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BREXIT: Impact on the EU and consequences

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Abstract: 29th of March 2019 UK is scheduled for the United Kingdom leaving the European Union. Leaving EU was mainly triggered by the concern about the sovereignty of UK and immigration aspect, which was probably the last straw for the people who voted YES on the referendum on 23 of June 2016. This paper is analyzing the impact of BREXIT from economic and political aspect and the effect on the free movement of people from both perspectives – UK and EU. It was found, that both sides are going to suffer some consequences from BREXIT in every aspect, but it will not mean the end of the European Union.

Keywords: Article 50, Brexit, European Union, United Kingdom.

INTRODUCTION

After European Coal and Steel Community was instituted in 1952, UK decided not to become a member due to concerns about sovereignty and democracy. Same decision was made against signing Treaty of Rome and becoming the member of the European Economic Community in 1957. So, although United Kingdom has played a great part in European Union, it was not a member until 1973.¹

Late 1950's UK had changed its opinion and started negotiations to enter the Common Market. They applied and were vetoed twice, 1963 and 1967 by the President of France Charles De Gaulle, who accused Britain of having a deep-seated hostility towards European construction and that they showed a lack of interest in the Common Market. "*The present Common Market is incompatible with the economy, as it now stands, of Britain,*" were his exact words on the matter, which led to criticizing UK economy, agriculture, working condition and even more aspects.² After third application in 1973, after de Gaulle was no longer the President of France UK became a member of the European Communities after voting in the House of Commons with the result of 356 in favor to 244 against. In 1975 UK held its first referendum, whether to remain in the European Community, the Common Market. Turnout of the referendum was 64% and 67% of the voters supported continued membership.³

This brief introduction of UK's history with EU demonstrates the rocky relationship between the two. At first, although encouraged to join, UK decided to stay distant from joining the new community and after reaching the decision to finally join, they were vetoed twice and accused of being hostile.

WHY BREXIT

BREXIT was triggered mainly by two aspects. First is the question of sovereignty. As we know, this has always been the main issue for UK in regards of EU. Leavers are claiming, that accession into the EU in 1973 has limited the Parliamentary sovereignty, which is one of the

¹ „A history of the UK's EU membership“ June 15, 2016

² „On this day 1967: De Gaulle says 'non' to Britain – again“

³ Vaughn Miller. „The 1974-75 UK Renegotiation of EEC Membership and Referendum“ July 13, 2015. House of Commons Library

principles of the UK constitution.⁴⁵ In Van Gend en Loos case in 1963 was articulated, that „By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on an international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states of the Community, the member states have limited their sovereign rights, and albeit within limited fields, have created a body of law which binds both nationals and themselves“.⁶ In the case of Costa v ENEL the supremacy of EU law against national law was established.⁷ With the Brexit their aim is to regain the sovereignty and with that be able to make their own trading agreements with other countries.

The second aspect is immigration. The UK citizens opposition to EU is strongly connected to immigration policies of the EU. Many are convinced, that immigration is negatively affecting nationalism and everyday lives of british people. Politicians have promised that, that Immigration will stop, there will not be free movement.⁸ This is the main reason for the YES vote on the referendum.

IMPACT OF BREXIT

Article 50 of the Treaty of European Union allows a member state to decide to withdraw from the EU, according to its own constitutional requirements. Once the decision is made, the member state is required to notify the European Council, triggering a two- year negotiation period which may be extended by agreement.⁹ The exact impact of the Brexit is determined by the outcome of these negotiations. Biggest issues regarding the impact of Brexit are politics, economics, citizens rights and cuts to the EU budget after Brexit. So with the referendum, only thing, that was decided was to leave the European Union. On the referendum there was only a question, whether to leave the Union or stay. There was never any indication, what leaving the EU will entail.

There are four scenarios with Brexit, which all have different results and consequences for EU as well as for UK. Today, there is free trade between EU member states and there are rules laid down by EU. It is called a single market. If there is no deal for UK leaving, then 29 of March 2019 UK will have trade with EU on the bases of rules set by World Trade Organization, meaning that UK will become „third country“ to EU.¹⁰ With this, there will be custom checks, border taxes and other tariffs will be applied to goods entering to EU from UK and vice versa. Since Ireland remains in the EU, there will have be a „hard border“ between the two for blocking movement of goods and people without border checks. So basically no deal situation would be the worst for both UK and EU and would change Europe as we know it today.

Hard Brexit means, that there will be a deal for UK leaving, but they will be cut out of single market, customs union and European Court of Justice. That means, that UK is able to make a free trade agreemet with EU but also with other countries, such as USA, Canada and China.

When soft Brexit deal is made, then UK would remain into single market and customs union. There would be a few changes to EU when it comes to soft Brexit in terms of trade and customs.

⁴ „Parliament’s authority“ <https://www.parliament.uk/about/how/role/sovereignty>

⁵ „Dreaming of sovereignty“ March 19, 2016. The Economist

⁶ Judgement of the Court. Van Gend en Loos v Nederlandse Administratie der Belastingen 6

⁷ Judgement of the court. Costa v ENEL

⁸ Tom McTague. „Theresa May unveils new UK immigration system“ October 2, 2018. Politico

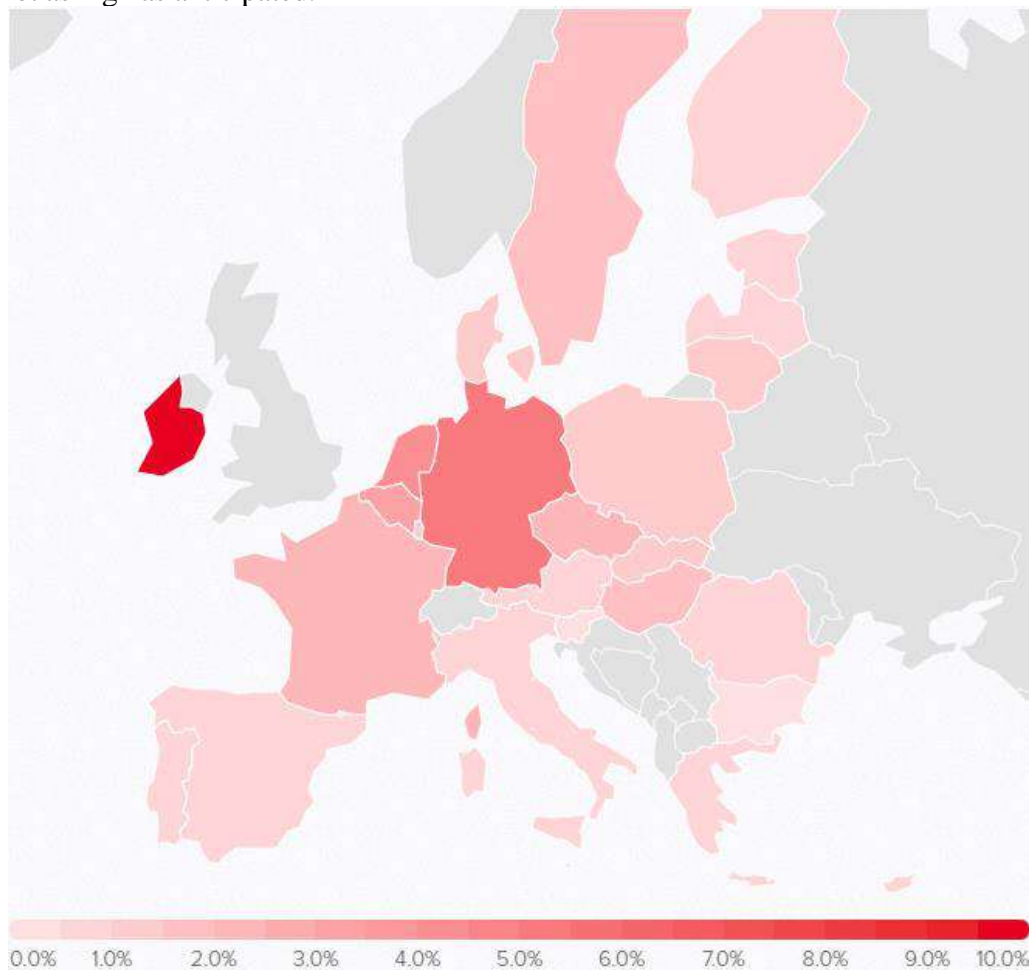
⁹ CONSOLIDATED TEXTS OF THE EU TREATIES AS AMENDED BY THE TREATY OF LISBON, article 50

¹⁰ Dobrin, S., & Chochia, A. (2016). The concepts of trademark exhaustion and parallel imports: a comparative analysis between the EU and the USA. *Baltic Journal of European Studies*, 6(2), 28-57.

Brits have tried to make a compromise and „cherry pick“ the condition best for them, but should also appeal to EU. The so called „chequers deal“ – staying into single market, but being able to make trade deals with other countries.

ECONOMICAL IMPACT

UK is one on the top contributors to EU budget with 8,9 billion GBP in 2017. Between 2014 and 2017 UK's contribution was 13%, making them third contributor after Germany and France. Each member state also receives benefits from EU. Most of the member states, especially newer members receive more, than they pay. UK contributes more than they receive. After leaving, UK will stop contributing annually and that means, that other member states have to start contributing more.¹¹ After Brexit in 2021-2027 there will be a 94 billion euros less in the budget and at the first look it seems that EU must have to start cutting back some programmes. But according to a brief issued in spring 2018¹² assumes, that due to inflation and growth, the income of the 27 member states will be 28% higher than in 2014-2020, which means, that the financial impact of Berxit for EU is not as high as anticipated.



Share of GDP exposed to the departure of the United Kingdom from the European Union.

Image source: www.politico.com

¹¹ „The UK is one of the biggest contributors to the EU budget“ July 13, 2018

¹² Zsolt Darvas, Guntram Wolff. „Rethinking the European Union's Post Brexit Budget Priorities.“ March 2018. Bruegel

Economical consequences with Brexit vary between different member states and it is dependant on the location and trade volumes. Countries, that are close to or have high volume of trade with UK, such as Ireland (10%), Netherlands (4,4%), Belgium (3,5%), Germany (5,5%) and France (2,2%) have the highest impact on their GDP after Brexit.¹³

After Brexit, whatever opt-out option is complied, it will reduce the trade between EU and UK and increase the cost due to taxes and fees on the border. Although loss or decrease of trade with EU is more damaging to UK then vice versa, it is bad for both. And as previously mentioned, it can go as high as 10% loss of GDP for some states. Probably it will not be the worst case scenario.

FREE MOVEMENT OF PEOPLE

In this modern world living, studying and working as well as tourism has become a reality and inside EU for it's citizens, there are only a few restritions. The situation will change, especially living and working in UK will become more difficult. As previously mentioned, immigration was one of the main reasons that people voted YES on the referendum. And it was not only migrants from thirld world countries they were concerned about. In 2004, when the largest accention to EU happened, UK opened it's borders to all the new EU citizens. Between 5000 and 13 000 migrants were expected to arrive into UK the first year, but close to 130 000 did.¹⁴

Theresa May has already stated, tha UK will end free movement of people. *„Two years ago, the British public voted to leave the European Union and take back control of our borders. When we leave we will bring in a new immigration system that ends freedom of movement once and for all. For the first time in decades, it will be this country that controls and chooses who we want to come here.“*

The new plan is to choose migrants according to their skills and education. The aim for this is to avoid people, who come with an intention to receive social benefits or simple labour. According to May, it is fair to ordinary working Brits.¹⁵

There is 3.2 million EU citizens living in UK and 1.3 million on UK citizens are living in EU. What does Brexit mean to them? According to the joint paper conducted and negotiated between EU and UK government, these people can stay where they are under the same conditions as today. Anyone coming after Brexit day will have to meet the new requirements laid down by UK.¹⁶

POLITICAL IMPACT

There is 751 seats in European Parliament, UK holds 73 of these seats. In the Parliament, there are two sides – protectionism and liberalism, which refers to wheather Europe should be more open or closed. UK with it's 73 seats represents liberalism, along with Northern liberal block against Southern protective bloc and without UK, the balance would shift to protctionist bloc. Brexit would also change the political ideolgy – majority of UK's MEP's represent center-right and eurosceptic groups. After Brexit, their loss would strengthen the left and lead to more social Democratic union.¹⁷

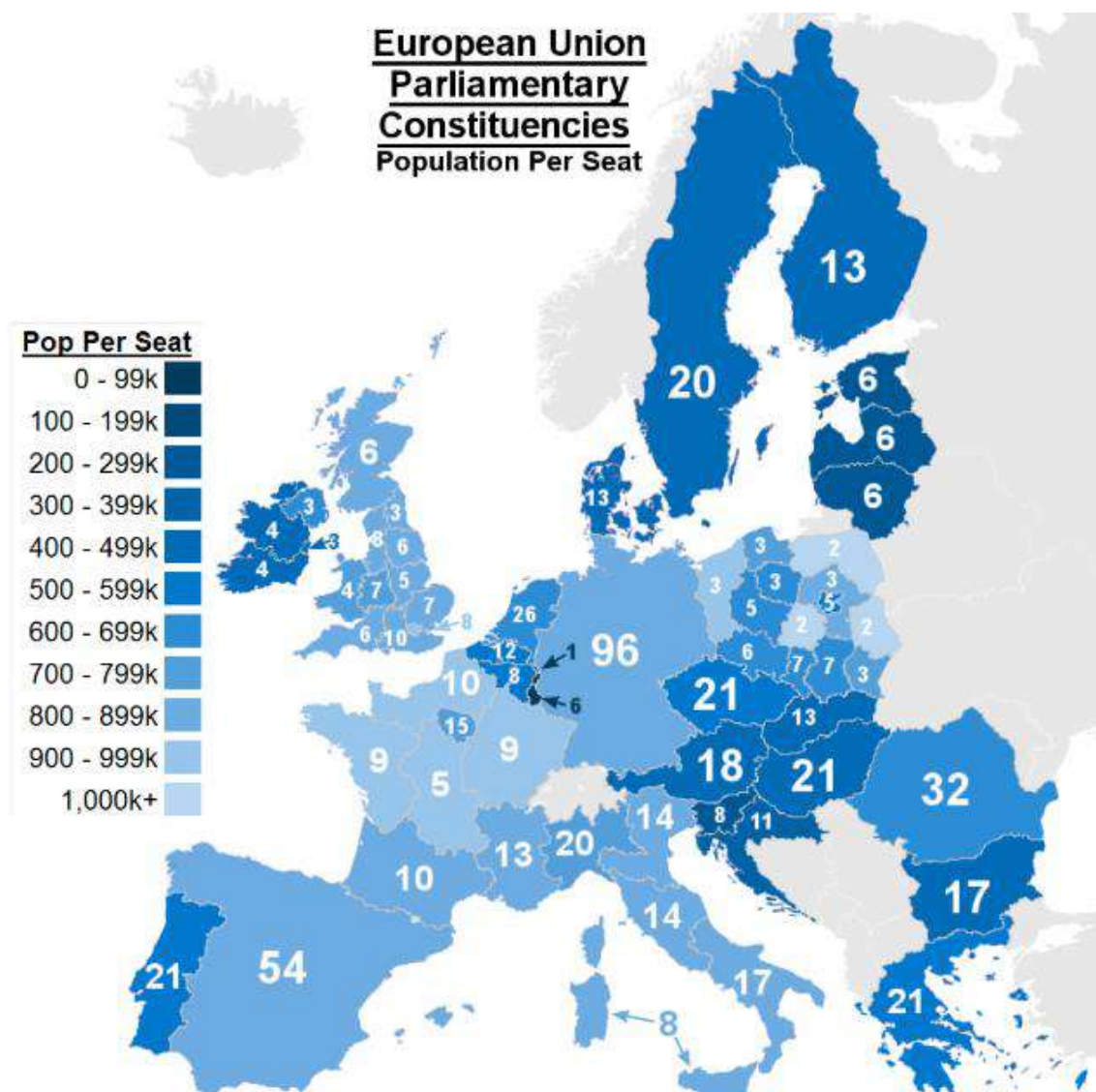
¹³ Jacopo Barigazzi. „Where Brexit will hurt most in Europe“ January 8, 2018. Politico

¹⁴ Ian Jack. „Who do I blame? Eight reasons we ended up in this Brexit mess“ March 3, 2018. The Guardian

¹⁵ Tom McTague. „Theresa May unveils new UK immigration system“ October 2, 2018. Politico

¹⁶ „Joint report from the negotiators of the European Union and the United Kingdom Government“ December 8, 2017. European Commission

¹⁷ Oliver Patal, Chistine Reh. „Brexit: The Consequences for the EU's Political System“ 2016. University College of London



Map of EU Parliament 2014, population per seat. Image source reddit.com

UK has been a balancing force between France and Germany. Studies have shown, that after leaving, opposition between the two will grow stronger. France will have more difficulties standing out for their political views and Germany will increase their political power, which can increase opportunity for federalization.¹⁸

The change in political power after UK leaving can make EU more volatile, controversial and weaker. Since the representation of the liberal member states decreases, EU may become more closed to the outside world than before. There has been discussion about other member states leaving EU, if UK is granted soft Brexit. This is highly unlikely. As mentioned before, UK is one of the biggest countries in EU in terms of GDP, population and MEP's on the European Parliament. Although the EU's immigration politics has been a problem for other member states, most will have a lot more to lose from leaving than UK does.

¹⁸ Kristjan Raid. 2016. „Brexit'i poliitilised mõjud Suurbritanniale ja Euroopa Liidule“ Bakalaureusetöö. Tallinna Tehnikaülikool

CONCLUSIONS

There is no reason to believe, that Brexit won't happen. Brexit affects both – EU and UK and it's hard to say exactly, who will come out of it as a winner, but it is clear, that both sides will suffer some consequences.

In political aspect, there will be a shift in political power inside EU and according to the most probable scenario Germany will gain more power and also some tension between Germany and France will resurface, since the neutralizing UK will not be there. Liberal bloc will lose its power in European Parliament, which would mean that EU will be more closed in terms of trade and there will be more regulations. In political aspect, there is also a threat, that EU will lose its power in foreign politics.

In economy, the consequences vary – it does leave a big hole into EU budget, but when we are considering inflation, there will not be any huge sacrifices for any member states. The trade between UK and EU member states is still an open question. It is really depending on the opt-out option. Unless there is a soft-brexite deal, the trading will change. And that may influence some member state's GDP for as much as 10%.

Since stopping immigration is one of the highest priorities for UK after Brexit, the free movement of people will be affected highly. It is already confirmed, that no-one will have to move due to Brexit, but migrating into UK will be considerably more difficult for everyone in the future.

Brexit would end the European Union as we know it today, but it will not cause the collapse of the EU.

BIBLIOGRAPHY:

- „A history of the UK's EU membership“ June 15, 2016 <http://ukandeu.ac.uk/explainers/factsheet-on-timeline/>
- „On this day 1967: De Gaulle says 'non' to Britain – again“
http://news.bbc.co.uk/onthisday/hi/dates/stories/november/27/newsid_4187000/4187714.stm
- Chochia, A., Troitiño, D. R., Kerikmäe, T., & Shumilo, O. (2018). Enlargement to the UK, the Referendum of 1975 and Position of Margaret Thatcher. In *Brexit* (pp. 115-139). Springer, Cham.
- Chochia, Archil, David Ramiro Troitiño, Tanel Kerikmäe, Olga Shumilo, and Nicole Lindstrom. "The First European Community and the British Position." In *Brexit*, pp. 59-81. Springer, Cham, 2018.
- Vaughn Miller. 13 July 2015. „The 1974-75 UK Renegotiation of EEC Membership and Referendum“ House of Commons Library
- „Parliament's authority“ <https://www.parliament.uk/about/how/role/sovereignty> (last accessed 22.11.2018)
- Dobrin, S., & Chochia, A. (2016). The concepts of trademark exhaustion and parallel imports: a comparative analysis between the EU and the USA. *Baltic Journal of European Studies*, 6(2), 28-57.
- „Dreaming of sovereignty“ March 19, 2016 <https://www.economist.com/britain/2016/03/19/dreaming-of-sovereignty> The Economist
- Kerikmäe, T., Chochia, A., Troitiño, D. R., & Hrebickova, A. (2018). The First Attempts to Unify Europe for Specific Purposes and British Flexibility. In *Brexit* (pp. 21-32). Springer, Cham.
- Judgement of the Court. *Van Gend en Loos v Nederlandse Administratie der Belastingen* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0026>
- Judgement of the court. *Costa v ENEL* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006>
- Tom McTague. „Theresa May unveils new UK immigration system“ October 2, 2018
<https://www.politico.eu/article/theresa-may-unveils-new-uk-immigration-system/>
- CONSOLIDATED TEXTS OF THE EU TREATIES AS AMENDED BY THE TREATY OF LISBON,
article 50

- „The UK is one of the biggest contributors to the EU budget“ July 13, 2018 <https://fullfact.org/europe/uk-one-biggest-contributors-eu-budget/>
- Zsolt Darvas, Guntram Wolff. „Rethinking the European Union’s Post Brexit Budget Priorities.“ March 2018 http://bruegel.org/wp-content/uploads/2018/03/PB-2018_01_correction.pdf Bruegel
- Jacopo Barigazzi. „Where Brexit will hurt most in Europe“ January 8, 2018. <https://www.politico.eu/article/brexit-impact-on-european-regions-revealed-by-eu-report-phase-2-negotiations/>
- Ian Jack. „Who do I blame? Eight reasons we ended up in this Brexit mess“ March 3, 2018. <https://www.theguardian.com/commentisfree/2018/mar/03/brexit-immigration-jobs-eton-europe> The Guardian
- „Joint report from the negotiators of the European Union and the United Kingdom Government“ December 8, 2017. https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf
- Oliver Patal, Chistine Reh. „Brexit: The Consequences for the EU’s Political System“ 2016. <https://www.ucl.ac.uk/constitution-unit/research/europe/briefing-papers/Briefing-paper-2> University College of London.
- Kristjan Raid. 2016. „Brexit poliitilised mõjud Suurbritanniale ja Euroopa Liidule“ Bakalaureusetöö. Tallinna Tehnikaülikool
- Troitiño, D. R., Kerikmäe, T., Chochia, A., & Hrebickova, A. (2018). Cooperation or Integration? Churchill’s Attitude Towards Organization of Europe. In Brexit (pp. 33-56). Springer, Cham.
- Troitiño, D. R., Kerikmäe, T., Chochia, A., & Hrebickova, A. (2018). First European and Pan-European Integration Efforts and British Reluctance. In Brexit (pp. 3-20). Springer, Cham.
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EU Defense: Development of the European Defense Space and Its Relation with NATO

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Abstract: *The European Union's Common Security and Defense Policy has often been associated with producing in the future a "real" common European Union army. However, many of the Member States of the EU are already a part of a defense alliance in the form of NATO. Consequently, what is the and what will the relationship be between these two organizations? This article provides a short overview of the relationship now and its potential future direction.*

Keywords: *CSDP, NATO, EU army, EU-NATO relationship.*

INTRODUCTION

During the War in Kosovo the ineptitude of the EU to tackle a crisis in what may be called its backyard was revealed and as a consequence it became a driving force for closer EU security and defense cooperation¹. On the other side of the Atlantic during this time, the Clinton administration looked favorably upon this type of development in the EU and encouraged an "ever closer Union"².

Since the early late 90s and early 2000s, the rhetoric has changed dramatically. In 2018, the President of France, Emmanuel Macron, is now calling for a "real EU army" to defend Europe against China, Russian and even the United States³. Macron's statement cannot be considered to be an exception either, as his statement echoes earlier statements made by the German Chancellor Angela Merkel calling for more independence from the United States in regards to defense⁴. Predictably on the other side of the Atlantic the President of the United States, Donald Trump labeled Macron's statements as insulting⁵.

Therefore, in the span of about 20 years the relationship between the EU and the United States, and in this context by extension NATO as the United States is the major military power behind NATO, has changed dramatically from a co-operative standpoint to almost an opposing stance.

Consequently, several important questions arise from this rhetoric, what is the present state of the common EU defense and would a divorce from NATO even be viable in the near future?

¹ Paul Cornish and Geoffrey Edwards "Beyond the EU/NATO dichotomy: the beginnings of a European strategic culture", *International Affairs* 77, no.3 (2001):588

² Caspar W. Weinberger "EU separate defense – a bad idea", *Forbes*, 3 April, 2000, 49

³ Eli Meixler, "French President Emmanuel Macron Calls for a 'European Army' to Defend Against China, Russia and the U.S.", *TIME*, November 7, 2018, <http://time.com/5446975/emmanuel-macron-european-army-russia-us/>

⁴ Jordan Fabian, Morgan Gsalter, "Merkel: Europe can no longer rely on US protection", *The Hill*, October 5, 2018, <https://thehill.com/homenews/administration/387067-merkel-europe-cant-count-on-us-to-protect-us-anymore>

⁵ Chris Stevenson, Jon Stone, "Trump attacks Macron's call for EU army to defend against US as 'very insulting'", *INDEPENDENT*, November 9, 2018, <https://www.independent.co.uk/news/world/americas/us-politics/eu-army-trump-macron-france-europe-military-us-russia-china-defence-a8627176.html>

THE COMMON SECURITY AND DEFENSE POLICY (CSDP). ORIGINS AND OVERVIEW OF THE CSDP

The Saint-Malo Declaration of 1998 is seen by many as the launch pad for the EU's Common Security and Defense Policy (CSDP), however already at this stage the relationship it was to have with NATO was not entirely clear⁶. France and United Kingdom both had widely different interpretations of the meaning of "autonomy" in regards to NATO⁷. For France, autonomy meant independence from NATO strengthening the European political power, whereas for the UK it meant building up European military power to bring life to NATO⁸.

The UK has been known to slow the progress of the CSDP's development, however, with Brexit the UK seems to have paradoxically changed its position by making suggestions it would like to continue to be a part of the CSDP.⁹ Nonetheless, one might expect the French view on the autonomy in regards to NATO strengthen in the coming years, however, the situation is not so black and white as the development of the CSDP demonstrates.

After the St. Malo declaration at the Cologne Summit the European security and defense policy was launched which was subsequently changed to the CSDP under the Lisbon Treaty¹⁰. As to the Lisbon Treaty, the Security and Defense aspects are concentrated in Section 2 of the Treaty spanning from Articles 42 to 46 of the TEU, as well as Article 222 TFEU regarding the solidarity of the Union.

Consequently, an interpretation of the Treaty Articles is crucial to understanding the present state of the CSDP, for the Treaties form the primary law of the European Union. As to the method of Treaty interpretation, despite international customary law warranting an interpretation under Article 31 (and 32) of the VCLT, the situation is not always so simple in the EU¹¹. For example, in interpreting the Treaty compliance of the European Stability Mechanism the CJEU chose to interpret the situation not in accordance with international law but rather the political winds at the time¹². Therefore, the interpretation of the Treaty articles regarding the CSDP are mainly indicative as they may be interpreted contrary to their textual meaning in the future if sufficient political pressure is exerted.

Nonetheless, the key wordings of Article 42 include (2) whereby the CSDP "shall include the progressive framing of a common Union defense policy" which in turn "will lead to a common defense". From these wordings in accordance with Article 31 of the VCLT it is apparent that the objective of the CSDP is a common defense, and by that extension, what Macron may refer to as a "real EU army", at least eventually.

Furthermore, Article 42 (7) incorporates a more concrete collective defense provision, whereby if one MS is the "victim of armed aggression on its territory" other MS "shall have" an obligation of providing "aid and assistance by all means in their power". Interpreting this text in accordance with its ordinary meaning under Article 31 it is apparent that the other MS have, in case of an armed attack an obligation to provide all forms of assistance including military to the attacked MS. Considering the wording of "by all means in their power" attached

⁶ Chris J. Bickerton, Bastien Irondele, Anand Menon, "Security Co-operation beyond the nation-state: The EU's Common Security and Defence Policy", *Journal of Common Market Studies* 49, no.1(2011):3

⁷ Ibid, p 3

⁸ Ibid, p 3

⁹ Federico Santopinto et al, CSDP after Brexit: the way forward(Belgium: European Parliament, 2018), 4

¹⁰ Bickerton, Irondele and Menon, "CSDP", 3

¹¹ Gunnar Beck, "The Court of Justice of the EU and the Vienna Convention on the Law of Treaties", *Yearbook of European Law* 35, no.1(2016):1

¹² Ibid, p 504

to the “aid and assistance”, the interpretation under Article 31 must include the deployment of troops and material provided the MS in question has a military under its control. Therefore, in effect this clause is not very different from NATO’s mutual defense obligation in Article 5, though Article 5 is more explicit as it references the use of armed force directly.

This “collective defense” provision of Article 42 (7) is complemented by Article 222, which provides for a “solidarity” obligation between the MS. More specifically, the article calls for “joint action” if a MS is the victim of a “terrorist attack or the victim of a natural disaster or a man-made disaster”. The term “man-made disaster” is broad and can include anything from a disaster at a Nuclear Power Plant to arguably, war, as the primary defining factor is that people i.e. “man-made” cause the disaster. Therefore, if put into the context of object and purpose of the Treaty under Article 31 it is not implausible to suggest that war is a “man-made disaster” that requires joint action, thereby reinforcing the message of Article 42 (7).

However, what of the relationship with NATO? Under Article 42 (2) it is additionally stated “this section shall not prejudice the specific character of the security and defense policy” and “shall respect the obligations of certain Member States which see their common defense realized” with NATO and be “compatible with the common security and defense policy established within that framework”. Interpreting the above, it is evident that, at least when drafting the Lisbon treaty, the objective of the CSDP was not to replace NATO but rather complement it. This is evidenced by the exemptions made to the obligations certain MS have under their NATO membership, whereby Section 2 of the TEU shall not prejudice those obligations, therefore, placing the CSDP into a complementary or subservient role to the NATO obligations, that is to say, the EU CSDP obligations under this provision shall not override the NATO obligations.

Consequently, at least on paper, if interpreted in accordance with Article 31 and hence, in good faith in accordance with the ordinary meaning of the terms in their context and the object and purpose of the treaty, the EU primary law sets down a NATO friendly framework. However, as mentioned above the CJEU may later creatively interpret Section 2 of the TEU to fit a more anti-NATO political climate in the EU, or that the next iteration of the EU Treaties will be worded considerably less NATO friendly.

However, the “collective defense” provision of Article 42 (7) contains a caveat whereby “Commitments and cooperation in this area shall be consistent with commitments under” NATO “for the those states that are members of it”. Again this may be interpreted as suggesting that the NATO obligations may not be overruled by the provision of collective defense under Article 42 (7). Therefore, as not all EU MS are members of NATO, this creates a non-uniform framework for the application of CSDP provisions. This is due to the MS that are also NATO members being potentially able to, if they so desired, to not comply with the CSDP obligations by referring to a conflict with their NATO obligations. As a result, the Common Security Defense Policy may not be as “Common” as the EU would need it to be, in the case of conflicting obligations with NATO.

Since the Treaty of Lisbon in 2007, 2017 has been called a watershed moment for the CSDP by some owing to the numerous developments that took place, that may form the foundation for European security in the future¹³. In the field of joint research and development in 2017 the Preparatory Action for Defense Research and the European Defense Industrial

¹³ Nathalie Tocci, “Towards a European Security and Defence Union: Was 2017 a Watershed?”, *Journal of Common Market Studies* 56, (2018):135

Development Program (EDIDP) regulation were launched.¹⁴ In addition the Coordinated Annual Review on Defense (CARD) trial run was started to better co-operate the national defense budgets as well as increase transparency in this respect¹⁵.

Furthermore, 25 MS of the EU notified the High Representative of the Union for Foreign Affairs and Security Policy to activate the Permanent Structured Cooperation (PESCO).¹⁶ PESCO may go as far as to develop a single European armored vehicle as well as one of its most concrete impacts besides developing the joint capabilities of the MS armies. As a final note the first permanent European military command was established¹⁷. Consequently, 2017 was a busy year for the CSDP development and may well have long lasting effects on the CSDP in the EU, however, as the developments are so recent at the time of writing it remains to be seen what effect they will have in practice. Certainly, the development of a successful common European armored vehicle would be a tangible success for the CSDP, which may increase enthusiasm towards the project. However, equally if such a project is undertaken and the resulting vehicle is the product is akin to a soup with too many cooks, it may similarly spoil the appetites of the MS to develop military equipment together.

CSDP AND NATO

On the surface, the relationship between the EU, and by that extension the CSDP, and NATO has been clear, the two organizations have a “Strategic Partnership” contained in the 2002 Berlin plus agreement¹⁸. However, it is commonly understood that one of the key features of NATO is the guarantee of defense among allies, of which the United States is the single most important provider¹⁹.

Therefore, the relationship between NATO and the EU/CSDP is determined not only be the actions of the EU/CSDP but the United States. The United States that may be described as the last superpower²⁰ is generally speaking not interested in being an equal partner, but the leading partner in any coalition, certainly one between NATO and the EU²¹. This is further reinforced by the disproportionate contribution the United States makes into NATO, by providing 71.1 % of the alliance’s combined defense spending²², which naturally gives the US a more powerful voice. For NATO is certainly not an alliance of equals, but rather may be more aptly described as a collection of nations allying themselves with the United States and relying on it for protection. Therefore, as a result any discussion about the EU’s relationship with NATO will inevitably involve United States’ politics and their desires.

¹⁴ Ibid, p 135

¹⁵ Ibid, p 135

¹⁶ Ibid, p 135

¹⁷ Ibid, p 135

¹⁸ Simon J. Smith and Carmen Gebhard, “EU–NATO relations: running on the fumes of informed deconfliction”, *European Security* 26, no.3(2017):304

¹⁹ Ibid, p 304

²⁰ Hubert Muckel and Paul C. Jussel, *NATO and EU/European Defense initiatives: competitive or complimentary?*(Pennsylvania: US Army, 2006), 10

²¹ Petros Dimetriou, “NATO&CSDP: Can the EU afford to go solo?”, *Cogent Social Sciences* 2(2016):4

²² Holly Ellyatt, “Trump’s NATO criticism is ‘valid,’ Europe isn’t spending enough on defense, UK ex-minister says”, *CNBC*, July 11, 2018, <https://www.cnbc.com/2018/07/11/trumps-nato-criticism-is-valid-europe-isnt-spending-enough-on-def.html>

Consequently, one must continuously remember that as the EU/CSDP power grows the more it will begin to rival the global influence of the United States²³. Therefore, the relationship may become increasingly strained in the future if the CSDP's military power will begin to rival that of the United States'.

With that said, during the 2013 special summit on the CSDP the call was for more co-operations between the CSDP and NATO²⁴. A sentiment, which was echoed in the 2016 European Global Strategy, which aimed to "deepen" the relationship between the two alongside the Joint Declaration, signed in Warsaw two weeks later²⁵. Consequently, the calls by European leaders going as far as to say defense against the United States are quite clearly a recent phenomenon, for it is clear from the above that the relationship, at least on paper, has been one of co-operation.

Ironically, this shift may have its roots in 2016 as well with the presidency of Donald Trump, who has called for a cessation of the United States paying for Europe's defense²⁶. It must be stated that Mr. Trump's frustrations are not unfounded, as only four European member states of NATO, meet the agreed 2% minimum GDP defense spending agreed in 2006.²⁷ It is alarming that one of these four is the United Kingdom who is evidently intending to leave the Union, and despite the uncertainty raised earlier likely the CSDP as well. That would mean that the only 3 EU MS meeting the 2% NATO spending target are Greece, Estonia and Poland.

The notable omissions from the 2 % spending target are both France and Germany, which are held to be key for a credible CSDP, as they would form the Franco-German engine to power it²⁸. This fact has not escaped the notice of many other notable individuals besides Mr. Trump, such as MIT international relations professor Barry Rosen who in 2014 called for a 10-year gradual US withdrawal from NATO²⁹. His concerns were similar to Trump's, the alliance is simply not cost-effective and for the US the costs outweigh the benefits, even other US presidential candidates such as Bernie Sanders echoed this motion³⁰.

As a result, there is considerable underlying as well as sometimes-overt tension in the relationship between NATO and the EU/CSDP, which may result in a sort of a lose-lose situation for the EU. If the CSDP fails to become powerful enough to not be considered a free-riding ally of NATO, the US may well withdraw from NATO citing its financials, leaving the EU and by that extension, Europe vulnerable.

On the other hand, if the CSDP succeeds and becomes a powerful rival to the United States the relationship between the two organizations may suffer nonetheless as the present supremacy of the US will be challenged. Therefore, arguably a moderately successful CSDP would be the most fruitful ground for a co-operative relationship with NATO in the future; however, with the political rhetoric becoming increasingly opposing, this modest aim may not be what the EU will set as its target.

²³ Muckel and Jussel, *NATO and EU/European Defense initiatives*, 11

²⁴ Joylon Howorth, "Strategic autonomy and EU-NATO cooperation: threat or opportunity for transatlantic defence relations?", *Journal of European Integration* 40, no. 5(2018):525

²⁵ *Ibid*, p 525

²⁶ *Ibid*, p 528

²⁷ Dimetriou, "NATO&CSDP", 9

²⁸ Tocci, "Towards a European Security and Defence Union: Was 2017 a Watershed?", 134

²⁹ Howorth, "Strategic autonomy and EU-NATO", p 529

³⁰ *Ibid*, p 529

THE UKRAINE CRISIS AND A JOINT FAILURE?

The Crisis that began in 2014 in Ukraine has already been heralded as a failure from NATO owing to its lack of ability to deal with the Russian aggression.^{31,32} Obviously, this assessment is not without its caveats as Ukraine is not a NATO member and therefore not formally a part of the defense alliance. However, there had been a widespread notion that Ukraine will join NATO such as at the Bucharest Summit where allied leaders agreed that Ukraine would become a NATO Member in the future³³.

However, there was backpedalling on the part of Ukraine in 2010 regarding its NATO membership and there was no formal invitation from Ukraine for NATO assistance³⁴. Nonetheless, some state that the crisis revealed decision-making problems within NATO regarding the crisis, which was initially thought to be a mere small incident, which proved to be wrong when Russia annexed Crimea, by which time it was too late³⁵. To make matters worse, European NATO member states had pushed for less defense spending owing to the 2008 crisis and the US had began to shift its focus towards Asia, which resulted in a storm of circumstances that left NATO looking weak on the global stage³⁶.

However, to say that the EU came out any better would be a false. The Common Security and Foreign Policy of the EU was far from common during the crisis³⁷. The flagrant violations of the “solidarity” of the EU MS was quite appalling, the UK sold sniper rifles, ammunition, drones and laser technology to Russia while criticizing France for the planned sale of the ship Mistral to Russia³⁸. This was additionally complemented by the internal bickering of the MS regarding the response towards Russia, with the severity of the actions to be taken being a highly divisive topic³⁹.

As if the situation could not get worse, according to the Ukrainian press, the supplying of weapons to the conflict was very confused among the EU MS as well⁴⁰. The UK, Germany, France, the Czech Republic, Austria, Italy, Greece and Cyprus provided weapons to Russia while Poland, Finland, the Czech Republic, the UK and Lithuania delivered weapons to Ukraine⁴¹. While supplying both sides may be an apt business strategy for the EU, it is certainly not a moral or unified strategy. As a result, the EU in effect supplied both sides of the conflict and did not provide a unified response, which one might expect under a Common Security and Foreign Policy. Needless to say, this makes the EU and by that extension the CSFP and CSDP look weak and divided on the international arena.

Therefore, neither NATO nor the EU demonstrated their finesse in dealing with military aggression on European soil. This failure brings into question the potential success of the CSDP in the future as a cohesive, unified and capable force on the international stage.

³¹ Hoffmann, T., & Chochia, A. (2018). The institution of citizenship and practices of passportization in Russia's European Neighborhood Policies, 'Russia and the EU Spaces of Interaction, Abingdon: Routledge, Taylor & Francis Group, 223-237.

³² Isaac Kfir, "NATO's Paradigm Shift: Searching for a Traditional Security–Human Security Nexus", *Contemporary Security Policy* 36, no.2(2015):222

³³ Ibid, p 223

³⁴ Ibid, p 223

³⁵ Ibid, p 223

³⁶ Ibid, p 223

³⁷ Ondrej Filipec, "(In)efficiency of EU Common Foreign and Security Policy: Ukraine, Brexit, Trump and beyond", *Slovak Journal of Political Sciences* 17, no. 3-4(2017):284

³⁸ Ibid, p 284

³⁹ Ibid, p 284

⁴⁰ Ibid, p 284

⁴¹ Ibid, p 284

CREDIBILITY AND VIABILITY OF A NATO INDEPENDENT EU CSDP

As Kofi Annan once stated “You can do a lot with diplomacy, but you can do a lot more with diplomacy backed up with firmness and force”⁴², consequently, for an EU army and by that extension the CSDP to be effective, it must have credible military force behind it. This is especially true if any semblance of Macron’s vision of a “real EU army” that could protect Europe from China, Russia or the United States is to be chased after.

As expressed by the Americans above regarding the European states free-riding on their defense, the state of the European militaries appears far from ideal. During the crisis in Kosovo for example, the United States flew 60 % of all sorties and 80 % of strike sorties and the European forces were heavily dependent on US intelligence⁴³. Memories such as these leave long-lasting impressions, which must be erased by operational successes by the EU/CSDP forces, if they are to be taken seriously by other global powers.

Germany especially has been the subject of very unflattering headlines regarding its military. Which is a huge concern if a Franco-German engine would be driving the CSDP in the future.

The headlines have included the German military resorting to the use of broomsticks in NATO exercises to cover-up the lack of machine guns in 2015⁴⁴. Which is barely the tip of the iceberg, as almost a third were missing, not to mention 41 % of their handguns, three-quarters of their night vision equipment and the Germans were using ordinary Mercedes vans as replacements for armored personnel carriers⁴⁵.

Similarly, in late 2017, once the scourge of the Atlantic, the entire German U-boat fleet was out of action, as all six need repairs⁴⁶. The situation became more embarrassing in 2018 when the German navy refused to commission their new frigates owing to their multiple faults⁴⁷ and a report stating that the armed forces as a whole were less ready for war than ever⁴⁸. Consequently, Germany can be held to be a prime example of the type of NATO “free-rider” the United States has grown increasingly tired of, as the Germans only spend 1.2 % of their GDP on their military⁴⁹.

On the European level, the situation is not much better as the defense spending of the EU countries dropped from 2.8 % of their GDP in 1988 to an average of 1.5 % in recent times, which does not compare favorably to e.g. Russia 5 % GDP⁵⁰. Therefore, the abysmal situation with the German military may be representative of a much wider problem throughout the EU MS, which must certainly be addressed if the CSDP is to be taken seriously globally. For it is unlikely that future Russian aggression will be deterred by the use of EU broomsticks.

⁴² Ibid, p 286

⁴³ Cornish and Edwards, “Beyond the EU/NATO dichotomy”, p 588

⁴⁴ Justin Huggler, “German army used broomsticks instead of guns during training”, *The Telegraph*, February 18, 2018, <https://www.telegraph.co.uk/news/worldnews/europe/germany/11420627/German-army-used-broomsticks-instead-of-guns-during-training.html>.

⁴⁵ Ibid

⁴⁶ Associated Press, “Germany’s entire submarine fleet is now out of action”, *Business Insider*, 20 October, 2018, <http://uk.businessinsider.com/ap-germanys-entire-u-boat-fleet-is-out-of-action-2017-10>

⁴⁷ Robert H. Charette, “New German Warship Fails Sea Trials Due to Tech Woes”, *IEEE Spectrum*, February 7, 2018, <https://spectrum.ieee.org/riskfactor/computing/it/new-german-frigate-fails-tests>

⁴⁸ Associate Free Press “Underequipped German army ever less ready for battle, damning report concludes”, *The Local.DE*, February 20, 2018, <https://www.thelocal.de/20180220/underequipped-german-army-ever-less-ready-for-battle-damning-report-concludes>

⁴⁹ Ibid

⁵⁰ Filipec, “(In)efficiency of EU Common Foreign and Security Policy”, p 287

However, even Russia's military budget, albeit shrouded in some mystery as to its exact size⁵¹, pales in comparison to that of the United States, which spent 686.9 billion USD on defense in 2017⁵². To put this in context, Germany only spent around 45 billion USD on its defense in 2017 with France hovering around the same number and the UK spent 55 billion USD⁵³. Therefore, to even nearly match the United States' military spending through an "EU army" would require a massive effort from the EU Member States, as the total for all the MS for defense adds to about 200 billion⁵⁴.

Therefore, regardless if the EU aims for strategic autonomy from NATO or a co-operative role with NATO, it would seem that in either case a substantial increase in the defense spending of the MS is in order. For it is unlikely that the United States, and hence the major defense provider of NATO, will continue to pay for a charade where only the US with very few exceptions is the only one meeting the agreed obligations.

This situation is made worse if the United Kingdom decides to stay completely outside of the CSDP and opts to leave the EU with a "hard" Brexit. It is no secret that the UK military is one of the biggest in Europe, and as established above one of the few that actually meets the NATO spending targets. As a result the disappearance of the British military entirely from the CSDP would be a blow felt deeply in the present state of affairs. As for example Germany is in no position to take the UK's place in terms of defense spending as it has stated to only reach a defense spending of 1.5 % of its GDP by 2024⁵⁵.

A further consideration is the fact that there may be a resulting power imbalance within the EU and the CSDP. This is due to the fact that out of all the European militaries only the UK and France have nuclear weapons⁵⁶. Consequently, if the UK were out of the equation, this would mean that France would have considerable leverage over the rest of the EU MS, as it is the only member with nuclear capabilities. This has not gone unnoticed in Germany, as there is a serious debate about equipping the nation with nuclear capabilities⁵⁷.

Nonetheless, in the near future if the EU/CSDP would divorce itself from NATO, however unrealistic this may be, and the UK separates entirely from the CSDP, the French will be in a favorable position to dictate its policies owing to its nuclear capabilities to the rest of the Union. Thus, the resulting power imbalance is no trivial concern, for it would likely only add further fuel to the euro skepticism of smaller EU nations that they are merely dominated by the more powerful MS.

⁵¹ Vladimir Jushkin, "What is Hidden in Russia's Military Budget", RKK ICDS, May 25, 2018, <https://icds.ee/what-is-hidden-in-russias-military-budget/>

⁵² Holly Ellyatt, "Trump's NATO criticism is 'valid,' Europe isn't spending enough on defense, UK ex-minister says", CNBC, July 11, 2018, <https://www.cnbc.com/2018/07/11/trumps-nato-criticism-is-valid-europe-isnt-spending-enough-on-def.html>.

⁵³ Ibid

⁵⁴ "How much is spent on defence in EU?", Eurostat, Accessed 20 November, 2018, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180518-1?inheritRedirect=true>

⁵⁵ Holly Ellyatt, "Trump's NATO criticism is 'valid,' Europe isn't spending enough on defense, UK ex-minister says", CNBC, July 11, 2018, <https://www.cnbc.com/2018/07/11/trumps-nato-criticism-is-valid-europe-isnt-spending-enough-on-def.html>.

⁵⁶ Matthew Karnitschnig, "German bomb debate goes nuclear", POLITICO, March 8, 2018, <https://www.politico.eu/article/german-bomb-debate-goes-nuclear-nato-donald-trump-defense-spending/>.

⁵⁷ Ibid

CONCLUSION

The development of a “real EU army” has taken considerable steps in the span of a relatively few years, notably in 2017. While the long-term results of these developments remains to be seen, it demonstrates the will and ambition of the EU to develop the CSDP into a respectable and formidable entity.

However, the reality of the force behind the CSDP, that is to say the European militaries, is at this stage appears quite dismal. Significant investments must be made into the military spending of the EU MS, which is aided by the joint research and development framework that has been developed especially in 2017. Nonetheless, the fact remains that as of this moment there does not appear to be enough operational capability and force behind the CSDP for it to truly become a force to reckon with on the global stage. This is further reinforced by the poor demonstration of the “unity” and cohesion of the EU MS during the 2014 Ukrainian crisis where the EU MS response was far from unified.

Due to these factors, despite the increasingly opposing political rhetoric between the EU and the United States, and by that extension, NATO, as of this moment the EU simply does not have the capacity to divorce itself from NATO or the United States. Consequently, for the near future the relationship between EU and NATO ought to be, from the EU perspective that of the “strategic partnership” agreed in Berlin for right now Europe needs NATO more than NATO (that is to say, the United States) needs Europe. The EU is not capable of forming a credible defense for Europe on its own against an increasingly aggressive Russia, and certainly the thought of a credible defense against the United States as Macron called for is a fantasy at this stage. Therefore, it is in the EU’s best interest in the short-term is to develop the CSDP into an entity that is capable of being a credible strategic partner to NATO, and only later if the need or desire eventually arises in the distant future, a credible global entity on its own.

BIBLIOGRAPHY:

Books

- Muckel, Hubert and Paul C. Jussel. *NATO and EU/European Defense initiatives: competitive or complimentary?* Pennsylvania: US Army, 2006.
- Santopinto, Federico et al. *CSDP after Brexit: the way forward*. Belgium: European Parliament, 2018.

Journal Articles

- Beck, Gunnar. “The Court of Justice of the EU and the Vienna Convention on the Law of Treaties”, *Yearbook of European Law* 35, no.1(2016):484:512
- Bickerton, Chris J., Bastien Irondele, Anand Menon. ”Security Co-operation beyond the nation-state: The EU’s common Security and Defence Policy”, *Journal of Common Market Studies* 49, no.1(2011):1-21
- Chochia, Archil, David Ramiro Troitiño, Tanel Kerikmäe, Olga Shumilo, and Nicole Lindstrom. "The First European Community and the British Position." In *Brexit*, pp. 59-81. Springer, Cham, 2018.
- Cornish, Paul and Geoffrey Edwards. “Beyond the EU/NATO dichotomy: the beginnings of a European strategic culture”, *International Affairs* 77, no.3 (2001):587-603
- Dimetriou, Petros. “NATO&CSDP: Can the EU afford to go solo?”, *Cogent Social Sciences* 2(2016):1-16
- Filipec, Ondrej. “(In)efficiency of EU Common Foreign and Security Policy: Ukraine, Brexit, Trump and beyond”, *Slovak Journal of Political Sciences* 17, no. 3-4(2017):279-298
- Hoffmann, T., & Chochia, A. (2018). The institution of citizenship and practices of passportization in Russia’s European Neighborhood Policies,’. *Russia and the EU Spaces of Interaction*, Abingdon: Routledge, Taylor & Francis Group, 223-237.

- Howorth, Joylon. "Strategic autonomy and EU-NATO cooperation: threat or opportunity for transatlantic defence relations?", *Journal of European Integration* 40, no. 5(2018):523-537
- Keedus, L., Kerikmäe, T., Chochia, A., & Troitiño, D. R. (2018). The British Rebate and the Single European Act: Political Ramifications of an Economic Reform. In *Brexit* (pp. 141-151). Springer, Cham.
- Kerikmäe, T., Chochia, A., Troitiño, D. R., & Hrebickova, A. (2018). The First Attempts to Unify Europe for Specific Purposes and British Flexibility. In *Brexit* (pp. 21-32). Springer, Cham.
- Kfir, Isaac. "NATO's Paradigm Shift: Searching for a Traditional Security–Human Security Nexus", *Contemporary Security Policy* 36, no.2(2015):219-243
- Smith, Simon J. and Carmen Gebhard. "EU–NATO relations: running on the fumes of informed deconfliction", *European Security* 26, no.3(2017):301-314
- Tocci, Nathalie. "Towards a European Security and Defence Union: Was 2017 a Watershed?", *Journal of Common Market Studies* 56, (2018):131-141
- Troitino, D. R., Kerikmäe, T., & Chochia, A. (2018). De Gaulle and the British Membership in the European Communities. In *Brexit* (pp. 83-97). Springer, Cham.
- Troitiño, D. R., Kerikmäe, T., Chochia, A., & Hrebickova, A. (2018). Cooperation or Integration? Churchill's Attitude Towards Organization of Europe. In *Brexit* (pp. 33-56). Springer, Cham.

Magazine Articles

- Associate Free Press. "Underequipped German army ever less ready for battle, damning report concludes", *The Local.DE*, February 20, 2018, <https://www.thelocal.de/20180220/underequipped-german-army-ever-less-ready-for-battle-damning-report-concludes>
- Associated Press "Germany's entire submarine fleet is now out of action", *Business Insider*, 20 October, 2018, <http://uk.businessinsider.com/ap-germanys-entire-u-boat-fleet-is-out-of-action-2017-10>
- Charette, Robert H. "New German Warship Fails Sea Trials Due to Tech Woes", *IEEE Spectrum*, February 7, 2018, <https://spectrum.ieee.org/riskfactor/computing/it/new-german-frigate-fails-tests>
- Ellyatt, Holly. "Trump's NATO criticism is 'valid,' Europe isn't spending enough on defense, UK ex-minister says", *CNBC*, July 11, 2018, <https://www.cnbc.com/2018/07/11/trumps-nato-criticism-is-valid-europe-isnt-spending-enough-on-def.html>
- Fabian, Jordan and Morgan Gsalter. "Merkel: Europe can no longer rely on US protection", *The Hill*, October 5, 2018, <https://thehill.com/homenews/administration/387067-merkel-europe-cant-count-on-us-to-protect-us-anymore>
- Huggler, Justin. "German army used broomsticks instead of guns during training", *The Telegraph*, February 18, 2018, <https://www.telegraph.co.uk/news/worldnews/europe/germany/11420627/German-army-used-broomsticks-instead-of-guns-during-training.html>
- Jushkin, Vladimir. "What is Hidden in Russia's Military Budget", *RKK ICDS*, May 25, 2018, <https://icds.ee/what-is-hidden-in-russias-military-budget/>
- Karnitschnig, Matthew. "German bomb debate goes nuclear", *POLITICO*, March 8, 2018, <https://www.politico.eu/article/german-bomb-debate-goes-nuclear-nato-donald-trump-defense-spending/>
- Meixler, Eli. "French President Emmanuel Macron Calls for a 'European Army' to Defend Against China, Russia and the U.S.", *TIME*, November 7, 2018, <http://time.com/5446975/emmanuel-macron-european-army-russia-us/>
- Stevenson, Chris, Jon Stone. "Trump attacks Macron's call for EU army to defend against US as 'very insulting'", *INDEPENDENT*, November 9, 2018, <https://www.independent.co.uk/news/world/americas/us-politics/eu-army-trump-macron-france-europe-military-us-russia-china-defence-a8627176.html>
- Weinberger, Caspar W. "EU separate defense – a bad idea", *Forbes*, 3 April, 2000, 49

Other

- "How much is spent on defence in EU?", Eurostat, Accessed 20 November, 2018, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180518-1?inheritRedirect=true>

A question on the state supremacy over the law: the context of reforming Ukraine's criminal legislation

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Abstract: This paper represents an observational discussion on the essence of Criminal law, in the context of contemporary views on the body and its inter-relations with the state. By choosing a specific case of a particular country (Ukraine), this paper confirms that the academic debate on such a comprehensive subject can become as diverse as it can possibly be.

Key words: Law, Ukraine, Criminal law, state supremacy.

INTRODUCTION

The very essence of law has been and remains the focus of modern legal and political thought. Even these days, conceptually, law could be considered one of the main categories not only within general theorising in the broad field that quasi-unifies philosophy and jurisprudence, but also an important subject of research in a high number of other academic disciplines. This is all due to the fact that the correct understanding of law, its essentiality as well as its direct 'product' (i.e. legislation) assists in formulating a set of basic premises for objective interpretation of different social as well as normative aspects of every-day life. In a specific case of a particular country – for our special example, this country is chosen to be Ukraine – the debate on such a comprehensive subject can become as diverse as it can possibly be. Especially, when it comes to inter-relations between the state and the law in Ukraine, as argued by Tyushka, “right after coming to power, political elites strive to adjust the basic constitutional norms in a way providing them broader scope of authority and, respectively, better control of the oppositional powers”¹. Perhaps, this argument indirectly supports a suggestion that “the post-independence history of the Ukrainian Constitution can be conceived as a history of discussions about the Constitution”². However, such theorising has been directly linked to the country's Supreme Law, the Constitution, underlining its objectively unique place in the grand debate. What about some other bodies of law, for example Criminal law?

Generally, the scholarship on the topic underlines that the criminal law's meaning is essentially associated with the body's sectoral characteristics, defining it as “a system of legal rules (indeed, laws), adopted by the *Verkhovna Rada*³ [...] that designate those socially dangerous acts are considered as crimes and what kind of punishment will be applied to the person who committed it”⁴, or as a “branch of law that integrates the legal rules, which determine the act as a crime and the punishment for it, and other measures of legal influence to be applied to the person who committed

¹ Tyushka, A. (2016). ‘From Constitutional Volatility to Constitutional Stability: Any Chance to Reconcile Constitutionalism and Power Struggle in Ukraine?’ in *Historia i Polityka*, 16 (23), pg. 58.

² Chaban, N. and Vernygora, V. (2010). ‘Ukraine's Constitutional ‘Saga’: Ukrainian Media Reflections of the Constitutional Profess’ in *Trames*, 14 (64/59), 3, pg. 228.

³ The *Verkhovna Rada of Ukraine* is the country's unicameral parliament that is composed of 450 members (commonly known as deputies).

⁴ Baulin, Y. et al. (2010). *Criminal Law of Ukraine: General Part. Textbook* (Kharkiv: Pravo), 4th edition, pg. 12.

it, while determining the grounds for criminal liability as well as exemption from criminal liability and punishment”⁵. At the same time, such definitions are justified precisely because of the questions relating to the criminal law, which is a form of its legislative expression: in accordance with Part 2 of Art. 1 of the country’s Criminal Code, “[it] determines which socially dangerous acts are crimes and which punishments are applied to the persons who committed those acts”⁶.

Such understandings of Criminal law (with a great deal of similar definitions that could be allocated in the field), despite certain differences, are unified by a highly important distinguishing feature – they all determine the relevant body of law mainly through the description of the institutions that form it, matching or even equating Criminal law with a criminal law (or a law on criminal liability). However, this approach was commonly accepted during the dominance of the so-called normative theory of law, but in was in the times when Ukraine was an integral part of the former Soviet Union. These days, it seems to be obsolete and insufficient in the process of clarifying the essence of Criminal law, especially in the context of contemporary views on the body and its inter-relations with the state. Arguably, such a **misleading discrepancy** represents an academic problem, and, considering the above, this paper attempts at **drawing attention to this issue in the light of modern views on legal thinking**. In addition, while taking into account the main vector of the general legal thought’s development – at least, in some foreseeable years to come – where there is a likelihood for the process to be leaning towards the creation of an integrative legal concept, one could see a certain logic in intertwining this general debate with **an observational discussion** on Criminal law as well. Not only such a drive is reinforced by an academic desire to participate in developing the theory of Criminal law, but the aforementioned discussion’s outcome should be of immense assistance for law-makers.

I. OBSERVING THE DEBATE

Indeed, for most of the XX century, legal studies in Ukraine were based on a dogmatic interpretation of law (including the Criminal law), linking it to the set of rules and principles established by the ruling class. Without ‘dwelling’ too much on the socio-historic causes of this interpretation, it is worthwhile mentioning that it was connected with the following two factors. **On the one side**, there was an evident normative ‘visibility’ of the direct impact that the state-promoted communist ideology made on the correlation between the individual’s and the society’s interests, and, of course, on the state in itself that would always prevail over the former and the latter. **On the other side**, there was a centuries-long particular psychological ‘attachment’ to the phenomenon of faith that the Ukrainian people have always been known by. At first, it was a faith in higher powers; then – a faith in a good tsar, who will do everything in the right way; and, finally – a faith in the state that should help in realising or even realise any dream or desire.

However, since the collapse of the former Soviet Union and due to a number of fundamental changes in the country’s political, social and economic structures, the following features of the aforementioned dogmatic interpretation of law started being seriously questioned: **a)** the domination of one class over others in a modern society; **b)** the state-related origin of law as the phenomenon’s one and only origin; **c)** the supremacy of the state over law; **d)** the absolute level of sameness between law and the law.

⁵ Naumov, A. ed. (1994). *Criminal Law of Russia. General Part* (Moscow: Jurist), pg. 10.

⁶ *The Criminal Code of Ukraine*, current version with revisions on 11 January 2019. (2001). Accessible: <https://zakon.rada.gov.ua/laws/show/2341-14?lang=en>.

Without any intention to look down at the role that the old interpretation played in a certain period of the legal thought's development in Ukraine (some could argue that this role was significant), this paper underlines that the criticism of the previously dominating approach was not coincidental with the time when almost everything associated with past had been harshly criticised. Objectively, the critique was based on widespread societal disagreement with the doctrinised possibility for the legislator to continue being coupled with arbitrariness of the state, which essentially would continue following from the previous interpretation of law. Nor should one underestimate the change of ideological basis in the views on the state's predominant role over the society.

From the second half of the XX century, in the process of discussing the essence of law, the understanding of legal provisions and articles as 'cells' of law was criticized quite sharply as "narrow regulatory, normative, [and] positivist understanding of law"⁷. This critique was based on a fair reprimand of the inappropriateness of bringing law only to the texts of the laws, as this entails a separation from the practice of its implementation and diminishes (or does not sufficiently recognise) human rights and freedoms, as well as the moral principles of society.

Some of these scholarly comments are objectively relevant even today, in the sense that not only in the process of Criminal law enforcement, but also in theoretical doctrinal studies, there is still an existing tendency to be limited only to a range of comments on legal texts, without analysing any nature of their origin or societal perceptions on them. Indeed, the overwhelming majority of the provisions of the Criminal Code of Ukraine, migrating from one of its editions to another, are, so to speak, traditional, 'crafted' by centuries of history and, therefore, fully coincide with the notions of justice. However, recently, in the light of the actuality and its challenges, a range of new provisions are increasingly being introduced in the law – for example, the criminalization of extremist activity (Art. 110-1)⁸. The latter, in itself, while widely considered a dangerous phenomenon, however, due to the imperfection of legislative technique in describing it, as well as the appearance of notions like "social hatred" and "social affiliation", is perceived by society in a mixed way.

It is hard to counter-argue that the process of meticulous studying the actual texts of criminal legislation is one of the main stages of getting closer to the understanding of law. At the same time, the plain texts, being apart from the live social content, legal relationship-driven dynamics, guarantees for those texts to be implemented in reality, and without taking into account a degree of the society's legal consciousness as well as common traditions and law enforcement practices, do not assist much in preparation of substantiated proposals for the Criminal Code's improvement, not to mention that such a simplified approach can lead to a certain erosion of law and order. Therefore, treating the Criminal law (as well as any other law) merely as a 'conglomerate' of legal texts will not help in identifying the legal content of these acts, while 'drowning' in different requirements, declarations, and definitions. For example, how could one, being guided only by the text of the Criminal Code's Art. 2, Par. 1⁹, define the concepts and features of the "crime" outlining the legal grounds for criminal liability, or disclose the essence of the "criminal liability", or distinguish it from the "punishment"?

In addition, as it could be observed, the view on the legal texts as if they are "the state's order", which is one of the major postulates of normativism that links the regulatory function of law exclusively to the imperative method, could lead one towards an intriguing argument. It could be suggested that even if the law consolidates and enshrines the rights of citizens, it does not simply 'deliver' an important legal as well as positive command, but also it could be seen and treated as a

⁷ Podvolotsky, I. (1923). *Marxist Theory of Law* (Moscow-Petrograd: State Publishing House), pg. 156.

⁸ *The Criminal Code of Ukraine*.

⁹ *The Criminal Code of Ukraine*.

restrictor of those rights “at least for the reason that only those rights are secured but not the other ones, and only those rights, but not the other ones are allowed to be exercised”¹⁰.

It will be hard to deny, even if it is going to be a denial of an abstraction, that if the Criminal Code does not consist of any norms on criminal responsibility for the murder, the society would be reacting on such a *status quo* with indifference, while waiting for the wise legislator to fix the issue. In fact, the state seems to only formalise the notion of the need to protect the most important of the relationships, universally recognised in society or necessary for its own existence. Or, sometimes, it provides for framing up an appropriate vector to form the aforementioned notion – for example, by criminalising one or another act. Depending on whether or not the act is perceived as conforming to the societal views on fairness and justice, the state determines its further fate (legal treatment) – the law can be amended accordingly or it can be abolished altogether.

However, such an overwhelming normativism on the nature and the way of exercising the citizen's rights could easily lead some scholars to a conclusion that the norm of Criminal law represents a formulated, secured and protected rule for the state to ‘behave’ accordingly¹¹. For example, Naden¹² also argues that the whole essence of Criminal law is reduced only to the power of the state, and the nature of relations, which is framed up by this particular body of law, comfortably ‘dwells’ on such an understanding. Objectively, this academic vision dramatically reduces the comprehensive scope of Criminal law-bound relationships to become a ‘one-way road’, which they are not. In addition, should the multi-faceted notion of Criminal law be substituted, so the body of law becomes a function of the state, determining the state's essence, this will, with necessity, degrade the real significance of Criminal law by ‘pushing’ it towards adopting a status of a variety of the State law. In fact, it is rather intriguing to note that such an academic stand-point could be taken by a scholar who, in her monograph, dedicated plenty of space to disagree with the narrowly normativist understanding of law¹³.

In the context of this observation's topic, it is possible to make a step further arguing that the fact of treating the Criminal law only through the prism of the body's textual component, which presumably expresses the will of the state, represents – almost – an inborn distinguishing feature of the Ukrainian legislator's understanding of the issue. Unfortunately, the legislator's long-term stability in taking a ‘special care’ of the normative side of law, particularly in the part that concerns the ‘pure’ stately origin of law and the state's perceived as well as real supremacy over law, leads to a very common situation when the legislator merely embodies an exclusive role of ‘the creator’ of legal norms.

Moreover, taking into account issues of reflection of this definition in the consciousness of society (legal consciousness), the quality of the text of the law as a guarantee of the simplicity of the implementation of norms in relations between the relevant actors (legal relationships), and the dynamics of the practice of the functioning of the legal system in general (law and order) often ‘resides’ outside of the legislator's attention, becoming just a declarative component of the process.

II. DISCUSSING THE OBSERVATIONS

This material does not have an academic intention to degrade the state-driven process of expanding the legislative regulation of issues related to the fight against crime – naturally, such an

¹⁰ Nedbailo, P. (1965). ‘Issues of the Structure of the Soviet Legal Norms in Connection with Their Gradual Development into the Rules of a Communist Community’ in *Law and Communism* (Moscow), pg. 129.

¹¹ Naden, O. (2012). *Theoretical Foundations of Criminal Law Regulation in Ukraine* (Kharkiv: Pravo), pg. 110.

¹² Naden.

¹³ Naden.

effort made by the state deserves to be welcomed, especially given the circumstances of Ukraine. However, a situation can only be considered objectively optimal should a new law on combating crime be a result of a comprehensive professional discussion on as well as testing of those legal ideas to be used in the new law. After all, the whole process should be all about harmonising the interests of the individual, society, and the state. Otherwise, it is difficult to even raise a question of the fairness of the requirement for ordinary citizens in regards of the application of the *ignorantia legis non excusat*¹⁴ principle, since the volume of such changes and additions to the major segments of the Ukrainian legislation is so large that it requires from professional lawyers plenty of efforts to keep up with and even understand the process. It is also a concern that the legislator, sometimes, overuses the limitations of the standard rule for a new provision of the Criminal Code to enter into force. Although the possibility of enacting a new norm from the day of its official publication does not contradict Art. 4, Par. 1 of the Criminal Code¹⁵, this provision relates to a certain range of exceptional cases (such as a catastrophe or war, for example) and, therefore, it is not for systematic use, as is often the case today.

From this standpoint, one could argue that the amendments to the Criminal Code should not be so frequent, because it could raise a question on the legislator's level of competence – was the change really needed to be made, or was it a situation what the *Verkhovna Rada* made a serious error or misjudged something in the process of analysing the directions of societal development that it is now hectically trying to fix the issue by amending the already amended norm of the Criminal Code or/and adding some other norms in. Or, what if the highly sophisticated as well as strategic process of lawmaking in Ukraine is reduced to a something else – **either** an attempt to reach a set of narrowly utilitarian or lobbyism-driven or politically-motivated goals for the benefit of a small group of people, **or** a childish competition between different MPs or factions for a higher number of bills proposed during a single period. In the pre-revolutionary Ukraine (before 2013), there were more than 120 drafts on amendments to the Criminal Code formally submitted at the *Verkhovna Rada*, not to mention that, since 2001, it has been recorded a bit less than a thousand of different legislative proposals on the Code's 'improvements'. At the same time, if we take into consideration that the overwhelming majority of those proposals, usually, related not to one, but were focused on adjusting five, ten or even twenty Articles of the Criminal Code, then the total number of changes would not have been too far from several thousand.

Although the number of actual amendments to the Code, which entered into force since 2001, is much lower if compared to the aforementioned 'avalanche' of proposals, – 'only' 471, – and the vast majority of them were concerning some editorial clarifications or criminalization¹⁶. Interestingly enough, 7 of those have already been eliminated, while 26 have been decriminalized on the ground of humanizing the current law¹⁷, some of them, nevertheless, are associated with systemic transformations that substantially change the generally accepted approaches and views, which have been formed within the Ukrainian legal doctrine centuries. Such novelties cannot always be considered indisputable. This argument can be applied, for example, to a number of legal norms adopted **a)** on the basis of a perception that fining represents one of the mildest types of criminal punishment, and, as a consequence, **b)** on the ground of a particular set of criteria, which

¹⁴ Latin for "ignorance of law excuses no one".

¹⁵ *The Criminal Code of Ukraine*.

¹⁶ We are talking about 70 of newly recognised offences, where some of them have already been amended, with Art. 368 and 339 of the Criminal Code 'suffering' the changes for correspondingly 5 and 6 times.

¹⁷ Tatsiy, V., Borisov, V., and Tyutyugin, V. (2013). 'Stability and Dynamism – Necessary Conditions for the Effectiveness and Quality of Ukrainian Legislation on Criminal Liability' in *Current Problems of Criminal Law Impact: Collection of Scientific Articles* (The Luhansk State University of Internal Affairs, Ukraine, and The Volgograd State University, Russia).

assist in classifying offences by their severity. For instance, the notion of ‘unlawful profit’ that was introduced by the laws on *On the Principles of Prevention of and Counteraction against Corruption* and *On Amendments to Certain Legislative Acts of Ukraine on Legal Charges for Corruption Offenses*, adopted a more narrow conceptual connotation if compared to the notion of ‘bribe’, which is traditional for the Ukrainian legislation. Objectively, as argued, this situation does not help in reaching the state-promoted ultimate goal of strengthening the fight against corruption¹⁸.

This could be treated as a classic as well as actual example of the Ukrainian legislator’s ultimate misinterpretation of its very own direct function in the formalization of the Criminal law’s norms. Instead, the legislator substitutes the aforementioned comprehensive function by a questionable unilateral activity on defining the normative content alone, which is always a negative consequence of normativism, especially given the level of statehood’s development of statehood in Ukraine. Therefore, if the goal is to build a law-governed state in Ukraine, there is also an objective necessity to search for and find a new understanding of the Criminal law, which would confirm not only the state’s legitimacy, but also human rights as well as a custom of favouring the law before favouring the state.

On that basis, the idea of the broad understanding of law has been developed, and as its direct consequence, law has been distinguished from the law. According to this concept, as suggested, not only legal norms, but also legal relations as well as legal ideology and legal consciousness, were included in the concept of law¹⁹. Such a take on legal thinking makes it possible to overcome legal formalism; in addition, its democracy-bound idea is about legitimacy and justice to not only be proclaimed on paper (in the legal text), but also embodied through the state-originated practical activities and in strict accordance with the citizens’ legal conscience. However, at present, the stated concept of legal thinking is only partially used and appreciated in the Criminal law of Ukraine, and only in that part that relates to legal relations, as one of its qualities. And it happens at a time when the world’s academic thought went much further on. Therefore, it may turn out that, while theoreticians will continue ‘trying on’ different views on the legal understanding and its compatibility with the Criminal law of Ukraine, the practical field (especially, given the example of the EU) will begin removing the barriers between different legal systems, undermining basic foundations of legal pluralism. In fact, the process of creating a single international legal space has already begun and, from now on, the history of European law, as argued, is written in Brussels and Strasbourg²⁰.

Within the framework of the contemporary intra-Ukraine academic debate, the scholarship started leaning towards contextualising Criminal law with discussions on legal relationships, legal ideology, and legal consciousness. For example, Kuznetsova and Tyazhkova believe that Criminal law – as a body of law as well as a legal sub-system – includes not only a system of norms adopted by the supreme authority, but also “criminal legal interactions related to law-making and law enforcement”²¹. In his turn, Pudovochkin offers an extensive definition of the Criminal law as an independent branch of law, which, while based on the [conceptual] ideas of legality, equality, guilt, justice and humanism, represents a system of legal norms adopted by the supreme body of representative power that determines [...] socially dangerous acts as crimes, by regulating them via prohibitions, obligations, permissions or incentives that arise on their basis from the moment when

¹⁸ Kirichko, V. (2013). ‘Criminal Liability for Corruption’ in *Scientific & Practical Commentary* (Kharkiv: Pravo).

¹⁹ Piontkovsky, A. (1958). ‘On the Question of the Relationship between Objective and Subjective Law’ in *Soviet State and Law*, 5, pg. 25-36.

²⁰ Kovler, A. (2002). *Anthropology of Law. Textbook for Universities* (Moscow: Norma/Norma-INFRA), pg. 5.

²¹ Kuznetsova, N. and Tyazhkova, I., eds. (1999). *The Treatise on Criminal Law: General Part. Volume 1* (Moscow: Zertsalo), pg. 1-2.

the crime was committed in the relations between the person who committed the crime and the state, which is represented by its competent authorities.²²

However, this paper argues that yet another scholarly opinion on the issue – this time, it was offered by Navrotsky²³ – deserves a decent level of recognition, even though it could and, most probably, will be widely criticized by supporters of traditionalism. Navrotsky also supports the idea of differentiating and correlating the concepts of Criminal law and the law (criminal norms), but prefers to discuss the issue using the well-known “content vs. form” formula, while underscoring that the content can never exist without the proper form and the form cannot be in existence without any content²⁴. Therefore, in his seminal book, he argues that the identification of Criminal law as [simply] the law and the treatment of the two as antipodes are extreme ways of debating on the issue²⁵.

Unfortunately, Navrotsky does not provide his own definition of Criminal law. Instead, he contributes in underscoring the societal purpose and role of this particular body of law, distinguishing the latter from the functions and tasks of the Criminal Code. Therefore, Navrotsky describes the functions of Criminal law to be as follows: **a)** formulating the society’s requirements on determining the scope and features of a criminal offence and measures to respond to such acts; **b)** determining the circumstances, which prevent an act that is characterized by certain features of a crime from being recognized as such; **c)** determining the grounds for exemption from criminal liability and punishment²⁶. Building on it, it is possible to argue that the described functions are exercised only within a framework of legal relationships, which is constructed in strict accordance with the society’s requirements of society. Thus, in general, the function of Criminal law, although related, but does not necessarily coincide with the function of the law.

In addition, regarding the range of objectives that Criminal law possess, it is not surprising that these are also differentiate from the objectives of Criminal legislation. While the Criminal Code’s Art. 1, Par. 1 outlines that the document’s objectives are about “legal protection of the most important social relations”²⁷, the particular case of Criminal law underlines that the body of law’s main task should be based on achieving justice in the field of crime prevention, according to the following thesis: “everyone who deserves punishment for committing a crime has been subjected to criminal responsibility, and anyone who is not guilty was not brought to such responsibility”²⁸. This remark is not indisputable, but if based, for example, on libertarian views on legal thinking – it has its logic.

Even though such an academically fruitful discussion on delineation of a particular body of law and the law has a sufficient theoretical justification, it can also enlighten the students of legal studies to a number of aspects that could be treated as angular for both the theory of Criminal law and the state-arranged actions of law enforcement. Most probably, one could quickly realize that, during its historical process, the world has come across a high number of legislative norms, but not many of them could be described as legal. For example, what can one say about eastern despotisms or different stages of the Soviet history?

Those and many other historic periods ‘produced’ legal norms that were objectively unfair, inhumane, and, therefore, would not meet societal requirements in principle. For example, what

²² Pudovochkin, Y. (2005). In Malinin, V. ed., *Encyclopaedia of Criminal Law: the Concept of Criminal Law. Volume 1* (Saint Petersburg), pg. 182.

²³ Navrotsky, V., ed. (2013). *Criminal Law of Ukraine: General Part* (Kyiv: Yurinkom Inter).

²⁴ Navrotsky, pg. 25.

²⁵ Navrotsky.

²⁶ Navrotsky.

²⁷ *The Criminal Code of Ukraine*.

²⁸ Navrotsky, pg. 29.

would be a scholarly judgement on the December 1919-issued *Guiding Principles of Criminal Law of the R.S.F.S.R.*, which were in force in some parts of the modern day Ukraine – the document, firstly, outlined that “Soviet criminal law has the task, by means of repression, of protecting the system of social relations corresponding to the interests of the laboring masses, organized into the ruling class under the dictatorship of the proletariat in the transitional period from capitalism to communism”, and secondly, defined a crime as “an act of commission or omission dangerous for the given system of social relations, and makes struggle by governmental power necessary against the person (criminal) who perpetrates such acts or allows them to occur as a result of a failure to act”²⁹.

Certainly, one can assume some ideology-oriented operational logic in the then legislator’s argument that a handful years of the Soviet political regime’s existence was not enough to issue a corrected-by-history forecast on a range of possible criminal offences – there was simply no any historical analogy to 1917 – but the *Guiding Principles* would still hardly be treated as a societal requirement. Or let us take the so-called ‘seven/eight law’, known in history as the *1932 Law of Three Spikelets*, according to which no one was allowed to take any grain left in state farms without being qualified as a thief – the primary punishment for this crime, in accordance to this law, was execution by shooting, and no amnesty was allowed³⁰. This law was issued during the Soviet famine of 1932–33, which in the Ukrainian context was compounded by the *Holodomor*³¹. Perhaps, few experts may find the ‘seven/eight law’ corresponding to some interests of the state, but, for the society of the former Soviet Union, the law was appalling.

Considering the above, the results of assessment of many current laws are not always equivocally positive. If not all of them meet the requirements of society, then how do we treat those that do not meet this criterion? This is only one of quite a few questions that arise not only in theory and practice, but also within society. That is why it seems to be objectively incorrect to exclude a social content from the law, turning this social dimension merely into a formality – in comparison with the conceptual meaning of Criminal law. Even more incorrect could be to employ a one-sided approach in the process of analysing the concept of justice, presenting it as an antagonistic battle between the society’s and the state’s understandings of the concept.

Arguably, if an individual and society have their own idea of the law conforming to their rights, the state, as a social entity, may also have relevant interests, which are extremely important for its sustainability or even survival but do not necessarily coincide with the notions of fairness celebrated by a narrow circle of individuals. For example, when it comes to such a crime as treason against the state in the form of a transition to the enemy’s side during the period of martial law or at a time of armed conflict, it can be committed by a person who disagrees with the state-run policies or dominating ideologies, and such cases were widespread during the World War II – not only in Ukraine, but also in Belarus, France, Russia, others. These discrepancies should be communicated and discussed within a given society, so a common ground is found. In fact, any legal system’s content is linked to history-originated legacies and history-bound legitimacy, and those are not always unambiguous or unquestionable. In general, historical experience shows that the ‘weight’ of positive law, which is created by a far-sighted state over time, can and should become an integral

²⁹ *Guiding Principles of Criminal Law of the R.S.F.S.R.* (1919). Accessible: <http://soviethistory.msu.edu/1917-2/state-security/state-security-texts/guiding-principles-of-criminal-law-in-the-rsfsr/>.

³⁰ The decree of the Central Executive Committee and the Council of People’s Commissars of the USSR, *About protection of the property of state enterprises, kolkhozes and cooperatives, and strengthening of the public (socialist) property*, 7 August 1932. Accessible: ‘The Law of Five Spikelets’ http://memorialholodomor.org.ua/eng/zakon_pro_5/.

³¹ The *Holodomor* was a man-made famine in the Soviet Ukraine in 1932-33, considered by the modern Ukrainian state to be an act of genocide. To date, 14 sovereign countries, 18 states of the U.S.A. as well as the United States Senate officially recognised the *Holodomor* as an act of genocide.

part of the society's conception of justice and, in the future, be considered in inseparable unity with the content of Criminal law. Therefore, it could be evidently argued that the Criminal law is an instrument, but not only of a society concerned – at the same time, it provides plenty of tools for the state regarding its perceptions on crime, punishment and related concepts. It is academically and practically inappropriate to see the two sides being counteracting in such a context.

Regarding the law in itself, it is solely a reflection of the state's understanding about the requirements of society in terms of arranging a process on combating crime and its expediency – from the practical side, the law is always formulated as successfully as the legislator is capable in achieving it. Therefore, 'nowhere' is the place where one could find only 'good law' and only 'bad laws'. In each legal system, there is one and the other, otherwise the students of legal studies should depart from the objective principle of the state-society' coexistence (not society within the state and not the state for the sake of society) towards an artificial construct of a non-excising benchmark-law that does not reflect the actuality.

From this point of view, of course, there must be a room for perfect models of legal acts and systems, developing universally-accepted principles, axioms and postulates of the Criminal law, advocating progressive and criticizing reactionary normative acts. As far as the law will meet these ideals, so the state will claim its legal form. With necessity, a professional lawyer, a given society, the state, and, especially, the citizen need to be on the same page: their wishes, beliefs, and thoughts will be remaining as an ideal model until the legislator 'converts' them into the law. Accordingly, the provisions of these laws should reflect the will of both the citizen and the state (objective interests of the state), but not the ruling elite's desire to get some arrangements framed up by legal norms. Therefore, the creation of representative (legislative) bodies, the Constitutional Court, the adoption of the Constitution of Ukraine is the only legitimate way to achieve the goal, although it is inappropriate to overestimate their significance without taking into account a certain level of legal awareness.

III. CONCLUSION

To formulate a set of concluding remarks, it needs to be reiterated that the offered discussion was of observational nature. In general, Ukraine is still painting its 'legal portrait', and the country's Criminal law is also experiencing constant transformations reflecting on different *intra*-societal and international changes. Summarizing the above, it could be stated that, **firstly**, the argument on the objectively existing difference between Criminal law and the law is not baseless. Law is a broader concept, and, apart from the criminal law (the highest act of legislative power), it also includes legal relations (interactions), legal consciousness, and may cover other regulatory requirements.

Secondly, the distinction between the two phenomena can be found in their origin. The law is issued by the state, but Criminal law, as an integral body of law, precedes the law, because it directly arises from different societal or the state-related needs. Livshits argued that "[t]he state does not create law, [the state] must consolidate the ideas on justice formed in society"³². Yavich went further, recognizing law as "objective social relations [existing] even before their authorization by the law"³³.

Thirdly, the difference between the two exists in their content as well. On this issue, Nersesyants underlined that law should not, of course, be confused with the various [legally]

³² Livshits, R. (1989). 'Law and the law in a socialist Rechtsstaat' in *Soviet State and Law*, 3, pg. 17.

³³ Yavich, L. (1977). 'Law and Public Relations (A Methodological Aspect of the Problem)' in *Problems of the Theory of Socialist State and Law* (Moscow: USSR Academy of Sciences, Institute of State and Law), pg. 114.

binding acts – laws, decrees, executive orders, precedents, officially authorized practices and so on, in other words – with the officially established (so-called positive) law. In contrast to the law, law's inherent features are equality and freedom. [...] Where [...] there is no principle of equality, there is no law as such.³⁴

Indeed, in accordance with the postulates of Criminal law, this thesis is fully reflected in the broad principle of “*nullum crimen sine poena, nulla poena sine lege, nullum crimen sine poena legali*”³⁵, should the principle's content be interpreted in the following way: **a)** it represents equality – each and every punishment in its volume and content fully corresponds to the society's understandings and perceptions of the dangers associated with the committed crime; **b)** it represents freedom – no one can apply any appropriate measures of state coercion, except in the cases provided for by the Criminal Code; **c)** it represents both equality and freedom at the same time – all people are equal before the law and, and nobody should avoid criminal liability, if there grounds for that.

Fourthly and finally, the still prevailing view on the content of Criminal law in Ukraine through the positivist prism should be considered obsolete, since it does not satisfy the academic thought in the field of legal studies. Enhancing our conceptions of law, which forms the Criminal law as its body, should be holistically based on legal ideas, principles, norms, and social relations. Therefore, scholarly research in the field urgently seeks for new directions to extend the boundaries of integrative concept in the context of legal thinking.

REFERENCES:

- Baulin, Y. *et al.* (2010). *Criminal Law of Ukraine: General Part. Textbook* (Kharkiv: Pravo), 4th edition. In Ukrainian: Баулін, Ю. та ін. (2010). *Кримінальне право України: Загальна частина: підручник* (Харків: Право). За ред. Сташиса В. та Тація В., 4-те видання, перероблене і доповнене.
- Chaban, N. and Vernygora, V. (2010). ‘Ukraine’s Constitutional ‘Saga’: Ukrainian Media Reflections of the Constitutional Profess’ in *Trames*, 14 (64/59), 3, 227–249.
- Guiding Principles of Criminal Law of the R.S.F.S.R.* (1919). Accessible: <http://soviethistory.msu.edu/1917-2/state-security/state-security-texts/guiding-principles-of-criminal-law-in-the-rsfsr/>.
- Kirichko, V. (2013). ‘Criminal Liability for Corruption’ in *Scientific & Practical Commentary* (Kharkiv: Pravo), 60-76. In Ukrainian: Киричко В. (2013) ‘Кримінальна відповідальність за корупцію’ in *НПК* (Харків: Право).
- Kovler, A. (2002). *Anthropology of Law. Textbook for Universities* (Moscow: Norma/Norma-INFRA). In Russian: Ковлер А. (2002). *Антропология права. Учебник для вузов* (Москва: Издательство Норма/Норма-ИНФРА).
- Kuznetsova, N. and Tyazhkova, I., eds. (1999). *The Treatise on Criminal Law: General Part. Volume 1* (Moscow: Zertsalo). In Russian: Кузнецова, Н. и Тяжковой, И., ред. (1999). *Курс уголовного права. Общая часть. Том 1: Учение о преступлении. Учебник* (Москва: ЗЕРЦАЛО).
- Livshits, R. (1989). ‘Law and the law in a socialist Rechtsstaat’ in *Soviet State and Law*, 3. In Russian: Лившиц, Р. (1989). ‘Право и закон в социалистическом правовом государстве’ в *Советское государство и право*, 3.
- Maltsev, V. (2000). *Introduction to Criminal Law* (Volgograd: VUI of the MIA of Russia). In Russian: Мальцев, В. (2000). *Введение в уголовное право* (Волгоград: ВЮИ МВД России).
- Naden, O. (2012). *Theoretical Foundations of Criminal Law Regulation in Ukraine* (Kharkiv: Pravo). In Ukrainian: Наден, О. (2012). *Теоретичні основи кримінально-правового регулювання в Україні* (Харків: Право).

³⁴ Nersesyants, V. (1997). *Philosophy of Law* (Moscow: Norma/INFRA M), pg. 22.

³⁵ Latin for “no crime without penalty, no penalty without a law, no crime without a legal punishment”.

- Naumov, A. ed. (1994). *Criminal Law of Russia. General Part* (Moscow: Jurist). In Russian: Наумов, А. ред. (1994). *Российское уголовное право. Общая часть* (Москва: Юристъ).
- Navrotsky, V., ed. (2013). *Criminal Law of Ukraine: General Part* (Kyiv: Yurinkom Inter). In Ukrainian: Навроцкий, В., ред. (2013). *Українське кримінальне право. Загальна частина* (Київ: Юрінком Інтер).
- Nedbailo, P. (1965). 'Issues of the Structure of the Soviet Legal Norms in Connection with Their Gradual Development into the Rules of a Communist Community' in *Law and Communism* (Moscow). In Russian: Недбайло, П. (1965). 'Вопросы структуры советских правовых норм в связи с постепенным перерастанием их в правила коммунистического общежития' в *Право и коммунизм* (Москва).
- Nersesyants, V. (1997). *Philosophy of Law* (Moscow: Norma/INFRA M). In Russian: Нерсесянц, В. (1997). *Философия права. Учебник* (Москва: Издательство Норма/ИНФРА М).
- Piontkovsky, A. (1958). 'On the Question of the Relationship between Objective and Subjective Law' in *Soviet State and Law*, issue 5. In Russian: Пионтковский, А. (1958). 'К вопросу о взаимоотношении объективного и субъективного права' в *Советское государство и право*, выпуск 5.
- Podvolotsky, I. (1923). *Marxist Theory of Law* (Moscow-Petrograd: State Publishing House). In Russian: Подволоцкий, И. (1923). *Марксистская теория права* (Москва-Петроград: Государственное издательство).
- Pudovochkin, Y. (2005). In Malinin, V. ed., *Encyclopaedia of Criminal Law: the Concept of Criminal Law. Volume 1* (Saint Petersburg). In Russian: Пудовичкин, Ю. (2005) в Малинин, В. (отв. ред.), *Энциклопедия уголовного права: Понятие уголовного права. Том первый* (Санкт-Петербург).
- Resolution of the Central Executive Committee of the Soviet Union and the Council of People's Commissars of the USSR. (1932). 'About Protection of the Property of State Enterprises, Kolkhozes and Cooperatives, and Strengthening of the Public (Socialist) Property', 7 August (Collections of Laws of the USSR), issue 62. In Russian: Постановление ЦИК и СНК СССР от 7 августа 1932 г. 'Об охране имущества государственных предприятий, колхозов и кооперации и укреплении общественной (социалистической) собственности' (Собрание законов СССР), выпуск 62.
- Tatsiy, V., Borisov, V., and Tyutyugin, V. (2013). 'Stability and Dynamism – Necessary Conditions for the Effectiveness and Quality of Ukrainian Legislation on Criminal Liability' in *Current Problems of Criminal Law Impact: Collection of Scientific Articles* (The Luhansk State University of Internal Affairs, Ukraine, and The Volgograd State University, Russia), 71-84. In Russian: Таций, В., Борисов, В., и Тютюгин, В. (2013). 'Стабильность и динамизм – необходимые условия эффективности и качества законодательства Украины об уголовной ответственности' в *Современные проблемы уголовно-правового воздействия: межгосударственный сборник научных статей* (ЛГУ ВД им. Э.А. Дидоренко, Украина, и Волгоградский Государственный Университет, Россия), 71-84.
- The decree of the Central Executive Committee and the Council of People's Commissars of the USSR, *About protection of the property of state enterprises, kolkhozes and cooperatives, and strengthening of the public (socialist) property*, 7 August 1932. Accessible: 'The Law of Five Spikelets' http://memorialholodomor.org.ua/eng/zakon_pro_5/.
- The Criminal Code of Ukraine*. (2001). Current version with revisions on 11 January 2019. Accessible: <https://zakon.rada.gov.ua/laws/show/2341-14?lang=en>.
- Tyushka, A. (2016). 'From Constitutional Volatility to Constitutional Stability: Any Chance to Reconcile Constitutionalism and Power Struggle in Ukraine?' in *Historia i Polityka*, issue 16 (23), 57–71.
- Yavich, L. (1977). 'Law and Public Relations (A Methodological Aspect of the Problem)' in *Problems of the Theory of Socialist State and Law* (Moscow: USSR Academy of Sciences, Institute of State and Law). In Russian: Явич, Л. (1977). 'Право и общественные отношения (методологический аспект проблемы) в *Проблемы теории социалистического государства и права* (Москва: Академия Наук СССР).

Democracy and the EU: Implication of democratic framework in the EU affairs. The role of European citizen

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Abstract: *The concept of an EU citizen has developed over the years with not just economic, right to reside in other Member States but also rights in the democratic processes. The processes of decision making, passing legislation and legal proceedings are proceeded between the institutions of the European Union, that function according to the powers assigned to them. The opportunity to influence decisions for an EU citizen arises from three ways of participation that have developed in the provisions of the treaties. The EU citizens can affect the democratic process through their national elections, in the elections of the European Parliament and by proceeding a merited legal claim to the Court of Justice of the European Union. The author analyzes official information along with journal writings to introduce the aspects of the topic. The author analyzes the relevant developments in the treaties that create the current legal rights of the EU citizen. The author covers the EU organizations relevant for the paper, their composition and their functioning in the Union. Also, the author analyzes features and mechanisms that take place in the democratic process along with the democratic deficit.*

Keywords: *EU citizenship, democratic process, EU citizens' electoral rights*

INTRODUCTION

The European Union is composed of multiple different organs with different functions. Originally the European Union that started out as a Union for trade between Germany and France has reached its union of a single market to 28 states, additionally to the Member States there are members such as Iceland and Norway who are a part of the European Economic Area but not a part of the other functions of EU.¹ The European Union is also additionally a legislator and a political entity, both of which have developed over the years, mostly concerning legislation in the single market. The union is a political structure with political decision making and at the ground level of influence is at least legally the Member State and the European citizen. In this paper the author will introduce the democratic framework that currently rules the Union. The author will then proceed to introduce and analyze the effects that this framework has on the functioning of the Union. Once the basics of the have been introduced the author will analyze the role of the European citizen, or to be more precise, the Member State citizen that has European union citizenship through their citizenship in their Member State. Their role in the democratic process is not obvious at all, due to different functions of the union, treaty provisions and their right to vote for a representative in the European Parliament. The aim of the paper is to define the democratic framework according to which the decisions are made in the Union, the different institutions and parties to the decisions and lastly introduce the ways this system works under the democratic principles and how the individual European citizen can have their voice heard in the structure. The questions that it mainly aims to answer is that whether the European citizen can affect directly or indirectly the functioning of the Union or is the citizenship of EU only a grand declaration without any actual practical application.

¹ Countries in the EU and EEA Accessed: 21.11.2018 <https://www.gov.uk/eu-eea>

DEVELOPMENTS

The democratic framework in the European Union consists multiple organs and decision making is mainly done by the European Parliament and the Council. The newest development in the field of the Treaty of Lisbon that extended the decision-making powers of the Parliament and created some additional elements to the system, but first let's take a look at the what was achieved in the Treaty of Maastricht. The treaty of Maastricht created the concept of EU citizenship and created a larger field for the powers of the Parliament also affecting to Councils voting procedure to majority voting.² The Maastricht treaty gave more say to the Parliament in the democratic process, and created the possibility for EU citizens to run for the parliament or vote for candidates into the Parliament.³ In terms of creating a democratic framework this puts the Union into a completely new perspective in the authors opinion. The fact that actual democratic features are presented to the citizens that reside in the Union area is great. The legal right to affect the functioning using these rights would actually create a democratic element. The Union has grown and in this manner the integration of democratic rights and ensuring in the legal field that a person does have the rights is important. This affects the functioning of EU affairs a lot, and the perspective changes when a truly democratic method is laid down in the law there is a greater possibility for integration of European people, because it puts them on the same line. I will later review the functioning in a more detailed manner where it is unfortunately the case that not everyone is on the same line, but the important part is that a legal change was made that created equal right and unifying right to the citizens of EU. As a personal note the author considers having rights that unify people on the level of citizens is extremely important for the idea for further integration, it has the democratic spirit in that citizens are able to get their voices heard.

Another key development in the EU is the Lisbon Treaty or the Treaty on the Functioning of the European Union (TFEU). This treaty introduced a lot more of democratic aspects to the Union, that affected the Parliament Council and the how the Member States interact with them. The treaty came into force in 2009. It was a project of the Union that started as a project to create a constitution for the Union. Due to voting procedures an official constitutional treaty never came in to force in the EU, however the treaty of Lisbon did, and it affected the functioning in a manner that could have some constitutional elements, like changing how the powers that govern decision making interact with each other and how the power is divided between them.⁴ The treaty also changes the prior three pillar approach, first being legislation directives, second pillar is common action, joint action and the third pillar is common positions framework positions.⁵ The changes included the third pillar into the first one and thus discontinuing to have the third one.⁶

The more specific institutional changes in the EU, that were brought into force by the Lisbon treaty were: The Parliament composition was changed to represent the EU citizens, with the change that EU citizens could vote for their Members of European Parliament (MEP), increased the Parliament policy areas with 40 new areas and created the maximum limit of MEPs that is 751. The European Council consisting of heads of states or heads of government, became

² Eichenberg, R. Dalton, Russell. Post-Maastricht Blues: The Transformation for citizen support for European Integration, 1973-2004, *Acta Politica* 2004, 42. P 128-152, 139.

³ The citizens of the Union and their rights, Achievements, B 2 Accessed: 21.11.2018,

<http://www.europarl.europa.eu/factsheets/en/sheet/145/the-citizens-of-the-union-and-their-rights>

⁴ The Treaty of Lisbon, History, Accessed: 21.11.2018 <http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon>

⁵ Sieberson, S. The Treaty of Lisbon and its Impact on European Union's Democratic Deficit, *Columbia Journal of European Law*, Vol 14:3, 2008. P 446-465, 449.

⁶ *Ibid.*

formally recognized as an EU institution. And finally, the Council of the European Union, formed of ministers of the Member States, applied a new voting rule for their passing legislation, 55% of the voters need to agree and the agreement needs to represent 65% of the EU's population.⁷ The renewed decision-making process takes into consideration the basic principle of democracy which is that the direction of the majority will be taken. Especially the requirement that it needs to represent 65% of the population inhabiting the Member States seems to be a very democratic requirement and as representative of the democratic principle of the EU.

The developments in the European Union can clearly be seen as leaning towards a more democratic direction. To put it more clearly the developments have allowed for the democratic process, or has created the ability of voters to affect the political decision by voting for their candidate in a powerful way. Considering the decision making of the European Parliament, the voter can vote for their national MEP according to their interest to represent them in the Parliament and thus originally keeping a part of the decision making in the hands of the voter. The voter also, by affecting their national elections affects the composition and decision of the European Council and the Council, heads of states are voted to their position in the Member States by their nationals and the ministers are also generally selected from among the candidates that are elected into the national parliament. Even though there might a bit longer of a reach from the voter's ability to affect these positions they are still selected by the democratic process, the participants of these institutions take part in majority voting type systems that are quite democratic in that sense. There can be drawn a link between the representatives and their election that they are chosen by the vote of the majority and operate under a system of majority voting. The developments and the treaties have certainly created at least in principle a quite a democratic outlay in the decision making of the Union.

IMPLICATIONS ON THE DEMOCRATIC PROCESS

The European Parliament and its Members form political groups within the Parliament and are not divided by nationality, currently there are 8 groups and a MEP can decide to stay unattached to these groups and still remain in the parliament.⁸ The democratic aspect affects this part of EU decision-making greatly because as said the MEPs are voted in by the EU citizens. The Parliament is involved in passing legislation with Council of EU, the legislation that is proposed by the Commission.⁹ This I see as a fundamental democratic aspect to the Union, the MEPs discuss matters and affect legislation that is separate from the functioning of national parliaments. National parliaments do have an option to interact with the Parliament, something that will be reviewed in the paragraph but in essence the MEPs are separate from national parliaments. The democratic decision making is emphasized since it creates a separate function from national parliaments to the decision making. It does go both ways since national parliaments are also voted by the citizens and their legislative bodies in their countries so there are many layers to the system.

One of the measures that affects the decision-making of the European Parliament is the involvement of national parliaments through a function that is known as Early Warning

⁷ The Treaty of Lisbon Summary, Accessed: 21.11.2018 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum%3Aai0033#keyterm_E0003

⁸ The Political Groups in the European Parliament, Accessed: 21.11.2018 <http://www.europarl.europa.eu/about-parliament/en/organisation-and-rules/organisation/political-groups>

⁹ European Parliament, What does the Parliament do? Legislative, Accessed 19.11.2018 https://europa.eu/european-union/about-eu/institutions-bodies/european-parliament_en

Mechanism, which allows for the national parliaments inspect legislation and to see whether it is harmonious with the principle of subsidiarity.¹⁰ The aim of the mechanism is to create a more legitimate and democratic way to make decisions without creating new bodies in to the EU order.¹¹ The function of the national parliaments is not allowed to create new legislation or disallow a law to be drafted or passed, on its own, but it can obtain these powers in co-operation the Commission when the Commission is proposing legislation, or the European Parliament or the Council.¹² The power is not absolute in that sense that it does not disrupt or alter the processes of the institutions by simply creating a new power, but the ability to co-operate with one of the institutions does have an effect. It does seem like quite a strange approach to have more power to the national parliaments since it does not give an actual power to them. But like stated previously the aim is to create legitimacy, this having an aspect of the national parliaments simply being taken for a ride and not having any say in it, their ability to be heard is increased.

The EU citizenship and its function were a new development in the matter, however Parliament has had a directly elected MEPs since 1979.¹³ Through these changes the European parliament has become increasingly powerful, has acquired a co-legislative position alongside the Council, except when agriculture is concerned.¹⁴ This shows democratic process in the Union has been greatly different in the past. The Parliament is stronger foothold in the matters of EU even though not a full Parliament of the area meaning that they are still co-legislator, which does not give the EU citizens the electoral power to vote for their candidates in the Parliament and have the people deciding for their matters in this way, such that is usual in a nation. Of course, this is a good example of the fact that the EU is not one nation but a collection of its Members who are going forward to a more democratic direction in this regard or this is the impression the author of this paper has gotten from the development of the treaties.

The parliament is on an electoral level representative of the EU voters, however there are aspects to it create an interesting gap in interests of voters and MEPs. The interests of the voters and MEPs differentiate greatly in topics such as further integration of the European Union, the MEPs leaning towards integration than the voters.¹⁵ This is probably an unavoidable phenomenon in any democratic process at least to some extent. It does express some level of difference in approach to matters regarding MEPs and the voters, however in terms of democracy and the voters being represented in the Parliament according to their interest as an election would imply, does not become fulfilled. The democratic process does have implications in the affairs since the MEPs are elected with democratic means, this somehow does not seem to constitute a democratically successful end in this manner.

The democratic legitimacy of the Parliament is subject to criticism. There are two factors having an effect of democratic deficit, these are the formation parliament as a party system which is assumed to be derived from national democratic systems, the second one is that the Parliamentary representatives might not be competing for European issues on the elections to the Parliament but rather on national issues and their elections to the parliament would have an element of citizens disappointment in the functioning of the national government and therefore

¹⁰ Cooper, I. A Virtual Chamber for the European Union? National Parliaments After the Treaty of Lisbon, West European Politics, Vol 35, No, May 2012, p 441-465, 441

¹¹ *Ibid.* p 446.

¹² *Ibid.* p 448.

¹³ The European Parliament, Historical Background, Introduction, Accessed 22.11.2018
http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.1.pdf

¹⁴ Eriksen, E. Oddvar, J. Democracy Through Strong Publics in the European Union? Journal of Common Market Studies, Volume 40, No 3, p 401-424, 411-412.

¹⁵ Mair, P. Thomassen, J. Political Representation and government in the European Union, Journal of European Public Policy, 17:1, January 2010, p 20-35, 28.

electing the MEP is based on the national issues more than EU.¹⁶ As for the first part of deficit, the structure of dividing into parties might not be such a negative thing. It seems to be always happening that most political systems operate under the assumption that there are likeminded persons that than formulate a joint direction or decision on a matter. It seems like more an appropriate way to have 751 people be somehow organized among themselves so that directions are more large scope among parties but individuals of those parties can express their personal opinion on a matter as a separate representative still going the direction of their party. The second part seems more damaging, it can be used to cloud the vision of the voters based on some internal issue and the might not be linked to the actions of the MEP in the Parliament that much. The MEP representing the things they promise might not happen either way but it would seem to be a more transparent approach to engage in the election with the opinions that are likely to be evaluated once in Parliament so that the process would seem less foggy.

Next the topic of the discussion will be the other institution passing legislation in the European Union that is the Council of the European Union. The institution is formulated of the ministers of Member States and they are the second party to the adopting new laws to the EU legislation.¹⁷ Their part of being involved in the EU legislation and being ministers of countries they are also involved in the developments of national legislation. They are along with the Parliament the key decision-making body of the EU.¹⁸ The interesting part about the Council of European Union is that in comparison it to the Parliament it is quite small in its representative size. This could be seen as that they have a lot smaller group to discuss in compared to the Parliament which is 751 persons. They are of course making the decision together with the Parliament but framing it in a way that it is two institutions where one is a lot larger than the other it seems somewhat odd that they are as involved in the decision-making. Council also has a larger gap regarding the voter, since it is not one step away from the voter as it is in the Parliament, but ministers are parts of the governments of the Member States and depending on the Member States are appointed to their position. It might not be a considerable gap since they are already elected officials but there is no more of a link between the vote and the Council member.

CJEU AND THE ECHR

When talking about democratic decision being realized it is important to talk about the enforcement decisions and making sure that proper actions are taken in the different institutions. The role of the Court of Justice of the European Union is important in this sector. With the compilation of 1 judge per Member State the CJEU power is not limited only to dealing with decision regarding EU law in Member States but matters can be proceeded to them if EU has not taken proper action in one of their institutions.¹⁹ The decision of the Court of Justice are major impact when there is discussion of actions taken in the internal market, their role is extremely visible in these matters and considering democracy the function is extremely important. Inside a democratic framework where legitimacy and justice are important, the role of a court is foundational as a place where disputes can be settled.

¹⁶ Ibid., p 21

¹⁷ Council of the European Union, What does the Council do? Negotiate and adopt EU laws, Accessed: 21.11.2018 https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en

¹⁸ Accessed: 21.11.2018 https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en

¹⁹ Court of Justice of the European Union, What does the Court of Justice Do? Ensuring the EU takes action, Accessed: 21.11.2018 https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en

In terms of rights of an individual in a democratic process, it is important to ensure that any individual in their nation has the right to participate in the political process and have their human rights protected, which ensured by the European Court of Human Rights. The basic rights of an individual are set out in the EU Charter of Fundamental Rights.²⁰

EUROPEAN CITIZEN'S ROLE

The European citizen has multiple options how they can vote on issues regarding the affairs of EU. Being an EU citizen is quite an astonishing development in the world, EU not being a country but an agreement between Member States. Based mostly on the common good of having a single market but that it provides a political voice for citizen, even though the author is not a historian he does not think an arrangement like this has existed before in the world or the cases would be rarity, but this I cannot state as a fact. These political rights of the citizen, along with other freedoms ensured by EU such as free movement of people. The unique feature is that there is no clear constitution which is what differentiates the arrangement, there of course being other differences but this being an important one.

Firstly, we must to discuss how they can affect matters through their national elections. EU citizens can affect the matters of the Union on their national level, by voting for the candidate of their choice, from the elected candidates then is formed the national parliament from which political arrangements of opposition and government are made but most importantly for this paper the ministers are elected. The elected ministers are in communication with the through the Council of European Union. This is one of the ways a European citizen is involved with the decision of the EU. There in lies a connection between the individual citizen and the Council of the European Union. The ability to have the Member State to affect the political and legal decision is extremely important since the parliaments of nations represent the fair electoral decision in democratic states and there is a connection to a higher institution in this manner. Having a nation that has a democratic foundation is a prerequisite for membership in the EU which ensures again that rogue or tyrannical governments cannot be a part of the community.

Secondly, the European citizen can vote for their MEPs to represent them in European affairs, at least this is the founding idea behind it even though there is criticism whether this is actually the case. The problem however, is more of practical nature because in case MEP candidates ride the wave of being against unpopular decision made by a Member State government under the election this is for the European citizen to decide if they will enable this type of game playing with the political system. One does not matter like in democracies but the important thing considering the individual citizen is that the framework behind the structure has the potential of creating this type of a result. Approaching the matter from this aspect the European citizen does have quite a bit of democratic responsibility placed on him or her because the Parliament is one of the institutions making the decision passing the laws. The problem of a democratic deficit being realized as a MEPs being voted in because of a stance against national political decision making I consider as a feature of the system, but an inherently distinct quality. Politics is not considered the game of honesty anyway even though it seems that this is something that the majority vote forgets when the candidates are campaigning. Nevertheless, European citizens do have the possibility of voting for their candidate to represent their interests in the European Parliament and when new legislation is discussed there are movements to contact your

²⁰ EU Charter of Fundamental Rights, Accessed: 21.11.2018 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016P/TXT&from=EN>

MEPs. This is something that was going around the internet when the Parliament was considering new legislation regarding copyright laws in the European Union, which was then approved in the Council and after the first rejection it was approved in the Parliament.²¹ There is a democratic aspect that EU citizens could vote for their representatives in the parliament to vote towards their interest, regarding how effective this is arguable, but the democratic element behind it that the EU citizen is one step away from having a possibility to contact a member of the quite big institution is extremely democratic at its core.

The third way a European citizen can have their say in the democratic framework, or to put in other words to have their say how the community is approaching the tasks it is dealing with is the CJEU or the European Court of Human Rights. A European citizen can bring a claim against their state or a claim can be brought against the other EU institutions in the CJEU and this is important in the democratic process. The reason behind the importance is that a European citizen can have their voice heard in a fair hearing of CJEU in case their rights have been violated, or a company can do this as well. It is an important part of a democratic society that everyone has the right to demand a fair hearing if their rights have been violated and it is an extremely democratic element of the European Union that an individual can have their case heard in the CJEU or the European Court of Human Rights. ECHR deals with human rights violations and they have a large spectrum in severity of violations which are all important for democracy. Specific democratic rights involving politics can be pursued all the way to ECHR. Considering Eu as a community of not just market but political co-operation as well the rights of the citizen have been emphasized in this aspect greatly.

CONCLUSIONS

The European Union has created a democratic framework that affects the entire Union. Through different treaties like the Maastricht Treaty or the Lisbon treaty democratic processes have been altered and there is a more cohesive and developed democratic system in place currently. The Member States have been ensured their platforms, opportunities and tools to operate in the framework. There different institutions of the EU that operate in the sphere of proposing legislation, passing legislation and creating the political directions for the Union that can use their power. There is the court system that handles matters that involve EU elements and do take matters seriously and give judgements where a person is up against their nation when a for example a directive has not been implemented correctly like the Francovich case.²² So in the midst of it all the citizen is not forgotten.

The electoral problems involving the citizens and their ability to affect EU affairs are multiple, whether it is a democratic deficit in the system or something that is misused are important problems which might be solved with more integration or not. The framework ensuring the citizen's rights is the important part when analyzing EU as a community. It does form a sort of society of Member States where the states themselves have a say in the process and they have tools like the early warning mechanism or heads of states assembling together to discuss the current political directions the Union should take. The division of powers between the courts, Commission, Council of the European Union and the Parliament are important factors in well assembled society to decrease possibilities of abuse of power, how well this is handled is arguable but the fact that the treaties have created a system that is in its foundation based on this is

²¹Julia Reda, Eu copyright reform/expansion, point 3, Accessed 21.11.2018 <https://juliareda.eu/eu-copyright-reform/>

²²Court Decision 21.11.1991, **Francovich, Joined cases C-6/90 and C-9/90**

important. While Member States, the Council of the European Union and Parliament interact with each the citizen has not been forgotten but they have been created rights which can have an impact in the Union and they can participate in the political process of the Union through national elections, European Parliament elections or through the courts. This is a great standing for the individual because they are not only members of their national state but European citizens, which is something that might not be as noticed or engaged in as it would allow.

To sum it up the democratic framework of the European Union is quite complex in its nature, and might not function to the fullest of its ability. The framework does however include all the functions of a society of nations where the citizens are not replaced with nations but are a part of the process.

REFERENCES:

1. Chochia, A., Troitiño, D. R., Kerikmäe, T., Shumilo, O., & Lindstrom, N. (2018). The First European Community and the British Position. In *Brexit* (pp. 59-81). Springer, Cham.
 2. Countries in the EU and EEA Accessed: 19.11.2018 <https://www.gov.uk/eu-eea>
 3. Eichenberg, R. Dalton, Russell. Post-Maastricht Blues: The Transformation for citizen support for European Integration, 1973-2004, *Acta Politica* 2004, 42. P 128-152
 4. The citizens of the Union and their rights, Achievements, B 2 Accessed: 19.11.2018,
 5. The Treaty of Lisbon, History, Accessed: 21.11.2018 <http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon>
 6. Sieberson, S. The Treaty of Lisbon and its Impact on European Union's Democratic Deficit, *Columbia Journal of European Law*, Vol 14:3, 2008. P 446-465,
 7. The Treaty of Lisbon Summary, Accessed: 21.11.2018 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum%3Aaai0033#keyterm_E0003
 8. The Political Groups in the European Parliament, Accessed: 21.19.2018 <http://www.europarl.europa.eu/about-parliament/en/organisation-and-rules/organisation/political-groups>
 9. European Parliament, What does the Parliament do? Legislative, Accessed 19.199.2018 https://europa.eu/european-union/about-eu/institutions-bodies/european-parliament_en
 10. European Parliament, What does the parliament do? Legislative, Accessed 19.199.2018 https://europa.eu/european-union/about-eu/institutions-bodies/european-parliament_en
 11. Cooper, I. A Virtual Chamber for the European Union? *National Parliaments After the Treaty of Lisbon*, *West European Politics*, Vol 35, No, May 2012, p 441-465,
 12. The European Parliament, Historical Background, Introduction, Accessed 22.11.2018 http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.1.pdf
 13. Eriksen, E. Oddvar, J. Democracy Through Strong Publics in the European Union? *Journal of Common Market Studies*, Volume 40, No 3, p 401-424,
 14. Kerikmäe, T., Chochia, A., Troitiño, D. R., & Hrebickova, A. (2018). The First Attempts to Unify Europe for Specific Purposes and British Flexibility. In *Brexit* (pp. 21-32). Springer, Cham.
 15. Mair, P. Thomassen, J. Political Representation and government in the European Union, *Journal of European Public Policy*, 17:1, January 2010, p 20-35
 16. Troitiño, D. R., Kerikmäe, T., Chochia, A., & Hrebickova, A. (2018). Cooperation or Integration? Churchill's Attitude Towards Organization of Europe. In *Brexit* (pp. 33-56). Springer, Cham.
 17. Troitiño, D. R., Kerikmäe, T., Chochia, A., & Hrebickova, A. (2018). First European and Pan-European Integration Efforts and British Reluctance. In *Brexit* (pp. 3-20). Springer, Cham.
 18. Council of the European Union, What does the Council do? Negotiate and adopt EU laws, Accessed: 19.11.2018 https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en
-

19. Court of Justice of the European Union, What does the Court of Justice Do? Ensuring the EU takes action, Accessed: 21.11.2018 https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en
 20. EU Charter of Fundamental Rights, Accessed: 21.11.2018 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016P/TXT&from=EN>
 21. Julia Reda, Eu copyright reform/expansion, point 3, Accessed 21.11.2018 <https://juliareda.eu/eu-copyright-reform/>
 22. Court Decision 19.11.1991, Francovich, Joined cases C-6/90 and C-9/90
-

Brexit and Constitutional Law of the European Union

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Abstract: *This paper analyses the impact of Brexit to the European Union. What effect does it have on the integration process? And what are the possible options that the United Kingdom has at the moment. The idea of the European Union army is discussed briefly. And what would be the consequences of a "Hard Brexit".*

Keywords: *Brexit, Integration, European Union army, Sovereignty*

INTRODUCTION

Integration in the European Union has been affecting the member states sovereignty more than ever. Even if the process has had a positive effect on the economy and functioning of the states, it has another side to it. If people start to feel that the decisions for their future are being not made in the hands of their representative in the state, it causes the feeling of losing sovereignty. Although their elected representatives may also not act in the will of their voters, they are easier to be manipulated by public opinion and they may react to the voice of the people more as being afraid to lose their position in the state. In the United Kingdom, people started to feel that the decisions were made without their will. The British were mainly demanding to minimize the immigration and to get back the sovereignty to make trade deals for themselves freely.

As the people of United Kingdom have expressed their will through referendum and decided to leave the European Union, the aftermath of the decision is still unknown. Negotiations are ongoing and in order to find out what are to come as a result of Brexit, it is needed to analyse the possible consequences of agreements that could be made.

IDEOLOGICAL SWIFT

It is difficult to evaluate the effect of the United Kingdom leaving the European Union to the integration process as a whole, because in some fields, the UK has been a big supporter of integration and in some areas, that has not been the case. The area that the UK has surely expressed their support for has been the development of the single market. But they have a reputation of being against integration in social policy areas.¹

The United Kingdom has been regarded as one of the northern liberal countries in the union with the Baltic states and countries like Germany, Denmark, Sweden, Finland and the Netherlands, these states have had an ability to block legislation by qualified majority voting in the European Council². But if they leave the union, the northern liberal bloc will lose the blocking minority to block legislation, because the southern protectionist countries will have more power. In order for to not lose the power to have an ability to block legislation, when needed, the northern liberal countries will have to find other partners. By classifying the member states as countries who are in the Eurozone opposed to those, that are not, the Eurozone states will also gain such a majority, that the non- Eurozone states don't have a blocking minority against.

¹ [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604973/IPOL_STU\(2018\)604973_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604973/IPOL_STU(2018)604973_EN.pdf)

² <https://www.ucl.ac.uk/constitution-unit/research/europe/briefing-papers/Briefing-paper-2>

A research has been done, evaluating, how has the voting of the UK affected the decisions that have been made in the EU parliament by comparing, what kind of results would have been made without the UK. The research showed, that the UK parliament representatives tend to be for reducing “red tape”, also without the UK being in the parliament, the vote for stricter copyright regulation would not have passed, the EU budget would have been smaller, but member state’s contribution would have increased and there would be a stronger push for tax harmonisation and a higher taxation for financial transactions.³

EUROPEAN UNION ARMY

As the UK has one of the biggest armies of EU and therefore has had a major foreign relations influence, the leaving, will weaken the European Unions power on an international power scale. The United Kingdom represented 23% of the total budget spent on defence by European countries in 2015.⁴ But as the departure from the union weakens the European Union’s international power it has given a possibility to increase power that wasn’t possible before. Rousseau had a discussion on uniting Europe in a letter the idea of creating a European Union army has been raised by Macron and Merkel. The UK has been against the idea of a European Union army and vetoed the idea because they have thought that it would undermine NATO, but now when they don’t have a say, there is a possibility. For the European Union influence in international matters the existence of a united army would surely be beneficial, but as some countries see the current integration process moving too fast, it could instead create more tension in the union and possibly cause a mentality of disintegration in states like Poland. The Foreign minister of Estonia, Sven Mikser has said that he doesn’t see that the government of Germany would accept giving the right of making a decision to move the German forces to a representation of the European Union. A state giving away power over a state’s army is definitely a big loss of sovereignty.

EUROPEAN UNION BUDGET

The United Kingdom has been reliable of a significant part of European Unions budget. In 2017 the UK contributed to the EU public sector a net worth of about 10, 2 billion euros⁵ that is the so called “Brexit gap”. That makes the UK the second biggest net contributor after Germany. Although United Kingdom is supposed to continue to contribute in paying for some of the institutions after the next Multiannual Financial Framework period starts⁶. But if the UK ends contributing to the European Union budget, the European Union has to fill the 10 billion euros worth gap, therefore budget changes will be inevitable. “Since the UK is a significant net contributor, the EU27 will either need to cut spending, increase contributions or do a combination of both.”⁷ This means that EU members will have more economic obligations in relation to EU contribution affected by the UK actions, if they exit the EU.

³ http://60811b39eee4e42e277a-72b421883bb5b133f34e068afdd7cb11.r29.cf3.rackcdn.com/2016/04/VoteWatch-Report-2016_digital.pdf

⁴ file:///C:/Users/User%20name/Downloads/Brexit_-_Major_Consequences_on_the_Process_of_Euro.pdf

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691017/EU_finances_2017_Cm9576_web.pdf

⁶ https://www.cer.eu/sites/default/files/prbrief_mff_gordon_24.4.18.pdf

⁷ https://www.cesifo-group.de/DocDL/EconPol_Policy_Report_04_2017_Brexit.pdf

SINGLE MARKET AND CUSTOMS UNION

One of the reasons why the people of the UK chose to leave the European Union was the promise to regain its sovereignty of establishing trade deals, and to end the immigration flow. One way to leave the union would be to join the European Economic Area, as Norway, Iceland and Liechtenstein have, even though, they would still have to follow the four freedoms and the EU legislation, but they would have some freedom to negotiate trade deals for themselves.⁸ But the negotiations are showing that Theresa May is focusing to stay in the customs union. If the deal that states that the UK will stay in the customs union will be approved, it will mean, that the UK will lose its decision power, but has to follow the rules imposed on them by the EU until the end of the new date of transition period, which is set on the end of 2021, but the UK cannot leave without permission from the EU, because the EU has a right to extend the transition period to the end of the century.⁹

BORDER PROBLEMS

Although in the withdrawal agreement that is on the table at the moment proposes that the United Kingdom will stay in a customs union until the end of the new date of the transition period, one of the most important problems regarding the departure that still remains, is the border between Northern Ireland and the Republic of Ireland. If the United Kingdom chooses to restrict the free movement of people, it is necessary for them to start controlling their borders, and the border with the Republic of Ireland has a history of causing tension. The problems of border control start from local farmers, that have land that crosses the border and people who live on one side of the border, but work on the other side a border. A hard border would definitely be causing harm for the everyday lives of such people. And it could possibly harm the peace process that the “Good Friday Agreement” has accomplished.¹⁰

If the migration would be controlled without a “hard border” and using technology to control the border, it would be a big risk to take, because such a border would be hard to have control over in a way that doesn't harm the everyday lives of the people that need to cross the border daily. Another way to deal with the situation is to let the Northern Ireland have free movement with the Republic of Ireland. The border control would therefore be carried out on the route from the Northern Ireland to other parts of UK. This would bring Northern Ireland closer to EU and that is not something the UK is willing to accept.

EUROPEAN UNION LEVERAGE

If the United Kingdom will have greater financial growth without the European Union, it will certainly make other states of the union hesitate on the utility of the union for their own economy and they will see it as an opportunity to start bargaining some benefits for themselves too. But as the EU has leverage over the UK, by being a bigger economic power, it is unlikely that such a deal would be made between the two, that the EU will let the United Kingdom leave and have bigger economic growth. That is one reason why it is so hard to get a “divorce deal” that satisfies both

⁸ file:///C:/Users/User%20name/Downloads/SSRN-id2841333.pdf

⁹ https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf

¹⁰ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933715

parties. If the economic growth in the European Union will be bigger than in the United Kingdom, the support in member states will likely to grow as people will acknowledge the positive impact that being a member states gives to a country's economy. This would therefore encourage support for integration in the member states. EU has significant leverage in negotiating a withdrawal agreement, and the possibility of UK getting a deal that would give them the benefit of participating in free market with the EU and to gain the sovereignty to make their own trade agreements internationally is very low,¹¹ the UK basically has two possibilities. To remain in the customs union and act under EU legislation and the European Court of Justice decisions, or to go through with a hard Brexit. As it is unlikely that the UK parliament will support the deal that would be worse than if they had stayed in the union and remained a right to participate in legislation and governing of the union. The chances of a "hard Brexit" are very likely.

As the only state in the European Union that has chosen English as an official language will be leaving, the question of using English as a language for the European Union institutions to be working in, has been raised. But there is no other language that is so useful for the framework of EU affairs.¹²

CONSEQUENCES OF A "HARD BREXIT"

A "Hard Brexit" is something, that one could be expecting as an outcome of a referendum that was about leaving the EU. Although it may not be beneficial for the people of the UK, it was after all the majority and the will of the people must be respected, even if they did not know what could come out of the decision. If it would happen, the UK would get back all the sovereignty to start organizing their economy.

If the EU and UK will not agree on a trade agreement before march 2019, the World Trading Organisation rules on imports of third countries, and the tariffs of the same regulations will be implemented by the parties.¹³

As the trade between the European Union and the UK would in that case decline, the economies of both parties are not likely to benefit. The UK's gross domestic product per capita could in that situation be 14 per cent lower by the year 2030.¹⁴

One of the negative consequences could be, that some of the banks, located in the city of London are likely to move to the European Union market, if the UK would stay out of the customs union. A study shows that of the 90 per cent of the European banking industry, resides in London, and about about 30 per cent, would move to a member state if the circumstances would find it necessary.¹⁵ And as the international banks will lose as well the cross- border benefits, that they have been enjoying in the UK, they are likely to move their headquarters to a member state.¹⁶ If the banking industry would move to the union, it would surely be beneficial for the EU economy, as then, the member states could collect taxes off of those banks.

¹¹ Dobrin, S., & Chochia, A. (2016). The concepts of trademark exhaustion and parallel imports: a comparative analysis between the EU and the USA. *Baltic Journal of European Studies*, 6(2), 28-57.

¹² <https://onlinelibrary.wiley.com/doi/epdf/10.1111/weng.12264>

¹³ https://www.cesifo-group.de/DocDL/EconPol_Policy_Report_04_2017_Brexit.pdf

¹⁴ <https://pdfs.semanticscholar.org/d729/e7e6c2b8ad3944f0d8784e77c72740fd05db.pdf>

¹⁵ <https://books.google.ee/books?id=rj1LDwAAQBAJ&printsec=frontcover&dq=brexit&hl=et&sa=X&ved=0ahUKEwjNmtbb4cbeAhXI2SwKHTYecrwQ6AEIazAJ#v=onepage&q=brexit&f=false>

¹⁶ <http://www.kenwitsconsultancy.co.uk/wp-content/uploads/2016/09/BREXIT-2016-Policy-Analysis-from-the-Centre-for-Economic-Performance.pdf#page=40>

Some industries in Britain could not afford their shipments to go through border control, because they operate on precise time, that each of the part of their product is supposed to arrive and a delay of one part could harm the whole production process, so they could choose to move to the EU as well. As being in a larger economic area as the EU, without tariffs, gives the businesses the opportunity to export more and for the consumers to consume at a lower price.¹⁷ If the UK businesses would lose that advantage, some of them would certainly decide to move their businesses to the EU.

CONCLUSION

As the UK parliament would be the riskiest party, that would be have to vote for agreeing this withdrawal deal, it is unlikely that they would do so. The reason for that would be, that such a deal would not be beneficial in any way comparing it to if the UK would remain in the union. But this deal could not be seen beneficial in the sense of regaining sovereignty as well as they would have to obey EU regulation. So, to analyse the impact that the possibility of the UK leaving the EU would still be very speculative. If the UK leaves, it is sure, that there will be some ideological swifts in the parliament and the council. The international influence of the EU is likely to decrease and there has to be some compensation in that area to replace the UK's part. An EU army would be unlikely as the member states lack the willingness for giving away such an important part of a state sovereignty.

REFERENCES:

- Chochia, A., Troitiño, D. R., Kerikmäe, T., & Shumilo, O. (2018). Enlargement to the UK, the Referendum of 1975 and Position of Margaret Thatcher. In *Brexit* (pp. 115-139). Springer, Cham.
- Oliver, Tim, Walshe, Garvan, et. al. "The Impact of the UK's Withdrawal on EU Integration"(2018) [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604973/IPOL_STU\(2018\)604973_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604973/IPOL_STU(2018)604973_EN.pdf)
- Patel, Oliver, and Christine Reh. "Brexit: the consequences for the EU's political system." UCL Constitution Unit Briefing Paper (2016): 1-5.
- Hix, Simon, Sara Hagemann, and Doru Frantescu. "Would Brexit matter? The UK's voting record in the Council and the European Parliament." (2016).
- Pricopi, Marius. "Brexit–Major Consequences on the Process of European Military Integration?." In *International conference KNOWLEDGE-BASED ORGANIZATION*, vol. 23, no. 1, pp. 260-264. De Gruyter Open, 2017.
- HM Treasury. "European Union Finances 2017: statement on the 2017 EU Budget and measures to counter fraud and financial mismanagement"(2017)
- Gordon, Noah. "The EU budget after Brexit:Reform not revolution"(2017)
- Dobrin, S., & Chochia, A. (2016). The concepts of trademark exhaustion and parallel imports: a comparative analysis between the EU and the USA. *Baltic Journal of European Studies*, 6(2), 28-57.
- Lehmann, Matthias, and Dirk A. Zetzsche. "Brexit and the consequences for commercial and financial relations between the EU and the UK." (2016). Force, EU Task. "Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level " (2018).
- Felbermayr, Gabriel, and Clemens Fuest. "Economic Effects of Brexit on the European Economy. No. 4." ifo Institute-Leibniz Institute for Economic Research at the University of Munich, (2017)
- Modiano, Marko. "English in a post-Brexit European Union." *World Englishes* 36, no. 3 (2017): 313-327.

¹⁷ http://eprints.lse.ac.uk/66144/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_LSE%20BrexitVote%20blog_brexit02.pdf

- Schoof, Ulrich, Thieß Petersen, Rahel Aichele, and Gabriel Felbermayr. "Brexit–potential economic consequences if the UK exits the EU." *Future Social Market Economy Policy Brief 5* (2015).
- Doherty, Brian, John Temple Lang, Christopher McCrudden, Lee McGowan, David Phinnemore, and Dagmar Schiek. "Northern Ireland and 'Brexit': The European Economic Area Option." (2017). Martill, Benjamin, and Uta Staiger. "BREXIT AND BEYOND."(2018)
- Dhingra, Swati, et al. "The consequences of Brexit for UK trade and living standards." (2016).
- Dhingra, Swati, Gianmarco Ottaviano, Thomas Sampson, and John Van Reenen. "The impact of Brexit on foreign investment in the UK." *BREXIT 2016 24* (2016).
- Troitino, D. R., Kerikmäe, T., & Chochia, A. (2018). De Gaulle and the British Membership in the European Communities. In *Brexit* (pp. 83-97). Springer, Cham.
- Troitino, D. R., Kerikmäe, T., Chochia, A., & Hrebickova, A. (2018). Cooperation or Integration? Churchill's Attitude Towards Organization of Europe. In *Brexit* (pp. 33-56). Springer, Cham.
- Troitino, D. R., Kerikmäe, T., Chochia, A., & Hrebickova, A. (2018). First European and Pan-European Integration Efforts and British Reluctance. In *Brexit* (pp. 3-20). Springer, Cham.
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ISIS – A GLOBAL OR REGIONAL THREAT?

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Abstract: *The study of terrorism is a very diverse, contingent and complex phenomenon. The world has long been fighting terrorism, pervaded with ethnic and religious characteristics, it does not represent a new tool against the civilized world order. Terrorism, featured by religious narratives backed by economic and political aspirations, has significantly changed a number of institutions and states' geopolitical strategies towards the hot terroristic areas of the world. When the Western world, in particular the USA, started celebrating a meritorious victory against "Al-Qaeda", by killing its spiritual leader Osama bin Laden, simultaneously a new terroristic organization called the "Islamic State of Iraq and Syria" (hereafter ISIS) announced a pretension of being a discretionary power in the Middle East. This paper aims at observing and analyzing how the ISIS has transformed from regional to a global threat and how the forming processes of such heavily militarized terrorist organization have developed to be perceived as a top global challenge of the world.*

Keywords: *Al-Qaeda, ISIS, Middle East, Terrorism.*

INTRODUCTION

The world has long been fighting terrorism, pervaded with ethnic and religious characteristics, it does not represent a new tool against the civilized world order. Terrorism, featured by religious symbols backgrounded with economic and political aspirations, has significantly changed political map of the modern world. When the Western world, in particular the USA, started celebrating a meritorious victory against 'Al-Qaeda', by killing its spiritual leader Osama bin Laden, exactly that time, a new terroristic organization called the "Islamic State of Iraq and Syria" (hereafter ISIS) announced a pretension being a hegemonic power in the Middle East. The violation, which was being carried out by the ISIS militants against disobeyed Sunnis firstly and then Shias of the Middle East, soon crossed the regional boundaries and became an object of care for many Asian, African, European and Cross-Atlantic states. Occupation of North Iraqi cities in 2014 was accompanied by the statements of the European and the USA political leaders that it was a local problem that should have been solved in the Middle East, but after the November attacks in Paris in 2015, which ended with around 130 dead civilians, ISIS's actions were estimated as a global challenge for the European continent. Part of the US Senators had been persistently asserting that ISIS does not have any alarming linkage with the American soil, pretending that the Islamic Caliphate would have never appeared on the agenda, but after the December Christmas attack in San Bernandino in 2015, where 14 died and 24 were injured, American political establishment redefined ISIS as an increasing threat.¹

Boko Haram, which is ISIS-affiliated terroristic organization, responsible for deaths of thousands of innocent people in North African states, is known as the most trusted supporter organization of ISIS, which also carries out a mass violation against African Muslims and Christians. Majority of fighters who have joined ISIS are from the North African states, where the idea of Islamic Caliphate is well absorbed and implementation of restrictive instruments against it seems hard for the local governments.

¹ Atagi, C. (2016) *14 dead in San Bernandino, and we still don't know why one year later.*

ISIS's seeking of strongholds is gaining momentum in Southeast Asia. In the list of 18 countries that estimate ISIS as a number one security, is also Philippines.² ISIS-affiliated Philippine terrorist group Maute, follows the path of the Islamic State and creates numerous problems to national security forces. It has already taken responsibility for many deadly attacks in the country and officially acknowledged ISIS as a brother organization. Apart from the Philippines, Australia, Indonesia and India are the targets of ISIS. It actively appeals local Muslims to sober, carry out jihad and put their contribution in creation of Islamic Caliphate.

According to Paw Research Center survey, aligned with global warming, ISIS is estimated as a top global threat in the world and perceived as a cancer that has to be carved out.³ Regardless of open disputes between confronted political elites, existed threat, which is no longer regional problem, has made world's powerful states allied to root this cancer out with unified forces. The anti-ISIS USA-led coalition call on states to be engaged in the process since defeating such large-minded so-called 'Jihadist' state is unimaginable in only one state's endeavor.

FROM REGIONAL TO GLOBAL STAGE

Creation of ISIS

Many ISIS analysts confirm that the creation of this terrorist formation does not have a linkage only with the late Syrian rebellions, its creation has started long before. According to one of those sources, its roots can be traced to the late 1990's and in one man's vision to challenge the Western presence in the Middle East and its regional anchors and this man is Jordanian born Abu Musab al-Zarqawi. He has developed ties with Al-Qaeda under Osama bin Laden's rule and intending the resistance against the West, Israel and the Middle Eastern states, which did not consider to be genuinely Islamic.⁴ Looking at 2016 mass Human Rights violation, raping and torturing carried out by the ISIS militants, the Islamic State represented a deadly challenge to the people of Middle East and to governments in this region, as well as to other countries worldwide.⁵ This terrorist organization did not arise out of nowhere, it has profound roots in Jordan to the early 1990's, which became active in Iraq in the beginning of 2000's. After 2004, relationship between ISIS and its predecessor Al-Qaeda has worsened and because of ISIS savage methods of violation, ISIS – Al-Qaeda divorce derived from ISIS's open pretension to be a state with its own state institutions, legislation and governing structures, rather than a group, another source says.⁶ Part of anti-USA political analysts argue that IS, as well Al-Qaeda, would not seize such threatening power without the West's support. They blame on US president Barack Obama and his administration in feeding this terrorist organization with weapon and finances by mediating other Arab states in order to overthrow Syrian president, Bashar al-Assad, who represents a solid stronghold of Russia's Putin and whose rule has long transformed into tyranny.⁷ The main arguments of these critics lay down

² Romualdez, G. B. (2017). *ISIS identified as top global threat*.

³ Poushter, J., Manevich, D. (2017). *Globally, People Point to ISIS and Climate Change as Leading Security Threats*. Paw Research Center.

⁴ Tziarras, Z. (2017). *Islamic Caliphate: A Quasi-State, a Global Security Threat*. Journal of Applied Security Research. No. 12:1, 111-112.

⁵ Kerikmäe, T.; Hamulak, O.; Chochia, A. (2016). *A Historical Study of Contemporary Human Rights: Deviation or Extinction?* Acta Baltica Historiae et Philosophiae Scientiarum, 4 (2), 98–115.

⁶ Johnston, B. P., Shapiro, N. J., Shatz, J. H., Bahney, B., Jung, F. D., Ryan, K. P., Wallace, J. (2016). *Foundations of the Islamic State. Management, Money, and Terror in Iraq, 2005-2010*. RAND Corporation. No. 1, 249-276.

⁷ Hoffmann, T.; Chochia, A. (2018). *The Institution of Citizenship and Practices of Passportization in Russia's European Neighborhood Policies*. In: A. Makarychev, T. Hoffmann (Ed.). *Russia and the EU Spaces of Interaction* (223–237). Routledge, Taylor&Francis Group.

into the Obama's unforeseen vision that these radicalized fighters would become a threat for the region and for the USA, too, after capturing the weapon. Obama's such incorrigible mistake has made Russia able to hold a dominant position in the Middle East by destroying ISIS and reinforce its political weight in the West, critics argue.

Many ideas exist about ISIS as a second phase of Arabs Spring that did not find a success ending in the beginning of the 2010's. In the point of views of ISIS spiritual leader, Abu Bakr al-Zarqawi and current leader Abu Bakr al-Baghdadi, the purpose of the Islamic State is to unify Sunni jihadists of the Middle East, North Africa, South-West Asia and part of Europe that would fulfill the Mohammad's prediction.

Creation if ISIS was followed by some religious assessments that it was the sign of the apocalypse of the anti-Christ and the day of judgement⁸ that in some degree leaves the questions how much this is the day of judgement and how much the economic factors are behind of this terrorist organization, which attracts many socially excluded and economically vulnerable people.

Occupation of the Middle East and Crossing Regional Borders

According to figures that reveal the number and percentage of Muslim population in Africa, 635 million Muslims live on this continent making up 53% of the whole population (Africa Muslim Population 2016), it would be an acceptable for al-Zarqawi and al-Baghdadi to begin carrying out jihad from this soil, however it is quite noteworthy that they needed an acting lever, which would accelerate the spread of their ideology and attract radicalized Sunnis in very short terms. ISIS militants attached their forces to the civil rebellions against Syria's president Assad, which is why they have chosen this territory and not Africa for forming the Islamic State.

Very first successful punitive operation jihadist carried out was burning a Jordan pilot alive in the beginning of 2015 that caused open anger of Jordan King who immediately announced the war against ISIS and led his army to Syria. Exactly this fact is estimated as a first regional level violation that was followed by other regional states' involvement in fight against ISIS. Soon ISIS declares war against Assad of Syria and all Sunni Muslims who refuses allegation to ISIS, as well. Their punitive methods have become known as brutality against innocent people at lower level and destruction of the Middle East civilization at upper level. Occupation of North Syrian and Iraqi cities has left thousands of tortured, raped and killed people aligned with devastated cities of antic civilization hearth. Bombing of Aleppo and Raqqa of Syria and Mosul of Iraq has left thousands of people without households and enforced to seek a shelter in neighbor Turkey and Europe at best.

After mass flows of migrants from Syria and Iraq towards Turkey and Eastern Europe in 2015, Western media and a number of European states considered ISIS as an increasing global threat.⁹ After seeing millions of exterminated migrants at the European door, Germany, France and Belgium political leaders called for sanctions against ISIS-affiliated fighters in their state boundaries that was later resulted in mass suicide bomber and armed attacks by ISIS-inspired militants over the innocent civilians in those countries.

ISIS OUTSIDE THE MIDDLE EAST

ISIS in Africa

Mass violation and high rate of death of civilians committed by ISIS-inspired radical Muslim fighters in Africa have attracted global attention and become an object of discussion. Sunni

⁸ Asim, Q. I. (2017). *This is why young European Muslims are joining Isis*.

⁹ Kerikmäe, T.; Chochia, A. (Eds.) (2016). *Political and Legal Perspectives of the EU Eastern Partnership Policy*. Springer International Publishing.

Muslims' attitude that no Muslim can be a true Muslim without living in the Islamic State¹⁰ is well shared and well supported by Boko Haram terrorist organization. A Nigerian terrorist group, Boko Haram, is an African fundamentalist Islamic organization, which has a direct tie with ISIS and express allegiance to this organization. Boko Haram's intention to carve out any Western education and values related to Western society and form a state in accordance with Sharia laws, has already sacrificed more than 20,000 police officers and civilians. The Global Terrorism Index said that this radical group is responsible for 6,644 in 2014 and that number is expected to increase, since its insurgency against Christians and local governments continues.¹¹ North Africa is the area where Islamic radical ideology has easily penetrated into masses and placed a radicalized youth into its service. Because the ideology of Islamic Caliphate soon has become popular among economically deprived African Muslims, ISIS leaders officially acknowledge Boko Haram as a brother organization and assess Africa as the best stronghold for ISIS. According to numbers revealed in 2015, so-called Maghreb region, combining of Tunisia, Algeria, Morocco, Libya and Mauritania, is characterized by the highest number of fighters who have left Africa for ISIS and it reached 8240 fighters.¹² The vast majority of those fighters are the people who don't have access to education, work, social benefits and from nothing they become enemies for the local governments, particularly, when they use "Eastern fighting methods" gained during travelling to the Middle East.

Boko Haram does not frighten only local communities, as it is estimated as a significant threat for international organizations represented in North African region. United Nations compound became a target of this group in 2011 when 23 people died and 75 got injuries after explosion of car bomb.¹³ Boko Haram's imagination of torture reached a peak when they kidnapped 276 schoolgirls from Nigerian village Chibok. Part of those girls are still missing while many of them were raped and killed. Chibok tragedy has turned around the face of this Islamic group that was qualified as the crime committed against humanity and it has created a necessity for the Nigerian government to call for international help to defeat this Islamic radical terrorist organization.

In spite of the fact that ISIS is losing important territories in the Middle East, Abu Bakr al-Baghdadi assumes Maghreb region as a solid stronghold where the lack of international surveillance, weaknesses of local governmental security forces and shortage of local people's resistance can be used in favor of ISIS.

ISIS in the USA

The United States has an incomparable experience in fighting against terrorism. It seemed that CIA has defeated Al Qaeda, which some political scientists believe this terrorist group was remarkably promoted by the United States, a new threat has emerged on the stage, called ISIS.¹⁴ Garikai Chengu is a research scholar at Harvard University who belongs to the group of analysts who considers ISIS as a US-based terroristic organization against Assad's regime and Russian ambitions in the Middle East. Chengu states that Obama and his administration have started assessing ISIS as a global threat only after the American journalists had been beheaded by ISIS-inspired militants and they has realized that controlling the Islamic State would require a hard effort.

After the San Bernandino and Orlando attacks in which 63 people died in total, former president Obama stated that ISIS did not have anything with religion, that it was a cult of death,

¹⁰ Dar, A. S (2016). *Contemporary discourses on the possibility of an 'Islamic state': an overview*. Journal of Contemporary Arab Affairs. No. 9:3, 421-427.

¹¹ INSTITUTE FOR ECONOMICS AND PEACE. (2017). *Global Terrorism Index 2017*.

¹² THE SOUFAN GROUP. (2015). *An Updated Assessment of the Flow of Fighters into Syria and Iraq*. Foreign Fighters. THE SOUFAN GROUP.

¹³ CNN Library (2017). *Boko Haram Fast Facts*.

¹⁴ Chengu, Garikai. (2017). *America Created Al-Qaeda and the ISIS Terror Group*.

which threatens the Muslims in the region and in the USA, too.¹⁵ Current 45th president of the USA, Donald Trump has criticized Obama's regulations against the Islamic State and condemned him that was immediately followed by his promise he would take care of this global problem. From the first days of his rule he enhanced the sanctions against travelling from eight Asian and African countries towards America, the countries where in six out of eight, Muslims comprises of the total majority of population. In late 2016 Trump frozen the mass migration flows from the Middle East and Magreb regions that is vividly clear it worsened the situation that had been even much worsened before.

Brett McGurk, the top US envoy for the anti-Isis coalition bombing its territories in Syria and Iraq, said it was his and his coalition's duty to defeat the IS fighters in the Middle East and protect Americans from their killing hands.¹⁶ Atrocities, the Islamic State fighters led in the US soil after returning from the Middle East, needed to be solved by a complex approach and killing those fighters straightforwardly after revealing them in connection with ISIS, would not be the best solution. The USA was one of the first states aligned with leading European states, which have introduced the promoting programs to the returnees in case of revealing in inspiration by the Islamic State ideology. That programme has intended to help the returned fighters in resocialization process and make them able to find their place in society.

ISIS in Southeast Asia

India is the part of the countries the Islamic State struggles to unify under so-called Khorasan Province and this unification belongs to ISIS's so-called 'five years plan' that should be completed by 2020. Among the terrorist attacks IS-affiliated terrorist groups have carried out in India there is one when terrorist attacked the railway near Mumbai city that has ended up with 182 dead and 770 wounded. After that, the Islamic State militants threatened India by attacking one of its national symbols and a pattern of Indian civilization, Taj Mahal. ISIS has announced within its main social media, Telegram, that Taj Mahal is the main target of their actions in India.¹⁷ Destroying exhibits of cultural heritage represents IS's handwriting that had already devastated the cities of Syria and Iraq representing the face ancient civilizations. In the views of some ISIS researchers, Taj Mahal is the part of the Islamic State's saga and a piece of chain of violation. Although, regardless of the current circumstances that more and more Indian youth join ISIS, India does not tend to be engaged in fight against ISIS at the global level. India supposes to work on suspension of IS-inspired Indians at a local level, rather than to involve in the US-led anti ISIS coalition in Syria and Iraq. Unlikely to Trump's administration, Indian government argues that fighting in the Middle East will bring some negative results back in India.¹⁸

As in every action area of the Islamic State, Indonesia's capital city, Jakarta, suffered from IS attacks carried out by its fighters in shopping mall and around the city's public gathering places, lost 4 civilians that has encouraged IS's behavior in this region and it has called on others to commit attacks ahead of Indonesia's Independence Day.¹⁹ This message once again has confirmed that public holidays are the best acting place for the Islamic State's fighters.

According to a report of by the Carnegie Council, around 1,000 people travelled to ISIS-controlled territory of the Middle East from the Southeast Asia²⁰ and the contribution of the

¹⁵ Schwartz, I. (2015). *Obama Addresses Nation on ISIS Threat: This Is Not A War Between America and Islam*.

¹⁶ Dearden, L. (2017). *More than 400 British Isis jihadis have already returned to UK, report warns*.

¹⁷ Abraham, B. (2017). *ISIS Terrorists Vow To Intensify Attacks On India, Declare Plan To Target Taj Mahal*.

¹⁸ Tecimer, N. (2017). *India and the Fight Against Islamic State*.

¹⁹ THE STRAITS TIMES. (2017). *Further attacks in Indonesia feared after Jakarta bombing, ISIS-linked insurgency in Philippines*.

²⁰ Kurlantzick, J. (2016). *Southeast Asia – The Islamic State's New Front?*

Philippines in this terrorist migration is sizeable. Maute and Abu Sayyaf are the two representatives out of 60 Islamist radical groups in the Southeast Asian region, which have pledged allegiance to Abu Bakr al-Baghdadi and decided Marawi city to be the place of their violation. This city poses the ground of battles between IS fighters and military personnel and because of the large-scale attacks on the Filipino civilians it has long ago attracted the interests of international organizations, such as United Nations.²¹

This year one jihadist appealed Chinese people with video message that they don't understand the speaking language of other people and the soldiers of Islamic Caliphate themselves will come to Chinese people and teach them the language of weapon as revenge against the oppressors.²² Speaker of the Internal Affairs of China, Xuan Lei stated that ISIS is the challenge for the whole universe and it should be defeated by the coalition forces, but hesitation of China resisting ISIS at the global level is clear. As India, China's president Xi Jinping follows the Mao's non-interference policy and use some abstaining ways in order to avoid mass attacks at the local stage. It is more predictable that Jinping is going to be use UN's peace programmes to pretend other global political leaders that he puts his contribution against ISIS.²³ Such peaceful position of China against ISIS, analysts argue, comes from China's local problem with Muslim radical Turkic ethnic group called Uyghurs who declare pretensions over China's west border, and who also represent the target of ISIS for mass recruitment. This is the main condition why China attempts to close the eyes on mass defeating operations in the Middle East.

ISIS in Europe

Despite the fact Quran says that carrying out jihad is unacceptable on people who don't pose a threat for you, ISIS fighters consider Europe and the Western ideology as a main threat for true Muslims. Speaking about ISIS and its violation, immediately Europe and innocent European civilians emerge on the scope. Since 2013, hundreds of Europeans have sacrificed IS's armed and suicide bomber attacks. Massive attacks during the celebration of public holidays and in public transports, carried out by the militants of the Islamic State, have created fear in people to join the public gathering places. Moreover, it has aggregated the conflict between Europeans and Muslim migrants. The assaults committed by radical Islamist organization followed by part of Europeans' radical position against expanding Muslim communities in Europe has formed open ideological confrontation between the latter societies that is merely noticeable.

Before the well-known Parris attacks in 2014, the British government assessed the Islamic State as a global threat and a part of Al-Qaeda. The government stated that IS aims to carry out jihadist ideology almost everywhere based on Sharia law and refer violation by using its radicals. Prime Minister, Theresa May commented that the Islamic ideology would not spread root in British society.²⁴

Russia, France, Germany, Belgium and the United Kingdom comprise the European five, which are characterized by the highest numbers of fighters left Europe for ISIS and exactly these are states, which suffer the most from ISIS attacks. From March 2016 to August 2017, 850 people left the UK for the Islamic State where 350 have already returned and 200 of them were liquidated by the national security forces.²⁵ British soldier and veteran of the Afghanistan war was ruthlessly

²¹ Griffiths, J. (2017). *ISIS in Southeast Asia: Philippines battles growing threat*.

²² O'Neill, K. (2017). *ISIS threatens China for the first time as child Muslim fighters vow to return home and attack own country*.

²³ Topuria, R. (2015). *CHINA VS. ISIS?*

²⁴ Ramiro Troitino, D.; Kerikmäe, T.; Chochia, A. (Eds.) (2018). *Brexit: History, Reasoning and Perspectives*. Springer International Publishing.

²⁵ Radio Free Europe. (2017). *Where Do IS Foreign Fighters Come From?*

tortured by two Islamic extremists in accordance to the reason that Muslims are dying by the British soldiers every day. Extremists announcing it as 'an eye for an eye'.²⁶

Issue of returned fighters is on the agenda in British government. Unlikely to Rory Stewart, Minister of International Developments, who considers killing jihadists as the best solution, the British government defines rehabilitation and reintegration of the British-IS fighters as a significant solution, particularly for women and children who are vulnerable to the Islamic ideology.²⁷ They think that they have to detect the returned fighters and support them in resocialization because much has been spent on their growing, forming and educating.

In March 2016 Belgium's capital Brussels was rocked by several deadly attacks thought to be linked with ISIS. Soon Brussels airport appeared in panic where 14 people died and 20 wounded after the terrorist attack inspired by the Islamic State's ideology, which once again united the Belgium's people against terrorism. The level of terrorism threat in Belgium is three out of four that is very dangerous. A small European state is distinguished by its number of terrorists with per capita. Around 85 out of 130 terrorists, who are being searched by Red circular enhanced patrolling, are Belgium-born.²⁸

Among the explanations why this country is in the target of ISIS we can name one very symbolic factor that Belgium and Brussels are the face of the European Union while the main EU institutions are deployed here. Rooting fear in Belgium and victory over the city of the European political establishment automatically means the defeat of the Western ideology that is the motto of the ISIS.

Emergence of ISIS at the global level seriously damaged German society. After several armed attacks on German people in which the Christmas market attack is exceptionally brutal, year of 2016 was acknowledged as a year of terrorism. The photos, the ISIS fighters published in German media in late 2016, the slogans against "enemies of Allah" were included where they intend German people. They were also appealing other Muslims in Germany to do the same as their Belgium brothers have already done in Brussels.²⁹ Massive attacks, in which young people's, sometimes teenagers, contribution is sizeable, and fighter's migration from Germany to the Middle East that is very critical, have caused certain legislative amendments aiming at revision of travelling laws.

Regardless of the fact that German state officials approved the plan of sending 1,200 soldiers in the Middle East against ISIS, they look aside of fighting ISIS at a global level in order to prevent its people from the Islamic State's violation. Their position about involving in airstrikes in the Middle East against ISIS was negative.

Compared to Germany, France leads the strongest anti-jihadist coalition in the Middle East and Africa. France, among the European five, has suffered the most and the November 2015 Paris multiple attacks is estimated as the deadliest aggression carried out on the European continent by the Islamic Caliphate. It left 130 dead and millions of threatened. Saint-Etienne, also is the first European city where clergymen itself was executed by the ISIS fighters. A question might be raised why eight times more fighters are joining ISIS from France, rather than from Bosnia and Herzegovina where 51% of population are Muslims.

Many analysts argue that terrorism has deep roots in France and apart from religious, some socio-economic factors play a crucial role, as well. From the Western Europe, France has "sent" the biggest number of radical fighters to the Middle East and the vast majority of those fighters had grown up in the culturally isolated and economically devastated "banlieues" (suburbs), which are far away from France of wine, charcuterie, chateaux and cheese (Burke 2016). Unemployment and

²⁶ Hayden, E. M. (2017). *Terror in the UK: A timeline of recent attacks*.

²⁷ Dearden, L. (2017). *More than 400 British Isis jihadis have already returned to UK, report warns*.

²⁸ Tabula. (2015). *Brussels is paralyzed because of high terrorist threat*.

²⁹ Tomkiw, L. (2016). *ISIS Attack Germany? Islamic State Lists German Targets For Brussels-Style Terrorism*.

poverty that usually accelerates the joining process to ISIS, are the main troubles of French Muslims added social exclusion and encouragement in a negative context that they will never become real français. After above mentioned factors, analysts argue that satiric magazine Charlie Hebdo, which is very prominent in France, put its own contribution in the ISIS attacks throughout the country when they have actively started insulting Muhammad's cult.

We face a paradoxical moment in Russian Federation. Many jihadists leave Russia for ISIS while Putin actively provides Bashar al-Assad with a significant artillery forces to defeat the Islamic State. For Russia, it might be considered as a fight against own Muslim citizens on another soil that emerges questions about fairness of Putin's behavior. We can convert this issue into historical narrative that asserts that Muslims and particularly radical Muslims have always been a threat for Russia and those Muslims' free outflow to the Middle East poses a great opportunity for Putin to clean Russian soil.

Number of fighters, who left Russia in from March 2016 to August 2017 for joining ISIS, is three times bigger than German one. Muslims coming from the Caucasus region have always been a part of Russian society and confrontation between the Caucasian Muslims and Russian government reached a peak in the middle 1990's in the Chechnya.³⁰ Those Muslim's desire to revenge for the Chechnya wars is tireless and that desire has already found a successful ending into several suicide bombings at public transports.

ISIS AS A GLOBAL CHALLENGE

Political assessments

The Islamic State has partially reached some success the European people to be afraid of enjoying public holidays in the streets. After the Nice terrorist attack during the Bastille Day and the Berlin Christmas market tragedy, ISIS has published a dangerous poster in which the Santa from one of London's streets is holding a bloody knife in hand and the main slogan of the poster is: "Soon on your holidays" that sent British people to constant panic once again.

The money ISIS earns from oil, banks robbery and drug trafficking seriously threatens Western political elite. According to Viktor Ivanov, the head of the Federal Drug Control Service in Russia, ISIS's annual income from transiting heroin from the Middle East to Europe is up to one billion Dollar.³¹ It becomes more complicated to negotiate with such financially strong terrorist power, which aims at altering current religious, political and socio-economical aspects at any cost that aggravates critics in the Western camp.³² Barack Obama defined ISIS as a global threat that does not have any mutuality with religion, because no religion, including Islam, condones massacres of innocent people.

Sometimes when we see how politicians in the Congress and Europe attempt to spread the notion that people in the West are out of ISIS's danger, they immediately get attacked from the opponents to declare ISIS as a global threat and denounce misleading people. According to official web page of the US Department of State, ISIS presents a global threat which has attracted a lot of foreign young fighters from across the world who technologically organize the IS's operations.³³ In

³⁰ Chochia, A.; Popjanevski, J. (2016). *Change of Power and Its Influence on Country's Europeanization Process. Case Study: Georgia*. In: Kerikmäe, T.; Chochia, A. (Ed.). *Political and Legal Perspectives of the EU Eastern Partnership Policy* (197–210). Springer International Publishing.

³¹ (Joshi 2015).

³² Tziarras, Z. (2017). Islamic Caliphate: A Quasi-State, a Global Security Threat. *Journal of Applied Security Research*. No. 12:1, 111-112.

³³ U.S. DEPARTMENT OF STATE. (2014). *The Global Coalition To Defeat ISIS*.

2016 during the Milken Institute-organized platform about the ways of defeating ISIS, Former Prime Minister of the UK, Tony Blair, who admits his mistake in the UK-US led operations against Saddam Hussein, now confidently defined ISIS as a global problem that has to be solved in the regional boundaries and further distribution towards other regions has to be prevented. This year Indonesian president Joko Widodo estimated the Islamic caliphates' violations as a wake-up call for the entire region. His vision is the regional governments to unite under strong coalition to combat ISIS in this region.³⁴

Problem solving methods

Summarizing briefly to what measures need to be implemented in order to handle such growing global threat, quoting an American President would be a good start: "The vast majority of victims around the world are Muslim. If we are to succeed in defeating terrorism, we must enlist Muslim communities as some of our strongest allies rather than push them away due to suspicion and hate," Barack Obama said.³⁵ Secretary of States, John Kerry has long started criticizing ISIS as a modern world's cancer and Al-Qaeda's successor organization, who previously gave ISIS a qualification of mass threat. In his words, defeating such sophisticated and well-funded terrorist organization makes the mission more complicated where a single state's battle is a waste of time. Only a single state's effort to change ISIS's plans is doomed to failure and this attitude is well shared by the US Department of State. According to this institution's official statement, terrorism can be defeated by a sustained and comprehensive multilateral approach that combines active participation and co-operation of the states. The governments of the Southeast Asian countries launched the joint campaign in the Sulu Sea against kidnapping and piracy perpetrated by the Abu Sayyaf, ISIS-affiliated terrorist groups.³⁶ France, which is one of the main enemies of ISIS in the Middle East, calls for other European and African political leaders to send their fighting items to the Middle East aligned with anti-ISIS US-led coalition and support the local governments to advance in this ongoing war.

Solving economic and social problems, which play a significant role for young fighters to join ISIS, would be considered as a successful step in terms of destroying this radical fundamentalist terrorist group. It is a decisively important from the local Europeans to promote Muslim minorities to integrate, get jobs and have access to proper education. They need to leave bidonvilles, actively engage in the process of healthy social life and have less time for making radical decisions. Society to avoid the contradictions between the civilizations which is the major driving force for this radical Islamist organization, it is also vitally important to acknowledge and respect different religious and political affiliations and enhance co-operation with Muslim communities that are suffering from the outrage of so-called Islamic Caliphate. Prominent sociologist Samuel Huntington has developed the same vision in the early 1990's that incentivizing controversy between different religious communities is the major purpose of such terrorist groups that bring us to war of civilizations eventually.

CONCLUSION

During last several decades, the wars the terrorist organizations have declared against religious minorities, the Western ideology and the whole universe, are realizing by abusing religious

³⁴ Edwards, W. (2017). *ISIS' Reach Extends to Southeast Asia*.

³⁵ Schwartz, I. (2015). *Obama Addresses Nation on ISIS Threat: This Is Not A War Between America and Islam*.

³⁶ Edwards, W. (2017). *ISIS' Reach Extends to Southeast Asia*.

naivety for political and economic purposes. ISIS struggling to bring its goals into reality have already destroyed the half of the Middle East region and millions of innocent lives. Its brutality is experienced in almost every continent and aligned with global warming it carries a significant massive threat for the strongest states of the world. Its violations particularly since 2014 have deserved the frantic attention of mass and social medias that increases the level of panic through the vulnerable groups. Despite the fact ISIS is losing important bases in north Iraq, it belongs to their strategic plan to attack the West by the Christmas. They also warn Chinese people to be careful and acknowledge 45th American president Donald Trump as the enemy of Allah.

Among the socially unsuccessful and economically vulnerable fighters who join ISIS, there are many who possess European passports and had access to proper European education before. Europe-born fighters represent the main technical force for ISIS and exactly they are responsible for large-scale terrorist attacks on the European soil. This fact threatens the European leaders the most. They constantly increase the number of social programmes in order to exclude European Muslim from ISIS propaganda. The United Kingdom, Germany, Belgium and France who suffer the most from ISIS armed and suicide bombing attacks, actively attempt to detect young people noticed in relationship with ISIS and promote them in rehabilitation and resocialization process instead of punishment.

REFERENCES:

- Abraham, B. (2017). *ISIS Terrorists Vow To Intensify Attacks On India, Declare Plan To Target Taj Mahal*. Accessible: <https://www.indiatimes.com/news/india/isis-terrorists-to-intensify-attacks-on-india-declare-plan-to-target-taj-mahal-273598.html> , 6 December 2017.
- Asim, Q. I. (2017). *This is why young European Muslims are joining Isis*. Accessible: <http://www.independent.co.uk/voices/barcelona-spain-terrorism-young-european-muslims-joining-isis-a7903026.html> , 5 December 2017.
- Atagi, C. (2016) *14 dead in San Bernardino, and we still don't know why one year later*. Accessible: <https://www.usatoday.com/story/news/nation-now/2016/12/01/one-year-san-bernardino-massacre-leaves-more-questions-than-answers/94762084/> , 5 December 2017.
- Burke, J. (2016). *Why does France keep getting attacked?* Accessible: <https://www.theguardian.com/world/2016/jul/15/why-does-france-keep-getting-attacked> , 10 December 2017.
- Chengu, Garikai. (2017). *America Created Al-Qaeda and the ISIS Terror Group*. Accessible: <https://www.globalresearch.ca/america-created-al-qaeda-and-the-isis-terror-group/5402881> , 6 December 2017.
- Chochia, A.; Popjanovski, J. (2016). Change of Power and Its Influence on Country's Europeanization Process. Case Study: Georgia. In: Kerikmäe, T.; Chochia, A. (Ed.). *Political and Legal Perspectives of the EU Eastern Partnership Policy (197–210)*. Springer International Publishing.
- CNN Library (2017). *Boko Haram Fast Facts*. Accessible: <http://edition.cnn.com/2014/06/09/world/boko-haram-fast-facts/> , 6 December 2017.
- Dar, A. S (2016). Contemporary discourses on the possibility of an 'Islamic state': an overview. *Journal of Contemporary Arab Affairs*. No. 9:3, 421-427. Accessible: <http://www.tandfonline.com/doi/pdf/10.1080/17550912.2016.1204681?needAccess=true>, 5 December 2017.
- Dearden, L. (2017). *More than 400 British Isis jihadis have already returned to UK, report warns*. Accessible: <http://www.independent.co.uk/news/uk/home-news/isis-british-jihadis-return-uk-iraq-syria-report-islamic-state-fighters-europe-threat-debate-terror-a8017811.html> , 6 December 2017.
- Edwards, W. (2017). *ISIS' Reach Extends to Southeast Asia*. Accessible: <https://www.thecipherbrief.com/isis-reach-latches-southeast-asia> , 10 December 2017.
- Griffiths, J. (2017). *ISIS in Southeast Asia: Philippines battles growing threat*. Accessible: <http://edition.cnn.com/2017/05/28/asia/isis-threat-southeast-asia/index.html> , 7 December 2017.
- Hayden, E. M. (2017). *Terror in the UK: A timeline of recent attacks*. Accessible: <http://abcnews.go.com/International/terror-uk-timeline-recent-attacks/story?id=47579860> , 7 December 2017.
-

- Hoffmann, T.; Chochia, A. (2018). The Institution of Citizenship and Practices of Passportization in Russia's European Neighborhood Policies. In: A. Makarychev, T. Hoffmann (Ed.). *Russia and the EU Spaces of Interaction* (223–237). Routledge, Taylor&Francis Group.
- INSTITUTE FOR ECONOMICS AND PEACE. (2017). *Global Terrorism Index 2017*. Accessible: <http://visionofhumanity.org/indexes/terrorism-index/> , 5 December 2017.
- Johnston, B. P., Shapiro, N. J., Shatz, J. H., Bahney, B., Jung, F. D., Ryan, K. P., Wallace, J. (2016). Foundations of the Islamic State. Management, Money, and Terror in Iraq, 2005-2010. *RAND corporation*. No. 1, 249-276. Accessible: <http://www.jstor.org/stable/pdf/10.7249/j.ctt1cd0kpz.16.pdf>, 5 December 2017.
- Kerikmäe, T.; Chochia, A. (Eds.) (2016). *Political and Legal Perspectives of the EU Eastern Partnership Policy*. Springer International Publishing.
- Kerikmäe, T.; Hamulak, O.; Chochia, A. (2016). A Historical Study of Contemporary Human Rights: Deviation or Extinction? *Acta Baltica Historiae et Philosophiae Scientiarum*, 4 (2), 98–115.
- Kurlantzick, J. (2016). *Southeast Asia – The Islamic State's New Front?* Accessible: https://www.carnegiecouncil.org/publications/ethics_online/0122 , 7 December 2017.
- O'Neill, K. (2017). *ISIS threatens China for the first time as child Muslim fighters vow to return home and attack own country*. Accessible: <http://www.mirror.co.uk/news/world-news/isis-threatens-china-first-time-9940336> , 7 December 2017.
- Poushter, J., Manevich, D. (2017). *Globally, People Point to ISIS and Climate Change as Leading Security Threats*. Paw Research Center. Accessible: <http://www.pewglobal.org/2017/08/01/globally-people-point-to-isis-and-climate-change-as-leading-security-threats/> , 5 December 2017.
- Radio Free Europe. (2017). *Where Do IS Foreign Fighters Come From?* Accessible: <https://www.rferl.org/a/where-do-is-foreign-fighters-come-from/28853696.html> , 7 December 2017.
- Ramiro Troitino, D.; Kerikmäe, T.; Chochia, A. (Eds.) (2018). *Brexit: History, Reasoning and Perspectives*. Springer International Publishing.
- Romualdez, G. B. (2017). *ISIS identified as top global threat*. Accessible: <http://www.philstar.com/business/2017/08/31/1734260/isis-identified-top-global-threat> , 5 December 2017.
- Schwartz, I. (2015). *Obama Addresses Nation on ISIS Threat: This Is Not A War Between America and Islam*. Accessible: https://www.realclearpolitics.com/video/2015/12/06/obama_addresses_nation_on_isis_threat_this_is_not_a_war_between_america_and_islam.html , 6 December 2017.
- Schwartz, I. (2015). *Obama Addresses Nation on ISIS Threat: This Is Not A War Between America and Islam*. Accessible: https://www.realclearpolitics.com/video/2015/12/06/obama_addresses_nation_on_isis_threat_this_is_not_a_war_between_america_and_islam.html , 6 December 2017.
- Tabula. (2015). *Brussels is paralyzed because of high terrorist threat*. Accessible: <http://www.tabula.ge/ge/story/102144-briuseli-umaghlesi-teroristuli-safrtxis-gamo-paralizebulia>, 10 December 2017.
- Tecimer, N. (2017). *India and the Fight Against Islamic State*. Accessible: <https://thediplomat.com/2017/06/india-and-the-fight-against-islamic-state/> , 6 December 2017.
- THE SOUFAN GROUP. (2015). An Updated Assessment of the Flow of Fighters into Syria and Iraq. Foreign Fighters. *THE SOUFAN GROUP*. Accessible: http://soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate3.pdf, 6 December 2017.
- THE STRAITS TIMES. (2017). *Further attacks in Indonesia feared after Jakarta bombing, ISIS-linked insurgency in Philippines*. Accessible: <http://www.straitstimes.com/asia/se-asia/further-attacks-in-indonesia-feared-after-jakarta-bombing-isis-linked-insurgency-in> , 7 December 2017.
- Tomkiw, L. (2016). *ISIS Attack Germany? Islamic State Lists German Targets For Brussels-Style Terrorism*. Accessible: <http://www.ibtimes.com/isis-attack-germany-islamic-state-lists-german-targets-brussels-style-terrorism-2346404> , 10 December 2017.
- Topuria, R. (2015). *CHINA VS. ISIS?* Accessible: <http://blog.fdclub.ge/2015/12/02/china-vs-isis/>, 7 December 2017.
- Tziarras, Z. (2017). Islamic Caliphate: A Quasi-State, a Global Security Threat. *Journal of Applied Security Research*. No. 12:1, 111-112. Accessible: <http://www.tandfonline.com/doi/pdf/10.1080/19361610.2017.1228038?needAccess=true>, 5 December 2017.
- U.S. DEPARTMENT OF STATE. (2014). *The Global Coalition To Defeat ISIS*. Accessible: <https://www.state.gov/s/seci/> , 10 December 2017.

Populism: New Political Parties in Europe, Governments and Ideas and their Support for a Less Integrated Europe

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Abstract: *Populism has become one of the most important and mentioned word in the world of politics. It has been especially important in the European politics of recent period. The very formation of the European Union holds a direct link with the need to make amends in a society that was viciously damaged by the mainstream populist rhetoric of an “us” versus “them”. This article analyses current political situation in the EU and the role of populism in it, related consequences and the possible solution scenarios.*

Keywords: *Brexit, European Integration, European Union, EU politics.*

INTRODUCTION

In 2017, the Cambridge University Press chose ‘Populism’ as the word of the year. According to the publication, this choice is made not only based on the most researched words in their online platform during the timeframe of a year, but it also considers the so-called “spikes”, circumstances when that specific word is repeatedly searched much more than usual in particular days, which suggests the occurrence of an event or chain of events directly related with the sought word¹.

It comes with no surprise that so much attention has been directed over the term populism, especially since for the last few years this phenomenon has grown in representation in both local and international spheres, and issues such as immigration, rising nationalism and economic discontent continue to raise tensions between people and their leaders.

However, populism should not be interpreted as a political phenomenon in itself, and that is because it has a direct link with a global political scenario that has been shaping itself for the last three decades with the advent and development of globalization. This process goes further beyond decreasing the financial, cultural, social, technological and economic barriers between countries and people, and in several cases, one of which Europe is included, this boarder globalization pattern has transformed the ways national and foreign policies interact.

As mentioned, this phenomenon is global, but perhaps it can be seen with unequalled strength in European Union - EU because no other political and economic group has yet reached such a complex and institutionalized interdependence between their member states as the EU has, with the creation of the Single Market, the common currency and the free movement of people. The way the Union has conducted its own establishment and decision making is a clear example of how governments must, in a great number of areas, make joint decisions with other states and institutions that will influence directly their domestic issues².

¹ Cambridge University Press (Website). “Populism’ revealed as 2017 Word of the Year by Cambridge University Press”. November 30, 2017. Accessed November 19, 2018. <https://www.cam.ac.uk/news/populism-revealed-as-2017-word-of-the-year-by-cambridge-university-press>.

²Balfour, R., Emmanouilidis, J., Fieschi, C., Grabbe, H., Hill, C., Lochocki, T., Mendras, M., Mudde, C., Niemi, M.K., Schmidt, J. and Stratulat, C. (2016), *Europe’s Troublemakers. The Populist Challenge to Foreign Policy*, Brussels: European Policy Centre, p. 17.

And while subsidiarity³, as one of the main principles of EU Law, assures that decisions are taken as closely as possible to the citizens to be accountable by them, there are certain policy fields falling under EU competence that can really constrain a country's autonomy and impose a challenge to governments that have to remain approachable and accountable to their citizens when their decision-making legitimacy is under scrutiny.

In fact, European countries have become so intertwined in many different areas that unequivocally, the Union can provoke an action in the domestic developments, and at the same time, suffer from a reaction coming from each of its member states domestic policies. What has been seen on recent years is that globalization and this political cooperation/integration have made the lines of concepts such as sovereignty or national identity so faint, with their everchanging and ever evolving meanings, that some citizens feel a big gap between their claims and the Union's Policies⁴.

Thus, the feeling of alienation, lack of connection or representativeness with one's government or plain dissatisfaction with the decisions carried out by a governmental leader can be a political gun in the hands of people willing to promote an agenda against the elites, economic liberalism or internationalization and that is what has been occurring in several European countries as the rise of populist parties and political figures grow, gain support or representativeness in the governments and for some, threaten the very existence of the European Union and its integration project.

Understanding the connections between the rise of populism and the European momentum is not an easy task, neither it is to predict if and how the growth of populism in the form of several political parties in different countries can threaten the very existence of the EU or in the very least, how it can influence negatively its integration project.

Overall, this paper aims to shortly explain the meaning of populism, from its historical background to its main characteristics; investigate the reasons behind its popularity and growth inside Europe, highlighting the current main far right populist parties, their approach to EU integration and the challenges they represent. Lastly, this paper intends to discuss alternative measures that could be taken by the European Union and the member states to put populism into a halt.

“US” VERSUS “THEM”: THE POPULIST AGENDA AND ITS CONTRIBUTION FOR A LESS INTEGRATED EUROPE

What is Populism? Where does it come from? What does it eat? Even though the idea of populism is not exactly new, having its first manifestations in the modern society taken back to the 19th century with the Narodnik movement in tsarist Russia and the People's Party in the United States, there is no commonly accepted definition to the term yet⁵.

One of the reasons to this lack of a concept is because the expression populism has been attributed in the last two centuries to a very significative number of different political movements, some so conflicting between themselves that they could be positioned to very different edges of the political spectrum. For instance, populism has been used to define the politically oriented coalition

³ European Union Law, EUR-Lex (Website), Glossary, Accessed in November 20, 2018. <https://eur-lex.europa.eu/summary/glossary/subsidiarity.html>.

⁴Ibid, p. 16.

⁵ Surel, Yves. 2011. “The European Union and the Challenges of Populism, in Notre Europe Policy Brief, 27”. Accessed in November 20, 2018. <http://institutdelors.eu/publications/the-european-union-and-the-challenges-of-populism/?lang=en>.

of agrarian reformers that sought a change in legislation to give American farmers economic parity with business and the industry in the 19th century, whereas in the 20th century in Latin America, the term is employed to allude to the economic mismanagement, sometimes dictatorial and demagoguery practices of leaders like Argentinian Juan Domingo Perón, Peruvian Alberto Fujimori or Hugo Chávez, from Venezuela⁶.

Currently, in the 21st century, the concept in Europe is largely used to describe political right-wing parties that defend Anti-EU and anti-immigration agendas like the Austrian Freedom Party, the Dutch Party for Freedom, France's National Front, Alternative for Germany, UK Independence Party and so many others; the left-wing Latin American Pink Tide and also both right and leftist groups in the United States, personified by politicians such as Donald Trump and Bernie Sanders.

Hence, there is no precise way to comprehend a term that is far too ambiguous, but an attempt can be made by observing what these different political movements from different political and socio-economical time all have in common.

According to Yves Surel, there are three constants that can be identified in populist speeches, which are:

the reminder (as an extension of the previous point) that all power derives necessarily from the people, a group defined by nationalism or other social criteria ("the people against the powerful", for example, as shown by Pierre Birnbaum, 1979); the idea that institutions and politicians have undermined this ideal by diverting the exercise of power from its first mission, that of respect for the sovereign people, which gives rise to a rhetoric focusing on betrayal by various elites⁵; and the desire to restore a previous and/or more legitimate order guaranteeing the sovereignty of the people and their representatives⁷.

In sum, populism can be regarded as a 'thin-centered' ideology⁸ that very simplistically, divides society in two homogenic and very antagonist groups, the "pure people" and on the other side, the "corrupt elite". For populists, politics should be an expression of the general will of the people, giving them what they want. And as it was seen, the fact that it is a thin ideology, makes it possible for it to be easily shifted, some might say manipulated, to work alongside "thicker" ideologies like socialism or liberalism, for example.

Interestingly, whichever side of the political scale decides to engage the populist rhetoric believes that only they are fit to make people's voices heard and people's wills fulfilled, and that happens due to the fact that populism is by nature exclusive. The "elite" opposed could easily be "foreigners", "Muslims", "eurocrats" or "the establishment", this dichotomy often tries to use people's will as a way to bypass institutions or vilify opponents, generating a permanent feeling of "us" versus "them", unable to coexist in harmony⁹.

⁶ Muro, Diego. "Let the people rule! Definitions and theories of populism", In *Populism in Europe: from Symptom to Alternative?* edited by Eckart Woertz, p. 9-14. Barcelona: CIDOB, 2017. Accessed November 20th, 2018. https://www.cidob.org/en/articulos/cidob_report/n1_1/let_the_people_rule_definitions_and_theories_of_populism.

⁷ Surel, Yves. 2011. "The European Union and the Challenges of Populism, in Notre Europe Policy Brief, 27". Accessed in November 20, 2018. <http://institutdelors.eu/publications/the-european-union-and-the-challenges-of-populism/?lang=en>.

⁸ Matthews-Ferrero, Daniel. "Populismo europeo contemporáneo y la vuelta de la historia". *Revista CIDOB d'Afers Internacionals* n.119, p. 85-111, September 2018. Accessed in November 21st, 2018. https://www.researchgate.net/publication/328036611_Populismo_europeo_contemporaneo_y_la_vuelta_de_la_historia, p. 88-89.

⁹ Balfour, Rosa. "The (Resistable) Rise of Populism in Europe and its Impact on European and International Cooperation". In *IEMed. Mediterranean Yearbook 2017*. (Barcelona: 2017). p. 56-57. Accessed in November 22nd, 2018. https://www.iemed.org/observatori/arees-danalisi/arxiu-adjunts/anuari/med.2017/IEMed_MedYearbook2017_rise_populism_europe_Balfour.pdf

Without a doubt, populism can be portrayed in a pejorative demeanor by the mainstream media, which do not reflect every political group activities and beliefs. In the European case, the presence of populist parties or representatives is not recent, they have been part of the political system since the 1980's, nevertheless, the results of recent elections and exponential growth of populist influences in several countries have raised a red flag to those concerned with the impact of populism in liberal democracies and what the parties' illiberal, nationalist, anti-pluralist or even authoritarian attitudes can represent for European Integration's future.

THE GROWTH OF POPULIST RADICAL RIGHT PARTIES, THEIR APPROACH AND CHALLENGES TO EU INTEGRATION

Data as recent as June of the current year shows that the European Parliament is currently composed by one Left-wing Populist Party, two Centrist Populist Party and seven Populist Radical Right Party¹⁰. For the purposes of this research, the analyses will focus under the group composed by the Populist Radical Right Parties – PRRP for two main reasons: first, their political representation composes a majority in comparison with other populist governments/coalitions and second, their anti-establishment and nationalist responses suggest a setback in transnationalization of politics by focusing in national policies that can jeopardize the project of an “ever closer union”.

There is no denial that some of the populist claims are funded in real grievances, that being said, the criticism on integration, globalization and the growing Euroscepticism are actually based on cultural and economic aspects that shouldn't be taken for granted. Nevertheless, it is noticeable that the populist approach is not limited to a mere divergence in policies, if that was the case, populism wouldn't be an issue since dialectic is the very point of democracy. Rather than that, populists tend to claim that they are the only legitimate representative of the “real people” and not the so called “elites” or “establishment”¹¹.

Previously, it was highlighted that the EU Law works in a complex multi-level competence when it comes to its policies, applying whenever necessary the principle of subsidiarity. Ironically, it is EU's own framework that makes it such an easy target to blame for the multiple crises that fall upon Europe. EU is a convenient scapegoat to populist onslaught, which uses the criticism over European Integration as means to succeed in their main scope of increasing power and influence in the domestic sphere.

To illustrate, we can point out that the nation-states are actually the ones that hold the competence to deliberate and establish policies regarding migration, social security, education and culture policies. Be that as it may, the mass discontent of the European citizens when the refugee crisis broke down in 2015 fell mostly upon Brussels, even though it was not competent to legislate on the matter. For political parties, transferring blame to an abstract and impersonal notion of EU is easier than facing potential unpopularity for measures approved by them¹².

¹⁰ Falker, Gerda. Plattner, Georg. “Populist Radical Right Parties and EU Policies: How coherent are their claims?” In *EUI Working Papers RSCAS 2018/38*. June, 2018. Accessed in November 21st, 2018. http://cadmus.eui.eu/bitstream/handle/1814/56165/RSCAS_2018_38.pdf?sequence=1&isAllowed=y. p. 2.

¹¹ Buti, Marco, Karl Pichelmann. "European Integration and Populism: Addressing Dahrendorf's Quandary." *Seven Things I Learned about the Transition from Communism | VOX, CEPR Policy Portal*. February 22, 2017. Accessed in November 20, 2018. <https://voxeu.org/article/european-integration-and-populism-addressing-dahrendorfs-quandary>.

¹² Colomina, Carme. “Populism “made in the EU” In *Populism in Europe: from Symptom to Alternative?*, edited by Eckart Woertz, p. 23-26. Barcelona: CIDOB, 2017. Accessed November 20th, 2018. https://www.cidob.org/en/articulos/cidob_report/n1_1/populism_made_in_the_eu.

Also, the “distance” from a national perspective between citizens and a massive and bureaucratic European institution might provoke a feeling of “illegitimate representation”, lack of participation in the democratic process and loss of sovereignty by a nation and its citizens, increasing the popularity of populist speeches such as “let’s take back control of our country”.

According to Stefan Lehne¹³, it is unlikely that the EU and the radical-right populists could co-exist since they are fundamentally incompatible, and thus, the rise of this phenomenon and its political representation can carry serious consequences for the future of the European union. The scholar highlights three main threats that these Parties represent to EU: first, the power struggles that can happen between the Old and New Parties inside the European Parliament. Currently, the so called “old establishment” still stand as the majority of representation which can anger the new forces, these last ones often hold prestige and popularity on local or national level, but sometimes are unable to represent their countries in Brussels due to the time lag that national policies take to catch with European Union’s. This time lag in power rotation can from one hand insure stability in periods of turmoil, but at the same time, may portray the EU as lacking legitimacy. Also display Brussels’ apparent inflexibility to new ways of democratic participation.

The second challenge identified by him concerns the functioning of the European Union itself. Rapid change in the political scenario will make it hard for the union to govern considering that the whole political system is based on transnational cooperation, negotiation and stability. Open confrontation can compromise the consensus which is the main working method of the union, and the existence of partners who do not share the same views and values might bring stagnation to the entire system.

The third challenge is the menace that these parties signify to EU’s symbolic role. Anti-austerity agenda, anti-globalization, extreme conservatism opposes directly core values and attributions performed by the union such as free trade, internationalism, protection of sexual, religious and foreign minorities.

At the moment, these core values and European Integration are protected under the EU system, but the political representation is the tool necessary to start implementing change by these Parties. In positions of power, it is possible to support other governments that stand by those ideas, it is possible to exercise real influence in political agendas and lastly, becoming a very real, very personified alternative to power.

Earlier this year, in light of the recent elections and the Populist Radical Right Parties – PRRP getting much more votes than in previous decades, an empirical study was conducted by Gerda Falkner and Georg Plattner for the Robert Schuman Centre for Advanced Studies to evaluate the coherence of the policy-specific demands of different parties within the European Union and how much do they actually agree or disagree when it comes to reforming EU policies¹⁴.

This evaluation was made by analyzing the Radical Right Parties’ programmatic claims on reforming three specific EU Policy field, they are: *EU Foreign and defense policy issues*, *Actions against various forms of discrimination* and *The Internal Market*. Regarding the issue of *EU Foreign and defense policies*, the results found point out that the parties do not have a coherent vision that would implicate in joint action capable of bringing reform. The results also showed that these PRRP’s visions and goals are not converging into the same point and it seems that they are not so strongly nationalists that would completely reject any EU-level policies.

¹³ Grabbe, Heather. Lehne, Stefan. “Can the EU Survive Populism?”. Carnegie Europe (Website). June 14, 2016. Accessed in November 22, 2018. <http://carnegieeurope.eu/2016/06/14/can-eu-survive-populism-pub-63804>

¹⁴ Falker, Gerda. Plattner, Georg. “Populist Radical Right Parties and EU Policies: How coherent are their claims?” In *EUI Working Papers RSCAS 2018/38*. June, 2018. Accessed in November 21st, 2018. http://cadmus.eui.eu/bitstream/handle/1814/56165/RSCAS_2018_38.pdf?sequence=1&isAllowed=y. p. 11-17.

To what concerns the second field, *Actions against various forms of discrimination*, when these parties already were expected to oppose liberal policies, results show a much less incoherent approach from the PRRPs. However, conflicts were found while data was analyzed, showing that in countries like Netherlands with longstanding cultural practice of non-discrimination against LGBTQ communities, the country's political and cultural tradition could impact in the Party's approach to reform of the topic.

Finally, according to the authors, for the third topic explored (*Internal Market*), the incoherence is again the word of order. The controversy resides, from one side, in the wishful liberty to be able to alter norms and standards or end supranational competition policies and the other, countries with different geopolitical orientation and weaker domestic market saw advantages in keeping EU's regulations of services that are of common interest¹⁵.

It may be too early to draw any assumptions regarding weather or how the Populist Radical Right Parties would impact the reform of EU Policies in case their influence continues to grow in member states governments and inside EU's own institutions. It seems clear that as of right now, the different PRRP's approaches to different matters and even worse, total ideological contradiction among them wouldn't allow the creation of a single unified group in the coming months. However, their power and influence should not be taken likely as something from a distance reality, the status quo is shifting, and the European Union and its member states must shift along with it if they want to remain thriving and existing as a political and economic integrated block.

CONCLUSION

A celebrated quote from Karl Marx said "*Hegel remarked somewhere that all great, world-historical facts and personages occur, as it were, twice. He forgot to add: the first time as tragedy, the second as farce!*"¹⁶. If he was correct in that statement, and historical facts are bound to repeat themselves, then the unmerciful pages of history will do well to remind us that there were no societies left unscarred from the polarization and conflicts brought on by populism, be it from left or right wing.

The very formation of the European Union holds a direct link with the need to make amends in a society that was viciously damaged by the mainstream populist rhetoric of an "us" versus "them". Over 70 years ago, the European countries came together and decided to promote integration and cooperation in order to keep the peace, to protect the minorities, to respect the fundamental rights, to promote economic rebuild and growth by uniting.

Maybe this political moment will mend ties that once bind European citizens together, but in order for that to happen is necessary to acknowledge that there is a problem and that as a problem, it needs to be addressed. But what can be done? Well, there are at least a handful of alternatives proposed by different scholars and specialists as to what should be the European Union to put a halt on populism and get back on track towards the path of integration.

Some of the alternatives proposed in a Report commended by the European Policy Center emphasizes the need for EU Policy Makers need to work on the content of the policies, not only how they are communicated to the citizens. In that same aspect, it also underlines the necessity of

¹⁵ Falker, Gerda. Plattner, Georg. "Populist Radical Right Parties and EU Policies: How coherent are their claims?" In *EUI Working Papers RSCAS 2018/38*. June, 2018. Accessed in November 21st, 2018. http://cadmus.eui.eu/bitstream/handle/1814/56165/RSCAS_2018_38.pdf?sequence=1&isAllowed=y. p. 22-25.

¹⁶ Marx, Karl. *Le 18 Brumaire de Louis Bonaparte*. Paris: Nouveau Monde, 2017 [1852].

politicians to engage with newer groups of people beyond their regular constituents, using the current that can play an important role providing the environment for that to happen¹⁷.

The Report even uses humor to state that the only thing mainstream politics should be coping from the populists it's their online popularity and the easy way they can get their ideas spread among several different groups of people. If communication is key, so is the language used to get the idea through, a relatable vocabulary, with non-technocratic terms might be of aid for policy-makers to engage with the voters.

While these first solutions address mostly how to make mainstream politicians as "popular" as populists, other scholars offer suggestions that involve greater core changes in the EU, like for example how essential it is to deliver common public goods like the strengthening of security and internal and external borders, a common migration, asylum, and refugee policy and also, extending the Single Market's achievements with the creation of a dedicated fiscal capacity for the Eurozone¹⁸.

Another important challenge that needs to be addressed by the European Union is the attempt to fill the social gaps caused by globalization through the building of a European Pillar of Social Rights and also ensuring a consistency between European and the nation's action budgets.

Finally, perhaps the most important action measure to be taken by the union is the promotion a more democratic, transparent and accountable process of decision making by all the European citizens, making these decisions always more accessible and comprehensible by the average man. A clear delimitation of what is the national legislator and what is the European Union's is also a way of keeping the representatives in checks and stop the blaming attribution.

There is no magic formula to prevent populism from growing but fixing and improving on European Union's project is certainly a good way preserve the European values and the international cooperation, but it has to start by capturing the approval of the own European Citizens. The general public feels so distant to the bureaucratic and complex system of regulations that is EU that most of them hardly see it as a democracy, and yet, according to a poll conducted after Brexit in six European Countries¹⁹, a clear majority of the citizens classify their EU participation as something positive whereas only a small minority would be willing to leave the Euro. As it can be seen, the regular citizens don't blindly embrace populism, they don't even reject the democratic the democratic

BIBLIOGRAPHY:

- Balfour, R., Emmanouilidis, J., Fieschi, C., Grabbe, H., Hill, C., Lochocki, T., Mendras, M., Mudde, C., Niemi, M.K., Schmidt, J. and Stratulat, C. (2016), *Europe's Troublemakers. The Populist Challenge to Foreign Policy*, Brussels: European Policy Centre.
- Balfour, Rosa. "The (Resistable) Rise of Populism in Europe and its Impact on European and International Cooperation". In *IEMed. Mediterranean Yearbook 2017*. (Barcelona: 2017), p. 56-57.
- Buti, Marco, Karl Pichelmann. "European Integration and Populism: Addressing Dahrendorf's Quandary." Seven Things I Learned about the Transition from Communism | VOX, CEPR Policy Portal. February

¹⁷Balfour, R., Emmanouilidis, J., Fieschi, C., Grabbe, H., Hill, C., Lochocki, T., Mendras, M., Mudde, C., Niemi, M.K., Schmidt, J. and Stratulat, C. (2016), *Europe's Troublemakers. The Populist Challenge to Foreign Policy*, Brussels: European Policy Centre.

¹⁸Buti, Marco, Karl Pichelmann. "European Integration and Populism: Addressing Dahrendorf's Quandary." Seven Things I Learned about the Transition from Communism | VOX, CEPR Policy Portal. February 22, 2017. Accessed in November 20, 2018. <https://voxeu.org/article/european-integration-and-populism-addressing-dahrendorfs-quandary>.

¹⁹Fouquet, Jérôme. "Les Européens et le Brexit". Fondation Jean Jaurés. July 15, 2016. Accessed in November 22, 2018. <https://jean-jaures.org/nos-productions/les-europeens-et-le-brexit>.

- 22, 2017. Accessed in November 20, 2018. <https://voxeu.org/article/european-integration-and-populism-addressing-dahrendorfs-quandary>.
- University Press, Cambridge (Website). "Populism' revealed as 2017 Word of the Year by Cambridge University Press". November 30, 2017. Accessed November 22, 2018. <https://www.cam.ac.uk/news/populism-revealed-as-2017-word-of-the-year-by-cambridge-university-press>.
- Chochia, A., Troitiño, D. R., Kerikmäe, T., & Shumilo, O. (2018). Enlargement to the UK, the Referendum of 1975 and Position of Margaret Thatcher. In *Brexit* (pp. 115-139). Springer, Cham.
- Chochia, Archil, David Ramiro Troitiño, Tanel Kerikmäe, Olga Shumilo, and Nicole Lindstrom. "The First European Community and the British Position." In *Brexit*, pp. 59-81. Springer, Cham, 2018.
- Colomina, Carme. "Populism "made in the EU" In *Populism in Europe: from Symptom to Alternative?*, edited by Eckart Woertz, p. 23-26. Barcelona: CIDOB, 2017. Accessed November 20th, 2018. https://www.cidob.org/en/articulos/cidob_report/n1_1/populism_made_in_the_eu.
- European Union Law, EUR-Lex (Website), Glossary, Accessed in November 20, 2018. <https://eur-lex.europa.eu/summary/glossary/subsidiarity.html>.
- Falker, Gerda. Plattner, Georg. "Populist Radical Right Parties and EU Policies: How coherent are their claims?" In *EUI Working Papers RSCAS 2018/38*. June, 2018. Accessed in November 21st, 2018. San Domenico di Fiesole, Italy. http://cadmus.eui.eu/bitstream/handle/1814/56165/RSCAS_2018_38.pdf?sequence=1&isAllowed=y.
- Fouquet, Jérôme. "Les Européens et le Brexit". Fondation Jean Jaurés. July 15, 2016. Accessed in November 22, 2018. <https://jean-jaures.org/nos-productions/les-europeens-et-le-brexit>.
- Grabbe, Heather. Lehne, Stefan. "Can the EU Survive Populism?". Carnegie Europe (Website). June 14, 2016. Accessed in November 22, 2018. <http://carnegieeurope.eu/2016/06/14/can-eu-survive-populism-pub-63804>.
- Keedus, L., Kerikmäe, T., Chochia, A., & Troitiño, D. R. (2018). The British Rebate and the Single European Act: Political Ramifications of an Economic Reform. In *Brexit* (pp. 141-151). Springer, Cham.
- Kerikmäe, T., Chochia, A., Troitiño, D. R., & Hrebickova, A. (2018). The First Attempts to Unify Europe for Specific Purposes and British Flexibility. In *Brexit* (pp. 21-32). Springer, Cham.
- Marx, Karl. *Le 18 Brumaire de Louis Bonaparte*. Paris : Nouveau Monde, 2017 [1852].
- Matthews-Ferrero, Daniel. "Populismo europeo contemporáneo y la vuelta de la historia". *Revista CIDOB d'Afers Internacionals* n.119, p. 85-111, September 2018. Accessed in November 21st, 2018. https://www.researchgate.net/publication/328036611_Populismo_europeo_contemporaneo_y_la_vuelta_de_la_historia, p. 88-89.
- Surel, Yves. 2011. "The European Union and the Challenges of Populism, in *Notre Europe Policy Brief*, 27". Accessed in November 20, 2018. <http://institutdelors.eu/publications/the-european-union-and-the-challenges-of-populism/?lang=en>.
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Current Issues in Internal Security

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Abstract: *Security has always been an important issue of European agenda, however, recently it has become even more topic for discussion as EU faces difference challenges related to its security and security on its borders. This paper analyses these issues, explaining what are the current perceptions and understanding in the EU.*

Keywords: *European Union, European Security, EU Foreign and Security Policy.*

INTRODUCTION

Who wouldn't want to feel themselves safe and secure at their home, in their homeland, in the country they reside, in European Union. According to the Cambridge dictionary the definition of security is protection of the person, building, organization, or country against threats such as crime or attacks by foreign countries. Way to a period of peace and stability unprecedented in European history. The creation of the European Union has been central to this development. It has transformed the relationship between our states, and the lives of our citizens. European countries are committed to dealing peacefully with disputes and to cooperation through common institutions.

Europe has never been so prosperous, so secure and so free. The violence of the half of the 20th century has given way to a period of peace and stability unprecedented in European History. The creation of the European Union has been central to this development. It has transformed the relation between our states, and the lives of our citizens. European countries have committed to deal peacefully with disputes and cooperating through common institutions.¹

My research topic choice was not easy. I wanted to select a subject that “speaks” to me, that I feel interested in. Truth be told, I did not know lot about the criminality and terrorism, not more that an average person who follows the daily news-flow does. Recently I have found myself thinking about that subject. I believe I have been driven by my own personal experiences of facing criminal activity as well terrorism from close distance.

Living in the little, rather secure country as Estonia is, we do not consider threat as an everyday issue. I travel several times a year to Brussels and I was on my way to the metro station in Brussels, on March 2016, while the bombing inside the station took place. It was rather awful experience that made me feel insecure and threatened in Europe. Second dreadful experience took place this year in Torremolino, Spain while I had “opportunity” to witness a murder that took place in the middle of the touristic area, during the early evening time in the restaurant full of people. Europe is not the same I thought. I believe that only possibility for preventing and countering criminality in European Union is stronger cooperation of the member states. While 26 countries² share the same borders for the free and unrestricted movement of people the Union has to take special measures to secure the citizens the internal security.³

¹ A secure Europe in a better world. European Security Strategy <https://europa.eu/globalstrategy/en/european-security-strategy-secure-europe-better-world>

² <https://www.schengenvisainfo.com/schengen-visa-countries-list/>

³ Troitiño, D. R., Kerikmäe, T., & Chochia, A. (Eds.). (2018). *Brexit: History, Reasoning and Perspectives*. Springer.

In the essay I will firstly look in the history of how the European internal security has developed over the years. In the second chapter I concentrate on the current state of play Thirdly I will bring out the possible solutions of how the believe the internal security could be improved.

EUROPEAN UNION ADDRESSING THE THREATS

The post Cold War environment is one of the increasing open borders in which the internal and external aspects of security are indissolubly linked. Flows of trade and investment, the development of technology and the spread of democracy have brought freedom and prosperity to many people. Others have perceived globalization as a cause of frustration and injustice. These developments have also increased the scope of non-state groups to play a part in international affairs. And they have increased European dependence- and so variability- on an interconnected infrastructure in transport, energy, information and other fields.⁴

Before the Treaty of The European Union national governments monopolized internal security and retained it as a closely guarded issue of sovereignty.⁵

European Union has been active in tackling the key threats. After eleventh of September with measures that included the adoption of a European Arrest Warrant, steps to attack terrorist financing and an agreement on mutual legal assistance with The United States of America. The European Union continues to develop cooperation in the area and to improve its defences.

Even in the era of globalization, geography is still important. It is in the European interest that countries on our borders are well-governed. Neighbors who are engaged in violent conflict, weak states where organized crime flourishing, dysfunctional societies or exploding population growth on its borders all pose problems for Europe.⁶

Large scale aggression against any Member State is now improbable. Instead Europe faces new threats which are more diverse, less visible and less predictable.

Terrorism puts living at risk. It imposes costs, it seeks to undermine the openness and tolerance of our societies and it poses a growing strategic threat to the whole of Europe. Increasingly, terrorist movements are well-resourced, connected by electronic

INTERNAL SECURITY STRATEGY

The European Union's Internal Security Strategy⁷, adopted by the Spanish presidency early in 2010, followed on from the coming into force of the Lisbon Treaty in 2009, building the previous developments within the European Union in the Area of Freedom Security and Justice policy. The main focus of the European Union Internal Security Strategy is to prevent and combat "serious and organized crime, terrorism and cybercrime, in strengthening the management of our external borders and in building resilience to national and man-made disasters"⁸.

⁴ Solana, J, Civilian Perspective on Security Strategy; A secure Europe in a better world- the European Security Strategy. P 52.

⁵ Mitsilgas, V; Monar, J and Reed W „The European Union and Internal Security. Guardian of the People?“, Palgrave Macmillan, 2003. p 1.

⁶ European Security Strategy. A secure Europe in a Better World.
<https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf> p.35

⁷ Communication for the Commission to the European Parliament and the Council; The EU Internal Security Strategy in Action: Five steps towards a more secure Europe, COM/2010/0673 final.

⁸ Communication for the Commission to the European Parliament and the Council; The EU Internal Security Strategy in Action: Five steps towards a more secure Europe, COM/2010/0673 final. P.3.

The Internal Security Strategy intersects and overlaps with the European Union's Counter-Terrorism strategy⁹, the Strategy for the External Dimension of JHA¹⁰ and the European Union's Security Strategy.¹¹

The Internal Security Strategy for the period 2015-2020 is defined in Council Conclusions of 16th June 2015. It constitutes the European Union's strategy shared by institutions and Member States aiming at tackling the security challenges and threats facing the European Union until 2020. The strategy is composed of several policy documents: The Council conclusions of 4-5th of December 2014 and the Council Conclusions of 16th of June 2015, with the principles it outlines based on the Commission's Communication "European Agenda on Security", taking into account the views expressed by the European Parliament.

In terms of content, the internal security strategy is in line with the principles and priorities for action defined by the Commission in its European Agenda on Security:

Tackling and preventing terrorism, radicalization to terrorism and recruitment as well as financing related to terrorism, with special attention to the issue of foreign terrorism fighters, reinforced border security through systematic and coordinated checks against the relevant databases based on risk assessment as well as integrating the internal and external aspects against terrorism;

Preventing and fighting serious organized crime on the basis of the European Union policy cycle;

Preventing and fighting cybercrime as well as enhancing cyber security;¹²

Due to the entry into force of the Lisbon Treaty, the role of The Court of Justice of the European Union has been significantly strengthened. First, because of the abolition of the pillar structure, the jurisdiction of the Court will extend to the law of the European Union, which means the Court gain jurisdiction in the Area of Freedom, security and Justice. As regards police and judicial cooperation in crime matters, its jurisdiction to give preliminary rulings is binding, and is no longer subject to a declaration by each member state. Under the Treaty of Lisbon, the field of police and criminal justice will become part of the general law, and any court or tribunal will be able to request a preliminary ruling from the Court of Justice.¹³

In order to support and enhance the Union's activities to pursue the establishment and development of Area of freedom, security and justice, the specialized European Agencies were created: Europol¹⁴, Eurojust¹⁵ and Frontex¹⁶.

In my opinion internal and external security have to and do go hand in hand. Considering one without another would be thinking of having an unlocked house without a gate to protect it, or a

⁹ Council of the European Union; The European Union Counter-Terrorism Strategy, Brussels, 30 November 2005, 14469/4/05.

¹⁰ Council of the European Union; A strategy for the External Dimension of JHA, Global Freedom, Security and Justice, Brussels, 30 November 2005, 14366/3/05.

¹¹ Solana, J., A Secure Europe in a better world, European Security Strategy, Brussels, 12 December 2003.

¹² Draft Council Conclusions on the Renewed European Union Internal Security Strategy 2015-2020. <http://data.consilium.europa.eu/doc/document/ST-9798-2015-INIT/en/pdf> p.6

¹³ Trauner, F and Servent, A-R, „Policy Change in the Area of Freedom, Security and Justice“; den Boer, M. „Police cooperation. A reluctant dance with the supranational EU institutions“ p123.

¹⁴ Council Decision 2009/371/JHA Establishing the European Police Office (Europol): <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0371&from=EN>.

¹⁵ Council Decision 2009/426 JHA, on the strengthening of Eurojust and amending serious crime; [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/New%20Eurojust%20Decision%20\(Council%20Decision%202009-426-JHA\)/Eurojust-Council-Decision-2009-426-JHA-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/New%20Eurojust%20Decision%20(Council%20Decision%202009-426-JHA)/Eurojust-Council-Decision-2009-426-JHA-EN.pdf)

¹⁶ Council Regulation 2007/2004/EC Establishing a European Agency for the management of Operational Cooperation at the External Borders of the Member States of the European Union; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R2007&from=EN>

unlocked gate (which would be external security) allowing everyone to enter your back garden. Some days ago, European Council adopted the Commission's proposal to strengthen the Schengen Information System (SIS), the most commonly used information sharing system¹⁷ for migration, security and border management. According to the Commission, the reinforced SIS system will help border guards and police to better track down dangerous criminals and terrorists.¹⁸

TERRORISM

Judicial cooperation in Europe against terrorism is not new. It may have gained a new dimension after the attacks in Madrid and London, but the fight against terrorism was one of the reasons why European judicial cooperation became a key theme on the mid-1970s when the so-called TREVI group was founded.¹⁹

November 22, 2018 the European Commission decided to send notice to Estonia (and 15 other member states: Belgium, Bulgaria, Czech republic, Greece, Spain, Croatia, Cyprus, Lithuania, Luxemburg, Malta, Austria, Poland, Portugal, Romania and Slovenia) for failing to communicate the national measures taken to implement the new rules on combatting terrorism²⁰. European Commission communicated, that the law is crucial element of the European Union's fight against terrorism – criminalizing and sanctioning terrorist-related offences, such as travelling abroad to commit a terrorist offence, returning to or traveling within the European Union for such activities, training for terrorist purposes and the financing of terrorism. European Commission stressed that the law sets out specific provision for victims of terrorism making sure they have access to reliable information as well as professional and specialist support services, immediately after an attack and for as long as necessary. Member states had until the 8th of September 2018 to notify the Commission that they have brought into force the national measures necessary to comply with the directive. Commission gave the member states additional time of two months to fully implement the new rules on their national law, not meeting the deadline for second time, Commission is considering addressing reasoned opinion.²¹

That illustrates, that even though Estonia among other countries are doing its best to reach the goals set by European Commission, there are more work to be done to meet the requirement of fighting with terrorism. In that particular case on the other hand, as there were 16 countries who were failing to communicate the national measures, it might me that the communication of the Commission itself was not satisfactory.

Trust is good control is better?

While there has been taken several strategic steps to strengthen the internal security, there is still room for improvement. What happens if we enlarge the power of the law enforcement agencies? Will the level of security increase and therefore the terrorism and criminality decrease? And foremost, will the enforcement agencies act lawfully in a way that they do not violate the human rights?

¹⁷ With over 5 billion consultations in 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181119_update-factsheet-sis_en.pdf

¹⁸ European Commission Press Release Database http://europa.eu/rapid/press-release_IP-18-6450_en.htm

¹⁹ Spence, D. „The European Union and Terrorism“ Nilsson, H. „Judicial Cooperation in Europe against terrorism“ p.71.

²⁰ Directive (EU) 2017/541 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0541&from=EN>

²¹ European Union Press Release Database http://europa.eu/rapid/press-release_MEX-18-6523_en.htm (22.11.2018)

There was rather interesting case in the Estonian newspaper Eesti Ekspress recently²² where was mentioned, that Estonian higher court decided to ask preliminary ruling from European Court of Justice concerning how the police may use the means of communication in the process of investigation. In Estonia, the means of communication (mobile phone positioning) is used under the directive²³ ²⁴that the usage of in the criminal proceeding was declared a violation of human rights by European Court of Justice. Surveillance of the mobile phones give rather specific date about the persons private life, including the names, the call registers the content of the sms-s and calls, that is allowed to ask only in a case of serious offence or crime. The definition of serious crime is defined variously in different member states. This case illustrates, that even though there are contra and pro argument whether the mobile surveillance is violating the human rights for privacy, it may still prevent serious crimes or even terroristic act to happen. The advocates as well Estonian representative in European Court of Justice N. Grünberg were arguing on both sides.

Estonian investigative media has stated in the article²⁵ that even though the level on criminality in Estonia is decreasing, the activity of surveillance of the mobile phones, recordings, databases and other surveillance methods are pretty common in Estonia.

I personally believe that in certain cases there should be rather breach of human rights allowed for a good cause of preventing or avoiding crimes against person. Especially in a light where the role of information and technology play growing role in the internal security and crime.

CONCLUSIONS

The development of the European Union Internal Security Strategy presents new challenges for not only for European Union Institutions and agencies, from a policy and practice perspective, but its implementation at a security level opens up new challenges in the context of fundamental rights and justice. Many academic authors have raised the issue of the imbalance in development of the Area of Freedom, Security and Justice, pointing out that there has been significant development under the heading of security, but that the freedom and justice elements of the project are lagging behind. In addition the perceived need to develop close working relations with third countries, not only in the European Union's immediate neighborhood, but across the globe, many of which do not operate on the bases od liberal democratic principles, poses new and complex challenges for the maintenance of the rule of law, and the fundamental principles that underpin, not only the European Union, but also each of its individual member states.²⁶

I believe that the monetary support by the member states or from the European Union's budget for helping even more develop and coordinate the internal security of European Union is the

²² https://ekspress.delfi.ee/kuum/tragi-advokaadi-tegutsemine-viib-koeravorsti-varguse-juhtumi-euroopa-kohtusse?id=84492147&fbclid=IwAR2_w0d-uTHFtYfjWCmrDOHv4bMOIPDTsSEiD_Qn18r--jeEt3PIeps78q0

²³ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0024>

²⁴ The directive has been implemented to Estonian Electronic Communication Act. The paragraph Under discussion is § 111¹, obligation to preserve data. <https://www.riigiteataja.ee/en/eli/530052018001/consolide>

²⁵ <https://ekspress.delfi.ee/kuum/laanemere-meister-nuhkimises-eestis-kuulatakse-inimesi-10-korda-rohkem-pealt-kui-skandinaavia-riikides?id=83701819&fbclid=IwAR1OX27xXKhNBBtW5vsXOG5IW5Kt734IBeAFOnxK0bvZE5XdWY3jaRCnBuQ>

²⁶ O'Neill, M., Swinton, K. and Winter, A., „New challenges for the eu International security strategy“. Retrived from: <https://www.proquest.com/products-services/ebooks/ebooks-main.html>.

only possibility to hold or improve the level of internal security. Perhaps the level on knowledge could also be improved so that the level on security could be similar (or almost similar) in all member states. Mutual level around European Union will increase the stability in police structure as well in border control areas.

And last but not least the acknowledgement of the need and necessity of the internal security buy the citizens- the common way of thinking, engagement of the society and common actions of the citizens as well the member states make the strong internal security.

BIBLIOGRAPHY:

1. Solana, J, Civilian Perspective or Security Strategy; *A secure Europe in a better world- the European Security Strategy*. Brussels, 12.12.2003.
 2. Mitsilgas, V; Monar, J and Reed W „*The European Union and Internal Security. Guardian of the People?*“, Palgrave Macmillan, 2003.
 3. Trauner, F and Servent, A-R, „*Policy Change in the Area of Freedom, Security and Justice*“; den Boer, M. „Police cooperation. A reluctant dance with the supranational EU institutions“
 4. O'Neill, M., Swinton, K. and Winter, A. „*New challenges for the eu International security strategy*“. Retried from: <https://www.proquest.com/products-services/ebooks/ebooks-main.html>.
 5. Spence, D. „*The European Union and Terrorism*“ Nilsson, H. „Judicial Cooperation in Europe against terrorism“ p.71.
 6. A secure Europe in a better world. *European Security Strategy* <https://europa.eu/globalstrategy/en/european-security-strategy-secure-europe-better-world>
 7. Schengen Visa information: reachable: <https://www.schengenvisainfo.com/schengen-visa-countries-list/>
 8. Eesti Ekspress “*Tragi advokaadi tegutsemine viib koortevorsti varguse juhtumi Euroopa kohtusse.*” Kättesaadav: https://ekspress.delfi.ee/kuum/tragi-advokaadi-tegutsemine-viib-koeravorsti-varguse-juhtumi-euroopa-kohtusse?id=84492147&fbclid=IwAR2_w0d-uTHftYfjWCmrDOHv4bMOIPDTsSEiD_Qn18r--jeEt3PIeps78q0
 9. European Union Press Release Database http://europa.eu/rapid/press-release_MEX-18-6523_en.htm (22.11.2018)
 10. Eesti Ekspress article: “*Läänemere meister nuhkimises: Eestis kuulatakse inimesi 10 korda rohkem pealt kui Skandinaavia riikides*” <https://ekspress.delfi.ee/kuum/laanemere-meister-nuhkimises-eestis-kuulatakse-inimesi-10-korda-rohkem-pealt-kui-skandinaavia-riikides?id=83701819&fbclid=IwAR1OX27xXKhNBBtW5vsXOG5IWsKt734IBeAFOnxK0bvZE5XdWY3jaRCnBuQ>
 11. European Security Strategy. A secure Europe in a Better World. <https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf>
 12. Communication for the Commission to the European Parliament and the Council; The EU Internal Security Strategy in Action: Five steps towards a more secure Europe, COM/2010/0673 final.
 13. Council of the European Union; The European Union Counter-Terrorism Strategy, Brussels, 30 November 2005, 14469/4/05.
 14. Council of the European Union; A strategy for the External Dimension of JHA, Global Freedom, Security and Justice, Brussels, 30 November 2005, 14366/3/05.
 15. Draft Council Conclusions on the Renewed European Union Internal Security Strategy 2015-2020. <http://data.consilium.europa.eu/doc/document/ST-9798-2015-INIT/en/pdf>
 16. Council Decision 2009/371/JHA Establishing the European Police Office (Europol): <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0371&from=EN>.
 17. Council Decision 2009/426 JHA, on the strenghtening of Eurojust and amending serious crime; [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/New%20Eurojust%20Decision%20\(Council%20Decision%202009-426-JHA\)/Eurojust-Council-Decision-2009-426-JHA-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/New%20Eurojust%20Decision%20(Council%20Decision%202009-426-JHA)/Eurojust-Council-Decision-2009-426-JHA-EN.pdf)
-

18. Council Regulation 2007/2004/EC Establishing a European Agency for the management of Operational Cooperation at the External Borders of the Member States of the European Union; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R2007&from=EN>
 19. With over 5 billion consultations in 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181119_update-factsheet-sis_en.pdf
 20. European Commission Press Release Database http://europa.eu/rapid/press-release_IP-18-6450_en.htm
 21. Directive (EU) 2017/541 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0541&from=EN>
 22. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0024>
 23. Troitiño, D. R., Kerikmäe, T., & Chochia, A. (Eds.). (2018). *Brexit: History, Reasoning and Perspectives*. Springer.
 24. Commission, E. (n.d.). Retrieved from https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181119_update-factsheet-sis_en.pdf
- Sterling, L. S. (2009). *The Art of Agent-Oriented Modeling*. London: The MIT Press.
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EU Internal Security: Terrorism and Criminality

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Abstract: *This research examines the main concepts involving terrorism and criminality having as scope the European Union territory and its singular characteristic such as supranational legal entity compounded by Member-States without borders. Considering the rule of law upon the EU members, which demand to provide collective security, adds up to the fact that the movement of people and data around the world has increased exponentially, the European Union legal framework comes developing measures to enhance a deep integration in order to provide security to its citizens. This paper highlights the legal sources inside the European Union Constitutional Law and EU Law, as well as its recent amendments defining the Euro-crimes involving transnational criminality as borderless crimes. Besides, we analyze through this paper the concept of terrorism according to the European Union Criminal Law doing a correlation between domestic and international terrorism and the fact that the European Union has the liability to provide personal security and also dealing with the surging of nationalism due to globalization and migration problems. The EU legal system comes advancing to a supranational law structure capable of creating robust cooperation to provide internal security combating terrorism and the borderless criminality.*

Keywords: *Internal security, borderless crimes, terrorism, mutual cooperation.*

INTRODUCTION

Internal security means domestic problems and these problematic situations sometimes are directed towards to people which we most care about or a place that we use to know as home. This subject makes us point fingers to ourselves and start to wonder about failures. The enemy infiltrated and undercover now are capable of creating instability, fear, and insecurity. If we observe societies affected by terrorism and criminality, their actions turn to be becoming heading towards these extreme situations implementing an agenda for the government and increasing the tasks for law enforcement agencies.

Hence, terrorism and criminality call for everyone responsibility into this scenario bearing in mind that the enemy can be living in the next door or coming quietly through the borders as a tourist or even as another citizen coming back home, it implies there are no armies involved using different uniform colors and bringing an explicit menace. We are not exaggerating towards a state of exception explained by Professor Giorgio Agamben¹ as a desperate situation where the fundamental rights foreseen by law are bent for the purpose to restore the constitutional order. Foremost, internal security is something constant which needs to be thought outside and before times of crisis. Nevertheless, the countries, and talking about the European Union, the member states have to establish a definition of security and its policies to achieve a minimum standard based on stable, structured cooperation.

Our aim with this research paper is to explore these two sensitive variables able to begetting new concerns relating to how to provide internal security for a supranational entity as the European Union. On one segment the terrorism emerges as a form of protest, a way to pay back for something undesirable, an extremist method to impose fear and pain striking innocent people which one will live with constant uncertainty about safeness. The terrorism will appear when political arguing and diplomacy reach the failure converting into a situation that nations are targets and groups are involved in which agreements are no tools to negotiate, and extreme measures have to be taken in order to control the situation.

¹ Agamben, Giorgio. *State of exception* (Chicago: University of Chicago Press, 2005) 5.

Under other circumstances, a sensitive increase of criminality can make a place uncomfortable spreading insecurity what can address people to pressure the government or try to solve the problem by their own hands. It is a common view that crime is a social problem intrinsic tie to human behavior consequently possible to soar among social inequality and lack of education and stability what can be read as an incomplete application of welfare state taking a narrow view "often confined to health, housing, income"². Moreover, some individuals deliberately decide to commit crimes before the results that it can bring especially if the internal law and the prosecution system are inadequate to provide effectiveness against organized criminality and white-collar crimes. Likewise, nowadays several crimes are committed without the necessity of people crossing borders just using the virtual field known as cyberspace.

The European Union is continuously changing to expand its borders by bringing new states, and these fresh members imply more problems to handle internally. In particular, the free movement of persons offered a vast field to issues such as terrorism and criminality spread over the Member States, because people are engaged in crime and terrorism, they are the tools to perpetrated these crimes. Also, we could mention that some European countries have easy requirements to grant citizenship based on *jus solis* criteria, giving free access to the European area. With that in mind, solutions cannot come separately, and as a community it has must always be thought to have the ideals from the past acting like guidance light to the future avoiding misconceptions.

1. BORDERLESS CRIMINALITY AND COLLECTIVE SECURITY

According to Article 3(2) of the Maastricht Treaty, officially known as Treaty on European Union - TEU, one of the fundamental aims of the Union is to offer security to its citizens without internal frontiers. Also, complementing the sense of individual security Article 3(5) brings the directive in which the Union will address its external relations in order to promote the protection of its citizens. Observing these aspects, we can see that security is turning to individuals rather than to the Member States representing a singularity within the Union. Hence, this brief analysis is capable of defining that in a narrow concept the individual is the center of security concerns, on the other hand, taking an extensive insight the State is what matters³.

Accordingly, the TEU incorporate into the primary law, as its constitutional structure of the European Union, a common foreign, security and defense policies. Moreover, we should also remark the Treaty on Functioning of European Union - TFEU, which reproduces in its Article 67(1) the constitutional guarantee of security with the strict compliance for fundamental rights, despite differences of the legal systems and traditions of the Member States. It is import to remember there are no internal borders to enforce control for persons which it claims to be a common area for security issues. Each one of the States, being a member of the Union, remaining with its sovereignty to establish a criminal law. In contrast, the constitutional framework assigns an approximation of the criminal laws to avoid substantial differences which could be resulting in relative leniency of the law applied to similar cases ruled by different courts from some the Member States which must observe an interpretation uniform under EU Law principles and European Court of Justice case-laws. Additionally, the new wording of Lisbon Treaty provides to the European Constitutional System a new framework to develop a European Union criminal law bringing the following rule in Article 83:

² Cousins, Mel. *European Welfare States: Comparative Perspectives* (London: Sage Publications, 2005) 7.

³ Marczuk, Karina Paulina. *Towards the EU's internal security strategy: a new paradigm of internal security?* ResearchGate.com Website: https://www.researchgate.net/publication/327545113_Towards_the_EU%27s_Internal_Security_Strategy_A_New_Paradigm_of_Internal_Security. Accessed on 10 November 2018.

"The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament."

Concerning to EU criminal law, under that article, the TFEU set up the directives to European Union criminalize such giving offenses known as transnational crimes, precisely because of these crimes are a borderless dimension which requires special attention and uniform enforcement of the law. Despite this, the Member States remaining its sovereignty regarding other crimes, even though it could be regarded as a twofold criminal system inside the EU. It is equally essential to consider that the exhaustive roll aforementioned transferred the law-making competence from de Member States to EU represented by The Council and European Union Parliament. Notwithstanding the citizenship guarantees provided for in Article 20 et seq. of TFEU, and Articles 309 et seq. of Chart of Fundamental Rights of European Union, the free movement of persons can suffer restraint regarding the protection against expulsion granted for in Article 28(3) of Citizens' Rights Directive 2004/38/EC - CRD⁴. Due to the wording of that law, it can happen exceptionally "if the decision is based on imperative grounds of public security," those borderless offenses provided in Article 83(1) of TFEU are considered especially leading organized criminality, and they are connected with this particular concept of public security, according to the European Court of Justice -ECJ ruling of law in Case C-348/09, P.I. v. Overbürgermeisterin der Stadt Remscheid (May 17, 2013):

"In the light of the foregoing considerations, the answer to the question referred is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3), as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it."⁵

In the face of that interpretation, the ECJ adequately ensured the abstract concept concerning public security to the Member States setting what sensitive spots might usually be considered heinous, which calls for uniform reprehension by EU law. Nevertheless, the European Union competence to typify crimes and to determine sanctions is not taking out the liability of the States to enforce the law within their borders. A legal system with powerful competencies, especially in the criminal ground, is essential to provide effectiveness for responding and producing adequate and proportional measures to cohabit criminality.

1.1. A new vision of integration to enhance internal security

Since the Lisbon Treaty came into force, the EU criminal policy has to increase its sense of cooperation not only based on agreements between surrounding countries but creating particular

⁴ Mitsilegas, Valsamis, "EU Criminal Law Competence after Lisbon: From Securitized to Functional Criminalisation", in *EU Security and Justice Law: After Lisbon and Stockholm*, eds. Murphy, Cian C., & Acosta Arcarazo, Diego (Oxford: Hart Publishing, 2014) 115.

⁵ European Union, European Court of Justice (website), Reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen. Freedom of movement for persons, accessed November 19, 2018, <http://curia.europa.eu/juris/liste.jsf?num=C-348/09&language=EN>

bodies inside this supranational entity to handle with dimensional issues. In the prosecution system, two agencies have to perform strength cooperation, and these agencies are:

The European Police Office - Europol working as a law enforcement agency providing a host between police departments around EU, although that agency has no power to enforce the law and its officers are not able to execute policing tasks⁶. The Europol acts being a core offering support such as database exchange, forensic analyses, and training which demonstrates conventional forms of cooperation⁷.

Another significant form of mutual assistance is the European Union's Judicial Cooperation Unit - Eurojust. Acting on the bases of Article 85 et seq. of TFEU, this agency performances its duties establishing a framework of cooperation between two or more Member States to investigate, and prosecute felonies. Nevertheless, the said Article 83(1) of TFEU brings these atrocious crimes on a list not exhaustive once the definition of organized criminality still has an open concept inside EU. Recently, in November of 2018, the relations between these two agencies were set by Regulation (EU) 2018/1727 of the European Parliament and of The Council, and according to Annex 1 that brings a wide array of crimes is listed as:

- terrorism,
- organized crime,
- drug trafficking,
- money-laundering activities,
- crime connected with nuclear and radioactive substances,
- immigrant smuggling,
- trafficking in human beings,
- motor vehicle crime,
- murder and grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage taking,
- racism and xenophobia,
- robbery and aggravated theft,
- illicit trafficking in cultural goods, including antiquities and works of art,
- swindling and fraud,
- crime against the financial interests of the Union,
- insider dealing and financial market manipulation,
- racketeering and extortion,
- counterfeiting and product piracy,
- forgery of administrative documents and trafficking therein,
- forgery of money and means of payment,
- computer crime,
- corruption,
- illicit trafficking in arms, ammunition and explosives,
- illicit trafficking in endangered animal species,
- illicit trafficking in endangered plant species and varieties,
- environmental crime, including ship source pollution,
- illicit trafficking in hormonal substances and other growth promoters,

⁶ European Union, Europol (website), Activities and Services, accessed November 19, 2018, <https://www.europol.europa.eu/activities-services/services-support>

⁷ Cornell, Anna Jonsson, "EU Police Cooperation Post-Lisbon", in *European Police and Criminal Law Co-operation*, eds. Bergström, Maria, & Cornell, Anna Jonsson (Oxford: Hart Publishing, 2014) 147.

sexual abuse and sexual exploitation, including child abuse material and solicitation of children for sexual purposes,
genocide, crimes against humanity and war crimes.

After analyzing the legal framework showed in this chapter, we can conclude that the European Union comes strengthening its structure of cooperation against transnational criminality which constitutes means capable of menace the internal security and destabilizes the regular order. These borderless crimes not only affect the EU citizens directly but also the institutions causing weakness to them leading to a scenario where States are not able to afford protection and defense. The European integration with the free market and free movement of goods, services, and persons means also sharing common problems to which must coexist in harmony towards a well-functioning of public services⁸, remembering that one of the natural needs of the human being is to feel safe. An intergovernmental system needs to be ruled by singular criminal law in matters of common interest to avoid discrepancies, especially regarding severe crimes. Moreover, the Member States remain with their competences to enforce the EU Criminal Law and also the jurisdiction in criminal proceedings. EU criminal law is trying to prevent that one Member State establishes severe sanctions to a crime differently for the other one which could beget a criminality migration.

2. DEALING WITH TERRORISM, AN UNPROFITABLE CRIME

According to the European Union Criminal Law, terrorism is typified as a criminal behavior what means that exists sanctions and perpetrators will be charged before the law. Thus, differently from others crimes, when people commit terrorism, they are not expecting monetary compensations. Conversely, they will expend money to achieve, and their goals and targets are nations, its private or governmental institutions, and society in general. As an unprofitable crime, organized groups acts supporting this crime appearing as a third sponsor. So, one of combating is exhausting the usual sources of money which finance this criminality what justifies the intense struggle to prevent money laundering. It is a premeditated crime whose purpose is not only hit specific targets but to spread fear and panic to the whole society.

Studying the simple classification of terrorism, basically, we find two classes: domestic terrorism and international terrorism and both of them base their motivations in extreme political ideologies such as nationalism in which we found "the most potent of social forces."⁹ However, in the first case, the criminals are the own citizens from the States, and in the second situation, the perpetrator comes from outside¹⁰. So, bringing those definitions into European Union, observing the right to free movement of persons joined to the context of the citizenship rights, things become clear to understand why this menace can affect each Member State. Cooperation inside the Union is crucial to struggle against terrorism. Historically, EU has a link with many countries around the world and adopting the *jus sanguinis* right attached to citizenship many people become citizens but without the sense of loyalty to the States and European values which

⁸ Davies, Gareth, "Free Movement, the Quality of Life and the Myth that the Court Balances Interests", in *Exceptions from EU free movement Law*, eds. Koutrakos, Panos, Shuibhne, Niamh Nic & Syrpis, Phil (Oxford: Hart Publishing, 2016) 222.

⁹ Nairn, Tom; James, Paul (2005). *Global Matrix: Nationalism, Globalism and State-Terrorism* (London and New York: Pluto Press, 2005) 33.

¹⁰ Purpura, Phillip. *Terrorism and Homeland Security: An Introduction with Applications* (Butterworth-Heinemann homeland security series, 2007) 17.

implies that a backdoor is open to international terrorism. In a similar situation, but without people crossing borders, the cyberterrorism preaches the same harm. The last conclusions reported by The Council, in the meeting occurred on 18 October 2018, the terrorism and its international and regional ramifications and the theme discussed received the following review:

The last conclusions announced by The Council, in the meeting occurred on 18 October 2018, were about the terrorism and its international and regional ramifications and the theme discussed received the input on its report, drawing the attention to EU adopts measures in order to "strengthen the capacity to prevent and respond effectively to radicalisation and terrorism, in full respect of fundamental rights. The Commission proposal on preventing the dissemination of terrorist content online should be examined as a matter of priority."¹¹ Another passage calls attention to "strengthen our crisis management capacity and the coherence and effectiveness of the EU and national crisis response mechanisms. Negotiations on the EU civil protection mechanism proposal should be concluded by the end of the year"¹².

This concept of civil protection keeps alive the idea of personal security on behalf of EU residents which has the basis on a prompt answer to potential threats to stop the harm and damages caused. Equally the investigation, prosecution and the ruling of law have to follow the same concept. Therefore, besides strengthening of the Europol and Eurojust, EU launched in 2017 the Permanent Structured Cooperation - PeSCo, in reliance on Articles 42(6) and 46 of the TEU this new body came to improve the military and civilian assistance working closely with European Defense Agency. Consequently, it means that the European Union is in constant developing of its internal security and the warfare against terrorism find places inside and outside of the borders.

CONCLUSION

As shown in this brief study, the problem of internal security in the European Union goes beyond the dilemmas faced for its Member States. It occurs because as supranational entity EU has to deal with multiple concerns and get ready to attend these needs. Regarding this, providing security of person following the definition imposed by the Charter of the Fundamental Rights of EU is not an easy task. The new concept of "Euro-crimes"¹³ adopt under Article 83 of the Treaty on the Functioning of the European Union proved to be a useful and necessary method to uphold the internal protection which passed to adopt an EU Criminal Law as independent legal order directly applicable to the Member States. At the same time, international terrorism increase in EU territory as a result of an extreme sense of nationalism due to globalization phenomena, free movement of persons and migration problems, coupled with the issue of radical external groups that attack European Union Member States in response to their actions in the global scenario. Notwithstanding these facts, the Union is developing tools to keep standing its principles.

Hence, there is a legal framework to enhance the cooperation in the criminal matter, which in addition to the list of international agreements increase the liability of the Member States to take actions towards internal security. The EU legal system advances gradually and only through the uniform of the supranational law is possible to create a safe zone for the European Union. Nonetheless, as we know EU law has no direct impact in the resident citizens and has to be implemented by each Member State which can be seen a weak spot inside the system. On the other hand, at least the national courts have an extra instrument to apply to trial proceedings.

¹¹ European Union, The European Council (website), European Council meeting (18 October 2018), accessed November 20, 2018, <https://www.consilium.europa.eu/media/36775/18-euco-final-conclusions-en.pdf>

¹² Ibid.

¹³ Chalmers, Damian, Davies, Gareth & Monti, Giorgio. European Union Law (Cambridge: Cambridge University Press, 4th ed, 2011) 613.

Another issue involving internal security is taxation, and it occurs because enhancing local safety in EU territory results in increasing of expenses, especially when it involves external operations which imply in tax increases based on the solidarity principle.

Giving these points, our analyze had the aim to highlight the legal structure of the European Union to provide internal security combating terrorism and the borderless criminality. We could observe that internal security involves constant efforts whereas that sometimes these actions conflict with other fundamental rights such as freedom and private life requiring proportionality and rationality to uphold these rights.

REFERENCES:

- Agamben, Giorgio. *State of exception* (Chicago: University of Chicago Press, 2005).
- Bergström, Maria, & Cornell, Anna Jonsson. *European Police and Criminal Law Co-operation* (Oxford: Hart Publishing, 2014).
- Bossong, Raphael, and Mark Rhinard. *Theorizing Internal Security Cooperation in the European Union* (Oxford: Oxford University Press, 2016).
- Chalmers, Damian, Davies, Gareth & Monti, Giorgio. *European Union Law* (Cambridge: Cambridge University Press, 4th ed, 2011).
- Chochia, A., Troitiño, D. R., Kerikmäe, T., Shumilo, O., & Lindstrom, N. (2018). The First European Community and the British Position. In *Brexit* (pp. 59-81). Springer, Cham.
- Cousins, Mel. *European Welfare States: Comparative Perspectives* (London: Sage Publications, 2005).
- Dimitrios, Dalaklis. *International Security and Stability: The Western European Union and the European Integration*. ResearchGate.com Website: https://www.researchgate.net/publication/281638025_International_Security_and_Stability_The_Western_European_Union_and_the_European_Integration. Accessed on 10 November 2018.
- Hudson, Rex A. *The sociology and psychology of terrorism: who becomes a terrorist and why?* Library of Congress Website. https://www.loc.gov/frd/frd/pdf-files/Soc_Psych_of_Terrorism.pdf. Accessed on 10 November 2018.
- Kerikmäe, T., Chochia, A., Troitiño, D. R., & Hrebickova, A. (2018). The First Attempts to Unify Europe for Specific Purposes and British Flexibility. In *Brexit* (pp. 21-32). Springer, Cham.
- Koutrakos, Panos, Shuibhne, Niamh Nic & Syrpis, Phil. *Exceptions from EU free movement Law* (Oxford: Hart Publishing, 2016).
- Marczuk, Karina Paulina. *Towards the EU's internal security strategy: a new paradigm of internal security?* ResearchGate.com Website: https://www.researchgate.net/publication/327545113_Towards_the_EU%27s_Internal_Security_Strategy_A_New_Paradigm_of_Internal_Security. Accessed on 10 November 2018.
- Mitsilegas, Valsamis, Jörg Monar, and Wyn Rees. *The European Union and Internal Security. Guardian of the People?* (New York. Palgrave Macmillan, 1st, 2003).
- Murphy, Cian C., & Acosta Arcarazo, Diego. *EU Security and Justice Law: After Lisbon and Stockholm* (Oxford: Hart Publishing, 2014).
- Nairn, Tom; James, Paul (2005). *Global Matrix: Nationalism, Globalism and State-Terrorism* (London and New York: Pluto Press, 2005).
- Purpura, Phillip. *Terrorism and Homeland Security: An Introduction with Applications* (Butterworth-Heinemann homeland security series, 2007).
- Sageman, Marc. *Turning to Political Violence. The Emergence of Terrorism* (University of Pennsylvania Press, 2017).
- Troitino, David Ramiro. *European Integration: building Europe* (New York: Nova Science Publishers, 2013).
- Troitiño, D. R., Kerikmäe, T., Chochia, A., & Hrebickova, A. (2018). Cooperation or Integration? Churchill's Attitude Towards Organization of Europe. In *Brexit* (pp. 33-56). Springer, Cham.
-

- Troitiño, D. R., Kerikmäe, T., Chochia, A., & Hrebickova, A. (2018). First European and Pan-European Integration Efforts and British Reluctance. In *Brexit* (pp. 3-20). Springer, Cham.
- Wolff, Sarah. *The Mediterranean Dimension of European Union's Internal Security*. (New York. Palgrave Macmillan, 1st, 2012).
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Humanising Cyberspace: the EU Legislation and its transformative power

MELDA KAMIL ARIADNO AND PROF. ANIS H BAJREKTAREVIC

Abstract: *While our troposphere is dangerously polluted, one other space – that of intangible world, created by the interconnected technology – follows the same pattern: a cyberspace. Additionally, our cyberspace becomes increasingly brutalised by its rapid monetisation and weaponisation. It mainly occurs through privacy erosion. How to protect effectively individuals and their fundamental human rights, and how to exercise a right for dignity and privacy?*

The EU now offers a model legislation to its Member States, and by its transformative power (spillover) to the similar supranational projects elsewhere (particularly ASEAN, but also the AU, OAS, SCO, SAARC, LAS, etc.), and the rest of world.

Keywords: *Cyberspace, Data, Privacy, EU, ASEAN; Indo-Pacific, Twining, Transformative power.*



While our troposphere is dangerously polluted, one other space – that of intangible world, created by the interconnected technology – follows the same pattern: a cyberspace.

Information is a content and the frame, means and the goal in the world of binary codes. Commodification of information in digital world is nothing else but a search for a cyberspace currency. Hence, what is a black gold, oil/crude for the PEM (Primary Energy Mix) of every national economy that is a personal data in the world of cyber-information – component that predominantly energises and runs the system.

No wonder that our cyberspace becomes increasingly brutalised by its rapid monetisation and weaponisation. It mainly occurs through privacy invasion and its constant erosion due to an expanding exposure and inadequate preservation. How effectively to protect individuals, their fundamental human rights, and how to exercise a right for (cyberspace) dignity and privacy?

The EU now offers a model legislation to its Member States, and by its transformative power (spill-over) to the similar supranational projects elsewhere (particularly ASEAN, but also the AU, OAS, SCO, SAARC, LAS, etc.), and the rest of world. (From a *lege specie* towards the universal jurisdiction.)

* * *

Rules and regulations to protect personal data do not trigger many sympathies. The corporate world sees it as an unnecessary deterrent; as a limit to their growth – more to pay and less or slower to yield, innovate and expand. Governments would traditionally wish the rules should apply to every societal stakeholder but themselves. And citizenry by large too frequently behave benevolent, nearly careless whether their data is harvested or safeguarded at all.

However, such legislation is needed today more than ever before. The latest round of technological advancements was rapid, global and uneven. No wonder that in the aftermath of the so-called IT-revolutions, our world suffers from technological asymmetries: assertive big corporations and omnipresent mighty governments on one side and ordinary citizenry on the other. Even in the most advanced democracies today – such as the EU, personal autonomy is at the huge risk: Everyday simple, almost trivial, choices such as what to read, which road to take, what to wear, eat, watch or listen are governed (or at least filtered) by algorithms that run deep under the surface of software and devices. Algoritmisation of ‘will’ is so corrosive and deep that users are mostly unaware of the magnitude to which daily data processing rules over their passions, drives and choices.

Clearly, technology of today serves not only a Weberian predictability imperative – to further rationalise society. It makes society less safe and its individuals less free.

Societies are yet to wake up to this (inconvenient) truth. In the internet age of mobile, global and instant communications, people tend to focus more on the ‘here-us-now’ trends: goods, services, and experiences that the IT offers. Individuals are less interested on the ways in which privacy is compromised by software, its originators and devices – all which became an unnoticed but indispensable part of modern life. Despite a wish of many to grasp and know how data processing and harvesting affects them, population at large yet has no appetite for details.

But, the trend is here to stay – a steady erosion of privacy: bigger quantities of data are harvested about larger number of persons on a daily, if not hourly basis. Corporations and the central state authorities want more data and are less shy in how they obtain and use it.

Prevention of the personal information misuse (PIM) —intended or not—is the main reason the European Union (EU) introduced the new set of provisions, as of May 2018. Hence, the General Data Protection Regulation (GDPR) – as the legislation is known – is an ambitious attempt to further regulate digital technology, especially in respect to the private data protection. It is of course in conformity with provisions of both the Universal and European Charter of Human Rights, which hold the protection of human dignity and privacy as an indispensable, fundamental human right.

The intention of legislator behind the GDPR is twofold: to regulate domestically as well as to inspire and galvanise internationally. The GDPR is meant to open a new chapter in the Internet’s history at home, while creating, at the same time, a roadmap for other state and corporate sector actors beyond the EU. The challenge is clear: to reconcile the rights of individuals to data protection with the legitimate interests of business and government.

For the rest of the world, the GDPR should be predictive, inspirational and eventually obligatory. Lack of acting now could open a space for the abuse of power – be it for illegitimate corporate or authoritarian gains of the hidden societal actors. In such a negative scenario – on a long run – losers are all. Historically, victimisation of individuals (through constant suspension of liberties and freedoms) ends up in a state or corporate fascism, and that one in a self-destruction of society as whole.

COMPREHENSIVE LEGISLATION AS POWERFUL DETERRENT

The Internet age exposes individuals in an unprecedented ways to the domestic or foreign predatory forces. Everybody is tempted to participate in digital economy or digital social interaction. This cannot go without revealing personal information to large state or non-state entities of local or international workings. If the field is not regulated, the moment such information leaves its proprietor, it can be easily and cheaply stored, analysed, further disseminated and shared without any knowledge or consent of its originator.

So far, neither market forces nor the negative publicity has seriously hindered companies and governments from tapping on and abusing this immense power. Nothing but a bold and comprehensive legislation is efficient deterrent, which stops the worst misuse. Only the legal provisions to protect personal data may serve a purpose of special and general prevention:

Be it in case a local or transnational corporate greed, governmental negligent or malicious official, or the clandestine interaction of the two (such as unauthorised access to personal phone and Internet records, as well as the unverified or inaccurate health and related data used to deny person from its insurance, loan, or work).

While totally absent elsewhere, early European attempts to legislate a comprehensive regulatory system of personal data protection have tired its best. Still, the EU's Data Protection Directive of 1995 was falling short on several deliverables. (It was partly due to early stage of internet development, when the future significance of cyberspace was impossible to fully grasp and anticipate). Hence, this instrument failed to identify comprehensively the wrongdoings it sought to prevent, pre-empt and mitigate. The 1995 text also suffered from a lack of (logical and legal) consistency when it came to directing and instructing the individual EU member states (EU MS) on how to domesticate data privacy and promulgate it the body of their respective national legislation. Finally, the GDPR solves both of these problems.

This instrument of 2018 clearly stipulates on discrimination combating (including the politically or religiously motivated hate-contents), authentication-related identity theft, fraud, financial crime, reputational harm (social networks mobbing, harassments and intimidation). Moreover, the European Commission (EC) has stated that the GDPR will strengthen the MS economies by recovering people's trust in the security and sincerity of digital commerce, which has suffered lately of a numerous high-profile data breaches and infringements.

However, the most important feature (and a legal impact) of the **GDPR is its power of being a direct effect law. This means that** individuals can invoke it before the MS courts without any reference to the positive national legislation. That guaranties both speed and integrity to this supranational instrument – no *vocatio leagis* and no unnecessary domestication of the instrument through national constituencies. Conclusively, the 2018 instrument is further strengthened by an **extra-territorial reach** – a notion that make is applicable to any entity that operates in the EU, even if entity is not physically situated in the EU.

This practically means that each entity, in every sector and of every size, which processes personal data of the EU citizens, must comply with the GDPR. It obliges governments and their services (of national or sub-national levels); health, insurance and bank institutes; variety of Internet and mobile telephony service providers; media outlets and other social data gathering enterprises; labour, educational and recreational entities – in short, any subject that collects digital information about individuals.

The GDPR further strengthens accountability principle. The state and commercial actors hold direct and objective responsibility for a personal data collecting, storing and processing (including its drain or dissemination). Clearly, this EU instrument strengthens the right for information privacy (as a part of elementary human right – right to privacy) by protecting individuals from misappropriation of their personal data for a harvesting, monetisation or (socio-political) weaponisation purpose.

Namely, the GDPR gives individuals the right to request a transfer of their personal data (account and history information) from one commercial entity to another (e.g. from one bank or phone provider to another). Another right is to request – at short notice and for an unspecified reason – the commercial enterprise to stop both the data collection and the marketing dissemination, or to demand clarification on a marketing methods and nature of services provided. This instrument also offers individuals the right to request that their personal data are deleted (being zipped and sent back to its proprietor beforehand) – as stipulated in art.17 (the right to be forgotten).

The GDPR calls upon all operating entities to hire a data protection officer as to ensure full compliance with the new rules. It also invites all data collecting entities to conduct impact assessments – in order to determine scope frequency, outreach and consequences of personal data harvesting and processing. (For example, if certain entity wished to introduce biometric authentication for its employees and visitors entering daily its premises, it would need at first to run an assessment – a study that answers on the necessity and impact of that new system as well as the exposures it creates and possible risk mitigation measures.)

The GDPR obliges every entity that gathers data to minimise amount and configuration of personal data they harvest, while maximizing the security of that data. (For instance, if the auto dealer or travel agency requires potential customers to fill out the form to request a price quote, the form can ask only for information relevant to the product or services in question.)

The new legislation also mandates data gathering entities to notify the authorities – without any delay – whenever they suspect or witness a personal data breach. Conclusively, the GDPR obliges entities to present the public with clean and through information about the personal data they harvest and process—and clearly why they do so.

On the sanction side, the GDPR supports the regulators with new enforcement tools, including the norm setting, monitoring of and enforcement of compliance. For a non-compliance, the instrument prescribes steep fines.

To answer adequately the accountability standards enacted by this EU legislation will certainly invite large data gathering entities to bear significant investments. However, for the sake of credibility outreach and efficiency, they will have stimuli to introduce the new procedures and systems within the EU, but also beyond – wherever their operations are present. Complementary to it, the GDPR stipulates that if an entity transfers personal data out of the EU, it must safeguard that the data is handled in the new location the same way like within the EU. By this simple but far-reaching and effective spill over notion, the standards embodied by the GDPR will be delivered to the rest of the world. Hence, this instrument is not (only) an inner code of conduct that brings an outer appeal; it is a self-evolving and self-replicating standard of behaviour for our common (digital) future.

TWINNIG: ASEAN, INDO-PACIFIC, ASIA

It is obvious that the stipulations of the GDPR would serve well interests of Republic of Indonesia (RI). That is actually in line with a very spirit of the 1945 Constitution, which obliges the state to protect, educate and prosper the Indonesian people. This supreme state act clearly proclaims that the respecting individual personal data is resting upon the two principles of the Pancasila. Namely these of; Fair and Civilized Humanity. Mutual grant and observance of everyone's elementary rights is an essence of freedom and overall advancement of society.

The government, with the mandate of its authority to protect the public (public trust doctrine), must manage the personal data fairly and accountably. The GDPR also encourages the formation of an independent personal data protection supervisory institution so that it can correct the policies and rules of the bureaucracy and state administration to act accordingly in managing the personal data of the population. Moreover, every democratic government should be more proactive in protecting society when comes to the management of the personal data of its residents.

Interestingly, the Indonesian legislation already has instruments that follow notion of the GDPR. Thus, the Law No. 11 on Information and Electronic Transactions of 2008 (by a letter of its article 2) emphasizes the principle of extra-territorial jurisdiction. (In this particular case, it is related to the cross-border transactions. Indonesia should always safeguard its national interests: the RI jurisdiction stretches on any legal action that apply in Indonesia and/or carried out by Indonesian citizens. But it also applies to legal actions carried out outside of Indonesian jurisdiction by Indonesian citizens or a foreigner legally residing in RI, or Indonesian legal entities and foreign legal entities that produce legal effects in Indonesia.

This of course assumes the very nature of a use of Information Technology for Electronic Information and Electronic Transactions, which can be cross-territorial and even universal. What is assumed by this Law as "harming the interests of Indonesia" goes beyond pure national economic

interests, while protecting strategic data, national security, territorial integrity and sovereignty, citizens, and Indonesian legal entities.)

When comes to the Right to be Forgotten (Right for Privacy and Right for Dignity), Indonesia must see it as a principle of real protection that is in the best interests of data owners. Further on, such a right should be strengthened by the principle of 'without undue delay', as to avoid the administrative obligation to request a court decision to uphold the right. On a long run, it will surely benefit businesses far more than the personal data originators themselves.

LEADING BY EXAMPLE

In line with the Right to Portability Data elaborated by the GDPR, Indonesia also needs to closer examine the EU instruments. Hence, the EU Regulation No.910 / 2014 concerning electronic identification, authentication and trust services (eIDAS) offers an idea how to harmonize the provision of digital identity and personal data in realm of electronic communications. (Electronic identification and authentication is a technology process that has an economic value. Such a business opportunity should be reconciled with a safety and security standards when comes to use of and traffic with of personal data for commercial interests.)

Regarding security, Indonesia must immediately have a clear policy on Cryptography to protect personal data. Cryptography is a double-use process; it can be utilised for civilian purposes, but it can also be used for the vital national interests, such as defense and security. Therefore, privacy and cybersecurity protection is a complementary concept of protection. Holistic approach strengthens the both rights of individuals as well as protection of national interests, rather than it ever conflicts one over the other.

Finally, the ASEAN Declaration of Human Rights in its article 21 stipulates that the protection of personal data is elementary part of Privacy. As one of the founding members, a country that even hosts the Organisation's HQ, Indonesia must observe the notions of this Human Rights Charter. That is the additional reason why RI has to lead by example.

The EU's GDPR clearly encourages a paradigm shift within the public services and government administration services on national, subnational and supranational level for all the ASEAN member states. It is to respect the fundamental freedoms and liberties, a quality that will shield population from random and ill-motivated arbitrary judgments of individual rights under the pretext of public interest.

Indonesia and ASEAN can take a lot of learning from the dynamics of the EU's regulation of GDPR and e-IDAS as to its own benefit – to foster its own security and to elevate a trust in regional e-commerce within the ASEAN economic zone. Since the ASEAN (if combined) is the 4th largest world economy, this is a call of future that already starts now. After all the EU and ASEAN – each from its side of Eurasia – are twin grand projects of necessity, passion and vision.

Naturally, for anyone outside, Indonesia and ASEAN are already seen as the world's e-commerce hub, of pivotal importance far beyond the Asia-Pacific theatre.

Vienna/Jakarta 28 DEC 2018

REFERENCES:

1. The EU (and EEA) Instrument (2018), *General Data Protection Regulation /GDPR: REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA*
-

- relevance)/, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>(accessed as of 181218);
2. The UN Charter (1947), *Universal Declaration of Human Rights*, UNIS NY 1947;
 3. Council of Europe (1950/1953), *European Convention of Human Rights*, CoE Strasbourg Press (2013 ver.);
 4. The EU Instrument (1995), The EU Data Protection Directive of 1995 /DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data/, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&rid=5> (accessed as of 181218);
 5. Bajrektarevic, A., Karantzeni, D. (2015), *Cybersecurity: Essentials – Institutions, Instruments, Types and Forms*, NOVA Science Publishers;
 6. RI Parliament (1945), *Constitution of Indonesia (Undang-Undang Dasar Republik Indonesia 1945, UUD '45)*, Jakarta GovPrintHouse (1964 ed.);
 7. Soekarno, K.S., (1945), *Pancasila – the Five Principles (the Indonesian State Philosophy)*, <https://www.britannica.com/topic/Pancasila> (accessed as of 241218);
 8. RI Parliament (2011), *Law of the Republic of Indonesia No. 11 on Information and Electronic Transactions of 2008*, <http://www.bu.edu/bucflp-fig/files/2012/01/Law-No.-11-Concerning-Electronic-Information-and-Transactions.pdf> (accessed as of 241218);
 9. The EU (2014), *EU Regulation No.910 (eIDAS) /Regulation (EU) No910/2014 of European Parliament and of the Council of EU on Electronic Identification and Trust Services for Electronic transactions in the Internal market and repealing Directive 1999/93/EC/*, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0910&from=EN> (accessed as of 281218)
 10. Association of Southeast Asia Nations (2012), *ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the Declaration – AHRD*, ASEAN HQ Press, Jakarta 2013.

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