 284 final European Commission (26th September 2014, Brussels). Commission staff working document Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens Accompanying the document Communication to the European Parliament and to the Council Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens.

[6] The European Convention on Human Rights.

[7] Judgment of the Court of the European Union of 23 September 2003. Secretary of State for the Home Department vs. Hacene Akrich. Case C-109/01.

[8] Judgment of the Court of the European Union of 25 July 2008. Blaise Baheten Metock and others vs. Minister for Justice, Equality and Law Reform. Case C/127/08.

[9] Nález Ústavního soudu České republiky ze dne 1. dubna 2003 [Judgment of the Constitutional Court of the Czech Republic of 1 April 2003], No. II. ÚS 119/01.

[10] Rozsudek Nejvyššího správního soudu České republiky ze dne 16. května 2007 [Judgment of the Supreme Administrative Court of the Czech Republic of 16 May 2007], No. 2 As 78/2006-64.

[11] Rozsudek Nejvyššího správního soudu České republiky ze dne 23. dubna 2010 [Judgment of the Supreme Administrative Court of the Czech Republic of 23 April 2010], No. 5 As 14/2010-115.

[12] Rozsudek Nejvyššího správního soudu České republiky ze dne 31. srpna 2012 [Judgment of the Supreme Administrative Court of the Czech Republic of 31 August 2012], No. 5 As 104/2011-102.

[13] Rozsudek Nejvyššího správního soudu České republiky ze dne 2. října 2013 [Judgment of the Supreme Administrative Court of the Czech Republic of 2 October 2013], No. 1 As 58/2013-43.

[14] Rozsudek Nejvyššího správního soudu České republiky ze dne 7. listopadu 2013 [Judgment of the Supreme Administrative Court of the Czech Republic of 7 November 2013], No. 2 As 59/2013-33.

[15] Rozsudek Nejvyššího správního soudu České republiky ze dne 30. dubna 2014 [Judgment of the Supreme Administrative Court of the Czech Republic of 30 April 2014], No. 3 As 101/2013-34.

[16] Rozsudek Nejvyššího správního soudu České republiky ze dne 19. června 2014 [Judgment of the Supreme Administrative Court of the Czech Republic of 19 June 2014], No. 2 As 52/2013-69.

[17] Rozsudek Nejvyššího správního soudu České republiky ze dne 22. dubna 2015 [Judgment of the Supreme Administrative Court of the Czech Republic of 22 April 2015], No. 6 Azs 32/2015-30.

[18] Rozsudek Nejvyššího správního soudu České republiky ze dne 23. dubna 2015 [Judgment of the Supreme Administrative Court of the Czech Republic of 23 dubna 2015], No. 7 Azs 80/2015-31.
[19] Rozsudek Nejvyššího správního soudu České republiky ze dne 6. srpna 2015 [Judgment of the Supreme Administrative Court of the Czech Republic of 6 August 2015], No. 10 Azs 115/2015-38.
[20] Treaty on the Functioning of the European Union.
[21] Usnesení předsednictva České národní rady č. 2/1993 Sb., o vyhlášení Listiny základních práv a svobod jako součásti ústavního pořádku České republiky, jak vyplývá ze změny provedené ústavním zákonem č. 162/1998 Sb. [Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the Chapter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic No. 2/1993 Coll.].
[22] Usnesení rozšířeného senátu Nejvyššího správního soudu ze dne 26. července 2011 [Resolution of the Supreme Administrative Court of the Czech Republic (extended chamber) of 26 July 2011], No. 3 As 4/2010-151.
[23] Zákon č. 379/2007 Sb., kterým se mění zákon o pobytu cizinců na území České republiky a některé další zákony [Act No. 379/2007Coll., which is amending the Act on the Residence and some other laws].
[24] Zákon č. 89/2012 Sb., občanský zákoník Act No. 89/2012 Coll., New Czech Civil Code].
[25] Zákon č. 326/1999 Sb., o pobytu cizinců na území České republiky a o změně některých zákonů, ve znění pozdějších předpisů.

[26] Zákon č. 94/1963 Sb., o rodině v posledním znění [Act No. 94/1963Coll., Czech family law, in its latest version before its cancellation by the New Czech Civil Code on 1st January, 2014].

[27] Zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů [Act No. 40/2009 Coll., Criminal Code, as subsequently amended].