EAST-WEST STUDIES

Journal of Social Sciences of Tallinn University School of Governance, Law and Society

EWS Number 8 (47) December 2017

EAST-WEST STUDIES

Journal of Social Sciences of Tallinn University School of Governance, Law and Society

EWS Number 8 (47) December 2017

EAST-WEST STUDIES

Journal of Social Sciences of Tallinn University School of Governance, Law and Society

Narva mnt. 29
10120 Tallinn
http://www.tlu.ee/en/School-of-Governance-Law-and-Society
ISSN 1736-9541
ISBN 978-9949-29-232-5

CONTENTS

PREFACE

It is my distinct pleasure to introduce a new edition of the East West Studies Journal. This edition, perhaps more than previous ones, exhibits the ever-growing complexity of challenges confronting contemporary legal scholarship. The edition has three groups of articles, focusing on international law, human rights and the rights of the vulnerable groups respectively. International law is the subject of the articles by Tiina Pajuste, who writes about the evolution of the concept of immunity of international organizations, and by Heiki Lindpere, who addresses the question of protection and preservation of marine environment. International law is also relevant in the article by Heidi Kaarto (protection of the environment as a mandatory requirement) and by Gaziza Shakhanova (the architecture of security in the Eurasian region). Rao Javaid Iqbal´s and Tahir Mahmood's contribution comparing Islamic and western traditions in the context of Pakistan belongs also into the international law section. Human rights is the main area of research for Carsten Wulff (the right to be forgotten) and Mari-Ann Susi (animal rights). The rights of vulnerable groups are investigated by Marju Medar and others in the article reporting about the complexities of participation in the Estonian labor market, and by Zsolt Bugarski, Hans van Ewijk, Jean-Pierre Wilken and Rait Kuuse analyzing comparatively the implementation of article 19 of the UN Convention of the Rights of People with disabilities. I invite you to enjoy the exemplary analysis and thought-provoking discussions.

Mart Susi

Professor of Human Rights Law

Editor

THE EVOLUTION OF THE CONCEPT OF IMMUNITY OF INTERNATIONAL ORGANISATIONS

Tiina Pajuste

ABSTRACT

This article looks at the change in the conceptual foundations of the immunity of international organisations, paying special attention to the nature of the immunity of the first international organisations and the later disappearance of that unique approach. Three distinct stages in the development of the concept of immunity of international organisations can be discerned. In the first stage, the early international organisations were bestowed immunity derived from an augmented concept of neutrality. The second stage witnessed the granting of diplomatic privileges and immunities to certain organisations and their officials. The third stage involved the adoption of the concept of 'functional immunity' of international organisations. The article will also engage with the discussions (or lack of them) surrounding the adoption of immunity provisions and study the progression of analytical engagement with the concept of immunity. An examination of these stages will reveal how changes in the conceptual bases of immunity initially came about mostly due to practical considerations and without an analysis of the conceptual transformation that resulted.

Keywords: *international organisations, concept of immunity, immunity from neutrality, League of Nations, United Nations.*

I. INTRODUCTION

The first international organisations were established in the middle of the nineteenth century, at a time when states had absolute immunity.[1] The main concern in that process was ensuring that host states could not interfere in the functioning of those new organisations.[2] It was thought natural, if not inevitable, to grant immunity to international organisations, guided by the example of state immunity. The initially limited immunities developed over time and expanded on the basis of privileges and immunities of states and their representatives, as it was convenient to refer to this already existing category of law.

The development of the concept of immunity of international organisations happened in several stages. The first stage witnessed the extension of the status of neutrality and independence to some riparian commissions. The second stage started with the establishment of the League of Nations and the granting of diplomatic privileges and immunities to that organisation. The third stage began with the founding of the United Nations and the adoption of the concept of 'functional immunity' of international organisations. This article aims to demonstrate how the initial unique concept of immunity disappeared due to the utilisation of previously established concepts, and how immunity later changed along with the development of international organisations.

II. THE IMMUNITY OF EARLY INTERNATIONAL ORGANISATIONS – 'IMMUNITY FROM NEUTRALITY'

Although later organisations were greatly influenced by the privileges and immunities of states and their officials, the im-

[1] This immunity was first recognised by the US Supreme Court in the *Schooner Exchange* case, where the court concluded that states are exempt "from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality": *The Schooner Exchange v. M'Faddon & Others*, US Supreme Court, 11 *United States Reports* 144.

[2] The relevance of guaranteeing independence from the host state was reaffirmed, for example, by the Constitutional Committee of the ILO while discussing the status and immunities to be accorded to the ILO: "international institutions should have a status which protects them against control or interference by any one government in the performance of functions for the effective discharge of which they are responsible": ILO, General Note (on the Status, Immunities and Other Facilities to be Accorded to the International Labour Organisation by Governments), First Session of the Committee on Constitutional Questions of the Governing Body, 27(2) *International Labour Office Official Bulletin* (1945) p. 199.

munities of the first international organisations were established independently from influence by the rationales and principles behind state immunity. Immunities were granted on the practical basis of simple necessity, to guarantee independence from host states (as organisations did not, and do not, possess territory of their own, and have to function on the territory of a host state). The immunities evolved relatively quickly from the recognition of states that the common benefits achievable by organised cooperation would not be achievable if individual members were permitted to apply their laws at will to the functions and activities of international organisations.[3] Also, the host state would have more influence on an organisation based on its territory, which would not be acceptable to the other member states.

Such practical concerns necessitated granting immunities already to the first organisations. For example, the personnel and establishments of the European Commission of the Danube were given immunity in order to guarantee independence in carrying out its functions. This was done by Article 21 of the Public Act of 1865:

> "The works and establishments of all kinds created by the European Commission of the Danube […] shall enjoy the neutrality stipulated by Art. 11 of the said Treaty, and shall be, in case of war, equally respected by all the belligerents.
>
> The benefit of this neutrality shall be extended, with the obligations which spring from it, to the general inspection of the navigation, to the administration of the Port of Sulina, to the staff of the Navigation Cash Office and Seamen's Hospital, and lastly, to the technical staff charged with the superintendence of the works".[4]

The term 'neutrality' may seem puzzling, but subsequent treaties, practice by the host state and writings on the topic point to the conclusion that this 'neutrality' resulted in immunity. The concept of neutrality was adapted to fit the context of international organisations and fairly swiftly evolved to a grant of immunity. There are views that this initial grant of neutrality by the Public Act of 1856 already constituted giving the Commission diplomatic immunity. For example, it has been asserted that "this highly important Act announces neutrality for the Commission and all its works and agencies, thus placing the highly complex institution *under the protection of diplomatic immunity in all respects*".[5] It seems more plausible, however, that the main reason for the states to grant protection to the Commission, predicated on the juridical concept of neutrality, was to safeguard the personnel of the Commission should war break out among the member states.[6]

The concept of neutrality, as it was applied to international institutions and their personnel, was a departure from the classic concept applied to states. The 'neutrality of institutions' concept merely granted inviolability and imposed the obligation to grant all belligerents within the jurisdictional area equal rights and equal opportunity to make use of the facilities and the regime of the Commission. The institution was powerless to protect itself and its status. Conferring neutrality on the Commission was also a means to grant independence from the influence and control of a single member state.[7] As

---

[3] Gordon H. Glenn, Mary M. Kearney and David J. Padilla, "Immunities of International Organizations" (1981–1982) 22 *Virginia Journal of International Law* pp. 266–7. For further discussion on reasons for granting immunities to international organizations, see, e.g., A. Hammerskjöld, "Les immunités des personnes investies de fonctions internationales" (1936-ii) 56 *Recueil des Cours* pp. 151–2; Hugh McKinnon Wood, "Legal Relations between Individuals and a World Organisation of States" (1945) 30 *Transactions of the Grotius Society for 1944* pp. 143–4; C. Wilfred Jenks, *International Immunities* (London: Steven & Sons Limted, 1961) pp. xiii, 40–1, 166–7; Niels Blokker, "International Organizations: the Untouchables?" (2013) 10 *International Organizations Law Review* (2013) p. 260; Johan G. Lammers, "Immunity of International Organizations: The Work of the International Law Commission" (2013) 10 *International Organisations Law Review* p. 281 (on what the ILC considered as the justification for privileges and immunities of international organizations).

[4] Article 21, Public Act of the European Commission of the Danube, 2 November 1865, 45 *British and Foreign State Papers* 98.

[5] Gordon E. Sherman, "The International Organization of the Danube Under the Peace Treaties", (1923) 17 *American Journal of International Law* p. 448 [emphasis added]. The same approach is taken in Clyde Eagleton, *International Government* (3rd edition, New York, The Ronald Press Company, 1957) p. 163.

[6] This view is shared by Linda S. Frey and Marsha L. Frey, *History of Diplomatic Immunity* (Ohio State University Press, 1999) p. 544.

[7] For another discussion of this concept of neutrality of institutions, see David B. Michaels, *International Privileges and Immunities: A Case for a Universal Statute* (The Hague, Martinus Nijhoff, 1971) pp. 36-7.

Secretan points out, "this method has nothing in common with diplomatic privileges and immunities," but "the underlying object is the same, namely the protection of the independence of the agents of the international community".[8]

Accordingly, the protection of international organisations was initially conceived as an adaptation of the pre-existing concept of neutrality to the context of international organisations. Later on, the concept of 'neutrality of institutions' developed independently of the neutrality in the context of the law of war. The content and evolution of this concept of 'neutrality' becomes clearer by looking at subsequent treaties dealing with the European Commission of the Danube. Article VII of the 1871 Treaty of London, revising certain stipulations contained in the Treaty of 1856, extends the protection of neutrality to other categories of the Commission's staff and reveals a notion of 'immunity from neutrality':

> "All works and establishments of every nature created by the European Commission in execution of the Treaty of Paris of 1856 or of the present Treaty, shall continue to enjoy the neutrality which has protected them hitherto and which shall be equally respected in the future and in all circumstances by the High Contracting Parties. The *benefits of such immunity as may spring from this neutrality* shall be extended to the entire administrative and technical personnel of the European Commission."[9]

It is peculiar to see that it is the "works and establishments" and the "administrative and technical personnel" that are granted the benefits and not the organisation itself. This shows an interesting parallel with state immunity resulting from the ambassador's protection. Most likely this approach relied on the presumption that if the personnel and premises are protected, the organisations themselves are protected too.[10] Some years later, the need for clarity most likely incited the inclusion of Article 53 in the Treaty of Berlin of 1878, which makes the independence of the Commission explicit:

> "The European Commission of the Danube on which Rumania shall be represented is maintained in its functions, and shall exercise them henceforth as far as Galatz in *complete independence of the territorial authorities*. All the treaties, arrangements, acts and decisions relating to its rights, privileges, prerogatives, and obligations are confirmed".[11]

This provision (or any other agreement concluded up to this point) did not contain any mention of diplomatic immunities – the immunity and independence of the Commission were seen as resulting from the neutrality of the organisation. Nonetheless, this approach changed. This might have been due to the Romanian Government assimilating the members of the Commission and its non-Romanian personnel to members of accredited diplomatic missions. According to the Secretary-General of the Commission, "the Rumanian Government has recognized that officials of the Commission should be treated as the staff of a diplomatic mission".[12] As part of this, Commission officials were granted tax exemptions and non-Romanian officials were also given an exception from customs duty. Hammerskjöld also points out that:

> *"Quant aux membres de la Commission, le Gouvernement roumain semble, d'après les données dont nous disposons, accorder les pleines immunités non seulement aux membres titulaires - ce qui va de soi, eu égard au fait qu'il s'agit de*

---

[8] Jacques Secretan, "The Independence Granted to Agents of the International Community in Their Relations with National Public Authorities" (1935) 16 *British Year Book of International Law* p. 61.

[9] Article VII, Treaty of London, 13 March 1871, 16 De Martens, *NRG*, Part II, 273 [emphasis added].

[10] This is also pointed out in Edwin H. Fedder, "The Functional Basis of International Privileges and Immunities: A New Concept in International Law and Organization" (1960) 9 *American University Law Review* p. 62.

[11] Article 53, Treaty of Berlin, 13 July 1878, De Martens, *NRG*, 2nd Series, Tome III, at p. 449 [emphasis added].

[12] Francis Rey, "Les Immunités des fonctionnaires internationaux" (1928) *23 Revue critique de droit international privé* p. 14.

> *diplomates au sens étroit du mot - , mais aussi aux suppléants, qui sont des consuls."*[13]

One can assume that the assimilation of officials of the Commission to diplomats occurred due to the relative ease of adding new entities to a pre-existing category that serves the same purpose, rather than creating a new status, which would require new legislation or rules to implement it.

This approach was solidified with the Convention Instituting the Definitive Statute of the Danube of 1921, which constituted the International Commission of the Danube and provided that "[t]he property of the International Commission and the persons of the Commissioners are entitled to the privileges and immunities which are accorded in peace and war to accredited diplomatic agents".[14] The approach taken by Romania and the 1921 Convention might have influenced subsequent writers to claim that the Danube Commission was granted diplomatic immunity from the moment of its establishment and to neglect the uniqueness of the actual approach first adopted, i.e. of using the concept of neutrality and deriving immunity from that.

The immunities granted to members of tribunals, too, influenced the development of the immunity of international organisations. For example, the 1907 Hague Convention for the Pacific Settlement of International Disputes granted diplomatic privileges to members of the Permanent Court of Arbitration who did not reside in their own country.[15] Thus, granting diplomatic immunity to non-diplomats was not a new phenomenon when it started occurring in the context of international organisations.

This bestowing of diplomatic immunity in relation to the Danube Commission happened without a theoretical analysis of the compatibility of this concept with the Commission and its needs. There are various major differences between states and international organisations with respect to immunity. Jenks highlighted three such differences. First, the special importance of immunities "in relation to the State of which the official is a national" is unique to international organisations, as "the considerations of principle involved differ profoundly from those applicable to diplomatic immunity". Second, in the case of immunities of international organisations there is no sending state that can exercise jurisdiction and an equivalent jurisdiction "therefore has to be found either in waiver of immunity or in some international disciplinary or judicial procedure". Third, Jenks emphasised the role of "sanctions which secure respect for diplomatic immunity are the principle of reciprocity and the danger of retaliation by the aggrieved State" and noted that the same does not apply with respect to international organisations. He concluded that:

> In view of such factors as these the functional requirements of international organisations need to be considered on their own merits and not on the basis of automatic assimilation to the functional requirements of diplomatic intercourse.[16]

Subsequent organisations to which states chose to grant immunity mostly followed the lead of the Danube Commission, though early on there were some differences in approach. For example, Hammerskjöld notes that the position of

---

[13] A. Hammerskjöld, "Les immunités des personnes investies de fonctions internationales" (1936-ii) 56 *Recueil des Cours* pp. 152. In English: "With regard to the members of the Commission, the Government of Romania seems, from the data available to us, to grant full immunities not only to the titular members - which is self-evident, given the fact that they are diplomats in the narrow meaning of the word - but also to alternates, who are consuls."

[14] Article 37, Convention Instituting the Definitive Statute of the Danube, 23 July, 1921, 26 *League of Nations Treaty Series*, No 647, p. 173.

[15] Article 46, para 4, Hague Convention of 1907 for the Pacific Settlement of International Disputes, Second Peace Conference, The Hague, 1907, *Actes et documents*, Tome I, p. 612. The provision was the following: "Les Membres du Tribunal, dans l'exercise de leurs fonctions et en dehors de leur pays, jouissent des privilèges et immunités diplomatiques" ("The members of the tribunal, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities").

[16] C. Wilfred Jenks, *International Immunities* (London: Steven & Sons Limted, 1961) p. xxxvii.

the Commission of the Elbe was "*moins généreux*" (less generous), as the Elbe Navigation Act limits granting diplomatic privileges only to the delegates, the Secretary General and the Deputy Secretary General. Nevertheless, the Act further stipulates that "the persons designated by the Commission" will receive all necessary facilities for the performance of their duties.[17]

It seems clear that the change in approach – from the unique "neutrality" concept to that of "diplomatic immunity" – did not result from a considered analysis of the needs of international organisations or the repercussions that the change would bring about. It was due to the convenience of utilising a previously established concept – temporary practicality trumped conceptual clarity. This assimilation set the tone when it came to establishing the first universal organisation (in relation to its subject matter) and deciding its immunity regime.

III. THE LEAGUE OF NATIONS' ADOPTION OF "DIPLOMATIC IMMUNITY"

At the time of the establishment of the League of Nations, granting immunities to international organisations was still haphazard and unsystematic.[18] Bestowing immunity on international organisations in the 19th and at the beginning of the 20th century was far from being the rule; there were many organisations, especially the more technical or scientific ones, which existed without any special treatment or rights being accorded to them. For example, neither the Universal Postal Union (established 1874) nor the International Copyright Union (1886) nor their staff or accredited delegates initially had any immunity.[19]

However, the League officials were given immunity in Article 7, which stated that "[r]epresentatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities".[20] The reasons for inserting the clause granting diplomatic prerogatives to the League officials into the British draft (which was the basis for subsequent drafts) have not been recorded, and there was apparently no discussion of this provision in the Commission on the League of Nations.[21] Hill, who wrote an extensive analysis of the privileges and immunities of the League officials, believed that this provision was not based on an analysis of the immunities of earlier international organisations, and that at that time there was no established practice concerning international officials to refer to. He claimed that the decision to give diplomatic privileges and immunities to representatives of member states when attending meetings followed the general practice of granting diplomatic immunity to diplomatic representatives sent to *ad hoc* international conferences.[22] As Blokker highlights, "the regime of diplomatic privileges and immunities was readily available, well-known and generally accepted" and a means to immediately provide "these officials with the necessary status and protection to perform their functions".[23] In all probability, this decision may not have been thoroughly explored during

---

[17] A. Hammerskjöld, "Les immunités des personnes investies de fonctions internationales" (1936-ii) 56 *Recueil des Cours* pp. 153.

[18] On the history of the League of Nations in general see, e.g., Francis Paul Walters, *History of the League of Nations* (London, Oxford University Press, 1952); Bernard Shaw, *League of Nations* (London, The Fabian Society, 1929); Ruth B. Henig (ed), *The League of Nations* (Edinburgh, Oliver and Boyd, 1973); P. Raffo, *The League of Nations* (London, Historical Association, 1974); Lassa Oppenheim, *The League of Nations and Its Problems: Three Lectures* (London, Longmans, 1919); Alfred E. Zimmern, *The League of Nations and the Rule of Law: 1918-1935* (2nd edn, London, Macmillan, 1939); Gary B. Ostrower, *The League of Nations from 1919 to 1929* (Garden City Park, NY, Avery Publishing Group, 1995); George Gill, *The League of Nations from 1929 to 1946* (Garden City Park, NY, Avery Publishing Group, 1996); Frederick S.Northledge, *The League of Nations: Its Life and Times 1920-1946* (Leicester University Press, 1986); William E. Rappard, "Evolution of the League of Nations" (November 1927) 21(4) *American Political Science Review*; Ruud van den Berg, "Promising or Failing- League of Nations and United Nations Organisation"(1994-1995) 4(2) *Tilburg Foreign Law Review*; Donald S. Birn, *The League of Nations Union 1918-1945* (Oxford, Clarendon Press, 1981).

[19] Treaty relative to the formation of a General Postal Union, Berne, 9 October 1874, 147 *CTS* 136; Convention for the Creation of an International Union for the Protection of Literary and Artistic Works, 9 September 1886, WIPO Doc. WO001EN.

[20] Art 7, para. 4, Covenant of the League of Nations, 28 April 1919.

[21] Charles Howard Ellis, *The Origin, Structure & Working of the League of Nations* (Boston, Houghton Mifflin Company, 1929; reprinted in 2003) p. 75.

[22] Martin Hill, *Immunities and Privileges of International Officials: The Experience of the League of Nations* (Washington, Carnegie Endowment for International Peace, 1947) p. 4.

[23] Niels Blokker, "International Organizations: the Untouchables?" (2013) 10 *International Organizations Law Review* (2013) p. 265.

the haphazard and hasty deliberations that led to the creation of the League.[24] As Jenks wrote in 1961, the Covenant provision was so general in character that it "left unsettled a large proportion of the questions which arose in practice, especially since the use of the concept of diplomatic immunities for the purpose of defining international immunities furnished no answer to the novel questions which arose in connection with international organisations and their officials".[25]

As in the previously addressed case of the European Commission of the Danube, it was the officials, and not the organisation, who were protected under Article 7.[26] Only a later agreement, the second *modus vivendi* agreement,[27] granted immunity to the organisation itself. The officials of the League of Nations were given "diplomatic" privileges and immunities, without clarifying what that means. The subsequent *modus vivendi* agreements of 1921 and 1926 concluded with Switzerland, the League's host state, specified the content of these privileges and immunities (at least in the host country). The agreements in question did not purport to be an official interpretation of the Covenant; they were a practical solution to the problems arising out of the application of Article 7. Yet they influenced the development and understanding of the League officials' privileges and immunities and their position in other states.

The first, provisional *modus vivendi* of 1921 between the League and the Swiss Government was constituted by a letter of 19 July 1921, from the Head of the Federal Political Department to the Secretary-General, and the acceptance letter by the latter of the propositions. The Swiss Federal Council, mostly due to the small number of League functionaries, decided to apply the existing law of diplomatic immunity to them. This decision to assimilate the functionaries of the League to the members of diplomatic missions of the corresponding rank at Bern was not unprecedented. As mentioned above, the same was done to the officials of the European Commission of the Danube by the Romanian Government.[28] The appropriateness of this assimilation can be questioned. As mentioned before, the motivation behind the decision was convenience. It was not the result of a thorough analysis to determine the privileges and immunities that would be required for the independence of the organisation. This assimilation has been seen as the cause for the Swiss Council ignoring "the distinction between those privileges and immunities required by international law and those granted from courtesy" and as resulting in an extension to the League of "exemptions that could not technically be demanded under the covenant".[29] The assimilation was done with the first section of the agreement:

> "The staff of the Secretariat of the League of Nations and the International Labour Office shall be accorded the same prerogatives and immunities as are conferred by international law and practice on the staff of diplomatic missions; it shall accordingly be placed on the same footing, *mutatis mutandis*, as the members of diplomatic missions accredited to the Confederation.[30]

By the terms of this agreement, the personnel of the Secretariat and of the International Labour Office were divided into two classes, equivalent to those into which the members of diplomatic missions accredited in Switzerland were grouped. The first or 'exterritorial' category was composed of those officials who corresponded to public functionaries. The

---

[24] This is the view taken in Frey and Frey, *supra* note 6, p. 547.

[25] C. Wilfred Jenks, *International Immunities* (London: Steven & Sons Limited, 1961) p. 1.

[26] As Wood highlights, "[l]ittle consideration seems to have been given to an organization's privileges and immunities, even during the period 1920–1945": Michael Wood, "Do International Organizations Enjoy Immunity Under Customary International Law?" (2013) 10 *International Organizations Law Review* pp. 291.

[27] Communications from the Swiss Federal Council Concerning Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office, Annex 911a, 7 *League of Nations Official Journal* (1926), p. 1422.

[28] See *supra* footnotes 11, 13.

[29] Frey and Frey, *supra* note 6, pp. 548–9.

[30] Section I, The provisional *modus vivendi* of 1921 with the Swiss Federal Council, letter of July 19, 1921, from the Head of the Federal Political Department to the Secretary-General of the League of Nations, unofficial translation found in Annex I of Hill, *supra* note 19, pp.121–37.

second category consisted of "technical or manual personnel" and included those who, despite not being assimilated to public functionaries, were engaged and paid by the League and were in the exclusive service of the Secretariat or the ILO.[31]

The subsequent 1926 *modus vivendi*, besides settling the question of the tax exemption of Swiss officials, "summarized and completed" the arrangement of 1921.[32] Unlike its predecessor, it was submitted to the League Council for approval and published in the *Official Journal*. Article 1 of the agreement contains the grant of jurisdictional immunity to the League:

> "The Swiss Federal Government recognizes that the League of Nations, which possesses international personality and legal capacity cannot, in principle, according to the rules of international law, be sued before the Swiss Courts without its express consent".[33]

This was the first explicit provision granting immunity to the organisation itself, instead of merely protecting its officials. On the other hand, the focus of the agreement was still on the staff of the organisation. This is illustrated by the fact that the heading of the agreement referred explicitly to the staff of the League and of the ILO and did not mention the immunities of the League as such. The agreement maintained the division of staff into the aforementioned two categories. Immunity from jurisdiction, both civil and criminal, was granted to agents of the first category, subject to the waiver of immunity. Members of the second category and Swiss nationals of both categories were accorded jurisdictional immunity only for official acts performed within the limits of their functions. The same article concludes by declaring that the League of Nations "will endeavour to facilitate the proper administration of justice and execution of police regulations at Geneva",[34] but due to the non-binding language used, this is not a concrete legal obligation of the League.

Most writers of the inter-war period (and some post-World War II writers) dealt with the immunity of the League, and of other international organisations and their officials as an extension of diplomatic privileges to a new class of persons, and not as a new phenomenon.[35] For example, Aufricht asserts that "traditional rules of international law relating to the privileges and immunities of states and their diplomatic agents have been extended to a new class of persons, namely, to public international organizations".[36] The granting of immunity to the League and its officials was willingly accepted. It was seen as necessary for the independent functioning of the organisation. The main controversy was over whether an individual could enjoy diplomatic protection against the state of which he himself is a national.[37] Article 7 of the Covenant of the League made no differentiation between functionaries of the League on the basis of their nationality. The *modus vivendi* agreements, however, excluded functionaries who were nationals of the state of residence from some of the benefits of privileges and immunities. Their special treatment was confined to immunity "in respect of acts performed by them in their official capacity and within the limits of their official duties" and their salaries from the League were exempted from

---

[31] *Ibid*, pp. 121–2.

[32] Communications from the Swiss Federal Council Concerning Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office, Annex 911a, 7 *League of Nations Official Journal* (1926), p. 1422.

[33] *Ibid*, Article 1.

[34] *Ibid*, Article 7, Article 9.

[35] This is the view taken in Cecil J. B. Hurst, "Diplomatic Immunities – Modern Developments" (1929) 10 *British Year Book of International Law*; C. van Vollenhoven, "Diplomatic Prerogatives of Non-Diplomats", (1925) 19 *American Journal of International Law*; Lawrence Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest" (1931)25 *American Journal of International Law*; Josef L. Kunx, "Privileges and Immunities of International Organizations" (1947) 41 *American Journal of International Law*; Hans Aufricht, "The Expansion of the Concept of Sovereign Immunity: With Special Reference to International Organizations" (1952) 46 *ASIL Proceedings*; Norman L. Hill, "Diplomatic Privileges and Immunities in International Organizations" (1931-1932) 20 *Georgetown Law Journal*.

36 Aufricht, *supra* note 29, p. 86.

37 This is also pointed out in Niels Blokker, "International Organizations: the Untouchables?" (2013) 10 *International Organizations Law Review* pp. 264–6, as part of a useful summary of six elements prevalent in the early discussions about the immunity of international organizations.

cantonal and municipal direct taxes.[38] Limiting their privileges and immunities was the result of considerations of expediency – the practical necessity of securing a *modus vivendi* acceptable to the state of residence.[39]

The predominant opinion in doctrine during the inter-war period based the immunities of international functionaries on their need for independence in the exercise of their functions and held almost unanimously that states are not authorised to make any distinction between their nationals and those of other states. As the guarantee of immunities was seen as essential to the independence of such officials, there could be no valid reason for making a distinction among them on the basis of their nationality.[40] This view was understandably also endorsed by international organisations themselves. For example, the Director of the International Labour Office made the following statement:

> "The Office and its officials are required to defend common international interests which may sometimes be contrary to the policy or opinion of a particular country. In all cases it is necessary that the action of the Office and its officials should be free from all pressure on the part of an individual state. This is the real meaning of the diplomatic immunities granted to the Office and its officials. It will therefore be seen that there are three points about the immunities: (1) they belong not to the individual but to the office which he fills; (2) they are a right and not a favour; (3) they are granted without distinction of nationality".[41]

Though writers and international organisations supported treating all officials of organisations on a similar basis, certain governments (mostly host states) were reluctant to recognise diplomatic privileges and immunities in favour of their own nationals. This resulted in the problem remaining unsolved until the creation of the United Nations and subsequent treaties on privileges and immunities.

A related issue was the possible denial of justice to third parties. When the country of origin of an international organisation's official coincides with that of his residence, local courts do not have competence to take on the case due to the jurisdictional immunity of the official. Already in the inter-war period, there were fears that creating a class of persons over whom courts cannot exercise jurisdiction may result in a denial of justice to third parties.[42] However, the common understanding seemed to be that the waiver of immunity is a sufficient tool for counterbalancing the immunity of international officials.[43] This was also the opinion in the Institut de Droit International in 1924, when they adopted a resolution stating that:

> "*Au cas où les agents de la S. D. N. seraient assignés ou poursuivis devant une juridiction quelconque, l'autorité compétente pour procéder à leur nomination aura qualité pour, se prononcer sur la levée de l'immunité.*"[44]

---

[38] Article 9, Communications from the Swiss Federal Council Concerning Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office, Annex 911a, 7 *League of Nations Official Journal* (1926), p. 1422.

[39] Preuss, *supra* note 29, pp. 709–10.

[40] This position with regard to nationals is found, for example, in Preuss, *supra* note 29, pp. 709–10; C. van Vollenhoven, "Diplomatic Prerogatives of Non-Diplomats" (1925) 19 *American Journal of International Law* p. 471; Norman L. Hill, "Diplomatic Privileges and Immunities in International Organizations" (1931-1932) 20 *Georgetown Law Journal* pp. 44–5; and Secretan, *supra* note 8, p. 71.

[41] Report of the Director of the International Labor Office, International Labour Conference, 8th Session, Geneva (1926), Vol II, para. 25 at p. 51.

[42] This concern has been articulated, e.g, in Secretan, *supra* note 8, p. 71; and in Henri T. P. Binet, "Recent Developments Affecting Diplomatic Privileges and Immunities" (1931) 13 *Journal of Comparative Legislation and International Law* p. 86.

[43] E.g., Kunx, *supra* note 29, p. 861; and Secretan, *supra* note 8, p. 72.

[44] Résolutions concernant l'interprétation de l'art. 7 al. 4 du Pacte de la Société des Nations, Annuaire de l'Institut de Droit International – session de Vienne – Août 1924 (1925), p. 180 (Article 4). In English: "In the event that the agents of the S.D.N. are accused or prosecuted in any jurisdiction, the authority who was competent to appoint them, is competent to decide on the waiver of immunity."

The rapporteur De Visscher, when introducing this Article, stated that "*il faut prévenir les abus*" (abuse must be prevented).[45] Writing a couple years later, Binet goes so far as to claim that the possibility of the competent authorities refusing to waive the immunity of an official "is surely too remote and improbable to be taken into account" as "[i]nternational institutions, like individual States, have the greatest interest in entertaining the most amicable relations with all States".[46] Naive as this opinion might seem, it reflects the trust placed in international organisations (especially the League of Nations) at that time.

Despite the initial acceptance of granting diplomatic immunity to officials of international organisations, discussion soon began over the appropriateness of equating the status of diplomats to the status of such officials. As Blokker notes, there was increasing support for the view that the legal status of officials of international organisations is fundamentally different from that of diplomats, and that privileges and immunities for diplomats could not simply be used for them as well.[47] The 1924 Vienna session of the Institut de Droit International looked in detail at the basis of diplomatic privileges and immunities of the agents of the League of Nations.[48] The Report by Adatchi and De Visscher, which formed the basis for discussion, stated that the key difference between diplomats and officials of international organisations was that diplomats exercise "*une fonction d'intérêt strictement national et ne relève que du Gouvernement qui l'a accrédité*" (a function that is strictly of national interest and is the sole responsibility of the Government that accredited them), whereas officials exercise "*une fonction d'intérêt international, c'est-à-dire commun aux Membres*" (a function that is of international interest, i.e. common to all Members). They pointed out the distinct source for the privileges and immunities of organisations, different from that of diplomatic immunity, which is to "*permettre* à *la Société d'exercer en pleine indépendance les fonctions de pacification et de coopération internationales que lui assigne le Pacte*" (allow the Society to exercise in full independence the functions of pacification and international cooperation, assigned to it by the Pact).[49] In the discussions, Mr De Lapradelle noted that "*l'extension des privilèges diplomatiques* à *la S. D. N. doit-elle* être *poursuivie avec prudence et dans le doute mieux vaut ne pas porter ces immunités aussi loin que celles dont bénéficient les* États" (the extension of diplomatic privileges to the S.D.N. must be pursued with prudence, and in case of doubt it is better to not extend these privileges as far as those enjoyed by the Member States). Mr Mercier added that "*qu'il n'y a pas identité de motif pour conférer aux agents de la S. D. N. les immunités des représentants des* États" (there is no need to confer to the agents of the S. D. N. the immunities of the representatives of the States).[50]

A decade later, Hammerskjöld agreed that "*cette divergence entre les bases secondaires des immunités diplomatiques proprement dites et des immunités accordées aux personnes investies de fonctions d'intérêt international suffit déj*à à *indiquer que les deux sortes d'immunités ne peuvent point* être *confondues*" (this divergence between the secondary bases of diplomatic immunities and the immunities granted to persons fulfilling functions in the international interest is already sufficient to indicate that the two kinds of immunities cannot be mixed up), but affirmed that despite their different natures the contents of immunities granted to both states and international organisations must be similarly strong to create the necessary guarantees to enable officials to perform their functions independently in the territory of a foreign state.[51]

IV. CREATION OF THE UN "FUNCTIONAL IMMUNITY" MODEL

The granting of privileges and immunities was not uncommon at the time when the establishment of the United Nations

[45] Annuaire de l'Institut de Droit International – session de Vienne – Août 1924 (1925), p. 99.

[46] Henri T. P. Binet, "Recent Developments Affecting Diplomatic Privileges and Immunities" (1931) 13 *Journal of Comparative Legislation and International Law* p. 86.

[47] Niels Blokker, "International Organizations: the Untouchables?" (2013) 10 *International Organizations Law Review* p. 265.

[48] Rapport sur l'art. 7, al. 4: Privilèges et Immunités diplomatiques des Agents de la S. D. N. de MM. Adatci et Charles de Visscher, Travaux Préparatoires de la Session de Vienne, Annuaire de l'Institut de Droit International – session de Vienne – Août 1924 (1925), p. 2. The Report looked at two other questions as well: the extent of the privileges and immunities of the League, and their application to officials of the ILO.

[49] *Ibid*, p. 3.

[50] Annuaire de l'Institut de Droit International – session de Vienne – Août 1924 (1925), pp. 102–3.

[51] A. Hammerskjöld, "Les immunités des personnes investies de fonctions internationales" (1936-ii) 56 *Recueil des Cours* p. 184.

was being prepared. Many international organisations had been bestowed privileges and immunities, to a large extent based on the example of the arrangements made between the League of Nations and the Swiss Government. These organisations and their experiences provided the precedents to be considered when it came time to elaborate the privileges and immunities of the UN. Quite surprisingly, the Dumbarton Oaks proposals for the UN Charter did not include any provisions about immunity.[52] However, despite the Preparatory Commission of the United Nations lacking a firm programme of privileges and immunities designed for the organisation, it did make certain recommendations relating to the subject matter.[53]

First, all officials, whatever their rank, should be granted immunity from legal process in respect of acts done in the course of their official duties. Yet they considered that not all officials needed "full diplomatic immunity", which should be limited to the cases where it is really justified. The Commission considered that any excess or abuse of immunity or privilege would be detrimental both to the interests of the international organisation and to the countries asked to grant such immunities. Second, only immunities and privileges that were "really necessary" should be requested. Third, the Commission recommended that, when the UN concludes contracts with private individuals or corporations, it should include in the contract an obligation to submit disputes arising out of the contract to arbitration. Fourth, privileges and immunities should only be conferred on officials "in the interests of the organization" and not for the benefit of the individual.[54] These recommendations have been seen as an effort to avoid one difficulty experienced by the League of Nations – the discrimination by governments between the position of the national versus the non-national.[55] The Preparatory Commission emphasised that the privileges and immunities were not granted in the interests of the individual but to ensure the smooth and efficient functioning of the institutions and that no unnecessary privileges would be given. The recommendations demonstrate that the Preparatory Commission did not envisage absolute immunity for international organisations and that it contemplated safeguards against unaccountability.

The question of the privileges and immunities of the UN appeared on the agenda of the legal problems committee of the San Francisco Conference. The end result was that the Committee recommended the following text for inclusion in the Charter:

> "I.(1) The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes.
>
> (2) Representatives of the members of the Organization and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
>
> II. The General Assembly may make recommendations with a view to determining the details of the application of the foregoing provisions or may propose conventions to the Members of the United Nations for this purpose".[56]

This article was adopted later with only minor changes in wording.[57] It is significant that this provision avoids the use of the term 'diplomatic' in describing the nature and extent of the privileges and immunities that were to be granted.

---

[52] Proposals for the Establishment of a General International Organization, Washington Conversations on International Peace and Security Organization, 7 October 1944, available online at: http://www.ibiblio.org/pha/policy/1944/441007a.html (accessed 10.01.2015).

[53] Preparatory Commission of the United Nations, Study on Privileges and Immunities, *Report* (London, 1946), Chapter VII, Annex A, p. 62.

[54] *Ibid*.

[55] Michaels, *supra* note 7, p. 56.

[56] Commission IV (Judicial Organization), Committee 2 (Legal Problems), Report of the Rapporteur of Committee IV/2, as Approved by the Committee, Doc. 933 IV/2/42 (2), 12 June 1945, *Documents of the United Nations Conference on International Organisation, San Francisco, 1945,* Vol XIII, p. 703.

[57] Article 105, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

The Preparatory Commission had still used the expression 'diplomatic privileges and immunities' in their work.[58] The Legal Problems Committee decided to avoid the term 'diplomatic' and substituted that standard for the determination of the privileges and immunities with one that they considered more appropriate for the organisation. The new standard was the necessity of realising the purposes of the organisation and, in the case of its officials and the representatives of its members, providing for the independent exercise of their functions.[59] The drafters avoided analogy to sovereign immunities and emphasised a standard derived from the needs of the organisation itself.[60]

The use of the phrase 'diplomatic immunities' in the League of Nations Covenant had made it possible to apply to the League officials an existing body of law and practice that fulfilled the criteria for safeguarding the organisation and its officials. On the other hand, the negative aspect of the phrase was that it produced a legalistic problem as a result of the common definition of 'diplomatic'.[61] During the inter-war period, some prominent writers such as Hurst had arrived at the conclusion that it was unfortunate that the phrase 'diplomatic immunities' was used in the Covenant. He believed that the phrase was used too loosely and was inadequate to express the real purpose of the provision – placing the individuals covered by Article 7 of the Covenant in a position of non-subjection to local jurisdiction.[62] It has also been argued that anxiety concerning possible abuse, or the ever increasing number of persons enjoying diplomatic privileges, and the influence of nationalistic considerations, had a role to play in this change of approaches.[63] The Legal Problems Committee, like the Preparatory Commission, aimed to restrict the privileges and immunities to those truly necessary.

The draft article proposed by the Legal Problems Committee did not specify which specific privileges and immunities it covered. This was thought to be superfluous. The Committee stated that the "terms privileges and immunities indicate in a general way all that could be considered necessary to the realization of the purposes of the Organization, to the free functioning of its organs and to the independent exercise of the functions and duties of their officials". The Committee believed that it would have been impossible to establish a list valid for all the member states, while at the same time taking account of the special situation of host states.[64]

On the other hand, the Committee recognised that one of the difficulties with the League Covenant was that the exact nature and extent of diplomatic privileges and immunities remained without definition. Consequently, the Committee opted to insert paragraph II, which gave the GA the right to make recommendations or propose conventions to clarify the content of the privileges and immunities. The Committee contemplated that such recommendations could apply only to host states and possibly take the form of proposing a bilateral treaty, or that a general convention could be created to submit to all the members. The Committee added that these recommendations would not impair the provisions of paragraph I, which would become obligatory for all members as soon as the Charter became operative.[65]

The General Assembly took advantage of this opportunity and in January 1946 referred Chapter VII of the Report of the Preparatory Commission (dealing with privileges and immunities) to the Sixth Committee for consideration and reporting.[66] As a result, the Sixth Committee submitted six resolutions to the GA, one of which related to the adoption of the General Convention on Privileges and Immunities of the United Nations.[67] The Sixth Committee examined the respective advantages of the two options

---

[58] Preparatory Commission of the United Nations, Study on Privileges and Immunities (1946), p. 62.

[59] Report of the Rapporteur of Committee IV/2, Doc. 933 IV/2/42 (2), 12 June 1945, *Documents of the United Nations Conference on International Organisation, San Francisco, 1945,* Vol XIII, p. 704.

[60] This is highlighted in Alice Ehrenfeld, "United Nations Immunity Distinguished from Sovereign Immunity" (1958) 52 *American Society of International Law Proceedings* p. 88.

[61] Michaels, *supra* note 7, p. 56.

[62] Hurst, *supra* note 29.

[63] Kunx, *supra* note 29, p. 839.

[64] Report of the Rapporteur of Committee IV/2, Doc. 933 IV/2/42 (2), 12 June 1945, *Documents of the United Nations Conference on International Organisation, San Francisco, 1945,* Vol XIII, p. 705.

[65] *Ibid*, p. 704.

[66] Sixteenth Plenary Meeting, 19 January 1946, United Nations, *Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly* (London, 1946), p. 241.

[67] GA Resolution No 22(1), 13 February 1946.

for implementing the provisions of Article 105 – making recommendations or proposing conventions to the member states – and decided to recommend the latter, attaching a proposed general convention on the privileges and immunities of the United Nations to the resolution.[68] Along with the experience of the League of Nations and the two *modus vivendi* agreements, the immunities of states, as an already developed and functional system, served as a convenient model for setting out in detail the privileges and immunities of the UN.[69]

Jenks points to the important role a 1945 ILO Memorandum played in the process, despite it not formally constituting part of the *travaux préparatoires* of the General Convention.[70] The Memorandum interpreted the League of Nations experience and distilled it down to three basic propositions: (a) that international institutions should have a status which protects them against control or interference by any one government in the performance of their functions; (b) that no country should derive any national financial advantage by levying fiscal charges on common international funds; and (c) that international organisations (though the Memorandum was speaking about the ILO in particular) should be accorded the facilities for the conduct of their official business customarily extended by states to each other. Jenks emphasises that these propositions aim to give organisations "functional independence necessary to free international institutions from national control and to enable them to discharge their responsibilities impartially on behalf of all their members". This Memorandum greatly influenced the content of the General Convention, though the historical link was never formally recorded.[71]

The Sixth Committee reported to the GA that the discussion on the Convention had been "particularly exhaustive and thorough" and that the text submitted had been approved unanimously.[72] The only controversy that arose in discussing the convention (both in the Sixth Committee and the GA) was over Section 18(b, c), dealing with taxation and national service obligations of UN officials, and Section 30 of the Convention, which dealt with disputes over the application or interpretation of the Convention.[73] The core provision dealing with the immunity of the UN appears not to have given rise to any disagreement. This provision is the following:

> "The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."[74]

The general sentiment in the GA towards the Convention was expressed by the UK representative, who declared that:

> "It is important that in setting up this great new international Organization we should not ask for it to possess privileges and immunities which are greater than those required for its efficient organization. […] On the other hand, equally important is it to ensure that it has adequate privileges and immunities. To give too few would fetter the United Nations Organization

[68] Annex 22, Privileges and Immunities of the United Nations, Report of the Sixth Committee to the General Assembly, Appendix I, UN doc. A/43/Rev 1 in United Nations, *Plenary Meetings of the General Assembly* (1946) p. 644.

[69] According to Kunx, this seemed not only "logical in view of the historical development of the problem, but also highly advantageous, because of the relative clarity of international law concerning diplomatic privileges and immunities": Kunx, *supra* note 29, p. 837.

[70] ILO, General Note (on the Status, Immunities and Other Facilities to be Accorded to the International Labour Organisation by Governments), First Session of the Committee on Constitutional Questions of the Governing Body, 27(2) *International Labour Office Official Bulletin* (1945) p. 197–223.

[71] C. Wilfred Jenks, *International Immunities* (London: Steven & Sons Limted, 1961) pp. 15, 17.

[72] Except for paragraphs (b) and (c) of section 18, where the US delegate made reservations on the grounds that the right to exempt US nationals from taxation and from national service obligations was a prerogative of the Congress of the USA: *ibid*, p. 642.

[73] Appendix I, Report of the Sixth Committee to the General Assembly in United Nations, *Plenary Meetings of the General Assembly* (1946), p. 643; Statement by Sir Hartley Shawcross, representative of the United Kingdom, Thirty-First Plenary Meeting, 13 February 1946, United Nations, *Plenary Meetings of the General Assembly* (1946) pp. 452–3.

[74] Article II, Section 2, General Convention on the Privileges and Immunities of the United Nations, 1 *UNTS* 15, 13 February 1946.

in the discharge of its tasks. The Charter provides that the immunities and privileges to be granted should be such as are necessary for the fulfilment of its purposes, and that is exactly what this important and historic document does".[75]

It seems surprising that the disparity between the functional immunity imagined by the drafters of the Charter and the unqualified "immunity from evert form of legal process" the General Convention provides was not noticed or debated. This could have been the result of jurisdictional immunity of international organisations not being a major concern at that time.[76] Although states had enlarged their activities on a grand scale by then, international organisations had not. The UN was still a young organisation with limited activities and relatively few employees (at the end of 1949 the Secretariat numbered 4,166 compared to the 41,426 staff members in June 2014).[77] Many other major international organisations did not even exist. In addition, the post-war situation and the trust accorded to international organisations had their influences. The difference in the approaches – functional and essentially restricted immunity envisaged by the drafters of the Charter versus the absolute immunity provided by the General Convention – might also be due to the Charter being a creation of the states, while the clarification of privileges and immunities was done by an organ of the organisation. Though the General Assembly is composed of the representatives of all member states, the convention was essentially drawn up by the Sixth Committee. The organisation was probably more prone to grant itself as many privileges and immunities as possible, while the states drawing up the Charter preferred a restrictive approach.

V. THE RESULTING ABSOLUTE IMMUNITY

While the UN Charter speaks only of a functional immunity (immunities "necessary for the fulfilment of its purposes"[78]) to be enjoyed by the organisation before national courts, this standard is not clearly defined anywhere.[79] In doctrine too, the UN and other international organisations are said to enjoy immunity based upon its "functional necessity". The functional necessity standard is often considered to be "conceptually appealing because it is flexible enough to allow courts to balance the operational needs of international organizations against other important legal principles and public expectations, such as fairness to private litigants and accountability under the rule of law".[80] However, what appears like a rather restrictive concept of immunity, in practice turns out to be a broad and almost unlimited immunity from the jurisdiction of national courts. This development was most likely influenced by the example of the UN. As mentioned above, the General Convention speaks of 'immunity from suit' in an unqualified way, which has been generally understood to mean absolute immunity.[81]

Reinisch points out that one reason for the interpretation of functional immunity as absolute immunity could be the fact that multilateral privileges and immunities treaties often provide for an unqualified, hence absolute, immunity even

---

[75] Statement by Sir Hartley Shawcross, Thirty-First Plenary Meeting, 13 February 1946, United Nations, *Plenary Meetings of the General Assembly* (1946) p. 452.

[76] Michael Singer, "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns" (1995-1996) 36 *Virginia Journal of International Law* pp. 5 –56.

[77] 1949 numbers are found in UN, "The United Nations from 1946 to 1949", 1950 *Yearbook of the United Nations*, 4; and 2014 numbers in Report of the Secretary-General, "Composition of the Secretariat", UN Doc. A/69/292, 29 August 2014, p. 13. In comparison, the League of Nations in 1920 had 158 civil servants, which increased to 707 by 1931: "League of Nations Secretariat", available online: http://biblio-archive.unog.ch/detail.aspx?ID=245 (accessed 10.01.15).

[78] Article 105(1), Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

[79] For a detailed consideration of UN immunity and the alternative methods of addressing claims that have been set up by the UN, see Bruce C. Rashkow, "Immunity of the United Nations: Practice and Challenges" (2013) 10 *International Organisations Law Review* pp. 332–48.

[80] Steven Herz, "International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity" (2007-2008) 31 *Suffolk Transnational Law Review* p. 474. See further on functional necessity: e.g. Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff, 1994); Singer, *supra* note 59, p. 66; Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (4th edn, Leiden, Martinus Nijhoff Publishers, 2003) para. 324.

[81] August Reinisch and Ulf Andreas Weber, "In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement" (2004) 1 *International Organizations Law Review* pp. 59–60. The *de facto* "absolute" immunity of the UN is somewhat mitigated by the fact that article VIII, Section 29, of the Convention requires the United Nations to make provisions for appropriate modes of settlement of disputes "arising out of contracts or other disputes of a private law character to which the United Nations is a party".

where the constituent instrument speaks of functional immunity, as demonstrated in the case of the UN and its specialised agencies. The more precise and detailed rules of the multilateral treaties (such as the General Convention in relation to the UN) can be seen as interpretations of what "functional" means in respect to jurisdictional immunity.[82] This view is supported by the UN Office of Legal Affairs, which stated in a 1983 Opinion that:

> "Pursuant to Article 105, paragraph 3, of the Charter, the detailed application of this general principle was effected *inter alia* through the Convention on the Privileges and Immunities of the United Nations".[83]

The acceptance of the absolute immunity of international organisations is illustrated by the US bestowing certain international organisations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments" at the end of 1945, a time when foreign governments were absolutely immune from the jurisdiction of both state and federal courts in the US.[84]

National courts have also confirmed that the UN enjoys unconditional immunity from every form of legal process under Section 2 of the General Convention. In *Manderleir*[85], the plaintiff instituted proceedings with a view to obtain compensation from the UN or the Belgian Government for damage he claimed to have suffered "as the result of abuses committed by the United Nations troops in the Congo". The Court dismissed the proceedings in so far as they pertained to the UN on the ground that the organisation enjoyed immunity from every form of legal process. The Court stated that even though no provision had been made for settlement of disputes (pursuant to Article VIII, Section 29), Section 2 was applicable and retained its validity and that the immunity of the UN was absolute. The plaintiff also argued that Article 105 of the UN Charter only conferred on the UN such privileges and immunities as were necessary for the fulfilment of its purposes. The Court replied by emphasising that Section 2 of the Convention conferred on the UN a general immunity from legal process, which was not limited to the minimum strictly necessary for the fulfilment of the purposes stated in the Charter. The Court stated that since the Convention and Charter had equal status, the former, dated 26 February 1945, could not limit the scope of the latter, which dated from 13 February 1946.[86]

This judgment was upheld by the Brussels Appeals Court. The Appeals Court held that, in acceding to the General Convention, the signatories to the Charter had defined the necessary privileges and immunities and that the courts would be exceeding their authority if they were to arrogate to themselves the right of determining whether the immunities granted to the UN by that Convention were or were not necessary. The Court also confirmed that the immunity from legal process granted to the UN under the Convention was in no way conditional upon the organisation respecting other obligations imposed by the Convention, more particularly by article VIII, Section 29. It further held that, although it was true that Article 10 of the Universal Declaration of Human Rights stated that everyone was entitled to a hearing by a tribunal, the Declaration was not legally binding and could not alter the rule of positive law constituted by the principle of immunity from every form of legal process formulated in the Convention.[87] This last argument is of questionable quality, as the Declaration is not

---

[82] August Reinisch, *The Privileges and Immunities of International Organisations in Domestic Courts* (Oxford University Press, 2013) pp. 8–9.

[83] UN Office of Legal Affairs, "Question of the Application of Section 205 of the United States Foreign Missions Act of 1982 to the Permanent Missions Accredited to the United Nations: Opinion Prepared at the Request of the Committee on Relations with the Host Country", *UN Juridical Yearbook* (1983) p. 222.

[84] This was done by the Congress, which enacted the International Organisations Immunities Act [8 U.S.C. § 215, 22 U.S.C. §§288-288fm 26 U.S.C. §§892, 3306(c)(16), 3410(a)(5), 4253(c), 7701(a)(18), 42 U.S.C. § 409 (1976)]. See further, Kathleen Cully "Jurisdictional Immunities of Intergovernmental Organizations" (1982) 91(6) *The Yale Law Journal* 1167. For a more recent consideration of the position of international organizations' immunity in the US, see Aaron I. Young, "Deconstructing International Organization Immunity" (2012) 44 *Georgetown Journal of International Law* pp. 311–66; and Steven Herz, "International Organizations in U.S Courts: Reconsidering the Anachronism of Absolute Immunity" (2008) 31 *Suffolk Transnational Law Review* pp. 471–532.

[85] *Manderleir v United Nations and Belgian State*, Brussels Court of First Instance, Judgment of 11 May 1966, in United Nations, *Juridical Yearbook 1966* (United Nations: New York, 1968).

[86] *Ibid*, p. 283.

[87] *Manderleir v United Nations and Belgian State*, Brussels Appeals Court, Decision of 15 September 1969, in United Nations, *Juridical Yearbook 1969* (United Nations: New York, 1971) pp. 236–7.

the only treaty containing this right, which may also be considered to be part of customary law.

As examples of other jurisdictions, in *Boimah*[88] a US court held that "[u]nder the [General] Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases", and the Swiss Federal Tribunal, in the case of *Groupement d'entreprises Fougerolle*[89], dismissed an action for annulment of an arbitral award on the ground of CERN's "absolute immunity from suit". With some exceptions, the courts are in general not eager to challenge the absolute immunity of international organisations. The concept of immunity has not changed, which is re-affirmed by the work of the ILC that takes the view that organisations should be granted "immunity […] from every form of legal process, except in the case of an express waiver which, however, should not extend to any measure of execution or coercion".[90]

VI. CONCLUSION

The concept of immunity of international organisations evolved from an adapted version of neutrality to an absolute immunity from jurisdiction based on 'functional necessity'. This occurred in three distinct stages. The initial concept, as applied in the case of the European Danube Commission, was formulated by reference to "complete independence from the territorial authority" and "the benefits of neutrality". In the second stage, from the end of the 19th century onwards, the favourite standard was that of diplomatic privileges and immunities, which were extended to the organisations and their officials by assimilating the officials to the diplomatic representatives of states. The third stage involved the establishment of the UN and the standard of 'functional immunity' adopted in the UN Charter. Although 'functional immunity' was perceived as a concept with the rationale of limiting the extent of immunity, the subsequent practice of the organisation and its member states has interpreted this as an absolute immunity from jurisdiction. The concept of functional immunity was willingly adopted by other international organisations. This three-stage development has shown how conceptual changes can come about due to practical considerations and without much theoretical discussion along the way.

---

[88] *Boimah v United Nations General Assembly*, US District Court, 24 July 1987, 664 *F.Supp*. 69 (EDNY 1987), p. 71.

[89] *Groupement d'entreprises Fougerolle & consorts v CERN*, Swiss Federal Tribunal, 21 December 1992, 102 *ILR* (1996), pp. 209-15.

[90] Leonardo Díaz-González, Special Rapporteur, Fourth Report on Relations between States and International Organizations (Second part of the topic), UN Doc. A/CN.4/424, 24 April 1989, Draft Article 7. For a detailed discussion of the work of the ILC on this topic, see Johan G. Lammers, "Immunity of International Organizations: The Work of the International Law Commission" (2013) 10 *International Organisations Law Review* p. 280.

The 3 Capacities of a State in Protecting and Preserving the Marine Environment from the Harmful Impacts of Shipping: the Estonian Perspective

Heiki Lindpere

Estonians have been a sea-going nation for ages and have had their own Vikings similarly to other nations around the Baltic Sea. The oldest sea-going boat from the Bronze Age, with a length of 7,5 meters, width of 2,5 meters and a mighty bow, found at the Sõrve peninsula of Saaremaa (the island Ösel) is 2700 years old.[1] Today we are talking about contemporary registration of ships after the Republic of Estonia regained its independence on August 20th, 1991, on the basis of continuity[2]. The registration of ships has faced great changes and ships registered at the Courts are deemed *quasi immovables* and, therefore, several peculiarities arise in various dealings with ships.[3] Some of these deficiencies and the higher cost of money in Estonia, together with conservative foreign banking practices, have led to a situation where we do not have any cargo vessels over 500 tons in the Estonian Ship Register at the Courts, and the needs of the Estonian shipping community are met either by the Register of Bareboat Chartered Ships at the Estonian Maritime Administration[4] and/or by using cheaper flags of convenience. There are no more state-owned shipping companies left since privatisation of the 70% of shares of the Estonian Shipping Co Ltd. in summer 1997 (it had 82 vessels with a deadweight of over 500,000 tons, but has lost its weight in the economy today).

Estonia has several ports with a nice turnover. The biggest one Port of Tallinn, consisting of 5 units, reported in 2015 that they had 7081 ship calls, received 9,793 mln passengers and handled over 22,4 mln tons of cargo (mainly transit cargo, among that 12,8 mln tons of Liquid Bulk; domestic cargo or cabotage is still small – 58,000 tons).[5]

Shipping, ports and related businesses amount to about 5% of the Estonian GDP according to the approved "Estonian Maritime Policy 2010-2020" document. Fishing and sailing with pleasure boats and SPA-hotels on the coast and islands are quite sizable and important activities for Estonians.

Therefore, it is no wonder that Estonians and the state are considering it very important to protect and preserve the marine environment of the Baltic Sea, evidenced especially by the state becoming a party to the relevant global and regional conventions on the Law of the Sea. The Republic of Estonia is a party to the "constitution of the seas" – the 1982 UN Convention on the Law of the Sea (UNCLOS) since August 26th of 2005, which in the marine environment protection

---

[1] See Edgar Saks, *The Estonian Vikings* (2nd edn, Boreas Publishing House: Cardiff, 1985) at 8-39.

[2] Respective Parliamentary Decision has been passed just a day after the *coup d`ètat* attempt was commenced in Moscow.

[3] In detail and with critics see: *Heiki Lindpere* and *Indrek Nuut.* „Laevaregister ja sellega seotud praktilised probleemid", 10 *Juridica* (2002), No.4, pp.261-267. In the original Estonian Registry of Ships, due to the fact that a ship is treated as *quasi immovable* in Estonia, the transfer of ownership of a vessel requires according to § 9 of the LMPA (Law of Maritime Property Act) first, the existence of a contract done by a notary and, second, an entry in the ship register. See also: See: Heiki Lindpere. Maritime zones and shipping laws of the Republic of Estonia: some selected critique. –in: Estonian Law Reform and Global Challenges. Essays Celebrating the Tenth Anniversary of the Institute of Law, University of Tartu. 2005, Tartu University Press, pp.22-24.

[4] The biggest ferry companies like Tallink AS and Saaremaa Laevakompanii AS are using this possibility to fly Estonian flag on astern of their ships.

[5] See www.portoftallinn.com/key-figures.

matters provides in Part XII the prevailing basic rights and obligations for States[6]. Estonia is also party to the regional **Convention on the Protection of the Marine Environment of the Baltic Sea Area** since August 9th, 1995[7], and other IMO conventions, which will be discussed in due course in this article. It is necessary to note from the very beginning that on 1 May 2004, Estonia became a Member State of the European Union, which brought and will continue to bring significant changes to the legal system of Estonia as a whole and to areas where the division of competences between the Union and its Member States will be shared as agreed. In the field of marine environment protection, the most comprehensive document is Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008, establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive – MSRD), which has been implemented in Estonia with short delays.

Even though Estonia has acted well in giving its consent to relevant international obligations, aiming at the protection and preservation of the marine environment, as well as accepting civil liability and compensation for pollution damages according to the principle the "polluter must pay", the author is not satisfied with how this extremely important field of law has been implemented on the national law level. No special legal act devoted to the protection and preservation of the marine environment has been either elaborated or passed yet. According to the author`s hypothesis, it is conceptually wrong to rely mainly on provisions of international law and implement that in national law by incorporating those provisions randomly – without any systematic approach – into the Water Law Act[8], which is meant to regulate the use and protection of rivers, lakes and groundwater. Because of several important aspects, this approach in legal regulation makes it cumbersome and unclear for every person in Estonia as well as for relevant state authorities.

In this article, the author will stress all the differences, comparing the regulation of how the marine environment and internal waters are protected, and present reasoning for passing a special law for the protection and preservation of the marine environment of Estonian maritime zones. However, before proceeding, it is worth considering how the state acts in 3 capacities according to Part XII of the UNCLOS: as a flag state, a coastal state and a port State.

Part XII "Protection and Preservation of the Marine Environment" of UNCLOS

The basic obligation of states ***to protect and preserve the marine environment*** is elaborated in more detailed provisions in a certain structure that is perhaps complicated to understand. ***First*** of all, there is a principal division of provisions into two groupings: 1) setting international rules and standards as well as implemented in national laws, and 2) enforcement rights and obligations with certain safeguards towards the protection of foreign vessels and crews from abuse of rights by the coastal states, who got additional powers by establishing exclusive economic zones (EEZ). ***Second,*** this marine environment protective regulation is made to cover the whole pollution load of the seas and oceans specifically oriented to each source of pollution. The GESAMP (Group of Experts on the Scientific Aspects of Marine Pollution) has estimated that from the full pollution load, the shares are distributed as follows: a) 77% from land-based pollution (incl. 33% from the air);

[6] See Article 311 p 3 of the UNCLOS: ""*Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.*"

[7] See RT II 1995, 11, 57.

[8] See Veeseadus (Water Law Act) – RT I, 28.06.2015, 10.

b) 12% from ships; c) 10% from dumping[9]; and d) 1% from activities on the deep seabed.[10] ***Third,*** there are several different maritime areas like internal waters, territorial seas and contiguous zones (the EEZ), in which coastal states have different rights and obligations in protecting the sea from pollution. For more detail see, for example, the monograph of the Finnish professor Kari Hakapää or the Dutch professor Erik Jaap Molenaar.[11]

Although vessel-source pollution of seas amounts to only 12% of the whole pollution load, it is to the best knowledge of the author most effectively regulated by the globally accepted law of the sea. In Estonian environmental law, there is no analogous law for the protection of lakes, rivers and ground water.

The shipping industry must obey the international rules and standards and take necessary actions to ensure that ships at sea fully conform to these rules. Flag states have the following obligation:

"States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference." (UNCLOS Art 211 (2)). This means that vessels under their registration states have the possibility to adopt even more stringent rules than internationally accepted rules and standards as minimum requirements. But coastal states have the opposite obligation – such international rules and standards are maximum requirements in certain aspects for vessels engaged in innocent passage through the territorial sea. Art 211 (2) of UNCLOS provides the following, *"Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."* So the competent international organisation IMO is taking care that only seaworthy vessels are sailing the World Oceans only because substandard vessels will pose dangers not only to themselves and their crews but also to other ships in maritime traffic.

Estonia as a flag state

According to the UNCLOS, *"every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship"* (Article 91 (1)) and every ship shall sail under the flag of one State only (Article 92 (1)); "*every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag" (Article 94 (1) and* such measures shall *mutatis mutandis* include those necessary to ensure: *"(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions,* ***the prevention, reduction and control of marine pollution,*** *and the maintenance of communications by radio"* (Article 94 (4)).

In maritime affairs, Estonia has adapted to the international requirements for a flag state relatively fast. The *Ülemnõukogu* (Estonian Parliament until the Constitution was adopted in next summer) passed the Merchant Shipping Code[12], combining into this *lex specialis* both norms of public and private law; the Government established the Estonian Maritime Administration together with the Estonian Ship Register.[13] Estonia became the 136th Member of IMO on 31 January, 1992, and within 1992-1993 acceded to most essential international conventions like SOLAS-74, Load Lines 1966, Tonnage 1969, ColReg 1972, MARPOL 73/78, Helsinki Convention 1992, etc. Several well-recognised classification societies were

[9] See „dumping" determined in Art 1 (5) of UNCLOS as basically any deliberate disposal of vessels, aircraft, platforms or other objects as well as any wastes into the sea (except when ships are in distress and using concept of „general average" known in maritime law).

[10] See GESAMP 1990. The State of Marine Environment, UNEP Regional Seas Reports and Studies No. 115. Nairobi, p.88.

[11] Kari Hakapää. Marine Pollution in International Law. Material Obligations and Jurisdiction with Special Reference to the Third United Nationsw Conference on the Law of the Sea. Suomalainen Tiedeakatemia. Helsinki, 1981; Erik Jaap Molenaar. Coastal State Jurisdiction over Vessel-Source Pollution. Kluwer. The Hague, 1998.

[12] Adopted 9 December 1991, in force 1 March 1992 – see: RT 1991, 46/48, 578.

[13] Work was commenced on 1 November 1991.

contracted and authorised to issue necessary certificates for vessels.[14] By 1 May 2010, Estonia had acceded or ratified 39 IMO conventions or protocols to them, as well as some CMI conventions and made those (with some exceptions) part of its national law.

Part XII "Protection and Preservation of the Marine Environment" of UNCLOS in Art 211 regulates mainly the flag state obligations towards its flagged vessels, and Art 217 is devoted to the provisions on enforcement. There are no complaints to the Estonian Maritime Administration supervising the vessels'conformity with the international rules and standards, outlined in Art 211 (2) as follows: "*States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.*"

However, the pre-court investigation of pollution incidents at sea in Estonia is assigned to the Environmental Inspectorate (EEI) within the Ministry of Environment. According to the findings of the author during the maritime law codification efforts arranged and procured by the Ministry of Economy[15], the EEI have not been authorised by law today to give any "diplomatic protection" to Estonian flagged vessels that happen to pollute maritime areas under the jurisdiction of any foreign state. Namely, Art 228 (1) of UNCLOS gives one safeguard, which is stated as follows: *"Proceedings to impose penalties in respect of any violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution from vessels committed by a foreign vessel beyond the territorial sea of the State instituting proceedings shall be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag State within six months of the date on which proceedings were first instituted, unless those proceedings relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels.*"

Estonia as a coastal state

As a coastal state, Estonia has lot of problems in trying to apply the Water Law Act on the basis of analogy, as is evidenced by the results of the research of the state procurement work (see reference No.15). For example, the incident involving the Maltese tanker *ALAMBRA* (75 366 GT) on 17 September 2000, when she was loading a cargo of heavy fuel oil in the Port of Muuga, Tallinn (Estonia). An alleged 300 tonnes of cargo escaped from a crack in the vessel's bottom plating. The *ALAMBRA* remained in its berth, arrested while clean-up operations were carried out, but was subsequently detained by the Estonian authorities pending a decision by the Tallinn Port Authority to allow the remaining 80 000 tonnes of cargo on board to be removed. The cargo transfer was eventually undertaken in February 2001, and in May 2001 the vessel finally left Estonia for scrapping.

Limitation of liability

The limitation amount applicable to the *ALAMBRA* under the 1969 Civil Liability Convention is estimated at 7.6 million SDR. The ship owner and his insurer, the London Steam-Ship Owners Mutual Insurance Association Ltd (London Club), have settled

[14] See: Heiki Lindpere. Maritime zones and shipping laws of the Republic of Estonia: some selected critique. –in: Estonian Law Reform and Global Challenges. Essays Celebrating the Tenth Anniversary of the Institute of Law, University of Tartu. 2005, Tartu University Press, pp.10-24.

[15] Mereõiguse kodifitseerimise lähteülesande projekt. Majandus- ja Kommunikatsiooniministeeriumi riigihange Riigisekretäri 19.12.2014 käskkiri nr 42 „Toetuse andmine rakendusasutuse tegevusteks prioriteetse suuna 12 „Haldusvõimekus" meetme 12.2 „Poliitikakujundamise kvaliteedi arendamine" tulemuste saavutamiseks" projekti raames. Compiled by Indra Kaunis, Heiki Lindpere, Alexander Lott

claims for clean-up costs for a total of US$ 620 000. The Estonian court of first instance approved this settlement in March 2004, and all court actions against the ship owner and the Club in relation to claims with respect to clean-up were terminated. A claim by the Estonian state for EEK 45.1 million (almost 3,0 mln USD), which had the character of a fine or charge[16], was also settled by the ship owner and the London Club at US$ 655 000. The court approved this settlement in March 2004, and the proceedings against the ship owner and the Club in relation to this claim were terminated. A claim for US$100 000 was presented to the ship owner and the London Club by a charterer of a vessel, said to have been delayed while clean-up operations were being undertaken. The owner of the berth in the Port of Muuga, from which the Alambra was loading cargo at the time of the incident, and a company contracted by the owner of the berth to carry out oil loading activities on its behalf, have submitted claims to the ship owner and the London Club for EEK 29.1 million and EEK 9.7 million, respectively, for loss of income due to the unavailability of the berth while clean-up operations were being undertaken.

Legal actions

In November 2000, the owner of the berth in the Port of Muuga and the company it had contracted to carry out oil loading operations took legal action in the court of first instance in Tallinn against the ship owner and the London Club, and requested the court to notify the 1971 Fund of the proceedings, in accordance with Article 7.6 of the 1971 Fund Convention. Having been notified of the actions, the 1971 Fund intervened in the proceedings. In the context of these legal actions, the question arose as to whether the 1969 Civil Liability Convention and the 1971 Fund Convention had been correctly implemented in Estonian national law.

The constitutional issue

On 1 December 1992, Estonia deposited its instruments of ratification of the 1969 Civil Liability Convention and the 1971 Fund Convention with the International Maritime Organization. As a result, the conventions entered into force for Estonia on 1 March 1993. However, the lawyers acting for the ship owner and the London Club, as well as the Estonian lawyers acting for the 1971 Fund, drew their clients' attention to the fact that, in their view, under the Estonian Constitution, ratification of the Conventions should not have taken place before the Estonian Parliament had given its approval and had adopted the necessary amendments to the national legislation. The conventions were not submitted to Parliament and the necessary amendments to national law were not made. The conventions had not been published in the Official Gazette. For these reasons, these conventions did not, in the view of these lawyers, form part of national law and could not be applied by the Estonian courts. The ship owner and the London Club raised this issue in their pleadings in the court of first instance, as did the 1971 Fund in order to protect its position. On 1 December 2003, the court of first instance rendered its decision on the constitutional issue. The court held that since the government had ratified the 1969 Civil Liability Convention without prior approval by Parliament, the ratification procedure had been a breach of the Estonian Constitution. For this reason, the court decided that the convention could not be applied in the case under consideration and should be declared in conflict with the constitution. The court of first instance, therefore, ordered that constitutional review proceedings should be initiated before the Supreme Court. In June 2009, all legal proceedings regarding this incident were terminated and the court of first instance in Tallinn confirmed the settlement agreement, stating that there is no valid claim against the 1971 Fund. This case is now closed. [17]

Consequently, all the claims were not adjudicated but settled and the courts involved did not have to apply the Estonian law but just confirm the negotiated results of the advocates representing every person involved. It is amazing that when this constitutional deficiency was liquidated by the *Riigikogu*[18] confirmed the accession of Estonia to the conventions CLC-169 and IOPC FUND-

[16] Calculated simply on basis of the Environment Tax Law, which defines "pollution damage" in a way contrary to the applicable civil liability convention CLC-1969 (as amended in 1992) and is, consequently, not accepted by the London based Oil Pollution Compensation Funds – whether 1971 or 1992.

[17] See www.iopcfunds.org – International Oil Pollution Compensation Funds. Incidents 2009, lk 67-68.

[18] See Official Gazette - RT II 2004, 25, 103.

1971, both with the 1992 Protocols. The texts were translated into Estonian and published as required by the Constitution. The director of the EEI is acknowledging today that for them and for the Ministry of the Environment it is still difficult to understand how to calculate the pollution damage at sea.[19]

In this short article, it is impossible to comment on all the problems arising from the attempts to incorporate some provisions of related IMO conventions and EU legislation into the Water Law Act of Estonia. Let`s take only two examples. ***First,*** Part XII of UNCLOS in determining the weight of a pollution incident or exposure to the environment uses notions like "***substantial discharge*** .....causing ***significant pollution", "wilful and serious pollution", "major damage",*** etc., which have not been qualified at all (do not have legal definition). Also, there are some mistakes in translating Art 220 of UNCLOS, which will make the application of the law very difficult, if not impossible. ***Second,*** a look into the Penal Code of Estonia, namely §-s 365^{1-2}, will provide the reader with a surprise, because it states that not every spill of pollutants from vessels into the marine environment in violation of prohibition will be punished but only ***systematic*** pollution. That is provided without any consideration of the size of the pollution damage as well as irrespectively of what maritime area this incident has occurred in or whether the accused is a foreign or Estonian vessel.[20] This makes it possible for the EEI to make protocols for the first spill of oil or other pollutants from vessels, and only in cases of subsequent spills is the Penal Code applicable – in practical terms, it applies only to liner service vessels. So the principle of "polluter pays" will not be followed.

Estonia as a port atate

As we have said above, substandard vessels are posing threats to the maritime traffic and many "flag of convenience" states are not properly following whether their vessels conform to the international rules and standards in respect of seaworthiness in full. In order to prevent such vessels from starting their voyages, 14 Maritime Administrations of North Sea States concluded an agreement in 1982 - the Paris Memorandum, which established a system of regular checks of ships at those states' ports or offshore terminals.[21] Estonia become a party to this memorandum in July 2005. It has been agreed that authorised ship inspectors have to visit and carry out investigations on seaworthiness at least of every foreign vessel calling at their ports. These kinds of checks of foreign vessels have been authorised by Art 218 and 219 of the UNCLOS, but are subject to safeguards provided in Art 226.

Moreover, nowadays coastal states of semi-enclosed seas preventing their seas from being polluted by ships have adopted rules stating that before a vessel goes to sea, she should give away all wastes on board to reception facilities in the port. Professor David H. Anderson recalls the vessel called the *Mostoles,* which was detained by the Dutch Maritime Administration in Rotterdam in 1993 for suspected violation of MARPOL. After some repairs were made, the detention was maintained by the competent officer because the vessel still had some engine bilge water on board that had been emptied into cargo slop tanks. He also declined the offer to seal them because the next port of call was not disclosed or known. The owner's complaint to the Dutch Ministry of Transport did not help, and he had to order a lighter and empty the engine bilge water before he got permission for the vessel to continue her trip.[22] – see: David H. Anderson, op.cit., pp. 175, 176. The same kind of regulation was adopted by the states around the Baltic Sea, amending with new rule No.7 the Annex

[19] See letter **of EEI director 29.06.2015.a nr J-6-7/554-2 as reply to the questioning of Consolato del Mare Ltd (the winner of State procurement on maritime law codification).**

[20] See Official Gazette – RT I, 12.03.2015, 21.

[21] See the Paris Memorandum of Understanding on Port State Control – ILM.1982, 21.

[22] See: David H. Anderson, "Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements," (1996) 11 *The International Journal of Marine and Coastal Law,*, pp. 175, 176.

IV to the 1992 Helsinki convention.[23]

There have been no complaints about the work of ship inspectors of the Estonian Maritime Administration in following the UNCLOS, Helsinki convention or Paris Memorandum, as well as the provisions of the Maritime Safety Law Act of Estonia.

Hereby the author wants to point out not all but some important characteristics or reasons why provisions of Part XII of UNCLOS and other related IMO conventions should preferably be incorporated and interpreted in a special law act in Estonia rather than randomly provided without proper care in the Water Law Act:

1) Land territory including lakes, rivers and groundwater are exclusively subject to the sovereignty of a state principally in uniform manner; however, coastal waters, territorial sea and the EEZ of a state have different statuses and legal regimes, where every person and state have to obey UNCLOS;

2) There is quite a big difference in size of internal lakes of Estonia or the Gulf of Finland or the Baltic Proper and so both areas need to be considered differently abou t the caused harm by spill of pollutants, as well as the implementation of the obligations according to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) will need for maritime areas of much bigger investments and training for oil spill combating etc;

3) International conventions like CLC-1992 and IOPC FUND-1992 are exclusively for application in maritime areas, not in mainland where rivers are not navigable, except for pleasure crafts, and lakes are not connected with the Baltic Sea in Estonia. No other laws are applicable in presenting any claim to the owner of a vessel. Art III paragraph 4 of the CLC-1992 starts the following: "*No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention.";*

4) In marine environment protection, preservation and control quite different terminology and concepts are used, compared to the environment protection of land territory – mixing this together in one piece of law makes this text too cumbersome and not clearly understandable.

The overall conclusion of the author is that the hypothesis in the introduction has been confirmed, and it is recommendable that Estonia should elaborate and adopt a separate law for the protection and preservation of its maritime areas, as well as for ensuring that not only the state but all persons who have suffered from pollution incidents at sea will be compensated in full.

---

[23] *"Regulation 7; Mandatory discharge of all wastes to a port reception facility*
A. Definitions: For the purpose of this Regulation:
1. "Ship-generated wastes" means all residues generated during the service of the ship, including oily residues from engine room spaces, sewage, and garbage as defined in Annex V of MARPOL 73/78, cargo associated waste including but not limited to loading/unloading excess and spillage, dunnage, shoring, pallets, lining and packing materials, plywood, paper, cardboard, wire and steel strapping;
2. "Cargo residues" means the remnants of any cargo material on board in cargo holds which remain for disposal after unloading procedures are completed.
B. Discharge of wastes to a port reception facility
Before leaving port, ships shall discharge all ship-generated wastes, which are not allowed to be discharged into the sea in the Baltic Sea Area in accordance with MARPOL 73/78 and this Convention, to a port reception facility. Before leaving port, all cargo residues shall be discharged to a port reception facility in accordance with the requirements of MARPOL 73/78.
C. Exemptions: 1. Exemptions may be granted by the Administration from mandatory discharge of all wastes to a port reception facility taking into account the need for special arrangements for, e.g., passenger ferries engaged in short voyages. The Administration shall inform the Helsinki Commission on the issued exemptions.
2. In case of inadequate reception facilities, ships shall have the right to properly stow and keep wastes on board for delivery to next adequate port reception facility. The Port Authority or the Operator shall provide a ship with a document informing on inadequacy of reception facilities.
3. A ship should be allowed to keep on board minor amounts of wastes which are unreasonable to discharge to port reception facilities." in: RT II 2007, 7, 26.

PROTECTION OF THE ENVIRONMENT AS A MANDATORY REQUIREMENT: THE POSSIBILITIES OF THE MEMBER STATES OF THE EUROPEAN UNION TO FAVOUR NATIONAL PRODUCTS

Heidi Kaarto

ABSTRACT

Over the years, the legal instruments of the European Union have been changed to increasingly contemplate environmental protection. Also, the CJEU has paved the way for environmental considerations by recognising in its case law that environmental protection is capable of restricting the free movement of goods. However, the Treaty amendments have not gone hand-in-hand with the development of the case law, and there seems to be one special loophole. Traditionally, only the express derogations from the free movement of goods rules were able to justify distinctly applicable measures, as compared to the mandatory requirements that could justify only indistinctly applicable measures. That is why the Court seems to now be between a rock and a hard place when it comes to distinctly applicable measures that could be justified on the grounds of environmental protection. This paper scrutinises the most recent case law of the CJEU and analyses whether the Court has even implicitly justified distinctly applicable measures on the grounds of environmental protection. The main purpose of the paper is to set the scene to explain the possibilities of the Member States to protect the environment to the detriment of the free circulation of goods.

Keywords: European Union, environment, free movement of goods, mandatory requirements, distinctly applicable measures

INTRODUCTION

The balancing of environmental interests with the free movement provisions has proven to be a challenging task not only for the Member States of the European Union (hereinafter "Member States") but also for the European Union (EU) institutions themselves. One recent and also practical example demonstrates this well: The new law in Hungary requires that retailers apply the same profit margins to domestic and imported agricultural and food products, although the cost of imported products is already subject to currency and exchange rate fluctuations. In turn, in Romania it is required that large retailers buy at least 51 per cent of food and agricultural products from local producers. The European Commission ('Commission') alleges that these rules on retail of agricultural and food products are in conflict with the free movement provisions and has sent letters of formal notice to Hungary and Romania in February 2017.[1]

Over the years, the fundamental legal instruments of the EU have been amended to increasingly contemplate environmental protection. It is, thus, necessary to see how the Court has managed to incorporate this constitutional evolution into its case law dealing with the interplay between trade and environment. The main purpose of this paper is to address the tension between the environment and trade and to examine in which kinds of circumstances the principles of environmental protection override the free circulation of goods. The hypothesis of the paper is that the Member States are allowed to directly discriminate against imported goods on the grounds of protection of the environment. The paper points out the most recent case law of the Court of Justice of the European Union (hereinafter "CJEU" or "the Court") concerning

[1] * The paper is a revised version of a Bachelor's Thesis and has been supervised by the Associate Professor of Tallinn University Law School, LLD Samuli Miettinen.
European Commission. (2017, February 15) Fact Sheet. February Infringements Package: Key Decisions. MEMO/17/234. Retrieved from http://europa.eu/rapid/press-release_MEMO-17-234_en.htm

the relationship between the internal market and the environment and analyses whether the Court has justified distinctly applicable measures restricting the free circulation of goods on the grounds of environmental protection.

I. THE TENSION BETWEEN THE FREE MOVEMENT OF GOODS AND ENVIRONMENTAL PROTECTION

In the past, the EU energy market liberalisation was dominated by the relatively market-oriented approach. This approach has, over the years, turned into the pursuit of a wide variety of goals, including the aim of reducing greenhouse gas emissions, which is part of the Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth.[2] Finally, in 1988 in the *Danish Bottles* case[3] the CJEU justified the restriction of the free movement of goods on the grounds of environmental protection in cases of indistinctly applicable measures and, today, environmental protection has risen among the key objectives of the Union. This is demonstrated in various parts of the Treaties, including Article 11 of the Treaty on the Functioning of the European Union (TFEU), Article 114 TFEU and Article 3(3) of the Treaty on the European Union (TEU).

Nevertheless, problems and conflicts occur from time to time, as the EU legal order has been conceptualised in terms of economic integration already from the beginning. As we know, at the heart of this economic integration lies the internal market, which is based on the free movement provisions. It is, thus, only self-evident that clashes between environmental measures and free movement of goods rules take place on a regular basis due to their different, and usually opposite, objectives. In general, the aim of economic integration is to liberalise trade and to harmonise the internal market. On the contrary, protection of the environment requires the creation of regulatory measures while, at the same time, allowing differentiation.[4] Thus, the weighing of internal market related interests and the protection of the environment against each other is all about considering the economic values of the EU and the non-economic values of the Member States. It is then the task of the Court to consider the supervision and control mechanisms put in place by the Member States, as well as the enforcement conditions in order to determine whether they impose a double burden or additional costs on the products coming from other Member States.

What also brings additional complications to the weighing of economic interests against the non-economic ones is the fact that it is also surprisingly difficult to separate the two from each other: despite the fact that environmental regulations generally aim at protecting biodiversity and human health, they are bound to usually have economic consequences as well, which cannot be separated from the non-economic aims of the measures.[5] It has been even argued, on the one hand, that the Court aims at amending the state of matters through judicial interpretation and, on the other hand, that since the environmental protection measures must discriminate in order to be really effective, this derogation should be interpreted differently. However, no clear conclusions can be drawn from the intentions of the CJEU.[6]

Mandatory requirements can, in general, justify only indistinctly applicable measures as compared to Article 36 TFEU

---

[2] European Commission. Communication from the Commission. Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth. COM(2010) 2020. Brussels, 3.3.2010.

[3] ECJ 20.9.1988, Case 302/86, Commission of the European Communities *versus* Kingdom of Denmark.

[4] De Sadeleer, N. (2015) Trade versus Environmental Law – The Fable of the Earten Pot and the Iron Pot. *Environmental Policy and Law*, 45(1), p. 23.

[5] Józon, M. The Enlarged EU and Mandatory Requirements. – European Law Journal. Vol. 11. Issue 5. 2005, p. 558.

[6] Escámez, S.B. (2006) Restrictions to the Free Movement of Goods – The Protection of the Environment as a Mandatory Requirement in the ECJ Case Law. University of Lund. Master of European Affairs programme, Law, p. 1.

derogations that can justify distinctly applicable measures.[7] Distinctly applicable measures are those that are overtly discriminatory, as they have a different burden both in law and, in fact, on imported and domestic goods. In comparison, indistinctly applicable measures are covertly discriminatory; despite the fact that they apply in law equally to national and imported products, in fact, they place a heavier burden on the imported ones.[8] It is argued that environmental protection has a different nature than the other mandatory requirements recognised by the CJEU in its case law: environmental protection usually has a transnational nature and may be based on primary Union law. As will be seen later in this paper, it seems that environmental protection could also be treated differently from other mandatory requirements in cases of distinctly applicable measures distorting the smooth functioning of trade between the Member States. [9]

II. ENVIRONMENTAL PROTECTION AND DISTINCTLY APPLICABLE MEASURES

2.1. The justification of barriers on free trade on the grounds of environmental protection in cases of distinctly applicable measures

The case law shows that the room for manoeuvre left for the national authorities is contained within blurred limits. In the most recent case law of the CJEU[10], no consideration has even been given to the matter of whether the measure was discriminatory or not. The focus of the Court has, instead, been on market access and proportionality. Thus, in this way, the Court has avoided being in the position to make a distinction between direct and indirect discrimination.[11] Nevertheless, a conclusion can be made that there has been a shift towards a more environmentally friendly approach: the Court has delivered a handful of judgments in which environmental protection has been successfully relied on, despite the discriminatory nature of the measures.[12] In several cases, a national discriminating environmental legislation was accepted that was environmentally oriented. Thus, it seems that national measures that pursue a legitimate environmental objective may be justified under Article 36 TFEU or under the mandatory requirements doctrine, even if they discriminate against products coming from other Member States.[13] This was the case already in Ålands *Vindkraft,* in which the CJEU sent an important message by stating that the Member States are permitted to have their independently formulated national subsidy systems despite the fact that they discriminate against foreign energy producers. Thus, the Member States are allowed to exclude producers coming from other Member States from their subsidy systems. This decision conflicts with the object of creating a unified internal energy market, in which there are no barriers to trade in the EU. However, to this day the Court has not even clarified if and when discrimination against imported goods is justified on the grounds of environmental protection. After this case, the remaining problems are in favour of abandoning the existing distinction between discriminatory and non-discriminatory subsidy measures.[14]

Similarly, the Court allowed the different treatment of domestic waste and waste coming from abroad in *Walloon Waste*

---

[7] See, for example, ECJ 16.1.2003, C-388/01, Commission of the European Communities *versus* Italian Republic, para. 19; ECJ 6.10.2009, C-153/08, Commission of the European Communities *versus* Kingdom of Spain, para 37; ECJ 30.3.2006, C-451/03, Servizi Ausiliari Dottori Commercialisti, para. 36; ECJ 29.5.2001, C-263/99, Commission of the European Communities *versus* Italian Republic, para. 15.

[8] Barnard, C. (2004). *The Substantive Law of the EU. The Four Freedoms*. Oxford University Press.

[9] Nowag, J. (2016). *Environmental Integration in Competition and Free-Movement Laws* (1st ed.). Oxford University Press.

[10] ECJ 10.2.2009, C-110/05, Commission of the European Communities *versus* Italian Republic, paras 58-59; ECJ 4.6.2009, C-142/05, Åklagaren *versus* Percy Mickelsson and Joakim Roos, paras 28, 31-33; ECJ 10.4.2009, C-265/06, Commission of the European Communities *versus* Portuguese Republic.

[11] Nowag, J. (reference 9)

[12] e.g. ECJ 9.7.1992, C-2/90, Commission of the European Communities *versus* Kingdom of Belgium ("Walloon Waste"); ECJ 14.7.1998, C-389/96, Aher-Waggon GmbH *versus* Bundesrepublik Deutchland; ECJ 13.3.2001, C-379/98, PreussenElektra AG *versus* Schleswag AG.

[13] Escámez, S.B. (reference 6) p. 45.

[14] Steinbach, A. & Brückmann, R. (2015) Renewable Energy and the Free Movement of Goods. *Journal of Environmental Law*, 27(1), p. 2.

and the discriminatory practices in the administration of subsidy systems for renewable energy in *PreussenElektra*. In the first one, the Court permitted the different treatment of domestic waste and waste coming from abroad due to the principle that waste should be disposed of as close to the source as possible.[15] This case is of exceptional importance as the CJEU had to determine whether a clearly distinctly applicable act could be justified on the grounds of the protection of the environment. To the surprise of many scholars, the measure was permitted. In turn, in *PreussenElektra*[16], the CJEU had to decide whether German law at that time on the promotion of renewable energy sources through a feed-in support scheme violated EU law. The CJEU also ruled in this case that discriminatory practices in the administration of subsidy systems for renewable energy did not violate the free movement of goods provisions.[17] The Court recognised that the measure was not discriminatory, as it had done in *Walloon Waste*, despite the fact that its effect was to limit the imports from traders located in other Member States.[18]

The most recent case law of the CJEU has confirmed the conclusions drawn from the earlier cases relating to the interplay between the environment and trade. The CJEU delivered an interesting judgment[19] a couple of years ago on the alleged breach of Finnish legislation on excise duty on certain beverage packaging and the retail sale of alcoholic beverages laid down for environmental and public health reasons. The case concerned Mr Visnapuu, who had forum shopped Estonia's lower prices on alcohol by offering clients living in Finland home delivery of alcoholic beverages purchased in Estonia. As Mr Visnapuu had made no declaration to Finnish customs and excise, he circumvented many excise duties imposed for health and environmental reasons. The CJEU considered in its judgment a variety of different questions relating to the interplay between environment and trade.[20] The law at issue allowed national manufacturers of alcoholic beverages to sell their own production provided that it was obtained by fermentation and contained a maximum of 13 per cent alcohol by volume of ethyl alcohol. The Court noted that despite the fact that a derogation is provided only for national manufacturers, no conclusion can be directly made that the health and public policy grounds have been diverted from their purpose and used to discriminate against imported goods or indirectly to protect certain national products. Thus, the conclusion of the Court was that the legislation at issue in the case was not precluded by Articles 34 and 36 TFEU.

In its judgment[21] from 2016, the CJEU considered a preliminary question relating to the importation of chemical products into Sweden without notification about the importation to the Kemikalieinspektionen within the prescribed time limit. In this case, the Court gave guidance on the conditions to be met by the registration requirements in order for them to be justified on the grounds of protection of the environment. The referring Court inquired whether the REACH Regulation[22] had to be interpreted as precluding national legislation, requiring the importer of chemical products to register the products with the competent national authority, when the importer is already under an obligation under that regulation to register the same product with the European Chemicals Agency (ECHA). The Court noted that the registration required in the case at hand was not a pre-condition for importing chemical products but only a way to enable the national authorities to

[15] ECJ 9.7.1992, C-2/90, Commission of the European Communities *versus* Kingdom of Belgium ("Walloon Waste"), para. 34.

[16] ECJ 13.3.2001, C-379/98, PreussenElektra AG *versus* Schleswag AG.

[17] *Ibid.,* para. 81.

[18] *Ibid.,* para. 70.

[19] ECJ 12.11.2015, C-198/14, Valev Visnapuu *versus* Kihlakunnansyyttjä (Helsinki) and Suomen valtio.

[20] Van Calster, G. (2017, June 9) Gavc Law. Cheers to that! The CJEU on excise duties, alcohol, packaging and regulatory autonomy in Valev Visnapuu. Retrieved from https://gavclaw.com/2015/11/23/cheers-to-that-the-cjeu-on-excise-duties-alcohol-packaging-and-regulatory-autonomy-in-valev-visnapuu/

[21] ECJ 17.3.2016, C-472/14, Canadian Oil Company Sweden AB and Anders Rantén *versus* Riksäklagaren.

[22] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/195/EC and 2000/21/EC as amended by Commission Regulation (EU) No 552/2009/ of 22 June 2009 as regards Annex XVII. OJ L 164. 26.6.2009.

maintain a database. The Court came to the conclusion that the REACH Regulation does not prohibit that kind of registration requirement, provided that the registration does not constitute a pre-condition to the placing of those products on the market. In addition, the registration must concern information different from that required by the regulation and it must contribute to the achievement of the objectives pursued by the regulation.

Finally, there are some other cases demonstrating the uncertainties the Court faces when it comes to distinctly applicable measures and environmental protection. The first is *Sydhavnens*[23], which has been interpreted to allow discriminatory measures on the grounds of protection of the environment.[24] As the Court held in the case that any restrictions on exports could not be justified on the grounds of environmental protection, particularly those on waste destined for recovery,[25] it has been argued that some export restrictions could be justified.[26] Similarly, the *Aher-Waggon* case has been interpreted as allowing discriminatory measures on the grounds of protection of the environment.[27] Despite these views, the fact remains that the Court has never formally taken the stance on whether discriminatory measures are justified on the grounds of the protection of the environment.[28] More recently, the CJEU has only clarified in the *Mac*[29] case that Member States are not permitted to deny the authorisation for parallel import on the grounds that the plant protection product in question does not have market authorisation granted under Directive 91/141[30]in the exporting Member State. However, the product must be identical to a product to which a parallel import authorisation has been granted in accordance with the directive in the importing state. In paragraph 40 of the judgment, the Court underlined that a total prohibition based on the presumed inadequacy of information is not justified in parallel re-importation cases.

What is also positive is that the Court has, in most of the recent cases, favoured the protection of the environment without even considering the volume of trade affected by the measure. The case has been so, for instance, in the afore-mentioned cases of *PreussenElektra* and *Aher-Waggon*[31]. The latter can additionally be considered as an indication of the Court's increasingly open attitude towards taking domestic externalities into account. In that case, the Court did not even consider the effects on the volume of intra-Community trade but focused its analysis on the necessity of the measure. Finally, the Court accepted the measure despite its discriminatory nature. This can be considered as a clear departure from the earlier free movement cases. [32]

2.2. The Assimilation of the Treaty Derogation of Protection of Health and Life of Humans, Animals and Plants with Environmental Protection

It seems on the basis of the case law studied that environmental protection can justify distinctly applicable measures; however, the next problem is how does the CJEU justify the restriction of free movement of goods on the grounds of environmental protection in cases of distinctly applicable measures? The scholars have suggested that the Court has, essentially,

[23] ECJ 23.3.2000, C-209/98, Sydhavnens Sten & Crus.

[24] e.g. Vedder, H.H.B. (2001) Environmental Protection and Free Competition: A New Balance? *Legal Issues of Economic Integration*, 28(1), p. 105.

[25] ECJ 23.3.2000, C-209/98, Sydhavnens Sten & Crus., para. 48.

[26] Vedder, H.H.B. (reference 24)

[27] e.g. Kingston, S. (2010) Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special. *European Law Journal*, 16(6), pp. 780, 794.

[28] Nowag, J. (reference 9), p. 1.

[29] ECJ 6.11.2014, C-108/13, Mac GmbH *versus* Ministère de l'Agriculture, de l'Agroalimentaire et de la Forêt.

[30] Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market. OJ L 230. 19.8.1991.

[31] ECJ 14.7.1998, C-389/96, Aher-Waggon GmbH *versus* Bundesrepublik Deutchland.

[32] Józon, M. (reference 5) p. 560.

two different options: either to read the Article 36 TFEU derogations so as to include environmental protection or to apply the mandatory requirements doctrine despite the distinctly applicable nature of the measure in question.[33] However, at least the case law of the CJEU does not provide a clear answer as to whether the mandatory requirements could, for instance, be assimilated with those of protection of health and life of humans, animals or plants; the Court has neither ruled out this possibility nor accepted it.[34] Nevertheless, the Court has declared, as to the relationship between the objectives of protection of the environment and protection of health that it is clear from Article 174(1) of the Treaty on the European Community (EC) (now Article 191 TFEU), that the protection of human health is one of the aims of the Union policy on the environment.[35] Those objectives are closely linked, in particular in connection with the fight against pollution, the purpose of which is to limit the dangers to health concerned with the deterioration of the environment. The objective of protection of health is, therefore, already incorporated, in principle, in the objective of protection of the environment.[36] The close relationship between the environment and health and life of humans, animals and plants can be seen also in that the clause of Article 36 TFEU requiring that the protection of health and life of humans, animals or plants has been successfully pleaded in various environmental cases.[37] By way of illustration, one could mention the *Aher-Waggon* case[38], in which aircrafts were required to be registered in order to minimise noise pollution.

In the same way as the CJEU has avoided having to answer the question of whether environmental protection can justify distinctly applicable measures and has, instead, implicitly justified discriminatory measures on the basis of environmental protection, the CJEU has only implicitly assimilated environmental protection with the Article 36 TFEU derogations. One example of this is the *Bluhme* case, which has been interpreted to indicate the direction that the Court is willing to read the written justifications contained in Article 36 TFEU more broadly.[39] In that case, the Court reasoned that measures aiming at maintaining biodiversity can be justified under Article 36 TFEU.[40] Julian Nowegian argues that the connections the Court made in its reasoning between the protection of health and life of plants of Article 36 TFEU and the protection of biodiversity could be applied to environmental protection more generally.[41] According to Nowegian, one can conclude from the judgment delivered by the Court in that case that discriminatory measures can be justified by environmental protection by using Article 36 TFEU.[42]

Additionally, in its most recent case law the CJEU seems to have done away with the distinction between distinctly and indistinctly applicable measures and, in that way, has assimilated the protection of environment with the Article 36 TFEU derogations. In 2014, the CJEU delivered its judgment in *Essent Belgium*[43] and declared that Member States are allowed to exclude guarantees of origin from other Member States when requiring the suppliers to surrender tradable certificates. In its reasoning, the CJEU clearly joined mandatory requirements with Article 36 TFEU derogations into a single group

---

[33] Oliver, P. J. (1999) Some Further Reflections on the Scope of Articles 28-30 (ex 30-6) EC. *Common Market Law Review*, 36(4), pp. 804-805; Notaro, N. (2000) The New Generation of Case Law on Trade and Environment. *European Law Review*. Vol. 5, pp. 467, 490-491.

[34] Escámez, S.B. (reference 6)

[35] ECJ 8.7.2010, C-343/09, Afton Chemical Limited *versus* Secretary of State for Transport, para. 32; ECJ 22.12.2010, C-77/09, Gowan Comércio Internacional e Servicos Lda *versus* Ministero della Salute, para. 71.

[36] ECJ 11.12.2008, C-524/07, Commission of the European Communities *versus* Republic of Austria, para. 56.

[37] De Sadeleer, N. (2013) Environmental Regulatory Autonomy and the Free Movement of Goods. *Jean Monnet Working Paper Series. Environmental and Internal Market.* Vol. 1, 27-28.

[38] ECJ 14.7.1998, C-389/96, Aher-Waggon GmbH *versus* Bundesrepublik Deutchland.

[39] ECJ 3.12.1998, C-67/97, Criminal proceedings against Ditlev Bluhme.

[40] *Ibid.,* para. 33.

[41] Nowag, J. (reference 9)

[42] *Ibid.*

[43] ECJ 11.7.2014, C.204/12, Essent Belgium NV *versus* Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt.

of excuses and, according to Peers, applied a mandatory requirement to "a facially discriminatory measure"[44]. The Advocate General suggested in its opinion that the Court should wipe away the distinction between discrimination *de jure* and discrimination *de facto* and, in that way, overturn the earlier case law. However, the CJEU only abandoned the distinction between the two forms of discrimination but did not overturn its previous case law. Indeed, the abandonment of the distinction between distinctly and indistinctly applicable measures makes sense: the different treatment of those measures is irrational, as the trade-restrictive effect of both distinctly and indistinctly applicable measures can be identical, and the harsher treatment of distinctly applicable measures may function as an incentive for the Member States to design neutral measures to discriminate against imported goods. However, as distinctly applicable measures are illegal, their justification should be more difficult than in the case of indistinctly applicable measures.[45] Advocate General Bot stated as follows in paragraph 94 of the opinion in *Essent Belgium*, "I think that discriminatory measures, particularly those which infringe a principle as fundamental as that of the prohibition of direct discrimination on grounds of nationality, ought to be subject to a strict requirement of proportionality."[46]

2.3. Concluding Remarks

On the basis of the case law studied, it seems that the CJEU is calling for the legislators to make a change in the legal status of environmental protection as a mandatory requirement. The CJEU has explicitly justified distinctly applicable measures on the basis of environmental protection without implicitly stating that the Member States are allowed to discriminate against imported goods on the grounds of environmental protection. Also, the fact that the CJEU has implicitly assimilated environmental protection in its case law with the Article 36 TFEU derogations supports the conclusion that the CJEU is not satisfied with the present state of matters. Moreover, the Court seems to have wiped away the existing distinction between indistinctly and distinctly applicable measures all together, which seems like a rational choice, taking into account the fact that indistinctly applicable measures can also be covertly discriminatory. Nevertheless, it is only understandable that the Court has not dared to expressly declare that environmental protection can justify distinctly applicable measures; the task of the Court is to interpret, not to legislate. Additionally, if the Court expressly allowed the justification of distinctly applicable measures on the basis of environmental protection, it would mean that the Court would have to overturn its previous case law. In the future, it remains to be seen whether the CJEU justifies distinctly applicable measures on the grounds of assimilating environmental with the Treaty derogations or by the mandatory requirements doctrine. In light of the present case law, it seems that the Court has already opted for the first option.

III. ENVIRONMENTAL PROTECTION IN CASE OF PUBLIC PROCUREMENT

3.1. The present framework

According to the public procurement indicators, government expenditure on works, goods and services represents around 14 per cent of EU GDP, amounting to about EUR 1.8 trillion every year.[47] Therefore, a significant contribution towards not only national and international, but also local and regional sustainability goals can be made by buying goods, services and works with a reduced environmental impact. Indeed, the European Commission has announced that the environmental goals relating to climate change, sustainable consumption and production and resource use can be achieved through Green Public Procurement (GPP). [48]

---

[44] Fontanelli, F. (2014, September 19) EU Law Analysis. Expert insight into EU law developments. The Essent judgment: Another revolution in the case law on free movement of goods? Retrieved from http://eulawanalysis.blogspot.fi/2014/09/the-essent-judgment-another-revolution.html

[45] *Ibidem.*

[46] ECJ 8.5.2013, Joined Cases C-204/12 to C-208/12, Opinion of Advocate General in Essent Belgium NV *versus* Vlaamse Regularingsinstantie voor de Elektriciteits- en Gasmarkt

[47] European Commission. (2015) *Public Procurement Indicators 2013*. European Union.

[48] European Commission. (2016) *Buying green! A Handbook on Green Public Procurement* (3th ed.). European Union.

The legal framework for public procurement is defined by the provisions of the TFEU and by the EU Public Procurement Directives[49] that have facilitated the achievement of the EU environmental goals by enabling public authorities to take environmental considerations into account.[50] The new EU public procurement directives demonstrate an increasingly open approach towards protection of the environment, as before it was not clear to what extent the environmental requirements could be taken into account in case of public procurement.[51] The directives clarify how the contracting authorities are able to contribute to the protection of the environment and the promotion of sustainable development while, at the same time, ensuring that they obtain the best value for money for their contracts.[52] Thus, the directives include environmental considerations and the full life-cycle costing of products when awarding contracts.[53] Next, this paper will examine whether the new directives leave room for the Member States to discriminate against foreign economic operators on the grounds of environmental protection.

3.2. The possibilities of the Member States of the European Union to favour national products by environmental reasons

Although the new public procurement directives demonstrate an increasingly open approach towards environmental considerations, strict rules have been put in place to prevent the contract authorities from discriminating against economic operators coming from other Member States: it is required that the awarding criteria are linked to the subject - matter of the contract, that they do not confer an unrestricted freedom of choice on the contracting authority, that they ensure the possibility of effective competition, and that the criteria are expressly mentioned in the contract notice and tender documents.[54] Also, the contracting authorities are required to ensure that the definition of the contract does not affect access to the tender by other EU operators or operators from countries with equivalent rights.[55] In addition, objectively verifiable and non-discriminatory criteria are to be accessible to all interested parties.[56] Thus, in principle, the contracting authorities of the Member States cannot discriminate against economic operators on the grounds of protection of the environment, as the procurements are to be non-discriminatory and open.

It is argued that a more is now towards a more protectionist approach applied by some countries. For instance, the French President Emmanuel Macron recently suggested a "Buy European Act" that would restrict the possibilities of the companies from third countries to bid for public procurement contracts within the Union.[57] However, as the EU wants to see more open public procurement markets also outside the EU, it is unlikely that the EU would restrict the abilities of the companies from third countries to bid for public procurement contracts in the EU Member States.[58] The European Commission has

---

[49] *Ibid*.

[50] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. OJ L 94. 28.3.2014; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. OJ L 94. 28.3.2014; Directive 2014/23/EU of the European Parliament and of the Council of 26 February on 2014 on the award of concession contracts. OJ L 94. 28.3.2014.

[51] HE (108/2016 vp) Hallituksen esitys eduskunnalle hankintamenettelyä koskevaksi lainsäädännöksi. (In English: *Government proposal for the law concerning public procurement*), p. 1.

[52] Point 91 of Directive 2014/24/EU (reference 51)

[53] European Commission. (2017, September 6) Environment. EU public procurement directives. Retrieved from http://ec.europa.eu/environment/gpp/eu_public_directives_en.htm

[54] European Commission (reference 48)

[55] *Ibidem*.

[56] Article 68(2) of Directive 2014/24/EU (reference 50); Article 83(2) of Directive 2014/25/EU (reference 50)

[57] Smith, P. (2017, May 18) Using Public Procurement to Achieve Political and Social Goals. Public Spend Forum Europe. Retrieved from http://publicspendforumeurope.com/2017/05/18/using-public-procurement-to-support-national-interests-protectionism-on-the-rise

[58] European Commission. (2017, March 29) Trade. Public procurement. Retrieved from http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/

already made a proposal for a new set of tools through which it would be possible to open up negotiations with countries outside the EU, to enable them to further open their public procurement markets.[59]

Concerning the situation inside the EU, nothing actually prevents the contracting authorities from using, for instance, award criteria that confer an unrestricted freedom of choice and from formulating environmental award criteria so that it artificially forecloses the market. As these practices are strictly prohibited by the transparency rules of the procurement directives, the monitoring authorities are likely to notify the national auditing authorities, courts or tribunals or other appropriate authorities or structures about the violations of the EU public procurement rules as required by the directives.[60] Nevertheless, the public procurement directives leave room for the contracting authorities to apply fair rules while, at the same time, enhancing the local producers' possibilities to participate in the procurement. They may use, for instance, terms that suit the local producers, but the terms must be fair for the non-local producers as well. Thus, the contracting authorities could set some special conditions for the realisation of the procurement contract relating to the environment. Through these special conditions, the contracting authorities can, in turn, encourage the local producers to make bids. Furthermore, the new public procurement directives encourage the contracting authorities to split up the big procurements which may, in turn, encourage the participation of small local producers.

The CJEU has delivered various judgments in which it has assessed the possible discriminatory nature of the systems laid down by the Member States. In *the Concordia Bus* case, it held that the system used by the Community of Helsinki was justified to be adequately specific and objective, as the system for awarding extra points for lower levels of noise and nitrogen oxide emissions had been specified and published before the evaluation of tenders.[61] In turn, in *the EVN Wienstrom* case[62] an award criterion on the amount of electricity produced from renewable sources in excess of the expected consumption of the contracting authority was ruled inadmissible. The reason for this was that the contracting authority could not verify the criterion effectively, as the award criterion was not linked to the subject matter of the contract. However, no judgments have been delivered by the CJEU concerning the new public procurement directives and the steps the contracting authorities have taken to protect the environment.

IV. CHALLENGES AHEAD

4.1. The possibilities of the Member States of the European Union to apply distinctly applicable measures to protect the environment

On the basis of the findings of this paper, it can be concluded that the CJEU has, indeed, one acute task: to expressly clarify whether environmental protection can justify distinctly applicable measures. Until today, the judgments of the CJEU have, on the contrary, avoided addressing the question of whether the measure was distinctly applicable or not. This has been the case, for instance, in *Mickelsson and Roos* where the CJEU, although justifying the measure on the basis of environmental protection, did not consider the issue of whether the measure was distinctly applicable. However, arguments have been raised on behalf of the discriminatory nature of the measure in question in the case.[63] The Court has applied the same line

[59] European Commission Proposal for a regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries. Brussels, 21.3.2012, COM(2012) 124 final.

[60] Article 83 of Directive 2014/24/EU (reference 50)

[61] ECJ 17.9.2002, C-513/99, Concordia Bus Finland

[62] ECJ 4.12.2003, C-448/01 EVN AG and Wienstrom GmbH *versus* Republic of Austria

[63] N. de Sadeleer. L´examen, au regard de l'article 28 CE, des règles nationales régissant les modalités d'utilisation de certains products. JT. 2009, p. 249 (referred to in Poncelet, C. Free Movement of Goods and Environmental Protection in EU Law: A Troubled Relationship? *International Community Law Review,* Vol. 15, p. 188); Opinion of Advocate General Kokott in ECJ C-142/05 (reference 10), paras. 58-60.

in other more recent cases as well.[64] Also, the approach the Court applied in *PreussenElektra* has led to wide discussion and confusion among the scholars. Although the Court decided to justify the measure at hand on the grounds of protection of the health and life of humans, animals and plants, it appeared that the measure had a closer connection with the protection of the environment. Thus, it is argued that the judgment the CJEU gave in the case increased the amount of legal certainty even further. Again, the judgment was an indication of the uncertainty the Court itself faces about the discriminatory measures and environmental protection.[65]

Advocate General Jacobs has pointed out that as environmental protection measures restricting the free circulation of goods typically make a distinction based on the nature and origin of the cause of harm, it should not even be required for environmental measures to be non-discriminatory.[66] Moreover, after the adoption of the Treaty of Lisbon and the recognition of the principle of a high level of environmental protection and improvement of the quality of the environment in the Charter of Fundamental Rights of the European Union (´CFR´), the Court should feel more comfortable to abandon the distinction between distinctly and indistinctly applicable measures where the measure protects the environment. The aforementioned should be applied in cases where there is no full harmonisation, no disguised restriction on trade and where the proportionality principle is observed. This conclusion is supported by the fact that environmental concerns are required to be integrated into the other EU policies. When considering Article 3(3) TFEU and Article 37 CFR, it seems to be self-evident that environmental protection ranks at the same level with free movement provisions. In addition, the mandatory requirements do not, in general, represent less legitimate interests than those expressly mentioned in the Treaty. The CJEU must probably also accept that the EU goes through an integration process in which the values that were present at the time of drafting the TFEU have changed and evolved. On the basis of constitutional amendments, it is clear that the protection of the environment is one of these new values that deserve legal protection.[67] It will be interesting to see whether the environmental protection will be balanced via making an exception for environmental protection or via a broad interpretation of the written justification contained in the treaties.

4.2. What level of protection does the environment need?

In the past, the CJEU has considered that "a high level of protection" of the environment does not have to be the highest level of protection technically possible.[68] Back then, statements similar to the aforementioned one sparked wide discussion among the academics, who were of the opinion that the Treaty requirements relating to the high level of protection of the environment seem to indicate a totally different direction. In light of the case law studied, it is clear that the CJEU still favours trade over environmental considerations. Though a better balance between the environment and trade has been struck by the Lisbon Treaty, environmental protection is still only an exception to the free movement of goods and is not even listed among the express derogations contained in Article 36 TFEU. Environmental issues have, especially in the case of the EU internal market, been secondary to the interests relating to the free movement of goods. The problem seems to lie partly in that environmental concerns are not taken as seriously as they should be – economic success seems to be more prevalent in many cases.

---

[64] Poncelet, C. (reference 63), p. 188; ECJ 15.3.2007, C-54/05, Commission of the European Communities *versus* Republic of Finland; ECJ 11.12.2008, C-524/07, Commission of the European Communities *versus* Republic of Austria; and ECJ 6.10.2011, C-443/10, Philippe Bonnarde *versus* Agence de Services et de Paiement.

[65] *Ibid*., p. 187. Look also: ECJ 14.12.2004, C-463/01, Commission of the European Communities *versus* Federal Republic of Germany, ECJ 14.12.2004, C-309/02, Radberger GetränkegesellschaftmbH and S. Spitz versus Land Baden-Württemberg; ECJ 15.11.2005, C-320/03, Commission of the European Communities *versus* Republic of Austria.

[66] Opinion of Advocate General Jacobs in ECJ 13.3.2001, C-379/98 PreussenElektra AG *versus* Schleswag AG, para. 233.

[67] Poncelet, C. (reference 63), pp. 181, 190-191.

[68] ECJ 14.7.1998, C-341/95, Gianni Bettati *versus* Safety Hi-Tech Srl.

Nevertheless, in the most recent case law even the Court itself seems to have changed its attitude towards the interplay between economic and environmental interests and has recognised that environmental considerations should gain more weight. It is only reasonable because, for instance, Article 11 TFEU requires the integration of environmental policy requirements into the definition and implementation of all other policies. There is no similar requirement in case of the free movement provisions. Also, paragraph 3 of Article 114 TFEU states that the Commission proposals in the area of the internal market are to be based on a high level of environmental protection. This provision is also one of its kind, as it contains quality requirements for individual measures proposed by the Commission. Finally, the Member States are allowed, on the basis of Articles from 114(5) to 114(8) TFEU, to adopt new environmental measures even after the EU has adopted harmonisation measures on the basis of Article 114(1) TFEU. It is not required for the measures to be limited to reasonable ones. All these arguments suggest that the legislator should also accept the fact that the values of the society have changed, and that environmental protection should be recognised to be of equal importance as the treaty derogations contained in Article 36 TFEU. This is supported by the fact that governments and companies have also found out the benefits gained through the protection of the environment related to innovation, resource- efficiency and boosting the economy.[69]

One of the main challenges for the future is to determine the level of protection the environment needs. Until today, there has been no consensus among the politicians regarding the level of protection to be achieved. This, in turn, brings with it the risk that the protection levels will be lowered.[70] This has indeed already been the situation with the Packaging Waste Directive, which grants the Southern Member States the possibility to decide to postpone the attainment of recycling targets.[71] Krämer has expressed an opinion that if the European institutions were made to explain and make transparent, as required by the transparency rule, Article 37 of CFR and the Aarhus Convention, the manner in which they have integrated environmental interests in the decisions they adopt, then environmental integration would take a huge step forward.[72] Whether the EU institutions manage to strike a balance between trade and environmental interests remains to be seen.[73]

4.3. The reduction of risk of clashes between the environmental rules and the free movement of goods through positive harmonisation

In the future, in order to minimise the possible discrimination against foreign products on the grounds of environmental protection, the EU should aim at ascertaining the compatibility of environmental measures with the free movement provisions. The harmonisation process is likely to reduce the risk of clashes between the environmental rules and the free movement of goods.[74] At the moment, the state of harmonisation standards is far from perfect, and there are many product categories that are not harmonised at all. This has resulted in a situation, where the environmental protection levels vary greatly between the Member States. This, in turn, means that when the standards in the recipient state are stricter than those of the exporting state, the national courts are left with the task of reviewing the justification of domestic measures.[75] The prevailing view seems to be, unfortunately, that environmental and health regulations are regulatory burdens and distort the internal market and the competition between the businesses. Also, it is argued that environmental issues should be

---

[69] European Commission. (2016) Magazine of the Directorate-General for the Environment. *Environment for Europeans*. No. 61, p. 7.

[70] De Sadeleer, N. (2013) The Principle of a High Level of Environmental Protection in EU Law: Policy Principle of General Principle of Law? *Iustus Förlag AB*, p. 453.

[71] Article 6(5) of Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste. OJ L 365. 31.12.1994.

[72] Krämer, L. *Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into the other EU Policies* in Kingston, S. (2013). *European Perspectives on Environmental Law and Governance.* Taylor and Francis.

[73] De Sadeleer, N. (reference 4) p. 27.

[74] De Sadeleer, N. (2017) Free Movement of Goods and Environmental Product Standards. *Jean Monnet Working Paper Series. Environment and Internal Market*. Vol. 3, p. 4.

[75] De Sadeleer, N. (reference 4) p. 26.

regulated only through soft law.[76] However, soft law measures are seen as ineffective tools when it comes to the elimination of direct discrimination against renewable energy generated in other Member States.[77]

Tougher harmonisation through, for example, directives concerning products, renewables, nature conservation and energy efficiency would be effective not only for the environment but also for the competitiveness of the Member States' economies.[78] This is demonstrated by the following example: infringements of EU law typically occur in the field of environmental regulation, public procurement and taxation. For instance, only 3.4 per cent of public tenders were given to bidders coming from other Member States during the years between 2006 and 2010. This, in turn, affects the free circulation of goods as the diverging environmental standards and discriminatory measures in awarding contracts in the field of public procurement are liable to impede or even prevent the businesses from doing business in other Member States.[79] Thus, tougher harmonisation and, for instance, granting financial advantages for environmentally better goods would enable businesses across the EU to have better possibilities of doing business in other Member States. Also, at the moment all Member States in the EU are permitted by the provisions of the EU secondary law to have discriminatory support schemes for renewable energy. It is questionable whether these schemes are compatible with the free movement provisions and some other EU primary law rules and principles.[80] The CJEU has regarded in its case- law, including Ålands *Vindkraft* considered earlier in this paper, that the Member States are permitted to lay down far-reaching limitations in case of renewable energy markets. In the future, the only way to allow the electricity from one Member State to enter the markets of other Member States is the aforementioned harmonisation of the renewable energy schemes.

Overall, the EU is more environmentally-oriented in today's world than in the past, as the values of the society have changed and will also change in the future. The CJEU has justified discriminatory measures, for instance, in *Aher-Waggon, PreussenElektra* and most recently in *Brenner Heavy Lorries*. Also, the implementation period of the public procurement directives that leave room for environmental considerations expired on 18 April 2017.[81] If everything goes as planned, a significant contribution can be made to sustainable production and consumption, as the public authorities are allowed *inter alia* to require that the goods the bidders deliver fulfil the requirements contained in environmental labels.[82] As the whole EU is becoming more environmentally friendly day by day and tries to accommodate environmental interests with the objectives relating to the internal market, it is all the more important that the CJEU expressly declares what kind of measures the Member States are permitted to lay down in order to consider environmental interests. Thus, further research is needed as the case law relating to the interplay between the environment and the economy develops. All in all, the findings of the article indicate that a Treaty amendment should be made relating to the status of environmental protection in order to ensure legal certainty.

CONCLUSIONS

The Lisbon Treaty stroke a better balance between trade and environment and declared the objective of attaining a high level of environmental protection. Environmental protection was raised among the most important values of the CJEU, despite the fact that environmental protection is not mentioned among the derogations contained in Article 36 TFEU. It

[76] I*bidem*.

[77] Szydlo, M (2015) How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after Ålands Vindkraft and Essent. *Common Market Law Review.* 52(2), pp. 507-508.

[78] De Sadeleer, N. (reference 4), p. 27.

[79] Hafner, M., Robin, E. and Hoorens, S. (2014, September) The Cost of Non-Europe in the Single Market. Free Movement of Goods. European Parliamentary Research Service. Retrieved from http://www.europarl.europa.eu/EPRS/EPRS_STUDY_536353_CoNE_Single_Market_I.pdf

[80] *Ibidem*.

[81] European Commission. (2017, August 31) Internal Market, Industry, Entrepreneurship and SMEs. Legal rules and implementation. Retrieved from https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en

[82] European Commission. EU Public Procurement reform: Less bureaucracy, higher efficiency. An overview of the new EU procurement and concession rules introduced on 18 April 2016. Ref. Ares (2016) 1875822. 20.4.2016.

seems that the case law of the CJEU mirrors the changes that were brought by the EU treaties, as the CJEU has allowed the restriction of free trade on the grounds of environmental protection despite the discriminatory nature of the measure. This has been the case, for instance, in *Bluhme*, *Sydhavnens* and *Aher-Waggon.* This seems to indicate that the CJEU also holds that environmental protection is by no means of less important value than, for instance, the health grounds contained in Article 36 TFEU. The more environmentally-oriented approach applied by the Court in the most recent judgments relating to the conflict between trade and environment seems like a sign for the legislators to make a change in the legal status of environmental protection as a derogation from the free movement provisions. This conclusion is supported by the fact that the CJEU has assimilated in its case law the treaty derogation of protection of health and life of humans, animals and plants with environmental protection.

In the future, the CJEU has yet to expressly declare whether environmental protection justifies applicable measures. It is argued among the scholars that the CJEU has, indeed, two different options: either to read the written exception contained in Article 36 TFEU so as to include protection of the environment or to apply the case law relating to the mandatory requirements despite the distinctly applicable nature of the measure in question. The fact that the Court has already assimilated the Article 36 TFEU derogations in its case law with environmental protection supports the first option. It seems that the hypothesis of the paper seems to be right at least in light of the latest case law of the CJEU; however, no clear conclusions can be made about the intentions of the Court, as the Court has not yet expressly declared that environmental protection can justify distinctly applicable measures.

Both an effective policy on the environment and the elimination of barriers on free trade require the elimination of barriers through harmonised rules on the EU level. Also, the effectiveness of the new, more environmentally-conscious public procurement directives depends mostly on their enforcement in the Member States. The practical problem of how to coordinate national environmental policies with the internal market will remain topical for several years: new studies are required when the Court delivers new judgments on the relationship between trade and environmental protection.

REFERENCES

Articles

1. de Sadeleer, N. (2013) Environmental Regulatory Autonomy and the Free Movement of Goods. *Jean Monnet Working Paper Series. Environmental and Internal Market.* Vol. 1.
2. de Sadeleer, N. (2015) Trade versus Environmental Law – The Fable of the Earten Pot and the Iron Pot. *Environmental Policy and Law.* 45(1).
3. de Sadeleer. (2017) Free Movement of Goods and Environmental Product Standards. *Jean Monnet Working Paper Series. Environment and Internal Market*. Vol. 3.
4. Escámez, S.B. (2006) Restrictions to the Free Movement of Goods – The Protection of the Environment as a Mandatory Requirement in the ECJ Case Law. University of Lund. Master of European Affairs programme, Law. Lund [Master's thesis].
5. European Commission. (2016) Magazine of the Directorate-General for the Environment. *Environment for Europeans*. No. 61.
6. Fontanelli, F. (2014, September 19) EU Law Analysis. Expert insight into EU law developments. The Essent judgment: Another revolution in the case law on free movement of goods? Retrieved from http://eulawanalysis.blogspot.fi/2014/09/the-essent-judgment-another-revolution.html
7. Józon, M. (2005) The Enlarged EU and Mandatory Requirements. *European Law Journal*. 11(5).
8. Kingston, S. (2010) Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special. *European Law Journal.* 16(6).
9. Poncelet, C. (2013) Free Movement of Goods and Environmental Protection in EU Law: A Troubled Relationship? *International Community Law Review.* Vol. 15.
10. Smith, P. (2017, May 18) Using Public Procurement to Achieve Political and Social Goals. *Public Spend Forum Europe.* Retrieved from http://publicspendforumeurope.com/2017/05/18/using-public-procurement-to-support-national-interests-protectionism-on-the-rise
11. Steinbach, A. & Brückmann, R. (2015) Renewable Energy and the Free Movement of Goods. *Journal of Environmental Law.* 27(1).
12. Szydlo, M. (2015) How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after Ålands Vindkraft and Essent. *Common Market Law Review*. 52(2).
13. van Calster, G. (2015, December 10). Cheers to that! The CJEU on excise duties, alcohol, packaging and regulatory autonomy in Valev Visnapuu. *Gavc Law – Geert van Calster*. Retrieved from https://gavclaw.com/2015/11/23/cheers-to-that-the-cjeu-on-excise-duties-alcohol-packaging-and-regulatory-autonomy-in-valev-visnapuu/
14. Vedder, H.H.B. (2001) Environmental Protection and Free Competition: A New Balance? *Legal Issues of Economic Integration*. 28(1).
15. Oliver, P.J. (1999) Some Further Reflections on the Scope of Articles 28-30 (ex 30-6) EC. *Common Market Law Review.* 36(4).

Bibliography

1. Barnard, C. (2004). *The Substantive Law of the EU. The Four Freedoms.* (1st ed.). Oxford University Press.
2. European Union. (2014). *Boosting growth and jobs. Success stories from EU Environmental Policy*. European Union.
3. de Sadeleer. (2013). *The Principle of a High Level of Environmental Protection in EU Law: Policy Principle of General Principle of Law?* Iustus Förlag AB. Uppsala.
4. European Commission. (2016). *Buying green! A Handbook on Green Public Procurement*. (3rd ed.). European Union.
5. Kingston, S. (2013). *European Perspectives on Environmental Law and Governance*. Taylor and Francis.
6. Nowag, J. (2016). *Environmental Integration in Competition and Free-Movement Laws.* (1st ed.). Oxford University Press.

Case law of the Court of Justice of the European Union

1. ECJ 9.7.1992, C-2/90, Commission of the European Communities *versus* Kingdom of Belgium ("Walloon Waste").
2. ECJ 14.7.1998, C-389/96, Aher-Waggon GmbH *versus* Bundesrepublik Deutchland
3. ECJ 14.7.1998, C-341/95, Gianni Bettati *versus* Safety Hi-Tech Srl.
4. ECJ 20.9.1988, 302/86, Commission of the European Communities *versus* Kingdom of Denmark.
5. ECJ 3.12.1998, C-67/97, Criminal proceedings against Ditlev Bluhme.
6. ECJ 23.3.2000, C-209/98, Sydhavnens Sten & Crus.
7. ECJ 13.3.2001, C-379/98, PreussenElektra AG *versus* Schleswag AG.
8. ECJ 29.5.2001, C-263/99, Commission of the European Communities *versus* Italian Republic, para. 15.
9. ECJ 17.9.2002, C-513/99, Concordia Bus Finland
10. ECJ 16.1.2003, C-388/01, Commission of the European Communities *versus* Italian Republic, para. 19;
11. ECJ 4.12.2003, C-448/01 EVN AG and Wienstrom GmbH *versus* Republic of Austria
12. ECJ 14.12.2004, C-463/01, Commission of the European Communities *versus* Federal Republic of Germany.
13. ECJ 12.12.2004, C-309/02, Radberger GetränkegesellschaftmbH and S. Spitz *versus* Land Baden-Württemberg.
14. ECJ 15.11.2005, C-320/03, Commission of the European Communities *versus* Republic of Austria.
15. ECJ 30.3.2006, C-451/03, Servizi Ausiliari Dottori Commercialisti.
16. ECJ 15.3.2007, C-54/05, Commission of the European Communities *versus* Republic of Finland.
17. ECJ 11.12.2008, C-524/07, Commission of the European Communities *versus* Republic of Austria.
18. ECJ 10.2.2009, C-110/05, Commission of the European Communities *versus* Italian Republic.
19. ECJ 10.4.2009, C-265/06, Commission of the European Communities *versus* Portuguese Republic.
20. ECJ 4.6.2009, C-142/05, Åklagaren *versus* Percy Mickelsson and Joakim Roos.
21. ECJ 6.10.2009, C-153/08, Commission of the European Communities *versus* Kingdom of Spain.

22. ECJ 8.7.2010, C-343/09, Afton Chemical Limited *versus* Secretary of State for Transport

23. ECJ 22.12.2010, C-77/09, Gowan Comércio Internacional e Servicos Lda *versus* Ministero della Salute

24. ECJ 6.10.2011, C-443/10, Phillippe Bonnarde versus Agence de Services et de Paiement.

25. ECJ 8.5.2013, Joined Cases C-204/12 to C-208/12, Opinion of Advocate General in Essent Belgium NV v Vlaamse Regularingsinstantie voor de Elektriciteits- en Gasmarkt

26. ECJ 11.7.2014, C-204/12, Essent Belgium NV *versus* Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt.

27. ECJ 6.11.2014, C-108/13, Mac GmbH *versus* Ministère de l'Agriculture, de l'Agroalimentaire et de la Forêt.

28. ECJ 12.11.2015, C-198/14, Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio

29. ECJ 17.3.2016, C-472/14, Canadian Oil Company Sweden AB and Anders Rantén *versus* Riksäklagaren.

Documents

1. European Commission. EU Public Procurement reform: Less bureaucracy, higher efficiency. An overview of the new EU procurement and concession rules introduced on 18 April 2016. Ref. Ares (2016) 1875822. 20.4.2016.

2. European Commission. Internal Market, Industry, Entrepreneurship and SMEs. Legal rules and implementation. Available online: https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en (11.5.2017)

3. European Commission. (2017, February 15). Fact Sheet. February Infringements Package: key decisions. MEMO/17/234. Retrieved from http://europa.eu/rapid/press-release_MEMO-17-234_en.htm

4. European Commission. (2017, March 29) Trade. Public procurement. Retrieved from http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/

5. Hafner, M. Robin, E. & Hoorens, S. (2014) The Cost of Non-Europe in the Single Market. Free Movement of Goods. European Parliamentary Research Service. Retrieved from http://www.europarl.europa.eu/EPRS/EPRS_STUDY_536353_CoNE_Single_Market_I.pdf (21.2.2017)

6. European Commission. (2015). *Public procurement indicators 2013*. European Union.

Legislation

1. Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market. OJ L 230. 19.8.1991.

2. Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste. OJ L 365. 31.12.1994.

3. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. OJ L 94. 28.3.2014.

4. Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. OJ

L 94. 28.3.2014; Directive 2014/23/EU of the European Parliament and of the Council of 26 February on 2014 on the award of concession contracts. OJ L 94. 28.3.2014.

5. Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/195/EC and 2000/21/EC as amended by Commission Regulation (EU) No 552/2009/ of 22 June 2009 as regards Annex XVII. OJ L 164. 26.6.2009.

6. European Commission Proposal for a regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries. Brussels, 21.3.2012, COM(2012) 124 final.

7. HE (108/2016 vp) Hallituksen esitys eduskunnalle hankintamenettelyä koskevaksi lainsäädännöksi. (In English: *Government proposal for the law concerning public procurement*).

THE ARCHITECTURE OF SECURITY IN THE EURASIAN REGION: IS RUSSIA STILL A GUARANTOR OF REGIONAL SECURITY?

Gaziza Shakhanova

ABSTRACT

Various attempts of Russian political leaders to keep their formerly subordinated nations under a strong influence of regional military-political and economic coalitions headed by Moscow are treated differently by the West, by Russia itself, and by the post-Soviet states. On the one hand, despite the withdrawal of the Warsaw Treaty and the Soviet Union in 1991, and the end of the Cold War between two blocks, the West still depicts Russia as an unfriendly state ready to attack Europe at any time, and calls the allies to more careful watchfulness over the "Russian bear". On the other hand, Russia itself is more preoccupied with NATO's enlargement towards the East, the import of "hybrid" wars and "colour" revolutions, and the stirring up of terrorism and religious extremism stemming from Iraq, Syria and Afghanistan. While the post-Soviet states, which are geopolitically located under Moscow's umbrella, demonstrate loyalty and form alliances with Russia for their own sake, Russia could guarantee the preservation of the existing regimes and their states' sovereignty and give them political freedom to realise a "multi-factor" foreign policy by balancing the strongest powers in the region. However, Moscow is trying to avoid the role of the "watchdog" of the region, looks for stronger allies to strengthen its global positions, and has already prioritised the global Shanghai Cooperation Organization over the regional one. The article gives a picture of the existing security system in the post-Soviet space in the military-political and economic aspects, and provides tentative suggestions on the main trends and problems in the system.

Keywords: Security Threats in the Eurasian region, post-Soviet states, Russia and Central Asia, the Collective Security Treaty Organization, the Shanghai Cooperation Organization, the Eurasian Economic Union.

I. THE PATCHWORK QUILT OF "EURASIA"

"For America, the chief geopolitical prize is Eurasia"
Zbigniew Brzezinski[1]

In his disputable book, the American realist Zbigniew Brzezinski depicted Eurasia as an extended geographical space located on the Eurasian continent, which included both Europe and Asia. His concept is correlated with the earliest geopolitical theories of "Heartland" by Sir Halford Mackinder. It is worth mentioning that both authors stressed the crucial geopolitical importance of the territory of the Russian Empire, later the speech was about the territory of the former Soviet states, which are extremely rich in "black gold". Although the term "Eurasia" includes plenty of historical, geographical and ideological interpretations and deserves solid academic study, in this article the Eurasian region is taken in a narrow meaning, and means the post-Soviet space headed by Russia. Taking into consideration that the newly joined members of the existing security structures in the Eurasian region are presented by such states as China, India, Pakistan and Iran, it is hard not to mention their role.

After the withdrawal of the Soviet Union in 1991, Russia has taken a role of the guarantor of security and stability in the Eurasian region. The architecture of security is presented by the Collective Security Treaty Organization (CSTO)[2] and the

[1] Brzezinski Z.K. (1997). The Grand Chessboard: American primacy and its Geostrategic Imperatives. New York: Basic Books. p.30.

[2] The Collective Security Treaty Organization (CSTO) was signed as the Collective Security Treaty (in Tashkent, 15/05/1992) by Armenia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Uzbekistan. In 1993, the Treaty was signed by Azerbaijan, Belarus and Georgia. In 1999, Uzbekistan, Georgia and Azerbaijan came out of the Treaty and joined to the GUAM – the Organization for Democracy and Economic Development, in 2005 Uzbekistan left it again. In 2002, the Treaty was reborn into the Collective Security Treaty Organization. In 2017, the CSTO celebrates its 15-year anniversary. Available on the site <http://www.odkb-csto.org/>.

Shanghai Cooperation Organization (SCO)[3]. Both are aimed towards the maintenance of security and stability in the region and have functional overlapping, which in certain ways misleads the comprehension of the security system. However, there is a strong differentiation between the organisations: the CSTO is a military-political organisation, while the SCO is more humanitarian or economic, as its activity is related to such issues as the Business Council or Bank Consortium.

It deserves to be mentioned that the post-Soviet states form the membership of different regional initiatives – the Conference on Interaction and Confidence Building Measures in Asia[4] (which includes 26 states located in Asia), the Community of Independent States, the Organization of Islamic Cooperation, the Organization for Security and Cooperation in Europe[5], but these are not fully involved in a settlement of regional security problems.

The foundation of the Eurasian architecture of security is presented by three key organisations which provide military-political and economic stability in the region – the Collective Security Treaty Organization (CSTO), the Shanghai Cooperation Organization (SCO) and the Eurasian Economic Union (EEU)[6].

Table 1. The Membership of Eurasian states in military-political or economic organisations

	Country	Collective Security Treaty Organization	Shanghai Cooperation Organization	Conference on Interaction and Confidence Building Measures in Asia	Eurasian Economic Union
1.	Armenia	+	-	-	+
2.	Belarus	+	-	-	+
3.	Kazakhstan	+	+	+	+
4.	China	-	+	+	-
5.	Kyrgyzstan	+	+	+	+
6.	Russia	+	+	+	+
7.	Tajikistan	+	+	+	-
8.	Uzbekistan	-	+	+	-
9.	India		+		
10.	Pakistan		+		
-	-	Observer state: Moldova	Observer states: Afghanistan, Belarus, Iran, Mongolia	Other members: Azerbaijan, Afghanistan, Bahrein, Bangladesh, Vietnam, Egypt, Israel, India Jordan, Iraq, Iran, Cambodia, Korea, Mongolia, United Arab Emirates, Pakistan, Palestine, Thailand, Turkey	Observer states: Moldova, Tajikistan, Azerbaijan, Uzbekistan
-	-	Former members: Azerbaijan, Georgia, Uzbekistan	Partners in dialogue: Azerbaijan, Armenia, Cambodia, Nepal, Turkey, Sri-Lanka	Observer states: Belarus, Indonesia, Laos, Malaysia, Philippines, Sri-Lanka, Ukraine, USA	Cooperation: Vietnam, Egypt, Iran, Serbia, Mongolia, Thailand

Source: http://odkb-csto.org/, http://rus.sectsco.org/, http://www.s-cica.org, http://www.eurasiancommission.org/

[3] The Shanghai Cooperation Organization (SCO) is an international intergovernmental organisation (15/06/2001), the members are Kazakhstan, Kyrgyzstan, China, Russia, Tajikistan, Uzbekistan, India and Pakistan. There are 4 observer states: Afghanistan, Belarus, Iran, Mongolia. Available on the site <http://rus.sectsco.org/about_sco/>.

[4] The Conference on Interaction and Confidence Building Measures in Asia (04/09/1999). There are 26 Asian member states. A part of the state's territory has to be located in Asia. Available on the site <http://www.s-cica.org/index.html>.

[5] The Minsk Group under the OSCO, which is aimed at a peaceful resolution of the Karabakh conflict between Armenia and Azerbaijan.

[6] The Eurasian Economic Union (EEU) is the economic integration, which provides four types of freedom – the unified markets of goods, services, capital and labour (29/05/2014). Initially, the Eurasian Customs Union and the Unified Economic Space were presented by Belarus, Kazakhstan and Russia, in 2015 – the treaty was signed by Kyrgyzstan and Armenia. Available on the site <http://www.eurasiancommission.org/>.

Theoretically, the article follows the realism traditions and aims at highlighting the main regional trends and problems in military-political and economic security threats by analysing the activities of the core organisations, as well as official documents, statements of political leaders and protocols of meetings.

The following are the main trends which characterise the security system in the Eurasian region:
(A) **the CSTO and SCO are based on the pivotal role of Russia**. How Russia pictures the regional and global threats coincides almost with all members of both organisations, but the bilateral relations between the remaining members themselves are less coordinated. The researcher could easily observe the constellation of chronical problems among the states themselves related to the long-standing territorial pretensions.
(B) **On the Eurasian territory, there are processes of regional and global integration which are passing simultaneously**. The CSTO's regional shield is intended to fade off regional threats stemming predominantly from the Central-Asian region (for example, the extremist activities of the Taliban or ISIS), while the initiatives of the SCO have a more globalised impact. The CSTO presents interests of only six states (Russia, Belarus, Kazakhstan, Tajikistan, Armenia and Kyrgyzstan), while the SCO[7] is performed by more powerful states – emerging economies (India, China, Russia, Iran, Pakistan). Thus, the picture of regional security could be depicted as having several circles of cooperation – the regional one (in the form of the CSTO headed by Russia) and the global one (in the form of the SCO headed by China and Russia, but expanded by the influential India, Pakistan and Iran).
(C) **The states-members of the CSTO, SCO and EEU have uncompromising contradictions**, which give us a solid reason to presuppose the uncompromising disputes on how they perceive the external threats. Under the SCO, such pairs of states as "India-Pakistan", "China-India", "Uzbekistan-Tajikistan", "Armenia-Azerbaijan" have longstanding unsolved conflicts on disputed territories, trans-boarding rivers and ethnical pretensions. That lets us to postulate the thesis that the main stimuli for states' unification under the umbrella of CSTO, SCO and EEU are the following: (1) Russia, India, China, Pakistan joined their efforts within the SCO activity in order to claim their distinctiveness and disagreement with the political paradigm of the West; (2) the less developed Central-Asian states, Belarus and Armenia have been motivated by Russian military umbrella, which is able to preserve the states' political regimes and provide a strong economic support.
(D) **In comparison to the CSTO, the SCO is the more authoritative organisation**. In the mid-term, the SCO combines the interests not only of the leaders among the developing countries of the world, but the members of the Nuclear Club (Russia, China, India, Pakistan) as well, which increases the importance of the organisation.
(E) **the post-Soviet states are highly dependent on military and economic support from Russia**. In particular, the former allies are highly dependent on supplies of energy and mineral resources (oil, gas, metals). But the most striking is the dependence on military and defence features. Many post-Soviet states spend more than 80% of their defence budget on supplies from Russia.

[7] Membership of India and Pakistan in the SCO is dated by June 2017. Iran is among of the states-observers.

Table 2. International Comparison of Defence Expenditure (US $ mln) and Military Personnel (in thousands)

Russia & Eurasia	Defence spending Current US $ mln			Defence spending % of GDP			Active Armed Forces	Estimated reservists	Active Paramilitary
	2013	2014	2015	2013	2014	2015	2016	2016	2016
Armenia	461	469	414	4.15	4.03	3.90	45	210	4
Azerbaijan	1,951	2,092	1,738	2.65	2.82	2.72	67	300	15
Belarus*	681	n.k.	n.k.	0.93	n.k.	n.k.	48	290	110
Georgia	411	390	307	2.55	2.36	2.23	21	0	12
Kazakhstan	2,292	2,026	1,945	0.99	0.94	1.00	39	0	32
Kyrgyzstan	103	92	80	1.40	1.25	1.12	11	0	10
Moldova	25	28	23	0.32	0.35	0.38	5	58	2
Russia	66,073	64,480	51,605	3.18	3.47	4.18	798	2,000	489
Tajikistan	195	195	152	2.29	2.11	1.89	9	0	8
Turkmenistan*	612	n.k.	n.k.	1.49	n.k.	n.k.	37	0	0
Ukraine	2,421	3,386	3,916	1.35	2.59	4.34	204	900	n.k.
Uzbekistan*	1,593	n.k.	n.k.	2.79	n.k.	n.k.	48	0	20
Total	**76,819**	**76,284**	**62,682**	**2.76**	**3.03**	**3.48**	**1,331**	**3,757**	**701**

Source: The Military Balance (2016). Chapter 5 "Russia and Eurasia". The International Institute of Strategic Studies. p.163-210.
*-information insufficient.

The above are the general trends in the system of collective cooperation in terms of military-political and economic aspects. Below is the information on existing contradictions on the level of all three organisations (CSTO, SCO, EEU).

II. THE COLLECTIVE SECURITY TREATY ORGANIZATION: INTERNAL PARADOXES

Being often compared with NATO, the Eurasian regional military-political organisation CSTO, formed by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Russia celebrates its 15-year anniversary in 2017. The most salient feature of the CSTO is that it has a defensive character and is aimed at the unification of six states in the face of external threats. Among the external threats are border conflicts, the penetration of terrorism, religious extremism, foreign-lead special operations, and narcotics trafficking from Afghanistan. The more proactive position of the CSTO could be mentioned on the southern boundaries of Central Asia[8] (predominantly, in Tajikistan and Kyrgyzstan) against terrorism and narcotics trafficking from Afghanistan .

The military forces of the CSTO are stationed in the following regions of collective security[9]:

1) **"The Eastern European" collective forces** – have the unified regional air defence system of Belarus and Russia, and the regional group of unified armed forces of Belarus and Russia;
2) **"The Caucasus" collective forces** – have the unified regional air defence system of Armenia and Russia, and the regional group of unified armed forces of Armenia and Russia;
3) **"The Central Asian"** – have the unified regional air defence system of Kazakhstan and Russia, the unified air defence system on the Central Asian region, and the Rapid Military Reaction Forces of the Central Asian region.

The CSTO's military forces are divided into following:
A) the Rapid Military Reaction Forces - **17 000;**
B) the Peacekeeping Forces -**3 600;**
C) the Aviation Forces;
D) the Rapid Military Reaction Forces of the Central Asian region – **5000.**

[8] Turkmenistan declared about its neutrality.

[9] More detailed information is available at <http://odkb-csto.org/js_csto/voennaya-sostavlyauschaya-odkb/forces.php>.

As well as in NATO, one of the key principles of the organisation is the claim that "If one of the Member States undergoes aggression (armed attack menacing to safety, stability, territorial integrity and sovereignty), it will be considered by the Member States as aggression (armed attack menacing to safety, stability, territorial integrity and sovereignty) to all the Member States of this Treaty. In case of aggression commission (armed attack menacing to safety, stability, territorial integrity and sovereignty) to any of the Member States, all the other Member States at request of this Member State shall immediately provide the latter with the necessary help, including military one, as well as provide support by the means at their disposal in accordance with the right to collective defence pursuant to article 51 of the UN Charter".[10]

Notwithstanding the fact that in the form of an organisation the CSTO works for more than 15 years, it remains more as a training military centre; real activation of the CSTO's mission has not happened yet. Despite the number of interregional crises in Kyrgyzstan, Tajikistan, and Armenia, the CSTO demonstrated an aloofness towards the situations. One of the first expressions of dissatisfaction with the CSTO's activity came from the side of Kyrgyzstan, which had an unstable situation provoked by ethnic clashes in 2010. The collective forces of the CSTO did not recognise it as a call for their mission due to Article 5 of the CSTO's Charter: "The Organization shall operate on the basis of strict respect of independence, voluntariness of participation, equal rights and duties of the Member States, non-interference in the affairs falling within the national jurisdiction of the Member States".[11] Thus, the CSTO is concentrated on fading off just the external threats by diminishing the importance of the internal.

The second example of CSTO's members raising questions about its efficiency was regarding the situation related to the chronic conflict between Armenia (the member of the CSTO and EEU) and Azerbaijan (which left the CSTO in 1999)[12]. Although the special OSCE Minsk group set out to bring the parties to reconciliation, none of the CSTO or EEU members expressed solidarity with the Armenian side. The political attitude of Moscow also remained unchanged – Russia continued supplying arms to both sides of the conflict – Armenia and Azerbaijan.

It is worth mentioning that the sympathies of leaders of the post-Soviet states go against the official position of Moscow; as a rule, these sympathies are based on the religious or personal preferences of political leaders. In July 2016, a well-known hyped-up notion propagated by Russian mass media about the resentment regarding Turkey and followed by anti-Turkish sanctions was not supported by Kazakhstan (Russia's closest ally), due to their cultural commonness Kazakhstan preferred to ignore the inimical rhetoric of Moscow. A similar neutrality was expressed in the case of Crimean events. In May 2014, upon Armenia's entrance into the Eurasian Economic Union the President of Kazakhstan N. Nazarbayev, while speaking to the President of Armenia S. Sargsyan, recalled that Armenia entered the WTO having territorial boundaries recognised by the United Nations, which essentially meant without the Nagorno-Karabakh region, and that in fact implied Kazakhstan's support for Muslim Azerbaijan. Following this topic, in April 2015 the President of Russia V. Putin has shown his support to the Armenian orthodox people by giving them a visit in memory of a genocide carried out during the rule of Ottoman Empire.

Not surprisingly, the events that happened in Crimea in February 2014 made many of the post-Soviet states envision how Russia, under the pretence of protecting Crimean Russian-speaking population at first, and then under the pretence of guarding their right to self-determination, had annexed its neighbouring country's territory. To a lesser degree, the situation in Abkhazia or South Ossetia, to a higher degree the events in Crimea in 2014 made, for example, the Central Asian states re-evaluate their external priorities and demonstrate their "Asian-like" subtle politics against Russia.

Based on the above, several aspects could be formulated which depict the activity of the Regional military organisation:

1. **The CSTO is predominantly a regional security structure, which is intended to protect the Central Asian**

[10] Article 4, the CSTO's Treaty (15/05/1992) <http://www.odkb-csto.org/documents/detail.php?ELEMENT_ID=1897>.

[11] Article 5, the CSTO's Charter (07/10/2002) <http://www.odkb-csto.org/documents/detail.php?ELEMENT_ID=1896>.

[12] The conflict between Armenia and Azerbaijan is considered within the OSCE Minsk Group.

states' interests[13] (predominantly, of Tajikistan and Kyrgyzstan) against terrorism stemming from Afghanistan and narcotics trafficking control. Thus, it has a more specified and regional dimension. Under the CSTO, primary attention is given to the Central Asian region in terms of the latest claims of the ISIS group to unify Afghanistan and Central Asia.

2. **The old Soviet traditions of pathological dependence of the post-Soviet states on the political approval of Moscow.** While in foreign politics the post-Soviet states are striving to demonstrate their sovereignty and independence, inside the society there are processes of emulation and catching-up with Russian accomplishments in different fields, as well as a hardly explainable eagerness of the elites for recognition. Despite having 26 years of independence, the post-Soviet states still highly depend on the former-Soviet centre – Moscow.
3. **The calibre of member states, as well as the scope of their interests is extremely heterogeneous,** which brings specificity into the CSTO's activity. Not the complexity of interests, but their heterogeneity presents the main difficulty, as there is little common in the concept of security threats between its members. While NATO acts in the name of the common aim, the Eurasian military block pursues two aims: first, to unify the collective forces to fade off external threats in Central Asia, the Caucasus and the far-west boundaries of the block; second, to recreate the former Soviet power balance and resist NATO's enlargement.
4. **The CSTO has not proved its necessity for its members, and remains more as a centre for military training.** In 2010, the appeals of Kyrgyzstan to suppress the unrest related to ethnical clashes was not supported by the CSTO[14]. *De jure*, such aloofness was justified by the terms of the CSTO's Charter on non-interference in the internal affairs of its members. *De facto*, the CSTO proves the presupposition that the CSTO plays the role of a mirror reflection to balance NATO.
5. **The CSTO's members demonstrate loyalty in relations with Moscow.** On the one hand, post-Soviet states need the guarantees for internal stability given to them by Moscow. On the other hand, the price for loyalty is a benevolence to the membership in other regional organisations headed by Russia.

1. The Shanghai Cooperation Organization: a Club of Disagreeing States or the Alliance against Western Dominance

The Shanghai Cooperation Organization is often called the second Warsaw Treaty, which is absolutely wrong. The SCO is not a military block. However, while the SCO strives for stability and security in the region, it does not allocate any collective forces – the only legitimate way in which the SCO acts is a dialogue and cooperation on the most challenging threats in the region, such as terrorism, separatism and extremism[15]. The SCO's members are China, Russia, Kazakhstan, Uzbekistan, Kyrgyzstan, Tajikistan, as well as India and Pakistan.

According to its main declaration, the SCO is not an alliance directed against other states and regions.[16] The SCO aims at strengthening mutual trust, friendship and good neighbourliness between the member states, making joint efforts to maintain and ensure peace, security and stability in the region, as well as encouraging effective political, trade, and economic cooperation.[17] Besides the political councils on the level of heads of states, governments, foreign affairs ministries and national coordinators, there are economic structures, such as the Business Council or the Bank Consortium.

Once again, there are no collective military forces under the SCO. However, this goes against the SCO's aims, as the strongest accent is given to the struggle against terrorism and religious extremism stemming from Afghanistan, Syria, and Iraq. One of the challenging threats for China is religious separatism proclaimed by "Eastern Turkestan", while for Iran, Russia and

---

[13] Uzbekistan left the CSTO in 1999.

[14] Article 5, the CSTO's Charter on non-interference into the affairs falling within the national jurisdiction of the States.

[15] The SCO's Regional Anti-Terrorist Structure (15/05/2001) <http://eng.sectsco.org/structure/#6>.

[16] The Declaration on the SCO's establishment (15/06/2001) <http://eng.sectsco.org/documents/>.

[17] The Declaration on the SCO's establishment (15/06/2001) <http://eng.sectsco.org/documents/>.

Central Asian states it is ISIS, as well as the Taliban.

The following are the main trends of global security cooperation:

1. **The diversity of the Member States' interests and the uncompromising nature of chronic conflicts** between them (China-India, India-Pakistan). Despite the commonality of the aims declared by the SCO, its members have mutual pretensions, which could congeal the development of multi-level cooperation, the formation of the SCO's agendas, and negatively influence comprehension of the "Shanghai spirit".

2. ***De facto,* the SCO is a more economic organisation**. However, the organisation positions itself as the one which strives for stability and peace in the region, its intentions are not supported by any strong collective military forces. The SCO's institutions and tools, as well as agendas are limited to general political and economic issues.

3. Unfortunately, the **attempts of both Eurasian organisations to resist terrorism have not been unified**. Taking into account their diversified strategic functionality (the CSTO is the military regional alliance, while the SCO is the global economic initiative), the realisation of the common goal has been impeded. In the short-run, the membership of India, Pakistan and Iran jointly with Russia and China could strengthen the role of the SCO in the struggle against terrorism.

4. **Russia and China are competing for the pivotal role in the region**. China strives for leadership in the Eurasian region. Its last "One Belt One Road" initiative, which includes the enormous geographical space from Pakistan to Africa, gave the strongest powers concern about saving their first ranks. By leading the Foundation on Infrastructure Investments and the Silk Road Fund, China attracts attention and makes the Central Asian states compete for Chinese money. However, despite the fact that China and Russia have strong bilateral relations, which have been reflected in the 30-year agreement on gas supplies (the "Sila Sibiri" pipeline) and their partnership under the BRICS organisation, these two states are political competitors in the Eurasian region.

5. **The SCO should rather be considered a Club of Disagreement with the West** or the Alliance against Western dominance. Being unified under the SCO, Russia, India, China, Pakistan do not have to march to the same Western civilization's drums, and have a solid tribune to claim their own political picture of the world.

2. The Romantic Eurasian Integration

In December 2012, US Secretary Hillary Clinton commented on the perspectives of the Eurasian Union by saying, "There is a move to re-Sovietise the region … but let's make no mistake about it. We know what the goal is and we are trying to figure out effective ways to slow down or prevent it."[18] Right after Crimea, in May 2014, the events were followed by a quick signing of an international treaty – the Treaty on the Eurasian Economic Community between three countries (Belarus, Kazakhstan, and Russia), which came with an abundance of sociological research conducted on an absolute approval of such economic unification by the general public. Despite an overabundance of mass media information that strongly supports the Eurasian unification, which does not prove its economical rationality, the realm of such unification from the very first days and up to this moment cannot justify hopes in the area of trade and economy: the internal trade within the Eurasian economic community decreases gradually (2012 – 67,8 bln $, 2013 – 64,5 bln $, 2014 – 61,1 bln $, 2015 – 45,6 bln $, 2016 - 42,5 bln $)[19].

The converse effect on the regional trade could be explained by the following factors. First, the Eurasian Project was created to balance the US-EU trade agreement, which puts the rational calculations on the backside of the project. Second, the EEU is still negatively perceived by its small members (as Kazakhstan, Kyrgyzstan or Belarus) as a loss of economic sovereignty, with some of the fiscal functions having been passed to the supranational organs. Third, the Russian proposals on the EEU's priorities go against the interests of other members. With the imposing of reciprocal sanctions against European goods, the official position of Moscow lobbied for the implementation of "European-like" production sites on the territory of the EEU's members. Finally, it deserves to be mentioned that the EEU is an attempt to recreate the production cooperation of the Soviet Union headed by Moscow and resist the processes of globalisation.

---

[18] Financial Times (07/12/2012) <https://www.ft.com/content/a5b15b14-3fcf-11e2-9f71-00144feabdc0>.

[19] <http://www.eurasiancommission.org/ru/act/integr_i_makroec/dep_stat/tradestat/tables/intra/Pages/default.aspx>.

III. CONCLUSION

By attempting to depict Russia's nation, Edward Luttwak, the American geopolitical thinker, said in an interview, "Drunk they defeated Napoleon. Drunk they beat Hitler. Drunk they could win against NATO"[20]. Hardly ever could that kind of characterisation be taken seriously, however, it reflects the Western dominant opinion of Russia. The sad truth about this story is that Russia still has been perceived through the old prism of Soviet accomplishments – both disputable and remarkable, and as an enemy who needs to be won.

Undoubtedly, Russia continues to play a dominant role in the post-Soviet space. By assessing critically, the main institutions of the regional security architecture (the CSTO, the SCO, and the EEU) are the political projects of Russia, and in many ways it was Russia that made them succeed. Despite its dominance in the region, one could not avoid mentioning the balancing and defensive role that Russia plays in the region – the role of the guarantor on the regional scale (for the sake of the Central Asia under the CSTO) and the role of the partner and competitor on the international scale (among China, India, Iran and Pakistan under the SCO). How Russia is perceived by the international community depends on how the international order is formulated, as "unipolar" or "multipolar". The former concept gives a short-sighted picture where Russia is demonised, while the latter tells us that "Russia is just one among the strongest states", and the confrontation will not bring any benefits. It happened once in the history of international relations, when the United States and China confronted the Soviet Union, with the weakening of the Soviet threat, China turned out to be the next enemy to the world order. Despite the fact that the Eurasian Architecture of Security has its own contradictions and weaknesses, Russia continues to play the role of the security guarantor in the region challenged by terrorism. Thus, it is time to speak not about confrontation, but about joining efforts in the face of common threats.

---

1. The Charter of the United Nations <www.un.org>
2. The Collective Security Treaty Organization (1992) <http://www.odkb-csto.org/documents/detail.php?ELEMENT_ID=126>
3. The Collective Security Treaty Organization, "Strategy-2025" <http://www.odkb-csto.org/documents/detail.php?ELEMENT_ID=8382>
4. The Charter of the Shanghai Cooperation Declaration (2002) <http://eng.sectsco.org/documents/>
5. The Tashkent Declaration by the Heads of the Shanghai Cooperation Declaration (2010) <http://eng.sectsco.org/documents/>
6. The National Security Strategy of Russia (2015) <http://www.scrf.gov.ru/security/international/document25/>
7. The Military Doctrine of Russia-2020 <http://www.scrf.gov.ru/security/military/document129/>
8. The Naval Doctrine of Russia-2020 <http://www.scrf.gov.ru/security/military/document34/>
9. The Law on the Kazakhstan's National Security (1998) < www.legislationline.org.ru>
10. The Concept of Kazakhstan' External Policy 2014-2020 <ww.mfa.gov.kz>
11. The Charter of the NATO <http://www.nato.int/cps/en/natohq/57772.htm>
12. The Organization for Co-operation and Security in Europe <http://www.osce.org/>
13. The Eurasian Economic Union <http://www.eurasiancommission.org/en/Pages/default.aspx>
14. The Military Balance (2016). Chapter 5 "Russia and Eurasia". The International Institute of Strategic Studies. p.163-210.
15. Brzezinski, Z.K. (1997). The Grand Chessboard: American Primacy and Its Geostrategic Imperatives. New York: Basic Books. p.30.
16. Neumann, I.B. (1999). Uses of the Other. The East in European Identity Formation. Minneapolis: The University of Minnesota Press. p.104.

[20] Neumann, I.B. (1999). Uses of the Other. The East in European Identity Formation. Minneapolis: The University of Minnesota Press. p.104.

OBJECTIVES OF GOVERNANCE:

A COMPARISON OF ISLAMIC AND WESTERN TRADITIONS IN THE CONTEXT OF PAKISTAN

Rao Javaid Iqbal

Tahir Mahmood

ABSTRACT

An Islamic state led by a Caliph works to achieve objectives of Islamic governance. The objectives of governance between Western (secular democratic system) and Islamic traditions have close proximity, at least in words. These objectives include collective action (*ijtimaiyat)* and social justice (*Aadalah*). Collective action is used to provide basic human rights, while the comparable Islamic term *ijtimaiya* is aimed at providing basic protections. A Western nation state is defined by having legitimacy to tax and maintain an army for defence, while in Islam, comparable terms, though having difference, are Zakat and *Jihad.* It is required that an Islamic state should achieve effective internal governance by developing legal instruments for achieving the objectives, even if it works under *Khilafah*, or democracy.

INTRODUCTION

An Islamic state is a form of government led by a Caliph, which, on the negative side, may be considered by many as the return of autocracy in the cloak of *Khilafah.* The term *Khilafah* has yet to be compared against the established secular norms of liberty, human rights and democracy. This paper studies the ultimate objectives of governance in Western and Islamic traditions in order to compare Western governance with the pure Islamic theocratic state, ignoring the middle line solution of a "democratic Islamic state", at the philosophical level. It compares definitions of a state and its objectives in both of the traditions, besides explaining the objectives. The study also provides a theoretical ladder of logic for the objectives of governance. Though various legal traditions have similarities, different political methodologies may be adopted to achieve them.

Governance and State

Rhodes defines governance as "methodology for managing the state affairs".[1] The state is governed through formal and informal institutions, as Stoker explained.[2] Objectives of governance include 1) "creating conditions for collective action and public order", according to Stoker. Wright et. al[3] state that collective action aims at improving conditions of a group (such as status or power), and it is enacted by a representative of the group, while Roel De Lange is of the view that normal and undisturbed life in the public sphere is called 'public order'.[4] In economics, collective action deals with the public goods or public choice of a group. The theory of collective action is also applied in politics, anthropology and other fields. The public order/*ordre public* has broad and diverse meanings. It is about peaceful situations in the public sphere, yet it includes

[1] Rhodes, R. (1996). The new governance: governing without government. Political Studies, Volume 44, pp. 652-653.

[2] Stoker, Gerry. (1998). Governance as theory: five propositions. International Social Science Journal, 50(155), pp. 17.

[3] Wright, Stephen, C., Taylor, M. Donald and Moghaddam M. Fathalli. (1990). Responding to Membership in a Disadvantaged Group: From Acceptance to Collective Protest. Journal of Personality and Social Psychology, Volume 58, p. 994–1003.

[4] Lange, Roel de. (2007). The European Public Order, Constitutional Principles And Fundamental Rights, s.l.: School of Law, Erasmus University Rotterdam, pp 3.

patterns of values that are vital for a community of citizens.

A state is the most legitimate structure to pursue objectives such as collective action and maintaining public order. So, there is need to understand the concept of 'state' itself and the level of legitimacy in political thought. Allan defines the state in Weberian terms, stating that it has "legitimate monopoly over the use of power", including the ability to tax people and maintain an army.[5] According to Collins, legitimacy for a group is an emotional attachment, which one feels when facing death in the company of others.[6] For Allan, nation-states are defined by factors like territory, rational law and a standing army.[7] Power, according to Allan, is the ability of people to do what you want, while legitimacy is the willingness of people to do what you want. In that manner, a legitimate governance structure or the state, in other words, enables people, by coordinating their formal and informal institutions, to willingly work for the attainment of a common goal, and for that purpose, it codifies social rules or develops a legal system. In modern structures of a state, there are attempts to coordinate formal and informal institutions, as is the practice of the European Union. These are visible efforts to improve from government (or control) to the level of state, where people may be coordinated to willingly work for the attainment of common goals.[8]

Beyond this simple conception, there is an idealistic and holistic conception of the state as well, wherein Jones (1990)[9] cautions that the "Challenge for governance is to understand connections across social, cultural, political, economic and environmental challenges". The state is a centre for managing societal systems, yet not the sole structure or an authority for these systems. Monty Marshall is of the view that a state regulates activity, manages conflicts and facilitates interaction in these systems, however, it is constrained by external dynamics.[10] For him, the state should be able to govern independently and through a "sovereign regime" within and without.

Objectives of Governance in Islam

Islamic scholars defy the impression that Islam is based upon autocracy. Khattab and Bouma point out in detail that there is no institution or body, whose rules are binding upon Muslims; instead, authority is a legal tradition provided in the holy texts *Quran* and *Sunnah* of the Prophet Muhammad (BPUH).[11] If Islam defies the autocracy and it is based upon a legal tradition too, then there must be some higher objectives that have to be achieved.

Islamic scholars have defined objectives of governance in various manners and ways. Collective action (*ijtimaiyah*) is a goal of *Shariah*. *Sadruddin Islahi* has written a short but commendable book on the subject, where he explained *Ijtimaiyah* as a tool for creating an "environment to achieve other vital objectives".[12] *Islahi* defines, in a quite classical Islamic way, the objectives of *Shariah* from the verses of the Holy Qur'an, which include: 1) "being witness for the truth against the people" before God, 2) establishing the religion (*din*), and 3) to enjoin the virtue and prohibit from undesired actions (*amr*

[5] Allan, Kenneth, D. (2011). The social lens. An Invitation to Social and Sociological Theory. s.l.:Sage Pine Forge Publishers.

[6] Collins, R. (1986). Weberian sociological theory. New York: Cambridge University Press, pp 156.

[7] Whether population as a factor for nation state? Of course, one may not not infer from "territory" as the barren land, instead it includes population as well. Whether recognition is a factor for a state? Recognition means external legitimacy. Nowadays, UN is a recognizing body. Internal legitimacy is achieved once a state achieves a territory. For those nation states which are in the process of recognition, there are few extreme and interesting examples. Israel is recognized by the UN but not by Arab states and Pakistan. On the other hand, Islamic Emirat of Afghanistan was not recognized by the UN and most of the countries except for Pakistan, Qatar and Saudi Arabia. Both cannot be denied as nation states when having territory. So, the definition is valid that a nation state may continue to exist until it has territory, rational law and a standing army (Allan, 2011: 257).

[8] Thomas (2003) mentions a white paper by the European Commission which suggested more structured relations with the informal institutions like NGOs and interest groups. He complains that the European governance is affected by the interest groups and networks. He blames that the European Commission is interested in working with the groups for voluntary acceptance and compliance rather than enforcement of laws.

[9] Jones, B. (1990). Sleepers Wake! Technology and the Future of Work. Third Edition. Melbourne. Oxford University Press.

[10] Marshall, Monty. (2010). The Measurement of Democracy and the Means of History. Society. 48. 24-35. Pp 27-28. 10.1007/s12115-010-9390-7.

[11] Khattab, Sayed and Bouma D. Gary. (2007). Democracy in Islam. Routledge, pp 23.

[12] Islahi, Sadruddin. (1985). Islam aur Ijtimaiyat (Islam and Collectivity). Islamic Publications Lahore. Trans by the Author.

bil maaroof wa nahi an almunkar).[13] The first one is more of a spiritual nature, while the third, *Amr bil maaroof wa nahi an almunkar,* seems to be a tool to achieve an objective. Though a few tools are extremely important for achieving the objective effectively, the premise of the study does not include a discussion on tools. The second objective defined by *Islahi*, "establishing the religion", is an important mechanism of collective action. It may be termed as a tool to create an atmosphere where the religion could flourish at an individual as well as a collective level. The same sort of phrase is defined in article 31 of the Constitution of the Islamic Republic of Pakistan.[14] The atmosphere conducive to Islam is created when the state fulfils its duties. As Maududi Sayyid[15] describes, the duties of an Islamic state include the establishment of justice, the enactment of prayer (five times a day at the collective level), the collection of *Zakat* (religious taxes), and ejoin the virtue, as well as prohibition from undesired actions. Imam Maududi Sayyid further describes that none of these functions may be performed without establishing a state that should implement laws through the power of the state (*sultan)*.[16] So, in that manner, establishing a religion is a comprehensive phrase that is akin to establishing an Islamic state or, in other words, opting for collective action.

Then, there are five objectives of *Shariah* as defined by Imam Al-Ghazali[17] and his teacher Al Juwaini. These include protection of religion (*Din*), protection of life (*nafs*), protection of posterity (*nasl*), protection of wealth (*mal*), and protection of the intellect (*aql*). An interesting debate regarding public interest (*ijtimaiyah*) and the objectives of *Shariah* was initiated by Al-Ghazali, who criticised the principle of public interest (*ijtimaiya*) and suggested that it should be constrained by the limits mentioned in the objectives of Islamic law (Maqasid al-shariah). Amin, Tahir[18] as well as Qutb Sayyid[19] explain the concept of social justice in Islam, where it is clarified that society should keep a balance between the role of the individual as well as that of the community.

Here, Islamic society should develop its own strategy to protect the welfare and related aspects of the individual Islamic citizen and avoid the thorny debate to adopt the Western regime. It is important to note that Islam is a complete and comprehensive way of life (religion, or *Din*), where it is a stigma to accept any external principle, law or way of life. An inward and compatible terminology is required for such a religion, otherwise it may face internal rifts and eventual breakups. A broken society cannot withstand any internal or external challenges, while an integrated society may progress in a coherent manner. In order to avoid such sort of issues, Islamic concepts need to be explored and organised genuinely to strengthen the society from within. So, Islam may not need reference to external philosophy (like the one based upon the regime of freedom, rights and democracy) to protect their citizens' interests from the crunch of state, from the aggression of negative groups or from the coercion of the collective. Islam does have its own context to take care of social justice, collective action and provide vital protections to lead to quality life, development and governance.

---

13 Islahi (1985: 81-82) mentions three verses from the Holy Quran to prove objectives of collective action. 1) وَكَذَٰلِكَ جَعَلْنَاكُمْ أُمَّةً وَسَطًا لِّتَكُونُوا شُهَدَاءَ عَلَى النَّاسِ وَيَكُونَ الرَّسُولُ عَلَيْكُمْ شَهِيدًا (Translation: Thus have We made you a Community of the "Golden Mean" so that you may be witnesses in regard to mankind and the Messenger may be a witness in regard to you). 2) كُنتُمْ خَيْرَ أُمَّةٍ أُخْرِجَتْ لِلنَّاسِ تَأْمُرُونَ بِالْمَعْرُوفِ وَتَنْهَوْنَ عَنِ الْمُنكَرِ وَتُؤْمِنُونَ بِاللَّهِ · Translation: You are now the best people brought forth for (the guidance and reform of) mankind. You enjoin what is right and forbid what is wrong and believe in Allah. 3) شَرَعَ لَكُم مِّنَ الدِّينِ مَا وَصَّىٰ بِهِ نُوحًا وَالَّذِي أَوْحَيْنَا إِلَيْكَ وَمَا وَصَّيْنَا بِهِ إِبْرَاهِيمَ وَمُوسَىٰ وَعِيسَىٰ أَنْ أَقِيمُوا الدِّينَ Translation: (He has appointed for you the same Way of life which He had ordained for Noah and which (0 Muhammad) We have now revealed to you; and which We had already enjoined on Abraham and Moses and Jesus, stressing: "Establish this Way). Translation by Imam Maududi, Sayyed.

14 Article 31 of the Constitution states as under: Islamic way of life.-(1) "Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah". One should note that it is part of the 'principle of policy' and not a 'fundamental right' and hereby not enforceable and this is why the non-enforcement of principles of policies create panic among Muslims.

15 Maududi Abulala Sayyid. (1967). *Islami Riasat* (Islamic State). Islamic Publications Lahore, pp 555-557. Translation of selected paragraphs by the Author.

16 Ibid pp 308

17 Al-Ghazali, Muhammad Bin Muhammad. (d. 505 AH/1111 AD). (2010). Al-Mustasfa min 'Ilm Al-Usul (The Clarified in Legal Theory), Darul Kutub Ilmiyah. Beirut. (P 1:174)

18 Amin, Tahir. (1991). Nationalism and internationalism in liberalism, Marxism and Islam. s.l.:International Institute of Islamic Thought, pp 10.

19 Qutb, Sayyid. 1953. Al-'Adalah Al-Ijtima'iyyah Fi Al-Islam. American Council of Learned Societies. Translated by Hardie, J.B. (2000). Social Justice in Islam. Islamic Publication International.

The objectives of Islamic law (*Shariah*) need a little more explanation, though it is not the direct focus of the article. Munir[20] explains that they are, in fact, higher objectives to take care of the individual welfare and protection. The implementation of *Sharia* is driven by "*masalih*" or seeking of benefit and repelling of harm from the individual and the public. *Maslaha* (plural of which is *Masaleh*) may be used instead of *ijtimayyiah* for collective action. Though both have different meanings, Islamic scholars have used the word *Maslaha* frequently for the governance. Munir further divides the *Masaleh* in three categories: *Daruriat* or necessary interests, *hajyiat* or supporting interests, and *tahsiniyat* or complementary interests.[21] If necessities (*Daruriyat*) are ignored, chaos and disorder may prevail in the worldly affairs and loss in the life hereafter may be expected. *Hajiyat* (requirements) facilitate life and remove hardships, while the *Tahsiniyat* are aimed at adding beauty to life, which may include better utilisation, beautification and simplification of *daruriyyat* and *hajiyyat*. Imam Shatibi mentions the relationship between *daruriyyat, hajiyyat* and *tahsiniyyat,* where *daruriyyat* are essential for *hajiyyat* and *tahsiniyyat*. Any decline in *daruriyyat* reduces *hajiyyat* and *tahsiniyyat*, while the reverse may not be true.

Social justice needs more explanation because it is the central aim of Islam. It is also a vital objective of *Sharia* (Maududi Sayyid 1967: 570; Amin 1991: 10, Qutub S 2000: 25-28). Social justice provides the basis of the Islamic order, though it is also an important pillar of other societies (Islahi 1985; Maududi Sayyid 1967: 539-540). Maududi Sayyid (1967) explains that "social justice is sole reason (objective) to establish an Islamic state". Qutub Sayyid (2000: 27-28) is more philosophical, defining Islam as a religion of justice and unity (or Oneness of God). His book is titled *Al-'Adalah Al-Ijtima'iyyah Fi Al-Islam* (Social Justice in Islam). The title literally means "Collective Justice in Islam", and so the word collective or social are synonyms for the translator of the book. He defines the purpose for the collectiveness in an amazing way as "solidarity, love, cooperation and mutual understanding which is based on faith in One God". To him, social justice is not a matter of outward orientation, instead it is linked to the inner self, and then it should be required by the society as the highest purpose, not merely a societal issue. Qutb Sayyid goes a little further to look at social justice from a balancing act between groups, generations, parties, etc., and that regardless of differences in colour, sex, race and belief, stating that "It is because it all depends upon 'rights and duties' and not on being a specific person". He further establishes social justice upon the freedom of three elements: conscience, human equality and mutual cooperation, but reverence for Allah is the final guarantee of the establishment of justice. For Qutb Sayyid, social justice exists once there is human liberation intellectually and emotionally from the instinct of servitude and worshiping any but Allah.[22] There is a complete equality of all human beings because everyone has access to Allah. Qutb Sayyid, thus terms this form of liberation as one of the 'cornerstones to establish social justice in Islam'. But again, justice is not in the mere form of a one-sided act by the ruler; instead, it is practically linked to the duties of the masses through the consultation process between the rulers and the ruled.[23] As is written in the Quran, "Take collaboration with them in the matter" (Quran Sura 3, 153).[24] Here, in Islamic governance, the ruler is obeyed because he submits to the authority of Allah.[25] There could be issue in the behaviour of the privileged ruling classes. For that matter, the words of Qutb Sayyid[26] may provide the guidance, "Islam sets a strict limit to the powers of a ruler so far as he is personally concerned. Yet, Islam gives him the broadest possible powers looking after the collective matters." But it should be guided under the Messenger's phrase, "There must be no hardship and no contention". Then, another addition

[20] Munir, Muhammad (2014) Shari'ah and Nation-state: the Transformation of Maqasid al-shar'iah Theory, International Seminar on "The Practice of Islamic Law in the Muslim World" held in Jakarta on 11-12 November, 2014.

[21] For Muslim jurists *maslahah* is the seeking of benefit and the repelling of harm as directed by the Lawgiver.

[22] Qutb, 1952: 774 as mentioned in Asyraf et al. 2012. Asyraf et al. 2012. Islamic Concept of Social Justice in the Twentieth Century. Advances in Natural and Applied Sciences, 6(8): 1423-1427, 2012. In another book, Qutb explains that "He (The God) establishes and maintains (real) justice, since justice is an essential quality of Godhead…. Throughout history, justice was established only during those periods when God's method was adhered to". [In the Shade of the Quran. (1965). Verse 19-20, Surah III, Volume II.]

[23] Qutb Sayyid. (1952). Al-Adalah Al-Ijtimaiyyah fi'l-Islam (Social Justice in Islam). Cairo: Mactbaa Dar al-Kitab Al-Arabi, pp 95

[24] Few translations of the same verse use the word "consult" instead of "collaboration". There is vast literature avaialble on consultation (*Shura*) that is a process through which many scholars justify Islamic democracy as well. Effindy (2008: 41) refer to the principles of justice (adl), consultation (shura), egalitarianism (musawah), trust (amanah) and freedom (hurriyah).

[25] Qutb Sayyid. (1952). Al-Adalah Al-Ijtimaiyyah fi'l-Islam (Social Justice in Islam). Cairo: Mactbaa Dar al-Kitab Al-Arabi, pp 96-97.

[26] Ibid. pp. 98

to the objectives is by Abdullah Al-Ahsan (n.d), a contemporary scholar who adds *Amanah* (Trustworthiness and honesty) as another objective of governance.[27] In short, collective action or collectiveness (*Ijtima'iyyah*) of Islam makes it a religion of popular masses, as it emphasises public issues and asks for the individual's sacrifice for the sake of collective benefit. In this manner, Islam is a popular faith and requires its followers to work in groups and not individually, yet considering the welfare of the individual under the five objectives of *Shariah*.

Sayyid Maududi,[28] while explaining the objectives of an Islamic state, adds another dimension; defence (*Jihad)*, as an objective of an Islamic state (and so a way for collective action). For Qutb Sayyid too, Islam is a spiritual power which encourages the fostering of material powers; it enjoins self-defence and defensive war. The explanation of Maududi Sayyid is very enlightened, as he explains *Jihad* (defence) as a struggle against the (negative) self (wishes), an effort against the dominant segments of society around, and a fight against the wrong systems (which are incompatible with Islam), including that of religious, cultural and political systems of the world.[29] Here, we may find that collective action and state are rather synonyms for Maududi Sayyid. It seems that, for him, establishment of an Islamic state or collective action should lead to a revolution at all stages of one's life in personal as well as in collective spheres. For him, *Jihad* is a broader concept, yet it includes practical war as well. It is quite interesting that Maududi Sayyid is the strongest supporter of democracy and human rights in Muslim society. His party contests in elections regularly.

OBJECTIVES OF GOVERNANCE AND PAKISTAN

The Constitution of the Islamic Republic of Pakistan may also be studied under the objectives of governance. The Constitution is an effort to enjoin both of the legal traditions; Islam and the West, without setting limits or providing a mechanism of resolving the critical issues. The preamble of the Constitution of the Islamic Republic of Pakistan states these principles as, "where in the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed. ... Faithful to the declaration made by the Founder of Pakistan, Quaid-i-Azam Mohammad Ali Jinnah, that Pakistan would be a democratic State based on Islamic principles of social justice".

The Constitution of the Islamic Republic of Pakistan utilises the word *Sharia,* though it is not well defined. A Federal *Sharia* Court (the second-tier court equivalent to the High Court) is a constitutional body that exists in the country, while there exists another higher body, the "*Sharia* Appellate Bench", which works with the Supreme Court, the highest constitutional body. So, the word *Sharia* is not new to the constitutionalists and legislators of the country, yet there is a need to define these phrases and to prioritise as well as carve out practicable solutions under these terminologies and existing institutions.

For Pakistan, until very recently when the justice system was freed from political manoeuvring, there was critique by a few scholars that "social justice is not ensured in a country which is the aim of Islam, democracy and human rights as well as mentioned in the Constitution of Pakistan categorically" (Hasan[30] and Hussain I[31]).

All what one may conclude is that the terminologies and words for governance are mixed up. They are not properly defined, nor is there strict implementation of these words according to the spirit of the Constitution. If managed with care, the

[27] Al-Ahsan, Abdullah and Young, Stephen B. (nd.) Guidance for Good Governance Explorations in Qur'anic, Scientific and Cross-cultural Approaches. International Islamic University Malaysia and Caux Round Table. http://www.cauxroundtable.org/view_file.cfm?fileid=134

[28] Maududi Sayyid. Ibid. Pp 558-559

[29] Apart from entering into the debate of religious, non religious and good or bad, one should try to explore whether there is a way to reestablish an Islamic society. Islamic society is a reality which cannot be ignored in anyway. It has got its own dynamics, terminologies and criteria for governance of people, which is independent of any other sets of political governance. The paper attempts to look at those principles in abstract and then compare the terminologies with other prevailing political systems.

[30] Hassan, Lubna. (2010). Rule of Law, Legal Development and Economic Growth, Perspectives of Pakistan. Pakistan Institute of Development Economics.

[31] Hussain Ishrat. (2011). Redefining Governance. Paper read at the SDPI Fourteenth Annual Conference held at Islamabad on Dec 13, 2011. http://ishrathusain.iba.edu.pk/papers.html

experience of Pakistan could have become a precedent of an Islamic political model, to provide enough examples to other societies besides providing an explicit basis for legal traditions. Still, there are enough reasons to define and practice these terminologies and phrases as a model for governance.

Comparison of Governance Related Terminologies in Islam and Western Thought

Here, the study compares various notions of governance. First, the conception of a state itself in the West vis a vis Islam. Allan uses the Weberian terms "legitimate monopoly" of the state, which is akin to "sovereign regime – within" by Monty Marshall.[32] But the legitimacy or sovereignty is defined by the minimalistic yet practical notions of "ability to tax and use of power". One may find the comparable Islamic terms of "obligatory religious taxation; the '*Zakat*'", and '*Jihad*' (defence). A practical example is the Constitution of the Islamic Republic of Pakistan, where Article 7 defines the state as existing at various levels; federal, provincial and local, which have the authority to impose taxes or cess, while articles 243-245 of the Constitution detail the formation and working of the Armed Forces. So, for the requirement of a definition of a state, Western, Islamic and Pakistani thoughts are on the same page.

For the second aspect, collective action, which is an objective of Western thought, is guided by the regime of rights, while the Islamic stream provides the synonym of *Ijtima'iyah*. Collective action in Islam is guided and constrained by five objectives of *Sharia,* which include protection of religion (*Din*), life (*nafs*), posterity (*nasl*), wealth (*mal*), and the intellect (*aql*). The protection of life and wealth may be compared with vital elements of Western regime such as rights to life and property. The conception of rights by John Locke (1689, 229)[33] also describes that a man has the natural right to preserve his property, his life liberty and estate. Here the study avoids the differences among Islam and Western thought, which are too many and appear too often leading to fierce philosophical as well as real conflict. But the use of terminologies leads to commonalities among the concepts regarding collective action.

Now, the third one, social justice provides the basis of Islamic order, though it is also an important pillar of other societies (Islahi 1985; Maududi Sayyid 1967: 539-540), like the Western one. Maududi Sayyid explains that "social justice is the sole reason to establish an Islamic state". The Western literature provides that social justice is part of the Western democratic system. A few theorists such as Brian Barry consider that democracy and justice are one and the same thing[34]. The role of political institutions is widely accepted to ensure social justice through democracy.[35] But there are others like Meijenfeldt[36], who notes that the link is ambiguous, as for him the market should provide social justice, though it is not an automatic process. By theory, democracy cannot be envisaged if it does not provide social justice. Amartya Sen also supports democracy for being capable of managing disasters such as famine.

Social justice is provided to the citizens of the state, yet it may work as a way of developing relations with the external environment too. It is noteworthy that societies may develop different ways and means of social justice.

While states manage their own matters, there is increased integration of the countries and so external relations are important while managing the nation states. Islam also describes principles for such matters. Mahmood Ghazi[37] described a number of Islamic principles concerning the relation of an Islamic society with other societies and among them is 'reciprocity', while Husein Nasr[38] is of the view that relations among societies may be established through spiritual experience. I could

[32] Marshall, Monty. ibid. 28

[33] John Lock. (1689). Second Treatise of Government.

[34] Dowding, Keith. (2004). Justice and Democracy: Essays for Brian Barry. Edited by Keith Dowding, Robert E. Goodin, Carole Pateman, Brian M. Barry. Cambridge: Cambridge University Press.

[35] Ibid. pp 92

[36] Doorn, M. ., & In Meijenfeldt, R. . (2007). Democracy: Europe's core value? : on the European profile in world-wide democracy assistance, pp 44.

[37] Ghazi, Mahmood Ahmad. (1997). International law of Islam. Bhawalpur speeches Volume 2. Islamiya University Bhawalpur. Urdu Book. Translated by the Author.

[38] Nasr, Hussain. (1988). Islam and the plight of modern man. Published by Suhail Academy Lahore for Dawah Academy. Islamabad.

not read through any details, which could explain "how to depend upon spiritual experience for visible relations". On the other hand, reciprocity may be practiced, and there are institutional ways for adopting the reciprocity. One such way could be the legal process of social justice. It is interesting to note that *Amirul Momineen,* Mullah Muhamamd Umar of Afghanistan had suggested to conduct a judicial inquiry of Usama Bin Laden in a neutral Islamic country[39]. So, Islamists do not deny the importance of social justice. The justice, particularly, social justice, may have interesting notions, as it may have mechanisms to govern the communities within a state. Once a state is better managed within, it may have good relations with other countries. The justice system shows flexibility too, as it is not tightly chained to the political system. If traditions of justice are well entrenched in the society, the justice system will work on merit to resolve matters instead of following the immediate and short-term political interests. It is quite plausible that real differences of the societies may come out.

Against this backdrop, we consider the similarity of objectives of governance like collective action and social justice. It requires that the nation states and civilizations should not enforce the mechanisms of implementation of the objectives. Each and every society or civilization follows its own ways and means of achieving the objectives, and in that very process it considers the background knowledge, past traditions, values and many more. So, the institutions that enforce Western-style democracy and human rights could also be part of the problem for the world peace and its integration. Few Western scholars have mentioned that democratic countries may not deal with other nations in democratic ways until they are internally democratised, as has Monty Marshall. It is also mentioned that the US and the EU have adopted democracy promotion as their foreign policy.[40] In such sort of situations, we may seek, alternatively, guidance and resolution of issues through working at the level of higher objectives and use of common terminologies to avoid differences. There should be no attempt to integrate societies into one political or legal tradition, because humans, individuals and groups, are not brands of a production factory which should have standardised outputs, packaged and labelled into one.

There are issues with the democratic tradition because of which it cannot be adopted as a common criterion or tool to assess the governance among various types of states and societies. Democracy and human rights are based upon secular thoughts. "Human rights assume that the state is secular and that its power over citizens must be limited as Vervoorn describes.[41] The word "secular" is defined as, "not connected with religious or spiritual matters".[42] The antonym of the same is defined as "godly, holy, religious and spiritual".[43] On the other hand, the state religion of Pakistan is Islam, according to Article 2A of the Constitution. Similarly, the *Khilafah* (theological) state, if established anywhere, will be based upon religious thought. So, in that manner, there is a direct conflict between the Western democratic political system and the religious ones. Durkheim's conception is enough answer to such definitions, where he equates the word "social" with "religion", as noted by Malinowski and Van Gennep from Durkheim[44], 1897 /1917.[45] So, any common platform that aspires to use "democracy" or "secular" or "religion-less" system, may declare the religious groups or their social as well as political manifestations to be "unnecessary" or "harmful". But in fact, these are based upon social phenomena and add to the integration of society.

Students of politics, Islam, philosophy and sociology may find very interesting comparisons in the study of constitutions of Islamic states and the nation states and their underlying philosophies. Apart from few categorical differences at critical points, there are ambiguous and undefined terminologies that need more thought and effort for comparisons.

---

[39] Though Islamic Emirate of Afghanistan was not formally recognized by the UN, yet some of UN members recognized it. Similarly after a long time of war in Afghanistan, it is not yet assured that the Taliban are totally vanished away. There are signs that the UN and its departments may have to come ahead to recognize the Taliban or arrange truce with the warring factions.

[40] Lord Dahrandorf, the former EU Commissioner notes, "Promoting democracy is a noble cause". According to him, the countries in transition face troubled trajectories (Meijenfeldt 2007, pp 75).

[41] Vervoorn, Aat. (1998). Re-Orient: Change in Asian Societies. Oxford University Press, pp 80-81.

[42] http://oxforddictionaries.com/definition/english/secular

[43] http://thesaurus.com

[44] Durkheim, Emile. (1982). The Rules of Sociological Methods and Selected Texts on Sociology and Its Methods. Ed. Steven Lukes and Translated by W.D. Halls. The Macmillan Press Ltd. Pp 6.

[45] Religion is most primitive of all social phenomena. It is from it that have emerged all other manifestations of collective activity – law, morality, art, science, political forms, etc. In principle, everything is religion (Durkheim 1897, printed in 1982 referred to an article "Materialistic Conception of History". Steven Lukes explains referring to Hobbs and Roussou that "man is naturally inclined to politics, domestic and religious life and to commercial exchanges , etc., and it is from these natural inclinations that social organization is derived (Durkheim 1982,: 143).

Though the article may have proved or tried to prove various faulty assumptions or half-baked thoughts, it aims at pointing to an important conclusion. Apart from the intermediate objectives like democracy, human rights, etc., there are a few common higher-level objectives that exist in Islamic as well as Western traditions. These need more effort to be considered for better coordination among diverse societies, apart from enforcing the unnecessary terminologies for the sake of standardisation, democratisation or else. Common platforms should explore other ways to coordinate societies for the sake of common terminologies, which are found in the literature and have been present since decades, instead of utilising energies on the achievement of intermediate objectives and immediate political standoffs.

Ladder of Governance Objectives

There may be a ladder of governance objectives, if logically developed around the cause and effect relationship. A ladder is required to clarify the thought, define the terminologies, set the order of the rationale, and work out the limits of the terminologies.

Collective action is the first step in the governance ladder in the Western tradition, while human rights are the second step. This means that the Western political managers govern the society and take collective action to provide human rights, liberties and freedoms. The third step in the ladder is development of each and every person because democracy is considered a "process through which citizens learns to be self-determined individuals".[46]

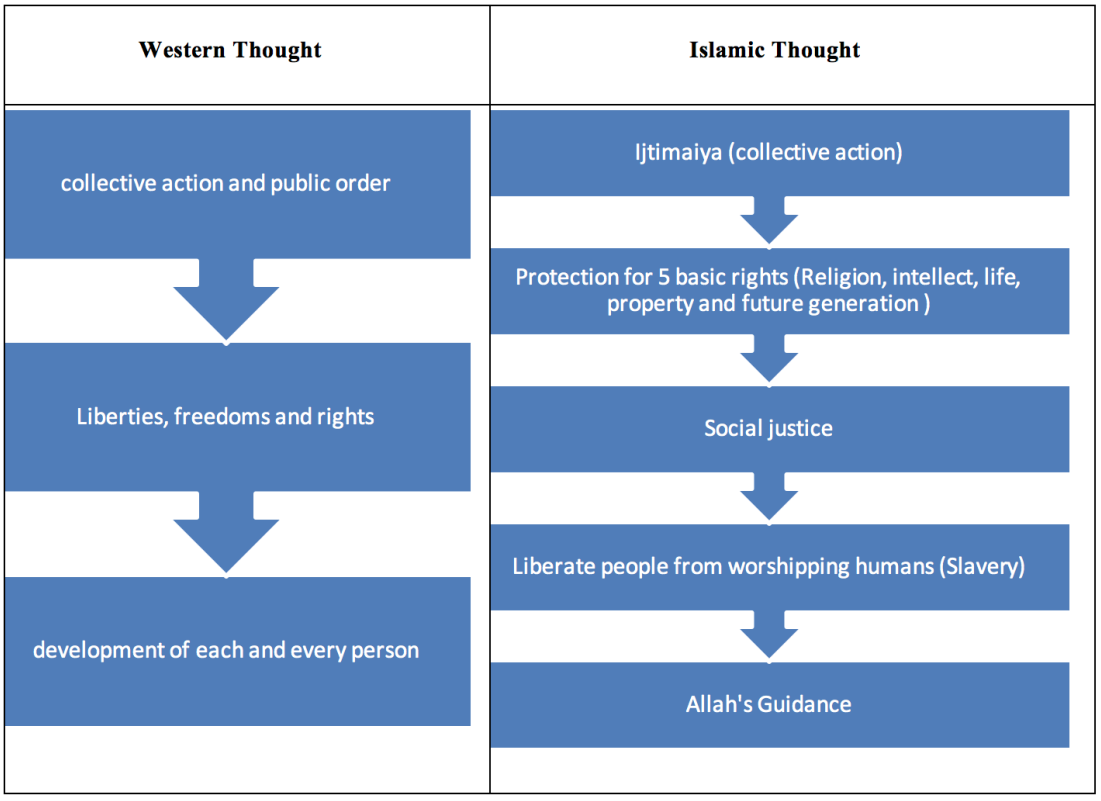
For Islam, *Ijtima'iyyah* or collective action is the first step. In the second stage, collective action is utilised for the sake of five basic protections: religion, life, intellect, wealth and progeny. In the third stage, these protections are a way to provide social justice, which is an aim of Islam, as Maududi Sayyid puts it. Beyond that, in the fourth stage, we ensure social justice in Islamic society to liberate people from worshiping humans and guide them towards the Creator, the God (the ultimate salvage from slavery), as a *Sahabi* (a companion of the Prophet Muhammad, Peace Be Upon Him) described the core of Islam to a Roman king.[47] This is a very logical step in the ladder because all human beings are treated equally in Islamic society, and so they have to receive freedom from enslavement of humans. Qutb Sayyid also explains the same that everyone is equal as mentioned above[48]. There is a fifth logical step in Islamic tradition, for which I got support from the words of Qutb Sayyid that "the ruler and his subjects together must bow to the authority of Allah in all things". So, a common scripture, the Words of Allah and the Prophet (Peace Be Upon Him) are final to guide and unite everyone, where all the differences should converge.

[46] Shuifa, H., 2008. The concept of democracy. *Front. Philos. China,* 3(4), pp. 631.

[47] This may be supported by the words of Qutb Sayyid (2000) where he refers to social justice as "Therefore, the individual, the group, the party, the nation are governed by one law with one goal, that the activity of the individual and the activity of the group may proceed freely and all can work together without conflict, directing their lives to God, the Creator of life".

[48] For Qutb Sayyid, social justice exists once there is human liberation intellectually and emotionally from the instinct of servitude to and worship to any but Allah (Qutb, 1952: 774). There is a complete equality of all human beings, and social solidarity in the sense that one can gain complete access to Allah without any feeling of fear of life or fear of someone's strength.

Figure 1: Ladder of Logic for Governance



A two-way chain of logic is provided as under:

1) *Ijtima'iyyah* (collective action) is constrained and guided by protection for 5 rights (religion, intellect, life, property and future generations), which is methodology to ensure social justice that provides liberty to people from worshipping humans (slavery) that guide people towards the way of Allah.

2) Guiding towards Allah is the highest objective that liberates people from worshiping other humans (slavery), which requires social justice that is ensured through protecting 5 rights (religion, intellect, life, property and future generation), for which the collective action (*Ijtima'iyyah*) is taken.

All these steps do not necessarily mean that the guidance of Allah is not sought at each and every step, but that it is the highest and final objective of a Muslim.

CONCLUSION

The state is defined as one claiming legitimate monopoly over the exclusive use of power, which includes the ability to tax people, create rational law and maintain an army. In Western tradition, the nation state performs all of these functions. Beyond that, it enables people, by coordinating their formal and informal institutions, to willingly work for the attainment of public order and collective action. Human management has improved from the government (or control) to the governance of networks at the level of the state.

Islamic scholars define collective action (*Ijtima'iyyah)* as one of the objectives of *Sharia*, just like the Western thought, yet there are further goals toward which the collective action should lead. These include the five objectives of *Sharia,* including the protection of religion, (*din*) life (*nafs*), posterity (*nasl*), wealth (*mal*), and the intellect (*aql*). There are other important

objectives: social justice and *Jihad*. *Jihad*, in a broader sense, is a struggle to establish and protect an Islamic society. In this manner, Islam is a popular faith and demands followers to work in groups. The specific objectives of Islam also include establishing the religion (*din),* which may include establishing a state system.

Social justice is considered as the sole reason for the establishment of an Islamic state by some of the scholars. This paper suggests that social justice may also provide basis for the required linkages in a better way than the political structures do. It is because of the absence of the immediate political resolve. Instead, the justice based decision may provide the longer-term view of the societies and may decide on the actual legal traditions. The differences that are reflected in the justice process may better represent the tradition of the society at the time.

An Islamic state may achieve effective internal governance by developing legal instruments for achieving these objectives, which are defined by *Sharia*. Once an Islamic state, working under *Khilafah*, ensures effective internal governance, external linkages may be developed.

Apart from testing or extending half-baked thoughts, the article suggests that common platforms should try to coordinate civilizations around common terminologies, which are too many and have been there since long, instead of aggrandising around immediate political standoffs.

FROM NORM EMERGENCE TO ACTIVATE PROMOTION THROUGH COURTS: A CASE STUDY OF THE RIGHT TO BE FORGOTTEN

Carsten Martin Wulff

ABSTRACT

This article deals with the 'right to be forgotten' as defined in the EU General Data Protection Regulation, which is set to enter into force in May 2018. The development of the right to be forgotten is viewed in light of two concepts, which so far have not been addressed by academics writing on the subject. First, the right to be forgotten is reviewed in the eyes of Bob's theory on norm emergence, acceptance and internationalisation. Second, the role of the courts in the development of this right is discussed using the legal interpretivist approach defined by Dworkin. For this court-driven approach, jurisprudence from Europe (Germany, Netherlands, France and the United Kingdom) and outside of Europe (United States) is reviewed. The goal of both approaches is to establish to what extent the right to be forgotten so far has stuck to known concepts regarding the emergence of human rights and to provide an outlook on what future developments the right to be forgotten would have to take in order to become an established, customary norm in the future.

Keywords: Right to be forgotten, new human rights, Legal interpretivism, norm emergence, General Data Protection Regulation

INTRODUCTION

In the 21st century, everyone using the internet leaves a digital footprint. It is nearly impossible for an individual to track what personal data is collected and stored in the web. This digital footprint already has real world implications for individuals. Before job interviews, applicants' social media accounts are screened, and it has become common practice to „google" applicants.[1] Mistakes from the past, which often re-surface through the internet, have been used as grounds for rejecting applicants. This "digital footprint", like many other parts of the internet, has remained mostly unregulated.

This legal vacuum has been caused by rapid developments in technology, which the European Union (hereinafter 'EU') 1995 Data Protection Directive could not foresee. The Directive grants a right to rectification, erasure or blocking of data which does not comply with the Directive, with strict criteria for processing. These criteria have been summarised as granting the data subject notice of the processing, with the purpose being clearly defined. The data subject must have the possibility to opt out. The data processor must ensure security of the data and has the duty to inform prior to disclosure to third parties. Furthermore, data subjects should be able to hold controllers accountable for the principles, and they should ensure a fair balance of affected rights.[2]

The wording of the criteria may have been sufficient in 1995 when the capabilities of technology were rather limited com-

[1] Fazlioglu, M., Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet, International Data Privacy Law, Vol. 3:3 (2014), p. 150

[2] Tempest, A., Brandau G., Data protection in Europe – A cloudy future, Journal of Direct, Data and Digital Marketing Practice Vol. 12 (2010), p. 187

pared to what they are today. Nonetheless, with the development of the internet, the provisions of the 1995 Directive soon became harder to interpret in light of more cases arising in the member states where the Directive could not provide the necessary answers.

This first changed when a case from a Spanish court was sent for preliminary reference to the European Court of Justice (hereinafter 'ECJ'). In the case, a Spanish citizen requested that Google delete personal data which was stored from an auction of his repossessed home. As a legal basis, Costeja referred to the EU 1995 Data Protection Directive. Three questions were referred to the Court. The scope of these can be summarised as:

1.) Does the EU 1995 Data Protection Directive apply to search engines such as Google;

2.) Does EU law apply to Google Spain, given that the company's data processing server was in the United States;

3.) Does an individual have the right to request that his or her personal data be removed from accessibility via a search engine (the Right to be forgotten)?[3]

In the ruling of May 13, 2014, all three questions were answered affirmatively. The ECJ referred to Article 12 of the Directive. This states that, "Member States shall guarantee every data subject the right to obtain from the controller: (…) (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data".[4] Reference was also made to the aims of the Directive, which include the protection of "fundamental rights and freedoms, notably the right to privacy."[5] In the ruling, the Court also took into account Article 8 of the Charter of Fundamental Rights, which grants the right to protection of personal data.

The Court upheld that Google can be regarded as a data controller in the meaning of the Directive. Here, the Court went against the interpretation of the Advocate-General (hereinafter 'AG') who concurred that the business model of Google made them subject to the jurisdiction of the Directive, however, not as a data controller in the meaning of the Directive.

Most controversially, the Court upheld that individuals have the right to request personal data to be removed from accessibility, again going against the opinion of the AG. The AG held that freedom of information and expression take precedence over a right to erasure. He predicted that granting such a right would lead to the "automatic withdrawal of links to any objected contents or to an unmanageable number of requests handled by the most popular Internet search engine service providers."[6]

The ruling sparked debates across Europe; the media titled this ruling as the emergence of the "right to be forgotten" in the EU, as the data to be deleted was not factually incorrect. It also highlighted that legislation was not keeping pace with

[3] Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (2014),* http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=EN (accessed 27.09.2017)

[4] Ibid, par. 100

[5] Ibid, par. 3

[6] Case C-131/12, Google Pain SL and Google Inc. v. Agencia *Española de Protección de Datos (AEPD) and Mario Costeja González (2013), Opinion by AG Jääskinen,* http://curia.europa.eu/juris/document/document.jsf?text=&docid=138782&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=928931 (accessed 29.09.2017)

the rapid developments of the internet. Already prior to the Google Spain case, the Commission promised to draft a new Data Protection Directive, which amidst other provisions would establish clear criteria as to what rights the ruling implies.[7]

In April 2016, the Council and Parliament approved the General Data Protection Regulation, which will enter into force in 2018. The right to be forgotten has not been granted as much attention as could have been expected following the 'Google Spain' case. Instead, Article 17 lists a right to Erasure ('right to be forgotten'), stating that under certain circumstances a data subject may request deletion of personal data.[8] How this provision will be implemented and what scope of protection it grants is yet to be seen.

This article will analyse the development of the right to be forgotten. How did it gather attention and how has it managed to be „upgraded" to a recognised and protected right since the 1995 Directive? A multidisciplinary approach will be taken. From a sociological perspective, the development of the right will be analysed through the theory proposed by Bob of norm emergence, acceptance and internationalisation. From a legal approach, Dworkin's theory of legal interpretivism will be used to analyse the role of the Courts in the development of the right both in Europe and internationally. As case studies, Germany, the Netherlands, France and the United Kingdom will be used. For a global comparison, the perspective for a right to be forgotten in the United States will be briefly reviewed.[9]

The objective of this article is to establish to what extent the right to be forgotten follows the criteria proposed by Bob, the role of the Courts in this process and through doing so, provide an outlook on whether the right to be forgotten will become customary law in the future.

For this analysis, the right to be forgotten will be viewed as the right to oblivion; that is, the right to have data stored on the internet concerning events in the past be erased after a certain period of time has elapsed.[10] This stands in contrast to the right to erasure, currently listed in the 1995 Directive, which essentially allows for the right to delete data only if it is incorrect or has become irrelevant over time.[11]

The wording in Article 17 of the General Data Protection Regulation resembles a middle ground between these two approaches. The criteria that must be met for erasure are summarised in Article 17 (1) [a-d]. The main difference compared to the 1995 Directive is found in 17 (1) [b], which allows for erasure when "the data subject withdraws consent on which the processing is based… and where there is no other legal ground for the processing."

17 (2) places the obligation on the controller to take reasonable steps to inform controllers that are processing the personal data that the data subject has requested the erasure to any links to, or copy or replication of those personal data.

---

[7] Ambrose, M., Ausloos, J., The Right to Be Forgotten Across the Pond, Journal of Information Policy Vol. 3 (2013)

[8] General Data Protection Regulation Proposal http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf (accessed 10.05.2017)

[9] Keele, B., Privacy by Deletion: The Need for a Global Data Deletion Principle, Indiana Journal of Global Legal Studies, Vol. 16:1 (2009), p. 374

[10] Ausloos, J., *The 'Right to be Forgotten' – Worth remembering?,* Computer Law & Security Review Vol. 28 (2012), p. 148

[11] General Data Protection Regulation, 2016/679 EU, Art. 17 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX-:32016R0679&from=EN (accessed 29.09.2017)

17 (3) states that this right may not be enforced:

(a) For exercising the right of freedom of expression and information

(b) For compliance with a legal obligation

(c) For reasons of public interest in the area of health

(d) For archiving purposes in the public interest, scientific or historical research purposed or statistical purposes

(e) For the establishment, exercise or defence of legal claims.[12]

At this point, it is worth noting that the wording of Article 17 widens the right to erasure defined in the 1995 Directive. Where previously this right could only be enforced if the data was inaccurate or unlawfully processed, 17 (1) [b] allows for the data subject to revoke his consent to processing. This sets the right to be forgotten apart as a new right, separate from the right to erasure.

It is a right that has become necessary following the information revolution, which has made it profoundly easier for information to be available and accessible all over the planet.[13] As the data available from one's past can easily shape the perceptions and expectations of others, the feasibility of having an individual be in charge of his own data stored on the internet can be seen.

Although derived from them, the right to be forgotten sticks out from the right to privacy and right to data protection; it stands closer to being an extension of the right to personality, which, for example, is known in the Dutch and German legal systems and which will be later discussed in this paper.[14]

Norm Emergence and Active Promotion Through the Courts

Where it has been established that the right to be forgotten is a new human right, derived from, but distinctive from existing rights, this opens the possibility to look into criteria which have been previously followed in the establishment of rights.

In his work on new human rights, Bob introduced three criteria that can commonly be seen in the framing of a new human right: norm emergence, norm acceptance and norm internalisation.[15] During the emergence phase, a gap in the legal framework is found, usually by a group that is suffering from a lack of protection. During the acceptance phase, civil society and local politicians push for the emergence of the norm. During the internationalisation phase, the norm is discussed on the international level, eventually leading to international protection of the norm. This framework can be applied to a right that has not been present in domestic legislation, or where a certain "trigger" event has made it imminent for the international community to agree on common protection. A good example is the United Nations Universal Declaration of Human Rights, which was passed in the aftermath of the atrocities committed during the Second World War.

---

[12] Ibidem

[13] Pagallo, U. *Legal Memories and the Right to be Forgotten,* in Floridi, L. (eds), *Protection of Information and the Right to Privacy – A New Equilibrium?,* Springer Verlag 2014, p. 19

[14] See for example, Federal Data Protection Act (Bundesdatenschutzgesetz), https://www.gesetze-im-internet.de/bdsg_1990/ and Constitution of the Kingdom of the Netherlands, https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008 (both accessed 29.09.2017)

[15] Bob, C.., Fighting for New Rights, in Bob, C. (ed.), The International Struggle for New Human Rights, University of Pennsylvania Press (2008), p. 7

As the right to be forgotten to a certain extent has been deduced by Courts through existing legislation, including Articles 6 and 8 of the European Convention on Human Rights and case law based on the 1995 Directive[16], the dynamics of case law and legal evolution also have to be viewed in this paper. The premise is that Bob's criteria and legal interpretivism are two approaches that can be combined to obtain a clearer picture of the development of a norm, specifically during the norm acceptance phase.

The legal interpretivist school of thought has three main points:

1.) Law is not a set of given data, conventions or physical facts, but what lawyers aim to construct or obtain in their practice.

2.) There is no separation between law and morality (this sets it aside from positive law)

3.) Legal values do not exist independently and outside of the legal practice. (this sets it aside from natural law)[17]

This theory is chosen as it allows for and accounts for the role of courts and practitioners in the process of developing legislation and actively shaping norms. Not just on European level, also on national levels, it can be seen that the right to be forgotten is a unique right; one which has been deduced from existing laws.

In contrast to theories of natural law, legal values do not exist independently and outside of the legal practice. The right to be forgotten is a specific right and a right that has first gained prominence through the recent technological advances.

Opposed to theories of positive law, the right to be forgotten has not just been established by a competent authority. The notion of forgetting is historically founded; it specifically has roots in the right to personality found in the legislation of multiple EU countries.

A fundamental point of legal interpretivism is that institutions can convey rules. These rules will be scrutinised by the public and practitioners as to whether they conflict with certain basic moral principles of fairness and justice.[18] This outlook can be applied quite well in the recent developments of the status of the right to be forgotten in the General Data Protection Regulation, in which the wording was altered from Article 17, however, the context was kept. The analysis of both civil society actors and working parties of the European Parliament and Commission in the modification of the scope of this new norm further fit in the interpretivist framework.

As the analysis will try to highlight, following the emergence of the idea of the right to be forgotten, especially in Europe, it has been the Courts which have driven the development of the right.

[16] See European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 28.09.2017) and Directive 95/46 EC, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=en (accessed 28.09.2017)

[17] Stavropoulos, Nicos, "Legal Interpretivism", *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition), Edward N. Zalta (ed.),http://plato.stanford.edu/archives/sum2014/entries/law-interpretivist(accessed 26.09.2017)

[18] Ibid 25

Development of the Right to be Forgotten

The 1995 Directive was the first piece of EU legislation that specifically dealt with data protection. Article 6 lays forth that data may only be collected for "specified, explicit and legitimate purposes". Article 12 provides for a right to erasure if data is incomplete or inaccurate. Article 14 states that a data subject may object to the processing of his data on specific grounds. Article 22 provides for remedies, however, it does not go into detail as to the scope of these remedies in case a data subject's rights are violated.[19]

On May 15, 2003, DG Internal Market of the Commission published the first report on the implementation of the 1995 Directive, COM 2003 (265). Findings at the time were that not enough member states had transposed the directive into national legislation; therefore, a thorough analysis of whether amendments are necessary couldn't be made.[20] The Commission noted that following discussions with member states and national supervisory authorities, an overall consensus could be seen that amendments were not necessary at the time. [21] Nonetheless, an online survey conducted among 9,156 Union citizens and data controllers found that 81% of those polled thought that the level of data protection was insufficient, bad, or very bad.[22]

On March 7, 2007, the Commission released COM 2007 (87) and again concluded that the Directive should not be amended. However, it was pointed out that new legislation might be needed to keep up with technological advances. The Article 29 working party was to keep an eye on these developments through its Internet Task Force.[23]

Meanwhile, the idea of a right to be forgotten emerged at the re:publica conference 2008 in Berlin. The conference brought together developers, activists, hackers, journalists, NGOs and representatives from social media and marketing to discuss contemporary internet related issues. It was funded by the German media board of Berlin-Brandenburg (RBB) and the Federal Agency for Civic Education. (Bundeszentrale für politische Bildung).[24] Mayer-Schönberger held a keynote speech on data protection for web 2.0 and the right to be forgotten.[25] This conference is seen by academics to be one of the first instances where the concept of the right to be forgotten gained public attention.[26]

In a speech on November 30, 2010, Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, informed the public that she was working on introducing the right to be forgotten for EU citizens.[27] The proposal at the time was seen as a reaction to new privacy guidelines set by social networks such as Facebook, which make it nearly impossible for users to have their data permanently deleted.[28]

---

[19] Directive 95/46 EC, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=en (accessed 27.09.2017)

[20] COM (2003) 265 Final, "Report from the Commission: First report on the Implementation of the Data Protection Directive (95/46/EC), Brussels 15.5.2003, p.7

[21] Ibid, p. 8

[22] Ibid, p. 9

[23] COM (2007) 87 Final, "Communication from the Commission to the European Parliament and the Council: on the follow-up of the Work Programme for better implementation of the Data Protection Directive", Brussels, 7.3.2007, p. 10

[24] Facts and Figures re:publica, https://re-publica.com/en/dub16/page/facts-and-figures (29.09.2017)

[25] The Big #RPReview: Re:Publica 2008 – The Critical Mass, 28.12.2015 https://re-publica.com/en/16/news/big-rpreview-republica-2008-critical-mass (29.09.2017)

[26] i.e. Weber, R., "The Right to be Forgotten: More than a Pandora's Box?", JIPITEC Vol. 2 (2011), p. 125

[27] Reding, V., "Privacy Matters – Why the EU needs new personal data protection rules", Speech/10/700, Brussels 30.11.2010

[28] Bunn, A., *The curious case of the right to be forgotten,* Computer Law & Security Review Vol. 31 (2015)

On November 4, 2010, COM 2010 (609) was published in which it was concluded that while the core principles of Directive 95/46 still are valid, the Directive couldn't meet the challenges of rapid technological developments and globalisation and, hence, required revision. Amidst other fields, the Commission stated that it will examine ways to clarify the "so-called right to be forgotten", listed here as "the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes."[29]

One of the reasons why the Commission reviewed the existing legislation was the entering into force of the Treaty of Lisbon. Article 16 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') states that everyone has a right to data protection. Elimination of the pillar structure meant that from now on the same basic legal protections should apply to all types of data processing. Furthermore, from now on there should be increased oversight and participation in policymaking by the European Parliament, data protection is mentioned as a fundamental right in the Charter of Fundamental Rights of the European Union and the EU is obligated to accede to the European Convention of Human Rights.[30] The Proposal for a new regulation on data protection was published on January 25, 2012 (2012/0011 (COD)). The Proposal took into account Directive 46/95/EC and Article 8 of the European Convention on Human Rights.

In the initial draft, the title of Article 17 was "Right to be forgotten and erasure". In this form, Article 17 would have added extra weight to the oblivion aspect of the new right. The change to "Right to Erasure (Right to be forgotten)" was decided by the LIBE committee of the European Parliament. In the press release, it is clarified that "the right to be forgotten is of course not an absolute right".[31] The right to be forgotten cannot amount to a right to rewrite or erase history. Neither should it take precedence over freedom of expression or freedom of the media.[32] The vote to exclude the right to be forgotten from the text was conducted on October 21, 2013. Despite the ruling in Google Spain on May 13, 2014, no further amendments were made to Article 17.

The driving actor behind pushing the right to be forgotten on the Commission side was the Article 29 Working Party, which was launched in 1996, based on Article 29 of the Data Protection Directive. It consists of one representative of the data protection authority of each EU Member State, the European Data Protection Supervisor and the EU Commission. On the side of the Parliament, the LIBE committee was responsible for the changes to the initial draft. This committee consists of MEPs, who elect a chairman and four vice-chairmen. The active role of the LIBE committee ensures the democratic accountability of the legislation, with the members being accountable to their constituents.[33]

In the history of the right to be forgotten, two things are worth highlighting. Until the 2008 re:publica conference, there has been increasing consensus that the 1995 Directive was becoming outdated. The survey in which 81% of respondents found that data protection in Europe was insufficient can be interpreted as a first sign of increasing awareness that there was an issue which the law did not address. There was increasing discontent with the loss of control over data once it has been uploaded to the internet.

---

[29] COM (2010) 609 Final, "Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A comprehensive approach on personal data protection in the European Union.", Brussels 4.11.2010, p. 9

[30] Kuner, C., "The European Commission's Proposed Data Protection Regulation: A Copernican Revolution in European Data Protection Law", Bloomberg BNA Privacy and Security Law Report 06.02.2012, p. 4

[31] European Commission Memo, "LIBE Committee vote backs new EU data protection rules", Memo/13/923, Brussels, 22.10.2013, p. 7

[32] Sartor, G., "The Right to be forgotten in the Draft Data Protection Regulation", International Data Privacy Law 2015 (Volume 5, Issue 1), p. 71

[33] See: European Commission Memo, LIBE Committee vote backs new EU data protection rules, Brussels , 22.10.2013

From the perspective of norm emergence, secondly, it is important to highlight that civil society at the re:publica conference was the first to offer a solution to the problem. As late as 2007, the Commission did not see the need to update the Directive. Although Mayer-Schönberger's proposal of the right to be forgotten was quite different to what now will be implemented in the General Data Protection Regulation, he is still widely accredited as being the mind behind the European interpretation of the right.[34] [35] To summarise, elements of norm emergence in accordance with Bob's criteria are present. It was civil society that first saw the need for European action and proposed a first solution.

The next expected step would be norm acceptance. On a European level, an example would be the speech of Commissioner Reding, where for the first time it was mentioned that introducing a right to be forgotten was one of the objectives of the Data Protection Directive overhaul. In order to combine Bob's criteria with legal interpretivism, it will now be attempted to establish the norm acceptance using the case law of a few European countries which have been active in developing the predecessor of the European right to be forgotten.

As norm emergence and acceptance is not an absolute one-way path, but rather two complimenting stages which are necessary before reaching the stage of norm internationalisation, the fact that the case law was developed before the emergence of the current right to be forgotten is not a hindrance. The case law serves as evidence that the Courts have been playing an active role in developing the overall norm and continue to do so.

In Germany, the right to be forgotten is not specifically listed in the legislation; however, the German Basic law (*Grundgesetz*) knows the right to privacy, right to self-presentation and right to informational self-determination.[36] Already in the late 1960s, discussions on a right to data protection started in Germany. In 1970, the State of Hessen passed the Data Protection Code, which is still credited to be the first such code in the world.[37] In 1977, the Federal Law on Data Protection (*Bundesdatenschutzgesetz*) was adopted.[38]

In 1983, it was the Constitutional Court that deduced the right to informational self-determination from the basic law. The Federal Parliament planned a population census in 1983 and prepared an act to conduct the census. This act was met with widespread public scepticism, which led to multiple constitutional complaints being filed against the act under Article 93 of the German Basic Law. In the landmark decision (*Volkszählungsurteil*), the Court established that the automated processing of personal data constituted a danger to the freedom of personal development, and found the act to be in breach of the basic law.[39]

In previous case law, a right to personality was already established. This right is based on the protection of human dignity (Art. 1 (1) Basic Law) and the protection of general liberty (Art. 2 (1) Basic Law).[40] In the *Volkszählungsurteil*, the Court

---

[34] i.e. Gilani, S., Book Review of Viktor Mayer-Schönberger, Delete: The Virtue of Forgetting in the Digital Age, Human Rights Law Review Vol. 10 (4) 2010, p. 787

[35] Facts and Figures re:publica, https://re-publica.com/en/dub16/page/facts-and-figures (accessed 29.09.2017)

[36] German Basic Law (Grundgesetz) Art. 2 (1), http://www.gesetze-im-internet.de/gg/index.html (accessed 29.09.2017)

[37] Kodde, C., *Germany's 'Right to be forgotten' – between the freedom of expression and the right to informational self-determination,* International Review of Law, Computers & Technology (2016), p. 3

[38] Federal Data Protection Act (Bundesdatenschutzgesetz) Version from 1990, https://www.gesetze-im-internet.de/bdsg_1990/ (accessed 29.09.2017)

[39] 1 BvR 209/83, 1 BvR 484/83, 1 BvR 440/83, 1 BvR 420/83, 1 BvR 362/83, 1 BvR 269/83 (Volkszählungsurteil), http://openjur.de/u/268440.html (accessed 28.09.2017)

[40] German Basic Law (Grundgesetz) Art. 1 (1) and 2 (1), http://www.gesetze-im-internet.de/gg/index.html (accessed 28.09.2017)

found that automated data processing constitutes a danger to the right to personality. Therefore, part of this right of personality had to be a right to informational self-determination. This constitutional right "guarantees the right of the individual to decide for themselves about release and use of their personal data."

The *Bundesdatenschutzgesetz* was amended in 1991 and, following the 1995 EU Data Protection Directive, the amount of litigation increased in Germany. The level of protection granted by the *Bundesdatenschutzgesetz* was higher than the minimum standards set out in the Directive; nonetheless, the case law in Germany reflects the general conflict of the right to informational self-determination (data protection) with the right to information of the public.[41] An important point of conflict is section 35 of the German law, which states that data must be deleted once the processing is completed and if ongoing processing and storage of data is not in accordance with the law.[42]

German case law essentially has established two points. Where the data in question has been self-disclosed, once processing has been completed or the individual withdraws consent for processing of the data, the data must be erased.[43] Where the data has been uploaded by a third party, if the data does not concern the private life of an individual, or if it does, it does not constitute libel or include sensitive personal information, the freedom of expression prevails over the right to informational self-determination.[44]

How does this fit with Bob's criteria? Elements of norm emergence are visible. The public debate on the population census act fits this criterion. The constitutional complaints filed and the subsequent verdict of the Court forced politicians to reconsider the act in Parliament. Specifically, it was the fear of data protection which angered the public at the time and the lack of legislation that set boundaries to what extent personal data can be processed.[45]

The review of the Constitutional Court is in accordance with the second criterion, norm acceptance. The review and decision of the Court to establish a right to informational self-determination gave a legal basis to the concerns of the public and addressed a legally non-regulated field. The development of the right through case law is in line with the legal interpretivist school of thought. The Constitutional Court has established rules and norms with its decisions. Specifically, in Germany, where the Constitutional Court deals with constitutional complaints and sees itself as the gatekeeper of the Constitution, this should come as no surprise.

In the Netherlands, the right to be forgotten is also not directly mentioned in the Constitution. Article 10 of the Dutch Constitution provides a right to respect for one's 'personal sphere'.[46] Sections 2 and 3 essentially instruct the legislator to draft laws regarding the processing of personal data. The 1988 act on the registration of personal data was replaced in 2001

---

[41] Kodde, C. (2016), p. 4

[42] Federal Data Protection Act (Bundesdatenschutzgesetz) Section 35 (2), https://www.gesetze-im-internet.de/bdsg_1990/ (accessed 29.09.2017)

[43] Kodde, C. (2016), p. 10, also see BGH, 15.12.2009 - VI ZR 227/08 (Sedlmayr) http://lexetius.com/2009,3998 (accessed 29.09.2017)

[44] BGH 23.06.2009 – VI ZR 196/08 (Spickmich.de), http://lexetius.com/2009,1764 (accessed 28.09.2017) and Landgericht Regensburg, 21.01.2009 - 1 O 1642/08 (2) (meinProf), http://info-it-recht.de/datenbanken/urteile-db/21012009---lg-regensburg-az-1-o-1642-08-2.html (accessed 28.09.2017)

[45] Hornung, G., and C. Schnabel, "Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-determination." Computer Law & Security Review 25 (1) (2009) p. 86

[46] Constitution of the Kingdom of the Netherlands, https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008 (accessed 29.09.2017)

by a newer version, which implemented Directive 95/46/EC.[47] The right to privacy is granted by Art.6 (162) of the Dutch Civil Code.[48] As no law regulates how to proceed when these two rights collide, in the Netherlands it also was left to the courts to determine which right prevails.

In 1994, the Supreme Court recognised a general right to personality. In the Valkenhorst II decision, a daughter who wished to have the identity of her father disclosed from the institution in which her birth took place was permitted to obtain this information, despite the mother not giving her consent to the disclosure of this information.[49]

In a previous decision, the Court established a right to be let alone, which increases the longer the period of time is after an event occurred. In this decision, the plaintiff tried to prevent the publication of his photos in an article about the six most notorious murderers after World War II. The Court of Appeal rejected the claim, citing the freedom of expression. The Supreme Court ultimately upheld the decision, however, it established that the weight of the right to be let alone increases over time.[50]

The Van Gasteren decision combined the reasoning of both decisions and established more clear criteria for the right to personality. In this case, opinion articles were published decades after a crime was committed. The plaintiff argued that his right to be let alone had been violated. The Court found a violation and the reasoning laid forth that the general right to personality encompasses the right to not be confronted with a conviction that dates back more than 40 years.[51] The Court established that a violation of the right to be let alone can also constitute an infringement of the right to personality.

In contrast to Germany, the element of norm emergence in the public is not visible. Sources hinting at a general interest of the public could not be found. This, to an extent, also explains why, in contrast to Germany, the first Dutch law on data protection was only passed in 1988, 18 years after the first German law. Furthermore, the development was triggered by a few cases and was not about establishing a new right, but clarifying which right prevails in conflict scenarios. The decision in Valkenhorst II came as a surprise to many and, in general, the three relevant cases discussed here were decided within a short period of time.[52]

A greater role in the development of the right to personality in the Netherlands can be attributed to the Courts. The Supreme Court was given the chance to develop the scope of norms with its decisions and has actively done so in the three decisions of the 1990s.

France is widely regarded to have the most far reaching laws on privacy in Europe. Article 9 of the Civil Code states that "everyone has the right to respect for private life". Already before the Google Spain judgment, the French administrative regulatory body the CNIL has been enforcing "*le Droit a l'Oubli*" before the internet era. On Feb. 15, 2012 the Tribunal de grande instance de Paris ordered the search engines google.com and google.fr to remove all links that could trace plaintiff Diana Z. back to her previous life.[53]

---

[47] Act on the Protection of Personal Data 2001, http://wetten.overheid.nl/BWBR0011468/2016-01-01 (accessed 29.09.2017)

[48] Art. 6 (162) Dutch Civil Code (Burgerlijk Wetboek), http://wetten.overheid.nl/BWBR0002656/2016-08-01 (accessed 29.09.2017)

[49] Verheij, A., *The right to be forgotten – a Dutch perspective,* International Review of Law, Computers & Technology (2016), p. 4

[50] Ibid, p. 5

[51] ECLI:NL:RBARN:2011:BP5304 (Van Gasteren), http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBARN:2011:BP5304 (accessed 28.09.2017)

[52] Verheij, A., p. 6

[53] Pagallo, U., Durante, M., *Legal Memories and the Right to be Forgotten,* in Floridi, L. (eds), *Protection of Information and the Right to Privacy – A New Equilibrium?,* Springer Verlag 2014, ISBN: 978-3-319-05720-0, p. 19

Google has contested a fine the CNIL imposed on it for not delisting links on google.com. This case was forwarded to the ECJ for a preliminary ruling on March 15, 2017. The Court will have to answer whether the parent company also must delist the results, although the domain is not European.[54] Despite the case ruling on the 1995 Directive, the judgment is expected to be a clear indicator of the scope of Article 17 in the General Data Protection Regulation.

As a final case study the United Kingdom, the only common law country in the Union is discussed. Has this had any impact on data protection laws? In contrast to civil law countries, in common law countries, freedom of expression usually prevails over data protection and privacy rights. This is reflected in the case law of the United Kingdom.

In *Wainwright v Home Office*, the High Court stated that a general right of privacy is not inherent in the common law.[55] *Campbell v MGN Ltd* established a tort of misuse of private information.[56] However, the scope of the tort remained unclear, which has led to inconsistent rulings. Most recently, a trend can be seen where Courts are more likely to grant injunctions if true information is mixed with false information. In *McKennitt v Browne*, the Court granted an injunction for infringement of privacy in a case where it was difficult to establish which disclosed information was the truth and which was not.[57]

The General Data Protection Regulation would likely have further tilted the scale towards enforcing privacy rights. Nonetheless, the discussion on this topic remains hypothetical as the United Kingdom has opted to leave the EU. Already during the drafting of the General Data Protection Regulation, the British media and politicians criticised that a right to be forgotten would lead to a further wedge being driven between Europe and the United States.[58] There is little reason to believe that the United Kingdom would implement a right to be forgotten after exiting the Union.

In the United States, case law has set a strong precedent against implementation of a right to be forgotten. In *Cox Broadcasting v. Coehn* (1975) the Court held that "even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears in the public record."[59] *Smith v. Daily Mail Publishing* confirmed this and elaborated that "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order"[60] In general, there is consensus among academics that the right to be forgotten in its current form could not be implemented in the United States.[61]

Currently, the academic discussion is already focusing on how to deal with the right to be forgotten if the ECJ rules that delisting also applies to non-European domains of data controllers. Four solutions have been proposed in case the ECJ rules in favour of CNIL. Countries can adopt the right to be forgotten for themselves, ignore the erasure/delisting claims, com-

---

[54] C-136/17, *Request for a preliminary ruling from the Conseil d'Etat (France) lodged on 15 March 2017– G.C., A.F., B.H., E.D.. v Commission nationale de l'informatique et des libertes (CNIL),* Official Journal of the European Union 29.05.2017

[55] O'Callaghan, P., *False Privacy and Information Games,* Journal of European Tort Law Vol. 4 (3) 2013, p. 283

[56] Ibid, p. 285

[57] Ibid, p. 286

[58] Shanin, S., *Right to Be Forgotten: How National Identity, Political Orientation, and Capitalist Ideology Structured a Trans-Atlantic Debate on Information Access and Control,* Journalism & Mass Communication Quarterly, Vol. 93 (2) 2016, p. 365

[59] Cox Broadcasting v. Cohn, 420 U.S. 469 (1975)

[60] Smith v. Daily Mail Publishing 443 U.S. 97 (1979)

[61] See: Larson III, R., *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to be Forgotten are Incompatible with Free Speech,* Communication Law and Policy Vol. 18 (1) 2013, p.91-120 and Ausloos, K., *The 'Right to be Forgotten' – Worth remembering?* Computer Law and Security Review Vol. 28 (2012) p. 143-152

ply with takedown requests or seek to establish a modified version of the right, with most scholars arguing for the latter[62] In the United Kingdom, there has been harsh criticism of an extra-territorial application of the right to be forgotten. This would set the dangerous precedent that other countries could also try to enforce their online jurisdictions outside of their territory.[63]

Perspectives for a Global Right to Be Forgotten

As the analysis has demonstrated, the principle of norm emergence, norm acceptance and norm internationalisation and legal interpretivism can be two sides of the same coin. As this paper has shown, specifically in the phase of norm acceptance, the courts can complement and push the development of a norm.

Concerning the right to be forgotten, it currently is still in a state of norm acceptance. The role of the national courts has been vital to both shaping and promoting higher standards of data protection, from which eventually the right to be forgotten could be deduced. Germany, France and the Netherlands have been active in shaping the right to personality, and specifically in France an active national data protection board can lead to the ECJ issuing a landmark judgment on the scope of enforcing the right to be forgotten in the near future.

The entering into force of the General Data Protection Regulation will lead to more legal certainty on the scope of the right to be forgotten. Nonetheless, in its current form, it is unlikely that the right will reach the stage of norm internationalisation. Common law countries, specifically the United States, have an apprehensive attitude towards such a right. In the United States, as demonstrated in the case law, the right to be forgotten in its current form cannot be implemented due to the First Amendment.

A solution could be to return to the roots of the right to be forgotten, as Mayer-Schönberger originally proposed at the re:publica conference and subsequently in his publications.[64] One approach he discusses is to introduce a data 'expiration date' for personal data uploaded to the internet. After the expiration date is reached, the data is automatically taken off the web; a segment of code would be added to it to ensure the implementation. The actual expiration date of the data could be negotiated between the parties involved. The phrasing of the Google Spain judgment, in fact, indirectly addresses the possibility of an expiration date for data. Even when the initial processing of data was lawful, processing "may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected."[65]

It has been argued that after a certain amount of time elapses, data reaches a 'break-even' point where there is no extra benefit for the host to keep it online.[66] Although the concept would require further elaboration, an expiration date for data

---

[62] Ambrose, M., *Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception,* Telecommunications Policy Vol. 28 (2014) p. 801

[63] MacCarthy, M., *Globalizing the right to be forgotten sets a dangerous precedent*, Infoworld Media Group, 06.04.2016

[64] i.e. Mayer-Schönberger, V., "Delete: The Virtue of Forgetting in the Digital Age), Princeton University Press (2011) 272 pages

[65] Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (2014), Par. 93*

[66] See: Sartre, U., The right to be forgotten: balancing interests in the flux of time, International Journal of Law and Information Technology, Vol.24 (2016), p. 80 and Pagallo, U., Durante, M., Legal Memories and the Right to be Forgotten in in Floridi, L. (eds), *Protection of Information and the Right to Privacy – A New Equilibrium?*

might be the most apt approach to develop a right to be forgotten, which could be implemented globally. It would avoid the conflict with the First Amendment in the United States and would take the burden off the Courts (and data controllers) to have to balance privacy and expression rights for data where the area of dispute is solely based on the right to be forgotten.

EMPOWERING ANIMALS WITH FUNDAMENTAL RIGHTS – THE VULNERABILITY QUESTION

Mari-Ann Susi

ABSTRACT

In the search of applicable methodological tools for analysing the phenomenon of empowering animals with fundamental rights, the question of animals as a vulnerable group has received (undeservedly) little attention. Animal rights is an area where sociological and legal sciences meet, making it an exemplary interdisciplinary research area. It appears that the question of attributing fundamental rights to animals has primarily been studied by legal scholars, who view this as an issue having strong ethical and philosophical component. The main legal theoretical approaches to animal rights – such as the welfarist, abolitionist and middle-position – avoid focusing on the question of vulnerability. This is probably because vulnerability is a sociological and not a legal criterion. What seems missing from today's global discourse on animal rights is an empirical aspect of how the society understands the need for protecting animals. The doctrine of vulnerability may serve as one interdisciplinary tool to analyse the growing attention to animal rights. There are many examples from the history of mankind that demonstrate how some vulnerable human groups have been deprived of basic rights and subsequently have been gradually provided with full recognition of their rights (ethnic and gender minorities, women, people with disabilities). The author is not arguing that there is sufficient theoretical or empirical information to consider animals as a vulnerable group. Nor is there a consensus about what vulnerability means in legal terms. The author wishes to demonstrate that the matter of vulnerability of animals is a research question that needs to be explored in depth, using both sociological and legal methods.

More broadly, this article shows that the current stage of theoretical analysis of the reasons for animal protection inevitably leads to the fundamental rights questions of animals. Conversely to international law, where the 'nuclear option' means the exclusion or exit of someone[1] or something, in the context of animal rights the 'nuclear option' means universal acceptance of the capability of animals to have fundamental rights, which will substantially change the human rights framework as we know it forever. The number of scholars who write about the need for change in theoretical and practical paradigms governing the protection of animals is reaching a critical point, which means that this shift is merely a matter of time. Recognising theoretically that at least some animals have at least some fundamental rights, and then proceeding to this recognition in soft and hard international law is inevitable, if my proposition of a paradigmatic change either on the horizon or already ongoing is correct.

As we will see below, during the short academic "excursion", when exploring diverse replies to the question of whether animals have or should have fundamental rights, these replies all take a position on whether fundamental rights for animals can be justified. The question about justification of human rights is nothing new. Robert Alexy has written that the existence of human rights depends on their justifiability and on nothing else.[2] What is justifiable is correct, according to Alexy. Once we can justify why animals should have fundamental rights, then at the same time we can have an argument of correctness requiring the global community to recognise that animals have fundamental rights. This, of course, will depend on whether fundamental rights for animals are justifiable.

[1] For example, a dissatisfied country exiting an international organisation or dissatisfied member states deciding to "close" down an international court.

[2] Robert Alexy, "The Existence of Human Rights", in: *Archives for Philosophy of Law and Social Philosophy*, supplementary volume 136 (2013), 11.

INTRODUCTION

The study of animal rights is an area where sociology and law meet. On the one hand, the debates around the possibility of recognising animals as a distinct group having certain rights – even fundamental rights – depends on how the society understands the need for such recognition. This is a sociological question, focusing on how social understandings are "translated" into legal norms. One can argue that without social acceptance of the need to recognise animals as having rights, law would not be able to achieve one of its goals – that is to turn social norms into legal norms. On the one hand, lawyers and legal scholars are not certain which approach is most suitable for meeting the heightened social awareness of the need of protecting animals. It appears that the usage and combination of both sociological and legal methods may be an answer to understanding why there is a growing need to speak about protecting animals, and which legal avenues are most suitable to achieve this goal.

Current scholarly debates around animal rights have not produced a consensual approach to some of the fundamental questions concerning this relatively new branch of law and legal research, such as the distinction between animal law and the legal regulation of animal welfare protection. A fundamental question within the discourse about animal rights is whether these rights are protected because humans recognise that animals (or at least some animals) have certain unalienable rights, or in alternative, because the protection of animals is part of protecting the fundamental rights (of humans) for sustainable environment and/or diversity of the habitat. Scholars are also debating whether animals are a vulnerable group and whether there are similarities in the social attitudes within the dynamic evolution of modern society towards the various vulnerable groups and now also towards animals.

There are some theoretical premises which seem to be accepted by a majority of authors. Both the social and legal scholars, the animal welfare activist communities and policy-makers at domestic and global levels seem to agree that animal welfare has become a global concern. There is increasing evidence that the civil society is aware of the need to recognise at the very least that animals deserve protection[3]. This conceptual agreement seems to disappear when the next question is asked – what should be the appropriate response via legal regulation, e.g. global vs regional vs domestic to achieving the goal of the protection of animals? Is it sufficient to rely on social norms, or is legal regulation unavoidable? A sociologist might argue that if the lawyers cannot agree on the ways in which to legally protect animals, then social norms may be sufficient. A lawyer, in turn, might reply that law can respond only when there is social consensus on which animals and to what extent need to be protected. Be as it may, since animals are used globally for various purposes (mainly economic, but also scientific and for providing enjoyment), social and legal norms must also respond globally. Therefore, across cultures there is a need for agreeing upon certain minimum standards of animal protection. The claim that certain standards of protection are needed may be agreed upon, irrespective of the question of whether one believes that animals have rights.

This paper will now briefly outline the main theoretical approaches to animal law and the question whether animals should/could have fundamental rights. The author will also add to each main approach presented a reflection on whether the idea of vulnerability of animals as a distinct group might fit into the respective argumentation. The question of animal protection and animal rights involves ethical, economical, philosophical, sociological and legal components.

The author will especially explore the applicability of the concept of vulnerability in understanding why the question of

[3] Several powerful global organisations have emerged with the goal or promoting world-wide understanding of the need to protect animals – see the World Society for the Protection of Animals (WSPA), the Animal Welfare Movement, but also the EU platform on animal welfare. See also scholarly discussion about the role of the civil society in fostering the understanding of the need to protect animals - International Handbook of Animal Abuse and Cruelty: Theory, Research, and Application (New Directions in the Human-Animal Bond), edited by Frank A. Ascione, Purdue University Press 2010.

animal rights is increasingly in the agenda of political and social debates, leading to the search of an appropriate legal response. Yoriko Otomo from the University of London has studied how emerging patters of economic interdependence have changed representations of women and animals[4]. It appears that the approach of viewing animals as a vulnerable group is not entirely new, although the majority of scholars do not explore this theoretical avenue. Even if, at the outset, the comparison of animals to a vulnerable group may be rejected as fundamentally unsound, at a closer look this approach deserves attention. It will be important to analyse the pros and cons of the concept of vulnerability and try to come closer to an understanding of whether this concept is an applicable instrument to the gradual recognition of the fundamental rights of animals. If there is ever to be a consensus among legal scholars, interest groups and global policy-makers that the concept of vulnerability is a theoretical pillar for developing animal rights law, this will inevitably lead to far-reaching consequences both in the legal protection of animals and in how the society understands animal rights. Martha Fineman, one of the globally known proponents of the vulnerability doctrine in human rights law, has written that acceptance of a vulnerability approach towards some specific legal issue is likely to lead to a paradigmatic change in the way in which the society addresses existing material and social inequalities[5]. Under the fundamental rights of animals, the author only has a limited number of fundamental rights in mind, which are recognised via various international instruments for humans – such as the right to food and water; the right not to be tortured; the right to be protected from disease and pain; the right to express normal behaviour; and the right not to be subject to fear and distress.

THEORIES

There are three main theoretical approaches, which address the question of why animals deserve legal protection.

First, there is the **"welfarist" position**, which argues that animals are protected not because they have rights, but because of the need to avoid unnecessary suffering[6]. Within this approach, the question of whether animals have rights has been of marginal interest, dominantly as a matter of theoretical or philosophical abstraction. Animal welfare emerged as a scientific concept, based on the presumptions that humans are bound by certain moral restraints when dealing with animals. The ethical component has not disappeared with the entry of the suggestion that animals have rights, but rather it has transformed into strengthening animal protection and adding a global aspiration, at least from the perspective of animal protection activist groups. According to this theory, animals should not be subject to suffering, but at the same time they have no right to life within the meaning as humans have the absolute right to life. The welfarism theory does not operate with the idea that animals have rights, but is based on the unchallenged idea that animals are property, albeit a special kind of property. The question of whether animals are to be viewed as a distinct vulnerable group seems to not have any purpose within this approach, since the idea of granting animals fundamental rights is excluded. Animals need to be protected because we as humans have moral obligations – therefore, this is predominantly a sociological question.

Second, in contrast to welfarism, the **"abolitionist" theory** argues that animals should be given certain rights, whereas the first right to be given is the absolute right not to be property. Although first introduced already in 1983 in the Western legal

---

[4] Otomo, Yoriko and Mussawir , Edward, eds. (2012) *Law and the Question of the Animal: A Critical Jurisprudence.* Abingdon; New York: Routledge. (Law, Justice and Ecology)

[5] Fineman uses the 'paradigm' language as follows, "A vulnerability approach accomplishes several other important political objectives that illuminate both why a post-identity paradigm is necessary and how powerful it can be in addressing existing material and social inequalities" - Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 2o Yale J.L. and Feminism 1, 2008 – 2009, at 17

[6] Robert Garner, A Defense of a Broad Animal Protectionism, in: Gary Francione and Robert Garner, The Animal Rights Debate: Abolition or Regulation? New York 2013, 129

discourse by Tom Regan, the idea of animals having rights has mainly stayed as a theoretical construct without practical "translation" into binding legal obligations. The term "abolitionism" in this context refers mainly to the need to abolish the exploitation of animals. This theoretical position seems radical (stigmatised by a situation of a monkey escaping from the zoo and shouting "freedom!"), which is difficult to realise in the modern economy. The scope of the abolitionist idea depends on the content of rights that one is ready to ascribe to animals, as well as criteria of such ascription. The "abolitionist" position argues that animals shall not only be treated humanely, but they should also be accorded rights or at least a few. This position has been advocated by Francione since the 1990s, and it leads to a logical conclusion that any modern commercial handling of animals needs to be abolished[7]. The question of animals as a distinct vulnerable group becomes irrelevant as well, but for an entirely different reason than with the first theoretical approach. Since the abolitionist position is already based on the recognition that animals have some fundamental rights, the concept of a vulnerable group is not needed to "make the argument".

Third, there is also a **"middle position"**, which argues that "animals are not autonomous, self-governing agents with the power to frame, revise, and pursue their own conceptions of the good and so do not have a fundamental interest in liberty. As such, animals have compelling rights that impose strict limitations on what we may permissibly do to them in a range of contexts. However, animals have no general right never to be used, owned, or exploited by human beings.[8]" Again, it seems that the discussion on whether animals can be viewed as a vulnerable group, to which in the future may be extended some fundamental rights, does not seem to be a suitable logical consequence of this line of thought.

However, a pattern still emerges from these considerations, indicating that there is a need for some fundamental change in the way in which human society thinks about animals in reference to their legal rights and status[9]. It seems, however, that the presumption of this call for a fundamental change may not yet be supported by empirical evidence. If lawyers are arguing that there is a need for a change, it does not necessarily mean that they have realised a social need for this change.

A philosophical aspect of this debate is whether the extension of a right to a right-holder is conditional upon this right-holder being aware that he/she/it holds the right? An affirmative answer would run contrary to the contemporary human rights discourse and main human rights protection instruments. If then a person can have rights without being aware of them, it means that the entitlement to some rights (at least some absolute fundamental rights) is not dependent on the will of the entitled person to actively enjoy these rights. Vulnerable groups like children, the elderly, and mentally disabled persons are the main groups that can be given as an illustration to this line of thinking. The following doctrine from the previous is that the divide between someone enjoying a right vis-à-vis the obligation of others to protect and respect this right does not depend on the conscious understanding on behalf of the right-holder that he/she/it has the right. Obligated persons would still have the obligation to respect and protect the rights of the vulnerable groups. From here, we are very close to describing the theoretical basis for recognising animal rights – animals as a vulnerable group have certain rights without the element of being aware of those rights, whereas there are obligations of third parties to recognise and protect these rights. In the view of the author of this article, this philosophical aspect – there is no morally valid argument to condition that a human rights holder should be aware of him/her holding these rights – should be one of the cornerstones for analysing the future of animal rights law.

---

[7] Gary Francione, Animals, Property, and the Law, Philadelphia 1995

[8] Alasdair Cochrane, Animal Rights without Liberation: Applied Ethics and Human Obligations; New York 2012, p 210

[9] There is an emerging trend in literature to question whether the animal rights movement and animal protection doctrines are another attempt by Western countries to impose their own views and ethical understandings upon the rest of the world. For example, the standards advocated by the animal protectionists run counter to the practice of some indigenous people of whale hunting, or against the Muslim practice of animal slaughter. Therefore, it cannot be denied that certain cultural traditions may hinder the overall acceptance of the idea that animal have rights and deserve protection at least regarding some absolute rights.

Neither the **practice of international (regional) courts**, nor the international legal instruments view animals as a distinct vulnerable group, which may be entitled to fundamental rights protection. It appears that the issue is perhaps not so much that this concept has been rejected as a result of some comprehensive debate, but because there is a lack of consensual approaches to the animal rights protection as such, so the variety of conceptual approaches is not an issue.

The shift in the understanding of the human-animal divide may be far-reaching. It is argued that animal welfare legislation (including at the EU level, for example, the EU regime on the protection of animals in laboratory conditions – Directive 2010/63/EU) contains a fundamental bias for favouring the interests of humans over the interests of animals. This bias influences law- and policy-making, and there is a clear economic component. However, should it be recognised that animals have certain rights, then it becomes difficult to argue for the preponderance of human interests and rights over animal interests and rights. At the same time, there seems to be some evidence that characteristics which for a long time have been viewed as characteristic to humans only may also be attributable to some animals (not all at the same time) – for example, the ability to make tools, learn, express themselves, show compassion. Modern science argues that there is no clear line to divide humans from animals and the relationship is the one of a continuum. Should this be the case, then there is no ground to argue that certain social phenomena, like moral values, social and legal norms and rights can only be applied to the human society.

Although European countries have established regulations both at domestic and regional levels (through the EU and the Council of Europe) for certain norms to protect animals[10], there appears no consensual approach as to the foundations of the legislation. Nor have the regional courts any significant case law, which would address the fundamental question of why animals are protected[11]. In an article dealing with the question about the paradigmatic changes in animal law, Anne Peters has reported that "the protection of endangered species, habitat protection, and biological diversity, have been addressed on a global level, but not the welfare of animals, let alone their rights"[12].

The Inter-American Court has perhaps used the concept of vulnerability more frequently than the European Court of Human Rights. When analysing the Inter-American Court's approach to the doctrine of vulnerability, Ludovic Hennebel has shown that the Court systematically deduces a special need for protection tailored according to the vulnerabilities of certain groups, which are particularly targeted, and then protects their "best interests"[13]. The best interests approach has certain similarities to the capabilities approach developed by Martha Nussbaum and described later in this article. It is sufficient to note at this point that perhaps the approach to analyse animal rights from the perspective of their own capabilities and interests is universal and not limited to specific academic circles.

Be as it may, it can be concluded that the current legislative efforts globally and regionally are unable to reach the fundamental rights approach to animals without first arriving at a scholarly consensus that animals have fundamental rights in

[10] For example, there are norms to regulate the keeping of farmed animals, the transport and slaughter of animals and the keeping of pets – see the Convention for the Protection of Animals kept for Farming Purposes, Additional Protocol for the Protection of Animals during International Transportation (ETS No. 193); Convention for the Protection of Animals for Slaughter, Convention for the Protection of Pet Animals

[11] The European Court of Human Rights so far has no cases dealing with the rights of animals. There are cases which have dealt with the right to privacy under ECHR article 8 in connection with affection to an animal. The judgment in *Cha-are Shalom Ve Tsedek v. France,* no 27417/95, judgment of 27 June 2000, concerned the slaughter of ritual animals. No issues of animal rights emerged in this case.

[12] Anne Peters, Introduction: Animal Law- A Paradigm Change, *Animal Law: Reform or Revolution?,* Anne Peters, Saskia Stucki, Livia Boscardin (editors), Schulthess 2015, p 18

[13] Ludovic Hennebel, The Inter-American Court of Human Rights: the Ambassador of Universalism, *Quebec Journal of International Law (Special Edition) 2011,* p 64

need of protection. A topic which will remain unexplored in this article is whether a full or nearly consensual position of some relevant stakeholders, such as the business sector processing animal products, is needed to bring about a fundamental change in recognising animal fundamental rights.

The question about the need of a fundamental shift in the legal protection of animals

It can be argued that ongoing reforms of animal legislation have not improved the situation of animals, but on the contrary, have continuously reinforced the property status of animals and thereby increased their exploitation and suffering. The recent welfare reforms are, thus, viewed as counterproductive because their goal is simply to quiet the moral discomfort of humans when confronted with the slaughter and exploitation of animals[14]. It is argued that isolated welfare norms remain incidental in international legal regimes, which formulate as their primary objective the regulation of harvesting and trading animals, their conservation and protection of global biodiversity. This has led some authors to write about the non-existence of a transnational animal protection regime (C. Otter[15]), a lack of a coherent legal regime (S. White[16]), and a lack of consistent attention from the international community (Bowman[17]). On the other hand, there seems to be an increased interest from lawmakers to pay attention to animal welfare.

Anne Peters is a proponent of the view that animal law and accompanying legal scholarship is capable and in need of a revolution comparable to a transition to a new paradigm[18]. This is because we are becoming more and more aware[19] that something has gone fundamentally wrong in how we have so far understood the matter of the protection of animals.

One can argue that the failure to give a greater emphasis to the human rights approach regarding certain socially pressing issues is indicative of the uncertainty and debate about the proper place and approach of human rights law towards the respective issue[20]. This does not mean that there is a denial of the need to recognise such right, but simply that the "birth process" of universal recognition of some right is difficult and may mean a paradigmatic change.

It seems that the current human rights theory is challenging the traditional understandings of the right to privacy. Within these debates, certain new doctrinal approaches are being proposed and argued, which have the potential of assuming an overarching effect on how to understand the notion of privacy, not only limited to humans as the primary bearers of human rights entitlements, but also reaching out to other species.

---

[14] Gary Francione and Anna Charlton, Animal Law: A Proposal for a New Direction, *Animal Law: Reform or Revolution?,* Anne Peters, Saskia Stucki, Livia Boscardin (editors), Schulthess 2015, p 18

[15] C. Otter, S. O'Sullivan and S. Ross, 'Laying the Foundations for an International Animal Protection Regime' (2012) 2 (1) *Journal of Animal Ethics,* pp 53 – 72

[16] S. White, 'Into the Void: International Law and the Protection of Animal Welfare' (2013) 4 (4) *Global Policy*, pp 391 - 398

[17] M. Bowman, P. Davies and C. Redgwell, *Lyster's International Wildlife Law,* 2nd edition (Cambridge University Press 2011)

[18] A doctrinal question is also, whether by extending (some) rights to (some) animals, the overall level of fundamental rights protection globally would weaken. This is the observation that if all rights are fundamental rights, what is their meaning?

[19] Anne Peters, Reform or Revolution, pp 25 – 26

[20] Dinah Shelton, *What Happened in Rio to Human Rights?,* Yearbook of International Environmental Law (1992), 82

One of the relatively new doctrines addressing the issue of privacy is **the theory of contextual integrity**, which is based on the idea of the 'reasonable expectation of privacy'[21] and articulates an 'alternative account of privacy'[22]. The contextual integrity theory is developed by the American scholar Hellen Nissenbaum and has as one of its fundamental building-blocks the idea that the understanding of privacy is based on ethical conceptions that evolve over the course of time. In other words, what may have been seen as falling outside of the notion of privacy, may no longer be so due to the development of the modern society. Privacy is a different category than just "being left alone". In the view of the author of this article, as soon as someone uses "human rights privacy language" in the context of an animal, for example, saying "give my cat some privacy" instead of saying "leave my cat alone", there is an implication that this cat is viewed by the owner as having human rights.

The author of this paper finds, based on the considerations outlined above, that **the aspect of animals as a vulnerable group** within the debate about the need to grant animals certain fundamental rights so far has not received enough attention. Although the vulnerable group argument does not seem decisive in any of the theoretical approaches, it may well complement the aspect where it is asked whether there are good reasons not to grant (some) animals (some) fundamental rights. This seems to be a situation, where sociological methods may provide an answer. If there is empirical evidence of social dynamics in recognising that some animals should be given fundamental rights, it may be difficult for the legal and political establishment to ignore this aspect. However, this question has not been studied comprehensively.

The main research question, as outlined above, is whether there is some similarity in the dynamics of social attitudes and the gradual legal recognition of the rights of vulnerable groups in the past with animal rights. This is not an entirely novel question, since in the academic debate some authors have pointed to the similarities of the current attitudes towards animals with the former attitudes towards some vulnerable groups.

Anne Peters has shown that as late as from 1879-1935 the Zoo in Basel organised so-called "peoples' shows", where those displayed (in captivity in cells) were non-Europeans in traditional clothing, who performed folkloristic dances and handcrafts.[23] She argues that these non-European people were not given any rights because they were viewed as morally inferior and incapable of taking care of themselves. Similar social attitudes can be seen from the discrimination of women and mentally ill individuals across the development of history. Current human rights practice is also addressing the matter of the vulnerability of prisoners and the question to what extent rights can be limited. Is there some similarity between the historical attitudes towards the vulnerable groups and the way in which contemporary society views animals from the perspective of whether they should be given some "fundamental rights"? It can be argued that implied speciesism is comparable to racism, or at least to discrimination with no just cause[24].

Comparison of social attitudes and expressions used towards vulnerable groups is a methodological challenge. When the hypothesis can be verified that animals are understood in the contemporary society as a vulnerable group, comparable

[21] R. Bellanova, 'Waiting for the barbarians or shaping new societies? A review of Helen Nissenbaum's "Privacy In Context", Stanford University Press, 2010)', (2011) 16 *Information Polity: an international journal on the development, adoption, use and effects of information technology 391, 393;* and T. Wong, 'Helen Nissenbaum's Privacy in Context: Technology, Policy, and the Integrity of Social Life (2010)' (2011) 12 *German Law Journal* 957, 965

[22] H. Nissenbaum, 'Privacy as Contextual Integrity", (2004) 79 *Washington Law Review* 101, 124

[23] A. Peters, 'Introduction: Animal Law – A Paradigm Change' see in literature review: A. Peters, S. Stucki, L. Boscardin, editors, see in literature overview, p 17 – 18

[24] A radical statement belongs to Alejandro Lorite Escorihuela, who compares the international treatment of animals to "global slaughterhouse".

to the way that human society in the past has defined certain vulnerable groups, then the logical development is that the overall recognition of animals having rights is not a matter of if, but matter of when. However, this conclusion only holds firm when one takes the position that there is no insurmountable watershed between humans and non-humans, which would make it impossible to even speak of extending human or fundamental rights to animals. This might even preclude extending to animals the handful of fundamental rights mentioned beforehand[25].

In order to verify the proposition of whether animals can be viewed as a distinct group, which may be subject to the benefit of progressive interpretation of human rights development, we have to look at whether there is any non-legal evidence regarding the possible dividing line between humans and animals. This search of the criteria allows to answer the question of whether it is a mission impossible to apply the same elements of legal dynamics to animals as towards other vulnerable social groups in the past. There appear two main lines of argumentation. One is arguing that humans are a unique group, sealed off from other living beings. The other is arguing that the dividing line between humans and animals is becoming more and more unclear, as the characteristics which for a long time were considered to be applicable only to humans also apply to some animals[26]. Based on the current scientific evidence, the author concludes that the argument about the possible insurmountable dividing line between humans and animals is primarily moral or legal and not biological.

Doctrines focusing primarily on the aspect of fundamental rights without reference to vulnerability

Before exploring the question of vulnerability further, the author asks whether there are currently specific doctrines, within the main theoretical approaches outlined above, that primarily focus on the question of extending or denying fundamental rights to animals without using the concept of vulnerability. Are there doctrines which *per se* exclude the possibility of animals ever being granted some fundamental rights, and if so, how do these doctrines relate to the concept of vulnerability? And then, if there are doctrines which consider the possibility of granting animals some fundamental rights, even theoretically, does it mean that the human rights language[27] used indicates similar dynamics to those that have occurred when other vulnerable groups have been gradually granted the full spectrum of fundamental rights?

A related scientific question is: which are the arguments usually applied when denying certain rights to some groups? This question can be researched from the perspective of arguments used to deny or withhold rights from certain groups (minority groups, vulnerable groups, groups on the basis of some ethical or religious characteristics). Then we can further ask, whether similar arguments are used to deny rights to animals.

The author of this paper wishes to outline some approaches which render even the theoretical possibility of extending to animals some fundamental rights questionable: these are the legal personhood approach and the non-personal subjects approach.

[25] right to food and water; right not to be tortured; right to be protected from disease and pain; right to express normal behaviour; right not to be subject to fear and distress.

[26] New scientific evidence shows that animals can speak, make tools, transfer learned techniques, make tools and show compassion. Some animal communities clearly have a social structure and forms of communication, which may even surpass the communication techniques among humans. See for example Carl Safina, *Beyond Words: What Animals Think and Feel,* Henry Holt 2015. It seems to the author of this paper that even if the limit to which animals can reason and think has not been conclusively proven, at the same time there is sufficient argumentation to show that animals have the features of feeling and reasoning.

[27] Sally Engle Merry, Anthropology and International Law, *Annual Review of Anthropology,* 2006, 99 – 116.

There is emerging literature on the question of whether animals should be granted "**legal personhood**"[28]. There are powerful non-governmental organisations, which claim the recognition of legal personhood of animals as their mission [29]. This aspiration, albeit legally challenging to lawyers and animal rights activists, seems to downplay the stigma of a fundamental right which exists with or without the bearer of this right having legal personhood. The approach of setting a condition for any living being to be granted fundamental rights – that this being also has a full standing before the law – may have its roots in the Enlightenment's understanding of morality being inseparable from legal personhood, but it does not seem to correspond to the contemporary understanding of human rights.

Beaudry concludes that the approach of seeking to grant some animals legal personhood is a dead end, which may succeed occasionally in separate court cases, but is not bound to overcome the theoretical barrier that legal personhood is inseparable from human beings[30].

The question of whether animals are comparable to a vulnerable group seems to not enter the discourse of lawyers and activists fighting for granting animals legal personhood. Rather, this approach seems to be based on the idea of a social contract stretched to encompass all living creatures. Like Christine Korsgaard has written, "We may demand that we not be tortured, injured, hunted, or eaten, not just because of the assault on our autonomous nature, but because of the assault on our animal nature; therefore we should not treat our fellow animals in those ways. Autonomy puts us in a position to make the demand, but it is not the reason for the demand."[31]

Another approach, which, if realised, would mean almost a paradigmatic change in our understanding of fundamental rights, calls for a **new category of non-personal subjects of law**, which would overcome the dead end of the legal personhood concept. The authors of this proposition, Polish legal scholars Tomasz Pietrzykowski and Aleksandra Lis formulate this as follows, "The recognition of animals as non-personal subjects of the law entails making their vital interests legally relevant considerations that must be taken into account in all decisions that could materially impact their well-being. The obvious differences between human beings and non-human animals suggest that the latter should enjoy only one legal right – to have one's individual, subjective interests taken into account whenever they may be seriously affected by decisions or actions of third persons. The concept of non-personal subjecthood avoids the obvious difficulties in attributing animals with the whole bundle of rights (most of which are bluntly inconsistent with the nature of even the most developed non-human animals) implicated by the ordinary concept of personhood in law.[32]"

When considering this proposition, one can ask whether there are fundamental differences between, from one side, the position that animals have only one right, e.g. to have their subjective interests taken into account when affected by decisions of third persons, and from the other side, with the approach there are certain vulnerable groups (young children, mentally disabled persons, old persons with dementia) that primarily have this same interest. Are there other criteria that need to be

---

[28] Jonas-Sebastien Beaudry, From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court,

[29] For example, the US-based organisation the Nonhuman Rights Project (NHRP), which gives as its mission in its webpage, "Our mission is to change the legal status of appropriate nonhuman animals from mere 'things', which lack the capacity to possess any legal rights, to 'persons', who possess such fundamental rights as bodily integrity and bodily liberty" – see the website of NHRP at: www.nonhumanrightsproject.org

[30] Baudry, p 31

[31] Christine Korsgaard, Fellow creatures; Kantian ethics and our duties to animals, *Tanner Lectures on Human Values* 24, 100 – 101.

[32] Aleksandra Lis and Tomasz Pietrzykowski, Animals as Objects of Ritual Slaughter: Polish Law after the Battle over Exceptionless Mandatory Stunning, *Global Journal of Animal Law,* 2/2015, 1 – 13, p 13.

considered to distinguish such vulnerable groups other than their genetic code? If there are not, then we are close to a state where this new legal category, which the authors refer to, has some similarities with the doctrine of a vulnerable group[33].

The author notes that both approaches are legal doctrines and have not used empirical evidence obtained via using sociological methods in their argumentation. Perhaps this would even be difficult to imagine – how can you ask the population such a theoretical question, whether they think that animals should become legal persons, although the replies would be far-reaching. It might make much more sense to empirically study the question of whether the population views animals as a vulnerable group, because the categories used are far more understandable. The author of this article has come across a phenomenon of "human rights" language used towards animal suffering in judicial proceedings, which merits deeper research, but it has to remain for another article outside of the current one. When analysing recent Estonian court cases where animal cruelty was the subject matter, the author has come across many statements of charges where the prosecutor accuses the defendant of animal cruelty, causing the animal *mental* suffering. There is no mention of mental suffering as a qualifying criterion in respective Estonian penal legislation. Whenever someone causes another person mental suffering, consciously or not, this infringes on this person's right not to be tortured or be subject to inhumane treatment. The latter is a fundamental right[34]. Causing an animal mental suffering means infringing on this animal's right not to be subject to torture. It will be a challenge to study the reasons for the choice of words of these prosecutors when writing about the mental suffering causes of animals.

The question of vulnerability of animals in sociological and legal aspects

In order to test the hypothesis that the legal dynamics in the recognition of animals as a vulnerable group, thereby leading to the conversion of some fundamental rights to this vulnerable group, are comparable to the dynamics that have appeared in the past regarding other human vulnerable groups, two questions need to be addressed from the methodological perspective. The first question is whether animals are or should be viewed as having the characteristics of a distinctly vulnerable (non-human) group. The second question is whether there are some similarities in the progressive recognition of the rights of the vulnerable groups in general (which then in turn needs to be applied to any vulnerable group), which can then be compared to the legal discourse around the rights of animals. The first question is mainly sociological and its study requires sociological methods. The second question includes both sociological and legal methods.

Traditionally, vulnerable groups include indigenous peoples, ethnic minorities, refugees, migrant workers, women, children, people with HIV/AIDS, persons with disabilities and older persons. There are various international legal instruments which protect these rights, such as the Convention on the Rights of the Child, or the Convention on all Forms of Discrimination against Women.

It appears, however, that the concept of a vulnerable group within international human rights law has not been the subject of intense scholarly debates[35]. There seems to be some consensus that the concept of vulnerability is linked to the susceptibility of harm. For example, Mary Neal writes, "Vulnerability speaks to our universal capacity for suffering, in two ways. First, I am vulnerable because I depend on the co-operation of others (including, importantly, the State) … Second, I am

[33] Although remaining outside of this article, the author points out that perhaps the non-personal subject of a legal approach can also be a tool for addressing the matter of recognising the fundamental rights of artificial intelligence.

[34] Protected, for example, under the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 3

[35] See, for example, the analysis in: Lourdes Peroni and Alexandra Timmer, Vulnerable groups: The promise on an emerging convent in European Human Rights Convention law, *International Journal of Constitutional Law* (2013) 11, 1056 – 1085. With reference to the jurisprudence of the European Court of Human Rights, the authors argue that the Court has only recently started to use the concept of a vulnerable group, originating from cases involving the Roma minority.

vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds.[36]" Regarding the term's origin, it has been pointed out that it originates from the Latin word *vulnus,* meaning the "wound"[37].

Within the discussion of vulnerability, the matter of **suffering** has special importance, since it has been used in the past to argue for the extension of fundamental rights to human vulnerable groups. The goal has been to universally recognise that these groups suffer and then find ways to eliminate the unnecessary suffering.

At first glance, when relying on the matter of suffering, there is striking resemblance with some fundamental arguments which have been used to ask whether animals should be extended fundamental rights. Already in 1781, Jeremy Bentham introduced the idea that there is a moral dimension in the treatment of animals, his famous statement being in reference to animals, "The question is not, can they reason? Nor, Can they talk? but, Can they suffer?"[38] Now, if one is judging on the basis of the ability of animals to suffer, then the questions of whether animals can be viewed as a distinct vulnerable group capable of having some fundamental rights extended to them is already answered in a positive manner. On the other hand, the ability to suffer can also be used in argumentation which does not necessarily lead to the acceptance of the proposition that animals should be accorded fundamental rights.

In the 1960s, the British Farm Animal Welfare Council formulated five freedoms for animals: freedom from hunger and thirst; freedom from discomfort; freedom from injury, pain and disease; freedom to express normal behaviour; freedom from fear and distress. (Comparable to the "four freedoms" formulated by F.D. Roosevelt in 1941: freedoms of speech and expression, freedom of worship, freedom from want, freedom from fear). The key concept of these freedoms is not that animals have rights, but the idea that animals should not be subject to unnecessary suffering. However, these freedoms would be close to rights, if they were accorded to animals. It seems that the watershed between a "freedom" and "right" is not something of substance, but rather linguistic expression of how the one asking the questions replies to the main issue – do animals have rights? It needs to be noted that the freedom to "live" (an animal's right to life) is not mentioned among these freedoms. It can, therefore, be argued that animals are not protected because they have rights, but because humans recognise the duty to protect them because of ethical and perhaps economic reasons. The ethical reason here would be primarily the need to avoid unnecessary suffering. The main research question in this context is somewhat "traditional": are some animals protected in the contemporary society because they have rights, or because humans protect their own rights through the concept of animal welfare? This question can be viewed through concrete legal and social sub-questions. The media sometimes seems to devote more time to cruelty against animals than against humans, accompanied by public compassion exhibition. Is media doing this because it is concerned about the cruelty towards animals as such, or is it a concern about violence as an undesirable social phenomenon in general behind these reports?

Be as it may, it seems that the concept of suffering by itself is not sufficient to guide one to the simple statement, "Animals can suffer, consequently, they need to be extended some fundamental rights with the view of averting the suffering". However, at the same time it is also not sufficient to deny this conclusion.

The concept that animals are to be viewed as a distinct vulnerable group is gaining some recognition and theoretical back-

[36] Mary Neal, Not Gods but Animals: Human Dignity and Vulnerable Subjecthood, *Liverpool Law Review* (2012), 177

[37] Brian Turner, *Vulnerability and Human Rights,* Essays on Human Rights, Penn State University Press 2006.

[38] It may be interesting to note that René Descartes was of the view that animals do not have a mind, and as a mind is necessary to feel pain, animals cannot feel pain.

ing within the discussions of the overall concept of vulnerability. Martha Fineman has defined vulnerability as the possibility of becoming dependent[39]. According to Fineman, a vulnerable subject may have episodic or permanent dependency on others, and the potential for dependency is universal[40]. Fineman believes that the current legal and social structures privilege individuals whose potential for vulnerability is not realised[41]. If applied to animals, it is easy to see that at least some animals are permanently dependent on humans. On the other hand, the majority of species do not depend on humans for their existence, as they live in the wild or in urban settings independently from humans. Arguing that only those animals who are vulnerable because of their dependency on humans for food and shelter are to be accorded fundamental rights might stretch the argument of vulnerability to a dead end. This line of thinking, if applied to Francione's abolitionist position, would mean that at the very moment when animals are freed and they lose their dependence on humans, they consequently are no longer vulnerable and, therefore, lose their fundamental rights. Figuratively speaking, an ape escaping from the zoo with the slogan "Freedom!" would not be able to claim protection under the fundamental rights umbrella, since the ape is not dependent any longer and, consequently, not vulnerable. This leads to the argument that the doctrine of vulnerability, if applied to animals for arguing for their fundamental rights, must include some more basic elements than just material dependency for existence, as the latter can easily change.

Martha Fineman has contrasted the typical association of vulnerability with victimhood, deprivation, dependency or pathology to an understanding of vulnerability that reaches beyond the equal protection model[42]. For Fineman, vulnerability is different from dependency. Both are universal, but vulnerability is a constant, while inevitable dependency is episodic and sporadic.

Building on the vulnerability concept of Martha Fineman, Ani Satz has argued that the theory of animals as vulnerable subjects is based on three premises. First, animal capacities for suffering are morally relevant. Second, she calls it 'speciesist' to privilege human over non-human suffering. Third, since humans and non-humans are universally vulnerable to suffering, their most basic capabilities must be treated equally[43]. Satz has been critical of all approaches advanced by legal scholars which address the dearth of protections for domestic animals[44]. She writes that these proposals "cannot overcome deeply entrenched inequalities in current law that result from legal gerrymandering or the hierarchy problem of human rights or interests being privileged over those of animals".[45] If Satz is right, then the only possibility to overcome these inequalities is to recognise that animals have fundamental rights, as this would eliminate the hierarchy problem. The same fundamental rights cannot have more weight towards a certain category of right-holders in comparison with other categories.

The author finds it established that the proposition that animals can be viewed as a distinct vulnerable group cannot be excluded on the basis of the criteria frequently used for determining the main characteristics of a vulnerable group (ability for suffering, need to be taken care of). The research needs to focus further on establishing whether there may be some common features in the scholarly understanding of the concept of vulnerability which may preclude identifying animals

---

[39] Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 20 Yale J.L. and Feminism 1 (2008), at 9 – 10.

[40] Ibid.

[41] Ibid, at 13 - 14

[42] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 2o Yale J.L. and Feminism 1, 2008 – 2009, at 8 - 9

[43] Ani B. Satz, *Animals as vulnerable subjects: beyond interest-convergence, hierarchy, and property,* Animal Law, vol 16:2, 2009, 1 - 5014

[44] Such as changing the legal status of animals from property to persons, or altering the allowable uses of animals regardless their classification as property.

[45] Satz, 36 - 37

as a vulnerable group[46].

The research question that needs also methodological focus is, thus, whether there is something in the various concepts of vulnerability which may preclude considering animals a distinct vulnerable group.

The author wishes to outline two distinct concepts: the capabilities approach and the idea of the progressive development of fundamental rights.

Martha Nussbaum has introduced **the capabilities approach** to justice for animals, which calls to find out which capabilities humans and animals share. The capabilities approach, according to Nussbaum, is based on the idea of a basic social minimum focusing on human capabilities, of what people are actually able to do and to be – in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being.[47] When applied to animals, this approach focuses on the questions of what animals are capable of doing and which rights need to be protected in order to protect their existence. As such, it seems that the capabilities approach does not exclude the gradual expansion of fundamental rights to animals. Martha Nussbaum herself is an advocate of the approach of giving animals the protection of some fundamental rights. Within this debate, Martha Nussbaum has argued that the most appropriate method to distinguish between species is the so-called "species norm", with a view to which species have opportunities to flourish.

Amartya Sen has developed the capabilities approach from a somewhat different perspective than Martha Nussbaum, avoiding the idea that certain universally accepted principles need to be advanced through any set of capabilities, such as the principle of human dignity. He defines the capabilities approach as enabling certain outcomes achievable through human rights law, which depend on an individual's biology and other limitations.[48]

Satz writes about the Equal Protection of Animals (the EPA approach), which combines vulnerability and capability theory and the principle of equal protection[49]. Satz is, of course, aware of the possible criticism to this paradigmatic change proposition, leading her to conclude that the realisation of the EPA approach creates a presumption against animal use[50], possibly challenging the idea of animals as consumption for food[51]. Satz does not, surprisingly, argue for a differentiated application of the EPA approach, where domestic animals would have the entitlement to equal protection and others not.

---

[46] A dilemma may, of course, emerge if we imagine that international law would indeed recognise some animals (great apes, the dolphins, the whales, the pets) as having certain unalienable fundamental rights, such as the right to life. Notwithstanding that it might effectively lead to the abolition of whaling rights, situations may also emerge when the rights of an animal as part of a vulnerable group need to be balanced against other rights. Vulnerability *per se* is a criterion which gives the subject relatively more weight than to another subject with no such pre-condition. What if great apes were extended fundamental rights, such as the right to life, and in a zoo a grown-up suddenly appeared in the cage of the great ape? Today most zoos would not hesitate to shoot the great ape, if there was reason to believe that the person's life may be in danger. But if this great ape had a fundamental right to life, then strictly taken in a balancing exercise this ape's rights would have more weight than the right to life of a grown-up man, who by his own fault appeared in his cage. Would the zookeepers refrain from intervention then?

[47] Martha Nussbaum, W*omen and Development. The Capabilities Approach,* Cambridge University Press 2000, p 5

[48] Amartya Sen, *Capability and Well-Being,* in: *The Quality of Life* 31 (Martha Nussbaum and Amartya Sen, editors, Clarendon Press 1993), at 318

[49] Satz, 40

[50] Ibid

[51] The EPA approach calls for the realisation of rights among all animals to have necessary food and hydration, maintain bodily integrity, be sheltered, exercise and engage in natural behaviours of movement, and experience companionship

A novel aspect in the concept of vulnerability seems to be its gradual expansion, for example, Martha Fineman has written that vulnerability "presents opportunities for innovation and growth, creativity, and fulfilment. It makes us reach to others, form relationships, and build institutions.[52]" Here is yet another similarity with animals and also with the capabilities approach.

We may, perhaps surprisingly, find the endorsement of the capabilities approach also from European "blue-sky" constitutional rights research. When writing about the justification of human rights, Robert Alexy has listed one among the eight justifications an explicative justification, which consists of an analysis of the discursive practice of asserting, asking and arguing[53]. According to Alexy, this explicative argument leads only to freedom and equality as capabilities or possibilities[54]. For the purposes of this article, this opens an approach that once capabilities are instrumental in the construction of fundamental rights, it is not dependent on who the holder of these capabilities is. This then means that the capabilities approach *per se* does not exclude the view that animals are holders of fundamental rights.

Another legal concept is the one of the **progressive development of human rights**[55], which argues that human rights have gradually been expanded to encompass different vulnerable groups, which originally did not receive the benefit of such rights. In the event of a progressive rights development, who are the actors that are best positioned to decide on the scope and nature of a new rights[56]? Are these international courts, national or political institutions or civil society organisations? The answer seems to be that there is a variety of factors. Fundamentally, the context of the progressive development of human rights also touches the issue of whether the global society is currently witnessing the emergence of new human rights, or whether they are just a reflection of the need to highlight some specific aspect of a particular right? If the latter is correct, then we need to say that progressive development in the context of animals is indicative of the process by which certain existing rights are extended beyond the threshold of humans.

Both of these approaches lead to conclude that vulnerable groups have been gradually extended the protection of various fundamental rights. If animals can be viewed as a vulnerable group, then perhaps this logic is also applicable towards them. However, none of these approaches distinctly make the latter argument.

CONCLUSION

When reviewing the article before commencing on the conclusion part, the author noticed something which had remained somewhat hidden when writing. This is the frequency of the term 'paradigm' in various settings. Martha Fineman uses the 'paradigm' language when writing about the vulnerability approach in addressing material and social inequalities. Anne Peters refers to the need for paradigmatic changes at the global level on the question of why animal rights need to be protected, leading to a revolutionary change. The Equal Protection of Animals approach, if realised to the full, inevitably will lead to a presumption against all animal use, which Satz refers to as a paradigmatic change. Helen Nissenbaum's contextual integrity theory, which is applicable to all people and societies, means a paradigmatic change in the way we understand what privacy is. This implies that the notion of privacy is not species-dependent, but context-dependent, opening the door

[52] Martha Fineman, "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, *The Elder Law Journal* 2012, p 126

[53] Robert Alexy, "The Existence of Human Rights", in: *Archives for Philosophy of Law and Social Philosophy*, supplementary volume 136 (2013), 13 - 18

[54] *Ibid.*

[55] David Kennedy, The International Human Rights Movement: Part of the Problem? *Harvard Human Rights Journal* (2002),

[56] Alan Boyle, Human Rights or Environmental Rights? A Reassessment. *Fordham Environmental Law Review* (2007), 471 - 511

for fundamental rights protection of animals. Tomasz Pietrzykowski and Aleksandra Lis have formulated a non-personal subjects approach, which, if realised, again means a paradigmatic change of our understanding of fundamental rights – that there are hierarchies within the fundamental rights system based on the subject of the rights holder. Therefore, one conclusion from this paradigm 'language' is that the current theoretical and legal approaches to animals and fundamental rights are neither satisfactory to the scholarly, nor to the stakeholder community. When a critical mass of informed colleagues continues to write about the need for a paradigmatic change, then this change will eventually happen, yet it is not possible to ascertain what will be the main characteristics of the new paradigm in reference to animals and fundamental rights.

The author has demonstrated in the article, on the one hand, a consensual agreement with the proposition that animals deserve more protection, yet, on the other hand, there is a lack of consensus on the question of exactly why and how. The question of justifiability is crucial for the discussion to go one way or another: if there is a reasonable justification for why animals should have fundamental rights, this will sooner or later also be recognised in global human rights law. If there is no such justification, then animal welfare legislation will be the ceiling of legal protection, unless some circumstances should change substantially.

Within the search of a proper doctrinal basis for arguing whether (some) animals should be given (some) fundamental rights, the concept of vulnerability has escaped comprehensive sociological and legal analysis. This approach is primarily originating from feminist studies. There are no studies focusing on the question of how the general population would react to the question of granting animals fundamental rights. Such a study would need to have an aspect of dynamics – e.g. whether the attitudes are changing over time. It also seems that most scholars are avoiding the question of vulnerability of animals – this is not a deliberate decision, but the question of vulnerability simply remains outside of their focus. However, there are some authors who consider that especially the question of vulnerability may hold an answer to the question of whether at some point in the future there may be a growing consensus on the need to extend some fundamental rights to animals. To put it differently, if the concept of animals as a vulnerable group cannot be advocated from both the sociological and legal perspective, then the possibility of extending some fundamental rights to animals may fail. In the view of the author, the task of legal and social scholars has a clear moral dimension here – to describe theoretically a more harmonious society, where different species co-exist without causing one another more than just minimal harm, and thereafter attempt to "translate" the theory into concrete normative protection.

COMPLEXITIES OF PARTICIPATING IN THE ESTONIAN LABOUR MARKET: EXPERIENCES OF PERSONS WITH MENTAL HEALTH PROBLEMS, EMPLOYERS AND SERVICE PROVIDERS

Marju Medar
Zsolt Bugarszki
Koidu Saia
Anne Tiko
Indrek Sooniste
Anu Hall
Anu Rahu

ABSTRACT

The article explores how mental health services, social services and support from employers enable young persons with mental health problems to participate in the labour market. The qualitative study based on 32 semi-structured interviews was carried out within the framework of the project "Positive Attitude Development (PAD) – access to labour market for young adults with mental health problems" among persons with mental health problems, service providers and employers in Estonia. The results showed that young people with mental health problems, aged 18-35, are interested in participating in the labour market, but they experience multiple problems in different domains of life due to their disease, an insufficient educational level and working skills, and the lack of a supportive environment. Employers are motivated to employ them, but they need more support and counselling. A various selection of supportive services has been developed and provided by the Unemployment Insurance Fund, but the availability varies in different Estonian regions. The service providers and specialists point out the positive influence of the closest network and support programmes. The main supportive key elements were identified to be the following: (1) increasing tolerance and changing attitudes towards mental health problems in society; (2) more equal and open opportunities to participate in community life; (3) the need for the provision of specific support services in order to increase the self-confidence and working skills of youth and to develop the cooperation between service providers and employers; (4) more flexible solutions are needed for encouraging employment and entrepreneurship among vulnerable people in the community. Using the potential of the Estonian eGovernance system, easy access to entrepreneurial opportunities, flexible part-time positions and taxation solutions are needed to increase entrepreneurial spirit among young people with mental health problems.

Keywords: Mental Disorder, Labour Market, Participation, Unemployment, Social Protection.

INTRODUCTION

The development of the society is sustainable if all its members are active, involved and contribute to its development as much as they can. A manifestation of active involvement and contribution is employment, which enables active participation and guarantees income and coping, as well as being able to contribute to the development of the society. Several novel challenges have arisen connected to this topic in the recent decades, including the employment of young people and the opportunities of disabled persons, mainly disabled youth, for taking part in societal life and employment.

Combating youth unemployment is a particular and immediate objective, considering the unacceptably high number of young Europeans who are unemployed. All efforts must be mobilised around the shared objective of getting young people who are not in education, employment or training back to work or into education or training within four months, as set out in the Council's recommendation on the "Youth Guarantee"[1].

[1] EUCO 104/2/2013. Cover Note from General Secretariat of the European Council, REV 2, Brussels, 27/28 June 2013.

Building on the Commission's communication on youth employment, determined and immediate action is required at both national and EU levels. Today, the European Council agreed on a comprehensive approach to combat youth unemployment, building on the following concrete measures: speeding up and frontloading the Youth Employment Initiative; speeding up implementation of the Youth Guarantee; increased youth mobility and involvement of the social partners. The EU and its member states have put in place a series of concrete measures to help young Europeans get a job, an apprenticeship or further education[2]. The social partners need to be fully involved and actively engaged in these efforts. The European Council welcomed the "Framework of Actions on Youth Employment" agreed by the social partners on 11 June 2013.[3]

At national level, where most of the competences related to employment are, Member States should advance with their reforms. They are taking measures to modernise vocational and education systems, strengthen the cooperation between education and business to facilitate the transition from school to work, improve the integration of low-skilled young people into the labour market, and promote apprenticeships and traineeships in key economic sectors, as well as entrepreneurship and start-ups[4].

The economy is one of the most important social environments that affect well-being, and community psychologists have studied the social costs of one of the key economic stressors –job loss. However, economically inadequate employment has received much less research attention than unemployment concerning mental health effects.[5] Finally, at the OECD Expert Meeting in 2010, policymakers across the OECD discussed the relations between job losses and mental health problems[6]. For the latter, governments have to continue pushing forward with structural reform to ensure the best use of future labour potential especially among disadvantaged groups. In this regard, there is a growing need to improve labour market participation for people with mental health conditions and disability. This is crucial for achieving both higher economic growth and greater social cohesion in society, given the relation between health, employment and productivity.

The OECD's thematic review[7] showed that the employment rate of people with disability is low; typically, 40% below the average rate in the population. Most strikingly, on average only one in four individuals reporting a mental health problem is employed, and of those with a severe mental illness, up to 90% are not economically active.

In this article, we describe they key factors which support the participation of young people with mental health problems in the labour market. The study was conducted during the PAD[8] project implementation. The current text introduces the results of the Estonian part of the study.

THEORETICAL FRAMEWORK

Young Age, Mental Health Problems and Unemployment

During the last decade, several European Union member states have paid increased attention to the employment issues of people with a reduced work ability, which involves changing the principles of allocating benefits, simplifying access to labour

[2] Youth unemployment in the EU-28: facts & figures, October 2016. Unemployment statistics, October 2016/ 22.02.2017

[3] Framework of Actions on Youth Employment. European Council welcomes the European Social Partners, June 2013.

[4] International Labour Office. (2017). World Employment and Social Outlook 2017> Sustainable enterprises and jobs. Formal enterprises and decent work. Geneva:ILO

[5] Dooley, D. (2003). Unemployment, Underemployment, and Mental Health: Conceptualizing Employment Status as a Continuum. American Journal of Community Psychology, Volume 32, Issue 1-2, September 2003, Pages 9–20

[6] Sickness, Disability and Work: Breaking the Barriers. OECD's thematic review. OECD Expert Meeting, Paris, 26 - 28 April 2010.

[7] OECD (2009). Sickness, disability and work: Keeping on track in the economic downturn. Background Paper. High - Level Forum, Stockholm, 14 - 15 May 2009.

[8] It was an interactive project where partners (high schools / universities, non-governmental and public organizations) from Finland and from Estonia were involved. In Finland the project was realized in cities of Helsinki, Vantaa and Espoo. In Estonia in the cities of Tallinn, Haapsalu and Keila. Co-operative partners in Finland were the two largest NGOs - Finnish Central Association for Mental Health and The National Family Association promoting Mental Health in Finland. In Estonia, the main co-operational partner was Tallinn Mental Health Centre. The project contributed to EUSBSR strategy by improving prosperity among young persons suffering from mental health and social problems to get access to labour market. The project was also in line with EU strategy thorough educational and training activities planned at the project.

market services and developing various support schemes for fostering the employment of people with special needs.[9] More than 4.2 million young Europeans under 25 are unemployed today (2.9 million in the euro area). This means that more than one in five young Europeans on the labour market cannot find a job.[10] Youth (under 25 years) unemployment rate in Finland is 22.4% and in Estonia it is 13.1%.[11]

In 2016, the work ability reform was initiated also in Estonia, with the objective of supporting the full and active life of people with a reduced work ability. The reform renewed the principles of how work ability is evaluated (starting from 1 July, 2016, the Unemployment Insurance Fund evaluates the work ability and pays work ability allowance to people whose incapacity for work has never been determined by the Social Insurance Board or whose assessment was done before July 2010), the system of support and the variety of services (starting from 1 January, 2016, the Unemployment Insurance Fund and the Social Insurance Board started providing totally new and renewed services to people in need) and the Unemployment Insurance Fund took over the administration of the system. The reform is accompanied by the responsibility of the state to assist people with special needs in finding work, keeping work and improving their coping with everyday life, taking into account the individual abilities and needs of the person.[12]

Involving more than 100 000 persons in Estonia, among whom a large proportion is already working or would like to find work, the work ability reform is accompanied by the responsibility that the people with a reduced work ability are expected to be active; until now, however, this responsibility has remained unclear for many, creating insecurity and prompting questions. The activity requirement does not mean that people are expected to start working immediately, but rather that the people with a reduced work ability who do not work have to register themselves as unemployed in order to be entitled for the work ability allowance. They should also look for work and cooperate with the Unemployment Insurance Fund, from where they are entitled to receive monetary assistance and various types of support necessary for finding work. [13] It is assumed with the implementation of the reform that a person makes an effort to find work and makes use of the services that are offered in order to increase the likelihood of finding work. Being active involves, for example, also studying, caring for a child less than 3 years of age or caring for a person with a disability.

The aim of the work ability reform is to support bringing together the employers and the employees with a reduced work ability. Previous studies[14] indicate that employers face the problems of shortage of labour supply and see hiring people with a reduced work ability as a solution, but they need support for this to happen in practice. In order to support employers, the Unemployment Insurance Fund offers services directed at the employers who already employ or wish to employ people with a reduced work ability. The work ability reform signifies a huge step in bringing Estonian social and labour policy up-to-date, and in that context incapacity for work is perceived as a challenge for the inclusion of people into the community and the labour market.

Considering the context and activities of the above-mentioned reform, the target group of the current study consists of young people with mental health problems in the age group of 18-35, who have been diagnosed with a mental disorder and have been assessed as in need for special care services. According to the registry of the Social Insurance Board[15], 35626 persons have

[9] European Commission. (2010). European Disability Strategy 2010-2020: A Renewed Commitment to a Barieer-Free Europe.

[10] Youth unemployment in the EU-28: facts & figures, October 2016. Unemployment statistics, October 2016/22.02.2017

[11] Unemployment statistics - Main statistical findings. Recent developments in unemployment at a European and Member State level, Eurostat, Statistics Explained, December 2016

[12] Ministry of Social Affairs. (2017). Work Ability Reform. http: //sm.ee/en/work-ability-reform

[13] Arusoo, M. (2017). Töövõimereform õnnestub koostöös. Sotsiaaltöö. 3/42-44.

[14] Sotsiaalministeerium. (2016). Teadlikkus ja hoiakud vähenenud töövõimega inimeste ning töövõimereformi teemal. Turu-uuringute AS CentAR. Töötingimuste ja töökeskkonna mõju ajutise ja püsiva töövõimetuse kujunemisel. Tallinn: Eesti Rakendusuuringute Keskus CentAR. 2015

[15] Ministry of Social Affairs (2014). Special Care and Welfare Development Plan for 2014-2020. https://www.sm.ee/sites/default/files/content-editors/eesmargid_ja_tegevused/Sotsiaalhoolekanne/Puudega_inimetele/special_care_2014-2020.pdf

been registered in Estonia as permanently incapacitated for work (10-100%), with one of the reasons for incapacity being a psychiatric diagnose. This is more than one in five persons with an incapacity for work. In addition, there are persons in whose case a mental disorder is an accompanying problem. One of the key characteristics of mental disorders is early onset. The median age at onset across all types of mental disorders is around 14 years of age, with 75% of all illnesses having developed by age 24. Anxiety disorders start particularly early in life and substance use disorders typically in youth, whereas the first appearance of mood disorders shows a broader distribution across age, with more frequent onset in the thirties and forties.[16]

One of the main targets of the National Reform Programme "Estonia 2020" is to increase the employment rate of 20-64-year-olds to 76% by 2020, which means bringing 43,000 new people to the labour market. Most people with mental health problems belong to the group of people with 40-100% loss of capacity for work. 42.9% of them are unemployed, and young people between 18 and 30 have the greatest chance to be activated on the labour market.

Life Domains, Participation and Support Model

People with a psychiatric disability often have difficulty engaging in the community. They are often faced with fewer opportunities than other citizens due to health problems, stigmatisation, discrimination and poverty.[17] A modern community support system could be seen as complementary to an individual or personal support system.[18] The type of support needed depends on the specific needs connected to different life and personal domains. In the CARe model, eight different domains are described: four life domains (the areas of housing, working, learning, and recreating) and four personal domains (self-care, health, purpose and meaning, and social relationships). A person might need completely different support in one domain than in another. Someone can be depending on persons in one area, in order to be independent in another.[19]

Social inclusion refers to a policy designed to ensure that all people are able to participate in society regardless of their background or specific characteristics, which may include, for example, disability. Compared to the general population, groups with such special characteristics are much more likely to face low education, unemployment, homelessness and the resulting poverty and social exclusion. The goal of social inclusion is to give all people an equal chance for participation in society. In order to achieve this goal, the barriers to participation in all aspects of life, such as education, employment, leisure, and citizenship must be addressed. The barriers may be material, such as physical inaccessibility; however, very often the barriers are intangible, for example, discrimination, which serves to exclude.[20]

The support model is developed to provide community care and community support. It is based on a number of the following models: supported living, psychosocial rehabilitation, community support, the presence approach and the empowerment model. The main principles of the support model are: (1) the focus is always on the interaction between a person(s) and their environment; (2) the emphasis is on existing resources; professional support is only given when existing resources fail or are insufficient; (3) the focus is on empowering individuals and communities, in order for them to increase and use their own strengths; (4) the focus is on strengths, options, empowerment, growth and development and not on limitations; (5) the focus is on inclusion and participation: working together on 'social capital'.[21] A person with disabilities has the same rights as every other citizen and, consequently, also the same obligations.[22]

---

[16] OECD. (2011). Sick on the Job? Myths and Realities about Mental Health and Work©

[17] World Health Organisation. (2011). World report on disability. Geneva: Author.

[18] Wilken, J.P. (2013). Community Support. http://thecareeurope.com/?c=community-support&l=en

[19] Wilken J.P. and D. den Hollander (2005). Rehabilitation and Recovery. Amsterdam: SWP Publishers.

[20] Schneider J. and C.J. Bramley (2008). Towards social inclusion in mental health? Advances in Psychiatric Treatment (2008) 14: 131-138.

[21] Wilken J.P. (2005). Working on Social Inclusion: the development of a Support Model. In: Van Eijken J. & H. van Ewijk (eds), Reinventing Social Work. Utrecht: Hogeschool Utrecht

[22] Wilken J.P. and D. den Hollander (2005). Rehabilitation and Recovery. Amsterdam: SWP Publishers.

It can be expected that a greater emphasis will be put on the community in the near future. This also means that social workers should focus more on supporting individuals in the community and on encouraging and developing grass root forms of mutual assistance in the communities. This requires, however, a shift in thinking and acting, both in the community and among professionals. There are needs for such community (re)development towards more social cohesion, support and counselling for people with a disability, their families and social networks, and a better cooperation between service users, professional workers, civil servants and policymakers.[23]

METHODS

The aim of the study was to develop the knowledge base about how to support more effectively the participation of young people with mental health problems in the labour market, based on the viewpoints of youth with mental health problems, service providers and employers.

The study attempted to answer the following research questions: (1) What have been the positive and negative experiences of young people with mental health problems in finding and keeping a job and participating in work life in general? (2) What have been the experiences of the specialists and service providers who support the youth in finding a job? (3) What are the experiences of employers who have supported young people in becoming and being employed?

The qualitative research method was implemented as an approach for exploring and understanding the meaning individuals or groups ascribe to a social or human problem. The process of research involves emerging questions and procedures, with data typically collected in the participant's setting. Data analysis inductively builds from particulars to general themes, and the researcher interprets the meaning of the data.[24],[25] The study was based on a phenomenological approach, in which the researcher identifies the "essence" of human experiences concerning a phenomenon, as described by participants in a study. Understanding the "lived experiences" marks phenomenology as a philosophy as well as a method, and the procedure involves studying a small number of subjects through extensive and prolonged engagement to develop patterns and relationships of meaning.[26],[27]

The empirical data was collected from September to December 2016, through semi-structured interviews conducted with young persons with mental health problems (7), service providers (including specialists from the Unemployment Insurance Fund) (12) and employers (13). The sample was conducted based on purposed sample principles[28] in 3 different Estonian regions (Harjumaa, Tartumaa, Lääne-Virumaa). The purpose was to include in the sample various representatives (young persons, service providers, employers who have the hiring experiences) from the north, south and central-eastern part of Estonia (see Table 1).

[23] Jean Pierre Wilken, Zsolt Bugarszki, Karin Hanga, Dagmar Narusson, Koidu Saia & Marju Medar (2017): Community orientation of services for persons with a psychiatric disability. Comparison between Estonia, Hungary and the Netherlands, European Journal of Social Work, DOI: 10.1080/13691457.2017.1289896

[24] Creswell, J. W. (2003). Research Design: Qualitative, Quantitative and Mixed Methods Approaches. University of Nebraska, Lincoln. Sage Publications.

[25] Creswell, J.W. (2014). Research Design: Qualitative, Quantitative, and Mixed Methods Approaches, University of Nebraska-Lincoln. Sage Publications.

[26] Moustakas, C. (1994). Phenomenological Research Methods, Sage Publications, Thousand Oaks California, p. 180-182.

[27] Creswell, J.W. (2014). Research Design: Qualitative, Quantitative, and Mixed Methods Approaches, University of Nebraska-Lincoln. Sage Publications.

[28] McLaughlin, H. (2012). Understanding Social Work Research. Second Edition. SAGE Publications Ltd

Table 1. Sample for interviews

Region in Estonia	Service providers	Young persons with mental health problems	Specialists of Unemployment Insurance Fund	Employers	Total
Harjumaa	8	7	2	5	22
Tartumaa	1	-	-	3	4
Lääne-Virumaa	1	-	-	5	6
Total	10	7	2	13	32

The interviews were conducted in Tallinn, Rakvere, Tapa and Tartu. The interviews were recorded and then transcribed – the scripts had a total length of nearly 70 pages.

The qualitative content analysis method was used for data analysis, which is a systematic qualitative data describing method characterised by three main features: it contains data, is systematic and flexible.[29] During the data analysis process, the inductive category development was implemented.[30] It consists of formulating categories and assigning the categories working step-by-step through the text. In the end, the category system stands for the whole material, so the recording unit has to comprise all text. The results were interpreted and illustrated by using quotations from the interviews (information about the interviewed person is provided in brackets). In the Results' section, the key categories have been marked in bold.

RESULTS

The key results based on the experiences of young persons with mental health problems, employers and service providers about the domains that influence participation in the labour market are described below and shortly mapped in Table 2.

Table2. Domains that influence successful participation in the labour market[31]

Life / personal domain	**For young persons**	**For employers**	**For service providers**
Housing			
Learning	-Insufficient education	-Now learning through practice +Guidelines and training, support coping -More enterprise-specific training on site needed	+Cooperation with teachers at school, youth, service providers, employers, communities as the key factor

[29] Schreier, M. (2014). Qualitative content analysis. In U. Flick (Ed.), *The SAGE handbook of qualitative data analysis* (pp. 510-524). London: SAGE Publications Ltd.

[30] Mayring, P. (2014). Qualitative content analysis: theoretical foundation, basic procedures and software solution. Klagenfurt, Austria 2014.

[31] + which has been perceived as positive; - which has been perceived as a negative factor

Working	-If unsuitable conditions – then worsening health, burnout +Part-time job realistic +Family members as support persons for working -Unrealistic expectations -Transport problems in rural / remote areas	-Building working habits etc. difficult -Support services needed in bigger amount (individual-specific) -Expect other goods if hiring these persons -Part-time not preferred -More services (i.e. support person in bigger workload) needed	+See the positive influence of programmes directed to youth and employers & activity supervisors -Unrealistic expectations by the youth and by employers +Internship supports +The detailed description of work profile necessary for youth
Recreating			Hobby activities support working
Self-care			
Health	-Health influences dropout from school -Unsuitable conditions at work	-Need to be informed about health conditions and trained how to communicate, solve problems -Bad habits -Employees try to hide the disability	-The hardest target group are undiagnosed persons -Learnt helplessness & vulnerability combined +Part-time working and adjusted working conditions
Purpose and meaning	+Flexible career choices +Individual support	-As social project, not valued enough +Recognition and positive feedback, equality motivates employees	+Much depends on the youth´ and the employers' motivation to cooperate, previous experiences +Important to preserve youth dignity -Unclear identity related to working (youth)
Social relationships	-Not understood -Low-paid and short-time jobs do not motivate or create relationships -Should be more open with employers +Value good relationships with employer and with colleagues	-Support person needed to cope in the team of workers +Organization culture and equally treating support relations	-Youth are afraid of stigmatisation and do not want to inform employer and colleagues -Resistance of family members

The experiences of young persons in finding work and maintaining it

Young persons with mental health problems have little experiences in looking for and finding work. They have mainly done preparations for starting to look for work and received help from different service providers. The process has been complicated due to **insufficient education** – dropping out of school has been related to personal health problems as well as problems at school. It has been difficult to obtain education due to the curricula and study forms that do not take into account their special needs. Young people would like to have more flexibility in their career choices while studying, and they need more individual support in the form of career counselling.

The incomplete educational opportunities of young people and wrong career choices lead to burnout and **worsening health**. It is considered important that the school supports the ability and willingness of young people to cope in the main life domains, including working life. *When heading towards burnout, young people start to drink. Career choices should be made at the beginning of secondary school. Being absent from school, complaints and bad grades lead to burnout, stress and symptoms of illness. It is important to ensure that the person still has the ability and willingness to act. (*22-year-old male, 10 grades of education).

On several occasions, the experiences young people have obtained from the process of searching for job are negative, as they have not received work although they have applied for it or they have not been able to keep their job. The reasons for not getting a job have been mainly mentioned as health problems and **unsuitability due to special needs** for performing certain tasks, e.g. jobs needing strength and psychological resilience and self-defence skills. In addition to previously mentioned problems, there is the fear that special needs are not understood and people will be ridiculed. Also, the received experiences are deepening this understanding that the society does not accept and does not understand.

Young people would like to find **part-time work**, as this is suitable and realistic considering their health problems. *I am not able to work every day, I would like to find work for a few days in a week, because I have an anxiety disorder. I take pills. (*22-year-old male, basic education). Young people have often been offered low-paid and short time jobs, which does not motivate them to maintain the work relationship.

Young people have positive views of their experiences of looking for work and working, when the **working conditions are flexible** – they have been able to choose their working time and make their own schedule, and when work has entailed physical activity and creativity. *For a while, I dug ditches and worked in construction. Now I work as a substitute in a retail chain. I put out the goods, I see discounted goods, I look at people, I can choose my working hours and make my own schedule. I can plan my work more there, I can leave earlier. They pay an hourly wage. This work is physical enough and it is interesting. (*22-year-old male, 10 grades of education).

Young people have received support in looking for work, finding work and going to work mainly from their **family members**, who have assisted them in finding information, making contacts and have acted as a support person. *I have been supported by my stepfather, girlfriend and mother. My mother has supported me in general, and acted as a contact person and a support person (e.g. waking up in the morning). (*22-year-old male, 10 grades of education). Young people have sometimes received information from acquaintances and social media. When looking for work, finding work and working, information from the CV Centre (a job advertising portal) and the Unemployment Insurance Fund have been useful. At the same time, there are young people among the interviewed persons, who have not turned to the Unemployment Insurance Fund.

Young people understand that they should be more **open with employers** when discussing their special needs, which will prevent future problems. An obstacle is also that young people are insufficiently heard and included in making the decisions that concern them in the work context. Young people wish to choose their own paths, find their talents and skills. At the same time, they feel the pressure to meet the demands of their parents, school and society. *Young people should be allowed to choose their own paths, find their talents and skills. I feel two kinds of pressures, graduate secondary school and choose a career in addition to addictions and disorders. (*22-year-old male, 10 grades of education)

Young people feel there is too much **bureaucracy** when looking for work and getting work, and requirements for work

are too high and unreasonable. *For example, speaking four languages in a restaurant. Young people are pressured to study and work at the same time. (*22-year-old male, 10 grades of education). It can also refer to the difficulties in assessing the realistically suitable work places before submitting their application. The target group needs more guidance on how to evaluate the appropriateness of available job offers.

Sometimes **transportation problem**s are an obstacle for young people in going to work, including having no driving license and/or a suitable public transport connection. This is an issue which needs to be more supported in rural and remote areas.

Young people **value good relations** with their employer and colleagues. They expect that employers offer legal counselling, safety guidelines and advice as supervisors. *It is positive when you experience flexibility, humanity, good company and normal wages, for example, 4,50eur per hour. (*22-year-old male, 10 grades of education). Self-confidence is important for coping and this should not be trampled upon.

Young people emphasise the need to develop **critical thinking** skills already in the education system, which also ensures their ability to cope with working life. Young people felt they could not participate enough as they lacked the knowledge, skills and abilities to be heard. *Young people should be trained and included. They should be prepared for inclusion. Young people are good at recalling things (because they have learned these by heart at school), but they are not able to think. Young people need to be taught how to think, after which they can be included, otherwise we do more harm than good. (*22-year-old male, 10 grades of education).

Experiences of employers in supporting young people in finding work and keeping the job

The interviewed employers have hired young people with mental health problems mainly through the Unemployment Insurance Fund or the NGO Hea Hoog[32]. In both cases, the cooperation has produced positive results. While looking for workers, if necessary, the employers turn directly to the institution where young people with special needs reside and recruit an employee who is recommended and whom they need.

The employers need to be **aware of the special needs** of these young persons for the work to be more efficient. The employer needs to know what these young people are capable of doing, otherwise work cannot be done and these special needs are not taken into account. Supervision needs to take into account the peculiarities of these young people and demonstrate how a task should be done, as then work is performed with great precision and diligence. The employers have to pay attention to developing the work habits of young people and take the peculiarities of their employees into account outside the working hours and, if necessary, teach them the rules of communication. The knowledge of the employers has been gathered through everyday practice and disability is not directly an issue in the work place. *Experiences are good, it is good to communicate with young people, and they are dutiful, humane and positive. Young people are proud and thankful for being offered a job and fulfil their tasks dutifully depending on their abilities. (Manager of service company)*

The main task of the employer is to manage his business, and it is not possible to assume additional duties for arranging the work. For that reason, the employers would especially like to receive **support services,** but also additional resources or other goods from the welfare system, while hiring young people with special needs. Support persons, a service provided by the state, offer support to a person when starting work and getting used to it. However, the service is not always provided to a personalised extent, as much as the specific individual needs. The employers say that they have received some support in supervising work from support persons, the NGO Hea Hoog has also contributed activity supervisors, and this support has been effective. However, often times when the employers have needed support they have not received it, as the specialists are unable to help.

Concluding a contract of employment with employees who have mental health problems is complicated for employers, because it is difficult to organise the work as usual and observe that the tasks have been carried out. The employers are not interested in investing additional time and money related to organising the work of young people with special needs.

[32] Authors' comment: a non-profit organisation, founded for supporting people with psychic special needs and provides services all over Estonia

For the employers, it is **a social projec**t and usually not valued enough by society. *The employers have to take into account the health condition of young people with special needs, including planning work and leisure time so that there is no mental overload and health issues related to it. The employer lives indirectly according to the rhythm of the employee/client, takes into account when the employee eats and sleeps. (Manager of a catering company)*

Part-time work is a problematic factor for the employer. The employers find that there could be more part-time jobs, if there were no limitations in hiring people with special needs, e.g. a strict background check by Riigi Kinnisvara AS (State Real Estate Ltd).

From the employer, working with youth requires positive attention related to supervision of work and blending into the **staff.** Problems sometimes occur when working with young people and, in this case, support from a support person is needed. Support persons can be activity supervisors, appointed support persons or family members. *Young people communicate actively with activity supervisors and, in this case, there is always access to communication channels and information about the persons. We act as one team, young people, support persons, employers and other members of the team. (Manager of a landscaping company)*

The employers feel responsible for their young employees with special needs and try to give them tasks that can be completed. *It is necessary to assist young people with blending into the team, in order for the work to go well and for team members to accept each other. (Manager of a landscaping company).* Young people are motivated through **recognition and feedback** on their work. *It is a simple rule that if an employer gives praise, then work goes well and results are good. People are proud of being recognised. Young people enjoy their work being valued. Young people need to be accepted as equal partners. (Chairman of a housing association)*

The employers point out that it is necessary to draw up **guidelines on** how to act with young people with special needs in a work situation and in a work collective. Up to now, help has been received from the specialists of the Unemployment Insurance Fund and AS Hoolekandeteenused (Social welfare services Ltd), also from support persons and specialists from the Astangu Vocational Rehabilitation Centre.

The employers need knowledge and **training**. *More knowledge is needed about psychological peculiarities in order to better understand and support one's employees and prepare tasks taking into account their special needs. Knowledge is also needed in the areas of planning, organising and financing work when it is related to hiring people with special needs. (Manager of a landscaping company)*

Training should be organised in a flexible manner, e.g. training courses in businesses (Manager of a catering company). There is a lack of an expert group that would give advice. Sometimes the quality of training content is problematic (e.g. punishment method).

The employers emphasise a viewpoint related to the organisation culture that people with special needs should be **equally treated** in the enterprise. *Co-workers should be like friends. This way of thinking can be developed in case the focus is not directly on the disability and special needs, in which case communication takes place between the actual persons. This creates a good work climate and a positive environment. (Manager of a catering company).*

Another problem for the employers that they are unaware of the background, capabilities and skills of the young people with special needs. Often young people do not want to acknowledge their disability and **try to hide** their special needs, *e.g. give the reading tasks to someone else. The employer needs to know if young persons can read and write and what they can do, otherwise there are problems with contracts and work-related documentation. (Manager of a landscaping company)*

Negative aspects include the **bad habits** of these young people, e.g. stealing, eating disorders or overly critical and demanding attitudes. The employers claim that sometimes they are employing people who clearly have special needs but are not diagnosed. This is seen as incomplete work on the part of the Unemployment Insurance Board, because the board should also be able to notice undiagnosed persons and refer them to respective specialists (e.g. Asperger).

It was seen as a problem that the service of **work-related rehabilitation is insufficiently available** in certain regions, and the specialists of the Unemployment Insurance Board have not always been prepared for offering this service. The employment of young people with special needs is obstructed by overly complicated and strict rules enforced by the Labour Inspectorate and the Unemployment Insurance Board.

The support person service offered by the Unemployment Insurance Board does not always suit young people with mental health problems, because it does not take into account special needs and is more suitable for an ordinary person. The time needed for learning is longer than the foreseen duration of the support person service. In some cases, the need for a support person is long-term or life-long. (Manager of a company offering sport services)

In some cases, the obstacle lies in the organisation of transport or observing the bus schedule. Sometimes, it is not very clear, who needs help, the young person or his family, and it is necessary to work with all of them in order to increase the ability to work.

Experiences of support service providers in supporting young people in looking for work and finding it

The main instruments for supporting young people with mental health problems, who are looking for work and working, are **different programs** that support employment, developed by the Tallinn Mental Health Centre, the Astangu Vocational Rehabilitation Centre and the Unemployment Insurance Board. Currently, several programs that support employment, including symptoms control program, developing communication skills with video training, a family training program for the family members of people with mental disorders, an inpatient rehabilitation program, vocational rehabilitation programs and others, are available for people living in Tallinn and Harju County. The experiences of specialists in communicating with employers are positive. If employers have the necessary knowledge, it is possible to agree on what the employee wishes, determine individual conditions and inform the employer about how to support the young person.

Young people usually say during the first meeting that they are interested in finding a job, but the evaluation often concludes that this is **not realistic**, as people tend to overestimate their abilities and possibilities. *The family members expect that young people will go to work, but they do not last long there as people with mental health issues have problems with handling stress. Parents have elevated expectations and it is hard to cope with these*. (Specialists of the Unemployment Insurance Board)

Cooperation is going on at the level of institutions and specialists, including vocational education teachers, specialists in centres (psychologist, psychiatrist, employment specialists, social workers, etc.) in order to support the young people. Cooperation is also going on with local governments, and these activities focus mostly on providing support and services, adjusting a person's living place and on issues of transport and access to information needed every day.

The experiences of the specialists of the Unemployment Insurance Board have been both positive and negative in supporting the employment of young people with mental health problems. Getting employment depends on the young person himself, the support he receives from home, and whether previous experiences related to looking for work or working have been positive or negative.

It depends on young people how they **disclose information** and if they are knowledgeable about their illness. If young people disclose information in time, it can be taken into account, but there are also those who do not want to talk and then it is harder to support them. *If a young person is referred to the Unemployment Insurance Board from the Mental Health Centre, then the client has been prepared and is ready to receive services offered by the board.* (Specialists of the Unemployment Insurance Board)

The specialists point out that it should be kept in mind that the target group is very **vulnerable**, and the dignity of these young people has to be respected in all activities as then cooperation is better and more effective. *Young people might be afraid of stigmatisation, and they do not wish to reveal things related to their illness. At the same time, employers need to know about the special needs so they can take these into account*. (Specialists of the Unemployment Insurance Board) The experience so far is that if a special need is mentioned in the employment contract, the employer is aware of it and even the changing of a manager does not affect the work.

Negative experiences are related to the fact that young people with mental health related special needs do not stay at work for a long time. If they are aware of their illness, they stay at work for a longer time and are not afraid of asking for help. It is important to be able to attend **work-related internships**. If a young person does well during the internship, then there is a 50% guarantee that the place of internship becomes their future place of work.

Both employment specialists from the Astangu Vocational Rehabilitation Centre as well as case managers from the Unemployment Insurance Board find that people with mental health disorders are the **most complicated** target group, *as you don't know, what the special need means, how the person with a special need thinks and acts. The hardest client group are undiagnosed people, who should in fact be sent to a psychiatrist.* (Specialists of the Unemployment Insurance Board, employment specialists of the Astangu Vocational Rehabilitation Centre)

Obstacles of getting and maintaining work are: a low level of knowledge and a lack of information among employers regarding the peculiarities of their employees; resistance from family members and learned helplessness acquired by the young person himself, and a lack of work motivation and information about support services and support measures, especially in the case of youth who **do not speak Estonian**. (Specialists of the Unemployment Insurance Board, employment specialists of the Astangu Vocational Rehabilitation Centre)

It is important to work with the **identity** of young people, i.e. who I would like to be, an artist, an employee, etc.? *It is important to understand what the person himself wants and if it is possible to achieve it.* (Specialists of the Tallinn Mental Health Centre)

Finding employment is made easier by certain personality traits that young people have, e.g. being positive and taking into account **hobby activities**. It is necessary to find suitable jobs for young people, including opportunities for part-time work, adjusted working time, etc. It is important for the young person to find his place. *If the strengths and skills of the person have been well tested and have been taken into account in finding employment, then work becomes more stable and subject to fewer risks.* (Specialists of the Tallinn Mental Health Centre)

In matters related to the work of young people with mental disorders, it is necessary to determine and describe their work profile in detail, so that the employer can then find the right tasks for the person. **An activity supervisor** can supervise the young person in his communication with the employer, including discussing one's problems and needs in order to avoid future misunderstandings.

DISCUSSION

The ongoing work ability reform[33] in Estonia is aimed at supporting bringing together employers and employees with a reduced work ability, including young persons with mental health problems. The current study shows that all partners – young persons, service providers and employers – perceive the importance of developing better cooperation, communication and mutual support in this process. **Cooperation network**s of various parties that support bringing young people to the labour market, including vocational education teachers, case managers, employers, specialists (psychologists, psychiatrists, employment specialists, career counsellors, social workers, etc.), educators in different fields and others, should be made more efficient so as to better support the employment of young people. The specialists who participated in the study mentioned that society is judgemental and this will not change before the focus is on the person and their strengths. Decreasing stigmatisation in society happens through **positive experiences**. Positive experiences need to be described and introduced to the wider public, by using the help of experienced advisors. It is necessary to decrease people's fears related to special needs. Thus, emphasising the success stories should be an everyday task for the support system.

[33] Ministry of Social Affairs. Work Ability Reform. http://sm.ee/en/work-ability-reform

As previous thematic studies[34] have indicated, employers need more support services, training and positive attention while they are planning or employing young persons with mental health problems. The necessary services must be equally accessible in all regions. Most of the employers interviewed see it as a social project, and it is not easy for them to adjust the working conditions, to solve the practical problems caused by the employee's health-related issues, to invest extra time and other resources. In order to foster the access of young people with mental health problems to the labour market, the **employers need training and counselling** – this helps to broaden the awareness of employers on the issues related to mental health problems and the behavioural patterns of people who suffer from such disorders. Knowledge is needed about psychological peculiarities in order to better understand and support one's employees, and to prepare job related tasks, taking into account their special needs. Employers are in need of training also in terms of other issues related to entrepreneurship, including work planning, marketing, concluding agreements, cooperation with partner organisations like local governments, financing, etc., and all this first and foremost in the context of special needs. Employers need to be advised on the issues of how to organise and supervise the work of young people with special needs. Employers should be prepared for offering jobs and hiring young people so that what they expect is realistic.

Full participation, carrying the responsibilities and duties of a full citizen is still a challenge for persons with mental health problems, and there are still stigmas, myths and negative attitudes in society which build barriers for persons with mental health problems. People with a psychiatric disability are often faced with fewer opportunities than other citizens, due to health problems, stigmatisation, discrimination and poverty.[35] Young persons with mental health problems mentioned that the main supportive agents during looking for job and maintaining it are their closest family members, which means an individual support system.[36] But it was pointed out that there are also needs for community (re)development towards better social cohesion, support and counselling of people with disabilities, their families and social networks, and better cooperation between service users, professional workers, civil servants and policymakers.[37]

The skills related to work and other areas of life should be developed already **in the education system**. In the education system, both in general and vocational education, it is necessary to provide young people with special needs an education that takes **into account their special needs** through specialised curricula and learning forms. In terms of education, young people see the need for greater flexibility in terms of career choices and timely career counselling. The insufficient career opportunities and wrong career choices of young people lead to burnout and worsening health. Communication and other social skills can be developed through **extracurricular activities.**

The opportunities of participating in specific support programs need to be expanded to cover all young people with special needs and their families in need of those services when preparing them for going to the labour market. While participating in **different programs**, it is important to focus on the identity of young persons, on increasing their self-esteem and work motivation and facing fears related to becoming employed. It is especially vital to participate in the symptoms control program, because being knowledgeable about one's illness allows young people to better keep their jobs and encourages asking for help. Being knowledgeable about one's illness allows having and maintaining a job. It is also very important to guarantee young people with mental health problems continued support after the program has ended in order to avoid relapses, and support their entry into the labour market in a more efficient way.

[34] Bugarszki, Z., Medar, M., van Ewijk, J.P., Wilken, J.P., Narusson, D., Saia, K., Kriisk, K., Kiis, A., Susi, M., Sooniste, I., Rahu, A. (2016). Uuring psüühilise erivajadusega inimestele suunatud erihoolekandesüsteemi ümberkorraldamiseks ja tõhustamiseks teiste riikide praktikate alusel. Lõppraport
Wilken, J.P., Admiraal, L., Bugarszki, Z., Leenders, F., Medar, M., Narusson, D., Saia, K., Hanga, K. (2014). Improving community support for persons with disabilities. A study in three European countries.

[35] World Health Organisation. (2011). World report on disability. Geneva: Author.

[36] Wilken, J.P. (2013). Community Support. http://thecareeurope.com/?c=community-support&l=en

[37] Jean Pierre Wilken, Zsolt Bugarszki, Karin Hanga, Dagmar Narusson, Koidu Saia & Marju Medar (2017): Community orientation of services for persons with a psychiatric disability. Comparison between Estonia, Hungary and the Netherlands, European Journal of Social Work, DOI: 10.1080/13691457.2017.1289896

The current study shows that the **employers fulfil a key role** in easing young people into working life and training them. The employer acts as a mentor and a supervisor. Humane treatment, creating a positive atmosphere, recognising young people and providing feedback concerning the tasks that are performed, contribute to a great extent to young people holding on to their jobs. Specialists responsible for supporting employment see that realistic expectations about working, positive experiences in looking for work and employment support are some of the preconditions for long-term employment.

Part-time work and **adjusted working conditions** were mentioned by all target groups as an important way in which to employ young people with mental health problems. The expectations of young people and support specialists for part-time jobs are opposed by employers, for whom creating a part-time work place is complicated, "bureaucratic" and time-consuming. For that reason, work mediation programs and services should support the elimination of these obstacles through legal counselling and active work supervision in work places to avoid extra duties for the employer as the work relationship starts and continues.

Topics related to the main life and personal domains[38] which need special attention and which influence the success of finding a job and maintaining it are: learning (the education system is not supportive or flexible enough; employers need more specific training); working (the youth have unrealistic expectations, they need adjusted working conditions, internship is needed), recreation (hobby activities supporting coping at work), health (employers need to be informed, but employees tend to hide their disability; health conditions influence coping at work), purpose and meaning (work is important for youth; employers need to be recognised more; cooperation as a key factor), social relationships (give value for working; reflect participation, inclusion and equality).

In order to achieve an equal chance for participation in society, the barriers to participation in all aspects of life must be addressed. [39] The interviews revealed that the main barriers that influence the success of finding and maintaining a job are related to the inflexible education system, the negative attitudes towards persons with mental health problems, the lack of information and continuous support for employers who plan to or have hired persons with mental health problems. The employers and service providers see persons with mental health problems as a vulnerable group, but they also see the learnt helplessness and poor skills, combined with a readiness to carry the rights and obligations of a fully-fledged citizen.[40] Thus, the results of the study show that there is still room for improving the implementation of the principles of the support model[41] as empowering individuals and communities, strengthening existing resources, working together on "social capital" related to the participation of young persons with mental health problems in different life areas including work.

LIMITATIONS AND CONCLUSIONS

These findings are drawn from a small, qualitative study conducted with a small number of young persons with mental health problems, employers and service providers – it raises questions about the generalisability of the findings. Therefore, findings are exclusive to the particular study context and, as such, there is no intention to seek generalisations. More research with larger samples from different regions would allow for more definite conclusions.

Despite these limitations, the findings of this study shed light on the perspectives of participation of young persons with

[38] Wilken J.P. and D. den Hollander (2005). Rehabilitation and Recovery. Amsterdam: SWP Publishers.

[39] Schneider J. and C.J. Bramley (2008). Towards social inclusion in mental health? Advances in Psychiatric Treatment (2008) 14: 131-138.

[40] Wilken J.P. and D. den Hollander (2005). Rehabilitation and Recovery. Amsterdam: SWP Publishers.

[41] Wilken J.P. (2005). Working on Social Inclusion: the development of a Support Model. In: Van Eijken J. & H. van Ewijk (eds), Reinventing Social Work. Utrecht: Hogeschool Utrecht

mental health problems in the labour market. The findings suggest that Estonian young persons with mental health problems are interested in participating in the labour market. However, they experience multiple problems in various domains of life related to their health conditions, to insufficient flexibility of educational system mechanisms, which need to be strengthened to fully support their entry into working life, (fear of) being stigmatised and the limited options to work with adjusted working conditions. Employers who are planning or who have hired persons with mental health problems must be supported to acquire the knowledge and skills to create supportive working conditions and to understand the issues related to the disabilities. Also, the findings of the study suggest that support services need to be equally available for the young persons, their family members and for employers in all Estonian regions. The formal supportive system should provide specific services in order to increase the self-confidence and working skills of the youth and to develop strong and mutual cooperation between the service providers and employers. Furthermore, the findings suggest that service providers and employers need to be encouraged to foster support model principles in the process of cooperating with persons with mental health problems.

DECLARATION OF INTEREST

The authors have no conflicts of interest.

ACKNOWLEDGEMENTS

This publication was supported by the European Union Interreg Central Baltic Program (Grant number T-183-15) and carried out as a sub-activity of the project "Positive attitude development – a success factor in the integration of the young people with mental health problems to the labour market" (Positive Attitude Development, P.A.D. project) in cooperation with the Arcada University of Applied Sciences from Finland.

COMPARATIVE ANALYSIS OF THE IMPLEMENTATION OF ARTICLE 19 OF THE UNITED NATION CONVENTION OF THE RIGHTS OF PEOPLE WITH DISABILITIES IN EIGHT EUROPEAN COUNTRIES

Zsolt Bugarszki

Hans van Ewijk

Jean-Pierre Wilken

Rait Kuuse

ABSTRACT

The transition from institutional to community care for vulnerable people has been shaping the welfare system in Europe over the last decades. For the period of 2014-20, deinstitutionalisation became one of the highlighted priorities of the European Commission in order to promote reforms in disability and mental health care in the convergence regions, too.

Between 2007 and 2013, Estonia as many other Eastern European countries implemented the first wave of deinstitutionalisation, and during the new EU budget period a second wave will be carried out in order to continue and hopefully complete the transition. In this study, we try to give an overview of the experiences of different European countries, highlighting good practices and possible pitfalls.

Keywords: deinstitutionalisation, community-based services, disability care, mental health, European Union

METHODOLOGY

Our study is based on an analysis of relevant policy papers that have been extended by interviews with key experts of the given countries. Within the framework of this study, we use the United Nations Convention on the Rights of Persons with Disabilities as a legal reference for the terminology and definition of deinstitutionalisation and community living, while we consider the Guidelines of the European Expert Group[1] as a policy reference.

This study has been conducted at the request of the Estonian Ministry of Social Affairs.

We included 8 European countries in our analysis:

- Czech Republic
- Estonian
- Slovakia
- Hungary
- Romania
- the Netherlands
- United Kingdom

[1] Common European Guidelines on the Transition from Institutional to Community-Based Care http://deinstitutionalisationguide.eu/ (last download: 26th of September 2015)

- Sweden

The selected Eastern European countries can provide us with an opportunity to explore their progress and difficulties with the implementation of deinstitutionalisation, while the selected Western European countries can be analysed from the perspective of the latest developments in community care. Countries were selected based on the preferences of the Estonian Ministry of Social Affairs.

In our research, we relied on the monitoring system of the UN Convention. The Convention ordered to set up a systematic monitoring system that is run by the Committee on the Rights of Persons with Disabilities. The Committee is a body of 18 independent experts[2], which monitors the implementation of the Convention on the Rights of Persons with Disabilities.

The monitoring process is a well-documented communication between the state parties and the Committee. Each country submits an Initial Report, where they summarise all their efforts to implement the Convention. The Committee creates a List of Issues as a reaction to this report and each country has an opportunity to reply to the list of issues. An official face-to-face hearing is also organised, and after that the Committee publishes its Concluding Observations. This monitoring system provides us with an excellent and detailed overview on the implementation of the UNCRPD.

In four of the selected countries (Sweden, Czech Republic, Hungary and Slovakia) and in the EU, the first round of the whole monitoring process has already been finished, while in two countries (the Netherlands, Romania) the process hasn't started yet.

Table 1. : Monitoring the process of the Committee on the Rights of Persons with Disabilities

Country/Document	Initial Report	List of Issues	Replies to the list of Issues	Concluding Observations
United Kingdom	Submitted	Submitted	Submitted	-
Sweden	Submitted	Submitted	Submitted	Published
The Netherlands	-	-	-	-
Czech Republic	Submitted	Submitted	Submitted	Published
Hungary	Submitted	Submitted	Submitted	Published
Slovakia	Submitted	Submitted	Submitted	Published
Romania	-	-	-	-
Estonia	Submitted	-	-	-
EU	Submitted	Submitted	Submitted	Published

In our analysis, we paid particular attention to the implementation of Article 19, which concentrates on the right to live independently and to be included in the community.

Beside the officially submitted and published documents of the monitoring process, in many countries we had an opportunity to analyse shadow reports and independent studies on the implementation of deinstitutionalisation.

Furthermore, we have conducted interviews with key experts in each country in order to extend the information we received during our desk research and to clarify our questions. The interviews were conducted over Skype or via e-mail using the method of semi-structured interviews.

Interviewed key experts:

- **Czech Republic:** Jan Pfeiffer – psychiatrist, founder of many community-based initiatives in the Czech Republic, former chair of the European Expert Group.

2 http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx (last download: 02th of August 2017)

- **Slovakia**: Maria Machajdíková – researcher, SOCIA Foundation
- **Hungary**: István Sziklai – researcher, ELTE University Faculty of Social Sciences
- **Romania:** Elena Tudose – researcher, program director at Institute of Public Policy in Bucharest.
- **The Netherlands:** Dr Els Overkamp - senior researcher, Research Centre for Social Innovation
- **United Kingdom:** Dr Nick Hervey - expert in the history of the UK mental health system, and former senior manager in mental health and social care
- **Sweden**: Lars-Göran Jansson – director, Göteborgsregionens Kommunalförbund, Vice-chair of European Social Network

Definitions of deinstitutionalisation and community living

While all the reference documents are emphasising the importance of a clear commitment toward deinstitutionalisation and community living, there is no universal definition for these terms.

Article 19 of the UNCRPD approaches the issue of independent living and community inclusion from the perspective or equal rights. It doesn't mention deinstitutionalisation as a relevant policy to ensure these equal rights, but puts an emphasis on the desired outcome of any policy measures that have to aim at giving the opportunity of having a free choice of place of residence and access to community-based housing or residential services.

> ***"Article 19 - Living independently and being included in the community***
>
> *States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:*
>
> *a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;*
>
> *b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;*
>
> *c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs."*[3]

The Guideline of the European Expert Group[4] describes in detail the transition from institutional to community-based care. To create a common understanding, they defined institutions as the following:

> *"There are different understandings of what constitutes 'an institution' or 'institutional care' depending on the country's legal and cultural framework. For this reason, the Guidelines use the same approach as in the Ad Hoc Report. Rather than defining an institution by size, i.e. the number of residents, the Ad Hoc Report referred to 'institutional culture'. Thus, we can consider 'an institution' as any residential care where:*
>
> *• residents are isolated from the broader community and/or compelled to live together;*

[3] United Nation Convention on the Rights of Persons with Disabilities Article 19 http://www.un.org/disabilities/default.asp?id=279 (last download: 29th of August 2017)

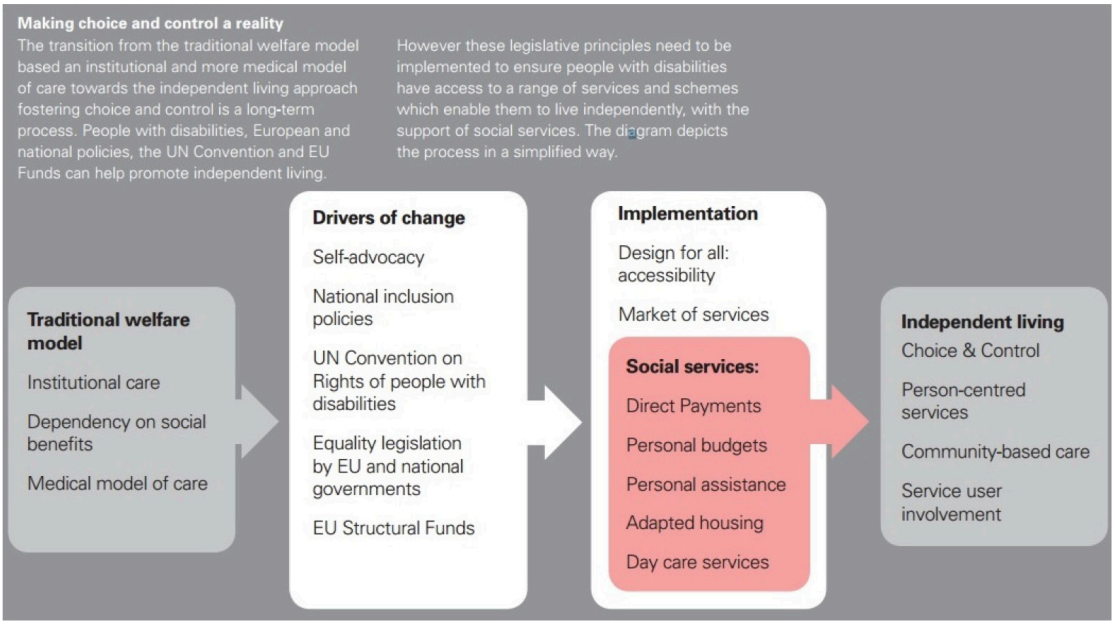
[4] Common European Guidelines on the Transition from Institutional to Community-Based Care http://deinstitutionalisationguide.eu/ (last download: 29th of August 2017)

- *residents do not have sufficient control over their lives and over decisions which affect them; and*
- *the requirements of the organisation itself tend to take precedence over the residents' individualised needs."*[5]

The European Social Network (ESN), as a member of European Expert Group on Transition from Institutional to Community Care, has published a report in order to outline the first steps in deinstitutionalisation and identifying key elements for good community care.[6] The ESN also published a report on how social services in different European countries are promoting choice and control alongside people with disabilities.[7]

In the following figure, we can see a summary of the optimal transition from a traditional welfare model based on an institutional and more medical model of care towards the independent living approach in the community.

Figure 1. The process of shifting from traditional welfare model towards an independent living approach



Source: European Social Network

Analysing the communication between the UN Monitoring Committee and the selected state parties, we can have an overview of how different stakeholders interpreted the given legal frameworks and policy guides.

Due to the fact that there is no strict definition for institutions, institutional care and community care, different state parties identified their existing situation very differently.

In Sweden, the basic objective of the Act concerning Support and Service for Persons with Certain Functional Impairments (LSS)[8] is to enable this group of individuals to live as others do. The social welfare boards of local municipalities are obliged to ensure that persons who encounter difficulties in their everyday lives are enabled to participate in the life of the community and to live as others do.

[5] Common European Guidelines on the Transition from Institutional to Community-Based Care p.25. http://deinstitutionalisationguide.eu/ (last download: 29th of August 2017)

[6] Developing Community Care – Report of European Social Network. 2011. Brighton UK. http://www.esn-eu.org/developing-community-care/index.html (last download: 29th of August 2017)

[7] Independent living: making choice and control a reality – Report of European Social Network. 2011. Brighton UK.

[8] http://www.independentliving.org/docs3/englss.html (last download 29th of August 2017)

In the UK, the right of independent living has a crucial importance. "*The UK's approach to independent living goes well beyond the right as described in Article 19 and encompasses increasing choice and control, removing barriers and inclusion in the community. This approach underpins the rights set out in many of the other articles of the Convention. Independent living means having choice and control over assistance and/or equipment needed to go about daily life, and having equal access to housing, transport and mobility, health, employment and education and training needs.*"[9]

In Slovakia, the government emphasises that the provision of social services in the community or in out-patient facilities has priority over the provision of social services in an institution on a residential basis.[10]

Romania didn't submit its initial report to the UN Committee yet, but in a report[11] of the European Coalition for Independent Living (ECCL) we could explore that the Romanian Institute for Public Policy considers the lack of a clear objective in the national strategy for deinstitutionalisation to be a fundamental problem. Although the National Strategy for People with Disabilities refers to the development of community-based services and includes social integration as an objective, it does not make explicit requirements to replace existing residential institutions with community-based services.

In the Hungarian initial report, we can find that "*If 24-hour care is needed for supporting independent living the traditional forms of institutional social care – caring-nursing homes, rehabilitation institutions provide solution in addition to the homes operated for such persons.*"[12]

In the Czech Republic, the initial report of the government also considered traditional large institutions (homes for persons with disabilities) as services related to Article 19 of the UNCRPD.[13]

Although the Constitution of the Republic of Estonia does not expressly state that people have the right to live in a community, it is implied in the principle of human dignity provided for in the Constitution. The Constitution also provides that everyone has the right to choose freely where to reside. The main problems with the provision of social services to disabled people are related to the availability and quality of the services, as those vary across local governments because different local governments have different administrative capabilities due to their territory, revenues, population size, etc. A person should enter the 24-hour care service only as a last resort, when all other measures to support the person have failed and the person's coping cannot be ensured by other services.[14]

As we can see, while in Sweden and in the UK community participation is emphasised, in five Eastern European countries institutions are still considered a relevant part of the service system.

In a study on mental health, European researchers were exploring the proportion of mental health services to compare the weight of institutions and hospital care with service capacities in community care. The authors revealed that in all the new member states (and in many Western European countries, too) institutional care is still considered the mainstream of the welfare services, while community-based services outnumber institutional care only in countries where the process of deinstitutionalisation has already been implemented over the previous decades.[15] (see Map 1.) Similar results can also be seen in disability care.

The lack of a clear (operational) definition for community living and institutional care led to a wide variety of understand-

---

[9] Initial Report of the United Kingdom of Great Britain and Northern Ireland to the UN Committee on the Rights of Persons with Disabilities. November 2011.

[10] Initial Report of Slovakia to the UN Committee on the Rights of Persons with Disabilities. January 2012

[11] Briefing on Structural Funds Investments for People with Disabilities: Achieving the Transition from Institutional Care to Community Living, European Network on Independent Living – European Coalition for Community Living, December 2013 http://www.enil.eu/wp-content/uploads/2013/11/Structural-Fund-Briefing-final-WEB.pdf (last download 29th of August 2017)

[12] Initial Report of Hungary to the UN Committee on the Rights of Persons with Disabilities. October 2010

[13] Initial Report of the Czech Republic to the UN Committee on the Rights of Persons with Disabilities. November 2011

[14] Initial Report of Estonia to the UN Committee on the Rights of Persons with Disabilities. November 2015.

[15] Mapping Exclusion. Institutional and community-based services in the mental health field in Europe. Mental Health Europe. Brussels 2012 http://tasz.hu/files/tasz/imce/mapping_exclusion_-_final_report_with_cover.pdf (last download: 29th of August 2017)

ing and interpretation of Article 19, and the first wave of deinstitutionalisation has been implemented based on these varying concepts.

Map 1. Long-term care in institutions vs. community care in the field of mental health care in Europe.

Source: Mental Health Europe

The first wave of deinstitutionalisation

The importance of the transition from institutional to community care was not obvious, even in countries where this transition was considered successful so far.

In Sweden, the first wave of deinstitutionalisation turned out to be a failure. The political decision on closing down institutions was made in 1993, and the process of deinstitutionalisation lasted for 7 years.

Former institutions became hotels or conference centres, while new housing opportunities were provided by local municipalities. The relatively fast implementation might have occurred since there was an obvious commitment on behalf of all stakeholders toward deinstitutionalisation, and they could rely on the experiences of other countries like Italy or the United Kingdom.

However, the first attempt of deinstitutionalisation ended up as a failure because the first community housing instances were rather a group of group homes, and segregated "disability" blocks instead of real integration. Very soon it became clear that the situation of residents hadn't really changed in these settings, the culture of large institutions and also the segregation from real communities were transformed to the new services.

A second turn of deinstitutionalisation was implemented in Sweden, taking into consideration the principle of real community integration.[16]

Studies performed by Ravelli (2006) focused on how Dutch mental health care specifically developed toward deinstitutionalisation from 1993 to 2004.[17] In this period, almost all general psychiatric hospitals were involved in mergers with at least one regional institution providing ambulatory mental health care (regional ambulatory mental health care institutes). In 2015, there were 30 integrated mental health care institutions and 41 specialised agencies, including 20 organisations for community living.

The main lines of the change process in the period until 2005 focused on building new facilities, streamlining referrals and setting up care programmes. "Care circuits" (networks) were formed, which are organisational units where similar treatment programmes or care facilities for a particular target group are combined.

De-hospitalisation and decentralisation were the key concepts for the above processes. In practice, these concepts were translated into the replacement of clinical facilities by part-time clinical treatment or completely extramuralised forms of treatment, such as home care, supported housing and Assertive Community Treatment teams. During the last decade, most of the regions have created FACT teams, which provide both intensive care and psychosocial support to persons with psychiatric disabilities living in a community or in supported housing facilities. The 'F' stands for 'function' or 'flexible', meaning that the care can be flexible in terms intensity, according to the needs of the client.

The number of places in institutions for the care of people with intellectual disabilities in the Netherlands did not decrease over the years. Instead, deinstitutionalisation took place in the form of moving places to all kinds of settings in the community.[18]

Supporting persons in the community with regard to self-care and participation is the main focus of the new Social Support Act, which entered into force on 1 January 2015. As a result of this act, local municipalities became responsible for these services. Most of the local authorities created integrated multidisciplinary social teams to provide an array of services to the whole population, so not only persons with mental health problems, but also people with a learning disability and the elderly.

In the new system, only treatment and 24-hour care remain centralised through the budgets of the medical insurance companies. All the other forms of care and support have become the responsibility of the municipalities. The money has been transferred from the state budget to the municipal budget, but with a budget cut of 25%.

---

[16] Source of the information is the presentation of Lars-Göran Jansson on the Seminar on deinstitutionalisation of the European Social Network in Warsaw 2009 and also on the interview we conducted with him within the framework of this research.

[17] Taken from: Ravelli, D.P. (2006). Deinstitutionalisation of mental health care in the Netherlands: towards an integrative approach. *Int J Integr Care*. 2006 Jan-Mar; 6: e04. Published online 15 March 2006. Retrieved: October 14, 2015. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1480375/

[18] Schuurman, M. (2015), Naar de samenleving. De transformatie van de inrichtingszorg voor mensen met verstandelijke beperkingen in Nederland, tussen 1989 en 2014. *NTZ 1*-2014, 10-34.

The United Kingdom has a long tradition of deinstitutionalisation and developing community-based services[19]

In 1971, a Government paper on 'Hospital Services for the Mentally Ill'[20] proposed the complete abolition of the mental hospital system. There was a shift towards the provision of other community-based services for people with mental illnesses, such as supported housing, day services and community-based mental health nurses and social workers. This was colloquially referred to as community care and was supported by government policies such as 'Better Services for the Mentally Ill',[21] 'Care in the Community'[22] and 'Community Care with Special Reference to Mentally Ill and Mentally Handicapped people'.[23] Numbers of residents of both mental health institutions as well as institutions for persons with intellectual disabilities dropped considerably in the 80s and 90s.[24]

Reported inadequacies in community service provision for those individuals who had previously lived in asylums have provoked a great deal of debate over the last 50 years. However, the tone of this dialogue has changed. Early critics often cited that there were increased numbers of people with mental health problems who had become homeless after the closure of the asylums and cited this as evidence that community care had 'failed'.[25] However, longer term studies of the outcomes for people who had spent many years living in the asylums have shown that the majority of people, even those with the most complex problems, have increased their social networks, gained independent living skills, improved their quality of life and have not required re-admission.[26] The same is shown in studies about persons with an intellectual disability moving to forms of supported living in the community[27].

In Eastern European countries, deinstitutionalisation started to be implemented only after they joined the European Union in 2004 and EU Structural Funds became available to cover the costs of the transition.

As a result of a first attempt in Slovakia, the state invested almost 200 million euros between 2007 and 2011 into large and isolated residential institutions instead of community-based services.[28] Due to the negative feedback of the European Commission, a new development plan was created in 2011 with the participation of NGOs and key professionals.

In Hungary, the government planned to build new institutions with up to 150 beds using EU Structural Funds, but a relevant resistance of NGOs and professionals led to the withdrawal of the original call for proposals by the National Development Agency in 2009, and a new concept was developed by 2011.[29] On the other hand, researchers explored the fact that the Hungarian government has spent resources on building and renovating large institutions between 1996 and 2006, in spite

---

[19] The information about the history of deinstitutionalisation in the U.K. has been taken from an extensive review study conducted by. Killaspy (2006). From the asylum to community care: learning from experience. *British Medical Bulletin* (2006) 79-80 (1): 245-258. doi: 10.1093/bmb/ldl017 First published online: January 23, 2007.

[20] Department of Health and Social Security 1971). *Hospital Services for the Mentally Ill.* London: HMSO.

[21] Department of Health and Social Security (1975). *Better Services for the Mentally Ill.* London: HMSO.

[22] Department of Health and Social Security (1981). *Care in the Community.* London: HMSO.

[23] House of Commons Social Services Committee (1985). *Community Care With Special Reference to Mentally Ill and Mentally Handicapped People*. London: HMSO. Department of Health and Social Security.

[24] Mansell J. Deinstitutionalisation and community living: Progress, problems and priorities. *Journal of Intellectual & Developmental Disability* 2006; 31(2):65-76

[25] Coid J. (1994). Failures in community care: psychiatry's dilemma. *Br Med J* 1994;308,:805-806.

[26] Leff J. (1997). *Care in the Community: Illusion or Reality?* London: Wiley.
Leff J, Trieman N. (2000). Long stay patients discharged from psychiatric hospitals. Social and clinical outcomes after five years in the community. TAPS Project 46. *Br J Psychiatry 2000*;176:217-223.
Trieman N, Leff J. (2002). Long-term outcome of long-stay psychiatric inpatients considered unsuitable to live in the community: TAPS project 44. *Br J Psychiatry* 2002;181:428-432.
Thornicroft G, Bebbington P, Leff J. (2005). Outcomes for long-term patients one year after discharge from a psychiatric hospital. *Psychiatr Serv 2005*;56:1416-1422.

[27] Beadle-Brown, J., Mansell, J. and Kozma, A. (2007) Deinstitutionalization in intellectual disabilities. *Current Opinion in Psychiatry,* 20, 437-442.

[28] Monitoring of Absorption of Structural Funds in the Area of Social Services during the period of 2007-2011. INESS 2013.

[29] "One step forward, two steps backwards" Deinstitutionalisation of large institutions and promoting community-based living in Hungary through the use of the Structural Funds of the European Union. ELTE University 2011

of the fact that the first law on deinstitutionalisation was adopted in 1998.

In the study of the Institute of Public Policy, researches revealed that in Romania the emphasis was on the modernisation of existing residential institutions instead of the development of community-based alternatives during the period of 2007-2013. In their interviews, they explored the idea that the driving force behind projects to renovate large institutions was the need to ensure that institutions comply with the new quality standards, and Structural Funds seemed to be great opportunities to finance such works.[30]

We found more consistent development work in the Czech Republic, where during the 2007-13 budgeting period preparation work was carried out to motivate and involve different stakeholders and to support users, professionals and regional municipalities.

In Estonia, the challenges of deinstitutionalisation were similar to other CEE countries. According to Kuuse and Toros (2017)[31], despite the fact that community-based social welfare solutions have gained greater attention over time in various strategic documents, the results showed rather limited effect due the narrow and fragmented understanding and application of the deinstitutionalisation principles.

The impact of EU structural funds was, nevertheless, visible as the first wave of deinstitutionalisation was initiated with the support of the European Regional Fund and aimed at the closure of the large special care homes and substitute care homes for children. As a result, from 2007 until the end of 2015, 17 large institutions were reorganised into 88 family-type homes (33 for children and 55 for the special care sector). Nevertheless, in many cases those homes formed separate villages on the outskirts of the cities.

The European Social Fund resources were aimed at increasing labour market participation of people with special needs and their relatives through support to provision of mainly already existing various services at state and municipality level. In 2015, a small amount of the ESF funds were used directly to support the process of deinstitutionalisation, more precisely the concept paper for deinstitutionalisation was written and evaluation of 200 residents of special care homes was carried out. The outcome of the evaluation estimated the overuse of round-a-clock services, up to 1/3 of being in institutions could be dealt with on community-based services.

2014-20 Budget Period – the second wave of Deinstitutionalisation in the new member states

The European Union has recognised the problem of the misuse of Structural Funds by different Member States.

> "*On 20 November 2013, the European Parliament approved a new set of regulations governing the use of Structural Funds, referred to as the Cohesion Package 2014 – 2020. For the first time, the Structural Funds regulations include an explicit reference to the transition from institutional care to Community living, which falls within the thematic objective of "Promoting social inclusion and combating poverty and any discrimination" (Article 9 of the Common Provisions Regulation on the use of Structural Funds).*
>
> *(…)*
>
> *The transition from institutional to community-based services is one of the aims of investments in health and social infrastructure under the European Regional Development Fund (ERDF). Only those actions that help to establish the conditions for independent living should be supported by the EU. Any measure contributing to*

[30] Briefing on Structural Funds Investments for People with Disabilities: Achieving the Transition from Institutional Care to Community Living, European Network on Independent Living – European Coalition for Community Living, December 2013 http://www.enil.eu/wp-content/uploads/2013/11/Structural-Fund-Briefing-final-WEB.pdf (last download 29th of August 2017)

[31] Kuuse, R., Toros, K. (2017) Estonian social policy: from Soviet heritage to understanding the principles of deinstitutionalization. European Journal of Social Work. p. 1-12

further institutionalisation of disabled people or the elderly should not be supported by ESI Funds."[32]

Member States also recognised the failure of their former policies and they modified their development plans to some extent.

Slovakia and Hungary adopted new strategies for deinstitutionalisation in 2011. According to the Slovakian plans, 20 new pilot projects were supposed to be implemented by 2015 within the framework of the National action plan on the transformation of residential social services[33].

The implementation of the action plan has been problematic in Slovakia. Due to governmental changes and the lack of clear strategies at the level of local municipalities, a majority of the projects had massive delays.

Despite these problems, the deinstitutionalisation and development of community-based services has been slowly continuing and gradually expanding into all regions. To support this process, the Government also allocated resources from the Regional Operation Fund for the period of 2014-2020.[34]

Hungary's new Strategy on Deinstitutionalisation consisted of a plan to transform residential care within a period of 30 years. As a result, new forms of housing services were proposed under the name of supported living, while the strategy maximised the capacity of new facilities in 50 beds. Still financed from the resources of the 2007-2013 budget period, 6 large institutions were selected for the first wave of deinstitutionalisation after the failure of the first plan in 2009.[35]

For the period of 2014-20, the Hungarian Government plans to continue the implementation of deinstitutionalisation. Larger financial resources will be available during this period and a new development program has been initiated in order to develop community care. The principles of the new service structure include the following:

- Provide security while promoting the individual decision making of users (by introducing supported decision making).
- Person-centred and individually tailored services that lead to the enriched social capital of users.
- Network of services, co-ordination between different fields (social, health, vocational and cultural services).
- Accessible services that are available for everyone in their own community within a range of 20 km.
- Access to public transportation.
- In order to avoid the establishment of segregated "disability" districts or villages, the strategy maximises the number of disabled people living in housing services to 10% of the population of the given community.[36]

In 2007, the Government of the Czech Republic adopted a document titled "Concept to Support the Transformation of Residential Social Services into Other Types of Social Services Provided in the User's Natural Community and Enhancing the User's Social Inclusion in Society".[37] This strategic document determines objectives and measures to support the process of transformation and deinstitutionalisation, which is being implemented in the Czech Republic now.

---

[32] Replies of the European Union to the list of Issues. June 2015.

[33] http://www.employment.gov.sk/files/legislativa/dokumenty-zoznamy-pod/narodny-plan-deinstitucionalizacie_en.pdf (last download: 29th of August 2017)

[34] Implementation of the United Nations Convention on the Rights of Persons with Disabilities in Slovakia. Alternative report of non-governmental and disability persons organizations. July 2015. http://www.mdac.org/sites/mdac.info/files/crpd_slovakia_alternative_report.pdf (last download: 29th of August 2017)

[35] Bugarszki, Zs., Eszik, O., Szentkatolnay M., Sziklai, I.: Deinstitutionalization and Promoting Community-Based Living in Hungary. ELTE University, 2011

[36] Fejlesztési koncepció-javaslat a fogyatékos személyek számára ápolást-gondozást nyújtó szociális intézményi férőhelyek kiváltásáról szóló stratégia (2011-2041) végrehajtásának elősegítéséről a 2015-2020. időszak tervezéséhez**.** Fogyatékos Személyek Esélyegyenlőségéért Közhasznú Non-Profit Kft. Budapest 2015

[37] Resolution of the Government of the Czech Republic of 21 February 2007 No. 127.

The general aim of the project was based on detailed analyses of the current situation regarding social services, to arrange for a comprehensive system to support the transformation of such services, to prepare development plans, to raise awareness, to create a system of vertical and horizontal cooperation among all entities involved in the transformation process of institutional care, to support the process of enhancing the living conditions of users of today's residential social care facilities, and to foster the respect of the human rights of users of residential social services and their rights to enjoy a full life comparable to their peers living in a natural environment.[38]

In a new phase, project outputs were channelled towards the pilot launch of the transformation process in selected top-risk facilities in all regions, under the conditions of cooperation with all stakeholders and the observance of principles of transformation process transparency.

In order to continue with the process of deinstitutionalisation, the Czech Republic has prepared a National Plan on Promoting Equal Opportunities for Persons with Disabilities for the Period 2015–2020, which mentions the following specific objectives and measures:

- Development of community services that reflect the needs of people with disabilities and assist in retention in their natural social environment; in response to a reduction in mass-residential facilities.
- Financing of social services that reflect the needs of people with disabilities and help to remain in their natural environment.
- Support for caregivers of persons with disabilities.
- Training and development of staff working in the social services.
- Supporting targeted public relations activities for major target groups.
- The reform of psychiatric care and its connection to the social services system.
- Social housing adapted for people with disabilities.
- Programs to "reintegrate" people with disabilities into the labour market.[39]

In 2016, the government adopted the Social Welfare Development Plan 2016-2023[40], which defines the main aims and activities for employment and social policy. Among others, one of the objectives is "to develop the provision of social services, including improving the availability and quality of these services and emphasizing the services that support independent coping and life in society, as well as the de-institutionalisation of the welfare services system". The development plan acknowledges the principles of deinstutionalisation and foresees many activities and investments in that regard.

In the case of Estonia, the second wave of deinstitutionalisation continues the previously implemented strategy and builds on the experiences of the first wave. Approved plans foresee a continuation of investments into the special-care infrastructure with the aid of the European Regional Fund in the amount of 56 million euros until 2020, with the aim of modernising 1400 service places[41] . The support is provided for reorganising large institutions into facilities with no more than 30 service places and creating new community-based service places. The projects are expected to impact populated areas with at least 300 inhabitants, and the number of places can not exceed 10% of the local population[42]. According to the Social Welfare

[38] Initial Report of the Czech Republic to the UN Committee on the Rights of Persons with Disabilities. November 2011

[39] Replies of the Czech Republic to the list of issues. December 2014

[40] Ministry of Social Affairs (2016). Welfare Development Plan 2016-2023. http://www.sm.ee/sites/default/files/contenteditors/eesmargid_ja_tegevused/welfare_development_plan_2016-2023.pdf (last download: 29th of August 2017)

[41] The Reorganisation of Special-Care Facilities. (2015). Retrieved May 22, 2016 from http://www.struktuurifondid.ee/public/Oige.pdf

[42] https://www.riigiteataja.ee/akt/115092015022

plan for 2016-2023, the special care system is also going through a design process with the aim of testing and applying a new organisation of services more linked to the community.

With the support of the European Social Fund, major structural reforms are carried out, and one of the most important ones is the work ability reform, with estimated support from the ESF at around 170 million euros and an effect on around 100 000 citizens. Also, the further development of social services in local municipalities is supported by structural reforms[43] .

In the cases of Hungary, the Czech Republic and Slovakia, the first monitoring period has already been implemented and we could explore the Concluding Observations of the Committee.

Addressing the Hungarian government, the Committee took note that the State party has recognised the need for the replacement of large social institutions for persons with disabilities in community-based settings (deinstitutionalization). However, it noted with concern that the State party has set an extraordinary long, 30-year time frame for its plan for deinstitutionalization. The Committee was also concerned that Hungary has dedicated European Union funds, to the reconstruction of large institutions, which will lead to continued segregation.[44]

As a recommendation:

> *"The Committee calls upon the State party to ensure that an adequate level of funding is made available to effectively enable persons with disabilities to: enjoy the freedom to choose their residence on an equal basis with others; access a full range of in-home, residential and other community services for daily life, including personal assistance; and enjoy reasonable accommodation with a view to supporting their inclusion in their local communities.*
>
> *The Committee further calls upon the State party to re-examine the allocation of funds, including the regional funds obtained from the European Union, dedicated to the provision of support services for persons with disabilities and the structure and functioning of small community living centres, and to ensure full compliance with the provisions of article 19 of the Convention."*[45]

In its Concluding Observations, the UN Committee also notes with concern that the Czech Republic invests more resources in institutional settings than into community care. The Committee urges the State party to allocate sufficient resources for the development of support services in the community. The Committee also recommends having a clear timeline with concrete benchmarks for the implementation of the National Plan on Promoting Equal Opportunities for Persons with Disabilities 2015-2020 in the Czech Republic.[46]

In Slovakia, the Committee expressed its deep concern about the high number of institutionalised persons with disabilities, in particular women with disabilities. They noted that progress on the deinstitutionalisation process is too slow and there are ongoing investments from government budgets in institutions. They also pointed out that the lack of provision of full support for persons with disabilities to live independently in their communities hinders the successful implementation of deinstitutionalisation[47].

---

[43] http://www.sm.ee/et/struktuurivahendid-sotsiaalvaldkonnas-2014-2020#6.%20T%C3%B6%C3%B6v%C3%B5ime%20toetamise%20s%C3%BCsteemi%20k%C3%A4ivitamine

[44] Concluding observations on the initial periodic report of Hungary, adopted by the Committee at its eighth session (1728 September 2012)

[45] Concluding observations on the initial periodic report of Hungary, adopted by the Committee at its eighth session (1728 September 2012)

[46] Concluding observations on the initial report of the Czech Republic. May 2015.

[47] Concluding observations on the initial report of Slovakia. May 2016.

CONCLUSIONS

Seeing these controversial outcomes of deinstitutionalisation in Eastern Europe, it is not a surprise that the UN Monitoring Committee became very critical of the EU in their Concluding Observations.

> *"The Committee is concerned that across the European Union persons with disabilities, especially persons with intellectual and/or psychosocial disabilities still live in institutions rather than in local communities. It further notes that in spite of changes in regulations, in different Member States the ESI Funds continue being used for maintenance of residential institutions rather than for development of support services for persons with disabilities in local communities."*[48]

The Monitoring Committee not only expressed its concern that in spite of the ratification of the UNCRPD many people still live in large institutions in Europe but was very critical of the EU Commission, as it allowed using Structural Funds to maintain and develop large residential institutions.

In countries where deinstitutionalisation has been finalised over the last decades, the system has been remarkably shifted from institution-based solutions to community care. There is massive evidence of the positive outcome of independent living, and policy priorities are moving toward greater influence of user groups and user involvement, and toward an emphasis on recovery oriented, person centred approaches, followed by tailored financial schemes. However, we also need to recognise that economic turbulence and existing ideological or political debates on the role and content of the welfare state are affecting the well-established Western European model, too. In the UK and also in the Netherlands, we experienced severe austerity measures that may undermine the positive outcomes of former reforms.

In the new member states, access to EU structural funds brought an outstanding opportunity for a fundamental reform of the long-term care system, and in spite of the fact that this process has been started in all 5 examined countries, there is obvious tension between the principles of the United Nation Convention and the implementation of deinstitutionalisation. The importance of the second wave of deinstitutionalisation in the new member states is crucial, as it is hard to predict what kind of resources will be available for these countries in the next 2020-2027 budget period of the EU.

[48] Concluding observations on the initial report of the European Union. September 2015.

AUTHORS

Zsolt Bugarszki

Hungarian social worker, expert of social policy, lecturer at the School of Governance, Law and Society at Tallinn University, Estonia.

Hans van Ewijk

Professor Emeritus of Social Work Theory, University of Humanistic Studies, Utrecht, Netherlands.

Anu Hall

Member of the Executive Board of the Foundation "Hea Hoog". Master's student at the School of Governance, Law and Society, Tallinn University.

Rao Javaid Iqbal

Graduate student of International Islamic University, Islamabad; MS Development Studies from COMSATS University, Abbottabad.

Heidi Kaarto

MA student of European law from Leiden University Law School.

Rait Kuuse

Deputy Secretary General on Social Policy at the Ministry of Social Affairs Republic of Estonia.

Heiki Lindpere

Lecturer of International Law at the School of Governance, Law and Society at Tallinn University, Estonia.

Tahir Mahmood

PhD in Rural Institution related to Land Tenure from George August University. Assistant Professor in the Department of Development Studies, COMSATS University, Abbottabad.

Marju Medar

Associate Professor at the School of Governance, Law and Society at Tallinn University, Estonia.

Tiina Pajuste

Lecturer in international and EU law at the School of Governance, Law and Society at Tallinn University. She holds an LLM from the University of Helsinki and a PhD from the University of Cambridge.

Anu Rahu

Service Development Manager at the Tallinn Mental Health Centre.

Koidu Saia

PhD student, Research Coordinator and Lecturer at the School of Governance, Law and Society at Tallinn University, Estonia.

Gaziza Shakhanova

PhD student at the Jan Masaryk Center for International Studies, University of Economics, Czech Republic, Prague.

Indrek Sooniste

CEO of the Tartu Mental Health Care Foundation, PhD student at the School of Governance, Law and Society at Tallinn University, Estonia.

Mari-Ann Susi

PhD student of sociology at the School of Governance, Law and Society at Tallinn University, Estonia.

Anne Tiko

PhD. Lecturer of Psychosocial Social Work. School of Governance, Law and Society, Tallinn University.

Jean-Pierre Wilken

Professor at the Research Centre for Social Innovation of HU Utrecht University of Applied Sciences, the Netherlands.

Carsten Wulff

Lecturer at Tallinn University's School of Governance, Law and Society. He is enrolled in the PhD program of Government and Politics and is writing on the Right to be forgotten.