Contemporary Legal and Economic Issues IV

Editors
Ivana Barković Bojanić and Mira Lulić

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2013

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Editor's Word

The book **"Contemporary Legal and Economic Issues"** represents an international forum on major legal and economic problems confronting a contemporary society. It is organized in relatively rare format of a short monograph based on set of chosen scientific papers in the fields of law and economics, which is an advantageous way to construct a promising framework, to offer some scientific and practical comments and to arouse readers' interest in the overall approach, without having to carry the burden of the necessity to strive for completeness or detail.

Contributions to the book are made by individual authors and co-authors coming from international academic community who are providing a global perspective to various economic and legal issues, whereby economic and legal principles are applied to real problems.

The authors are students and professors who, individually or as a joint effort, contribute an article that deals with legal or economic issues often proving in their texts that law and economics are two scientific fields that are in many cases highly inter-related.

The book promotes scientific writing as the primary tool of academics and scholars to disseminate thoughts, ideas, research results and boldly present them to the professional and lay public for discussion, praises and critiques; it promotes cooperation between students and professors, i.e. mentorship, which is rewarding for both students and their professors by uniting them in a joint effort to produce a work where each invests effort, knowledge and enthusiasm to the best of their potential and benefits from the synergy effect; it promotes international cooperation between individuals and institutions taking part in this project pointing out that the distances in geography no longer represent an obstacle in establishing and developing the international cooperation and making the world of science truly global; it proves through topics covered that nearly all issues, in this case related to the law and economics, have left the strict realm of purely domestic jurisdiction.

The book is intended as teaching and learning material in particular courses since it offers a reflection of current topics dealt in the fields of law and economics, as well as it can be very instructive text for wider audience who find legal and economic issues challenging.

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Ivana Barković Bojanić and Mira Lulić

SEXUAL ORIENTATION DISCRIMINATION IN THE CASE-LAW OF THE COURT OF JUSTICE OF THE EU – A REVOLUTION OR STEADY PROGRESS?

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Abstract

The Court of Justice of the European Union has developed many standards concerning discrimination based on different grounds, including sexual orientation. At the beginning the Court was rather cautious and decided to leave the Member States with the task of the protection of homosexual rights. However, after the adoption of the Directive 2000/78 its approach has been changed. The article presents the most important cases concerning sexual orientation discrimination and the status of the same-sex couples. It also considers the reasons which lie behind the change of the Court's approach and tries to answer the question whether it is a revolution or a steady progress[1].

Key words: *sexual orientation discrimination, homosexual rights, the status of the same-sex couples, the Court of Justice of the EU, directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*

1. INTRODUCTION

An overview of the European Union law and policy on sexual orientation issues can lead to the conclusion that after a long period of inaction in this area, in recent years there has been a change in an approach towards the general protection of homosexual rights. The main reasons for the weak intervention of the Union in sexual orientation discrimination can be easily traced to the market foundations of European social policy as well as to the sensitive moral debates

[1] Paper prepared in the frames of the project financed by the National Centre of Science (decision no.DEC-2011/01/B/HS5/00965).

on these issues which undoubtedly reinforced the perception that this was not a matter appropriate for the European Union law.[2] However, over the years fundamental rights have become its integral part (which was underlined in the provisions of the Treaty of Maastricht signed in 1992). As a result, homosexual rights, in particular combating discrimination on the grounds of sexual orientation, have been more seriously taken into account by the European Union institutions. It is interesting to note that in 1991 the European Commission adopted a recommendation on the protection of the dignity of women and men at work[3] where it stated that harassment on grounds of sexual orientation can be treated as behaviour that undermines the dignity and as such is inappropriate in the workplace. The most active institution in this area has undoubtedly been the European Parliament that has adopted several resolutions on both homosexual rights and fight against homophobia (e.g. the resolution on equal rights for homosexuals and lesbians in the EC of 1994[4]).

The Court of Justice of the European Union (further: the Court or the ECJ) has also been confronted with the question of sexual orientation discrimination. At the beginning its response to this problem was rather disappointing as it refused to assimilate discrimination on the grounds of sexual orientation with this on the grounds of sex (case C-249/96 *Grant v. SWT*). As a result the complainant was refused to get travel concessions in respect of her partner of the same sex although she claimed that it was in breach of Article 119 of the European Economic Community Treaty which provided for the principle of equal pay for equal work between women and men. This line of reasoning was maintained by the Court in the later case-law (in particular joined cases C-122 and 125/99 *D and Sweden v. Council*). However, after the adoption of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[5] its approach has been changed which is illustrated by at least two cases (Case C-267/06 *Tadao Maruko* and Case C-147/08 *Römer*).

The main purpose of this article is to present the arguments given by the ECJ in these four cases with particular reference to the role played by fundamental rights doctrine and the principle of non-discrimination in protection of homosexual interests. It will also be considered what reasons lie behind the change of the Court's approach and if it can be called a revolution or rather a steady progress. The article concludes with a presentation of possible prospects of the European Union law (that is both the legal regulations and the case-law) on combating discrimination on the grounds of sexual orientation.

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[2] M. Bell (2002), *Anti-Discrimination Law and the European Union,* Oxford, pp.118-119.

[3] Commission Recommendation of 27 November 1991, OJ 1992, L 49/1.

[4] EP Resolution of 8 February 1994, OJ 1994, C 61/40.

[5] Council Directive 2000/78, OJ 2000, L 303/16.

2. GRANT V. SOUTH-WEST TRAINS

Ms Grant's contract with her employer - SWT (a company which operates railways in the Southampton region) provided for travel concessions for her partner. However, when she applied for it for her female partner, SWT refused to allow this benefit, on the ground that for unmarried persons travel concessions could be granted only for a partner of the opposite sex. As a result Ms Grant made an application against SWT to the Industrial Tribunal, Southampton, arguing that the refusal constituted discrimination based on sex. On 22 July 1996, the Industrial Tribunal stayed the proceedings and referred to the Court several questions concerning the interpretation of Article 119, *inter alia* if the phrase 'discrimination based on sex' include discrimination based on the employee's sexual orientation or discrimination based on the sex of that employee's partner.

In its judgment of 17 February 1998[6] the Court held that the refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination on based on sex prohibited by Community law. The ECJ did not refer to the Advocate General Elmer's opinion who came to the conclusion that this was a case of direct sex discrimination in the sense of being directly related to the gender of an employee's partner. Instead the Court confined itself to considering the position for a male employee with a same-sex partner.[7] As a result it stated that 'the condition for the grant of those concessions cannot be regarded as constituting discrimination directly based on sex, since it applies in the same way to female and male workers.'

It seemed that the ECJ did not take into account the fact that in this case discrimination was not based on either sexual orientation or sex, but on both of them – not the sex of the employee was the causal factor, but the coincidence of the sex of the employee with that of her partner.[8] The strict dividing line established by the Court between these criteria of discrimination could be connected with the inclusion by the Treaty of Amsterdam (signed on 2 October 1997) in the Treaty establishing the European Community of a new Article 13. It allowed the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament to take appropriate action to eliminate various forms of discrimination, including this based on sexual orientation. Thus,

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[6] Case C-249/96, [1998] ECR I-621.

[7] S. Terrett, A Bridge Too Far? Non-discrimination and Homosexuality in European Community Law, *European Public law,* 4, p. 495.

[8] See further M. Bell (1999), Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT, *European Law Journal*, 5, p. 71.

the Member States decided to treat it in a separate way and the ECJ seemed to be unwilling to interfere with that choice in particular that the Treaty of Amsterdam was awaiting ratification at this time. In other words it decided to leave the protection of homosexual rights in the Member States hands.

It was emphasized by the Court when it stated that 'in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex … It is for the legislature alone to adopt, if appropriate, measures which may affect that position.'[9] The ECJ reached such a conclusion although Ms Grant referred to a number of sources in particular: the laws of the Member States, those of the Community and other international organizations in order to show that they treated the two situations as equivalent. So she asked the Court to consider not only the provisions of the Treaties but also the position taken by both the actors at international arena and other European institutions e.g. European Parliament.

In relation to the national law the Court noted that in most of the Member States cohabitation by two persons of the same sex was treated as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights, while in other Member States was not recognized in any particular way. In this way the ECJ ignored the general legal trends on questions of the prohibition of sexual discrimination and the extension of equal treatment to same-sex couples.[10] In relation to the Community law the Court observed that the European Parliament underlined in its resolutions that it deplored all forms of discrimination based on sexual orientation, however, no binding rules had been adopted in this area. Thus, the ECJ was not ready to rely on non-binding law in order to develop the principle of non-discrimination based on sexual orientation. However, the main arguments for non-recognition of same-sex couples as equivalent to marriages or stable relationships outside marriage were found in the law of the European Convention on Human Rights and its interpretation by both the European Commission of Human Rights and the European Court of Human Rights. Such a position of the ECJ was quite astonishing given the fact that firstly, it was not bound by the standards adopted in the frames of the Convention and secondly, that on several occasions it rejected the jurisprudence of the European Court of Human Rights maintaining that it was free to set a higher level of human rights protection. The best example is the judgment of 30 April 1996 given in the case *P v. S*[11] where the negative jurisprudence of the

[9] Case C-249/96, [1998] ECR I-621, § 35 and 36.
[10] Bell, *supra* note 7, p. 73.
[11] Case C-13/94, [1996] ECR I-2143.

European Court of Human Rights on transsexuals was not taken into account and the Court decided to protect their rights under European Union law.

The question may arise why did the ECJ accord the greater protection to transsexuals than to homosexuals? It seems that the Court was aware (or at least hoped) that the latter were going to be protected by the European Union law adopted on the basis of Article 13 of the Treaty establishing the European Community. In this situation it was easier to refer to the division of powers between the legislative and judicial organs of the European Union. In fact the ECJ recognized that it was the responsibility of the legislature to adopt appropriate measures in this area, in particular in relation to the equal treatment of same-sex couples, so it did not decide to develop the law but left it to the Member States. It even went further where stated that 'although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community.'[12] In this way the ECJ set certain limits to judicial activism even though the problem was attached to the protection of the fundamental rights.

Such a position is also connected with other factors. Firstly, regulations relating to sexual orientation raise various ethical and religious questions and are highly controversial whereas the case-law of the Court indicates that it tends to avoid such controversies.[13] Secondly, the ECJ seemed to focus on the potential future impact of its decision. Though, in principle, the mere statistics should not affect the finding of the law, it is undoubtedly true that numbers, in particular the number of homosexuals in the European Union, are likely to be a relevant factor in the Court's analysis.[14] Moreover, it probably took into account the potential economic consequences of recognising same-sex partners in general social welfare system. Thus, the ECJ indirectly indicated that the economic costs may outweigh respect for fundamental social rights. This reflected the market-driven nature of European social law.[15] One thing was certain: after the Court's decision in *Grant* the next step in relation to combating discrimination based on sexual orientation belonged to the Members States. This was confirmed in the next case concerning the equal treatment of same-sex couples.

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[12] Case C-249/96, [1998] ECR I-621, § 45.

[13] See V. Harrison (1996), Using EC Law to Challenge Sexual Orientation Discrimination at Work, in *Sex Equality Law in the European Union* (eds) T.K. Hervey and D. O'Keeffe, Chichester, Wiley, p. 273.

[14] N. Carey (2001), From Obloquy to Equality: in the Shadow of Abnormal Situations, *Yearbook of European Law,* 20, p. 104

[15] Bell, *supra* note 7, p. 76.

3. D AND SWEDEN V. COUNCIL

D was an official of the European Communities of Swedish nationality working at the Council. He registered a partnership with another Swedish national of the same sex in Sweden in 1995. As a result he applied to the Council for his status as a registered partner to be treated as being equivalent to marriage (for the purpose of obtaining the household allowance provided for in the Staff Regulations). However, the Council rejected his application on the ground that the provisions of the Staff Regulations could not be construed as allowing a 'registered partnership' to be treated as being equivalent to marriage. Following that rejection D brought an action to the Court of First Instance claiming that the refusal to recognize the legal status of his partnership should be annulled and that he and his partner should be granted the remuneration to which he claimed entitlement under the Staff Regulations and other general provisions applicable to officials of the European Communities.

In its judgment of 28 January 1999[16] the Court of First Instance (CFI) considered that according to its case-law the concept of marriage must be understood as meaning a relationship based on civil marriage within the traditional meaning of the term.[17] It also came to the conclusion that it was not necessary to refer to the laws of the Member States in interpreting the Staff Regulations for Officials, in particular as regards the consequences for a person living with a partner of the same sex. In other words, the CFI underlined that the notion of marriage in the Staff Regulations was open to autonomous interpretation, confined to its traditional meaning. To support this view, it referred to the case-law of both the European Court of Human Rights (that limited Article 12 of the Convention to 'traditional marriages between two persons of the opposite biological sex') and the Court of Justice in particular to the case *Grant*. As a result the CFI held that the Council was under no obligation to regard as equivalent to marriage, for the purposes of the Staff Regulations, the situation of a person who had a stable relationship with a partner of the same sex, even if that relationship had been officially registered by a national authority. Other pleas alleging infringement of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and infringement of the principle of equal pay for men and women were also rejected.

In this situation the CFI decision was appealed to the ECJ by both D and the Swedish government. However, the Court in its judgment of 31 May 2001[18] rejected all arguments presented by the appellants. First, it underlined that the question whether the concepts of marriage and registered partnership should

[16] Case T-264/97, [1999] ECR – staff cases I-A-1.

[17] See e.g. Case T-65/92, *Arauxo-Dumay* v *Commission,* [1993] ECR II-597, § 28.

[18] Joined cases C-122/99 P and C-125/99 P, [2001] ECR I-4319.

be treated as distinct or equivalent for the purposes of interpreting the Staff Regulations had not been resolved by the Court of Justice yet. It admitted that a stable relationship between partners of the same sex which had only a *de facto* existence (as was the case in *Grant*) was not equivalent to a registered partnership under a statutory arrangement as the latter had effects in law akin to those of marriage, in particular in relation to obligations of the partners. However, at the same time it noticed that according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex and although an increasing number of them had introduced statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex, such couples are regarded as being distinct from marriage.[19] In the Court's opinion this was the main reason to interpret the Staff Regulations in such a way that registered partners cannot be covered by the term 'married official'. In fact the ECJ took the same position as previously in the case *Grant* since it stated that only the legislature could, where appropriate, adopt measures to alter that situation, for example by amending the provisions of the Staff Regulations. As a result the narrow interpretation of the notion of marriage, confined to its traditional meaning, was maintained by the Court.

In relation to infringement of the principle of equal treatment of officials irrespective of their sexual orientation, the ECJ indicated that 'it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner'.[20] It this way it underlined again that discrimination based on sex and on sexual orientation should be treated separately. However, the Court did not decide to protect the appellant and simply stated that the situation of an official who had registered a partnership in Sweden could not be treated as comparable to that of a married official.

Such position can be criticized because the ECJ did not take into account the fact that differentiation based on marital status can lead to indirect discrimination as marriages between two persons of the same sex are not provided for in most of the Member States. In fact three basic situations can be distinguished:

- discrimination between unmarried different-sex partners and unmarried same-sex partners (direct discrimination on the basis of sexual orientation),
- discrimination between married different-sex spouses and registered same-sex partners (direct or indirect discrimination on the basis of sexual orientation)

[19] Id. § 34-36.
[20] Id. § 49.

- discrimination between married different-sex spouses and unmarried same-sex partners (indirect discrimination on the basis of sexual orientation).[21]

The question if in the second situation there is a direct or indirect discrimination is further considered in the *Tadao Maruko* and *Römer* cases (see below). As far as the judgment in case *D and Sweden v. Council* is concerned it should be added that it was set aside when in 2004 the Staff Regulations were changed and art 1d predicted that non-marital partnerships should be treated as marriage provided that certain formal conditions are fulfilled.[22]

4. TADAO MARUKO V. VERSORGUNGSANSTALT DER DEUTSCHEN BÜHNEN

Under German law, marriage is reserved to different-sex couples and the registered partnership can be established by two persons of the same sex when they each declare, in person and in the presence of the other, that they wish to live together in partnership for life (paragraph 1 of the Gesetz über die Eingetragene Lebenspartnerschaft of 16 February 2001, as amended by the Law of 15 December 2004). In 2001 Mr Maruko entered into such a life partnership with a designer of theatrical costumes. His partner had been a member of the Versorgungsanstalt der deutschen Bühnen (the German Theatre Pension Institution, VddB) since 1 September 1959 and was socially insured in that pension fund. After his death in 2005 Mr Maruko applied to the VddB for a widower's pension but the application was rejected on the ground that its internal regulations did not provide for such an entitlement for surviving life partners. Consequently, he brought an action before the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court, Munich). Mr Maruko claimed that the refusal of the survivor's benefits amounted to discrimination on grounds of sexual orientation of his partner prohibited by the Directive 2000/78/EC. The German Court stayed the proceedings and referred to the Court of Justice questions on the

[21] K. Waaldijk (2001), Towards the Recognition of Same-Sex Partners in the European Union Law: Expectations Based on Trends in National Law, in *Legal Recognition of Same-Sex Partnership, A Study of National, European and International Law*, (eds) R. Wintemute and M. Andenæs, Oxford, p. 645.

[22] They are listed in Article 1 (2) (c) of Annex VII of the Staff Regulations. This provision speaks of "an official who is registered as a stable non-marital partner, provided that: (i) the couple produces a legal document recognised as such by a Member State, or any competent authority of a Member State, acknowledging their status as non-marital partners, (ii) neither partner is in a marital relationship or in another non-marital partnership, (iii) the partners are not related in any of the following ways: parent, child, grandparent, grandchild, brother, sister, aunt, uncle, nephew, niece, son-in-law, daughter-in-law; (iv) the couple has no access to legal marriage in a Member State; a couple shall be considered to have access to legal marriage for the purposes of this point only where the members of the couple meet all the conditions laid down by the legislation of a Member State permitting marriage of such a couple. Document available at http://ec.europa.eu/civil_service/docs/toc100_en.pdf.

interpretation of this Directive which concerned two main issues: the scope of this act, in particular if the survivor's benefits could be treated as 'pay' and the concept of discrimination on grounds of sexual orientation.

In its judgment of 1 April 2008[23] the Court stated that the Directive 2000/78 applies to both the public and private sectors in relation to conditions of pay and that it does not apply to payments of any kind made by state schemes or similar. Therefore, it must be determined whether a survivor's benefit granted under an occupational pension scheme such as that managed by the VddB can be treated as equivalent to 'pay' within the meaning of Article 141 of the Treaty establishing the European Community (EC Treaty).[24] The ECJ then referred to its earlier case-law according to which for the purposes of assessing whether a retirement pension falls within the scope of this Treaty provision, the one criterion which may prove decisive is whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment. After a detailed evaluation of the occupational pension scheme managed by the VddB, the Court came to conclusion that the survivor's pension is derived from the employment relationship of Mr Maruko's life partner and as such must be classified as 'pay' within the meaning of Article 141 of the EC Treaty.

In determining the scope of the Directive 2000/78 the Court also referred to the Recital 22 of its preamble which states that 'the Directive is without prejudice to national laws on marital status and the benefits dependent thereon'. The ECJ admitted that, these matters fall within the competence of the Member States and Community law does not detract from that competence. However, it underlined that in the exercise of that competence the Member States must comply with Community law, in particular with the provisions relating to the principle of non-discrimination. Consequently, the Recital 22 of the preamble to Directive 2000/78 cannot affect its scope of application. In this way the Court rejected arguments presented in the proceeding by the VddB and the United Kingdom Government that this provision contains a clear and general exclusion and determines the scope of the Directive. It also confirmed that the meaning of the Recital 22 of the preamble does not go as far as to allow more beneficial treatment of married partners.[25] What is even more important, the ECJ made it clear that even though the European Union is not competent in the area of marital status and benefits dependent thereon, its provisions on principle of non-

[23] Case C-267/06, [2008] ECR I-1757.

[24] Id. § 40-42.

[25] When implementing the Directive at least three Member States (Ireland, Italy and the United Kingdom) interpreted this recital as a basis for such a different treatment. See further K. Waaldijk and M. Bonini-Baraldi (2006), *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, The Hague, p. 115.

discrimination must be complied with by the Member States. It follows that those Member States that, within the field of application of the Directive, allow for disadvantageous treatment of same-sex partners simply based on the Recital 22 of its preamble, have to reconsider their laws in the light of the *Maruko* decision.[26]

The further part of the judgment concerned the concept of discrimination on grounds of sexual orientation, in particular the Court had to consider whether a case such as that of Mr Maruko involved such discrimination. It is interesting to note, however, that both the complainant and the Commission maintained that refusal to grant the survivor's benefit to life partners constitutes indirect discrimination within the meaning of Directive 2000/78, while the national court referred in its questions to Article 2 (2) (a) of this Directive which concerns direct discrimination. First, the ECJ recalled the definitions of both forms of discrimination.[27] Then, it analysed Mr Maruko situation in the light of information on German law given by the referring court. According to it Germany created for persons of the same sex a separate regime, the life partnership, the conditions of which have been gradually made equivalent to those applicable to marriage. This partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as the survivor's benefit at issue in the main proceedings is concerned. However, the entitlement to that survivor's benefit is restricted, under the provisions of the VddB Regulations, to surviving spouses and is denied to surviving life partners. Therefore, the ECJ stated that 'if the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78'.[28] Thus, the Court found that in this case there was a direct sexual orientation discrimination if, under German law, registered partnership places persons of the same sex in a situation comparable to that of spouses. The referring

[26] Ch. Tobler and K. Waaldijk (2009), Case C-267/06,Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, *Common Market Law Review*, 46, pp. 734-35.

[27] According to the provisions of the Directive 2000/78 direct discrimination occurs where one person is treated less favourably than another person who is in a comparable situation, on any of the grounds referred to in Article 1 of the Directive (that is religion or beliefs, age, disability or sexual orientation) while indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

[28] Case C-267/06, [2008] ECR I-1757, § 72.

court was to determine whether there was such a comparability in relation to the survivor's benefit provided for under the occupational pension scheme managed by the VddB.

The ECJ did not explain why it decided to apply a direct rather than an indirect discrimination approach although the complainant, the Commission and the Advocate General Ruiz-Jarabo Colomer in his opinion[29] claimed otherwise. However, the distinction between the two concepts is important for practical reasons – most of all the possibilities of justification are fewer in the case of direct discrimination than in the case of indirect discrimination (the former can only be justified on the basis of grounds stated in the law that is in the Directive 2000/78 and none of them seemed relevant in the case of *Maruko*).[30] Thus, the Court's approach was beneficial for Mr Maruko and persons in similar situation and as such welcomed in most academic comments.[31] It should be added that in its earlier case-law concerning discrimination the ECJ put emphasis on the formal aspects. Consequently, any measure that did not formally rely on a prohibited criterion would be assed in the framework of indirect discrimination, even if its substantive effect was practically the same as in the case of direct discrimination.[32] However, it seems to have changed this approach which is illustrated in the case *Nikoloudi* decided in 2005 where the Court stated that: 'the subsequent exclusion of a possibility of appointment as an established member of staff by reference, ostensibly neutral as to the worker's sex, to a category of workers which, under national rules having the force of law, is composed exclusively of women constitutes direct discrimination on grounds of sex.'[33] Accordingly, direct discrimination also includes measures that are formally neutral but that, due to legislative provisions or to binding rules of the employer, have the same exclusionary effect as measures directly relying on the prohibited criterion.[34] The same situation was in the case *Maruko* where all surviving life partners were deprived of the survivor's benefit and the internal regulations of the VddB did not refer to the worker's sexual orientation.

As direct discrimination occurs where one person is treated less favourably than another person who is in a comparable situation, the national court was left with the task to decide if under national law there was such a comparability

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[29] Advocate General Ruiz-Jarabo Colomer in Case C-267/06, [2008] ECR I-1757, point 102.

[30] Tobler and Waaldijk, *supra* note 25, pp. 735-736.

[31] *Id*. at 736.

[32] This approach was criticized in academic writing. See further Ch. Tobler (2005), *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerpia-Oxford, pp. 312-313..

[33] Case C-196/02, *Vasiliki Nikoloudi v. Organismos Tilepikoinonion Ellados AE.*, [2005] ECR1789, § 40.

[34] Tobler and Waaldijk, *supra* note 25, p. 740.

between Mr Maruko and a surviving spouse situation as concerns the survivor's benefit. This means that the positive results of the commented judgment can be observed mainly in those Member States that decided to introduce to their legal systems registered partnership for same-sex couples with the same or similar rights and obligations as predicted for marriages. The ECJ did not address the question whether there would be direct or indirect sexual orientation discrimination if the legal situations of married and registered partners were less comparable. It seems that in such cases at least indirect discrimination should be taken into account. Similarly, in the Member States without registered partnership (e.g. Lithuania, Poland, Greece, Italy) unregistered same-sex partner challenging their exclusion from a marital benefit could at least invoke the prohibition of indirect sexual orientation discrimination.[35] Such conclusion can be drawn from the next case decided by the ECJ, in particular from the opinion of the Advocate General Nilo Jääskinen given in this case.

5. RÖMER V. FREIE UND HANSESTADT HAMBURG

Mr Römer worked for the Freie und Hansestadt Hamburg as an administrative employee in the period of 1950-1990 when he ceased work on grounds of incapacity. Since 1969, he has lived continuously with Mr U and in 2001 they entered into a registered life partnership, in accordance with German law. Mr Römer informed his former employer of this in October 2001 and one month later he requested that the amount of his supplementary retirement pension be recalculated on the basis of the more favourable deduction under tax category III/0. However, the Freie und Hansestadt Hamburg refused to amend the calculation of the said pension on the ground that under the Law of the Land of Hamburg (on supplementary retirement and survivors' pensions for employees of the Freie und Hansestadt Hamburg) only married, not permanently separated, pensioners and pensioners entitled to claim child benefit or an equivalent benefit are entitled to have their retirement pension calculated on the basis of this tax category. Mr Römer brought the case before the Labour Court in Hamburg claiming the same treatment as a married, not permanently separated, pensioner. In his opinion this criterion must be interpreted as including pensioners who have entered into a registered life partnership. Since Mr Römer referred to the Directive 2000/78, the German court decided to stay the proceedings and asked the ECJ several questions concerning its interpretation. In fact they were similar to those asked by the court in the case *Maruko* as they concerned *inter alia*: the scope of the Directive (whether supplementary pension benefits fall within its scope and what the role of the recital 22 in the preamble is), the concept of discrimination on the grounds of sexual orientation (whether the

[35] *Id*. at 744.

different treatment in question constitutes direct or indirect discrimination) and additionally the temporal effects of the Directive (from which date equal treatment should be ensured).

The ECJ in its judgment of 10 May 2011[36] came to the conclusion that supplementary retirement pensions paid by a public scheme constitute pay within the meaning of Article 157 of the Treaty on the functioning of the European Union and as such they fall within the scope of the Directive 2000/78. As regards, the recital 22 in the preamble, the Court just referred to its judgment in *Maruko* and repeated that this provision cannot affect the application of the Directive. It is interesting to note that the Advocate General Niilo Jääskinen in his opinion given in the presented case confirmed the exclusive competences of the Member States in regulating civil status, in particular marriage and registered partnership. At the same time, however, he expressed such a view that leaving same-sex partners without any kind of legal recognition constitutes discrimination based on sexual orientation as it also violates homosexual dignity, but added that this question is outside the scope of the European Union law.[37]

In relation to the concept of discrimination on the grounds of sexual orientation, the ECJ first recalled the definition of the direct discrimination and then turned to the question of comparability of the situations. It emphasized that the situations do not have to be identical, but only comparable and the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. 'Thus, the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings …'[38] The Court underlined that the German law on registered life partnerships provides that life partners have duties towards each other to support and care for one another and to contribute adequately to the common needs of the partnership by their work and from their property, as is the case between spouses during their life together. Since the same obligations are incumbent on both registered life partners and married spouses, the two situations can be treated as comparable.

In relation to the criterion of less favourable treatment on the grounds of sexual orientation, the Court just indicated that Mr Römer's supplementary

[36] Case C-147/08, *Römer v. Freie und Hansestadt Hamburg*, judgment of 10 May 2011, not yet published.

[37] Advocate General Niilo Jääskinen in Case C- 147/08, point 76.

[38] Case C-147/08, *Römer v. Freie und Hansestadt Hamburg*, judgment of 10 May 2011, not yet published, § 72.

retirement pension would have been increased, under the Law of the Land of Hamburg if he had married instead of entering into a registered life partnership with a man. It also noticed that during his working life, the contributions payable by Mr Römer in relation to the benefit at issue in the main proceedings were not in any way based on his marital status, since he was required to contribute to the pension costs by paying a contribution equal to that of his married colleagues. Consequently the Court came to the conclusion that a supplementary retirement pension paid to a partner in a civil partnership, which is lower than that granted in a marriage, may constitute direct discrimination on grounds of sexual orientation if the partnership is reserved to persons of the same gender and if under national law the life partner is in a legal and factual situation comparable to that of a married person as regards that pension. The ECJ left the national court the task of assessing the comparability, but gave it some instructions – it should focus on the respective rights and obligations of spouses and persons in a registered life partnership, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.

It seems that the Court did not dispel all interpretation doubts raised in the preliminary questions. The referring court also asked if a directly discriminatory legislative provision can be justified by the aim which is a component of the national legal order of the Member State, but not of European Union law. Moreover, it wanted to know what legal criterion should be applied in order to determine in cases of indirect discrimination how to weigh up the principle of equal treatment under European law and that other legal aim of the Member State's national legal order. In other words the referring court looked for some instructions how to apply the objective justification test within the concept of indirect discrimination. It is a pity that the ECJ missed the opportunity to deal with these important questions in particular that not all Member States provide for the registered partnership in their legal orders. In fact, the presented judgment's results are restricted only to those states which predict this form of partnership.

However, some important instructions are given by the Advocate General Niilo Jääskinen in his opinion. He stated that if the registered partnership is similar to marriage (comparability of rights and duties) and some benefits for same-sex couples which are at the same time available to heterosexual marriage are excluded there is a direct discrimination. If however, registered partnership is not comparable to marriage there is at least indirect discrimination if first, the same-sex partner is put at a particular disadvantage compared to a married one and second, the provision at issue cannot be objectively justified by a legitimate aim and the means of achieving that aim are not appropriate and necessary. The referring court should assess whether these conditions are met but the Advocate

General stated directly that even if it is accepted that the protection of marriage and family constitutes a legitimate aim, the undertaken measures seems to be disproportionate as there are other ways of protection of marriage and family. Moreover, he underlined that direct discrimination cannot be justified as its definition in the Directive does not refer to objective justification.

The last issue dealt with by the Court in the presented judgment was connected with the temporal effects of the Directive 2000/78. The ECJ observed that the applicant in the main proceedings would not be entitled to equal treatment under the Directive before the expiry of the period allowed to Member States to transpose it. Referring to the earlier period (that is between the registration of the life partnership of the applicant and the expiry of the period for transposition of Directive 2000/78), the Court first underlined that this act does not itself lay down the principle of equal treatment in the field of employment and occupation, but has the sole purpose of laying down a general framework for combating discrimination on various grounds, including sexual orientation. Next, it referred to the principle of non-discrimination on the grounds of sexual orientation in the European Union law but did not consider the issue more broadly (this was done by the Advocate General in his opinion).

The ECJ stated, however, that in order to apply such a principle to a particular case, it must fall within the scope of European Union law. In its opinion neither Article 13 of the Treaty establishing European Community nor Directive 2000/78 enables a situation such as that at issue in the main proceedings to be brought within the scope of European Union law in respect of the period prior to the time-limit for transposing that directive. Therefore, the right to equal treatment could be claimed by an individual at the earliest after the expiry of this time-limit, namely from 3 December 2003, and it would not be necessary to wait for that provision to be made consistent with European Union law by the national legislature.

The recognition of the principle of non-discrimination on the grounds of sexual orientation could be an important step towards the proper protection of homosexual rights at the European Union level. The Advocate General underlined in his opinion that the criteria of discrimination should be treated in the same way and since the Court acknowledged the existence of the principle of non-discrimination on grounds of age the same conclusion should be drawn in relation to sexual orientation.[39] As a general principle it can be applicable to

[39] It seems, however, that the prohibition of discrimination on grounds of sexual orientation is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment. In that context see the Case C- 555/07, *Seda Kücükdeveci v. Swedex GmbH & Co. KG*, [2010] ECR I-365, paragraph 50 which concerned discrimination on grounds of age.

any field which falls within the scope of the EU law. Moreover, the national organs have to ensure its effectiveness which means that 'the national court, faced with a national provision falling within the scope of European Union law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision.'[40] However, the Court took a more cautious approach and did not decide to recognize directly the general principle of non-discrimination on the grounds of sexual orientation.

6. THE EVALUATION OF THE COURT'S APPROACH TO SEXUAL ORIENTATION DISCIRMINATION

When one compares the Court's position on discrimination against same-sex couples adopted in the *Grant* case with the view expressed in the *Römer* case, the latter seems to be a revolution. However, in the period between these judgments two important events occurred. First, the Treaty of Amsterdam came into force on 1 May 1999 and second, the Member States decided to adopt the Directive 2000/78. Thus, it can be said that the legislature met the Court's expectations - it adopted the measures necessary to eliminate sexual orientation discrimination.

Therefore, some commentators underline, that although in the *Grant* case the Court opted for the restrictive approach which contrasted, for example, with its case-law on discrimination based on the sex change, the effects of this judgment could prove to be ultimately beneficial for homosexuals. Why? Since the Member States confronted with such an approach decided to undertake specific measures on combating discrimination on the grounds of sexual orientation.[41] They could not simply ignore the fact that some of the European Union citizens were deprived of the protection given by the EU law e.g. in the frames of the free movement of workers or the principle of equal pay for equal work. In his opinion in the *Maruko* case the Advocate General Ruiz-Jarabo Colomer rightly underlined that 'the principle of equal treatment has evolved over time, extending beyond the boundaries of equal pay for men and women to apply to other fields and other individuals, as Directive 2000/43 demonstrates. … Moral prejudices and the social exclusion of groups with certain sexual identities have been overcome along the way. Although the struggle began in order to combat discrimination against women, subsequent efforts have been directed towards discrimination

[40] *Id*. § 53. This conclusion can be applied by analogy in relation to the principle of non-discrimination on grounds of sexual orientation.

[41] See e.g. M. Bell, *supra* note 1, p. 110. The author underlines that Grant encouraged the Union to address sexual orientation issues in an overt and direct fashion that may prove to be ultimately more beneficial than covert inclusion in the gender equality legal framework.

affecting homosexuals – including the first step towards decriminalizing same-sex relationships – or transsexuals, as well as discrimination against bisexuals'.[42]

As it was mentioned above the most visible sign of the change of the European Union approach to homosexual rights was the inclusion by the Treaty of Amsterdam in the Treaty establishing the European Community of a new Article 13 which provided for combating discrimination based on sexual orientation. The next step was undertaken in 2000 when the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation was adopted. It prohibits not only direct but also indirect discrimination, harassment and instructions to discriminate linked to sexuality. However, its scope is confined to the sphere of employment *inter alia* recruitment, promotion, vocational training, working conditions, dismissals and membership of and involvement in an organization of workers or employers, including the benefits provided for by such organizations. It is especially relevant to homosexuals that the Directive applies to wages and other forms of remuneration.[43]

Two cases which came before the Court of Justice concerned the interpretation of the concepts of pay and discrimination as regulated by the Directive 2000/78. As regards the former the Court confirmed that the broad definition adopted in its case-law on sex discrimination applies in cases concerning homosexuals. The latter question was not dealt with details but the ECJ decided for a substantive rather than formal approach when it stated that in both *Maruko* and *Römer* cases there was a direct sexual orientation discrimination contrary to Directive 2000/78.

On the whole it should be noticed that since the adoption of this act the Court's case-law on sexual orientation discrimination has changed a lot. However, it does not have a revolutionary character but rather has been evolving in a steady way. The Directive 2000/78/EC seems to be a foundation stone upon which further levels of homosexual protection can be built both in the case-law and legal acts of the European Union. The problem is that next steps which should be undertaken in this field, in particular the protection of the life of same-sex couples, enters into the sphere of the Member States competence to regulate marital and family status. Thus, the EU's lack of direct competence in matters of family law makes the further evolution of equality for same-sex couples and homoparental families a difficult undertaking.[44] The ECJ in not in an easy

[42] Advocate General Ruiz-Jarabo Colomer in Case C-267/06, [2008] ECR I-1757, points 83-84.

[43] M. Bell, Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union, in *Legal Recognition of Same-Sex Partnership, A Study of National, European and International Law,* (eds) R. Wintemute and M. Andenæs, Oxford, p. 656.

[44] D. Borillo (2009), Discrimination Based on Sexual Orientation, Available at http://www.era-comm.eu/oldoku/Adiskri/08_Sexual_orientation/2009_Borrillo_EN.pdf. (Accessed: 10 October 2012)

situation – on the one hand, it has to be careful not to offend the sensitivities of Member States in this area and on the other it cannot ignore the fact that the disparities between national legislation concerning marriage and different forms of registered partnership undermine the free movement of homosexual citizens and their families. This difficult position should be taken into account when the Court is criticized for not being sufficiently active in the area of combating sexual orientation discrimination.

7. CONCLUSION

The provisions of the Treaty of Amsterdam and the adoption of the Directive 2000/78 establishing a general framework for equal treatment in employment and occupation confirm that the European Union is engaged in constructing a legal domain of protection against sexual orientation discrimination. Similar conclusion can be drawn from Article 21 of the Charter of Fundamental Rights of the European Union which provides for the prohibition of discrimination based on different criteria such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age and last but not least sexual orientation.

However, in the present state of the European Union law this protection is restricted to the sphere of employment. All the cases presented in the article concerned benefits or pensions paid to the worker by reason of the employment relationship. This is certainly not the only sphere where the sexual orientation discrimination may occur. Therefore, the European Commission prepared a proposal for a Council directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation which is to apply in relation to social protection (including social security and healthcare), social advantages, education and access to and supply of goods and other services which are available to the public, including housing.[45] However, its Article 3 (2) clearly predicts that 'this Directive is without prejudice to national laws on marital or family status and reproductive rights' which means that it does not require any Member State to amend its present laws and practices in relation to these issues. So it will remain for Member States alone to take decisions on questions such as whether to recognize or not the same-sex marriages.

[45] See Article 3 (1) of the proposal, COM(2008) 426 final. The proposed directive has been examined in the Council for more than three years and still certain questions needs further discussion e. g. the division of competences, the overall scope and subsidiarity or the disability provisions, including accessibility and reasonable accommodation for persons with disabilities.

This is a consequence of the lack of the EU's competence in the area of family law. Therefore, one of the possible scenario is that lives of homosexual citizens in the EU can be split down the middle, with protection granted them as employees (and possibly in the near future as consumers or users of public administration), but refused to them as members of a couple.[46] Undoubtedly, these issues will come back before the Court of Justice not only in relation with the interpretation of the regulations of the Directive 2000/78 but also those included in other European Union acts which refer to such concepts as: spouse, marriage, registered partnership or sexual orientation.[47]

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[46] Borillo, *supra* note 44, at 4.

[47] See e.g. Article 10 (1) (d) of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004, L 304/12) which refers to 'a group based on a common characteristic of sexual orientation'. Several questions concerning this provision were asked by the German court in the Case C-563/10, *Kashayar Khavand v Federal Republic of Germany.* However, later the reference was withdrawn and consequently the President of the Court ordered the removal of the case from the register.

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INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS, "SOFT LAW" AND PROTECTION OF ENVIRONMENT

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Abstract

The article deals with the role the international non-governmental organizations play in the process of law-making in the field of international protection of environment and contemporary international environmental law. Starting from the definition of INGOs, the authors analyze their law-making capacity in contemporary international law through the so-called phases of imagination, standard-setting and implementation. As in some other fields of international law today, the INGOs participate in the creation of international environmental law mostly through their influence on the negotiation process at the international conferences, but also through the creation of so-called "soft law" instruments introducing some general principles which, although not legally binding, may influence the states' behavior. Such influence, however, does not exclude the possibility of transformation of such principles and rules contained in these "soft law" instruments into customary law creating the legal obligations for states.

Keywords: *international non-governmental organizations (INGOs), "soft law", protection of environment*

1. INTRODUCTION

Although discussions about the nature of international law and its distinctiveness from other fields of law are somehow inherent in international law, the last few decades have showed the increasing interest of scholars and practitioners for particular phenomenon of "soft law" in international law. It seems that the proliferation of theories on "soft law" is closely related to the concept of "relative normativity", fully inaugurated in international legal discourse with the famous article of Prosper Weil.[1] The reasons for the emergence of discourse on "relative normativity" in international law are complex. Due to its specific, horizontal structure as opposed to the hierarchical structure of municipal legal systems, the legal nature of international law has often come into question. On the other hand, the ubiquitous process of globalization followed by rapid social and economic changes that have started some thirty years ago have contributed to the proliferation of legal and political documents created by various actors on global law-making stage.[2] These texts are most commonly referred to as "soft law", opposed to the "hard law" (i.e. non-questioned "real law").[3] From its emergence in international legal discourse, the only certainty about "soft law" is an "infinite variety" of its meanings and concepts, as well as of its role and functions, in the attitudes of its advocates and opponents.[4]

Some of these new actors, whose role in international legal arena seems ascending more and more, are international non-governmental organizations (INGOs). Though it seems that the expansion of "soft law" can be found in all international law fields, in some of them, as it is in international environmental law, "soft law" is more evident. As at the same time INGOs play very significant role in development of international environmental law, this paper will analyze the influence that certain INGOs have in the law-making process in the field of international environmental law, mostly through a prism of "soft law".

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[1] P. Weil, Towards Relative Normativity in International Law, *American Journal of International Law,* Vol. 77, Issue 3, 1983, pp. 413 – 442. On relative normativity see also: I. Duplessis, Le vertige et la soft law: Réactions doctrinales en droit international, Les Etudes en hommage à la Professeure Katia Boustany, *Revue Québecoise de Droit International*, Vol. Hors-série, 2007, pp. 245-268.

[2] The increased influence of new actors in international law-making process has been anticipated in an almost prophetic way by W.G. Friedmann. Among five main tendencies which characterize the development of international law, he included the widening of the scope of international law and inclusion of new actors. See: W.G. Friedman, *The Changing Structure of International Law,* New York, Columbia University Press, 1963, pp. 70-74 and pp. 369-371.

[3] The father of the term "soft law" was Lord McNair, although he was using it in a different manner than it is used today. See: A. D. McNair, *The Law of Treaties*, Oxford, Clarendon, 1961.

[4] The term "infinite variety" has been used in the well-known article of R. Baxter, International Law in Her Infinite Variety, *International and Comparative Law Quarterly*, Vol. 29, Issue 4, 1980, pp. 549-566.

2. THE NOTION OF INGOS

There are numerous definitions of INGOs in international law doctrine since international lawyers are not unanimous in understanding of their constitutive elements. Some authors sort out only one element of INGOs – their non-governmental character. Thus, Rodley defines an NGO as "any group of individuals who have come together voluntarily to work for a particular objective, other than by means of governmental action."[5] Private, non-governmental element of INGOs is also stressed by Charlotte Ku who defines them as "voluntary organizations of individuals".[6] Some authors require that such organizations "are not established by a government or by intergovernmental agreement".[7] Similar provision can be found in the UN ECOSOC Resolution 288B(X) granting the consultative status to some INGOs with the ECOSOC,[8] while the later ECOSOC Resolutions on the same topic have broadened the understanding of non-governmental character of the organizations. These Resolutions consider as non-governmental even the organizations "which accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization."[9]

Actually, the above mentioned definitions of INGOs point out two different understandings of their non-governmental character: the non-governmental structure of an organization and the functioning of an organization independently of the governmental sector. In our view, a non-governmental character of INGOs should be accepted as a basic element in their definition, but understood in both its aspects. Consequently, even the organization that accepts both categories of members (private, as well as those designated by governmental authorities)

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[5] N.S. Rodley, Human Rights NGOs: Rights and Obligations (Present Status and Perspectives), in: Th.C. van Boven, C. Flinterman, F. Grünfeld, R. Hut (eds.), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors*, Utrecht, Netherlands Institute of Human Rights, 1997, p. 44. Similarly, Hart and Thetaz-Bergman determine the entire non-governmental sector in that way: "The nongovernmental sector is best defined by exclusion; it includes all those persons, individually and collectively, who are not formally within the government." S.N. Hart, L. Thetaz-Bergman, The Role of Nongovernmental Organizations in Implementing the Convention on the Rights of Child, *Transnational Law and Contemporary Problems*, Vol. 6, No. 2, 1996, p. 376.

[6] Ch. Ku, The Developing Role of Non-governmental Organizations in Global Policy and Law Making, *Chinese Yearbook of International Law and Affairs*, Vol. 13, 1994-95, p. 142.

[7] H.H.-K. Rechenberg, Non-governmental Organizations, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3, Amsterdam, Lausanne, New York, Oxford, Shannon, Singapore, Tokyo, Elsevier, 1997, p. 612.

[8] "Any international organization which is not established by inter-governmental agreement shall be considered as a non-governmental organization (…)" UN Doc. ECOSOC Res. 288B(X), of 27 February 1950, Part I, para. 8. Cf. also: L.C. White, *International Non-Governmental Organizations*, New Brunswick, Rutgers University Press, 1951, p. 3.

[9] See: UN Doc. ECOSOC Res. 1296(XLIV), of 23 May 1968, Part I, para. 7; UN Doc. ECOSOC Res. 1996/31, of 25 July 1996, Part I, para. 12.

should be considered non-governmental as long as all these members have equal rights and influence upon the work of the organization.

At the same time, there are many authors who, apart from the non-governmental character of these organizations, emphasize their international character as well. However, although it may seem that there is a consensus in international law concerning this element, sometimes it is also understood in two different ways. Some authors require that an organization to be *international*, should gather its members from two or more countries.[10] Similarly, Willettes determines an INGO as an "organized group of individuals or organisations from more than one country."[11] Sometimes, such requirements go even further recognizing a non-governmental organization as international if it gathers members from three[12] or six countries,[13] or even from different continents.[14]

By contrast, some other definitions of INGOs do not require the international character of the structure of organization, but international character of its aims and activities. Such a definition of INGOs as "international associations" has been proposed by the *Institut de Droit International* in 1950: "*Les associations internationales (…) sont des groupements de personnes ou de collectivités (…) qui exercent (…) une activité internationale d'intérêt général, en dehors de toute préoccupation d'ordre exclusivement national.*"[15]

Besides, we can find a cumulative approach as well, which puts together both, the requirement for the international structure of organization, and for the international character of its aims and work.[16] However, it seems to us that the international character of the structure of organization necessarily determines the international character of its aims and activities. Thus, the mere fact that an organization gathers in its membership individuals and/or associations from

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[10] See e.g.: White, *op. cit.*, (note 8), p. 7. Thus, for example, Cavaré states: *"Les Membres de ces groupements sont des categories d'individus ressortissants aux différents Etats."* L. Cavaré, *Le droit international public positif*, Vol. 1, Paris, Éditions A. Pedone, 1951, pp. 488-489. Cf. R. Jennings, A. Watts (eds.), *Oppenheim's International Law*, Vol. 1, London, Longman, 1995, p. 21.

[11] P. Willetts, (ed.), *"The Conscience of the World" The Influence of Non-Governmental Organizations in the UN System*, Washington D.C., The Brookings Institution, 1996, p. 5.

[12] See: N. Sybesma-Knol, Non-State Actors in International Organizations: An Attempt at Classification, in: Boven et al.(eds.), op. cit., (note 5), p. 29.

[13] See: Draft Convention aiming at facilitating the work of international non-governmental organizations, submitted to UNESCO by the Union of International Associations (UIA); for the text see in: Union of International Associations (ed.), *International Association Statutes Series*, Vol. 1, München, New York, London, Paris, K.G. Saur, 1988, Appendix 4.10.

[14] See: B. Stošić, *Les organisations non gouvernementales et les Nations Unies*, Genève, Librairie Droz, 1964, p. 77.

[15] *Annuaire de l'Institut de Droit International*, Vol. XLIII, Bath, 1950-II, p. 384.

[16] Such an approach is proposed in the Draft Convention aiming at facilitating the work of international non-governmental organizations, *supra*, (note 13).

various states can be a guarantee of the international character of its aims and activities which overpass the states' borders.

Finally, probably the most disputable element in defining INGOs is their non-profit-making character. Thus, for example, Lador-Lederer defines them as non-profit-making organizations.[17] The requirement for the non-profit-making character of INGOs is emphasized by Willetts,[18] and Stošić as well,[19] but it can also be found in the above mentioned Resolution of the *Institut de Droit International*,[20] in the European Convention on the Recognition of the Legal Personality of International Non-governmental Organizations of 1986,[21] as well as in the UIA Draft Convention aiming at facilitating the work of international non-governmental organizations.[22]

However, there are some other opinions. Thus, Rechenberg makes difference between two kinds of non-governmental organizations: "those with non-profit, i.e. idealistic objectives, and those with economic aims. (…) NGOs with economic aims include mainly so-called multinational or transnational corporations."[23]

Anyhow, it seems to us that the distinction between profit-making and non-profit-making organizations exceeds the question of their field of activities. Actually, such an element is the main criterion to distinguish multinational corporations, companies and other subjects of international trade law from public international law and its subjects (or at least from other participants in international relations regulated by norms of public international law).

After having exposed the above definitions we can determine the notion of INGOs, at least for the purpose of this paper: INGOs are organizations that are international in their membership, non-governmental in their activities and non-profit-making in their objectives.

3. DEFINITION AND CLASSIFICATIONS OF "SOFT LAW"

When the "soft law" phenomenon is in question, the problem appears already in the beginning – with the definition of the term itself. If we try to approach

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[17] See: J.J. Lador-Lederer, *International Non-governmental Organizations and Economic Entities*, A.W. Sythoff, 1963, p. 60.

[18] See: Willetts (ed.), *op. cit.*, (note 11), p. 5.

[19] See: Stošić, *op. cit.*, (note 14), pp. 77 et 311.

[20] "*Les associations internationales (…) sont des groupements de personnes ou de collectivités, librement crées (…) qui exercent, sans esprit de lucre, une activité internationale (…).* " *Supra*, (note 15), p. 384.

[21] For the text of the Convention see: Council of Europe, *Explanatory report on the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations*, Strasbourg, 1986, pp. 13-17. For the text of the Convention see ETS, no. 124.

[22] See: *supra*, (note 13).

[23] Rechenberg, *op. cit.*, (note 7), p. 276.

to the "soft law" in the widest term, one possibility will be to accept Thürer's positioning of "soft law": "Social norms of varying character and relevance influence the behavior and decisions of actors participating in international relations. As far as their binding quality is concerned, such social norms range from purely moral or political commitments to strictly legal ones."[24] Shelton's understanding of "soft law" is similar to such reasoning as she finds out that there are different combinations in the continuum from "non-law" to "hard law".[25] Francioni's "working definition" determines "soft law" as those international norms, principles and procedures, which are outside the system of formal sources of international law of Art. 38. para. 1 of the Statute of the International Court of Justice or which lack requested normative content for creation of enforceable rights and obligations, but which are on the other side capable of producing certain legal effects.[26] Other authors also give more or less similar definitions of "soft law", while relying on different aspects of "softness" and it's relation to the "hard law".[27] It seems that most of authors see "soft law" floating somewhere in a limbo between "non-law" and "hard law".

Of course, the attitude of certain authors toward "soft law" depends also on their affiliation to a particular school in the doctrine. Thus, the binary distinction of "soft" and "hard law" as two clearly distinct concepts of "non-law" and "real law" is self-evident for the positivist approach. Rationalist theory relies on belief that states act rationally, so they will choose "soft" or "hard law" mechanism depending on their particular reasoning at some point. The youngest "big" theory on the nature of "soft law" is constructivist theory which emphasizes the complex socialization and inter-state processes on one hand, while on the other,

[24] D. Thürer, *Max Planck Encyclopedia of Public International Law*, http://www.mpepil.com/, visited on 29 November 2011.

[25] D. Shelton, Introduction: Law, Non-Law and the Problem of Soft Law, in: D. Shelton, (ed.), *Commitment and Compliance: The Role of non-binding norms in international legal system,* Oxford, Oxford University Press, 2000, pp. 3-4.

[26] See: F. Francioni, International "Soft Law": Contemporary Assessment, in: Lowe, V., Jennings, R.Y.(eds.), *Fifty Years of International Court of Justice,* Cambridge, Cambridge University Press, 1996, p. 167.

[27] A. Aust understands "soft law" as "international instruments which their creators do not recognize as treaties, even if they do not use interpretative expressions as "shell", and whose purpose is promulgation of norms of general or universal meaning", see in: T. Mensah, Soft Law A Fresh Look at an Old Mechanism, *Environmental Policy and Law*", Vol. 38, No. 1-2, 2008, p. 50. C. Crawford Lichenstein considers that "soft law is instead a norm expressed by the international community to which it is hoped, at least by the group of states articulating the "norm," that states will adhere, but to which there is no obligation of adherence." C. Crawford Lichenstein, Hard v. Soft Law, Unnecessary Dichotomy, *International Lawyer*, Vol. 35, No. 4, 2001, p. 1434.

this theory accepts the considerable role of different state and non-state actors in the international law-making process.[28]

There is no doubt that the reasons why states sometimes choose "soft law" as the outcome of international negotiations and conferences are multiple. Sometimes it is simply easier for a state to agree on a "soft law" norm where there is no clear determination for the acceptance of the *legal* commitments. In addition, "soft law" norms are more acceptable, and sometimes even the only feasible solution when, due to the contrasting interests of states, the compromise as the lowest common denominator is needed. This being so, a "soft law" solution could be the only possibility available. Although the concept, legal nature, effectiveness and position of "soft law" in international legal system remains at least controversial, it can hardly be denied that it deserves attention, as well as INGOs, which play significant role in the creation and promotion of "soft law" instruments in contemporary international relations and consequently in international law.

4. INGOS AND LAW-MAKING CAPACITY IN INTERNATIONAL LAW

The participation of INGOs in creation of environmental law can be analyzed through the same three phases of the international law-making process in general in which these organizations participate in creation of legal norms in other branches of international law. Thus, despite their strong connection, it is possible to sort out:

a) the phase of imagination;

b) the phase of standard-setting; and

c) the phase of implementation.[29]

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[28] More on different theories, in particular on critical constructivism see in: G.C. Schaffer, M.A. Pollack, Hard v. Soft Law: Alternatives, complements and antagonists in international governance, *Minnesota Law Review*, Vol. 94, 2010, pp. 706-799. On different international relations theories and "soft law" see: A. Guzman, T.L. Meyer, Explaining Soft Law, Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers, 2010.; accessible on: http://escholarship.org/uc/item/90w080tp; visited on 3 November 2011. On the neopositivist approach see: J. d'Aspremont, Softness in International Law: A Self Serving Quest for New Legal Materials, *European Journal for International Law*, Vol. 19, No. 5, 2008, pp. 1075-1093; A. d'Amato, Softness in International Law: A Self Serving Quest for New Legal Materials A Replay to J. d'Aspremont, *European Journal for International Law*, Vol. 20, No. 3, 2009, pp. 897-910; J. d'Aspremont, Softness in International Law: A Self Serving Quest for New Legal Materials: A Rejoinder to Tony d'Amato, *European Journal for International Law*, Vol. 20, No. 3. 2009, pp. 911-917.

[29] Cf. A. Cassese, How Could Nongovernmental Organizations Use U.N. Bodies More Effectively?, *Universal Human Rights*, Vol. 1, No. 4, 1979, p. 76; D. Lapaš, International Non-Governmental Organizations and the Protection of the Environment, *Thesaurus Acroasium*, Vol. XXXI, 2002, p. 670.

Ad a) Acting in the phase of imagination, INGOs appear as an organized means of public participation in international decision-making. Their activities here can be described as some kind of pre-legal initiative: they point out at the necessity of the international legal regulation of certain issues, usually offering in the same time some general ideas for such a regulation. In this phase INGOs use a combination of campaigns, from educational activities, publication of results of scientific research, propaganda, up to lobbying and other extralegal means in order to influence public opinion, as well as the international legislation.

Ad b) In the phase of standard-setting we usually find the active legal participation of INGOs in the international legislative process. Generally, such a participation may be initiated whether by INGOs themselves, or upon the invitation of states, or more often by intergovernmental organizations. Thus, INGOs usually organize so-called NGO forums, i.e. unofficial NGO conferences organized, if possible, along-side the official diplomatic conferences, in order to make possible for diplomats to here INGOs' proposals.[30] On the other hand, when the initiative comes from intergovernmental organizations, INGOs are allowed to participate at the conference, and usually they are invited to officially submit their statements and proposals.

Ad c) The phase of implementation is the last, but very important stage in the international law-making process. If it fails, all the achievements of previous phases will be nothing more but a "dead letter". The role of INGOs in this phase of law-making process in some international law branches like environmental law, as well as in human rights law, includes INGOs visits to different areas, taking samples and photographs, and other fact-finding activities in order to control the implementation of the standards adopted in the previous phase.[31]

4.1. INGOs and International Environmental Law

Among new actors who have appeared on international law-making stage, INGOs started to play significant role in international environmental law almost from its beginning. What is more, it would be possible to follow the history of international environmental law through the activities of some most influential INGOs. However, the turning point happened in the beginning of 1970-ies, i.e. in the moment when INGOs started to play more visible role in environmental matters on global stage.[32] In 1972 the United Nations Conference

[30] Cf. Lapaš, *op. cit.,* (note 29), p. 671.

[31] *Ibid.*, pp. 674-675.

[32] The above mentioned activities of environmental INGOs can be traced back to the beginning of the 20th century, with creation of International Association of Academics in 1899 and International Research Council in 1919. Based on the activities of these two organizations, International Council of Scientific Unions (ICSU) was established in 1931, today known as International Council of Science. See: http://www.icsu.org/about-icsu/about-us/a-brief-history; visited on 3 November

on the Human Environment (Stockholm Conference), which resulted with the Stockholm Declaration, took place. Also, in the same time the United Nations Environmental Programme (UNEP) was established.[33] Some of today's most influential environmental INGOs as Greenpeace,[34] World Watch Institute (WWI),[35] World Wide Fund for Nature (WWF),[36] Friends of the Earth,[37] International Institute for Environment and Development (IIED),[38] etc. started their activities in that time. During that period INGOs began to organize the INGOs conferences usually taking place along-side the official, governmental environmental conferences.[39] The following decades witnessed the proliferation of global environmental concerns in many fields: creation of treaties, conferences, increasing interest of the media and NGOs activities. One of the best known soft-law instruments from that period is the Report of the World Commission on Environment and Development (WCED)[40] of 1987: "Our Common Future" (Brundtland Report).[41] It is interesting to compare the number of 400 NGOs that were attending the Stockholm Conference in 1972 to some 10000 NGOs participating at the UN Conference on Environment and Development (Rio Conference) in 1992,[42] when many of them have already been organized within large NGOs networks.[43]

Rio Conference resulted with the famous Rio Declaration and Agenda 21. While the first document elaborates further the principles confirmed at the

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2011. This organization is an example of so-called QUANGO (Quasi non-governmental organization) as representatives of governments, governmental agencies but also other INGOs participate in its membership. Also, International Union for Conservation of Nature (IUCN), which in 1956 changed its name from International Union for the Protection of Nature, belongs to the same type of organization. See: http://www.iucn.org/; visited on 3 November 2011. For a historical overview of the environmental INGOs see: D. Lapaš, *Međunarodne nevladine organizacije kao subjekti međunarodnog prava*, Zagreb, Pravni fakultet u Zagrebu, 1999, pp. 66-71.

33 UNEP was created by UN General Assembly Resolution A/RES/2997 on 15 December 1972.

34 http://www.greenpeace.org/international/en/about/history , visited on 3 November 2011.

35 http://www.worldwatch.org/mission, visited on 3 November 2011.

36 http://wwf.panda.org; visited on 3 November 2011.

37 http://www.foei.org; visited on 3 November 2011.

38 http://www.iied.org/; visited on 3 November 2011.

39 Periodically, and especially in the beginning of 1990-ies, this trend turned to organizing of counter-summits which clearly oppose the official, governmental summits. See: F. Yamin, NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities, *Review of European Community and International Environmental Law*, Vol. 10, No. 2, 2001, pp. 150-152.

40 UN General Assembly Resolution A/RES/38/161 of 19 December 1983.

41 Gro Harlem Brundtland was the Chairman of the Commission.

42 *Ibid.*

43 *Ibid.* As the examples of such networks Yamin mentions the Climate Action Network (CAN), Pesticide Action Network (PAN), Regional Environmental Centre for Central and Eastern Europe (REC), Global Legislators for a Balanced Environment (GLOBE); see: Yamin, *op. cit.*, (note 39), p. 152.

Stockholm Conference, the second one presents an action program for the creation and implementation of sustainable development, the term clearly defined in Brundtland Report and enormously used and discussed by different actors on international stage in the following years.[44] Another result of the Rio Conference is the UN Framework Convention on Climate Change (UNFCCC).[45] Some authors see the period of 1980-ies and 1990-ies as an era of populist approach to the environmental problems but in the same time they remark a significant progress in certain environmental fields.[46] The activities of environmental INGOs continue in the beginning of 2000s, although in different atmosphere and circumstances comparing to those which prevailed at the time of Rio Summit.[47] Anyway, some of the environmental INGOs today enjoy very broad public support and significant financial resources. In 2010 Greenpeace raised over 226 million EUR and had more than 2.8 million donators.[48] The income of the WWF was 525 million EUR,[49] and Friends of the Earth gathered more than 2 million members and supporters.[50] These numbers are important by themselves but if we compare them to the same categories in 2000, very significant increase will be visible in all of them.[51] This being so, one can conclude that some important

[44] For an overview on the meaning and concept of sustainable development see: S. Palassis, Beyond the Global Summits: Reflecting on the Environmental Principles of Sustainable Development, *Colorado Journal of International Environmental Law and Policy,* Vol. 22, No. 1, 2011, pp. 41-77.

[45] http://unfccc.int/essential_background/items/6031.php; visited on 4 November 2011. The Convention entered into force in 1994. The subsequent Kyoto Protocol was adopted in 1997 and entered into force in 2005. See: http://unfccc.int/essential_background/kyoto_protocol/items/6034.php; visited on 4 November 2011.

[46] Thus, Palassis has remarked following achievements in that period: "1) the significant reduction of vessel-source environmental pollution; 2) the international regulation of the trade in hazardous waste; and 3) the successful avoidance of the narrowly-averted disaster of irreversible ozone depletion." Also, the same author mentions the "greening of the European Union (EU) treaty-system" as an environmental success of the time. See: Palassis, op.cit., (note 44), p. 46.

[47] The Rio Conference was held in the time of significant changes such as the end of the Cold War, expansion of communication technologies and rapid globalization. In general, the optimism has prevailed that the environmental problems are solvable. The period after 2000 was characterized by a limited progress in major environmental problems, increased terrorist activities and global dissemination of economic and financial instability. As a result, general atmosphere for solving global environmental problems now seems more pessimistic than it was at the time of Rio Conference.

[48] http://www.greenpeace.org/international/Global/international/publications/greenpeace/2011/GPI_Annual_Report_2010.pdf; visited on 6 November 2011.

[49] The data is from WWF Annual Review 2010 accessible on: http://wwf.panda.org/; visited on 6 November 2011.

[50] http://www.foei.org/en/who-we-are; visited on 6 November 2011.

[51] F. Yamin quoted the following data for the year 2000: The World Wide Fund for Nature had around 5 million supporters and income of around SFr 470 million; Greenpeace International had more than 2.5 million members in 158 countries with an annual budget in the region of 30 million USD and Friends of the Earth had over 1 million members in 58 countries. See: Yamin, op. cit., (note 39), p. 151.

conditions for increasing participation of INGOs in environmental field have been improved, as well as the support of the public for their work.

4.2. Pluralism of Environmental INGOs

When speaking about environmental INGOs one should bear in mind that numerous differences among them exist and various methods of classification can be applied.[52] For the purpose of this paper, we will try to distinguish three main groups of INGOs:[53]

1) activist INGOs

2) scientific INGOs

3) business INGOs.

First group of INGOs relates to those organizations whose activities and programs are recognized world-wide and whose actions are organized in accordance to clearly expressed goals about particular environmental problems. Some examples of the biggest INGOs belonging to this group are previously mentioned Greenpeace, WWF and Friends of the Earth, whose range of activities, budget and influence can easily stand comparison with some of intergovernmental organizations and programs.[54] Second group of "scientific INGOs" consists of research-based INGOs, whose activities and scientific research provide very significant contribution to the environmental regimes and different fields of environmental sciences. The WWF, IIED, Union of Concerned Scientists,[55] World Resources Institute,[56] Institute for European Environmental Policy,[57] Foundation for International Environmental Law and Development (FIELD),[58] are some of the best known INGOs in this group. Thus, some authors refer to these organizations as "epistemic communities"[59] describing them as "conscience

[52] See: Lapaš, *op. cit.*, (note 32), pp. 68-69.

[53] However, we are fully aware that in practice some INGOs could belong to more than one of these categories, as the activities of many of them often include some distinctive features of another group.

[54] Cf. http://www.unep.org/rms/en/Financing_of_UNEP/index.asp; visited on 7 November 2011.

[55] http://www.ucsusa.org/about/; visited on 7 November 2011.

[56] http://www.wri.org/; visited on 7 November 2011.

[57] http://www.ieep.eu/about-us/about-ieep/; visited on 7 November 2011.

[58] http://www.field.org.uk/; visited on 7 November 2011.

[59] One of the explanations of this term is offered by P.M. Haas: "An epistemic community is a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue-area. Although an epistemic community may consist of professionals from a variety of disciplines and backgrounds, they have (1) a shared set of normative and principle beliefs, which provide a value based rationale for the social action of community members; 2) shared casual beliefs, which are derived from their analysis of practices leading to or contributing to a central set of problems (...); 3) shared notions of validity – that is intersubjective, internally defined criteria for weighing and validating

keepers."[60] However, the most controversial group of environmental INGOs is undoubtedly the third one – "business INGOs." The first doubt in relation to this group arises with the question whether the entities having the profit-making objectives can be regarded as NGOs at all. The attitudes toward this problem are not unanimous. If we consider strictly that non-profit character is one of the key elements of an NGO, it will be possible to exclude (theoretically) business NGOs from the NGO world. On the other hand, what seems more plausible is the position of authors who propose softer understanding of environmental non-state actors concerning their profit-making character.[61] Actually, their exclusion would be possible only in theory since the business community has always been very much involved in the process of environmental law-making, especially in some environmental fields such as the climate change.[62] The influence and diversity of this group of INGOs in the negotiations directed to the establishment and implementation of the UNFCCC have led some authors to distinguish those business INGOs representing gray industry groups whose primary concern is the impacts of the climate change treaties on economy, from those that are members of the "light green group" representing some energy-efficient industries such as the ones relied on the renewable energy resources, natural gas, cogeneration etc. [63] The example of the first group was the Global Climate Coalition (GCC) whose findings, often in clear collision with those of Intergovernmental Panel of Climate Change (IPCC), were highly controversial.[64] Equally, the World

knowledge in the domain of their expertise and 4) a common policy enterprise – that is a set of common practices associated with a set of problems to which their professional competence is directed..." P. Haas, Introduction: Epistemic Communities and International Policy Coordination, *International Organization*, Vol. 46, No. 1, 1992, p. 3. On epistemic communities, NGOs and climate changes see: C. Gough, S. Shackley, The Respectable Politics of Climate Change: The Epistemic Communities and NGOs, *International Affairs*, Vol. 77, Issue 2, 2001, pp. 329-346.

[60] Cf. Yamin, *op. cit.*, (note 39), pp. 154-155.

[61] See: A. Alkoby, Non-state Actors and the legitimacy of international environmental law, *Non-State Actors and International Law*, Vol. 3, No. 1, 2003, pp. 48-50.

[62] Different proposals were made for the improvement of the role of the business community in the climate change treaty system within the framework of UNFCCC. One of them was the establishment of the Business Consultative Mechanism between business representatives and UNFCCC system. The last proposal of this kind was submitted by the International Chamber of Commerce in 2010. See: http://unfccc.int/resource/docs/2010/smsn/ngo/200. pdf; visited on 8 November 2011.

[63] Alkoby, *op. cit.*, (note 61), p. 38.

[64] The GCC ceased its activities in 2002. See: http://www.nytimes.com/2009/04/24/science/earth/24deny.html; visited on 8 November 2011. An extreme example of how sensitive the relation between business society and NGOs can be was the latest verdict of the French court, which fined multinational energy company EDF Group for spying on Greenpeace nuclear campaign, while four persons are to be imprisoned. See: http://www.bbc.co.uk/news/science-environment-15683090; visited on 10 November 2011.

Business Council for Sustainable Development (WBCSD) can be mentioned here as well.[65]

5. VARIETY OF "SOFT LAW" IN INTERNATIONAL ENVIRONMENTAL LAW AND THE ROLE OF ENVIRONMENTAL INGOS

5.1. Relevance and Variety of "Soft Law" in International Environmental Law

If we take a brief look at the history of international protection of environment, it will be clear that not only some of the basic environmental documents were created as "soft law" instruments but also that some of the UN environmental key programs like the UNEP base their existence and activities on "soft law" grounds.[66] Thus, a number of these key global environmental documents were created as "soft law" instruments: e.g. Stockholm Declaration, Bruntdland Report, Rio Declaration and Agenda 21.[67]

Firstly, we will try to make classification of the most important reasons for application of "soft law" in this field. Some of the reasons for more extensive use of "soft law" in international environmental law pertain to the view that existing means of dealing with global environmental problems are not sufficient. If we analyzed the proposals and studies on international environmental law, which some authors proposed some twenty years ago, we could conclude that today there have not been much substantial changes in the whole system of international environmental law, except of the filling in some gaps in the existing treaties.[68] One of the most comprehensive explanations of the role of "soft law"

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[65] http://www.wbcsd.org/home.aspx; visited on 8 November 2011.

[66] The mandate and objectives of the UNEP are based on five documents which individually represent different kinds of "soft law": UN General Assembly Resolution A/RES/2997 of 15 December 1972, Agenda 21, the Nairobi Declaration on the Role and Mandate of the UNEP adopted by the UNEP Governing Council in 1997, the Malmö Ministerial Declaration, and the UN Millennium Declaration adopted in 2000. In addition, we can mention here the recommendations related to international environmental governance approved by the 2000 World Summit on Sustainable Development and the 2005 World Summit. www.unep.org/PDF/UNEPOrganizationProfile.pdf; visited on 9 November 2011.

[67] That, of course, does not exclude the possibility of transformation of some of their provisions into customary law creating the legal obligations for states.

[68] In 1991, prior to the Rio Conference, G. Palmer identified major problems related to the global environmental governance which can be generally named as institutional gap and the problem of methods by which international environmental law has been made. He considered as the institutional gap the fact that the UN lacks coherent institutional capacity to address global environmental problems. He proposed the creation of a new, permanent body "International Environmental Organization" which would have considerably higher powers than those exercised by the UNEP. In his opinion, the UNEP performed its activities in a satisfying way, but it lacks powers to address the environmental problems comprehensively. It is interesting that he considers production of many "soft law" documents under the auspices of the UNEP as insufficient way of

in international environmental law is the one offered by T. Mensah. For him, it is not deniable that "soft law" has played a very constructive role in all areas of international environmental law "including the formulation of rules and standards, in the implementation of international agreements and programs, and in enforcement of particular regulations and legal regimes."[69] In addition, he explains that states sometimes use "soft law" instead of treaties in environmental matters, because the development of a particular subject matter is not completed or there is no consensus on the content of related rules and principles.[70] In other cases, he welcomes the use of "soft law" when there is a need for adopting an instrument immediately and without delay.[71] Furthermore, Mensah agrees that "soft law" may be used as the initial phase in the process of the establishment of a new treaty regime.[72] Finally, in his view, "soft law" may be seen as a tool for promulgation of general principles and norms in cases where there is no agreement on specific standards to be used for the implementation of certain principles and norms.[73]

5.2. "Soft Law" and Environmental INGOs in the Climate Change Regime and in the Concept of Sustainable Development

Two environmental subsystems, the international climate change regime and sustainable development system, are chosen here for a short analysis of diversity of "soft law" and the role INGOs play in each of them.

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addressing the environmental problems. But on the other hand, by analyzing the inadequacy how international environmental law has been made, he criticizes especially the rule of unanimity as predominant in international conferences, as well as in treaty-making. However, such a situation has contributed to the more visible role of some INGOs and to the proliferation of "soft law" documents. See: G. Palmer, New Ways to Make International Environmental Law, American Journal of International Law, Vol. 86, Issue 2, 1992, pp. 259-283.

[69] See: Mensah, *op. cit.*, (note 27), pp. 51.

[70] *Ibid.*

[71] *Ibid.*

[72] *Ibid.* Mensah offers as an example here the proclamation of the principle of "common heritage of mankind." The principle was first embodied in the UN General Assembly Resolution 2749 of 17 December 1970. The intention in this case was to propose such a new regime to the states before it was incorporated in the UN Convention on the Law of the Sea in 1982. Of course, some other examples of such transformation deserve to be mentioned here as well, e.g. the UNEP Guidelines on Environmental Impact Assessment which were incorporated in the Convention on Environmental Impact Assessment in a Transboundary Context and the FAO International Undertaking on Plant Genetic Resources transformed into the Treaty on Plant Genetic Resources for Food and Agriculture of 2001.

[73] *Ibid.* p. 52. His further elaboration on the usefulness of "soft law" in international environmental law includes: "soft law" as articulation of the agreed standards or guidelines which states have to apply for being able to fulfill its domestic or international obligations; principles which emerged as "soft law", but represented the base for treaty instruments as principle of preventive action, precautionary principle, principle of common but differentiated responsibility, etc.

5.2.1. International Climate Change Regime

The influence of the INGOs on Climate Change Regime had already been visible during the negotiations phase, before the treaty was concluded. Some authors even claim that their informal influence and lobbying were the key factors contributing to the success of the UNFCCC.[74] This treaty is also significant as it defines in details the role of the INGOs within the treaty system. The treaty provisions describing the role of the INGOs have formalized their position in the treaty system and made them almost unavoidable partner for the states requiring for the concerned INGOs only to be "competent enough".[75] If an INGO possesses such competence, no state alone can object to its participation but it has to secure the votes of at least one third of the parties presented at the conference of the parties.[76] Such an observer status led some authors to the conclusion that INGOs and non-governmental sector in general have played the leading role in the climate change negotiation process through the identification of the problems, application of the knowledge relevant for the policy development etc.,[77] while on the other hand, these "soft entities", the representatives of NGOs at the 1992 Conference, were at the same time the main opponents to the "softness" related to the states' obligations in the UNFCCC.[78]

The influence of the INGOs raise further in conferences and documents created after the UNFCCC and the most important document related to it, i.e.

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[74] See: Alkoby, *op. cit.*, (note 61), p. 36.

[75] Art 4.1. defines the role of the NGOs in the treaty system in general terms: "All parties, taking into account their common but differentiated responsibilities and their specific national and regional priorities, objectives and circumstances shall: (...) (i) Promote and cooperate in education, training and public awareness related to the climate change and encourage the widest participation in this process, including that of non-governmental organizations (...)." Art. 7.2. mentioned the first condition for the participation of the NGOs in treaty system – their competence: "The Conference of the parties, as the supreme body of this Convention, shell keep under regular review the implementation of the Convention, and any related legal instrument that the Conference of the Parties may adopt (...). To this end, it shell: (l) seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and inter-governmental and non-governmental bodies (...)" The second criterion for the participation of NGOs in UNFCCC concerns states' consent for such participation. Art. 7.6 states as follows: "(...) Any body or the agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the Secretariat of its wish to be represented at a session of the Conference of the parties as an observer, may be so admitted, unless at least one third of the parties present object (...)."

[76] *Ibid.* On the formal participation of NGOs in similar treaties see: Alkoby, *op. cit.*, (note 61), pp. 36-38.

[77] See: R. Eckersley, Soft Law, Hard Politics and the Climate Change Treaty, in: C. Reus Smit (ed.), *Politcs of International Law,* Cambridge, Cambridge University Press, 2004, pp. 102-104.

[78] See: *Ibid*. 81-86. The author explains the role of the NGOs from the point of critical constructivism which allows a more prominent role of the NGOs in the law-making process as compared with the neoliberal and neorealist theories.

the Kyoto Protocol.[79] At the same time, the attendance of the representatives of civil society at the key environmental conferences gradually becomes more visible. Thus, some 533 INGOs attended the second official meeting of the Conference of the parties of the UNFCCC (COP) in Berlin in 1995.[80] In 2009 more than 1300 INGOs were admitted to the Copenhagen meeting including representatives from all three major groups of INGOs (activist, scientific, business INGOs) mentioned earlier in Chapter 4.2.[81] On the last COP meeting in Durban in December 2011 almost 1400 INGOs were registered as observers.[82] Other side of the coin is the fact that huge majority of the INGOs attending the Conference were Western hemisphere INGOs.[83]

On the other hand, the "soft law" continues to play very significant role in all key documents adopted after the Kyoto Protocol among which the most important are: the Bali Roadmap of 2007,[84] the Cancun Agreements of 2010,[85] and the Durban Package of 2011.[86] All these documents represent a set of different kind of predominantly "soft law" instruments which include actions plans, recommendations and decisions. The general aim of these documents is an endeavor for development and implementation of the goals defined in the UNFCCC and the Kyoto Protocol on the one hand and for the creation of the new obligatory multilateral instrument for the period after expiration of the Kyoto Protocol at the end of 2012 on the other. Unfortunately, not even one of these conferences succeeded by completion of legally fully fledged successor of the Kyoto Protocol. Thus, one could consider that the closest candidate for success in this field was the last conference in Durban, which resulted by accepting the five year commitment period from 1 January 2013 to 31 December 2017. As this commitment period is intended to replace the content of the Kyoto Protocol

[79] For the text of the Kyoto Protocol see: http://unfccc.int/resource/docs/convkp/kpeng.pdf; visited on 11 November 2011.

[80] Data are quoted from: A. Spain, Who is going to Copenhagen – The Rise of Civil Society in International Treaty Making, *American Society of International Law Insights*, Vol. 23, Issue 35, 2009, p.2.

[81] *Ibid.*

[82] Data quoted from: C. Müller, The Myth of a Global Civil Society, http://www.dandc.eu/articles/197598/index.en.shtml; visited on 11 November 2011.

[83] Müller states, for example, that from populous and ecologically threatened Bangladesh only 8 civil society organizations were presented in comparison to some 120 German or 50 French. Other interesting data she states is that some large western INGOs as Oxfam or Germanwatch "endeavor to represent the voices of NGOs from developing countries". Ibid.

[84] For the text of the Bali Roadmap see: http://unfccc.int/meetings/bali_dec_2007/meeting/6319.php; visited on 11 November 2011.

[85] For the text of the Cancun Agreements see: http://unfccc.int/meetings/cancun_nov_2010/items/6005.php; visited on 11 November 2011.

[86] For the results of the Durban Conference see: http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php; visited on 10 January 2012.

and as the acceptance of the formal amendment to the Kyoto Protocol is hardly possible before the end of 2012, the parties will have the possibility to apply it provisionally before the entrance into force, i.e. before they will be legally obliged to do so. It means that their acceptance in that period will be entirely based on a sort of "gentlemen's agreement" as a kind of "soft law" as well. In other words, it seems that one of the main results of the Durban Conference now depends on the "soft law" instrument.[87]

As usual, the Durban Conference finished with the pledge that the negotiations would be continued with the aim of adoption of the new multilateral legal document in the new round of negotiations at the next station of the world climate change circus – at the end of 2012 in Doha. Another important example of the unavoidable role of "soft law" in the climate change regime is visible in the wording of the mandate to be achieved by the Ad Hoc Working Group on the Durban Platform for Enhanced Action. Thus, the Group has to complete its work aiming at the adoption of "this protocol, legal instrument or agreed outcome with legal force under the Convention applicable to all Parties…"[88] As this was for the first time that the grading of desired results included "an agreed outcome with legal force" as different from the protocol or another "legal instrument", it led some of the first legal commentaries of the Conference to the conclusion that this third possibility actually refers to some kind of "soft law" instrument.[89]

5.2.2. Sustainable Development

In the context of the "soft law" phenomenon it is hard to find a more controversial environmental issue than it is the concept of the sustainable development. The concept appeared fully in international legal discourse in 1987 with the Brundtland Report. In the Report it has been defined as "the concept that meets the needs of the present without compromising abilities of the future generations to meet their own needs..."[90]

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[87] See more in: C. Wold, The Durban Package and the Goals of the Pacific Small Islands Developing States, *American Society of International Law Insights*, Vol. 16, Issue 1, 2012, p. 2.

[88] In full wording: "(…) [*D*]*ecides that the Ad Hoc Working Group on the Durban Platform for Enhanced Action shall complete its work as early as possible but no later that 2015 in order to adopt this protocol, legal instrument or agreed outcome with legal force at the twenty - first session of the Conference of the Parties and for it to come into effect and be implemented from 2020*." See: http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf; visited on 11 January 2012.

[89] See: J. Werksman, Q & A: The Legal Aspects of the Durban Platform Text, in: http://insights.wri.org/news/2011/12/qa-legal-aspects-durban-platform-text; visited on 16 December 2011.

[90] For the full text see: http://www.un-documents.net/ocf-02.htm#I; visited on 11 November 2011. The process of creating of the concept of sustainable development was initiated at the Stockholm Conference, but in the Bruntdland Report it was expressed for the first time in an explicit way.

The concept itself has linked global environmental and economic problems in a persuasive way, emphasizing in the same time the dramatic increase of the world population and the scarcity of natural resources. In 1992 the UN General Assembly established the Commission on Sustainable Development (CSD),[91] charged with reviewing progress in the implementation of the Agenda 21 and Rio Declaration - documents which broadened the concept of sustainable development. The UN sponsored World Summit on Sustainable Development[92] in Johannesburg in 2002 resulted with the new plans and documents: Johannesburg Declaration on Sustainable Development, the Plan of Implementation of the World Summit on Sustainable Development and the Statement Regarding the Use of Renewable Energy Resources.[93] All the three documents from 2002 are entirely the "soft law" instruments, declaratory by their wording and characterized by very general provisions. After all, it has been clear from the history of negotiations at the Johannesburg Conference that even when it seemed that some precise legal obligations would be accepted, as the final result only the declaratory documents appeared.[94] If we try to reach the answer to the question why the concept of sustainable development looks so hard to achieve, it will lead us to the conclusion that from its beginning the lack of clarity and the ambiguity of the concept have contributed to its low implementation results.[95] It seems that all the problems followed from this initial vagueness which had turned the sustainable development into a highly hortatory concept in its nature and insufficient in achieving its goals.[96] Concerning the role

[91] A/RES/47/191 of 22 December 1992.

[92] See: http://www.johannesburgsummit.org/html/basic_info/basicinfo.html; visited on 11 November 2011.

[93] *Ibid.*

[94] Palassis describes how the intended adoption of the planned treaty on the use of renewable energy resources was transformed into the non-binding energy plan which calls states to develop cleaner and more "green" energy instead of complete reliance on fossil fuels energy. See: Palassis, *op. cit.*, (note 44), pp. 54 – 55.

[95] In this regard Palassis asked a question about the meaning of the concept of "sustainable development": "Does it mean development that is economically sustainable or this is a contradiction in terms as nothing physical can grow indefinitely or that indeed that 'development' can never be 'sustained'? What about sustainable use of renewable resources at rates within the capacity for renewal? What about non-renewable resources?" *Ibid.*, p. 58.

[96] For the discussion on the existence of the customary rule of sustainable development see: *Ibid.*, pp.70-73. Very interesting view on sustainable development as an "ideal" is presented by J. Verschuuren. He recognizes that the ideal of sustainable development has influenced many international, regional (European) and national binding and non-binding documents, but first of all, he sees its influence on the principles of environmental law. He defines that "ideal" as "a value that is explicit, implicit, or latent in the law or the public and moral culture of a society or group that usually cannot be fully realized, and that partly transcends contingent, historical formulations, and implementations in terms of rules and principles and policies." J. Verschuuren, Principles of International Environmental Law, *Umweltrechtliche Studien*, Vol. 30, 2003, pp. 49-50.

of the INGOs in this system it is worth noting that numerous INGOs have been involved in all stages of creation of previously mentioned documents related to the sustainable development. Their formal influence to the system of sustainable development is recognized by the creation of the initiative "Partnership for Sustainable Development" by the UN Department of Economic and Social Affaires, Division for Sustainable Development many INGOs networks have taken part thereof.[97] However, the criteria for the INGOs participation have become much softened if compared to those in the Climate Change Regime,[98] which helped some INGOs to influence significantly the concept of sustainable development by creating the particular treaty models in that field. The IUCN and International Council of Environmental Law (ICEL) made the Draft International Covenant on Environment and Development as an attempt to offer a model for multilateral negotiations which would eventually lead to the adoption of a binding instrument. [99] Whether such INGOs' activities will lead one day to the adoption of a binding instrument on sustainable development or will they be remarked just as a brave but not much influential attempt remains to be seen in the future.

6. CONCLUDING REMARKS

Evaluating the place and role of INGOs in the contemporary system of the protection of environment, particularly through their participation in the international environmental law-making process, it is inevitable to recall, probably the most frequently mentioned objection to the international legislative, not only in that field: the objection of too strong state sovereignty followed by often equally strong conflicts of states' interests. Such a situation sometimes makes any progress impossible. Usually, the INGOs are not directly bound by these interests, while on the other hand, some of them have knowledge and are much more competent in the field of the environmental protection than states and their diplomats. This being so, some INGOs today by their knowledge, competence and flexibility in international relations significantly influence the international law-making process, particularly through the drafting and promoting "soft-law" documents in the field. Therefore, INGOs should play here a role of the correct and cooperative partners to states and intergovernmental organizations, in order to protect our world. Maybe some of the above-mentioned scientific INGOs could be a good example here.

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[97] http://www.un.org/esa/dsd/dsd_aofw_par/par_about.shtml; visited on 12 November 2011.

[98] *Ibid.*

[99] http://www.i-c-e-l.org/indexen.html; visited on 12 November 2011. The first version of this document was already made in 1995, but both the second version from 1999 and the third one form 2003 were presented to the UN member states. See: Palassis, op. cit., (note 44), pp. 75-76.

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THE PRINCIPLE OF NON-INTERVENTION IN THE INTERNAL AFFAIRS OF STATES IN THE CONTEXT OF GLOBALIZATION

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Abstract

The second half of the 20th century is marked by frequent actions by the international community on behalf of peace building. There are appropriate instruments to be found by international organizations to ensure that states which are not members of the United Nations will also act in accordance with the principles established by the Charter of the United Nations. This is necessary for the maintenance of international peace and security. Peace is an essential condition for a human being to live and develop. The article attempts to answer some of the questions concerning the values in the current international community: peace, human dignity, democratic order, principles of international public law. Doubts can be answered after a thorough analysis of the notion threat to peace.

Key words: *principles of the UN Charter, threat to Peace, instruments to take action, human dignity, interest of the international community*

1. PEACE AS THE MOST IMPORTANT VALUE IN THE INTERNATIONAL PUBLIC LAW ORDER

1.1. Threats to the international peace and security

The international community is constantly facing problems arising in different parts of the world considered to be as the threat to the international peace and security[1]. In the last decade we observed these kind of situations in Iraq, Libya, Syria and Israel. It is highly controversial whether there are adequate instruments

[1] Bierzanek, R. (2004), The notion and division of the international conflicts, in Bierzanek, R. and Symonides, J., *Prawo międzynarodowe publiczne, 8th edn, Wydawnictwo Prawnicze Lexis Nexis, Warszawa, pp. 337-341.*

to take action on behalf the United Nations (UN) to solve problems of different nature in these countries in the interest of international community[2].

On 17 march 2011 UN Security Council approved 'No-Fly Zone' over Libya authorizing "all necessary measures" to protect civilians by vote of 10 in favour with 5 abstentions (including Germany and Russia, China, India and Brasil) in a Resolution No. 1973[3]. 19 march 2011 'Paris Summit on Libya' took place (with Polish participation). Coalition forces (France, Canada, Italy, USA and UK) launched 'Operation Odyssey Dawn' to enforce UN Security Council Resolution 1973 to protect Libyan people from the country's ruler-Moammar Gadhafi. The goal of the military coalition was to prevent further attacks by regime forces on Libyan citizens, officials said, adding that the coalition also wants to degrade the ability of Moammar Gadhafi's regime to resist a no-fly zone being implemented[4]. 31 march 2011 full responsibility for the operation in Libya was given to NATO, which began the operation 'Unified Protector'. After several months of conflict the rebels gained control of the capital Tripoli in August 2011. 20 October Moammar Gadhafi was killed in Syrta. New powers pronounced the liberation (riddance) of the country. Currently Mohammed Megarjef is the head of the state.

Successful revolutions in Tunisia, Egypt and the civil war in Libya inspired Syrians to protest against their ruler Bashar al-Assad[5]. First street protests took place on 26 January 2011. Later demonstrations were to be pacified by the government using the national army fighting, as it claimed, the Islamist movement. The international community declared pacification of the protests to be irrelevant but at the same time was not taking any action. At least 40, 000 people have been killed in Syria's uprising. The possibility to take a military operation such as in Libya was denounced.

No decision by the Security Council was taken due to veto by Russia and China which blocked the decision that would impose sanctions on Syria. On 30 October 2011 the Arab League presented a peace-plan which was to end the violence in Syria. Due to persistent pacification of the rebels against the regime in Syria on 12 November 2011 the Arab League took decision to suspend Syria in it's membership rights in the organization. So did the Organization of

[2] Symonides, J. (2004), The international society and community, in Bierzanek, R. and Symonides, J., *op.cit., pp. 17.*

[3] UN Security Council Resolution No. 1973 adopted at 6498 th Meeting 17 March 2011, 'No-Fly Zone' over Libya, authorizing 'All Necessary Measures' to protect civilians. Available at http://www.un.org/News/Press/docs/2011/sc10200.doc.htm (Accessed 19 December 2012).

[4] Garamone, J. (2011), Coalition Launches 'Operation Odyssey Dawn'. Available at http://www.defense.gov/news/newsarticle.aspx?id=63225 (Accessed 10 December 2012).

[5] Evans, D. (2012), Syria rebels hope arms will flow to new fighter command. Available at http://www.reuters.com/places/syria (Accessed 10 December 2012).

Islamic Cooperation. Wider international response to the violence in Syria is still paralyzed[6].

1.2. Supremacy of the Charter of the United Nations in the international relations

The UN Charter was drafted in order to prevent international conflicts on a worldwide scale[7] but the creators of UN Charter were not able to predict that local conflicts would become a plague[8]. Nevertheless UN Charter is still considered to be the so called *quasi-constitution in the international public law system*[9]. Through the principles established in the art. 2[10], the states and some international organizations shall create it's external politics according with international law and co-operate with one another[11]. This is essential to the fulfillment of the purposes and principles of the Charter of the UN. Moreover these principles are inherent part of every single element of the international public law system[12].

After II World War the main principles of the international public law system were established by the UN Charter but after 25 years of preparatory works General Assembly declared new version of these principles according to the UN practice. This took place through the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN adopted on 24 October 1970[13]. This Declaration defined the notion of the principles established thereof.

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[6] *Ibidem.*

[7] Kranz, J. (2009), Między wojną a pokojem: świat współczesny wobec użycia siły zbrojnej, in *Świat współczesny wobec użycia siły zbrojnej. Dylematy prawa i polityki, (Ed.) J. Kranz, Instytut Wydawniczy Euro Prawo, Warszawa, pp. 91.*

[8] Żukrowska, K. (2005), Pojęcie bezpieczeństwa i jego ewolucja, in *Bezpieczeństwo międzynarodowe. Teoria i praktyka, (Eds) K. Żukrowska and M. Grącik, Oficyna Wydawnicza-Szkoła Główna Handlowa w Warszawie, Warszawa, pp. 40-45.*

[9] Jasudowicz T. (2005), Prawa człowieka w Karcie Narodów Zjednoczonych, in Gronowska, B., Jasudowicz T., Balcerzak M., Lubiszewski M. and Mizerski R., *Prawa człowieka i ich ochrona, Wydawnictwo TNOiK , Toruń, pp. 47.*

[10] Charter of the United Nations signed on 26 June 1945 in San Francisco at the conclusion of the United Nations Conferece on International Organization. Available at http://www.un.org/en/documents/charter/intro.shtml (Accessed 10 December 2012).

[11] UN General Assembly Resolution No. A/8082/2625 adopted at 25th Session 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Available at http://www.un.org/documents/ga/res/25/ares25.htm (Accessed 10 December 2012).

[12] Nahlik, S. E. (1976), Zasady ogólne prawa międzynarodowego, in *Encyklopedia prawa międzynarodowego i stosunków międzynarodowych, (Ed.) A. Klafkowski, Wydawnictwo Wiedza Powszechna, Warszawa, pp. 457.*

[13] UN General Assembly Resolution No. A/8082/2625 adopted at 25th Session 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation

The prohibition of intervention by force or threat of the use of force is linked the general prohibition of the intervention in internal affairs of any state[14]. This second principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter means that:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security[15].

On 14 December 1976 the General Assembly adopted Resolution 31/91 on non-interference in the internal affairs of States[16]. And yet in the 80. Recognizing that full observance of the principles of non-intervention and non-interference in the internal and external affairs of sovereign States and peoples, either directly or indirectly, overtly or covertly, is essential to the fulfilment of the purposes and principles of the Charter

among States in accordance with the Charter of the United Nations. Available at http://www.un.org/documents/ga/res/25/ares25.htm (Accessed 10 December 2012).

[14] Osmańczyk E. J. (1986), *Encyclopedia of the UN and international relations (Encyklopedia ONZ i stosunków międzynarodowych), Wyd. 2, Warsaw, p. 340.*

[15] UN General Assembly Resolution No. A/8082/2625 adopted at 25th Session 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Available at http://www.un.org/documents/ga/res/25/ares25.htm (Accessed 10 December 2012).

[16] Osmańczyk, E. J. (1986), *op. cit., pp. 340-341. See Resolutions adopted by the United Nations Security Council since 1946. Available at http://www.un.org/en/sc/documents/resolutions/index.shtml (Accessed 19 December 2012).*

of the UN the General Assembly approved on 9 December 1981 the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States[17].

1.3. Adequate instruments to take action on behalf of the United Nations

Despite considerable success actions undertaken by the UN in order to maintain or restore international peace and security is still difficult to indicate measures in the contemporary international relations that would provide security not only to a every State but also to every individual in every part of the world[18]. The debate on the reform of the UN arose, concerning especially the search for more effective actions and more democratic membership in the Security Council through enlarging the number of permanent and non-permanent (maybe half-permanent) members of the Security Council[19]. In the 90. of the XX century the conflicts within the UN enhanced the difficulty to change anything in order to achieve full effectiveness. The weaknesses were especially the late reaction to the aggravated situations in the world and depreciation of the regional[20] and non-governmental organizations[21].

Universal security system of the UN[22] confers primary responsibility for the maintenance of international peace and security on the Security Council (art. 24.1)[23]. The Security Council shall act in accordance with the Purposes and Principles of the UN (art. 24.2). The competences of the Security Council are laid down in the UN Charter and consist for example out of[24]:

- power to decide what measures shall be taken to maintain or restore international peace and security (art. 39);
- power to determine the existence of any threat to the peace, breach of peace, or act of aggression (art. 39);

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[17] www.un.org/documents/ga/res/36/a36r103/htm

[18] Zajadło, J. (2009), Koncepcja odpowiedzialności za ochronę (Responsibility to Protect)-nowa filozofia prawa międzynarodowego?, in *op. cit., (Ed.) J. Kranz, pp. 271-278.*

[19] Łastawski, K. (2002), Pojęcie i główne wyznaczniki bezpieczeństwa narodowego i międzynarodowego, in *Współczesne bezpieczeństwo, (Ed) W. Fehler, Wydawnictwo Adam Marszałek, Toruń, pp. 25.*

[20] Iwanowska-Kędzierska, A. and Żukrowska K. (2005), Bezpieczeństwo koalicyjne-od Ligii Narodów do ONZ i OBWE, in *Bezpieczeństwo międzynarodowe. Teoria i praktyka, (Eds) K. Żukrowska and M. Grącik, Oficyna Wydawnicza-Szkoła Główna Handlowa w Warszawie, Warszawa, pp. 157-171.*

[21] Łastawski, K. *op. cit., pp. 26; Czaputowicz, J. (2005), Bezpieczeństwo w teoriach stosunków międzynarodowych, in Bezpieczeństwo międzynarodowe. Teoria i praktyka, (Eds) K. Żukrowska and M. Grącik, Oficyna Wydawnicza-Szkoła Główna Handlowa w Warszawie, Warszawa, pp. 74-76; Stańczyk, J. (2004), Kres „Zimnej Wojny". Bezpieczeństwo europejskie w procesie zmiany międzynarodowego układu sił, Wydawnictwo Adam Marszałek, Toruń, pp. 68-80; Popiuk-Rysińska, I. (2004), Globalny system bezpieczeństwa a porozumienia regionalne, in Globalizacja a stosunki międzynarodowe, (Eds) E. Haliżak, R. Kuźniar, J. Symonides, Oficyna Wydawnicza Branta, Bydgoszcz-Warszawa, pp. 175-182.*

[22] Iwanowska-Kędzierska, A. and Żukrowska, K., *op. cit., pp. 145-157.*

[23] www.un.org/en/documents/charter/chapter5.shtml

[24] www.un.org/en/documents/charter/chapter7.shtml

- power to employ measures not involving the use of armed force to give effect to its decisions (art. 41);
- power to take such action by forces as may be necessary to maintain or restore international peace and security, i.e. demonstrations, blockade and other operations by air, sea, or land forces of Members of the UN (art. 42);
- power to make recommendations (art. 39);
- power to make provisional measures in order to prevent an aggravation of the situation (art. 40).

2. THE ROLE OF A STATE IN CONTEMPORARY INTERNATIONAL REALTIONS

2.1. Promotion of human dignity

Promotion of human dignity and the basic rights of individuals in the contemporary international relations led to questioning whether peace is really the most important quality in the international public law order[25]. According to numerous international documents internationally protected rights on the basis of human dignity are the most important values, the foundations of other main normative interests of the contemporary international community: freedom, justice and peace[26]. Those documents emphasizing the meaning of human rights are: The Atlantic Charter from 1941 in point 6, the UN Charter from 1945 in the Preamble, the Universal Declaration of Human Rights from 1948 in the Preamble, both International Covenants from 1966 in their Preambles[27] and in the European normative system[28]: in the European Convention for the Protection of Human Rights and Freedoms from 1950 in the Preamble and in the Final Act of the Conference on Security and Co-operation in Europe from 1975 in principle VII, as well as in the documents of the World Conferences on Human Rights.

The relation between the human rights and peace seams to be clear – human rights have primacy because it is the human dignity and human rights that are the conditions of peace, understood correctly[29]. There can not be true peace against human rights. Human rights are considered to be rights protected

[25] Kwiecień, R. (2009), Aksojologia prawa międzynarodowego a siła zbrojna w perspektywie historycznej, in *op. cit., (Ed.) J. Kranz, pp. 75-80.*

[26] Jasudowicz T. (2005), Zagadnienia wstępne, in Gronowska, B., Jasudowicz T., Balcerzak M., Lubiszewski M. and Mizerski R., *op. cit., pp. 29.*

[27] Gronowska B., Jasudowicz T., Mik C. (1999), *Prawa człowieka. Wybór dokumentów międzynarodowych, Wydawnictwo TNOiK, Toruń, pp.12, 22 and 62.*

[28] Mik C. (1994), *Koncepcja normatywna prawa europejskiego praw człowieka, Wydawnictwo Comer, Toruń, pp. 44-97 and 139-161.*

[29] Jasudowicz T. (2005), *op. cit., in Gronowska, B., Jasudowicz T., Balcerzak M., Lubiszewski M. and Mizerski R., op. cit., pp. 29.*

unconditionally-they are international *ius cogens. On the other hand, the practical priority goes to peace as only in the peaceful conditions human rights may be cultivated*[30]. The new and balanced approach to the finding of new foundations to international legal order was presented in the Report of the International Commission on Intervention and State Sovereignty from December 2001[31]. The basic question that arose in the new context was: who serves international public law: to States or to the individuals[32]? On one hand, States are the ones who create international public law. On the other hand, the protection of human rights, rights of the individuals as an element of motivation to take military action in order to end massive breaches of those rights or restore and build democracy. The ideological pluralism in the international community has led to an attempt to build international constitutional basis with common values at the foundation of international legal order[33]. No doubt law should serve individuals. The circumstances of the development of universally protected human rights law has been described as *a slow work developing effective international human rights legal process on a universal basis*[34].

2.2. Internal conflicts as a threat to the international peace and security

Peace without doubt is a state of non-armed international conflict. On the other hand, numerous internal conflicts may be threats to the international peace and security as well[35]. Understanding the notion 'threat to the international peace and security' is nevertheless depending on the UN Security's Council decision[36]. The competences of the UN organs focus on the State as an entity rather than prevention of aggression against the citizens rights. The interpretation of the Charter of the United Nations should therefore be interpreted according to the naturalistic roots of the international public law rather than according to the positivist approach which nevertheless doesn't solve the problem in the pluralistic world.

It is doubtless if breaches of citizens rights within a State constitute threat to the international peace and security. Much attention should be paid to the human security. The scope of human security is not limited only to the freedom

[30] *Ibidem, pp. 29-30.*

[31] Zajadło, J. (2009), Koncepcja odpowiedzialności za ochronę (Responsibility to Protect)-nowa filozofia prawa międzynarodowego?, in *op. cit., (Ed.) J. Kranz, pp. 271-278; Steiner H. J., Alston P., Goodman R. (2007), International Human Rights in Context. Law, Politics, Morals, Oxford University Press, Oxford, pp. 85-96.*

[32] Kwiecień, R. (2009), *op. cit., in op. cit., (Ed.) J. Kranz, pp. 76.*

[33] *Ibidem, pp. 77.*

[34] Janis M. W., Kay R. S., Bradley A. W. (2008), *European Human Rights Law. Text and Materials, 3rd edn, Oxford University Press, Oxford, pp. 12.*

[35] Kranz, J. (2009), *op. cit., in op. cit., (Ed.) J. Kranz, pp. 83-91.*

[36] *Ibiedem, pp. 119-121.*

from armed conflicts but respect for human rights and respect for the rule of law[37]. This includes the right to fair economic and social conditions of living. In contemporary world human security is not only a matter limited to exclusive competence of a State[38]. International economic cooperation which intensified after World War II in the Western world has led to internationalization of the protection of human rights at the same time. The sovereignty of a States is now understood differently than it was[39].

At the same time, the problem of civil wars has not been solved. The principle of non intervention into domestic matters of a State (art. 2.7 of the UN Charter) is used as a shield against responsibility of States to protect it's citizens. There may be effective mechanisms to react to serious breaches of international public law principles bearing in mind that all the principles are linked with each other and neither one can exist without another ones. Mechanisms to react to serious breaches of human rights by a State versus it's own citizens should be established as well.

3. CONTEXT OF THE CHARTER OF THE UNITED NATIONS

3.1. Globalization

We live in a different environment now than when the UN Charter was drafted[40]. The sovereignty of a State[41] and the balance of powers of the members of Security Council are at present not the only foundation of the international legal order. Globalization with all it's unwanted consequences has brought increasing importance of human rights not only in the world but also in the international normative system[42]. Moreover recognition of pluralistic democracy and the rule of law as basic precondition to provide respect for human rights and fundamental freedoms in the global world led to the fight for those values as the only solution to organize what is concerned as internal (state) and external (state-state, state-organization, organization-organization relations)[43].

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[37] Łastawski, K. (2002), *op. cit., in op. cit., (Ed) W. Fehler, pp. 17-18.*

[38] See Pikulski, S. (1996), *Karnomaterialne i kryminologiczne aspekty bezpieczeństwa państwa, Urząd Ochrony Państwa, Warszawa, pp. 11-18.*

[39] See Tyranowski, J. (1997), Suwerenna równość, samostanowienie i interwencja w prawie międzynarodowym, in *Pokój i sprawiedliwość przez prawo międzynarodowe: zbiór studiów z okazji sześćdziesiątej rocznicy urodzin profesora Janusza Gilasa, (Ed.) C. Mik, Wydawnictwo TNOiK, Toruń, pp. 399-410.*

[40] Steiner H. J., Alston P., Goodman R. (2007), *op. cit., pp. 134-148.*

[41] Symonides, J. (2004), Wpływ globalizacji na miejsce i rolę państwa w stosunkach międzynarodowych, in *op. cit., (Eds) E. Haliżak, R. Kuźniar, J. Symonides, pp. 136-139.*

[42] Czaputowicz, J. (2005), Bezpieczeństwo w teoriach stosunków międzynarodowych, in *op. cit., (Eds) K. Żukrowska and M. Grącik, pp. 76-78.*

[43] Symonides, J. (2005). System ochrony praw człowieka OBWE, *Stosunki międzynarodowe-International Relations, 3-4, 34.*

3.2. Universal human rights in a globalized security system

Therefore, the consequences of the UN Charter's principle from art. 2.7 are changing. There are global solutions of economic, social but also legal problems (the good example is the external impact of the American law and on the contrary, the external impact of the EU law[44]). States are no more self sufficient[45]. If a State chooses to build such an illusion it will be excluded from the international arena which is a prove to a deformation of a system in such state[46]. Contemporary moral values shared by the international community are such as tolerance, openness to different cultures, peaceful coegsistance[47]. International legal system must give an adequate answer to these expectations[48]. Rights are supposed to be universal in a globalized world, especially human rights in the common interest of the humanity[49]. Nevertheless there is lack of procedures, instruments within the UN to fight against local breaches of those rights.

3.3. Conclusion

Legal solutions are non adequate to the social understanding of a problem of civil wars and local breaches of human rights. The only solution seams to be solidarity in the implementation of *ius cogens*[50], common political will of Security's Council states and complementarity of mechanisms not only of security organizations[51].

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[47] Kwiecień, R. (2009), *op. cit., in op. cit., (Ed.) J. Kranz, pp. 18-22.*

[48] Symonides, J. (2004), Wpływ globalizacji na miejsce i rolę państwa w stosunkach międzynarodowych, in *op. cit., (Eds) E. Haliżak, R. Kuźniar, J. Symonides, pp. 136-139.*

[49] Jasudowicz, T. (1997), O zasadach ogólnych prawa uznanych przez narody cywilizowane-garść refleksji, in *op. cit., (Ed.) C. Mik, pp. 141-162.*

[50] See International Court of Justice Adjudication (1970) Barcelona Traction.

[51] Popiuk-Rysińska, I. (2004), Globalny system bezpieczeństwa a porozumienia regionalne, in *op. cit., (Eds) E. Haliżak, R. Kuźniar, J. Symonides, pp. 195-197.*

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SOCIAL EXCLUSION AND THE RIGHTS OF OLDER PERSONS

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Abstract

The authors analyse the problem of defining social exclusion and compare notions of social exclusion and poverty. It is emphasised that the concept of social exclusion is a broad multi-dimensional concept, whose definition requires an interdisciplinary approach. Indicators of social exclusion have also been analysed. In addition to poverty, there are also social isolation and a lack of institutions. Social exclusion of the older persons is also analysed from the aspect of the trends in rapid population ageing in the Republic of Croatia and the world in general. The paper gives an overview of the relevant international, regional and national regulations that (in)directly protect the rights of older persons. They emphasise that it is extremely important to support and participate in the international level initiative to adopt a new international document (convention) on the rights of older persons as soon as possible. It would, inter alia, regulate the rules and minimum standards regarding the rights of older persons. This would, among other things, prevent exclusion of older people and take all measures necessary to make the older persons participate in society and the (local) community for mutual benefit.

Key words: *social exclusion, social inclusion, older persons, poverty, discrimination, human rights, international law*

I. INTRODUCTION

> *For so many to live to be old is one of the most remarkable achievements of the twentieth century. To be old and live in dignity free from all forms of abuse and violence must be a common goal for all societies of the twenty-first century.*
>
> (The World Health Organization[1])

Numerous organisations at international, regional and national levels are fighting to protect the rights of vulnerable social groups (children, women, persons with disabilities, members of the LGBT community, etc.). We rarely get the opportunity to find out about the activities of organisations whose primary goal is the protection and promotion of the rights of older persons. But, for the vast majority of states we know in advance the answer to the question whether older people are active participants in social events and equal to other members of the population or whether they are excluded from society.

Social exclusion is a term we often hear in everyday life and it seems self-evident. But its definition is a problem because the concept itself is multidimensional and multidisciplinary. It is, in fact, important to distinguish between the definition and research of social exclusion of the elderly and research of social exclusion of other social groups. We should also make the difference between the theory of social exclusion and the theory of poverty, but also explore the structure of the population in the Republic of Croatia and comment on indicators of exclusion of older people in our society (poverty, social isolation and restriction of access to public services).

Only a systematic analysis of statistical data collected from various research studies and reports creates a picture of the quality of life of older people and the problems they encounter in the exercise of their rights. Furthermore, these data refer to the possible need to introduce new measures of social policy and adopt new legislation aimed at improving the position of older people in the Republic of Croatia. The gathered data can be successfully analysed and a (more) adequate social policy devised only on the basis of comprehensive and carefully conducted studies, the goals of which are inclusion and equality of all citizens in society. A particular challenge is an attempt to link the concept of social exclusion with the concept of human rights violations in this population and bring these two terms in a cause-effect relationship. It is, in fact, important to put social exclusion in the context of human rights violations (of the elderly) and analyse the way in which this population is specifically protected against exclusion from society at

[1] The World Health Organization (WHO) and the International Network for the Prevention of Elder Abuse (INPEA), *Missing Voices: Views of Older Persons on Elder Abuse* (2002), p. 21.

the national and international level as well as answer the question whether our regulations are in line with international standards.

II. SOCIAL EXCLUSION

II.1. On the concept of social exclusion in general

The concept of social exclusion is often used in a variety of political debates and newspaper articles, and it has become one of the most popular topics of social sciences. However, attempts to define that concept encounter a number of difficulties. Šućur states that "frequent use of the term exclusion has not resulted in its satisfactory clarity, which means that, at least so far, it has not been theoretically well-founded or empirically confirmed."[2] "Theories of poverty, marginality and underclass" dominate in the American and Anglo-Saxon world, while the term "social exclusion" is characteristic of Europe. Some states have their own official definitions of that term (e.g., the United Kingdom and France).[3]

The European Union played a major role in popularising this term. A European approach to social exclusion is based upon the view that poverty and social exclusion are the result of structural problems in the society, and not the result of weaknesses or flaws of individuals.[4] However, even in the EU two research traditions to social exclusion exist: the Anglo-Saxon tradition of poverty, which emphasises the impact of the distribution of financial and material goods on social exclusion, and the French tradition, which emphasises the influence of social ties.[5] Thus, the Anglo-Saxon and the French tradition emphasise distributional and relational aspects of social exclusion, respectively. However, when defining this term, most theorists combine the distributional and the relational element and suggest that "social exclusion should be understood as the relatively permanent, multiple conditioned and multidimensional state of deprivation of an individual."[6] Thus, individuals are deprived such that they do not participate in the distribution of social assets, which are defined as a combination of institutional, cultural, socio-economic and interpersonal resources.[7] Their non-

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[2] Šućur, Zoran: Socijalna isključenost: pojam, pristupi i operacionalizacija, *Revija za sociologiju*, Vol. 35, No. 1-2, 2004, p. 45.

[3] For more details, see *ibidem*, pp. 45–50.

[4] Bayley, Deborah and Gorančić – Lazetić, Helena, eds.: *Neumreženi: Lica socijalne isključenosti u Hrvatskoj – Izvješće o društvenom razvoju Hrvatska 2006.*, UNDP Croatia, First edition, Zagreb, 2006, p. 17.

[5] Bejaković, Predrag: *Vodič za socijalnu uključenost,* Institute of Public Finance, Zagreb, 2009, p. 4.

[6] Matković, Teo and Štulhofer, Aleksandar, Istraživanje socijalne isključenosti – Empirijska analiza socijalne isključenosti, in: Ofak, Lana et al., eds.: *Siromaštvo, nezaposlenost i socijalna isključenost*, UNDP Croatia, First edition, Zagreb, 2006, p. 26.

[7] *Ibidem.*

participation is permanent in nature and it is not necessarily a consequence of excluded people's personal defects, but it is caused by institutionalised inequalities (e.g., unequal educational opportunities, etc.).[8] If the situation with distribution is unfavourable (low income, poor housing, etc.), social ties disintegrate more often, political participation of individuals is weaker and certain institutions are less accessible to them. It is clear that "different components of social exclusion influence each other, thus creating a spiral of insecurity, which ends in multiple deprivation."[9] As an example, we can take a person who loses his/her job. Unemployment leads to a lack of money inflow, which in turn leads to poverty. Social ties not only with co-workers but also with friends are broken because a person does not have the money necessary for social exchange (he/she cannot pay for dinner and other types of gatherings, buy presents, etc.), and this can lead to disintegration of marriage and family.

Given the difficulty of defining the concept of social exclusion, there are difficulties with research as well. In 2001, in an effort to transform social exclusion into measurable attributes, the European Union adopted the first set of indicators for monitoring social exclusion (the so-called Laeken indicators), which is composed of 18 indicators covering four dimensions of social exclusion (financial poverty, employment, health and education).[10] However, studies still differ in the way they collect and analyse data, since the selection of indicators and instruments depends on whether the subjects of the study are individuals or entire geographical regions, or what segment of society they belong to (older people, young people, ethnic minorities, etc.).[11]

Regardless of which definition or indicators and instruments we choose, we must agree that social exclusion is "a multidimensional phenomenon which weakens the relationship between the individual and the community."[12] There is undoubtedly a correlation between poverty, unemployment, inadequate access to the network of social security and health care on the one hand and discrimination and violation of human rights on the other. When we say that the concept of social exclusion is multidisciplinary, it means that its research includes sociology, economics, law, demography and other social sciences, which are inevitably intertwined in this concept. Certain particularly vulnerable groups, such as persons with disabilities, the homeless, Roma, ex-convicts and addicts face an increased risk of social exclusion. This risk group includes the elderly

[8] *Ibidem.*

[9] Šućur, Zoran: O pojmu socijalne isključenosti, in: Ofak, Lana et al., eds.: *Siromaštvo, nezaposlenost i socijalna isključenost*, UNDP Croatia, First edition, Zagreb, 2006, p. 12.

[10] *Ibidem,* p. 11.

[11] For more details, see Šućur: Socijalna isključenost: pojam, pristupi i operacionalizacija, op. cit., pp. 57– 60.

[12] Bayley, Gorančić – Lazetić, op. cit., p. 21.

as well. Since the definition and exploration of social exclusion are most often associated with exclusion from the labour market, the question arises as to how social exclusion of the elderly should be defined. Therefore, this notion should be researched "in the context of relationships and resources that exist outside (paid) work."[13]

A group of scientists studied social exclusion of the elderly through the prism of participation and inclusion of this population in activities outside the labour market (participation of older people in social networks, contribution and use of social capital), the prism of spatial separation and the prism of systematic withdrawal of institutions from certain areas.[14] Research has shown that participation in social activities outside the labour market is extremely important for social inclusion of the elderly in society. Older people largely rely on social networks made up of family members, friends, and neighbours. A systematic withdrawal of institutions from regions with a higher proportion of the elderly in the total population has also been noticed, which brings into question older people's access to fundamental health, social and other services.[15] On the other hand, in assessing the position of the elderly population in society, the English Longitudinal Study of Ageing uses seven dimensions of exclusion: social ties, cultural activities, social activities, access to basic services, exclusion in the neighbourhood, unavailability of financial products and unavailability of material products.[16] One of the conclusions of this study is that the quality of life of older people decreases as the number of dimensions in which older people are excluded increases.[17] Persons older than 80 years, living alone in rented flats, have no children, have no telephone connection, are of poor health, do not own a car, do not use public transportation, and have a low income are particularly exposed to the risk of exclusion in multiple dimensions.[18]

We have mentioned earlier that social exclusion is characterised by multidimensionality, so that, when it comes to social exclusion of older people, as can be seen from these examples, the emphasis is placed on other dimensions of exclusion instead of exclusion from the labour market. Older persons are deprived of certain social assets even more than young unemployed persons. This is usually the result of specificities related to the "third age" (low pensions,

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[13] Scharf, Thomas et al., Social Exclusion and Older People: exploring the connections, in: *Education and Ageing*, Vol. 16, No. 3, 2001, p. 304.

[14] *Ibidem,* p. 303.

[15] *Ibidem,* pp. 316–317.

[16] Barnes, Matt et al., eds.: *The Social Exclusion of Older People: Evidence from the first Wave of the English Longitudinal Study of Ageing (ELSA) – Final Report*, Office of the Deputy Prime Minister, London, 2006, p. 15.

[17] *Ibidem,* p. 9.

[18] *Ibidem,* p. 8.

poorer health status, social welfare dependency, etc.) and an inadequate response of the society to the needs of this population.

II.2. Poverty and social exclusion

In addition to the problem of defining the concept of social exclusion, the question arises as to its border with the concept of poverty. Is it another name for the theory of poverty or a new way of exploring and understanding social inequalities? If it is not about synonyms, what is the relationship of these two terms? Some theorists believe that the concept of social exclusion emerged in the late 20th century because politicians in developed countries would not like to use the concept of poverty, which is a sign of their failure.[19] Therefore they use the term social exclusion, although substantially poverty and social exclusion are synonymous. Most scientists, however, do not equate these two terms, but consider poverty one of the forms of social exclusion (besides exclusion from the labour market and social isolation).[20] While poverty is usually defined as the state of "having little or no money or few or no material possessions", social exclusion entails much more than a lack of money or material possessions.[21] It also assumes deprivation in social, cultural, political and other dimensions of life.

Social exclusion is a dynamic process, which prevents access to various elements of life over time, and theories of poverty are static (they believe poverty is a special situation that happens at a certain moment). The difference between poverty and social exclusion is also seen with respect to poverty that can be defined in absolute and relative terms, and social exclusion which is always perceived only in a relative sense. Hence, the situation and the living conditions of individuals and groups are always compared and analysed in relation to the rest of society. Unlike poverty, social exclusion puts more emphasis on certain aspects of social inequality (the use of social capital, intangible aspects of the living standard, etc.) and it is not focused only on the individual, but it pays attention to the problems of communities and geographical areas.[22] For example, mountain regions and islands are considered to be particularly exposed to the risk of social exclusion in the Republic of Croatia due to their position, but we cannot generally say that all inhabitants living in these areas are poor.

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[19] For more details, see Šućur: Socijalna isključenost: pojam, pristupi i operacionalizacija, op. cit., pp. 49–51.

[20] *Ibidem.*

[21] Bejaković, op. cit., p. 9.

[22] For more details, see Šućur: Socijalna isključenost: pojam, pristupi i operacionalizacija, op. cit., pp. 50–53.

III. SOCIAL EXCLUSION OF OLDER PERSONS

No country in the world is immune to social exclusion of individuals, whole groups of people, or certain geographical areas, so the Republic of Croatia is no exception. This problem is recognised in our country; however, the measures taken so far have not yielded satisfactory results.[23] As older people belong to an especially vulnerable group, it is important to say something about the present population structure as well as indicators of social exclusion of this social group.

III.1. Population ageing - trends in the world and the Republic of Croatia

Issues related to the elderly are marginalised by many. But, given the demographic trends in "population ageing", there is a need for serious and systematic research and problem-solving in relation with social, economic, political, health and other aspects of an elderly person's life. The world population is rapidly ageing: between 2000 and 2050, the proportion of the world's population over 60 years will double from about 11% to 22%.[24] The number of people aged 60 years and over is expected to increase from 605 million to 2 billion over the same period.[25] Population ageing is a global phenomenon which is most evident in Europe, where the proportion of people older than 65 increased from 8% to 15% over the last fifty years. In the European Union this proportion is 17%. It is expected that in the 21st century the percentage of older people in some countries will be as high as 30% (Japan 31%, Italy, Greece and Switzerland 28%).[26] More than two in five persons will be 60 or over in some countries.[27] The number of older

[23] Measures to improve the quality of life of older people and social inclusion of this population in the society were provided for by *Nacionalni program zaštite i promicanja ljudskih prava od 2008. do 2011. godine* (National Programme for the Protection and Promotion of Human Rights from 2008 to 2011), Official Journal of the Republic of Croatia, No. 119/2007 and the *National implementation plan on social inclusion 2011 - 2012*, official websites of the Ministry of Social Politics and Youth of the Republic of Croatia, http://www.mspm.hr/djelokrug_aktivnosti/medunarodna_suradnja/jim_zajednicki_memorandum_o_socijalnom_ukljucivanju_rh/joint_memorandum_on_social_inclusion_of_the_republic_of_croatia

[24] Official websites of the World Health Organization, http://www.who.int/features/factfiles/ageing/en/index.html/.

[25] According to the World Health Organization, the number of people aged 80 and older will quadruple in the period 2000 to 2050. By 2050, the world will have almost 400 million people aged 80 years or older. By the same year, 80% of older people will live in low- and middle-income countries. Chile, China and the Islamic Republic of Iran will have a greater proportion of older people than the United States of America. The number of older people in Africa will grow from 54 million to 213 million. For further details, visit the official websites of the World Health Organization, http://www.who.int/features/factfiles/ageing/en/index.html/.

[26] Helebrant, Ranko, ed.: *Zaštita prava starijih osoba*, Profil, Zagreb, 2005, p. 2.

[27] People aged 60 or over currently constitute from 1/5 to nearly ¼ of the population of Austria, the Czech Republic, Greece, Italy, Japan, Slovenia and Spain. By 2050, more than two in every five persons are projected to be at least 60 years of age in those countries. *World Population Ageing 1950-2050,* Population Division, DESA, United Nations, p. 12.

persons has tripled over the last 50 years and it will more than triple again over the next 50 years.[28] Even in the most developed regions, the proportion of older persons already exceeds that of children and by 2050 it will be double.[29] With an increase in the number of elderly and a decrease in the number of working-age people governments are already facing problems funding retirement, health care, and other services for the older persons.[30] Most demographers who follow global trends agree to four statements about the future of global population during the next quarter- to half-century: (1) the population will be bigger by two to four billion people by the middle of the century, and the majority of them will live in poor countries, (2) the population will increase less rapidly than it has recently, (3) more people will be living in cities (the population will be more urban than it is now), and (4) the population will be older than it is today.[31]

Like most European countries, the Republic of Croatia belongs to the group of countries with a very old population. According to estimates by the Croatian Bureau of Statistics (hereinafter referred to as: "CBS"), 766,485 people older than 65 years lived in the Republic of Croatia in the mid-2009, which makes 17.3% of the total population.[32] According to the proportion of older people in the population, the Republic of Croatia is above the average of EU countries. The life expectancy at birth for men and women in the Republic of Croatia is 72.9 and 79.6 years, respectively.[33] One of the important indicators of the population structure is the ageing index, i.e. the proportion of the population aged 60 and older in relation to the population from 0 to 19 years of age, and the elderly are considered to be all those people whose index is above 40. In 2009, in the Republic of Croatia this index was 107.6.[34] As far as predictions for the future are concerned, according to population projections by the year 2051 (CBS), "if one takes into consideration the medium fertility and medium migration variant, the proportion of people older than 65 years at the national level will increase to 27.6%."[35]

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[28] *Ibidem*, p. 11.

[29] *Ibidem*, p. 15.

[30] Nash, S. Kyleen: Shades of Gray: The Impact of World-Wide Aging on Elder Abuse and Neglect in the United States and France, *European Journal of Law Reform*, 6, 2004, p. 246.

[31] When it comes to population projections for the future, it should be taken into account that they are not reliable. Namely, population projections are surrounded by uncertainty for a series of reasons such as the rates of birth, death and migration, that are unpredictable and may be projected erroneously. Cohen, Joel E.: *World Population in 2050: Assessing the Projections,* Federal Reserve Bank of Boston, Conference Series, Proceedings, Boston, Volume year 2011, pp. 85-87.

[32] Ostroški, Ljiljana, ed.: *Statističke informacije 2011.*, Croatian Bureau of Statistics, Zagreb, 2011, p. 20.

[33] *Ibidem,* p.19.

[34] *Ibidem,* p.20.

[35] Mihel, Sandra and Rodin, Urelija: *Pobol i uzroci smrtnosti osoba starije životne dobi u Hrvatskoj u 2009. godini*, Croatian National Institute of Public Health, Zagreb, 2010, p. 5.

Given the population structure, recent demographic trends and projections for the future, we believe that it is extremely important to pay special attention to the category of population that is growing constantly and faster than any other age group. In order to initiate the improvement of their position in society, it is necessary to consider issues that pose the greatest obstacle to their inclusion and their potential use.

III.2. Indicators of social exclusion amongst older persons in the Republic of Croatia

A major problem facing the older persons in the Republic of Croatia is a lack of money, usually due to little or no pension. Retirement is often characterised by a cessation of communication with a number of people, primarily with co-workers. These lost contacts are most frequently not replaced with new contacts and activities in the community. Health care facilities are located and concentrated in major cities, and continuous healthcare reforms lead to uncertainty and increased costs of treatment. From a financial and any other point of view, singles are expected to find it more difficult to endure poverty in old age. All of this leads to systematic exclusion of the older population from society. Taking into account the Croatian population-related statistics and research results, the authors of the 2006 National Human Development Report concluded that a typical member of this group is "at the age of 74, having a monthly income of up to 2,000 kn and living alone or with a spouse."[36] As older people generally either do not participate in the labour market at all or they participate in the labour market to a very small extent, the main dimensions referring to their exclusion from society are poverty, social isolation and lack of access to public services.

III.2.1. Poverty among the older persons

According to the CBS data, in 2010, the at-risk-of-poverty rate in the Republic of Croatia was 20.6%.[37] With regard to their social and demographic characteristics, older people belong to the age group that is most at risk of poverty. In 2010, the at-risk-of-poverty rate for persons aged 65 years and over was 28.1%, whereby it amounted to 23.3% for men aged 65 years and over and 31.3% for women.[38] A relative poverty risk of this population is 1.7. Thus, for older people in our country there is a 70% greater than average probability that they will live in poverty.[39] This risk increases in case of a single-person household. The 2003 Household Budget Survey suggests that a single person aged 65 and

[36] Bayley, Gorančić – Lazetić, op. cit., p.100.

[37] Lipavić, Vesna, and Pajtak, Andreja, eds.: *Pokazatelji siromaštva u 2010. godini*, Vol. XLVIII, No. 14.1.2., Croatian Bureau of Statistics, Zagreb, 2011, p. 1.

[38] *Ibidem.*

[39] Šućur, Zoran: Hrvatsko iskustvo, in: Ofak, Lana et al., eds.: *Siromaštvo, nezaposlenost i socijalna isključenost*, UNDP Croatia, First edition, Zagreb, 2006, p. 18.

over is exposed to double the risk of poverty than a single person younger than 65 years.[40] Most older people live in two-person households. Approximately 244,000 single-person households in the Republic of Croatia, 80% of which are female households, have a particularly low standard of living.[41] According to data provided by the Croatian Institute for Pension Insurance, in December 2011, 579,712 people (51.58%) were receiving a pension of less than 2,000 kn, 271,364 of whom were receiving an old-age pension of less than 2,000 kn. The next 27.58% of persons were receiving a pension totalling between 2,000.01 and 3,000 kn.[42] Older persons who live in Central and Eastern Croatia and in rural areas have the lowest income.[43] From the aforementioned data we may conclude that, when it comes to income, the elderly are placed in the unenviable position. In order to meet the basic needs they rely to a large extent on the help of other family members and on social transfers. Approximately 6% of older persons households receive social assistance, and more than 18% regularly receive non-cash or cash assistance from people outside the family.[44] The 2006 National Human Development Report reveals that 22.5% of older persons do not have anyone to turn to when it comes to money, and the government is the only source of help.[45] Given the data on income and the fact that poverty increases the risk of social exclusion, there is no doubt that older persons are an especially vulnerable population in our country.

III.2.2. Social isolation of older persons

In contrast to loneliness, which appears to be the subjective experience of an individual, social isolation is an objective situation a person is in, who does not have any social ties, or his/her social ties are few or too weak. Poverty increases the risk of social isolation, but not all socially isolated persons are poor, nor are all poor persons socially isolated. In the Republic of Croatia, there is a strong family tradition and older persons, regardless of the low income, need not be isolated. The research conducted in 2004 by the Croatian Caritas and the Centre for Promotion of Social Teaching of the Church indicates a low level of participation of Croatian citizens in formal forms of sociability and the importance of informal social ties.[46] A very small number of older people volunteers or participates

[40] Matković, Štulhofer, op. cit., p. 29.

[41] Bayley, Gorančić – Lazetić, op. cit., p. 103.

[42] Krstičević, Goran et al., eds.: *Statističke informacije Hrvatskog zavoda za mirovinsko osiguranje*, Vol. IX, No. 4/2011, Croatian Institute for Pension Insurance, Zagreb, 2012, p.12.

[43] Japec, Lidija and Šućur, Zoran, eds.: *Kvaliteta života u Hrvatskoj – Regionalne nejednakosti*, UNDP Croatia, First edition, LKD, Zagreb, 2007, p. 120.

[44] *Ibidem,* p. 163.

[45] Bayley, Gorančić – Lazetić, loc. cit., see footnote 41.

[46] Šućur, Hrvatsko iskustvo, op. cit., p. 20.

actively in political life of the community. Older people find church as the most significant formal organisation.

Older people who have no living family members are particularly vulnerable to social isolation. Although it was stated in the 2006 National Human Development Report that 88% of respondents communicate with their neighbours at least once a week and 47.6% communicate with their children every day, 53.6% of older people said that their social life was not stimulating.[47] However, when it comes to social networks, we can notice a difference between rural areas, where people still feel obligated to help their neighbours and friends, and urban areas, where this feeling is much weaker or completely lost.

As we have already mentioned, family traditions are important in the Republic of Croatia, but the trends of weakening family ties and changing family structures have not circumvented our country either. There has been a constant decrease in the number of multigenerational families. Children are moving from rural areas to the cities, which in turn weakens the role of close relatives who care for older persons and the disabled. In order to avoid social isolation of older people in such circumstances, it is necessary to encourage non-institutional care for these people, not only in the form of home health care and assistance, but also by offering various cultural, social and educational activities. Supportive, "age-friendly" environments allow older people to live fuller lives and maximise their contribution.[48] Creating "age-friendly" physical and social environments can have a big impact on improving active participation and independence of older people.[49] It is important to be aware that the recognition of senior citizens' entitlement to social dignity (the term which includes both human and economic dignity) is based upon the concept of social solidarity.[50] "All members of society are dependent upon each other, and all members are responsible for one another".[51]

III.2.3. The problem of unavailable institutions and public services

Social exclusion of older people, both in the world and in the Republic of Croatia, is often accompanied by the dimension of (un)availability of public services. We believe that, in addition to poverty, this is one of the most important

[47] Bayley, Gorančić – Lazetić, loc. cit., see footnote 41.

[48] Official websites of the World Health Organization, http://www.who.int/features/factfiles/ageing/en/index.html/.

[49] Official websites of the World Health Organization, http://www.who.int/features/factfiles/ageing/en/index.html/.

[50] Sandel, Michael J.: *Liberalism and the limits of justice.* Cambridge University Press, Cambridge, 1982, cit. according to Ben-Israel, Gideon and Ben-Israel Ruth: Senior citizens: Social dignity, status and the right to representative freedom of organization, *International Labour Review,* Vol. 141, No. 3, 2002, p. 255.

[51] *Ibidem.*

factors that influences exclusion of this group from society. Given the specificities of the "third age", this is a population that is more in need of using certain services provided by state institutions (social welfare, health care and pension system) than the rest of the population. But, it is due to these specificities that the exercise of certain rights is made difficult or impossible.

When we look at access to social services, it should be noted that according to data from the 2006 National Human Development Report 55% of older people stated the social welfare centre as the main source of income supplement, and 11,700 older people have a social welfare payment.[52] Although a lot of money in our country is contributed to social transfers, and laws and regulations provide for a number of various forms of assistance, the question is how much older people know about their own rights and to which extent they are able to exercise them.[53] Sometimes help comes not to those who need it most, and often the most appropriate form of assistance is not applied.

Access to health care facilities is extremely important for this population. According to the Croatian National Institute of Public Health, in the year 2009 general practitioners recorded 3,178,798 diseases and conditions of people older than 65, which makes 31% of the total number of diseases and conditions.[54] In the same year, 213,187 people aged 65 and older were hospitalised, which makes 34.9% of the total number of individuals treated in hospitals in the Republic of Croatia.[55] Although compulsory health insurance is available to everyone in our country, the problem occurs when older people must participate in the costs of treatment, even if small amounts of money are concerned. Another problem associated with access to health services is that most of the health care institutions (other than primary health care institutions) are located in larger cities. In these cases, travel expenses to and from medical treatments represent an obstacle to the older population. With regard to access to public services, there is a problem of access to public transport. Public transport in big cities is free for people older than 65 years. However, in small towns and rural areas, there is no public transport at all or it is inadequate, and older persons have to rely on private transport, which is expensive.

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[52] Bayley, Gorančić – Lazetić, op. cit., p. 101.

[53] In 2010, the expenditures on social transfers consisting of fixed payments and one-time financial assistance provided to social welfare beneficiaries totalled to 600,862,914 kn. For more details, see Ostroški, Ljiljana et al., eds.: *Statistički ljetopis Republike Hrvatske 2011.*, Croatian Bureau of Statistics, Year 43, Zagreb, 2011, p. 537.

[54] Mihel, Rodin, op. cit., p. 6

[55] *Ibidem,* p. 7.

III.3. Social exclusion of older persons in the Republic of Croatia - concluding remarks

The Report on Poverty, Unemployment and Social Exclusion indicates that 10% of people in the Republic of Croatia feel excluded.[56] As a group, the socially excluded are dominated by individuals aged 40 and over who have a low level of education and reside in smaller settlements.[57] The average age of the excluded is 44.1 years, and women account for 68.1% of the total number of the excluded. The risk of social exclusion was 2.24 times higher in rural areas, and 70.2% of people who live in the settlements under 2,000 residents feel excluded.[58] Although the fact that 10% of Croatian citizens feel excluded from society raises concerns, the situation is even more serious when we consider social exclusion of people of the "third age". As many as 34.7% of older people in the Republic of Croatia feel excluded from society. The percentage is even higher when it comes to persons older than 65 years who live alone (40.8%).[59] More than one third of members of the elderly population in the Republic of Croatia are deprived of social assets that should be available to all on equal terms. If we take into account the estimated number of people aged 65 and older, we come to a conclusion that nearly 266,000 older people in the Republic of Croatia are, to a greater or lesser extent, cut off from society.

Data on the population structure, poverty of older persons and conditions in which this population lives in the Republic of Croatia, provide only a rough picture of reality. Life in poverty, in dilapidated residential buildings, with little or no contact with family members and neighbours, the problem of travel expenses to and from medical treatments, and the exercise of rights to benefit from social welfare services, are typical of daily life of the "third age" population. Those living in rural or remote areas are even more affected. Political participation and participation in formal social organisations are poorly represented. As to this matter, the situation is somewhat more favourable in larger cities; however, low income is the problem and an obstacle to social inclusion here as well.

IV. SOCIAL EXCLUSION AND A VIOLATION OF HUMAN RIGHTS OF OLDER PERSONS

The exercise of rights of the elderly refers in the first place to ensuring the dignity of older persons, preventing discrimination on the basis of age and care about the quality of life of this group. Unfortunately, "age discrimination is often considered less harmful than other grounds of discrimination and is frequently

[56] Matković, Štulhofer, op. cit., p. 28.
[57] *Ibidem,* p. 32.
[58] *Ibidem,* p. 30.
[59] Japec, Šućur, op. cit., p. 159.

regarded as permissible, legitimate or economically efficient".[60] Of course, just because someone is older than 65 does not mean that he/she is devoid of feelings and that he/she should be considered a burden to society. With regard to life expectancy, medical and evolutionary advances, older people can participate actively in community life for a longer period of time and contribute to the community with their knowledge and experience. But, even if someone is dependent on the assistance of others, it does not mean that we can treat him/her as a less valuable member of society. Due to helplessness and dependency, all vulnerable groups, including older persons, should be protected from human rights violations. Exclusion of this population from society is a result of disrespect for rights. This need for protecting people in the "third age" has been recognised at the international level; however, it is still not properly implemented in practice. In general, only highly developed and wealthy countries have started to work seriously on solving this problem in practice as well.

IV.1. Protection of the rights of older persons at the international and regional level

At the international level, there is no systematic and comprehensive, legally binding protection of the rights of older people and hence there is no protection against social exclusion. However, the United Nations recognised the importance of this issue and organised several international conferences on ageing. The first assembly was held in Vienna, Austria, in 1982, when the Vienna International Plan of Action on Ageing was adopted.[61] In the meantime, at the 42nd Plenary Meeting the General Assembly adopted the Proclamation on Ageing[62] (16 October 1992, by Resolution 47/5) and held a conference on ageing on 15-16 October 1992 to mark the tenth anniversary of the adoption of the Vienna International Plan of Action on Ageing. The second global conference was held in 2002 in Madrid (Spain), i.e., the UN World Assembly on Ageing, when the well-known Madrid International Plan of Action on Ageing 2002 was adopted.[63] The Madrid International Plan of Action on Ageing is "a key global policy document of ageing".[64] It is a document whose task was to respond to the

[60] Alon-Shenker, Pnina: The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination, *Canadian Journal of Law and Jurisprudence,* Vol. XXV, No. 2, July 2012, p. 243.

[61] The text of the *Viena International Plan for Action on Ageing* is available on the official United Nations websites, http://www.un.org/es/globalissues/ageing/docs/vipaa.pdf/.

[62] The text of the *Proclamation on Ageing* is available on the official United Nations websites, http://www.un.org/documents/ga/res/47/a47r005.htm/.

[63] The text of the *The Madrid International Plan of Action on Ageing – Guiding Framework and Toolkit for Practitioners & Policy Makers 2008*, is available on the official United Nations websites, http://www.un.org/ageing/documents/building_natl_capacity/guiding.pdf/.

[64] Zelenev, Sergej et al., eds.: *Vodič za nacionalnu implementaciju Madridskog internacionalnog plana akcije o starenju*, United Nations, New York, 2008, p. 8.

opportunities and challenges of population ageing in the 21st century as well as to promote social development for people of all ages.[65] It contains 239 individual recommendations, aimed at improving the position of older people and ensuring active participation of older persons in all fields.[66] The implementation of recommendations provided for in this document in national legislation would create conditions for social inclusion of older people. The document is a so-called *soft law* document and as such it is not legally binding; it only provides guidelines and instructions, and can be used as a guide for governments and experts in practice that deal with older persons.

Within the framework of UN activities it is worth mentioning the UN Principles for Older Persons 1991 that were adopted earlier.[67] In order to improve the quality of life of older people in society it is necessary to make efforts to implement the principles of independence, care, self-fulfilment, dignity and social participation of these persons. This implies that older people remain involved in society, participate actively in the formulation and implementation of policies that affect their well-being, share their knowledge with the younger generation, get involved in voluntary work and activities and organise movements and associations.[68] Several other United Nations documents relating to the older persons, their problems and rights, should be mentioned. These are the Global Targets on Ageing for 2001 that aimed to provide assistance in the implementation of the International Plan of Action on Ageing and the Proclamation on Ageing. Both documents were adopted by the General Assembly in 1992.[69] Finally, aware of the importance of protecting the rights of older persons, on 14 December 1990, the United Nations General Assembly (by Resolution 45/106) designated 1 October the International Day of Older Persons. It should also be mentioned that "Ageing and health" was the theme of World Health Day marked on 7 April 2012.[70]

In 2008, Kwong-leung Tang published an important paper entitled "*Taking Older People's Rights Seriously: The Role of International Law*", in which he calls on the international community to adopt an international convention as soon as

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[65] Visit the official United Nations websites, http://www.un.org/en/events/olderpersonsday/.

[66] For more details, see Zelenev et al., loc. cit.

[67] Visit the official United Nations websites, http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/581/79/IMG/NR058179.pdf?OpenElement, and http://social.un.org/index/Ageing/Resources/MadridInternationalPlanofActiononAgeing.aspx/.

[68] *Ibidem.*

[69] *Global Targets on Ageing for the Year 2001: A Practical Strategy,* Report of the Secretary-General, 1992 A/47/339; General Assembly Resolutions A/RES/47/5 (16 October 1992).

[70] Official websites of the World Health Organization, Regional Office for Europe, http://www.euro.who.int/en/who-we-are/whd/past-themes-of-world-health-day/world-health-day-2012-active-ageing-good-health-adds-life-to-years/.

possible that would establish a system that would monitor the protection of human rights of older persons.[71] As the rights of women, children, migrant workers, racial groups, victims of torture, persons with disabilities, are specifically protected, there is now a strong need to protect older persons by a special international instrument.[72] That is why Tang proposes that the future convention on the rights of older people should address a range of fundamental human rights of older persons, and it should especially contain the following provisions: "The right to an adequate standard of living, including adequate food, shelter, and clothing; The right to adequate social security; The right to freedom from discrimination based on age or any other status, in all aspects of life (access to housing, health care, and social services); The right to the highest possible standard of health; The right to be treated with dignity; The right to protection from neglect and all types of physical or mental abuses; The right to full and active participation in all aspects of political, economic, social, and cultural life of society; The right to full and effective participation in decision-making concerning their well-being."[73]

Bearing this goal in mind, a special Open-ended Working Group on strengthening the protection of the human rights of older persons was established by UN General Assembly.[74] The first session of this Open-ended Working Group was convened from 18 to 21 April 2011 in the United Nations in New York. The first session was focused on understanding the current situation of the human rights of older persons around the world.[75] In May 2012, the UN held a three-day Expert Meeting on the human rights of older persons in New York to precede the third working session of the Open-ended working group.[76] The meeting aimed at informing the debate from a substantive human rights perspective by "addressing urgent and relevant gaps in the respect, protection and fulfilment of human rights of older persons".[77]

But, until such international convention is adopted, older persons need to seek their protection within the existing network of general protection of human rights. Here we should mention special provisions of international documents that are (in)directly applicable to older persons. These are e.g. the Charter of

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[71] Tang, Kwong-leung: Taking Older People's Rights Seriously: The Role of International Law, *20 Journal of Aging & Social Policy 99*, 2008, p. 99 and further.

[72] *Ibidem,* p. 100. See also Sanchez Rivera, Sebastian J.: Worldwide Ageing: Findings, Norms, and Aspirations, *Revista jurídica Universidad de Puerto Rico,* Vol. 79, No. 1, 2010, pp. 281-282.

[73] Tang, op. cit., p. 109.

[74] Visit the official websites of the Open-ended Working Group on strengthening the protection of the human rights of older persons, http://social.un.org/ageing-working-group/firstsession.shtml/.

[75] *Ibidem.*

[76] Visit the official United Nations websites, http://social.un.org/ageing-working-group/egm2012.shtml/.

[77] *Ibidem.*

the United Nations (1945)[78] (Art. 55), the Universal Declaration of Human Rights (1948)[79] (Articles 3, 22, 25, 27), the Convention Relating to the Status of Refugees (1951)[80] (Art. 24), the International Covenant on Economic, Social and Cultural Rights (1966)[81] (Articles 9, 11, 12), ILO C102 (1952) – Convention concerning Minimum Standards of Social Security[82] (Part V), C111 (1958) – Discrimination (Employment and Occupation) Convention (Art. 5(2))[83], ILO CO128 (1967) – Convention concerning Invalidity, Old-Age and Survivor's Benefit[84] (Parts III and VI), ILO R162 (1980) - Recommendation concerning Older Workers[85] (Section II, para. 5(g)), ILO R166 (1982) - Termination of Employment Recommendation[86] (Art. 18), ILO C168 (1988) Employment Promotion and Protection against Unemployment Convention[87] (Art. 26 d), the African Charter on Human and Peoples' Rights (1981)[88] (Art. 18), etc.

Finally, it is important to note that only the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[89] mentions "the elderly" in Art. 7. According to that article, discrimination based on age is prohibited in the exercise of the rights guaranteed by that Convention. Other international agreement we need to mention in

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[78] *Povelja Ujedinjenih naroda,* Official Journal of the Republic of Croatia – International agreements, No. 15/1993 and No. 7/1994.

[79] *Opća deklaracija o ljudskim pravima,* Official Journal of the Republic of Croatia – International agreements, No. 12/2009.

[80] *Konvencija o pravnom položaju izbjeglica,* Official Journal of the Social Federal Republic of Yugoslavia – International agreements, No. 71/1960, Official Journal of the Republic of Croatia – International agreements, No. 12/1993.

[81] *Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima,* Official Journal of the Social Federal Republic of Yugoslavia, No. 7/1971 and Official Journal of the Republic of Croatia – International agreements, No. 12/1993.

[82] The text is available on the official ILO websites, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C102/.

[83] The text is available on the official ILO websites, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C111/.

[84] The text is available on the official ILO websites, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312273:NO/.

[85] The text is available on the official ILO websites, http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312500/.

[86] The text is available on the official ILO websites, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312504:NO/.

[87] The text is available on the official ILO websites, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312313:NO/.

[88] The text is available on the official websites of the African Union, http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf

[89] *International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families,* A/RES/46/114, official UN websites, http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/582/02/IMG/NR058202.pdf?OpenElement

the context of older people is the *Convention* on the Rights of Persons with *Disabilities* and its Optional Protocol (2006)[90], to which the Republic of Croatia is a party since 2007.[91] In this international treaty, older people are mentioned in two articles, i.e., Art. 25(b) and Art. 28(b). Pursuant to Art. 25 (Health), the States Parties to this Convention undertake to achieve the "highest attainable standard of health without discrimination on the basis of disability", ensure access to health services, and especially b), *inter alia*, provide early identification and intervention, as well as services designed "to minimise and prevent further disabilities" among older persons. Furthermore, Art. 28. (Adequate standard of living and social protection) of the Convention on the Rights of Persons with Disabilities imposes an obligation on States Parties to recognise the right of persons with disabilities to social protection without discrimination ensuring *inter alia* "access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes".

Besides violating the rights of older persons to freedom from discrimination and freedom from violence, the protection of social, economic, political and cultural rights is particularly important for this population. Although older people have the same rights as young people, some rights take on greater importance in old age (e.g., the right to social security, adequate health care, financial security, etc.). It is known that some of the rights that young people exercise with no trouble are denied to the elderly (e.g., access to health care and nursing services) or lower-level care is provided for older persons than other members of society, thus they are discriminated against. Although the protection of these rights is guaranteed under the general protection of human rights to all people, when it comes to older persons, it is often violated, resulting in the exclusion of this population from society. Denial of access to material, financial and social assets of society to the members of this age group represents a violation of many rights and deprives older persons of dignity and a secure life, as well as social equality.

At the European level, social rights are in general regulated by two extremely important regional documents. The first is the European Convention for the Protection of Human Rights and Fundamental freedoms (1950)[92], and the other

[90] UN General Assembly, Convention on the Rights of Persons with Disabilities Resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106.

[91] Republic of Croatia is a State Party to the *Convention on the Rights of Persons with Disabilities and its Optional Protocol* pursuant to the *Act for Confirming the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, Official Journal of the Republic of Croatia – International agreements, Nos. 6/2007, 3/2008 and 5/2008 – corrigendum. The Convention on the Rights of Persons with Disabilities entered into force in the Republic of Croatia on 3 May 2008.

[92] Council of Europe, *The European Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaties Series no. 5,* Council of Europe, Strasbourg, 1950.

is the European Social Charter (1961)[93]. The documents are important because they provide the basis for further development of social rights in Europe. Since at a global level there is no legally binding document that would protect older people from social exclusion, the latter is an extremely important document for us, i.e. the European Social Charter (1961) with the Protocols. The elderly are explicitly mentioned in the Additional Protocol to the European Social Charter signed in 1988, and certain rights are guaranteed to them by Art. 4. The aim of this article is to protect the elderly from poverty and enable them to access social, health and other services in the community. It also aims to promote non-institutional care for the elderly, so that they are provided adequate housing and adequate health care. Older people living in institutions are guaranteed participation in making decisions concerning living conditions in these institutions as well as respect for their private life. In this way, they are supposed to remain full members of society, free to choose the way of life and live an independent and dignified life.

Rights of the elderly were introduced into EU law for the first time in Art. 25 of the Charter of Fundamental Rights of the European Union: "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life" (Title III, Equality).[94] Let us recall that this Charter refers to all European institutions and shall be applicable in all EU Member States. Art. 25 is thus "a new departure for the EU", since for the first time it clearly mentions the rights of older people, but also because it "respects and recognises" the rights of the elderly.[95] The European Union has devoted much attention to social inclusion, but also to the rights of the elderly. "Prevention and integration have become important aspects of social security policies at all levels (supranational, national, regional and local) in Europe in recent years".[96] So the year 2010 was the European Year for Combating Poverty and Social Exclusion[97], and 2012 was the European Year for Active Ageing and

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[93] Council of Europe, *The European Social Charter: Collected Texts, including Explanatory Reports,* Council of Europe, Strasbourg, 1997.

[94] These rights are not defined in the Charter of Fundamental Rights of the European Union. The Updated Explanations on the text of the European Union Charter of Fundamental Rights states that Article 25 draws on Article 23 of the European Social Charter and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers (1989). Thus rights of the elderly concern more general and programmatic measures in favour of older people in comparison with anti-discrimination law. For more details, see Meenan, Helen: Reflecting on age discrimination and rights of the elderly in the European Union and the Council of Europe, *14 Maastricht Journal of European and Comparative Law*, 39, 2007, p. 41. The text of the *Charter of fundamental rights of the European Union,* Official Journal of the European Communities, 2000, p. 41 and further.

[95] *Ibidem,* p. 63.

[96] For more details, see Greve, Bent: Prevention and integration: an overview, *European Journal of Social Security,* Volume 9 (2007), No. 1I, p. 3. and further.

[97] For more details on the 2010 European Year for Combating Poverty and Social Exclusion, see the official websites of the European Commission http://ec.europa.eu/employment_

Solidarity between Generations[98]. As part of the celebration of these years a large number of projects aimed at improving the quality of life of vulnerable groups (including the elderly) have been conducted, and the public has been educated on and sensitised to the problems that occur in the older population.

But still, no comprehensive, legally binding instrument on the rights of the elderly has been enacted at the regional level. We should mention here that the Council of Europe, as an extremely important inter-governmental organisation for the protection of human rights in Europe, initiated in this context an important project entitled Human Dignity and Social Exclusion Initiative (HDSE).[99] The project lasted from 1994 to 1998. It covered *inter alia* the elderly, and proposals referring to the fight against the risk of social exclusion were given. The HDSE initiative took a broad approach and "it was the first time that a team of researchers had been brought together to develop a pan-European thinking on poverty and social exclusion."[100]

IV.2. Protection of older persons from social exclusion in the Republic of Croatia

There is no systematic protection of human rights of the elderly either at the international level or in our country, but these rights are protected under general regulations. In its Chapter III (Fundamental Freedoms and Rights of Man and Citizen), the Constitution of the Republic of Croatia[101] gives provisions on the rights all citizens of our country are entitled to. Violation or deprivation of these rights place people in an unfavourable position, which can result in social exclusion. The only provision of the Constitution which mentions the elderly is the provision of Art. 63(4), which states that children shall be bound to take care of old and helpless parents. But here the elderly are mentioned in the context of family relationships, and not as the duty of the state to guarantee the exercise of some special rights to this population. With respect to the protection of social exclusion, relevant provisions of the Constitution of the Republic of Croatia are of special importance for older people, since they guarantee everyone the right to health care in accordance with the law (Art. 59 of the Constitution), and respect for and legal protection of their personal and family life, dignity, reputation and honour (Art. 35 of the Constitution). The provision of Art. 58(1) of the

social/2010againstpoverty/index_en.htm/.

[98] For more details on the 2012 The European Year for Active Ageing and Solidarity between Generations, see the official websites of the European Union, http://europa.eu/ey2012/.

[99] For more details on the project, see the official websites of the Council of Europe, http://www.coe.int/t/e/social_cohesion/hdse/. See also Duffy, Katherine: Risk and Opportunity: Lessons from the Human Dignity and Social Exclusion, *Canadian Journal of Law and Society,* Vol. 16, 2001, pp. 17-41.

[100] *Ibidem,* p. 18.

[101] *Ustav Republike Hrvatske*, Official Journal of the Republic of Croatia, Nos. 56/90, 135/97, 8/98, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010 and 85/2010. – consolidated text.

Constitution also matters to them, and it obliges the Republic of Croatia to ensure to weak, helpless and other unprovided-for citizens due to unemployment or incapacity to work the right to assistance to meet their basic needs, and the provision of Art. 65(1), which states that everyone shall have the duty to protect children and helpless persons. However, as we have seen in the section of this paper dealing with the situation of the elderly in our society, this population faces numerous difficulties in exercising the rights guaranteed by the Constitution, which results in its exclusion from society. The National Programme for the Protection and Promotion of Human Rights from 2008 to 2011[102] provided for the measures aimed at improving the quality of life of the elderly in the form of non-institutional care and encouraging voluntary assistance to the elderly, but it did not have any detailed information on violations of the rights of the elderly, or significant measures of social inclusion and poverty reduction among this population.[103] In addition to the Constitution of the Republic of Croatia, provisions of the following acts are of particular importance for the protection of the rights of older persons: the Family Law Act,[104] the Domestic and Family Violence Protection Act, [105] the Anti-Discrimination Act[106] and the Free Legal Aid Act.[107]

In the context of older people and protection of their rights in the Republic of Croatia the aforementioned European Social Charter with Protocols is also important, and in particular the provision of Art. 4 of the Additional Protocol to the European Social Charter, which refers to the elderly. Republic of Croatia is a party to the document since 2003.[108] Although in our country some measures have been undertaken to achieve the purposes of Art. 4 of the Additional Protocol to the European Social Charter, further efforts are needed for systematic implementation of its provisions in the acts and regulations, finding adequate

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[102] *Nacionalni program zaštite i promicanja ljudskih prava od 2008. do 2011. godine*, loc. cit.

[103] For more details, see *ibidem.*

[104] *Obiteljski zakon,* Official Journal of the Republic of Croatia, No. 116/2003.

[105] *Zakon o zaštiti od nasilja u obitelji,* Official Journal of the Republic of Croatia, Nos. 137/2009, 14/2010 and 105/2011.

[106] *Zakon o suzbijanju diskriminacije,* Official Journal of the Republic of Croatia, Nos. 85/2008 and 112/2012.

[107] *Zakon o besplatnoj pravnoj pomoći,* Official Journal of the Republic of Croatia, Nos. 62/2008 and 81/2011.

[108] Republic of Croatia is a State Party to the given document pursuant to the *Act for Confirming the European Social Charter, the Additional Protocol to the European Social Charter, the Protocol Amending the European Social Charter, and the Additional Protocol to the European Social Charter* Providing for a System of Collective Complaints, Official Journal of the Republic of Croatia – International agreements, Nos. 15/2002 and 8/2003. The European Social Charter and the given protocols to the European Social Charter entered into force in the Republic of Croatia on 1 April 2003.

ways to protect the rights of older persons, and the achievement of the objectives outlined in the above mentioned article.

The Joint Memorandum on Social Inclusion of the Republic of Croatia (JIM)[109] of 2007, which was prepared by the Croatian government in collaboration with the European Commission, is important for identifying the problem of social exclusion in the Republic of Croatia and the implementation of welfare reform. The goal of this document was to assist Croatia in the fight against poverty and social exclusion and the modernisation of social protection systems. In order to achieve the objectives of this document, in the period between 2007 and 2012 the Croatian government was adopting implementation plans with concrete measures for social inclusion. Reports on the results of the measures taken were regularly submitted to the Commission. The National Implementation Plan on Social Inclusion 2011-2012[110] identified elderly women as a vulnerable group, and it also considered a long-term and sustainable solution to the problem of poverty among senior citizens and retirees. The envisaged measures related to the reforms of the pension insurance system, the protection of older people with no adequate income through the social welfare system and the elderly living alone through the social welfare system.[111]

The United Nations Development Programme (UNDP) Croatia, which exists in our country since 1996 is also significant to the study of social exclusion in the Republic of Croatia and the recognition of this problem in general, but also in the context of people in the "third age".[112] The social inclusion programme provides support to persons with difficult access to civil, political and social rights. As part of this programme, data on the level of social exclusion are collected, transparency in creating social policy as well as public debate at the national level referring to this issue are promoted, and support for voluntary work and local development initiatives aimed at most isolated community groups is provided.

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[109] *Joint Memorandum on Social Inclusion of the Republic of Croatia*, official websites of the Ministry of Social Politics and Youth of the Republic of Croatia, http://www.mspm.hr/djelokrug_aktivnosti/medunarodna_suradnja/jim_zajednicki_memorandum_o_socijalnom_ukljucivanju_rh/joint_memorandum_on_social_inclusion_of_the_republic_of_croatia/%28offset%29/10 /.

[110] *National Implementation Plan on Social Inclusion 2011 - 2012*, avilable on the official websites of the Ministry of Social Politics and Youth of the Republic of Croatia, http://www.mspm.hr/djelokrug_aktivnosti/medunarodna_suradnja/jim_zajednicki_memorandum_o_socijalnom_ukljucivanju_rh/joint_memorandum_on_social_inclusion_of_the_republic_of_croatia/.

[111] *Ibidem.*

[112] For more details, see the official UNDP Croatia websites, http://www.undp.hr/.

V. CONCLUSION

Given the above, social exclusion of older people is considered relatively permanent, structurally conditioned deprivation among older people of material, financial, cultural, social, health and other assets. Social exclusion is a result of the infringement of older people's rights. The consequence of all this is an unequal position of the ageing population in society, and weakening or breaking of ties of older persons with the (local) community. Although everyone agrees that this phenomenon is multi-conditional, depending on whether it is dealt with by sociology, demography, law, or any other social science, the emphasis is placed on the various causes of this phenomenon in society. Connecting the concept of social exclusion with the concept of human rights is one of the ways of understanding and explaining the emergence of the globally widespread phenomenon of exclusion of individuals, whole groups or geographic areas from society. Social exclusion is not a consequence of violence against older persons, but the result of repeated violations of various rights (economic, social and cultural), and the institutional and social barriers set in that way. Hence it comes as a result of the infringement of rights, but it represents a violation of law itself, because it deprives the elderly of dignity, independence and participation. Due to multiconditionality of this phenomenon, we must stress that it heavily depends on social policy measures, which are provided for to include the elderly population in the community.

In the Republic of Croatia activities are undertaken the goal of which is social inclusion of older persons, as well as the prevention of discrimination and disclosure of prejudices and stereotypes that exist against this category of the population. This is a long and difficult job for any society, even the most advanced ones. In the Republic of Croatia, there is a good network of regulations that goes for the prohibition of discrimination; however, further serious work on their better implementation in practice is necessary. Also, the *Convention* on the Rights of Persons with *Disabilities* and its Optional Protocol (2006) should be more carefully applied in practice, especially the part in which the Convention applies to older persons. Finally, the Republic of Croatia should seriously support the efforts of academia and non-governmental organisations on the adoption of the (draft) Convention on the rights of older persons. This international document (contract) would set rules and standards for their protection.

Adequate measures need to be undertaken as a response to the problems identified by the elderly. To analyse and solve the problems of social, economic and cultural rights of older persons it is of particular importance to continuously and systematically collect data on the older population and possibly to create a separate register of older persons in the Republic of Croatia. All this requires cooperation of government bodies, public services, local and regional government and self-

government, non-governmental organisations, and the citizens themselves. It is necessary to change the acts and other regulations, to design and implement adequate social policy measures, to promote transparency and accessibility of public services to everyone and to develop all forms of non-institutional care for the elderly. As to rapid population ageing, it is also necessary to respond as soon as possible and adopt new models, change the existing concepts of thinking and introduce new policies in relation to the elderly. Of course, this requires a lot of money. However, the lack of money should not be an excuse to violate human rights.

By including older people in society we can use their potential. A large number of older people could not continue working any more and thus generate their own income not related to the pension insurance system. They should be allowed to do this. This population, according to their abilities, can be involved in voluntary work and actively participate in the community, and even help others. If older persons have an adequate income, are provided with health care and non-institutional care, and are offered cultural, social and educational activities, they will be able to take care of themselves for a longer period of time. We would all benefit, both as individuals and as a community, from the implementation of social policy aiming to include older persons, create an atmosphere where human rights are respected and use the knowledge and skills of older persons and their inclusion in society.

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AN INSTITUTIONAL ANALYSIS OF HOUSING DELIVERY IMPROVEMENTS: A MALAYSIAN CASE STUDY

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Abstract

Procedural delay and inefficiencies associated with housing regulations have long afflicted the house building industry in both developed and developing economies. The Malaysian housing market has long been regarded as overregulated. Overregulation has been blamed for market inefficiencies and increased housing costs. As a result, the Malaysian government continuously undertook measures to enhance the efficiency of the housing delivery system by reviewing housing regulations and procedures. The most recent major revamp in 2007 focused on two main aspects namely; simplifying and shortening the development approval process and introducing a self-certification system. This study provides a macro-level analysis of these improvements in Malaysia. It draws on an institutional framework to explore the effects of institutions on the implementation of these improvement measures. The findings show substantial influence from pre-existing legal and government systems.

Keywords: *Housing delivery, housing regulations, improvements, procedures, institutions*

1. INTRODUCTION

Procedural delay and inefficiencies have long afflicted the house building industry in both developed and developing economies. As a result, housing

regulations have been associated with high construction costs by researchers, policymakers and international organisations. For instance, UN-HABITAT (2011) reported that one of the factors contributing to low housing affordability in Asia is "the compliance costs and regulations surrounding formal housing development (that) are expensive and time consuming". Specifically in developing countries, the majority of the World Bank housing studies have reported that regulations have skewed housing market efficiencies (Bertaud & Brueckner, 2004; Bertaud & Malpezzi, 2001; Dowall & Clarke, 1996; Hannah, Bertaud, Malpezzi, & Mayo, 1989; Malpezzi & Mayo, 1997; Mayo & Sheppard, 1996). Mayo & Sheppard (2001) argued that 'stochastic development control' by planners increases development risks.

Since the 1980s, the Malaysian housing market has been perceived as overregulated, leading to low elasticity of supply compared to the neighbouring Thailand (Hannah et al., 1989; Malpezzi & Mayo, 1997; Mayo, Malpezzi, & Gross, 1986; Mayo & Sheppard, 1996, 2001). Perceptions of overregulation have led to the call for deregulation of the Malaysian housing market. Notably, the Malaysian government continuously undertook measures to enhance the efficiency of the housing delivery system. The most recent major revamp in 2007 focused on improving two procedural aspects namely to simplify and shorten the development approval process and to establish a self-certification system. Both improvements had been implemented at Local Authorities throughout Malaysia. An efficient housing delivery system is in line with government aspirations contained in the recent National Housing Policy that was implemented in 2011.

Housing studies supporting negative perceptions on housing regulations have mainly adopted econometric modelling as the main approach. The mainstream modelling approach has been criticised for giving little regard to the effects of institutions in the housing market (Ball, 1998, 2003) and assuming a unitary housing market (Adams, Watkins, & White, 2005). In particular, models have a tendency to gloss over the interaction of regulations with the pre-existing legal and government systems and the mediation of regulations by housing actors. Having exposed the gap in the previous mainstream approach, we propose the adoption of an institutional framework in analyses of policy impact on the housing market. We submit that an institutional approach will complement knowledge about regulations provided by the mainstream neo-classical economic modelling approach.

We provide an analysis of housing regulations in Malaysia, citing a case study on the recent efforts to streamline and improve housing development procedures in the country. We show how the implementation of housing regulations may be influenced by the existing institutional framework within the housing market. In doing so, we explain how pre-existing legal and government systems can

influence new housing policy. This in-depth analysis enables the identification of advantages of and barriers to future deregulation or improvement measures to the housing market.

Following the introduction, the literature review section will provide the conceptual framework for the study. This conceptual framework becomes the basis for the methodology adopted which is presented in the next section. Subsequently the study context will be provided as a precursor to the results and discussion on the actual operations of housing regulations.

2. LITERATURE REVIEW

2.1. Effects of state intervention in housing provision

State interventions may be defined as *direct* and *indirect inputs f*rom the public sector, taking the form of subsidies, taxes, regulation and other interventions (Hannah et al., 1989). Tiesdell and Allmendinger (2005) identify four broad policy interventions in the land and property market aimed at shaping, regulating, stimulating and building the capacity of the market. They stated that the state can use an array of tools to influence the housing market, depending on the aim of the policy. The mechanisms vary in terms of degree of control (shape, regulate, stimulate or build the market) and scope of control (macro-level or micro-level). Furthermore, the intervention tools may be restrictive (e.g. building regulations) or facilitative (e.g. grants). In the property market, public policy is used to "override markets or steer market forces to achieve desired political aims" (Ball, 1998, p. 1502).

State regulation is one of the mechanisms to control housing market actions, internalise externalities and incorporate public interest considerations (Tiesdell & Allmendinger, 2005). Generally, three types of regulations control housing provision. Firstly, development control is implemented to protect health, safety, or welfare (Adams, 2008; Cheshire & Sheppard, 1997, 2003; Dowall, 1992), to preserve the environment (Adams, 2008; Dowall, 1992) and to improve energy conservation (Adams, 2008; Downs, 1991). In most countries, development control comprises elements of urban containment, density, minimum building standards and social integration (Brueckner, 2010). Development control is often identified with urban land policy (i.e. the control of the land market will have a corresponding effect on the property market) (Adams, 2008). Regulations that control development activities include planning, land and environmental laws. Secondly, planning obligation is used to convert benefits accrued to landowners caused by the planning system into public goods. It is also described as a betterment tax on the land value with planning permission (Monk, Short, & Whitehead, 2005). Examples are the Section 106 planning agreements in the

UK and the low-cost housing quota in Malaysia. Finally, housing standards are employed to ensure that houses are built according to acceptable physical and social standards. It has been observed that developing countries tend to adopt western building standards that can be unsuitable to the local socio-economic conditions (Malpezzi & Mayo, 1997; UN-HABITAT, 2011).

2.2. Housing market and institutions

According to Ball (1986, 2003b, 2006), housing provision involves aspects of production, consumption and exchange. Developing upon Ball's ideas, Burke & Hulse (2010) view production as "concerned with the nature and techniques of land ownership, land assembly and housing production"; consumption as "concerned with the forms and methods by which households consume housing"; exchange as "concerned with the practices and institutions which facilitate the sale, renting and use of housing" and further add a fourth housing provision dimension (i.e. management) which is categorised as "the practices by which the housing system is managed, including policy and planning at all levels of government" (p. 824).

Located within the different spheres of housing provision are a network of actors, each playing their own roles and each displaying distinct economic behaviours that correspond to their organisational objectives (Ball, 1986, 2003, 2006, 2010). The roles and degree of involvement of these actors are determined by the specific housing type and tenure (Ball, 1986). Generally, these actors include planners, developers, various government departments, financial institutions, land owners, building contractors and house buyers or renters (Ball, 1986). In housing production, Ball (2010) indicates that at the micro-level, the characteristics of the developer, the site, the project and the Local Authority can influence the speed of development approval. Whilst developers are responsible to transform the urbanscape, their activities are regulated by planners. In sum, planners represent the regulator whilst developers are the regulated party in housing production. The implementation of housing regulations depends on their interpretation by planners and negotiation between planners and developers (Monk et al., 2005).

In the past, policymakers tended to assume a unitary housing market at the national level, neglecting market disaggregation and dynamism caused by pre-existing social, economic, government and political institutions (Adams et al., 2005c). Significantly, local variations of the housebuilding industry may occur between and within countries due to potential economies of scale, market factors, information asymmetries, regulation and risk (Ball, 2003b). Recent developments in property studies have confirmed disaggregation within the

housing market due to institutional forms between and within countries (Ball, 2003; Keogh & D'Arcy, 1999; McMaster & Watkins, 2006).

The review of the international literature indicated that the neo-classical econometric modelling tradition is the main approach in the analysis of housing regulations. This literature focuses on the extent to which planning policy "through its constraints on overall land supply... (can) lead to higher prices and densities (and)... restrictions in the quantity of homes supplied" (Adams, 2008, p. 4571). Using neo-classical econometric modelling as the main approach, the mainstream economic studies present a broad overview of the impact of regulations on house prices. By linking economic fundamentals with price, econometric models show how regulations add to total housing costs (see for instance Bertaud & Brueckner, 2004; Bertaud & Malpezzi, 2001; Bramley & Leishman, 2005a, 2005b; Malpezzi & Mayo, 1997). Regulations that govern planning, land use and the environment have been consistently demonstrated to inflate house prices by these models in terms of compliance costs and land supply constraints. Overall, this group of literature is similar in its main approach (econometric modelling) and result (inflationary propensities of regulation).

Earlier, it was established that the housing market is shaped by interactions of tangible and intangible institutions. Notwithstanding the role of institutions, the mainstream tradition using neo-classical econometric modelling of land and housing market phenomena has a tendency for "institutional neglect" (Ball, 1998, p. 1515). Furthermore, its positivist-deductive approach employs assumptions of perfect competition and profit-maximising among firms in achieving its conclusions that may not stand in practice (Ball, Lizieri, & Macgregor, 1998). Realising these shortcomings, the institutional approach emerges to address the mainstream approach's neglect of institutions and provides a deeper insight into the "less tangible social costs and benefits" of land and housing regulations (Adams, 2008, p. 4571).

2.3. Institutional framework to study housing regulations

The institutional approach in the analysis of housing regulations is based on the principle that the housing market is characterised by "pre-existing institutional practices, market conditions and government policies" (Murphy, 2011) which may influence the way housing regulations are negotiated and enforced. In a centrally planned supply system such as Malaysia, interactions between the state and housing markets determine the success of policy interventions (Agus, 2002). According to Adams (2008), government interventions, including housing regulations, influence housing supply through its impact on industry players. It is the interactions between these housing agents and other institutional factors in the regulatory environment that influence the outcomes of housing regulations.

At this point, it is useful to provide a definition of institutions in the context of this chapter. These definitions are derived from both the economic and property perspectives. Hodgson (1998, 2000, 2003, 2006, 2007) undertook to define institutions from an economics point of view. At its core, institutions are "systems of established and prevalent social rules that structure social interactions" (Hodgson, 2006, p. 2). The relationships between the institutional environment and tangible and intangible institutions within the property market are discussed in detail by Keogh & D'Arcy (1999). Tangible property institutions (actors) include developers and government agencies whilst intangible institutions (habits, norms or rules) may include property rights and land use and development control. The property market can be characterised by its political, social and legal environment that serve as the framework within which these tangible and intangible institutions operate. Nonetheless, the influence flows both ways in that the institutional environment shapes and is simultaneously being shaped by institutional actors and rules. There is also a reciprocal relationship between actors and rules, whereby the behaviour of actors are shaped by habits, norms and rules that become entrenched (i.e. institutionalised).

There are significant variations within the institutional perspective. For example, the New Institutional Economics (NIE) focuses on issues such as transaction costs and institutional behaviour. In NIE, institutions are defined as "as both organisations per se and the rules, norms and traditions that govern and affect economic behaviour and policy formulation" (Gibb & Nygaard, 2006). NIE is concerned with how transactions costs affect the structure of governance and mode of organisation/production of goods and services (Coase, 1937) and whereby governance structures strive to minimising transaction costs is posited as a function of governance structures (Williamson, 1985). Ball (1998) divides institutionalism in property studies into four main approaches namely the mainstream economics, power, structure-agency and structure of provision. Each main approach may be divided into different institutional analyses that have their own strengths and weaknesses according to the topic under study.

3. METHODOLOGY

The literature review guides the central argument of this chapter that the existence of institutions has a significant impact on how regulations are rolled out at the on-the-ground level. This chapter recognises that the effects of regulations may be conditioned by the disaggregation of housing markets and other pre-existing institutions (e.g. the political, social, economic and legal institutions) together with policies designed to influence the land market. Notably, this chapter argues that the legal and government systems are two additional factors that

cause disaggregation of the housing market, which in turn affects the operation of housing regulations.

Based on the central argument that the housing market is disaggregated at the regional level resulting from institutions, the institutional Structure of Provision (SOP) thesis (Ball, 1983, 1986, 1998, 2003) was adopted as the main approach for this chapter. In the context of housing, an SOP is defined as "an historically given process of providing and reproducing the physical entity, housing; focusing on the social agents essential to that process and the relations between them" (Ball, 1986, p. 158). This approach recognises the spatial and temporal boundaries of the housing market, as "structures of provision are historical products and cannot be isolated from their contemporary environment" (Ball, 1986, p. 163). Thus, a property type may have different SOPs between countries and even several SOPs nationally at one point in time (Ball et al., 1998). Among institutional factors that may influence the composition of SOPs include the legal structure, the local housebuilding industry, local building material and economies of scale (Ball, 2003). These institutional factors and also "changes in technologies, tastes and policies and the strategies of the institutions involved" result in continual change of SOPs (Ball et al., 1998, p. 131). In terms of aspects of housing provision, we focus on *production* to align with the National Housing Policy and the nature of planned housing in Malaysia as reflected in the five-yearly Malaysia Plan.

The SOP is used to frame our analysis of Malaysian housing regulations, which involves a two-tier analysis. The macro-level analysis of housing regulations involves examining relevant housing regulations and the current institutional arrangements of regulatory implementation. Next, we undertook a micro-level analysis of housing regulations by providing a case study of two new procedural improvements to the housing delivery system. The case study was constructed from a review of various government publications, websites and interviews with seven major housing developers in a State in Malaysia. The macro-level analysis provides a general view of the regulatory environment over housing provision whilst the micro-level analysis provides a further insight into the actual operation of housing regulations at the regional level. Thus, our two-tier analysis offers an in-depth perspective into the interactions of housing regulations with pre-existing institutions in the Malaysian housing market.

4. THE CONTEXT

4.1. The institutional environment of the Malaysian housing market

The evolution of modern Malaysia plays an important role in shaping the country's housing policy. Malaysia is a federation of thirteen individual States and three Federal territories. The country comprises two major regions, Peninsula

Malaysia and East Malaysia, separated by the South China Sea. The west coast of Peninsula Malaysia is more developed than the east coast. Administratively, Malaysia is a constitutional monarchy (ILBS, 2010). Although the supreme ruler is the King, the executive power is held by the parliament, which is headed by the Prime Minister, and authorized to pass national legislation (ILBS, 2010). As a federation, the central governance is administered by the Federal Government with each individual State being ruled by the State Authority headed by a Chief Minister (ILBS, 2010). Federal and State powers are clearly divided in the Malaysian Constitution under the Federal, State and Concurrent lists (Awang, 2008). In effect, there is a three-tier system of administration in Malaysia - Federal, State and Local (ILBS, 2010). This multi-level government structure gives rise to a complicated housing regulatory structure.

The country adopts a centrally planned housing supply. Housing targets are announced in the five-yearly Malaysia Plan according to price and State. The Ministry of Housing and Local Government ('MHLG') assumes the responsibility to ensure housing targets are met. In the context of residential stock, Table 1 shows that the total housing for the whole country currently stands as 4,510,623 units. Since 2002, the housing stock steadily increased at the rate averaging 4% per annum. The Klang Valley region comprising the States of Selangor, Johor, Perak, Kuala Lumpur and Penang accommodates 3,142,118 or approximately 70% of the total residential stock (Valuation and Property Services Department, 2011).

Table 1: ***Housing supply in Malaysia, 2002-2011***

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Existing stock	2,991,738	3,237,559	3,452,369	3,647,887	3,850,568	4,043,040	4,193,150	4,322,921	4,433,310	4,510,623
Incoming supply	572,961	584,531	617,743	612,718	608,840	574,841	551,263	541,824	527,166	584,546
Total existing & incoming	**3,564,699**	**3,822,090**	**4,070,112**	**4,260,605**	**4,459,408**	**4,617,881**	**4,744,413**	**4,864,745**	**4,960,476**	**5,095,169**

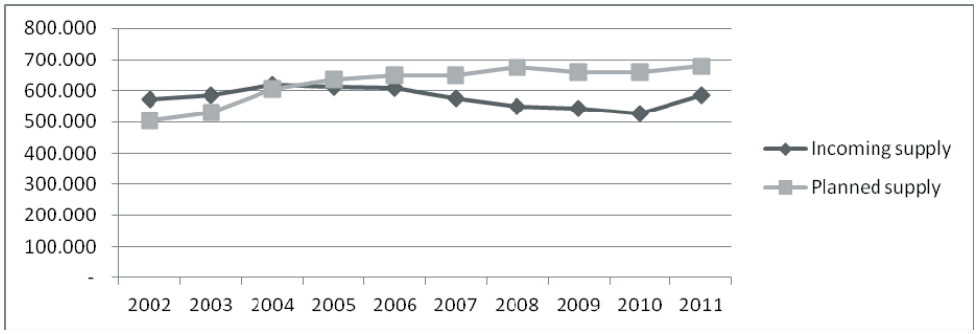
Source: Compiled from various Property Market Reports by the Valuation and Property Service Department

The latest population census in 2010 indicates a population of 28,250,000 which comprises 6,544,500 households (Department of Statistics Malaysia Official Website, 2010). Comparing the above number of total residential stock against the number of households, there is a shortage of approximately 2 million units of formal housing to match the number of households. The number of incoming supply stood at 584,546 units against the planned supply of 678,302 units as at the fourth quarter of 2011. Table 1 shows that there has been a significant shortfall of housing supply in the country, holding the number of households relatively constant during the period.

Figure 1 further illustrates the constant underachievement of the housing market. Actual incoming supply has not achieved the planned supply since

2004. One of the issues that interferes with the planned housing supply is "(w)eaknesses in ensuring implementation and compliance with the service delivery system on housing" (MHLG, 2011). An efficient housing delivery system is therefore crucial in ensuring that the state achieves its housing targets.

Figure 1: ***Incoming vs. Planned supply, 2002-2011***



Source: Compiled from various Property Market Reports by the Valuation and Property Service Department

Based on the need to close the gap in housing supply, the MHLG continuously undertook measures to enhance the efficiency of the housing delivery system. The most recent major revamp in 2007 focused on three main aspects namely; simplifying and shortening the development approval process; introducing a self-certification system and improving the maintenance and management of subdivided buildings (MHLG, 2009). Since 2007, the first two improvements had been implemented in all Local Authorities. However, there has yet been a systematic analysis of the implementation of these improvements.

4.2. Housing development process in Malaysia

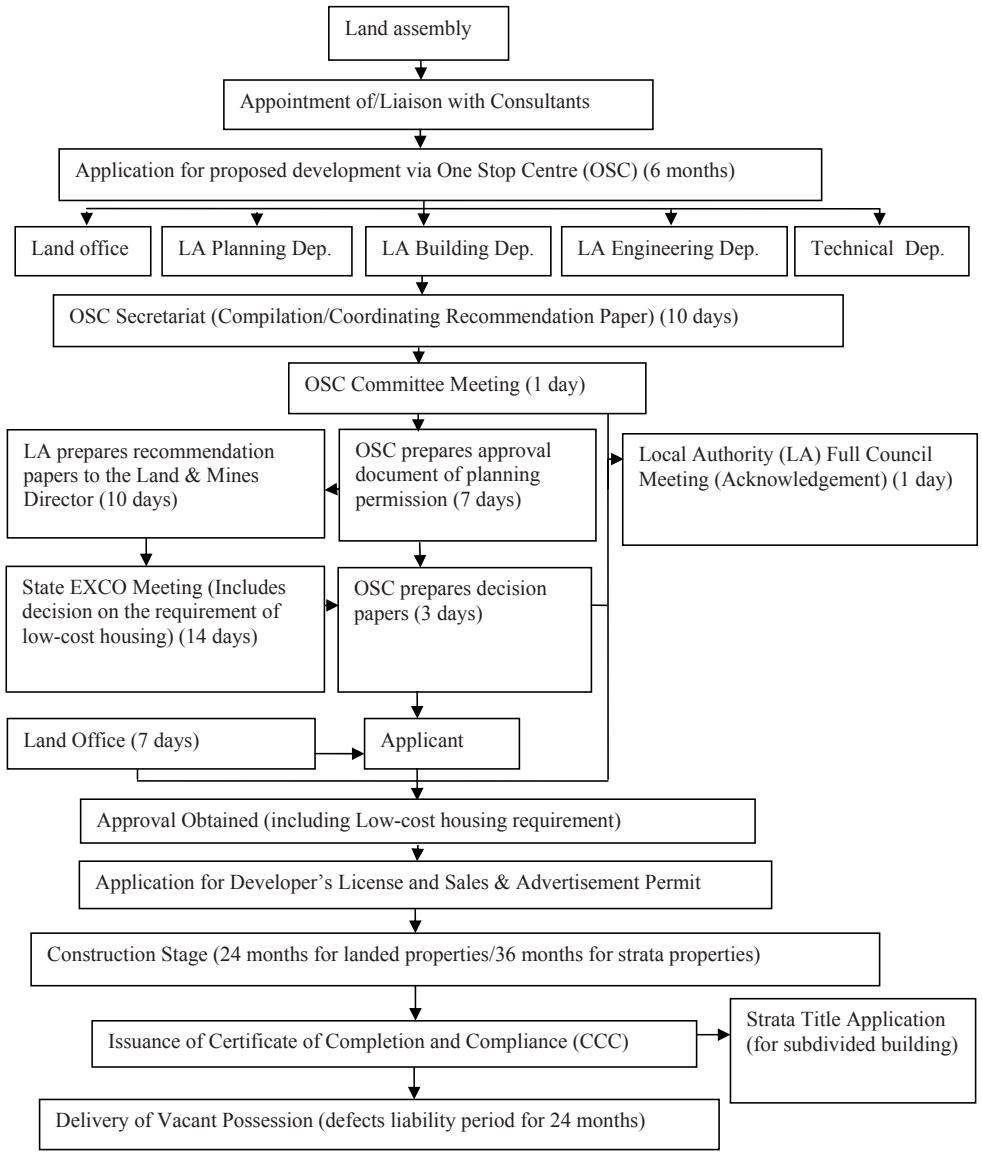
The current Malaysian housing system favours home ownership with a home ownership rate of 85%, public housing of 7% and private rental housing of 5.5%, as recorded in 1998 (RICS, 2008). The general housing delivery system adopts the "sell-then-build" model whereby developers offer houses for sale prior to construction (Sufian & Ab. Rahman, 2008). Private sector developers have been noted to cater mainly for the high and medium income housing (Yap, 1991) but the government has increasingly relied on the private sector to construct low-cost housing (Yahaya, 1989).

The typical housing development process in Malaysia is shown in Figure 2. The detailed processes in Figure 2 can be divided into the initial stage, the plan-preparation stage and the construction and disposal stage. At the initial stage, the developer begins by identifying a suitable site. Large west coast developers with background in plantations keep land banks in the form of former rubber

and oil palm estates (Yap, 1991). In addition, a 'privatisation' scheme may be proposed to the State Authority on state land. Specific to housing development, a 'privatisation' refers to a housing PPP between the state and the market, with the land provided by the state and development by the private sector under various conditions and arrangements agreed by both parties (Wan Abd Aziz, Hanif, & Musa, 2007).

The next stage involves plan-preparation and approval. It commences with the developer preparing a preliminary plan for 'approval in principle' from the Local Authority planners (LAPs) (i.e. approval in land use change, proposed population density, type of development, etc.). At this stage, developers can meet with LAPs for planning advice and also negotiation. Following this, a professional consultant will prepare the development proposal report containing the layout plan, building plan, infrastructure plan, landscape plan, etc. to obtain the development order. It is crucial for developers to submit documents that are complete and fulfil all criteria prescribed in development plans. Incomplete documents can be rejected at the onset whereas non-compliant documents may cause rejection later in the review process. These rejections cause potential delays in housing development activities.

Figure 2: ***The flowchart showing the housing development process in Malaysia***



Source: Adapted from the REHDA website http://www.rehda.com/industry/pdp/index.html accessed on 10 May 2011.

It is important to note that the housing development procedure in Malaysia is controlled by a number of regulations besides the main housing law (i.e. the Housing Development Act 1966). Based on the requirements of the various regulations, prior to 2007 developers had to obtain individual approvals from

technical agencies such as various departments at the Local Authority, the Sewerage Department and the Department of Irrigation and Drainage. This bureaucratic system was reported to be highly problematic to developers (Agus, 2002). In 2007, the housing delivery system was streamlined by amending relevant planning, building and administrative regulations and replacing the previous housing development saw a One Stop Centre (OSC) established at each Local Authority to accept development applications, distribute them to relevant agencies and monitor the progress of the applications. Bigger Local Authorities have a separate OSC unit from its planning department, whilst smaller Local Authorities may combine the OSC with the planning department. For developers, the organisational capacity of a Local Authority can determine the speed of the development application process.

In the final stage of development (i.e. the construction phase), 'landed' properties (terraced, semi-detached and detached houses) must be completed within 24 months, whilst strata properties (flats and apartments) must be completed within 36 months according to law (see Figure 2). Newly completed buildings must be certified before occupation is allowed. Prior to 2007, certification of the completed building was the responsibility of the Local Authority. However, problems of delay and limited public resources have resulted in a new system under the Certificate of Completion and Compliance (CCC), whereby the 'principal submitting person' (i.e. project architect, engineer or draughtsman) will certify the completed building. As shown in Figure 2, the building is guaranteed after 24 months of its delivery to the buyer under the defect-liability period.

4.3. The regulatory framework controlling housing provision

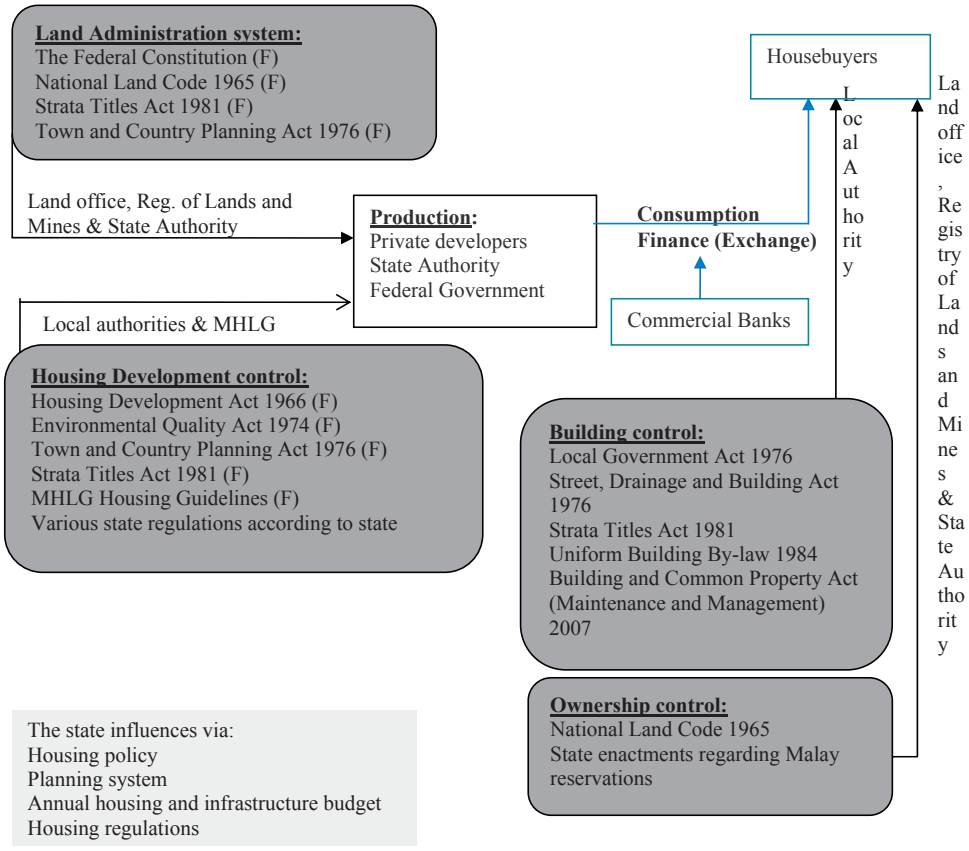
The regulations controlling housing provision in Malaysia had been previously evaluated by the World Bank in 1988 using neo-classical econometric modelling as the main approach (see Bertaud & Malpezzi, 2001; Hannah et al., 1989; Malpezzi, 1990, 1999; Malpezzi & Mayo, 1997; Mayo & Sheppard, 1996). In general, overregulation and excessive development standards were reported to inflate housing development costs. According to one author, "on balance government regulations have still cost the developer money, raised costs and reduced supply" (Malpezzi, 1990, pp. 1002 later in Malpezzi, 1999, p.1836). However, the regulatory environment not only comprises "formal instruments" (i.e. regulations) but also the "organisational arrangements" (i.e. institutions involved in regulatory implementation) (Adams, 2008, p. 4571). The regulatory environment for housing provision differs by region due to the operation of institutions. The legal, government and political structures result in different sets of housing regulations being adopted in each individual State in Malaysia. Increasingly, international housing literature has shown tendency to

adopt institutional approaches in examining the effects of housing regulations at the country level (Crook, Monk, Rowley, & Whitehead, 2006; Keivani & Werna, 2001; Monk & Whitehead, 1999; Whitehead & Monk, 2011). More importantly, some authors have ventured to use institutional frameworks at the regional level in analysing housing regulations (Burgess, Monk, & Whitehead, 2011; Monk et al., 2005).

Figure 3 shows the myriad of regulations and relevant agencies that control housing provision in Malaysia. The regulations comprise Federal acts and guidelines and State regulations (enactments). Each regulation has a different role; for instance, the Housing and Development Act 1966 directly controls housing development activities whilst the Town and Country Planning Act 1976 indirectly controls housing supply by monitoring land development activities. In theory, any conflicts or overlaps between types and tiers of regulations will be resolved by referring to the highest source of Malaysian law namely the Federal Constitution. These housing regulations have undergone several amendments in the past to reflect changing socio-economic trends.

These regulations are implemented by various government agencies at the Federal, State and Local levels. The implementation of these regulations will depend on their interpretation by government officers and negotiations with housing developers. It must be noted that these regulations are not rigid as there are flexibility mechanisms embedded in both the regulation themselves and also the regulatory system. This flexibility will be explored below.

Figure 3: *Selected regulations controlling the structure of housing provision in Malaysia*



Source: Compiled by the authors

5. ANALYSIS OF HOUSING REGULATIONS

The regulatory environment comprises both the regulations and the implementing organisations. An examination using the institutional Structure of Provision framework gives a more complete view of the on-the-ground operation of housing regulations. Aiming for explanatory rather than generalizability capacity, this section presents the macro-level analysis of housing regulations according to the two aspects of the regulatory environment.

5.1. Formal instruments

Eleven different Federal regulations related to housing provision were selected and analysed. This effort has yielded a large array of provisos which gave the impression of a dense housing regulatory environment. This sheer number of different regulations results in occasional contradictions and overlaps of provisos in different regulations, increasing and inconsistencies in the regulatory system

(i.e. which regulation to follow, which agency should implement and which aspect needs to be regulated). For planners, conflict is most pronounced between the Town and Country Planning Act 1976 (Act 172) and the National Land Code 1965 (NLC). For instance, a zoning provision in the statutory plan under Act 172 may be overridden by the land use expressed in the land title under the NLC.

Table 2: ***Summary of selected primary Federal housing regulations analysed***

Federal regulations	Area of control	Specifics of control
Housing Development Act 1966	Administration (Developer)	Controls developers by outlining the obligations of the private developer in license conditions. Protects house buyers in Schedules G and H, which set the standard contract between developers and house buyers (Sale and Purchase agreement).
Local Government Act 1976	Administration (Local Authority)	Outlines the functions, rights and obligations of the Local Authority. This includes describing the power of the State Authority over the Local Authority in giving directions and law-making in the Local Authority area.
National Land Code 1965	Land development	Controls land ownership, land use and land dealings.
Street, Drainage and Building Act 1976 Uniform Building By-laws 1984 Fire Services Act 1988 Sewerage Services Act 1993	Building code	Provides minimum building standards for purposes of health, safety and welfare of occupants. Requires the principal submitting person (architect, engineer or draughtsman) to monitor and certify the building from its construction to completion by following the Certificate of Completion and Compliance (CCC) procedure. This is part of quality control of completed housing units.
Town and Country Planning Act 1976	Planning	Requires planning permission for land development activities, including land sub-division and physical land development.
Environmental Quality Act 1974	Environmental considerations	Requires the Environmental Impact Assessment (EIA) report to be prepared and submitted for proposed housing development of 50 acres and above.
Strata Titles Act 1985 Building and Common Property (Maintenance and Management) Act 2007	Strata property	Controls the ownership, dealings, construction and maintenance and management of multi-storey dwellings and gated communities.

Sources: Derived and analysed from various statutes

The wording and content of the legal documents can be described as mostly vague and generic in nature. Generally these generic and broad provisions enable room for interpretation. For instance, among a housing developer's duties is to ensure that "water and electricity supplies are ready for connection to the housing accommodation" but does not spell out specifically what that entails. Developers may argue that once the water and electric meters are installed, the water and electricity supplies are indeed ready for connection. Hoever, house buyers may take a different view because to them, the time gap before water and electricity supplies actually flows into the house could be substantial. This is just an example of a difference in interpretation of the procedure between different parties.

5.2. Organisational structure

The review of housing regulations (i.e. formal instruments) only reveals part of the analysis. An examination of the interaction of the identified regulations with other institutions provides further and perhaps more important insight of the manner of regulatory implementation at the macro level.

The legal authority over housing is set out in the Malaysian Constitution. Items in the Malaysian Constitution were agreed upon by all States that formed the new nation preceding the modern Malaysia in 1957 (Maidin et al., 2008). Thus, the Constitution forms the primary source of Malaysian formal written law and takes precedence over all other formal written law.1The assignment of legislative powers is set out in Federal, State and Concurrent Lists of the Malaysian Constitution, whereby the Federal Government controls items in the Federal List, the State Authority controls the State List items and both the federal and state governments jointly legislating Concurrent List items. Table 3 shows the constitutional control over land development elements in Malaysia. Land (an important factor of production) and the Local Authority (the regulator of land development at on-the-ground level) are both placed under the State Authority. Although town planning and housing fall under the joint authority of the state and federal governments, the State Authority's dominance over land development at the state level is guaranteed through its control over land and the Local Authority.[2] This constitutional arrangement effectively gives the control over the implementation of low-cost housing policy and regulations to the State Authority.

Table 3: ***Constitutional control over land development elements in Malaysia***

Item	Legal provision
Land	Item 2, State List
Local Authority	Item 4, State List
Town planning	Item 5, Concurrent List
Housing and provisions for housing accommodation	Item 9C, Concurrent List

Source: The Malaysian Constitution

[1] Besides formal written law, the Malaysian property law also recognises customary law which is based on the Malay culture and Islamic practices. A precedent case in property law was *Kiah bte Hanapiah vs Som bte Hanapiah [1953] 19 MLJ 82* which decided that traditional Malay timber houses being unfixed to the ground are chattels.

[2] This control is further strengthened by the Malaysian town planning legislation which states that "the State Authority shall be responsible for the general policy in respect of the planning of the development and use of all lands and buildings within the area of every local authority in the State... (and may give) any local planning authority directions of a general character not inconsistent with the provision of this Act" (Section 3, Town and Country Planning Act 1976).

The analysis of the constitutional authority over housing highlights the considerable influence of the legal structure. It is normal practice for the State Authority in each state to mandate any proposed development above a certain size to obtain the State Authority written endorsement as part of the development approval process. This requirement is implemented alongside planning procedures, which require planning permission for new land development. The reason for submission of the application for any substantial new developments is to enable the State Authority to impose the low-income housing requirement, known as 'low cost housing quota'. The low-cost housing component differs from state to state, ranging from 25 to 40 per cent. Any appeal by the developer regarding the low-cost housing quota is made to the State Authority, instead of planners.

The dominance of the State Authority in low-cost housing quota implementation raised the issue of continuity of the national housing policy administration. In theory, planners are responsible to translate and implement the national economic and development plans together with federal policy at the local level (including the achievement of the low-cost housing target). The constitutional division over housing somewhat interferes with the continuity of the national housing policy by giving the State Authority the bulk of the power over low-cost housing.

The legal institution's influence over the housing regulatory environment is further strengthened by the three-tier government system, confirming the State Authority's primacy over the federal agency overseeing housing development (the Ministry of Housing and Local Government or 'MHLG'). Although developers generally have to comply with license conditions under the Federal housing act, it is State procedures that may have a greater direct impact on developers. For instance, development applications on substantially-sized lands must be brought into the monthly State Executive Council (EXCO) meeting for endorsement. The date of these meetings may interfere with the development approval time frame as prescribed by the Federal act. Thus, it seems that in practice the State Authority rather than the MHLG has more substantial power over housing development progress.

6. CASE STUDY

As previously mentioned, the latest major improvements in the housing development system were undertaken in 2007 with the establishment of the One Stop Centre (OSC) to process all development applications and the replacement of the problematic Certificate of Fitness for Occupation (CFO) system with the Certificate of Completion and Compliance (CCC). To date, there has yet been any study on the effectiveness of the streamlined development processes. This

section provides the first glimpse into developers' experience with the streamlined system. The fieldwork was undertaken in the State of Terengganu, Malaysia.

Table 4 briefly discusses the new improvements, their perceived advantages and possible barriers to implementation. The analysed results show that the new systems, formulated and passed by federal policymakers, had some implementation issues at the regional level due to institutional factors that were identified during fieldwork.

Table 4: *Analysis of recent improvements implemented in the housing delivery system*

Type of improvement	Relevant Acts reviewed	Previous system	New system	Perceived advantages of new system	Possible barriers to effective implementation of the new system
Establishment of One Stop Centres (OSCs) at Local Authorities	Housing Development Act 1960 Uniform Building By-Laws 1984 Local Government Act 19	The developer had to individually submit the development application to separate technical agencies such as Ministry of Public Works, Fire Department, the Department of Irrigation and Drainage, etc. which was time consuming.	The OSC secretariat to receive development application, distribute the application to relevant technical departments and monitor the application progress. Land development applications administered by the OSC include land development, planning permission, building plans, earthwork plan and road and drainage plan.	The streamlining of the development application processes under the new system enabled a faster processing time than under the previous system. The development proposal approval for those projects that adopt the 'Build Then Sell' concept, high impact projects and projects that involve foreign investments should be granted within 4 months whilst others, under the 'Sell Then Build' will be processed within 6 months.	Observation of the current OSC structure found that it is a possible source of tensions as its clerical staff is under the Local Authority whilst its management is under Federal Government posts. Among complaints from developers include lack of dependable checklist of required documents and slow approval period compared to the previous system, especially with established developers who had good relationship with technical agencies.
Certificate of Completion and Compliance (CCC)	Housing Development Act 1960 Uniform Building By-Laws 1984 Local Government Act 19	The Certificate of Fitness for Occupation (CFO) whereby the certification of newly completed building was undertaken by the Local Authority.	A certification system of newly completed buildings before occupation is allowed. Under the CCC, the principal submitting person (professional architect, professional engineer or professional draughtsman) who prepares and submits the building plan has to oversee the project throughout the construction process and fill in related forms before finally signing the certificate upon the completion of the building.	Being self-regulation and self-certification, it could reduce costs and delay.	Developers generally indicated a lack of clarity in the implementation mechanism of CCC.

Source: Authors' analysis of various data, interview data and own observation

An example of problematic institutional structure is the organisation of the OSC. In essence, the OSC Unit is responsible to monitor and push other technical departments to achieve the specified time limits in the development approval process. Whilst the Planning Department and the OSC Unit were combined in smaller Local Authorities, a larger Local Authority can have a separate OSC Unit whereby a Federal planner is appointed to head a Local Authority unit. Having a Federal officer to head a Local unit is a debatable arrangement as the Federal-State-Local division of authority is a sensitive issue. The State Authority is especially keen to have a State-leaning officer to administer State policies at the Local level. Additionally, the development approval needs to be endorsed by the State Executive Council within 14 days, which must also be ensured by the OSC. Here, an analogy of David attempting to control Goliath may be made; the OSC was a 'junior' department, in terms of hierarchy compared to the State Executive Council, basically the highest lawmaker in the State. This observation was made by developer interviewees.

Interviewees indicated that little regard was given to regional institutional arrangements in the process of improving housing development procedures. In Malaysia, the organisational structure of Local planning authorities differs in terms of role and responsibilities based on the size of the Local Authority. Thus the one-size-fits-all improvement efforts by the Federal Government could reverse an already well-oiled mechanism at the Local or State level. An interviewee compared what he perceived as a more established old system with the new housing development approval system:

> *"The objective (of OSC) may be achieved in certain places which have problems, districts that have problems. The OSC may be helping there. To me the previous system in District A was already fast. So when the OSC came, it was a step backward. If OSC moves at 120 (km per hour), previously District A had been running at 140 (km per hour) so you have to reverse. This is the problem." (Developer 7)*

The new system of OSC was established to reduce delays in processing development applications based on the premise that a development secretariat will be able to effectively receive development application documents, distribute them to various technical agencies for endorsement and bring endorsed applications in the Local Council meeting for approval within a period determined by the MHLG. However, the effectiveness of OSC may be weakened by unclear procedures and effects of the pre-existing organisational structure. As interviewees remarked:

> *"The OSC is supposed to assist us but actually we have to do the follow up ourselves. We have to do some running around." (Developer 4)*

"What grade is an OSC officer? I'm asking you. What are the grades of the other officers that they control to get the information? It's as if: 'Who are you to order me around?' That's my observation. Something wrong there, a low level officer trying to question higher level officers. So that is just not right. That is why I said, it's supposed to apply a specialist concept. A specialist has clout." (Developer 7)

The comment made by Developer 4 reflects the weakness in the running of the new OSC, which was supposed to be the only reference point to developers in determining the status of their application. According to the OSC standard operating procedure, all development applications should be processed within six months. During that processing time, the OSC was supposed to 'chase' other technical departments for comments to observe the given time frame. Nevertheless, Developer 7 commented on the efficacy of the system which he saw as flawed because the OSC officer may be inferiorly ranked in the organisational structure of the Local Authority.

The problem with OSC was also apparent in CCC, which is a certification system for newly completed buildings applicable to developments approved after 2007. Since the development process takes several years, most developers still have no experience with CCC. However, an interviewee who has already encountered some difficulties with the new system made an observation regarding the Local Authority's departure from theory*:*

"It's only our first project with CCC. I don't really understand about CCC. They say this will be done step-by-step, when you complete a task they will go (for inspection) but now the Local Authority say it can be accumulated and they just want to take photos when it's been completed. I don't understand that, it's different from what I learned. This is new, for projects after 2007. For CCC, both the Fire and Rescue Service department and IWK (private sewerage company) have to go for inspection. By right only consultants are supposed to do this, the architect and engineer. Now they say Fire Services and IWK." (Developer 4)

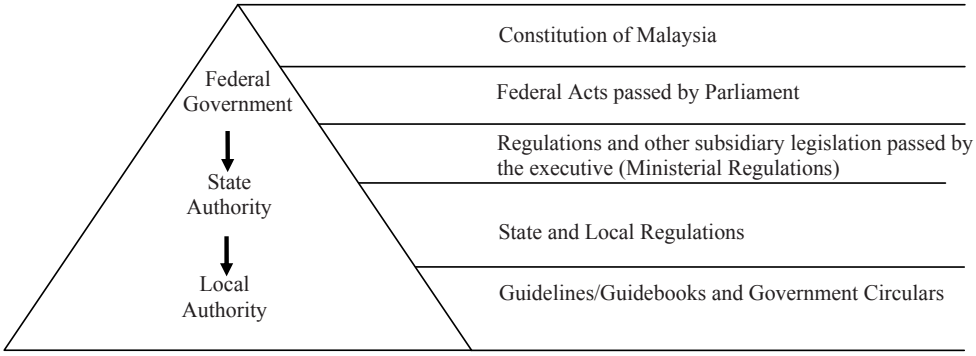
It is apparent from the above comment by Developer 4 that the implementation of the new building certification system was suffering from unclear procedures. This again signalled a communication failure between the regulator and developers.

7. DISCUSSION

Overall, the above results have highlighted the importance of 'digging deeper' beneath the surface of seemingly opaque sets of regulations to examine the actual effects of housing regulations. The findings strongly suggest that any study of the regulatory environment controlling housing provision should incorporate pre-existing institutions such as the legal and government systems.

Figure 4 shows the hierarchy of the government system comprising, in order of importance, the Federal Government, the State Authority and the Local Authority against the hierarchy of the various sources of housing regulations in Malaysia. This seemingly linear government arrangement is complicated in practice by the division of Federal/State powers under the Constitution of Malaysia. Legal and historical factors have conditioned the roles of actors in the structure of housing provision, giving ample powers to the State Authority rather than the Federal agency entrusted to carry out the national housing policy. Federal regulations may be partially or not at all implemented by State Authorities because of this authority division over components of housing provision. In turn, in practice the State Authority can influence both the supply of and the quality of housing produced in the State boundaries.

Figure 4: ***Hierarchies of the Malaysian government system and the formal written law***



Source: Author's analysis

The legal system, together with the government institution, has given the State Authority considerable control over the implementation of national housing policy at the State level. The 'rank-pulling' of a dominant authority can remove regulatory barrier and reduce bureaucracy. Evidence of the State Authority primacy was reported in exempting low-cost housing quota requirement, changing the 'low-cost' to 'affordable' housing type which enables a higher ceiling price and implementing more generous building standards. This presents a form of local capture by the State Authority. It can be argued that that the State Authority can better anticipate local housing needs compared to Federal policymakers located 400km away in the nation's capital. Therefore, the local capture by the State Authority can enhance the well-being of local house buyers.

Despite the reported opacity of the regulatory environment, the findings indicated that the regulatory environment contained room for flexibility and negotiation to offset a seemingly rigid and dense set of regulations. Generally

regulations contain broad provisions that have enabled flexibility in interpretation and implementation. Although critics can comment on the possibility of manipulating this flexibility and the uncertainty of 'stochastic development controls', this regulatory environment has been successful in producing more than 4.5 million formal dwelling units in Malaysia.

In terms of the new procedural improvements, interviewees indicated that these improvements have yet to reach their objectives. The above could be normal teething problems for any new systems. Nevertheless, it reveals the significance of the institutional arrangement of the Local Authority and reliable communication to developers when making any regulatory changes. The failure to take these factors into consideration could substantially affect the implementation of any new national policy at the Local level or other efforts to streamline development processes in the future.

8. CONCLUSION

The regulatory environment comprises "formal instruments" (i.e. regulations) and the "organisational structure" (i.e. the manner in which regulations are interpreted, implemented and mediated by actors). In the above analysis, the regulatory environment was shown to be significantly influenced by the legal and government systems at the macro level. Despite a seemingly dense set of regulations, these interactions have fostered an environment that has enabled the market to produce more than 4.5 million houses. Although the State Authority's constitutional primacy in administering the national housing policy at on the ground level may present a potential source of conflict, this arrangement also fosters a discretionary implementation that sympathises with developers and promotes the fulfilment of home ownership aspirations of the people.

This chapter shows that it is imprudent to undertake an analysis of housing regulations without understanding institutional dynamics within the regulatory environment. This is shown by the micro-level analysis of regulations using a case study of recent regulatory improvement. Any conclusions of the regulatory environment should include an examination of the institutionalised behaviour of key housing actors who are directly involved in housing provision. It is planners' interactions with developers that determine the outcomes of the housing regulatory environment at site level. Hence, the examination of the behaviour, perception and experience of planners and developers within the prevailing regulatory environment should form the next step in the analysis of housing regulations.

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EXONERATION FROM STRICT CIVIL LIABILITY FOR DAMAGES AWARDED FOR HARM CAUSED BY DANGEROUS OBJECTS AND ACTIVITIES

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Abstract

Strict liability for damages in civil cases is liability comprising obligation for damages regardless of the fault of the injurer. In other words, the injurer shall be obliged to compensate the damage regardless of his fault. The mere fact that he has caused the damage, is a sufficient reason for his liability but fault is not a key element. The question arises if and in which cases the injurer can be exonerated from strict liability. The paper deals with the possibilities of exoneration from strict liability for damages for harm caused by dangerous objects and activities. The paper conveys a systematic survey of legal norms in particular legal texts including provisions on exoneration from strict liability for damages awarded for harm caused by dangerous objects and activities, as well as an analysis of exoneration possibilities in a number of legal texts. The paper also deals with certain distinctions in particular legislation, it comments on conflict between general law (lex generalis) and specific law (lex specialis) and it also suggests tort legislation harmonisation. The paper also indicates the need for possible amendments of the applicable legislation governing this complex legal area.

Key words: *strict liability, damages, exoneration from liability, dangerous objects, dangerous activity*

1. INTRODUCTION

There are two types of civil liability for damages: strict liability and fault liability. Strict liability for damages in civil cases, unlike fault liability, is liability comprising obligation for damages regardless of the fault of the injurer. The mere fact that he has caused the damage, is a sufficient reason for his liability but fault

is not a key element. It is important to emphasize that liability based on fault and strict liability are not completely separate categories. It is difficult to establish a clear border line between them. Strict liability and fault liability are alternatives in terms of convenient classification and exposition, but closer examination suggests that in terms of substance there is really a continuum rather than two categories[1]. Undoubtedly, there are many cases in which it is possible to see "grey areas" between these two liabilities.

The legal issue of exoneration from strict liability for damages awarded for harm caused by dangerous objects and activities has been marked by a specific legal concept and by complexity in the sense of practical legal implementation i.e. legal practice. Speaking of legal concept, the first thing to notice is that our legislation does not offer many legal provisions governing this legal area, which per se need not be a bad legal solution in spite of the fact that a more profound analysis reveals a series of doubts and raises questions of their interpretation and implementation in practice.

The basic hypothesis of this paper is that legal provisions governing the issue contain certain flaws resulting in discrepancies in legal practice.

By indicating the concrete facts deriving from substantial and systematic analysis of tort legislation[2] the aim of the paper is primarily to justify previous hypothesis that Croatian tort legislation in a part that refers to exoneration from strict liability for damages, undoubtedly contains several flaws in wording of legal rules governing this extremely important and complex area of law, consequently leaving a space for certain concrete alterations in order to offer a better, easier, more efficient and just system.

2. EXONERATION FROM LIABILITY FOR DAMAGE CAUSED BY DANGEROUS OBJECTS AND ACTIVITIES - EQUAL LEGAL FRAMEWORKS

The Civil Obligations Act[3] (hereinafter COA) has integrated these two liabilities[4] (for dangerous objects and activity) in the same chapter and even under the same legal provisions in the Croatian tort law system, by conditions and ways of their manifestation in legal practice. This does not in any way mean that it

[1] For more on this see KOCH, Bernhard, KOZIOL, Helmut, *''Unification of Tort law: Strict Liability*", Kluwer Law International, The Hague/London/Boston, 2001.

[2] On tort law in the Croatian and comparative legal systems see KLARIĆ, Petar, *''Odštetno pravo"* [eng. Tort law], Official Gazette, Zagreb, 2003.

[3] Official Gazette, No. 35/05 and 41/08.

[4] Generally on liability in case of causing damage see: BURAZIN, Luka, ''Analiza pravne odgovornosti u slučaju prouzročenja štete: sa stajališta opće teorije i filozofije prava " [eng. Analysis of legal responsibility in the case of causing damage: in terms of general theory and philosophy of law], Journal of the Faculty of Law in Zagreb, No. 6, 2008, pp. 1421-1452.

is a less appropriate legal solution than the one offered by single regulation. On the contrary, it is questionable if the completely separate regulation by the same general provision is possible in this case if we take into consideration that it is about establishing the liability for specific danger source as such, regardless of its factual and legal background.

However, the legal loophole is the fact that within the chapter ''Liability for damage caused by dangerous objects or activity" the law refers to both liabilities in only two provisions (Articles 1063 and 1064 of the COA), whereas other provisions govern only liability for damage caused by dangerous objects. This legal loophole refers mainly to the chapter ''Exoneration from liability" (Article 1067) on exoneration from liability solely of the owner of a dangerous object. Dangerous activity as such is neither a regulation issue of this article of the Act nor of this part of chapter in general, thus the question of legal regulation relating to exoneration from liability for damage caused by dangerous activity is well taken. Why does a further legal text that originally separated in two provisions (Article 1063 and Article 1064) the liability for damage caused by dangerous objects from liability for damages caused by dangerous activity clearly and notionally now only stipulate liability for damage caused by dangerous objects?

It has been presumed that the legislator intended to apply the provisions governing the exoneration of the owner from liability for damage caused by dangerous object to the liability of the person involved in dangerous activity although this has not been explicitely established by the law. Legal practice confirms that judges are led by the same presumption when deciding upon exoneration from liability for damage caused by dangerous activity because they regularly refer to Article 1067 relating to exoneration of the owner of dangerous object. Nevertheless, I deem that the obvious legal vague wording cannot be justified by the fact that judges (or anybody else who is entrusted with the task of interpreting the law) apply Article 1064 where the owner of dangerous object and the person involved in dangerous activity are put in equal legal position when it comes to liability.

What is the point in notional division into two forms of liabilities in one article and tacit integration of both in another, while regulating the way of exoneration from these two liabilities? If the legislator's intention is to integrate the liabilities for an ''increased danger" requiring special care and concern by those supervising it, regardless of the kind of danger, i.e. regardless of the fact that this special care over a danger source is needed and that the danger source is an object, an actitivity or something else, then there is no reason to avoid defining the text of the law in this way.

The Austrian tort system has opted for a term ''effective control over a danger source" thus not approaching the dilemma of exoneration from liability when

the owner has no ''control" over his dangerous object because e.g. it was stolen from him, since ownership as such is not a guiding principle determined by law that should be directed towards a person liable for damage. Effective control is a vital liability factor regardless of a concrete legal and factual base that such control is established on. It is very important who has the duty to control the risk (increased danger) with special care be it an owner of the object, a thief, a lessee, a lease holder or somebody else i.e. the question whether the liability of those who are involved in dangerous activity has been legally established by activity registration, concession, subcooperation etc.

The detailed analysis would prove that Croatian tort system pursues the same goal although legal provisions wording at first glance do not support it. Exonerative reasons stipulated by Croatian COA speak for the fact that control over a danger source is actually the most important factor when establishing liabilities, although the wording of the law does not seem to define it adequately.

Ownership is rarely a guiding principle towards a liable person in French tort law[5] and in German or Italian tort law. Furthermore, the notion ''a dangerous object and a dangerous activity" can be rarely found as the foundation of strict liability in comparative European legal systems; it is more about a ''danger source" as a general term or a concrete danger source which is an object to regulation by a particular law.

A question also arises if any concrete special laws exist that should be supplemented by more precise provisions on (exoneration from) strict liability for damages caused by dangerous objects and dangerous activity.

The mere legal practice points to a need for more precise and concrete provision of the law. By analysing and researching it, we come to the conclusion that courts can barely handle such burden that was imposed upon them by vague wording of the law. Legal practice proved it rather demanding to decide upon conditions and ways of (exoneration from) strict liability for damage caused by e.g. electrical cables as well as slippery stairs, fire-arms, unfastened flower pots, a bite of a vicious dog, railroad activities etc. on basis of only a few, similar provisions of the law[6].

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[5] A well-known *''Franck case"* (1941) in which the Supreme Court broke away from its former tendency to assume that the keeper was the owner of the object. The equation ,,keeper=owner", which until then had been defended by the Cour the cassation, was thought to be unfair by the lawers Courts, which refused to apply it when ever the owner had lost all control over object at the time of accident. More of this case see in KOCH, Bernhard, KOZIOL, Helmut, *''Unification of Tort law: Strict Liability"*, Kluwer Law International, The Hague/London/Boston, 2001, p. 136.

[6] More on legal practice analysis concerning this legal issue see in LUCIĆ, Nataša, ,,*Vlasnik kao subjekt građanskopravne odgovornosti od opasne stvari kroz pravnu teoriju i sudsku praksu* " [eng. The owner as a subject of civil liability from damage caused by dangerous object in legal theory and legal practice], Pravni vjesnik, No. 1, 2012.

Legal solutions that are given by our legal system, are not only vague but also very unusual. To be more precise, comparative legal European systems dispose of a series of special provisions on strict liability for damage caused by dangerous objects and dangerous activity apart from general ones, whereas an only legal source of such complex problem area is seldom expressed by the same few flexible, generally applicable legal standards. Austria as well as Germany[7] has, for example, a series of laws comprising very precise provisions on strict civil liability for damages[8]. England as a common law country has also regulated this liability for some special cases by a series of important precedents while deciding upon exoneration from strict liability for damage caused by a special danger source. In addition to these, there are some important laws[9] in effect that govern this kind of liability.

The Italian system of strict liability for damages caused by special danger sources does not feature many specific laws (although, of course, there are a few) that contain special provisions on such liability but Italian Civil Code comprises a series of provisions governing this liability e.g. for animals[10], dilapidated buildings[11], motor vehicles in motion[12], dangerous activities by nature or in a specific way while performing dangerous activities[13] etc.

Similarly, the French Civil Code also has several provisions thus governing this kind of liability for special cases as well as some specific laws comprising provisions on such liability. Still, what characterizes the French system is implementation of general principle ''le principe général de responsabilité du fait des choses dont on a la garde", as well as a great expansion of strict liability for damages caused by a special danger source under the auspices of legal practice[14].

The Croatian tort system, in addition to the COA, governs exoneration from strict liability for damages caused by dangerous objects and dangerous activity in a specific way within several laws. The following two chapters of the paper deal with the issue of these laws, the legal provisions and their interpretation.

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[7] For example the Austrian *Eisenbahn und Kraftfahrzeughaftlichtgesetz, Lufthartgesetz, Reichshaftlichtgesetz, Rohrleitungsgesetz, Mineralrohstoffgesetz, Forstgesetz, Gentechnikgesetz* etc.

[8] E.g. the *German Straßenverkehrsgesetz, Haftpflichtgesetz, Umwelthaftungsgesetz, Gesetz über die friedliche Nutzung der Kernenergie und den Schutz gegen ihre Gefahren, Bundesberggesetz, Gentechnikgesetz, Wasserhaushaltsgesetz, Bundesimmisionsschutzgesetz, Bundesjagdgesetz* etc.

[9] Water Industry Act 1991, Gas Act 1965, Merchant Shipping Act 1995, Nuclear Installations Act 1965, Civil Aviation Act 1982, Animals Act 1971, Railway Fires Act 1906 and 1923, Environmental Protection Act, Submarine Pipelines Act 1982 etc.

[10] Art. 2052 of the Italian CC

[11] Art. 2053 of the Italian CC

[12] Art. 2054 of the Italian CC

[13] Art. 2050 of the Italian CC

[14] On dangerous object notion in French law see STANUŠIĆ, Slobodan, *''Objektivna odgovornost za štetu"* [eng. Strict liability for damage], Banja Luka, 2012.

3. FAULT OR ACTION OF THE INJURED AS REASONS TO EXONERATION FROM STRICT CIVIL LIABILITY FOR DAMAGES

Although it may seem completely irrelevant at first sight whether law has determined fault or activity of the third person or the injured to be the reasons for (partial) exoneration from strict civil liability from damages, this is not the case. Since there are two kinds of liabilities for damages, the liability based on fault in regard to fault and strict liability regardless of fault, the same refers to exoneration from liability i.e. with exoneration from liability for damages or a part of damage.[15]

Pursuant to Article 1067 of the COA the reasons to exoneration from liability for damage caused by dangerous object is an activity but not the fault of the injured or the third person.In accordance with the mentioned legal standard, it is sufficient that the injured or the third person have caused damage regardless of the fault.

Justification of such a legal solution is disputable. Let us assume a situation in which damage by dangerous object was caused by the activity of the injured of which he is not guilty and there is neither liability of the owner nor of the third person. The question arises who suffers damaging consequences? If we ascribe it to a coincidence that has happened to the injured, then we deviate from the notion of strict liability (the liability regardless of the absence of fault).

Domestic legal practice has indicated that this was a disputable legal solution. By a systematic analysis of expositions in court decisions[16], we come to the conclusion that the fault of the injured when deciding on his contribution to his own damaging consequences, is not excluded regardless of the fact that law does not anticipate a tortious act of the injured as an assumption for exoneration of the injurer from strict liability[17].

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[15] About the limits of area of possible application of the fault-based liability rule and strict liability rule for damages in Croatian and comparative law see BUKOVAC, Maja**,** *"Sive zone" izvanugovorne odgovornosti – područja moguće primjene pravila o odgovornosti na temelju krivnje i objektivne odgovornosti za štetu"* [eng. The Grey Zones of Tortious Liability – The Area of Possible Application of the Fault-Based Liability Rule and Strict Liability Rule for Damages], Zbornik Pravnog fakulteta Sveučilišta u Rijeci, No. 1, 2009.

[16] See CRNIĆ, Ivica, *''Odštetno pravo", Zbirka sudskih rješidbi o naknadi i popravljanju štete s napomenama i propisima* [eng. ''Tort law", Collection of court decisions on damages and rectification with remarks and regulations], second revised and expanded edition, Zgombić i Partneri d.o.o. – nakladništvo i informatika d.o.o., 2008 and CRNIĆ, Ivica, *''Zakon o obveznim odnosima", Napomene, komentari, sudska praksa i abecedno kazalo pojmova,* [eng. ''Civil Obligations Act", Remarks, comments, legal practice and index by alphabet, the fourth revised and expanded edition, Organizator, Zagreb, 2010.

[17] Even the legal practice of the Supreme court denotes this fact. This conclusion is easy to argue by accessing the Internet pages of the Supreme court of Croatia, published court decisions.

The reason for such divergence between the meaning of legal provision and its implementation in legal practice can be found in the fact (as well as in the previously set thesis) that if the fault of the injured is not taken into consideration it will be often impossible to achieve a just court decision concerning the distribution of liabilities between the injured and injurer. Therefore it is a subject to court exposition regardless of the fact that courts are not obliged to it by the law and that courts should be in the position to resolve such cases more easily because fault is neither supposed to be determined nor decided upon. On the contrary, determination of fault seems to make the procedure of reaching legally justified and acceptable court decisions easier.

This is supported by comparative solutions where the fault of the injured is also taken into consideration as an assumption to exoneration from strict civil liability[18] – so called ''contributory negligence" is mostly demanded on the side of the injured in order to classify participation of the injured or the third person as a contribution to damaging consequence.[19]

4. ANALYSIS OF APPLICABLE LEGISLATION CONCERNING EXONERATION FROM STRICT CIVIL LIABILITY FOR DAMAGE – MAIN ISSUES AND DISCREPANCIES

4.1 Civil Obligations Act

The Civil Obligations Act (COA) is a basic legal source that regulates the issue of exoneration from strict civil liability for damage caused by dangerous object and dangerous activity. The COA first establishes that a damage, emerged in connection with dangerous object or dangerous activity is considered to derive from that object or activity unless it is proven that they were not the cause of damage[20] as well as that the owner is liable for damage caused by dangerous object and that a person is liable for damage deriving from dangerous activity of the person performing it.[21]

Article 1067 of the COA stipulates the way of exoneration from strict liability for damage caused by dangerous object and dangerous activity as follows:

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[18] Such solution is anticipated by German, Austrian, French, Italian, English and other European legal systems.

[19] More about comparative study analyses the tort law rules of France, England and Germany see FLAHLBUSCH, Markus, *''The principle of strict liability as principle of European tort law: assessing possibilities of harmonisation in the case of liability for harm caused by movable objects"*, International Journal of Liability and Scientific Enquiry, No. 4, 2009, pp. 359-422.

[20] Article 1063 of the COA.

[21] Article 1064 of the COA.

''The owner shall be exonerated from liability if he proves that the damage results from another unforeseeable cause not incident to the object, which could not be prevented, avoided or eliminated.

The owner shall be exonerated from liability if he proves that the damage has occurred exclusively due to an action of the injured party or a third party, which the former could not foresee and the consequences of which could not be avoided or eliminated.

The owner shall be partly exonerated from liability if the injured party has partly contributed to the occurrence of damage.

If a third party partly contributed to the occurrence of damage, that party shall be liable to the injured party solidary with the owner of the object, and shall make compensation proportionate to the degree of its fault.

The person of whom the owner has made use in the use of the object shall not be considered a third party. ''

The provisions make it obvious that one of the reasons for exoneration from strict civil liability for damages is force majeure and it is determined here as an unforseeable cause beyond object that could not be prevented, avoided or eliminated.

However, it remains unclear if the mere act of the third person or the injured under specific conditions and according to our law can be deemed ''an unforseeable cause being beyond object that could not be prevented, avoided or eliminated"? According to such established legal wording, it seems to be possible. The aforementioned (cause beyond object, inevitability and irremovability) can denote the action of the injured or of the third person. Nevertheless, since the actions of the third person and the injured are subject to regulation of specific chapters, separated from chapters determining force majeure as exonerative reason, it is clear that legislator did not intend to determine the action of the injured or of the third person by force majeure.

In comparative legal systems such actions are often deemed a force majeure[22] because they are frequently not ''under supervision" of a liable person.

4.2. The Act on Liability for Nuclear Damage

The notion ''force majeure" as an exonerative reason has been determined more specifically in the Act on Liability for Nuclear Damage[23] (hereinafter

[22] See KOCH, Bernhard, KOZIOL, Helmut, *''Unification of Tort law: Strict Liability"*, Kluwer Law International, The Hague/London/Boston, 2001.

[23] Official Gazette, No. 143/98.

ALND) stipulating a user[24] as a person liable for nuclear damage caused by nuclear accident, according to the strict liability standard[25] and pursuant to Article 12 force majeure is considered exclusively as armed conflicts and natural disasters.

> *''User is not liable for damage if the damage is caused by nuclear accident that is an immediate aftermath of armed conflict, enmity, civil war, uprising or an extremely severe natural disaster.''*

It is no coincidence that such a clear determination is an integral part of the ALND considering the fact that this law is the result of harmonisation with the Acquis Communautaire of the European Union[26]. Therefore it is no intention in any way to devaluate a legislative segment of the Croatian legislation but only to draw attention to a specific ''disagreement'' between provisions of the law that are the implementation product of verbatim EU directive texts and the ones that are the product of independent development of the Croatian legislation without an impact made by necessary adjustment to the European law.

This statement is supported by the fact that the ALND also determines that the user is not liable for nuclear damage in a nuclear plant or to properties which can be found in the plant, and are being used or meant to be used in connection to the facility and to transportation vehicle carrying nuclear material when the nuclear accident occured, and pursuant to Article 14:

> *''The user is not liable for nuclear damage to the injured if he proves that the injured caused the damage deliberately.*
>
> *If the user proves that nuclear damage was caused entirely or partially by severe negligence of the injured, the court can entirely or partially exonerate the user from liability for the harm that the injured suffered.''*

This provision, without doubt, deviates in a certain way from the basic standard of strict liability and exoneration from the one imposed by the COA. It is not necessary to emphasize that in this case the distinction has emerged as a result of adjustment to the EU law. It has already been mentioned that many European legal systems anticipate the fault of the injured as an exoneration reason and not exclusively the action where fault is not crucial as laid down by our COA.

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[24] Article 10 of the ALND.

[25] Article 11 of the ALND.

[26] General introduction to the status of environmental liability in Europe with results of a comparative project covering 14 jurisdictions in 13 European countries (Austria, Belgium, England and Wales, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Scotland, Spain, Sweden) on the private law aspects of environmental liability that also contains overview on liability for nuclear damage see HINTEREGGER, Monika, *''Enviromental Liability and Ecological Damage in European Law''*, Cambridge University Press, 2008.

There is no doubt about the relationship between general and specific law while deciding the implementation issue of an adequate legal rule; in reference hereto it must be pointed out that subjective relation of an injured towards damage, is an inevitable element when deciding upon his contribution thereto.[27]

4.3. Environmental Protection Act

In addition to the ALND, the Environmental Protection Act[28] (hereinafter: EPA) also stipulates force majeure as an exoneration reason and determines it as ''natural phenomenon of unpredictable and inevitable feature that could not be prevented or eliminated." The third person action can also be the reason for exoneration from strict liability provided adequate security measures have been taken.

Pursuant to Article 153 paragraph 1 of the EPA:

''The company referred to in Article 150 paragraphs 1 and 2 of this Act shall not be liable for the environmental damage or for damage to protected species if it proves that the damage resulted from:

- *an unpredictable and inevitable natural phenomenon which could not have been prevented nor eliminated,*
- *an act of a third party even though appropriate safety measures were undertaken,*
- *compliance with a mandatory order or instruction given by the public authority, with the exception of an order or instruction given after an emission or sudden event caused by the company's own activity. ''*

Unlike the COA, it is obvious that the ALND and EPA do not cast into doubt the fact if one exoneration reason could subsume the other, more precisely, could the third person action and/or the injured action be deemed force majeure under specific conditions and according to the provisions of the law.

Both acts clearly stipulate which unforeseeable and unavoidable events could function as exonerating grounds. In accordance herewith the question has not been raised (as the possible dilemma with the Civil Obligations Act – hereinafter the COA) if there is a need for division of the third party action and action performed by the injured party into special exonerating grounds in which, by legal qualification, both cases can be external, unforeseeable and unavoidable.

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[27] On nuclear law sources see: AMIŽIĆ, Petra, ''*Najvažniji izvori nuklearnog prava Republike Hrvatske*" [eng. The most significant sources of nuclear law in the Republic of Croatia], Pravo u gospodarstvu, No. 4, 2008, pp. 802-825; and on liability for nuclear damage see :GRABOVAC, Ivo, ''*Odgovornost za nuklearnu štetu u Hrvatskom pravu*" [eng. Liability for nuclear damage in the Croatian law], Pravo i porezi, No. 9, 2005, pp. 25-28.

[28] Official Gazette, No. 110/07.

Since the Environmental Protection Act determines external events solely as natural events, there is no reason for the dillemas mentioned.[29]

Certain discrepancies in interpretation have been caused by Article 154 of the Environmental Protection Act :

''If the company referred to in Article 150 paragraphs 1 and 2 of this Act, due to certain accidental circumstances, causes environmental damage in performing a dangerous activity or causes damage to protected species in performing an activity, it will be considered that the damage was caused as the result of those accidental circumstances.

If the company referred to in Article 150 paragraphs 1 and 2 of this Act proves that damage within the meaning of paragraph 1 of this Article was not caused by its activity, or proves that the damage was caused by the activity of another legal or natural person or that the damage occurred due to some other circumstance, the principle of causality referred to in paragraph 1 of this Article shall be dismissed. ''

Firstly, systematic research of the complete Act cannot answer the question what these possible „accidental circumstances" are that the legislator meant while deciding to foresee these circumstances as special exonerating grounds and that cannot be classified as any other grounds thoroughly set by the preceding articles of the Act. Moreover, it is not completely clear if this is an exonerating ground in its full sense i.e. if the paragraph 1 of this Article could form the legal basis for exoneration from strict liability for damage.

Can „accidental circumstances" form grounds for exoneration from strict liability for damage? The case such as an event which could have been prevented if it had been foreseen, but in which the tortfeasor cannot be attributed fault, is a borderline to civil fault liability. If an activity has been qualified as dangerous, it is irrelevant if the damage was caused by accident or not when only force majeure and not the accident exonerates from civil strict liability.

The question is, what was meant to be regulated by paragraph 2 of this Article that had not already been the content of the previous provisions of the law summarized in the chapter thereof.

Furthermore, by general wording „or that the damage occurred due to some other circumstance" this paragraph has gained a special dimension which could include a number of circumstances as grounds for exoneration from liability for which no possible limits are foreseen by the Act.

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[29] In this case the partially varying legal solutions in our tort law system emerged as the consequence of harmonisation of environmental protection rules with the EU standards. More on EU environmental law in: MACRORY, Richard, „*Reflections on 30 Years of EU Environmental Law: A High Level of Protection?*", Europe Law Pub Watherlands, 2005.

4.4. The Water Act

The Water Act[30] (hereinafter: WA) is another act that comprises provisions on exoneration from strict liability for damages. Pursuant to Article 133 of this Act:

'' Damage caused to the third party by water activity shall be considered as resulting from the fault liability.

Damage caused to the third party on public water resource, water resource and water buildings shall be considered as resulting from the fault liability unless the injured party proves that they result from dangerous substance that is in or was in that space or dangerous activity that was performed or is performed in that space. Water resources engineering and measures for protection against harmful activity of water are not considered dangerous activities. ''

The question is why the WAV stipulates that „water resources engineering and measures for protection against harmful action of water are not considered dangerous activities.“ It is almost impossible to imagine any construction activity which is not dangerous under certain circumstance whereas dangers while engineering water resources (according to the definition of the same law '' building of water facilities for regulation and protection, building the facilities for basic melioration drainage and maintenance water works, all aimed water to flow harmlessly") and protection against harmful activity of water (''activities and measures for protection against flood, protection against ice on waters, erosion and flood control") that are high-risk by nature, are beyond any doubt.

If specific purpose of the activities was meant to be the justification of strict liability evasion then the wording of the law should have been that the activities are considered as resulting from fault liability and not to determine a specific activity as harmless regardless of how it is performed i.e. regardless of the fact if this activity requires special attention or control by those performing it and those involved in it.

5. CONCLUSION

There are several dilemmas in the provisions of the Croatian tort system concerning exoneration from strict civil liability for damage caused by dangerous object and dangerous activity, and they make space for specific concrete alterations that would make it clearer, more precise, more specific and in the end more harmonised with solutions offered by legal practice. First of all by following the example of more advanced European tort systems, it is worth reconsidering if a term ''liability for dangerous object and dangerous activity“ could be exchanged for the term ''liability for a specific danger source" regardless of what kind of

[30] Official Gazette, No.153/09 and 130/11.

danger source we are dealing with (objects, activities or anything else). If we stick to present term, it is by all means necessary to harmonise current provisions of the COA in a way that the aforementioned exoneration from liability for damages caused by dangerous object should be explicitly mentioned for dangerous activities as well and secondly, that current legal practice, i.e. experience referring to the provision for exoneration from liability for damages of dangerous object when reconsidering exoneration from liability for damages of dangerous activity, thus deserves its indisputable legal foundation.

The justification of the COA solution needs to be reconsidered that the activity of the injured and of the third person instead of the fault of the injured or of the third person are the reasons for exoneration from strict civil liability for damages, particularly in regard to the fact that specific laws with provisions on exoneration from this kind of liability, speak of fault but not of the activity by the injured and the third person as exoneration reasons. Furthermore, domestic legal practice supports this assumption witnessing the fact that fault has been taken into consideration as justification for exoneration from strict liability for damages in a number of judicial decisions despite the fact that their legal foundation is a disputable provision of the COA, and even a degree of fault which has contributed to damaging consequence.

In addition to this there are still several disputable legal solutions in current tort system that this paper has been dealing with leading to the conclusion that there is room for certain law reforms.

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THE ROLE OF NATIONAL COURTS IN ENFORCING UNLAWFUL STATE AID

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Abstract

This paper explores the important role that national courts can and should play in the enforcement of State aid field. Member States' courts apply EU State aid law in many categories of proceedings . The aim of this article is to present and analyze the key aspects of private enforcement in the State aid field, with a particular focus on the jurisprudence of the EU courts and proceedings observed in national courts. After a brief overview of the principles underlying the enforcement of State aid law in the Member States, article describe the basic principles underlying the division of responsibilities between the Commission and national courts in State aids matters, then discuss the two main responsibilities facing national courts – protecting competitors against unlawful aid and ensuring effective recovery of illegal and incompatible aid.

Key words: *State aid, European Union, national courts, Commission*

1. WHAT IS EU STATE AID POLICY ?

European State aid law has been the subject of growing attention over the last few years. The aim of this article is to present and analyze the key aspects of private enforcement in the State aid field, with a particular focus on the jurisprudence of the EU courts and proceedings observed in national courts. After a brief overview of the principles underlying the enforcement of State aid law in the Member States, we will describe the basic principles underlying the division of responsibilities between the Commission and national courts in State aids matters, then discuss the two main responsibilities facing national courts –

protecting competitors against unlawful aid and ensuring effective recovery of illegal and incompatible aid.

The Treaty on the Functioning of the European Union (TFUE)[1] defines state aid as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities. Therefore, subsidies granted to individuals or general measures open to all enterprises do not constitute state aid. State aid poses a threat to the free movement of goods since by conferring a benefit on a particular understanding or industry, it distorts competition between Member States and interferes with the functioning of the single market. It is important to note, that state aid represents for Member States a vital instrument of economic and social policy, necessary for a region or to whole sectors of the economy[2]. The control of State aids is an almost unique feature of competition policy in the European Union. Only in the EFTA is there a similar system of supranational control over the subsidies granted by States to enterprises, a system which owes its existence to the need to harmonize competition policies in the European Economic Area[3].

European law attempt to achieve a balance between Member States and the European Union. Article 107(1) TFUE of the Treaty on the Functioning of the European Union defines what measures constitute state aid. It also articulates a general prohibition: *any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*. That prohibition, however, is neither absolute nor unqualified. Article 107(2) and Article 107(3) catalog policy objectives for which otherwise prohibited aids might benefit from exemption[4].

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[1] The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, entered into force on 1 December 2009 (O.J. UE C 306, 17.12.2007 r.). The Treaty establishing the European Community was replaced by the Treaty on the Functioning of the European Union (TFEU). In accordance with the article 5 of TFEU, the articles 87 and 88 were renumbered to articles 107 and 108. Consolidated version of the Treaty on the Functioning of the European Union, OJ C 115, 9.5.2008

[2] See: Steiner J, Woods L, EU Law, Oxford: Oxford University Press (2003), p.280

[3] For a general overview see: S. Lehner, and R. Meiklejohn (1991), Fair competition in the internal market: Community State aid policy, *European Economy* No 48, European Commission, Brussels, Chapter 3.

[4] The art. 107 (2) reads: The following shall be compatible with the internal market:
(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
(b) aid to make good the damage caused by natural disasters or exceptional occurrences;
(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic

The categorization of a measure as aid within the meaning of the EC Treaty requires that all four of the conditions set out in Article 107(1) TFUE be satisfied. First, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition[5].

2. NATIONAL COURTS AND STAID AID LAW ENFORCEMENT

2.1. General issues

As regards the supervision of Member States' compliance with their obligations under Articles and of the Treaty, the national courts and the Commission fulfill complementary and separate roles[6]. Whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the EU Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 108(3) of the Treaty is infringed[7].

It is necessary to clarify the position with regard to the demarcation of competences between the Commission and the national courts concerning that provision. The role of the national court depends on the aid measure at issue and whether that measure has been duly notified and approved by the Commission: National courts are often asked to intervene in cases where a Member State authority has granted aid without respecting the standstill obligation. This

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disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
(3) The following may be considered to be compatible with the internal market:
(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

[5] See: Opinion of Advocate General Kokott Case C-169/08, 02.07.2009, *Presidente del Consiglio dei Ministri v. Regione autonoma della Sardegna,* ECR [2009] I-10983, p.123

[6] Case C-39/94 *SFEI and Others* [1996] ECR I-3547, p.41

[7] Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 75

situation arises either because the aid was not notified at all, or because the authority implemented it before getting the Commission's approval. The role of national courts in such cases is to protect the rights of individuals affected by the unlawful implementation of the aid[8].

Member States are in principle obliged to recover unlawful State aid. This general obligation stems from Article 108(2) TFUE and from Council Regulation No 659/1999 of 22 March 1999[9]. The individual decision which declares a particular form of State aid to be unlawful imposes a more specific obligation on the Member State to which it is addressed. The decision is binding on its addressee. Those obligations serve to restore the *status quo* insofar as possible and to eliminate anti-competitive advantages created by unlawful State aids[10].

2.2. Unlawful State Aid and the role of the national courts

National courts are most frequently called upon to rule in recovery cases when a beneficiary tries to challenge the validity of a national recovery order. Nevertheless, court action may also be introduced by a Member State seeking to enforce a Commission recovery decision or a competitor seeking redress against the national authorities' failure to do so[11].

National courts play an important role in the enforcement of recovery decisions adopted under Article 14(1) of Regulation (EC) No 659/1999, where the Commission's assessment concludes that aid granted unlawfully is incompatible with the common market and enjoins the Member State concerned to recover the incompatible aid from the beneficiary. The Union Courts have consistently held that any national court, including a constitutional court, is required to do everything within its power to give effect to the prohibition of aid under Article 107(1) TFUE and to the duty of notification and the obligation not to put measures into effect under Article 108(3) TFUE. At the same time, national courts must abstain from any measure which could jeopardize the attainment of the objectives of the EC Treaty[12]. It is for the national courts to draw all the necessary consequences of the infringement of Article 108(3) TFUE in accordance with their national law, with regard to both the validity of the acts

[8] Commission notice on the enforcement of State aid law by national courts, 2009/C 85/01, paragraph 21

[9] Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, paragraph 1.

[10] Case C-419/06 *Commission* v *Greece* [2008] ECR I-0000, paragraphs 53 and 54 and the case-law cited therein.

[11] See: B. Brandtner, T.Beranger, C. Lessenich, Private State Aid Enforcement, European state aid law quarterly 2010, (9), p. 27

[12] Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, *Distribution Casino France and Others* [2005] ECR I-9481, paragraph 30.

giving effect to the aid and the recovery of financial support granted in breach of that provision[13].

Proceedings before national courts give potential claimants the opportunity to resolve many state aid related concerns directly at national level, in particular concerning the recovery of illegal aid from the beneficiary, interim relief or possible damages actions.

In the case *Transalpine Olleitung*, the Court rules that "it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from Community law" [14]. The Court adds, that this only be so provided, firstly, that those rules are not less favourable than those governing rights which originate in domestic law (principle of equivalence) and, secondly, that they do not render impossible or excessively difficult in practice the exercise of rights conferred by the EU legal order (principle of effectiveness)[15].

In a number of rulings the Court has used the standard argument that article 108(3) TFUE entrusts the national courts with the task of preserving, until the final decision of the Commission, the rights of individuals faced with a *possible breach* by State authorities of the prohibition laid down by that provision. The objective of the national courts' tasks is therefore to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid may not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision[16].

In that regard, it is important to note that, as the Advocate General Kokott stated in the Opinion to the case C-275/10 Residex Capital IV CV, EU law requires national courts to order those measures which are appropriate effectively to remedy the consequences of the unlawfulness of an aid measure. It is established case-law of the Court that national courts must therefore ensure that all appropriate inferences are drawn, in accordance with their national law, from an infringement of the third sentence of Article 108(3) TFEU, as regards both the validity of the measures giving effect to the aid and the recovery of financial support granted in disregard of that provision. This generally has the result that all transactions – civil law contracts not least of all – which are

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[13] See: Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraph 49 and *C-199/06 CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 41;

[14] Case C-368/04, *Transalpine Ölleitung*, [2006] ECR I-09957, ;

[15] Ibidem, paragraph 45 in finem.

[16] See: Case C-1/09 *Centre d'Exportation du Livre Français (CELF), Ministre de la Culture et de la Communication v Société Internationale de Diffusion et d'Édition,* [2011] ECR I-0000, paragraph 30-34.

concluded in connection with the granting of State aid which is unlawful on procedural grounds are considered null and void or ineffective. The Court has held that 'the validity of acts entailing implementation of aid measures is affected by failure, on the part of the national authorities, to observe the prohibition on implementing aid without Commission authorization.' The main objective is to ensure in this way that aid which is incompatible with the internal market is never implemented. However, if aid is nevertheless granted in breach of the duty to notify and of the prohibition on implementation, it will at least be necessary to ensure that the recipient forfeits the resultant advantage and that the consequences of the unlawfulness of the aid measure are remedied so that no distortion of competition occurs or is perpetuated. The previously existing situation should be re-established[17].

The logical consequence of a finding that aid is unlawful is to remove it by means of recovery in order to restore the situation previously obtaining[18]. Accordingly, the main objective pursued in recovering unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage which such aid affords[19]. By repaying the aid, the beneficiary forfeits the advantage which it had over its competitors on the market, and the situation prior to payment of the aid is restored[20].

In its Wienstrom case, the Court clarified that where aid has been granted to a recipient in disregard of the last sentence of Article 108(3) EC, the national court may be required, upon application by another operator and even after the Commission has adopted a positive decision, to rule on the validity of the implementing measures and the recovery of the financial support granted. EU law requires the national court to order the measures appropriate effectively to remedy the consequences of the unlawfulness, but that, even in the absence of exceptional circumstances, EU law does not impose an obligation of full recovery of the unlawful aid. In such a situation, pursuant to EU law, the national court must order the aid recipient to pay interest in respect of the period of unlawfulness. Within the framework of its domestic law, it may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it, subsequently. It may also be required to uphold

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[17] Opinion in Case C-275/10 *Residex Capital IV CV v Gemeente Rotterdam*, [2011] *ECR,* Unreported, paragraph 29-32 and the case-law cited therein.

[18] See, inter alia, Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 66; judgment of 28 July 2011 in Case C-403/10 P *Mediaset* v *Commission*, paragraph 122.

[19] Case C-520/07 P *Commission* v *MTU Friedrichshafen* [2009] ECR I-8555, paragraph 57 and Case C-275/10 *Residex Capital IV CV v Gemeente Rotterdam*, [2011] *ECR,* Unreported, paragraph 33-35.

[20] Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22.

claims for compensation for damage caused by reason of the unlawful nature of the aid[21].

It is only in exceptional circumstances that it would be inappropriate to order repayment of the aid. In that regard, the Court has already held, in respect of a situation in which the Commission had adopted a negative final decision, that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid[22]. If such a case is brought before a national court, it is for that court to determine and interpret these circumstances in close cooperation with the Commission and with due regard for the possibility of preliminary questions to the Court[23].

To justify the national court not ordering recovery under Article 108(3) of the Treaty, a specific and concrete fact must therefore have generated legitimate expectation on the beneficiary's part. The Court has repeatedly held that the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a EU authority has caused him to entertain expectations which are justified. However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration[24]. Similarly, if a prudent and alert economic operator could have foreseen the adoption of a EU measure likely to affect his interests, he cannot plead that principle if the measure is adopted[25]. The principle of legal certainty, which is fundamental to Union law, [26] requires, in particular, rules involving negative consequences for individuals to be clear and precise and their application predictable for those subject to them[27]. In other words, individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.

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[21] Case C – 384/07 Wienstrom GmbH v Bundesminister für Wirtschaft und Arbeit [2008] ECR I-10393 p. 27-29

[22] Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 16 and C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraph 42.

[23] For a recent overview of this issue, see: T. Jaeger, 'The CELF Judgment: A Precarious Conception of the Standstill Obligation', *European state aid law quarterly*, 2008, (7) pp. 279-289 See for a critical analysis of these judgments also P.C. Adriaanse, Appropriate Measures to Remedy the Consequences of Unlawful State Aid. An analysis of the ECJ Judgment of 12 February 2008 in Case C-199/06 (CELF/SIDE), Review of European Administrative Law 2009 (1), pp. 73-86.

[24] Case C-506/03 *Germany* v *Commission* [2005] ECR I-0000, paragraph 58.

[25] Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products Lopik* v *Commission* [1987] ECR 1155, paragraph 44.

[26] Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30

[27] Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 79.

As indicated above, the protection of individual rights arising out of violations of the standstill obligation is one of the national courts' key responsibilities. Legal protection for third parties under Article 108 (3) TFEU is not limited to ordering the recovery of unlawful aid. The Court has also repeatedly held that the national courts' obligations may include awarding damages. This applies where a third party has suffered loss as a result of the unlawful aid.

National law provides legal basis for claims for damages based on infringement of Article 108(3) TFUE. The various Studies on the Enforcement of State Aid Law at National Level show different examples. For instance, in Austrian law section 1 of the Austrian Act against Unfair Competition applies. In Finnish law the Act on Damages is mentioned in the studies, whereas in Dutch law actions for damages for breach of the State aid rules should be brought under the same rules and principles as actions for damages based on tort[28].

Few categories of claims can be distinguished in national legal systems:

- damages claims lodged by a competitor of the beneficiary against the Member State,
- damages claims lodged by a competitor of the beneficiary against the aid beneficiary,
- damages claims lodged by the aid beneficiary against the Member State, and
- other claims for damages[29].

The example of damages claims lodged by a competitor of the beneficiary against the Member State we can find in Conseil d'Etat *Pantochim* judgment[30]. A competitor to the beneficiary sued the French State for the loss suffered as a result of the impossibility of marketing certain products which, unlike the products of the aid recipient, had not been subject to a tax exemption. The aid in question was both unlawful and incompatible with the internal market, but no causal link between the violation and the loss suffered was found to be proven[31].

In the *Baby Dan* case[32], the Dutch court rejected a claim for damages lodged by the plaintiff against two competitors which had received State aid (under an employment relief program) and allegedly used it to sell certain products below

[28] See: B. Brandtner, T.Beranger, C. Lessenich, Private State …, p. 26

[29] See: M. Honoré , N. Eram Jensen, Damages in State Aid Cases, European state aid law quarterly, 2011, (2) p. 266.

[30] Conseil d'Etat, Société Pantochim SA, 31 May 2000, Cases n°192006 and n°196303, Revue de jurisprudence fiscale 2000, pp. 729–730

[31] See: M. Honoré , N. Eram Jensen, Damages …, p. 266.

[32] Court of Appeal Amsterdam ("Gerechtshof Amsterdam"), 29 June2006, LJN AZ 1425, Baby Dan A/S v Werkvoorziening Weert en Omstreken (De Risse) and Werkvoorziening De Kanaalstreek (WeDeKa)

cost price. The Dutch Court of Appeal agreed that the measure should have been notified to the Commission but did not find that the aid recipients had committed a tortious act[33].

Actions for damages lodged by the aid beneficiary (or a potential aid beneficiary) against the Member State applied German Regional Court of Magdeburg judgment[34] in which a steel producer had not obtained State aid from the German State following a negative Commission decision. It subsequently claimed damages from the German State which should (partly) compensate it for its failure to obtain State aid. The Court rejected the claim, holding, *inter alia,* that an award of damages would amount to State aid on its own[35].

The duty of national courts to draw the necessary legal consequences from violations of the standstill obligation is not limited to their final judgments. As part of their role under Article 108(3) of the Treaty, national courts are also required to take interim measures where this is appropriate to safeguard the rights of individuals[36]. Interim recovery can also be a very effective instrument in cases where national court proceedings run parallel to a Commission investigation.

The most approachable cases are those where unlawful aid has not yet been disbursed, but where there is a risk that such payments will be made during the course of national court proceedings. In such cases, the national court's obligation to prevent violations of Article 108(3) can require it to issue an interim order preventing the illegal disbursement until the substance of the matter is resolved. Where the illegal payment has already been made, the role of national courts usually requires them to order full recovery (including illegality interest).[37].

3. CONCLUSION

Private enforcement before national courts has played a relatively limited role in State aid but private enforcement actions can offer considerable benefits for State aid policy.

In the State Aid Scoreboard of Autumn 2008, the Commission considers that State aid enforcement by national courts can play an important role in the overall system of State aid control. National courts are often well placed to protect individual rights affected by violations of the State aid rules and can offer

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[33] See: M. Honoré , N. Eram Jensen, Damages …, p. 268.

[34] Regional Court ("Landgericht") of Magdeburg, 27 September 2002, 10 O 499/02 and Higher Regional Court Oberlandesgericht of Naumburg, 14 May 2003, 12 U 161/02

[35] See: M. Honoré , N. Eram Jensen, Damages …, p. 268.

[36] See Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote14, paragraph 46.

[37] See: The Commission notice on the enforcement of State aid law by national courts , OJ 2009 C 85, p. 1., p. 48-49 and the case-law cited therein.

quick and effective remedies to third parties[38]. Proceedings before national courts give third parties the opportunity to address and resolve many State aid related concerns directly at national level.

On the other side despite the settled case-law of the Court on the tasks of the courts of the Member States with regard to the protection of the rights of competitors of beneficiaries of unlawful aid, a lot of unexplained questions as to the practical implementation in national proceedings and the scope of protection provided by national law.

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SOME ASPECTS OF THE RIGHT TO FREE ELECTIONS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

Free elections constitute a basic instrument of democracy and their organization in States with developed political pluralism and freedom of expression never comes under question. The right to free elections as a political right of all citizens entails continuous engagement of the State into organization and monitoring of elections, management of voting lists and catering for impartial settlement of electoral disputes. This article is primarily focused on theoretical analysis of free elections, also having regard to historical circumstances of the development of election law. The latter represents a background for the core topic of the article, namely the case-law of the European Court of Human Rights in relation to the right to free elections. The evolution of the protection of the right to free elections is an unstoppable process that makes a valuable contribution to the protection of human rights in general but also burdens the European Court of Human Rights with an even larger volume of work. In approximately sixty years of its existence, a short, restrictively defined provision of Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms has managed to encourage the creation of abundant jurisprudence and has set high standards of electoral law in forty-seven member States of the Council of Europe.

Key words: *right to free elections, European Court of Human Rights, case-law*

1. INTRODUCTION

Free elections constitute a basic instrument of democracy and their organization in States with developed political pluralism and freedom of expression never comes under question. Donnelly argues that "democracy and human rights share a commitment to the ideal of equal political dignity for all"[1]. The right to free elections can be viewed from two aspects: from the viewpoint of the equal right of all citizens to elect and be elected as members of representative bodies (general and equal active and passive electoral right) and through the prism of the characteristics of the election process (secrecy and directness). Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the First Protocol) grants the right to free elections in the sense of the liability of States to, within a reasonable period of time, organize elections of legislative bodies through a secret voting system and in circumstances ensuring a possibility for all citizens to freely express their opinion. However, even in democratic member States of the Council of Europe it has come to violation of the right to free elections, which has given the European Court of Human Rights (hereinafter: ECHR) a chance to intervene and thus build up its abundant practice.

This article is primarily focused on theoretical analysis of free elections, also having regard to historical circumstances of the development of election law. The latter represents a background for the core topic of the article, namely the case-law of the European Court of Human Rights in relation to the right to free elections. Despite initial resistance, the standpoint that organization of free elections is not only a procedural liability of signatory States to the Protocol but also an instrument for exercise of the individual voting right of every citizen has become rather widely accepted. The right to free elections has often been considered in the context of other Convention rights such as the right to freedom of expression and association[2], the right to an efficient legal remedy and prohibition of discrimination[3]. It falls into the domain of political rights which can be derogated in exceptional cases[4], i.e. countries may take measures derogating from their obligations some political rights "in time of public emergency which

[1] Donnelly, Jack, Universal Human Rights in Theory and Practice, Second Edition, Cornell University Press, Ithaca and London, 2003, p. 191.

[2] The freedom of expression and opinion is linked to a number of other rights and sometimes overlaps with the right to participation in public life, the right to vote, and the right to stand for election. Smith, Rhona K. M., Textbook on International Human Rights, Fourth Edition, Oxford University Press Inc., New York, 2010, p. 291.

[3] See more in: DeFeis, Elizabeth F., Elections – A Global Right?, Wisconsin International Law Journal, No. 3/2000-2001, pp. 321-329.

[4] Andrassy, Juraj et al., Međunarodno pravo 1, 2. izmijenjeno izdanje, Školska knjiga, Zagreb, 2010, pp. 373-374; Mégret, Frédéric, Nature of Obligations, in: Moeckli, Daniel; Shah, Sangeeta; Sivakumaran, Sandesh (eds.), International Human Rights Law, Oxford University Press Inc., New

threatens the life of the nations and the existence of which is officially proclaimed (...), provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"[5].

Today, the ECHR is facing great challenges in terms of broadening of interpretation of this right to some aspects of electoral (voting) systems and to election campaign issues. Strong support to the EHCR is in this context provided by the Parliamentary Assembly of the Council of Europe and the Venice Commission. Besides, the issue of the voting right of prisoners and abroad voting are always deemed burning. On such occasions, the role of the EHCR involves establishment of balance between the right of individuals and groups to free elections on one hand and legitimate goals of national States which represent a ground for restriction of the voting right on the other hand.

2. ON ELECTIONS IN GENERAL

2.1. The concept, features and types of elections

"Elections denote a procedure applied for people's entrustment of political power to a representative body for a certain period of time (four or five years in the principle). In many democratic countries, the president is also provided with such a power. Elections represent the people's sovereign will. Therefore, they are seen as a source of the legitimacy and legality of the entire system of state government. In order to reflect the people's sovereign will, elections have to be free and fair"[6]. These features of elections imply, regarding the election process, respect for fundamental rights and freedoms such as freedom of opinion, expression and association as well as prohibition of discrimination. The right to free and fair elections as well as the right to participate in the elections as a candidate are essential elements of the right to take part in the conduct of public affairs which is closely intertwined with the exercise of the right to self-determination[7] and with the (still contested) right to democracy[8].

York, 2010, pp. 143-144; Degan, Vladimir-Đuro, Međunarodno pravo, Školska knjiga, Zagreb, 2011, pp. 493-494.

[5] Article 4 paragraph 1. Međunarodni pakt o građanskim i političkim pravima, Official Gazette of the Republic of Croatia – International Treaties, No. 12/1993; Offical Gazette of the Socialist Federative Republic of Yugoslavia, No. 7/1971.

[6] Smerdel, Branko; Sokol, Smiljko, Ustavno pravo, Četvrto neizmijenjeno izdanje, Narodne novine d.d., Zagreb, 2009, p. 235. See also: Fox, Gregory H., International Law and the Entitlement to Democracy After War, Global Governance, No. 2/2003, pp. 183, 185.

[7] Vandewoude, Cécile, The Rise of Self-Determination Versus the Rise of Democracy, Göttingen Journal of International Law, No. 3/2010, p. 992.

[8] Eckert, Amy E., Free Determination or the Determination to Be Free? Self-Determination and the Democratic Entitlement, UCLA Journal of International Law and Foreign Affairs, No. 1/1999,

In terms of the Republic of Croatia, the voting right is primarily granted by Article 45 of the Constitution stipulating that "all Croatian citizens who have reached the age of eighteen years (voters) shall be entitled to universal and equal suffrage in elections for the Croatian Parliament, the President of the Republic of Croatia and the European Parliament and in decision-making procedures by national referendum, in compliance with law"[9]. Suffrage shall be exercised in direct elections by secret ballot. As far as free and fair elections are concerned, it is important that all political parties are provided with equal conditions of competition in the sense of an access to media and impartial treatment of the bodies monitoring the elections. These conditions are ensured by Article 29 of the Croatian Act on Election of Representatives to the Croatian Parliament[10] and the Rules of the Croatian Parliament for Electoral Promotion of Croatian National Electronic Media[11]. Equal access to media has often been criticized due to the dilution of political campaign in the context of providing marginal political parties with too much space in media. However, it is the only guarantee for granting equal rights to all candidates at the elections since most of them cannot, in the financial sense, fight the big players who tend to invest certain funds in the electoral promotion beside the official electoral programme. In fact, these equal rights refer only to presentation of candidate lists while the promotion is regulated to the least extent.

One of the basic typology of elections is the division into competitive, noncompetitive and semicompetitive elections. Elections are considered competitive if the choice and freedom of election are granted both formally and virtually[12]. In case either is completely denied, then it comes to noncompetitive elections which are common for totalitarian systems. With respect to authoritarian

pp. 56-67; Burchill, Richard, The Developing International Law of Democracy, Modern Law Review, No. 1/2001, pp. 123-134; Wheatley, Steven, Democracy in International Law: A European Perspective, International and Comparative Law Quarterly, No. 2/2002, pp. 227-228, 235-239; Maogoto, Jackson Nyamuya, Democratic Governance: An Emerging Customary Norm?, University of Notre Dame Australia Law Review, Vol. 5/2003, pp. 69-75.

[9] Ustav Republike Hrvatske, Official Gazette of the Republic of Croatia, Nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2010, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010.

[10] Zakon o izboru zastupnika u Hrvatski sabor, Official Gazette of the Republic of Croatia, Nos. 116/1999, 109/2000, 53/2003, 69/2003, 167/2003, 44/2006, 19/2007, 20/2009, 145/2010, 24/2011, 93/2011, 120/2011.

[11] Pravila o postupanju elektroničkih medija s nacionalnom koncesijom u Republici Hrvatskoj tijekom izborne promidžbe, Official Gazette of the Republic of Croatia, Nos. 165/2003, 105/2007.

[12] Nohlen singles out six principles of the depiction of elections as truly competitive. These are a) freedom of electoral competition under the same conditions, c) existence of real competition among political parties, their programmes and candidates, c) equality of opportunities for running for positions and electoral competition, d) secret voting as a guarantee for freedom of election, e) well-balanced and fair system and f) temporal restriction of the post-election status. See: Nohlen, Dieter, Izborno pravo i stranački sustav, Školska knjiga, Zagreb, 1992, p. 20.

systems, elections are free in the principle but they are restrained in the reality (semicompetitive elections)[13], often in line with the Stalin's admonition "it matters not who votes, but who counts the votes"[14].

2.2. Principles of suffrage in democracies

- Universal suffrage

Throughout history, universal suffrage had been limited by excluding certain ethnic, religious and other groups, as well as by setting property and educational qualifications for voters and electoral candidates. Universal suffrage implies that all citizens regardless of their sex, race, skin colour, religion or ethnicity have the right to vote and to be voted for. Laws may, of course, be used to prescribe certain conditions such as minimum age, citizenship and/or domicile, i.e. habitual residence. Namely, domicile and habitual residence are what electoral rolls are based upon, which in turn serve as suffrage and voters records. They are characterized by continuity (they are constantly updated) and cohesion (they apply to all elections)[15].

The establishment process of universal suffrage varied in different developed post-industrial societies[16]. In general, it started in the mid-19th century, when the right to vote was being given to more and more population groups, which lead to most of the Western world having introduced universal and equal suffrage after World War II.

Universal suffrage, as an essential element of the right of all citizens to vote, is inseparably intertwined with equal suffrage and secret ballot as proclaimed in the 1966 International Covenant on Civil and Political Rights. Namely, the Covenant regulates the right of all citizens to vote at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors[17]. According to Steiner, this is one of the rare statements of a theory of political legitimacy that falls clearly within the liberal tradition[18].

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[13] Kasapović, Mirjana, Izborni leksikon, Politička kultura, Zagreb, 2003, pp. 243-245.

[14] Balian, Hrair, Ten Years of International Election Assistance and Observation, Helsinki Monitor, No. 3/2001, p. 203.

[15] Kasapović, Mirjana, op. cit. (note 13), pp. 283-285.

[16] For instance, France had abrupt and sudden changes in the scope of the electorate, whereas the same process in the United Kingdom evolved at a steady pace. Women in Finland were given voting rights as early as 1906, but in Switzerland this did not happen until 1971. Throughout history, the voting rights had also been limited to military personnel. Nowadays, however, democracies do not limit voting rights to military personnel, as political involvement of the military is merely a relict present only in underdeveloped societies. Nohlen, Dieter, op. cit. (note 12), pp. 27-32; Smerdel, Branko; Sokol, Smiljko, op. cit. (note 6), pp. 236-237.

[17] Article 25. Međunarodni pakt o građanskim i političkim pravima, op. cit. (note 5).

[18] Steiner, Henry J., International Protection of Human Rights, in: Evans, Malcom D. (ed.), International Law, Second Edition, Oxford University Press Inc., New York, 2010, p. 809.

• Equal suffrage

"This principle requires that the weight of votes of all those entitled to vote is equal and not differentiated by property, income, tax, education, religion, race, gender or political stance"[19]. Historically, differentiation was present in the so-called (social) class voting with certain quotas for representatives of particular social classes. Such quotas were often largely disproportionate to the shares in total population, which lead to the nobility and clergy having more representatives than the bourgeoisie, working class or even the several times more numerous peasants. Another form of unequal suffrage was the so-called plural voting system, which allowed landowners to vote in all electoral constituencies they owned real-estate in. Dual voting rights are nowadays applied for the purposes of protecting minority groups (e.g. ethnic groups)[20]. The biggest challenge in the sense of equality of suffrage nowadays is the forming of electoral constituencies which would enable the number of representatives to be as proportionate to the number of voters as possible.

• Secret ballot

This principle is based on the decision of the voter being unknown to others. "This is the opposite of all forms of open (voting by signature) and public voting (voting by raising hands or by acclamation)"[21]. The implementation of this principle is monitored by the bodies which conduct and supervise the elections, such as electoral commissions. It regards the arranging of polling rooms and boots, official ballots which may be covered, sealing of ballot boxes etc.

• Direct universal suffrage

Direct suffrage implies that the voters decide on their representatives directly and without mediation. In indirect elections voters cast their votes for an electoral college, which in turn elects representatives, i.e. mandate holders. It is possible to conduct this voting method in more than two stages. There are two types of indirect elections: indirect by form (in which the electoral college is bound by the voters' decision) and indirect by substance (in which the electoral college elects the mandate holders at their own discretion)[22].

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[19] Nohlen, Dieter, op. cit. (note 12), p. 26.

[20] In this sense, Articles 16 – 19 of the Act on Election of Representatives to the Croatian Parliament allow members of ethnic minorities to vote for representatives of minority groups on separate lists along with the existing voting right of all Croatian citizens. Zakon o izboru zastupnika u Hrvatski sabor, loc. cit. (note 10).

[21] Nohlen, Dieter, loc. cit. (note 19).

[22] Ibid.

• Characteristics of passive universal suffrage

Passive suffrage as the reverse and prerequisite of active suffrage is mostly governed by the same principles – it is both universal and equal. However, the minimum age for candidacy is not equal to minimum age to vote in all countries. Aside from differences in minimum age requirements, in some countries and especially the ones with high immigration levels, passive suffrage is not recognized with citizens who have subsequently acquired it by naturalization, or the right to vote can be acquired only after a certain period of time, i.e. after five, ten or more years[23]. Rules on parliamentary incompatibility are also considered justified limitation of voting rights. It concerns the prohibition of simultaneous performing of leadership duties in multiple branches of authority in accordance with the principle of separation of powers. In countries which allow candidacy to holders of functions, such as Constitutional Court judges, there is usually the obligation to suspend the previous function[24].

Even though in most of the multi-party parliamentary democracies every adult citizen may run for office, the actual chance to be elected is usually on the side of the candidates who have been supported by political parties. They may directly be appointed party leaders, may be elected intra-party or the party may choose to feature pre-candidates among which the voters will choose a candidate. As a formal limitation of the passive universal suffrage, a certain number of signatures (as sign of support) which the candidate must collect in an electoral district may be prescribed. In Croatia it is necessary to collect 500 voter signatures for party or independent list candidacy[25] and 10 000 for presidential election candidacy[26].

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[23] Smerdel, Branko; Sokol, Smiljko, op. cit. (note 6), p. 241. However, EU member States guarantee the right to take part in local elections and European Parliament elections to residents of other member States without limitations. This guarantee is based on the European citizenship which is an addition to the citizenship of a member State. National regulations may be used to limit the voting rights of citizens of other member States only if the elections concern national or regional legislative bodies. See: Kochenov, Dimitry, Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: an Ignored Link?, Maastricht Journal of European and Comparative Law, No. 2/2009, pp. 197-223; Yiğit, Dilek, Democracy in the European Union from the Perspective of Representative Democracy, Review of International Law and Politics, No. 23/2010, pp. 130-136; Bauböck, Rainer, Why European Citizenship? Normative Approaches to Supranational Union, Theoretical Inquiries in Law, No. 2/2007, pp. 453-458, 474-480; Schleicher, David, What if Europe Held an Election and No One Cared?, Harvard International Law Journal, Vol. 52/2011, pp. 110-161.

[24] Smerdel, Branko; Sokol, Smiljko, ibid., p. 242.

[25] Zakon o izboru zastupnika u Hrvatski sabor, loc. cit. (note 10).

[26] Zakon o izboru predsjednika Republike Hrvatske, Official Gazette of the Republic of Croatia, Nos. 22/1992, 42/1992, 71/1997, 69/2004, 99/2004, 44/2006, 24/2011.

3. THE RIGHT TO FREE ELECTIONS AND THE COUNCIL OF EUROPE

3.1. Evolution of the provision on the right to free elections

The fundamental document for human rights protection in Europe, as well as the right to free elections is the Convention for the Protection of Human Rights and Fundamental Freedoms (and Additional Protocols) signed within the framework of the Council of Europe[27]. This "comprehensive bill of rights on the Western liberal model"[28] is especially important due to the guarantee of judicial protection of 800 million Europeans in forty-seven signatories. Specifically, each individual or group of individuals who believe that one or more of their rights given to them by the Convention or its protocols have been infringed upon may address the ECHR that has been a full-time court since 1998. Prior to the establishment of the Court, the protection of the implementation of the Convention took place in two stages – in a proceeding before the European Commission of Human Rights and in a proceeding before the Court[29]. It is because of this that decisions of the Commission shall occasionally be mentioned in this paper when it comes to older cases.

The provision regarding the right to free elections is the only so-called "political clause" in the Convention seeing as how it concerns the organization of political systems of signatories. Other than that it is specific also because it prescribes positive duties of countries and not refraining from infringement and preventing violation as it is prescribed for protection of most of the rights in the Convention.

In September 1949 the Advisory Committee of the Council of Europe recommended to the Committee of Ministers to incorporate a provision in the draft of the Convention, which would bind the signatories to respect the fundamental principles of democracies in good faith and especially so in the sense of holding free elections in reasonable intervals, with universal suffrage, direct and secret ballot and that they do not repress criticism of government or obstruct the right to political opposition. The recommendation was not accepted, with the explanation that it would be beyond the scope of the Convention, whose primary goal was to guarantee individual rights without determining the political structure. Sir David Maxwell-Fyfe, the President of the Committee for Legal and Administrative Questions of the Consultative Assembly warned the Committee

[27] Konvencija za zaštitu ljudskih prava i temeljnih sloboda, Official Gazette of the Republic of Croatia – International Treaties, Nos. 18/1997, 6/1999, 8/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010.

[28] Brownlie, Ian, Principles of Public International Law, Seventh Edition, Oxford University Press Inc., New York, 2008, p. 568.

[29] Omejec, Jasna, Vijeće Europe i Europska unija, Novi informator, Zagreb, 2008, p. 241.

of Ministers that the omission of the clause on democratic institutions would weaken the Convention since it would not provide protection of important political rights and freedoms to the individuals. The initiator of another similar recommendation was the French delegate and Judge Pierre-Henri Teitgen. At the Assembly session in August 1950 he warned of the need to prevent totalitarian regimes in Europe and suggested to do so by including the clause on free and democratic elections in the Convention[30].

However, the Convention as signed in Rome on November 4, 1950 did not include the "political clause" – it was decided that discussion on the subject would be held later on and that the decision would be included in the first protocol to the Convention. The provision on the right to free elections was finally included in Article 3 of the First Protocol, thus extending the original scope of the Convention[31]. It was opened for signing in 1952 and entered into force in 1954. The Article emphasises that: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature"[32]. This was obviously a very cautious and restrictive formulation, which was the result of a compromise, seeing as how the provision on universal suffrage, repression of criticism of government and obstruction of opposition was omitted. Hence, the only obligation that was prescribed was that member States hold free elections at reasonable intervals without interfering into the election systems, mandate calculations and possible justification of suffrage limitations.

3.2. Article 3 of the First Protocol *Rationae Personae* – Evolution Towards Acknowledging Individual Right to Free Elections

Early practice of the European Commission of Human Rights denied that the individual right to vote may be based on Article 3 of the First Protocol[33]. Both the European Commission and the ECHR retained this position during the 1960s. However, the change was brought on by the so-called "Greek case". A military coup was staged in 1967 in Greece, which lead to the dissolution of parliament and suspension of political parties. The same year Denmark, Sweden, Norway and the Netherlands filed a joint application to the Commission of

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[30] Golubok, Sergey, Right To Free Elections: Emerging Guarantees Or Two Layers Of Protection, Netherlands Quarterly of Human Rights, No. 3/2009, p. 364-365.

[31] Jennings, Sir Robert; Watts, Sir Arthur (eds.), Oppenheim's Internationa Law, Ninth Edition, Volume 1, Parts 2 to 4, Oxford University Press Inc., New York, 1996, p. 1023.

[32] Zakon o potvrđivanju Konvencije za zaštitu ljudskih prava i temeljnih sloboda i Protokola br. 1, 4, 6, 7, i 11 uz Konvenciju za zaštitu ljudskih prava i temeljnih sloboda, Official Gazette of the Republic of Croatia – International Treaties, No. 18/1997.

[33] *X v. Germany*, Application no. 530/59, Decision of 4 January 1960, Collection 2.

Human Rights against Greece. The Commission decided that in this case Article 3 of the First Protocol was breached. The limitation of the right of citizens to vote was interpreted as a violation of free expression of the (political) opinion of the people, as it is stated in the very Article[34]. Consequently, Greece had to withdraw from the Council of Europe in 1970 and became a member again only after the democratic regime was reinstated in 1974[35].

The Commission finally confirmed in 1975 that Article 3 of the First Protocol protects the individual right to vote, while in later decisions it is stated more precisely that it concerns the right of an individual to elect and be elected in legislative bodies elections. Of particular significance is the judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium* from 1987[36], which next to the guarantee of active and passive universal suffrage set the criteria for the justification of limitation of the right to free elections which the country may impose. This means that the individual right to vote does exist, but is not absolute[37].

The particularity of the passive universal suffrage lies in the fact that its holders may (and mostly are) political parties. The Court had therefore regularly acknowledged active legitimation to parties who considered themselves to have been impaired in the electoral process. In the case of *Russian Conservative Party of Entrepreneurs and Others v. Russia* (2007) the party was allowed to act as the applicant in the name of one of their candidates who was deprived of passive suffrage[38].

3.3. The Material Scope of the "Political Clause"

The provision of Article 3 of the First Protocol to the Convention is quite narrowly defined, which is why the Court faces great challenges upon its interpretation. Namely, the protection does not extend to all types and levels of elections. The material scope of the right to free elections includes only the elections of legislative bodies established by the constitution of the signatory, i.e. the parliament. At the same time it is necessary to make a distinction in relation to the representative bodies of local self-government, in relation to the directly elected executive authorities (which in many systems denotes the president) and in relation to the supranational representative bodies such as the European

[34] *The Greek Case (Government of Denmark v. Government of Greece, Government of Norway v. Government of Greece, Government of Sweden v. Government of Greece and Government of the Netherlands v. Government of Greece)*, Application nos. 3321/67, 3322/67, 3323/67 and 3344/67, Report of the Sub-Commission of 5 November 1969, paras. 319-321.

[35] Omejec, Jasna, op. cit. (note 29), pp. 53-54.

[36] *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment of 2 March 1987.

[37] Golubok, Sergey, op. cit. (note 30), p. 367.

[38] *Russian Conservative Party of Entrepreneurs and Others v. Russia*, Application nos. 55066/00 and 55638/00, Judgment of 11 January 2007 (final, 11 April 2007).

Parliament. The question of failure to hold European Parliament elections in Gibraltar was discussed in the case of *Matthews v. the United Kingdom*. The Court did not wish to get into the lack of compliance between the Council of the European Communities legal acts and the Convention simply because the Communities were not a contracting party. However, it was established that the United Kingdom with its national regulations was in violation of Article 3 of the First Protocol since it did not allow free expression of will of the people of Gibraltar[39].

In federal countries and countries with strong regional autonomy such as Austria, Germany, Belgium and Spain, the Convention bodies generally recognize regional parliaments as legislative bodies in accordance with Article 3 of the First Protocol. Relevant in this sense is the judgment in the case of *Vito Sante Santoro v. Italy*[40].

In some member States of the Council of Europe, the president of a republic may have considerable authorities, such as the right of promulgation of laws passed by the parliament, veto and the constitutional initiative to assess the constitutionality of the law, and sometimes even the right of legislative initiative. The presidential elections in countries in which the president is elected directly do not fall under the scope of Article 3 of the First Protocol either. This issue was especially emphasized after the presidential elections in Azerbaijan in 2002. In the case of *Gulyiev v. Azerbaijan* it was decided that the President may not be considered a legislative body within the meaning of Article 3 since the President does not have strictly legislative powers, which in the case of Azerbaijan belong to the Parliament since the Azerbaijani Constitution prescribes separation of powers[41]. However, in the same year and in the case of *Boškoski v. the Former Yugoslav Republic of Macedonia* the Court decided to dissociate from its previous rigid stance by allowing the possibility of applying Article 3 to presidential elections in the situation in which the Office of the Head of State would have the power "to initiate and adopt legislation or enjoy wide powers to control the passage of legislation or the power to censure the principal legislation-setting

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[39] *Matthews v. The United Kingdom*, Application no. 24833/94, Judgment of 18 February 1999.

[40] In the case the Court decided that Article 3 of the First Protocol is applicable to the regional representative body elections in Italy due to the fact that, according to the Italian Constitution, regional councils have the authority to pass laws on their respective territories in areas such as public healthcare, urban planning, agriculture and education. In order for these bodies to be considered legislative, according to Article 3 of the First Protocol, the authority must be one that possesses own primary (and not delegated) legislative authority, i.e. that the national constitution explicitly defines a body as a legislative one. Hence, in this case, the Court relied on the national interpretation of a legislative body. *Vito Sante Santoro v. Italy*, Application no. 36681/97, Judgment of 1 July 2004 (final, 1 October 2004), paras. 52-53.

[41] *Guliyev v. Azerbaijan*, Application no. 35584/02, Decision of 27 May 2004, para. 5 (The Law).

authorities"[42]. Despite hinting at the possibility, the EHCR regularly dismisses as inadmissible the applications relating to presidential elections due to the lack of jurisdiction under the Convention, thereby following the Guliyev doctrine and not considering the analysis of presidential powers in certain cases[43].

As it was confirmed in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the right to free elections implies both the active and passive universal suffrage of an individual. Regarding the passive universal suffrage, the Court set several important principles:

- Passive universal suffrage was derived from active universal suffrage because the voters must be given the right to choose between alternatives. Therefore, a country may choose to prescribe more strict criteria for electoral candidates than for voters who are electing them (*Melnychenko v. Ukraine*)[44].
- Article 3 of the First Protocol also applies period following election in the sense of the right of candidates to perform the functions to which he or she was elected for. In the case of *Sadak et al. v. Turkey* it was decided that there had been violation of passive universal suffrage of the elected members of the Turkish Parliament who had to resign from their parliamentary mandates since the Constitutional Court had dissolved their party because of their attitudes and statements on the status of the Kurds[45].
- However, the EHCR has stressed on more than one occasion that the right of voters to choose between different political standpoints and platforms does not necessarily guarantee that each voter will be able to find a candidate he or she intended to vote for on his or her ballot. Namely, the electoral law tolerates certain constraints which arise from the very nature of exercising the rights or are imposed by countries for justified reasons.

[42] *Boškoski v. the Former Yugoslav Republic of Macedonia*, Application no. 11676/04, Decision of 2 September 2004, para. 1 (The Law).

[43] Golubok, Sergey, op. cit. (note 30), p. 368.

[44] *Melnychenko v. Ukraine*, Application no. 17707/02, Judgment of 19 October 2004, para. 57.

[45] *Sadak and Others v. Turkey*, Application nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment of 17 July 2001.

4. LIMITATIONS OF THE RIGHT TO FREE ELECTIONS IN INTERPRETATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Similar to interpretation of other rights from the Convention, the EHCR has established that the right to free elections may be limited primarily due to restrictions arising from the right itself so that it can be more efficiently exercised. An example of that would be the age limit for exercising active and passive voting rights, as well as restrictions arising from time and space or even from technical (im)possibilities in the election process. However, every limitation of electoral rights set by a member State in the Council of Europe must have a legitimate goal and must not be disproportionate to the intensity necessary for the achievement of the goal. Proportionality is checked via a so-called proportionality test. These criteria were mentioned for the first time in the judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium*[46], to which the Court has been referring to for the past two and a half decades and defined in even more detail. The judgment in the case of *Aziz v. Cyprus* states that the limitations of right to free elections must not be such as to exclude a person or groups of persons from taking part in the political life of their country and especially in legislative body elections. As regards the prescribing of a registered residence on the territory of the State as a condition for the right to vote, the Court found that such provision does not violate Article 3 of the First Protocol[47]. In the judgment in the case of *Gitonas et al. v. Greece* it was decided that Greece did not violate the right to free elections despite the strict rule according to which representative candidates were not allowed to perform any public service for a period longer than thirty-three months before the elections[48].

The *ratio* of limitation of suffrage must have a democratic stronghold. The Protocol itself does not define the legitimate goals that may justify the limitation, which is why the Court envisages them *ad hoc* in each case. To exemplify, in the case of *Paksas v. Lithuania* the Court accepted the protection of democratic order and the rule of law as a legitimate goal[49]. Aside from legitimate goals and proportionality, the EHCR case-law produced another criterion for evaluation of limitations of the right to free elections – the criterion of non-arbitrariness. Namely, the procedures and conditions for candidacy and supervision of electoral competition must be such as to prevent arbitrary decision making on exercising of passive universal suffrage of individuals and political parties. In the case of *Podkolzina v. Latvia*, the position of the Court was that discretional decisions

[46] *Mathieu-Mohin and Clerfayt v. Belgium*, op. cit. (note 36), para. 52.

[47] *Aziz v. Cyprus*, Application no. 69949/01, Judgment of 22 June 2004, para. 28.

[48] *Gitonas and Others v. Greece*, Application nos. 18747/91, 19376/92, 19379/92, 28208/95, 27755/95, Judgment of 1 July 1997, para. 37.

[49] *Paksas v. Lithuania*, Application no. 34932/04, Judgment of 6 January 2011, para. 101.

must not be made on passive universal suffrage once the candidate has already met the legal criteria for candidacy[50]. Arbitrary and inappropriate were also the actions of the Italian authorities described in the case of *Labita v. Italy*, where a person was disenfranchised from the right to vote on suspicion of being tied to the mafia and on being declared "dangerous to the society"[51]. In post-Soviet countries of Eastern Europe these irregularities are very noticeable primarily due to unjustified disqualifications of candidates and annulment of elections[52].

In cases of receiving an "application package" in regard to the same election activities, i.e. the same violations, since 2004 the Court has had the ability to establish underlying systemic problems and a "pilot judgment". This concerns situations in which the cause of frequent Convention violations lies in the quality of legal standards so that in the country in question it is possible to order change of legislation and that all related cases be dealt with by referring to the decision in the "pilot judgment"[53].

4.1. Margin of appreciation and limitations on the right to vote

When it comes to choosing the type of electoral system, the electoral threshold and other issues which indirectly affect the exercise of right to free elections, the ECHR is much more cautious and does not establish violation of the First Protocol all too easily. This matter is considered an area where the country is at liberty to make arrangements in accordance with its historical, cultural and political heritage, also known as margin of appreciation[54].

There are great differences between the democratic traditions and political systems of Convention signatories and especially between the founding member

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[50] The possible subsequent removal from a list of candidates may only be decided upon by an independent higher body and not the body conducting the registration. *Podkolzina v. Latvia*, Application no. 46726/99, Judgment of 9 April 2002, para. 35.

[51] The suspension of the right to vote was not lifted even after all charges were dropped, whereby the grounds for the measure ceased to exist. The Italian authorities did have a legitimate goal, but the limitation was arbitrary and disproportionate, thereby violating Article 3 of the First Protocol. *Labita v. Italy*, Application no. 26772/95, Judgment of 6 April 2000, paras. 198-203.

[52] For example, following the Azerbaijani parliamentary elections in 2005, the Court received a large number of claims from the same country precisely in terms of limitations of the right to free elections. In the case of *Kerimova v. Azerbaijan* the applicant alleged that the invalidation of the parliamentary elections in which she won by a landslide was unjustified and arbitrary. In the case of *Seyidzade v. Azerbaijan*, the applicant was a former clergyman who was denied to stand for elections despite having been relieved of his religious duties. In both cases the Court declared that there was a violation of Article 3 of the First Protocol due to evident denial of electoral rights. *Kerimova v. Azerbaijan*, Application no. 20799/06, Judgment of 30 September 2010 (final, 30 December 2010), para. 55; *Seyidzade v. Azerbaijan*, Application no. 37700/05, Judgment of 3 December 2009 (final, 3 March 2010), para. 40.

[53] See more: Omejec, Jasna, op. cit. (note 29), pp. 250, 254-256.

[54] Gomien, Donna, Europska konvencija o ljudskim pravima, Naklada d.o.o., Zadar, 2007, p. 226.

States of the Council of Europe and newly joined former communist countries of Central and Eastern Europe and the Caucasus. The Grand Chamber of the ECHR decided in the case of *Ždanoka v. Latvia* that the right to free elections of a member of the Soviet Communist Party who was not allowed candidacy in the Latvian parliamentary elections was not violated. The Grand Chamber was of the opinion that Latvia did not overstep its wide margin of appreciation and it pointed out at the same time that what is admissible in one country (e.g. in the transition period) may not be admissible in another country, where democracy is well-established. The rules in this area vary according to the historical and political factors that are characteristic of individual countries[55]. The danger of such an approach may arise from inconsistency and lack of uniformity of case law when deciding on margin of appreciation.

4.2. Linguistic limitations in the context of free elections

In cases when the language becomes a limiting factor of the right to free elections, the EHCR does not have a uniform practice. In the previously mentioned case of *Mathieu-Mohin and Clerfayt v. Belgium*, the underlying issue concerned the provision of the Belgian law, which stipulated that the candidates elected to the Flemish Council must take the parliamentary oath in Dutch, which the applicants – French speaking Belgians – considered to be a limitation. The Court decided "that was not a disproportionate limitation such as would thwart the free expression of the opinion of the people in the choice of the legislature"[56].

In the case of the *Fryske Nasionale Partij and Others v. The Netherlands*, the Court interpreted that the candidates were not directly limited in their electoral right, but that the language requirements upon registration for elections represented an indirect way of limiting the rights from Article 3 of the First Protocol[57].

In the judgment in the case of *Podkozlina v. Latvia* it was emphasised that the State has a wide margin of appreciation when prescribing candidacy conditions for parliamentary elections, including the testing of command of working language of the Parliament. Therefore, in this case the language criterion was not a controversial issue, but the way in which the lack of command with the applicant was established[58].

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[55] *Ždanoka v. Latvia*, Application no. 58278/00, Judgment of 16 March 2006, paras. 121, 124, 135-136.

[56] *Mathieu-Mohin and Clerfayt v. Belgium*, op. cit. (note 36), para. 57.

[57] *Fryske Nasionale Partij and Others v. The Netherlands,* Application no. 11100/84, Decision of 12 December 1985, para. 2 (The Law).

[58] The violation involved an arbitrary deprivation of passive universal suffrage and non-compliance with the guarantee of fair and objective decision-making of an impartial body on the basis of national legislation. *Podkolzina v. Latvia*, op. cit. (note 50), para. 33.

4.3. Limitations in relation to freedom of expression and association

Given that Article 3 of the First Protocol itself refers to the "free expression of the opinion of the people", the exercise of right to free elections implies freedom of promotion of all candidates. However, the freedom of expression of candidates must also mean equal opportunities for all holders of electoral programs so that the media presence of a party or candidate does not cause pressure on the electorate body. Such irregularity was reason for the annulment of presidential elections in Ukraine in 2004[59]. Also, excessive restrictions of freedom of expression in electoral campaigns may jeopardize the right to free elections, even if they are legitimate in the sense of Article 10 of the Convention[60].

Many non-governmental organizations as well as the Parliamentary Assembly of the Council of Europe (PACE) warned in their decisions of denial of access to mass media for political parties running for office in elections in Armenia and Azerbaijan. The Code of Good Practice in Electoral Matters, which was adopted by the Venice Commission, recommends that legal regulations, in terms of media representation and together with a non-discriminatory time period for representation in public radio and television stations, be used to provide all participants in elections with a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising. These recommendations are however a non-binding and *soft-law* instrument which the Court is not obliged to apply[61].

Freedom of assembly and association, as guaranteed by Article 11 to the Convention, is very important for the exercise of right to free elections and especially in terms of political pluralism[62]. Each democratic party may contribute

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[59] Golubok, Sergey, op. cit. (note 30), p. 383.

[60] Article 10 stipulates that "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises;
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". Konvencija za zaštitu ljudskih prava i temeljnih sloboda, loc. cit. (note 27).

[61] Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report – Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002). Available at: http://www.venice.coe.int/docs/2002/CDL-EL(2002)005-e.asp.

[62] Article 11 reads as follows: "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests;
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for

to the political development of the society and public debate. In case of violation of party rights, the Court will primarily discuss whether the dissolution of a party or prohibition of candidacy that were imposed on a party are justified and whether they are in violation of Article 11 to the Convention. With regard to Article 3 of the First Protocol, the Court will not consider the application should it determine that there was no violation. However, in accordance with Article 3, a party may be given direct protection in the case that national authority measures prevent individual candidates from standing for elections[63].

5. ON SOME ISSUES PERTAINING TO THE ELECTORAL SYSTEM AND THE ELECTION PROCESS IN THE LIGHT OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

5.1. Implications of Types of Electoral Systems on the Efficient Exercise of Right to Free Elections

European countries have different historical, demographic, political and other reasons for applying a certain type of electoral systems and the ECHR takes them into account upon reviewing applications. It is impossible to prohibit the use of a certain electoral system. What is possible is to monitor whether unjustified limitations of the right to vote and be voted for were imposed during preparation and implementation of elections. "Any electoral system in the sense of Article 3 of Protocol No. 1 must be assessed in light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the free expression of the opinion of the people in the choice of the legislature"[64]. Two cases are worth taking into consideration in this regard. In the admissibility decision in the case of *Lindsay et al. v. the United Kingdom* it was established that Great Britain was not in violation of Article 3 of the First Protocol by applying a different electoral system in Northern Ireland. The European Commission accepted the government's arguments saying that it wanted to protect the minority religious groups in Northern Ireland from underrepresentation as a legitimate goal and justification[65]. Along these lines is the decision in the case of the *Liberal Party,*

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the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State". Konvencija za zaštitu ljudskih prava i temeljnih sloboda, loc. cit. (note 27).

[63] Golubok, Sergey, op. cit. (note 30), p. 385.

[64] Moucheboeuf, Alcidia, Minority Rights Jurisprudence Digest, Council of Europe Publishing, Strasbourg Cedex, 2006, p. 268.

[65] *Lindsay and Others v. the United Kingdom*, Application no. 8364/78, Admissibility Decision of 8 March 1979, para. 1 (The Law).

R. and P. v. the United Kingdom. In the application the party pointed out the problem of disproportion between the number of votes and seats won as a result of a simple majority system. The European Commission decided that Article 3 of the First Protocol was not violated, but left open the question of justification of implementing such a system if it prevents religious or ethnic groups from having representation[66].

5.2. Electoral Threshold and the Issue of "Lost" Votes

A high threshold for the winning of seats or mandates may cause great difficulty to smaller parties and individual candidates in the sense of their underrepresentation in the representative body in favor of large parties. The effect of underrepresentation, i.e. votes "lost" to parties that have not passed the threshold, is especially significant when a high election threshold is prescribed at the level of the entire country and not only for individual constituencies. The most vivid example is the Turkish electoral legislation which prescribes an electoral threshold of as much as 10% of the votes necessary to win seats in the Parliament. In the judgment in the case of *Yumak and Sadak v. Turkey* the applicants were candidates of the People's Democratic Party (DEHAP) which won the 2002 parliamentary elections with 46% of votes in the Şırnak province. However, seeing as how it did not win 10% of votes at the level of Turkey, all three seats of the province were given to parties who had a mere 14% and 10% of votes in the constituency. The applicants claimed that the high electoral threshold was at odds with the free expression of the opinion of the people in the choice of the legislature as prescribed by Article 3 of the First Protocol. The Court ruled that there was no violation, stating that the threshold existed in previous elections as well and that the applicants could have predicted such an outcome. Moreover, the electoral threshold was not an arbitrary decision adopted against applicants. However, the Court did not take into account the fact that the constituency was a predominantly Kurdish province and that in cases of underrepresentation of ethnic and religious minorities it left the door for establishing violation of electoral rights caused by the electoral system open. The Court emphasised "that although the threshold was high it did not go beyond a level within the margin of appreciation of the national authorities in the matter, since it could not as such hinder the emergence of political alternatives within society"[67]. This is substantiated by the fact that the smaller parties are not only allowed, but also encouraged to associate in national elections. The Court also noted that the threshold is nevertheless the highest among member States of the

[66] *Liberal Party, R. and P. v. the United Kingdom*, Application no. 8765/79, Decision of 18 December 1980, paras. C, The Law.

[67] *Yumak and Sadak v. Turkey*, Application no. 10226/03, Judgment of 8 July 2008, para. 126.

Council of Europe and that it would be desirable to introduce a lower threshold and/or corrective mechanisms with the aim of better representation[68].

Even prior to the judgment in the *Yumak and Sadak* case the development of above-mentioned practices was characterized by constant refusal to review the threshold as a threat to the right to free elections. In the decision in the case of *Federación Nacionalista Canaria v. Spain*, the Court concluded that even the systems with high electoral threshold or high number of candidacy signatures are not in violation of Article 3 of the First Protocol. Prior to that, the Constitutional Court of Spain decided that the set statutory threshold is justified by the legitimate goal of preventing excessive fragmentation of Parliament, but that it does, to a certain extent, provide protection to smaller political associations. The opinion of the EHCR was that the Spanish electoral legislation had not been arbitrary or disproportionate nor did it threaten the freedom of expression of opinion of the people and that Spain did not cross the line of free evaluation with its relatively high electoral threshold upon application of electoral system[69].

5.3. Violation of the Right to Free Elections in the Implementation and Monitoring of the Electoral Process

Every member of the Council of Europe has an obligation to hold elections and to secure methods for electoral dispute resolution. It is also necessary to ensure independence and impartiality of the electoral authority in supervising of the electoral process, counting votes and declaring the election results. The decisions made by these authorities shall be subject to appeal with an independent and impartial judicial authority. The most significant procedural obligations of the State in this regard are forming of the objective election commissions, ensuring the privacy of the polling place, sealing of the ballot boxes and supervising of the printing and using of the ballot papers. One of the most significant judgments regarding the election commission procedures was in the case of the *Georgian*

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[68] Ibid., paras. 109-148. In 2004, along the lines of the *Yumak and Sadak* case the Parliamentary Assembly of the Council of Europe urged the Turkish authorities to lower the election threshold of 10% by declaring it excessive. In the 2007 Resolution on the state of human rights in Europe it was concluded that in well-established democracies there should be no thresholds higher than 3% during parliamentary elections. These two resolutions are not legally binding, but their importance lies in the professional or political authority of the body which adopts them. Parliamentary Assembly, Honouring of obligations and commitments by Turkey, Resolution 1380 (2004), 22 June 2004, para. 6. Available at:
http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/ERES1380.htm;
Parliamentary Assembly, State of human rights and democracy in Europe, Resolution 1547 (2007), 18 April 2007, para. 58. Available at:
http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta07/ERES1547.htm.

[69] *Federación Nacionalista Canaria v. Spain*, Application no. 56618/00, Decision of 7 June 2001, para. 1 (The Law).

Labour Party v. Georgia[70]. After the Rose Revolution in Georgia at the end of 2003, the Supreme Court of Georgia annulled the results of the parliamentary elections. Likewise, in 2004, the Central Electoral Commission of Georgia (CEC) annulled the results of the repeated parliamentary elections in Khulo and Kobuleti electoral districts. Nevertheless, on a day of new vote the polling stations in the Khulo and Kobuleti districts failed to open, but the CEC tallied the votes in the entire country and announced the results of the elections. It stated that the Labour Party received 6,01% of the vote, which was not enough to clear the 7% threshold and thus to obtain seats in Parliament (although, based on the results of the cancelled 2003 Parliamentary elections, Labour Party of Georgia had 20 of 150 mandates in Parliament). In view of the fact that there was a significant number of voters in the Khulo and Kobuleti electoral districts, the Labour Party complained that it had been unlawfully deprived of a genuine chance to obtain seats in Parliament. The applicant party also complained under Article 3 of the First Protocol about the violation of its right to stand for election, arguing that the CEC could not lawfully end a national election without first having held an election in the Khulo and Kobuleti districts. It noted that partial conduct of the CEC was due to the composition of the electoral commissions, since, in every commission at all levels, 8 out of the 15 members were representatives of the presidential and pro-presidential parties. The Government's main argument was that the failure to hold elections in Khulo and Kobuleti districts was the consequence of the escalation of the tensions in the region. Moreover, according to the Government, the Labour Party had failed to substantiate its claim that it could have received sufficient votes from those districts to enable it to overcome the 7% legal threshold. However, the exclusion of those two districts from the general election process had failed to comply with a number of rule of law requisites and resulted in what was effectively a disfranchisement of a significant section of the population (60,000 voters). Consequently, a large part of population did not get its representatives in Parliament. Like in many other post-communist countries, no one wanted to discourage Georgia in its development of democracy. Therefore, as to the composition of the electoral administration itself, the Court stressed that the respondent State should be granted a wide margin of appreciation in this respect. Nevertheless, the Court concluded that there had accordingly been a violation of the applicant party's right to stand for election under Article 3 of the First Protocol on account of the *de facto* disfranchisement of the Khulo and Kobuleti voters[71].

[70] *Georgian Labour Party v. Georgia*, Application no. 9103/04, Judgment of 8 July 2008 (final, 8 October 2008).

[71] Ibid., paras. 11, 15, 26, 28, 32, 35, 90, 113, 114, 116, 142.

5.4. The Right to an Effective Remedy for Violations of Electoral Rights

Respecting the Article 13 of the Convention - right to an effective remedy is an important precondition for the realization of the right to free elections in national legal system. The specificity of the legal protection in cases of violations of the electoral rights is in its urgency (in most legal systems the appeal is resolved within 48 hours of receipt). Also, in addition to the electoral commission as the appellate authority, there must be an independent judicial authority as the court of the second instance for electoral disputes. Decisions of these authorities must not be arbitrary and should be in line with national legislation.

In the case of the *Russian Conservative Party of Entrepreneurs and Others v. Russia* (2007), the ECHR delivered a significant judgement in which it concluded that there was a violation of Article 13 of the Convention as well as Article 3 of the First Protocol. Namely, in September of 1999, the applicant party nominated 151 candidates for the elections to the State Duma and, in October, the Central Electoral Commission (CEC) confirmed receipt of the party's list. In November 1999, the CEC refused registration of the applicant party's list of candidates, having found that certain people on the list, including the candidate listed second, Mr Žukov, had provided inaccurate information about their income and property. The Elections Act provided for disqualification of the entire party's list in the event of "withdrawal" of one of the top three candidates on the list in situations where the candidate's name had been taken off the list of the candidate's own free will or at the request of the candidate's electoral union. Disagreeing with the CEC's interpretation, the applicant party successfully challenged its decision before the domestic courts (the Supreme Court of the Russian Federation) and obtained a final judgment to the effect that "withdrawal" applied only if it had been voluntary. The judgment was immediately enforced, so the CEC registered the applicant party and allowed it to carry on its electoral campaign. Nevertheless, in November 1999 a deputy prosecutor general lodged an application for supervisory review, requesting the Supreme Court to reopen the proceedings and to accept the CEC's original broad interpretation of section 51(11) of the Elections Act which provided for the refusal or cancellation of a party's registration in the event of the withdrawal of one of the top three candidates on the list. The Presidium of the Supreme Court subsequently quashed the earlier judgments by way of supervisory-review proceedings and upheld the CEC's position. Consequently, the CEC annulled its earlier decisions, refused the registration of the applicant party's list and ordered the applicant party's name to be removed from the ballot papers. The applicant party appealed unsuccessfully and in December 1999, the elections to the State Duma took place. The applicant party was not listed in the voting papers. In April 2000, the Constitutional Court of the Russian Federation declared

unconstitutional the part of section 51(11). However, the Constitutional Court also ruled that the finding that section 51(11) was unconstitutional was of no consequence for the State Duma elections of December 1999 and could not be relied upon to seek a review of the election results. All further appeals by the applicant party were unsuccessful, including its application to have its election deposit returned. The applications of Mr Žukov, one of the Russian Conservative Party of Entrepreneurs candidates and an applicant party and Mr Vasilyev as a party supporter were lodged with the ECHR[72].

Pursuant to Article 3 of the First Protocol, the applicants alleged a violation of the Russian Conservative Party of Entrepreneurs' and Mr Žukov's right to stand for election and a violation of Mr Vasilyev's right to vote for the party of his choice. It followed that there had been a violation of Article 3 of the First Protocol in respect of the applicant party and Mr Žukov. Concerning whether the decision to disqualify the applicant party and Mr Žukov from standing in the election was proportionate to the legitimate aims pursued, the Court found that requiring a candidate for election to the national parliament to make his financial situation publicly known pursued a legitimate aim and in that it enabled voters to make an informed choice and promoted the overall fairness of elections. A contrario, concerning Mr Vasilyev's complaint that it had been impossible for him to cast his vote for a party of his choosing – the applicant party – which had been denied registration for the election, the Court did not consider that an allegedly frustrated voting intention could be considered grounds for an arguable claim of a violation of the right to vote. An intention to vote for a specific party was essentially a thought; is existence could not be proved or disproved until and unless it had manifested itself through the act of voting. The Court concluded that the right to vote could not be construed as laying down a general guarantee that every voter should be able to find on the ballot paper the candidate or the party he or she had intended to vote for[73]. Pursuant to Article 13 of the Convention, the ECHR found that the Russian Conservative Party of Entrepreneurs and Mr Žukov were denied an effective remedy in respect of the violation of their electoral rights through the use of the supervisory-review procedure on an application by a deputy Prosecutor General, a State official who was not a party to the proceedings. Besides, even if there were an impartial body, the applicants would not have time to apply for a review of the Supreme Court's judgment in the light of newly discovered circumstances. The Government did not point to any circumstances of a substantial and compelling character that could have justified that departure from the principle of legal certainty in the

[72] *Russian Conservative Party of Entrepreneurs and Others v. Russia*, op. cit. (note 38), paras. 9, 10, 11, 13, 15, 17, 18, 19, 21, 25.

[73] Ibid., paras. 43, 44, 62, 76, 79.

present case. Finally, having found, in particular, that the domestic proceedings concerning the applicants were conducted in breach of the principle of legal certainty, the Court held that there had been a violation of Article 1 of the First Protocol in respect of the domestic authorities' refusal to refund the election deposit to the applicant party[74].

The case of *Orujov v. Azerbaijan* concerned the disqualification of a candidate from running for the parliamentary elections on the ground that he had allegedly attempted to influence voters by funding repair works on public facilities. After submitting the appeal to the Azerbaijan court, the applicant had not been afforded much time to examine the material in the case file and to prepare arguments in his defence. Furthermore, the proceedings before that court had not afforded the applicant the necessary procedural safeguards. According to the ECHR, the interference with Mr Orujov's electoral rights had thus fallen short of the standards required by Article 3 of the First Protocol[75].

6. TERRITORIAL CRITERION AND THE ELECTORAL RIGHTS – LEGAL REASONING OF THE EUROPEAN COURT OF HUMAN RIGHTS

6.1. Length of Stay and the Electoral Rights

The modern age is characterized by a great mobility of the population, especially within the European Union. Change of residence is closely related to voting rights of a person who has changed it. It is widely accepted that national States have the right to determine conditions for gaining the voting rights considering the citizenship and the length of stay (in the case of parliamentary elections). The right to vote in a particular country generally derives from citizenship and the use of suffrage rights are often restricted or limited in some ways with length of stay or the residence in general.

In the case of *Py v. France* the Ordinance on the institutional organisation of New Caledonia brought in a ten-year residence requirement for participating in elections to the Congress and provincial assemblies. The reason for bringing in a residence condition was to ensure that the consultations would reflect the will of "interested" persons and that the result would not be altered by a massive vote cast by recent arrivals on the territory who had no solid links with it. Furthermore, the restriction on the right to vote was a direct and necessary consequence of establishing Caledonian citizenship. The Court found that New Caledonia's

[74] Ibid., paras. 84, 89, 96, 101.

[75] *Orujov v. Azerbaijan*, Application no. 4508/06, Judgment of 26 July 2011 (final, 26 October 2011), paras. 7, 55, 59.

current status amounted to a transitional phase prior to the acquisition of full sovereignty and was part of a process of self-determination[76].

6.2. Electoral Rights for Citizens Abroad

Historically, external voting is quite a recent phenomenon. Even in long-established democracies citizens with foreign residency were not granted the right to vote until the 1980s (e.g. Federal Republic of Germany and Great Britain) or 1990s (e.g. Canada and Japan). In the meantime, many emerging or new democracies in Central and Eastern Europe have introduced legal provisions for external voting[77].

A problem arises when a large number of external voters decisively affect the election result (e.g. in Croatia and Hungary). Although the introduction of the right to vote for citizens who live abroad is not required by the principles of the European electoral heritage, the Venice Commission generally suggests that States should adopt a positive approach to this right[78]. National practices regarding the right to vote of citizens living abroad and its exercise are far from uniform in Europe, however, developments in legislation point to a favourable trend in out-of-country voting. Thirty-seven (out of forty-seven) Council of Europe member States have implemented procedures allowing voting from abroad. This right is sometimes recognised for citizens temporarily resident abroad, while in other States expatriates lose the right to vote after a certain period of time (e.g. in the United Kingdom after fifteen and in Germany after twenty-five years). Several countries provide the right to vote abroad only with the consent of the authorities of the country in which the voter resides and in some countries citizens living outside the country are allowed to elect their own representatives to the national parliament in special constituencies set up outside the country (e.g. Croatia, France, Italy and Portugal). In Ireland, for example, the only people allowed to vote abroad are members of the diplomatic corps as well as the police and armed forces. There are also countries where no legal provisions have been enacted to organise voting in parliamentary elections

[76] *Py v. France*, Application no. 66289/01, Judgement of 11 January 2005 (final, 6 June 2006), paras. 3, 12, 23, 24, 61.

[77] Electoral Law, Council of Europe Publishing, Strasbourg, 2008, p. 129.

[78] Sánchez Navarro, Ángel J., Venice Commission›s Opinions and the Issue of Distance Voting: Are Common Standards Possible?, in: European Commission for Democracy Through Law (Venice Comission) in co-operation with the Federal Public Service of Belgium, 5th European Conference on Electoral Management Bodies – Distance Voting, 20-21 November 2008, CDL-EL(2009)017, Strasbourg, 15 September 2009, pp. 55-59. Available at: http//www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2009)017-bil.

for their nationals abroad. These countries include Albania, Andorra, Armenia, Azerbaijan, Cyprus, Malta, Montenegro and San Marino[79].

Voting from abroad is subject to a number of conditions, beginning with those related to registration on the electoral roll. Generally, a prior application is required from the citizen abroad. For example, in Slovenia a prior notification is sent to the National Electoral Commission, while in Denmark, the application must be submitted to the last municipality in which the voter lived. In the case of Estonia, Finland, France, Georgia, Iceland, Italy, Lithuania, Moldova, Norway, Romania, Sweden and Ukraine expatriate voters do not have to complete any formalities as a precondition for registration, as they are registered automatically on the basis of the existing list of voters[80].

One of the important decisions considering the voting abroad was in the case of *Doyle v. The United Kingdom*. As a British citizen who lived in Belgium since 1983, the applicant expressed the wish to exercise his voting right in the United Kingdom in the 2006 parliamentary elections, but his request was rejected. On the basis of the 2002 Representation of the People Act only nationals resident overseas for less than fifteen years could register to vote in United Kingdom general and European elections. Nevertheless, they could be reinstated on the electoral role if they returned to the United Kingdom to register themselves. The applicant complained about his inability to vote in United Kingdom elections stating that he should not be denied his right to vote in national elections of his country of nationality, unless and until he is registered to vote in the elections of his country of residence. The Court noted that over a period of fifteen years, a non-resident citizen is less directly or less continually concerned with his country's day-to-day problems and has less knowledge of them. Therefore, the legitimate concern is to limit the influence of citizens living abroad in elections on issues which primarily affect persons living in the country. Furthermore, the Court emphasised that a period of fifteen years does not appear to be either disproportionate or irreconcilable with the underlying purposes of Article 3 of the First Protocol, because over such a time period, the applicant may reasonably be regarded as having weakened the link between himself and his country of nationality and that he is not affected by the acts of political institutions to the same extent as resident citizens. Furthermore, the applicant had two possibilities of using his right to vote. It was open to the applicant to seek to obtain the vote in the country of residence, if necessary by applying for citizenship. On the other hand, if he returns to live in the United Kingdom, his eligibility to vote as a British citizen will revive. In the circumstances, the Court concluded

[79] *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment of 15 March 2012, paras. 33, 35-39.

[80] Ibid., paras. 40-41, 43.

that the application was manifestly ill founded, so it declared the application inadmissible[81].

In the recent case of *Sitaropoulos and Giakoumopoulos v. Greece* (2010, 2012), both applicants were officials of the Council of Europe, Greek nationals who worked and lived in Strasbourg. They expressed the wish to exercise their voting rights in France in the 2007 Greek elections, but their request was not granted. The Greek Constitution of 1975 generally provides that all Greeks have the universal suffrage and that voting arrangements for Greek nationals outside Greece have to be regulated by a special act adopted by a majority of two thirds of Parliament. However, in April 2009, the Bill entitled "Exercise of the right to vote in parliamentary elections by Greek voters living abroad" was rejected by the Greek Parliament since it failed to secure the majority of two thirds of the total number of members of Parliament required by the Constitution[82].

The applicants argued that they were registered on the electoral roll in Greece, held valid Greek passports, owned immovable property in Greece on which they paid income tax and were still authorised to practise as lawyers in Greece. They emphasised that being unable to vote in the Greek parliamentary elections from their State of residence constituted interference with their voting rights, in breach of both the Greek Constitution and the Convention. In the applicants' view, it was clear from the Council of Europe instruments (e.g. Parliamentary Assembly Resolution 1459 (2005) and Recommendation 1714 (2005) and the Venice Commission's Code of Good Practice in Electoral Matters) that member States were under an obligation to make the right to vote effective. They noted that many member States to the Council of Europe guaranteed in practice the right of expatriates to vote from abroad in parliamentary elections. However, in its judgment, the Chamber held that there had been a violation of Article 3 of the First Protocol. Although the applicants still had the option of travelling to Greece in order to vote, in practice this complicated significantly the exercise of that right, as it entailed expense and disruption to their professional and family lives. The Chamber also held that the failure to enact legislation giving practical effect to voting rights for expatriates was likely to constitute unfair treatment of Greek citizens living abroad – particularly those living at a considerable distance – in comparison with those living in Greece[83].

At the request of the Greek Government, the case was referred to the Grand Chamber. The request was based on the Government's argument that the article of the Constitution concerning voting abroad, far from imposing any obligation

[81] *Doyle v. The United Kingdom*, Application no. 30158/06, Decision of 6 February 2007, A. The Circumstances of the Case, Complaint, The Law.

[82] *Sitaropoulos and Giakoumopoulos v. Greece*, op. cit. (note 79), paras. 1, 3, 11, 14, 16.

[83] Ibid., paras. 23, 28-29, 39, 43-44, 47.

on the legislature, was optional in nature. The Government added that voting arrangements for Greek nationals outside Greece had to be adopted by a majority of two thirds of Parliament; this confirmed the need to secure very broad political consensus on the subject in Greece. Furthermore, the Greek Government had already attempted to pass a law on voting rights for Greek expatriates, a fact which demonstrated the political will to find a solution to the problem. The Government also reiterated the reasons for requiring an enhanced two-thirds majority for enactment of the implementing legislation, namely the need for political consensus in view of the considerable numbers of Greek citizens living abroad - 3,700,000 persons compared with a population of 11,000,000 living in Greece. Blanket recognition of the right of expatriates to vote from their place of residence could give rise to political instability in Greece. The Grand Chamber confirmed this argument as a legitimate aim of the Greek Government which fully justifies limitations on expatriate voting rights. It was further noted that neither the Greek Constitution nor relevant international documents form a basis for concluding that States are under an obligation to enable citizens living abroad to exercise their right to vote. In other words, such a move can be viewed as a possibility, not an obligation. As to the disruption to the applicants' financial, family and professional lives that would have been caused had they had to travel to Greece in order to exercise their right to vote in the parliamentary elections, the Court was not convinced that this would have been disproportionate to the point of impairing the very essence of the voting rights in question. For these reasons, the Court unanimously held that there has been no violation of Article 3 of the First Protocol[84].

Taking into consideration the abovementioned judgments, it can be concluded that the ECHR considers that States have a wide margin of appreciation in determining electoral rules on the right to vote for expatriates, depending on their historical, political and other circumstances.

6.3. The Diaspora Vote in the Croatian Parliamentary Elections

In the past decade, the Croatian diaspora has increasingly become a significant player in the Croatian political arena. Namely, the impact of the political situation in Croatia on citizens living abroad is minimal. Besides, a large number of expatriates may exercise their voting rights due to their double nationality. The electoral legislation in Croatia has been changed in 2010 to give District XI (for Croatian citizens living abroad) three fixed seats in the Croatian parliament[85]. On elections held before the 2010 changes, the number of the representatives

[84] Ibid., paras. 54, 56, 72, 75, 80-81.

[85] Article 4. Zakon o izmjenama i dopunama Zakona o izboru zastupnika u Hrvatski sabor, Official Gazette of the Republic of Croatia, No. 145/2010.

from District XI varied from four to six seats (depending on a number of voters), sometimes in favour of the right-wing political parties. If in the future the ECHR would have to solve a question like this, its decision would probably be based on the cases of *Doyle v. The United Kingdom* and *Sitaropoulos and Giakoumopoulos v. Greece*, giving the Croatian authorities a relatively wide margin of appreciation.

7. SOME SPECIFIC ISSUES OF THE ELECTORAL RIGHT

7.1. Prisoners' Right to Vote

The practice of the Council of Europe member States concerning restrictions imposed on prisoners' voting rights is not uniformed. In the countries where restrictions are provided for loss of voting rights is tailored to specific offences or categories of offences, i.e. depending on the length of the sentence or the gravity of the offence. In its 2005 Recommendation on the abolition of restrictions on the right to vote the Parliamentary Assembly of the Council of Europe calls upon the Committee of Ministers to appeal to member and observer States to reconsider existing restrictions on electoral rights of prisoners and members of the military, with a view to abolishing all those that are no longer necessary and proportionate in pursuit of a legitimate aim[86].

The ECHR accepted that a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners' voting rights could still be justified in modern times. However, the judgment from 2005 showed that the Court could not accept that an absolute bar on voting by any serving prisoner in any circumstances fell within an acceptable margin of appreciation. In the case of *Hirst v. The United Kingdom.* the applicant was serving a sentence of life imprisonment, but was released from prison on licence after 24 years. The applicant, barred by the 1983 Representation of the People Act from voting in parliamentary or local elections, relied on Article 3 of the First Protocol taken alone and in conjunction with Article 14 of the Convention, and on Article 10 of the Convention. The Court concluded that the United Kingdom's blanket ban was also disproportionate, arbitrary and that it impaired the essence of the right, but also potentially deprived a significant proportion of the population (over 48,000) of a voice or the possibility of challenging, electorally, the penal policy which affected them. The Court also confirmed

[86] Parliamentary Assembly, Recommendation 1714 (2005) – Abolition of restrictions on the right to vote, 24 June 2005 (24th Sitting), http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/EREC1714.htm.

that a general and automatic disenfranchisement of all serving prisoners was incompatible with Article 3 of the First Protocol[87].

In May 2012, in the case of *Scoppola v. Italy* the Grand Chamber of the ECHR issued another important judgment related to restrictions of prisoners' voting rights. The applicant was sentenced to thirty years' imprisonment and a lifetime ban from public office, which in turn led to the permanent forfeiture of his right to vote. In the Italian legal system a ban from public office is an ancillary penalty which entails forfeiture of the right to vote (Presidential Decree no. 223/1967) and for which express provision is made by law in connection with a series of specific offences, irrespective of the duration of the sentence imposed - the consequence of this is that persons sentenced to less than three years in prison continue to enjoy the right to vote. Those sentenced to three to five years forfeit their right to vote for five years, and lastly, persons sentenced to five years or more are deprived of their right to vote for life. The Chamber found that the disenfranchisement of the applicant was of the general, automatic and indiscriminate nature and that there had accordingly been a violation of Article 3 of Protocol No. 1. The Italian government made a request for the case to be referred to the Grand Chamber, in accordance with the breach of the Article 3 the First Protocol, for Italy's legislation have adopted that the disenfranchisement of prisoners depends on the type of offence and/or the length of the custodial sentence. Furthermore, under Italian law it is possible for a convicted person who has been permanently deprived of the right to vote to recover that right. Three years after having finished serving his sentence, he can apply for rehabilitation, which is conditional on a consistent and genuine display of good conduct and extinguishes any outstanding ancillary penalty date on which the principal penalty had been completed. This means that he can apply for rehabilitation and, where applicable, recover the right to vote at an earlier date. Consequently, the impugned measure pursue a legitimate aim, namely enhancing civic responsibility and respect for the rule of law and encouraging citizen-like conduct. However, the Grand Chamber accepted the argument made by the Government that each State has a wide discretion as to how it regulates the ban, both as regards the types of offence that should result in the loss of the vote and as to whether disenfranchisement should be ordered by a judge in an individual case or should result from general application of a law. The Court found that in the circumstances of the case, the restrictions imposed on the applicant's right to vote maintained the integrity and effectiveness of an electoral procedure and that there has been no violation of Article 3 of the First Protocol[88].

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[87] *Hirst v. The United Kingdom*, Application no. 74025/01, Judgment of 6 October 2005, paras. 1, 3, 12, 14, 20, 45, 68.

[88] *Scoppola v. Italy*, Application no. 126/05, Judgment of 22 May 2012, paras. 1-2, 5-6, 14, 21, 76, 87, 92, 97, 109-110.

7.2. Right to Free Elections and the Prohibition of Discrimination

Pursuant to Article 14 of the Convention, everyone enjoys rights and freedoms without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This is an example of the accessory prohibition of discrimination where discrimination is prohibited only in relation to the other rights enshrined in the Convention. The scope of discrimination as defined in Article 14 is extended by the adoption of Protocol No. 12 which regulates the general prohibition of discrimination, i.e. the prohibition is extended to all rights defined in the law. Restrictions of Article 3 of the First Protocol may in certain circumstances represent the violation of these two norms[89].

One of the most significant judgments regarding the right to free elections in relation to the prohibition of discrimination is one in the case of *Sejdić and Finci v. Bosnia and Herzegovina*. The applicants complained of their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina because the Constitution of Bosnia and Herzegovina makes a distinction between "constituent peoples" (persons who declare affiliation with Bosniacs, Croats and Serbs) and "others". Only persons declaring affiliation with a "constituent people" are entitled to run for the House of Peoples and the Presidency. The Presidency shall comprise one Bosniac and one Croat from the Federation and one Serb from the Republika Srpska and the House of Peoples shall comprise five Croats and five Bosniacs from the Federation and five Serbs from the Republika Srpska. Therefore, the applicants complained of their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina on the ground of their Roma and Jewish origin respectively. The Court concluded that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of the First Protocol. As regards the Presidency, the Court found that the impugned precondition for eligibility for election constitute a violation of Article 1 of Protocol No. 12. Furthermore, it was assessed that, despite of the historical background and the circumstances in which the Bosnia and Herzegovina Constitution was imposed (as a part of the peace settlement), the respondent State had enough time to adjust its legal system to the relevant provisions of the Convention. Lastly, by becoming a member of the Council of Europe in 2002 and by ratifying the Convention and the Protocols thereto

[89] Thornberry, Patrick; Martín Estébanez, María Amor, Minority Rights in Europe, Council of Europe Publishing, Strasbourg Cedex, 2004, pp. 47-51; Mazur Kumrić, Nives, General Prohibition of Discrimination in International Law – Sejdić and Finci v. Bosnia and Herzegovina, Annals Constantin Brancusi – Juridical Sciences Serie, No. 3/2012, pp. 22-23.

(but also by adopting the Constitution of Bosnia and Herzegovina in 1995), the respondent State has voluntarily agreed to meet the relevant standards of the Convention[90].

The Constitution of Bosnia and Herzegovina is an annex to the General Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Peace Agreement") [91], initialled at Dayton on 21 November 1995. Its main purpose was to end the conflicts between the three ethnical groups (Bosniacs, Croats and Serbs), making peace in Bosnia and Herzegovina possible. The Preamble to the Constitution confirmed that only Bosniacs, Serbs and Croats are "constituent peoples", while the other ethnic groups, which did not take sides in the conflict, were simply set aside. The Bosnian ethnocentric legal system and the concept of "constituent peoples" have permitted legalised discrimination on the basis of ethnic background[92].

According to the European Commission 2011 Progress Report on Bosnia and Herzegovina, the complicated decision-making process in Bosnia and Herzegovina has contributed to delay structural reforms, reduce the country's capacity to make the system compatible with European standards and make the constitutional reform possible only with the consensus of all three ethnic groups[93]. This has also confirmed long-standing practices of exclusion of ethnic minorities from effective participation in political life[94].

8. CONCLUSION

The right to free elections as a political right of all citizens entails continuous engagement of the State into organization and monitoring of elections, management of voting lists and catering for impartial settlement of electoral disputes. Still, this right is not absolute and is subject to many restrictions. These restrictions are permitted only if they refer to a legitimate aim and are not inclined towards deprivation of the essence of the voting right but to generation of a stable political and social framework for efficient exercise of this right.

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[90] *Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, Judgment of 22 December 2009, paras. 1-2, 6-7, 9, 41, 46-47, 49-50, 56.

[91] Ustav Bosne i Hercegovine, Izdanja Parlamentarne skupštine BiH, Publikacija br. 66, Sarajevo, 2010, pp. 5-29.

[92] More on Bosnian ethnocentric legislation in: Sarajlić, Eldar, Bosnian Elections and Recurring Ethnonationalisms: The Ghost of the Nation State, Journal of Ethnopolitics and Minority Issues in Europe, No. 2/2010, pp. 66-88; Mazur Kumrić, Nives, op. cit. (note 89), pp. 13-15, 20-50.

[93] European Commission, Bosnia and Herzegovina 2011 Progress Report, SEC(2011) 1206 final, Brussels, 12 October 2011, p. 7. Available at: http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ba_rapport_2011_en.pdf.

[94] Goodwin-Gill, Guy, Elections, Democracy, the Rule of Law and International Law, Australian International Law Journal, No. 1/2006, p. 14.

It is the different scope of interpretation of the justifiability of restrictions of the right to free elections that facilitates the parallel development of two levels of the protection of this right in the Council of Europe member States. The first one refers to the ECHR that still acknowledges the broad freedom of States to opt for their electoral systems. This assertion is probably supported by the fact that Article 3 of the First Protocol does not explicitly grant the general and equal voting right in any line but only caters for organization of secret voting in conditions appropriate for free expression of the people's will. The other one, though being an unbinding level of the protection, encompasses activities of the Venice Commission and Parliamentary Assembly of the Council of Europe. These two bodies are much louder when it comes to the criticism of national rules which, under the disguise of political and historical tradition, violate the electoral right of independent candidates and political parties. Despite their counselling function, these bodies can exercise major influence on the practice of the EHCR by virtue of their authority.

The evolution of the protection of the right to free elections is an unstoppable process that makes a valuable contribution to the protection of human rights in general. In approximately sixty years of its existence, a short, restrictively defined provision of Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms stipulating the right to free elections has managed to encourage the creation of abundant jurisprudence and has set high standards of electoral law in forty-seven member States of the Council of Europe.

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CAPITAL GAINS TAX IN PAKISTAN: ILLICIT FINANCIAL FLOWS THROUGH PRESIDENTIAL ORDER?

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Abstract

In April 2012 the Security and Exchange Commission of Pakistan (SECP), the stock market regulator, has sought suspension of section 111 of the Income Tax Ordinance until 2014. This legal section allowed the tax authorities to tax person's income, assets and investments whose nature and source are unexplained. For the first time, this kind of controversial decision was made by presidential order after convening the National Assembly. Therefore the Federal Board of Revenue (FBR) vetted the required ordinance from the law ministry to make way for the implementation. SECP supported the order, which was for political reasons excluded from the annual budget. The source of investment in shares would not be asked until the end of the fiscal year 2013-14 where the amount would remain invested for a minimum of 120 days. The exemption from section 111 allows stock brokers to invest black money in the capital market, giving them the opportunity to whiten millions of USD in undeclared earnings. For tax authorities, the scheme might generate some revenues, but does not allow them to identify investors. The order does not contribute to the aim of documenting the economy with a huge informal sector.

Keywords: *Money laundering, capital gains tax, Islamic Banking, illicit financial flows, amnesty schemes*

[1] Opinions and points of view expressed in this article are those of the authors and do not necessarily reflect any official position or policy.

1. LEGAL BACKGROUND

The capital market in Pakistan remained exempt from CGT for the past 36 years, which created an anomaly in shape of un-documented gains accrued through transactions in the capital market during the period.[2] In April 2012 the Security and Exchange Commission of Pakistan (SECP), the stock market regulator, has sought suspension of section 111 of the Income Tax Ordinance until 2014.[3] This section allowed the tax authorities to tax person's income, assets and investments whose nature and source are unexplained.[4]

For the first time, this kind of controversial decision was made by presidential order after convening the National Assembly. Therefore the Federal Board of Revenue (FBR) vetted the required ordinance from the law ministry to make way for the implementation. SECP supported the order, which was for political reasons excluded from the annual budget. The source of investment in shares would not be asked until the end of the fiscal year 2013-14 where the amount would remain invested for a minimum of 120 days.[5]

The National Clearing Company of Pakistan Limited (NCCPL) shall act as a withholding agent to compute, determine, deduct and deposit the CGT to provide ease of calculation and documentation to individual investors. SECP and FBR, along with other capital market service providers, are made responsible to work out the exact details of these necessary changes. NCCPL shall develop an automated system in this regard and furnish a detail statement of capital gains and taxes to the FBR on quarterly basis. Pakistan Revenue Automation Limited (PRAL) shall conduct regular system and procedural audits of NCCPL on quarterly basis. NCCPL shall issue annual certificates of the capital subject to taxes to the taxpayers, which have to be filed with the return of income as evidence. [6] The filing can be done electronically on FBR website, is supported by PRAL and delivers an acknowledgement slip for each quarter.[7]

CGT on disposal of securities is subjected to tax under section 37A with section 100B. Section 37A subsection (3) defines securities as 'share of a public company, voucher of Pakistan Telecommunication Corporation, Modaraba Certificate, an instrument of redeemable capital and derivative products'. Since the Koran forbids taking interest, Islamic mercantile banks charge fees for their services instead of interest; for savings accounts no credit interest is paid. Bank

[2] See Sarfraz,

[3] See Khan, Govt to allow investment, 2012.

[4] See Income Tax Ordinance (2001), chapter VIII Anti-Avoidance, part IV Prevention of fiscal evasion, section 111 Unexplained income or assets, version amended up to 30th June 2011.

[5] See Sarfraz, Public Companies, 26th April 2012.

[6] See Daily Times, 2012.

[7] See PRAL, CGT guide, 2012.

customers can participate in the investments of the bank and in case of success they will be paid their negotiated share of the profit (Modaraba); but in case of failure they must also accept the financial loss. Besides banks, also independent Modaraba companies offer investors to buy a stake in an open investment fund or insurance fund with agreed profit sharing. For his fund participation he receives a 'Modaraba certificate' which is freely tradable at the stock exchange. Modaraba play an important role in the economy and Modaraba companies hold substantial sums of money from Pakistanis and foreign investors. The income of the 'Modaraba societies' is free of income tax under the condition that they pay at least 90% of their annual profit to the certificate owners.[8] Thus these profits may go to not tax-paying persons of the country directly or hidden by tax shelter companies, registered in tax havens.

2. ECONOMIC IMPACTS

The exemption from section 111 allows stock brokers to invest black money in the capital market, giving them the opportunity to whiten millions of USD in undeclared earnings. This type of amnesty scheme has been promised since months by the Finance Minister and the Deputy Chairman of the Planning Commission. In 2011 the government planned to exempt investments which are held for more than 12 months and apply capital gains tax (CGT) of 10% for investments held under 6 months and 7.5% for those held less than 12 months; this scheme was not implemented. The new scheme worked out between SECP and FBR adjusts the rate for shares hold between 6-12 months to 8% and introduces a 0.01% capital value tax (CVT) on trading of shares as financial transaction tax.[9]

The idea behind this scheme was to boost the stock markets (as it was announced by the Finance Minister during a visit at Karachi Stock Exchange (KSE)).[10] In 2008 stocks have plunged on concern the political instability will blunt government efforts to tackle a rising insurgency by Islamic extremists, grapple with inflation at its highest in 30 years and revive the faltering economy. From April till September 2008 KSE even set a floor for stock prices to halt a plunge that wiped out 37 billion USD.[11] Trading resumed after the floor for stock prices in December 2008.[12] Since then activities at KSE 100 gradually decreased from a market capitalisation of about 120 billion USD in December

[8] See SECP, Prudential Regulations for Modarabas, 2004.
[9] See Law and Justice Division, Ordinance No. 2(1)/2012-Pub, 24th April 2012, 2.
[10] See Express Tribune, Finance minister approves SECP proposal, 2012.
[11] See Sharif, Pakistan Stock Index Is Little Changed, 2008.
[12] See Qayum; Sharif, Pakistan's Stocks Mostly Untraded, 2008.

2009 to 35 billion USD in July 2011.[13] Pending collection issues of CGT played a catalyst role in the bearish sentiment at KSE in July 2012, which ended the short term increase of activities in the artificially inflated market.[14]

The current FBR management does not rule out tax amnesty schemes, which officially aim at bringing informal sectors into formal sectors of the economy and argues that amnesty schemes have also been announced in other European countries.[15] In Europe e.g. Switzerland 2012 signed a tax agreement with UK, Germany and Austria to collect a final withholding tax of 19-42% of all assets of inhabitants of these three countries in Swiss bank accounts, which exempts account holders from punishment in their respective home jurisdictions.[16] Compared to that, the Pakistani scheme might generate only some revenues for the tax authority, but does not allow them to identify the investors. The order does not contribute to the aim of documenting the economy with a huge informal sector. During 2011 FBR collected aggregated 418 million PKR from the CGT.

3. INTERNATIONAL AML MEASURES

OECD's Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.

(3) The recommendation three on money laundering and confiscation, money laundering offence states that 'countries should criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences'.[17] With the new order money laundering is decriminalised even in its very narrow range of stock investments, since sources of income don't even need to be examined any longer.

(9) FATF recommendation number nine asks countries to ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations. This recommendation is contradicted by the new order,

[13] See KSE, http://www.kse.com.pk/.
[14] See Bloomberg, KSE100 Index, Volume, http://www.bloomberg.com/quote/KSE100:IND/chart.
[15] See Chaudhry, FBR chairman warns against multiple audits.
[16] See KPMG, The new tax agreements of Switzerland, 2012.
[17] OECD, FATF, AML recommendations, 2012, 14.

since amounts invested in the stock exchange are exempted from other measures against money laundering in the recommendations.

(10) Recommendation ten is reversed, since financial institutions should be obliged to due diligence of their customers, which includes an assessment of the sources of the invested funds above 15,000 EUR. Sub-section (d) clearly states that 'Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.'

(13) Recommendation thirteen requires for financial institutions customer due diligence measures like gather sufficient information about a customer to understand fully the nature of the respondent's business and to determine the reputation of the institution and the quality of supervision, including whether it has been subject to a money laundering or terrorist financing investigation or regulatory action. Financial institutions should be prohibited from entering into, or continuing, a correspondent banking relationship with shell banks. Financial institutions should be required to satisfy themselves that respondent institutions do not permit their accounts to be used by shell banks.[18] This recommendation is ignored with the new order, since the source of income was made irrelevant (and potentially could come from shell banks).

Other recommendations prohibit financial institutions to make business with persons using other money transmission channels or oblige financial institutions to take special measures on certain customer groups like 'politically exposed persons'. These measures cannot be fulfilled under the new order, since the sources of fund are allowed to stay shadowy.

4. CONCLUSION

The suspension of section 111 of the Income Tax Ordinance until 2014, which allowed the tax authorities to tax person's income, assets and investments whose nature and source are unexplained, formally legalises money laundering of undeclared assets. The official stand that the scheme might generate some additional revenues, might become true, but does not allow the tax authorities to identify the investors or their sources of funds. Therefore, the order does not contribute to the aim of documenting the economy with a huge informal sector.

The same holds for other types of tax amnesty schemes, which encourage the population to evade taxes due to a variety of current and planned whitening

[18] OECD, FATF, AML recommendations, 2012, 18.

schemes. In fact, Pakistan has a permanent money laundering and tax amnesty scheme in the form of section 111(4) of the Income Tax Ordinance, 2001 that ensures that no question will be asked for any amount of money remitted from abroad through normal banking channels or encashment in Pakistani currency.[19] This section is basically in place to encourage remittances, but finally enables tax evaders not to bother about being sanctioned by tax authorities. It guarantees tax exemption for money brought into Pakistan and therefore enables whitening undeclared money for only 1.5-2% fee to any money exchange dealer to get these remittances fixed in their names.

Currently, in view of the next election, another scheme called Tax Investment Scheme is planned, where citizens will be asked to declare their assets by paying tax in the range of 1-1.5%. Former amnesty schemes asked taxpayers to pay at least 10% of the undeclared assets for converting black money into white. Both existing and new taxpayers will be able to accept this one-off offer, which will expire in three months already and holds for foreign and local assets as well. This scheme can be interpreted as one time opportunity for the better off to whiten black money in circulation.[20] This scheme could be installed by the government to whiten the illicit money earned during its tenure before handing over power to caretakers during the election period. The income tax returns of the politicians are now subject to closer scrutiny by the Election Commission as also by the media. Some of the politicians having large assets had not fully declared those assets in tax returns in the past. This amnesty would provide an opportunity to the politicians, who desire to take part in next elections and therefore have to regularise the position of their assets by paying nominal tax – at a much lesser rate than the tax rate paid by honest taxpayers.[21]

Billions of USD are sent abroad from Pakistan, which includes dirty money that is hidden in tax havens and later on is legitimised using schemes provided by the state. Out of total remittances of about 13 billion USD received through normal banking channels during fiscal year 2011-12, about 40% was on account of this 'round-tripping. This money includes several sources like aid money, drug money, foreign money, money in exchange for fighting war against terrorism and black money, which can be whitened by mere remittance through normal banking channels or investing in stock exchanges.[22] In conclusion, the tax morale in the country is negatively affected by these kinds of schemes, since they put integrity at a discount and place a premium on vulgar and ostentatious display

[19] See Baig, Amnesty schemes disincentive honest taxpayers, 2012.
[20] See Bukhari and Ul Haq, Tax amnesty schemes, 2012, 2.
[21] See Mirza, Tax amnesty schemes, 2012.
[22] See Bukhari and Ul Haq, 2012.

of wealth. The new schemes are bound to meet the same fate as the earlier ones, since tax amnesty schemes are no answer to Pakistan's maladies like tax evasion.

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UNDOCUMENTED MIGRANT WORKERS' RIGHT TO REMUNERATION: CONSEQUENCES OF INCOMPLETE TRANSPOSITION OF THE EMPLOYER SANCTIONS DIRECTIVE INTO THE CROATIAN LAW

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Abstract

Undocumented migrant workers are legally invisible in the country of employment and therefore particularly vulnerable to human rights abuses, among which the most prominent is the deprivation of labour rights. Legality of residence status of migrant workers commonly takes precedence over internationally recognized legal obligations of the state to respect migrants' fundamental human rights, including labour rights, irrespective of the residence status. This tendency commenced to shift at the EU level following the adoption of the Employer Sanctions Directive in 2009, which explicitly recognized undocumented migrant workers' right to remuneration with the aim to prevent labour exploitation under the prefix of illegality of residence status. This paper analyses legal framework applicable to labour rights of undocumented migrant workers in the Republic of Croatia, with particular emphasis on the consequences of incomplete transposition of the Employer Sanctions Directive into the Croatian law. Currently, the undocumented migrant workers in Croatia do not enjoy de iure full protection of fundamental human rights, particularly the basic labour right - right to remuneration - which significantly increases their vulnerability to the labour exploitation and other human rights abuses by employers.

Key words: *labour rights, undocumented migrant workers, labour exploitation, Employer Sanctions Directive*

„International human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants, as they are often in a vulnerable situation, have a particular need for the protection of their human rights, including basic civil, political, economic and social rights."[1]

1. INTRODUCTION

One of the prerogatives of state sovereignty is the right to prevent the facilitation of unauthorized entry, transit and residence of foreign citizens. This is an incontestable internationally recognized right, enforced through the enactment of criminal responsibility for violation of national laws on entry, movement and residence. Nonetheless, migrants who enter and reside illegally (or whose migration status is undocumented for whatever reason, i.e. overstay visa, loose right to residence because of divorce from principal holder of the status, are born into irregularity, etc.) within the territory of a foreign state do not cease to enjoy fundamental human rights by the fact of criminal liability for violation of residence laws. They remain subjects of internationally recognized human rights as universal, indivisible, non-discriminatory, inalienable, interdependent and interrelated. In the context of undocumented migrations, universal and non-discriminatory applicability of rights is given particular importance regardless of the state borders and legality of movement and residence. Thus, human rights are unequivocally *residence-status-blind.* This approach was confirmed in the landmark decisions of two regional human rights Courts – the Inter-American Court and the European Court of Human Rights. The former established that "*the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment,"* while the latter in *Siliadin* case decision deliberately omitted to address the issue of irregularity of residence status of the applicant, tacitly establishing its irrelevance to the human rights abuses (in this case labour exploitation).[2] Regional human rights Courts hence enacted the provisions of international human rights framework to the

[1] Council of Europe, Resolution 1509 (2006), Human rights of irregular migrants. Available at: http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1509.htm (accessed 9 January 2012).

[2] Inter-American Court, *Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC- 18/03, 17 September 2003, Inter-Am. Ct.H.R. Available at: http://www.corteidh.or.cr/juris_ing/index.html., in: Noll, G. (2010) Why Human Rights Fail to Protect Undocumented Migrants, *European Journal of Migration and Law* 12, p. 261. and *Case Siliadin v. France*, Judgment 26/10/2005. Available at: http://ec.europa.eu/anti-trafficking/download.action;jsessionid=nSpNQPKMRJJC5L37h2pRVkxC8Xwh822hpWrtTydQTCvqgWPBcTVV!-1841744785?nodeId=0236dd77-487c-4cdc-9041-b9f8d21d9827&fileName=Siliadin_v_France_en.pdf&fileType=pdf (accessed 17 December 2012), see more in: Vinkovic, M., Spadina, H., *Labour Rights of Migrant Domestic Workers: Employers' Goodwill or Duty of the State of Employment?*, upcoming.

labour rights of a *sui generis* category of *legally invisible* workers.[3] This invisibility may and often does lead to deprivation of fair working conditions, access to public services, education, access to social housing, etc. additionally exacerbating their vulnerability to unreported and unsanctioned violence thus advancing the *invisibility* of their basic human rights.[4]

2. INTERNATIONAL LEGAL FRAMEWORK APPLICABLE TO THE RIGHTS OF UNDOCUMENTED MIGRANTS

International framework relating to the rights of undocumented migrant workers has mainly been developed by the International Labour Organization (further: ILO) and by the Council of Europe (further: CoE). All eight core ILO Conventions on fundamental human rights are applicable to the rights of all workers, irrespectively of their residence status. The *ILO Migrant Workers (Supplementary Provisions) Convention No. 143* stipulates that *"migrant workers who are irregularly employed and whose situation cannot be regularised should enjoy equality of treatment with migrant workers regularly admitted and lawfully employed with respect to rights arising out of past employment as regards remuneration, social security and other benefits."*[5] The *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families,* which entered into force on 1 July 2003, laid down fundamental labour and other human rights of undocumented migrants stipulating that *"States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights related to remuneration, other conditions of work and other conditions of employment by reason of any irregularity of their stay or employment. In particular, employers shall not be relived of any legal or contractual obligations, nor shall their obligations be limited in*

[3] All universal human rights are applicable to all persons, irrespective of their migration status, so undocumented migrant workers can derive their rights from *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966), the *International Covenant on Economic, Social and Cultural Rights* (1966), the *Convention on the Rights of the Child* (1989), *the International Convention on the Elimination of All Forms of Racial Discrimination* (1965), *ILO Convention No. 143 on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (1975), *ILO Discrimination (Employment and Occupation) Convention* of 1958 and *Recommendation No. 111*, the *European Convention on Human Rights* (1950) (ETS No. 5), the *European Social Charter* (1961) (ETS No. 35), the revised *European Social Charter* (1996) (ETS No. 163) and the *Council of Europe Convention on Action against Trafficking in Human Beings* (2005) (CETS No. 197), all listed in Art. 9 of the *Council of Europe Resolution 1509*.

[4] Cf. *Report of the UN Special Rapporteur on contemporary forms of slavery, including its causes and consequences* (op. cit. 1) and ILO *Report on Decent Work for Domestic Workers*, International Labour Conference 99, 2009, ILO, Geneva.

[5] Available at: http://www.unesco.org/most/migration/full_conv_ilo143.htm (accessed on 17 December 2012).

any manner by reason of such irregularity".[6] *The Durban Declaration* and the United Nations *Universal Periodical Review* mechanism emphasised special vulnerability of migrant workers and the importance of non-discriminatory recognition of any human rights to migrants, i.e. without distinction based on the immigration status and without excluding undocumented migrants from the protection of human rights law.[7]

On the regional level, the *European Convention of Human Rights* is applicable to all persons present on the territory of member states to the Convention, including undocumented migrants, whilst Article 1 of the *Protocol No. 1* to the *ECHR Convention* protects future income of an individual if it has already been earned or in the event of an enforceable claim thereto.[8]

The CoE tackled the lack of legal instrument which would be applicable to the rights of irregular migrants through adoption of the *Resolution 1509 on human rights of irregular migrants.*[9] This instrument provided an explicit entitlement to "*fair wages, reasonable working conditions, compensation for accidents, access to a court to defend their rights and also freedom to form and to join a trade union"*. The Council of Europe also envisaged that *"any employer failing to comply with these terms should be rigorously pursued by the relevant authorities of the member state"* (Art. 13.5). [10]

The Charter on Fundamental Rights of the European Union also contains provisions applicable to undocumented migrants (Art. 3, 4, 19, 24 and 47), but it is silent on the right to remuneration.[11]

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[6] Art. 25 of ICRMW. Available at: http://www2.ohchr.org/english/law/cmw.htm (accessed on 17 December 2012).

[7] Art. 50 of the *Durban Declaration*. *Universal Periodic Review*, UN mechanism established by the UN Council for Human Rights to review the compliance of human rights standards in each of 192 UN Member States. See more at: http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx. (accessed on 12. January 2013).

[8] Art. 3, 5, 6, 8 and 13 of ECHR Convention are of particular importance to the other rights of undocumented migrants. Full text of Convention available at: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf (accessed on 12. January 2013).

[9] *Council of Europe, Resolution 1509 (2006), Human rights of irregular migrants*, Art. 5 and art. 15, available at: http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1509.htm (accessed on 12 July 2012).

[10] Another relevant CoE instrument for rights of undocumented migrant workers is the *Recommendation 1618 (2003) on Migrants in irregular employment in the agricultural sector of southern European countries*, available at: http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta03/erec1618.htm (accessed on 12 July 2012).

[11] *Charter on Fundamental Rights of the European Union*, OJ C 364/I, adopted on 18 December 2000, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed on12 January 2012).

The European Social Charter of EU is not applicable to the rights of third country nationals, but nevertheless the European Committee on Social Matters in case *FIDH vs. France* has interpreted that any "*legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter"* although not all the Charter rights may be extended to the migrants having irregular residence status.[12]

3. THE EUROPEAN UNION APPROACH TO UNDOCUMENTED MIGRANT WORKERS' RIGHT TO REMUNERATION

Undocumented migrants cannot be employed legally within the territory of European Union Member States because legality of their employment depends on the regularity of their residence status, i.e. a foreigner is legally allowed to work only upon the issuance of work or residence permit or single permit (combining both permits). This excludes them from being protected by national labour legislation of the country of employment, due to the fact that national immigration law has primacy over labour law. Despite the prohibition of legal employment and lack of labour law protection, undocumented migrants should not be deprived of the right to fair and just salary as they are guaranteed this right by international human rights law, superior to immigration laws and labour laws. In reality, researches have demonstrated frequent deprivation of the right to salary and various forms of labour exploitation of undocumented migrant workers,[13] which the European Commission confirmed in its *Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals* where it pointed out that illegal employment *"can also lead to serious exploitation or even slavery-like conditions, which cannot be tolerated in the European Union."*[14]

During the transfer of immigration competencies to the area of shared competencies of the EU from 1999 until 2007, security approach of the EU to irregular labour migrations was characterized by stringent criminalization

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[12] *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 13/2003, European Committee on Social Rights, available at: http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=400976, (accessed: 12. January 2013), and in: *Fundamental rights of migrants in an irregular situation in the European Union*, Fundamental Rights Agency, p. 24.

[13] Carrera, S., Merlino, M., *Undocumented Immigrants and Rights in the EU Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme*?, Centre for European Policy Studies, December 2009, p. 31.

[14] *Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals*, COM (2006), 402 final, Brussels, 19.7.2006, available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2006&nu_doc=402 (accessed on 12 January 2013).

of irregularity and migration control, with policy priorities in the areas of cooperation with third countries, integrated management of external borders, promotion of regularizations, fight against human trafficking as well as fight against illegal employment. This approach did acknowledge the need to *"reduce intolerable forms of exploitation",* but however it emphasized that illegal employment leads to unfair competition on the labour market between legally and illegally employed workers, decreased tax revenues and undermines legal migration channels.[15] *Rights –based approach* was largely absent from the EU policy documents (with the exception of unaccompanied minors and victims of trafficking), while undocumented migrants were not recognized as one of the most vulnerable categories of migrants and were treated as if they were not fundamental rights holders.[16]

This commenced to change in 2007 when the European Commission put forward the *Proposal for a Directive providing sanctions against employers of illegally staying third-country nationals*,[17] an instrument aiming to harmonize a nexus between employment, immigration and criminal law[18] suggesting that *"employers would be required to pay any outstanding remuneration to illegally employed third-country nationals and any outstanding taxes and social security, Member States to put in place mechanisms to ensure that third-country nationals, even if they have left the Member State , receive any back payment of wages without a need to submit a claim".* The Commission's initial proposal was to presume at least a six-month employment for the purposes of the calculation of remuneration, unless the employer can prove differently. In further negotiations this was shortened to at least three months of presumed employment. In addition, the initial proposal also included the provision that migrant workers who have committed a criminal offence are not to be repatriated until they receive all the back pay due. During negotiation procedure, Member States did not agree to link repatriation with the payment of due remuneration and therefore this provision was not included in the adopted text of the Directive.

Following the Proposal and under its own initiative, the European Economic and Social Committee (EESC) issued the *Opinion on the Proposal for a Directive*

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[15] Ibid. par. 36-41.

[16] Cf. Carrera, S., Parkin, J., *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union*, Study of Centre for European Policy Studies, 14 November 2011, pp. 2-5, available at: http://www.ceps.eu/book/protecting-and-delivering-fundamental-rights-irregular-migrants-local-and-regional-levels-europ (accessed: 12 January 2013); Carrera, S., Merlino, M., *Undocumented Immigrants and Rights in the EU Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?*, op. cit. (12), p. 25.

[17] COM (2007) 249 final, Brussels, 16.5.2007

[18] Carrera, S., Guild, E., *An EU Framework no Sanctions against Employers of Irregular Immigrants, Some Reflections on the Scope, Features & Added Value*, CEPS Policy Brief, 2007, p. 2.

presenting the position that the Directive is "*an instrument that promotes respect for human rights.*"[19] The Committee also cautioned against the use of term *"illegal immigrant"* as it implies *"very negative connotations which could give rise to increased discrimination and xenophobia towards all migrant workers."*[20] The Committee proposed a stipulation in order to oblige the employer to *"pay from the day that the claim for payment is submitted, and not from the date the claim takes legal effect"*, and an amendment to the Directive by the provision that "*the rights of workers under the employment contract should continue to apply, irrespective of whether or not they have a residence or work permit"*. Both proposals were dismissed by Member States, which only accepted the Committee's proposal that *"employers must calculate any outstanding remuneration in accordance with the laws, regulations, administrative decisions and/or collective agreements that normally apply to such employment"* which was subsequently incorporated into the final text of the Directive.

Shortly after the submission of the Opinion of the EESC, the Committee of the Regions in their Opinion on *"A global approach to migration: Developing a European Policy on labour immigration in conjunction with relations with third countries"* urged that the "*necessary measures be taken to guarantee that returned migrants receive any outstanding pay*" and called on Member States' authorities to improve legal protection of the abused workers, *inter alia* by considering to grant them a long-term residency status in the country.[21]

On 18 June 2009 the *Directive 2009/52/EC of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals* (commonly referred to as: *the Employer Sanctions Directive*) was adopted.[22] All Member States were obliged to bring into force all laws, regulations and administrative provisions necessary to comply with the provisions of the Directive by 20 July 2011.[23] On 22 February 2012 the Commission issued a decision to initiate the infringement procedure (i.e. a formal request to Member States to comply with the EU law) against Belgium, Luxembourg and Sweden which failed to transpose the provisions of the Directive into their national laws, while legal procedures against Austria,

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[19] *Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals* (Own-initiative opinion), (2008/C 204/16), Official Journal of the European Union C 204/70, 9.8.2008., par. 14.4 and par. 5.1

[20] Ibid. par. 5.7

[21] Opinion of the Committee of the Regions on "*A global approach to migration: Developing a European policy on labor immigration in conjunction with relations with third countries"*, Official Journal of the European Union C 257/20, 9.10.2008. pp. 49-50.

[22] Official Journal L 168, 30/06/2009.

[23] Art. 17, par. 1 of the *Employer Sanctions Directive*.

Germany, France and Malta, for delaying the implementation of the Directive, were discharged.[24] Besides Member States, Republic of Croatia took the opportunity to harmonize *Aliens Act* with the provisions of the *Employer Sanctions Directive* in 2011. In the following part, we will provide a detailed analysis of incomplete transposition and its impact on the protection of fundamental rights of undocumented migrant workers in Croatia.

4. TRANSPOSITION OF THE EMPLOYER SANCTIONS DIRECTIVE INTO THE CROATIAN ALIENS ACT

All status and employment-related matters concerning aliens in the Republic of Croatia are regulated by the provisions of the *Aliens Act.*[25] The preamble of the Act made reference to the *Employer Sanctions Directive* as one of the *acquis communautaire* instruments the *Aliens Act* complies with. Our opinion is that the *Aliens Act* incompletely transposed the provisions of the *Employer Sanctions Directive*, omitting to include the most important safeguard a state can provide to undocumented migrant workers – statutory obligation of the employer to pay the salaries due - thus creating a legal vacuum in which undocumented migrant workers are legally unprotected.

Employment or any other use of undocumented migrants' labour is explicitly prohibited by the provisions of the *Aliens Act,* more specifically by Art. 73, par. 7 which stipulates the employer's duty to verify the regularity of residence status by requesting a valid single permit i.e. combined residence and work permit, certificate on registration for employment or the approval of residence which the employer has to retain throughout the duration of the employment (Art. 73, par. 8) and make available for inspections by immigration authorities or labour inspectorate.[26] Employers, state authorities, legal and natural persons have

[24] European Commission Press Release, *Sanctioning employers of irregular migrants: Commission urges three Member States to act,* Brussels, 27 February 2012, available at: http://www.europa.eu/rapid/pressreleaseaction.do?reference=IP/12/166&format=html&aged=0&language=en&guilange=en (accessed on 1.6.2012).

[25] *Aliens Act (Zakon o strancima)* was amended several times during the past years in the process of harmonization with the *acquis communautaire*. From the initial *Aliens Act* adopted on 13 July 2007 (published in the Official Gazette No. 79/07) which entered into the force on 1 January 2008, through the *Act on Amendments to the Aliens Act* of 13 March 2009 (Official Gazette No. 36/09), to the current new *Aliens Act* adopted on 28 October 2011 (published in the Official Gazette No. 130/11), which entered into force on 1 January 2012. Available at: http://www.mup.hr/main.aspx?id=47#dozvola (accessed 2.1.2013.).

[26] *"Illegal entry to the Republic of Croatia includes: crossing of the state border outside of the place or outside normal opening hours of operation of border crossings, avoidance of the border control, entry during prohibition on entry or prohibition of residence into the Republic of Croatia, enters prior to the expiration of deadline from art. 46. Par. 2 of Aliens Act, entry on the basis of fraudulent or falsified travel or other document required for border crossing, visa or residence permit."* (Art. 39 of *Aliens Act*). "*Alien has*

a statutory obligation to inform the police about irregular immigration status or illegal employment of a migrant worker (Art.73, par. 10 and Art. 111).

One of the main raisons for categorizing the *Employer Sanctions Directive* as an instrument promoting the respect for human rights was the inclusion of the provision of Art. 6 of the Directive concerning the employer's liability for back payment of outstanding remuneration to undocumented workers in which the Directive stipulates that *"Member States shall ensure that the employer shall be liable to pay: any outstanding remuneration to the illegally employed third-country national; an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines; and where appropriate, any cost arising from sending back payments to the country to which the third-country national has returned or has been returned"* (Art. 6, par. 1). Since Member States were not given the possibility to opt out of parts of the Directive, Croatia had the obligation to harmonize its laws, in this case the *Aliens Act,* to comply with all provisions of the Directive. Instead of transposing complete provision of Art. 6 of the Directive, the *Aliens Act* has transposed only one out of three substantial provisions and unfortunately it was a provision which does not relate to any of undocumented workers' rights, but rather related to the employer's obligation to pay public contributions, i.e. taxes and social contributions, penalty rate and fees (Art. 212 of the *Aliens Act*). *Aliens Act* has incorporated a provision on the presumed three–month employment of undocumented migrant worker as a basis for calculation of the amount of payment of public contributions (Art. 213 of the *Aliens Act* and Art. 6, par. 3 of the Directive).

The Act has provided a very detailed breakdown of the amount of public contributions the employer has to pay, with impressive eight articles dedicated exclusively to the payment of public contributions and taxes, which indicates the legislator's evident intention to use the provisions of the *Aliens Act* as a means of stipulating modalities of the employer's financial liability for the criminal act of illegal employment, but without stipulating any financial liability for deliberate denial of payment of outstanding remuneration. Since the *Aliens Act* has not legalized the right to remuneration, it is self-explanatory why the violation of that right has not been included in the part of the Act which stipulates criminal liability, i.e. penalties and fines. Therefore, employers could claim that undocumented migrant workers in Croatia are not entitled to a paid employment, and the courts would have difficulties to establish the applicable

illegal residence if he is not on a short-term residence, if he does not have valid residence permit, approved asylum claim, subsidiary or temporary protection, if he is neither asylum seeker nor alien from art. 53 of this Act" (Art. 101, par. 2).

statutory penalties even if they derive undocumented migrant workers' right to a paid employment from applicable regional or international legal norms.

The *Aliens Act* also transposed the provision of Art. 6, par. 2b of the Directive stipulating that "*before the execution of expulsion order, the alien who resided and worked illegally will be informed about the available options for remuneration compensation, with any statutory contributions in accordance with* lex specialis*, and will be informed about the possibility to lodge a complaint or to take legal action against the employer*" (Art. 107, par. 5). The problem is that in the Directive this provision is a part of overall statutory right to remuneration for past work, while in the Croatian Act the incorporation of this provision is both confused and confusing since the Act does not specify any entitlement to remuneration, or applicable legislation from which an alien could derive his right to remuneration. Therefore, the idea of transposing only a fraction of the most important provision for the *rights-based approach* to irregular migrations does not seem justifiable. The right to information does not suffice to qualify as a form of legal protection of undocumented migrant workers since they do not enjoy statutory right to the remuneration. Stipulating the mere information entitlement to the right which cannot be derived neither from the *Labour Act* nor from the *Aliens Act* seems redundant.

Furthermore, a reference to a *lex specialis* in this case could be a reference to the *Labour Act* (which from the outset we consider a *lex generali)* or to another law applicable to special categories of employees (it is difficult to imagine the applicability of *lex specialis* in labour law as they mainly regulate the employment in public services, which is *de facto* and *de iure* irrelevant to undocumented migrants). Notwithstanding the legislator's intention, none of the Croatian laws could be considered the *lex specialis* applicable to derive the right to remuneration due to the fact that employment contract, or verbal agreement on employment concluded between the employer and an undocumented migrant, violate directly the *ius cogens* on the authorization of entry, residence and employment, entail criminal liability, and any formal agreement of that kind would be null and void.[27] We do support German theory on *factual employment* which should preserve legal effects of employment until the moment of annulment, i.e. establishment of the illegality of labour relation, and we also acknowledge the possibility to apply a theory by which the nullity of a labour relation should be considered *ex nunc,* while the nullity of employment contract should be considered *ex tunc*.[28]

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[27] See in: Momčinović, H., *Nevaljanost ugovora – ništetni i pobojni ugovori prema Zakonu o obveznim odnosima*, Pravo u gospodarstvu, Vol. 45, No. 6, Zagreb, 2006., pp. 129-132. and Vukorepa, I., *Zapošljavanje stranaca,* Radni odnosi u Republici Hrvatskoj / Potočnjak, Ž., (ed.), Zagreb, Pravni fakultet, Organizator, 2007, pp. 893-922.

[28] Tintic, N., *Radno i socijalno pravo*, knjiga prva: Radni donosi(I), Zagreb, Narodne novine, 1969, pp. 689 -700, cited in Ibid. (Vukorepa), pp. 899-900.

But in reality there is a significant risk that the courts might give precedence to the norms of the *ius cogens* of residence and place the burden of proof on undocumented migrant workers who rarely possess the evidence of performed work or a written employment contract and therefore are not in a position to prove the existence of a factual employment relation. Employers could easily abuse legally unrecognized employment to avoid the payment of outstanding remuneration to the worker, particularly bearing in mind that undocumented migrants usually face swift deportation from the country of employment, which deprives them of the possibility to submit a substantiated claim before the competent authority or court (in spite of the availability of temporary residence permits for undocumented migrants whop choose a sort of *quid pro quo amicus curiae* status which is less likely to be given priority over a possibility to conduct successful deportation). This was exactly one of the *raisons d'être* of the *Employer Sanctions Directive* which, irrespective of whether the employer was ignorant about the irregularity or the existence of consensual agreement between undocumented migrant worker and the employer, established fundamental right to the protection from labour exploitation by recognizing the migrants' right to remunerated work and by introducing the employer's obligation to pay the outstanding salaries.

Apart from that, remuneration is not explicitly mentioned in the *Aliens Act*. Just on the contrary, Art. 219, par. 2 of the Act in uses the term *"compensation"* stipulating that *"the amount of compensation to the illegally residing alien and the amount of paid public contribution based on that compensation shall not be considered tax expenditure of the employer",* which additionally undermines the employer's obligation to pay salary to the workers, regardless of the regularity of their residence status. This provision clearly intended to penalize the employers, but as side effect the employers could be enticed to labour exploitation since the cost of work (due to worker's residence status) is legally unrecognized.

Moreover, the *Aliens Act* omits to stipulate the internationally recognized right to the minimum wage or to the wage that would be in accordance with mandatory national provisions on wages, collective agreements or in accordance with the established practice in the relevant occupational branches (as stipulated in Art. 6, par. 1a of the Directive) which creates ample opportunity for possible abuses since the Croatian *Minimum Wage Act* is derogated by the force of *ius cogens* of the immigration provisions of national law. Undocumented migrant workers are consequently legally unprotected from the employers' discretionary power to determine their salaries below the threshold of statutory minimum. This could lead to serious labour exploitation which is, due to the irregularity of residence and employment and legal and physical invisibility of undocumented migrant workers, beyond the reach of labour inspections.

Finally, it is noteworthy that the *Employer Sanctions Directive* obliges Member States to *"enact mechanisms to ensure that illegally employed third-country nationals: (a) may introduce a claim, subject to a limitation period defined in national law, against their employer and eventually enforce a judgment against the employer for any outstanding remuneration, including in cases in which they have, or have been, returned; or (b) when provided for by national legislation, may call on the competent authority of the Member State to start procedures to recover outstanding remuneration without the need for them to introduce a claim in that case."* Additionally, the Directive prescribes the employer's obligation to cover all the costs arising from sending back payments to the country to which a migrant worker has been returned. These provisions are obviously not applicable to the Croatian law because a precondition for the implementation of the provision is the adoption of a provision relating to the remuneration of irregular work. It is however indispensable to review the overall framework of the Directive, and the legal obligations the Directive has set to Member States, having in mind that Croatian legislation will have to be further harmonized in order to fully comply with the provisions of the *Employer Sanctions Directive.*

5. CONCLUSION

Following the analysis of the applicable norms of Croatian *Aliens Act* and the *Employer Sanctions Directive*, we can conclude that despite the ambitious preamble goals, the *Aliens Act* is unfortunately not harmonized with the provisions of the *Employer Sanctions Directive*. In addition, the Aliens Act is not in accordance with international legal instruments Croatia has ratified, nor with the instruments of the Council of Europe to which Croatia is a party, because all of them stipulate the right to remuneration to all workers, and even explicitly stipulate undocumented migrants' right (CoE *Resolution No. 1509)*.

Croatia has opted for security-oriented approach towards undocumented migrants and criminalization of irregular migrations, whereas the EU has gradually moved towards the rights-oriented approach. All present and future Member States will be expected to demonstrate full commitment to common migration policies of the EU; therefore Croatia still has a chance to embrace rights-based approach in the forthcoming *National Migration Strategy*.

For the moment, the *Aliens Act* does not provide the right to remuneration as a basic human right nor can qualify as any form of legal protection of undocumented workers against labour exploitation and violation of fundamental human rights. We had difficulties to identify a single right of an undocumented alien in Croatia, besides the right to get a temporary residence if he/she opts to be a sort of *quid pro quo amicus curiae,* which in the context of unregulated right to the payment of outstanding remuneration, could rather represent the interest of

the state (to facilitate the establishment of the employer's criminal liability) than of a migrant worker. The current *Aliens Act* is therefore a non rights-oriented law, but upon Croatia's accession to the EU, the *Employer Sanctions Directive* will have to be completely transposed into national legislation and the *Aliens Act* will have to be amended. Until that time, undocumented migrant workers in Croatia will continue being outside the labour law protection and predominantly dependent on the goodwill of their private employers. This increases their vulnerability to the labour exploitation and labour-related abuses, from which they could have been protected by the *Aliens Act.*

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HEDGE FUNDS ACTIVITY IN THE CREDIT DERIVATIVES MARKET

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Abstract

A hedge fund can be defined as a registered or non-registered financial institution that admits that the financial leverage may be applied for its investments, as well as derivatives not only for hedging purposes, but for speculation and arbitrage as well. The paper concentrates on some channels of the risk transfer form hedge funds to other parts of the financial market and chosen types of risk that accompany hedge fund activity. It is shown that although banks seem to manage some risk by selling it to hedge funds through the credit derivatives market, in fact this risk is accumulated in different parts of the financial market and must come back to them in a more intense form and is then transferred to other parts of the financial market.

Keywords: *hedge funds, credit derivates, financial markets*

1. INTRODUCTION: SCOPE, OBJECTIVE AND THESIS

The aim of this paper is to pay attention to some channels of the risk transfer form hedge funds to other parts of the financial market and chosen types of risk that accompany hedge fund activity. It is shown that although banks seem to manage some risk by selling it to hedge funds through the credit derivatives market, in fact this risk is accumulated in different parts of the financial market and must come back to them in a more intense form and is then transferred to other parts of the financial market. Thus, if the model risk is not considered by market participants by setting some safety margins, it is realized at a certain moment and its effects are further transmitted.

2. THE IDEA OF HEDGE FUNDS

Hedge funds are lightly regulated active investment vehicles with great trading flexibility. They are believed to pursue highly sophisticated investment strategies, and promise to deliver returns to their investors that are unaffected by the vagaries of financial markets. The assets managed by hedge funds have grown substantially over the past decade, increasingly driven by portfolio allocations from institutional investors. Unlike mutual funds, hedge funds are not evaluated against a passive benchmark and therefore can follow more dynamic trading strategies. Moreover, they can take long as well as short positions in securities, and therefore can bet on Capitalization spreads or Value-Growth spreads. As a result, hedge funds can offer exposure to risk-factors that traditional long-only strategies cannot. This is why they gather more and more interest of both investors and scientists. Because they are unregistered subjects, it is difficult to assess the financial results of the whole industry.

There are different data bases gathering hedge funds and it is not compulsory for hedge funds to reveal their performance data to the data providers. That means that for many hedge funds performance data are not available. This additionally makes it more difficult to assess the performance of the hedge funds industry. Additionally, hedge funds follow different strategies and hence their return characteristics differ considerably. Hedge fund data have a number of peculiarities in comparison to say mutual fund data. The high entry and attrition rates create biases in the index of hedge fund returns. The strategies and secrecy surrounding hedge funds make that only monthly return data are available. Partly for this reason, the returns appear to be smoother than these may be in reality. Nevertheless, when compared to the behaviour of bank returns or to the returns on insurance companies, hedge fund strategies are often less volatile (less uncertain). Over time the excess returns delivered by the hedge fund industry have come down on average. Because hedge funds follow different investment strategies as it was mentioned earlier, the author divides them on the basis of these strategies. It helps to catch the most characteristic features of every strategy and to draw conclusions on the performance of every strategy itself.

Although hedge funds are very much associated with the negative events of the LTCM period, it is important to understand that they have various positive effects on the financial system: they contribute to market liquidity, play an important role in the price discovery process, contribute to the elimination of market inefficiencies, and offer diversification benefits to investors. For example, a study of the markets in U.S. dollar interest rate options indicated that participants viewed hedge funds as a significant stabilizing force. In particular, when the options and other fixed income markets were under stress in the summer of 2003, the willingness of hedge funds to sell options following a spike in options

prices helped restore market liquidity and limit losses to derivatives dealers and investors in fixed-rate mortgages and mortgage-backed securities.

Caldwell reports that the first hedge fund was formed by Albert Winslow Jones in 1949. During the early years of the hedge fund industry (1950s – 1970s), the term "hedge fund" was used to describe the "hedging" strategy used by managers at the time. However, the term evolved and now is used in a different context specified beneath.

Generally understood, hedge funds are considered a subset of alternative assets, which include virtually any investments that do not restrict themselves to the traditional strategies of holding long-only positions in publicly traded stocks and bonds. Examples of alternative investments include private equity; inflation hedges such as timber and real estate; and of course, hedge funds. A key difference between hedge funds and other alternative investments is that hedge funds mostly deal in publicly traded securities, although some that present themselves as hedge funds deal in private transactions such as private investments in public entities (PIPE). Still others engage in highly illiquid securities. Investment strategies applied by hedge funds use financial leverage, which means that from one point of view, they may generate higher rates of return, but on the other side, they put investors into higher level of risk.

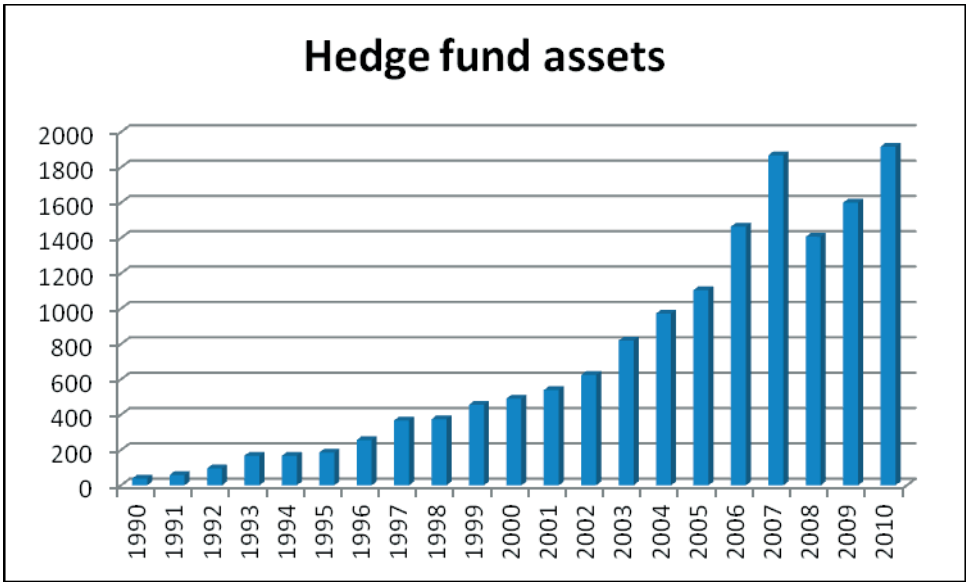
According to Fung and Hsieh, while mutual fund returns have high and positive correlation with asset class returns, hedge funds returns have low and sometimes negative correlation with the same asset class returns. They attribute this failure to the dynamic use of leverage and changes in asset exposure by hedge funds. This rule also works for hedge funds offered on the Polish financial market as it is proved beneath.

3. HEDGE FUNDS AS PARTICIPANTS OF THE CREDIT DERIVATIVES MARKET

By a hedge fund the author means a registered or non-registered financial institution that admits that the financial leverage may be applied for its investments, as well as derivatives not only for hedging purposes, but for speculation and arbitrage as well. They are one of the most vital participants of the credit derivatives market, acting both as sellers and buyers of these instruments. N. Chan, M. Getmansky, S.M. Haas, A.W. Lo argue that the risk/reward profile of most hedge funds differs in important ways from more traditional investments, and such differences may have potentially significant implications for systemic risk. The sudden increase of hedge fund assets in the last years (see chart 1) has given the possibility of new financial products and markets development (financial innovation), however on the other hand, resulted in the market distortion, which in turn revealed new types of risk (see figure 1).

Hedge funds field is one of the fastest developing parts of the world financial market. Their number has increased rapidly in the last years. They still have good perspectives for the future, which lets assume that their dynamic development will be continued. The number of assets gathered in these institutions has also been growing fast making them important players in the global economy.

Chart 1. *Hedge fund assets in 1990 – 2010 (billions of dollars).*



Source: Hedge Fund Research.

Figure 1. *Hedge funds and risk creation.*

Source: Author.

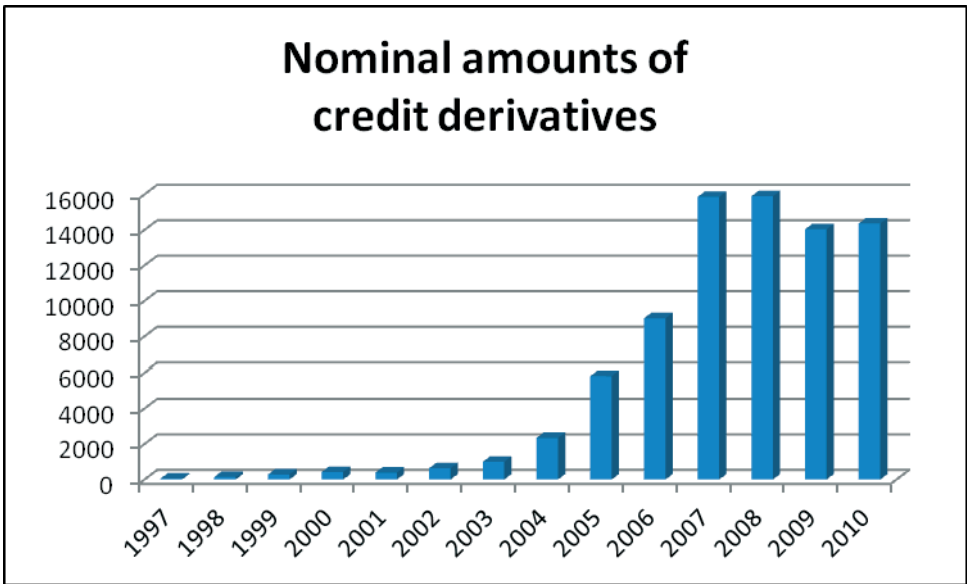
The mentioned types of risk are transferred to other parts of the financial market:

- In the direct way – through transactions conducted on the financial market like taking speculative positions with cash or derivative market instruments. By doing so, they can increase market volatility and induce liquidity problems.

- In the indirect way – through operations conducted with other market participants that lead to risk accumulation at sequential stages of this process and reveal it suddenly when it is too late for its management. As one of the stages of risk management is its identification, if it is done improperly, the whole process of risk management is not applied in the right way.

Thanks to their willingness to buy and sell risk, hedge funds contributed to the dynamic development of the credit derivatives market (see chart 2), but on the other hand they increased the systemic risk. That is why it is fundamental to create adequate risk management systems both in these and other financial institutions that will aim at reducing it. Credit derivatives are a specific class of financial instruments of which the value depends on an underlying market value which in turn results from the credit risk of private or government entities. Derivatives can be treated as new products and their virtue is that they give the possibility of the credit risk transfer (credit derivatives) or other types of risks (for example currency risk), which helps a company to concentrate on its main activity no matter what the market situation is. All in all, credit derivatives can either replicate credit risk, transfer it or hedge.

Chart 2. *Nominal amounts of credit derivatives in 1997 – 2010 (billions of dollars).*



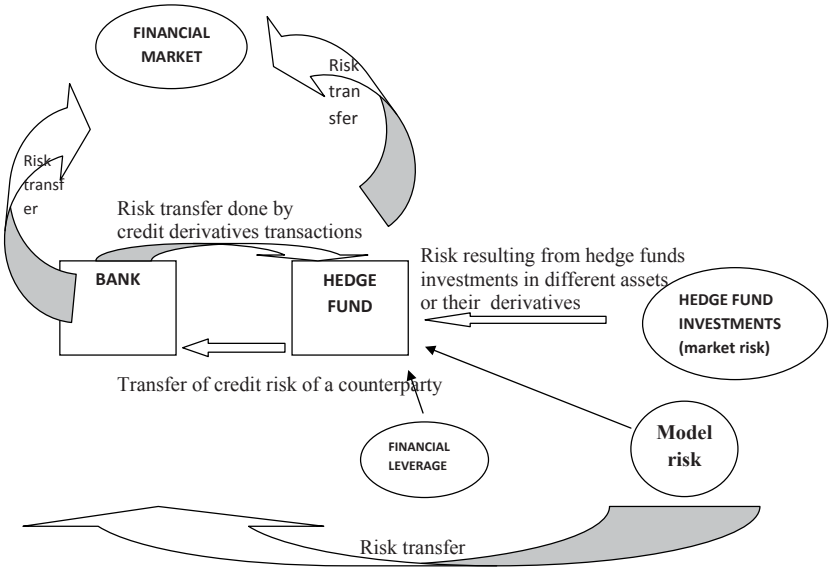
Source: OCC's Quarterly Report on Bank Trading and Derivatives Activities First Quarter 2010, Controller of the Currency, Administrator of National Banks, Washington DC 20219, p. 11 and OCC's Quarterly Report on Bank Trading and Derivatives Activities First Quarter 2008, Controller of the Currency, Administrator of National Banks, Washington DC 20219, p.10.

4. RISK TRANSFER FROM THE HEDGE FUND INDUSTRY TO BANKS: *IN LIEU OF CONCLUSION*

Risk management standards in a bank, because of obvious reasons, are more strict than in a hedge fund, which means that the bank is able to accept a lower risk level than the hedge fund. Thus, it transfers the credit risk to the hedge fund and treats is as risk management. The hedge fund takes it on and if the risk realizes, it has liquidity problems, which in turn makes the risk come back to the bank. To sum up, if the bank gets rid of risk by entering into a credit derivative transaction with a highly leveraged institution that does not manage risk properly, although it is convinced that it is a part of its risk management process, in fact it must be aware of the fact that this risk may return when the hedge fund has liquidity problems and it will be too late to manage it (see figure 2). Even if a hedge fund invests in such assets that at first glance do not seem to have anything in common with the mortgage market, these are for example credit derivatives that transfer this risk to this market. This is why banks should be obliged to manage their exposures to hedge funds by the control of risk taken by these institutions. One of such measures can be the level of leverage, but also acquainting the risk management system used by the hedge fund that it is going to get into a transaction with. It is made more difficult because of the common reluctance of hedge funds to reveal their financial operations. One of the possible solutions to it would be a creation of one state rating institution that could rate hedge funds depending on the risk level applied and thus on the risk generated for other participants of the financial market. In such a case the counterparty risk could be reduced, as hedge funds, being interested in getting high rating grades, would pay more attention to risk taken, not only to rates of return. Besides, hedge funds should be interested in obtaining credit ratings because they would give some of them possibilities of cheaper financing, as the higher the rating, the lower the cost of capital is.

Moreover, although databases of hedge fund investments have been created, they have lots of biases. One of them is the so called survivorship bias which means that failed hedge funds are removed from databases. Another one is the so called backfill bias which in turn means that hedge funds that start to be included in a database, can only report positive rates of return. It means that real rates of return of the hedge fund industry are probably lower than they are shown by numerous databases.

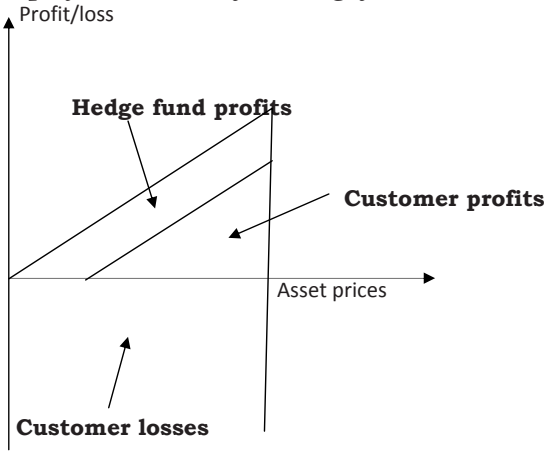
Figure 2. ***The transfer of selected types of risk between the hedge fund and the bank and its impact on the financial market.***



Source: Author.

Another problem is that hedge funds are rewarded for rates of return that they generate, without any regard to high risk level. These are their customers who are punished when the market goes in the wrong direction (see chart 3). It means that hedge funds have no motivation to keep risk at moderate levels because the higher the risk is, the higher profits are possible and in case if their decisions are wrong, they make losses for customers, not for themselves. It means that if the risk increases, potential profits of a hedge fund grow up and at the same time, potential losses do not, which induces the moral hazard.

Chart 3. ***Unbalanced profits and losses of the hedge fund and its customers.***



Source: Author.

The European Central Bank sets out four points of the European CDS market that deserve attention:[1]

- The CDS market remains highly concentrated in the hands of small group of dealers
- The interconnected nature of the CDS market, with dealers being tied to each other through chains of OTC derivative contracts, results in increased contagion risk
- CDSs are widely and increasingly used as price indicators for other markets, including loan, credit and even equity markets, which makes these instruments play a broader role in the determination of prices
- The liquidity of this market that results in the significant widening observed in sovereign CDS spreads in mid-March 2009.

All the above-mentioned features, although discussed here only for Europe, could be extended to the global context. Together with the model risk and the influence of the financial leverage, they lead to the easy transfer of risk among all financial market participants.

Leaving aside the question of ethics emphasized so often in the literature, when giving rating grades, the model risk appears in any rating methodology too. It influences the market by the impact on its participants confidence in issuers and issues. If done improperly, market mechanisms are distorted. For example, I. Fender and J. Kiff[2] document in their paper some important features of the rating agencies' models for evaluating CDO collateral pool credit risk and how differences in model specifics may influence the credit risk assessment of individual pool tranches and show that the use of different modelling approaches may lead to different rating outcomes for individual tranches, particularly once differences in correlation assumptions are taken into account.

It is necessary to point out here that although credit derivatives are the important field of hedge fund cooperation with banks, the main activity between them concentrates on cash and securities lending to hedge funds. It additionally increases the thread of counterparty risk from the point of view of banks, because they lend money to hedge funds which is next invested in risky transactions whose risk is staying out of control of banks. If risk valuation techniques are inadequate, hedge funds create systemic risk by the possibility of making large losses for banks from which they borrow funds. Thus, it is necessary for banks to

[1] Credit Default Swaps and Counterparty Risk, European Central Bank, August 2009, p. 4 – 5.

[2] I. Fender, J. Kiff, CDO rating methodology: Some thoughts on model risk and its implications, BIS Working Papers, Bank for International Settlements, Monetary and Economic Department, November 2004, p. 13.

manage their exposures cautiously in order to prevent the financial market from the risk transfer. However, here also the moral hazard appears as hedge funds as customers are a source of high profits and at the same time the level of risk generated by them is often neglected.

Amongst the most important reasons for the credit risk transfer from hedge funds to other parts of the financial market there are:

- The lack of understanding of models assumptions and the need of managing the model risk
- The lack of professional ethics called the moral hazard in the literature
- Excessive speculation whose aim is to generate high profits regardless of the risk level
- Inadequate risk management systems in which the analysis of profits is done out of touch with the risk level
- The positions of the largest funds are highly correlated, which intensifies the so called domino effect with regard to other market participants. S.J. Brown, W.N. Goetzmann and J.M. Park[3] prove it using simple statistical methods. It intensifies the model risk from the global point of view creating the so called systemic risk
- High dependence of rating agencies on a few vital customers leading to the moral hazard
- Insufficient knowledge concerning the counterparty risk
- Low hedge fund data availability making it impossible to assess the level of risk properly, as well as to model the shape of the distribution of rates of return
- Charging customers with commissions on profits without sharing losses with them, which induces the moral hazard
- Improper management of banks' exposures to hedge funds

All these above – mentioned effects are intensified by the use of financial leverage which is thought to be one of the greatest risks in the hedge fund industry. Two types of leverage are given in the literature:[4]

[3] S.J. Brown, W.N. Goetzmann, J.M. Park, Hedge Funds and the Asian Currency Crisis of 1997, 13 May 1998, p. 1 – 28.

[4] P. McGuire, E. Remolona, K. Tsatsaronis, Time – varying exposures and leverage in hedge funds, BIS Quarterly Review, March 2005, p. 68; Large EU Banks' Exposures to Hedge Funds, European Central Bank, November 2005, p. 34 – 35.

- Balance sheet leverage (also called loan or economic leverage) – achieved by outright borrowing usually provided by larger banks and is balance sheet intensive. The hedge fund assumes borrowing of debt and plays the market with debt to attempt to multiply returns faster and greater than its required payments.
- Instrument leverage (also called derivatives – based gearing or financial leverage) achieved by taking off – balance sheet positions, such as derivatives and structured notes which can amplify returns by allowing exposures to underlying assets without requiring a cash outlay equal to the value of the assets. Banks generally did not have the possibility to capture off – balance sheet leverage arising from trading in derivatives, because of the separation of prime brokerage and trading activities, as well as the inadequate disclosure of hedge funds positions.

To sum up, hedge funds create systemic risk by the possibility of making large losses for banks from which they borrow funds. Thus, it is necessary for banks to manage their exposures cautiously in order to prevent the financial market from the risk transfer. Otherwise, the whole financial market is endangered with high risk levels.

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ON THE REGIONAL POLICY OF THE EUROPEAN UNION: A BRIEF LITERATURE REVIEW

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Abstract

The regional development has become one of the most challenging issues in the era of globalization, which shifts increasingly greater responsibility for economic growth and development from the nation-state to the region. Uneven regional development - in terms of GDP per capita, production growth, employment, etc. - represents in the long-run one of the greatest obstacles in the sustainable development of national economy. Bearing all economic and social consequences of regional disparities in mind, the balanced regional development has become one of the most important guidelines of the European Union, which uses one-third of its budget through its cohesion policy in order to reduce existing regional disparities. The Central and Eastern European Countries (CEECs), such as the Republic of Croatia, are all witnessing the rise of regional inequalities within their borders. Thus, national governments have been increasingly aware about the role of the regional development and necessity to define coherent regional development policies. This paper deals with the key theoretical and practical issues related to the regional policy of the European Union in general and the Republic of Croatia in particular. The theory and practice of the regional policy is supported by the (brief) literature review which makes this paper a starting point for more comprehensive research on the regional development and policy. Apart from theoretically discussing the notion of regional policy, its creation and instruments, the paper

also confers the current state and trends in the regional policy, as well as it indicates present and future challenges to improve the current regional policy approach.

Key words: *regions, regional policy, cohesion policy, European Union, Croatia*

1. INTRODUCTORY REMARKS

The European Union (EU) is taking part in the process of linking its regions and their development, as well as the reduction of the growing mutual differences through the application of the adequate regional policy. Many economists are concerned with issues in relation with the degree of success of the EU regional policy (Faíñaa & López-Rodríguez, 2004; Torrisi, 2007; Vila Maior, 2008; Arguelles *et al.*, 2011), while there are some opinions about a low and/or negative impact of regional policy in generating regional development (Basile *et al.*, 2001; Breidenbach *et al.*, 2011).

Regions allow the implementation of policies at levels lower than the national ones, and regional borders are marked by natural, historical or administrative boundaries that sometimes coincide. According to the EU classification, regions are divided into NUTS regions (i.e. *Nomenclature of Units for Territorial Statistics*) in three levels with the minimum and the maximum threshold of the average population size in the region. According to data from the year 2006 that were released by Eurostat, EU-27 are divided into 97 regions at NUTS 1 level, 271 regions at NUTS 2 level, and 1303 regions at NUTS 3 level (EUROSTAT, Regions of the European Union, 2009).

Regional policy is an instrument of financial solidarity and cohesion of the EU, which aims to reduce the existing differences in development between regions of Member States, to improve the living conditions of the least developed parts of the European Union and to reduce the wealth gap between regions (Kesner-Škreb, 2009:103). It represents the investment policy, keeping business, economic growth, improved quality of life and sustainable development, and is the expression of the EU's solidarity with less developed countries and regions. Funds are mostly provided in those areas where the differences are the greatest (EU Regional Policy). The primary objective of EU regional policy aims at creating growth of the overall EU economy, as well as the following objectives: convergence, competitiveness and cooperation (Malais, Haegeman, 2009). Competitiveness was set as a target in the Lisbon strategy, and it is a kind of an EU imperative and the natural law of economic development and policy (Bristow, 2009).

Assistance for less developed regions is achieved by some of the existing funds of EU regions and some authors tried to identify the basis for the different distribution of certain funds within different EU regions (Bodenstein & Kemmerling, 2012).

Thus, regional policy does not imply only regional development but also linking at the EU level by reducing the existing differences in development between regions. EU regional policy can be defined as the most important instrument for achieving cohesion in order to enhance the competitiveness of local economies and thereby eliminate the existing imbalance. The degree of development of each region is expressed by two important indicators, i.e. gross domestic product per capita (GDP) and unemployment rate (Ministry of Foreign and European Affairs, 2011). The existing regional differences can be displayed by means of the GDP per capita, although it is not always an accurate indicator of the standard of living since the relative costs of living are omitted. According to this indicator, the richest region is Inner London with the EU-27 average of 270% of GDP per capita, and the poorest region is north-east Romania, with 23% of the EU average. (EU Regional Policy 2007-2013).

Table 1. Regional GDP per capita in the EU27 in 2009 ***(in PPS, EU27 = 100)***

Regions of the EU	**GDP per capita** *(in % with respect to the EU average EU average)*
Regions with GDP per capita above 150% of the average	
Inner London in the United Kingdom	332% of the average
Grand Duchy of Luxembourg	266% of the average
Bruxelles / Brussels in Belgium	223% of the average
Hamburg in Germany	188% of the average
Bratislavsky kraj in Slovakia	178% of the average
Some of the regions below 50% of the average	
Severozapaden in Bulgaria	27% of the average
Severen tsentralen in Bulgaria	29% of the average
Nord-Est in Romania	29% of the average
Yuzhen tsentralen in Bulgaria	31% of the average

Source: EUROSTAT, http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/1-13032012-AP/EN/1-13032012-AP-EN.PDF, (6 November 2012)

Among 39 regions of more than 125% of the EU-27 average, even eight are situated in Germany, five in the Netherlands, four in Italy and Austria, Belgium, Spain and the United Kingdom. Special emphasis is placed on a significant contribution of people who commute to work every day, and this is reflected through the influx to a particular region, which provides those levels of production that cannot be attained if only the active population is included in a certain area. Regions that are 50% below the EU-27 average are located in Bulgaria and Romania, while regions with the EU average above 75% are mostly

located in Poland, the Czech Republic and Romania, as well as in Hungary and Bulgaria (EUROSTAT, Regional GDP, 2012).

The need to reduce the existing differences is gaining in importance by knowing that there also exists a gap within the Member States, and not just between them. The new acceding countries have substantially affected the aforementioned differences, in particular the 2004 enlargement of the European Union, which expanded the territory by some 20%, but it was not followed by adequate GDP growth. Effects of enlargement are visible, regardless of the cause of inequality itself (unfavourable geographical location or social and economic changes, or a combination of these). Therefore, through solidarity and cohesion regional policy attempts to achieve positive effects, by reducing the differences in income and prosperity of certain countries and regions and improving the living standards of Member States by bringing them to a level as close to that of the EU as possible. The implementation of EU policy for the purpose of reducing regional disparities takes place through four structural funds: i) *the European Regional Development Fund*, ii) *the European Social Fund*, iii) *the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development*, and iv) *the Financial Instrument for Fisheries Guidance*. The Cohesion Fund was established in 1993 to finance transport and environment infrastructure (EUbusiness, 2007). The basic difference between structural funds and cohesion funds is determined by the fact that cohesion fund resources are allocated to Member States, not to regions.

2. REGIONAL POLICY OF THE EUROPEAN UNION: CREATION AND INSTRUMENTS

Regional policy is one of the most important and complex policies of the European Union (Oana & Cristian, 2011). Institutions and determining their framework for appropriate action play a significant role in the implementation of regional policy and generation of economic growth (Rodríguez-Pose, 2010).

The beginning of application of some kind of regional policy is marked by signing the agreement at the establishment of the European Economic Community (EEC Treaty) in 1957. One of the goals was to create a unified economy and ensure its development while reducing the existing differences between individual regions and lagging behind of less developed regions. EU regional policy is also known as cohesion or structural policy, and it represents about 35 % of the total EU budget (Ivanova, 2012: 11). Cohesion policy is an area to which most of the EU resources are allocated, and the importance of evaluation results from the constant redistribution (Hoerner & Stephenson, 2012). The creation of regional policy was marked in 1975 by providing financial instruments and creation of the European Regional Development Fund (ERDF) the aim of which was to redistribute funds to the poorest regions (Bache, 1998).

In addition to this fund, the European Social Fund and the Cohesion Fund operate as the remaining two instruments in the modern economy.

The process of integration within the European Union included the creation of a single market, the development of single institutions and the creation of coherent policies, but contrary to earlier predictions, these three levels did not follow the same path to development. The creation of a single European common market has been most successful, institutional integration has developed at a slower rate, and uniform policies have been hardest to implement. Since one third of the European Union fund is made up of the resources allocated to the implementation of regional policy, this issue rises interest very often (Hooghe & Keating, 1994), and it becomes additionally more significant when one takes into account the fact that the EU is composed of about 493 million citizens (Ciurea & Cornelia, 2010).

In order to balance the economic and social differences in Member States, the majority of resources from regional funds should help regions with GDP below 75 % of the EU average (EurActiv, 2010).

The legal basis for financial instruments is evident through the laws of the European Union, and the instruments themselves are managed by national and regional authorities and co-financed by national, regional and cross-border programs (EU Regional Policy 2007-2013). Structural funds are EU policy instruments with the most intense participation in the promotion of economic growth in Member States that facilitate the process of convergence. However, empirical research has confirmed, on average, the inefficiency of structural funds. The results indicate otherwise only in cases when there is a "right" institution in the country that participates in structural funds. In addition to an insight into the efficiency of structural funds, research also provides an insight into the results of other variables, such as openness, institutional quality, corruption and good governance indicators (Ederveen *et al.*, 2002), and the positive impact of regional policy is reflected in reallocation of funds (Knarvik, 2004).

2.1. Regional policy: *current state and trends*

Current measures of regional development are defined only in economic terms, although the objectives of the European Union include economic and social cohesion (Perrons, 2012). Portugal is one of the EU Member States supporting the earlier theory of inequalities. This country is also characterised by regional asymmetry; a way of measuring in this case was achieved through the regional HDI (i.e. *Human Development Index*) (Silva & Ferreira Lopes, 2012). EU integration has created not only different perspectives but also theories. Social identity theory may be mentioned as an example, which assumes that the

development of a strong national identity represents the most important factor in politics leading to the expansion in Member States (Curley, 2009).

Since one of the objectives of cohesion policy is to increase the competitiveness of regions in the EU, the European Commission is trying to achieve this goal through the support of entrepreneurial activity across regions. A case of empirical research has been recorded that provided an insight into the relationship between entrepreneurial activities and entrepreneurial perception as well as the economic performance of regions and their regional policies in the area of Spain and Germany. The aforementioned survey and its results showed a link between entrepreneurial activities and regional policy within the EU (Sternberg, 2012).

Economic development of the region can be traced through GDP, but a comparison of two regions of different size is possible based on regional GDP per capita. Hence, we compare regional GDP with the population of the observed region, so that this difference between the place where an activity is performed and the place of residence becomes important. GDP includes all final goods made in one year within national boundaries, regardless of the place of residence of persons who participated in the creation of final goods. Moreover, GDP per capita captures the correct measurement only in cases where the persons involved in the creation of GDP are also the residents of the region in question. It is therefore understandable that regional GDP per capita is extremely high in areas where a high proportion of commuters is recorded and it should not be equated with regional primary income. Regional GDP is calculated in the currency of the country and then converted into euro at an average rate in a given calendar year. GDP is converted further by using the conversion factor known as purchasing power parity, to an artificial common currency, enabling in that way a comparison of purchasing power of different national currencies (EUROSTAT Regional Yearbook, 2010).

The assessment of the effectiveness of EU regional policies can be done by means of some econometric models, which compare the actual situation achieved with the help of European funds and the expected one, with no European funds (Bajo-Rubio *et al.,* 2004).

Over the last fifty years, the increased delegation of political authority at the regional level can be noticed, and a regional demand for involvement in political decision-making was considered (Studinger & Bauer, 2012). Since the 2006 reform, regional policy has been focused on the priorities set out in the Lisbon strategy and oriented towards growth and employment of all EU regions and cities, and it is characterised as the main instrument between 2007 and 2013. The case of Bulgaria as one of the new members of the European Union talks about the EU Member State whose aim is to become a competitive EU Member State by the year 2015 with a high standard of living, income and social

awareness, and the these goals could be achieved through structural funds, which will certainly help in developing and improving the quality of life in the country. However, there are different views on regional policy and structural funds, as well as on their effectiveness (Ivanova, 2012). There are also different resource allocation mechanisms in the implementation of cohesion policy (Dunford & Perrons, 2012). The basis is the policy envisaged for the period 2007 - 2013 and focus on the convergence for which around 81 % of the total funds are secured, regional competitiveness and employment, which account for about 16 % of the resources, and territorial cooperation with about 2.5 % of available funds (EUROSTAT, Regions of the European Union, 2009).

Regional policy is a political area in which special attention should be given to countries that have not become Member States yet. An example of Turkey provided an insight into first how macroeconomic stabilisation should be covered, and then the reforms that will create a fertile ground for the actual implementation of certain policies themselves. Thus, joining the EU contributes to the increase in the standards in the field of European regional policy (Bilen, 2005).

The correlation between the strategies of regional development and new acceding states from Central and Eastern Europe is also evident for future regional and cohesion funding in market integration. It is interesting that for new Member States pre-accession requirements have increased significantly and labour mobility and wage flexibility in the enlarged European Monetary Union (*EMU*) have been limited without the existence of a unified fiscal calculation, which might affect the reduced readiness of these countries to participate in the EMU. Regional policy is also used in this case to achieve integration of less developed economies in transition to well-developed EU markets, and a comparative analysis observed the degree of integration, through variables over the business cycle, trade within the industry and the level of foreign direct investment (Bergs, 2001). According to the experience of previous enlargements of the European Union, it was shown that the two types of policies are particularly relevant. Those are primarily public programs of long-term support that have a negative impact on economic growth and should be shut down due to inefficiency, and the mobility of labour and capital that were not too big in all enlargements (Boldrin & Canova, 2003).

The existence of the so-called access to policy networks is considered very often, which serve as a kind of an analytical tool, and are pointed out as relevant to policy processes and outcome. However, the ambiguity of policy networks can sometimes do both enhance and reduce the efficiency and legitimacy of policy-making (Börzel, 1997). In contrast to the positive effect of policy networks, the differences in human and public capital are the cause of regional disparities in one third of cases – equally divided between these two factors – and in the case of reducing regional disparities, public investment may be used and the extent

to which regional allocation and compliance with regional needs are made (De la Fuente, 1995).

A positive impact of EU regional policy is mostly reflected in a shorter period of time in which the EU average, and sometimes even the growth that surpasses the EU average, is reached. However, economic success and social processes require a close cooperation. European regional policy has the potential visible through the conversion of common challenges into opportunities, and the key components are a cooperation of all regions in the European Union, planning and effective management as key elements to ensure regional development. In terms of organisation of regional policy, there is regional solidarity among EU Member States, so that the richest European regions pay more into the EU budget than they get back from the budget, but their benefit from this kind of investment is visible through the implementation of modern infrastructure and production, sustainable use of resources and better education of people coming from poorer regions (EU Regional Policy 2007 - 2013).

Speaking of the state of regional policy in different regions, and in accordance with EUROSTAT indicators, 41 regions have a GDP per inhabitant of more than 125 % of the EU-27 average and they are home to 20.6% of the population. The regions with a GDP per inhabitant of between 75 and 125% of the EU-27 average are home to 55% of the population and some 9.9% of the EU population lives in 28 regions whose GDP per inhabitant is less than 50%, and almost all regions are located in the new Member States. Only two regions of the candidate countries (the Northwestern region of Croatia and Istanbul in Turkey) are at the level of 75% of the EU-27 average. In 2007, in 67 regions GDP was less than 75% of the EU-27 average, and it refers to about 24% of the population living in the aforementioned area (EUROSTAT Regional Yearbook, 2010).

Speaking of regional policy in the Federal Republic of Germany as one of the more advanced EU countries, we have to mention a very interesting research conducted by Thielmann. According to Thielmann (2000), distinguishing between different levels of management can be viewed as a European institution which is given the normative content. Significant changes that followed the reunification demanded necessary adjustments in the manner of implementing regional policy (Anderson, 1995). Although improvements are evident in relation to reducing the gap in most urban areas in the eastern part of the country, the burning issue of this economy is caused by constant structural socio-economic differences between the old and the new parts. These differences are manifested through indicators such as GDP per inhabitant and unemployment. Regions lagging behind that are located in the western part of the country face the issue of restructuring the industrial and agricultural sectors (OECD, 2010). There are three basic objectives of structural policy: minimising unemployment, maximising GDP and equalising

regional unemployment rates (Tangian, 2005), and research also shows that the role of institutions[1] is significant for political processes (Thielemann, 1998). In the Federal Republic of Germany, except through the activities of the EU, the development of regional policies is also encouraged through the agency called *Joint Agreement for the Improvement of Regional Economic Structures*. In this way, less developed regions are encouraged to participate in the economic development, and this should be achieved by overcoming regional gaps, reducing regional differences and unifying economic growth (Eggert *et al.*, 2007: according to BMWI, 2005). Numerous projects have been realised through cohesion policy investments. More than 1500 small and medium enterprises and about 800 new businesses are mentioned as examples of completed projects. Furthermore, very large investments have been made in the sector of transport, road and rail infrastructure. Also, there has been significant progress in the area of research and development; several thousand research tasks have been conducted, and more than 1.5 million participants took part in educational and training courses. Many improvements and collaboration have been established in the areas close to the border, particularly with the Benelux countries and France (European Cohesion Policy in Germany, Cohesion Policy 2007 - 2013).

The enlargement and the accession of new Member States to the EU necessarily imply some central issues like regional policy and requirements for appropriate changes. The need for a reform emerged particularly in the acceding countries of Central and Eastern Europe (Faina & Lopez Rodriguez, 2001). Also, European funds in Central and Eastern Europe countries can only be used in cases where countries have harmonised regulations with the regulations of the European Structural Fund (Heimpold, 2001).

If we take into account the example of regional policy of Bulgaria, as a new Member State of the EU, it is evident that regional policy was established under the influence and in line with the requirements of the European Union (Monastiriotis, 2008). Furthermore, there are cases when the application of a particular policy in the region has significantly improved the urban core of the region, creating at the same time significant differences in relation to the rest of the region (Turala, 2006). Regional policy is a means by which we want to influence the reduction or elimination of the contemporary global problem, and the EU is investing

[1] *Institutions imply different aspects of law enforcement (property rights, rule of law, legal systems, peace), the functioning of the market (market structure, competition policy, openness to foreign markets, capital and technology), inequality and social conflicts (relationship between inequality and growth has been extensively studied), political institutions (democracy, political freedom, political stability, political unrest), health system, financial institutions as well as government institutions (size of bureaucracy, corruption)* (Barković & Lucić, 2010). In terms of the definition, institutions are seen as *a code of conduct in a society or, more formally, the restrictions people invented to create human interaction* (Barković & Lucić, 2010; according to North, 2003:13).

significant efforts and financial resources to meet its objective of eliminating regional disparities. Interest in this domain has increased considerably (Storper, 1995), which is an additional sign of the importance of these issues.

3. PRESENT AND FUTURE CHALLENGES OF EU REGIONAL POLICY: *CONCLUDING REMARKS*

In recent years, there has been an increasing interest in innovation as part of regional policies, through which *smart growth* is to be achieved. *Smart growth* is the way to make the full innovation potential of EU regions running. The driving force of innovation is as important for thriving regions as it is for those characterised as lagging behind in development (Europe 2020; Wintjes & Hollanders, 2010; Ajmone Marsan & Maguire, 2011). It has recently been defined as a source of growth in the areas of human capital, the single market, the sector of small and medium enterprises, infrastructure, European environmental policy, European regional policy and external sources of growth. Furthermore, it covers management, ambition, responsibility and confidence in market conditions (Henclewska, 2012).

Great goals and challenges are reflected in the EU regional policy: reducing disparities between regions, increasing efficiency at national and European levels, and reducing inequalities within Member States. However, it is possible that by eliminating regional disparities and achieving these goals policy-makers misinterpret initiatives and programs to achieve the most effective effects (Hart, 2007). However, the application of a single European regional policy is creating new opportunities, particularly in regions of the former transition countries and it may therefore have a significant and important role in European integration (Szegvari, 2004).

As the most comprehensive policy, regional policy has many open questions. Some of the challenges facing the Union and the implementation of regional policy are the problems caused by globalisation and the global crisis as well as relocation of economic activities to the area of expensive capital (Marján, 2008). Regional policy should include the social and economic situation in the whole Europe, compensate lagging behind within certain areas, and cover the political situation. However, since in certain regions even very large funds do not allow for stable economic growth of advanced countries, certain authors also mention the idea of returning to the strategy of developing Europe at two levels. Certainly, the development of policy in this direction would be unfavourable to new Member States (Gawlikowska-Hueckel, 2007).

Typically, the most common challenges for the European region include the following: globalisation, demographic changes, the impact of climate change, and

safe, sustainable and competitive energy use. Globalisation occurs as an engine of scientific and technical progress, increasing knowledge, trends, competitiveness and innovation, while demographic changes refer to age and changes in the structure of employees in the society. Furthermore, climate change has occupied a central place in the EU along with one of the biggest challenges of society, i.e. energy. The aforementioned will work towards the development of new markets and the ability to adjust to structural changes and emerging social consequences (Regions 2020).

Views on the need to use regional policy only in regions lagging behind the leading parts of the world are divided, as well as opinions about the necessary implementation of regional policy in all parts of the EU (The Future of Cohesion Policy in Richer Regions, 2009; Cohesion in Europe, 2010). However, the effects of global change and the global financial crisis have created significant changes within the very regions of the EU, including the application of specific regional policies. Changes in the stability of the economy are evident through certain macroeconomic indicators, which is reflected in the employment rate and changes in the employment rate within certain regions of the EU (Marelli *et al.,* 2012).

According to the model of the situation in the EU, regional policy is not marginalised within Croatia either. This standpoint was confirmed by numerous scientific papers focused on the application and definition of regional policy in Croatia (Čavrak, 2003; Grčić, 2007; Đulabić, 2008; Maleković & Puljiz, 2009; Kersan-Škabić, 2012). The current period in Croatia is characterised as a period of adjustment and harmonisation of Croatian legislation with the EU acquis, and the implementation of regional policy in Croatia is carried out pursuant to the *Strategy for Regional Development of the Republic of Croatia* and the *Regional Development Act.*

While creating cooperation and stability at the regional level, political and economic reasons occupy a significant place and play a significant role, and they represent the incentive factors of development. Therefore, focus on regional cooperation in Croatia is a very important segment in generating a stable labour market and achieving regional development (Vidovic *et al.*, 2011).

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PUBLIC SPENDING AND ECONOMIC PERFORMANCE IN NIGERIA: 1970 – 2009

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Abstract

Economic growth is critical to development. A stagnating economy is unlikely to guarantee development, though it has been established that economic growth may not be a sufficient condition for development. This paper examined the impact of public spending on economic growth in Nigeria between 1970 – 2009 and observed that there is a positive relationship between public spending and growth. If government spends more, the economy is likely to grow but the problems of distribution of the gains of growth become another issue. This paper suggests that government need to create room for the private sector development by deregulating the upstream sector of the petroleum industry. It is only then that deregulating the downstream would make sense. Such deregulation would also create a disincentive for politics and corruption.

Keywords: *public spending, economic growth, development*

1. INTRODUCTION

Economic growth in its simplest form refers to a sustained rise in the output level of an economy. In the early years of development theorizing in the third world, economic growth was seen as synonymous with development. However, a counter revolution soon proved that economic growth was not sufficient to define

development. Since then, the meaning of development has evolved with time. In recent times however, some issues are becoming clearer and consensus is being achieved especially with respect to the core values or objectives of development. According to the UNDP (2010), much of the current perspectives recognize broad based progress or rise in human welfare as the core of development. As such, targets could be set to be achieved e.g. millennium development goals. For welfare to improve, production and distribution are important. In other words, economic growth continues to be a key source of or vehicle for development especially when all segments of society can freely contribute to and distribute the gains of growth. This work examines the impact of public spending on economic growth in Nigeria.

According to UNDP (2010), since independence in 1960, the over reaching goal of Nigeria's economic development has been to achieve stability, material prosperity, peace and social progress. This is more likely in a growing economy. Two growth strategies available have been experimented; namely, a private sector led growth strategy where individuals or the private sector become the key agents of productivity and growth as typical of a capitalist system. On the other hand, a public sector driven economy has also be experimented in which the government through public spending assumes the commanding heights of the economy.

The UNDP (2010) believes there is currently a public sector dominance in the economy which is fueled by the expanding oil sector. This work examines the impact of public spending on economic growth especially in view of the fact that excess public spending could actually crowd out the private sector. The work cover 1970 to 2009, a period of forty years. The paper is important now as part of the deregulation of petroleum industry debate (See Olaide 2011).

2. DEFINITION OF CONCEPT

According to Bailey (1995), public spending may be defined as spending of government at all levels, it includes transfer payments and exhaustive expenditures such as purchases of consumables i.e. expenditures on current goods and services (recurrent expenditure), capital goods and services but according to Anyanwu (1997), public spending defines the absorption of resources, by the public sector, where the public sector is defined as the part of national economy where economic and other activities are under the control and general direction of government. On the other hand, economic growth has been defined in various ways According to Schumpeter (1934) Economic growth is a spontaneous increase in the volume of output which brings the economy to a new level of equilibrium. Friedman (1992) defines economic growth as an expansion of the economy in one or more dimensions without a change in its structure and development as an innovative process leading to the structural transformation of social system. Essentially,

economic growth is all about rise in a nation's total output of goods and services. The Gross National Output (GNP) is a major index of the level of the output of its nationals while the Gross Domestic Output (GDP) is a more relevant index to measure the quantum of domestic output. The greatest constraint in measuring output over the years has been among others insufficient data, the volume of self-served products in the economy, wastes and pollutions. This work intends to examine if public spending generates economic growth. Economic performance is been used as economic growth.

3. LITERATURE REVIEW

Theoretically, public spending in a pervasive way in a market economy may be justified when the market fails to become an efficient allocator of resources generally referred to as market failure. Otherwise, in a market economy, the role of government is to provide those items which the private sector may need but have little or no motivation to provide. These items are generally referred to as public goods.

Public spending may be beneficial or detrimental to economic growth. According to Omoro (2011) empirical evidence with regard to the public expenditure – growth relationship is diverse mostly based on cross sectional studies that often include a sample of both advanced and developing countries. Some of these studies as evidenced by Barro (1991) concludes that public spending has a negative impact on economic growth. But Ram (1986 cited in Omoro 2011) using a sample of 115 countries observed that government or public spending had a significant and positive impact on growth particularly in developing countries where the sample was drawn from. Expenditure in specific sectors as health, transport and communication had been investigated and found to have positive impact on economic growth in developing countries.

Musqrave (1958) has also shown that at the early stage of economic growth, there is need for a high rate of public spending as a proportion of total investments in a developing economy. This is due to the need for governments to provide basic social infrastructures as roads, health facilities, schools, bridges and other necessary institutions and infrastructure which are to put the economy on the paths of growth. The reasoning is that as the economy matures, and the private sector becomes fully equipped, the public sector should actually recede in influence. But Wagner (1883) proved that there was a long-run tendency for state activities to grow relative to the growth of the economy. This assertion of Wagner was based on empirical evidence and is often referred to as the Wagner's law. i.e. that government grows in influence as per capita income grows. Table 1, Shows public spending on selected sectors in the Nigerian economy between 1980 and 1996.

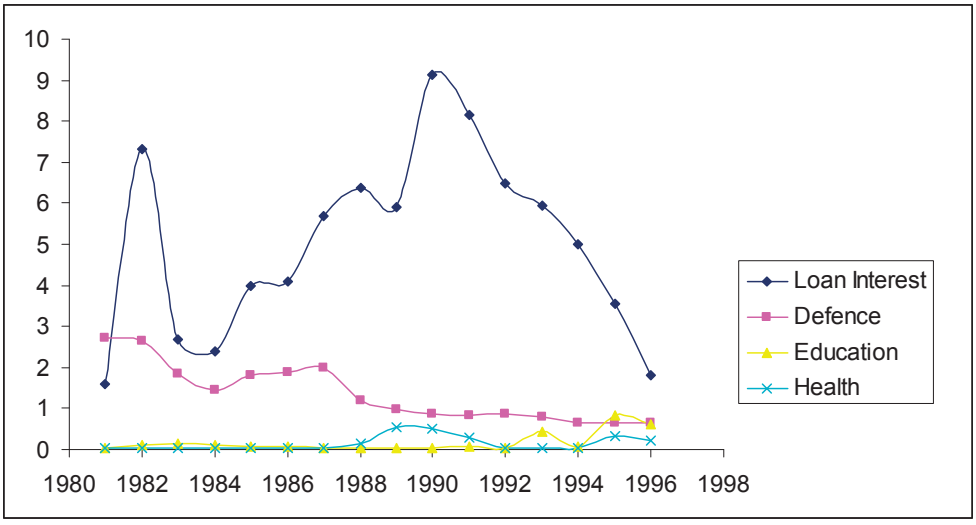
Table 1: ***Public Spending in Selected Sectoral Analysis of Federal Expenditure (1980 – 1996).***

Year	Loan Interest			Defence			Education			Health		
	Amt (NM)	% of Exp	% of GDP	Amt (NM)	% of Exp	% of GDP	Amt (NM)	% of Exp	% of GDP	Amt (NM)	% of Exp	% of GDP
1980	839.6	3.54	1.65	1606.3	6.78	3.16	1238.5	5.23	0.10	360.6	1.52	0.03
1981	818.0	3.85	1.61	1474.9	6.94	2.71	930.0	5.58	0.04	416.0	1.96	0.04
1982	8783.6	24.62	7.32	1371.4	8.92	2.65	924.2	6.01	0.10	269.0	1.75	0.03
1983	1525.8	13.24	2.67	1063.3	9.23	1.85	956.0	8.30	0.15	254.5	2.21	0.04
1984	1528.9	13.08	2.40	923.1	7.90	1.45	745.5	6.38	0.1	121.6	1.04	0.02
1985	2583.6	19.45	3.99	1312.8	8.85	1.81	823.5	5.55	0.08	223.4	1.51	0.02
1986	3004.7	17.91	4.11	803.2	4.79	1.90	875.2	5.22	0.07	312.21	1.86	0.03
1987	6181.4	28.0	5.68	215.5	9.79	1.98	488.7	2.04	0.02	124.2	0.56	0.05
1988	9238.7	33.29	6.36	1720.1	6.20	1.18	1786.7	6.44	0.04	578.2	2.08	0.14
1989	13273.7	32.74	5.90	2219.3	5.47	0.99	3399.3	8.39	0.04	796.8	1.97	0.55
1990	26414.4	39.53	9.14	2285.2	3.79	0.88	2819.1	4.68	0.02	823.2	1.37	0.5
1991	35962.9	39.67	8.15	2711.7	4.07	0.84	1553.3	2.33	0.07	771.3	1.16	0.3
1992	48712.6	38.75	6.50	4221.8	5.20	0.87	2444.2	2.60	0.05	1634.0	1.76	0.03
1993	49400.7	27.49	5.93	6381.6	3.60	0.78	6331.5	3.57	0.44	2567.6	1.45	0.02
1994	49400.7	34.88	5.01	667.4	4.67	0.67	9434.7	6.66	0.07	2843.1	2.07	0.03
1995	51058.4	19.90	3.55	9360.4	3.64	0.65	12172.8	4.75	0.85	4633.0	1.81	0.32
1996	42964.3	20.92	1.82	1568.2	6.43	0.67	14882.7	6.10	0.63	4834.9	1.98	0.21

Source: CBN Annuals (Various Years)

The sectors of focus include defence, education and health. These are very vital sectors of the economy. As at today the Academic Staff Union of Universities (ASUU) are on strike protesting among other things that government ought to increase its spending on education to at least 26 percent (See the Punch of December 6, 2011 P.8). As shown in Table 1, government has not met the mark. And it is difficult to expect government to direct as much as 26 percent of its budgetary provisions to only education in view of the competing demands of government finances e.g Health, Defence, Agriculture. Figure 1 presents the allocation in pictorial form.

Figure 1: *Public Spending Pattern in Nigeria 1980 - 1995*



Source: Table 1

Until Obasanjo achieved the repudiation of foreign debts with the Paris club, Nigeria had a high debt over hang which attracted high interest charges annually (See Table 1 and Figure 1).

4. METHODOLOGY

This work relies on secondary data obtained from the Central Bank. For ease of analysis, it is modeled that

GDP = F(TPE, TREY, FDEF, DSAP, EXR, INF) - - - - - - - 1

Where:

GDP = Gross Domestic Product at current market prices
TPE = Total Public Expenditure
TFEV = Total Federally Collected Revenue
FDEF = Fiscal Deficit (Federal government fiscal balance)
ΔSAP = SAP dummy (pre-SAP period taking the value of 0, 1970 – 1985 and 1986 – 1992 taking the value of 1.
EXR = Exchange Rate
INF = Inflation Rate

The Model can be re-specified as follows:

$GDP = X_0 + X_1TRE + X_2TREV + X_3FDEF + X_4DSAP + X_5EXR + X_6INF + Ut$ - - - -2

When Ut = Stochastic (error) term

The apriori expectation is as follows: $X_1>0$, $X_2>0$, $X_3<0$, $X_4>0$, $X_5<0$, $X_6<0$

The estimation technique used is the Ordinary Least Square (OLS) method. This is because "OLS" has best, linear and unbiased properties.

Table 2: ***Gross Domestic Product, Total Public Expenditure, Total Federal Collected Revenue, Fiscal Deficit, SAP Dummy, Exchange Rate and Inflation (1970 – 2009).***

Years	GDP at mkt Price	TPE	TFEV	FDEF	DSAP	EXR	INF
1970	6205.1	11300.1	634.0	-473.1	0	0.7143	13.8
1971	757.7	1092.4	-473.1	199.0	0	0.6955	16.8
1972	8,208.3	1863.7	199.0	96.8	0	0.6571	3.2
1973	11,990.7	1178.8	96.8	296.7	0	0.65709	5.4
1974	19,298.3	4260.8	296.7	1,767.6	0	0.6299	13.4
1975	31,558.8	8258.3	1,767.6	427.4	0	0.6159	33.9
1976	27,297.5	9710.5	5514.7	-1,068.2	0	0.6265	21.2
1977	32,747.3	11695.3	8042.4	-901.5	0	0.6466	15.4
1978	36,083.6	72337.1	7371.0	-23892.0	0	0.6060	16.6
1979	43,150.8	13191.4	1072.4	1461.7	0	0.5959	11.8
1980	50,989.6	23695.7	15233.5	-197.2	0	0.5464	9.9
1981	50,749.1	21238.8	13290.5	3928.6	0	0.6100	20.9
1982	51,709.2	15368.2	11433.7	-54404.6	0	0.6729	7.7
1983	57,142.1	11525.2	10508.0	-3456.0	0	0.7241	23.2
1984	63,608.1	11686.4	11253.3	-2557.6	0	0.7649	39.6
1985	72,355.4	14826.7	15055.8	-3039.7	0	0.8938	5.5
1986	73,067.9	16770.7	12595.8	-8254.3	1	2.02026	5.4
1987	108,885.1	22018.7	2538.6	5889.7	1	4.0179	10.2
1988	224769.7	40540.3	53870.4	15134.3	1	7.3916	38.3
1989	224769.7	40540.3	53870.4	15134.3	1	7.3916	7.5
1990	260636.7	60268.2	98102.4	22116.1	1	8.0378	13.0
1991	324010.0	66584.2	10091.,6	-35755.2	1	9.9095	44.5
1992	347090.0	96797.2	10053.2	-39532.2	1	17.2984	57.0
1993	697,090.0	2382.65	19279.4	107735.3	1	22.0511	72.8
1994	914940.0	202513.3	201910.8	-70270.6	0	21.8861	29.2
1995	1.977,740	269520.1	459987.3	-70270.6	0	81.0208	29.3
1996	2823900	288094.6	523597.0	1000.5	0	81.2508	8.5
1997	2939650.0	356262.3	591151.0	39049.40	0	81.6494	10.0
1998	2881310.0	487113.4	463608.89	-5,000.0	0	83.8072	6.6
1999	352650.0	947690.0	949187.9	-133,389.3	0	92.3438	18.9
2000	4980943.0	701059.4	190619.7	-285104.7	0	100.8016	12.9

2001	5639865.0	1018025.6	2231532.5	-03773.30	0	111.4921	14.0
2002	5901970.0	1078155.8	173187.5	-2011301.60	0	120.4700	15.0
2003	6100861.0	1319203.6	194333.0	-451471.70	0	135.3770	14.0
2004	11673602.2	1.735336.7	2355256.8	-2141426	0	137.5690	15.0
2005	14709766.5	2034578.0	1963452.1	-106732.5	0	136.3240	77.7
2006	18564591.70	2456852.2	2345.2428	-293322.2	0	126.0520	12.0
2007	20097317.70	2945763.5	2145345.8	-312245.6	0	125.5690	6.1
2008	25786425.90	3532689.8	1.123345.8	-252352.7	0	115.5020	15.1
2009	35897352.86	389723	2896723.2	-190452.9	0	115.6320	12.1

Source: CBN Annuals (Various Issues)

Table 3: ***Regression Results***

VARIABLES	**RESULTS**
R (Correlation co-efficient)	0.870
R2	0.756
$\overline{R}^2$ (Adjusted $\overline{R}^2$)	0.712
F – ratio	17.060
Dw, Statistics	2.666
X_0	-703510.68
X_1	7.449
X_2	-4.135
X_3	29.290
X_4	133672.281
X_5	90331.723
X_6	23315.87
$T[x_0]$	-0.343
$T[x_1]$	3.805
$T[x_2]$	-1.76
$T[x_3]$	3.561
$T[x_4]$	0.049
$T[x_5]$	1.963
$T[x_6]$	0.323
$Se[x_0]$	2049082.629
$Se[x_1]$	1.958
$Se[x_2]$	2.34
$Se[x_3]$	8.403
$Se[x_4]$	2736360.06
$Se[x_5]$	46015.031
$Se[x_6]$	72182.256

From the table above, the regression result is represented in a compact form, as can be seen below;

$$GDP = X_0 + X_{1\ TPE} + X_{2\ TFEV} + X_{3\ FDEF} + X_{4\ DSAP} + X_{5\ EXR} + X_{6\ INF} + U_T$$

GDP = 703510.68 + 7.449 (TPE) – 4,135 (TFEV) + 29.290 (FDEF)

Se (X0) (2049082.629) Se (x1) (1.958) Se(x2) (2.34) Se (x3) (8.403)

T(x0) (-0.343) t (x1) (3.805) t (x2) (-1.76) t (x3) (3.561) + 133672.381 (DSAP) + 90331, 723 (EXR) + 23314 (INF) + ut

Se (x4) (2736360.061) Se (x5) (46015,031) Se (x6) (72182.256)

t(x4) (0.049) t(x5) (1.963) t(x6) (0.323)

R^2 = 0.756

$\overline{R}^2$ = 0.712

F- ratio = 17.060

DW. Statistics = 2.666

Level of significance 5%

S-values and t-values are reported in parenthesis below the coefficient.

From the results above, the parameter estimate for Total Public Expenditure (TPE) and Fiscal Deficits Expenditure had the expected positive sign but Total Federal Collected Revenue (TFEV), Exchange Rate (EXR) and inflation rate (INF) did not conform to the expected signs.

In economic terms this means total public expenditure and fiscal deficits has positive impact on economic growth while total federal collected revenue impact negatively on economic growth. Increases in total public expenditure by N1.00 led to N7.5 increases in total GDP, while a decrease in total federally collected revenue (TFEV) by N1.00 led to decrease in GDP by N4.1.

In statistical criteria – the statistical significance of the parameter estimates are 3.05, -1.76, 3.561, 0.049, 1.963, 0.323 for total public expenditure, Total federally collected revenue (TFEV), Federal Deficit (FDEF), SAP Dummy (DSAP), Exchange rate (EXR) and inflation rate (INF) respectively. It is seen that t-cal > t-value for t-cal of t ($\overline{X}_1$) and t ($\overline{X}_3$). It is safe to conclude that public spending is significant to economic growth in Nigeria, at least within the period under review (1970-2009). The coefficient of determination showed that the model had a high explanatory power of about 75 percent, meaning that 75% of changes or variation is explained. The F-test also measured the fitness of the

model indicating an empirical result of 7,060 against the 2.45 critical value at 95% significant level.

5. CONCLUSION AND RECOMMENDATION

This study has shown the importance of government and its spending in Nigeria is an engine of growth. Public spending directs the pace of economic activities in Nigeria, a high spending affects growth positively. This is understandable because the economy is monocultural and relies on the petroleum industry in which government is the greatest beneficiary. This also explains why politics has become the most lucrative profession in Nigeria. The bulk of resources to run the economy including policies are domiciled with government and this can be inimical to development because according to Okowa (1996) when economic and political power reside in the same group of people, radical changes (which could change the *status quo*) become difficult but development arises through such changes. It also explains pockets of violence in Nigeria (See The Punch of Dec. 8 and Nov. 25, 2011) proving that when peaceful change become impossible, violent changes become necessary.

Governments in Nigeria should not limit its activities but should also allow the private sector to grow. Part of the oil revenue should be allocated to owners of land where such wealth was not to enable them invest in alternative businesses and grow the economy. Government should deregulate the upstream of it wants to deregulate the downstream of the petroleum industry. As it is now, the private sector is being crowded out and this explains why there is a weak private sector in the economy. Apart from the banks which are now on a dwindling turn, the only viable sector is oil and this is a sector with a very weak linkage to the domestic economy. So, apart from those in government or the oil sector, many Nigerians live in poverty and low output.

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A STRATEGIC ANALYSIS OF SAFETY AND AVAILABILITY OF NATURAL GAS: CURRENT SITUATION AND TRENDS IN CROATIA

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Abstract

Due to its characteristics and availability, natural gas is becoming an increasingly important energy source whose consumption is rapidly increasing worldwide, including Croatia. The main objective of this paper was to analyze the Croatian gas market in terms of safety and availability of supply. For this purpose, production and consumption of natural gas were analyzed. Also, the current situation and development tendencies associated with it were detected. Given the growing importance of the process of regionalization and globalization of the gas market, the analysis of safety and availability of natural gas in Croatia was carried out in an international context, and hence possible supply routes of energy were discussed. According to forecasts, by the year 2030 Croatia will meet only about 1/8 of its needs with its gas production. Therefore, the issue of diversification of gas supply routes and expansion of its storage capacities is extremely important.

Key words: *natural gas, supply routes, Croatia*

1. INTRODUCTION

In the past two decades, world natural gas proved reserves have been growing, and world natural gas consumption has been growing even faster. Therefore,

natural gas is gaining a strategic role as an energy source. Moreover, the growing importance of LNG (i.e. Liquefied Natural Gas), gas production from unconventional sources, and new technologies (e.g., cogeneration, trigeneration, polygeneration, fuel cells) particularly contribute thereto. Construction of gas pipelines and LNG facilities enable trading with gas over long distances and contribute to the globalization of the gas market. Therefore, the gas market, though still primarily based on regional influences, becomes more global in character, especially in terms of planning supply routes and pricing.

Croatia only partially covers its needs for fossil fuels with its own oil and natural gas production, while it imports the largest part. The forecasts of the Energy Institute Hrvoje Požar (EIHP) indicate an increasing dependency of Croatia on energy imports, especially on oil and gas, so that natural gas and crude oil combined will share approximately 24.4 percent (Vuk et al., 2011, p. 38). This is supported by the fact that the average growth rate in natural gas production decreased to 1.26% in the period 1992-2010 compared to 8.43% in the period 1945-1990 (see Table 3). Such slow growth in natural gas production, together with an increase in consumption (by 1.28% in the period 1992-2010), caused an increase in the average share of imports of natural gas from 8.34% in the period 1978-1990 to 34.71% in the period 1992-2010 (Table 3). An increased dependence on natural gas and energy import is opposite to Croatia's strategic interest and the wish for safe, quality, affordable and sufficient energy supply, especially due to a number of factors such as, for example, instability of prices in regional and global markets, or changes in global geopolitical relations.

As an available, relatively inexpensive and clean energy source, natural gas is becoming an increasingly important part of not only the European, but also the Croatian energy strategy. The reason for this can be found in the growing consumption of this energy source, and partly in the fact that gas can be used as fuel for energy production, heating, transport, fuel production, production of plastics and other goods.

The main objective of this paper is to analyze the Croatian gas market in terms of safety and availability of supply. For this purpose, production and consumption of natural gas will be analyzed and the current situation and development trends related to them will be detected. Given the growing importance of the process of regionalization and globalization of the gas market, the analysis of safety and availability of natural gas in Croatia will be carried out in the international context, and will therefore include an analysis of possible supply routes of this energy source.

After a review of production and consumption of natural gas in the European and international context in the next section, the analysis of safety and availability of natural gas in Croatia in terms of production, consumption, supply routes and storage is given in Section 3. A conclusion is given in Section 4.

2. PRODUCTION AND CONSUMPTION OF NATURAL GAS IN THE INTERNATIONAL CONTEXT

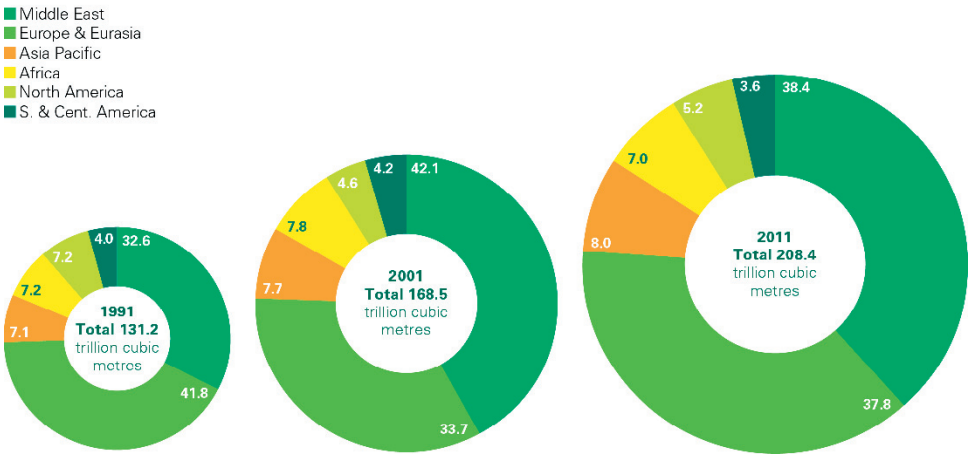
According to the U.S. International Energy Agency (IEA, 2012), total gas production is expected to increase by 55% by the year 2035, out of which unconventional sources (e.g. shale gas) will account for almost 2/3 of growth (under the condition that it becomes commercially viable and environmentally acceptable), and its share in the total output will rise from 14% at the present time to 32% in the year 2035. The increased availability of natural gas will have a moderate impact on gas prices, which will result in the higher global demand for natural gas by more than 50% between 2010 and 2035. The gas share in the global energy mix will reach 25% in the year 2035, it will exceed coal and gas and become the second largest source of primary energy after oil.

According to the data published in the BP Statistical Review of World Energy (2012), in 2011 the European Union (EU) produced 155 billion m3 of natural gas and this was not sufficient to meet its demand, which stood at 447.9 billion m3 in the same year. Hence, the EU was, as in previous years, a net importer of natural gas. The share of natural gas produced in the EU in the year 2011 was 4.7% of total world production and it decreased in 2011 in comparison to 2010. The share of natural gas consumed in the EU in 2011 in total global consumption was 13.9%, and it was also lower than in 2010. According to the same source, Europe and Eurasia have recorded an increase in production in the period 2009-2011. The largest producer of natural gas is Russia, whose share in total production of the region is almost 59% and reports a rising trend. On the contrary, its share in consumption is much lower and in 2011 it accounted for 38.6%. Only Norway's share is at a level of about 10% in production, while the share of all other countries is less than 10%. In natural gas consumption, only Russia has a double-digit share, while the share of all other countries is less than 10%.

Following the study of the European Centre for Energy and Resource Security (Eucers, 2011), unconventional sources of natural gas in Europe (especially shale gas) could cover European gas demand for at least another 60 years. That would reduce Europe's dependency on supplies from Russia and the Middle East. Shale gas reserves in Poland are estimated at 47% of the current European reserves and their commercial exploitation could begin soon.

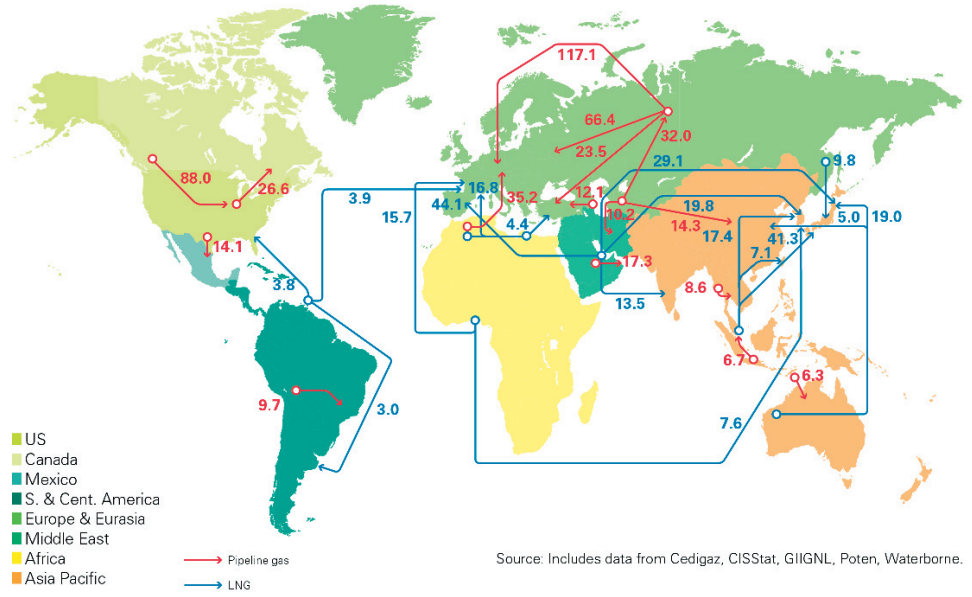
The highest share of conventional natural gas reserves is located in the Middle East (about 40%), followed by the countries of the former Soviet Union and others. Figure 1 and Figure 2 show the distribution of world natural gas reserves and the main supply routes for trading with natural and liquefied gas, respectively.

Figure 1: ***Distribution of proved gas reserves in 1991, 2001 and 2011***



Source: BP (2012)

Figure 2: ***Trade with natural and liquefied gas between regions in 2011 (in billion m³)***



Source: BP (2012)

As gas production from unconventional sources has not yet achieved the desired level of development, European countries are highly dependent on gas supplies from Russia and the countries of Central Asia and the Caspian region, using pipelines and LNG technology. The situation in Croatia in this respect is given below.

3. AVAILABILITY OF NATURAL GAS IN CROATIA IN TERMS OF SUPPLY SAFETY AND SUFFICIENCY

3.1. Natural gas production

In 2010, 2727.2 million m3 of natural gas were produced in Croatia (Table 1). Natural gas is produced in Croatia from 25 gas fields, 16 Panona gas fields and 9 Adriatic gas fields, which cover 84.1% of domestic needs. However, when the budget includes only natural gas from the Adriatic Sea that belongs to Croatia, domestic natural gas will settle 71.9% of total demand (Vuk et al., 2011). The highest gas production (see Table 2) is realized on the exploitation fields Panona, Molve and Kalinovac which have built plants for processing and preparation of gas for transport – the Central Gas Station Molve I, II and III. Their processing capacities are shown in Table 2.

Table 1: ***Balance reserves and natural gas production (million m3)***

Natural gas	Reserves	Production
1990	48,475.30	1,982.30
1995	38,878.80	1,966.40
2000	29,204.50	1,658.60
2005	30,358.60	2,283.40
2006	30,110.50	2,713.50
2007	40,919.70	2,892.10
2008	36,436.10	2,729.40
2009	34,500.20	2,704.80
2010	31,587.10	2,727.20

Source: Vuk et al. (2011, p. 137), according to Ministry of economy, labour and entrepreneurship (MELE) and EIHP

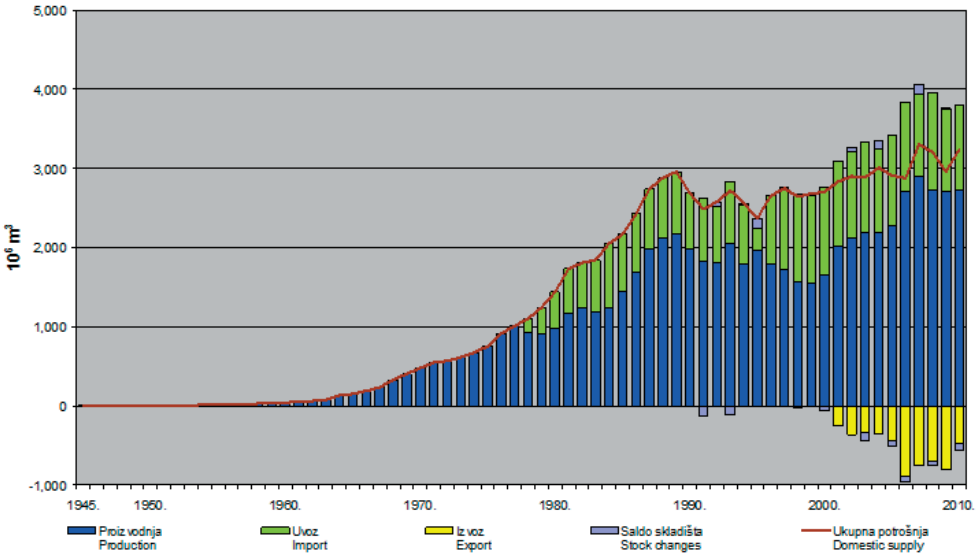
Table 2: ***Production capacities of the central gas stations (million m3/day)***

Central gas station	Installed capacity
Molve I	1
Molve II	3
Molve II	5
Ukupno	9

Source: Vuk et al. (2011, p. 137), according to INA

In the structure of primary energy production, natural gas increased its average share from 9.25% in the period 1945-1990 to 37.50% in the period 1992-2010. In the latter period, the average annual growth rate was 2.24%. While Table 2 shows the structure of the natural gas supply and the average annual growth rates, availability of natural gas in Croatia between 1945-2010 is illustrated in Figure 3.

Figure 3: *Available quantities of natural gas in Croatia*



Source: EIHP, www.eihp.hr/english/projekti/EUH_od_45e/euh45e.html (accessed January 12, 2013)

Table 3: *The structure of the supply of natural gas and an average annual rate of change (in %)*

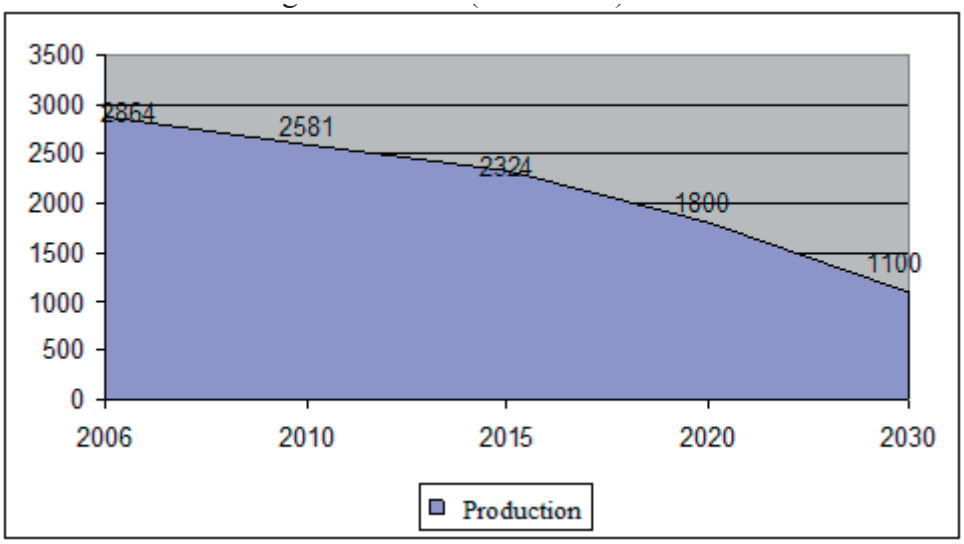
Share	1945	1955	1965	1975	1985	1995	2005	2010
Production	100.00	100.00	100.00	100.00	66.43	83.04	78.47	84.13
Import	0.00	0.00	0.00	0.00	33.57	11.57	38.97	33.00
Export	0.00	0.00	0.00	0.00	0.00	0.00	-15.35	-14.93
Stock change	0.00	0.00	0.00	0.00	0.00	5.39	-2.10	-2.20
Total	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00

	Average share, in%		The average annual rate of change,%	
	1945-1990	1992-2010	1945-1990	1992-2010
Production	91.66	74.75	8.43	1.26
Import	8.34	34.71	6.96	2.78
Export	0.00	-9.35		
Stock change	0.00	-0.11		
Total	100.00	100.00	8.80	0.69

Source of data for the calculation: EIHP, www.eihp.hr/english/projekti/EUH_od_45e/euh45e.html (accessed January 12, 2013)
Note: for import the period is 1978-1990

Table 3 shows slowing of the average annual growth rate of natural gas production in Croatia and increasing of imports, but also exports over the last few years. According to estimates by the Ministry of Economy, Labor and Entrepreneurship (MELE) and UNDP, the production will be reduced from 2,581 million m3 in the year 2010 to 1,100 million m3 in 2030 (see Figure 4). As already stated, according to the EIHP, there will be a decrease in the production of fossil fuels, so that natural gas and crude oil together will have a share of approximately 24.4% (Vuk et al., 2011, p. 38).

Figure 4: ***Production of natural gas in Croatia (million m3)***



Source: MELE and UNDP (2008, p. 69)

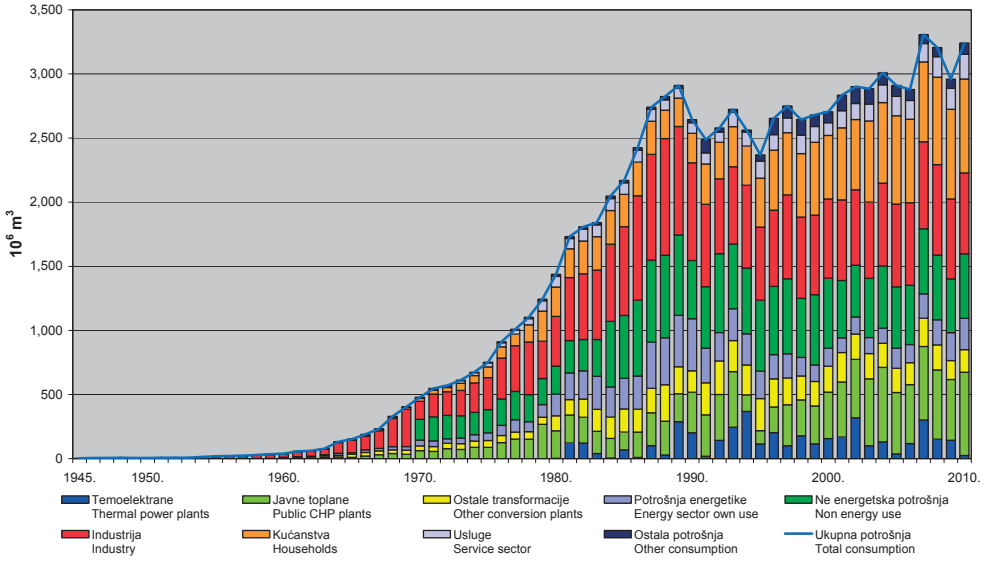
Plinacro Ltd., the Croatian gas transmission system operator[1] predicts that in the year 2030 Croatia will meet only 13% of its gas needs with own production, while for meeting the needs of the rest it will have to import gas.

3.2. Natural gas consumption

According to the data from the EIHP, the share of natural gas in total energy consumption expressed in PJ in the period 1992-2010 was 26.74%, and in the same period, gas consumption has grown at an average annual rate of 1.23%. In the structure of final energy consumption gaseous fuels have participated with an average share of 19.52%, with an average annual growth rate of 2.59% in the period 1992-2010. A lower average annual growth rate was achieved in industry (0.40%), in contrast to the consumer sector which experienced a growth of 4.70%. However, the average industry share in the same period was higher than the share of other sectors (38.06% vs. 21.80%).

Rapid gas consumption growth was recorded in the 1970s and 1980s and this is illustrated in Figure 5. A decline was recorded in the early 1990s as well as over the last few years, as a response to the transition process, the Homeland War and recession, although not in its intensity as total and final energy consumption. In 2010, natural gas consumption was 3241.5 million m3.

Figure 5: ***Structure of natural gas consumption in Croatia***



Source: EIHP, www.eihp.hr/english/projekti/EUH_od_45e/euh45e.html (accessed January 12, 2013)

[1] Source: Plinacro Ltd.: Natural gas, http://www.plinacro.hr/default.aspx?id=37 (assessed 20 January 2013)

Gas consumption in Croatia grew at an average annual rate of 1.28% in the period 1992-2010. During this period, the fastest growing gas consumption was recorded in households, services and in other consumption, while an average annual decline of 9.42% was reported as regards consumption of gas by thermal power plants. There are significant annual fluctuations in natural gas consumption, which makes it difficult to plan necessary quantities. Data shown in Table 4 provide more information on average consumption, consumption structure and average annual rates of change.

Table 4: ***Structure of natural gas consumption and average annual growth rates, in%***

Share	1945	1955	1965	1975	1985	1995	2005	2010
thermal power plants	0.00	0.00	0.00	0.00	3.18	4.82	1.25	0.74
public CHP plants	0.00	0.00	7.08	11.58	6.36	4.37	16.46	20.05
other conversion plants	0.00	0.00	15.92	7.08	8.28	10.60	6.47	5.45
energy sector own use	6.30	6.30	7.60	8.04	11.06	9.00	5.42	7.50
non-energy use	0.00	0.00	0.00	24.09	22.59	23.40	16.43	15.55
industry	83.70	83.70	64.44	33.36	31.91	24.06	22.21	19.44
households	6.00	7.73	3.71	11.09	11.63	16.10	23.64	22.61
service sector	4.00	2.27	1.26	3.97	4.15	5.60	5.20	5.94
other consumption	0.00	0.00	0.00	0.80	0.84	2.05	2.92	2.73
total consumption	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00

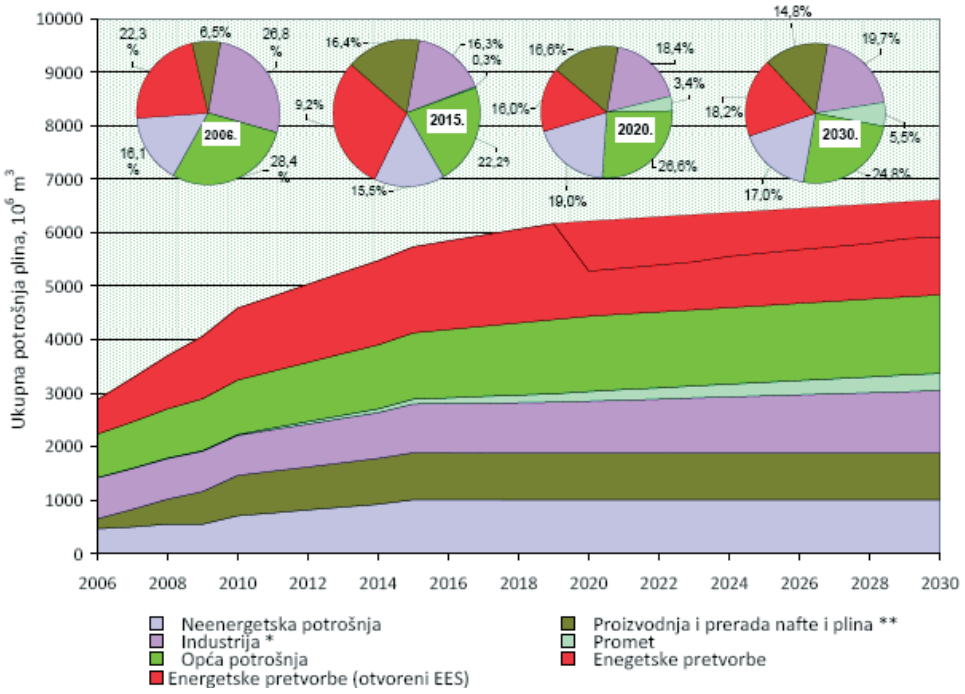
	Average share, in %		The average annual rate of change, %	
	1945-1990	1992-2010	1945-1990	1992-2010
thermal power plants	0.91	5.85	53.93*	-9.42
public CHP plants	6.86	13.91	14.53**	3.38
other conversion plants	6.33	7.36	12.08***	-2.16
energy sector own use	8.96	6.29	19.07****	0.52
non-energy use	10.31	17.92		-1.11
industry	54.93	22.22	14.00	0.43
households	8.33	18.87	17.70	5.37
service sector	3.02	4.66	16.08	5.16
other consumption	0.35	2.92	13.65*****	5.63
total consumption	100.00	100.00	16.74	1.28

Source of data for the calculation: EIHP, www.eihp.hr/english/projekti/EUH_od_45e/euh45e.html (accessed January 12, 2013)

Note: The average annual growth rates in the period 1945-1990 are different; * is for the period 1981-1990; ** is for the period 1964-1990; *** is for the period 1961-1990; **** is for the period 1946-1990; a ***** is for the period 1972-1990.

According to expert predictions, consumption of natural gas in Croatia would grow by the year 2030 to 5918.2 million m3, given that by then the European and regional natural gas and electricity markets would develop to a single energy market in which power plants will compete with each other according to their competitive abilities. The predictions are that energy consumption in such an open system would amount to 6609.3 million m3.[2] Figure 6 shows the total consumption projection of natural gas in Croatia.

Figure 6: ***The projection of total natural gas consumption in Croatia***



Source: MELE and UNDP (2008, p. 61)
*Note: * final consumption, self-produced electricity and steam & hot water; ** without non-energy consumption, including overall losses of natural gas in the system*

Taking into account the predictions of natural gas consumption and production, the analysis of potential routes for natural gas is of crucial importance to managing this form of energy and achieving the Croatian energy development goals. Specifically, in the Croatian Energy Strategy (NN 130/09) it is stated that its objective is to build a sustainable energy system, therefore a system with balanced development between environmental protection, competitiveness and safety of energy supply. That system needs to provide quality, safe, affordable and

[2] Source: MELE and UNDP (2008, p. 61, Table 8-2)

adequate supply of energy to Croatian citizens, which is not an easy task bearing in mind the growing demand, limited domestic resources and uncertain global energy market conditions.

3.3. Supply routes and storage of natural gas

In Croatia, about 85% of natural gas is produced domestically, with part of the production exported according to the production sharing contract between INA and the Italian company Agip. Agip has participated in investments in developing and bringing to production gas fields in the northern Adriatic. The rest of gas is imported. Figure 2 places Croatia in world trade with natural and liquefied gas, whereas Figure 7 places it in the existing and planned projects and projects under construction, which link the Croatian gas transportation system with regional gas systems.

Figure 7: *International projects related to the natural gas supply*

Source: Plinacro Ltd. (2012, p. 7)

In ensuring safe supply of natural gas, supply diversification and the ability to use different supply sources, as well as increasing the capacity utilization of the primary national gas transport system, transit and interconnecting pipelines have a great importance (see the 2011 Annual Report Plinacro on the status and plans regarding the pipelines). In Croatia, the ongoing development activities related to the international projects include: the Ionian-Adriatic Pipeline (IAP), LNG RV, the NETS initiative and the South Stream (see Figure 7).

1. Ionian Adriatic Pipeline - IAP. It is a pipeline that would connect the gas pipeline system of Lika and Dalmatia with the Trans-Adriatic Pipeline (TAP), with continuous building from Split to Ploče and further on south through Montenegro and Albania. It is a strategically important project whose implementation will allow the opening of a new energy corridor for the Southeast Europe region within the fourth EU transmission corridor, with the aim of establishing a new supply route of natural gas from a new source - the Caspian and Middle Eastern regions. In this way, areas of all states the IAP pipeline has an impact on (Albania, Montenegro, Bosnia and Herzegovina, and Croatia) would be gasified. The total length of the pipeline from Croatian Split to Albanian Fieri will be 516 km, and its capacity of 5 billion m3 per year would enable the supply of natural gas markets within the region, while the other half could be used in Croatia and for transit. The Ionian-Adriatic Pipeline will have an option of two-way gas flow, and it will allow the supply of Southeastern Europe with natural gas from other sources, some of which should be mentioned in particular - the future LNG solution on the island of Krk.

2. LNG RV (Regasification Vessels). It is about building a facility for receiving LNG ships with a gasification plant and its connection with the Croatian gas transportation system. Given that the development of the Adria LNG project is at a standstill, this project is designed primarily as a possibility of bridging the supply of natural gas until the completion of construction and commissioning of classical LNG terminals which should be working in Omišalj on the island of Krk.

Application of the LNG RV technology provides a new gas supply route to the country it is located in. Also, it opens up the possibility of gas transit and can be utilized for ensuring additional quantities of gas during peak demand as such ships typically have tanks for liquefied natural gas. The advantage of using the LNG RV technology over conventional liquefied natural gas lies in the fact that it is cheaper and the implementation of the project is faster. In adition, it has less impact on the environment. Therefore, in accordance with the approved "concept of migration", Plinacro predicted the LNG development project in phases. The first phase would include construction of installations for reception of LNG carriers and their connection with the land transport system. Specifically, the gas that would be taken over from the terminal for LNG RV on Krk to the mainland would be transported through the new pipeline Kukuljanovo-Omišalj, and then through the Croatian gas transportation system to consumers, underground storage facilities and/or neighboring countries. The second phase that would follow would include construction of facilities for gasification on land, while the existing berth from the first phase would be used for reception of conventional LNG ships, for reception and storage of LNG. Finally, the third phase would include building classical inland tanks for LNG (the most expensive

part of conventional plants), and by that the maximum capacity of the terminal (from the predictable 4-6 billion m3 per year) would be achieved.

Related to construction of an LNG terminal on Krk, the negotiations are in place regarding the fact that Qatar could be a gas supplier in the next 25 years. Construction of a gas terminal in Omišalj on the island of Krk will be taken over by the company LNG Croatia. Its business owners are Plinacro and HEP Zagreb with the same percentage as in 2010 (a jointly controlled entity). In 2011, recapitalization of LNG Croatia was carried out, whereby the owner shares remained the same. The expected capacity of the terminal would be 5 billion m3, at least in the first phase, and the terminal could be operational in a few years. The LNG project is an alternative to the previously planned terminal at the same place by Adria LNG, an international consortium of four European energy companies (E.ON Ruhrgas (Germany), Geoplin (Slovenia), OMW Group (Austria) and Total (France)). The Adria LNG project was stopped at the end of 2010, as the consortium delayed the final decision until further notice due to the reduction of gas demand during the economic crisis in the European markets.

3. LNG evacuation pipeline Omišalj-Zlobin-Rupa. This pipeline is intended for takeover of the entire gas quantities from the LNG solutions in Omisalj on Krk. The planned capacity of the pipeline with a diameter of 1000 mm and a pressure of 100 bar would be 15 billion m3. The international pipeline Zlobin-Rupa (Kalce/SLO) in Zlobin would be connected with the main pipeline Omišalj-Zlobin, and in Slovenian Kalca with the future Slovenian transportation system, thereby allowing the transport and transit of natural gas from LNG solutions to Slovenia and further to Italy and the central European countries.

4. The NETS (New European Transmission System) project is about connecting gas pipeline systems of the countries in Central and Southeast Europe, aimed at creating a stable regional gas market that would connect the Baltic and the Adriatic, i.e. which could be linked to new supply routes. As part of this project an EU grant was promised to Croatia for connecting the pipeline to Hungary.

5. The South Stream is a 3,600 kilometer pipeline that would transport gas from Russia to Europe, passing from Russia via the Black Sea to Bulgaria, where it would be separated into two ways: the southern that would lead through Greece to Italy, and northern that would go through Serbia to Croatia, Slovenia and Austria and from Croatia directly to the north of Italy. Although the interest of Russians was clearly stated in 2007, due to political reasons Croatia did not sign the treaty, and the Russian South Stream pipeline, as published in November 2012, would bypass Croatia. This means that the transit of gas will not take place through Croatia. Although Croatia will have an access to gas from the South Stream, it will lose millions in transit. A possible route of the South Stream

for Croatia was determined by Backo Novo Selo-Sotin-Slobodnica and the next cooperation steps in the implementation of the project are under consideration. The underwater section of the Black Sea pipeline would be 900 kilometers long, and the capacity would be 30 billion m3 of gas annually. The land sections would have less capacity.

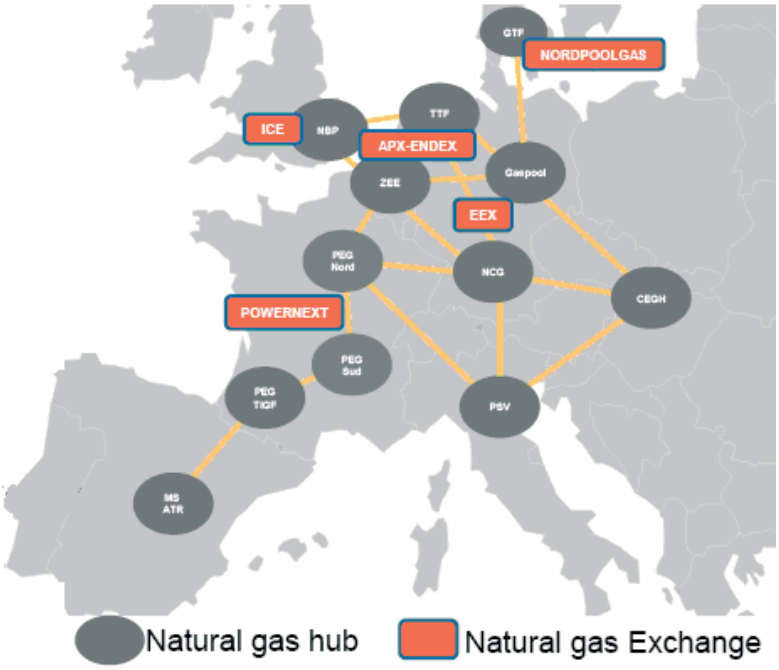
These activities, as well as other projects related to interconnection with the pipeline systems from the environment (see the 2011 Annual Report Plinacro Ltd.) are directed, which is extremely important, to increasing the safety and diversification of gas supply. For this purpose it is important to emphasize the activities of the company Podzemno skladište plina Ltd., a company registered for the storage of natural gas. The company owner is Plinacro Ltd. Podzemno skladište plina Ltd. provides for safety and flexibility of gas supply, or, as stated by the Podzemno skladište plina Ltd. (www.psp.hr), their importance lies in balancing the supply and consumption of gas (seasonal and daily), optimal (uniform) gas production, favorable gas purchase (hourly dynamics of supply remains constant throughout the year) and acting as a strategic reserve of gas. Specifically, surplus of gas that occurs in warmer parts of the year and near end consumers (in large amounts over a long period of time and in the same condition) is stored. That gas can be (partially or entirely) used in colder parts of the year when gas is "missing". In addition to the gas storage facility Okoli, which is operated by Podzemno skladište plina Ltd., development plans of the company include both extension of existing storage capacity and construction of a new storage in Grubišina Field (see Development Plan for Podzemno skladište plina, http://www.psp.hr/o-nama/poslovanje/plan-razvoja/).

With its own production and storage facilities, liquefied natural gas and various supply routes, gas supply from the spot market, supply would be improved in terms of safety, but potentially also in economic terms. It should be noted that the implementation of the interconnector with Hungary is responsible for the opening of the market because Croatia gained access to Hungarian warehouses where there is a capacity of approx. 6 billion m3 of gas, of which E.ON has 4.2 billion m3, access to Russian gas from a new route via Ukraine and Hungary, as well as an indirect approach to Serbia and Romania. At the same time, a new supply route to the spot market, Austria's gas hub at Baumgarten, was opened.

There are numerous gas hubs in Europe (see Figure 8), but the Austrian gas hub, the Central European Gas Hub, CEGH, Baumgarten, is especially important for Croatia. It is a wholly owned subsidiary of OMV Gas International and one of the most important hubs for natural gas in Central Europe. CEGH provides an international trading platform in gas at Baumgarten and other border points of the Austrian network. It is infrastructurally equipped. Its specificity is in the fact that all gas that comes to Baumgarten physically originates from the East

(Russia, Nabucco, South Stream). About 1/3 of oil is shipped to Europe through Baumgarten.

Figure 8: *European gas hubs and gas exchanges*



Source: Heather (2012)

The problem of Croatia with access to the spot market primarily relates to overcrowding of the Slovenian-Austrian and Austro-Hungarian gas interconnector. However, in the future Croatian access to the spot market is certain, and this will be enhanced by availability and safety of natural gas supply in Croatia.

4. CONCLUSION

Natural gas is becoming an increasingly important part of not only the European, but also Croatian energy strategy. The main reason for this lies in the fact that it is a relatively available, inexpensive and clean energy source whose reserves and production grow. On the other hand, the use of this energy source is numerous and multi-sectoral, and therefore greater. According to the estimates by the IEA (2012), global demand for natural gas will grow by more than 50% between 2010 and 2035, and the gas share in the global energy mix will reach 25% in 2035. Thus, it will become the second largest primary energy source after oil.

An increase in natural gas consumption in Croatia is not accompanied by an increase in natural gas production, and the need for natural gas import will rise. In 2010, Croatia met 72% of its total natural gas demand through domestic sources. According to expert predictions, by 2030 Croatia will meet only 13% of its gas needs with its own production. Taking into account Croatian energy-related development goals, especially in ensuring competitive, high quality, safe, affordable and adequate energy supply, as well as information on the status and trends in production and consumption of natural gas, it is of strategic interest to diversify supply routes and increase storage capacities. In this sense, the ongoing projects include projects of interconnections with pipeline systems in the region, i.e. international projects: the Ionian-Adriatic Pipeline, LNG RV, the LNG evacuation pipeline Omišalj-Zlobin-Rupa, the NETS Southern Stream, projects aimed at providing access to the gas hub at Baumgarten and expanding storage capacities of natural gas in Croatia.

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MEASURING SERVICE QUALITY IN BANKS USING *SERVQUAL*

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Abstract

Once banks began to understand the leadership role to maintain satisfied customers and long-term competitive advantages arising from this, the banks began marketing promotion. The main purpose of this exercise was to make a qualitative research on opinions, attitudes and perceptions of customers of Transilvania Bank from Oradea (retail/corporate) on their quality of banking services. The study was structured in two directions: identify expectations of customers before using the services of Transilvania Bank and their perception about the quality of banking services after becoming bank customers. Data collection was obtained using questionnaires and the collected data were summarized in a summary of the results grid, applying then calculations and analysis on them. They showed such attitudes, opinions and perceptions of customers about the quality of services are offered by BT, and then were formulated recommendations clear and immediate on the quality of customer service provided to adapt SERVQUAL dimensions to the socio-cultural context specific to the Romanian banking market.

Keywords: *servqual, expectations, perception, dimension, satisfaction*

1. THE IMPORTANCE AND THE IMPLICATIONS OF MARKETING BANKS

The competition in banks is growing, even though there are still some obstacles on the market, and the intensity of the commercial activities reached very high rates due to strong globalization and market operators.

These two factors, competition and development of commercial actions, make it necessary to implement a marketing activities in banks. Banks have shifted theirs orientation from that towards the product into the market. Market orientation means that banks have the necessary measures to satisfy the demands ofcustomers, to innovate the products and to identify consumer needs. Considering that human needs are in constant motion and change, the organizational and functional structure of the bank should be flexible.

The marketing process requires attention and importance from the financial market operators. To be held in optimal conditions, banks should identify the most profitable markets, to analyze the needs of all customers, both present and potential (future) and to prepare and implement strategies and policies to meet the targets. Marketing services generally appeared as an application of the consumer marketing in industries, agricultural and international.

The factors that led to the development of marketing services could be described by the following: removal of some restrictions imposed by that leading the liberalization of services, technology advancement, development leasing, business automation, etc..

Bank marketing has an important role in maintaining the relationship between bank and customer. Opposite banks offer products to consumers is not limited to developing banking As technology evolves, the emergence of new needs in this economic relationship between the two is crucial. To survive the competitive environment, banks should pay attention to satisfying customer needs, to care for them, or risk losing them.

However, there are some situations where a bank can ignore customer expectations. If the market that they are acting on has a general level of quality services relatively low, and customers have high expectations, banks do not give much attention to quality services. This can be repaired by the appearance of a competitor offering superior quality services. A dangerous approach that places the service quality on an inferior place in the top priorities of the bank is dumping policy. A bank may charge prices lower than the competition, but it is quite difficult because technology advances and a competitor can provide good quality services at a lower price, because other costs are lower.

There can also be a monopoly. In this case it is not necessary to focus on the client, because he still has no where to turn for alternative services. Monopoly situation is not realistic today, because the banking market is highly developed,

with many businesses that provide products to please the customer. If there is a new product on the market for a short time, the bank that offers that product is superior to other banks that can not offer the same products, the customer having to resort to that bank, on the risk of not receiving the same quality as the hoped. Competition will take innovative ideas, and the partly monopoly situation will disappear.

Even if customers are offered high quality services, they will not always remain faithful to banks if there are no new products on the market, consumers are willing to pay for those services. In theory, the price offered for a product is one of the factors that can influence the consumer, in reality it has a decisive weight in the choices they make.

The relationship between customer and bank is also influenced by the knowledge of customers about the bank and the bank's brand. Consumer confidence and loyalty can be achieved by maintaining brand image, which may contribute to the choice of bank as service provider. While the choice is influenced by brand, effective choice depends on the amount of knowledge possessed by customers about the nature of provided service.

Bank marketing is important because by means of it is succeeding to overcome barriers for imposed by the market competition, the intensity of the banking market operations having a very high level, largely due to globalization and the high interest of companies. Banks practice a customer focussed policy, seeking profitable markets while satisfying consumer expectations analysing the present and potential expectation of customers, and elaborating strategies for the bank to achieve the desired objectives.

Marketing bank has the following applications:

Analysis, research and studying customers and their needs, to generate new high quality products. To establish an efficient strategy is required to know in detail all information relating to customer needs and expectations of behavior are, by performing experiments or marketing phenomena simulation.

- Ensure a tracking of launched products, ensuring a complex management of banking services, on as new market requirements, which will be updated. Marketing needs to anticipate and influence as much as possible the environment in which the banke operates, so that emerging opportunities to be exploited. A goal function is to provide high quality services aimed at increasing consumer welfare.
- To publicize and advertise the brand bank, to popularize banking products and inform consumers about the benefits of services.
- Encourage and support banks' offering continuous training

Cost analysis, in order to choose the best solution for both the customer and the bank. Profit is a principal, the essence of existence the entire banking system, like any other business. By marketing can be determined what should be produced and how, thus avoiding the appearance of over stock, priced according to market opportunities, making it possible to achieve a high volume of sales, having also applications in transportation, distribution, storage and sale effective products / services bank.

So, marketing has a critical role in ensuring bank liquidity because it oversees economic environment with the help of informational system and update the database with new marketing research results, accurate and complete.

2. THE QUALITY OF BANKING SERVICES - THE BASIC PREMISE OF A BANK LONGEVITY

Romanian banking system can be characterized as a dynamic business environment in which banks encounter considerable difficulties to increase or at least to maintain market share. Increasing the number of banks led, on the one hand to increased competition, and on the other hand has increased standards that banks must meet to gain a net advantage in this area. Moreover, competition between banks is a factor that generates increasing demands from customers, putting pressure on management. People everywhere are now more and more access to information, both quantitatively in terms of sources and in terms of quality, so it is expected that banks working together to meet the needs where when and how they want. Otherwise, customers are willing to make changes, and the bank risks losing its market share for competitors.

Considering all of this, the main concern of credit institutions in Romania should be to maintain a portfolio of clients. Long-term cooperation relations between a bank and its customers is the proof of that bank's efforts in providing quality services that meet consumer demands. Moreover, keeping existing customers is a challenge for banks and a starting point in trying to improve performance, financial performance. It is therefore necessary more and more to focus all efforts aimed at improving services, a bank has more than won as not only meet our customer needs, at their request, but even they anticipated. As some researchers, "high-quality services resulting in satisfied customers" who "becomes, then, loyal customers." In other news, the high standards adopted by some banks to bring them a competitive advantage over others, in that if the customer is satisfied, most likely will continue to use the services of the institution that has worked and even recommend his knowledge, ignoring offers other banks. So it is important to review the quality of services so that you can identify those that need improvement. Banks should be responsive to the

feedback they provide to customers and nuance, in the sense of knowing which aspects are crucial in obtaining a degree of satisfaction as close to maximum. Only then will be able to distinguish between other actors in the banking and loyalty to their customers.

In terms of consumer services can be perceived as benefits or experiences, so to say he is satisfied or rather, the client evaluates every contact he had with the bank: indirectly, through ATMs, Internet Banking etc. or directly with staff within the bank. So I would say the following idea: quality is the aspect that concerns the banking institution and customer satisfaction is the result of how the bank providing the services. The overview of the degree of satisfaction of a consumer banking products and services is made when the customer actually walks bank and when they call for electronic devices.

The analysis of banking services quality and customer satisfaction is imperative for several reasons.

The first reason is determined by the idea that the services by their nature are intangible products offer a bank can be easily copied by competitors, and its provision of services is no exception. Since there are tangible and can not be seen, they can be easily adapted as a competing banking institution, without the bank to stand out in a negative way. All banks in Romania offers customers the ability to withdraw money from ATMs to access their accounts via Internet Banking service. In addition, is almost no differences between the characteristics of these services from one bank to another. In these circumstances, the mere fact that credit institutions include in their offer these services is no longer a competitive advantage. However, how it is treated within a bank customer can be a major difference, is almost impossible gestures staff, ambience and atmosphere of competition created to be reproduced. What distinguishes the modern channels of traditional service delivery channels is the fact that involve contact between man - machine, while the second category involves direct relationship between client and staff, which must meet certain quality. Attitude, gestures, experience of employees believe there are aspects difficult to copy exactly. There are researchers who have given attention to this subject and concluded that is a direct, positive, link between staff serving customers and overall satisfaction reported by him, in that staff is the factor that makes a difference: people who use services banks generally believe that the differences are insignificant market supply from one institution to another, so that often choose depending on how you believe they have been treated within the bank. It shows, such a relationship of cause - effect (positive) between the quality and professionalism of employees in the banking system -> increase customer satisfaction -> loyalty -> increasing the market share.

The second reason concerns the preoccupation of banks to open new territorial units, although the market is visibly affected by the negative consequences of

financial crisis that shook the world. It is true that expansion is not as great as the glory years in the field and that all banks have resorted to closing agencies, but it can be seen, however, that are interested to come closer to their customers every neighborhood of large cities. Watching the evolution of the branches, EFMA (European Financial Management and Marketing Association) show that in 2006 in Romania there are a number of 4346 units, up to 2008, reaching 6,323 units in November of that year, as said at a seminar Deputy Prime BNR, Florin Georgescu.[1]

After the outbreak of the crisis began restricting embodied in closing neporofitabile agencies, action that banks did not use immediately, rather they preferred to keep most of the territory of existing units, even if they did not perform to maintain them, even , the „on track" or transferred „minus" given the lack of performance costs incurred by the customer. All these in order to stay closer to their customers, used to find at least one agency banking of the institution that works in their neighborhood. Proof is the fact that the first half of 2011 there were 6100 bank units in Romania[2], aspect shows a slow reduction of their number as economic and financial context. When a bank closes one agency, it send negative signals population, which could become distrustful, therefore, banks prefer to keep as many workstations that created them, in order to be perceived still as strong banks that meet all requirements of their customers. In addition to all this, a significant number of people in Romania, especially in rural areas but not only, still have no access to the Internet or, even if they are not accustomed to use to perform banking transactions. There are people who hesitate to use the ATM for cash withdrawals or to pay by card, by POS products purchased from various retailers and prefer instead to raise money from the cashier, even if it means withholding a commission. Therefore, these customers - not few in number - will feel that their needs come to those banks that are the easiest to get to make all these transactions.

Third, customer satisfaction is even greater as more directly interact with the bank due to culture and history of our people; the communist regime, which marked Romania was characterized by the fact that freedom of expression and socialization have been oppressed, so currently Romanians want to interact a lot with each other, especially with those are managing their money, because they feel so safe, unlike other peoples, who are more individualistic.

Feeling of insecurity appears once between customer and bank employee an interposed device that consumer is forced to use. The bank is no longer making

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[1] Ursu, I. (2008), "6.323 unități bancare în Romania", *Business Magazine.* Extras de pe : http://www.businessmagazin.ro/actualitate/afaceri/6-323-de-sucursalebancare-in romania-3558778

[2] Raluca Florescu, pe http://www.evz.ro/detalii/stiri/2011-an-de-foc-cat-mai-rezista-sucursalele-bancare-de-cartier-952030.html, articol din data de 1 Noiembrie 2011

everything for him, now he had to do alone or at ATM or on the Internet Banking transactions for which until now it was enough to wait a few minutes at the counter. There is a certain degree of discomfort with the fact that such transactions require the accumulation of a set of information regarding the operation, making the client to meet sceptically any innovation or new service bank offers it, the desire to simplify things. Transpires here too the extremely important role of staff, who must demonstrate empathy, patience and professionalism.

It is the duty of those who are part of the management to consider all these requirements and to handle continuously the improvement of employees who will establish a relationship with customers based on trust, which will reduce their uncertainty and enhancing their satisfaction felt. Quality that the service consumer appreciates comes ultimately from the trust that he receives reliable information from the services provider that is useful banking and, whenever there is a confusion or is not handle in a certain respect, finds support promptly.

For these reasons, the premise from which we start in making the case study was that perhaps Romanians satisfaction regarding banking services that benefit is mainly influenced by the relationship they establish with the bank, innovation than the physical elements, tangible or processes in general.

In the specialty literature was outlined the idea that customer satisfaction is a decisive factor influencing purchasing behavior, and repurchase behavior. For this reason, many organizations adopt various strategies to improve the level of customer satisfaction, based on certain research strategies. There are some obvious advantages generated by the satisfied clients, among which may be mentioned: their loyalty, reduced elasticity demand depending on price, protect market position against competitors' actions, reducing transaction costs and the costs of attracting new customers, and improving awareness and reputation of the company in the industry. Finding specific needs, the reasoning based on that consumers select offerings and how they evaluate further products and services purchased, are key elements in understanding the formation process of customer satisfaction.

The purchase decision made by customers can be divided into three phases: before purchase, purchase (and consumption) and after purchase.[3]

Regarding the before purchase stage for a company it is important to understand the reasons for a consumer to choose to buy a product or service. This stage includes all actions and judgments made by the consumer before a specific procurement. The process of decision begins by recognizing of a need or problem, the consumer noticing there is a difference between the case where there

[3] Alina Filip, Diana Maria Vrânceanu, *Procesul decizional de cumpărare și dezvoltarea satisfacției clienților,* articol publicat in revista CALITATEA – acces la succes, nr 5/2010 (Managementul calității), p.16-17

is and a desired situation. The solution Identified by the consumer for reducing the GAP between the two situations calls for a potential purchase. The customer through a process of searching relevant information from both internal (memory, past experiences) and external sources (advertising, information provided by sales staff, references received from other customers, etc.). The amount of information on which individuals base their decision depends on the importance he assigns to purchase to be made in terms of financial and psychological costs involved. Also, the consumer tends to give credibility to various different sources of information, enhanced for personal sources (advice received from relatives, friends, colleagues who have already used that product / service) and lower for marketing sources (messages sent through various ways by bidders leaflets, brochures, TV spots, etc.). Consumer will make the selection based on evaluation criteria concerning tangible attributes but also intangible product or service, or different aspects of its delivery. There are rare situations where the consumer compares all feasible alternatives when assessing offers available, they may determine usually a limited list of options, depending on experience and information acquired, which will select the product or service to be purchased.

Purchase stage includes a number of decisions that the consumer will be done in connection with the service at selected before purchase stage. Even if the choice has already been set, purchase can be influenced at this stage by changing the motivations or circumstances of time, place and manner of payment of purchase. Purchasing decisions may be more or less planned, based on a series of consumer expectations for staff behavior which sells the product delivery process and product performance. In the case of goods, the purchase is followed by consumption of either immediately or over a period of time. For services due to the fact that it is inseparable from the supplier, purchase and consumption take place simultaneously. Therefore the consumer's assessment of the experience of buying is done throughout the service delivery process (assessment postalegere) and not only after consumption (evaluation for after choice consumer goods).

After purchase stage is the stage in which the consumer evaluates the extent to which the purchase and consumption of the product / service was satisfactory. This assessment involves mental comparison of the perceived performance compared with previous standards or expectations, there are three possible options: excitement, satisfaction or customer dissatisfaction. Influence the level of satisfaction through marketing activities undertaken by the company requires knowledge of customer expectations and how they are formed.

More and more banks have already adopted the concept of total quality, like the industrial producers. The bank must first identify the quality level expected by customers. Unfortunately, quality is difficult to define and judge. Retaining customers, building their loyalty is perhaps the best way to measure

the quality of the service, the ability of banks to retain customers largely depends on a constant supply of high values[4]. Unlike manufacturing firms that can adjust their equipment to produce a high-quality banking, service quality can vary continuously, depending on the interaction between provider and client. Inevitable problems can occur at any time: a delay, a bad day, waiting longer in line, etc.

Unlike manufacturing firms can adjust their equipment to produce a high-quality banking service quality can vary continuously, depending on the interaction between provider and client. Inevitable problems can occur at any time: a delay bad day, waiting longer in line, too hot or too cold, functionality, etc. overloaded programs. And that such problems can not be prevented, the bank must learn to overcome them, to annihilate them and especially to learn from their mistakes. A return from a delicate situation can turn an angry customer into a loyal customer since acquires confidence in the ability of the institution and its staff to overcome moments of crisis. A first step in this direction is to give paramount attention and frontline staff, giving the authority, responsibility, confidence and incentives to recognize and meet customer needs through services that live up to expectations.

Customer expectations are different ways of training and expression, so that they may be the result of previous experience, or may be based on a prediction on a presumption of person to buy a given service to how such it should be provided, or may be the result of a preconceived opinions about the benefits that should bring that service, investment or effort compared to buying. Starting from claims diversity exhibited by customers, some authors have identified two standards by which customers evaluate service performance: the first refers to the desired level of service and the second service level considered adequate (or the minimum acceptable). The desired level of service has as a characteristic the fact that tends to maintain over time as a result of needs and wants, which are in turn the result of personality, customer education. Therefore, this level may be higher if the client operates in the same field or a similar field as possessing special knowledge about how it can and should be provided the service. Instead, the minimum acceptable can suffer small changes, depending on whether the customer is located, but even a certain situation can generate different reactions among consumers. For example, in the case of an emergency, it would be that easy for a customer to accept a service that does not meet his expectations, simply because that service needs as quickly as possible, while if another client, the minimum acceptable level will be higher, just because she needs that service to be provided during forced them to him. However, the minimum standard may

[4] Valerie Zeithaml - *"Service Quality, Profitability, and Economic Worth of Customers: What We Know and What We Need to Learn"*- Academy of Marketing Science Journal, winter 2000, p.8-9

be influenced by the existence or rather the lack of alternatives to acquire the desired service. The more there will be more options, the customer will be more demanding, so it will accept a lower quality service.

As shown, the concept of customer satisfaction is defined in the literature as a variant form of statements and definitions. In this sense, some authors (Zeithmal, 1991) shows that the definitions set forth on customer satisfaction varies depending on the level of specificity. Thus, according to this level of specificity, the definition of customer satisfaction may refer to:

1.Satisfaction about the product
2.Satisfaction on the decision to acquire experience
3.Satisfaction on performance attributes
4.Satisfaction on the experience of consumption
5.Satisfaction on the institutions and shops
6. Satisfaction related to pre-purchase experience

Another interesting interpretation of the concept of customer satisfaction is that grouping definitions into two categories[5]:

1.The definitions that address satisfaction as a final state of the consumer and which do not focus on the process that lead to it.

2.The definitions which concern the entire process of constructing and training of customer satisfaction definitions that are more precise and analytical, stressing at the same time, the nature and importance of different elements (dimensions) construction of this concept, and the links between them.

Therefore, some experts feel that the concept of customer satisfaction is related to the after-purchase products or services, it is impossible to judge satisfaction as long as the product or service was not consumed. In their view, customer satisfaction is a global judgment relating to the consumption experience specific product or service itself influenced by personal characteristics and consumer. Other authors consider the concept of satisfaction as an overall assessment of the utility of a consumer product or service based on the perception of „what" and „how" was provided.

Also, the concept of customer satisfaction can be explained and operationalized in terms of the quality concept. Thus, most experts agree that customer satisfaction can be defined as an assessment of the various dimensions of quality products and services.

The border between customer satisfaction and service quality is difficult to delimit, terms are often confused. If a quality service refers to the way in which

[5] Yi ,Y., 'A critical review of consumer satisfaction' in V.Zeithaml (Ed.), *Review of Marketing*, 1991, Chicago: American Marketing Association, p.35-42

it is supplied, then we can say that the general feeling of satisfaction are using it. Satisfaction comes from experience, from customer contact with the service. Some authors consider quality as an intrinsic attribute of service and customer satisfaction is only if they perceive that quality. Therefore an unwritten rule in banking is not to sell to the customer a „product" but „qualities" of that product. A good sales person will sell a loan, but the ability to purchase a house, a car, etc. with money from funding provided by the bank, but will not sell Internet Banking will allow you to shorten the time spent in line at the counter, quick and convenient access to personal accounts, reducing travel expenses to bank office, also will not sell a warehouse officer, but will give customers an alternative to their economies safety. Otherwise, it's very possible for a customer to purchase the product or service banking advisor, but if you find that it serves to cover its needs, the more likely that the sale process will stop. The seller ability consists in discover or, going forward, to anticipate consumer needs. Is no exaggeration when we say that some needs were created by economic agents centuries ago, no one felt the need to have bank cards to make payments at merchants - cashing cash wages and all transactions are made in cash.

Being considered as a prerequisite for establishing enduring relationships, profitable between a bank and its customers, relationships that are beneficial to both parties, service quality is a complex coordinated, though not necessarily complicated, if examined closely. Therefore a series of investigations are needed to better understand the meanings of ‚quality' and how it differs in meaning to customers, unlike the other customers. Depending on the results, the management of institutions should try to adapt the offer so that it is accessible and to thank the group of clients are addressed. This is even more difficult as quality is a subjective dimension, which every man can appreciate different filters whereas the own value system through their own experience, for example, a customer who is always busy and has time to reach the bank within the appropriate time, we believe that the Internet Banking service is exactly what you need, while a person who does not have easy access to the Internet will not see in it a quality service that they bring great satisfaction.

In the specialty literature were given several definitions of quality, some authors define service quality as the difference between customer expectations in terms of efficiency of services provided by an institution and how they evaluate the services they receive. Similarly, other authors understand service quality as the difference between consumer expectations and how they perceive these services to be effective[6]. As you can see, both definitions share two elements: customer expectations and their perceptions, that is what they expect to find and receive the collaborating institution, versus what they perceive they have received. So

[6] Zeithaml, V.A., and Parasuraman, A. (2004), *Service Quality*, Marketing Science Institute, USA.

when we talk about expectations and about the results, the quality is the sum of several attributes: the look and bank space is organized, the presentation of the offer, employee communication skills, inspire their confidence, accessibility, there parking etc.

The cover of customers' needs and satisfaction are more than necessary in any business, but his loyalty is a prerequisite for bank profitability. In the current economic conditions and financial markets, maintaining long-term relationships with its customers is a challenge for any bank challenge that can be averted by offering products and services that constantly adapt to requirements. Management has provided numerous methods to investigate where is positioned against the competition, researchers have outlined several methods for the analysis of quality services in various fields, in order to measure subsequent satisfaction of individuals in relation to the services provided by those institutions. These include SERVQUAL method, patented by Zeithmal and Parasuraman (2004), based on identifying GAPs between customer expectations and their perceptions, ie what is expected to meet having contact with various services, compared with as they met. SERVQUAL is probably the most common model for measuring customer satisfaction felt [7], model that analyzes five dimensions: safety, empathy, reliability, responsiveness, visual impression. Based on the discussions and analyzes the links between customer satisfaction and perceived quality of service expectations, SERVQUAL model trying for the first time operationalize the concept of satisfaction in a theoretical and academic background[8].

Another model that has proved useful is quality technical / functional qualities developed by Gronroos, technical quality refers to the result itself, while functional quality describes how customer service is provided and is considered to be coordinated main, more important than technique. Gronroos model built based on 6 dimensions similar to those proposed by SERVQUAL model namely professionalism, attitude, flexibility, trust, reputation, credibility.

A third model pretty used is SERVPERF defined by Cronin and Taylor (1992), whose scale of measurement is quite similar to that provided by SERVQUAL model, the only difference being that this model analyzing customer opinions only in how they perceive the quality of services offered by different companies, which were not their expectations about those services. So SERVPERF does not realize a comparison between expectations and perceptions, as the authors model considers that the comparison is not necessarily conclusive for relationship

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[7] Bahia, K., and Nantel, J. (2000), "A reliable and valid measurement scale for the perceived service quality of banks", *International Journal of Bank Marketing*, *18*, 84-91.

[8] Derek, A., Rao, Tanniru, R., *Analysis of Customer Satisfaction Data*, Milwaukee (Wisconsin): ASQ Press, 2000;

satisfaction, quality, they believe that if customers overall impression of a certain institution is positive, then that the institution provides quality services.

3. SERVQUAL METHOD – BASIC INSTRUMENT FOR THE ANALYSIS OF CUSTOMER SATISFACTION

The customer satisfaction process is described in the economic literature in various ways and models, which does nothing but highlight the complexity of this concept; in fact, given that customer satisfaction analysis calls for a notion of "quality "and aspects of consumer behavior, one can say that this concept goes beyond the purely economic theories, incorporating elements from the fields of psychology, behavioral studies or mathematics or statistics.

One of the most popular theories related to the customer satisfaction is the theory "confirmation / failure to confirm satisfaction process ". In principle, this theory is based on the idea that customer satisfaction is based on a process of comparing what you expected from a product or service and what you get from that product or service. The concept of "expectations" of customers is "the set of attributes known about products or services at a time"[9] or "pre-consumer information held by a consumer about the general level of satisfaction and was acquired or from personal experience or from hearsay information. "[10]. We can say that a customer expectations will be increasing as previous experience was a satisfactory, the client will become more demanding and will be increasingly harder to please.

It follows that the customer satisfaction can be structured in three stages: [11]

1. In the first stage consumer builds and form his level of expectation of the product or service you want, expectations that are formed before consumption or acquisition and, for the most part, is based on information achieved from discussions with friends, or the media.
2. In the second stage, the customer consumes or „experience" the product or service, that contact with the level of actual quality or performance, which it has it;
3. In stage three, as a result of „ experience" gained on the quality or performance level had effectively consumed the product or service, a

[9] Olson, J.C., şi Dover P., 'Disconfirmation of consumer expectations through product trail', 1979, *Journal of Applied Psychology*, Vol.64, p.179

[10] Yi ,Y., 'A critical review of consumer satisfaction' in V.Zeithaml (Ed.), *Review of Marketing*, 1991, Chicago: American Marketing Association, p.35

[11] Vavra, Terry, G., *Improving Your Measurement Of Customer Satisfaction*, Milwaukee (Wisconsin): ASQ Quality Press, 1997

process of comparison is considered before expectations and the actual consumption of quality or performance experience.

According to supporters of this theory, perception of quality or performance level may be below expectations or may be at or above the expectations taken. Based on the three cases mentioned above, logically, occurrence of the phenomenon of satisfaction / dissatisfaction covers the following:

1. If the level of quality or performance is perceived by the consumer below his expectations the dissatisfaction appears.
2. If the level of quality or performance perceived by consumer is to its expectations the proper satisfaction appears, although this situation may be characterized as a situation of balance between satisfaction and dissatisfaction (type situation „neither satisfied nor dissatisfied. „);
3. If the level of quality or performance perceived by the consumer, is above his expectations, occurs enchantment.

The perceived quality of services is considered as an attitude, the construction of this concept being based on the difference between the client final conclusions and its initial expectations about the service consumed. One of the models which is based on the process of "confirmation / failure confirmation expectations theory ", is the SERVQUAL model proposed by Parasuraman, Zeithaml and Berry.

In fact, the SERVQUAL model is a model of quality services operationalization and construction, based on measuring satisfaction about certain dimensions of quality, that is based on measuring the difference between "what customers want" and "what he gets." In general, SERVQUAL model starts from the premise there is a variance in certain aspects, issues that affect the quality of service. The difference between customer expectations and perception of service quality is seen by the authors as a continuous spectrum ranging bordered on one side of the "ideal quality", the opposite being the "unacceptably poor quality." The authors consider that when perception related to a particular service is below expectations for that service, that customer service will be labeled as less satisfactory. However, if the perception of service is higher than expectations for it, that service will be tagged by customers as being satisfactory.

The importance of SERVQUAL modelhighlighted by the the large number of research studies that use this model or a model derived from it, can be summarized as follows:

1. SERVQUAL model is based on an extremely simple, flexible and easy to apply instrument, that is structured to identify the GAP between "what" customers expect to receive and "what" is offered to them by organizations;

2. the model is built on a multidimensional measurement tool, so of service quality as well as customer satisfaction, which stands out clearly and simple the main areas and aspects which must be improved qualitatively to meet customers a high degree;

3. on the proposed dimensions of the instrument used by SERVQUAL model, managers are able to "personalize" measuring system quality and customer satisfaction according to the specifics of organization and external environmental conditions. In this regard, based on the idea that every organization has specific aspects that distinguishes it from other organizations, the model can be viewed as a guide to explain, construction and "custom" system for measuring quality and satisfaction.

It should be noted that SERVQUAL model has been criticized by some experts on that the model conceptualizes and operationalize the perceived quality according to the discrepancy between expectations and perceived quality. In this regard, is necessary to recall Cronin's and Taylor's opinion, who believes that the model and instrument for measuring quality and customer satisfaction should not contain the expectation dimension.

Thus, their proposed model operationalize quality and customer satisfaction according to a single component, called "performance". Based on empirical analysis and on the discussion of certain theoretical aspects, Cronin and Taylor believes that the model for measuring quality and customer satisfaction based on an instrument that measures the performance only (model SERVPREF), has a power far greater explanation and validity, than models and tools based on the disconfimation expectations theory (SERVQUAL class models). In fact, Cronin and Taylor believes that "the perception of high performance really means a high quality of services"[12].

Although SERVQUAL model was criticized by many writers about either how to design and operationalize of the concepts of quality and satisfaction, or the predictability, reliability and validity of building size instrument, it remains a model for the analysis and measurement quality and customer satisfaction.

4. THE IMPORTANCE OF CUSTOMER SATISFACTION

Undoubtedly, in the beginning of this century customer satisfaction defines very clearly the meaning and significance of today's real economic activities. In this sense, extensive production and consumption of products and services is not today the sole purpose of economic activities, the main purpose of companies.

[12] Cronin, J. Joseph, Jr., and Taylor, Steven A. (1994), "SERVPERF Versus SERVQUAL: Reconciling Performance-Based and Perceptions-Minus-Expectations Measurement of Service Quality," Journal of Marketing, 58, 125-131.

From a certain perspective, the main purpose of companies is to „sell" products or services, respectively to produce and deliver those products or services that meet in a very high degree requirements and needs of consumers or users .

Thus, the importance of customer satisfaction, in general, consists in recognizing mode and the way in which organizations generate and create „pleasure" so in the consumers of products or services and among suppliers of such services or products. Numerous studies have shown the importance of customer satisfaction for these organizations by highlighting the link between customer satisfaction and financial results, customer satisfaction and maintaining or attracting customers. Benefits they can have an organization by measuring customer satisfaction they are indisputable; between them, we remember that:[13]

- contribute to improving the quality of products and services;
- helps to reduce costs and expenses;
- increase and boost personnel employed spirits.

Concerning the role of customer satisfaction, this can play many roles for an organization, whether private or public. As an overview and synthesis, customer satisfaction can affect many organizational processes, being used as a tool in many areas posed by an organization.

Thus, customer satisfaction can be used for an organization as[14]:

1. Management tool – when is used properly by managers, customer satisfaction can be an effective tool for motivating staff, providing a control loop feed-back in the motivation / demotivation of staff. Also, many organizations use it in measurement of customer satisfaction as the basis for establishing and substantiating so mission or objectives (and goals for management to performance) and to increase managerial accountability (how to spend resources).

2. Tool for improving the quality of provided products and services - having regard to how to define quality, it is clear that any attempt to improve the quality of products or services provided must take account of customers that their satisfaction with the quality provided. In this regard, customer satisfaction provides information on the quality of products or services provided and feedback is for any assurance system or quality improvement.

3. Comparison of Benchmarking tool - for many organizations, the customer satisfaction is used as part of a competitive basis for comparison between organizations of the same kind. Moreover, using customer satisfaction as a basis for comparison between rival organizations from a certain area has a major

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[13] Wagenheim, G.D, și Reurink, John H., 'Customer Service in Public Administration', 1991, *Public Administration Review*, Vol.51, no.3, p.263-270

[14] Dr Horia Mihai Raboca, *Curs de marketing*, de pe http://www.apubb.ro/

strategic commitment. Knowing how and the level in which rival organizations from the market are satisfying their customers can help to determine creating and building the organization's strategy or objectives.

4. Public relations and image tool - for many organizations, a satisfaction measurement system is used to increase or change the image among customers, citizens or the media, by speculating and fructification of relationship that is established between the organization and its customers or clients.

5. Compensation tool - many private organizations use customer satisfaction measurement for determining incentive plans for their employees. In this regard, many institutions, private or public, began to give material incentives to employees based on the degree to which they contribute and are involved in increasing the meeting of customer requirements.

6. Allocation of resources Guide - often customer satisfaction measurement results are used to distribute or allocate resources at their disposal. In this regard, analyzes and reports on factors contributing to customer satisfaction and needs can help managers to decide which services and products to be developed and encouraged.

On the other hand, measuring customer satisfaction can be regarded as a performance measurement organization in the satisfaction analysis mainly serve management goals. I think that the study of customer satisfaction does not include importance or value in itself, the importance and value appear when someone uses this type of measurement, in a certain way, to achieve and accomplish goals and objectives. Case study presented in this paper will try to capture it.

5. ANALYSIS OF CUSTOMER SATISFACTION IN BANKING BASED ON SERVQUAL METHOD. CASE STUDY: TRANSILVANIA BANK

5.1. Theoretical consideration

The need to assess quality of services offered to consumers, so companies in the services sector and researchers in the field have proposed several models and tools to be used for this purpose. Of these, SERVQUAL instrument, based on the conceptual model of the differences (GAPs) between expectations and perceptions of consumers to quality has established itself as the most commonly used so by researchers in field and in the practical activity service firms15.

[15] Dan MICUDĂ, "Mixul de marketing și evaluarea calității serviciilor bancare românești. Studiu de caz privind evaluarea calității serviciilor bancare din Pitești", Universitatea „Transilvania" din Brașov, Facultatea de Științe Economice - Școala Doctorală - Domeniul Marketing, Brașov, 2010, p. 48.

The proper method consists in analyze the determining factors of of perceptions and expectations of customers. Most factors are developed in the form of questions addressed to customers on the basis of questionnaires, interviews or focus group meetings. After analyzing the results, the service provider will find out what their customers want and if they are satisfied with the way they are served. The difference between customers' perceptions (P) and expectations (E) is the main purpose of measuring customer service quality. SERVQUAL is built on a response scale designed to include both customer expectations and perceptions regarding service. The method allows evaluation but at the same time it is a tool for improvement and comparison with other organizations of the sector.

The factors analyzed for determining the quality of service are grouped into five broad categories, each in its turn comprising a set of 4-5 questions. To find out the quality of service perceived by customers, the factors presented above are developed in the 22 questions about perceptions of service and 22 questions about their expectations before taken advantage of that service. Each question is measured by marks from 1 (minimum) to 7 (maximum), where 1 means "strongly disagree" and 7 means "strongly agree". So customer perceptions are measured using the same scale. The response scale is so designed to include both customer expectations and perceptions about the service.

Strongly Disagree Strongly Agree

1 2 3 4 5 6 7

After being collected all the answers it starts the proper calculation, determining for each statement in the questionnaire a score that is calculated as follows:

a. It is determining the average values perceived (P) and expected (E) by customers for each dimension of quality, depending on the number of existing statements in the questionnaire. For example, to determine the mean size of tangibility perceived. The same applies for tangibility average expected and for the other dimensions of service quality.

b. Determine the final scores or GAPs for each question, by making the differences between perceived and expected average values (P-E), and then calculated the average GAP for each of the 5 dimensions of quality, both in unweighted form and in the weighted form shares of importance given to each of the five categories of questions.

The interpretation of results is done after the calculation, that if the value difference is positive, the perceived service quality is better than expected service quality. When the difference is zero, then the perceived service quality is the same as the expected service. When the difference is negative, perceived service quality is below the expected service.

This method of service quality analysis is considered to be an efficient and quite complex, but not always the most accurate and relevant as customer responses are subjective and are influenced by their own previous experience, social status, age, sex, life style and environment. Should therefore be a reasonable number of people interviewed, to be the most representative of the population.

5.2. The analysis of Transylvania Bank's customer satisfaction based on the SERVQUAL method

The main purpose of this process was to make a qualitative research on opinions, attitudes and perceptions of customers of Banca Transilvania -Oradea (retail / corporate) on their quality of banking services offered to them.

This study was a comprehensive process, conducted in several stages of work, namely:

- elaboration of the questionnaire addressed to bank customers;
- choice of bank to be analyzed, namely Raiffeisen Bank;
- setting approach to bank customers, namely the interview, especially at the city offices of the bank;
- collecting data based on questionnaires and interviews, on a sample of bank customers;
- data collection and processing;
- interpretation of results.

Conduct of the study was structured in two directions: identify expectations of customers from Oradea before using the services of Transilvania Bank and their perception about the quality of banking services after becoming bank customers.

The research started from a series of hypothesis such as: most interviewees are aware of the importance of quality banking services which will, are interested in topics related to improving the quality of banking services, are familiar with the products and services offered by banks, are satisfied with the work of bank staff, have confidence in banks and in the information coming from them and appreciate the degree of internal organization of the banking companies as appropriate.

Since that theme is a theme explored in the public interest, but also the subject matter subscribes to a sensitive area for the consumer (the personal finance) was considered appropriate to use individual qualitative methods, specifically the interview.

The interviews consisted in a discussion with the interviewed persons and completing the questionnaire with answers and scores given by interviewed and the data information collected were summarized in a summary of the results grid,

and then applying calculations and analysis on them. Thus, have been showed attitudes, opinions and perceptions of customers from Oradea about the quality of services offered to them by BT.

5.2.1. The questionnaire

More specifically, the research questionnaire contains a set of 22 questions, grouped on five dimensions, each containing thus a set of 4 or 5 questions. The five dimensions are:

- **tangibility**: physical facilities, equipment, personnel and advertising materials (physical evidence of service): Set 1-4;
- **reliability**: ability to provide service in a fair, safe and always promised level of performance: set 5-9;
- **responsiveness**: willingness to assist customers and provide them with prompt service: Kit 10-13;
- **assurance**: the ability to inspire trust and confidence clients and competence, respect and honesty of employees: 14-17 set;
- **empathy**: treat with due attention to each client, ease of contact and communication with the client: set 18-22.

For a better understanding of these dimensions, we will detail their meaning.

Tangibility[16]. Due to the absence or weak presence of physical existence for services, consumers often rely on their evaluations of tangibility items accompanying them. Tangibility size means the comparison of customer expectations with firm performance taking into account the ability to manage elements of tangibility. The tangibilities of a services company consist in a wide variety of assets such as office lighting system, wall color, daily correspondence, presentation materials and appearance of company personnel. Therefore, tangibility component has two dimensions: one focusing on equipment and facilities, and other one on the staff and media provider used by the firm. Tangibility is determined based on analysis of four statements covering customer expectations and other four for perception measurement.

It should be noted that the statements on expectations apply to firms with excellent performance, while those relating to perceptions target company reviewed. Comparison of the expectations score with the perception score allows the determination of a numerical variable indicating the difference examined service tangibility. If the resulting variable records small values, the difference in tangibility plan is reduced, and consumer perceptions are closer to their expectations.

[16] Gheorghe Militaru, "*Managementul Serviciilor*", Editura C.H.Beck,Bucureşti 2010, p.242

The size of **reliability** in service provided. In general, this dimension reflects the consistency of the company performance. Nothing can be more frustrating to customers of a company than providing services that they do not trust. In many cases, consumers are willing to spend money only if the service provider believes that promises made. Consumers perceive trust as one of the most important quality dimensions. Consequently, failure to provide a service where customers generally have confidence is translated into a failure of the company.

Responsiveness reflects the commitment of staff to provide service in a timely manner. This dimension of SERVQUAL method refers to the availability and / or timeliness of company employees to provide the Service. Incidentally, customers may encounter a situation where company employees ignores costumer needs. Obviously, this is an example of lack of enthusiasm among company employees to provide the Service required by customers. It also refers to personnel training solicitude for the service the company.

Assurance refers to the competence of the company personnel and the security operations. Competence is related to knowledge and ability of company personnel in service delivery. Assurance is an important dimension of assurance services. Security reflects the feelings of a client to not be exposed to any risk or danger when they purchase a particular service. In addition to physical danger, the safety component of the assurance dimension reflects the financial risk issues and privacy, for example, for medical services.

Empathy dimension. Empathy is the ability of the services company staff to put in place its customers. Therefore, companies that emphasize empathy understand better the customer needs and arrange for their services accessible to customers. Instead, companies that ignoring customers do not pay due attention to their needs compoprtament shows they have no empathy. Based on a large number of experiments performed and data collected from practical service delivery, was determined relative importance of each dimension of service quality, as follows: tangible elements 11%, Reliability19%, Responsiveness 22%, Assurance 32%and Empathy 16 %. Respective weights are approximate and were obtained as average values of experiments conducted by the authors of SERVQUAL. Depending on the type of service and experience of evaluators assessed in covered service, the weights may have different values. Moreover, even the authors recommend that in assessing the weight to be established by a group of experts and / or evaluators.

5.2.2. Measurement and evaluation procedure

Measurement and evaluation procedure of service quality using SERVQUAL consists of the following main steps:

Step 1. Setting of service quality

Depending on the area covered by the service, shall be adapted the meaning of the five SERVQUAL dimensions and is reworded the content attributes of each dimension. The result of this step is a tabular representation of the size and quality of service attributes (in the context of use specified).

Step 2. Data collection based on questionnaires and interviews

In order to collect data using the questionnaire technique. Usually it is useing two assessment questionnaires:

- questionnaire number 1 with significant „customer expectations of service quality";
- questionnaire number 2 that measures „customer perceptions of service quality". Questionnaires are sent to reviewers, electronically or on paper, along with instructions for completion and use of questionnaires, as well as explanatory comments on the significance of quality attributes.

When fill in the questionnaire No. 1, the evaluator should consider what it means for him that service quality based on its own experience as service users. The evaluator is asked to express its own opinion and to assess the degree to which the service should meet the specified quality attributes. The evaluator answers are reflected by giving a note to each attribute on a Likert scale with 7 degrees of intensity. The evaluator must provide notes to all the attributes included in the survey.

If the evaluator considers that a particular attribute is essential for the quality of service, then gives the highest grade 7 (attribute is „absolutely essential"). If the evaluator finds that a particular attribute is not essential or relevant for q0uality service, then he will give a minimum grade (attribute „not essential"). Note 4 is an average value, and other notes are intermediate values close more or less than the minimum or maximum.

When completing the questionnaire No. 2, the evaluator is required to determine the degree to which service meets the quality attributes, as he believes as a result of using the service. The evaluator answers is reflected by providing a note on a Likert scale with 7 degrees of intensity. If the evaluator believes that the service meets the attribute, then gives the highest grade 7 (the evaluator perceives that the attribute is fulfilled and expressed „total agreement"). If the evaluator believes that the service does not meet the attribute, then gives the minimal grade 1 („strongly disagree"). Note 4 is an average value, and other notes are intermediate values close more or less than the minimum or maximum, reflecting different levels of service quality perception of the evaluator. Note that

in completing the questionnaire No. 2 there are no „good" answers or „wrong" answers. The responses reflect perceptions of quality customer service.

Step 3. Calculation and determination of the service quality

The data collected through questionnaires are structured and arranged in a format that allows the calculation and determination of the quality of service.

a. Determination of service quality for each dimension. The indicator is calculated as the average deviation between „perceptions" and „expectations" for each dimension of service quality

$$SQj = \frac{\sum_{i=1}^{nj} (Pij - Eij)}{nj}$$

where:
SQj =service quality dimension j, j = 1, ..., 5
Pij= perceptions for the declaration i from size j, i = 1, ... 22, j = 1, ... 5
Eij =expectations for the declaration i from size j, i = 1, ... 22, j = 1, ... 5
nj = the number of statements from size j.

b. The calculation of overall (unweighted) service quality . The indicator is calculated as the average of service quality, without taking into account weights (levels) of importance assigned by the evaluator.

$$SQ = \frac{\sum_{j=1}^{5} SQ_j}{5}$$

c. Calculation of overall (weighted) service quality (SQp). The indicator is calculated taking into account the weight given to the assessor every dimension of service quality

$$SQ_p = \frac{\sum_{j=1}^{5} SQ_j * P_j}{100} \quad \text{unde} , \sum_{j=1}^{5} P_j = 1$$

Step 4. Presentation and interpretation of results

The results obtained from the measurement and evaluation are recorded in an evaluation report and are presented both in tabular and graphical.

Usually, the evaluation report includes all documents prepared in the previous steps (the characteristics list, the questionnaires completed by evaluators, the synthetic tables for calculating indicators, etc..) and several synthetic tables and graphs based on data obtained from the documents mentioned and which are used when interpreting the results. Regarding the outcome of the evaluation - the indicator "servicequality" expressed as the difference between perceptions and expectations - the interpretation is as follows:

- positive values indicate a better service than expected;
- negative values indicate lower quality;
- zero signifies a satisfactory level of quality.

The research was carried out over three weeks in the period 01.07.2012-22.07.2012, on a sample of 250 people, and within the next two weeks will take place development and presentation of conclusions. The objective of this study was the discovery of new information on the relationship between the bank - client to analyze the quality of banking services offered by the bank to its customers.

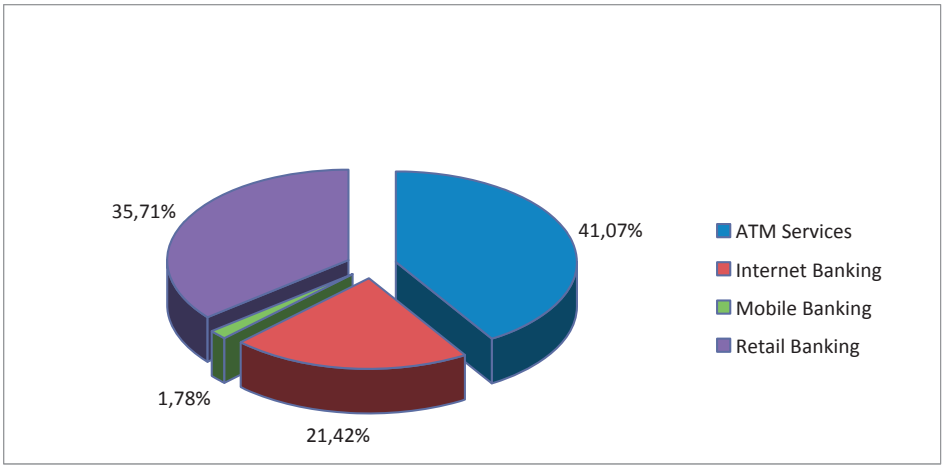
Sample of people surveyed was dominated by people aged between 36-45 years representing 32% of the total sample, 24% aged 46-55 years, 22% aged 26-35 years, 16% aged 18-25 years and 6% older than 55 years. In the analyzed sample, we can see that the most respondents are working in private sector 41.17%, followed by public sector 19.6%, 17.64% of the respondents said that self-employed, 7.84% said they are unemployed or are students and only 5.88 % are retired.

Regarding net income, 20% of respondents have an income below 900 RON, 40% have an income of between 900-1600 RON, 30% have income that falls between 1600-2700 RON and only 10% have more than 2700 RON.

In the analyzed sample, we can see that the banking service preferred by customers of Transilvania Bank is the ATM seervice, with a percentage of 41.07%, followed by Retail Services - 35.71%. Internet Banking Services Retail losing ground to Retail services with 14.29 %, on the last place beeing the Mobile Banking .

Thus, we consider necessary to promote the Mobile Banking in Transylvania Bank. By promoting this service is reached win for both parties, in reduced costs and efficiency of resources used in carrying out banking, saving money, time and human energy.

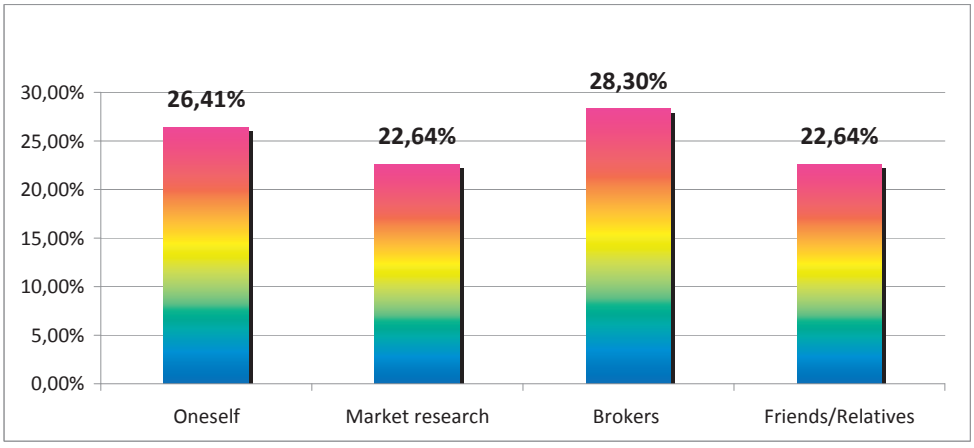
Figure 1. *Most Preferred Banking Service by the customers of Transilvania Bank*



Source: Made by authors

As a result of the survey carried out, we can see that the most customers are influenced in their decisions by banking specialists, winning only a percentage of 1.89 to bank decision makers on their own, disregarding the opinion of specialists or other opinions - friends / relatives.

Figure 2. *Influence of account services*

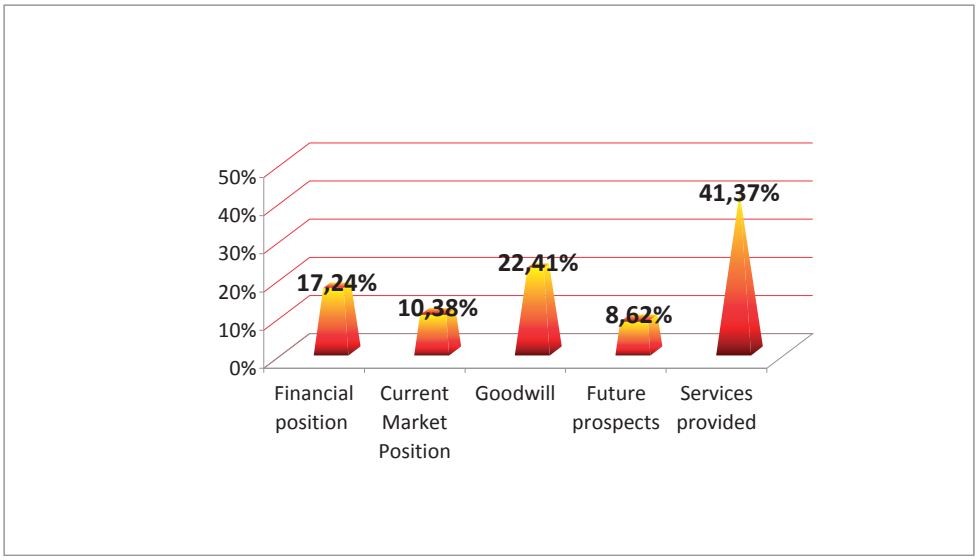


Source: Made by authors

Banking services offered to customers have a tremendous step in the decision to open a bank account or purchasing a banking service, at least that is what 41.37% of Transilvania Bank's questioned customers consider. Bank's reputation

is on the 2nd place , with a percentage of 22.41%, a fairly large GAP to leader position in this matter under review.

Figure 3. *Factors considered before opening an Account*



Source: Made by authors

We believe that this is beneficial for bank, because the provided services are the most easily modeled of all those listed. Thus, focusing on services and packages offered can lead to an increase of customers, maintain and carry out the next the bank-customer relations. When we are analyzing the average score of customer expectations and perceptions of Transilvania Bank (Table 1), we ca see that generally all the five indicators received a score between 5.1 and 6.2. These indicators reflect a high quality of banking services, as perceived by the respondents, both before and after they become customers of Transilvania Bank. We can mention that the bank is raising to the level of expectations that customers have at it. In more detail:

- Analyzing the expectations, the highest score was obtained by the tangibles, namely 3. Employees at excellent banks will be neat appearing(5.84), followed by 1. Excellent banking companies will have modern looking equipment (5.70), also surrounded by tangibles. The other end of the stack, we can mention the responsiveness, 13. Employees of excellent banks will never be too busy to respond to customers' requests., with a score of 5.00. As an average branch wishes, highest average recorded in the visual impression - 5.55, while the lowest average in the receptivity - 5.32, a relatively small difference.

- Analyzing perceptions, the highest score was recorded throughout the tangibles, 1. Excellent banking companies will have modern looking equipment (6, 22), followed by assurnce dimension, 17. Employees of excellent banks will have the knowledge to answer customers' questions (6.00). As an average customer perception, the highest average was recorded by assurance (5,685), followed by tangibles with a difference of 0.005. The lowest average was recorded by empathy.
- The GAP analysis can highlight many aspects of banking services. A negative GAP is a unfavorable aspect of the bank in question, because of a higher than current expectations of bank service offered. The existence of such a negative GAP should draw an exclamation point to that bank and taking action in a short time. Otherwise, the bank risks very much, which may reach the loss of customers. BT has recorded several negative GAP, unfortunately, the biggest GAP in tangibles is negative, 3. Employees at excellent banks will be neat appearing(a difference of 0.56). Negative GAP is also recorded in the Responsiveness, 11. Employees of excellent banks will give prompt service to customers (0.1), 12. Employees of excellent banks will always be willing to help customers, (only 0.02). Empathy recorded a negative GAP in the 19. Excellent banks will have operating hours convenient to all their customers (0.24), 22. The employees of excellent banks will understand the specific needs of their customers(0.12).
- The highest average GAP score is recorded in tangibles (0.405), followed by empathy with a score of 0.132. Although the reliability had a relatively small average GAP (0.084), should be noted that this dimension has not been any negative GAP, so customer expectations were below perception, which we consider a good thing. The smallest GAP was in the responsiveness with an average of 0,075.

Table 1. ***Calculation of servqual scores for Transilvania Bank***

Statement	Expectation Score	Perception Score	GAP Score
Tangibles	Average for Dimension		**0.405**
1. Excellent banking companies will have modern looking equipment.	5.70	6.22	0.52
2. The physical facilities at excellent banks will be visually appealing.	5.50	5.86	0.36
3. Employees at excellent banks will be neat appearing.	5.84	5.28	-0.56
4. Materials associated with the service (such as pamphlets or statements) will be visually appealing at an excellent bank.	5.18	5.36	0.18
Reliability	Average for Dimension		**0.084**
5. When excellent banks promise to do something by a certain time, they do.	5.46	5.56	0.10
6. When a customer has a problem, excellent banks will show a sincere interest in solving it.	5.44	5.50	0.06
7. Excellent banks will perform the service right the first time.	5.22	5.36	0.14
8. Excellent banks will provide the service at the time they promise to do so.	5.22	5.32	0.10
9. Excellent banks will insist on error free records	5.52	5.54	0.02
Responsiveness	Average for Dimension		**0.075**
10. Employees of excellent banks will tell customers exactly when services will be performed.	5.48	5.62	0.14
11. Employees of excellent banks will give prompt service to customers.	5.54	5.44	-0.1
12. Employees of excellent banks will always be willing to help customers.	5.28	5.26	-0.02
13. Employees of excellent banks will never be too busy to respond to customers' requests.	5.00	5.04	0.04
Assurance	Average for Dimension		**0.165**
14. The behavior of employees in excellent banks will instill confidence in customers.	5.48	5.56	0.08
15. Customers of excellent banks will feel safe in transactions.	5.66	5.82	0.16
16. Employees of excellent banks will be consistently courteous with customers.	5.30	5.36	0.06
17. Employees of excellent banks will have the knowledge to answer customers' questions.	5.64	6.00	0.36
Empathy	Average for Dimension		**0.132**
18. Excellent banks will give customers individual attention.	5.42	5.58	0.16
19. Excellent banks will have operating hours convenient to all their customers.	5.38	5.14	-0.24
20. Excellent banks will have employees who give customers personal attention.	5.24	5.30	0.06
21. Excellent banks will have their customer's best interests at heart.	5.28	5.36	0.08
22. The employees of excellent banks will understand the specific needs of their customers.	5.36	5.24	-0.12

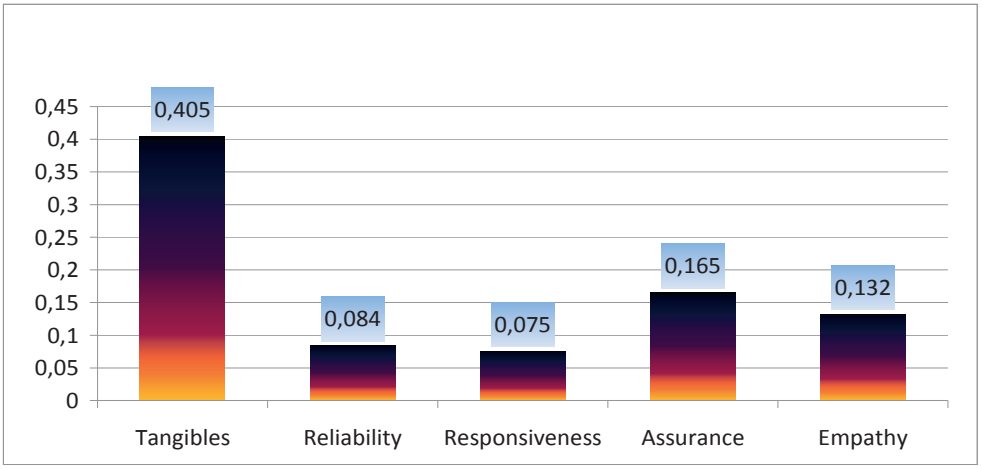
Source: Made by authors

Table 2. *Calculations to obtain unweighted servqual score*

1. Average **Tangible** SERVQUAL score	0.405
2. Average **Reliability** SERVQUAL score	0.084
3. Average **Responsiveness** SERVQUAL score	0.075
4. Average **Assurance** SERVQUAL score	0.165
5. Average **Empathy** SERVQUAL score	0.132
TOTAL	0.861
AVERAGE (= Total / 5) UNWEIGHTED SERVQUAL SCORE	0.172

Source: Made by authors

Figure 4. *Average for each dimension*



Source: Made by authors

It may be noted first that the GAP values presented in Table 2 have values between 0 and 1, which indicates a small GAP at all between expectations and perceptions. As can be seen in the average GAP value in almost all cases the perception is greater than the expected, which is very good for the bank.

From Figure 4 we can see that all measured values of indicators have values greater than 0, the visual impression recording the highest value.

Table 3. ***The importance given to each dimension***

Features	Percentage
1. The appearance of the banks physical facilities, equipment, personnel, and communication materials.	18.9
2. The banks ability to perform the promised service dependably and accurately.	19.58
3. The bank's willingness to help customers and provide prompt service.	19.62
4. The knowledge and courtesy of the bank's employees and their ability to convey trust and confidence.	23.3
5. The caring, individual attention the bank provides its customers	18.2
Total:	100

Source: Made by authors

People who were surveyed gave the highest importance to knowledge and courtesy of employees and their ability to inspire confidence and trust (23.3%), the bank's willingness to help customers and provide prompt service (19.62%), followed rapidly by bank's ability to clearly and accurately perform the promised service (19.58%), appearance of facilities, equipment, personnel and promotional materials of the bank (18.9%), classifying in the last place special attention on each individual bank offers its customers (18.2%).

Tabel 4: ***Servqual weighted scores***

SERVQUAL Dimension	Average for Dimension	X	Importance Weight	=	Weighted Score
Tangibles	0.405	x	18.9	=	0.382
Reliability	0.084	x	19.58	=	0.081
Responsiveness	0.075	x	18.6	=	0.069
Assurance	0.165	x	20.1	=	0.165
Empathy	0.132	x	17.9	=	0.118
TOTAL					0.815
AVERAGE (= Total / 5)					0.163

Source: Made by authors

From Table 4 it can be seen that values order of indicators remains unchanged after weighting average scores obtained previously, tangibles remains first, while responsiveness is still in the last place.

6. CONCLUSIONS

Most respondents are young people aged 36-45 working in the private sector and achieve an average income of between 900 and 1600 Ron representing 40% of the total sample.

BT is considered the safest bank in the opinion of clients interviewed, and the ATM service is used, with a percentage of 41.07%, followed rapidly by Retail Services - 35.71%.

Most customers are influenced in taking decisions by banking specialists.

Banking services offered to customers have a tremendous step in making the decision to open a bank account or purchasing a banking service, at least 41.37% of questioned customers consider that.

People who were surveyed gave highest importance to knowledge and courtesy of employees and their ability to inspire confidence and trust (23.3%).

GAP analysis can highlight many aspects of banking services. A negative GAP is a negative aspect of the bank in question, because of a higher than current expectations of the bank service. A positive GAP is a plus point for the bank, with a perception higher than Expectancy. It may be noted first that the GAP values presented in Table 1 have values between 0 and 1, which indicates a small difference at all between expectations and perceptions.

As can be seen in the average GAP value in almost all cases the perception is greater than the expected which is very good for the bank.

We recommend to the bank to take action on correction negative GAP made by a stronger emphasis on appearance of employees, improve timeliness of services and increasing the availability of employees to help customers in a short time and useful.

Another improvement could be to extend opening hours, although there appear other variables such as increased staff costs due to extending working hours and their production of a certain discomfort. Bank should focus on training of its employees in understanding specific customer needs by providing individualized advice and banking products, attracting and maintaining customers in a permanent state of comfort.

This study also enabled capturing the negative aspects, which are required to be corrected in the local banking, especially in the context of economical and financial crisis that affected the national, local and international banking market, in recent years to recover credibility and attractiveness more low of banks.

SERVQUAL instrument, has obvious advantages in measuring service quality, but has a too general construction, focused more on service quality and

operational side also requires a lot of adjustments to capture specific Romanian context. It also does not allow processing and detailed analysis of the variables investigated, being more oriented to operational side to simplify the research. This selection tool remains for practical research, the area that do not involve complicated inferences in the variables studied and to give clear and immediate answers bank management, on the quality of customer service provided to adapt the original SERVQUAL dimensions specific socio-cultural context of the Romanian banking market.

The current difficult economic environment and the need to increase competitiveness of Romanian banks in terms of increased competition due to globalization of the economic process, accelerated in Romania joining the European Union, requires a more pragmatic and realistic approach to quality of services that banks offer Romanian. With maturation of the Romanian banking market, quality of services tends to consist of a decisive competitive advantage for banks in the effort to increase sales and profitability.

This study is perceptible to improvements due to limitations such as small sample size, lack of a comparison with results that would have been obtained for other banks, which could surprise the more convincing the service quality bank offered the local banking market.

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ENHANCING LEADERSHIP INTEGRITY EFFECTIVENESS STRATEGY THROUGH THE INSTITUTIONALIZATION OF AN ORGANIZATIONAL MANAGEMENT INTEGRITY CAPACITY SYSTEMS

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Abstract

Aims/objectives: *This paper aims to analyze organizational management integrity capacity system as an improvement concept for enhancing leadership integrity effectiveness in a university setting. It departs from the analysis of the current organizational culture, values, virtues, managerial capabilities and attitudes to assume any organizational task. This paper aims also to propose a strategic model for the institutionalization of an organizational management integrity system.*

Study design: *Cross-sectional study.*

Place and Duration of Study: *University Center for Economic and Managerial Sciences, University of Guadalajara. The study is conducted for one academic year during the term 2011-2012.*

Methodology: *The research methods used are the analytical based in the literature review and interpretative of the main findings to provide a synthetic model.*

Results and conclusion: *The outcomes of the research on the application of organizational management integrity capacity systems may demonstrate that the drama of leadership effectiveness is centered on dysfunctional organizational integrity culture and leadership. This paper provides a sound strategies and institutionalization for organizational integrity capacity philosophy focused on leadership integrity effectiveness that empowers management professionals to act with integrity and supported by an organizational integrity culture.*

Implications: *The results provide the basis to develop strategies for an organizational integrity leadership framed by an organizational integrity culture, sustained by a code of conduct, regulation policies and overall the development and institutionalization of an organizational integrity capacity system which can positively influence the behavior of key stakeholders and actors.*

Keywords: *integrity, leadership integrity effectiveness, management integrity development, organizational integrity capacity system*

1. INTRODUCTION

The purpose of this study is to analyze the relationship between organizational management integrity capacity and leadership integrity effectiveness. Organizational integrity and managerialism are schools of thought to frame and support strategic choices and measures in corruption prevention and control. Organizations face challenges to "do the right thing" and ensure organizational integrity by creating an ethical leadership culture capable to ensure sustainable management integrity.

Organizational integrity should be considered within the context of a wide range of leadership variables. The effects of leadership integrity on organizational effectiveness have been well studied and reported on the literature (Brenner and Molander, 1977; Mortenson, Smith, and Cavanagh, 1989; Posner and Schmidt, 1984), although there is a lack of concern to analyze the impact of organizational management integrity on leadership effectiveness. The link between organizational management integrity capacity system and leadership integrity effectiveness has not been adequately tested empirically. Usually the organizational management is not aware of its integrity, moral and ethical issues and principles exercised or it is reluctant to articulate and admit its organizational values to sustain good governance practices, such as anticorruption rules.

Traditional educational organizations and institutions of higher education are considered by Meyer and Rowan (1983) as tightly coupled through the traditional ritual classifications that create the façade of organizational integrity.

2. CONCEPTUAL AND THEORETICAL BACKGROUND

2.1. Concept of integrity

The word integrity derives from the Latin, meaning wholeness, completeness, conscientious coherence, or committed responsibility. Integrity comes from the Latin for whole and complete. The concept of integrity is multidimensional and should be specified.

The term integrity refers to strict fidelity to own personal principles embedded in the moral and ethical complexity and responsiveness to sustain integrity capacity (Hampshire, 1983, 1989; Williams, 1985; Nagel, 1979; Fernandez and Barr, 1993; Benjamin, 1990; Kahane, 1995). Bennis (1989) states that integrity is one of the best qualities of leadership. Integrity is an attribute related to ethics (Kerr, 1998) that reflects more adherences to a moral code (The American Heritage Dictionary of the English Language, 1992) and incorporates honesty and trustworthiness (Northouse, 1997). Werhane and Freeman (1997) define integrity as the quality of moral self-governance at the individual and collective (organizational) levels.

Becker (1998, pp. 157–158) defines "integrity is commitment *in action* to a morally justifiable set of principles and values . . ." in such a way that it is assumed as a moral justification based on the reality of a universal truth. Integrity is an integral part of good leadership (Batten, 1997; Covey, 1996; Fairholm, 1998; Manz, 1998; Nix, 1997; Northhouse, 1997; Rinehart, 1998; Sanders, 1994; Wenderlich, 1997; Winston, 1999). Huberts (1998) defines integrity as the quality of acting in accordance with socially accepted moral values, norms, and rules. Integrity is a functional attribute prominently cited in servant leadership literature (Covey, 1996; Fairholm, 1998; Kouzes and Posner, 1993: Nair, 1994; Pollard, 1996; Rinehart, 1998; Winston, 1999).

Integrity is about not doing the wrong thing, not necessarily doing "ethical" things but also about doing the right thing and being perceived as positive, active and proactive (Becker, 1998; Butler, 1991; Butler and Cantrell, 1984; Hosmer, 1995; Jarvenpaa, Knoll and Leidner, 1998); Mayer, Davis and Schoorman, 1995; Murphy, 1999; Parry and Proctor-Thompson, 2002). Integrity is a moral foundation for effective leadership (Clawson, 1999). Leaders with integrity are honest even when the situation is self-damaging (Russell and Stone, 2000). Integrity refers to an analytical decision-making process based on envisaged organizational principles and values that simultaneously may function as an ideal and a constraint (Karssing, 2000, 2006). A person of integrity has an awareness resulting in an attitude to follow the spirit of the rules, adhering to deeply held ethical principles and values and making right decisions (Badaracco 2002). Integrity is an attitude that surrenders to ethical commitment, the "gateway to

operating from one's deepest purpose, in concert with a larger whole" (Senge, Scharmer, Jaworski, and Flowers, 2004, 103).

Lasthuizen (2008) defines integrity as the quality of individual behavior in accordance with the organizational values, norms, rules and obligations and its organizational environment. Personal moral integrity is central to individual integrity that is an individual who accept full responsibility for his actions and any negative consequence. Using the analogy of the water thank, Thomas, Schermerhorn and Dienhart (2004) explain the commitment to integrity, where the floor is the legal baseline and above is the level of ethics that the organizational management adopts.

The components of process integrity, according to Petrick and Quin (2000) are moral awareness, moral deliberation, moral character and the practices and actions carried out by personal and collective agents. This process incorporates characteristics of integrity: conscientiousness and discernment, resolution and accountability, commitment and readiness, and coherence and authenticity in moral conduct.

The integrity literature has advanced from personal integrity to collective integrity, organizational integrity, and more recently to global collective level (Benjamin, 1990; Solomon, 1992; Carter, 1996; Paine, 1997; Petrick and Quinn, 1997; LeClair, Ferrell, and Fraedrich, 1998; Westra, 1998).

2.2. Organizational integrity

The concept of organizational integrity has its origins in Weber who argued that economic development was closely link to the emergence of formal bureaucracies and management routines or universal rules and regulations which provide secure and predictable basis for individual interests and capabilities to be channeled to collective projects. The concept of organizational integrity includes the concept of autonomy of capacity, competence and credibility of local political institutions and the efficiency of administrative bureaucracy either of local public institutions or private organizations.

Integrity capacity is "the individual and/or collective capability for repeated process alignment of moral awareness, deliberation, character and conduct that demonstrates balanced judgment, enhances sustained moral development and promotes supportive systems for moral decision making" (Petrick and Quinn, 2001:332). The growth of integrity capacity is intrinsically valuable and utilitarian - instrumental enhances the reputational capital as an intangible organizational asset (Fombrun, 1996; Petrick, Scherer, Brodzinski, Quinn and Ainina, 1999).

Organizations framed by outcome-oriented transcendent - teleological ethics sustain the balanced application of judgment integrity capacity and ethical

judgments in organizational settings leads to have good consequences and to achieve good ends (Trevino and Youngblood, 1990; Cohen, 1993; Trevino and Nelson, 1995). Organizational judgment integrity capacity is related to the balanced application of management and leadership integrity employing management, ethics and legal theories and promoting moral progress.

Personal integrity involving the well-being of the other embedded in moral principles and an ethical culture, it fosters the integrity to have beneficial effects at organizational level. Moral integrity may be subject to some conditions raising some moral dilemmas about the existence of organizational integrity even in for-profit organizations. Personal and organizational integrity are interactive attitudes between different stakeholders in relationships concerned and framed with moral principles and ethical issues. Organizational integrity means that corruption and fraud are absent in the individual behaviors of organizations. Integrity is a specific value instead of the related value incorruptibility (Van der Wal *et al.* 2006).

Organizational integrity is both a standard of personal moral excellence, and a relational value (Adler and Bird 1988). Organizational integrity refers to the integrity of individual working inside and outside in and on behalf of the organization (Klockars, 1997; Solomon, 1999). Organizational integrity is a social virtue emphasized by relationships and connectedness between persons and stakeholders of an organization, all of them behaving and acting with integrity, morally reasonable rational values (Becker 1998).

Organizational integrity creates standards to provide the cultural cohesion for professional responsibility and competence in a right attitude to approach organizational problems and dilemmas (Karssing, 2000, 2006). Organizational integrity is more than having a mechanism for holding individuals responsible. Organizational moral issues focusing on individual responsibility does not necessarily are a matter of, and can even detract from organizational integrity. The search for individuals responsible for misbehaviors may inhibit organizational integrity (Bowie, 2009).

Organizational integrity is defined "as organizational conduct compliant with the moral values, standards, norms, and rules accepted by the organization's members and stakeholders, but also as the commitment to an equal distribution of public services to all citizens" (Kolthoff, 2010: 43). As a social phenomenon, organizational integrity involves both consistency between principles and action embedding adherence to principles socially accepted and consensually validated with a comprehension of what is fair and just (Habermas, 1998).

Personal integrity is a process of maturing growth, something to pursue not something one possess as an attribute or moral trait (Wolffe 1988). The extended

notion of personal integrity into the social domain may become perceived as "organizational" integrity (Trevinyo-Rodriguez 2007, 82). Both levels of integrity, personal and organizational can be determined by the emphasis in the type of strategic implementation.

Practicing managers, scholars and professional associations are fostering organizational integrity, promoting ethics codes and building ethical workplaces (Bohte and Meier 2000; Jurkiewicz and Brown 2000; Zajac and Al-Kazemi 2000). To develop beneficial cooperation between persons and organizations, it is required trust-generating integrity (Axelrod 1984). Cameron, Bright and Caza (2004) consider that the ethical factors in organizations can be measured by organizational integrity among other four factors such as organizational forgiveness, organizational trust, organizational optimism, and organizational compassion.

Selznick (1957. 1969, 1992) argues that constituencies want the organization to evince organizational integrity by being self-consistent, trustworthy, non-opportunistic, and distinctively competent organizational self. People attempt to preserve a sense or organizational integrity through self justification, self integrity, and self affirmation processes, internal coherence (Staw, 1980 and Steele, 1988) and behave authentically to maintain integrity (Gecas, 1982).

Organizational integrity is an attribute of a dynamic organizational self, making possible the autonomy, as suggested by Kraatz and Block (2008). Individuals and organizations displaying commitment to values commonly shared by commitments that may sustain trustworthiness, can generate attitudes of personal and organizational integrity. An attitude of integrity framed by shared commitments can unfold to extend benefits to all the stakeholders in any organizational setting.

Relevant societal value can be added to the organizational integrity by designing and implementing strategies and policies centered on fostering the organization's overall social and environmental good standing. Organizational integrity can unfold by the awareness of the other (Srivastva and Barrett, 1988, 318). Kaptein and Wempe (2002, pp. 237 – 46) contend that corporate integrity is a value related to sustainability, social responsibility, accountability and specifically to empathy, solidarity, reliability and fairness.

The incentive structures require fitting the organizational moral integrity to be related. Organizational integrity may have adverse effects due to the wrong design of structures, procedures and incentives. A fair distribution of incentives and rewards play an important role in supporting or inhibiting organizational integrity. Individual's responses to organizational incentives and rewards are important for a practical account of organizational integrity.

The utilitarian - instrumental perspective considers organizational integrity as an instrumental tool is perceived ethically inferior to the intrinsic worth´s perspective that assumes that organizational integrity has more relevance. Under an utilitarian - instrumental and pragmatic framework of reference to integrity, it requires the existence of an entity, only to be assessed tentatively on a case by case basis, which maybe questionable.

Organizational integrity is embodied in an organizational ethical culture of open communication, interaction, diversity and dialogue within a common moral framework of principles and ethical values. Organizational integrity can be used to justify utilitarian - utilitarian - instrumental ethical discourse although it does not necessarily really foster standards of organizational ethics. Emphasis on the intrinsic value of organizational integrity matching actual performance and avoiding potential damages of utilitarian - instrumental misuse allows organizations to develop a genuine caring environment for all the internal and external stakeholders. Cameron, Bright and Caza (2004) reported integrity as one of the virtues that appears strongly related to firm performance and to prevent unethical and dysfunctional behaviors in organizations and the negative effects associated.

Organizational integrity as a theoretical approach aimed to minimizing corruption in organizations "refers to the integration of an organization's operational systems, corruption control strategies and ethical standards" (Larmour and Wolanin, 2001: xx). Organizational integrity has been advocated by professionals involved in human resources development and individual and group work processes (Swanson, 2001). According to Lyn (1994:111) organizational integrity is based on "the concept of self-governance in accordance with a set of guiding principles" more than normative - compliance to avoid legal sanctions. The definition of governance as a perceptual intrinsic activity is the organizational scaffolding supporting stakeholder trust.

Between the two levels of personal integrity and organizational integrity maybe a conflict when an individual's autonomous values and deeply held principles are not aligned with the organizational ethical culture. A litigious society makes more difficult to achieve organizational integrity. Therefore, Hampshire (1983) sustains that personal integrity and ethical behavior should be distinguished from integrity at an organizational level. By maintaining personal wholeness and integrity in the battlefield, organizational behavior strives for organizational integrity.

The maintenance of any organizational integrity system faces a representational framework of means and requirement. One of these requirements is to have reliable agents to acquire, maintain and reason the dynamics of changing organizations. This notion of organizational integrity regulates the organizational dynamics of

any system. Demazeau, and Rocha Acosta (1996) develop a model for multi-agent systems with dynamic organizations in terms of a population-organization structure for dealing with the notion of organizational integrity.

The interactions among the different components of organizational integrity give the identity to the integrity system. Organizational integrity systems are "policy and operational frameworks that are intended to integrate an organization's anti-corruption strategies. They usually comprise standard elements including risk assessment, audit and investigation capacity, reporting, education and training, organizational controls and policies, administrative structures, leadership and communication" (Plibersek and Mills, 2009:3).

When the identity is not strong, the organizational integrity may be shaky and the organization has not clear what stands for on their current operations and functions. However, the presence of an organizational integrity system formed by a set of integrity policies and operational procedures (ICAC, 2009) is not capable to stop workplace corruption despite the anti-corruption strategies designed and implemented by this framework. Failure in implementing an organizational integrity system may be a factor in workplace corruption.

Bowie (2009) associates some features of individual integrity and organizational integrity. Both are committed to moral principle. Organizational integrity is a reference to any issue involving wrongdoing that has legal individual and organizational consequences on efficiency, effectiveness, welfare, image, etc. The wrongdoing maybe is more of an individual involvement concerning a specific grievance in the workplace and less likely concerning issues involving all the stakeholders in organizational integrity.

The organizational integrity is in tension and conflict with the developments of global economic and political processes. Organizational integrity may not necessarily be in conflict with financial success. Hicks (2007: 14) assumes that "organizational integrity is a reflection of an agency's reputation for delivering on its promises and being true to its stated values and ideals in everything it does…. Organizational integrity is not the sum of individual or professional integrity in a particular entity."

There is lack of organizational integrity (Wollcock, 1998) in the situation of collapsed states (Zartman, 1995) where rules out the anarchy, the state institutions practically are non-existent. On the situation of predatory states (Evans, 1992, 1995) there is organizational synergy with a bureaucratic state apparatus formally constituted but corrupt, which is without organizational integrity. The situation of weak and inefficient communities or states (Migdal, 1988) with a considerable level of organizational integrity but an inexistent organizational synergy where the

state apparatus and the functions of civil society are subject to the rule of law, although they are not efficient and not capable to respond to the citizens' demands.

Having positive organizational capital reputation is not a sufficient condition for possessing organizational integrity, but it may have an empowering influence with all the relevant stakeholders. Reputational capital for organizational integrity is part of the corporation's brands grounded in the values, giving them a competitive advantage and positioning them in the market place (Bowie, 2009).

The dynamics of any information system links the courage required to achieve organizational integrity (Dewey 1909, 403) sustained by structural process to develop strong institutions of unity (Murdoch 1970, 95). An information system should maintain the organizational structures in their own organizational ethical culture to support organizational integrity. Dhillon and Backhouse (1999) identified the technical, formal and pragmatic basis for developing an information system to maintain organizational integrity.

Social networks and interactions provide a theoretical framework to analyze corruption prevention and resistance in terms of the existing organizational integrity. Organizational integrity establishes social norms in organizational settings seeking to define a schema of ethical values to resist corruption under the assumption that "deviance stems largely from the nature of the organization rather than the nature of the individual (Larmour and Wolanin, 2001: xx)." Boardman and Klum (2001) contend that corruption resistance depends on the key elements including the right ethical values, which are a prerequisite to organizational integrity, leadership driving the development and integration of the values and communication.

Any change on the organizational environment may create challenges, opportunities or threats for the equilibrium of organizational integrity. According to Wollcock (1998), there are some important emerging conditions which may erode organizational integrity. The increasing economic globalization processes have a strong impact in changing organizational activities and functions, labor patterns and stakeholders relationships. Individuals in organizations have principles they want to adhere to, which implies organizational integrity based on relationships of identity. Chang (2000) argues that these changes require to revaluating the principles of individual and organizational integrity and accountability. To do this, it is necessary besides to reassess the organizational management integrity and the leadership integrity in organizations settings.

3. RESEARCH QUESTION

To what extent does strategic organizational management integrity capacity system influences the institutionalization of leadership integrity effectiveness?

4. HYPOTHESIS

Variable Independent (X): Strategic organizational management integrity capacity system

Variable dependent (Y): Institutionalization of leadership integrity effectiveness

Variable	Description	Indicators
Independent X	Strategic organizational management integrity capacity system	
Dependent Y	Institutionalization of a leadership integrity effectiveness	

Based on the theoretical rationale that there is a positive relationship between organizational management integrity capacity system and leadership integrity effectiveness, the following hypothesis is proposed:

Hypothesis 1: A positive relationship exists between perceptions of strategic organizational management integrity capacity system and the institutionalization of leadership integrity effectiveness.

5. OBJECTIVES

A. To analyze the relationship between the institutionalization of leadership integrity effectiveness and the strategic organizational management integrity capacity system.

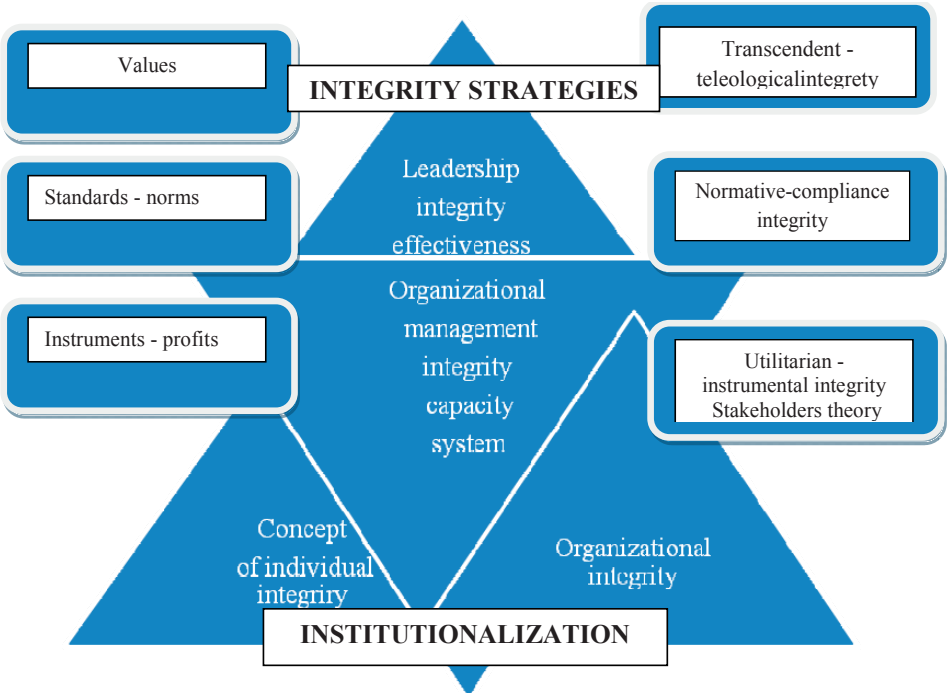
B. To contribute empirically to normative - compliance research on organizational management integrity capacity system.

C. To operationalize the notion of leadership integrity effectiveness.

D. To analyze how organizational management integrity capacity system contributes to leadership integrity effectiveness.

6. THEORETICAL FRAMEWORK RESEARCH MODEL

Fig. 1. ***Theoretical framework research model***



7. ORGANIZATIONAL MANAGEMENT INTEGRITY CAPACITY SYSTEM

Management integrity in organizational settings is a main issue of critical concern in leadership effectiveness. Organizational management integrity is concerned with the existence of a morally stable organizational system to sustain an integrity capacity system. The strength of the organizational integrity capacity system determines the implementation of the organizational integrity and ethics development system. Any improvement of any organizational integrity capacity system requires more than controlling ethical behaviors and enforcing normative - compliance (Petrick and Quinn, 1997). Organizational management integrity is concerned with moral principles and ethical behaviors that increase self-awareness with respect to individual interrelationships within the organization and with stakeholders outside the organization that increases.

Organizational integrity-based management is focused on managerial decision making and actions taken to integrate ethical principles, values and judgments into specific decisions and actions through dialogue (Waters, 1988). The knowledge of organizational management integrity would help to develop leadership effectiveness behaviors and therefore, at thus, at the end the integrity

against organizational effectiveness performance. Organizational management and leadership may reflect the awareness, officially convey and communicate the integrity as mission statements, codes of ethics and corporate culture (Simons, 1999). Smith (2003) inquiries the use of corporate ethics on managerial effectiveness and study some initiatives that contribute to organizational integrity.

Organizational integrity to be effective requires the code of ethics and other factors that may contribute to an effective application. Codes of ethics embedded in organizational settings are organizational behavior guides but cannot substitute moral climate. The existence of moral climate in an organization is a requirement for organizational integrity. Moral climate is the key notion of organizational integrity characterized by asset specificity, which can be created, difficult to reproduce and can be lost easily. Once the organizational integrity is lost, it has an immediate impact and it is not easy to regain it. (Bowie, 2009). Moral climate cannot be substituted by codes of ethics in organizational settings although.

A. Theoretical approaches to organizational management integrity system

Organizational management integrity cannot be approached from transcendent - transcendent - teleological ethics as an ideal standpoint but from the findings of economics, sociology, psychology, anthropology, etc. Organizational management integrity should balance the ideal, the possible and the practical. Ideals of organizational integrity must be practical and affordable (Bowie, 2009). The normative - compliance organizational commitments to mission, values and principles within the organization and among stakeholders lead toward a movement from organization to institution (Selznick, 1992, 1996) to legitimate organizational choices in a sustainable organizational integrity (Paine, 1994; Selznick, 1992).

A managerial decision at organizational level is whether to focus on a normative - compliance-directed system or an integrity-directed system (Ferrell et al., 1998; Weber, 1993). An integrity-directed system goes beyond normative - compliance of collective commitment and can be found in organization ethics development systems (OEDS). An ethical integrity system over normative - compliance clarifies moral and ethical behaviors, empowers the people to achieve moral autonomous reasoning and operationalize the organizational values.

To ensure personal and organizational integrity and functioning framed by the theory of organizational functional integrity, the members should maintain proper appearances linked to specific organizational formalities, such as hiring a manager, thus resignation does not poses a threat to organizational integrity. The organizational model of functional integrity shows that the normative - compliance of some activities and events may affect the functioning of the whole organization evolving as a multi eclectically process on specific activities. Thus,

organizational management should be aware of management and ethics theory assumptions and the implications of managerial responsibilities and functions implicitly linked to integrity (Petrick and Quinn, 1997).

The organizational functional integrity may be linked to the rules and policies, demonstrating the normative - compliance as the condition. The behavior displayed by an organizational setting may be problematic and disruptive of the organizational functional integrity. In the organizational model of functional integrity, the members' normative - compliance is an imperative to prevent long term problems and the defenders' image is essential to continue functioning (Gephart, 1978).

Stakeholder theory provides the moral framework for organizational integrity. All organizational stakeholders can provide inputs to enhance moral climate and thus, organizational integrity. The stakeholder management in organizational integrity must balance the interests and benefits of all stakeholders involved. A stakeholder single-minded that ignores the interests of others will result in failures to achieve organizational integrity. Conflict of interest between stakeholders and within organizations is a roadblock to organizational integrity. Attempting to manage the perceptions and impressions of organizational stakeholders, top management may be unaware of the damages that may create new reputational crises and problems of organizational integrity and honesty (Dutton, Dukerich and Harquail, 1994).

Thomas, Schermerhorn and Dienhart (2004) contend that sustainable – integrity programs build and confirm organizational cultures and supported by empirical evidences, they argue that integrity programs outperform normative - compliance programs on several ethical features. Creating sustainable organizational integrity is an important goal that requires a great deal of work to build and maintain organizational ethical cultures.

Bowie (2009) considers that the essential conditions for organizational integrity are competent people, effective monitoring and normative - compliance. According to Payne (2003) organizational management integrity has two choices related to ethics leadership, the integrity programs that is sustainable and normative - compliance programs. Integrity programs focus on excellence, self governance, encourage shared commitment, leadership is management driven and values drive actions. Normative - compliance programs focus on laws, organizational regulations and rules, the goal is conformity to standards to prevent misconduct, and the leadership is lawyer driven.

An old management paradigm is more focused on control; organizational ethics is dependent on more selective integrity rules, tools and screening instruments. An organization that has a deficient or lacking an integrity capacity system, is

prone to control ethical conducts at the workplace with all sorts of sanctions and punishment are imposed as the result to enforce the rule. A coordinated assurance paradigm in organizational ethics is driven by external standards to promote organizational internal integrity capacity systems. Organizational management is responsible to adopt a management paradigm as a framework for the implementation of an integrity capacity system.

Ethics codes, professional associations and ethics management play an important role in fostering organizational integrity. Ethics management is "a systematic and conscious effort to foster organizational integrity" (Menzel, D. C. 2005, 157). At the core of the organizational management integrity is embedded in an organizational ethical culture capable to embody the organizational strategic vision as the result of negotiated expectations between the internal and external stakeholders' interests. Promoting alignment between personal goals and development of shared vision contributes to organizational management integrity (Cacioppe, 2000).

Petrick, Scherer, Brodzinski, Quinn, and Ainina (1999) link managing integrity capacity as an eventual strategic resource for sustainable global competitive advantage. Managing organizational integrity capacity as an intangible strategic asset, it may contribute to the organizational core capability enhancing the benefits to the different organizational stakeholders and held them accountable (Korten, 1999; LeClair et al., 1998). Within this integrity framework, organizational leadership practices must function and foster the aggregate strategic asset of integrity capacity (Dunphy and Griffiths, 1998).

Managerial skills on system integrity capacity are crucial to sustain an organizational ethical culture committed to organizational integrity capable to develop a leadership and managerial integrity environment and to enhance organizational integrity capacity. System integrity capacity is defined by Petrick and Quinn, (2000:12) as "the aligned implementation of organizational policies that institutionalize ongoing moral improvement within and between organizations and enable extra organizational contexts to provide a morally supportive framework for integrity-building environments through statistically measured performance improvements" (Lindsay and Petrick, 1997; Petrick, 1998).

Petrick and Scherer (2002) suggest that the neglect of individual organizational managerial integrity capacity lead to managerial immoral and illegal conduct to managerial malpractices which have adverse impacts on the interests of all the stakeholders. Cruver (2002) and Swartz and Watkins (2002) explain based on the Enron executives case the consequences of these adverse effects when individual and organizational management integrity capacity is neglected. Organizations should enhance management integrity capacity systems to provide supportive

structures and contexts for ethical behaviors in the workplace. Organizational management integrity may under estimate or ignore personal responsibilities in some specific situations. Strong organizational management integrity is grounded on moral and ethical priorities that give the sense of mission and purpose to face any emerging challenge.

Management integrity must realize that stakeholders should never be treated as simply utilitarian - instrumentals, mere means to an end and never abandon one´s humanity (Habermas, 1998). The Habersian discourse ethics centered on true dialogue may fosters the intrinsic worth of organizational integrity. Organizational management integrity is an interdependent and synergistic process under a framework of communication and dialogue to make decisions and problem-solving. Strategic dialogue between the management integrity and all relevant stakeholders can develop and institutionalize organizational integrity.

Organizational ethics and values may become a tool for strengthening organizational integrity and organizational culture's identity aimed to sustain and enhance achievement of economic, financial, social and environmental goals. Organizational ethics is defined as "the principles, norms and standards that guide an organization's conduct of its activities, internal relations and interactions with external stakeholders. Ethics refers to the ethical standards identified, defined and implemented within organizations to achieve a culture of organizational integrity" (Plant, 2008/9:9).

To gain organizational management integrity requires specific structures, methods and strategies of organizational forms. A simple mechanism to obtain and enable organizational integrity management requires an understanding of the structures of organizational forms. Integrity management is a safeguard of the spread of unethical behaviors and integrity violations in organizational settings. Among these organizational forms is the management of relationships between the different organizational stakeholders of the firm. A structure of organizational form that sustains the unity with processes and products, it provides organizational integrity.

Structural unity with simplicity of organizational forms, structures and relationships is the base for organizational management integrity and good communication shared by all the participant stakeholders. Organizational management integrity through structural unity offers the potential to manage processes with complete control within virtual organizations, configuration management and supporting software deployment (Murer and Scherer, 1998).

The ethical principles and culture inherent in leadership behaviors at the workplace create the needed organizational culture to influence the building of organizational management integrity. Kolthoff (2007) found that organizational

management integrity is represented by leadership to safeguard integrity in performance management. The leader's commitment to create and maintain an ethical organizational management culture is the key element to the best practice of organizational integrity that has an impact on efficiency, effectiveness, competitiveness, organizational reputation, job satisfaction, commitment, etc. (Boardman and Klum, 2001). A strong ethical culture is a requirement for organizational management integrity.

An organizational integrity system as a broad prevention program aims to promote ethical behavior rather than attack the specific unethical behaviors to reduce harm (Sparrow, 2008:36-37). An organizational integrity audit, including the organizational management integrity, can be conducted to measure organizational integrity qualities (Kaptein, van Reenen, 2001).

An organization operating on organizational managerial integrity model has duty values built in the inherently heuristic nature of a behavioral-operational-procedural-structure from which right managerial decisions are inferred. In this sense, the application of the organizational managerial integrity model at any part and level of the organization requires of a procedure and a supportive structure being capable to find the guiding ethical principles to solve any problem.

Ethical practices contribute to organizational management integrity and also to organization's operational effectiveness and decision making processes. Ethical management behavior in the workplace may be more related to organizational factors and the organization's ethical culture than to individual attributes (Zipparo, 1998). Individual integrity in organizations maybe more questioned than the overall organizational integrity and organizational management integrity. Thus, building an organizational management integrity culture leads to create a corruption resistant organization.

To manage for organizational integrity requires having knowledge of individual's integrity at the workplace. Assuming that people do the right thing in organizations, it does not necessarily lead to organizational integrity. Organizational integrity may be reinforced by theory Y individuals in organizations who do not consider either treating others or be treated as mere utilitarian - instrumentals, as well as their jobs or the organization. Organizations embedded with integrity are not utilitarian - instrumental to selfish interests of specific stakeholders. On the other hand, theory X people treat others and consider organizations are mere means and utilitarian - instrumentals and not end (Bowie, 2009). Individuals in organizations treated as utilitarian - instrumentals may behave in accordance.

It is quite difficult to focus on the positive organizational effects of the behavioral management integrity if the leadership behavior may be espoused by a mismatch between the actual ethical conduct, values and morals, and actions

(Simons, 1999). Boardman and Klum (2001) focus on building organizational management integrity in an integrated organization's operational systems, corruption prevention strategies and ethical standards.

The integration of ethical standards into organizations in the form of codes of conduct extended beyond the required by law, is a necessary action to pursue organizational management integrity. Management organizational integrity has a positive relationship with organizational integrity and thus, with organizational effectiveness. An organizational integrity system to be considered as capacity, coherence and consequences (Shacklock and Lewis, 2006) should be validated if the organizational characteristics are defined in similar way in order to deliver results.

The aim of an organizational integrity management system is to prevent integrity violations. Huberts, Pijl and Steen (1999) develop a typology of organizational integrity violations consisting in corruption, conflict of interest, fraud, theft, improper use of authority, sexual harassment and discrimination, private time misconduct, abuse and manipulation of information, abuse and waste of resources.

Management of an organizational integrity system is based on corruption risk assessment. According to OECD (2010:24) a management of organizational integrity system "includes all utilitarian - instrumentals, processes, factors and actors that influence the integrity of the members of an organization" Utilitarian - instrumentals are categorized to determine and define, guide, monitor and enforce integrity. Defining utilitarian - instrumentals determine when integrity is compromised trough risk assessments. Implementing an organizational integrity management system makes public any integrity violation and any improvement might help to observe more integrity violations in the workplace.

Organizational management integrity manifests through the organization' values sustaining diverse activities, operations and relationships taking place within the different stakeholders.

The organization should be committed to ethical values, good governance, ethics management integrity and corruption prevention consistently displayed in its activities, operations and relationships with stakeholders contributing to sustainable organizational integrity. Governance means the pervasive management of organizational integrity and accountability subsuming both process transparency and relationship honesty (Kitchin, 2003).

Smith (2003) studies ethics management and some other initiatives that contribute to organizational management integrity. Ethics management is viewed as a planned managerial effort to foster integrity in organizations, and not as a control tool of individual and organizational behaviors Ethics codes,

statements of values and professional associations play an important role in fostering organizational integrity and building ethical workplaces (Bohte and Meier 2000; Jurkiewicz and Brown 2000; Zajac and Al-Kazemi 2000).

Regarding the overall organizational mechanisms of governance aimed to maintain, sustain and enhance organizational managerial integrity, there are several forms of knowledge governing interactions between individuals and organizations, which include among others codes of ethics, ethics manuals, integrity systems and procedures, etc.

New entrants to the organizational integrity system may be the developers of the organizational management integrity to lead with integrity. A measurement utilitarian - instrumental for organizational management integrity programs would provide information on integrity leadership, ethics management, misbehaviors, fairness, etc. These measures would be the indicators to diagnose any organizational integrity as it is and to promote the management of change towards the organizational development and growth.

Creating and increasing trustworthiness further helps develop organizational integrity and through structural unity supports the information systems security in the inter phase between virtual organizations and individuals in organizations. Structural unity achieves organizational integrity despite some limitations on sophisticated specific shared structures. Simplicity in organizational forms and structural unity should support improvement of organizational management integrity. Despite the sophistication of languages to model organizational processes, not necessarily reflect organizational management integrity as a framework to integrate configuration management consisting of artifacts and corresponding processes (Murer and Scherer, 1998).

Conflicting abstract standards in legalistic normative - compliance-driven organizations, causing moral stress may be the cause of unsuccessful organizational integrity-based management (Waters 1988) and moral muteness (Bird and Waters 1989; Trevino, Hartman, and Brown, 2000). To avoid the possibility of what Hicks (2007: 15) terms “systemic ethical failure” it is important to sustain an ethical organizational culture framework for maintaining and promoting organizational management integrity and for understanding and managing people in organizational settings. The antithesis and threat to organizational management integrity are any disconnection between rhetoric and action, such as utopianism and opportunism. Groupthink is a danger and a serious threat to achieve organizational integrity. Telepathy avoidance is necessary for organizational integrity.

A well trained and experienced professional management supported by organizational management integrity, will accomplish higher levels of

organizational performance and will achieve superior economic, social and environmental goals of efficiency and effectiveness and good ethical standards.

8. LEADERSHIP INTEGRITY

Organizational leadership and management integrity should resolve and prevent moral and ethical problems but holding individuals responsible, and more important, to solve and prevent a crisis o organizational integrity. Leadership integrity stimulates and has direct effects organizational integrity. Leadership integrity as morally acceptable behaviors contributes to the prevalence of organizational integrity. An essential requirement for moral leadership is an attitude of integrity and genuine commitment to moral principles and ethical values to become integrity leadership (Badaracco 1997, 120).

Leadership integrity in organizations is an important concern between organizational management integrity and leadership effectiveness (Kanungo and Mendonca, 1996). The impact of leadership integrity is limited only to a few direct effects on the prevalence of organizational integrity. Integrity focused-leadership has an impact on organizational integrity and influence the incidence and prevalence of integrity.

The leadership integrity plays a key role in creating and developing policies, procedures and the whole organizational system indicated by the level of influence that the organizational management integrity has on them. Organizational leadership integrity fostering integrity capacity improves the firm´s reputation capital with their internal and external stakeholders (Fombrun, 1996). Leadership without integrity may be a risk to any organization (Morgan, 1993; Mowday, Porter and Steers, 1982; Parry, 1998b; Posner and Schmidt, 1984). Organizational leadership integrity should establish and develop the behavioral and ethical role models for process, judgment and development integrity. Also, leadership integrity should build and sustain the organizational integrity capacity building to foster organizational moral progress.

The integrity capacity construct proposed by Petrick and Quin (2000) is focused to improve individual and organizational (collective) resources to foster moral progress in organizations, meaning the increase in stakeholders demonstrating the systems dimension of integrity capacity. Collective integrity is considered a stage of post conventional collective moral reasoning and commitment to universal ethical principles (Kohlberg, 1984; French and Granrose, 1995). Collective integrity capacity is a stream framed by integrity literature in philosophy and psychology (Erikson, 1950; Taylor, 1985; McFall, 1987; Srivastva and Associates 1988; Walters, 1988; Halfon, 1989; Calhoun, 1995).

These collective integrity capacities support judgment integrity and collective action processes. Petrick and Quin (2000) found a relationship between individuals and collectives exhibit moral processes with process integrity capacity and moral progress. Collective commitment to organizational moral can be cultivated through the implementation of collective developmental integrity capacity (Likert, 1967; Kochan and Useem, 1992; French and Granrose, 1995, Petrick, 1998). The aggregated individual development integrity capacity forms the organizational ethical culture that may support the collective commitment to developmental integrity capacity and moral progress. Taking into consideration the law for guidance is a necessary but not sufficient stage for organizational developmental integrity capacity.

Positive, active and pro-active leadership behaviors and doing the right things are perceived as having high levels of trust and integrity. Unethical and immoral behaviors, doing the wrong thing or what is not expected and valued are perceived as low integrity.

Diagnosing and developing leadership integrity effectiveness leads to identify and develop organizational management integrity and effectiveness. Organizational management integrity may be improved by developing transformational and developmental exchange leadership behaviors may reduce the non integrity and unethical behaviors. Integrity systems can be a framework of reference for the designing and implementing organizational strategy aimed to sustain the capability of leadership integrity role in the whole organizational system and to maintain the coherence of the organizational management integrity to deliver required actions.

Literature on ethical leadership integrity focus on the roles played to assess, enhance and ensure and sustain organizational management integrity. Exercising leadership integrity and having some guiding principles such as the public interest may be part of an analysis of a corruption resistance tendering process (Boardman and Klum. Some factors that contribute to maintaining the integrity of a tendering process include openness, honesty, accountability, objectivity, courage and leadership. (2001). Organizational leadership must be aware of integrity capacity as a strategic asset by improving competence in judgment integrity and held accountable for decisions related to organizational integrity and management integrity in organizational settings.

Leadership integrity is being held accountable for balance and consistent collective judgment integrity with respect to behavioral, moral and economic complexity. Leadership should be held accountable for the nurturing and management of key intangible strategic assets in order to sustain organizational integrity capacity. High integrity capacity of organizational leadership is more

concerned to stakeholder's moral issues, designing and applying sound policies and making right decisions (Litz, 1996; Driscoll and Hoffmann, 1999).

Building organizational integrity leadership based on the existing organizational culture may require to design and implement strategies and policies aimed to create and maintain key ethical standards, such as acting with integrity by being honest, open, accountable, objective and courageous (Boardman, and Klum, 2001). Organizational integrity is one organizational factor of emerging inspired leadership capable to influence and foster spirit at work.

Ethics leadership integrity – focused considers the importance of normative - compliance as the base of an ethical culture. To engage individuals and the whole organization in integrity programs beyond mere normative - compliance is a task of mindful organizational management integrity. They also report other empirical studies that found that employees are more concerned with the integrity than with rules and sanctions and the power of integrity to promote voluntary rule-following was greater.

Leadership should be facilitative in its integrity role and persuasive of vision and values and committed to develop organizational management integrity (Johnson, K.W., 2005). A research conducted by Kinjerski and and Skrypnek (2005) revealed that personal spirit at work is associated to leadership fostering a culture of caring individuals and organizational integrity aligned with its mission. They also found that alignment among individual values and organization's purpose and mission fosters organizational integrity.

Organizational leadership integrity skills to manage situations in moral complexity and to build and maintain the organizational integrity capacity system may enhance its reputational capital among all its stakeholders (Velasquez, 1996). Integrity capacity is intrinsically and utilitarian - instrumentally valuable in organizational settings as an intangible asset of reputational capital, although it may be functional and cultural differentials based on leadership integrity capacity system. Leadership integrity capacity systems sustained on the functional and cultural differentials may have diverse perceptions of quality services leading to an opportunity of improvement (Grant, 1996).

Organizational leadership integrity is challenged by the adverse impacts of integrity capacity exacerbated by economic globalization processes, to develop and implement strategies, policies and to improve theoretical tools for managing emerging ethical dilemmas resulting from (Yergin and Stanislaw, 1998; Petrick, 1998). Brown (2005) analyzes the integrity as a wholeness challenge of the cultural, interpersonal, organizational and environmental dimensions to a leadership strategy. The integrity challenge is to develop appropriate relationships and improve their quality among individuals, corporations and civic organizations

through the analysis, evaluation and redesign of communication patterns. Leaders know how to design organizational management integrity after knowing what it entails.

Recent literature on ethical and leadership integrity roles and related issues examines the implications with the organizational integrity system including the structural relationships between the individual integrity in interaction with the leadership integrity, the management organization´s integrity and the intra-organizational integrity systems (Shacklock and Lewis, 2006). Lasthuizen (2008) tested the empirical relationship based on theoretical and normative - compliance assumption between leadership and integrity and concluded that this relationship is complex and complicated. Testing theoretical and normative - compliance assumptions based on the relationship between organizational management integrity and leadership integrity.

There is a large body of the literature that claims the lack of integrity of transformational and charismatic leadership while another body of literature supports a positive relationship between transformational leadership and integrity. There are limited empirical evidences on how and to what extent organizational leadership contributes to organizational integrity. Parry and Proctor-Thompson (2002) support with empirical evidences that transformational and active transactional leadership styles appear to contribute to perception of integrity.

Research conducted by Parry and Proctor-Thompson (2002) suggests that active and positive leadership behavior is related to integrity. Inspirational leadership has weak direct effects on the prevalence of organizational integrity. Empirically it proved not be strong in the context of organizational integrity. Problems may arise when the leadership is inspirational but not ethical.

A. Transformational leadership

Empirical research testing the link between integrity and transformational leadership is limited and there is also a large body of literature that argues that transformational leadership theory allows the emergence of leadership lacking integrity. Among other links between leadership integrity and transformational leadership, having a clear vision and developing trust are core factors of transformational leadership contributing to organizational integrity (Bass, 1985, 1990, 1998; Yukl, 1989). A vision incorporates a value system that protects and promotes organizational integrity, and encourages learning and adaptation (Rowsell and Berry, 1993, p. 22). Tracey and Hinkin (1994) found evidence to support that transformational leaders possessed and behaved consistent with integrity and high ethical standards.

Transformational leadership has a limited impact on the prevalence of organizational integrity and not necessarily has a positive impact on individuals'

moral judgment. Petrick and Scherer (2000) define judgment integrity as the use of theoretical ethics resources to analyze and resolve individual and collective moral issues. Judgment integrity is at the core of integrity capacity and leadership integrity. For leadership integrity according to Petrick and Quinn (2001:337) judgment integrity means "being held accountable for achieving good results (outcome oriented transcendent - teleological ethics), by following the right rules (duty-oriented deontological ethics), while strengthening the motivation for excellence (character-oriented virtue ethics), and building an ethically supportive environment within and outside the organization (system improvement oriented contextual ethics).

Behavioral, legal, ethical and moral complexity shape organizational judgment integrity capacity sustained by management and ethics theories to establish balanced use managerial responsibilities. Stakeholders committed to handle moral complexity using judgment integrity to develop integrity capacity in organizational settings can enhance behavioral, moral and ethical progress in organizations (Petrick and Quinn, 1997).

Leadership integrity should develop judgment integrity to enhance full moral accountability by providing an integrated model of judgment integrity, merging perceptions and assumptions of behavioral, moral and economic complexities between organizational management integrity and global economics (Brunsson, 1989; Solomon, 1992). Organizational judgment integrity can be a conscious shaping and balancing of competing organizational management, macroeconomics to resolve economic complexity, behavioral, moral and ethics theories in the formation of organizational policies and leadership integrity practices (Petrick, 1999).

Pseudo-transformational leadership (Bass and Steidlmeier, 1999) arises because leadership integrity does not necessarily is effective integrity. Giampetro, Brown, Browne and Kubasek (1998) and also Price (2003) supported the assumption that transformational leaders may fail.

Carlson and Perrewe (1995, p. 5) argue that justice and integrity are values promoted by transformational leadership "as the best approach for instilling ethical behavior in organizations" although the link requires further empirical consideration. Gottlieb and Sanzgiri (1996) contend that leaders with integrity value share of information, viewpoints and feedbacks in an open and honest communication during decision making processes. Behavioral integrity is a critical component of transformational leadership (Simons, 1999). Organizational integrity may be maintained and enhanced by transformational leadership assuming that followers may behave with integrity. Transformational leadership does not necessarily develop and promotes integrity (Bass and Steidlmeier, 1999).

Bass and Steidlmeier (1999) consider that pseudo-transformational leadership may lack integrity. An empirical study found that justice connects integrity and transformational leadership in organizations (Gillespie and Mann, 2000). Focusing on the leadership behavioral integrity to enhance organizational managerial integrity, Parry and Proctor-Thomson (2002) discuss the integrity of transformational leadership drawing on the follower's interests towards the contribution to the interests of the group and away from the self (Den Hartog, Van Muijen and Koopman, 1997; Carlson and Perrewe, 1995).

Parry and Proctor-Thompson (2002) provide empirical evidences to support that the perceived integrity of leaders and transformational leadership are positively related, although this relationship may be moderated by a range of additional variables. They found a positive relationship between perceived leader integrity and demonstration of transformational leadership behaviors, and between perceived integrity and developmental exchange leadership. There is a significant positive correlation between perceived integrity and transformational leadership. Similarly, leaders with the highest perception of integrity are engaged on high levels of developmental exchange behavior.

Top-down ratings on assessments of subordinate integrity provided higher identification of transformational leadership and developmental exchange leadership than peer ratings. Transformational leadership behavior and developmental exchange leadership was perceived to possess the higher perceived integrity levels, especially transactional behavior, a type of contingent reward.

The Multi-factor Leadership Questionnaire (MLQ) was developed by Bas (1985). The use of MLQ provides empirical evidence on integrity of transformational leadership. One MLQ factor "idealized influence" relates positively to integrity (Bass and Steidlmeier, 1999). Individualized consideration and contingent reward correlate positively with each other (Avolio, Bass, and Jung, 1999) and both may be associated positively with perceptions of integrity (Lowe, Kroeck, and Sivasubramaniam, N., 1996).

B. Transactional leadership

Transactional leadership has an impact on the prevalence of organizational integrity and has not moral impact on individual's moral judgment. Two components of active-transactional leadership, management-by-exception (MBE-active) may have no significant correlation with perceived integrity and contingent reward may have differing relationship with integrity. The two components of passive-transactional leadership, management-by-exception (MBE-passive) may lack correlation with integrity and laissez-faire may correlate negatively with integrity.

Parry and Proctor-Thomson (2002) found no significant correlation between perceived integrity and MBE-active. Perceived integrity has the strongest negative correlation with passive management by-exception and laissez-faire demonstrated as a transactional leadership factors. The greatest variation in perception of integrity correlates with the laissez-faire leadership. Thus, the lowest perception of integrity is correlated with the high performance of laissez-fair leadership style. The lowest perception of leadership integrity is correlated to high levels of laissez-faire behavior and low levels of idealized attributes.

Corrective-avoidant leadership as a form of transactional leadership explains different perceptions about leader integrity. The highest perceptions of integrity are related are related to corrective avoidant behaviors while the lowest perceptions of integrity are related to high levels of laissez-faire leadership. The empirical research conducted by Parry and Proctor-Thompson (2002) provide evidences to support a negative relationship between integrity and corrective-avoidant. Higher leadership integrity is related to low levels of laissez fair leadership style and high levels of any corrective avoidant behavior (Parry and Proctor-Thomson, 2002)

C. Charismatic leadership

Transformational leadership is likely to have moral integrity far better than charismatic leadership. Simons (1999) identified charismatic leadership style as a potential ethical leadership. Howell and Avolio (1992) argue that the same qualities that can make a charismatic leadership style have the potential to be unethical leadership and lacking in integrity. The results provided evidence for positive relationship between perceived integrity and transformational factor of charisma, identified as idealized attributes and behaviors.

There is a negative relationship between perceptions of integrity and charisma, although Parry and Proctor-Thompson (2002) claim that is needed more in-depth qualitative case-study analysis. However, charismatic leaders can be perceived as lacking in integrity, although more research is needed to identify moderating and intervening variables.

9. LEADERSHIP INTEGRITY EFFECTIVENESS

Leadership integrity correlates most strongly with leadership effectiveness. Similarly, the presence of integrity related with organizational effectiveness. There is a critical relationship between integrity and measures of organizational and leadership effectiveness (Mowday, Porter and Steers, 1982) and a positive relationship between perceived integrity and a wide range of perceived effectiveness measures (Parry and Proctor-Thomson, 2002).

There are some empirical studies supporting the assumption that integrity is positively related to leader effectiveness (Kanungo and Mendonca, 1996; Mowday et al., 1982, Morgan, 1993; Posner and Schmidt, 1984; Steers, 1977). Integrity ratings are subject to bias of hierarchy, being higher and more favorable by superiors than by peers and subordinates (Morgan, 1993). Parry and Proctor-Thomson (2002) verify positive relationships between perceived integrity, leadership styles and a range of measures of organizational effectiveness. A positive correlation was found between leader and organizational effectiveness.

Empirical studies to test the relationship between perceived integrity and leader effectiveness have used the Perceived Leadership Integrity Scale (PLIS) developed by Craig and Gustafson (1998) and a revised version, the PLIS-R to determine and identify perceived integrity of leadership in organizations, although the integrity ratings of leaders may differ depending of the level of the rater. The PLIS-R measures beliefs on the *intent* of leadership.

To enhance integrity capacity as an intangible and organizational strategic asset, Petrick and Quinn (2001) propose some leadership practices. Leaders are often not held accountable for their neglect of integrity capacity and the cost incurred as a key intangible, strategic asset (Trevino, Weaver, and Brown, 2000; Petrick and Quinn, 2000). Petrick and Quinn (2001) identify the challenge of holding leaders accountable for the performance of organizational integrity capacity as an intangible strategic asset by focusing on judgment integrity to handle behavioral, moral and economic dimensions' complexities.

10. INTEGRITY STRATEGY AS MORAL MANAGEMENT

Integrity strategy is a concept related to moral management. Payne (1994) argues that integrity strategy is ethics as the driving force of the organization. Recognition of the organizational management integrity issue in influencing the strategic direction of organizations has created a greater organizational awareness of the history, ethics and culture. An organizational integrity management system may develop institutional strategies and policies aimed to building more human and ethical capabilities intended to resist corruption and other unethical organizational behaviors (Boardman and Klum, 2001).

Strategic deployment is the new paradigm of organizational integrity capacity that organizational integrity leadership by moral to guide ethical behaviors, to improve judgment integrity, to build and maintain collective commitment to integrity and to enhance moral reputation for system integrity capacity (Petrick and Quinn, 1997).

Organizational management integrity strategy, as part of the strategic planning to foster organizational integrity, should be aligned to the economic and financial

goals with ethical, social responsibility and environmental objectives. The evolving normative - compliance and transformative process character of organizational integrity is reflected in the organization's mission and values statements declared in the strategic planning (Paine, 1994, 2003). Clear integrity strategies and policies are necessary to constitute a framework model of organizational integrity to apply the values and rules through an integrity focused leadership.

Organizational integrity-based management strategies can be focused to strengthen the link between personal integrity and organizational management integrity. Organizational integrity-based strategies should be determined to transparent adherence to moral principles and to implement an ethical culture that could result in an attitude of integrity. Organizational integrity-based strategies foster credible leadership integrity, enhance reputation capital, improve trustworthy and loyalty, takes into account the conflicting interests of internal and external stakeholders. Implementing an organization integrity-based strategy means that internal and external stakeholders should commit to good governance practices where political correctness is well appreciated (Jackson and Nelson, 2004).

Personal integrity in an organization may be perceived as the cause of integrity failure rather than organizational integrity due to the individual responsibility. Personal integrity does not necessarily leads to behave ethical under some specific organizational situations. Strategies and policies on organizational management integrity-focused designed and formulated to improve the organization's integrity, should responsible balance the possible conflicting interests, recognized by Kaptein, van Reenen (2001) as the three dilemmas: entangled hands, the many hands and the dirty hands dilemmas.

An organizational integrity-based strategy can be grounded on the definition, demonstration and dissemination of core values in a relational synergy between the diverse stakeholders of the organization. At macro level, different combinations of organizational integrity and organizational synergy lead to different results. In order to implement organizational integrity, the leadership should be able to provide relational based quality centered on the core values from the inside out in every situation (Kingsley, K. 2005).

An organizational integrity strategy is a shared set of values-based approach designed and implemented proactively to obtain commitment from individuals, promoting individual ethical behaviors to raise the level of organizational ethics. Design and formulation of strategies to improve organizational management integrity should take into consideration surveying the programs and best practices performed by individual agencies. Best practices of corporate responsibility are essential part of strategic organizational management integrity.

An organizational strategy aimed to improve the organizational integrity should focus on leadership developing ethical policies ranging from codes of conduct, whistle- blower procedures, job rotation and applicant screening and some others (Lasthuizen, 2008). Design, formulation and implementation of strategies to improve organizational integrity, might be achieved through the monitoring of different group activities over time. Corporate social responsibility as an organizational strategy is a practice central to organizational integrity.

There are some discussions about implications of organizational management integrity related to issues questioning and rising doubts about the strategies' success of reengineering, restructuring, outsourcing, strategic skills and capabilities, core competencies, etc.

11. INSTITUTIONALIZATION OF AN ORGANIZATIONAL MANAGEMENT INTEGRITY CAPACITY SYSTEM

Issues of integrity and ethical dilemmas may be framed by the institutionalization of organizational ethical culture. The leadership and management of an integrity capacity system should provide the supportive institutional context to sustain the organizational commitment to collective moral progress. The institutionalization of a system integrity capacity gives support to the emergence and maintenance of an organizational moral, ethical and legal culture in the current organizational practices (Petrick and Quinn, 1997; Petrick, 1998).

Institutional coherence as a requirement for organizational integrity is concerned with all the stakeholders involved in any type of individual and organizational relationships avoiding wrongdoings. Woolcock (1998, p. 168) identifies organizational integrity at the macro level considering the institutional coherence and the competence capacity. An organization that institutionalizes and integrity-directed system may be able to enhance the reputational capital as a key intangible asset (Fombrun, 1996).

In the situation where there are high levels of organizational integrity and organizational synergy, the emerging institutional structure favors development through different channels to convey civil society demands in a continuous process of negotiation and embedded autonomy (Evans, 1992, 1995). The implementation of a system integrity capacity to institutionalize an organizational ethical, moral and legal culture may provide sustainable moral progress.

Clientelism and patronage in organizations may be dysfunctions when provide the basis for the institutionalization of corruption, misbehaviors, abuses, etc., and the lack of any organizational management integrity (GRECO 2002; Transparency International 2001; Papakostas 2001; *Kathimerini* 30 January 2003). Institutionalization integrity-directed systems are applied to all

the internal and external organizational stakeholders, such as the Acting with Integrity Program of Nortel based upon internalized ethical principles anchored by core business values.

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