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# ENVIRONMENTAL COOPERATION AS THE INSTRUMENT OF CONFLICT TRANSFORMATION IN EAST ASIA<sup>1</sup>

Ladislav CABADA and Šárka WAISOVÁ<sup>2</sup>

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*East Asia is an area with high number of political militarized conflicts, but also with high biodiversity and fast environmental degradation. A decade ago there emerged the idea that environmental cooperation is able to initiate and sustain a dialogue between the parties of a conflict and facilitates conflict transformation and peace building. This article tests on the three case studies from East Asia two hypotheses and asks one question to find out more about the origin and functioning of environmental cooperation in areas of political conflicts. The article shows that environmental cooperation can emerge even during a political conflict, but only at a time when the intensity of the violence is low. The emergence and development of environmental cooperative projects also depends on the support of external actors. We conclude that the intensity of environmental cooperation in conflict-prone areas remains weak even after many years and even when the process is strongly supported by many external actors.*

**Key words:** environmental cooperation; environmental peace building; cooperation in conflict areas; South Korea; North Korea; China; Taiwan; Thailand; Cambodia.

## 1 INTRODUCTION

In the 1980s East Asia<sup>3</sup> went from being the world's bloodiest battleground to one of its most peaceful regions, and this era of relative peace has continued.

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<sup>3</sup> East Asia here includes China, Japan, North Korea, South Korea, Mongolia, Taiwan, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore,



While there was a precipitous decline in organized violence in East Asia in the period of 1980-2010, the militarized disputes in the Taiwan Strait, Korean peninsula, the East China Sea, the South China Sea and between Cambodia and Thailand have not been resolved (Tønneson et al 2013). East Asia is not only the region with persisting number of military interstate conflicts but also with high biodiversity and high number of biodiversity hotspots. East Asia has great biodiversity importance and richness, ranking with South America as the richest place on Earth for variety of living. Of the world's 25 recognized biodiversity hotspots, seven are in East Asia, covering the entire ASEAN region, parts of India, Sri Lanka, southwest China and the eastern Himalayan countries of Nepal, Bhutan and India. Biodiversity hotspots are defined as areas featuring exceptional concentrations of endemic species and experiencing exceptional loss of habitat (Myers et al 2000; Hanson 2009). But East Asia is also the region with serious environmental problems. High population density combined with high rate of consumption of natural resources and the pressure of rapid industrialization without adequate environmental management have made East Asia one of the most polluted regions of the world. It has suffered environmental deterioration in terms of coastal and inland water pollution, air pollution, soil pollution, loss of biodiversity and deforestation. East Asia is also the region, where environmental institutions are often seen as weaker than institutions in other areas such as trade or security and conservationist policies are notoriously ineffective and inefficient. The growth of the population and the economic development in the region deepen the environmental pressure in East Asia and consequently mobilize number of domestic and international actors to support environmental protection in the area. But some of these actors, when supporting the conservation, not only think about the environmental protection, but try to use conservationist projects and programs to manage political and other conflict in the region. This paper is the study of the past and future of environmental cooperation as a conflict transformation instrument in East Asia.

The idea of environmental cooperation as a conflict transformation instrument emerged since the first half of the 1990s among scholars (Westing 2010; Conca and Dabelko 2002; Kramer 2008) as well as among international institutions (OSCE 2012; ADB 2011; IUCN 2013) and non-governmental organizations (NGOs). The idea presumes that conflict and cooperation can coexist and that a cooperative approach to planning, management and use of environmental resources can support trust, communication and interaction between (potential) adversaries and help transform threats. Environmental cooperation is seen as helping internalize norms, form regional identity and interests, operationalize routine international cooperation and marginalize the acceptance of the use of violence.

Despite the growing number of projects declaring the use of environmental cooperation as a conflict transformation instrument we believe that the conditions of its emergence and functioning in conflict-prone areas are not clear. There exist many analyses of particular cases, but we lack systematic analysis and research through the integrated analytical framework or testing particular hypotheses in more cases. This article offers the small-N-case study to test the genesis and functioning of environmental cooperation in areas of political militarized conflicts. It tests two hypotheses and looks for an answer for a question in three cases in East Asia. East Asia – with political militarized

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Thailand, Timor-Leste and Vietnam. For the demarcation of the region see for example the East Asian Peace program at Uppsala University. The program covers all of the listed countries as "East Asia".

conflict, high biodiversity and rapid environmental degradation seems to be perfect laboratory to test the idea.

Data for the research has been collected through the review of existing literature concerning environment, natural resources, conflict management and particular conflict, the analysis of governmental and non-governmental documents including web pages of various institutions and newspaper articles. Data concerning the intensity of conflicts has been derived from the Uppsala Conflict Data Program (UCDP/PRIO). In all cases the field research has been done. It has included semi-structured interviews with environmental journalists, NGOs, university and governmental representatives and direct observation (conferences, workshops and demonstrations). The field research has been carried out in Thailand and Cambodia (March 2012), in Taiwan (May – August 2012), and in South Korea (September 2013 and August 2014). The first part explains the selection of cases and introduces the causal mechanisms, which are tested in the case studies. The second part includes case studies, and the third part concludes the findings.

## 2 THE SELECTION OF CASES, AND HYPOTHESES AND QUESTION

For this article three political conflicts from East Asia have been selected, the criteria for which are: 1) went through various intensity stages including military violence defined as “minor military conflict” (see below), 2) have not yet been solved, 3) environmental cooperation began during the conflict and 4) the conflict parties were identifiable.

The political conflict is defined as “a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state.” Minor armed (political) conflict is defined as the clash, which “results in at least 25 battle-related deaths in a calendar year” (UCDP/PRIO Codebook 2016). The start date of the conflict is the date of the first battle-related death in the conflict (UCDP/PRIO Codebook 2016, 5). The following cases are researched (listed alphabetically):

- conflict between China and Taiwan, which started in 1949,
- conflict between South and North Korea, which started in 1949, and
- conflict between Thailand and Cambodia, which started in 1975.

Two hypotheses are tested and one question is asked to find out more about the origin and functioning of environmental cooperation in areas of political conflicts.

Hypothesis 1 (H1): *Environmental cooperation starts in the time, when the intensity of the conflict is low.*

The goal of the first hypothesis is to gain more information about the relationship between the intensity of conflict and environmental cooperation and spillover effect between environmental activities and politics. As mentioned, many scholars as well as practitioners believe (some of them rather hope) that cooperation in non-political issues can positively affect the political relations and support the peaceful management of the conflict. If we find out that the intensity of conflict decreased before the emergence of environmental cooperation, it would provide evidence that it is not the effect of environmental cooperation. The observable indicators are in this case the data from the UCDP

database about the intensity of the conflict in that particular calendar year compared with the environmental cooperation. We look for the evidence of environmental cooperation, analyse the context and investigate how intensive the violence has been in the time when the environmental cooperation emerged.

To bring the relationship between the intensity of the conflict and the emergence of environmental cooperation to light, both have to be defined. To classify the intensity of the conflict the UCDP methodology has been used. UCDP (UCDP/PRIO Codebook 2016, 5) defines explicitly two intensity levels – “minor armed conflict” and “war”. Implicitly UCDP uses three levels of intensity – conflict as such which is recorded in the database when the first battle-related death occurred, minor armed conflict and war. For the purpose of the present research the low intensity conflict is the situation, which did not reach the level of the minor armed conflict, i.e. in a given year there were less than 25 battle-related deaths.

Environmental cooperation is defined here as the situation when actors adjust their behaviour to actual or anticipated preferences of others in issues concerning environmental resources, their quality and sustainability (Keohane 1984). Environmental resources are such goods, which have a value of their own or have value for sustainable life of mankind at regional or global level. Environmental resources are hard to extract, loot and transport, they have a limited profit margin, they are not directly economically viable, they can't be traded and their quality is directly influenced by the behaviour of local actors. For example they can include high biodiversity; natural, historic-cultural, aesthetic, educational, research and monitoring value of the landscape; protection, anti-erosion, health-oriented and aesthetic function of vegetation; water and soil for local and regional climate and incidence of a pest; and regulative function of vegetation, water, and soil in biochemical cycles in the landscape.

Hypotheses 2 (H2): *Environmental cooperation in areas of political conflicts is initiated by external actors.*

The analyses of Conca and Dabelko (2002), Gasana (2010), Kramer (2008), UNEP (2003) and ITTO (2010) served as a base for the second hypothesis, which research the particular cases of environmental cooperation in conflict prone areas and which demonstrate that external actors play a special role when the environmental cooperation is developed in conflict-affected areas. We are interested to know if the presence of external actors is more a general phenomenon being presented also in areas of political conflicts. The observable indicator of H2 is the presence of external actors, who initiate governmental as well as non-governmental and formal as well as informal projects for environmental cooperation. In particular cases we will look for who initiated the project. We call these actors the instigators. The instigators are defined as those, who are the architects of an idea, are at the beginning of the particular process or establishing of a particular project, which assist in establishing and in the initial stage of implementing the projects. The external actors are all those who are understood to not be the conflict parties and do not come from the particular conflict countries; i.e. regional or international governmental organizations, international groups of experts, individuals such as scholars from universities or nature lovers, international expert NGOs or think tanks.

*Question 1 (Q1): How intensive is the environmental cooperation in the areas of political conflict, which went through the violent stage?*

We suppose that in political conflict where violence occurred there are no responsive conditions for the deepening of environmental cooperation even when the external support is strong and generous. Despite the fact that some authors believe that environmental politics as low politics bore the potential for the collective pursuit of common interest, other authors (Barnett 1991) proved that issues which had been understood as a part of low politics, can in particular context emerge as a part of high politics and as such are inapplicable to the area of cooperation. Trans-boundary environmental cooperation may be sensitive for particular actors, because they are aware of their authority. This shows that our existing knowledge about the potential and intensity of environmental cooperation is both diverse and limited. In each case it will be examined for how intensive the environmental cooperation has been, when it has reached the most intensive level and in what context.

To answer the question, the intensity of cooperation needs to be classified. We do not have any accepted methodology and thus we worked out our own scale. Our classification has been worked out on the base of Zbicz (1999), Metcalf (1994), and Mirumachi and Allan (2007). We differentiated four levels of intensity of cooperation: weak, moderate, high and full cooperation. The weak level rating is characterized by informal cooperation<sup>4</sup> carried out by NGOs and research specialists from universities and natural parks. The state and its bodies are not directly included in the cooperation, while the government tacitly agrees with the transfer of issues on non-governmental actors. At this level no joint projects emerge. Actors mainly exchange information, consult particular procedures and meet at conferences. Political representatives of conflicting parties unilaterally make declarations about environmental cooperation and state agencies of conflicting parties work on environmental protection independently from each other.

Moderate cooperation is the situation when the actors communicate regularly; at least twice a calendar year and governments participate formally or informally in negotiations. There arise joint governmental and non-governmental projects, joint NGOs, commissions and advisory groups with limited authority. The activities of those bodies include planning, advisement, monitoring, analyses and research of particular issues. Meetings of lower governmental representatives are organized, these meetings are non-binding.

The high level of cooperation has the formal style and is characterized by the institutionalization of cooperation, the existence of bilateral and multilateral commissions and joint panels and committees with the authority to create norms and supervise their observance. The projects of particular conflict parties are coordinated; there emerge conflict resolution mechanisms, norms regulating mutual relations and agreements about costs of cooperation. Full cooperation is a situation when there exists joint and fully integrated management of environmental resources and a joint executive body is created.

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<sup>4</sup> Informal cooperation is emerging spontaneously and is not based on a written agreement. Formal cooperation exists on the bases of a written agreement. An example of informal environmental cooperation is the so-called Picnic Table Talks between Israel and Jordanian which solved the conflict over Yarmouk water.



### 3 CASE STUDIES

In this chapter all hypotheses will be tested in particular cases. At the end of the chapter causal mechanisms observed in particular cases will be summed up in the chart (Chart 1).

#### 3.1 China and Taiwan

The relations between China and Taiwan are very complicated, despite the improvement in the last years and despite the fact that contemporary relations in the Taiwan Strait are probably the best since 1949. The first contact across the Strait concerning environmental cooperation started after the termination of Martial Law in Taiwan in 1987. The end of the 1980s was a period, when there were no violent clashes between Taiwan and China and the intensity of the conflict has been lower than a minor armed conflict (UCDP/PRIO Dataset 2016). The pioneers of environmental cooperation have been Chinese and Taiwanese universities, which at the end of 1987 organized a series of conferences concerning environmental protection of the Taiwan Strait.

The intensity of environmental cooperation across the Taiwan Strait has been growing since the beginning of the new Millennium; among other reasons for these changes have been the influence on the Chinese due to the preparation for the Olympic Games in 2008 and agreements concerning economic cooperation across the Taiwan Strait, so called ECFA (State Environmental Protection Administration PRC 2006; National Council for Sustainable Development 2003; Focus Taiwan 2010). The environmental cooperation across the Taiwan Strait includes periodical academic workshops, courses, and summer schools for university student, conferences and joint campaigns of NGOs. The projects relate to protection of soil and water resources, environmental friendly construction, environmental education, conservation of the seacoast and coral reefs, and environmental journalism (ISWC 2009; Gao 2009; Wilson Center 2017). The peak of environmental cooperation between Taiwan and China was represented by the establishment of a joint maritime nature park and a joint system of early warning in the case of an ecological accident in the Taiwan Strait (Focus Taiwan 2012; The China Post 2012). Despite Beijing and Taipei have declared the necessity to include environmental issues in the ECFA agreements, there is no progress in the issue (Rong-Chuan Wu 2012).

The analyses of actors engaged in environmental protection shows that the conservationist projects that are in China and Taiwan are initiated and supported by external actors such as ADB, EU, Greenpeace or by the US think tanks – but the cross-strait environmental cooperation is not supported directly. The external actors support Chinese or Taiwanese projects separately, or support regional projects (Rong-Chuan Wu 2012). The main reason for this approach is the political situation of Taiwan, which is – according to Beijing – a renegade province of Mainland China. Beijing thus refuses any project or cooperation, which may seem to help Taiwan to gain confirmation of its political independence (Turner and Wu 2001; Turner 2003; National Council for Sustainable Development 2003). Environmental cooperation between NGOs is slowed down by the particular position of environmental organizations in the Chinese political system and the fear of Taiwanese organizations about the connection between Chinese green groups to the Communist Party and State authorities (Tang and Zhan 2008; Tang and Tang 1997; Yang 2005).

In the case of Taiwan and China only H1 has been verified; environmental cooperation between China and Taiwan has emerged in the time of low intensity conflict. H2 has not been verified. Environmental cooperation between China and Taiwan is instigated and financed mainly by domestic actors; the external actors participate only exceptionally. Concerning the intensity of environmental cooperation, after 15 years it is moderate and informal.

### 3.2 North Korea and South Korea

The conflict on the Korean peninsula broke out after the Second World War. Despite the fact that the conflict has been going since 1953 and it has been never higher than a minor armed conflict and there have never been extensive clashes (UCDP/PRIO Dataset 2016), the relations between both Koreas have always stayed tense. The first suggestion of environmental cooperation between both Koreas emerged in the 1960s, but these suggestions originated from external actors and not one of the Koreas paid attention to the issue (Hocknell 1996). The milestone for the environmental cooperation on the Korean peninsula was in the beginning of the 1990s. In 1991 the North Korea joined the UN and in 1992 both Koreas took part in the Earth Summit. During the Summit both countries separately came up with a proposal, which they presented to the UN Secretary General and the UNEP director, to set up a nature reserve in the demilitarized zone (DMZ) (Hocknell 1996; Westing 2010; Kim 2001; Hayes and Cavazos 2013). Since 1993 both countries have been participating in regular regional meetings with higher environmental officials (NPEC 2013). In 1994 South Korea closed agreement with the UN to discuss the establishment of a UNESCO biosphere in the area of DMZ. Seoul tried to continue the negotiations in 1998 under its "Sunshine policy",<sup>5</sup> but Pyongyang refused any negotiations (Westing 2010). Progress was made in 2000 when both Koreas agreed to cooperate in fisheries and North Korea responded positively to the project of the trans-boundary nature reserve in the DMZ (Hayes 2010). In 2005 both countries agreed to establish the joint Inter-Korean Economic Cooperation Committee, which had on its agenda, among other things, environmental cooperation. In 2006 North Korea accepted the set of laws for environmental protection, which respected Seoul's requirements and framed the inter-Korean cooperation in the Kaesong economic zone. During the same year both countries, under strong international support, returned to the negotiations about the trans-boundary peace park in the DMZ and started negotiations about the joint marine peace park (Brady 2012). In 2007 Seoul and Pyongyang settled on an agreement to establish a joint fishery zone in the area of a disputed border area on the west maritime border and to establish a Special Peace and Cooperative Zone under special environmental protection in the West Sea (Nam et al 2007). They also created the joint committee for public health, medicine and environmental protection in Kaesong. Despite all the negotiations about the maritime peace park and the nature reserve in the DMZ have not been established yet.

Not only is environmental cooperation between both governments a given, but there are also projects on the non-governmental or semi-governmental level. The joint projects refer to environmental protection, reforestation or bird's migration and connect South Korean NGOs and research institutes with North Korean universities and state bodies (Brady 2012). But the environmental

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<sup>5</sup> The Sunshine policy was the approach of South Korea towards North Korea from 1998 until 2007. The aim of the policy was to make friendly gesture to Pyongyang; the policy resulted in greater political contact between the two States including brief meetings of family members separated by the Korean War or joint business projects such as special economic zones.

cooperation with the participation of non-governmental actors is complicated by administrative, judicial and political barriers (Oknim 2003).

The development of environmental cooperation regarding the Korean peninsula is strongly supported by external actors, despite their engagement with North Korea being very limited. The external actors instigate, and financially and organizationally, support the environmental cooperation between both Koreas and lobby Korea's political representatives as well as international organizations to negotiate new environmental projects for the Korean peninsula (Oknim 2003). The main supporters and donors are UNEP, UNESCO, environmental NGOs and groups of experts such as IUCN, BirdLife International, International Crane Foundation or Korea Peace Bioreserves System, Korean diasporas and engaged individuals and nature lovers such as A.H. Westing and T. Turner. International attention is paid especially to the trans-boundary peace parks in the DMZ and in the West Sea (Westing 2001; 2010).

In the case of North and South Korea both hypotheses have been verified. Environmental cooperation was set up in the time, when there were no violent clashes between both Koreas and the intensity of the conflict has been lower than a minor armed conflict (H1) and it would be difficult to develop without the support and assistance of external actors (H2). Despite the existence of inter-Korean joint committees there is no real joint environmental management and committees work as executive bodies dependent on the decision of the highest political representatives. Environmental cooperation between non-governmental actors goes slowly underway and is dependent on political and security barriers. Thus environmental cooperation between both Koreas can be described as weak (Q1).

### 3.3 Thailand and Cambodia

The conflict between Thailand and Cambodia broke out in 1975 as a border dispute. During next decades the relationship between both countries has been complicated by other issues including political and military interventions of neighbouring countries. Thai-Cambodian conflict has lasted for decades; it is considered non-violent and only from time to time there were limited escalations with occasional violent clashes. The disputes between both countries have been repeatedly heard before the International Court of Justice and ASEAN. The conflict escalated in 2008 when Cambodia asked UNESCO to list the Preah Vihear Temple – which is located in a disputed border area – as a UNESCO cultural heritage site. To get a portion of the financial profit from the increased tourism in the area both governments mobilized the domestic population and hostile demonstrations broke out in both countries (New Frontiers 2008). The violent clashes reached the intensity of a minor armed conflict in spring 2011 (UCDP/PRIODataset 2016). In 2012 with the assistance of the UN and ASEAN the intensity of the conflict decreased. But it is still not solved and the border dispute, which includes the Preah Vihear Temple, still brings tensions into the relationship between Thailand and Cambodia (BBC News Asia 2013).

The former Indochinese Region is an area not only with high number of various conflicts, but also the place with high biodiversity. At the same time it is an area, which faces very serious environmental degradation connected with overpopulation and industrialization (New Frontiers 2009a; New Frontiers 2009b; ITTO 2005a; ITTO 2005b). Despite this environmental degradation not being new to the region, the first steps toward cooperative environmental

protection have started in the middle of the 1990s. During this period the intensity of the conflict between Thailand and Cambodia was lower than a minor armed conflict (UCDP/PRIO Dataset 2016). One of the first deeds was the foundation of the Mekong River Commission in 1995. Mekong River Commission has been a follower of Mekong River Committee since the mid-1950s. The aim of the Committee was not environmental cooperation but solve technical issues such as dam construction. Its agenda included environmental protection and the coordination of environmental projects (Jacobs 1995; Wolf and Newton 2008). In 1995 the UNDP together with the UNEP and the WWF founded the Indochina Biodiversity Forum and initiated negotiations between Thailand, Cambodia and Laos about joint environmental protection of the border areas. Thailand and Cambodia resisted the initiative (Dillon and Wikramanayake 1997). The next step was made in 2000 when with the assistance of ITTO Thailand and Cambodia launched the project for biodiversity in the Pha Taem border area. Before the project started to run both countries ceased communication and stopped any activities on the project (Suiseeya 2012). Three years later under the pressure of the ITTO and the IUCN the project has been reopened (IUCN 2013). In 2006 Thailand and Cambodia established with the ADB's support the project of trans-border biodiversity conservation corridors. The project has been extended in 2011 until 2016 (New Frontiers 2006; South East Asia Tourism Monitor 2011). In 2007 both countries signed an agreement to cooperate in biodiversity conservation in the Emerald Triangle, the area on the border between Thailand, Cambodia and Laos. The cooperation in the Emerald Triangle partly continued after 2008 but because of the violent clashes during spring 2011 activities in the area ceased. In the second half of 2011, when the intensity of the violence decreased, smaller projects on the level of local authorities have been reopened on both sides of the Thai-Cambodian border (Suiseeya 2012; Gasana 2010; Supatn 2012; Hatsukano 2012).

Besides environmental cooperation on the governmental level, the non-governmental conservation activities also emerged during the 1990s. Under the international support the university cooperative network to save the wetlands and research biodiversity was established. The informal network had been formalized in 2002 (University Network for Wetland Research and Trainings in the Mekong Region n.d.). In 2009 NGOs from Thailand, Cambodia, Laos and Vietnam built the collation "Save the Mekong" to stop building dams and power plants on the Mekong River (New Frontiers 2006, 2008 and 2009). The coalition works with the support of Australian NGOs such as Oxfam or TEAR and international NGOs such as EarthAction (Oxfam Australia 2013). It is obvious that governmental as well as non-governmental environmental projects depend on external support. The role of the instigators, donors and supporters are played by the UN agencies, ADB, development agencies of the United States and Japan, expert agencies such as the ITTO and IUCN and NGOs (Gasana 2010; Suiseeya 2012; ITTO 2010; Dillon and Wikramanayake 1997; New Frontiers 2006).

In the case of Thailand and Cambodia both hypotheses were verified. Environmental cooperation had been launched when the intensity of the conflict was lower than that of a minor armed conflict (H1), and all projects depend on external support (H2). Concerning the intensity of cooperation, both governments avoid any joint or binding projects. Environmental cooperation develops among non-governmental actors and can be described as weak to moderate (Q1).

CHART 1: SUMMARY OF THE CASE STUDIES

	H1	H2	Q1
China/Taiwan	Verified	Not verified	Moderate
North/South Korea	Verified	Verified	Weak
Thailand/Cambodia	Verified	Verified	Weak to moderate

## 4 CONCLUSIONS

The idea that environmental cooperation in conflict-prone areas can build a bridge between conflict communities and assist with conflict transformation was born more than a decade ago. This idea resulted in projects, which have been implemented in the last years in conflict-prone regions. Despite the popularity of the idea and a number of existing projects, the knowledge about the emergence and operation of environmental cooperation in conflict-prone areas is very low. To fill the gap two hypotheses were tested and an answer for one question was looked for in three case studies from East Asia.

The first hypotheses (*Environmental cooperation starts in the time, when the intensity of the conflict is low*) has been confirmed in all cases. The results of the case studies show that political conflict and environmental cooperation can coexist, but in distinctive conditions. Environmental cooperation has begun in all the cases in the time when no violent clashes between conflict parties took place and the number of victims was relatively low (less than 25 battle related deaths). The case studies also obliquely showed that environmental cooperation is sensitive to the rise in the intensity of the violence; if the relationship between the conflict parties has worsened and the conflict intensity increased, the environmental cooperation was suspended or stopped. This finding is of course not surprising. But what is important is the finding from the analysis of the cases South Korea – North Korea and Thailand – Cambodia. These two cases demonstrated that non-political environmentally engaged actors such as ecological NGOs, groups of environmental experts, conservationists and agencies for environmental protection are less sensitive to the change in conflict intensity than the political agents, and they have been trying during the period of worsened political relations to maintain communication and immediately after the security situation was better to continue in the projects. In case of South Korea and North Korea non-political agents even had gotten over the difficult security situation and administrative-judicial barriers through meeting outside of the region. The case studies have indicated that the decline in conflict intensity is not the result of environmental cooperation. However, they also have indicated that if the environmental cooperation once started, it can resist the political conflict. The strongest limit of the environmental cooperation in conflict-affected areas is the level of violence and insecurity. We also found that in some cases, even when the insecurity was high, some environmental projects continued, but not as the cooperative activities; each party carried out the project separately. The problem is that in such mode no bridges and no trust between conflict communities may arise and the potential of environmental peace building is lost.

The second hypothesis (*Environmental cooperation in areas of political conflicts is initiated by external actors*) has been confirmed in two cases. The case studies indicate that environmental cooperation in areas of political conflict is very much dependent on external actors. They are instigators, negotiators and payers of projects and without their participation conflict parties would not



start the project and/or the project could not be carried out – it does not matter if the reasons for it are the lack of the money, lack of capacity or human resources, or lack of interest and enthusiasm. Environmental cooperation has in two cases been accompanied by a strong long-term engagement of third parties. When the external engagement declined, environmental cooperation started to crumble.

The hypotheses have been completed by a question about the intensity of environmental cooperation in conflict-prone areas. We have seen that environmental cooperation in areas of political conflicts has, despite the duration of the cooperation and the intensity of external support, remained weak to moderate; weak between the official parties and governmental bodies, a moderate level has been reached in cooperation between non-governmental actors on an informal level. The barrier for the growth of the intensity of environmental cooperation seems to be the distrust between conflict parties, non-stable political and security environment and administrative-judicial measures limiting communication (China – Taiwan, South Korea – North Korea). In cases of Thailand – Cambodia and China – Taiwan environmental cooperation stayed weak because environmental issues have become part of the high politics and strategic concerns.

Our findings indicate that to use environmental cooperation as an instrument of transformation and resolution of political conflict, which once experienced violence, is possible but the positive effects emerged rather among non-governmental and non-political agents and it is not clear which mechanism could help to spread the positive experience from environmental cooperation to politics. In other words, we do not know anything about the possibilities and mechanisms of spill-over effect: how the positive experience and trust, both won during the environmental cooperation, spread into the political issues, and how the positive experience and trust between those participating on environmental cooperation spill over among policy makers. Our findings showed that environmental cooperation could be a useful instrument of conflict transformation in political conflict which did not experience a violent phase and there are not any or a very low number of mental, political, administrative and security barriers to communication. The crucial point is the involvement of non-political domestic environmental actors, because these agents are in fact the long-term holders of environmental cooperation. But in East Asia at the domestic level, the role of the public and NGOs in environmental activities has been limited. The critical point for the operation and stabilization of environmental cooperation is the long-term involvement of external actors. The weakening of the external support, pressure and participation – mainly when the intensity of violence grows – leads to erosion and undermining of established cooperative ties.

Despite our research filled several gaps, some questions remained open. In the future, our interest should be oriented on questions about spill-over mechanisms – how the positive experience and trust won in the non-political issues areas may leap over into the political environment, how the trust and cooperative experience between agents engaged in the environmental cooperation may be shared with policy makers, and how to sustain the environmental cooperation when the external agents will leave.

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## DIRECT DEMOCRACY IN POLAND. BETWEEN DEMOCRATIC CENTRALISM AND CIVIC LOCALISM

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*One of the inherent elements of democracy is citizens' participation in public life. The most frequent ways of realization of political participation are universal elections and direct democracy institutions. The aim of this article is to compare the level of application of direct democracy mechanisms at the local and national level in Poland. The research was inspired by diverse institutional positions of direct democracy instruments in the Polish political system. The national ones are based on the Constitution of 1997, which gives them the status of high significance. But on the other hand, especially regarding formal conditions, it functionally limits their possible application. Local direct democracy institutions are normatively based on lower order acts (laws), which are much easier to amend. Hence, they are more adaptable to changing political and social conditions. The authors' research confirmed the thesis that the use of direct democracy mechanisms is more intensive at the local level. As a continuation of their research, the authors reflect on the determinants of this situation, making six hypotheses.*

**Key words:** direct democracy; referendum; legislative initiative; participatory budgeting; recall procedure.

### 1 INTRODUCTION

One of the inherent elements of democracy, being both its prerequisite and necessary condition, is citizens' participation in public life. If there is no universal political participation, the form of civil society is impaired, which eventually leads to weakening social loyalty to the whole political system (Lipset 1995, 231). The most frequent ways of realization of political

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participation are universal elections and direct democracy institutions. Due to the uncertain effect condition, both forms are regarded as the *sine qua non* of treating the political system in democratic categories (Przeworski 1991, 13). Even in the time of Athenian democracy, making decisions with the use of clay tablets or pebbles (called *psēphos*) led to citizens' participation in the decision-making process, granting it social legitimization, although it did not involve all the citizens but only authorized ones (Wohl 2015, 53).

The aim of this article is to compare the level of application of direct democracy mechanisms at the local and national level in Poland. The research was inspired by diverse institutional positions of direct democracy instruments in the Polish political system. The national ones are based on the Constitution of 1997, which gives them the status of high significance. But on the other hand, especially regarding formal conditions, it functionally limits their possible application. Local direct democracy institutions are normatively based on lower order acts (laws), which are much easier to amend. Hence, they are more adaptable to changing political and social conditions. Our thesis is that the use of direct democracy mechanisms is more intensive at the local level. From the psychological point of view, if citizens use the mechanisms of direct democracy available at the local level, they have the sense of influence on their closest environment. It is important from the perspective of the developing social responsibility for the common good. It is an integral element of civil society: individuals who collaborate, plan, and participate in making decisions that are important for them. Probably the effect of participation in decision-making at the local level is more tangible for citizens than in the case of national level decisions. Firstly, it concerns their vicinity, so they are able to better monitor the consequences of decisions they make. Secondly, the authorities initiating such processes are often well known to the residents, which may also generate a greater desire to engage in the processes. What is important, unlike in the national process, participation in making decisions at the local level is motivated by citizens' greater knowledge on the subject of voting, their greater experience, as well as interest in the results of the final decisions.

The reflection begins with a theoretical discussion of direct democracy mechanisms occurring in Poland. Then, we discuss the functioning of direct democracy mechanisms at both levels. In the conclusion, we make six hypotheses regarding the determinants of the situation we have diagnosed empirically.

## 2 MECHANISMS OF DIRECT DEMOCRACY

The contemporary direct democracy is not limited to universal participation in the making of socially relevant decisions. In the simplest approach, two forms of direct democracy can be identified: procedural and sovereign (Ulicka and Wojtaszczyk 2003, 174). The former case mainly involves the citizens' right to influence the authorities. Expressing their expectations and communicating with politicians, citizens can determine the character and form of the adopted solutions. The sovereign form of direct democracy involves the existence of instruments used to establish law or to directly affect the form of political institutions (Lijphart 1977, 176). The collective will expressed by the members of the community obliges the authorities to act with consideration of social preferences.

The scope of using direct democracy institutions as a form of making executive decisions alternative to decisions made by politicians is connected with references to the political system. Its specificity involves both normative and functional limitations. The most important ones are: (1) the availability of direct democracy instruments, (2) political tradition; (3) the form of political regime; (4) previous effects of their application; (5) the significance of the issues to decide about (Fiorino and Ricciuti 2007). Two least obvious references are worth pointing out in this inventory. The form of political regime shows that the issues of relationship between different types of authority (especially between the legislative and the executive) are important for the possible application of direct democracy instruments. In the case of a regime determined by strong competence of executive authority (e.g., the president or prime minister elected in a direct election, supported by a considerable parliamentary majority), direct decision-making may be preferred. The range of issues than can be settled using direct democracy procedures may result from the occurrence of relevant subject exemptions (Lupia and Matsusaka 2004, 463–482).

The inventory of direct democracy institutions is not finite. The development of democratic procedures and the community's self-government at various levels means that new, often innovative mechanisms of direct decision-making sometimes emerge (Matsusaka 2004, 157–177). The original classic ones, such as people's legislative initiative, a referendum, people's assembly, people's veto, a plebiscite or consultations, have recently been supplemented with the recall procedure and participatory budgeting (Toplak 2013, 31–33). In people's legislative initiative, which dates back to the ancient times, it is assumed that a group of citizens can move to change the law. A referendum is the form of making decisions by way of voting, in which the citizens vote for or against a certain solution. People's assembly is a form of making decisions at a specific location and time by all the authorized individuals. People's veto is a form of objection to an already adopted law or decision made by political authorities. A plebiscite is an institution similar to a referendum, but due to the subject (usually issues concerning a territory's belonging to a certain state or voting for or against the ruling authorities), it is weightier. Public consultations are a form of expressing public opinion, although authorities of another level make actual decisions concerning the subject. The *recall* procedure is an instrument of recalling individuals from public offices by way of vote (Musiał-Karg 2012, 32–45). Participatory budgeting is a mechanism of distributing financial resources on the basis of citizens' vote, as they express their preferences regarding the available goals (Sintomer, Herzberg and Röcke 2008, 164–178).

However, the application of direct democracy institutions is subject to certain rigors. According to Jack Haman, issues related to having power and putting an appropriate effort in political activity are a permanent limitation of the possible application of direct democracy procedures (Haman 2003, 60). In the case of representative democracy, two stages of decision-making occur. The general part of the problem to decide about, which is presented to all the voters, must have a simple structure so that an average citizen would be able to understand and analyse it. This assumption means that voters can choose e.g., to support a party or candidate in the election on the basis of the knowledge they have. Yet, the level of complexity of decisions to make is often much higher, so an average citizen may not be able to predict their consequences and may not understand the reasons for making them (Bingham Powell 1982, 2–4). In order for decisions made in this situation to be rational and effective, they need to be entrusted to representatives, who should have relevant resources to analyse the consequences of each potential solution. These resources are e.g., time needed for familiarizing oneself with the problem, effort put in its analysis, abilities

resulting from one's competence, and advisory base of political activists (Haman 2003, 60).

Another limitation that can affect the efficiency of direct democracy institutions is legitimization issues. Decisions made by way of referendum may not legitimize political decisions, in accordance with the principle of respecting arithmetic majority. In addition, they may contribute to deepening the divisions in the society and conflicts arising from them. Therefore, referenda in contemporary democracies are relatively rarely used as a decision-making mechanism, with two important exceptions. The first exception is Switzerland and its political system preferring the reference to citizens' will in decision-making (Hessami 2016, 270). The other exception is local referenda, which due to their subjects are often a convenient form of removing responsibility from the authorities and transferring it to all the citizens (Altman 2017, 1215).

Another argument against the use of direct democracy institutions is the character of decision-making process in democracy. It may not seem very relevant, because in social awareness the institutions of direct democracy have attributes of greater weight resulting from the engagement of a large group of citizens in the decision-making process, thanks to which they have social legitimization (e.g., adopting the constitution by way of referendum). On the other hand, however, they may contribute to generating divisions and social conflicts. Therefore, decisions of the parliament or president elected in a universal election, made in accordance with the procedure and with participation of different bodies (e.g., in the legislation process) may have greater social approval than they would have if they had been legitimized in a referendum, which would lead to deep social divisions (Wojtasik 2013, 26–27).

### 3 NATIONAL LEVEL

General research on Poles' opinion on direct democracy institutions show that political procedures should be based on these institutions to a greater extent (Tybuchowska-Hartlińska 2014, 120). These expectations were also reflected in the formation of a political party called Direct Democracy, which advocates the need of direct democracy basis for the principles of political system (Glajcar, Turska-Kawa and Wojtasik 2017, 64–68). The analysis of the actual state shows, however, that except for their unconventional forms (recall and participatory budgeting), direct democracy institutions are relatively rarely used. Poles still attach greater importance to universal elections and their effects (Wojtasik 2011, 213–215). The functional division into direct democracy and indirect democracy is based on the Constitution of Poland of 1997: Article 4 section 2 provides that: *"The Nation shall exercise such power directly or through their representatives."* In practice, institutions of direct democracy established in Polish law are: (1) nationwide referendum, which can be obligatory or optional; (2) legislative initiative for groups of at least 100 thousand citizens; (3) recalling a legislative or executive authority of a local government unit before the end of term by way of referendum; (4) residents of a local government unit expressing in a referendum their will concerning the way of solving problems concerning the community, within the responsibilities and power of the unit's authorities and in the case of important issues common for that community; (5) consultations with the residents of the local government unit, which may be obligatory or optional. Public consultations are a form of obtaining residents' opinion without binding effects; (6) legislative initiative of the members of the local government unit; (7) participatory budgeting.

Nationwide referendum experiences of citizens all over the country are not a motivational factor. In practice, after 1989, there have been only 5 nationwide referenda in Poland, two of which were obligatory (to confirm the Constitution and to give consent to the integration with the European Union). The others concerned universal enfranchisement of the citizens (1996), the ways of using state property (1996) and the ways of financing political parties and introduction of single-member electoral districts into the lower house of the parliament (2015). The participation threshold of more than a half of the citizens with the right to vote was only met in the case of the accession referendum (58.85%). In all the others, the voter turnout was significantly lower, and in the case of the 2015 referendum, it was only 7.8%. The relatively rare use of the institution of referendum at the national level results both from formal factors (complicated procedure of obtaining contest to conducting a referendum, the requirement of 50% voter turnout for the referendum to be valid, and the need to collect at least 500 thousand signatures supporting the motion for carrying it out) and political factors (politicians' reluctance to use forms of direct democracy as mechanisms limiting their power). It must be emphasized that political authorities initiated all the above-mentioned referendum initiatives, not by citizens themselves. Citizens' initiatives (with more than 500 thousand signatures of support) were overthrown in the lower house of the parliament, which must eventually agree to carry out each of them.

These factors mean that the nationwide referendum is not likely to be regarded as a useful instrument of direct democracy in Poland. Strong party dependence of politics has a negative impact on reference to citizens' will as the ultimate way of settling political disputes. Party leaders prefer instrumentalizing the decision-making process by building up the majority in the parliament. This way, they can be sure both of the final decision and the course of working it out. The limited possibility of creating new political leaders through referendum campaigns is also important in this case. The emergence of new leaders during a nationwide referendum would be more probable if the problem to decide about was a socially popular one and not yet tackled by politicians. In this case, social mobilization could lead to creating a new political leader and an environment around the leader as a competition for the existing political parties. In the Polish conditions, an example of such a referendum was the 2015 initiative concerning the introduction of single-member electoral districts into the Sejm. It was proposed by the social movement Kukiz'15 and the presidential candidate Paweł Kukiz. But the way of carrying out the referendum initiative by president Bronisław Komorowski made a large part of the citizens ignore the voting on the subject.

The non-regulatory form of direct democracy at the national level is people's legislative initiative. The Constitution of 1997 regulates the right to people's legislative initiative in Article 118 section 2, stipulating that: "The right to introduce legislation shall also belong to a group of at least 100,000 citizens having the right to vote in elections to the Sejm" Its non-regulatory character arises from two aspects. The first is the facultative character of further legislative procedure: the Sejm will decide whether the legislative initiative will actually lead to law establishment. The other one is the assumption that even if the people's legislative initiative is subject to legislative procedure, its ultimate effects depend on the Parliament. Apart from these limitations, there are also subject exemptions: a bill proposed by citizens may not refer to certain subjects. This applies to the areas the Constitution of the Republic of Poland reserves exclusively for other state bodies (e.g., adopting and changing the state's budget), to amending the Constitution, and to the powers of state bodies that

have been handed over to international organizations or international bodies. This last limitation results from the superiority of European laws, which cannot be changed by national acts. Thus, it excludes the performance of citizens' legislative initiative in this regard.

Since the adoption of the Constitution in 1997 (i.e., since allowing people's legislative initiatives in the present form) until 2015 (the end of the 7th term of the Sejm), 143 attempts of people's legislative initiative were made, 53 of which were successful in meeting the formal requirements and proceeding the legislative initiative. Generally, the bills submitted by citizens are not very effective. In the discussed period, only 11 bills submitted by citizens were actually adopted (seven of which were proceeded together with other bills submitted by other entities). This data shows the relatively low effectiveness of people's initiatives. The impression is even stronger if we compare their number with all the bills in the years 1997-2015. In that period, only 0.9% (53) out of all bills submitted by entities with the right to do so (5,897) were based on people's legislative initiative. On the other hand, the specificity of the Polish political system means that citizens' participation in the legislative procedure is occasional; other state bodies are a more natural addressee of the legislative initiative procedure (Rachwał 2016, 166–171).

#### 4 LOCAL LEVEL

The number of local governmental referenda in Poland, as well as people's interest in such referenda, are surprisingly low. Perhaps this originates in the sense that the mechanism is not very meaningful due to the lack of direct effect on the activities of the authority. They are usually used as part of the current policy, being the instrument of political competition. It is the same with the institution of legislative initiative of members of the local government unit. Political factors are to blame for using it so rarely: such motions are usually made by the opposition trying to achieve their political goals this way. As a result, although the bodies that are the addressees of these initiatives (councils of local government units) accept the motions (since they are legally obliged to do so), later they use procedural obstruction. In incidental cases, the authorities themselves use the procedure of legislative initiative. It happens whenever they need social legitimization of their activities, which they obtain by means of engaging citizens on their side. However, these are not really civil and bottom-up activities. They are rather a form of manipulation with the public opinion.

Social consultations are a more frequent local government level institution of direct democracy – in some cases they are simply required by law. This refers to procedures such as: (1) forming, combining, dividing, and abolishing local government units and determining their boundaries; granting a commune or a village the status of municipality and determining its boundaries; determining and changing names of communes and the seats of their authorities; (2) before adopting a resolution concerning the formation of a commune subunit on the initiative of an entity other than the residents; (3) before adopting the statute of a commune subunit; (4) before moving for the establishment of an additional name of a town in the language of a national or ethnic minority residing in that town; (5) determining, changing or abolishing the official names of towns, town districts, and physiographic objects. Optional consultations are usually organized in order to obtain social legitimization of planned activities.



The function of ensuring control of the authorities and enforcing political liability means that the logic of the electoral act may be reversed (the recall procedure). In the case of identifiable differences proving the local government specificity of performing them, there are no limitations on terms of office of rural commune heads and town mayors, and it is possible to apply the recall procedure in the form of referendum as an instrument of performing non-electoral enforcement of political liability. This latter factor refers to communal councils, town mayors, and rural commune heads. A study by Maciej Marmola shows that Poles would definitely like to extend the application of the recall procedure to other publicly elected offices (Marmola 2015, 115–116). On the other hand, however, the effectiveness of recall procedures so far has been relatively low: only on 82 out of 641 cases the representative authority was effectively recalled (Marmola 2014, 68–77). Rafał Glajcar (2010, 73–77) points to two tendencies in the practice of application of a recall referendum, noticeable after the restitution of the local government in 1990. The first is the stabilization of their number in each term of office, except the years 1998–2002, when there were nearly twice as many attempts to recall local government authorities as on average (196 vs 104). The other tendency is the growing effectiveness of this instrument, from 6.25% of all the recall referenda carried out in the 1990–1994 term to 17.28% in the 2006–2010 term. This may be connected with the departure from the rigid threshold of referendum validity (30%) in favour of a flexible threshold depending on the strength of mandate (three fifth of the voter turnout at the election of the body). Its real reduction could have had two effects: the psychological one and the mathematical one. As for the psychological one, it is easier for citizens to believe that they are able to generate in the recall procedure the voter turnout that will make it possible to actually recall the authorities. The mathematical effect is based on the comparison of two levels of voter turnout, the lower of which is required to recall the body.

Participatory budgeting is another institution of unconventional direct democracy (apart from the recall procedure) that is relatively often applied in Poland. It is noteworthy that it is a relatively new institution both in Poland and globally, established less than 30 years ago (Wampler 2010). The first town in Poland to apply participatory budgeting was Sopot in 2011. The very institution still arouses mixed feelings, especially among politicians. It results from fear of the loss of control of the budget, the belief that the councillors are about to lose the monopoly of making decisions concerning communes' budgets. On the other hand, the number of communes using this institution is dynamically growing. In 2015, it was as many as 80 local governments. Interestingly, the communes that do use it are both big cities (primarily including Warsaw, which spends the equivalent of over 10 million euros as part of participatory budgeting), and small communes where the budgets do not exceed the equivalent of 25 thousand euros. The clear success of participatory budgets in Polish communes seems to be a proof that citizens are more willing to engage in activities that give quick measurable effects (Wojtasik 2010, 158).

Declaratively, Poles express substantial interest in the mechanisms of direct democracy, perceiving them as a necessary support for political structures. The opportunities Poles have for engaging in the decision-making process at the local level, such as referendum or legislative initiative, have poor support. Perhaps it is determined by perceiving those mechanisms as the instruments of political competition, which occurs both at the local and the national level in Poland. Local consultations are organized slightly more often. It is mostly connected with the necessity to carry them out as part of certain procedures. Optional consultations, in turn, are usually carried out in order to obtain higher

social legitimization of the planned activities. Citizens are clearly becoming more and more interested and engaged in unconventional mechanisms of direct democracy, such as recall and participatory budgeting. For one thing, these mechanisms are easier to implement. In addition, from the psychological point of view they give citizens a greater sense of agency: they have more real effects, which the citizens can experience themselves.

## 5 CONCLUSIONS

The described results of using direct democracy institutions at the national and local level show a much higher potential in the latter case, which confirms the thesis made in the beginning. At the national level, no functional sources of the need to apply direct democracy have been found in democratic procedures. So far, in Poland, its application has been the result of normative obligation rather than the real need of listening to the *vox populi*. At the local level, to the contrary, we can see, not only more intensive use of its procedures, but also adding new institutions (participatory budgeting). Looking for the determinants of this situation, the authors make six hypotheses that determine further research.

### 5.1 Institutional barriers

The first hypothesis identifies the reasons for the diagnosed situation in the fact that national referendum or people's legislative initiative require much greater financial and organizational resources than do the instruments of direct democracy at the local level. In the analysed cases, the need of collecting a sufficient number of signatures (500,000 for the referendum and 100,000 for the legislative initiative) was often a formal barrier, which some initiatives were unable to overcome. We can speculate, then, that some of the emerging initiatives were not carried out when their organizers became aware of the formal obstacles they would have to face. On the other hand, these barriers are a kind of safety mechanism, which protects the institutions of direct democracy from social and political devaluation. The devaluation could have occurred if the number of submitted initiatives had exceeded the limits of political reason.

### 5.2 The monopolization of the political agenda

The other hypothesis is that the diagnosed situation is the result of a political factor, namely that political parties and their leaders are responsible for limiting the number of initiatives at the national level. Despite numerous great slogans and programme ideas, in practice they are not interested in limiting their power by letting other entities (including citizens) participate in the decision-making process. The monopolization of the political agenda allows to control political competition processes, and thus to achieve the assumed goals. Introducing the factor of uncertainty (bottom-up citizens' initiatives) into the presented system of relationships means that the predictability of effects expected by politicians may be considerably reduced. The context of political leadership is also an important determinant. New initiatives connected with nationwide referenda or legislative initiatives could be the factor of creating new political leaders, who might pose a threat to the functioning ones.

### 5.3 Psychological factor

The third hypothesis explains citizens' higher interest in local matters and the resulting higher potential of engagement in direct democracy initiatives at this level with reference to the psychological factor. An important element of this factor is the citizens' perception of how significant is the problem settled as part of direct democracy mechanisms. Local level problems are significantly closer to the citizens, more concrete and related to their responsibility for their proximity. What is more, this closeness means the voters have greater knowledge on the subject and are able to apply it in the decision making process. Local politics is an important sphere, connected with decisions that directly affect the functioning of the person in their place of residence. Citizens perceive such activity as more meaningful, because the initiative may refer to their closest environment, and hence, the quality of their lives. This will be a strong motivational factor, both for taking initiatives and for active participation in them. The greater sense of community involved in activity at the local level needs to be emphasized in the psychological factor. The citizens know each other and can exert stronger mutual influence by referring to common values and creating community goals.

### 5.4 Local identity

The fourth hypothesis involves a quantitative factor, which points to a much higher number of entities interested in creating their solutions at the local than the national level. Political activity at the local level is too greatly dependent on strong local identities, which are often institutionalized as local movements or associations. They integrate the local community by their activities, motivate them to participate in decision-making processes, and teach the people to take responsibility for their closest environment by encouraging them to participate in decision-making processes. It is often these communities that initiate the application of direct democracy mechanisms at the local level, since they can achieve their goals using those mechanisms. Well-developed local identity is the factor that strengthens the bonds with the entity (e.g., organization or association) that works to cultivate the residents' attachment to the location and regional identity. It is bound to give the sense of community and social representation. It is also a much more active initiator of direct democracy mechanisms as a collective entity with strong mutual support mechanisms and multiplied motivation force. To illustrate this difference, let us point out that the number of NGOs in Poland is more than 125 thousand, and the number of registered political parties is only 67 (as of 2017).

### 5.5 Historic factor

Lower interest in national level direct democracy institutions among the citizens may also result from the Polish history, which is the fifth hypothesis. Nearly fifty years of control by the Soviet Union, the lack of real political leadership and democratic rules may have led to the situation in which civic competencies have not developed well enough to allow the proper engagement in social matters (Wiatr 2018, 5–6). The processes of democratic socialization since 1989 may not have yet generated the necessary level of civic behaviours. Another historically significant aspect of the current form of civic engagement is the level of Poles' social integration. It may also be affected by the fact that the current territory of Poland is composed of lands that 100 years ago still belonged to the 3 powers of the time: Prussia, Russia, and Austria-Hungary.

Studies on political attitudes and voting behaviours show considerable differences overlapping with the boundaries of the occupants (Turska-Kawa and Wojtasik 2010, 11).

### 5.6 Specific structure of Polish religiosity

Our last hypothesis is the conjecture that the nature of religious structure may have an influence of Poles' engagement in social issues. However, it is hard to clearly define the direction of the influence, and this area definitely requires further research. It is important because Poland is a country with considerable religious homogeneity, where more than 90% of the community declare to be Catholics. It is a specific kind of religiosity (Turska-Kawa and Wojtasik 2017, 189–191), serving as a catalyst for citizens' activity. In research on social motivations, scholars do not agree as to the impact of religion. On the one hand, some hold the view that the religious factor is significant in motivating for activity (Putnam 2000; Musick and Wilson 2008, 279), that the sphere of religious axiology is related to social values (Leege 1993, 3–26; Harris 1994, 42–68) and that religious institutions serve socialization functions (Jones-Correa and Leal 2001, 751–770; Greenberg 2000, 377–394). The opposite view stresses the possibility of reducing the level of social activity by religious participation (Wuthenow 1999, 331–363), the competitive character of citizens' trust in their own religious group at the expense of the general social capital (Uslaner 2000, 569–590), or even religious activity reducing citizens' knowledge and social competencies (Scheufele, Nisbet and Brossard 2003, 300–324). Thus, we may make the thesis that due to the specific structure of Polish religiosity, the religious factor will have a strong impact, but it is hard to clearly determine the direction of this impact and its consequences for interest in local and national issues. The analyses may be directed by the fact that religiosity in Poland has the ludic character and by the lack of intensive laicization processes, unlike in many European countries (Burke 2009; Stawrowski 2004). The ludic character of religiosity means that it is dominated by non-liturgical practices. Popular religiosity involves anything that in classic theology was called paraliturgy or services. Such religiosity, although frequently considered to be immature, ensures the sense of meaning and helps form one's identity. In Poland, its fundamental features are the mass character (intensity of religious practices) and ceremonial character (observance of holidays and customs). Another expression of ludic religiosity is its close association with local customs and tradition of the region. It is not individual but is based on a specific community. This could also suggest focusing more activity on local than national issues.

The beginning of 2018 brought more changes in the normative situation of direct democracy institutions in Poland. The Act of 11 January 2018 on amending some laws so as to increase citizens' participation in the process of electing, functioning and control of some public bodies regulated that participatory budgeting would be mandatory in the biggest Polish cities (with powiat rights). The amount of the participatory budget will be at least 0.5% of the expenditure presented in the latest submitted report of budget performance. Some changes were also introduced in legislative initiative in local governments. In a commune up to 5 thousand residents, at least 100 persons can submit a legislative initiative, in a commune up to 20 thousand residents at least 200, and in a commune over 20 thousand residents at least 300. In the case of a powiat up to 100 thousand residents, the minimum of 300 persons have the legislative initiative, and in a powiat over 100 thousand residents, 500. In a province, this right is granted to a group of at least 1 thousand residents.

These regulations give more empowerment to the residents in relation to legislative and executive authorities in communes. They also extend the scope of local government legislative initiative to all the levels of local government.

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## DECLINE OF DEMOCRACY IN THE ECE AND THE CORE-PERIPHERY DIVIDE: RULE OF LAW CONFLICTS OF POLAND AND HUNGARY WITH THE EU

Attila ÁGH<sup>1</sup>

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*After the global crisis the Core-Periphery Divide has deepened in the EU between the most developed Core countries and the East-Central European (ECE) countries that has been most manifest in the violations of rule of law (RL) by Poland and Hungary. This process of confrontation with the EU rules and values has been termed in the paper as De-Europeanization that has been analysed in its historical trajectory from the “Copenhagen Dilemma” to the “Juncker Paradox”, as both of them have encouraged the ECE autocratic regimes by their neglectence. Namely, the paper argues first that the Copenhagen criteria have not been well prepared for regulating the accession of the New Member States (NMS), since the EU has not elaborated a proper facilitating mechanism for the sustainable Europeanization of NMS. Therefore, the Copenhagen Dilemma has emerged in the EU, which means that after the accession the EU has not had the legal tools to correct the divergence from democracy in NMS. The legal toolkits – the infringement process and the Article 7 procedure – have not been effective to enforce RL in ECE, as the increasing conflicts with Poland and Hungary have demonstrated. Moreover, for second, due to the “polycrisis”, the Juncker Commission has focused on the priorities of the Core and it has neglected these violations of EU rules and values. This neglectence and inaction has been counterproductive because it has increased the RL conflicts and has given manoeuvring room for the hard populist ECE regimes that has been described in this paper as the Juncker Paradox. The main reason for the ECE divergence from the EU mainstream has been their failure in the catching up process to produce competitive economy and sustainable democracy. In order to achieve this stage both the EU needs to reconstruct its legal toolkits as part of its new integration strategy and the ECE states have to overcome their*

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*current socio-political crisis that has produced these hard populist regimes.*

**Key words:** rule of law violations; infringement process; Article 7 procedure; systemic failure; EU polycrisis.

## 1 INTRODUCTION: THE ECE REGION AS A “BLIND SPOT” FOR THE EU CORE

The EU has regained its self-confidence after the global crisis, formulated manifestly by Angela Merkel (2017) that Europe “must take its fate into its own hands” and “we have to fight for our own destiny”. At the same time, after the global crisis the EU has been split by the Core-Periphery Divide deeper than never before with the increasing De-Europeanization at the Eastern periphery, due to the deep impact of the global crisis on the ECE states and the series of new conflicts they have recently developed with the EU during the refugee crisis. It has become obvious that the specific problems of the EU region have not been realized by the EU Core in general and the EU leadership in particular that can be termed as a “Blind Spot” in the East.

Consequently, although the Core-Periphery Divide has to be analysed also from the “formal” side as the rule of law (RL) procedures against these states that have been unprecedented in the EU, but this process should not be discussed as merely legal issue. It has to be analysed in the context of its “content” side as the failure of the catching up process of ECE states with the erosion of the global competitiveness and good governance, or the democratic performance in general in ECE. Therefore, this paper deals with the rule of law framework (RoLF) elaborated by the Commission, and with the democracy, rule of law and fundamental rights (DRF) issues discussed by the European Parliament against the background of the entire historical development of ECE within the EU.

The radical changes in ECE necessitate a radical reconceptualization, since new analytical devices needed to theorize the new conflicts between the Core and Periphery. In my view there are three steps of analysis to discover the divergence of ECE states from the EU mainstream developments: (1) the absolute “civilizational” (socio-economic and cultural) deficit before the accession and the emerging relative institutional deficit after the accession, (2) the growing gap between the formal-legal External Europeanization and the substantive Internal Europeanization, (3) the concluding De-Europeanization with De-Democratization. This present stage of deconsolidation/disintegration in ECE has been dealt with in this paper from the side of RoLF through the history of the violations of the EU rules and values in ECE and in the systemic approach of DRF issues. The distinction between the absolute (historical) and relative (EU-related) deficit, and the ensuing distinction between the External and Internal Europeanization was neglected for a long time in the European Studies, hence the present situation of the deep conflict has come as a surprise for the EU institutions because of their optimistic and evolutionary approach.<sup>2</sup>

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<sup>2</sup> This paper continues my analysis of the recent ECE developments from the former papers (Ágh 2016, 2017a, 2017b and 2018b), in which I have discussed the decline of democracy and the megatrend of the authoritarian revival in ECE based on the large international literature, so

First, as to the contrast between the absolute and relative deficit, it is important to note for the point of departure that the ECE states were excluded from the Western developments by the Yalta Agreement, and altogether at the start of democratization they had a serious socio-economic, institutional and cultural deficit. This historical heritage is an “absolute” deficit that has significantly been increased by the accession with the “relative” deficit, generated by the new challenges of the EU membership. This cumulative absolute and relative deficit together has predetermined the historical trajectory of ECE in the last decades to a great extent. Sztompka (2000) has noted that the ECE populations felt “triumph” in the process of “Returning to Europe”, at the same time worried about the missing competitiveness, since they perceived to be “incompetent” in the incoming Westernized world. Therefore the transfer of the Western formal-legal institutions as well as the “EU architecture” should have been handled with more care than has been the case in the official EU documents and the related expert analyses.

Second, the ensuing divergence between the External and Internal Europeanization can be explained by the “judicial integration”. Fritz Scharpf (2015) argues that it has actually been the bypass of integration through law in the EU. The failure of the EU’s transformation power – or at least its limits – has been caused by the dominantly formal-legal character of Europeanization and Democratization, without considering its economic, political and social context. The contrast and deep tension of the External and Internal Europeanization as a shallow versus deep integration goes through the entire history of the ECE political system as a whole. The External Europeanization has only scratched the surface in the ECE countries and finally it has turned into De-Europeanization.

Third, outlining the “conditionalities” of accession, the EU did not elaborate any Road Map as special strategy for the Europeanization of the ECE that has contributed to De-Europeanization and De-Democratization. The Copenhagen criteria have set some general requirements of the entry on democracy and competitiveness, vaguely indicating the need for capacity of membership, but without any effort to design the facilitating devices for the Europeanization-Democratization in the catching up process, that were not elaborated even in the accession process. In the sharpest way it has been formulated by the “Copenhagen Dilemma” in the EU that means losing the capacity of influencing the ECE developments after the accession. But it has also gained the meaning of supporting the populist ECE regimes through EU transfers despite their blatant violations of the rule of law system. Nonetheless, it has not led to the rethinking of the ECE catching up process in the EU as deleting the “Blind Spot”.<sup>3</sup>

All in all, the EU has not prepared a special strategy for the Europeanization of the ECE. In the Copenhagen criteria no special procedure was elaborated to control the legal aspects of Eastern accession. The Copenhagen criteria have set some general requirements of the entry on democracy and competitiveness, vaguely indicating the need for capacity of membership, but without any effort to offer the proper devices for the Europeanization-Democratization in the accession process, hence the topic of “Copenhagen Revisited” has come back forcefully in the 2010s (Nicolaidis and Kleinfeld 2012). In the sharpest way it

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here I do not go into this topic in detail. Actually, this paper further develops my concept of the contrast between the External and Internal Europeanization (Ágh 2018a).

<sup>3</sup> The EU Justice Commissioner Viviane Reding initiated and organized the RoLF process and raised the issue of Copenhagen Dilemma (see Bertelsmann Foundation 2017).

has been formulated by the “Copenhagen Dilemma” in the EU, meaning that the EU has also lost the capacity of influencing the ECE developments after the accession. Accordingly, although the European Studies literature was optimistic before the accession, it has turned much more pessimistic in the 2010s. As Blokker (2013, 2) has noted, by focusing on the formal institutions related to the rule of law, the EU has neglected the “sociological-substantive dimension to the building of constitutional democracy”, therefore they have considered the creation of the formal institutional façade enough for the maintenance of sustainable democracy.

## 2 THE EU LEGAL TOOLKITS AGAINST THE NON-COMPLIANCE IN THE RL MATTERS

The EU has developed two toolkits to cope with non-compliance within the EU: the infringement process and the “Article 7” procedure. Both have been designed as a long, multi-stage process, a dialogue between the EU institutions and the government concerned, presupposing the interest and willingness of this government to correct this issue and to comply with the EU rules and values. A brief summary about these toolkits has been attached to all EU documents concerned. In the EU both toolkits involve four basic EU institutions: the European Council, Council of the European Union, European Commission and European Parliament. But, given the fact that the European Council decides only about the strategic directions, there are three major players in the RL debates. The three main players, however, have diverging structural interests, different mentality and working capacity, hence the history of these toolkits’ applications consists of the series of deep conflicts between the Council, Commission and EP.

First, many experts argue that the infringement process is a routine procedure to regulate the violation of the EU rules/formalities. This is by far not a perfect legal procedure to correct the non-compliance with the EU rules, since it is too complicated and it takes a long time, it is still considered more or less as a working solution. For the EU this procedure has been mostly meant for the “technical” reason keeping the compliance with the EU law in order, first of all in the Single Market related issues, showing some signs of “technocratic fetishism” (only the “market” matters). Actually, the infringement process has not been a real success story in the EU, since its results have been controversial many times, leading to deep conflicts beyond the “technicalities”, but it has been kept for a want of better. The infringement procedure is just relative effective because it may be used in the cases directly regulated by the EU law. On the side of the countries concerned this process presupposes that governments - masterminding this systemic failure - would be ready and happy to engage in a friendly dialogue with the Commission to make the necessary corrections. Although in the hundreds of the “neutral” – basically economic - policies the infringement process has been more or less working, this missing dialogue predetermines the failure of these procedures in other matters as the Polish and Hungarian cases have shown.<sup>4</sup>

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<sup>4</sup> The Commission’s infringement powers have been laid down in Articles 258–260 of TFEU. The entire documentation of RL debates since 2010 can be followed in Euractiv (2017a), including the large numbers of infringement proceedings in the EU at the end of 2016. About the recent discussions of the infringement process see Sarsfield (2010).

The second legal tool has proved to be even less helpful. It is the so called “nuclear option” in the Art. 7 procedure of TEU about the suspension of voting rights in the case of serious violations of the EU rules and values. The legal analysis of the RL debates has demonstrated already that the Art. 7 proceeding could not give any solution for the blatant violations of the European values summarized in the Art. 2 of TEU. No doubt, that this Art. 7 procedure is only a warning and it has more of a symbolical than pragmatic role because the EU has not been prepared for these extreme cases in the ECE authoritarian systems. Otherwise, many member states feel that they should oppose any steps in its application, since in some respects they may also be concerned. The veto right by one member state against this procedure in the final stage demands so tough consent of all member states that it actually excludes its application and reduces it to the symbolical action. The basic mistake by designing of the Art. 7 procedure has been considering that the RL violations are isolated or separated cases, which neglects the strong connections between/among the basic European values enlisted in the Art. 2. In fact, what seems to be the violation of a particular EU value that violates the the EU value system as a whole, since the given value has been deeply interwoven with the other values.<sup>5</sup>

The RL discussions were necessitated to a great extent by the violations of the EU rules and values by the Orbán government in the early 2010s, but before analysing the Hungarian and Polish cases it is necessary to outline the general development of the RL issue in the EU. The first turning point came when President Barroso in his Union Address (The State of the Union, 12 September 2012) introduced the term of “systemic failure”, already referring to the Hungarian case. By 2013 all the three major EU actors entered the scene with their diverging roles.

First of all, the EP was activated as the “Guardian of Democracy” in the process leading to the Tavares Report. In 2013, due to cumulated problems and difficulties, the EP discovered and announced that some member states regularly violated the rules and values of the EU. The EU realized that the RL violations that appeared on the surface in ECE – above all in Hungary by the Orbán government - were just the signs of the much deeper political failures of democracy decline with its systemic features, even beyond the ECE region. The Tavares Report was passed by the European Parliament on 3 July 2013 with a large majority, and it asked for organizing a “Copenhagen Commission” in an all-European context. The Report requested “the establishment of a new mechanism to ensure compliance by all Member States with the common values enshrined in Article 2 TEU” (EP 2013, 15). The Tavares Report opened the public debate and led to the request for the systemic overview of rule of law, democracy and fundamental rights in all member states.

The Commission - the Guardian of Treaties – became the chief actor in the RL matters, producing an important decision by March 2014. The European Commission has established a New Framework to strengthen the Rule of Law in the EU, since the “recent events in some Member States demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter

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<sup>5</sup> Art. 2 of TEU: “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”



of serious concern. (...) there is a systemic threat to the rule of law and, hence, to the functioning of the EU". Whereas the infringement procedures are triggered "by individual breaches of fundamental rights", the New Framework has been designed to address "threats to the rule of law (...) of a systemic nature" (EC 2014, 2–7). Accordingly, the basic document, the Commission Communication on 11 March 2014 presented a legal innovation with a new comprehensive concept, formulated in the terms of "systemic failure" of, or "systemic threat" to RL. It has offered a "framework" to counter it as the Rule of Law Framework (RoLF):

"Today the European Commission adopted a new framework for addressing systemic threats to the rule of law in any of the EU's 28 Member States. (...) there is a need to develop a tool to deal at the EU level with systemic threats to the rule of law. The new rule of law framework will be complimentary to infringement procedures – when EU law has been breached – and to the so-called 'Article 7 procedure' of the Lisbon Treaty which, at its most severe, allows for the suspension of voting rights in case of a 'serious and persistent breach' of EU values by a Member State. (...) The new framework does not constitute or claim new competences for the Commission but makes transparent how the Commission exercises its role under the Treaties." (EC 2014, 1). Furthermore, "The framework can be activated in situations where there is a systemic breakdown which adversely affects the integrity, stability and proper functioning of the institutions and mechanisms established at national level to secure the rule of law. The EU framework is not designed to deal with individual situations of isolated cases of breaches of fundamental rights or miscarriages of justice." (EC 2014, 2).<sup>6</sup>

The Commission has introduced a holistic approach, considering the "systemic threat" to Europeanization as the serious violation of the rules and values of the EU. It has pointed out that the Art. 2 is in fact a coherent system of several values defining the European democracy in its entirety. Therefore a "bridge" has needed between the two procedures in the form of Rule of Law Initiative producing the Rule of Law Framework (RoLF): "The EU witnessing these systemic problems of rule of law, human rights and democracy has realised that the present tools at its service are limited. The infringement procedure and the nuclear option of Article 7 of the Treaty of the European Union (TEU) are not sufficient to tackle such issues. Acknowledging that a bridge should be made between these two procedures the idea of a FR protection mechanism was born, which resulted in the so-called 'Rule of Law Framework' (RoLF)" (Szalai 2014, 1; FR – fundamental rights).

Despite this innovation in 2014, these toolkits have usually been qualified by the experts as "light touch mechanisms". As Kochenov and Pech (2015, 1) explain, "Both procedures suffer indeed from a number of procedural and substantive shortcomings, with the consequence that Article 7 TEU has never been triggered whereas the Commission's infringement powers have proved ineffective to remedy systemic violations of EU values." In fact, the RoLF "takes the form of an early warning mechanism to enable the Commission to enter into a structured dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law preceding the eventual

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<sup>6</sup> On the preparation of this EU document see Butler (2013), Euractiv (2014), Polakiewicz and Sandvig (2015), and also Szalai-Krausz (2014) on the CoE side. The Bingham Centre for the Rule of Law (2013; 2015) was very active, e.g. it organized a big international conference after the EP resolution on the "Situation in Hungary on 10 June 2015.

triggering of Article 7 TEU. This ‘pre-Article 7’ mechanism does not exclude a parallel recourse to the infringement procedure.” They argue that the new framework has two big problems. First, they point out that the presumption is highly questionable that the “suspected” member state is willing to engage in the dialogue and therefore this process is bound to produce positive result, since in those countries where the ruling elites have made a conscious choice not to comply with EU rules, engaging in a dialogue is unlikely to be fruitful. Second, as they note, the Council’s Legal Service criticized the Commission for overstepping its powers. It is disappointing but understandable, given the reported unease of some governments, mainly the British, with the new regulation “undermining the role of member states within the Council”. No wonder that the main criticism originated from those governments, in which the rule of law records are rather poor. Finally, Kochenov and Pech conclude (2015, 3) that although the legal procedures have been designed addressing to threats to the EU rules and values summarized in Art. 2 of TEU, it has still remained a process that represent “the triumph of empty rhetoric over genuine action”.

All in all, this Commission Communication (EC 2014) has opened the way to the political innovation in the RoLF. With all shortcomings it was innovative and it offered a good start, but it was still too little and too late, still it was too much and too early for the Council. Even earlier when four member states demanded to put the RL issue high on the agenda, the Council discussed the issue as a brief note indicated: “The Council took note of an initiative by Denmark, Finland, Germany and the Netherlands for a new and more effective mechanism to safeguard fundamental values in member states and had a comprehensive discussion on the subject.” (CoE 2013, 8). Despite the efforts and initiatives of the four member states, the Council tried to marginalize this issue in the EU, and finally the Council opposed the Commission’s initiative. The internal tensions between the EU institutions can be best seen on the role of the Council. Whereas in the mid-2010s the Commission and EP played an active role of innovating, promoting and applying the RoLF procedures, the Council torpedoed them, or at least delaying and delegitimizing them referring to the member states’ competences, and turning RoLF into a bugaboo threatening the “national sovereignty”. It may be paralleled with the overall British efforts emphasizing “the Common Market only” and “leave us alone” in all other matters concerning the legal-political system. UK played a major role of opposing any meaningful decision, supported by some other member states in the Council, with an effort creating manoeuvring room in domestic politics in the spirit of Europe of Nations. This negative reaction of the Council to the innovative steps of Commission appeared already in 2014 and it has gone through the RoLF history in the last years (CoE 2014; CoE 2016).<sup>7</sup>

The innovative step of Barroso Commission, however, was not continued by the new Juncker Commission that has focused on the crisis management in the Core by marginalizing all other issues, including RoLF. Nevertheless, the RoLF process was continued by the European Parliament as the only remaining actor in this field. Actually, when after 2014 the new Commission was too busy with the “home affairs”, the EP became the chief actor instead of Commission in the RL debate. The EP still remembered the Copenhagen Dilemma and realised the dangers of the structural neglectance of the RL violations for the EU. Above all,

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<sup>7</sup> The behaviour of the Council after the 2014 Communication of Commission has been sharply criticized by the international experts, see Kochenov and Pech (2015) and Polakiewicz and Sandvig (2015).

the developments in 2014-2015 clearly demonstrated that the Commission's presumption about starting "a dialogue" with the infringement process was a failure. Systematically demolishing the liberal democracy, the Orbán government was not ready to any meaningful dialogue and went further following its masterplan, while on the partial and concrete issues involved into the infringement procedures made some compromises. The RL situation worsened significantly with the entry of PiS government in Poland, therefore the EP made a very important initiative on 23 October 2016 with its resolution on "EU mechanism on democracy, the rule of law and fundamental rights" as a recommendation to the Commission to establish a new "mechanism" further developing RoLF. In fact, the ambition of EP was much bigger, which meant actually a milestone in the EU history: the EP suggested the "European Union Pact on Democracy, the Rule of Law and Fundamental Rights", which also includes "systemic infringement", bundling several infringement cases together. This DRF Pact would monitor and regulate the decent behaviour of all member states with "objective benchmarks" according to the Art. 2 of the EU, with rules and values by incorporating all regulations "into a single Union instrument" (EP 2016c).

On the organization side, the EP wanted to involve the representatives of all EU institutions and the national parliaments into the new mechanism through preparing the Annual DRF Report with country-specific recommendations. The Annual Reports would be discussed by the annual inter-parliamentary debates, making arrangements for remedying possible risks and breaches that would unleash a DRF policy cycle within the EU institutions. This brave idea is indeed a turning point in the EU strategic thinking, for the first time totally overstepping the limitations of an "economic" community towards a socio-political community of democratic states. The monitoring or X-raying the complete socio-political life of member states, and the EU as such, would introduce a new era of the EU development.<sup>8</sup>

Thus, the marginalization of the new crisis phenomena in the "East" made the situation much worse with the entry of the new Commission. The violations of EU rules and values actually turned into a frozen conflict in the best case. Juncker has wanted to avoid losing time and energy by dealing with conflict management in the "East" in order to focus on the priorities of the Core (EP 2017b). This conflict avoidance or inaction by the Juncker Commission in the ECE case has been counterproductive and it has backfired that I call the "Juncker Paradox". The conflicts in the RL debates have deepened, since the autocratic and populist elites have been encouraged by the missing EU reactions to their open violations of the EU rules and values. The Juncker Commission has not realized that the ECE populations have been seriously hit by the global crisis and they have perceived the refugee crisis as a real threat, so the ECE region has remained a "Blind Spot" for the EU Core.

In fact, after the long and painful crisis management of the global fiscal crisis it has become crystal clear for the ECE states that the "convergence dream" (Darvas 2014) has not come true. The high expectations have evaporated, the resentment of the large masses has been running high in the region, although there has been a modest development in quantitative, GDP terms. However, the gap has increased between the Core and Periphery in qualitative terms of the new, "innovation driven" economy, since the ECE states have cut those

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<sup>8</sup> About the EP documents on the RL matters see "the legislative train schedule" (EP 2017a). The approach of the Council of Europe has been summarized in CoE (2017).

resources in R&D and (higher) education that would have been necessary to establish these new economy “beyond the GDP”. This situation has made obvious those structural problems coming from the lack of special catching up program in the Copenhagen criteria and in the entire accession process. The special Roadmap for the deep integration cannot be substituted by the magic of the formal-legal “judicial integration”. These structural problems of the socio-economic “content” have erupted after the global crisis and they have unleashed a vicious circle in confronting the Art. 2 of TEU. The inherent controversies in ECE have come to the surface by violating even the legal formalities of the EU, first of all in Poland and Hungary, but in various ways in all ECE countries.

Presenting its DRF resolution, the EP asked the Commission to formulate a proposal by September 2017 for the DRF Pact in the form of inter-institutional agreement for aligning and implementing existing mechanisms (EP 2016c). The Commission, however, due to its continued conflict avoiding behaviour, refused this magnificent initiative in its answer on 17 February 2017 with those political arguments, known from the former reactions of the Council. This refusal has been evaluated by the experts as the Commission’s decision for “Less EU” (Bárd and Carrera 2017). The authors have concluded that the permanent neglectance of the RL violations by the Commission may generate a deep legitimacy crisis in the EU. Nowadays a turning point can be expected in the EU, but before outlining the present situation a short overview is needed on the historical trajectory of the Hungarian and Polish developments from the Copenhagen Dilemma to the Juncker Paradox.

### 3 THE HUNGARIAN AND POLISH RL DEBATES: A SHORT OVERVIEW

#### 3.1 The “freedom fight” of the Orbán government against “Brussels”

Hungary was the chief culprit, therefore this first phase of the serious RL violations can be best described following the Hungarian case. The ECE story of the deepening conflicts with the EU in the RL matters began in 2010 when the Hungarian constitutional-legal situation changed drastically after the entry of the Orbán government (EC 2013). In fact, until the late 2015 Hungary was in the focus of the RL debates and mostly the Orbán government provoked the RL debate. However, the violations of the democratic principles and betrayal of European values were clear not only at the EU, but also at national level, since the Orbán government often violated also its own constitutional principles laid down in the Fundamental Law in 2011. The Hungarian case with the Orbán government in the early 2010s was exemplary: the government deliberately elaborated a masterplan consisting of three major steps to diverge from the EU rules and values and to confront them. The government had no intention at all to have a meaningful dialogue in order to comply with them, instead in a fake dialogue it just tested the tolerance of the EU. All international legal institutions condemned the steps of Orbán government in the early 2010s, nonetheless the EU tolerated this grotesque and openly declared “freedom fight” of the Orbán government against the EU, mentioned by them as “Brussels” with a reference to “Moscow”.<sup>9</sup>

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<sup>9</sup> The blatant violations of the EU rules and values as the divergence of Hungary from the democratic mainstream during the second Orbán government were first seriously discussed in the Tavares Report that unleashed a learning process in EP (EP 2013). On the Hungarian case Scheppele has written a series of papers, starting from Scheppele (2013).

The Orbán government has acted systematically, it has elaborated a “masterplan” of demolishing this European democratic order, as a De-Europeanization step by step, and this model has been copied in Poland after 2015. In this three-stage model (1) the state machinery, (2) judiciary and intermediary institutions, (3) depolitization of society and restricting civil society have been the main targets. The first step of the masterplan is the full control of state machinery. In this period the erosion of the “triple powers” or the “checks and balances” system took place in the spirit of the “majoritarian democracy” as “the winner takes all”. It was accompanied from the very beginning by the increasing government colonization of the media, and reaching almost the full conquer of the communicative space by the mid-2010s. The parliamentary majority extended its control to the independent institutions safeguarding the democracy and restricted the competences of the basic institutions like the Constitutional Court and State Audit Office. With a completely elaborated takeover strategy, the Orbán government managed to capture the state machinery, based on party loyalty from the public administration to secret services. This one-party control of the state meant unrestricted power of the ruling party, as the tyranny of the parliamentary majority. In the voluntarist legislative moves the government changed the laws and rules within days and without any consultation with the experts and the stakeholders.

The second step was an invasion against the judiciary, control over the Supreme Court and the Chief Public Prosecutor’s Office by their re-legislations and, as a result of the new institutional arrangements, by conquering their leading positions for the political appointees. This moves triggered the first series of infringement processes against the Orbán government. The new Fundamental Law with its nationalist rhetoric and dubious democratic engagement already stirred debates, and even more it was accompanied later by three clear cases of breaches of the EU law: (1) the retiring age of judges was reduced from one day to another in order to dismiss the independent judges and to appoint loyal ones in the leading positions, (2) the data protection ombudsman and the president of Supreme Court was removed from office and the entire structure of judiciary was reorganized (3) in the Constitutional Court and National Bank also personal changes were made, at the same time seriously restricting the CC competences.

As the first step of the infringement proceedings with the tough RL debates between the EU and the Orbán government on 17 January 2012 the Commission sent three “letters of formal notice” on the related issues. A long debate started between the Commission and the Hungarian government also on the new media law and the Media Authority, full with political appointees. All in all, after a very long time the Hungarian government made some small concessions in these cases, but basically it succeeded in consolidating these radical anti-democratic changes. Even these small concessions lost their functions, for instance the correction in the retiring age of chief judges came late when those concerned were already out of office and their places were filled by political appointees.

The basic divergence of Hungary from the democratic mainstream in the Orbán government was formulated already by the Tavares Report in 2013. The EP resolution on 10 June 2015 on the “Situation in Hungary” (EP 2015) – followed by the similar Reports year by year (see recently EP 2017c) - gave already a long list of the Hungarian government’s conflict with the EU laws and authorities. In fact, during the third Orbán government after 2014 there has been a constant flow of “law crisis” as breaches of the EU rules and values when

the government has tried to widen and deepen its control over the remaining independent actors and organizations. Although this conflict of Orbán government with the EU further deepened in the refugee crisis – e.g. by the “Stop Brussels campaign” in the late 2016 -, it did not receive a special attention and strong reaction from the Commission. Paradoxically, the strongest reaction in the Hungarian RL debate arrived from the EPP, from his party family, finally deeply disturbed by the extremism of Orbán: “The EPP Presidency sent a clear message to Prime Minister Orbán and his party, Fidesz that we will not accept that any basic freedoms are restricted or rule of law disregarded. (...) The EPP has also made it clear to our Hungarian partners that the blatant anti-EU rhetoric of the ‘Let’s stop Brussels’ consultation is unacceptable. The constant attacks on Europe, which Fidesz has launched for years, have reached a level we cannot tolerate.” (EPP 2017, 2). Obviously, this message led to the historical event on 17 May 2017 when in the EP resolution called for triggering the Art. 7 against the Orbán government with a large majority, including many MEPs from EPP (EP 2017d).

Nowadays, the Orbán government has entered the third stage of attacking civil society organizations. The ongoing third step is an attack against the interest organizations, local self-governments and civil society associations/NGOs. By 2017 the Orbán government almost completed this masterplan, the final battle was going on around the “society capture” by demobilising NGOs. Actually, the project of “social capture” began already in the early 2010s by harassing the civil society organizations (Ágh 2015), but it has reached its peak in the last years when the Orbán government turned to the open conflict with the main independent institutions. The conflict which has had the biggest international resonance has been the still open issue with the Central European University as a symbol of liberal democracy. The Hungarian parliament passed the Act XXV of 2017 on Higher Education on 4 April 2017 – targeted at the Central European University (CEU), therefore usually mentioned as Lex CEU. Many professional NGOs have been closely connected with CEU, so closing this University in Budapest would mean ending the activities of these watchdog organizations. Therefore, in the EP plenary session some MEPs pointed out that the EU was passively witnessing a systemic erosion of democracy in Hungary and called for tougher measures. As a reaction, on 26 April 2017 Frans Timmermans declared that the Commission triggered the infringement procedure against the Hungarian government in the case of the new education law.

This move, however, did not prevent the Orbán government to pass the new, directly oppressive civil law, amending the act on civil society from 2011 by the Act LXXVI of 2017. It has been targeted at the autonomous civic organizations with the demand to carry the term of “international agent” by those organizations which receive 7.2 million HUF (around € 20.000) a year from abroad. Altogether, Hungary under the Orbán government has covered all the three stages of the masterplan demolishing liberal democracy that can be shown by an in depth-analysis at much greater detail.<sup>10</sup>

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<sup>10</sup> There is no space here to describe the entire process in the Orbán government’s violations of the RL. I have finished the description of the Hungarian case with the civil society legislation, although since June 2017 there were many important events in the ongoing history, as the intensification of the infringement process in both “Lex CEU” and “Lex Foreign Agent” (EC 2017a and 2017b). The European Court of Justice on 6 September 2017 “dismissed the actions” of Hungary and Slovakia – supported by Poland – against the distribution of quotas in the refugee management. On the infringement issues see Bárd (2017).



Nevertheless, the EP resolution in 17 May 2017 suggesting to trigger the Art. 7 against the Orbán government and in the first half of 2018 the EP has been preparing a Report on the RL violations in Hungary. However, this initiative has not yet resulted in any significant changes in the Commission's position, remaining in the "dialogue" over the separate infringement processes on the ongoing violations of RL by the Orbán government. As usual, these conflicts were marginalized by the EU authorities, although they were concerned by Orbán's behaviour, but they did not consider it important given the complexities and difficulties of the EU polycrisis. The reaction of Commission was again the "light touch", the usual toothless infringement procedures also against these new acts discussed above.

In this situation the leading Hungarian professional NGOs sent a letter to the Commission: "We call on the Commission to proceed as expeditiously as possible to open infringement proceedings against the government of Hungary with respect to the rule of law. However, the European Commission should recognise that infringement procedures alone are inadequate tool to contain a concerted and holistic strategy designed to dismantle the infrastructure that supports democratic standards, protection of fundamental rights and the rule of law." (HCLU 2017, 3). All in all, the toolkits for the "judicial integration" did not work in the Hungarian case. They did not work in the Polish case either, which created however much bigger problem for the EU, given the "centrality" of Poland, but the importance of the Polish case may lead to some kind of "solution" in the RL debate.

### 3.2 The unfolding Polish case: losing the centrality of Poland in the present conflict?

In the Hungarian case one could argue that the neglectance of the conflict with the Orbán government has been painful, but unimportant, given the long list of the much stronger EU priorities and the low importance of Hungary out of the 27 member states. However, this argument would not work in the Polish case for several reasons. First of all, Poland matters that may be called the centrality of Poland in EU affairs as "the only big country" in the East, and given that Poland has been successfully coping with the global crisis, with the sustained economic growth mostly during the crisis. Second, this specific Polish crisis has recently come to the fore at the time when the EU has to take strategic decision about the future of the EU27 in the post-crisis period. Third, the contamination effect will be high among all member states, not only in ECE, if Poland will be allowed to violate the EU rules and values. Finally, fourth, it will create disturbances in the normal workings of the EU if two member states take non-EU conform decisions, since the member states accept the decisions originating from the same institutions of other member states. Thus, after Hungary, with the entry of PiS government in Poland a new phase began in the RL violations in the EU, since "Both governments introduced politically motivated legislations that constituted clear breaches of EU law and European values, undermined the rule of law, and restricted individual freedoms. What we see in these two countries is a determined effort to really subvert the existing democratic system in a fundamental way." (Ekiert 2017, 7). This parallel De-Europeanization process has been a serious blow to the EU integration given the centrality of Poland in the EU affairs.<sup>11</sup>

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<sup>11</sup> See the basic EU documents (EC 2016; EP 2016a and EP 2016b). On the similarity between the two countries see Balcer (2017), and on the Polish RL history see Bárd and Carrera (2017), Nalepa (2016), Szczerbiak (2016) and Završnik (2017).

The similarities between Poland and Hungary are striking in two respects. First, they have applied the same masterplan to demolish the liberal democracy as an authoritarian drift by the tyranny of the majority. Judiciary has turned out to be the central issue of the separation of powers given its anti-majoritarian nature, so Poland is firmly in the process of removing the independent judiciary.<sup>12</sup> Indeed, the basic target of the illiberal drive is blurring the boundaries between the executive, the legislature and the judiciary, by which the judiciary will be subjected to political influence. In the face of the flagrant RL violations by a member state as the dismantling of the judiciary's independence, the EU has to react. Second, Poland and Hungary have equally refused to abide the EU rules and values, and in their conflicts with the Commission they have not been ready either to any kind of meaningful compromise or real dialogue. Instead, they have talked about political accusations and have referred to their national sovereignty. The main difference between the Polish and Hungarian cases is that in Poland the entering PiS government had no two-thirds majority, therefore the execution of the masterplan has been much more difficult. All in all, without describing the conflict between Poland and the EU from event to event, in the early 2018 the RL situation is almost identical in these two countries, including their ongoing bilateral conflicts with the EU authorities, both through infringement processes and the sentence of the European Court of Justice, but with a clear Polish lead in the process of triggering the Article 7 procedure. They support each other, since their governments have declared that they would veto the Art. 7 procedure about the partner.<sup>13</sup>

After the entry of Poland into the RL debate first there was an eruption of comments, including long and deep analyses of the leading international experts. So far this huge scholarly literature has significantly enriched the RL debate in the EU given the high importance of Poland, especially in the historical moment of elaborating a new long term strategy for the EU. When Poland has violated the EU rules and values as a blatant case of De-Europeanization, the legal experts have discussed the EU toolkits against the RL violations from all sides. Especially CEPS (Centre for European Policy Studies) Institute has been very active on this issue by organizing conferences and publishing comprehensive analyses. For instance, in a recent contribution to the debate on the Polish case Adam Lazowski has formulated some strong sentences. Lazowski argues that the "Art. 7 was designed precisely to address situations like the one unfolding in Poland". He has warned that "Dismantling the independence of courts, however, undermines, for instance one of the fundamental principles on which Area of Freedom, Security and Justice is based (...) undermining not only the functioning EU criminal law but also EU law at large.". Therefore, "the time has come for serious action. (...) for now, Art. 7 TEU and infringement proceedings are ready to be utilised. Political isolation should follow." (Lazowski 2017, 2–4).<sup>14</sup>

<sup>12</sup> The Repair Act on Constitutional Tribunal in Poland, see Bugaric and Ginsburg (2016).

<sup>13</sup> The latest EU documents on the RL issue at the time of writing are EC, 2017, d-f and EP, 2018. On the support of the Polish case the Hungarian Parliament voted in May 2017 and on 15 March 2018 the Polish Senate accepted a resolution thanking it to the Hungarian Parliament and ensuring it about the Polish support for the Hungarian case.

<sup>14</sup> CEPS organized conferences already in 2013 on the RL debate (Bingham Report 2013; Bingham Centre 2015 and Carrera et al. 2013). CEPS has been very active after the PiS takeover, see the long and comprehensive papers (e.g. Bárd 2017; Bárd et al. 2016; Bárd and Carrera 2017) and the resulting books of Closa and Kochenov (2016), Jakab and Kochenov (2017) and Schroeder (2017). The German legal website Verfassungsblog (in English) has also been very active in discussing the Polish developments and I have relied on the recent evaluations of Blokker (2017) and Pech (2016). Euractiv (see e.g. 2017b) has followed the Polish event, too.

Here the open history starts with ongoing conflicts in the early 2018. Following a letter of protest prepared by five EP political groupings, a statement was issued by Vice President Frans Timmermans on 19 July 2017 mentioning to possibility to trigger the Art. 7 proceedings in the Polish case. At the time of writing some politics-oriented infringement proceedings are also going on in the Polish and Hungarian cases. In the Hungarian case the Art. 7 procedure has been taken into consideration by the EP and in the Polish case also by the Commission. Thus, in both – Polish and Hungarian - cases triggering the Art. 7 procedure has been raised. In the ensuing discussions it has also been mentioned that the veto can be avoided, if the Commission starts a common proceeding against Poland and Hungary, since they cannot vote in their own case. However, the RL debate has to be seen in a much larger context of the emerging new EU strategy for the next decade.

#### 4 CONCLUSION: THE HISTORY OF RL VIOLATIONS AND THE FUTURE OF THE EU

The historical trajectory of the RL violations in ECE runs from the “Copenhagen Dilemma” to the “Juncker Paradox”, but it may enter a new phase in 2018 depending on the new general strategy of the EU after the period of the global crisis management. This paper has tried to point out that the neglectence of the special treatment of the ECE states has created more problems than solved, since it has been encouraging the authoritarian systems. In the increasing Core-Periphery Divide the prevailing mind-set in the Core has been the preoccupation with its own “priorities”, which has meant actually reducing the complexity management to the urgent and direct conflict management in the Eurozone and refugee crisis. The Juncker Paradox has created a conflict by design as far as the “borderlines” of the RL violations have not been elaborated with a proper law enforcement mechanism and the Commission has not been ready to accept the EP political innovations in this respect either. From among the ten Juncker priorities presented at the entry of the new Commission even those which are closest to the sensitive issues of rule of law and the refugee crisis – Priority 7 and Priority 8 – do not have any reference to the specific ECE attitudes in the refugee crisis, to the RL violations in the ECE states and to the necessity of conflict management in these fields (EP 2017b, 20–26). This demonstrates the “structural neglectence” or repeated inaction in crisis management. Notwithstanding the real great significance of all ten former priorities, the complex silence about these specific problems in ECE in the basic documents of the Commission amounts to the crisis of crisis management in the “East”. As the mid-term analysis of the Juncker Commission by European Policy Centre has emphasized, the list of priorities of the Commission has not changed since 2014, which “opens them to criticism of not adapting to new realities” (Ivan 2017, 5; see also Russack 2017).<sup>15</sup>

Actually, the populations of all Central European states have shown their social and cultural unpreparedness to the influx of refugees as a historically emerging “hidden curriculum” in Central Europe as a whole (i.e. including Austria) in the recent geopolitical crisis. Moreover, especially the ECE states due to this

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<sup>15</sup> The suggestion has emerged from various actors, including governments that “to propose new conditions that would tie the access to EU funds to a country’s performance on governance and the rule of law (...) a powerful deterrent effect.” (Grabbe and Lehne 2017, 6).

historical heritage, the late arrival to the EU and their permanent internal debates have often been rather awkward to present their specific problems and the legitimate regional interests in the EU. Thus, beyond the ugly face of the present hard populist ECE regimes, there have been deep structural reasons for the different approach of the ECE populations concerning the refugee crisis that can be easily manipulated by the xenophobic autocratic regimes in the “stopping Brussels” campaigns under the pretext of the protection of national sovereignty and culture. Therefore, the measures of the EU migration management have been sabotaged by the Polish and Hungarian governments with the constant reference to the national sovereignty. This conflict has reached a high level with the entry of the Kaczynski regime in Poland and also by the further decline of the democratic setup in the other ECE states with their unstable coalition governments.

The contours of the new turning point can be seen in the early 2018. First of all, the EU has experienced a consolidation after the global crisis and the Brexit issue has turned to be manageable from the EU side. The Western leaders have repeatedly said that enough is enough, so there can be no patience any longer for the RL violations by the Polish and Hungarian hard populist regimes. In a rather optimistic mood the EU has begun to elaborate the perspectives for a stronger and wider integration. In this spirit there have been some signs to overcome the Juncker Paradox with its counterproductive treatment of the De-Europeanization process in ECE. The change has been strongly felt in the Juncker’s latest State of the Union Address with the strong warning that all member states have to respect the rule of law in the EU. This message has proposed - after the five EU scenarios of Commission presented in March 2017 - “the scenario six” as a new strategy answering the basic question: “Where is Europe heading?” On 13 September 2017 Juncker outlined a new program for the further federalization of the EU (Juncker 2017, 4–5). On 18 October 2017 there was a first ever meeting between Juncker and the V4 prime ministers that did not produce concrete results, but at least the need for considering the ECE special problems was raised.<sup>16</sup>

The EU has overcome the global crisis and may be reaching the situation of strategic decision about the future shape of the Union. In this historical moment the ECE populations have already a historical experience in the EU for more than a decade, in which a new generation has entered with socialization in Europeanization and Democratization. After the period of “societal frustration” leading to the decline of democracy, Poland and Hungary can and will return to the mainstream of European development with sustainable democracy and respect for the rule of law.<sup>17</sup>

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<sup>16</sup> There have been many analyses and long professional comments putting the RL conflicts in a wider perspective of the New World Order and the emerging EU strategy, see e.g. the Bruegel team of Demertzis et al. (2017). As Grabbe and Lehne (2017, 6) has emphasized it is “Time for Governments to Take a Stand”.

<sup>17</sup> The recent Globsec survey (2017, 13) that 80% of Poles and 79% of Hungarians want to stay in the EU, similarly 65% and 71% think that liberal democracy is the best political system for their country.

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## OPEN SOCIETY AND ITS ENEMIES: EAST EUROPEAN LESSONS FOR HONG KONG

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*Is Hong Kong's democratic transition doomed? This paper examines the challenges that Hong Kong has to face in its fight for democracy under Chinese sovereignty and critically evaluates the state of the democracy movement since the 2014 Umbrella Movement. With reference to the works on civil society and the democratic opposition in the former Communist regimes, the predicaments of Hong Kong's clamour for democracy will be analysed from a comparative perspective in order to explore options for the civil society as a change agent. The author submits that it is perhaps more important now than ever for Hong Kong to defend the moral foundations of the open society against an increasingly hard-line policy and to promote higher standards and norms of governance to keep Hong Kong distinct from the rest of China. In doing so, Hong Kong needs not succumb to self-fulfilling prophecies, which would result in hopelessness and capitulation.*

**Key words:** Civil Society; Democratization; Eastern Europe; Hong Kong; "One Country, Two Systems".

### 1 INTRODUCTION: DEMOCRACY'S DEAD END

A spectre is haunting Hong Kong: the spectre of what people who have long struggled for democracy would call "learned helplessness." Hong Kong has been a dependent polity, first as a British colony and then as a Special Administrative Region under a Communist regime (Kuan 1991). Hong Kong's right of self-determination was taken away at the request of Communist China when it was admitted to the United Nations in 1972 (Jayawickrama 1990). Since the early 1980s, political reforms have basically followed a track laid down by the sovereign powers, Britain and China, whose leaders never agreed to let the

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people of Hong Kong freely choose the government and the entire legislature. As Beijing tightens its grip over Hong Kong, one cannot possibly fail to notice the pervasive feelings that the “One Country, Two Systems” policy, which has propelled democratic changes for several decades, has turned out to be a straightjacket. Xi Jinping’s leadership is characterized by an unequivocal centrality of political control over Hong Kong with a barrage of political dogmas built around “nationalism,” “patriotism,” “sovereignty,” “the supremacy of the National People’s Congress,” and “national security.”<sup>2</sup> Growing concerns about and hostility towards the “mainlandization” of Hong Kong has led to the rise of “identity politics” and the concurrent proliferation of various strands of “localism” which have posed fundamental questions about the relations between China and Hong Kong. The situation has gone from bad to worse after the 2014 Umbrella Movement had failed to make a democratic breakthrough. The incessant crackdowns on the inchoate activism for “independence” and “self-determination” have given rise to a political witch-hunt, reflected in the disqualification of candidates for the Legislative Council who were considered “unable to uphold the Basic Law,” the unilateral interpretation of the Basic Law by the National People’s Congress Standing Committee which led to the disqualification of elected lawmakers, the changing of the legislature’s rules and procedures to undermine the opposition, and the trials of the leading figures of the Umbrella Movement. Hong Kong can hardly pass a day without news about assaults on the institutions, norms or values necessary to safeguard the distinctiveness of the city and the way of living: consent of the governed, checks and balances, clean and accountable government, rule of law, independent judiciary, press freedom as well as freedom of association and expression. Despite the appearances of stability and prosperity, there are concerns about the erosion of rights and freedoms. Hong Kong people are generally disillusioned (Table 1).

TABLE 1: CHANGES IN PUBLIC PERCEPTIONS OF HONG KONG, 1997–2018

	June 1997	January 2018	Change
<b>Net Satisfaction with:</b>			
Political Condition	17.3%	-47.2%	-64.5
Economic Condition	25.7%	12.3%	-13.4
Livelihood Condition	33.5%	-21.0%	-54.5
<b>Average score (0-10 points) on:</b>			
Prosperity	8.05	6.93	-1.12
Freedom	7.65	6.72	-0.93
Stability	7.33	6.65	-0.68
Rule of Law	7.17	6.29	-0.88
Democracy	6.70	5.74	-0.96
Equality	6.52	5.87	-0.65
Fairness	6.42	5.47	-0.95
Freedom of Press	7.15	6.21	-0.94
Freedom of Speech	7.14	6.65	-0.49
Freedom of Publication	7.21	6.24	-0.97
Academic Freedom	8.02	6.69	-1.33

Source: Public Opinion Programme, The University of Hong Kong, <https://www.hkupop.hku.hk/english/index.html> (accessed on 31 January 2018).

<sup>2</sup> “White Paper on The Practice of the “One Country, Two Systems” Policy in the Hong Kong Special Administrative Region,” 10 June 2014, <http://www.scio.gov.cn/zxbd/tt/Document/1372801/1372801.htm> (accessed on 24 February 2018).

The political predicaments of Hong Kong largely stem from the fact that it strives to become a democracy under a Communist regime which is said to become a “perfect dictatorship” (Ringen 2016). True, the replacement of the hugely unpopular Chief Executive C.Y. Leung by a more pragmatic Carrie Lam in 2017 has restored a sense of normalcy to the relations between the government and the governed. But this has neither changed the fact that Lam, like all her predecessors, owes her ascension to Beijing, nor has it changed the fact that the pro-Beijing, pro-establishment camp and the pro-democracy opposition remain poles apart on how to improve Beijing-Hong Kong relations. As the issue of democratic reform came to a deadlock, it has become more difficult for supporters of democracy that have endured a great deal of uncertainties and discords to project a sense of optimism. Hong Kong democrats have found themselves in an awkward position. To put it bluntly, what is to be done when Hong Kong’s democratization is doomed and there are growing fears of incremental reversals? As Joshua Wong Chi-fung, a student activist who was sentenced to imprisonment for his roles in the Umbrella Movement of 2014, told in an interview: “A lot of supporters left messages online hoping that I could tell them the way out for Hong Kong ... But what Hongkongers need to ask themselves is, why do you always want an answer from Joshua Wong?”<sup>3</sup> Steven Kwok Wing-kin, the 31-year-old Chairman of the pro-democracy Labour Party was reported to have admitted that Hong Kong’s road to greater democracy has come to “a dead end.” In his words, “the past democracy movement followed the timetable set by Beijing ... Now it is clear that Beijing is not sincere in allowing us to enjoy universal suffrage ... As a party, we have to tell the public how we can make Hong Kong a better place, besides fighting for democracy.”<sup>4</sup>

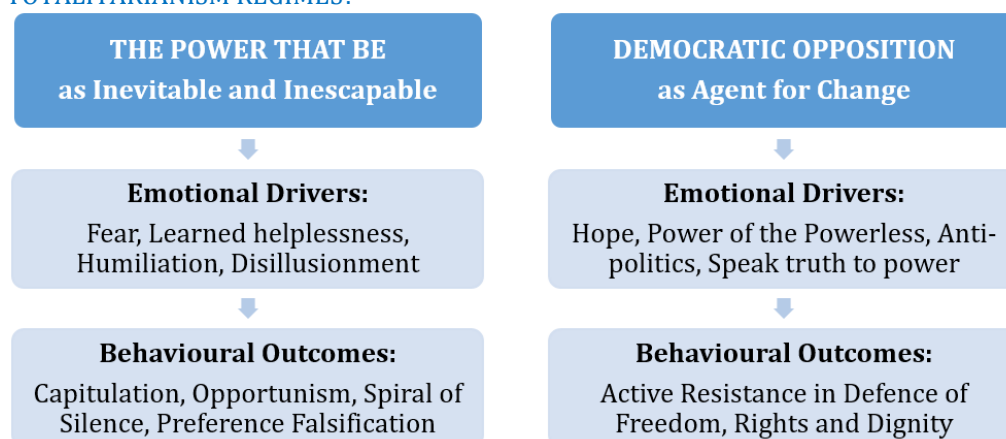
For the purpose of this study, the political backlash that we have witnessed is taken as the point of departure for advancing new debates. It is neither another empirical research on contentious politics in Hong Kong nor a summary of events and incidents since the Umbrella Movement. Rather, we see a need for an analysis about “the perception of a dead end” and what civil society and the democratic opposition could do to counter the reversals. We have adopted a problem-solving approach which encompasses three inter-related aspects: 1) to critically examine regime-based theoretical arguments for unsuccessful democratization; 2) to reflect on the roles and functions of civil society during the Communist era in Eastern Europe when the physical and spiritual repression was particularly harsh; and 3) to consider what lessons there are for Hong Kong. As we intend to concentrate on the cause and effect of “learned helplessness” in Hong Kong society and possible options for the pro-democracy movement, to say Hong Kong’s struggle for democracy and those we witnessed in Communist Europe are not comparable is premature. To our mind, the unit of analysis in this comparison is the oppressed opposition. A methodological innovation of this study is the comparative framework for studying the emotional drivers and behavioural outcomes across time and regimes. Hong Kong’s democratic predicament is brought together with those witnessed in former Communist regimes for the purpose of comparison and lesson-drawing. Comparative research across systems that are different in many aspects allows scholars to correct particularization based on single cases, to assess the influence of institutions and norms, and to generate hypotheses about causal relations between variables, which is an important step in theory development.

<sup>3</sup> “This fight is not just about me,” *South China Morning Post*, 3 November 2017.

<sup>4</sup> “Labour’s new chairman says democracy fight is a dead end,” *South China Morning Post*, 20 November 2017.

To further advance the theoretical debates about “democratic opposition against the despotic regime,” Table 2 envisages a two-track schema to map out distinguishable pathways for future investigation. Our arguments are three-fold: 1) Any suggestion that the regime is invincible is incorrect, and its propaganda serves no purpose other than an unwarranted defeatism; 2) principled evolutionism, not capitulation or revolution, will serve the cause of democracy; and 3) the defence of open society is where civil society and the democratic opposition can continue to exert effective influence on. These arguments have been built upon the premise that in contrast to the long-held belief that Hong Kong people would continue to enjoy “freedom without democracy,” civil liberties, political rights and rule of law are at risk from trade-offs, predation and abuse during a period of democratic stagnation. More importantly than ever, civil society and democratic development are intimately connected. There are important roles for civil society to play, including but not limited to tenacious defence of the basic values underpinning human rights and democracy, with active dissent as a key method of democratization from below. In spite of the apparent differences between Communist Europe and Hong Kong, the set of choices for the oppressed turn out to be strikingly similar.

TABLE 2: PARALLEL WORLDS: WHITHER DEMOCRATIC OPPOSITION IN TOTALITARIANISM REGIMES?



## 2 THE OPPOSITION AT A CROSSROADS

Hong Kong offers an interesting contribution to the comparative research on how civil society and the democratic opposition matter in defending the rights of citizens, fighting for democracy, as well as promoting good governance and common welfare. The “One Country, Two Systems” policy originally designed to accommodate two radically different sets of values and ways of living has always been a bone of contention (Chan 2004; Jang 2016). On the one hand, as a dependent polity, Hong Kong does not seem to stand a chance to fully democratize its system of government under Communist China. On the other hand, the city has witnessed the evolution of civil society which, according to Loh (2010, 25), “offers alternative visions, competition against official ideas even if the political system greatly favours pro-government forces.” In recent years, there has been an expansion of civil society activities beyond the traditional socio-political arenas of universal suffrage, housing, health care, and social welfare into new fronts like infrastructural projects, urban renewal, town planning, environmental protection, heritage protection, education, population policy, and animal rights. It goes without saying that civic activism has



encompassed a wide spectrum of people such as neighbourhoods affected by town planning applications, young people, parents, animal rights activists and retirees. Such actions may appear to be one-off and dis-jointed, but there are some cumulative and spillover effects on public opinion formation over time. In contrast to political parties, the legislature and the government which are in general held at low esteem by the public, civil society groupings tend to enjoy a higher degree of credibility and usually receive positive public receptions.

In fact, Hong Kong people have been more accustomed to mass mobilization against encroachments from the state than advancing systemic changes from below. Over the past decades, civil society and the democratic opposition joined forces at critical junctures in the process of democratization. The most remarkable success had to be the anti-Article 23 campaigns with no less than 500,000 citizens marching on 1 July 2003. "The power of the people" forced the government to abandon its controversial national security bill, followed by the downfall of the C. H. Tung government. In contrast, successive civic actions to push for democratization from below, such as the annual 1 July marches for universal suffrage, the 2010 De-facto Referendum Movement and the Umbrella Movement of 2014, received mixed receptions and left Hong Kong anguishing about whether the initiators had misjudged the people's recalcitrance and underestimated Beijing's obstinacy.

Insofar as mobilizing and coalition building are imperative to success, the weaknesses of Hong Kong's civil society as an agent for change have been well documented (Ku 2009; Lam and Tong 2007; Ma 2007). Large-scale, in-depth and organized or networked collaborations between groupings have been rare and their effectiveness varied considerably. Except for the traditional philanthropic community services and non-political activities, government officials are equivocal towards what they regard as "politicized (tainted) campaigns." Moreover, the public domain which is necessary for civil society and the opposition to operate is increasingly regulated by law enforcement authorities such as the police and a range of government departments which make their own rules. Last but not least, mass-oriented campaigns and actions have to compete with other organizations and activities for the attention, time, as well as human and financial resources necessary for sustainable development. Not surprisingly, Hong Kong's civil society has been regarded as vibrant but loosely-organized.

At any rate, post-1997 Hong Kong has been dubbed "a city of protest" (Dapiran 2017), where the tensions between Hong Kong and China have unleashed centrifugal forces that are hard to reconcile (Cheng 2016; Kurata 2015; Pang 2016). On the one hand, the democrats have argued that the protracted democratic transition is entirely attributable to the Communist party-state's determination to block the introduction of free and unfettered elections. The more Hong Kong is driven by political and economic reasons to integrate with the mainland of China after 1997, the more intense political and norm contestations between the two systems have become. The ruling political and business elites of Hong Kong who have stood to gain in the process of policy-driven integration are considered to be political marionettes in the eyes of their critics. On the other hand, the Hong Kong government and the pro-Beijing camp have continued to accuse the democrats of their unreasonable demands and irresponsible defiance. In recent years, the political environment has further deteriorated by a proliferation of aggressive "patriotic" groupings to serve as the cheering team for Beijing and the Hong Kong government. The democratic

opposition is portrayed by the pro-government propaganda to be unpatriotic, “anti-Chinese” as well as unwilling to uphold “One Country, Two Systems” and the respective constitutional obligations under the Basic Law. Last but not least, they claim that the democratic opposition has availed itself to overseas forces that seek to meddle with Chinese affairs and the impact of such despicable collusion on democratic reforms can only be negative. The blame game, together with the smearing and the scaremongering, will have no end.

A truce between the Communist regime and the democratic opposition has become increasingly difficult to arrive at as a new generation of Hongkongers came to the fore. Young people have constituted the mainstay of the pro-independence / separatist sentiments in Hong Kong against a backdrop of growing disillusionments not only with “One Country, Two Systems” but also the democracy movement that is seen to be ineffectual. Ideas such as “civility,” “tolerance,” “non-violence” and “unity” have been treated with contempt by the newly emerged militant groupings, which have exacerbated the schism of the democratic opposition (Kwok and Chan 2017). The anger and humiliation experienced during the Umbrella Movement and the 2016 civil unrest in Mong Kok (dubbed as the “Fishball Revolution” by its protagonists) have continued to fuel a militant subculture in society. An experimental study with 1,500 Hong Kong students in 2017 showed about 90 per cent of participants held unfavourable views of the Communist Party, with 40 per cent endorsing violence to achieve political aims.<sup>5</sup> The emergent literature on “localism” has just begun to try to make sense of the public resentment against not only the Communist party-state but also China (Fong 2017; Kaeding 2017; Veg 2015; Yuen 2015), with some calling for “a fundamental rethinking of the basis of what Hong Kong stands for” (Ortmann 2015, 48; Veg 2017).

It was politics of insecurity, not hope, which came to shape the 2016 Legislative Council election and the 2017 Chief Executive election. In the former, the gulf between the young radicals and rest of the democratic opposition grew bigger as they competed with each other for votes in very tight race against the pro-Beijing camp. Yet the records of the young radicals have been mixed. On the one hand, the new brands of political radicalism and the emergent Young Turks have helped to broaden the base of the opposition movement especially among the younger generation. On the other hand, the radicals’ tactics of shaming their rivals were directed more at the incumbent democrats than the pro-Beijing camp, their political stunts and theatrics may have been provokingly entertaining for their supporters but failed to win them much acclaim further. And as Beijing moved quickly to nip the growing calls for self-determination and independence in the bud, the radicals have been dealt with a fatal blow.

However, the cacophony of the 2016 campaign was not the only symptom of the disarray of the democratic opposition. During the 2017 Chief Executive (CE) election, the democrats lowered their expectations at the outset to block the incumbent C. Y. Leung’s bid for a second term of office. The so-called election has always been designed to give Beijing full control over the process, fixing the outcome before it even got started. Unlike the last three CE elections, the democrats decided not to field a candidate to challenge the pro-Beijing camp and to rally the people for universal suffrage despite winning more than 300 seats (mostly in professional middle-class sectors) out of the 1200-member Election Committee, which was the strongest performance of the democrats so

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<sup>5</sup> “Experiment shows 40 percent of students back violence in pursuit of political rights,” *South China Morning Post*, 3 October 2017.

far. Veteran democrats and their supporters who clearly grew tired of the seemingly hopeless fight agreed this time around to make a tactical shift towards the former Financial Secretary John Tsang's bid for the top job. A small but vocal group of enthusiasts publicly argued that Beijing could consider Tsang favourably in order to restore public confidence in "One Country, Two Systems" and change public perceptions about the Chinese leadership. Remarkably, Tsang's campaign relied mostly on his own personal charisma, plus apolitical appeals to the "Hong Kong spirit" and the core values of the city which he claimed to love and care about. Nor was he seen to be trying to extract any concession from Beijing and the pro-establishment camp for re-launching the democratic reform. As the electoral dust settled, Beijing's favourite Carrie Lam won with 777 votes to John Tsang's 365, dashing the democrats' hope for some kind of entente with the power that be.

The above episodes have shown that neither prophetic radicalism nor tactical cooperation with the liberal wing of the establishment was able to break the political impasse. Meanwhile, the pro-democracy parties and their leaders are at their nadir in the sense that it has become more difficult than ever to sustain citizens' participation in collective action amidst a collapse of faith in the chances of successful transition to democracy. However, the challenge is less about the development of a "sophisticated organizational structure" in the pro-democracy camp (in quotes as it has never been defined clearly) but more about working towards better social self-defense against a totalitarian party-state that continues to: (1) encourage a fundamental contempt for or hostility towards the democratic opposition, (2) pit patriotism/nationalism against the ideas and acts of defiance, (3) regard the process of democratic transition as a national security threat, (4) spurn anyone and any party associated with the opposition, (5) reward capitulation and (6) hail a kind of social and political harmony intended to produce a spiral of silence. In point of fact, what Hong Kong has been going through since the Umbrella Movement is comparable to what Eastern Europe experienced throughout the Communist period. The following section shows that a key development in the 1970s onwards was the rebirth of civil society as the primary opposition to the party-states.

### 3 OVERCOMING FEAR AND HOPELESSNESS: LESSONS FROM COMMUNIST EUROPE

Democratization is about regime change, but some dictators have managed to reinvent themselves without democratization. Regime collapse was averted through oppression, selective incentives and sanctions, adaptive innovations, and institutional augmentation (Dimitrov 2013; Dobson 2012). The Chinese Communist regime has been known for its resilience not only because of the combined forces of physical ruthlessness and emotional blackmail, but also because the party-state has introduced adaptive changes to the systems of ideology, propaganda, socialist market economy and governance since the Deng Xiaoping era. Beijing has gone great lengths to put forward "One Country, Two Systems" as a design for the reunification with Hong Kong, Macau and Taiwan. Rapid growth and diversification of the Chinese economy encourage people to pursue seemingly unlimited opportunities and personal gains. Such endeavours have contributed positively to the legitimation of the Chinese model home and abroad. However, all this has not changed the fact that the ultimate purpose of the ongoing manoeuvres are not dissimilar to what Giuseppe Tomasi di Lampedusa described in his famous novel *The Leopard* — "If we want things to

stay as they are, things will have to change.” The surge of China as global power has not rendered the regime’s penchant for ideological struggles obsolete. Quite the contrary, liberal (“western”) democracy is dismissed as adversarial and chaotic, whereas the Chinese one-party system is hailed as a superior form of “enlightened democracy which puts the west in shade.”<sup>6</sup> The “People’s Republic” exists only in name. There is no freedom of expression and censorship is rampant. It is clear that the rulers would not tolerate the disturbance of protests, strikes and demonstrations. Dissent is met with brutality and mockery. Orwellian no doubt, but when Communist leaders spare no effort in portraying themselves as invincible, as the guardians of national interest and security, the perceived omnipotence of the regime thus created could become self-reinforcing with every act of cowardice, passivity and collaboration with the regime. At the end of the day, there is no better guarantee than a widespread belief in the irreplaceability of the party-state—there is no alternative—for the permanence of the dictatorial rule in China.

By the same token, the people of Hong Kong have been told that, as an inseparable part of China, the city has no choice but to come to terms with “the supremacy of the Chinese Community Party” which would never give in to the democrats’ aspirations for a liberal democracy (Chen 2016, 205). The Communist regime has exploited “patriotism” and “nationalism” in counter-mobilizations to repel “universal” and “local” values represented by the pro-democracy groupings. Beijing appears to have a concerted plan, none other than an advanced form of the “carrot or stick” approach, to break up the democracy movement and to undercut its support, home and abroad. Like it or not, integration with Mainland China is said to be inexorable and convergence is just a matter of time. To Beijing, introducing democracy to Hong Kong under Chinese sovereignty has never been an intellectual problem, it has always been a question of power. It is highly plausible that the soft authoritarian hybrid regime in Hong Kong has begun the degeneration into hard authoritarianism (Case 2008; Fong 2013; Fong 2016; Ortmann 2016).<sup>7</sup> The struggle for democracy under such conditions is inherently a tortuous process.

Is “Socialism with Chinese Characteristics” really not comparable with other variants of communist regimes? We tend to disagree. Although Chinese people appear to have been enchanted with a heavy dose of consumerism-cum-patriotism, the situation is also one of perpetual sense of insecurity which is similar to what we have seen in former Communist regimes in Eastern Europe. As it stands, the so-called “Socialism with Chinese Characteristics” is a hybrid of Hungary’s “Goulash Communism,” which was introduced some years after the brutal suppression of the 1956 revolution (Bozóki 1994), and neo-Stalinist regimes in Czechoslovakia, Romania and East Germany where political liberalization had been categorically rejected and the security forces had resorted to more sophisticated methods of political surveillance. East European Communist regimes had never given up the use of terror to maintain dictatorship, though the party-state adopted the language of *raison d’etat* and nationalism to reframe power struggles and to justify actions against dissidents (Moran 1994). A related issue is the claim of the Communist leaders that

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<sup>6</sup> “Enlightened Chinese democracy puts the West in the shade,” *China Daily*, 17 October 2017, [http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-10/17/content\\_33364425.htm](http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-10/17/content_33364425.htm) (28 February 2018).

<sup>7</sup> Hong Kong has developed a hybrid regime under British rule. Hybrid regimes are, strictly speaking, authoritarian regimes which happen to have incorporated to a certain extent liberal and/or electoral qualities commonly found in democratic systems.

reforms, or rather the propaganda about them, had to begin with “gradual and steady democratization” of the party-state, thereby creating a moderate, rational wing of the establishment to promote “self-perfection” of the system. Pragmatism were promoted as the safe and sure thing for people who wanted change, for any concessions and rights had to be granted from above and allowed by their political masters. Paradoxically, the rise of an “enlightened” leadership served no other purpose than to perpetuate the dictatorship. The party-state marked out “no-go areas” and put down “lines-not-to-cross” as it undertook “major reform” and the situation soon degenerated into one of permanent credibility deficit. It was impossible to ascertain who among the outwardly loyal cadres and fellow travellers did it out of faith in Communist-led reform, who did it for the expected rewards, and who did it out of fear of losing their perks. Only one thing was clear, the pragmatists became enthusiastic apologists for the power that be, arguing that one should not to make things more difficult for the current party leadership because the next one may be worse. The emergence of Xi Jinping as the supreme leader has confirmed the making of a kleptocracy which is very aggressive, but certainly not omnipotent as it wants us to believe (Halper 2010; Mann 2007; Pei 2008; Pei 2016). The “social strategy of coping with Communism,” as Rychard (1991, 77) pointed out, ranged from a pattern of tactical collaboration, chicanery, lie, bribery and corruption, through involvement in semi-legal activities to outwit the system, to sporadic social protests to vent anger. In the words of Havel (1975), “Order has been established ... At the price of a spiritual and moral crisis in society ... It is the worst in us that is being systematically activated and enlarged—egotism, hypocrisy, indifference, cowardice, fear, resignation and the desire to escape every personal responsibility, regardless of the general consequences.” Elsewhere, Havel (1978) wrote that “We are all morally sick, because we all got used to saying one thing and thinking another ... All of us have become accustomed to the totalitarian system, accepted it as an unalterable fact and therefore kept it running ... None of us is merely a victim of it, because all of us helped to create it together.”

Across Eastern Europe, a new era of democratic opposition began to take shape in the 1970s with a series of intellectual contributions showing the growing interest in the subject of civil society and democratization from below. For one thing, any hope for “reform from within” was dashed after the brutal military crackdown of the Prague Spring of 1968 and the ensuing process of “normalization.” For another, Communist dictatorship had not ceased their attacks on civil liberties and human rights. Thus, dissidents had to develop a form of social self-defence against the totalitarian regimes. To start with, people wanting real changes had to free themselves from fear and inertia which were pervasive in almost every aspect of life. The attempts to press for changes from below entailed the formation of alliances based on the principles of human dignity, protection of human rights, solidarity and defence of the public domain for citizens’ actions. For Havel, the attempts to reconstitute civil society began with everybody’s mind, the basis of which was to reject the official ideology as “the Lie.” The Czech and Slovak dissidents envisaged the development of a “parallel polis” where humanity prevailed over ideology. In the event, Charter 77 became a force of conscience—the power of the powerless. Of equal importance, it was a form of “anti-political politics”:

That is, politics not as the technology of power and manipulation, of cybernetic rule over humans or as the art of the useful, but politics as one of the ways of seeking and achieving meaningful lives, of protecting them and serving them ...

Politics "from below." Politics of people, not of the apparatus. Politics growing from the heart, not from a thesis" (Havel 1978).

Breaking the barrier of fear and insecurity was easier said than done when the sense of control remained ubiquitous under an oppressive regime. The Charter 77 movement remained small in number. Most of the original 242 signatories of the Charter were intellectuals in the Czech lands; they had found little support among Slovaks, workers and peasants (Skilling and Wilson 1991). In the face of retaliation, open defiance was always going to be a dangerous, self-sacrificing undertaking. For many, the better option was to accept the reality as inescapable and withdraw into their private life. However, Havel and the Charter movement enjoyed a high level of moral authority, home and abroad. Although they did not develop into a formidable movement to withstand prosecution, an awakening of consciousness was underway. Havel's vision for a people-based, anti-political movement became a recurring theme in Hungarian and Polish civic actions too. The opposition shared the belief that nothing checked the authorities better than pressure from below. In *Antipolitics*, Konrad (1984) argued that one fought for freedom by acting "as though we were free men," even without the support of democratic political institutions. The Communist regimes and their politics were seen to be unchangeable from within, whereas the notion of "anti-politics" imbued the oppressed with a new sense of faith in one's ability to carve out a public domain away from state-controlled organization, mobilization, participation and communication. It was a counter-power that "cannot take power and does not wish to." The civil society movement focused on the creation of a network of informal groupings and platforms which would "keep watch on political power, exerting pressure on the basis of their cultural and moral stature alone, not through any electoral legitimacy. That is their right and their obligation, but above all it is their self-defense." No one was able to foretell how far democratization from below could go. By the late 1980s, Hungary was unique in the Communist bloc in the sense that an embryonic multi-party system began to function openly, each political grouping had a political agenda of its own (Hankiss 1990; Hann 1990).

In Communist Europe, Poles had long been famous for their intransigence and opposition to the regime. According to Touraine et al. (1983, 15), "Poland has always had two faces: the real country has never been entirely obscured by the official one, intellectual life has never been reduced to the dominant ideology, and the subjection to socialist realism, however brutal were the pressures which sought to impose it, was only a brief, black episode." The Polish Communist regime, weak in popular legitimacy from the outset, was inherently unstable. In Polish oppositional thinking of the 1970s and 1980s, Communist power was to be "rolled back" by the revival or reconstitution of civil society. The opposition leaders advocated peaceful means of mobilization to realize autonomy outside the realm of the party-state. Ultimately, it was a strategy of social self-organization to create the basis for resistance and regime change (Kořakowski 1971; Kuroń 1977). In the late 1970s, activists from the Committee for Workers' Defense, the Flying University and underground publishing centres demonstrated faith in this strategy in undertaking independent social actions that presaged the 10-million strong Solidarity movement as the embodiment of a united civil society against the party-state (Bernhard 1993; Garton Ash 1990; Goodwyn 1991; Laba 1990; Ost 1990; Staniszkis 1984).

It is important to note that the Polish nation was no exception in having



contemplated the plausibility of change within the party-state intertwined with a succession of leadership change and the activists had struggled between deference and defiance. Kołakowski's (1971) seminal essay on "Hope and Hopelessness" described how the geopolitical reality of the Cold War had at one point plunged the oppressed in Eastern Europe into a self-fulfilling prophesy of the eternality of the plight:

*"The belief that socialism in its present form is totally inflexible and can only be destroyed at one fell swoop, and therefore that no partial changes are in essence changes in its social nature, easily lends itself to defeatism, justifying opportunism and pure knavery."*

It follows that the function of the opposition was first and foremost to oppose fatalism and learned helplessness in society. Kołakowski and his protégé Michnik (1976) were widely accredited for putting forward a reformist, evolutionary approach based on a belief in the possibility of national and social liberation through gradual and partial pressures from below. The Polish intelligentsia acknowledged the difficult fact that one's struggle with the party-state was at the same time an internal struggle against the psychological barrier of fear and questions about the probability of success. The intellectuals' full observance of Poland's delicate geo-political situation during the Cold War explained to a large extent their preference for the evolutionist strategy over violent revolt, but the Polish people did have to confront themselves with a number of critical choices, in Michnik's own words:

*"We are not confronted with a choice between complete decay and perfection, but only with the choice of agreeing to decay or making an unceasing effort to preserve in our national life such values and standards which, once preserved, will not easily be destroyed."*

*"Opposition intellectuals are striving not so much for a better tomorrow as for a better today."*

*"One must choose between the point of view of the oppressor and that of the oppressed. The people of the democratic opposition should not place excessive hope in 'reasonable' party leaders. A programme for evolution ought to be addressed to an independent public, not to the totalitarian power... [the programme] should give directives to the people on how to behave, not to the power on how to reform themselves."*

*"The only policy for dissidents in Eastern Europe is an unceasing struggle of reforms, in favour of evolution which will extend civil liberties and guarantee a respect for human rights."*

In accordance with the evolutionist tactics, the ultimate goal of the opposition was the cultivation of solidarity among a plurality of self-governing civil associations capable of organizing public pressures so as to prevent the authorities from devouring society. The Solidarity movement was, first and foremost, a mass social movement against the state, its strength was derived from the fact that it came to incorporate a cross-section of the population of Poland. The Polish conception of civil society encouraged the formation of a *unified* movement of the oppressed against the imposed order (Bakuniak and Nowak 1987). For that, the Solidarity ethos encouraged its followers to think primarily in moral categories of the struggle of good against evil, truth against falsehood. Solidarity supporters saw their struggle against the party-state as "us" (*my*) against "them" (*oni*), as "society" (*społeczeństwo*) against "power"

(*władza*). Poland continued to develop a rich and exciting culture of self-governing and self-limiting resistance even when Solidarity was outlawed and driven underground. For almost a decade, Solidarity functioned as the anti-Communist, all-encompassing *vox populi*, culminating in the regime change of 1989.

In *Open Society and Its Enemies*, Popper (1945, 2–3) observed that “One hears too often the suggestion that some form or other of totalitarianism is inevitable ... [But] the future depends on ourselves, and we do not depend on any historical necessity.” Hence, he considered the open society as one in which individuals are confronted with personal decisions, stressing that “if we wish to remain human, then there is only one way, the way into the open society... into the unknown, the uncertain and insecure.” It has become clear from the above analysis that regime-oriented, elite-based explanations tend to exaggerate the powers of the Communist party-state and overlook the conditions and mechanisms whereby sources of resilience may coalesce, transforming the contexts in which democratization from below in the form of social self-defence can happen (Della Porta 2014; Sadowska 1993). Reflecting upon the democratization process in different continents towards the end of the last century, Linz and Stepan (1996, 9) gathered that “a robust civil society, with the capacity to generate political alternatives and to monitor government and the state, can help transitions get started, help resist reversals, help push transitions to their completion, help consolidate, and help deepen democracy. At all stages of the democratization process, therefore, a lively and independent civil society is invaluable.” The promotion of human rights and democracy has long depended upon citizen actions to uphold the values in both private and public domains. The crux of the matter is that the “carrot or stick” approach simply fails to exert the expected impacts on people who are determined to speak truth to power and people who no longer have faith in the ruling elites and the pragmatists to introduce change from within. The intrinsic values of activism are consequential in guiding behaviours (Edler-Wollstein and Kohler-Koch 2008). The moral commitment to press for changes from below has helped the democratic opposition to overcome fear and hopelessness in incessant uphill battles with the dictatorial regime.

#### 4 CONCLUDING REFLECTIONS

This analysis compares the challenges that Hong Kong has to overcome in its fight for democracy under Chinese sovereignty to those in former East European Communist regimes in order to explore the prospects, if any, of the Hong Kong democracy movement since the 2014 Umbrella Movement. As was its wont, the Chinese Communist Party has employed the “carrot or stick” approach to imbue the nation with a spiral of fear, learned helplessness and “preference falsification” (Kuran 1995). As discussed above, there is a growing literature on the fragility of “One Country, Two Systems” to show that the freedom of Hong Kong is increasingly at risk from trade-offs, predation and abuse when Beijing has obviously grown impatience with the city’s volatile politics.

Yet, the comparative analysis presented above would give us no ground to conclude that democracy in Hong Kong is doomed, not least because there has been a democratic opposition, an assertive civil society and a strong Hong Kong identity that cannot be wished away or purged overnight. The analysis and

discussion here have drawn several key conclusions. First, Hong Kong has already developed a rich culture of resistance and defense. Second, there is widespread disgruntlement towards Beijing's increasingly hardline policy towards Hong Kong. Third, the political stalemate over democracy and tensions between Beijing and Hong Kong has unwittingly opened a deep political division in society. There are both reasons to be hopeful about the future and reasons to remain cautious and restrained, but any form of self-fulfilling prophecies which point to capitulation or revolution are totally unwarranted.

Even though the democratic opposition is enfeebled due to mobilization fatigue after the Umbrella Movement, civil society and the democratic parties are not negligible actors either. High-handed clampdowns on the democracy movement have not helped to mend what is broken in "One Country, Two Systems" and there is no strong evidence to argue that the antipathy towards the Communist party-state and the local ruling elites has receded, especially among the young people. In Hong Kong's case, civil society and pro-democracy groupings that have little possibility to bring the process of democratization to fruition nevertheless form a sort of oppositional infrastructure which puts a limit on the power that be. Active resistance in defence of Hong Kong's open society may take place in the context of conventional electoral participation. Non-violent forms of resistance such as civil disobedience and perhaps other low-risk tactics have also been used to undermine the credibility of the pro-Beijing regime and mitigate the erosion of freedom in Hong Kong. There are no reasons to presume that the democratic opposition cannot adapt and adjust to setbacks and reversals in an increasing oppressive political atmosphere.

To conclude, with respect to the existing literature on the quandaries of democratization in Hong Kong, the discussion provides a rich harvest of alternative hypotheses. A democratic opposition could be built and rebuilt around the defence of Hong Kong as an open society. Its identity is both global and local, post-sovereign and post-national as opposed to the one imposed upon the city by the Communist party-state. Its actions resemble those of a norm entrepreneur focusing on the logic of appropriateness and the development of moral and cultural powers buttressed by universal norms and local core values (Chan 2018). Given Beijing's intention to control the electoral arena and the political institutions, the democratic opposition needs to combine short-term electoral purposes with an anti-political politics to advocate high standards of governance, ethics and morality which keep Hong Kong distinct from China. In doing so, it upholds the civic virtues for civil society and the people in Hong Kong. It goes without saying that the struggle itself always feels like a Sisyphean task, one that is not dissimilar to the democratic opposition in the former Communist regimes.

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## EUROPE: HELL OR PARADISE? AN OVERVIEW OF EUROPEAN LAW AND CASE LAW

Noemia BESSA VILELA and Boštjan BREZOVNIK<sup>1</sup>

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*The request for asylum and the concession of the status of refugee bring into question political, and humanitarian issues on migration, which in turn, brings about a dysfunctionality of the amount of solidarity between the member states. Creating a European regime wasn't sufficient, by itself, to correct such dysfunctionalities since it allows for a differentiated approach. In the present article, we'll look at the legal and historical framing of this question, resorting to the analyses of case-law from both the European Court of Justice and the European Court of Human Rights as well as existing EU laws on the topic. Previous studies have come to show the failure of the adopted measures in the EU, and several amendments have been made to the in force legislation. New diplomas have been developed in order to find new solutions to a prevailing problem. The dream to reach a safe haven where they would be safe – and not sorry – has collapsed, for some of them, having reached the borders of Europe and being prevented from crossing.*

**Key words:** EU; Migration Crisis; EU Law; Refugees; International Law.

### 1 INTRODUCTION

In the early 20<sup>th</sup> century, Dante Alighieri, in his “Divine Comedy” placed upon the gates of Hell, a sign. In that sign it could be read: “*All hope abandon, ye who enter here*”. Over a century later, those might as well be the words the refugees face in the borders of the European Union – and all Europe.

Departing from various countries, an incredibly high number of refugees brave hundreds, if not thousands of kilometres to get to the European borders. According to the United Nations High Commissioner for Refugees the crisis has reached its peak in the second half of 2015, and first of 2016 (UNHCR, 2018).

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Out of all refugees entering Europe through the Mediterranean route in the first trimester of 2016, more than half were women and children (UNHCR 2016).

Shaken by war, famine and misery, these refugees look at Europe as a pass for freedom, security and liberty. The threat that looms over them, forces the abandonment of their countries of origin and the facing, either by sea or land, of the dangers from the well-known “Refugees’ Routes”: the Mediterranean route, the Puglia and Calabria routes, the circular Albanian route – Greece, the Western Balkan route, and finally the Oriental Mediterranean Route (IOM 2018).<sup>2</sup>

Such an affluence of refugees, coinciding with an increase in number and fatalities of terrorist attacks in European soil, came to cause an extended, although not very successful, debate between member states regarding their immigration policies and encouraging the necessary humanitarian answers in the political field on immigration. The terror and panic that was spread amongst the population (Crone 2017, 6) and the political discourse overshadowed the European answer, forcing some member states to better guard their borders, or even, in the case of the United Kingdom, having served as grounds for a public referendum that came to result in the on-going negotiations for the UK to leave the EU, now known as Brexit.

It is in the context of economical unbalance, that the question of the refugees raises the largest cautions (Duarte 2017, 48). The European Council recognized, in the European Pact on immigration and asylum, signed on the 24 of September 2008, the existence of disparities regarding the concession of individual protection given to individuals and the several differences that this protection might assume. Therefore, the European Council requested new initiatives were promoted in order to adopt a Common European System of Asylum, following what had already been developed under the Tampere, The Hague and most of all, Stockholm programmes.

## 2 THE PROTECTION OF THE RIGHTS OF REFUGEES

The first time the civilized world saw the need to, by means of International Law and its legal entities, create an effective protection for the rights of refugees took place in the early XX century. In the period preceding World War I, right at the closing moments of the Russian civil war (1917–1921), the request for assistance by the International Red Cross Committee to the League of Nations, led to the first big step towards the development of legal grounds that would promote and enable the protection of refugees. Facing the migratory crisis of over a million refugees, hailing particularly from the Soviet Union, the League of Nations needed to find a concrete solution for this reality (Cutts 2000, 15). To that end, Fridtjof Nansen was appointed as the first High Commissioner for Refugees. Nansen was tasked with defining the legal statute of Russian refugees, determining the conditions of employment access for refugees in the countries that offered asylum and also delimiting the conditions for repatriation (ibid., 16). The Greco-Turkish war that took place from 1919 to 1922 only worsened the migratory crisis that was being felt in Europe. Once again, the work of

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<sup>2</sup> The IOM estimates that more than 186,000 migrants arrived to Europe in 2017 via Mediterranean routes. Approximately 92% of migrants reached European countries by sea (172,362), and the remaining 8% arrived using various land routes.

Nansen – largely developed on the field of war – would mark International Law. In the words of Cutts (ibid., 15–22), Nansen set the structural foundations of what came to be the Council of the United Nations for Human Rights. His historical importance is owed, not only to the legacy on the plan of protection for rights of refugees, but also to the fact that we performed under the authority of an international organization with a universal breadth, notwithstanding the predominately societal scope – unlike a community scope – of that organization. In retrospective, that is the main contribution that we can take from this brief historical reference: the protection for the rights of refugees was present from the very beginning, in the League of Nations, the very first international organization with a universal scope.

In early 1933 the British had already pre-war policy to protect the Jews. Regarding all negotiations little was done to prevent the slaughter of thousands of Jewish people that did not find any relief in the measures therein foreseen (London 1989, 27). In 1938, after the commencement of the II World War, the Parliament debated the question of Jewish refugees fleeing Nazi Germany. Regardless of it having taken place, no measures were taken in order to assure their protection, having some of the rights that had been granted in the 33-38 period under the pre-war policy, been withdrawn (ibid., 29). Also in 1938, and under the initiative of President Roosevelt, an international conference on the refugee problem was held in Evian, France (ibid., 31). All the meetings, ideas, and negotiations came to fail the Jewish people, as, in the outbreak of war, in 1939, no specific measures had been taken. In the aftermath of World War II, facing the horrors and crimes against humanity committed throughout the conflict, the question of refugees became relevant again at the core of International Law, and particularly at the international organizations that were constituted during that period. Having such atrocities been committed under the global inertia of other EU countries, it comes with no surprise that, in order to prevent a repetition of such shameful event, in 1948 the protection for the rights of refugees is enshrined in the Universal Declaration of Human Rights (UDHR) of 1948, in the scope of the United Nations (UN).

While the aforementioned declaration (UDHR) doesn't have, in itself, any legally binding force (Porter 1995, 150), it incorporates provisions understood as mandatory, either by international custom – a source of law – or by considering that some of those provisions are of a *ius cogens* nature (ibid., 151–153).

Of utter relevance, to the present paper is the fact that, in the convention itself, in Article 14 paragraph 1, it is stated, "*Everyone has the right to seek and to enjoy in other countries asylum from persecution*". Relatedly, Article 13 paragraph 2 states that "*Everyone has the right to leave any country, including his own, and to return to his country*". The International Covenant on Civil and Political Rights (ICCPR) proves itself to be quite similar with the UDHR on this aspect. Since the ICCPR is also an international treaty with binding force to the member states – the Covenant determines in its Article 12 that every individual "*shall be free to leave any country, including his own*" (2<sup>nd</sup> paragraph) and that "*Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence*" (1<sup>st</sup> paragraph), while equally, "*No one shall be arbitrarily deprived of the right to enter his own country*" (4<sup>th</sup> paragraph). This last provision is especially important, having earned particular relevance at United Nations Human Rights Committee, which concluded that, in that which concerns refugees, this provision encompasses the right to a voluntary repatriation, closing off, although implicitly, the prohibition of forced

migration and the mass expulsion of population to other countries. The UDHR can also be seen as an extension to the UN Charter as Article I of the Charter states clearly that one of the main purposes of the U.N. involves "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." (ibid., 150).

Still at the universal scope, it's possible to find provisions of Conventional International Law concerning the protection of the rights of refugees, which are concurrent to the UDHR. In truth, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 prohibits in its Article 44 about the question of refugees, their treatment as foreign enemies by any detaining forces (Pictet 1952, 263). This means that the refugees (denominated as "friendly enemies") enjoy, in the scope of this convention, from a different status than those of foreign enemies (which, in opposition, are called "real enemies"). The 1951 Convention Relating to the Status of Refugees came to be even more determining. Adopted on 28<sup>th</sup> of July, and entering into force on 22 April 1954, is grounded in Article 14 of the UDHR, this convention expresses a large and important international consensus in what concerns the most fundamental aspects of the status of refugees, and came to consolidate previous international instruments relating to refugees. Under this convention, refugees benefit from a treatment as favourable as the one offered to foreign citizens in general, and sometimes even the same as the treatment offered by the signatory States to their own nationals. Its' main object isn't limited to the recognition of the social and humanitarian issues so characteristic of the refugee crisis, but also states that refugees' crisis usually represents the potential for tensions between States, thus being necessary to appeal to international solidarity, specifically the principle of cooperation, aiming to alleviate the burden between States. The *non-refoulement principle*, prohibiting expulsion and repulse – is a central aspect in the protection of the rights of refugees, being part of their status. According to this principle, no signatory State of the Convention can expel or repeal a refugee to any territory where his life or liberty may be threatened (Allain 2001, 536–539; see also Kakosimou 2017, 168 and Duarte 2017, 52). Regardless of its broader protection, the Convention fails on the definition of the concept of refugee therein contained (McFadyen 2012, 17–20) as it grants a very precise historical delimitation and the added possibility for States to interpret the legal provision. The main issue raised by this determination of the concept, or lack thereof, is quite clear: being up to the States the application and enforcement of the provisions in the Convention, the possibility to restrict the concept of refugee becomes real, therefore limiting the very reach of the status in its subjective scope (Kneebone et al 2014).

This lack of precision remains present as not even the Protocol of New York, dated 31<sup>st</sup> of January 1967, an addition to the Convention Relative to the Status of Refugees, concluded in Geneva on 28<sup>th</sup> of July 1951 has come to clarify or overcome the imprecision contained in the previous definition, merely suppressing the geographical and temporal references in the definition from the Convention (Cameron et al 2015, 1217).

The Statute of the Office of the United Nations High Commissioner for Refugees is another instrument that aligns with the ratio of intensification and precision of the legal content in the status of refugees. The United Nations High Commissioner for Refugees (UNHCR) is a subsidiary organ of the General Assembly of the UN, created through Resolution 319 (IV) of the General Assembly of the UN on December 1949. Some member states didn't agree,

however, on the political implications that would arise from such an independent organism, therefore impeding its performance, which saw its duties start only in 1951 (UNHCR 2005). At its origin, the UNHCF was created in order to assist refugees by ensuring primarily that everyone can exercise their right to seek asylum, to seek for security and protection in another State, and finally to exercise the right for voluntary repatriation, as stated in Chapter I, paragraph 1 of the Statute of UNHCR. Other conventions will not be mentioned, as they don't directly relate to the Rights of refugees but rather to Human Rights in general.

### 3 THE RIGHTS OF REFUGEES IN THE EUROPEAN CONTEXT

The Council of Europe came to create the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights. It was opened for signature in Rome on 4 November 1950 and came into force in 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding. As an International Organization with a regional scope, the Council of Europe was constituted (...) *in the interests of economic and social progress, there is a need for a closer unity between all like-minded countries of Europe*".

It intervenes mostly at the level of the protections offered by the Rule of Law and the promotion for the legal cooperation on the most diverse topics, such as the creation of certain organisms. This is the case of the European Convention. In fact, not mentioning the expression "refugee", Article 3 establishes that *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

The case-law of the European Court of Human Rights (ECHR) regarding the application of Article 3 of the European Convention was first established in 1989 in *Soering v. United Kingdom*<sup>3</sup> that concerns Articles 3, 6 and 13 of the European Convention on Human Rights. After committing a series of homicides, Jens Soering, a German citizen living in the United States, came back to Europe where he would be arrested by the British authorities for *Cheque fraud*. At the same time the Bedford Circuit Court in the state of Virginia, accused Soering of a crime which could be punishable with the death penalty, and requested the British authorities his extradition. Soering appealed against this by invoking Article 3 of the European Convention. He argued that if he were found guilty of murder and sentenced to death, that he would experience 'death row-phenomenon' which would lead to the violation of his Convention rights. The European Commission of Human Rights admitted Soering's reasoning, since if extradited he could face torture, inhuman or degrading treatment. The ECHR concluded that *"(...) the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3)".* The Soering case raises the issue of *non-refoulement*, which engages State responsibility by the act of removal of an individual to a State where he or she will be exposed to a certain degree of risk of having her or his Human Rights violated (Greenman 2015, 272).

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<sup>3</sup> ECHR, *Soering v United Kingdom*, Judgment, Merits, and Just Satisfaction, 07/07/1989 App No 14038/88, A/161.

The existence of a real risk of inhumane or degrading treatment is justification for the application of Article 3, decided the ECHR. Even more, in what concerns applicants of asylum their expulsion may result in the liability of the signatory State. This solution is to be applied when it can be proved that the State possessed information, which could lead to a conclusion that, if expelled, the applicant would be exposed to a risk of treatment in breach of Article 3 of the European Convention, and the State still kept that decision. The ECHR case-law confirms this decision in *Chahal v. The United Kingdom*,<sup>4</sup> when it states that: “It is well-established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country”, also in *Cruz Varas And Others v Sweden*<sup>5</sup> the Court states that “As has been noted on previous occasions the Convention must be interpreted in the light of its special character as a treaty for the protection of individual human beings and its safeguards must be construed in a manner which makes them practical and effective”, and it does so, by, again citing its earlier jurisprudence, set forth in *Soering*.

*Soering* case has been consistently cited (i.e. *Hari Dhima v Immigration Appeal Tribunal*; *Ahsan Ullah, Thi Lien Do v Special Adjudicator, Secretary of State for the Home Department*; *Mohammadi v Advocate General Scotland*; *Regina v Special Adjudicator ex parte Ullah*; *Regina v Secretary of State for the Home Department*; *Lough and others v First Secretary of State Bankside Developments Ltd*; *Government of the United States of America v Barnette and Montgomery (No 2)*; *McElhinney v Ireland*; *Al-Adsani v United Kingdom*; *Fogarty v United Kingdom*; *MAK and RK v The United Kingdom, inter alia*).

Article 3 of the European Convention has, also, been called to defend the principle of *non-refoulement*, with the ECHR stating that this Article is compatible with Article 33 of the Convention Relating to the Status of Refugees of 1951, which prohibits the expulsion or the *refoulement* of refugees to other territories when their life or liberty are threatened by reason of race, religion, nationality, social group or political opinions. Vast is the ECHR case-law that confirms this comprehension, in which the following stand out: *Ireland v. The United Kingdom*<sup>6</sup> – where the application of Article 3 of the European Convention depends on the verification of a minimum level of seriousness, relating to the case specifics; the *Greek case*<sup>7</sup> – in which the European Commission on Human Rights described the concepts of torture, punishment and inhuman or degrading treatments; and *Selmouni v. France*<sup>8</sup> – where the ECHR established what it considers to be the minimum level to be able to qualify a certain treatment as torture.

More recently in case *X v. Sweden*,<sup>9</sup> X, a Moroccan national applied for asylum in Sweden after an expulsion request from the Swedish Security Service on the grounds of national security was accepted by the Swedish Migration Agency.

<sup>4</sup> ECHR, *Chahal v. The United Kingdom*, 15/11/1996, Appl. No. 22414/93.

<sup>5</sup> ECHR, *Cruz Varas and others v. Sweden*, 20/03/1981, Appl. No(s) 46/1990/237/307.

<sup>6</sup> ECHR, *Ireland v. The United Kingdom*, 18/01/1978 Appl. No. 5310/71.

<sup>7</sup> ECHR, *Greek Case*, 05/11/1969, Appl. No(s). 3321/67, 3322/67, 3323/67, 3344/67.

<sup>8</sup> ECHR, *Case of Selmouni v. France*, 28/07/1999, Appl. No. 25803/9.

<sup>9</sup> ECHR, *X v. Sweden*, 09/01/2018, Appl. No. 36417/16.



The asylum request was rejected and the expulsion order was confirmed by the Migration Court of Appeal. In his application, X, claimed that, having been considered a terrorist he would risk torture and at least ten years' imprisonment in Morocco, which would be a clear violation of Article 3 of the ECHR. Recalling its own jurisprudence, the ECHR, ruled that even facing the risk of terrorist activities the applicant's expulsion to Morocco would involve a violation of Article 3 ECHR *"It is well established that expulsion by a Contracting State may give rise to an issue under Article 3 and hence engage the responsibility of that State under the Convention where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such circumstances, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion"*.

#### 4 THE REFUGEES IN EUROPEAN UNION LAW

In order to manage the present crisis, which is both humanitarian and political in its nature, the EU's Asylum Policy has been called to action, although there are some issues in the Communities' performance. Since 1999, the EU has been working to create a Common European Asylum System (CEAS) and improve the current legislative framework. From the beginning and up 2005, harmonization of the common minimum standards for asylum was developed by the means of several different legislative acts. In 2001, the Temporary Protection Directive allowed for a common EU response to a mass influx of displaced persons unable to return to their country of origin. The Family Reunification Directive also applies to refugees (Duarte 2017, 61).

The EU's asylum policy as we now know finds its legal grounds on the provisions of Articles 67 paragraph 2 and 78 of the Treaty on the Functioning of the European Union (TFEU), in its final version, written in the Lisbon Treaty (Mitsilegas 2014, 183), and Article 18 of the Charter of Fundamental Rights of the European Union. Under the terms of the previous Articles in the TFEU, the EU aims to develop a common policy in the matters of asylum (Goudappel and Raulus 2011), establishing subsidiary and temporary protection destined to grant an adequate status to the asylum applicant, thus observing the principle of non-refoulement (Fry 2005, 100).

The harmonization of asylum proceedings to be applied by member states is also one of the proposed objectives by the EU, as can be seen in the Green Paper on the Common European Asylum System, which has fallen under the criticism of merely imposing a common minimum (UNHCR 2007), instead of proceeding to a full uniformization of the community policy regarding asylum proceedings, creating a single and equal regulation to be applied by all member states.

Notwithstanding, the terminology of the various subsections of paragraph 2 of Article 78 TFEU, contains the expressions *"uniform"* and *"common"*, which suggest a differentiated treatment with grounds on the specific subject matter of those subsections (Duarte 2017, 61). In fact – not wanting to diminish the importance of subsections *a)* and *b)* of paragraph 2 of Article 78 TFEU, relating to the status of asylum and subsidiary protection – the wording in this Article leaves quite clear the idea that the EU wishes to develop a *"(...) common policy on asylum, subsidiary protection and temporary protection"* (1<sup>st</sup> paragraph), and

for that end “(...) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system (...)” (2<sup>nd</sup> paragraph).

The right of asylum contained in the Charter on Fundamental Rights of the European Union is equal in content to the Convention Relative to the Status of Refugees of 1951 and its’ 1967 Protocol, as well as the Treaty on the European Union and the Treaty on the Functioning of the European Union, therefore relaying once more the problem to the same conditions we’ve been analysing so far, with the identified issues unchanged (ibid.).

## 5 BRIEF CONSIDERATIONS ABOUT EUROPEAN UNION LAW ON ASYLUM AND PROTECTION

As we have seen above, several steps have been taken towards ensuring a bigger degree of protection to asylum seekers, starting with the Treaty of Amsterdam and with several new adjustments, and amendments being made. The matters relating to asylum have been, throughout the ages, subjected to a positive evolution. The biggest contributions to that end are owed to the Treaties of Amsterdam and Nice, changes continue with the Treaty of Lisbon.

The Treaty of Amsterdam came to grant competences to the Council on the subject of asylum and refugees (Piris and Maganza 1998, S37), which would later propel the development of a specific European regime on it. As for the Treaty of Nice, it was foreseen that, within 5 years of it coming into force, the Council would have adopted specific measures for certain sectors, one of which was the appreciation of asylum requests on the basis of Articles 67(2) and 78 of the Treaty on the Functioning of the European Union and Article 18 of the EU Charter of Fundamental Rights. The point was to adopt criteria that would determine which member state was responsible for reviewing a request for asylum by nationals from third States and to adopt a set of basic rules relative to the acceptance of asylum applicants and the necessary proceedings to the concession of the status of refugee, having minimum criteria been set forth in the Treaty of Amsterdam (Kaunert and Leonard 2012, 3). The treaty of Nice was the target of severe criticism, having been said by Romano Prodi that it “... was characterised by the efforts of many to defend their immediate interests, to the detriment of a long-term vision” and “... unnecessary...”. The treaty of Lisbon as it came to grant the EU the competence to adopt, legislative instruments for a uniform status of asylum, a uniform status of subsidiary protection, a common system of temporary protection, common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status, criteria and mechanisms for the determination of the member state responsible for considering an application for protection, standards for reception conditions, and partnership and co-operation with third countries for the purpose of managing inflows of people applying for protection in accordance with Article 78 of the TFUE (ibid., 1400). It came to set common measures, rather than minimum measures set forth in both Amsterdam and Nice Treaties. Still, The Treaty did not make any changes to the decision-making procedure within the EU.

Resulting from the guidance therein foreseen in Treaty of Nice, the Council of the European Union (2001), issued a Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on

*measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof* – Directive 2001/55/EC of the Council. This Directive's scope was limited to the enumeration of a series of minimum standards for requirements to be fulfilled by asylum applicants from third States, stateless persons or any person in need of international protection during a massive influx of displaced persons in order to ensure a balance of efforts between the member states.

Not less decisive was Directive 2004/83/EC of the Council of 29 of April 2004, which established a set of minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, known as the "Qualification Directive". The 2004 Qualification Directive was introduced as part of the framework for a Common European Asylum System and aims to harmonize the criteria by which member states define who qualifies as a refugee or is, otherwise in need of international protection. Under this Directive, the concept of refugee is defined by subsection c) or Article 2, which generally follows the definition from the Convention on the Status of Refugees of 1951. Regarding the internal protection of asylum seekers, Article 8 of the Directive, determines that it is up to the member states to appreciate the request for international protection, with the possibility that they might find it not to be necessary. *"(...) if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country."* In fact, according to this Directive, member states should consider the general conditions of that region and country as well as the personal situation of the applicant. Notwithstanding the Council's efforts, it is quite noticeable the still standing resistance to the adoption of uniform policies.

As for Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011, also known as Recast or *"New Asylum Qualification Directive"* a set of rules were established relating to the conditions which nationals from third States or stateless persons should fulfil in order to benefit from international protection, creating thus a uniform legal status for refugees as well as the beneficiaries from subsidiary protection it brought certain improvements in defining people in need of protection and the content of such protection (Bačić 2012). Under this Directive, several amendments took place, for instance, in Article 2 subsection (j), we find an extended definition of the family with the deletion of the requirement that minor children of the beneficiary of international protection are dependent; in Article 7 is present the definition of actors of protection is clarified and there is a requirement for such protection to be effective and of a non-temporary nature; The internal protection concept is further aligned with the case law of the European Court of Human Rights and the possibility to apply this concept notwithstanding technical obstacles to return has been removed is set forth in Article 8; in Article 9 number 3 are the causal link' requirement between acts of persecution and the 1951 Refugee Convention grounds is amended to clarify that this link is fulfilled also where there is a connection between the acts of persecution and the absence of protection against such acts; also in in Article 10, number 1, subsection d) there is a new explicit obligation for States to take into consideration gender related aspects, including gender identity for the purposes of defining membership of a particular social group; The cessation provisions for refugee status and subsidiary protection incorporate an exception to cessation in relation to compelling reasons arising out of previous

persecution can be found in in Article 11 number 3 and Article 16 number 3. Subsection. In its turn, Article 14, numbers 4 and 6 is quite controversial as it has been said to be incompatible with Article 1C of the Refugee Convention that contains an exhaustive list of reasons for cessation of refugee status and, the provisions permitting revocation of, ending of or refusal to renew refugee status under Article 14 (4) of the Qualification Directive do not in reality implement Article 33 (2) of the Refugee Convention but instead enlarge the list of reasons for cessation of refugee status under the Article 1C of the Refugee Convention. By doing so, the Directive is found in breach of the member states' commitments to the Refugee Convention. It has also been said to be contrary to Article 1F of the Refugee Convention as it sets out an exhaustive list of reasons for excluding a person from a definition of a refugee because of the abhorrent acts he or she has committed, as can be read that *"the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nation. It, accordingly to Lambert (2006, 178) "is contrary to the Refugee Convention because it is based on a misreading of the purpose of Article 33 (2) in the Refugee Convention. Article 33(2) provides that a refugee whom there are reasonable grounds for regarding as a danger to the security or the community of the country in which he or she took refuge may not claim the benefit of the principle of non-refoulement; it does not provide that such a person may not benefit from the provisions of the Refugee Convention at large. Article 33(2) is not an exclusion clause."* In Chapter VII, are detailed the rights for beneficiaries of refugee status and subsidiary protection are approximated with the exception of the duration of residence permits and access to social welfare; member states are no longer permitted to reduce the content of rights granted to international protection beneficiaries on the grounds that such status was obtained due to activities engaged in for the sole or main purpose of creating the necessary conditions for being recognized as a person eligible for refugee status or subsidiary protection, as it was possible in the previous Directive, according to its Articles 20 number 6 and 7; Article 23 number two increased the right of family members of subsidiary protection beneficiaries are entitled to the same content of rights granted under Chapter VII in accordance with national procedures and in so far as compatible with the personal legal status of the family member; and also in Article 26 number 2, we can find a an improved provision on access to employment requiring member states to ensure that beneficiaries of international protection have access to training courses for upgrading skills and counselling services afforded by employment offices under equivalent conditions as nationals (ECRE 2013, 3–5).

It is important to mention that this Directive was created, unlike the first, after the entry into force of the Treaty of Functioning of the European Union (TFUE) (UNHCR 2012, 2–3). However, its provisions may not yet be sufficient to establish "common procedures" for the granting or withdrawing of a *"uniform status [...] valid throughout the Union"*.

As for the concept of refugee, it follows the already existent concept arising from the Convention Relative to the Status of Refugees (1951) and Directive 2004/83/EC, endeavouring for a more confined concept. It excels in the verification of a series of requisites for the individual appreciation of each

applicant's case, with the goal of granting the status of refugee, or in alternative the status of subsidiary protection, establishing a set of standards relating to the way in which a request for international protection is to be reviewed and the conditions which the nationals of third States and stateless persons need to meet to benefit from such protection, while equally focusing on the uniformized legal status of refugees and the beneficiaries of subsidiary protection. It does so by invoking subsections a) and b) of Article 78 of the TFEU with the goal of creating and developing a common asylum policy including European asylum system.

Right in the first Articles of the Directive, it comes to define, in Article 2, the concept of international protection, encompassing in it the status of refugee and the status of subsidiary protection (subparagraph a.).

The procedure for granting the status of refugee is commenced by presenting request for international protection that is to be examined by the member state where such request was submitted, under Article 4. It is up to the member state to request all documents deemed necessary for such application and the presentation of the reasons for seeking international protection. Under Article 4 paragraph 3, member states should be mindful of any relevant facts from the country of origin at that time, including the legislation, regulation and the way they're applied; the relevant declarations and the documentation presented by the applicant, involving information if the applicant has suffered or is at risk of suffering serious persecution; the situation and personal circumstances of the applicant, such as factors relating to his personal history, gender and age are to be taken into consideration, in order to examine, based on the personal situation of the applicant if the acts he was or may be exposed to could be considered persecution or serious harm; if the activities carried out by the applicant since leaving his or her country of origin had the sole end of creating the necessary conditions to apply for international protection, analysis in deemed in order to examine if those activities would expose the applicant to persecution or serious harm if he returned to that country; and still, if it was reasonable to predict that the applicant could rely on the protection of another country where he could claim citizenship. Paragraph 5 of Article 4 adds the following: if the member states demand that the applicant justifies his request for international protection and if the individual provides information found not be truthful, the elements could fail to be confirmed in the following cases: when it is evident the effort of the applicant to justify his request; when the applicant has provided relevant elements for the granting of essential protection and his explanation is satisfactory in the case of lack of documentation; when the declarations of the applicant have been considered as coherent and plausible; when the applicant has presented his request for protection as soon as possible; and when the general credibility of the applicant has been proven. For the examination of the requests for international protection, Article 5 of the Directive encompasses the events that occurred after the request and that may influence on the justified fear of persecution of the real risk that the applicant may suffer serious harm. The objective of the article isn't to exclude neither the member states consideration nor the concrete circumstances occurring at the applicant's country of origin. The usefulness of this provision is found in the fact that it effectively accounts for relevant external elements, which may influence the asylum request (Duarte 2017, 68). In turn, Article 6 defines the actors of persecution or of serious harm determining that these could be States, parties or organizations controlling the State or a substantial part of the territory of the State, and non-State actors, if it

can be demonstrated that the actors mentioned in points a) and b) including international organizations, are unable or unwilling to provide protection against persecution or serious harm. In the present Directive, the member states may after examining the request of the applicant, decide that the individual doesn't need international protection, when it can't be proved that in a specific part of his country or origin, a justified fear of persecution or serious harm exists, and also when it's possible for the applicant to obtain protection in another part of his country of origin. One big problem with the procedure is connected with the language of the application as no support is granted for the filling of the papers that are not written, in the majority of times, in a language that the refugee applicant understands (Perkowska and Jurgielewicz 2013, 120).

Therefore, we refer to the internal protection under Article 8 paragraph 1 which establishes the consideration that member states may refuse to grant international protection of an applicant if the requisites above are verified. However, if on one hand this provision gives the States almost an analytical and interpretative arbitrary power, on the other hand, we find remarkable the duty enshrined under paragraph 2 which establishes that upon the examination of the request, the States should consider the general conditions of the country of origin of the applicant and regarding the applicant himself, this way obtaining precise and up to date information, which could come from the Office of the United Nations High Commissioner for Refugees and from the European Agency for Asylum (UNHCR 2012). This orientation is quite clear when it states under paragraph 1 that "(...) *Member States may determine (...)*" and under paragraph 2 that "(...) *Member States shall (...)*", which is relevant regarding the interpretation and relying on the consideration that if Member States consider that there is a margin of internal protection in the country of origin in order to deny granting international protection, then it is mandatory that they verify the existence of certain conditions regarding the country or the relevant part of that country and the applicant, nearly imposing a duty to give a fair statement of reasons for the decision, which in any event reduces the member states wide margin of discretion and interpretation. Chapter III relates to the conditions to be met by the applicant for international protection, regarding the granting of the refugee status. Thus, we must account for the definition of refugee in the amended by the Directive, which under Article 2 subparagraph d) defines refugee as: "*third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or owing to such fear, is unwilling to avail himself or herself of the protection of that country, or stateless person, who, being outside of the country of habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it*", and is complemented by Article 9 of the same diploma, where acts of persecution are addressed, it can be read that these acts must be sufficiently serious by its nature or repetition as to constitute a severe violation of basic rights, in particular the rights from which derogation cannot be made under Article 15 number 2 of the European Convention on Human Rights and Fundamental Freedoms; and the acts that constitute an accumulation of various measures, including violations of Human Rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in the previous point.

The "*Reasons for persecution*" are established in Article 10, as its provision states that member states should consider that the concept of race includes



considerations of colour, descent or membership of a particular ethnic group; that the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from formal worship in private or in public, either alone or in community with others and other religious acts or expressions of view or forms of personal or communal conduct based on or mandated; that nationality isn't only confined to citizenship or lack thereof but shall in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity; and that a particular social share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is fundamental to identity or conscience that a person should not be forced to renounce it and still the consideration that a group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; finally the reasons for persecution encompass also the concept of political opinion, which is the holding of an opinion, thought or belief on a matter related to the potential actors of persecution.

On the subject of the procedure for granting and withdrawal of international protection, Directive 2013/32/EU of 26 of July 2013, which revoked previous Directive 2005/85/EC, fits the purpose of establishing common procedures for granting and withdrawing international protection pursuant to the recast Qualification Directive (ECRE 2014, 3). Specifically concerning international protection, this Directive aims to create faster, more efficient and fairer procedures in compliance with EU law. It was established, on the other hand, that member states should create specific mechanisms to aid applicant in requesting for international protection, with the obligation that the initial analysis for each request should never last over 6 months after the request for the status of international protection. The review proceedings can include several special forms of procedure, such as accelerated proceedings or request proceedings at the border (*ibid.*, 4).

This Directive establishes a set of rules for the reception of applicants for international protection these rules are to be applied to every national of a third state, stateless persons who apply for international protection in the territory of a member state. The main objective of this Directive is the creation of a *de facto* protection for asylum seekers, to be implemented by member states during the review proceedings pending the decision to grant asylum and to establish the common procedures for granting and withdrawing international protection (*ibid.*).

The Recast Directive, on its Chapter II, regarding "*Basic Principles and Guarantees*" confers, Article 6 paragraphs 1 and 5, a series of prerogatives to the applicants of international protection, with the most relevant being the sped up registration of the requests; the possibility for the request to be made for other individuals who the applicant may be responsible for and minors, accordingly to Article 7 paragraphs 2, 3 and 4; information and counselling at border crossing points or detention centres for third country nationals or stateless persons who wish to apply for international protection, Article 8 paragraph 1; the right to remain in the member state pending the examination of the application accordingly to Article 9 paragraph 1, the guarantee that applications shall be assessed even if they have not been made as soon as possible, as in mentioned in Article 10 paragraph 1; the guarantee that the status of refugee is examined first and if not granted, the assessment for the status of subsidiary protection shall be examined is set forth in the same article, in paragraph 2; the

guaranties relative to the procedure of assessment for requests follow, in paragraph 3; the guarantee that decisions regarding the requests for international protection are to be given in writing as is stated in Article 11 paragraph 1; there is, accordingly to Article 11 paragraph the possibility to challenge negative decisions; the right to benefit from an interpreter in order present their requests comes in Article 12 paragraph 1, being entitled to be informed of every step of the procedure; the right for a personal interview before the decision is now foreseen in Article 14 and the right to have legal assistance and representation in all steps of the procedure for assessment of the request, including the procedure relative to challenging the decision is set forth by Articles 19 to 23. Through the deletion of old Article 24 of the 2005 Asylum Procedures Directive, the recast Asylum Procedures Directive now no longer allows for derogations from the basic principles and guarantees as laid down in Chapter II in the context of border procedures or procedures dealing with subsequent asylum applications. As a result, regardless of the type of procedure used to process asylum applications, the same set of basic guarantees with regard to the personal interview, access to legal assistance and interpretation and guarantees for asylum seekers in need of special procedural guarantees and unaccompanied children (ibid., 34).

In what concerns the proceedings for granting the status of international protection, Chapter III of the Directive determines that the decision must be taken within 6 months from the request however; Article 31 paragraphs 3 and 4 allow member states to extend that deadline. While Article 31 sets as a principle that the examination of an asylum application must be concluded within 6 months of the lodging of the application, it also provides for a possibility for member states to extend such time limits for another 9 months or even 12 months. An extension of 9 months is possible in case (a) complex issues of fact and/or law are involved; (b) it is difficult to conclude the procedure within 6 months because a large number of third-country nationals or stateless persons apply simultaneously or (c) where the delay can clearly be attributed to the failure of the applicant to comply with its "cooperation" duties under Article 13. This can be further extended with another 3 months, by way of exception and in duly justified circumstances, "*where necessary to ensure an adequate and complete examination*". However, under no circumstances may the examination take any longer than 21 months from the lodging of the application (ibid., 34–35). The case for inadmissible applications follows Article 33, as it establishes an exhaustive list of criteria on the basis of which an application for international protection may be considered as inadmissible, excluding the use of any other admissibility grounds in national law.

Regarding procedural rules, under Article 40 and 42, the procedure for granting the status of refugee starts with a preliminary examination in order to verify the elements contained in the request for international protection of the applicant, it is up for the member state and their national law to define the specific terms of this examination. Lastly, Article 46 determines that applicants enjoy the guarantee to a judicial review if faced with a negative decision under the following grounds: the application is considered to be unfounded in relation to refugee status or subsidiary protection status; when the decision was taken at a border crossing or transit zone, through the application criteria defined in national law; in case of a refusal to reopen the examination of an application after its discontinuation; Likewise, applicants have the right for a judicial review from the refusals to reopen request assessments for international protection under the terms of Article 27 and 28 of the Directive and in the cases

where a decision of withdrawal of such protection has been made. As for the granting of the status of refugee and its accessory points are still subject to the provisions contained in Directive 2011/95/EU. With regard to Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, together with the Recast Dublin Regulation (below), the recast EURODAC Regulation and the recast Asylum Procedures Directive (above), constituted the final step in the second phase of harmonisation of asylum law in the EU member states, and replaces Council Directive 2003/9/EC (Roure 2009, 3–5). It increases the level of and access to reception conditions for applicants for international protection during the examination of their application in many respects (ECRE 2015). Unfortunately, its lack of transposition came to limit its applicability; hence, the authors only refer to it, not studying the directive in detail.

Dublin III Regulation,<sup>10</sup> substitutes the previous Council Regulation (known as Dublin II Regulation (EC) 343/2003) which establishes “*the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person*”. It grants applicants a better protection until the status of refugee is granted to them and is considered to be the cornerstone of the EU’s Common European Asylum System, or CEAS (Dragan 2017, 84). The criteria for determining the member state responsible for examining requests are divided in criteria of family, recent possession of a visa or residency permit in EU member state, but also the means with which the applicant entered the European territory. The Regulation creates a system of better border control, allowing simultaneously for more security and ensure compliance with the Dublin III Regulation, taking steps to avoid “*asylum-shopping*”, and at the same time, it determined the creation of the European Union’s biometric database containing the fingerprints of every asylum applicant and citizens of third States to be compared with the member states own systems, and the EURODAC, allowing for member states to detect an asylum seeker or a third State citizen remaining illegally on European territory, and if previous asylum requests, in the same, or any other member state had taken place. The main issue with this diploma is the fact that, in practice, it does not offer an efficient framework for burden sharing between member states (ibid., 85).

Concerned with the refugee crisis in Europe, the Decision (EU) 2015/1523 of 14 of September 2015 proceeded to relocate applicants for international protection who were in refugee camps in Greece and Italy. The decision only applied to applicants that had requested international protection in Italy or Greece and if in relation to those applicants these States would’ve been responsible for examining the request, under the criteria of determination established in Chapter III of the Regulation (EU) 604/2013. The relocation aimed at distributing 40000 individuals between the other member states who would, in cooperation with the European Agency for Asylum, adopt the necessary measures for direct cooperation and exchange of information with other entities, this Temporary EU Relocation System for the redistribution of asylum-seekers between EU member states was very controversial (Carrera, Gros and Guild 2015). The Decision imposes a strict procedure of collaboration, cooperation and exchange of information with aims for the approval and

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<sup>10</sup> Regulation 604/2013 of 26 June 2013.

relocation of refugees. The Decision is no longer in force, as its date of validity was the 17<sup>th</sup> of December 2017.

## 6 CONCLUSIONS

Throughout the years the concept of *refugee* has experienced severe changes. This mutation is deeply related to the changes in society itself, as well as the deeper care for the human person, and human dignity. There will never be a final concept for defining what a refugee is. Concluding that the lack of definition is one of the problems does not come as a surprise to the authors, that found, throughout this work, a multiplicity of definitions, concepts, and statutes that go around the concept of refugees but fail to provide one definition that will take into consideration all the peculiarities of this “state of being”.

After going through all the EU legislation on the matter, we came to conclude that, notwithstanding the growing intensity and worry regarding international protection, encompassing the granting of the status of refugee and subsidiary protection, the member states have a relatively wide margin of action to apply the provisions contained in the analysed directives. The directives themselves have been amended and improved in order to provide wider protection, but failing to do so. The diversity of legislation, as well as the margin it provides to the member states, whilst applying it, leads to a serious of restrictive interpretations of what is therein foreseen. The member states “find excuses” in the need for safeguarding their population, as well as economic and political reasons in order to limit the access of migrants – to be refugees – to enter and stay in their territory. The EU solidarity is broken when faced with economic, financial, and safety concerns arising from the population in general, and member states representatives in particular. The incorrect transposition, as well as lack of transposition of the directives only makes it more difficult for the refugees to have the necessary protection.

The mechanisms that would ensure the accomplishment of these solidarity principles are the decisive power of the EU, and its decision making process, as well as the creation of legislation to be enforced in all member states, regardless of their opposition. Even though the EU has always searched for harmonisation, and that it is to be achieved by the means of the legislation therein created, the truth is that the non-binding effect of some of its diplomas, as well as the lack of transpositions of some others, as is the case of Directive 2001/95/EU, fails to reflect a unified and systematic coherence in terms of performance, as we’ve seen, since besides the interpretative and appraising wide discretion, it allows for *asylum shopping*. The fragility of the Union’s policies in the matter of international protection lies in this particular aspect.

All other, and more recent legislative acts have failed to provide further protection, failing to ensure the accomplishment of those principles enshrined in the Declaration of Human Rights, The European Convention and the Charter. All those who are stopped at the borders of Europe see themselves, once again, deprived of their rights, as human beings, because, unwillingly, they became refugees. They are, again, left to their own chance. The dream of reaching Europe in search of a safe haven makes the borders of Europe their new hell.

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## COPING WITH DEMOGRAPHIC CHALLENGES: CASE OF SLOVENIAN LOCAL COMMUNITIES

Simona KUKOVIČ<sup>1</sup>

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*In recent decades, some of the remote rural Slovenian communities that have been historically dependent on traditional economies have experienced the most drastic emigration processes. Among the particularly difficult challenges that they have faced are retaining their youth and attracting new inhabitants. At the same time, some rural exurbs have experienced population growth, which presents another set of leadership challenges for the local executives, i.e. mayors. The analysis of the statistical data reveals that a) the populations of more than half municipalities experienced emigration between 2010 and 2018; b) the populations of urban centres are growing; c) more than one fifth of population live in the three largest urban municipalities and d) the population is concentrated in Slovenia's centre, near the capital city, where we have seen a trend of dramatic population growth. Further analysis shows that the municipalities, which are relatively close to the highways, mostly experienced population growth during the last eight years. Most of the municipalities that are located farther from the highways, and therefore more difficult to access, have experienced population declines during the same period. We conclude that regardless of how local leaders tried to improve the attractiveness of their municipalities, the state and its public policies played a key role, directly impacting local efforts and, consequently, demographic changes.*

**Key words:** demography; population movement; municipality; local leader; Slovenia.

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## 1 ORIGINS OF THE STUDY

In past decade, the number of people who live in cities worldwide has exceeded the number of people who live in rural areas. By 2050, the urban share is predicted to rise (Hambleton 2015) up to 75% (Newton and Doherty 2014). Even though urbanisation<sup>2</sup> affects many areas, has many facets and can cause severe societal problems (Sarzynski 2012), growth is still considered to be the key to an attractive future (Lombardi et al. 2010; Brorström and Parment 2016). This is why urbanisation has long been the subject of research and analysis, which have especially focused on how populations grow. However, the question of how and why communities shrink has only intermittently attracted interest (Brorström and Parment 2016, 74).

The local leadership plays a key role in setting policies and directing the local community. Local communities need active and innovative political leaders who promote investment in human capital, motivation and creativity (Brezovšek and Kukovič 2014, 218). Cooperation between various actors is necessary to solve complex social problems, requiring citizens to be active participants in defining the rules and policies of collective life (Wiatr 2016, 5–6). This is why Hambleton (2013, 11) identifies the six indicators of good local political leadership:

- Articulating a clear vision for the area: Setting out an agenda of what the future of the area should be and developing strategic policy direction. Listening to local people and leading initiatives.
- Promoting the qualities of the area: Building civic pride, promoting the benefits of the locality and attracting inward investment.
- Winning resources: Winning power and funding from higher levels of government and maximizing income from a variety of sources.
- Developing partnerships: Successful leadership is characterized by the existence of a range of partnerships, both internal and external, working to a shared view of the needs of the local community.
- Addressing complex social issues: The increasingly fragmented nature of local government and the growing number of service providers active in a given locality means that complex issues that cross boundaries, or are seen to fall between areas of interest, need to be taken up by leaderships that have an overview and can bring together the right mix of agencies to tackle a particular problem.
- Maintaining support and cohesion: Managing disparate interests and keeping people on board are essential if the leadership is to maintain authority.

The leaders of local communities are changing as they confront many challenges (Haček 2010, 45). The most important challenges include doing more for less, improving the quality of government services for citizens, adapting to changing demands and external influences, establishing horizontal relationships and networks and understanding the nature of the changes themselves (Brezovšek and Kukovič 2014, 219). Among the tectonic changes that affect local communities, demographic changes are one of most significant (Syssner 2015). These bring new and, for some communities, as-yet unknown challenges, due to either population growth or decline.

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<sup>2</sup> Urbanisation implies that people are moving to urban areas (Brorström and Parment 2016, 75).

Cities have traditionally been regarded as »growth machines« (Logan and Molotch 1987), where growth is perceived as a purely positive phenomenon. Local leaders often view urban growth as a success and, conversely, view communities that do not grow as less successful or even failures (Leo and Anderson 2006; Brorström and Parment 2016, 75). The preoccupation with growth implies that shrinkage and demographic declines are tragic and deeply problematic. Shrinkage has the negative connotation of a symptom of an undesirable disease (Sousa and Pinho 2015) and usually carries a certain stigma (Martínez Fernández et al. 2012, 220).

Leo and Anderson (2006) emphasise that most cities cannot actually affect their growth rate, no matter which strategies or policies they enact. However, according to Sousa and Pinho (2015), a local government can use one of two approaches to deal with a shrinking population: reaction or adaptation. Reaction entails finding ways to change the course of development, while adaptation implies minimising its negative consequences. This is not static but a dynamic process (Brorström and Parment 2016, 75). Hospers and Reverda (2015, 39) claim that politicians, citizens and others react to population declines in four stages: (1) trivialising the numbers, (2) attempting to counteract the decline, (3) learning how to deal with it and (4) utilising the shrinkage as an opportunity to enact innovative policies (Syssner 2015, 13). In addition, Hoyt and Leroux (2007) have argued that the actions of shrinking cities follow several phases. The first phase is *shock*, which could stem, for example, from a business closure, and the second phase is *reaction*. It is important to remember that neither shrinking nor growing municipalities follow general patterns; rather, they often act according to different rationales (Sousa and Pinho, 2015; Brorström and Parment 2016, 75). Furthermore, it has been typically understood that unrealistic and biased ideas of growth have hindered proactive strategies for managing decline (Lang 2012, 1748) or even intensified the negative consequences of shrinkage because it is not possible to plan for shrinking cities if the plan presupposes urban growth (Wiechmann and Pallagst 2012, 261–263; Syssner 2015, 13).

In recent decades, some of the remote rural Slovenian communities that have been historically dependent on traditional economies have experienced the most drastic emigration rates in Slovenia. Among the particularly difficult challenges that they have faced are retaining their youth and attracting new people. At the same time, some rural exurbs have experienced population growth, which presents another set of leadership challenges for the local executives, i.e. mayors. Therefore, we have chosen to emphasise demographic changes in Slovenian municipalities.

### 1.1 Aims of the Study

The first aim is to explore demographic changes in Slovenian municipalities and, on the basis of objective statistical data, discover which areas of the country are experiencing emigration and immigration. The second aim is to analyse and discuss how local leaders view the issues and challenges caused by demographic changes. The third aim is to understand how local governments respond to demographic changes and analyse how local leaders react when their municipalities shrink or grow in population and which public policies they develop to confront these ominous trends.

## 2 METHODS

For this article, we used a combination of quantitative and qualitative data.

When we chose particular municipalities<sup>3</sup> to study, we used quantitative demographic data (SORS 2018). First, we calculated the difference between the population in 2010 and the present<sup>4</sup> for each municipality and identified which municipalities are shrinking and which municipalities are growing in population. Second, we divided the 212 Slovenian municipalities into 12 statistical regions based on the Nomenclature of Territorial Units for Statistics (NUTS) model for categorisation introduced by European Union.<sup>5</sup> Thus, we obtained data about which statistical regions are losing their inhabitants and which, according to the inhabitants' perspectives, are more attractive to live in. Third, we identified the municipalities that, according to the statistical data, lost the greatest share of their population and the municipalities that have gained the greatest share of their population. These municipalities were invited to cooperate with us for our study.

A qualitative case study approach was chosen because it is, arguably, the best method for identifying patterns and making conceptual contributions (Yu and Cooper 1983; Fox and others 1988; Siggelkow 2007; Dillman and Frey 1973). The data were collected through interviews<sup>6</sup> with municipal leaders, i.e. elected mayors or directors of municipal administrations (DMAs), to identify which forces drive municipal activities related to population decline or growth. Extensive access to the local leaders was necessary to get first-hand information and real-life views into the research problems.<sup>7</sup> We were particularly interested to learn about how the local leaders reacted and adapted to the challenges caused by oftentimes drastic population changes and if they developed or, at minimum, proposed any new public policies to address the issue. To form a complete picture of their responses, we systematically combined quantitative

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<sup>3</sup> We conceive of »municipality« as constituting the municipal organisation.

<sup>4</sup> In both cases, the H1 data were used, i.e. the state of the population after 1 January in any given calendar year (SORS 2018). We chose 2010 as the starting point for the calculations because 2010 was the year of the regular local elections. The next local elections will be held in November 2018. The previous local elections were held in 2006, but the population statistics are not comparable with the current statistics because the national statistical office changed its methodology in 2008. In addition, we believe that the eight-year period is more appropriate for the analysis because it can show greater changes in the population than it would if we accounted for only a single term in office, i.e. 2014–2018.

<sup>5</sup> Statistical regions are: Pomurska (27 municipalities), Podravska (41 municipalities), Koroška (12 municipalities), Savinjska (33 municipalities), Zasavska (three municipalities), Spodnje Posavska (four municipalities), South-Eastern Slovenia (21 municipalities), Central Slovenia (26 municipalities), Gorenjska (18 municipalities), Goriška (13 municipalities), Notranjsko-kraška (six municipalities) in Obalno-kraška (eight municipalities). We should emphasise that this division into statistical regions does not represent an autonomous level of authority and serves only as the territorial division of the country (for example, for the collection of statistical data).

<sup>6</sup> As research was exploratory, we used predefined open-ended questions in the interviews. In some cases, we conducted interviews face to face; in other cases, we conducted them via phone and/or email. To gain a solid understanding of the particular local contexts, we also collected and examined materials provided by the municipalities. In total, we conducted 17 interviews with representatives from 17 municipalities; interviews were conducted in June 2018. All materials, identity of the interviewees and interview transcripts are with the author.

<sup>7</sup> We express gratitude to the following Slovenian municipalities that provided valuable insights and data (municipalities are listed in alphabetical order): Cerklje na Gorenjskem, Divača, Dravograd, Jezersko, Kanal ob Soči, Loška dolina, Loški Potok, Luče, Mirna Peč, Osilnica, Podvelka, Radeče, Sevnica, Škofljica, Tolmin, Turnišče, and Vipava.

and qualitative data, using inductive and deductive reasoning and applying an abductive methodology.

### 3 DATA ANALYSIS AND EMPIRICAL FINDINGS

In political science and sociology, it is not difficult to find studies that explore urbanisation and urban growth in many different contexts and countries (Reckien and Martinez-Fernandez 2011; Brorström and Parment 2016). Only recently, however, has attention been given to studies that examine declining populations in communities and examine how planners and local decision-makers confront the resulting consequences (see Sousa and Pinho 2015; Wiechmann and Bontje 2015; Syssner 2015). It is difficult, moreover, to find studies on this problem in Slovenia or in its neighbouring Central and Eastern European countries. Even though rapid demographic changes have taken place in Central and Eastern Europe, they are rarely mentioned in international studies on demographic change in local communities.

Consequently, in our own research, we have deliberately focused on Slovenian municipalities and studied the demographic changes that have occurred (and are occurring) in them. We limited our comparative analysis to 2010–2018. According to statistical data, Slovenia currently has 2,066,880 inhabitants (SORS 2018, data 2018H1), which means that the total population of Slovenia has increased by 1% over the last eight years. During the same period, the population of urban centres increased by 1.1%. Currently, more than a third (34.7%) of the Slovenian population lives in 11 urban municipalities. Further, more than a fifth of all Slovenian citizens (22.1%) lives in the three largest urban municipalities: Ljubljana, Maribor and Kranj.

Calculations by individual municipalities show that the populations of more than half (115 of 210<sup>8</sup>) of the municipalities shrank between 2010 and 2018. The populations of the remaining 95 municipalities increased.<sup>9</sup> We have produced a figure (see Figure 1) that illustrates these demographic changes. The red colour marks the municipalities that experienced population declines, and the green colour marks the municipalities that experienced population growth. We divided the municipalities into four sub-categories according to the intensity of the population growth or decline,<sup>10</sup> which is indicated by the intensity of the colours.

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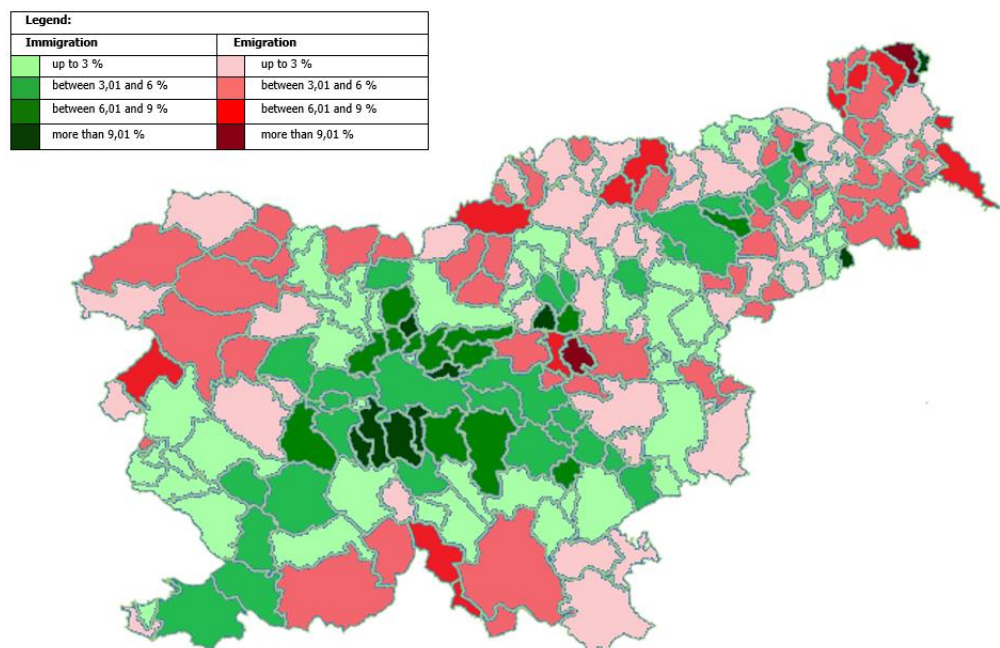
<sup>8</sup> Since two municipalities were established later (the municipality of Mirna in 2010 and the municipality of Ankaran in 2014), we have analysed them as units of the two municipalities (Trebnje and Koper) of which they were previously part.

<sup>9</sup> According to the calculations, between 2010 and 2018, the population decreased the most in Šalovci (-11.3%) and increased the most in Škofljica (+28.1%).

<sup>10</sup> In Category I, we included all municipalities with less than a +/- 3% demographic change. In Category II, we included all municipalities with a demographic change of +/- 3.01–6%. In Category III, we included all municipalities with a demographic change of +/- 6.01–9%. In Category IV, we included all municipalities with a demographic change of +/- 9.01%.



FIGURE 1: DEMOGRAPHIC CHANGES IN SLOVENIAN MUNICIPALITIES



Source: Author's own elaboration.

In Figure 1, some parts of Slovenia are markedly red, which means that their populations have shrank, while other parts are green, which means that their populations have grown. Facing these striking differences, we analysed the municipalities and combined them into the larger territorial units, i.e. the 12 Slovenian statistical regions, before comparing them.

The most dramatic population decline occurred in the Zasavska statistical region; the region lost 6.6% of its total population over the past eight years, with population declines in the three municipalities that comprise the Zasavska region. The Pomurska statistical region includes 27 municipalities, which altogether lost 4% of their population. Only one municipality in the entire Pomurska region—the smallest and most remote—experienced population growth, while all other municipalities experienced population declines over the past eight years. In the Koroška statistical region, all 12 municipalities experienced population declines over the past eight years, losing, in total, 3.1% of their population. The Goriška statistical region experienced population declines in nine municipalities and population growth in four municipalities; in this region, the population shrank by 1.5% between 2010 and 2018. A slightly less-pronounced population decline was observed in the Spodnje Posavska statistical region (-0.6%) and the Podravska statistical region (-0.4%).

In contrast, the populations of four statistical regions experienced slight growth, but, in every case, this growth was very minor (under 1%). For example, in the Savinjska statistical region, which includes 33 municipalities,<sup>11</sup> we observed population growth of only 0.1% over the past eight years. In the Notranjsko-

<sup>11</sup> The population decreased in 17 municipalities and increased in 16 municipalities.



kraška statistical region,<sup>12</sup> the growth was 0.2%; in the Gorenjska statistical region,<sup>13</sup> it was 0.4%; and in Southeastern Slovenia,<sup>14</sup> it was 0.5%.

TABLE 1: DEMOGRAPHIC CHANGES IN STATISTICAL REGIONS

Statistical region	Number of municipalities	Demographic changes/no. of municipalities		Population 2010	Population 2018	Difference (in %)
		-	+			
Zasavska	3	3	0	44,706	41,744	-6.6
Pomurska	27	26	1	119,548	114,776	-4.0
Koroška	12	12	0	72,812	70,550	-3.1
Goriška	13	9	4	119,080	117,260	-1.5
Spodnjeposavska	4	2	2	70,192	69,802	-0.6
Podravska	41	25	16	323,343	322,058	-0.4
Savinjska	33	17	16	260,025	260,317	+0.1
Notranjsko-kraška	6	3	3	52,217	52,334	+0.2
Gorenjska	18	9	9	202,903	203,636	+0.4
Southeastern Slovenia*	21	8	12	142,092	142,819	+0.5
Obalno-kraška*	8	1	6	110,412	113,961	+3.2
Central Slovenia	26	0	26	529,646	557,623	+5.3

Sources: SORS (2018, H1); author's own calculations and presentation.

More substantial population growth was observed in the remaining two statistical regions. The Obalno-kraška statistical region, which includes eight municipalities, experienced a population growth of 3.2% over the last eight years, with only one municipality experiencing a population decline. The largest population growth (5.3%) occurred in the largest statistical region, Central Slovenia (27% of the total population), where all 26 municipalities are marked in green.

When we look for causes of demographic changes in theory, we often encounter processes that might cause migratory flows. These processes are economic restructuring, de-industrialisation, globalisation, increased mobility and political changes (Reckien and Martínez-Fernández 2011, 1376; Haase et al. 2012, 10; Kotilainen et al. 2013; Hollander and Nemeth 2011, 352; Wiechmann and Bontje 2015; Syssner 2015). This means that the processes that trigger changes at the local level usually originate from higher levels of authority. Consequently, the next section is aimed at analysing the causes of Slovenia's demographic changes and discussing how local leaders have confronted the challenges caused by these changes.

#### 4 DISCUSSION: MEETING DEMOGRAPHIC CHALLENGES IN SLOVENIAN MUNICIPALITIES

The fact that some municipalities are experiencing population declines while others are experiencing population growth has, in some cases, been interpreted as a result of the interdependent processes of peripheralisation and centralisation, which make an area or region more attractive, in terms of economic development, infrastructure capacity, proximity to the urban area, etc. (Lang 2012, 1749). Some regions benefit from this kind of regulation while

<sup>12</sup> The Notranjsko-kraška statistical region includes six municipalities, and there was population growth in three cases and population declines in the remaining three cases.

<sup>13</sup> The municipalities in the Gorenjska statistical region experienced different trends. In nine cases, we found population growth, and, in the remaining nine cases, we found population declines.

<sup>14</sup> Southeastern Slovenia includes 21 municipalities. Since the municipality of Mirna was established in 2010, we analysed it as a part of the previous municipality of Trebnje. This means that we observed population declines in eight cases and population growth in 12 cases in Southeastern Slovenia between 2010 and 2018.

others experience capital outflows, shortages in economic subjects and, in particular, declines in human resources, resulting in low levels of innovation and intellectual engagement (Martinez-Fernandez et al. 2012; Syssner 2015).

It should be noted, however, that emigration and immigration are not the only causes of changes in the population of a particular municipality. Population change is also connected with fertility. Emigration, especially by young people, produces a double consequence for the municipality: first, an immediate decrease in the population, and second, a long-term population decline from fewer new-borns. Of course, the obverse effect is also true; immigration results in higher fertility rates.

#### 4.1 The Causes of the Emigration and Immigration of Slovenian Municipal Populations

Each municipality has its own characteristics—geographical, cultural, historical and social—according to which they differ. These characteristics can have positive or negative effects on the population. First, we asked the local representatives of the selected municipalities how they perceived the demographic changes taking place within their municipalities and who or what they believed was responsible for these changes.

The local leaders tended to believe that the demographic changes were caused by the national government's decisions, which have direct consequences for local communities, regardless of immigration or emigration. The municipal leaders that faced population declines emphasised that the centralisation process was the biggest problem.

*An important reason is centralisation and the reduction of the supply of public jobs in rural areas (Tax Administration, Surveying Authority, Social Work Centres, Administrative Units) and the closure of the mail office and the rural bank branches (Interviewee no. 17).*

*In recent years, the municipality has had lots of problems with basic things such as the school, the ATM machine, the mail office, the grocery shop, etc. (Interviewee no. 3).*

*The departments for the state's services are being systematically abolished, and the analysis shows that the total number of employees in these services is not decreasing, but centralizing (Interviewee no. 16).*

*It is necessary to decentralise the state, which, unfortunately, is not happening. Just the contrary is (Interviewee no. 15).*

Another area of concern is the uneven development of the state. A minority of the municipalities (and, consequently, the statistical regions) are experiencing above-average development, while the majority of the municipalities has not experienced this development.

*The national development policy has a significant influence on the movement of the population in the country and, consequently, in the municipalities, which do not achieve proportional development. . . . Disproportionate development will be very difficult to stop, even if a number of positive measures are adopted in the municipalities. . . . These facts will, in my estimation, further increase the developmental disparities until enough measures are taken at the state level to ensure proportional development in*

*all areas, in transport, education, health, agriculture, social protection and others (Interviewee no. 16).*

The third cause of population decline is job shortages in the municipalities. Our interviewees pointed out that young people go to larger towns for their high school and/or university education and find their first jobs there, start building their careers and, ultimately, settle near these urban areas.

*The decline in the population is due, in part, to the lack of adequate jobs in the municipality. These jobs would pay decent wages for young, highly educated jobseekers (Interviewee no. 14).*

In contrast, a representative from a municipality with a growing population stated the following:

*The completion of the industrial zone with the arrival of entrepreneurs has created jobs and allowed people to stay in the local municipality (Interviewee no. 7).*

In border municipalities, the problem is even worse as residents not only leave their municipality but also leave the state and move to larger towns and municipalities in other countries.

*The problem is with emigration to the neighbouring Austria, where better-paid jobs can be easily obtained and where living conditions are better, from cheaper houses to more affordable kindergartens (Interviewee no. 6).*

Transport infrastructure is also a major concern for the local leaders.

*The most-used mode of transportation today is the personal vehicle. Unfortunately, our municipality is at least 30 minutes away from the nearest highway. Consequently, the municipalities with substandard accessibility to the highway network are experiencing demographic outflows. The middle part of the third development axis is only in the planning phase, which does not suggest that the situation will rapidly improve. The investments in the national road infrastructure are too modest. The inadequate road network affects not only the mobility of the population but also the freight transport of companies, especially those that produce products, which, due to their size, represent difficult transport. One of these companies, for example, points out that, due to high fees and the inability of adequate transports, it cannot expand production in our municipality (Interviewee no. 16).*

*Traffic inaccessibility is one of the key reasons why populations are declining in the remote areas of the Alps (Interviewee no. 17).*

*We attribute the population increase in particular to our favourable geographical position; we are very close to the highway and the railway. Our apartments are cheaper than the apartments on the Slovenian coast (20 minutes away), so many of our new inhabitants are from the coast (Interviewee no. 7).*

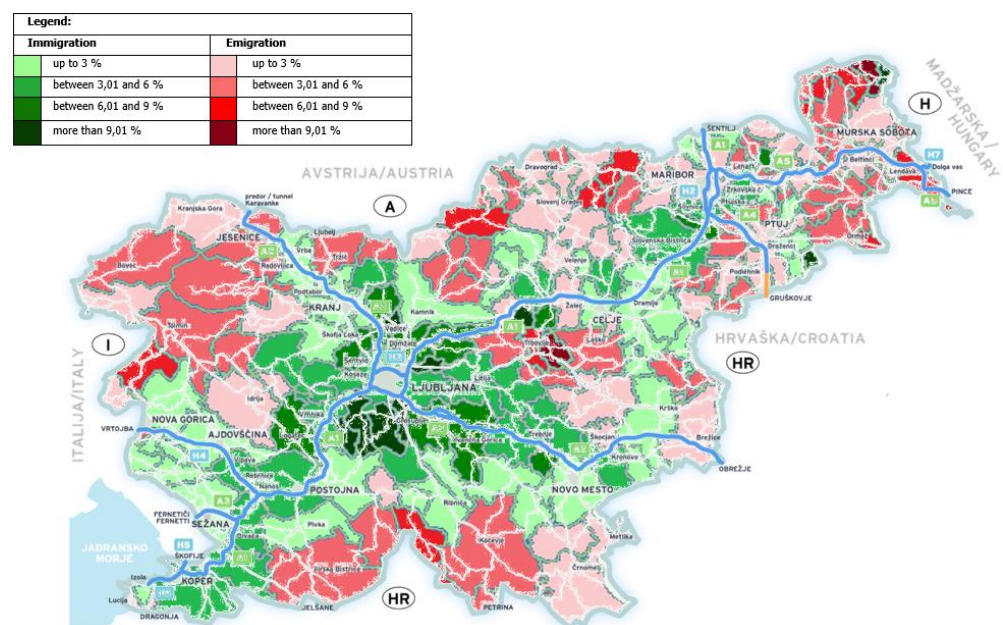
*Our municipality has become interesting in recent years because a highway was built in the immediate vicinity (Interviewee no. 8).*

*. . . In 2009, the municipal council adopted an important document (the Municipal Spatial Plan) that outlined further municipal development. Since then, we have managed to connect our municipality to the highway. The*

*highway has created new development opportunities, and we constructed a large economic zone near the highway (Interviewee no. 2).*

Following the concrete examples given by our interviewees, we also focused on how the highway system has impacted these demographic changes. Figure 2 presents the overlapped maps of the Slovenian municipalities and the motorway network. Note that the areas located along the highways are, for the most part, green, indicating that the population has increased over the last eight years. This growth is most evident in the country's centre, where the Slovenian capital Ljubljana is located. Note as well that the municipalities around Ljubljana are darker shades of green, which means that their immigration rates are even higher.

FIGURE 2: DEMOGRAPHIC CHANGES AND THE MOTORWAY SYSTEM IN SLOVENIA



Sources: DARS (2018); author's own presentation.

There are also numerous red areas that have experienced population declines during the last eight years. These areas tend to be more distant from the highway system, which makes them, as the local leaders emphasised, more difficult to access for both local residents and potential entrepreneurs. The lack of transportation infrastructure in turn causes these municipalities to be less attractive. The Pomurska statistical region is the only exception because it does have a highway connection. However, it is also the farthest statistical region from Slovenia's centre, near the Austrian, Croatian and Hungarian borders, and is also the least-developed region in Slovenia in terms of economic development and unemployment levels.

As we have noted, there are various factors (many of which are interdependent) that influence immigration and emigration to or from a particular municipality. Each of these phenomena has consequences that local communities and their leaders must address.

## 4.2 The Consequences of Emigration and Immigration for Slovenian Municipalities

Demographic changes produce positive and negative consequences. One of the most significant consequences is related to the municipal infrastructure and how it is used. Municipalities with decreasing populations have partially used or even empty public buildings that are becoming too expensive to maintain.

*Reducing the number of inhabitants has a number of consequences: closures of school departments and subsidiary schools, the reduction of divisions in kindergartens, reductions in public transportation, and closures of post offices, banks, grocery shops and public offices (Interviewee no. 1).*

*Due to population declines, the existence of the school is jeopardised. We are fighting to hold on to the ATM, and we will have to fight for post office to remain open. We managed to bring back the grocery shop (Interviewee no. 3).*

*Due to population declines, we have difficulties keeping schools in the countryside open (Interviewee no. 17).*

In contrast, municipalities with growing populations are upgrading their public infrastructure. In fact, they suffer from overcrowding and need to invest in new residential and industrial buildings.

*Many new citizens are (at least according to the statistics) the 'sweet' concern of the municipality. But, in practice, we face numerous challenges that exceed the municipality's capabilities in many areas. First and foremost is the provision of suitable premises and other public infrastructure for social activities, i.e. for kindergarten care and public schools. . . And here is another statistical 'reality'. According to all official indicators, our municipality belongs among the most developed Slovenian municipalities and, for this reason, is not entitled to state co-financing for the construction of infrastructure for kindergartens and schools (Interviewee no. 9).*

*Immigration has positive and negative consequences. It is necessary to invest in increasing the kindergarten's capacity. Due to the increasing number of children, the subsidiary school has been reopened and will remain open for the foreseeable future, and we have also been able to renew two subsidiary schools. . . It is necessary to invest in basic infrastructure (Interviewee no. 8).*

*Due to the increase in the number of children in kindergarten, the subsidies that the municipality pays for educational care services (preschool education) have drastically increased; we have a municipality that has over 80% of the children enrolled in the kindergarten. We do not have any queues because we provide kindergarten care for all (Interviewee no. 2).*

*The biggest "problem" in positive sense is inadequate kindergarten and school infrastructure. Already, this coming autumn we won't have enough classrooms. For the upcoming school year, we will temporarily solve this problem by having two departments have their classes in the music school, but, in the future, it will be necessary to upgrade the school building itself (Interviewee no. 7).*

*In 2012, we completed a new elementary school and kindergarten buildings, and, in September 2017, we completed a new sports hall for the new school. Considering the fact that the number of preschool and school divisions was*

*recalculated according to demographic statistics from 2010, which were not encouraging for us. In 2010, we had 6 kindergarten departments and 13 departments in the elementary school, but, in 2018, we already have 10 or 11 kindergarten departments and 18 departments in the elementary school. We have already encountered spatial distress in the kindergarten, but we have adequately solved it (Interviewee no. 2).*

In many of the responses from the leaders of municipalities with declining populations, we can see a clear link between emigration and ageing. Young educated people tend to leave (or do not return after completing their studies), so municipalities are forced to work hard to retain people in key positions. At the same time, the older population is gradually growing and requires different kinds of assistance.

*Empty houses with untidy surroundings appear over time, especially in rural areas (Interviewee no. 5).*

*Young people tend to leave because there are no job opportunities. At the same time, the older population poses a problem. As the young people leave, youthful energy and the desire for change also leave. We are facing a human resources deficit (Interviewee no. 10).*

*As young people emigrate, there are fewer new families and children and more and more elderly people. Many of them live alone and need different kinds of assistance (health, social, and/or financial). The consequence of more people with disabilities and more sick people, who need more and more outside help, is the need for more financial support for the institutions that provide this assistance for the older population (such as assistance at home). Development in all areas (entrepreneurship, agriculture and elsewhere) is diminishing (Interviewee no. 13).*

*At the moment, the most important negative consequence is the shortage of human resources, which is felt by practically all companies and public institutions (Interviewee no. 17).*

An important consequence of demographic changes is reflected in the distribution of state revenues. Municipalities with declining populations point out that:

*With fewer state financial resources than planned, financial obligations remain largely unchanged, even though income is lower (Interviewee no. 12).*

*The negative effect of emigration, in particular, is a smaller budget for solving the same or even bigger problems. Resolving problems in the local community is inversely proportional to the density of the population (Interviewee no. 1).*

*We have an unfinished retirement home that could provide many jobs, contribute to municipal development and convince young families to return. Unfortunately, there is no money for it, and, at the same time, there are no public or private investors that are interested in completing the retirement home (Interviewee no. 3).*

Municipalities with increasing populations agree that this process affects the distribution of financial resources. However, they have seen their budgetary revenues increase.



*The positive effect of immigration is rooted in the fact that municipalities receive most of their financial resources based on the size of their population, which means that our financial resources are increasing proportionately (Interviewee no. 4).*

*The municipality is becoming increasingly financially independent as it receives more income from more inhabitants (Interviewee no. 8).*

We can see that demographic changes bring different challenges, regardless of whether municipalities are facing emigration or immigration. Municipalities facing emigration experience the neglect of public infrastructure, the departure of young people and older populations. Municipalities facing immigration experience the opposite problems. Due to the rapid increase in the number of children, the municipalities' kindergartens and elementary schools have insufficient capacities, triggering the need for further investment. This means that the majority of a municipality's financial resources is invested to address the needs of its youngest inhabitants.

Both kinds of municipalities also highlight the financial implications of demographic change. Municipalities with growing populations receive more financial resources from the state, as well as more revenues from income taxes. Consequently, they are becoming more financially autonomous. However, what is alarming is the reduction of financial resources for municipalities with declining populations because this trend pushes them into even greater distress and increases their dependence on the state even as their problems continue to worsen.

#### 4.3 Local Government Responses and Policy Solutions

Research data from the mayors of Slovenian municipalities (see Kukovič 2015, 145)<sup>15</sup> show that the mayors' most important policy area (with 84% agreeing) is economic development. In larger municipalities (over 10,000 inhabitants), this proportion exceeds 90%. Mayors also want to focus on improving municipal infrastructure and transportation services (with 84% agreeing). This topic is more relevant for the mayors of smaller municipalities (under 10,000 inhabitants), with 87.3% agreeing, compared to the mayors of large municipalities, with 74.1% agreeing. In contrast, attracting new inhabitants to the municipality is far less important (with 29.2% agreeing). The data thus indicate that the mayors prefer to use indirect actions to improve the attractiveness of their municipalities.

The mayors' responses reveal that each municipality confronts demographic change in its own particular ways. Some municipalities have ordered expert studies, developed strategies to confront the issue and already implemented new public policies, while others are only now learning about the consequences of demographic change. Thus, municipalities use various policies within a legislative framework, but these policies often require state participation, which is frequently a serious problem because the implementation of these policies is delayed or even abandoned entirely.

*For many years now, we have alerted those in charge at the state level, but nobody is actually prepared to deal with these kinds of problems. We have*

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<sup>15</sup> The question was 'What do you wish the main themes of your accomplishments as mayor to be?'

*also sent a number of initiatives and suggestions for more efficient policies to various state institutions (Interviewee no. 9).*

The most common policy to fight emigration is financial transfers, especially subsidies for new-borns, which usually increase as the number of children in a family increases. Municipalities also subsidise preschool childcare.

*We offer financial aid to every new-born in the municipality. In addition, as mayor, I personally visit the parents of every new-born in the municipality. This way, I show symbolically that we are really happy about their decision to have children (Interviewee no. 15).*

*Every year, we organise a special reception for the new inhabitants of the municipality. It is not only intended for people to have an opportunity to socialise but also to allow parents to talk to the mayor about the problems that need to be solved (Interviewee no. 11).*

In some municipalities, people can get one-time financial assistance from the local government. Many municipalities also offer various other kinds of subsidies, including subsidies for new houses.

*There is special support for young families who wish to build new houses in the municipality. It takes the form of a subsidy for half of the communal contribution fee. It exempts young families and investors up to 35 years of age from paying half of the communal contribution fee (Interviewee no. 16).*

*The municipality does not charge a communal contribution fee, and this attracts private investors for housing projects (Interviewee no. 8).*

*In accordance with our regulations, all young families who decide to build a facility in our municipality are exempted from paying communal contribution fees, which could otherwise be up to ten thousand euros, depending on the location of the new facility (Interviewee no. 15).*

In addition to reductions to or exemptions from communal contribution fees for new housing, municipalities encourage immigration with other financial measures. The subsidies worth mentioning include the discount towards the building and land use fees, exemptions from public water and sewage fees, investments in renewable energy resources and co-financing small businesses and agriculture. Municipalities also invest in the restoration of abandoned trade and business premises and the expansion of trade areas. While planning and adopting new environmental plans, they account for rationally and effectively integrating them into the local environment.

According to the local leaders, they also heavily emphasise local infrastructure and have implemented a number of concrete policies. For example, they have invested in road networks not only in the municipality's centre but also in more distant places, which has encouraged citizens to settle in more remote places.

*When our municipality was established, we didn't have a square metre of tarmac outside of the municipal centre, even though we have the highest number of municipal roads per capita in the country. Nowadays, all distant farms (three hamlets lie over 1000 m above sea level) are connected to the valley by tarmac roads. This is why many young landlords decide to stay on the farms (Interviewee no. 15).*

*It is most likely that the population is increasing due to improvements in communal infrastructure, such as regular road maintenance, the construction of sidewalks, the construction and renovation of public lighting and the construction of a waste collection centre and a sewer system, which are particularly important for the seven villages that are located high in the mountains (Interviewee no. 4).*

In addition to road infrastructure, municipalities also invest in reliable optical Internet networks, which, according to the local leaders, are necessary for making a municipality attractive and functional.

Every municipality that participated in our study implemented policies that targeted young citizens. These included policies that improved living conditions and policies that encouraged young people to become more involved in public life. The municipalities created various strategies for youth, subsidised youth programs, created public spaces for socialising and provided sports and other infrastructure. At the same time, municipalities also created active economic policies.

*Through various activities, we strive to bring back the young people who are studying in major cities. These activities are, above all, measures to create positive conditions to encourage young families to settle in our municipality. We also provide subsidies for their first jobs (Interviewee no. 7).*

*We are trying to purchase old buildings and land to provide new housing for people. With municipal regulations, we enable successful companies to expand in the entrepreneurial zone (Interviewee no. 17).*

*We strive to use part of the budget for the youth to create new jobs. We are subsidising deficient professions and giving grants to future farm owners. Our municipality has established an entrepreneurial incubator and has a fund for non-profit housing. We organise local employment fairs and various training workshops for young people. . . We also invest in the economy, agriculture and tourism. With all of these measures, we estimate that young people have more opportunities to stay and develop their potentials at home. At the same time, it is also a challenge for them to find and exploit existing opportunities in their home environment (Interviewee no. 16).*

The local leaders pointed out that it is imperative to invest in the whole community, not just in the centre, because the countryside also offers possibilities for living and development that emphasises tourism and agriculture. They also note that, despite the need to invest in infrastructure, the municipality's basics should not be neglected, since rural municipalities can be well-organised and highly developed but also attractive with their natural, clean environments.

*We are one of the most intensely developed agricultural municipalities, which means that we must balance between needs of the indigenous people and the new inhabitants. The needs of agriculture require the mandatory cooperation of all inhabitants (Interviewee no. 2).*

The analysis of how municipalities respond to demographic changes is consonant with the results of previous research (see Haček 2007, 43; Kukovič 2015, 145). Municipal attractiveness is improved through indirect measures that try to attract new people and prevent people from leaving. We have identified the three interconnected pillars of local public policies that leaders believe are the most important: (1) policies for integrating young people,

including various social transfers, housing assistance, job search assistance and other subsidy measures; (2) policies for developing the economy, in particular (local) entrepreneurship, crafts, tourism and agriculture; and (3) policies to improve infrastructure (which refers to building and road infrastructure, as well as supporting infrastructure, e.g. water, sewage and Internet).

## CONCLUSION

Our study highlights important insights about on-going demographic changes in Slovenian municipalities and identifies significant differences between the statistical areas. The analysis of the statistical data reveals that (1) the populations of as many as 115 of 210 municipalities experienced declines between 2010 and 2018. The remaining 95 municipalities experienced population growth. (2) The populations of urban centres are growing, with more than a third (34.7%) of the total population living in 11 urban municipalities. (3) More than one of every five inhabitants (22.1%) live in the three largest urban municipalities (Ljubljana, Maribor and Kranj). (4) The population is concentrated in Slovenia's centre, near the capital city, where we have seen a trend of dramatic population growth.

The analysis of the qualitative data shows that there is no »one-size-fits-all« approach for managing local government because managing growth differs from managing declines. Our study shows that municipalities face pressing issues, regardless of whether their populations are growing or shrinking. Some municipalities face overcrowding and spatial distress, which force them to invest in public infrastructure, while other municipalities are struggling to maintain partially occupied or empty real estate. This struggle is becoming too expensive and too demanding for them as they fight to maintain existing public services as well.

We should ask whether immigration automatically means that one municipality is more attractive and vice versa: whether emigration means that certain municipalities are unattractive. We argue that this is not the case because emigration and immigration are affected by external factors. In this study, we analysed one of the external factors (the national highway system). We should recall that the analysis showed that the municipalities, which are relatively close to the highways, mostly experienced population growth during the last eight years. Most of the municipalities that are located farther from the highways, and, therefore, are more difficult to access, have experienced population declines during the same period. Therefore, some municipalities became attractive due to the transportation infrastructure while other municipalities experienced population declines and lost potential business investors due to the lack of transportation infrastructure.

During the interviews, we found that, regardless of how local leaders tried to improve the attractiveness of their municipalities, the state and its public policies played a key role, directly impacting local efforts and, consequently, demographic changes. The leaders also highlighted the state centralisation and the absence of a regional level. They saw the occasional political aspirations to merge or even eliminate the smaller municipalities as profoundly unhelpful, and they are fighting to ensure that the municipalities beyond the Central Slovenia statistical region would not be merely leisure settlements but would be areas that are creative and offer opportunities for better living.

The residents of Slovenia are able to choose between living comfortably in the country's urban municipalities, which have significantly developed infrastructure, and living in the somewhat more remote rural municipalities that offer clean natural environments but also more demanding living conditions. The choice, of course, depends on the people who will continue to dictate these demographic changes. However, these challenges will not be the problem of municipalities alone, but, increasingly, the problem of the state.

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