

4 LIBERTY.eu

APRIL 2018

REVIEW

NO.8





4liberty.eu is a network of several think tanks from CEE (Poland, Hungary, Slovakia, Slovenia, the Czech Republic, Bulgaria, Estonia, Lithuania, and Germany) and our partners from EaP countries. Our goals: to make the Central European perspective accessible to an international audience, to be a reliable source of information on regional issues, and act as the voice of the region. Our authors are experts, intellectuals, and researchers. We publish high-quality analyses, polemics, and articles in English, building bridges between nations to further understanding among experts from particular countries. Our website, 4liberty.eu, is designed to become a platform where experts and intellectuals representing liberal thought from Central and Eastern Europe can share their opinions and ideas.

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L I B E R T É !

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COLLAGES:

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Some photos courtesy of Magdalena Rogacka

LAYOUT



Quality Pixels s.c.

6 Sierpnia Street 14, 90-416 Łódź

www.qualitypixels.pl

COVER DESIGN

Katarzyna Lewandowska (Quality Pixels)

PRINT

Drukarnia Poldruk s.c. Józef Grzywa, Marek Kawka

39a Wrocławska St., 58-309 Wałbrzych

Freedom, It’s Personal

Freedom. A small, yet, extremely powerful word. Being members of the Western world, most of us enjoy our freedoms on a daily basis without giving it much thought. Alas, what was once granted may be easily forgotten. We get used to enjoying free and independent press, and having unlimited access to information. We take the ability to make choices, associate, act according to our own conscience, and say what we think out loud for granted. We stop noticing just how lucky we are until our freedoms are taken away from us. This is why we should protect them and make sure they remain intact. If necessary, we must take action, as “disobedience is the true foundation of liberty” – as H.D. Thoreau would say.

Yet, even in this part of the world, not every country guarantees the same personal freedoms, or their extent granted by the constitution may vary. On top of that, nothing is set in stone – the rules of the game called *freedom* may (although should not) fluctuate and undergo changes. Sometimes, the direction of these changes is undesirable. New governmental, political or social bodies do not shy away from trying to push the limits to bring their own vision of what a citizen should or should not be able to do in life. The time is now for civic society to take responsibility for to keep them in check, and to question every change that may potentially have a detrimental effect on our personal freedoms. After all, *ubi dubium, ibi libertas*.¹

Responsibility. Without it, no freedom can nor should be fully realized. Each and every individual must assume responsibility over his or her own life. As a society, we must be able to trust one another and rely on each other’s choices. It is the only way we can grow stronger as a whole. Unfortunately, to put it in Kirkegaard’s words, it is very often the case that we “demand freedom of speech as a compensation for freedom of thought which [we] seldom use.” Although the former should never be denied, the latter has to be its a prerequisite.

It is our job to ensure not only that others respect our personal freedoms, but also that we ourselves know their value and power. Therefore, we felt that it is our responsibility to devote the 8th issue of *4liberty.eu Review* to personal freedoms in the region. The issues related to freedom of the press, the rule of law, NGOs, paternalism, and freedom of religion in the context of education have been thus tackled from the perspective of Poland, Hungary, Bulgaria, Bosnia and Herzegovina, among others. We hope that closely following and drawing our attention to the recent developments in this regard will help us safeguard our personal freedoms. Because protecting them is *our* job. It’s personal.

Olga Łabendowicz
Editor-in-Chief of *4liberty.eu Review*
Coordinator of 4liberty.eu network

¹ Where there is doubt, there is freedom.

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Standing Strong And Firm for Personal Freedoms



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TANJA
PORČNIK

No matter which region of the world we look at, personal freedoms are under assault, be it by the government or by fellow citizens. As such, the government may repress the opposition, journalists, and civil society activists with unlawful imprisonment, torture, and disappearances, while fellow citizens may engage in acts of terrorism that physically injure us.

The rights to life and safety from physical aggression have long been recognized as fundamental to liberty, with the worst violation of our rights—by the government or fellow citizens—being when we are deprived of our life.

The life of a Slovakian investigative journalist Ján Kuciak was taken as he and his fiancée Martina Kušnírová were slain at their house in Veľká Mača, Slovakia in February 2018. This deeply chilling incident sent shockwaves not only across Slovakia, but also across the region. An attack on a journalist cannot be looked at in isolation, as it has ramifications for the entire society for two reasons.

First, an assault on a journalist is an attack on freedom of expression. Attacking one journalist for shedding light on the corrupt dealings of the political elite and their connections to those living on the other side of the law, means an attack on all members of the press and the others who speak truth to power.

Second, an assault on a journalist is an attack on the institutions of a free society that uplifts and protects the journalists for their instrumental role in preserving democracy, where the people keep government in check.

Thus, to preserve a free society, we need to stand strong to protect our freedom of expression, as well as all other personal freedoms.

This issue of the *4Liberty Review* presents a collection of articles focusing on the threats to personal freedoms in our region. Take, for instance, a János Kárpáti article on three *Stop Soros* bills currently being considered in the Hungarian parliament. If the bills were to become laws, the freedom of expression and freedom of association of the representatives of civil organizations, who are being critical of the government, would be visibly diminished.

Marek Tatała's article on the topic of the rule of law in Poland argues that Poles have, in recent years, rightfully went out on the streets to defend the rule of law against the attacks of the ruling Law and Justice (PiS) party. The article reveals that the problem of the justice system in Poland is its efficiency and not independence, as many believe.

In Bill Wirtz's article we find out that paternalistic lifestyle regulations do not merely infringe on the personal freedoms, their applications rarely show improvement to public health. As such, public policy makers would be best advised to engage in evidence-based policy-making and, most importantly, to defend the right of a consumer to make their own choices when it comes to her/his life.

We keep standing strong and firm against threats and violations to personal freedoms. ●

TANJA PORČNIK

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President of the Visio Institute. Co-author of the annual *Human Freedom Index*. Content Editor of *4liberty.eu Review* No.8

Politics Under the Reign of Social Media



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PIOTR
BENIUSZYS

The surge to prominence of extreme right-wing beliefs has become a sign of our times. It only takes a glance at a comparative analysis of election results and how they changed over the last decade in many Western countries. Similarly, a look at the change of tone in public debate and popular consent, which imply racist, anti-Semitic, xenophobic, nationalistic, clerical or homophobic sentiments, sometimes a hatred for one specific nation/religion or acceptance of violence as a viable means of political action. Some only recently unacceptable views have entered the mainstream public opinion. Questions about causes of this phenomenon emerge. One of the most frequently given explanations is the underlining frustration of social groups, triggered by the perceived or real decline of living standards. In the second

decade of the 21st century, social media of the Web 2.0 era have become a major tool for the proliferation of extremism.

TURNING POINT

People's idealistic expectation towards the Internet were fundamentally different from what is being experienced. The World Wide Web was expected to secure freedom and was to be an agent of universal inclusion – giving everyone a path to be a public debate influencer. Whoever wanted to, could be enabled to stop being only a communication recipient. Due to various Internet tools (such as blogs, discussion forums, internet radio podcasts, video streaming sites or comments under news articles) people were equipped with the possibility to emerge as broadcasters with a chance to summon a large audience and alter the views of its members. Social media have additionally reduced the virtual distance between the broadcaster and her/his target audience. They have turned out to be an instrument perfectly designed for political propaganda. Hence the increasing ease with which all manner of thought, idea or postulate is expressed. In the time of ancient Athens, a troublemaker misled to do that on the major agora would be removed by consent before he could spur confusion.¹ More recently, in the age of newspapers and later with omnipresence of television, a troublemaker of this kind would rather be faced with the challenge of getting away with his propaganda past the critical oversight of a newspaper or TV news channel's editor-in-chief.

Extremists have always utilized technology to their benefit. The National Socialists' proficiency in using the radio some 80-90

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¹ Blackwell, Ch.W. (2003) "Athenian Democracy: A Brief Overview", [in:] *Demos. Classical Athenian Democracy*. Available [online]: http://www.stoa.org/projects/demos/article_democracy_overview?page=all

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EXTREMISTS FEARED THE REACTION OF THEIR NEIGHBORS, COLLEAGUES, OR OF THEIR PERSONAL ROLE MODELS. AS A RESULT, THEY OFTEN REFRAINED FROM TALKING

years ago is almost legendary.² Yet radio, television, and even the news websites, blogs or discussion forums on the Internet are of a different quality from Social media. To produce successful propaganda using all the former types of media required the existence of infrastructure. No niche radio station, no amateurish local cable TV channel effectively watched by merely a few hundred people (if that many), and no blog with a similar audience reach, can alter the political processes in a democratic country. To influence the direction of a country, the owners of such media would need to have built a following by means of classical political action (networking, rallies, posters and pamphlets) before broadcasting anything. Meanwhile, social media

enables even weak and small groups to become conspicuous and to expand their reach incrementally (with the application of likes and retweets, among others). It is specifically these mechanisms that provide them with a mode of communication not only to already interested or convinced viewers/readers/followers, but also to odd recipients, who are potential recruits.

Therefore, faced with old-type channels dominated by the mainstream, extremist groups are betting visibly on social media. They have become a substantial political power in this realm. They are now able to generate the impression that their real-world level of support is drastically higher than it actually is. They achieve this goal by means of quantity (their strong activity on social media, the number of their posts, the fact that their comments tend to outnumber those of their critics) and quality (their showcased conviction to be agents of obvious truths and aggressiveness paired with a strong drive to be “winners” of all arguments they partake in). Their popularity is an Internet creation, but it also seems to be a self-fulfilling prophecy. From one point to the next, social media is emerging as a turning point in the battle of liberal democracy vs. extremism.³

The psychological aspect is highly relevant here. People who view the world through the filter of right-wing extremism have always existed. Studies have confirmed that in Western democracies there is a numerically stable, and rather significant group of people who hold such views or have a predilection for internalizing them. (The Center for Right-Wing Studies at the University of California Berkeley offers an internation-

² Adena, M., R. Enikolopov, M. Petrova, V. Santarosa, and E. Zhuravskaya (2013) “Radio and the Rise of Nazis in Pre-War Germany”, PSE Working Papers. Available [online]: <https://www.princeton.edu/csdp/events/Petrova04042013/Petrova04042013.pdf>

³ Montenegro, R. (2015) “Social Media Is Turning Us into Thoughtless Political Extremists”, [in:] *Big Think*, July 13. Available [online]: <http://bigthink.com/ideafeed/social-media-is-turning-us-into-thoughtless-political-extremists>.



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al overview of such studies). At the same time, resulting from the experience and fallout of World War II, the socio-psychological barriers for individuals to publicly declare themselves believers in this kind of ideology became insurmountable for many (albeit, of course, not to all). Extremists, aware of the perceived-as-reprehensible nature of their prejudices, often refrained from showcasing them. They occasionally fought internal battles against their views

themselves. Motivated by shame, they attempted to suppress their own lurking extremism. This feeling of shame led some to astonishing behavior – voting mainstream democratic. Extremists feared the reaction of their neighbors, colleagues, or of their personal role models. As a result, they often refrained from talking. They knew about the low social status of political extremism and believed that this poor opinion was widespread all throughout the society and the community they lived in. They usually were not aware of the fact that in some cases their neighbors and colleagues also hid their true sentiments of which they were likewise ashamed, while believing to be members of a marginalized group.⁴

The almost universal access to broadcasting one's own content on the Internet annulled these mechanisms of shame and control. The veil of ignorance fell crashing down as extremists started to publish their opinions. It began at first for the most part anonymously, but then – which in Poland could be noticed especially in the last few years – in increasing numbers with no such reservation, under real names on Facebook and other open and widely read platforms. Hundreds and thousands of people started to publish their ideas, emotions, prejudices, stereotypes, and hate speech on this media platform. In the most extreme cases, these messages were open attacks on human dignity, expressions of joy in light of fatal accidents occurring to members of a hated group, internet mobbing of specific individuals and not only public figures, and even expressed support for actions which in the past caused crimes against humanity such as genocide. All this content encouraged extremists still hiding in the closet to come out. Through social media they have

⁴ Falter, J.W. and S. Schumann (2013) "Affinity towards Right-wing Extremism in Western Europe", [in:] *Right-wing Extremism in Western Europe*, K. von Beyme (ed.), Routledge: Abingdon and New York, pp. 96-110.

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discovered that they are not isolated in their perception of reality. On the contrary, an increasing number of people seemed to be expressing their secret opinions without fear of defamation.⁵ This had a snowball effect, and the true strength was in the growing numbers. It gives strength and courage, removes the unpleasant feelings of shame and guilt, provides some kind of an alibi, and gives ground for demands to be heard. No one is ashamed, or fears being labelled an exhibitionist in a naturist colony. Shame is replaced by pride, self-confidence, and admiration, hostility towards those who previously put to shame, aggressiveness, ruthlessness, and a great relief follow. Facebook, Twitter, YouTube, and Instagram act as valves that can be used to release pressure.

The role of social media is further enhanced when the behavior of extremists online is compared to their behavior in real-life discussions.⁶ Here, public shaming seems to be still intact, but it does not work on social media. The computer screen is an efficient shield against any argument, any bloom of reflection, but most of all against the tempering interaction with an actual human being. The body language and tone of voice are not seen or heard and therefore powerless to change or even alter attitudes. Tweets or comments from other users, seen only as a text next to an avatar, can be ignored and are very often ridiculed or struck down with an angry and righteous response. The debate opponents in online discussions are not perceived as human

⁵ Peterson J. and J. Densley (2017) "How Social Media Sends Extremism into Overdrive", [in:] *CNN (International Edition)*. Available [online]: <https://edition.cnn.com/2017/08/23/opinions/social-media-fuels-right-wing-extremism-opinion-peterson-densley/index.html>

⁶ Montenegro, R. (2015) "Social Media Is Turning Us into Thoughtless Political Extremists", [in:] *Big Think*, July 13. Available [online]: <http://bigthink.com/ideafeed/social-media-is-turning-us-into-thoughtless-political-extremists>.

beings made of flesh and blood, but rather as some volatile actors on a virtual scene, who only play a role in hampering one's own political propaganda. Enemy entities of that kind deserve to be fought against with whatever means necessary.

FILTERED DEBATE

Social media function as if they were designed to meet the recruitment needs of extreme right-wing political movements. The algorithms used by them to pick and choose content for users to simply display them in chronological order operate as filters that allow political information to reach the user only provided it is in line with the user's previously exhibited preferences.⁷ This seems logical, given human psychological construction. People are comfortable with information that supports their view of the world, while troubled by data that openly challenges it. A provider of services would attempt to avoid provoking any cognitive dissonance in her/his customers, as their satisfaction is the basis of any business. Therefore, political content on social media profiles and timelines is set to enforce the recipients' existing convictions, beliefs, and attitudes while potential counterpropositions, consisting of "other side's" arguing points, which may persuade others to reconsider, face a much steeper slope.

Users of Facebook and other services are hence shut off in so called "information bubbles". Inside of these, the debate ceases to reflect the factual composition of standpoints on particular issues, instead becoming an "echo chamber," where everyone involved is preaching to the choir. A lot has already been put to paper⁸ about

⁷ See: Nikolov, D. D. F.M. Oliveira, A. Flammini and F. Menczer (2015) "Measuring Online Social Bubbles" [in:] *PeerJ Computer Science* 1:e38. Available [online]: <https://doi.org/10.7717/peerj-cs.38>

⁸ See: Lomas, N. (2018) "Fake News Is an Existential Crisis for Social Media", [in:] *TechCrunch*, February 18.

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the problem of these algorithms regarding the spread of purposefully false but politically influential misinformation parading as credited news, we now know as fake news, and about manipulations of election outcomes. Additionally, there is the problem of public debate standards being utterly destroyed by the inflicted "deafness" to the opposing side's suggestions and by the rejection of good will assumption. Yet, the ideological information bubbles carry an additional threat.

The Internet has been the battlefield of political rivals long before social media arrived. The information bubbles narrowed the room for head-on clashes though. Users and contents are filtered, and the blocking and muting of accounts on Twit-

Available [online]: <https://techcrunch.com/2018/02/18/fake-news-is-an-existential-crisis-for-social-media/>;
Allcott, H. and M. Gentzkow (2017) "Social Media and Fake News in the 2016 Election", [in:] *Journal of Economic Perspectives*, Volume 31, No. 2, pp. 211-236. Available [online]: <https://web.stanford.edu/~gentzkow/research/fakenews.pdf>;

Subramanian, S. (2017) "Inside the Macedonian Fake-News Complex". Available [online]: <https://www.wired.com/2017/02/velos-macedonia-fake-news/>; Cuthbertson, A. (2018) "Russian Trolls and Fake News Are Set to Get Even Worse", [in:] *Newsweek (The U.S. Edition)*, February 19. Available [online]: <http://www.newsweek.com/russian-trolls-fake-news-790976>

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NOTE

ter lowers the odds of both serious arguments and venomous hatred reaching the other side of the barricade. As a result, political predators come across each other less often than they used to, while the energy to slam-dunk political testimonies remains at the same high level. What can be done with it when only people of similar views are listening? In many cases the only viable option is to enter a contest in exceeding radicalism. Here, whoever can express the view shared by all in her/his information bubble in the most extreme, vulgar, aggressive, hate-fuelled, and sometimes even grotesque or absurd way, is deemed the "winner." Such an individual can count on the scores of fans, "friends", and followers with their likes and retweets. Political pundits of the social media era no longer compete against the "other side"

for the attention of the general public, but rather against rivals on the same "side" for the lasting attention of fringe fanatics.

If this is the way even the mainstream pundits behave, if extremist sound bites receive highest reward in popularity and attention, then the extreme right is bound to succeed. No one can outperform them in the radicalism race, and no one can label them as unacceptable outcasts of society anymore when they really operate within the same logic in their social media behavior. Inside their information bubble, they mobilize their ranks; hesitators become lukewarm loyalists, lukewarm loyalists become believers, believers become combat-ready activists and – finally – combat-ready activists become dangerous violent thugs. But the extreme right finds it easy to operate outside their bubble, where it recruits. The politically undecided or passive users of social media are now very much used to radical online content, therefore the general image of the extreme ceases to repel many originally moderate recipients.

STEPPING OUT ONTO THE STREETS

The drastically shortened attention span of an average reader of Internet messages also favors extremist propaganda. Social media have taken a further step here in comparison to 24/7 news TV channels or Internet websites of news broadcasters. The shorter the message is, the better chance it has to reach a wide audience and to go viral. Long articles are passé; a profound debate about ideas or nature of civilization is too.

These days, the decision of Twitter to increase the allowed number of characters per tweet from 140 to 280 provokes an outburst of discontent and resistance.⁹ Yet,

⁹ Nahman, H., (2017) "Why People Are Mad About Twitter's New Character Limit", [in:] *Man Repeller*, September 27. Available [online]: <https://www.manrepeller.com/2017/09/twitters-new-character-limit.html>

concision is not the only relevant aspect. In the modern online debate, the clarity of using only black and white colours to present a point is equally vital. There is no space for nuance, balance or shades of gray, neither is there space for thoroughly analyzing pros and cons. It seems obvious that creation of such one-dimensional, overly simplified political messages, based on emotion rather than reflection, comes much more natural to extremist and populist forces, and may be rather challenging for the moderate mainstream technocrats. Simplification of message synchronizes very well with the speed of content proliferation by the modern media.

In the 19th and 20th centuries, many experienced extremist political movements (most notably – Jacobinism, Fascism, National Socialism or Communism), many of which desired to change the world in a revolutionary manner. As they gained power, some of them managed to inflict serious harm by profoundly altering the reality of people's lives, before the natural process of blunting the ideological spear with the passage of time was able to take place under the influence of moderating pressures exerted by the majorities from the ideologically moderate center within the society.¹⁰ Yet, these processes did take place and in the age of slow media, the recruitment of supporters by radical movements often lasted years. In a number of cases (Poujadism in France, Populism in the United States, Morgen Glistrup's anti-taxation movement in Denmark, radical political Protestantism in the Netherlands, the right-wing extreme parties NPD, DVU and Republicans or the populist movement of Ronald Schill in Germany) this

meant that these groups were not able to reach a sufficient following before their ideological impetus extinguished and the moderating society absorbed them by proposing solutions to conflicts or crises that generated their emergence in the first place.¹¹ With today's technology this is no longer likely. The speed of extremist communication spreading, and radicalization of these movements will now always be higher than any attempts at their "domestication" by the moderate centre.¹²

The effectiveness of this type of modern communication is enhanced by old-type channels, which enable it to agitate outside information bubbles. All U.S. media report on the President's Twitter activity extensively. In Poland, the more spectacular Twitter exchanges of political foes, both active politicians and journalists, who in most cases are pledged supporters of one or other party, are sometimes headline news of the day.

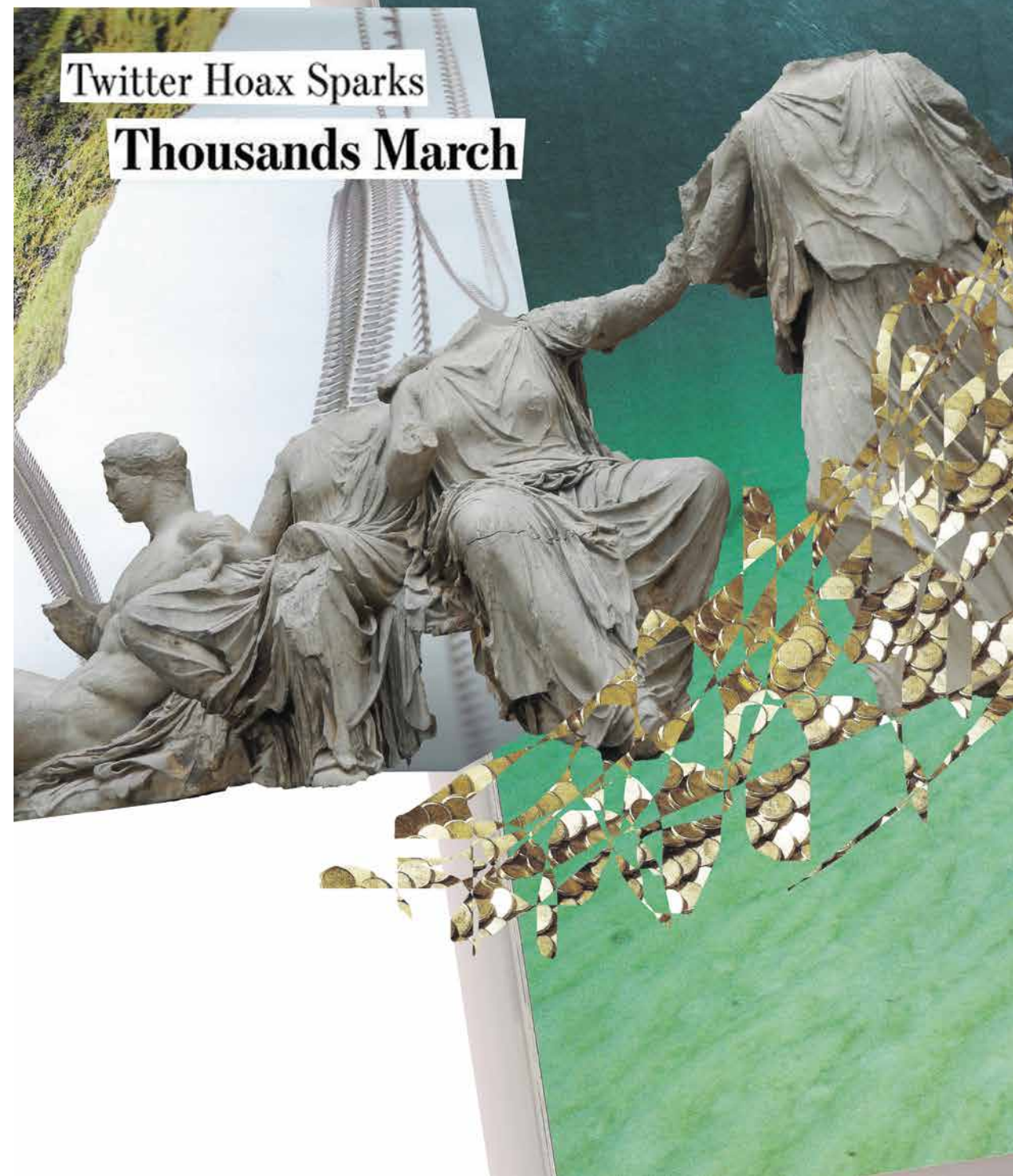
Tweets and Facebook posts are frequently quoted in papers and on their websites, occasionally constituting the whole story.¹³ The public takes note. People who hitherto disregarded social media as

¹¹ See: Bouclier, Th. (2006) *Les Années Poujade : une histoire du poujadisme (1953-1958)*. Paris : Éditions Remi Perrin; Rochester, A. (1943) *The Populist Movement in the United States*. New York: International Publishers; Hartleb, F. (2004) "Auf- und Abstieg der Hamburger Schill-Partei". [in:] *Das Deutsche Parteiensystem. Perspektiven für das 21. Jahrhundert*, H. Zehetmair (ed.), Wiesbaden: VS Verlag für Sozialwissenschaften., pp. 213–227.

¹² Peterson J. and J. Densley (2017) "How Social Media Sends Extremism into Overdrive", [in:] *CNN (International Edition)*. Available [online]: <https://edition.cnn.com/2017/08/23/opinions/social-media-fuels-right-wing-extremism-opinion-peterson-densley/index.html>

¹³ Broersma M. and T. Graham (2013) "Twitter as a News Source: How Dutch and British Newspapers Used Tweets in Their News Coverage, 2007–2011", [in:] *Journalism Practice*, Volume 7, Issue 4 "Journalists and Sources", pp. 446–464. Available [online]: <http://www.tandfonline.com/doi/abs/10.1080/17512786.2013.802481?src=recsys&journalCode=rjop20>.

¹⁰ Coy, P. G. (2013) "Co-Optation", [in:] *The Wiley-Blackwell Encyclopedia of Social and Political Movements*. Available [online]: <http://onlinelibrary.wiley.com/doi/10.1002/9780470674871.wbespm054/full>. (accessed on February 25, 2018)



a not-so-serious activity are faced with necessity to reconsider, since most of politics and their country's future seems to be decided there. These citizens, then, enter the stronghold of extremists and see a tendency to increase tolerance towards radical views. The final link of these processes is when radical views permeate reality, when online tolerance encourages the followers to express them during real-life rallies. What happens is a normalization of extremism as simply one of acceptable options for political choice.

It all starts in social media, and is then transferred through traditional media until it reaches the streets. Lessons learnt online are not forgotten. The strength-in-numbers philosophy continues to apply. In Poland, a huge march of radical right-wingers is organized every year during the National Independence Day on November 11. The additional linkage to "regular" patriotism on that day is designed to lower the psychological barrier of participants to admit to extremist views outside of the safety of the virtual world. Another lesson learnt is the only gradual uncovering of extremist depth of their true beliefs of the Polish Independence March vehemently rejected all remarks that they exhibit an ideological closeness to fascism or racism.¹⁴ Yet, as time went by and the numbers at the march annually increased, some of the comments to acknowledge these implications have been allowed to test public reaction. The marching folk's leaders of the November 11 rallies described themselves off and on as "Judeo-Sceptics" (expression used by former Polish MP Artur Zawisza) or "racial separatists" (word of Mateusz Plawski, the spokesman of the March's organizer), while at the

same time completely rectifying the term "nationalism", handled rather apprehensively not so many years ago.¹⁵

HOW TO REACT?

It seems that the aforementioned phenomena are Plato's proposition coming true. Each democracy is fated to end as tyranny. Will it be the progress of information technology, as John Gray¹⁶ suggested, that effectively leads people back to the faults of coercion, servitude, tragedy, and crime? It does appear increasingly likely. Donald Trump does not have to be (and surely is not) this dreaded tyrant we are expecting more and more to arrive, but much rather a tentative harbinger of what the future might hold two more turns from now. Can it be prevented? Will the societies be forced to transform their liberal democratic countries into something similar to contemporary Arabic states, where genuine democratic choice leads religious extremism to power, and the alternative is to uphold a limited scope for freedom by means of a semi-democratic regime based on progressive military? It is an important question to elaborate on in a separate article. Here, the question is a different one, and it deals with the future of social media. What ought to be done if they are to stop inadvertently assisting right-wing extremists in gaining support and, eventually, power?

Censorship of content is the easiest answer, but not the solution. Social media could theoretically be restricted, regulated, or even banned by law. It would not be the

first time that freedom of speech was limited in the name of homeland security in terms of securing the political system from degenerating into a version of itself that would precisely pose a security threat.¹⁷ Yet, censorship of freedom of speech is anathema to liberals who stand for human freedom, also because censoring freedom of individuals for one reason that the government perceives as a problem would encourage its application all over the place.

Furthermore, effectiveness of such censorship is questionable in the digital era, global economy and open borders in the liberal democratic world. For purely practical reasons it seems unlikely to successfully introduce separate and varying legal regulations for Facebook/Twitter operations in each of the approximately 200 countries. What should constitute grounds to, say, remove a post from Facebook if it is in violation of one legal framework, but completely acceptable within another? The language it is written in? Really? In the age of Google Translate? Besides, there is a strictly political consideration.

Authoritarian regimes are already eager to get around to censoring social media (some of them, like China and Iran on a permanent or Turkey on a temporary basis, already do that by simply banning or blocking them, but a complete blocking of a website in a country is a different approach from allowing it, yet tampering with the content of users' timelines). And there emerges a gray zone: countries no longer universally accepted as liberal democracies, but not yet classified as authoritarianisms. Poland and Hungary are among those, and in their case there is an anxiety among commentators and citizens that

these governments might seek to protect extreme right-wing content in social media from any censorship attempts generated by corporate terms of service. Germany, considered on the other hand a flawless liberal democracy, shows a different approach based on a recently introduced law that attempts to enforce a very strict handling of these terms of service. Social media companies can be fined for being ineffective or slow in removing extremist hate speech content from their services. Human rights defenders fear an overzealous reaction and hence a substantial infringement of free speech.

The current populist, nationalist, conservative governments in Warsaw or Budapest believe that they can use the spread of right-wing extremist propaganda to their advantage. It is their belief that as long as these groups remain under state control, their activity can influence a general shift of average political attitudes to the right, while allowing the far right-of-centre governments to parade as the new centre, a moderating middle ground between extremist and "leftist liberal" opinions, and even as the only credible bulwark against a surge to power of fanatics. The "monster" has to be on display to influence people's political decisions. Nationalist, conservative, and populist governments can become at least tactical allies with social media right-wing extremism, especially as long as the spread of accompanying fake news negatively impacts their political adversaries only, which certainly seems to be the situation. Therefore, as it is the case with any debate on freedom vs. security, the infringement of free speech on social media by political power bears great dangers and little to no advantages. In some cases, it will amount to no actual amends of the current situation, in others it will only provoke an outcry about yet another political discrimination by mainstream elites against the "people"

¹⁴ Żaryn J. (2010) "Z Marszem Niepodległości w tle", [in:] *Salon24*, November 2. Available [online]: <http://jan.zaryn.salon24.pl/245574,z-marszem-niepodleglosci-w-tle>

¹⁵ Polish Press Agency (2017) "My chcemy Boga", 'Naszą drogą nacjonalizm'. Marsz Niepodległości na ulicach Warszawy", [in:] *GazetaPrawna.pl*, November 11. Available [online]: <http://www.gazetaprawna.pl/artykuly/1084338,marsz-narodowcow-przechodzili-ulicami-warszawy.html>

¹⁶ Niederhauser, J. (2013) "An Interview with John Gray: 'Human Progress Is a Lie'", [in:] *Vice*, March 28. Available [online]: https://www.vice.com/en_us/article/qbwqem/john-gray-interview-atheism

¹⁷ Mockaitis, T. (2017) "Security vs. Civil Liberties", [in:] *Huffington Post*, February 19. Available [online]: https://www.huffingtonpost.com/tom-mockaitis/security-vs-civil-liberties_b_9273478.html

or it will simply be a tool for governing circles to silence democratic opposition. Social media must remain able to withstand political pressure of censorship.

Another way to weaken extremism is the use of algorithms. These filters certainly are a form of censorship as well, albeit an unmanned one. Facebook and Twitter already attempt to use algorithms to remove aggressive extremist content from their services. Yet, in this day and age, this can still lead to misinterpretation of the nature of tweets and posts. Should employees of social media companies undertake the job of censorship, the accusations of partiality, political discrimination, and freedom of speech infringement are unavoidable. Staunch defenders of freedom of speech and privacy rights, such as Polish Panoptikon's Katarzyna Szymielewicz, suggest the method of dispersed responsibility, such as grass-roots actions undertaken by users, who can tag, report or boycott extremist or false content¹⁸. Nevertheless, the aforementioned strength of extremist groups in social media paired with their well-documented capability to act in a coordinated manner can lead to their practical dominance in the "self-censorship" procedures of users. The result could be intensive tagging, reporting, and removing of anti-extremist content instead of the other way around. When fake news often receives three times as many likes or retweets as fact-checking posts that contradict them, the user-controlled content management can lead to very poor results indeed.

Algorithms are censorship in any case. Today, their major role is to show the users content similar to what they already liked. This means that they strengthen their pre-

existing political stance and are an obstacle, should they be willing to change it. Let us consider the following situation. There is a user who could potentially be convinced to alter her/his position on an issue after reading a particularly brilliant article. Yet, this will never happen because the user's access to the perspective-changing article is simply artificially denied by means of an algorithm that determines what does and what does not appear on this user's timeline. The user never becomes aware of the article's existence. This is political engineering. There is no reason to consider this circumstance more innocent than an algorithm-based operation to modify political views. Both are morally suspicious. If there could be an agreement on that conclusion, then the way utilizing algorithms for a digital-era anti-extremist education would be paved.

CONCLUSIONS

Social media companies could actively engage in a process of anti-extremist education. The experience of various school programmes¹⁹ (such as the Holocaust Educational Trust in the UK) shows positive results of meetings between the youth and people who witnessed the cruelties of war, who survived the Holocaust, or fell victim to race-related violence. Delivering content about harm done to people as a result of extreme right-wing views and prejudices to timelines of users whose previous liking or retweeting behavior allows suspecting extremist sympathies, could have a similar, moderating impact. Algorithms could be perfected to introduce such counterpoints without annoyance, as mild but catchy suggestions. This strategy could be implemented to fight the spread of extremism (both right and left) in the first instance,

but in a longer perspective it could simply to lead any users out of their information bubbles for the sake of reinstating open-mindedness and a viable political debate.

The business risk for social media corporations could be minor. Of course, no governmental institution should expect these to risk a widespread rebellion of large groups of users and customers. The processes of anti-extremist education would have to be gradual and slow, as any work on changing strong attitudes of people must be.

On the other hand, though, the position of Facebook or Twitter is strong enough to consider the creation of an "alternative" Facebook/Twitter practically unconceivable, especially in relatively small markets such as Poland or Hungary. The Polish nationalist circles undertook such an initiative in 2017 after Facebook cancelled a number of extreme-right profiles²⁰. The "Pol-Face" lasted a few weeks and was closed. The immensely strong market position should ultimately embolden Facebook, YouTube, and Twitter to act to turn these information bubbles into at least sieves, through which opposing views can travel more freely.

All users of social media, especially the young generation that is not even familiar with the world from before the digital age, is exposed to relentless propaganda of clickbaits. The ability to recognize the ideological agenda of content providers, to identify fake news, and to become a critical consumer of information is now key to remaining a free citizen²¹. These are the ba-

sics of digital literacy. Although it remains a task for schools, social media can and should get involved. It is the major corporate social responsibility task of our age.

In the end, an informal understanding between directing boards of the abovementioned global companies and the political liberal democratic mainstream, which still controls a vast fracture of influential governments with strong economies, would be helpful. It would be not only in the best interest of democratic societies, but also of corporations. They should also get involved in the process that would prevent a deep political change. Neither the introduction of strict rules or bans for their businesses by authoritarian governments, nor the loss of hundreds of thousands of potential users due to war, can be considered by them as good perspectives for business expansion.

One thing is certain. Wherever right-wing extremists, strengthened by their proficiency in using social media, would come to power, they would likely submit the very social media under their total control or dismantle them altogether, quite possibly during their first day in office. ●

[ven-luckert/extremists-are-thriving-o_b_14390260.html](https://ven-luckert.com/extremists-are-thriving-o_b_14390260.html)



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¹⁸ Ćwiklak, D. (2018) "Jak uratować świat przed Facebookiem", [in:] *Newsweek Polska*, no. 7/2018, pp. 56-59.

¹⁹ Alon, A. (2016) "97-Year-Old Holocaust Survivor Tells German Children about the Holocaust", [in:] *ynetnews.com*, April 29. Available [online]: <https://www.ynetnews.com/articles/0,7340,L-4797397,00.html>

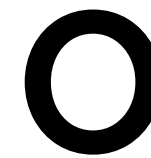
²⁰ Kwiek, D. (2017) "Powstał Polfejs – 'Facebook dla polskich patriotów'", [in:] *chip.pl*, September 27. Available [online]: <https://www.chip.pl/dzieje-si%C4%99/powstal-polfejs-facebook-dla-polskich-patriotow/>

²¹ Luckert, S., "Extremists Are Thriving On Social Media. How Should We Respond?", [in:] *huffingtonpost.com*, Available [online]: <https://www.huffingtonpost.com/ste->

Freedom of the Press Under Attack in Poland: Self-Censorship, Legal and Political Restrictions



*
MARCIN
FRENKEL



Official censorship existed in Poland from 1944 throughout the whole communist period. It was dissolved in April 1990 – nearly a year

after the first partially free election since the World War II. Freedom of speech is one of the major civil rights in Poland, like in every other country of the Western, democratic world. It is guaranteed by Article 14 of the Polish Constitution. In practice, however, since the 2015 double electoral victory (presidential and parliamentary) of the populist and rightist Law and Justice Party (PiS), the Polish government has introduced many measures which have indirectly affected the freedom of speech – including freedom of the press.

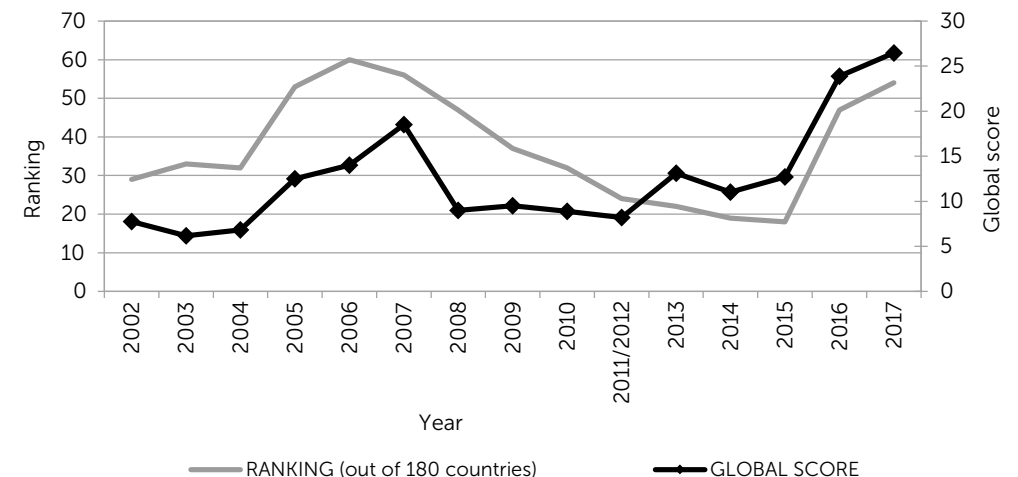
As a result, in 2017, Poland plummeted 7 ranks in the Reporters Without Borders' *World Press Freedom Index*, which was the second year in a row that Poland's ranking decreased (in 2016 the country fell 29 places in comparison to 2015) (See Figure 1). Figure 1 shows the trend for the last fifteen years: The black line stands for



THE FREEDOM HOUSE NOTED THAT THE DEGREE OF FREEDOM IN POLAND HAS BEEN SIGNIFICANTLY DETERIORATING

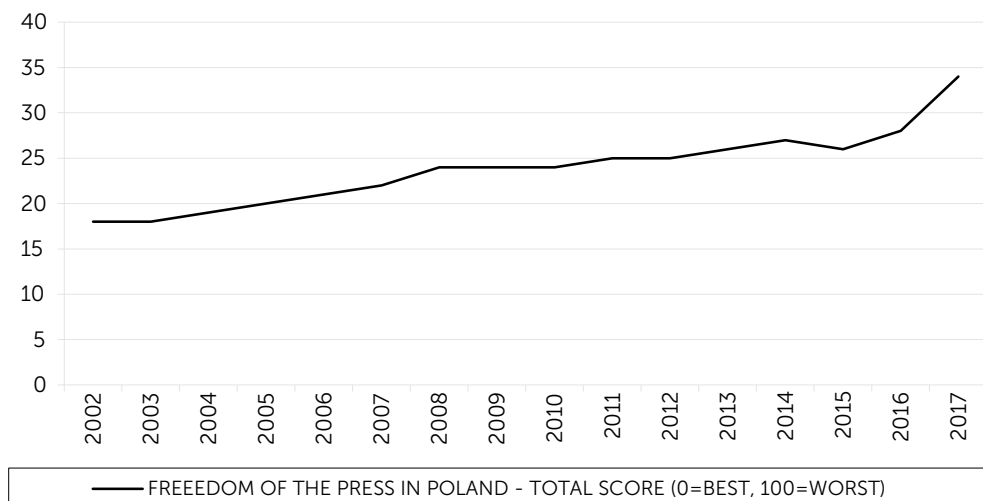
a number of points received (global score – the scale is ranging from 0 – the best possible score, to 100 – the worst) and the grey line stands for the position of Poland in the comparison with 179 other countries (ranking). A significant decrease of the Poland's rank occurred already during the previous PiS government, in 2005–07. [See Figure 1: Press Freedom in Poland, 2002–2017]

Figure 1: Poland in the World Press Freedom Index, 2002–2017



Source: Reporters Without Borders, *World Press Freedom Index*, Available [online]: <https://rsf.org/en/ranking>.

Figure 2: Poland in the Freedom of the Press Reports, 2002-2017



Sources: Freedom House, *Freedom of the Press Report*; Freedom House. *Freedom of the Press*. Washington. Available [online]: <https://freedomhouse.org/report/freedom-press/freedom-press-2017>

The Freedom House – an organization based in the United States and involved in promotion of democracy and civil liberties – also has negatively evaluated the current state of freedom in Poland, including the condition of media. In the last three annual *Freedom in the World* reports, the Freedom House noted that the degree of freedom in Poland has been significantly deteriorating. The watchdog uses a score from 0 to 100, where zero means a lack of, and one hundred means a full range of civil liberties and freedoms. In 2016, Poland received 93 points,¹ in 2017 – 89 points,² and in 2018 – 85 points.³

The authors of the Freedom House 2017 report identified the following major factors contributing to the fall of Poland's position in the ranking: changes in the judicial system, partisan control over the public media

and civil service, political pressure such as the so-called historical policy (promoting a very subjective version of Polish history) on scientists and journalists, attempts to tighten the anti-abortion law, and limitations on journalists' access to parliament.⁴

The Freedom in the World gives the big picture of a wide range of liberties in a given country. The freedom of media is just one of the subsections. The reason why we mention here the whole report and the aggregate score is because we believe that many other issues raised there (eg. breaking the separation of powers) have an indirect, but serious impact on the freedom of media.

The Freedom House publishes reports that also cover only the condition of the press. The score is worrying here as well:

¹ Freedom House (2016) *Freedom in the World*. Available [online]: <https://freedomhouse.org/report/freedom-world/2016/poland>

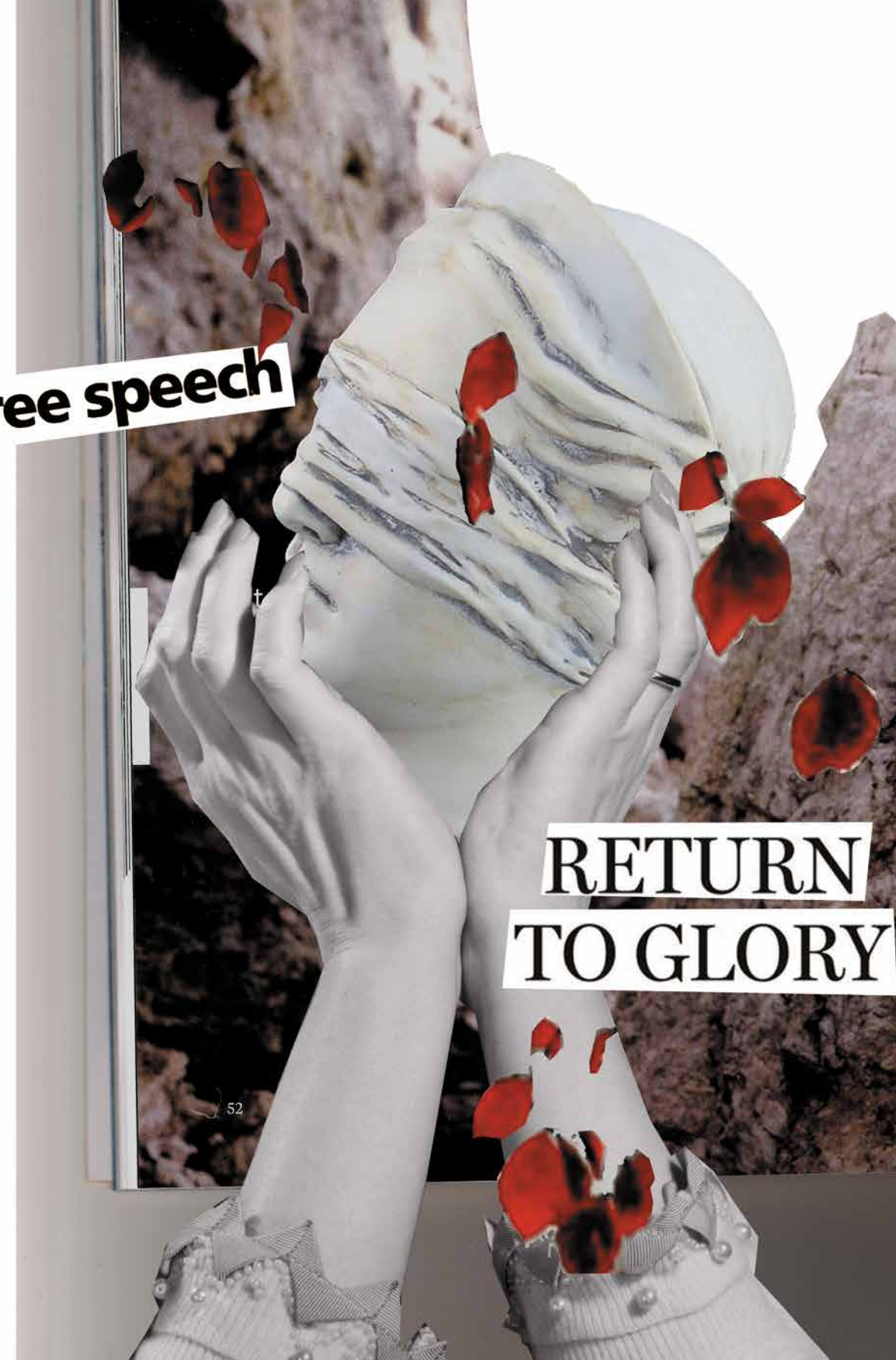
² Freedom House (2017) *Freedom in the World*. Available [online]: <https://freedomhouse.org/report/freedom-world/2017/poland>

³ Freedom House (2018) *Freedom in the World*. Available [online]: <https://freedomhouse.org/report/freedom-world/2018/poland>

⁴ Freedom House (2017) *Freedom in the World*. Available [online]: <https://freedomhouse.org/report/freedom-world/2017/poland>

free speech

RETURN
TO GLORY



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SINCE THE FALL OF COMMUNISM IN 1989 – THAT IS, FOR NEARLY THIRTY YEARS NOW – POLAND HAS NOT BEEN ABLE TO BUILD A POLITICALLY INDEPENDENT PUBLIC TELEVISION AND RADIO

in 2015 – 26/100 points,⁵ in 2016 – 28/100 points,⁶ and in 2017 – 34/100 points⁷ (the scale is: 0=Most Free, 100=Least Free). It is a radical deterioration in comparison to the previous years (See Figure 2). Moreover, in 2017 Polish media was for the first time in many years considered as “partly free” (earlier, in the post-communist era, they were considered to be “completely free”) in the Freedom of The Press Report.⁸

⁵ Freedom House (2015) *Freedom of the Press*. Available [online]: <https://freedomhouse.org/report/freedom-press/2015/poland>

⁶ Freedom House (2016) *Freedom of the Press*. Available [online]: <https://freedomhouse.org/report/freedom-press/2016/poland>

⁷ Freedom House (2017) *Freedom of the Press*. Available [online]: <https://freedomhouse.org/report/freedom-press/2017/poland>

⁸ Ibid

The Freedom House researcher's argumentation was clear and simple, “government intolerance toward independent or critical reporting, excessive political interference in the affairs of public media, and restrictions on speech regarding Polish history and identity”⁹ were listed as the factors contributing to the overall deteriorating situation in this area.

The drop in Poland's position in the above-mentioned rankings is not accidental. This is one of the results of a deliberate strategy of the ruling party to strengthen its power over democratic restraints.

The PiS party is trying to restrict the freedom of the press, or mass media in general, by using several methods.

I THE TAKEOVER OF THE PUBLIC MEDIA

As in many countries, Poland has public broadcasters in radio (eg. “Jedynka”, “Dwójka”, “Trójka”, “Czwórka” and “Polskie Radio 24”) and television (eg. TVP1, TVP2, TVP.INFO, TVP Polonia). The state is the owner of these media, and their mission is to broadcast politically neutral, high-quality and non-commercial content. In practice, public broadcasters – especially television – in the pursuit of reaching advertisers, often offer content that is not sophisticated but extremely commercial. The major problem, however, is the political allegiance of these institutions.¹⁰

Since the fall of communism in 1989 – that is, for nearly thirty years now – Poland has not been able to build a politically independent public television and radio. How-

⁹ Freedom House (2017) *Freedom of the Press*. Available [online]: <https://freedomhouse.org/report/freedom-press/2017/poland>

¹⁰ Foy, H. and Wasik, Z. (2016) “Poland: An Inconvenient Truth,” [in:] *Financial Times*, May 1. Available [online]: <https://www.ft.com/content/4344ca44-0b94-11e6-9cd4-2be898308be3>

ever, until 2015, the pro-government involvement of these media varied, but never took on such dimensions as it did after the 2015 elections.

The head of public television Jacek Kurski (Telewizja Polska, TVP), a former PiS politician, does not even conceal his political bias, arguing that “his” station is a counterbalance to the liberal media. As the watchdog portal Oko.press points out, such an attitude infringes on national and European law.¹¹

The public media, funded by the common subscription fee, are legally bounded to be pluralistic, non-partisan, independent, and should not adjust their content based on the competition from the commercial broadcasters¹². Noteworthy, the transformation of public media into a propaganda tool took place through the dismissal of hundreds of journalists since the beginning of 2016.¹³ These vacancies were filled with employees transferred from private right-leaning media.¹⁴

The above indicated events do not prove the existence of direct censorship in Poland, but they do provide evidence of an

¹¹ Szczęśniak, A. (2017) “Jacek Kurski bez ściemy o TVP: Telewizja publiczna nie ma być pluralistyczna. Ma być prorządowa,” [in:] OKO.press, October 22. Available [online]: <https://oko.press/jacek-kurski-bez-sciemy-o-tvp-telewizja-publiczna-byc-pluralistyczna-byc-prorzadowa/>

¹² Ibid.

¹³ Porter, K. (2017) “The Ongoing Struggle for Media Freedom in Poland,” [in:] *Public Media Alliance*, January 6. Available [online]: <https://www.publicmediaalliance.org/ongoing-struggle-media-freedom-poland/>; “Eroding Checks and Balances,” (2017), [in:] *Human Rights Watch*, October 24. Available [online]: <https://www.hrw.org/report/2017/10/24/eroding-checks-and-balances/rule-law-and-human-rights-under-attack-poland>

¹⁴ Brzezicki, Ł. (2016) “Trwa desant z TV Republika do mediów publicznych. Odchodzą wydawcy, prowadzący, operatorzy,” [in:] *wirtualnemedi.pl*, August 6. Available [online]: <http://www.wirtualnemedi.pl/artukul/trwa-desant-z-tv-republika-do-mediow-publicznych-odchodza-wydawcy-prowadzacy-operatorzy>

indirect restriction of freedom of speech. The criteria of whether a journalist in public media, which should be a model of impartiality, is employed, should not be determined by accepting to be a part of the partisan propaganda or not. This is particularly dangerous due to the large market share of these media, especially public television¹⁵ (eg. in 2016, TVP1 was the second – with 10.79% market share – and in 2017 the third – with 8.94% – the most popular TV station in Poland). The fourth place belonged to TVP2 in both years.¹⁶

The challenges of building an independent public media in Poland, an on-going issue over the last thirty years, plays a serious role in the debate on privatization and the creation of a more efficient system of promoting ambitious and valuable content.

II PUBLICLY OWNED BUSINESS ADVERTISING AS A PRESSURE TOOL

According to the Organization for Economic Co-operation and Development (OECD), Poland has the largest share of state-owned enterprises (SOEs) in the economy, in comparison to all other OECD and European Union (EU) countries.¹⁷ As the Polish liberal think tank Civil Development Forum (FOR) indicates, 17 of the 50 largest Polish companies fully

¹⁵ The Chanel One of the Polish Public Television (TVP) has the biggest (however decreasing) share in the Polish television market. See: Kurdupski, M. (2018) “TVP i TVN liderami, udany styczeń TVP2. Duży wzrost TTV i TV Puls,” [in:] *wirtualnemedi.pl*, February 2. Available [online]: <http://www.wirtualnemedi.pl/artukul/ogladalnosc-telewizji-styczen-2018>

¹⁶ Reisner, J. (2017) “Rynek telewizyjny w II kwartale 2017 roku,” [in:] *Krajowa Rada Radiofonii i Telewizji*, Available [online]: http://www.krrit.gov.pl/Data/Files/_public/Portals/0/kontrola/program/tv/kwartalne/rynek-tel-ewizyjny-w-ii-kwartale-2017.pdf

¹⁷ Trzeciakowski, R. (2016) “Wciąż za dużo państwa w polskiej gospodarce,” [in:] *Analiza FOR*, June 9, No. 8/2016. Available [online]: <https://for.org.pl/pl/d/8d5f17a217faf9417fa0ff903122ead3>

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AFTER THE CHANGE OF THE POLISH GOVERNMENT IN 2015, THE LARGEST SOES IN POLAND RADICALLY DECREASED THE NUMBER OF ADVERTISEMENTS IN MEDIA THAT WERE INCREASING THEIR SHARE OF THE MARKET, BUT WHICH WERE CRITICAL OF THE GOVERNMENT

or partially belong to the state.¹⁸ The first seven positions on the *Wprost* magazine list of *The 200 Biggest Polish Companies 2017*¹⁹ occupy companies where the state is the largest single stakeholder. In practice, state ownership means that politi-

cians currently in power delegate their representatives to managerial positions in such companies.²⁰

One of the results of these political appointments are changes in advertising strategy and, in particular, *where* advertisements are placed. The choice is often not based on efficiency, but political sympathy. After the change of the Polish government in 2015, the largest SOEs in Poland radically decreased the number of advertisements in media that were increasing their share of the market, but which were critical of the government. Further, they increased spending in the press and TV stations whose market share was shrinking, but which were supportive to the PiS. As daily *Gazeta Wyborcza* indicates, the earnings of TVP (controlled by the parliamentary majority) from SOE commercials in 2016 amounted to PLN 32 million (app. EUR 8 million) – more than in 2015, despite its shrinking market share by 5.86%. At the same time, its private competitor, TVN, had a 4% rise on the market, but sold less commercials to these companies by PLN 36 million (app. EUR 9 million).²¹

When comparing 2016 to 2015, a similar situation occurred when weekly magazines critical of the ruling party (such as *Polityka* and *Newsweek Polska*) received much fewer advertisements than the PiS-friendly ones (*wSieci*, *Do Rzeczy*), despite previously having a larger market share.

²⁰ Mikołajewska, B. (2017) "Miliony złotych dla ludzi PiS w spółkach z udziałem Skarbu Państwa. OKO.press publikuje listę ptac. Część I," [in:] OKO.press, March 28. Available [online]: <https://oko.press/miliony-zlotych-dla-ludzi-pis-w-spolkach-z-udzialem-skarbu-panstwa/>

²¹ Sudak, I. (2017) "Państwowe spółki nieracjonalnie wydają pieniądze na reklamę w mediach. 'Decyduje sympatia polityczna, nie racjonalność wydatków,'" [in:] *wyborcza.pl*, July 4. Available [online]: <http://wyborcza.pl/7,155287,22046074,panstwowe-spolki-nieracjonalnie-wydaja-pieniadze-na-reklame.html>

¹⁸ Ibid.

¹⁹ "200 Największych Polskich Firm 2017," [in:] *wprost.pl*. Available [online]: <http://rankingi.wprost.pl/200-najwieszych-firm>

Table 1: The value of SOE's advertisements in weekly magazines and their circulation

	<i>wSieci</i>	<i>Do Rzeczy</i>	<i>Wprost</i>	<i>Polityka</i>	<i>Newsweek Polska</i>
Value of SOE advertisements in the year 2015 (in millions PLN)	1	1	7	7	4
Average sale of magazine January-June 2015	75 416	52 745	43 992	118 636	111 205
Value of SOE advertisements in the year 2016 (in millions PLN)	11	8	12	3	1
Average sale of magazine January-June 2016	74 463	56 352	26 124	119 915	113 939

Source: www.wirtualnemedia.pl

Table 1 compares the circulation of weekly magazines and the value of SOE advertisements published in them in 2015 and 2016 (pro-PiS magazines are in the gray columns). It shows that changes in advertising budgets for a given weekly magazine were not explained by the readership.

Also, there was a large increase in the number of advertisements placed in *Wprost* with a pronounced simultaneous drop in its market position (see Table 1). This was a weekly magazine, which in 2014 published many illegal recordings compromising numerous politicians of the then-governing liberal Civic Platform (PO). Although the recordings did not contain any evidence of illegal activities, they were publicly believed to have contributed to the electoral defeat of the party in the 2015 elections.²² *Gazeta Polska*, a weekly magazine sympathizing with the PiS, is another example. Advertising revenues of this magazine increased in 2016 – in comparison to 2015 – by over 300% (despite a slight decrease in sales from 19,000 to 18,000 copies). In absolute terms, it means profits jumped to PLN 3.5 million (app. EUR 0.9 million) – from PLN

1.5 million (app. EUR 0.4 million) to almost PLN 5 million (app. EUR 1.25 million). Since 2016, the main advertisers in Poland are, of course, SOEs.²³

The marketing policy of the SOEs is not a direct tool of censorship, but it is undoubtedly a form of pressure exerted on journalists. This is a particularly negative phenomenon in a country like Poland with a generally low level of readership. The stream of advertisements from state-owned enterprises is of great importance for the financial stability of publishers. This also can influence journalists: a substantial increase in revenues in exchange for not criticizing the government.

The problem of where SOEs place their advertisements has existed long before the PiS took power. During the previous government coalition PO-PSL²⁴ in the years 2007-2015, many state-owned enterprises did not advertise in media sympathizing with the opposition. Neverthe-

²³ Czuchnowski, W. (2016) "Reklamy pod sam korek, czyli jak prawicowe media zarabiają, od kiedy rządzi PiS," [in:] *wyborcza.pl*, October 15. Available [online]: <http://wyborcza.pl/1,75398,20839408,reklamy-pod-sam-korek-czyli-jak-prawicowe-media-zarabiaja-dzieki.html>

²⁴ PSL – Polskie Stronnictwo Ludowe (Polish Peasants Party).

²² Cieski, J. (2015) "Polish Right Sweeps Parliamentary Elections," [in:] *politico.eu*, October 25. Available [online]: <https://www.politico.eu/article/polands-government-defeated-in-parliamentary-elections-2/>

less, there were also substantive reasons for this position, as the right-wing media had a smaller market share than those of a more liberal profile. Moreover, the liberal media continued to publish critical articles about the authorities, despite public advertising, which can hardly be said about the present media close to the ruling party. The political involvement of SOEs in the media market is one of the main arguments for their privatization. As long as politicians control these companies, there is an inherent risk that they will be used for political purposes.²⁵

III PROSECUTORS VS. JOURNALISTS

One of the first changes in the judicial system introduced by the current government was an integration of the Attorney General's Office with the Minister of Justice (a system which had also been in force in the period of 1990-2010). This move was a retraction from a legislation²⁶ introduced by the previous coalition, aimed at separating the Attorney General's Office from direct political influence.²⁷

The effects of integrating these two offices are visible on many levels, such as in the activities of the Attorney General's Office against independent journalists. In November 2017, the Society of Journalists (Towarzystwo Dziennikarskie, TD) published an open letter describing this issue,

²⁵ Siudak, I. (2017) "Państwowe spółki nieracjonalnie wydają pieniądze na reklamę w mediach. Decyduje sympatia polityczna, nie racjonalność wydatków," [in:] *Gazeta Wyborcza*, July 4. Available [online]: <http://wyborcza.pl/7,155287,22046074,panstwowe-spolki-nieracjonalnie-wydaja-pieniadze-na-reklame.html>

²⁶ Ustawa z dnia 9 października 2009 r. o zmianie ustawy o prokuraturze oraz niektórych innych ustaw (2009) [in:] *Dziennik Ustaw*, October 27. Available [online]: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20091781375>

²⁷ Under the reform legislation, the General Prosecutor was appointed by the President of Poland from two candidates presented by the National Council of the Judiciary and the Prosecutors National Council.

in which it recalled numerous examples of so-called "legal harassment," referring to the abuse of law to persecute specific individuals – in this case: journalists. As the authors point out, state institutions often do not respond to press allegations, or provide corrections or conduct substantive discussions with critics, but instead threaten them with legal sanctions.

Initially, politicians tried to intimidate journalists through the threat of trials for enormous financial compensation. However, due to the low effectiveness of this method, politicians, who are criticized by the media, now submit reports to the Attorney General's Office. Even if the case does not end up in court, the repeated calls for questioning discourage journalists from investigating politicians. Among the authors facing investigation by the Attorney General's Office are Wojciech Czuchnowski (for articles on changes in the judicial system), Tomasz Piątek (for a series of articles and a book about a former minister of national defense) and Andrzej Stankiewicz (for writing about the SKOK²⁸ semi-banking system associated with PiS politicians).²⁹

IV ELIMINATION OF GOVERNMENT SUBSIDIES FOR INDEPENDENT MAGAZINES

Every year, the Ministry of Culture in Poland allocates grants for niche ambitious magazines covering a wide range of political and cultural topics. The current Polish government radically reduced the number of titles

²⁸ SKOK (in Polish: Spółdzielcza Kasa Oszczędnościowo-Kredytowa) – National Association of Co-operative Savings and Credit Unions.

²⁹ "Towarzystwo Dziennikarskie: to nowa faza szyskan wobec dziennikarzy krytycznych wobec władzy," (2017) [in:] OKO.press, November 17. Available [online]: <https://oko.press/towarzystwo-dziennikarskie-nowa-faza-szykan-wobec-dziennikarzy-krytycznych-wobec-wladzy/>



entitled to this support. The grants were limited mainly to religious and conservative publishers.³⁰

As reported by the daily *Gazeta Wyborcza* in 2015, grants were awarded to 50 titles, a year later to 41 titles, and in 2017, only to 17 titles. This small group included such right-wing magazines as *Arcana*, *Teologia Polityczna*, and *Pressje*, but did not include any liberal (eg. *Liberté!*) or leftist (eg. *Krytyka Polityczna*) titles, or even the republican *Nowa Konfederacja*, which has recently been critical of the PiS party.³¹ This is just another sign for journalists in Poland, if you are skeptical about the government, you will face financial consequences. This system incentivizes self-censorship.

V RESIGNATION OR RESTRICTIONS ON PRESS SUBSCRIPTION BY STATE INSTITUTIONS

Another form of exerting pressure on media is reducing or canceling subscriptions to independent newspapers and magazines by ministries, public offices, and other state institutions. As portal Wirtualnemedi.pl reported, in the first months after the 2015 change of government, the Ministry of Finance, the Ministry of Economic Development, the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Sport, the Ministry of the Environment, the Ministry of National Education, and the Ministry of Treasury reduced the number

of subscribed copies of *Gazeta Wyborcza*, *Polityka*, and *Newsweek Polska* by more than 50%.

Smaller cuts were carried out in the Ministry of Digitalization, the Ministry of Family, Labor and Social Policy, the Ministry of Agriculture and Rural Development, the Ministry of National Defense, and the Ministry of Culture and National Heritage. Restrictions to subscribing to these titles were introduced by the Ministry of Infrastructure, the Ministry of Health, the Ministry of Science and Higher Education, and other institutions. At the same time, most of these ministries significantly increased their subscriptions to right-wing magazines, supportive of the current government.³²

In January 2016, the Ministry of Justice removed *Gazeta Wyborcza*, *Newsweek Polska*, and *Polityka* from the list of press titles that may be purchased by the appeal courts in Poland.³³ In the middle of 2017, the Ministry of Finance's guidelines to regional tax and customs offices were disclosed. The document prohibited subscriptions to such magazines as *Polityka* and *Newsweek Polska*, and restricted the purchasing of *Dziennik Gazeta Prawna* and *Rzeczpospolita*.³⁴

³² "Tylko resorty infrastruktury, zdrowia i nauki nie zmniejszyły prenumeraty *Gazety Wyborczej*, *Polityki* i *Newsweeka* (analiza)," (2016) [in:] wirtualnemedi.pl, October 1. Available [online]: <http://www.wirtualnemedi.pl/artykul/tylko-resorty-infrastruktury-zdrowia-i-nauki-nie-zmniejszyly-prenumeraty-gazety-wyborczej-polityki-i-newsweeka-analiza/page:1>

³³ "Ministerstwo Sprawiedliwości zmienia katalog prasy dla sądów. Z listy znika *Newsweek* i *Gazeta Wyborcza*," (2016) [in:] wirtualnemedi.pl, January 1. Available [online]: <http://www.wirtualnemedi.pl/artykul/ministerstwo-sprawiedliwosci-zmienia-katalog-prasy-dla-sadow-z-listy-znika-newsweek-i-gazeta-wyborcza>

³⁴ "Ministerstwo Finansów do korbówek: zakaz prenumeraty prasy lokalnej, *Polityki*, *Newsweeka* i *Pulsu Biznesu*, mniej *DGP* i *Rz*," (2017) [in:] wirtualnemedi.pl, June 7. Available [online]: <http://www.wirtualnemedi.pl/artykul/ministerstwo-finansow-do-skarbowek-zakaz-prenumeraty-prasy-lokalnej-polityki-newsweek-i-pulsu-biznesu-mniej-dgp-i-rz>

³⁰ Mrozek, W. (2017) "Prawica z dotacjami, liberałowie bez pieniędzy. Ministerstwo Kultury publikuje wyniki konkursu," [in:] OKO.press, February 16. Available [online]: <https://oko.press/prawica-dotacjami-liberalowie-bez-pieniedzy-ministerstwo-kultury-publikuje-wyniki-konkursu/>

³¹ Grzesiczak, Ł., Nurek, G. (2017) "Dotacje Ministerstwa Kultury tylko dla 17 czasopism! Bez pieniędzy *Krytyka Polityczna*, *Liberté!*, *Frona Lux*, *Jazz Forum*, *Midrasz*..." [in:] wyborcza.pl, February 15. Available [online]: <http://wyborcza.pl/7,75410,21378884,dotacje-ministerstwa-kultury-tylko-dla-17-czasopism-bez.html>

In the spring of 2017, Andrzej Melak, one of the PiS Members of the Parliament from Warsaw, contacted the Minister of Energy Krzysztof Tchórzewski, who is a supervisor of the Orlen Group, a leading state-owned provider of service stations in Central Europe. Melak asked Tchórzewski to ban the sale of *Gazeta Wyborcza*, *Polityka*, and *Newsweek Polska* at the Orlen gas stations. The Ministry did not sign-off on the ban. However, in March 2017, Orlen canceled a contract with Agora, the publisher of *Gazeta Wyborcza*, for the display of press titles,³⁵ resulting in consumer complaints about the lack of availability of *Gazeta Wyborcza* at Orlen gas stations.³⁶ At the same time, the media reported that employees of Lotos (another SOE like Orlen) had received the order to effectively display right-wing magazines at their petrol stations.³⁷

VI MEDIA ACCESS LIMITATIONS TO THE POLISH NATIONAL PARLIAMENT

In December 2016, PiS tried to change the rules governing media access to the Polish national parliament (i.e. limiting number of press passes, reducing the right of recording and live broadcasting, and closing the common areas).³⁸ Jointly with the oppo-

sition Members of the Parliament and the Ombudsman, who claimed the proposed changes are unconstitutional, many media outlets protested the proposal, including those sympathizing with the government.³⁹ Eventually, the ruling party withdrew the proposal. However, in the following months, minor changes limiting journalists' access to the parliament were gradually introduced (mostly closing of the common areas).⁴⁰

As publicist Michał Sułdrzyński noted, these attempts to limit media access to the parliament are not only hindering the work of journalists, but, above all, they pose a threat to democracy, which depends on transparency and free access to information about current political events.⁴¹

VII A NEW MEDIA LAW DRAFT

Since the last parliamentary election in 2015, the ruling PiS party has been working on the so-called Deconcentration and Polonization Act (in Polish: "ustawa o dekoncentracji struktur właścicielskich w mediach"). This bill is to regulate the media market in Poland. According to the official statements of the parliamentary majority, the proposed changes are supposed

³⁵ Sudak, I. (2017) "Poset PiS domaga się wycofania ze stacji PKN Orlen m.in. *Gazety Wyborczej*," [in:] wyborcza.pl, May 17. Available [online]: <http://wyborcza.pl/7,75398,21827118,posek-pis-andrzej-melak-nie-chce-gazety-wyborczej-na-orlenie.html>

³⁶ Lis, T. (2016) "Newsweek i *Gazeta Wyborcza* są chowane na stacjach Orlen. Agora z rozwiązana umową na ekspozycję tytułów," [in:] wirtualnemedi.pl, July 7. Available [online]: <http://www.wirtualnemedi.pl/artykul/tomasz-lis-newsweek-i-gazeta-wyborcza-sa-chowane-na-stacjach-orken-agora-z-rozwiazana-umowa-na-ekspozycje-tytulow#>

³⁷ Katka, K. (2017) "Lotos promuje prawicowe tytuły na swoich stacjach," [in:] trojmiasto.wyborcza.pl, January 9. Available [online]: <http://trojmiasto.wyborcza.pl/trojmiasto/1,35612,21217979,lotos-promuje-prawicowe-tytul-na-swoich-stacjach.html>

³⁸ "Mniej dziennikarzy i ograniczony dostęp do polityków. Sejm wprowadza ograniczenia dla mediów," (2016), [in:] wiadomosci.gazeta.pl, December 15, Avail-

able [online]: <http://wiadomosci.gazeta.pl/wiadomosci/7,114883,21124006,mniej-dziennikarzy-i-ograniczony-dostep-do-politykow-sejm-wprowadza.html>

³⁹ "Rzecznik Praw Obywatelskich o zaproponowanych 14 grudnia zasadach dostępu dziennikarzy do informacji w Sejmie," (2016) [in:] rpo.gov.pl, December 19. Available [online]: <https://www.rpo.gov.pl/pl/content/RPO-o-propozycjach-z-14-grudnia-o-dostepie-dziennikarzy-do-informacji-w-Sejmie>

⁴⁰ "Kolejne ograniczenia dla dziennikarzy w Sejmie. Byle dalej od Prawa i Sprawiedliwości," (2017), [in:] polsatnews.pl, December 8. Available [online]: <http://www.polsatnews.pl/wiadomosc/2017-12-08/kolejne-ograniczenia-dla-dziennikarzy-w-sejmie-byle-dalej-od-prawa-i-sprawiedliwosci/>

⁴¹ Sułdrzyński, M. (2016) "O ograniczeniu dostępu dziennikarzy do Sejmu," [in:] *Rzeczpospolita*, December 15. Available [online]: <http://www.rp.pl/Komentarze/312159868-Michal-Szudrzyński-o-ograniczeniu-dostepu-dziennikarzy-do-Sejmu.html>

to increase the share of Polish capital in the media industry (currently, a significant part of the market belongs to foreign owners).⁴² However, it seems that the main goal is to weaken the independence of media.⁴³

At the beginning of 2018, the media reported that these bills would not be processed in the parliament in the forthcoming future.⁴⁴ The decision to freeze these bills probably results from their incompatibility with international law (the new Act would constrain the free movement of capital – one of the fundamental EU rules). As such, the Polish government seems to be reluctant to open another field of conflict with the European Union and the United States. Nevertheless, as the journalist Agnieszka Kublik noted, the goal of the law, which may appear at any moment in parliament, may cause a so-called “freezing effect” in many editorial staffs due to the reluctance to provoke the ruling party with inconvenient material.⁴⁵

VIII THE DEATH CAMP LAW

A new law regarding death camps on Polish territory is yet another recent example limiting freedom of speech in Poland.

⁴² Dąbrowska, J. (2017) “Ustawa o dekoncentracji mediów – uzdrowienie rynku czy naruszenie interesów Polski?,” [in:] *wirtualnemedialny.pl*, August 13. Available [online]: <http://www.wirtualnemedialny.pl/arttykul/ustawa-o-dekoncentracji-mediow-uzdrowienie-rynku-czy-rzazace-naruszenie-interesow-polski>

⁴³ Wielowieyska, D. (2017) „Minister Sellin fałszywie opisuje rynek medialny w Polsce,” [in:] *wyborcza.pl*, August 29. Available [online]: <http://wyborcza.pl/7,75968,22293571,minister-sellin-falszywie-opisuje-rynek-medialny-w-polsce.html>

⁴⁴ “Dekoncentracji mediów nie będzie,” (2018) [in:] *Business Insider Polska*, January 15. Available [online]: <https://businessinsider.com.pl/media/dekoncentracja-mediow-w-polsce-zmian-nie-bedzie/8p96wmp>

⁴⁵ Kublik, A. (2017), “Jesień to pora repolonizacji, czyli PiS zabiera się za media prywatne. To będzie załatwione, choć będzie wielki opór,” [in:] *wyborcza.pl*, September 11. Available [online]: <http://wyborcza.pl/7,75968,22342547,jesien-to-pora-repolonizacji-czyli-pis-zabiera-sie-za-media.html>

Adopted by the Polish parliament in January 2018 and quickly signed by President Andrzej Duda, the amendment to the Act on the Institute of National Remembrance introduces criminal penalties for attributing Nazi crimes to the Polish nation or the Polish state “contrary to the facts”.⁴⁶

The Act excludes academics and artists from criminal liability, but the wording of the law is imprecise. The boundary between academic and journalistic activity is quite fluid, just like the phrase “contrary to the facts” – as historical research develops, facts are liable to change. In addition, the concept of the “Polish nation” also remains unclear. As conservative journalist Witold Jurasz notes, in practice, the law opens the way for censorship. Jurasz also refers to the statements of some PiS politicians who openly admitted that the new law is aimed to restrict the freedom of expression of specific popular writers (eg. Jan Tomasz Gross) whose vision of Polish history is different from what is popularized by the current Polish government.⁴⁷

In an analysis for the portal *Oko.press*, legal expert Patrycja Grzebyk points to numerous incompatibilities of the Act with both the Polish Constitution and international law, including basic rights such as the freedom of speech and the freedom of scientific research.⁴⁸

⁴⁶ “Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, ustawy o grobach i cmentarzach wojennych, ustawy o muzeach oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary” (2018) Available [online]: [http://orka.sejm.gov.pl/opinie8.nsf/nazwa/771_u/\\$file/771_u.pdf](http://orka.sejm.gov.pl/opinie8.nsf/nazwa/771_u/$file/771_u.pdf)

⁴⁷ Jurasz, W. (2018) “Polska mogła uniknąć skandalu. Niestety znów okazało się, że nie mamy dyplomacji,” [in:] *Wiadomości Onet*, January 28. Available [online]: <https://wiadomosci.onet.pl/tylko-w-onecie/witold-jurasz-polska-mogla-uniknac-skandalu-niestety-znow-okazalo-sie-ze-nie-mamy-komentarz/ry9cbw8>

⁴⁸ Grzebyk, P. (2018) “Prezydent podpisał ustawę o IPN.

Although the ability to enforce the new law is questionable (due also to its vague wording), the general atmosphere of the intimidation of journalists and academics remains a serious problem.

CONCLUSIONS

Despite the fact that in the 2015 campaign PiS presented itself as a moderate party promising better state management and improving social issues, the party carried out a ruthless attack on the rule of law and the separation of powers in Poland immediately after assuming office. Violations to the Polish Constitution, limits to the public’s right to assembly, and restrictions on the independence of the judiciary took place gradually (often described as “salami tactics” or “the boiling frog story”⁴⁹). The upswing of an economic cycle, generous social transfers (“Program Rodzina 500+”⁵⁰) and portentous nationalistic rhetoric combined with weak opposition, significantly reduced social resistance to these changes.

Similar tactics may be applied to the media. The gradual introduction of legal changes, the use of large SOEs to influence the market, and the general atmosphere of

Oto 8 punktów, w których jest niezgodna z prawem międzynarodowym,” [in:] *OKO.press*, February 8. Available [online]: <https://oko.press/prezydent-podpisal-ustawe-o-ipn-oto-8-punktow-ktorych-niezgodna-prawem-miedzynarodowym/>

⁴⁹ As George Pettit explains this metaphor (used in one of his songs): “The analogy is that if you take a frog and put it in boiling water, it will jump right out immediately, but if you put it in cold water and then you slowly turn the heat up, they’ll just eventually fall asleep and die.” [in:] *Urban dictionary*, Available [online]: <https://www.urbandictionary.com/define.php?term=boiled%20frogs>

⁵⁰ “Program Rodzina 500+” is a family income-supporting benefit according to which PLN 500 monthly (app. EUR 125) is granted for every second child under 18, and for the first child if the family income is below PLN 800 monthly (app. EUR 200). The law was adopted in February 2016 and payment of benefits began in April 2016.

uncertainty and intimidation are meant to remodel the conditions in which the media operate in Poland.

Nevertheless, the return to official censorship, as was apparent during the communist era, seems unlikely. The ruling party tends to dominate the media market in Poland with their supporters and marginalizes the critical press, so that the power of their influence does not have a major impact on the election result.

Experience shows that the ruling party withdraws from certain political initiatives only when faced with strong and loud resistance (e.g. the attempt to tighten the anti-abortion law in 2016⁵¹). To keep the free and pluralistic media in Poland alive and well, it is vitally necessary to arouse the public interest and civic consciousness on these issues. This refers to both domestic and international public opinion, including the EU institutions. The public has a moral imperative to maintain a critical eye on the activities of the ruling party, and to warn against continuing threats to freedom of speech. ●

⁵¹ See: Cocotas, A. (2017) “How Poland’s far-right government is pushing abortion underground,” [in:] *The Guardian*, November 30. Available [online]: <https://www.theguardian.com/news/2017/nov/30/how-polands-far-right-government-is-pushing-abortion-underground>



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Censorship Is the Least of The Problems: The Political and Economic Threats to Freedom of the Press in Hungary



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ESZTER
NOVA

When it comes to the freedom of the press, a casual observer may ask whether there is censorship in Hungary. Some may add that self-censorship can also be a problem – when the media pre-emptively select their stories and censor themselves to avoid legal or political repercussions. Currently, in Hungary, a certain degree of censorship is indeed present, legally or in the form of political or economic pressure. But the cloud of its presence is probably larger than its reality – giving credit to the abovementioned self-censorship concerns. Nevertheless, the relevance of (or rather, the threat of) censorship pales in comparison to that of economic tools that curtail the freedom of the media.

The political, legal, and economic spheres of society are difficult to disentangle even at the best of times. But autocracies make it even harder – with their manually steered economies, state-fed oligarchs, and by shaping the law to better serve political will and the interests of the ruling power.

This article focuses on the economic restraints on the Hungarian media and the tools that help the ruling power to curtail freedom of the press in their own favor. These measures, however, are almost impossible to disentangle from the subtle (and not-so-subtle) political and legal tools that are designed to serve the same purpose.

BEYOND MERE CENSORSHIP: HUNGARY'S RANKING IN PRESS FREEDOM INDEX

Hungary's position in press freedom rankings has been steadily declining since 2010, when the Orbán government came back into power after eight years in opposition. The changes in the country's constitution in 2011 were only the beginning, and they were followed by new institutions and the much-criticized media law that tightened

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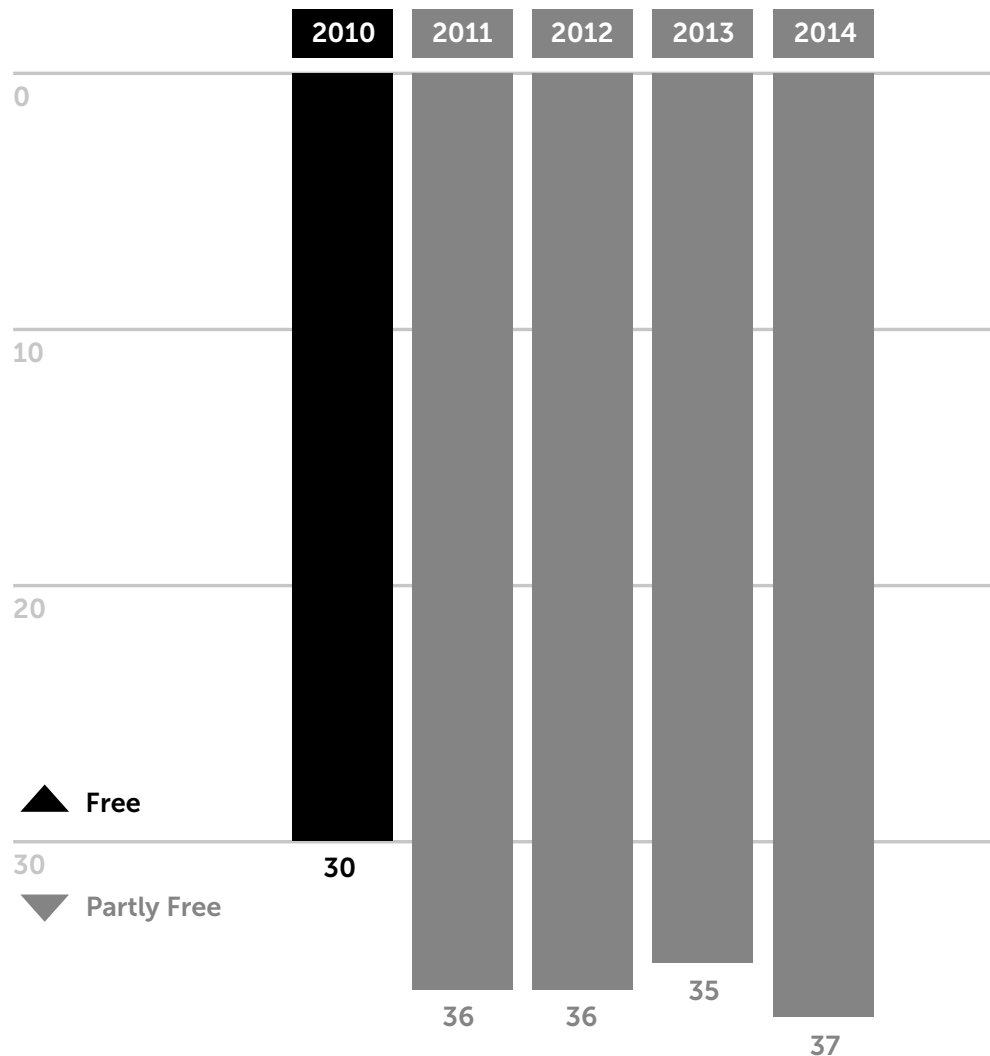
government control of the broadcast sector and extended regulation to print and online media. It consolidated media regulation under the supervision of the National Media and Infocommunications Authority (NMHH), whose leader also chairs the Media Council. But the worst hit on the independent media was an economic one: the consolidation of media outlets in the hands of two powerful oligarchs, which was greenlighted by authorities, whereas non-allies were blocked in their similar efforts. Consequently, the Hungarian press has been only “partially free” since 2011, according to the Freedom House's *Freedom of the Press 2017*, and the situation has steadily worsened since – most pronounced in the *economic environment of the media* (but also in *legal and political conditions*) (Figure 1)¹.

¹ Freedom House (2017) “Press Freedom’s Dark Ho-

Figure 1: Press in Hungary only partially free since 2011. After the re-election of the current Orbán government in 2014, the situation kept getting worse. In 2015, the press freedom score has declined by another 3 points to 40 (still "partially free"), and by 2016 to 44.

Hungary: 5-Year Decline in Press Freedom

Press freedom deteriorated slightly as the government imposed a new advertising tax and continued to pressure media owners.



Source: Freedom House (2017) *Freedom of the Press 2017*

Figure 2: Freedom of Expression and Information in Hungary



Source: Vásquez, I. and T. Porčnik (2017) *The Human Freedom Index 2017*. Washington, D.C.: Cato Institute, Fraser Institute, and Liberales Institut. Available [online]: <https://www.cato.org/human-freedom-index>

Although the media landscape in Hungary is nominally dominated by private companies, it does not mean that it is independent. While the political leanings of certain media outlets are not a problem, the government exerting direct or indirect control over it by legal, economic, and political means is. The pro-government media scene has expanded since 2010 – thanks to the friendly regulatory environment and limitless financial resources. Public media have also experienced an increase in funding, while loyal oligarchs were allowed to buy up entire economic sectors and regions – both in the media and elsewhere. To further confuse the casual onlooker, a high number of media takeover transactions in 2016 contributed to the confusion about the ownership of many outlets, leading the rest of the independent media guessing what was going on behind the scenes – and investigative journalists had to resort to painstaking legwork to prove what everyone knew: the consolidation of media outlets in the hands of Viktor Orbán's closest allies.

As the *Human Freedom Index 2017*² reports, journalists are not killed or jailed in Hungary (Figure 2). Access to the Internet is not curtailed either. Yet, when it comes to government influencing the media landscape, Hungary is only partially free. The means of control are sneaky, indirect, and all perfectly legal. Economic tools are leading the way, alongside targeted laws and taxation.

"(...)the fundamental elements of democratic operation are absent in Hungary. The media landscape, as it stands today, clearly hinders the formation of a thoroughly informed public opinion. One of key principles of the 1989 political changeover was to dismantle the information monopoly controlled by the regime. A quarter century after the fall of communism, Hungary is once again just a tiny step away from having a new, insulated media monopoly entirely serving the interest and satisfying the expectations of the ruling power."

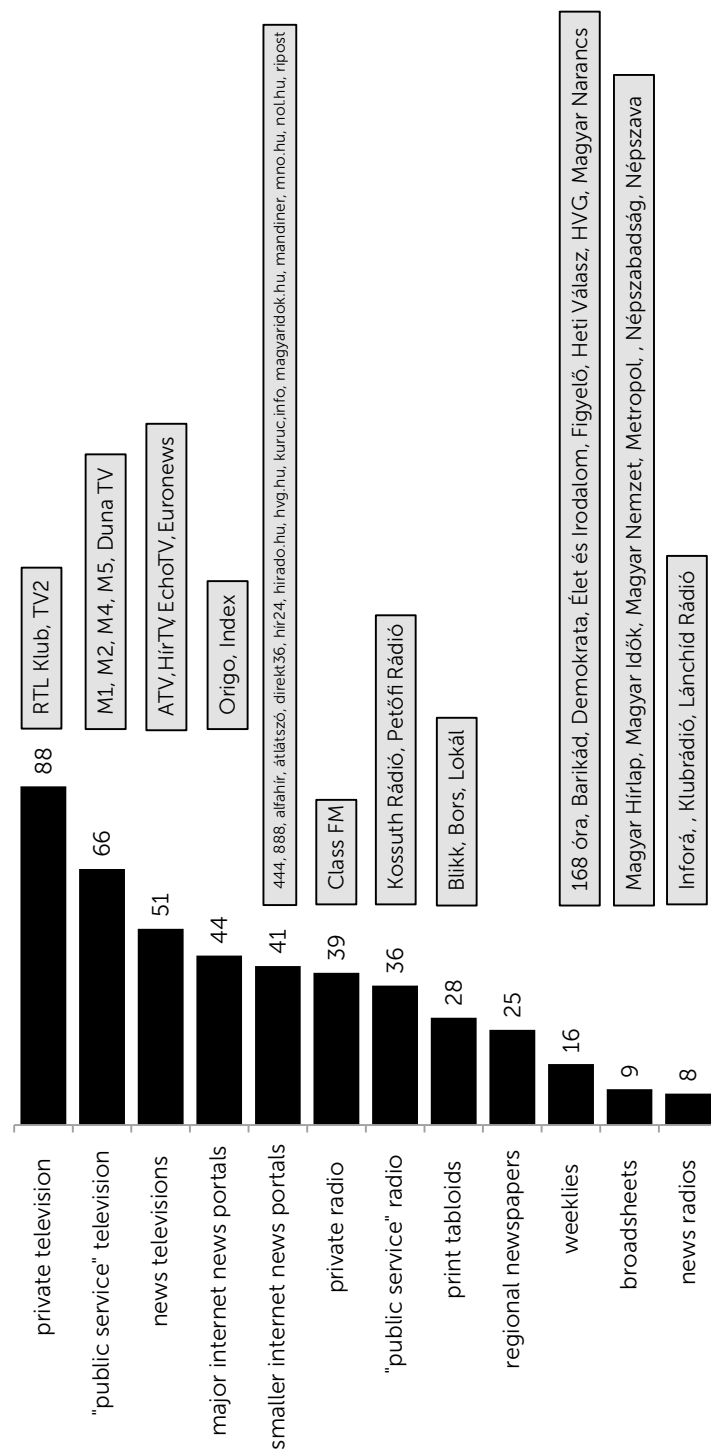
Mária Vársárhelyi (2017)³

² Vásquez, I., and T. Porčnik (2017). *The Human Freedom Index 2017*. Washington, D.C.: Cato Institute, Fraser Institute, and Liberales Institut. Available [online]: <https://www.cato.org/human-freedom-index>

³ Vársárhelyi, M. (2017) "The Workings of the Media:

tion," [in:] *Freedom of the Press 2017*. Available [online]: <https://freedomhouse.org/report/freedom-press/freedom-press-2017>

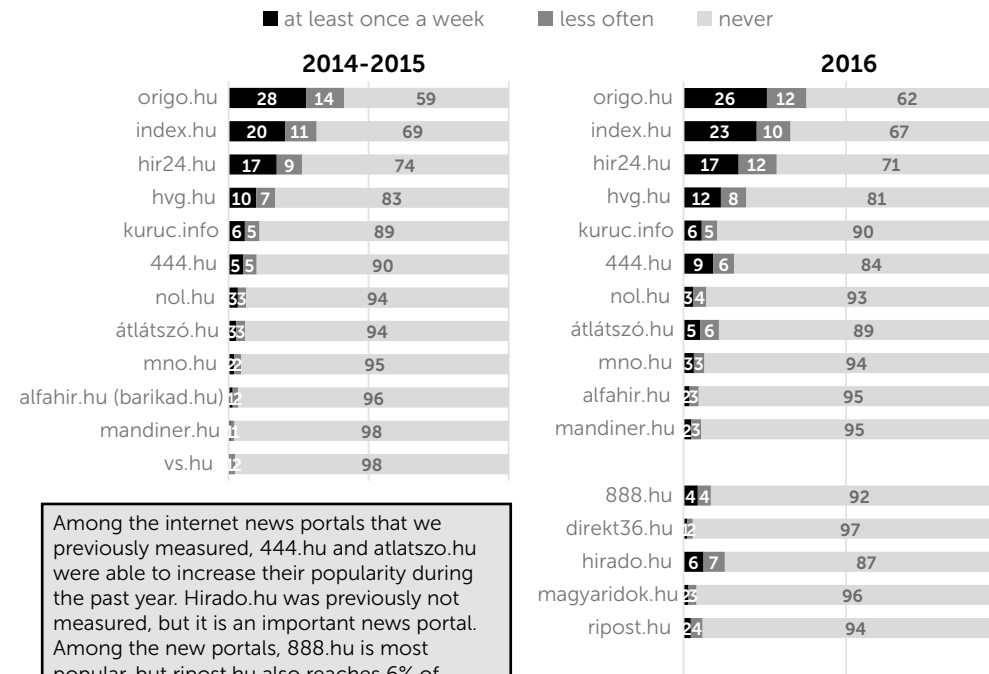
Figure 3: News consumption by types of media in Hungary



Source: Mérték Media Monitoring (November 2016)

MÉRTÉK
MEDIAN

Figure 4: News portals by influence.



Among the internet news portals that we previously measured, 444.hu and atlatzo.hu were able to increase their popularity during the past year. Hirado.hu was previously not measured, but it is an important news portal. Among the new portals, 888.hu is most popular, but ripost.hu also reaches 6% of respondents.

MÉRTÉK
MEDIAN

Source: Mérték Media Monitoring (November 2016)

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THE MEDIA LANDSCAPE

In Hungary, privately held major newspapers include ten national and twenty-four local dailies (Figure 3). Hungary has five national public radio stations and two main private stations. The two terrestrial commercial television stations (TV2 and RTL Klub) remain the principal source of news for most Hungarians, along with a growing number of cable channels.

TV2 has gone to a government-friendly oligarch in 2016, while RTL is regularly under regulatory or legal attacks. Online media news is dominated by a handful of portals

A Brainwashing and Money-Laundering Mechanism," [in:] Magyar, B. and J. Vársárhelyi (eds.), *Twenty-Five Sides of a Post-Communist Mafia State*. Budapest and New York: Central European University Press, pp. 491-526.

(Index.hu, origo.hu, hvg.hu, 24.hu, 444.hu) – origo.hu having been taken over by a government ally.⁴ With this step, one of the two most influential online news portals has lost its independence – and started churning out propaganda. [See Figure 4]

The access to alternative media (not controlled by the government) or to foreign news sources is more or less free – but in practice, it became rare. Outside urban areas, where local printed press and terrestrial TV channels still rule the public opinion, the government's control is near 100%. [See Figure 5]

"(...) among the adult population in dictatorship-era 1986 (...) 28% (...) regularly or sometimes tunes in to a foreign, "hostile" radio station (...). Currently, not even half of this ratio get their information from alternative news sources not directly or indirectly controlled by the government." Mária Vársárhelyi about the absorption and influence of Fidesz-controlled media in Hungary (2017)⁵

SELF-CENSORSHIP AND POLITICAL PRESSURE

Every year, Mérték Média conducts a survey among journalists in Hungary to rate press freedom on a scale from 1 to 10 (where 1 is the worst and 10 is free).⁶ In

2012, they gave an average score of 4.8. By 2016, the score declined to 3.8. The numbers show even more pessimism when we look at answers about the strength of political influence on news media.

In 2016, 75% of journalists said that there was 'very strong' political influence, strong enough to curtail press freedom. Another 18% said that the political influence was 'strong.' 56% stated that they personally experienced political interference, and 48% experienced interference from business actors (which may not be entirely separate under politically supported oligarchs).⁷

33% declared that they have decided not to publish certain pieces of information in order to avoid possible disadvantages. 28% admitted to self-censorship during the previous year.⁸

THE INFAMOUS "HUNGARIAN HANDS":

"There are four sectors where national capital must grow above international one. These are the media, the banks, energy, and retail. We are done with the first three, but the fourth had proven to be difficult. Unfortunately retail chains are cleverer than us. (But) a few more years and we'll complete this one too."

– PM Viktor Orbán's address at the Economic Forum in Krynica, Poland (September 2016) (own translation)⁹

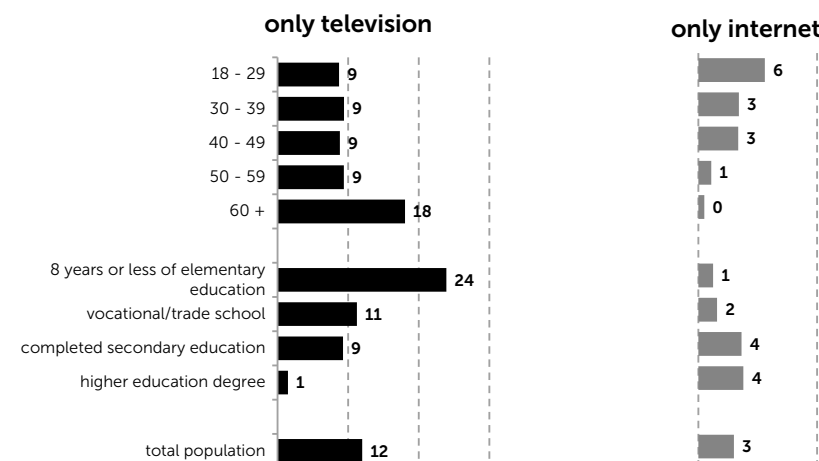
http://mertek.eu/wp-content/uploads/2017/06/ujsagi-rok-sajtoszabadsag_2016.pdf

⁷ Ibid.

⁸ Ibid.

⁹ Magyar Nemzet (2016) *Orbán: A média, a bankok és az energia kipipálva*. Available [online]: <https://mno.hu/kulfold/orban-nem-letezik-olyan-hogy-europai-nemzet-1360450>

Figure 5: Only from TV or only from Internet. Rural voters from lower educational backgrounds trend towards television, and local papers still dominates.



Those who receive their information exclusively from television tend to be the elderly and those with little education. Overall, few respondents indicated that they only use the internet to obtain their information (3%). Young people with high education attainment were most likely to fall in the latter category, but even among this group this ratio was not very high.



Source: Mérték Media Monitoring (November 2016)

“BY 2016, 60% OF OWNERSHIP IN THE MEDIA WAS IN "HUNGARIAN HANDS"”

Banking, media, energy, and retail have been the four sectors in which Prime Minister Orbán declared to aim for a majority stake to go into "Hungarian hands" in 2014.¹⁰ He has been working on his target

for years, by then calling for a so-called "Hungarian capital-owning class" to come into existence and claiming that, in his view, this is in the interest of the country.

In 2016, PM Orbán declared victory in all but one sector – banking proved to be slow to sell out, despite the punitive extra taxes and hostile political environment. [See Figure 6]

By 2016, 60% of ownership in the media was in "Hungarian hands". Opimus Press, owned by an Orbán-ally, Lőrinc Mészáros, controlled about half of the newspaper

for entire economic sectors to go into Hungarian hands. In his speech in 2014, he clarified that he does not even mean that these should be the hands of the state (nationalization), but exactly the hands of the Hungarians. See: Magyar Nemzet (2014) Orbán Viktor teljes beszéde. Available [online]: <https://mno.hu/belfold/orban-viktor-teljes-beszede-1239645>

¹⁰ One of many instances when Viktor Orbán has called

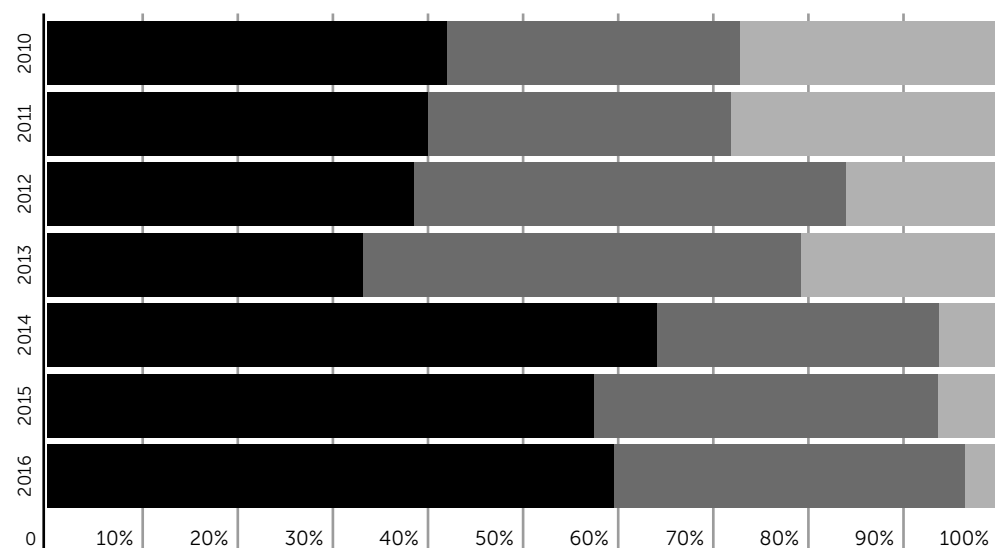
⁴ See: Index.hu (2016) *Átrendezi a magyar médiapiacot az állami buldózer*. Available [online]: https://index.hu/gazdasag/2016/06/14/magyar-mediapiac_2015/; Pál Dániel, R. (2017) "Orbán és Schmidt Mária benyelte volna az Indexet, Simicskának lépnie kellett," [in:] 444.hu. Available [online]: <https://tldr.444.hu/2017/04/27/orban-es-schmidt-maria-benyelte-volna-az-indexet-simicskanak-lepnie-kellett>

⁵ Vársárhelyi, M. (2017) "The Workings of the Media: A Brainwashing and Money-Laundering Mechanism," [in:] Magyar, B. and J. Vársárhelyi (eds.), *Twenty-Five Sides of a Post-Communist Mafia State*. Budapest and New York: Central European University Press, pp. 491-526.

⁶ Mérték Média Műhely (2017) *Az Újságírók Sajtósabadságképe 2016-Ban Magyarországon*. Available [online]:

Figure 6: Ownership by nationality in Hungarian media (2010-16)

BLACK: Hungarian, GREY: foreign, LIGHT GREY: mixed



Source: Index.hu

printing capacities in Hungary through its 2016 acquisitions. But it was not enough. In a cozy TV interview with a friendly party member in December 2017, PM Orbán announced his plans to take the rest of the Hungarian media "into Hungarian hands":

"(...)it is my personal conviction that it is part of a country's sovereignty that the majority of a media system working in a country must be in national hands."

"And I don't want to hide that I want even more than that. I would like it if the media in Hungary would be in Hungarian hands to the same proportion that it is in German hands in Germany, American hands in America. This is the level that must be reached. We are proceeding, but we are not there yet."

— PM Viktor Orbán (December 2017)
(own translation)¹¹

¹¹ Tamás, F. (2017) "Orbán még nagyobb befolyást akar

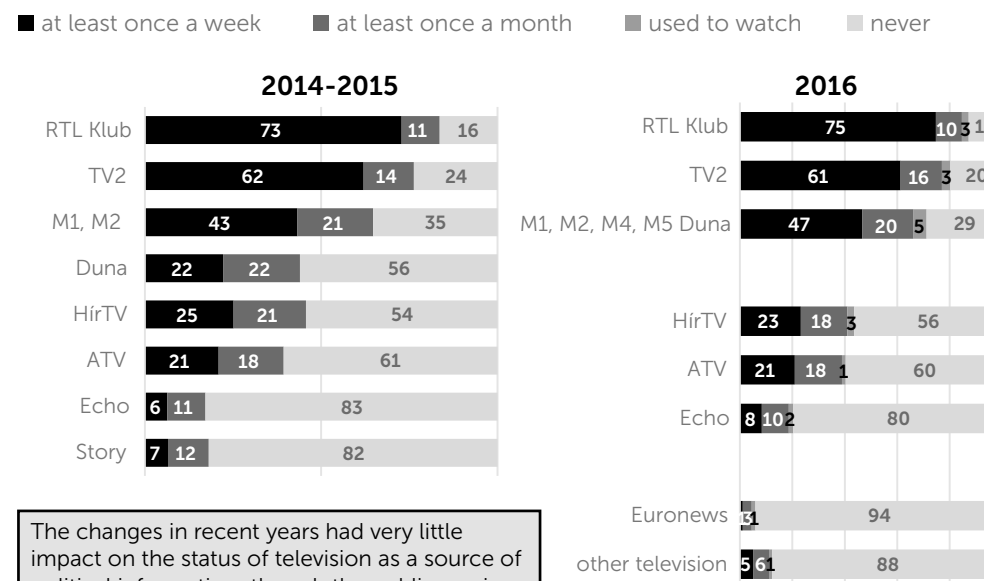
POPULISTS INVENTED "MEDIA SOVEREIGNTY"

PM Orbán wants as many of the Hungarian media outlets going into said "Hungarian hands" as the Germans have in the German media, and Americans in the U.S. media. Whatever that might be, because ethnic listing of ownership is not a common practice in Europe – at least not since the end of World War II.

PM Orbán claims that if the United States and Germany can have 'locally owned media,' then so can he. But in market economies, ownership structure is more the result of organic development than central planning. And a government may think of its own nationals as more easily *influenceable*, but they certainly would not say that publicly.

a médiában," [in:] Index.hu. Available [online]: https://index.hu/belfold/2017/12/22/orban_media_kulfoldi_tulajdon/

Figure 7: Hungarian television channels and their relevance. RTL Klub and TV2 lead the way as news sources



The changes in recent years had very little impact on the status of television as a source of political information: though the public service channels lost 5% of their viewers, they also won roughly the same number. HírTV was the only channel to lose a significant number of viewers: 3% indicated that they had previously watched it, and the share of its viewers is 5% lower than it was in 2014-2015.

Source: Mérték Media Monitoring (November 2016)

According to Hungarian media workers, who talked to Mérték, nationality of ownership has little to do with the independence of journalism – independence does.¹² Yet, it is telling that PM Orbán thinks that a domestic national media is more acquiescent. Foreign owners are indeed harder to manipulate. But they can still be made to sell their media outlet if their businesses are hit by punitive taxes or loss-making regulations. The Freedom House's *Freedom of the Press 2017* index has noted

¹² Mérték Média Műhely (2017) *Az Újságírók Sajtószabadságképe 2016-Ban Magyarországon*. Available [online]: http://mertek.eu/wp-content/uploads/2017/06/ujsgirok_sajtoszabadsag_2016.pdf

that the Hungarian "government's tax policies toward the media have also generated controversy over the past few years for disproportionately burdening middle-sized, domestically owned outlets."¹³

Such tactics by the Orbán administration have been practiced in the utilities and banking sectors in Hungary. As top managers and CEOs described the method (under condition of anonymity) for a research:

¹³ Freedom House (2017) "Press Freedom's Dark Horizon," [in:] *Freedom of the Press 2017*. Available [online]: <https://freedomhouse.org/report/freedom-press/freedom-press-2017>

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AFTER EIGHT YEARS IN POWER, WITH EVER-DECREASING CONSTRAINTS ON HIS WILL, PM ORBÁN'S PATIENCE SEEMS TO BE WEARING THIN. TODAY, HE HARDLY EVEN TOLERATES SYMBOLIC SETBACKS, LET ALONE ATTEMPTED LEGAL RESISTANCE, AND AN ENTIRE STATE STRUCTURE WORKS TO EXECUTE HIS WILL

"They have made life so difficult and so expensive for the foreign-owned utilities companies that they forced them to sell out. Regulating gas and electricity retail prices down to loss making levels, instituting utility tax (...). You did not see a wave of Venezuela style nationalization, but measures were taken to seri-

*ously reduce the value of these companies and then they [could buy them up]. That's what happened in the utilities and banking industries."*¹⁴

*"The government nationalized gas utility companies. (...) So politically, the message is very good: we have chased out profit-hungry foreign multinationals. They [the state] take over these utility services, then technological standards will erode and the government will say we need to improve the technological quality, they will improve it from taxpayers' money...oh no, before they start to improve, they will assign who will be the future buyers... their mates. Then they will sign the contract with them and afterwards the state will improve the technological quality of the companies for several billion HUFs and then these firms will be transferred into private hands close to the government. And then sooner or later they will try to sell them again to foreign multinationals."*¹⁵

But this tool was not limited to the utilities sector, or to foreign owners. As the case of an advertising company shows:

"They buy up a lot of companies...They use mafia tools. They use the power of the state. (...) For example, I know of a media company, which made lamppost posters for parties during elections. They were always very careful to have 50-50 percent of Fidesz and MSZP on their posters. It is a private company. Some people went there and said 'we would like to have 50 percent of your company for free'. As the company did not want to 'sell', after two months the same people went back and said 'we want 80 percent of the company'. Then

¹⁴ Sallai (Egerszegi), D. and G. Schnyder (2018) "The Transformation of Post-Socialist Capitalism – From Developmental State to Clan State?," [in:] *Greenwich Paper in Political Economy*, No. GPERC57, January 12. Available [online]: <https://ssrn.com/abstract=3100775>

¹⁵ Ibid.

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RESTRUCTURING BEGAN IN 2010 WITH FIDESZ PASSING A SERIES OF LAWS THAT CONSOLIDATED MEDIA REGULATION (PRINT, ONLINE, AND BROADCAST) UNDER THE SUPERVISION OF THE NATIONAL MEDIA AND INFOCOMMUNICATIONS AUTHORITY (NMHH), AND THE MEDIA COUNCIL

*– when the owners still did not sell – after two weeks they introduced a law that forbids political posters on city lampposts. As a consequence the market value of the firm went down to 10 percent [of its previous value]."*¹⁶

Even foreign owners can be penalized and eventually whipped into line by regulatory or tax tools (they are constantly un-

¹⁶ Ibid.

der attack), but it takes time and patience. However, after eight years in power, with ever-decreasing constraints on his will, PM Orbán's patience seems to be wearing thin. Today, he hardly even tolerates symbolic setbacks, let alone attempted legal resistance, and an entire state structure works to execute his will.

Everyone knows that PM Orbán's sore spot is RTL in this case, a countrywide commercial TV channel owned by the German parent company that refuses to make propaganda news, unlike its competitor TV2.¹⁷ RTL is one of the most significant news sources among the Hungarian population, according to a 2016 survey (See Figure 8).¹⁸

RTL's credibility as an information source is the highest among the population (See Figure 8), even among Fidesz voters (See Figure 8).

THE ROLE OF THE MEDIA COUNCIL IN HUNGARY

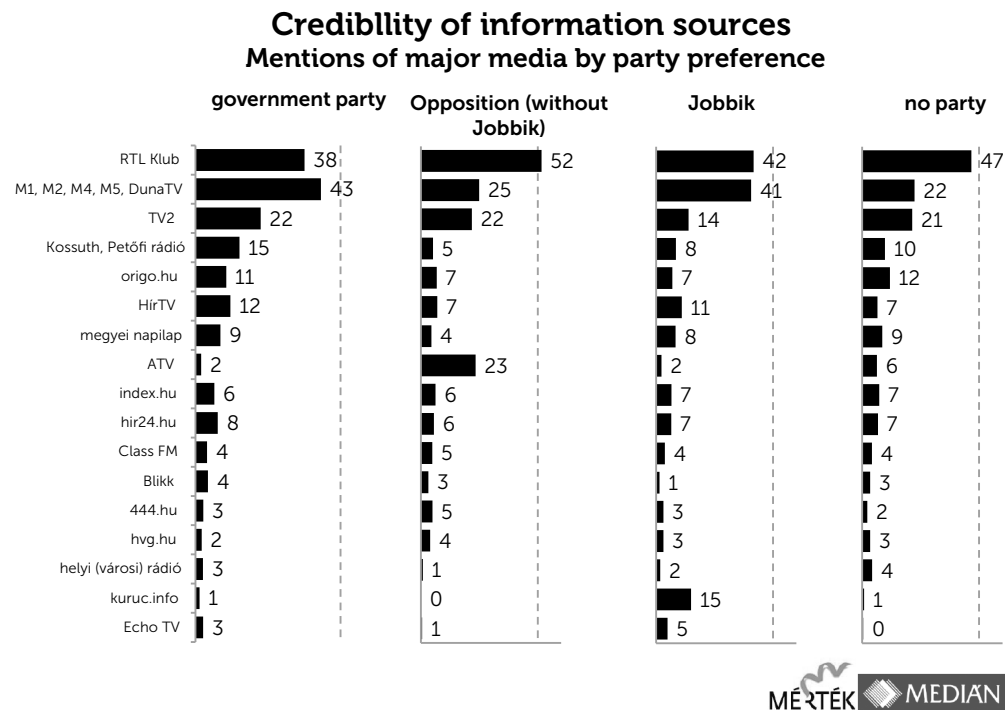
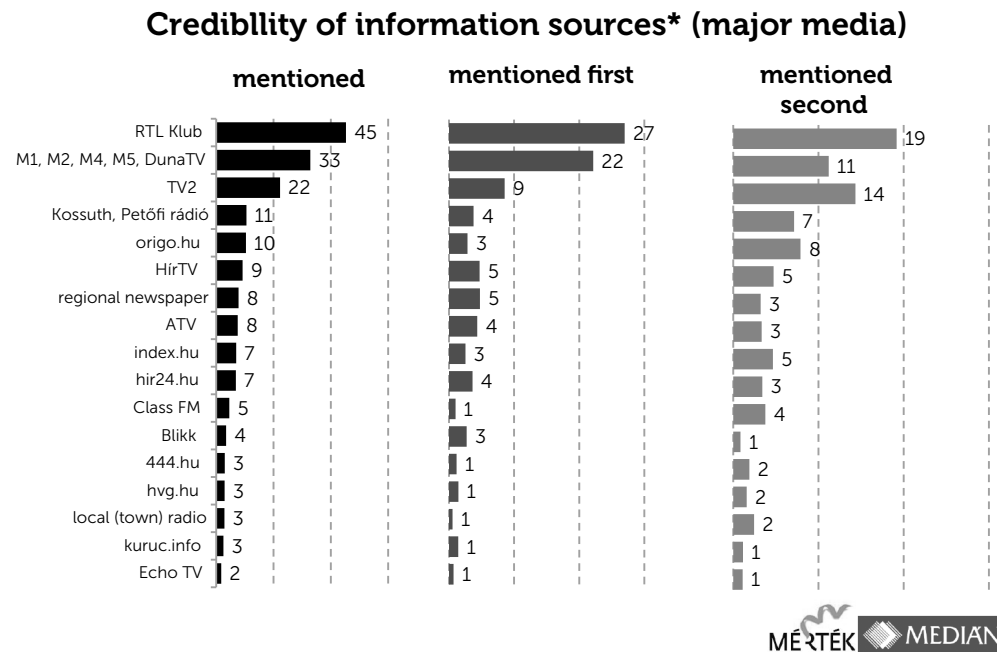
Since 2010, the government in Hungary has implemented a number of reforms in the media. Restructuring began in 2010 with Fidesz passing a series of laws that consolidated media regulation (print, online, and broadcast) under the supervision of the National Media and Infocommunications Authority (NMHH), and the Media Council.

The result of one of these media laws was not censorship (direct or indirect), rather, allowing oligarchs to attain near-monop-

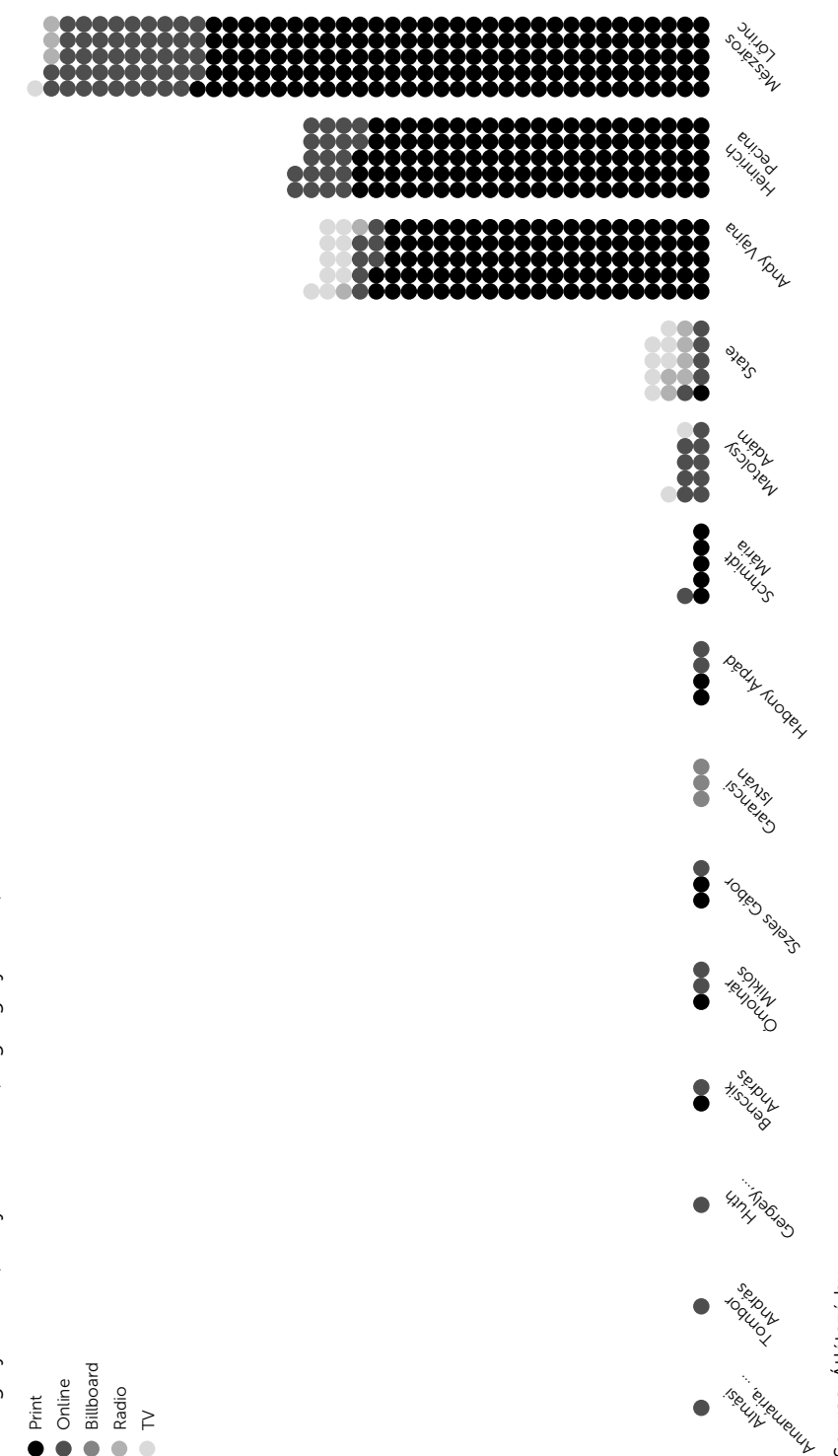
¹⁷ György, F.(2018) "Orbának az RTL Klub és az Index is kell," [in:] 24.hu. Available [online]: <https://24.hu/belfold/2018/02/22/orbannak-az-rtl-klub-es-az-index-is-kell/>

¹⁸ Mérték Media Monitoring (2016) *The Sources of Political Information in Hungary – The State of the Media Structure in the Time Before and After Its Transformation*. Available [online]: http://mertek.eu/wp-content/uploads/2017/01/Mertek_newsconsumption_eng_2016.11.25.pdf

Figure 8: Credibility of information sources among the total population and by party preference. RTL leads in all groups



Source: Mérték Media Monitoring (November 2016)



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WHEN GERMAN-OWNED RTL WANTED TO BUY CENTRAL MEDIA GROUP, NMHH FOUND IT A RISK TO INFORMATION PLURALISM AND BLOCKED IT

olies – while stopping foreign or independent owners from buying stakes or expanding. The Freedom House's *Freedom of the Press 2017* index has also noted the decreasing levels of foreign investment in newspapers and other news outlets: "The current government dominates all elements of the media value chain. It has used political influence to allocate digital, terrestrial, and cable frequencies on the basis of political criteria, and offers financial support to pro-government media through advertising contracts, while squeezing critical media out of the market."¹⁹

Furthermore, the NMHH's major role in creation of the current media landscape was its power to block or facilitate takeovers and acquisitions. When German-owned RTL wanted to buy Central media Group, NMHH found it a risk to information pluralism and blocked it. When the owner of its

¹⁹ Freedom House (2017) "Press Freedom's Dark Horizon," [in:] *Freedom of the Press 2017*. Available [online]: <https://freedomhouse.org/report/freedom-press/freedom-press-2017>

competitor – crony-owned and government-controlled TV2 – announced its intention to buy the publisher of a major tabloid newspaper (among other titles), NMHH greenlighted the deal in a record eight days with a simplified procedure, and without providing any explanation for this decision.

Similarly, simplified permission procedures preceded the acquisition of each and every regional publication by Mészáros and the consolidation in his newfound media empire in his company, Mediaworks (including television channels, radio stations, and print publications) – or the takeover radio channels' that went to another Orbán ally and the owner of TV2.²⁰ When pushed, NMHH claimed that every county was treated separately, although it is not clear how this statement was supposed to make the dominance of Mediaworks on the Hungarian media market less pronounced.

CONSOLIDATION IN THE HANDS OF ORBÁN'S ALLIES

The investigative journalists at *Átlátszó* worked themselves through an avalanche of data and created a visualization of how the Hungarian media were taken over by the government and Fidesz-friendly oligarchs (See Figure 9).²¹

In 2015, only 31 media outlets (individual dots) were controlled by the Hungarian government, 21 did not yet exist. By 2018, all 500 are Fidesz-controlled.²² According to the data, by January 2018, the Fidesz media empire was in charge of publishing 500 titles – ranging from

²⁰ Sajó, D. (2017) "Hogy vásárolhatta fel a kormány holdudvara szinte az egész sajtót?," [in:] *Index*, October 19. Available [online]: https://index.hu/belfold/2017/10/19/nmhh_mediataincs_vajna_meszaros/

²¹ *Átlátszó.hu* (2018) *Infographic: Explore the Media Empire Friendly to the Hungarian Government*. Available [online]: <https://english.atlatszo.hu/2018/01/16/infographic-explore-the-media-empire-friendly-to-the-hungarian-government/>

²² Ibid.

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EVER SINCE THE TAKEOVER, TV2 BECAME A BASKET CASE OF SUBSERVIENT INCOMPETENCE AND SPINELESS PROPAGANDA. ITS JOURNALISTS LEFT, SOME EMIGRATED, WHILE OTHERS BECAME BUS DRIVERS. IN THE MEANTIME, THE PROFESSIONALS WERE HASTILY REPLACED BY NON-JOURNALISTS AND LOYALISTS

teen magazines to TV channels. Two third were print newspapers, published by twenty-two separate publishers, which are owned by only fourteen individuals (See Figure 9).

Some of the old titles were discontinued, like the country's biggest and oldest daily, *Népszabadság*, which went to a previous-

ly unknown Austrian businessman before landing at Lőrinc Mészáros – a deal they have denied making for a few days. *Népszabadság* was shut down overnight in 2016. Its journalists were not allowed back in the buildings for their belongings. Over a five-decade-long archive disappeared. For those who wanted an explanation, the government prepared one: the newspaper was not profitable. This, however, can be said of almost all types of media in the age of Facebook, especially on such small language markets as the Hungarian one. It still does not explain why the 50+ years of archives had to disappear. What explains it, however, might be the fact that the newspaper kept leaking the antics of the central bank governor and the scandal was getting uncomfortable. The shutdown also sent a signal to journalists at other outlets. If the oldest daily can be discontinued and its journalists scattered, seeking jobs in the ever-shrinking market of non-governmental media, it can also happen to the newspaper you are working for. The chilling effect cannot be neatly quantified.

Other outlets were bought by oligarchs using generous loans provided by state-owned banks. This was the case of TV2, which used to be one of the main sources of news, especially in rural Hungary. After a legal battle over ownership between two oligarchs – one former and one current PM Orbán ally, the TV channel went into the hands of the latter. Ever since the takeover, TV2 became a basket case of subservient incompetence and spineless propaganda. Its journalists left, some emigrated, while others became bus drivers. In the meantime, the professionals were hastily replaced by non-journalists and loyalists. The once strong commercial channel is now a butt of jokes for headlines, such as 'Soros would have killed his own mother,' and ram-



Strains
Beyond
Speech

Alter, Challenge

pant migrant-themed fearmongering, as part of the government's two-year campaign against George Soros, Brussels, migrants, and other 'existential threats to the Hungarian way of life.'

Furthermore, another set of left-leaning media outlets were brought under Fidesz control. Their owners made deals and then moved their best political reporters into the night slot or let them go. All of this was completely legal and can be explained away with seemingly reasonable arguments. That is, after all, the nature of new autocracies everywhere.

SAMIZDAT IS BACK AND DEMOCRACY NEEDS SUPPORT

As a reaction to the government-dominated media (and the incessant, single-minded fearmongering propaganda), a few activists decided to start a Samizdat-like paper, photocopied, and hand-delivered by activists into people's mailboxes.²³

The tiny *Nyomtass Te Is* (You Should Print, Too) movement aims at breaking the monopoly of Fidesz-owned media in the Hungarian countryside, where print media still reigns supreme in shaping people's fears.

To give an idea of how much of a problem the one-sided propaganda became in Hungary, the United States Department of State's Bureau of Democracy, Human Rights, and Labor (DRL) announced a funding opportunity for the support of "objective media in Hungary."²⁴ The USD 700,000 fund (app. EUR 570,000) would support rural media outlets in Hungary

to help train and equip journalists in their fight to defend independent media as they are, once again, subject to political pressure and intimidation.

According to the official explanation by the U.S. State Department, the need was especially strong, precisely in rural Hungary, where government-controlled public media and a handful of outlets friendly to the ruling Fidesz party are the only news sources most people are exposed to.

"The program should improve the quality of local traditional and online media and increase the public's access to reliable and unbiased information. Projects should aim to have impact that leads to democratic reforms."²⁵

"The Department of State... seeks a partner for the United States Government who will help educate journalists and aspiring journalists on how to practise their trade," a State Department official told Reuters about the grant.²⁶ "The United States has publicly and privately expressed our concerns about the status of the free press in Hungary on multiple occasions," he added. They can use the funds after May 2018, possibly to evade the accusations that the grant was meant to interfere with the Hungarian general elections in April 2018.²⁷

Normally, the U.S. DRL does not concern itself with European countries, especially not the members of the European Union.

CONCLUSIONS

Hungary's position in press freedom rankings has been steadily declining since 2010. Its press has been only "partially free" since

2011, according to the Freedom House's *Freedom of the Press 2017* index. The situation has deteriorated further still, and the pro-government media have expanded. The governmental measures to discipline and control the media have included legal, political, and economic pressure – all of which are tightly entangled.

The ownership structure of the media is still heavily tilted towards privately owned companies – but private does not mean what it once used to. As per the repeated desire of Prime Minister and Fidesz leader Viktor Orbán, by 2016, 60% of the media has gone "into Hungarian hands" – a term implying that Hungarian owners can be kept under stronger control. In reality, however, it means something even more direct.

Under state capture and a quickly enriched oligarchic class, loyal allies of the governing party can hold a considerable share in the media and tilt it towards governmental propaganda. In December 2017, PM Orbán went even further and announced his plans to take the rest of the Hungarian media "into Hungarian hands" and with that, he invented *media sovereignty*, a new tool of authoritarianism. According to him, if the United States and Germany can have 'locally owned media,' then so can he. But in real economies, the ownership structure is more of a result of organic development than central planning. As a consequence of these efforts, the number of media outlets controlled by the government went from 31 to 500 between 2015 and 2018. They are amassed in the hands of only fourteen oligarchs, whereas the vast majority of these outlets belong to only two of them.

Political bias of certain media outlets is not where the key problem lies. It is rather in their lack of liberty, with the government exerting direct or indirect control over the

media. On the other hand, public media have observed an increase in funding, while loyal oligarchs were allowed to buy up entire sectors and regions – both in the media and elsewhere. At the same time, their potential competitors were blocked by the same media authority that did not see a problem with their growing monopoly on information sources in (mostly rural) Hungary. The re-allocation of an ever-growing state advertising budget (mostly to promote the government's constant hate campaigns) has also benefited only loyalist media outlets.

Although according to the *Human Freedom Index 2017*, journalists are not killed or jailed in Hungary and access to the Internet is not limited by the government, when it comes to the government influencing the media landscape, Hungary is currently only partially free. The means of control are sneaky, indirect, and are all perfectly legal. Economic tools are leading the way, alongside targeted laws, and taxation.

The chilling effect of direct and self-censorship is reflected in the 2017 survey, according to which 33% of journalist said that they have decided not to publish certain pieces of information to avoid possible negative consequences, while 28% admitted to other kinds of self-censorship. Nevertheless, the real damage of the 2010 media law is not censorship. It is allowing oligarchs to attain near-monopolies, while at the same time denying foreign or independent owners the chance to expand or even buy stakes. ●



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ESZTER NOVA

Fellow at Financial Research Institute in Budapest

²³ Samizdat refers to a system in the USSR and countries within its orbit, by which government-suppressed literature was clandestinely printed and distributed (Source: Merriam-Webster Online Dictionary).

²⁴ See: U.S. State Department Bureau of Democracy, Human Rights, and Labor. Available [online]: <https://www.state.gov/j/drl/p/275396.htm>

²⁵ Ibid.

²⁶ Reuters (2017) *U.S. Launches Media Fund for Hungary to Aid Press Freedom*, November 13. Available [online]: <https://www.reuters.com/article/us-hungary-us-media/u-s-launches-media-fund-for-hungary-to-aid-press-freedom-idUSKBN1DD21C>

²⁷ Ibid.

Personal Freedoms under Ongoing Transition from Totalitarianism to Democracy: The Case of Bulgarian Judiciary



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BREGOV

The post-communist societies had their own legal, economic, and defense ideologies. The Council for Mutual Economic Assistance (COMECON)¹ was directed by economic ideology, while the Warsaw Pact² was led by military ideology. They both served as a counterbalance to the Western culture's formations the European Coal and Steel Community (ECSC) and the European Economic Community (EEC) within Europe, and the North Atlantic Treaty Organization (NATO) – also within Europe but including the overseas counterpart.

Socialist doctrine sets state's welfare as the foundation of its ideology and puts, accordingly, public good over the personal one. The realization of this doctrine is secured through the means of economy and war. In the legal doctrine, the comprehensive notion of public good cannot be applied as the citizens and their rights remain unrecognizable, which demotivates people to contribute to the public good of socialism. The change of the legal order after abandoning socialism in Eastern European countries belonging to the Soviet bloc had a particular goal: to elevate the *individual* over the state formation, *videlicet*, the Constitution shall be an index of the rights and freedoms of the individual, and a guide on limiting the

¹ Council for Mutual Economic Assistance (CMEA), also called Organization for International Economic Cooperation (from 1991), was an organization established in January 1949 to facilitate and coordinate the economic development of the Eastern European countries belonging to the Soviet bloc.

² Warsaw Pact, formally Warsaw Treaty of Friendship, Cooperation, and Mutual Assistance, (May 14, 1955–July 1, 1991), was a treaty establishing a mutual-defense organization (Warsaw Treaty Organization) composed originally of the Soviet Union, Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, and Romania. The treaty (which was renewed on April 26, 1985) provided a unified military command and for the maintenance of Soviet military units on the territories of the other participating states.

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THE LEGAL
ORDER, AND LAW
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DEVELOP

so-called “state” entity. The laws, in turn, should serve as guidelines towards the usage of civic rights and freedoms. The main warrant protecting the rights of a citizen, who is liberated from totalitarian views, is **the legal order** as regulator of fundamental rights and freedoms, and justice as defender and guarantor to respect the rights of this citizen. The legal order, and law enforcement in particular, define the extent to which rights and freedoms of the individual may and will develop.

TRANSITION PROCESSES OF FORMER SOCIALIST STATES

Economy, defense, and legal order continue to be the connecting thread of the ex-communist camp's countries. Similar is the transition of these countries across the three key areas. As regards the economy – from predominantly state-owned property to privatization and protection of private property. In defense – from conscript army and allies facing the ideo-

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THE GOVERNING PRACTICES IN FORMER COMMUNIST COUNTRIES SYMBOLIZE THE INCOMPLETENESS OF THE PROCESS IN ITS OTHERWISE FORMALIZED EXECUTION. THIS IS WHY THESE GOVERNMENTS SUFFER FROM POPULISM AND THE MORE SERIOUS INFECTIONS SUCH AS AUTHORITARIANISM AND NATIONALISM

logical enemy, to professional army and partners led by the concept of protection against attack on the individual and on the democratic order. Law's mission

was to liquidate the Soviet-type constitutions and adopt Europe's inherent constitutions of the 1980s (those changing the image of the state).³ Given that the conceptual direction is clear, the timeline can be defined. It starts with the opposition of the pro-Soviet regimes, the rejection of those regimes, the free elections, and the binding of those who exercise the new power with the family of the old democracies. A tool of involvement is the membership in various "democracy clubs" – Council of Europe, negotiations prior joining European Union and NATO; and for those that successfully passed the process – full membership in these organizations.

However, the democratization could only be declared "accomplished" in the presence of working legislative, executive, and judicial institutions. Such institutions do not allow or make it the most difficult to master the transformation and redirect it to serve non-democratic government and the power to harm individual rights and freedoms.

The governing practices in former communist countries symbolize the incompleteness of the process in its otherwise formalized execution. This is why these governments suffer from populism and the more serious infections such as authoritarianism and nationalism. The manifestation of the weaknesses in Hungary and Poland, which has been expressed in the liquidation of the judicial independence, is slowly approaching the Balkans. The process of overpowering the judiciary by the executive in Romania did not start until the spring of 2017.

³ A constitutional generation adopted with the eradication of authoritarian regimes in Portugal and Spain and continued with the liquidation of the Soviet model state in the Eastern Bloc.

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THE POST-TOTALITARIAN LEGAL ORDER IS HIGHLY AMBIGUOUS – IT CONSTANTLY MIXES THE SHORTCOMINGS OF SOCIALISM WITH DEMOCRATIC ACHIEVEMENTS

BULGARIA'S TRANSITION

In Bulgaria⁴, these processes, though emerging later, are represented at three separate levels. On the one hand, nationalism is intensifying. The hatred towards the "other" constitutes a leading political platform of one of the two ruling Bulgarian parties – United Patriots. On the other hand, populism is finding gaps in the economic policy through statements on the fight against monopolies and a number of legal actions to curb business. From a third point of view, authoritarianism is manifested through the resolution of urgent issues not by the institutions, but by the individual will of the head of the executive power: the current Prime Minister Boyko Borisov. Re-

⁴ In the *Human Freedom Index 2017*, Bulgaria ranks 41 out of 159 countries, with an overall score of 7.83 in 'Human Freedom' (receiving a higher score in terms of 'Personal Freedom': 8.26, and lower for 'Economic Freedom': 7.39). See Vásquez, I. and T. Porčnik (2017) *The Human Freedom Index 2017*. Washington, D.C.: Cato Institute, Fraser Institute, and Liberales Institut. Available [online]: <https://www.cato.org/hfi>

garding the phenomenon of "skipping" institutions, most visible are the attempts of the executive power to control the judicial and when it does not succeed, to cause difficulties in its established functional order.

CONSTITUTIONAL PRINCIPLES VERSUS CLEAR RULES OF THE GAME

Simply put, legal order in ex-communist countries can be best explained by a person familiar with the structure and functioning of both democracy and socialism. Bulgarian scientist Nikola Dolapchiev's⁵ understanding of *the legal order* includes both the legal framework and law enforcement. His definition of the totalitarian legal order is remarkably accurate: "like the mythological Janus,"⁶ justice in these countries has two faces – one that is relatively decent and intended to be shown to the outside world, and another – the true one that can only be seen through careful study of the real facts." The post-totalitarian legal order is highly ambiguous – it constantly mixes the shortcomings of socialism with democratic achievements. The Bulgarian Constitution as of July 1991 is the first democratically adopted constitution among all the countries of the former communist camp. It proclaims the separation of powers in a parliamentary republic; it "preaches" the protection of human rights and raises the principle of private property and free enterprise. As a tool for the protection of the constitutionally established order, the Republic of Bulgaria perceives the functioning of a Constitutional Court (which is outside the judicial power), to be the "guardian" of the supreme law and the established state order. To protect the

⁵ Dolapchiev, N. (1953) "Law and Human Rights in Bulgaria," [in:] *International Affairs*, Volume 29, No. 1, p. 59.

⁶ In ancient Roman religion and myth, Janus is the god of beginnings, gates, transitions, time, duality and endings. Usually depicted as having two faces, Janus presided over the beginning and ending of conflict, and hence war and peace.



THE STATE OF THE BULGARIAN JUDICIARY CAN BE DESCRIBED AS "A STORY OF POVERTY AND GLITTER"

rights and legitimate interests of the citizens, a system of courts is established, which includes the division of civil, criminal, and administrative law. Extraordinary courts are not allowed, and specialized courts are governed by law. The Prosecutor's Office is unified and centralized and preserves its status as totalitarian, wielding broad powers in all spheres of public life. The figure of the Prosecutor General was described by one of the authors of the first totalitarian Soviet constitution in 1947 as "an institution of a supreme, higher-ranking nature."⁷ The Chief Prosecutor stands "above the Minister of Justice, over the Council of Ministers."⁸

Needless to say, the clear rules of the game are losing their clear content. The proclaimed democratic organization of society loses the opportunity to reflect the need for the development of society, including the refutation of the unresolved issues in the Bulgarian Constitution or

poorly settled issues regarding the exercise of citizens' rights. There are several reasons for this.

Firstly, because the concept of basic laws' dynamic nature as "living documents developing with society"⁹ is proclaimed but not developed in the Bulgarian constitution. The ordinary National Assembly changes the laws, while the polity and state government remain unchanged. In the event of a major change, a Grand National Assembly should be constituted. However, the supreme law does not specify anywhere, nor procedurally secure the form of polity or state government.

Secondly, this legal deficit has built a defense line against the attempt to redefine the Bulgarian constitution's temple of values – the organization of the judiciary. The Constitutional Court of the country contributed to this, as in a number of decisions it proclaimed any change in the organization of the judiciary to be "essential"¹⁰ and within the powers of the Grand National Assembly. Thus, the Constitutional Court acquired the character of a non-promulgated institution likened to an "additional legislature", as it has been labeled by Chris Hanretty.¹¹

According to the researcher, the main weaknesses of the judiciary are as follows:

- the prosecutor's office is overwhelming, but it is unaccountable and practically irresponsible for the pursued criminal policy;

⁹ Opinion of the Commission of Democracy by Law 2015 of the Council of Europe on the Constitution of the Republic of Bulgaria, CDL-AD(2015)022.

¹⁰ Resolution № 3/2003 of the Bulgarian Constitutional Court.

¹¹ Hanretty, Ch. (2014), "The Bulgarian Constitutional Court as an Additional Legislative Chamber," [in:] *East European Politics and Societies*, Volume 28, No. 3, pp. 540-558.

⁷ See: Doncheva, L. (2012) "The Problem Concerning the Judiciary in the Process of Elaboration and Adoption of the Constitution of the Republic of Bulgaria in 1947", [in:] *Epohi*, Volume XX, No. 2, pp. 137-158.

⁸ Ibid.



THE BULGARIAN CONSTITUTION IS ALSO CONTRADICTIONARY IN DISTRIBUTING THE WEIGHT OF THE INDIVIDUAL RIGHTS OF ITS CITIZENS

- despite the declared independence of the judiciary, bearers of the judiciary (the judges) are not provided with levers to exercise and defend their independence even within the judicial system itself;

- judges are irreplaceable but only after 5 years of service;

- for the courts as custodians of citizens' interests, no detailed distinction has been made between extraordinary and specialized courts;

- the constitution encourages the raising of a magistrate's establishment, following the example of the Soviet Party Nomenclature – the administrative heads of the court and the prosecution are not limited by the number of mandates they can perform.¹²

¹² Independent analysis of the structural and functional model of the Prosecutor's Office of the Republic of Bulgaria, available in English on the web-site of Ministry of Justice of Republic of Bulgaria. Доклад прокуратура (EN). Available [online]: <http://www.mjs.bg/2156/>

The state of the Bulgarian judiciary can be described as "a story of poverty and glitter"¹³ – following the title of a detailed study of the structure and practices of Bulgarian justice by Professor Bruno Schönfelder. The paradox of the Bulgarian judiciary's condition is its position as the most independent among the countries of the post-communist world. However, it has failed to successfully fulfill its plan and has fallen into crisis. The crisis becomes a manifestation of the unpredictability of justice, denial to use court, or finding alternative dispute resolution mechanisms that are on the verge of the law and often stimulate corrupt practices among magistrates and in the society as a whole. Alternative dispute resolution, most often using force methods, began in Bulgaria in the 1990s, and its use has not ceased to this day.

Initially, the independence of the judicial system has served as an obstacle to the new public order since 1989 to seek anti-communist homicide. That is, the initial strong independence actually served to preserve the status of former communist functionaries, not citizens.

Besides the problems listed above, the Bulgarian Constitution is also contradictory in distributing the weight of the individual rights of its citizens. Thus, the basic law proclaims and guarantees the inviolability of private property, but at the same time, it gives a handful of wide-ranging "social rights" – "provisions that are similar and even more outright than those of the constitutions of Poland and Hungary".¹⁴ The strengthened "social model" does not produce the desired social outcome – social systems such as health care, pension, and

¹³ Schönfelder, B. (2005) "Judicial Independence in Bulgaria: A Tale of Splendour and Misery," [in:] *Europe-Asia Studies*, Volume 57, No. 1, pp. 61-92.

¹⁴ Ibid.

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social assistance are in a state that does not adhere to what is stated. Professor Schönfelder gives as an example of the constitutionally established right to “free health care,” which raises a barrier to efforts for meaningful reform.¹⁵

GUARANTEES FOR THE REAL EXERCISE OF CITIZENS’ RIGHTS: THE ROLE OF THE JUDICIARY

There is not much to be destroyed in Bulgaria, as the achievement is not so significant—unlike the other countries of the former Socialist bloc. In principle, the independence of the court is guaranteed by the rule of law. It is the securing of this guarantee that has been a key recommendation to Bulgaria for a period of approxi-

mately 20 years, both from the Council of Europe and the European Union¹⁶. Following the principle of separation of powers, the modern democratic state adheres to the separation of power between legislative, executive, and judiciary. The executive power and the legislature in Bulgaria are essentially in a conflict-free relationship, as the majority in the National Assembly exercising the legislative power elects the executive.

By its nature, the judiciary is the state authority that protects against excessive state interference in citizens’ lives in an attempt to over-regulate or subordinate them. In this sense, if the separation of powers is considered, it is inevitable that the judiciary is the opposition of the executive and the legislature, as well as of the politically formed power.

By repealing acts and decisions of the executive that drive concrete policies, the court is also a corrective for policies, which puts it, again, in a vulnerable position. Thus, the judiciary, responsible to the public to protect the interests of each and every citizen, remains self-defenseless in the face of the other two branches of power. It is precisely the refusal of the legislature and the executive to provide sufficient constitutional guarantees for the independence of the judiciary that casts doubt on the protection of the fundamental rights of the citizens.

The independence of a court is achieved by giving independence to an individual judge, who her/himself is the holder of the judiciary. That is to say, not the insti-

¹⁶ See: Annual reports of the Cooperation and Verification Mechanism (CVM) for Bulgaria. Available [online]: https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en

¹⁵ Ibid.

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OF LAW

tution of the court, but rather the judge exercising the function is important. The level of independence is achieved and measured by how the matters of appointment, appraisal, promotion, and punishment of the individual judge are dealt with. The standard adopted by the Council of Europe is that these matters should be dealt with by a body made up of a majority of judges directly elected by the judges.¹⁷ Most often, this is the Supreme Judicial Council.

¹⁷ Opinion of the Commission of Democracy by Law 2017 of the Council of Europe on the Judicial System Act, CDL-AD(2017)018. Available [online]: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)018-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)018-e)

As opposed to judicial independence, the other representative of the judiciary in Bulgaria is the Prosecutor’s Office. It pursues state criminal policy and holds the function of investigating crimes, prosecuting, and maintaining the charges in court. Professional conduct is inherent to the Prosecutor’s Office, and to each individual prosecutor within the boundaries of the limited autonomy to which the Prosecutor’s Office is entitled. It is precisely the degree of independence that brings the great difference between judges and prosecutors. We speak of autonomy, as the judges are obliged to make a decision based on their inner conviction and the law without taking into account or defending state or any other interest. Unlike the judge, the prosecutor feels bound to defend the public interest by pursuing guilt and punishing specific individuals. This requires him to report to the public and the other authorities on the punitive policy pursued.

In the Bulgarian context, this distinction, affixed with explanations and recommendations by the Council of Europe, does not seem to be shared as a value and a landmark among much of the political class¹⁸. All efforts to reform the Bulgarian judiciary are marked by the two following features:

- refusal to give court independence, with the help of a government-led judicial council;
- refusal to seek accountability and responsibility of the Prosecutor General, retaining her/his status of the supreme figure amongst all magistrates in a Stalinist model.

In resolving a legal dispute regarding people’s civil rights and obligations or the merits of any criminal charge against

¹⁸ Ibid.

them, Article 6 of the European Convention on Human Rights (ECHR) guarantees the right of every person, to have a fair and public hearing of their case within a reasonable time by an independent and impartial tribunal established by law. Led by the desire for political control over the judiciary, the authorities in Bulgaria conduct policies that run counter to the principle of separation of powers and the rule of law. This puts at risk the protection of the fundamental rights and freedoms of Bulgarian citizens and foreigners staying within the territory of the country. In practice, there is no guarantee of the implementation of Article 6 of the ECHR, which is manifested in several ways for citizens and businesses.

1. For the citizens that means:

- in civilian terms: difficulties in exercising property rights. Cases of disputes and possession are subject to dependence and the right to freedom of association, which is always to be defended before a court, can hardly be upheld in the handling of a lawsuit by a dependent judge;
- in criminal terms: a risk of non-revealing and non-punishment of the perpetrators of the fundamental rights of the person, such as life, dignity and civil rights;
- in administrative terms: difficult protection against unlawful regulatory acts of local and central government.

2. For business:

- in civilian terms: difficulty in resolving commercial disputes and protecting the right of ownership of a commercial enterprise;
- in criminal law: a risk of difficult search for responsibility for abuse;

- in administrative law: difficulties in repealing irregular and unlawful regulatory acts, difficult defense in tax law infringement cases, as well as difficult or ineffective appeal procedures, public procurement, licenses and permits.

Judicial trials are also often deprived of the possibility of a predictable outcome of litigation.

Furthermore, the unreformed Prosecutor's Office is used to protect business interests close to power, to persecute businesspersons who are uncomfortable with power, and even to directly interfere in business affairs. The bankruptcy of one of the major banks in the country, Corporate Commercial Bank AD, helped by the Prosecutor's Office proceedings, despite the existence of a special regulator, is also indicative of this. Evidence of the over-interference of the Prosecutor's Office regarding economic relations is, for example, the conviction of the Republic of Bulgaria to the ECHR in the case of the Czech company Zlinsat against Bulgaria.¹⁹ In this case, the ECHR concludes: "the minimum degree of legal protection to which individuals and legal entities are entitled under the rule of law in a democratic society was lacking. It follows that the interference with the applicant company's possessions was not lawful, within the meaning of Article 1 of Protocol No. 1."²⁰ Thus, the dependence within the judicial system itself

¹⁹ Case of Zlinsat, spol. s r.o. versus Bulgaria (application no. 57785/00). Available [online]: http://hrlibrary.umn.edu/research/bulgaria/Zlinsat_en.pdf

²⁰ According to Protocol 1, Art. 1 of ECHR Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

by the Prosecutor General is multiplied as a dependence of business relations on the Prosecutor's Office.

LEGISLATIVE INITIATIVES CONFIRM OR REJECT FUNDAMENTAL RIGHTS: RECENT EXAMPLES

A fundamental feature of modern democracies is respect for citizens' rights, taking into account the maximum pluralism in society. In order to achieve this state of society, the laws governing relations should be legitimate for all citizens.

A sign of the legitimacy of the laws is that they are fully recognized and respected by the people. The condition for a legitimate legislative policy is an open and equal public discussion of policies and laws taking into account all points of view and giving priority to the stronger argument. As an expression of this, the legislative process is accompanied by public discussion and impact assessment of the draft legal act. In Bulgaria, a special law regulates this – the Law on Legal Acts.²¹

However, in Bulgaria the understanding is that the law regulates the principles, but does not affect the practices. The current 44th National Assembly, in less than a year of mandate, established law-making chaos. The procedure for proposing drafts of legislation, discussion, and voting suffers from several significant defects:

1. When the executive does not wish to clearly state their policy, they use an unpopular deputy as a proposer.
2. When governors conceal their collusion with the opposition on topics to the detriment of justice and public interest,

²¹ Law on statutory instruments, Promulgated State Gazette No. 27, April 1973, last amended State Gazette No. 34, May 2016. Available [online]: <https://www.lex.bg/laws/ldoc/2127837184>

proposers are deputies from the ruling party, and the opposition supports the law only when voting.

3. The deliberations of the bills in the committees of the National Assembly are carried out taking into account the views of politicians only, without taking into account the expert opinions of professional organizations, the academic community, and the non-governmental organizations.

4. The quality of the legislation is at a critically low level – basic procedural and structural laws change multiple times within a few months.

5. Legislation is unpredictable; there is no legal certainty.

6. Legislation is unclear – it is necessary to use the archaic method of authentic interpretation of the laws by the National Assembly because the judiciary does not find a way to apply them.

Failure to comply with the legislative process would not be a cause for serious concern if the laws ultimately did not obstruct the exercise of citizens' rights. In this way, the laws remain rather legitimate for their authors, but not for society.

LAW-MAKING CAPACITY IN BULGARIA

The law-making capacity in Bulgaria is therefore problematic. To illustrate this phenomenon, let us take a look at several examples of how the process of introducing or amending laws currently looks like in the country from the perspective of an active Bulgarian pro-European politician.²²

²² At present, the Republic of Bulgaria is governed by a coalition between the pro-European GERB party and a group of nationalist parties known for its pro-totalitarian views. The governing parties, although claiming to be in a different political view, show common thinking in drafting and adopting restrictive laws. The examples are detailed in the text.



Tide Turned Against
An Ideal Renewed

RESTRICTION OF ECONOMIC AND OTHER RIGHTS AND FREEDOMS

The populism of the government, masquerading as a socially responsible policy, was directly reflected in the recent amendment of the Commerce Act.²³ At the end of December 2017, an obligation was imposed on the seller of a commercial enterprise, a limited liability company, to prove that it had paid all its employees' salaries and insurance for a period of three years back from the date of the sale. If it is not able to pay its salaries and insurance contributions, the buyer can pay them for. Formally, nowhere in the law does it say that the sale of an enterprise with liabilities is forbidden. In practice, however, the public register of traders in the country refuses to record changes in the ownership of traders who have not provided evidence of the lack of liabilities.

Framing the image of politicians as "fighters with unfair employers," has been accompanied by serious administrative obstacles to prove this lack of liabilities. It turned out that there is no possibility of checking in the accounts of the National Revenue Agency whether a particular company has outstanding obligations to its employees and the state. It came to the acceptance of a declaration template, in which the seller of the company shall declare the presence or the absence of outstanding liabilities. Because of this "reform for the benefit of the people," for nearly three months it was actually impossible in Bulgaria to change the ownership of any company organized as LTD. This, in practice, limits the right to a free economic initiative, the right to property, and the right to association, which are enshrined in the Bulgarian constitution.

²³ Bulgarian Commercial Law, Promulgated State Gazette No. 48/18, June 1991, last amended State Gazette No. 15/16, February 2018, See: Art. 15, Art. 16, Art. 129. Available [online]: <https://lex.bg/laws/ldoc/-14917630>

CRIMINALIZATION OF THE FREEDOM OF CONTRACTING

From antiquity to the present day, it is clear that to conclude a treaty, one must have the freedom to negotiate, and this freedom goes hand in hand with the responsibility of what has been agreed. Simply put, *pacta sunt servanda* (contracts must be observed). But who, if not a modern populist, can reverse the principles of the Roman law?

The National Assembly of the Republic of Bulgaria has submitted draft amendments to the Criminal Code aimed at combating corruption in the private sector at the end of December 2017. In general, corruption is a state inherent to public entities when they exercise power in that capacity and position, but the Bulgarian Ministry of Justice does not share this understanding. The ministry is proposing to extend the concept of an official by including traders and their employees.²⁴ Two dangerous consequences arise:

1. Anyone negotiating more favorable terms on a commercial contract between private entities will be prosecuted if, in the negotiation process, s/he "has taken or accepted a gift or any service."
2. Anyone who has breached or failed to perform his/her duties and thus harmed the employer's financial interest will be prosecuted and charged. This text may sound convincing if we do not realize that a single disciplinary violation will lead to prosecution.

The bill is motivated to protect the interests of business and society, but business is clearly opposed to accepting it, as evidenced by the views of nationally representative employers' organizations.

²⁴ Народно събрание на Република България (2017) Законопроект за изменение и допълнение на Наказателния кодекс. Available [online]: <http://www.parliament.bg/bg/bills/ID/77927>

This legislative bias shows a return to the roots of the communist dictatorship – everything that is not explicitly permitted is forbidden. This is contrary to the principle of the modern rule of law, according to which, everything is allowed unless declared a crime by law.

EXTRAORDINARY COURTS IN NO TIME

Since 2011, a special type of courts and units of the Prosecutor's Office called "specialized," have been operating in the Bulgarian justice system. Their primary aim was to examine cases in which high-level people were accused. According to Art. 411a²⁵ of the Bulgarian Criminal Procedure Code, the specialized criminal court deals with some cases of crimes committed by MPs, ministers, mayors, municipal councilors and other senior administrative officials. In addition, these specialized structures had to serve as a promise to tackle organized crime and corruption, at the same time demonstrating to the public that something is being done, and reporting to the European Commission how well the Bulgarian politicians fight against corruption²⁶. Thus, a number of other special anti-corruption structures – a Commission for the Confiscation of Illegally Acquired Property, a Conflict of Interest Committee, among others – have "swarmed." The overall impression is for an abundance of authorities and laws with low law enforcement capacity and desperate performance – Bulgaria ranked 71st in

²⁵ Penal Procedure Code, Promulgated State Gazette No. 86/28 October 2005, last amended State Gazette No. 7/18, January 2018. Available [online]: <https://www.lex.bg/bg/laws/ldoc/2135512224>

²⁶ Penal Code, Promulgated State Gazette No. 26/2, April 1968, last amended State Gazette No. 101/19, December 2017. Available [online]: <https://www.lex.bg/laws/ldoc/1589654529>

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the *Corruption Perceptions Index 2018* of Transparency International, lowest in the European Union.²⁷

In the second half of 2017, a number of changes were made to extend the powers of the specialized courts and the specialized Prosecutor's Office.

First, amending the Law on the Judiciary government predicted a special order of higher salaries for judges and prosecutors of the specialized court and prosecution.²⁸ In simple terms, the new texts can be treated as payment by the political class to be more politely investigated and pros-

²⁷ Transparency International (2017) Corruption Perceptions Index 2017. Available [online]: https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table

²⁸ Judiciary System Act, Promulgated State Gazette No. 64/7, August 2007, last amended State Gazette No. 15/16, February 2018. Available [online]: <https://www.lex.bg/laws/ldoc/2135560660>

ecuted. The Supreme Judicial Council, the Supreme Bar Council, and the Union of Judges in Bulgaria expressed their opinions against this legislative action. The Legal Committee of the National Assembly did not comment.

Secondly, in parallel with this, the Penal Procedure Code has been amended, and cases against the special category of persons (ministers, deputies, mayors, municipal councilors,) will be governed by the same procedural rules, except for jurisdiction and time limits. Proceedings against the government will be dealt with in a shorter time, and the relocation of only some of the cases against the governors to the Specialized Criminal Court, mixes the permissible criteria for defining special and particular competencies. As a result, the Specialized Criminal Court neither has jurisdiction over all cases against a certain type of person, nor is it a specific category of cases against any category of person.

Because of this change, Bulgaria now experiences unequal treatment of judges, prosecutors and investigators, unequal treatment of the defendants themselves and signs of an extraordinary criminal court explicitly prohibited by the Bulgarian Constitution. The Supreme Court of Cassation requested the Constitutional Court to repeal the text of the law for this legislative action. At this stage, the case is admitted.

JUDGES HAVE NO RIGHT TO CONVICTION

In 2015 and 2016, the Bulgarian Constitution²⁹ and the Judiciary Act were amended to make prosecutors unable to influence the professional and disciplinary

matters of judges. Thus, the toolbox for pressure on the court through the prosecution was limited.

In 2016, Bulgarian politicians were reforming. In 2017, they were re-reforming. Under this motto the judiciary law was revised twice in the past year. One amendment allowed any judge to be removed from office if s/he was charged with a serious intentional crime without the right to appeal the removal. Apart from this, by removing the magistrate who has been charged as an accused with an intentional crime, the principle of the Roman law is undermined, namely that the accused is innocent until proved otherwise. Given the fact that the removal order cannot be appealed, the dismissed magistrate is deprived of the rights of defense. Although this is still a matter of law, written in Article 6 of the European Convention for the Protection of Human Rights, the deputies did not accept the abovementioned arguments. This made it possible for judges to be subject to prosecutors; if a prosecutor does not like a particular judge pronouncing a prosecution charge, the prosecutor has the right to charge the judge and remove the latter from a specific case.

Following an opinion by the Venice Commission and the International Judicial Association, a rapid revision of the law followed³⁰. However, the revised version still does not meet the standard of preserving the judge's independence, taking into account her/his inner conviction of how to resolve a particular case.

³⁰ Българска съдийска асоциация (2017) РЕЗОЛЮЦИЯ НА ЕВРОПЕЙСКАТА АСОЦИАЦИЯ НА СЪДИИТЕ. Available [online]: <https://www.judgesbg.org/bg/библиотека/mezhdunarodni-aktove/item/1344-резолюция-на-европейската-асоциация-на-съдиите,-сантяго,-чили,-13-11-17r.html>

²⁹ Constitution of the Republic of Bulgaria (1991). Available [online]: <https://www.lex.bg/laws/ldoc/521957377> (in Bulgarian)

“SOME OF THE RECENT LEGISLATIVE INITIATIVES OF POWER IN BULGARIA HAVE LED TO THE HARDENING OF THE POST-COMMUNIST ENVIRONMENT AND THE RETURN TO A STATE OF SOCIETY INHERENT TO THE PREVIOUS FORM OF SOCIALISM

INSTEAD OF A CONCLUSION

The countries of the former post-World War II communist camp have always had apparent signs of convergence. In the past, it has been the attempt to involve them as silent satellites of the USSR, and in their post-totalitarian life – to the legal and economic order of the Old World. At present, the actions of power in a number of countries in the former Eastern Bloc are aimed at abolishing the democratic functioning of the state, and hence the rights of citi-

zens in the name of values that they seek to make more important than human rights and freedom.

The structure and organization of the judiciary, coupled with the conceptually controversial and quality laws adopted in Bulgaria show that the rise of certain categories of fundamental rights at a constitutional level is not a sufficient guarantee for their exercise. Even if the state nominally recognizes certain rights, if good law and working authorities do not accompany this, they cannot really be exercised.

The role of the judiciary is of particular importance for the exercise of rights and the protection of the interests of citizens. If prosecutors do not investigate and accuse equally all criminal suspects, then the state is the protector of crime and aggressor against personal freedom. If the judges are not independent and free to decide cases of citizens, then any external force (another person or the state itself) is able to deprive them of their rights.

The same objective can be achieved by different means, but civil liberties and the rule of law can only be achieved through good legislation. Some of the recent legislative initiatives of power in Bulgaria have led to the hardening of the post-communist environment and the return to a state of society inherent to the previous form of socialism. •



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Freedom-Loving People Should Defend the Rule of Law in Poland



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MAREK
TATAŁA

One of the key topics in the public debate in Poland in the last two years was the rule of law. It has also become an important issue in the foreign media and institutions, including the European Union. On December 20, 2017, the European Commission declared that "[d]espite repeated efforts, for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has today concluded that there is a clear risk of a serious breach of the rule of law in Poland."¹

Whatever one might think about the Commission's decision, there was a series of legal acts, created and supported by the ruling Law and Justice (PiS) party, detrimental to the rule of law.

The Commission's remark may be compared to a thermometer indicating a fever. Thermometers show a symptom of a sickness and should not be ignored, but they cannot cure the sickness. This is why, in Poland, the European Union should not be expected to automatically terminate bad policies of one of its members, but rather treat the EU activities as a stimulus for a greater mobilization of the Polish civil society.²

LAW AND JUSTICE VS. THE RULE OF LAW

What are the examples of these bad policies? First, in the years 2015-16, the ruling PiS party took political control over the

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Constitutional Tribunal, converting it into a rubber-stumping body for PiS legislation³. Second, the law on the Ordinary Courts Organization empowered the Minister of Justice (who is at the same time the Prosecutor General, a deputy, and a political party leader) to dismiss heads of courts in an arbitrary way and appoint their successors without binding consultation with the National Council of the Judiciary. Third, the new law on the Supreme Court lowered the retirement age, as a result of which some judges (including the president of the court) will be automatically replaced.⁴

¹ European Commission (2017) *Rule of Law: European Commission Acts to Defend Judicial Independence in Poland* (Press Release), December 20. Available [online]: http://europa.eu/rapid/press-release_IP-17-5367_en.htm

² See also Tatala, M. (2018) "The EU Invokes Article 7 Against Poland, But Only Poles Can Defend Their Liberty", [in:] *acton.org*. Available [online]: <https://acton.org/publications/transatlantic/2018/01/05/eu-invokes-article-7-against-poland-only-poles-can-defend>

³ See: Helsinki Foundation for Human Rights, "The Constitutional Crisis in Poland 2015 – 2016". Available [online]: <http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR-The-constitutional-crisis-in-Poland-2015-2016.pdf>

⁴ See: Venice Commission's reports about Poland. Available [online], especially "Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme



ENEMIES OF THE PEOPLE

Fuel Fresh Fears

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THE GOVERNMENT
INTRODUCED
AN EXTRAORDINARY
APPEALS PROCEDURE
THAT GIVES
IT THE POWER
TO RE-OPEN FINAL
JUDGMENTS TAKEN
MANY YEARS AGO,
UNDERMINING
THE CERTAINTY
OF THE LAW

The government also introduced an extraordinary appeals procedure that gives it the power to re-open final judgments taken many years ago, undermining the certainty of the law. Finally, the new law on the National Council of the Judiciary enables the ruling party to control the composition of an institution, which was designed to protect courts and judges from politicians. The new National Council of the Judiciary is to be soon formed by the ruling PiS parliamentary majority while almost all opposition parties are boycotting this process, which they deem as unconstitutional.⁵

Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017)". Available [online]: <http://www.venice.coe.int/webforms/documents/?country=23&year=all>

⁵ Ibid.

All these legal changes, analyzed in detail (for example by the Venice Commission), infringe upon the independence of the judiciary and significantly weaken the rule of law in Poland. The presented article briefly discusses why the rule of law is important for freedom and prosperity and how it is conceptualized in some of the popular indices. The overview presents measurement of the rule of law in Poland and connects it with the PiS policies. Finally, the article explains the real problems with the rule of law in Poland that are not addressed by the ruling party (which is worsening the situation). The main argument is therefore that after PiS party won elections, many weaknesses of the rule of law in Poland, as indicated by various indices, were not necessarily connected with the justice system and judiciary. Moreover, when the justice system was indeed not working as well as it should have been, the PiS policies did not respond to any real problems and therefore cannot be regarded as justice system reforms dedicated to strengthening the rule of law in Poland.

WHY DOES THE RULE OF LAW MATTER?

The rule of law is an "essential guardian of freedom," as emphasized by Fred McMahon, from the Fraser Institute, in the Foreword to the most recent edition of the *Human Freedom Index*.⁶ The rule of law is also an important element of a sound democracy, in which political rights and civil liberties are respected and the powers of the government are constrained i.e. there is a limited government. As F.A. Hayek pointed out, "[t]he Rule of Law thus implies limits to the scope of legislation: it restricts it to the kind of general rules known as formal law, and excludes legislation ei-

⁶ Vázquez, I. and T. Porčnik (2017) *The Human Freedom Index 2017*, Cato Institute, the Fraser Institute, and the Friedrich Naumann Foundation for Freedom, p. 3.

ther directly aimed at particular people, or at enabling anybody to use the coercive power of the state for the purpose of such discrimination.”⁷

Moreover, the authors of the *Human Freedom Index* emphasized that the rule of law should be understood as a unified bundle together with security, as conceptualized by John Locke: “The end of law is not to abolish or restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, “where there is no law, there is no freedom;” for liberty is to be free from restraint and violence from others; which cannot be where there is not law.”⁸ The rule of law is thus needed to guarantee the existence of an individual’s freedom and protection from violations of this freedom by others.

It is therefore not surprising that such an important concept, from the perspective of a human life, as the rule of law has been measured by various indices, which enable better understating of what drives human well-being. These indices also make comparative analysis and forming policy recommendations much easier. The rule of law is used as an important component of many indicators like economic freedom (e.g. by the Fraser Institute and the Heritage Foundation), personal freedom (e.g. in the *Human Freedom Index*), governance (e.g. *Worldwide Governance Indicators* by the World Bank), political right and civil liberties (e.g. the by the Freedom House).

The rule of law indices themselves are usually composed of many sub-indicators. The *Rule of Law Index*, developed by the World Justice Project, is composed of

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THE POLICIES
IMPLEMENTED
BY THE PiS
GOVERNMENT
SO FAR WERE
NOT FOCUSED
ON THE IMPROVEMENT
OF THE SPEED
OF THE COURTS’
PROCEEDINGS
IN THE SLIGHTEST

44 sub-factors grouped in 8 categories, e.g. constraints on government powers, order and security, civil justice, and criminal justice.⁹ In the Freedom House’s civil liberties measurement, the rule of law is included and composed of four sub-categories: independent judiciary, due process in civil and criminal matters, protection of illegitimate use of force, and equal treatment by the law.¹⁰

THE RULE OF LAW INDEX IN POLAND AND PERSONAL FREEDOM

The PiS party won the parliamentary and presidential elections in Poland in 2015. In mid-November 2015, it gained political control over the legislative and execu-

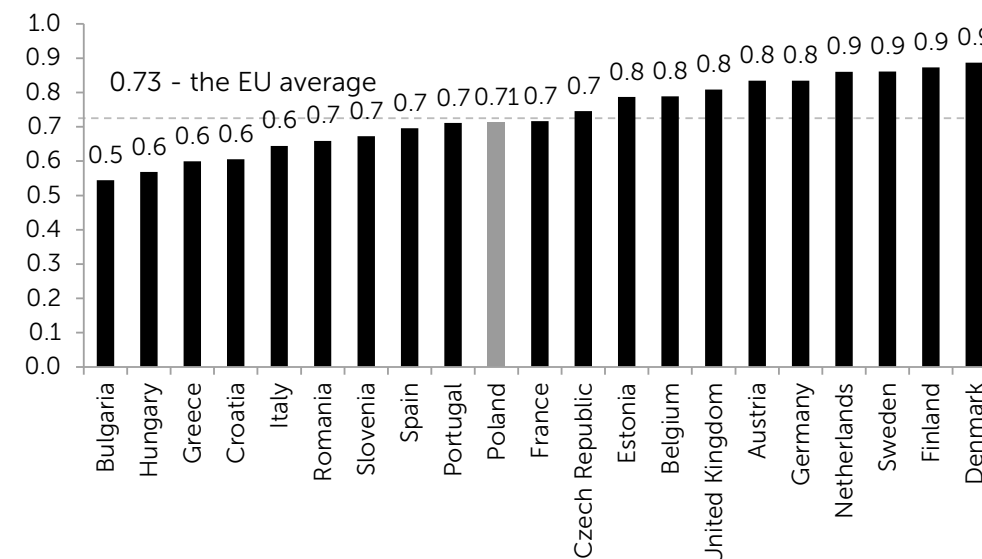
⁹ See: World Justice Project. Available [online]: <https://worldjusticeproject.org/>

¹⁰ See: Freedom in the World (2018). Available [online]: <https://freedomhouse.org/report/methodology-freedom-world-2018>

⁷ Hayek, F. A. (1944) *The Road to Serfdom*. Abingdon: Routledge, p. 87.

⁸ Locke, J. (1689) *Two Treatises of Civil Government*, New York: Barnes and Noble Books, sec. 57, p. 32.

Figure 1: Rule of Law Index 2016 in the EU



Source: World Justice Project¹¹

tive branches of the government. To have a better diagnosis of the situation after the eight years of the previous coalition led by the Civic Platform (PO) it is necessary to focus on the measurements of the rule of law before PiS started to implement its key policies in this area.¹¹ Therefore, the *Rule of Law Index 2016* edition by the World Justice Project is used, rather than its latest 2017-2018 edition.¹² As was emphasized, it is a very complex indicator and the authors of some other indices, e.g. the Human Freedom Index, also use it. In the 2016 edition, out of 21-member states of the European Union, Poland was ranked 12th (See Figure 1), with a score (0.71) out of 21-member states of the Eu-

ropean Union, which is slightly below the EU average (0.73). Poland ranks 15th in the EU & EFTA & North America region, and 22nd in the global ranking. The situation in Poland that led to these scores was not satisfactory and there has been significant room for improvement. Nevertheless, it was unjustified to claim that there was a crisis in the area of the rule of law.

Crucial information is revealed when looking at sub-factors of the *Rule of Law Index 2016*, especially when Poland’s scores diverge from the EU average. The biggest problems of the justice system (especially civil justice) are unreasonable delays (See Table 1). This finding is consistent with other data (e.g. Doing Business reports). It is important to emphasize that the policies implemented by the PiS government so far

¹¹ The first activities connected with the capturing of the Polish Constitutional Tribunal began just after the PiS government was formed but they should not have a significant impact on the majority of measurements done in 2015 and at the beginning of 2016.

¹² See: World Justice Project (2016). Available [online]: <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016>

¹³ Only 21 out of 28 EU member states are included in the Rule of Law Index. Scores for the countries like Lithuania, Latvia and Slovak Republic are unknown, which makes regional comparisons more difficult.

were not focused on the improvement of the speed of the courts' proceedings in the slightest.

Quality and speed of the administrative proceedings also negatively affected the value of the index in Poland and the methodology of the World Justice Project's report suggests that this was mostly due to the work of the local and national bureaucrats and not the administrative and other courts. Furthermore, in terms of availability and clarity of publicized laws and access to government data, transparency in Poland was worse than the overall score for the EU.

Three sub-factors of the *Rule of Law Index 2016*¹⁴ in which the score of Poland was relatively low, in contrast to the EU average, are constraints on the government powers. According to the *Rule of Law Index 2016* these powers have not been effectively limited by the legislature, the judiciary and by the independent auditing and review, i.e. sub-factors 1.1, 1.2, and 1.3. This is a clear signal that the politicians should strengthen the separation of powers and checks and balances in Poland and not to weaken or dismantle them. However, the ruling PiS party chose the latter path by increasing dependence of the judiciary on the government and significantly limiting possibilities of independent auditing by other public institutions, controlled now by the PiS nominees.¹⁵

¹⁴ See: World Justice Project (2016). Available [online]: <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016>

¹⁵ The list of the institutions includes various regulatory bodies and agencies, media supervisory institutions, and the key positions in the civil service. FOR (2018) estimated the scale of this changes. Available [online]: <https://for.org.pl/publikacje/raport-for-partia-w-panstwie-bezprecedensowa-wymiana-kadr-w-administracji-rzadowej-i-jej-legislacyjne-podstawy>

Overall, it is really difficult to blame the Polish judges and the justice system for rather weak performance in some of these areas. When judges, and the system in which they operate designed by the politicians, can be blamed (e.g. delays in the civil justice) it is still not a reason to weaken the independence of the judiciary, especially when one looks at the rather poor assessment of constraints on the government powers. [See Table 1]

It is also interesting to see how and why the score of Poland in the *Rule of Law Index* worsened between the 2016 edition analyzed above (0.71) and the latest 2017-18 edition (0.67). It becomes evident that the PiS's policies and political climate affected the scores. The actions that may have contributed to this include the public media activities in which judges, NGOs, and the opposition parties were frequently attacked in an unjustified way – one of the most recent examples of such an attack is a leaflet distributed by the Polish PM Mateusz Morawiecki to foreign journalists, which was based on manipulations and even lies about the Polish justice system and judges.¹⁶ 38 out of 44 sub-actors received lower scores in the most recent edition of the *Rule of Law Index*. Assessment of only two sub-factors mentioned in Table 1, showing divergence of Poland from the EU average (i.e. weaknesses of the rule of law from a comparative perspective) has slightly increased (by only 0.1). Moreover, Table 2 shows 11 sub-factors that experienced the largest drop. [See Table 2]

¹⁶ See: IUSTITIA Polish Judges Association (2018) "The Arguments of Polish Judges Association Iustitia Related to the Pm Mateusz Morawiecki Statements." Available [online]: <http://www.iustitia.pl/informacje/2073-the-arguments-of-polish-judges-association-iustitia-related-to-the-pm-mateusz-morawiecki-statements>

Table 1: Comparison of Poland's score in selected sub-factors of the Rule of Law Index 2016 with the EU average

Sub-Factors of the Rule of Law Index 2016 edition	Score	Poland versus EU average
7.5 Civil justice is not subject to unreasonable delay	0.34	-0.20
4.5 Freedom of belief and religion is effectively guaranteed	0.64	-0.15
6.4 Due process is respected in administrative proceedings	0.51	-0.13
1.1 Government powers are effectively limited by the legislature	0.61	-0.12
6.3 Administrative proceedings are conducted without unreasonable delay	0.54	-0.09
3.1. Publicized laws and government data	0.61	-0.09
1.2 Government powers are effectively limited by the judiciary	0.62	-0.09
1.3 Government powers are effectively limited by independent auditing and review	0.64	-0.08

Source: own calculations based on the World Justice Project

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NEW RESTRICTIONS
ON THE FREEDOM
OF ASSEMBLY
ENABLED
THE RULING
PARTY TO HAVE
A MONOPOLY
OF ASSEMBLY OVER
CERTAIN PLACES,
IN CERTAIN TIMES

First of all, the rule of the PiS party has contributed to growing conviction among the experts about the improper government influence on criminal and civil justice, even before the laws on the Supreme Court and the National Council of Judiciary were passed in 2018. Importantly, the Minister of Justice Zbigniew Ziobro, who was empowered to dismiss the heads of courts in an arbitrary way and appoint their successors, is at the same time the Attorney General (whose powers to control the prosecution have been significantly increased¹⁷), a member of the parliament and the leader of the political party Solidarna Polska (op-

¹⁷ Council of Europe (2017) "Opinion on the Act on the Public Prosecutor's Office, as Amended, Adopted by the Venice Commission at its 113th Plenary Session, 8-9 December 2017". Available [online]: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)028-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)028-e)

Table 2: Sub-factors of the Rule of Law Index, which experienced the largest drop between 2016 and 2017-18 editions

Sub-Factors of the Rule of Law Index	2017-18	2016	Change
8.6 Criminal system is free of improper government influence	0.59	0.80	-0.20
4.2 The right to life and security of the person is effectively guaranteed	0.72	0.88	-0.16
8.3 Correctional system is effective in reducing criminal behavior	0.58	0.71	-0.12
4.6 Freedom from arbitrary interference with privacy is effectively guaranteed	0.61	0.73	-0.12
7.4 Civil justice is free of improper government influence	0.59	0.70	-0.11
4.7 Freedom of assembly and association is effectively guaranteed	0.64	0.75	-0.11
3.4 Complaint mechanisms	0.72	0.82	-0.10
1.5 Government powers are subject to non-governmental checks	0.63	0.72	-0.09
4.4 Freedom of opinion and expression is effectively guaranteed	0.63	0.72	-0.09
3.2 Right to information	0.66	0.75	-0.09
3.3 Civic participation	0.63	0.72	-0.09

Source: Own calculations based on the World Justice Project

erating as part of the PiS parliamentary majority). Consequently, politicization and government influences in the justice system have been growing. It can also be one of the explanations why the right to life and security of the person is not regarded as guaranteed, as was in the past (See sub-factor 4.2 in Table 2).

Secondly, the *Rule of Law Index 2017-18* shows also how some other policies by the PiS party, which are not directly linked to the operations of the judiciary, contributed to the worsening of the Polish score. As such, new restrictions on the freedom of assembly enabled the ruling party to

have a monopoly of assembly over certain places, in certain times.¹⁸ New law on the police¹⁹ and so called anti-terrorist legislation²⁰, which make it easier for the gov-

¹⁸ See Amnesty International (2018) *Poland 2017/2018*. Available [online]: <https://www.amnesty.org/en/countries/europe-and-central-asia/poland/report-poland/>

¹⁹ Council of Europe (2016) "Opinion on the Act of 15 January 2016 Amending the Police Act and Certain Other Acts, Adopted by the Venice Commission at its 107th Plenary Session". Available [online]: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)012-e)

²⁰ Panoptykon (2017) "Poland Adopted a Controversial Anti-Terrorism Law". Available [online]: <https://en.panoptykon.org/articles/poland-adopted-controversial-anti-terrorism-law>

Table 3: Sub-factors of the Legal System & Property Rights area in the Economic Freedom of the World Index 2015

Rule of Law (Areas)	Poland's score	Highest Score in the Ranking	Poland in the Ranking (159 countries)	Source
Judicial independence	4.59	Finland (9.57)	85	GCR*
Impartial courts	3.73	Switzerland (3.73)	95	GCR
Protection of property rights	5.39	Switzerland (9.15)	76	GCR
Military interference in rule of law and politics	10.00	26 states (10.00)	1	PRS Group
Integrity of the legal system	7.50	9 states (10.00)	38	PRS Group
Legal enforcement of contracts	4.12	Norway (7.75)	84	Doing Business
Regulatory restrictions on the sale of real property	9.28	Georgia (9.98)	18	Doing Business
Reliability of police	5.15	Finland (9.65)	88	GCR
Business costs of crime	6.71	UEA (9.06)	51	GCR
Overall score: Legal System & Property Rights	5.79	Finland (8.88)	51	-

Source: Fraser Institute (*GCR = Global Competitiveness Report)

ernment to tap the phones or screen and block the online activities, led to a drop in score of the freedom from arbitrary interference with privacy. Worsening of the freedom of opinion and expression can be explained by the political climate, activities of the public media, and various attacks on the private media by the representatives of the ruling party.²¹ Further-

more, according to the *Rule of Law Index 2016*, the government powers were not effectively limited by the legislature, the judiciary, and by the independent auditing and review. In the 2017-18 edition, non-governmental checks were also assessed as much weaker than in the past.

Finally, the above-mentioned negative changes contributed to the lower score for rule of law in the *Human Freedom Index 2017* (in the area of personal freedom), as the index was based on the most recent edition of the *Rule of Law Index*.

²¹ See Freedom House (2017) "Pluralism under Attack — The Assault on Press Freedom in Poland," [in:] *freedomhouse.org*. Available [online]: <https://freedomhouse.org/article/new-report-pluralism-under-attack-assault-press-freedom-poland>

“ THE RULE OF LAW IN POLAND HAS BEEN ONE OF THE WEAKEST ELEMENTS IN THE OVERALL SCORES OF THE ECONOMIC FREEDOM

ECONOMIC FREEDOM AND THE RULE OF LAW

The rule of law is not only important for personal freedom, but for economic freedom as well. Therefore, its measurements are included in the most reputable global indices, such as the *Economic Freedom of the World* by the Fraser Institute (used also in the *Human Freedom Index*) and the *Index of Economic Freedom* by the Heritage Foundation. The measurement of the rule of law from the economic perspective usually focuses on the protection of property rights, independence of judiciary, and efficiency (usually speed and costs) of the contract enforcement by the courts. Moreover, it is mostly based on two sources – the *Global Competitiveness Reports* (by the World Economic Forum) and *Doing Business Reports* (by the World Bank). The rule of law in Poland has been one of the weakest elements in the overall scores of the economic freedom. To better understand how the rule of law was assessed in Poland let us first look at the latest *Economic Freedom of the World* report,

which covers the year 2015. Specifically in the area of Legal System & Property Rights, Poland received the lowest scores in 1) impartial courts, 2) legal enforcement of contracts, 3) judicial independence, 4) reliability of the police, and 5) protection of property rights (See Table 3).

Four of the components listed in Table 3 are based on the *Global Competitiveness Reports* (GCRs) and their *Executive Opinion Survey* (for Poland it is composed of around 200 responses).²² The two rounds of the survey, which later served as the score for the *Economic Freedom of the World* ranking, were conducted in 2015 and 2016. The scores for all four components were worse than in the previous edition. The question is to what extent the PiS political successes in 2015, and first policies implemented after PiS formed the government (e.g. taking control over the Constitutional Court), affected the opinions of business executives.

There are two further insights into the rule of law in Poland, resulting from the GCRs. Firstly, the real problem in the Polish justice system is its efficiency, mostly lengthy proceedings and unnecessary delays (as suggested also by the *Rule of Law Index* discussed above and *Doing Business* presented below). Nevertheless, there are no survey questions related to this problem in the *Executive Opinion Survey*, thus, to some extent, negative opinions on the efficiency might be expressed in other questions in which courts are mentioned, e.g. about their impartiality or independence.

²² For more information see: Global Competitiveness Report 2016-17 (2016) "Chapter 1.3: The Executive Opinion Survey: The Voice of the Business Community", pp. 77-88. Available [online]: http://www3.weforum.org/docs/GCR2016-2017/05FullReport/The-GlobalCompetitivenessReport2016-2017_FINAL.pdf

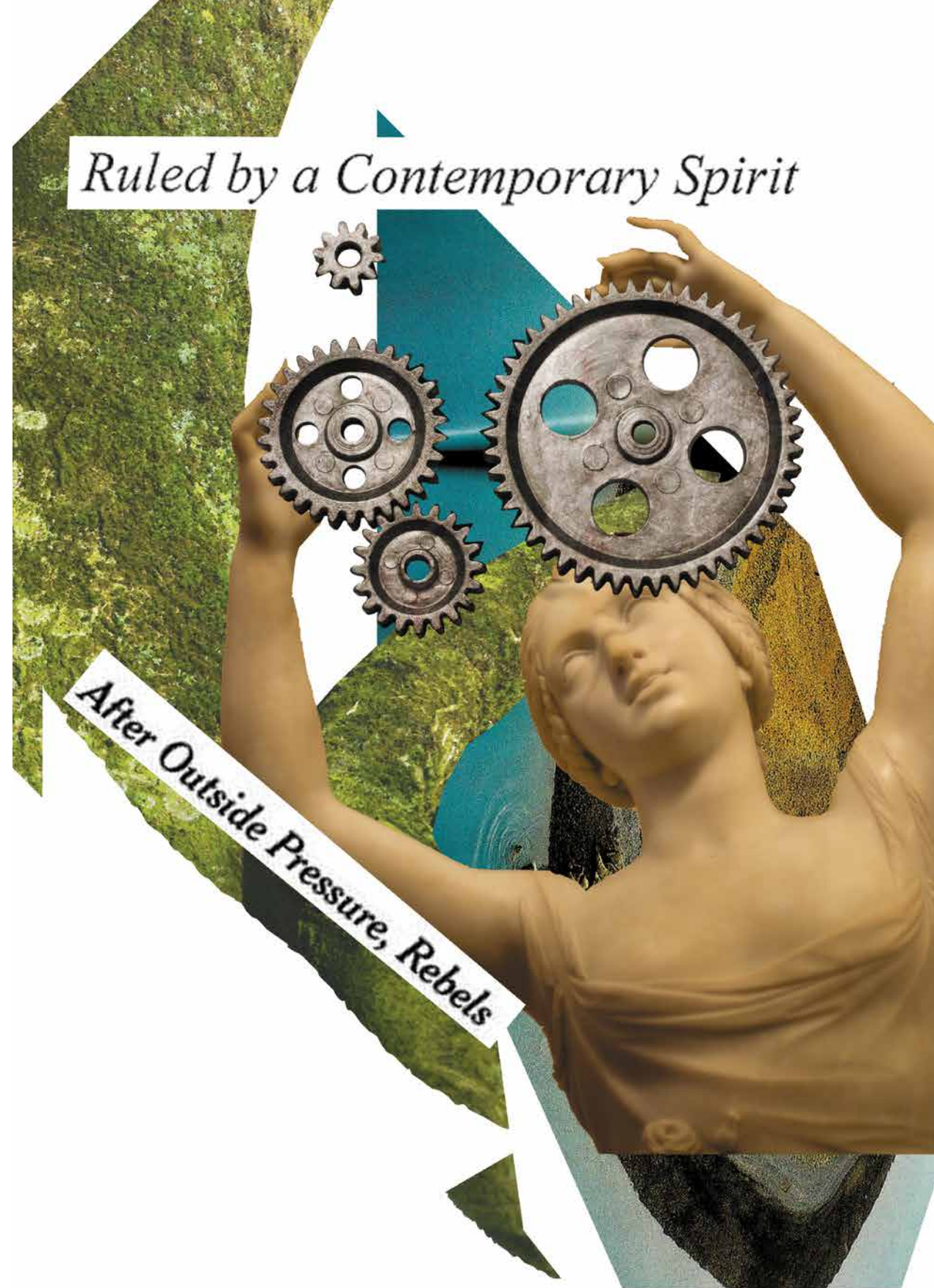
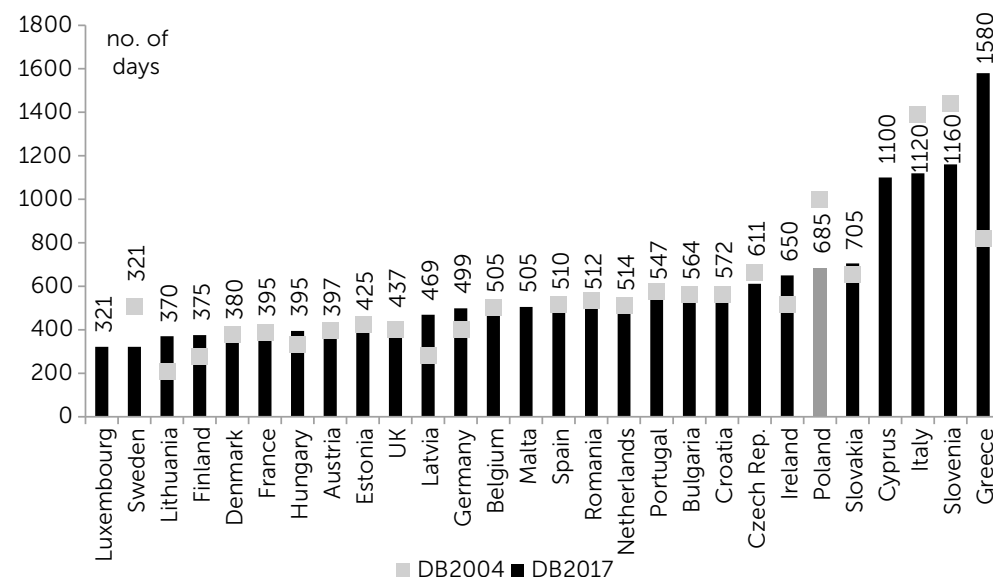


Figure 2: Number of days needed to resolve a commercial dispute as analyzed in the *Doing Business* reports



Source: own calculations based on the World Bank

Secondly, all the above questions from the GCRs are a part of the overall assessment of the institutions in the country. The worst scores for Poland in the most recent editions were given to public trust in politicians, favoritism in decisions of government officials, and burden of government regulations. They have nothing to do with the justice system in Poland and, unfortunately, the PiS government, through new regulations, policy instability, nepotism, and patronage within the public institutions and state-owned enterprises, made the situation even worse.

One of the worst sub-factors used in the *Economic Freedom of the World* ranking comes from the *Doing Business* reports, namely legal enforcement of contracts. This score is based on time (in days) and cost (as percentage of the debt) to resolve a commercial dispute.²³ In the case of Po-

land, the time is the biggest problem, and when looked from a comparative perspective, only five EU countries are assessed worse than Poland (Slovakia, Cyprus, Italy, Slovenia, and Greece). Nevertheless, since the first edition of the *Doing Business* report, Poland has made a huge progress in this area (See Figure 2). In other measures, e.g. the CEPEJ reports (in 2014 the average disposition time of 1st instance civil and commercial litigious cases was 203 days, with the average in the Council of Europe countries of 237 days)²⁴ and European Commission's EU Justice scoreboards²⁵, Poland is usually close to or above the EU

line]: <http://www.doingbusiness.org/methodology>

²⁴ CEPEJ (2016) *European Judicial Systems: Efficiency and Quality Of Justice*, p. 195. Available [online]: https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/REV1/2016_1%20-%20CEPEJ%20Study%2023%20-%20General%20report%20-%20EN.pdf

²⁵ European Commission (2017) *EU Justice Scoreboard*, pp. 7-8. Available [online]: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2017_en.pdf

²³ *Doing Business* (2018) *Methodology*. Available [on-

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IN SOME COUNTRIES, FOR INSTANCE BELARUS, AZERBAIJAN OR RUSSIA, THE COURTS WORK VERY FAST BUT THE JUSTICE SYSTEM'S INDEPENDENCE FROM THE RULING AUTHORITIES IS WEAK OR NON-EXISTENT

average, suggesting that it is an exaggeration to state that, again from a comparative perspective, Poland has dramatic problems or a crisis in this area.

Notably, time and cost to resolve a commercial dispute in a court do not only depend on activities of the judiciary (See Table 4). Evidence-based policies with a goal of reforming the justice system should consider the full picture of the situation.

Finally, the length of the court proceedings in Poland is longer globally than in many countries, but the speed of the justice system is not the only criteria important in the process of delivering the justice. As such, in some countries, for instance Belarus, Azerbaijan or Russia, the courts work very

Table 4: Components of the “Enforcing Contracts” category for Poland in the *Doing Business* 2018 report

Time (days)	685
Filing and service	60
Trial and judgment	480
Enforcement of judgment	145
Cost (% of claim value)	19.4
Attorney fees	12
Court fees	5.4
Enforcement fees	2

Source: World Bank

fast but the justice system's independence from the ruling authorities is weak or non-existent. These countries should definitely not serve as best practices of respecting the rule of law for Poland and other states.

Summarily, a more detailed analysis of the Global Competitiveness Reports and *Doing Business* is important to understand the weaknesses of the rule of law in Poland. Scores from these two reports have an impact on the *Economic Freedom of the World* reports, *Human Freedom Index*, and *Index of Economic Freedom*. The last edition of the *Index of Economic Freedom* states that in Poland “the judiciary is independent but slow to operate and sometimes subject to political pressure. The court system remains cumbersome, poorly administered, and inadequately staffed.”²⁶ First of all, this

²⁶ 2018 *Index of Economic Freedom* (2018) *Poland*. Available [online]: <https://www.heritage.org/index/country/poland>

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THE PiS POLICIES
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observation confirms that the problem of the justice system, which has never been seriously addressed by the ruling PiS party, is its efficiency and not independence. Secondly, the PiS policies in the area of the judiciary will make political pressures on the judiciary much easier and frequent and, as a consequence, weaken the rule

of law in Poland instead of strengthening this important pillar of the personal and economic freedoms.

FUTURE OF THE RULE OF LAW IN POLAND

Poles have been right to defend the rule of law against the attacks of the ruling PiS party.²⁷ It is true that the level of the rule of law, as measured by many indicators, was not perfect when the PiS government was formed, nor was it dramatically low. Moreover, the ruling party has never presented any credible, evidence-based diagnosis of the real problems of the justice system and reforms based on such an analysis. For example, as it was shown in this article, the key problem is the efficiency of the justice system and not the lack of independence in the judiciary. The ruling party has not yet addressed this problem, while some of their policies and inactions (such as maintaining many vacancies in the courts) made the situation even worse.

The rule of law is important for personal and economic freedoms, and thus is why these areas have been conceptualized and measured by various organizations, including the *Human Freedom Index*. Not all aspects of the rule of law are connected with the justice system and, in fact, the *Rule of Law Index* shows that one of the weaknesses that should be addressed are ineffective constraints on the governmental powers by the legislature, the judiciary, the independent auditing and review, and the non-governmental checks. Unfortunately, the consequences of various PiS policies are even weaker constraints on the government powers.

²⁷ See also Tatata, M. (2017) "Democracy and Rule of Law in Poland: U.S. Helsinki Commission Briefing," [in:] 4liberty.eu. Available [online]: <http://4liberty.eu/democracy-and-rule-of-law-in-poland-u-s-helsinki-commission-briefing/>

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WHAT IS NEEDED
TODAY IN POLAND
IS A WIDE PRO-RULE
OF LAW COALITION
OF THE CIVIL SOCIETY
ORGANIZATIONS,
BUSINESS COMMUNITY,
AND POLITICAL
PARTIES

Moreover, the rule of law is essential for an existence of a sound, constitutional democracy. As stated in the Declaration for Democracy in Central and Eastern Europe²⁸, one of the serious regional problems can be described as "a lack of independence and accountability in key political institutions, including the judiciary, which can lead to abuses of power and corruption." The PiS policies (including the law on the Ordinary Courts Organization from 2017 and the new laws on the Supreme Court and the National Council of Judiciary) will undoubtedly result in making this problem more and more visible.

In light of these developments, what is needed today in Poland is a wide pro-rule of law coalition of the civil society organizations, business community, and political parties. Firstly, the rule of law should be a platform of cooperation for the major opposition parties such as the Civic Plat-

form (PO), Nowoczesna, as well as non-parliamentary parties, even from the left. Secondly, the rule of law shall also constitute a platform of cooperation of various non-governmental actors that may have very different visions and missions, but in this one topic, can identify and promote a common agenda. Thirdly, there should be more interest in the rule of law among the business community as the rule of law is important for the economic freedom and business environment in Poland.

Evidence-based plans for a justice system reform should be drafted and proposed as an alternative to the PiS policies. It is true that in the opinion polls many people have been expressing their dissatisfaction with the current justice system.²⁹ This, however, does not automatically mean mass support for PiS anti-reforms. Apart from providing the alternatives, what is also needed is much better communication – both inside the judiciary (to inform the Polish people i.e. their customers about the courts' work), and about the rule of law in general (to make this topic attractive for the voters). Therefore, the concept of the rule of law should be more strongly embedded in people's minds and hearts as defending the rule of law is extremely important for the future of freedom and democracy in Poland. •

²⁹ E.g. CBOS (2017). Available [online]: http://www.cbos.pl/SPISKOM.POL/2017/K_112_17.PDF (in Polish)



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²⁸ The full text of the Declaration is available online (in Polish): <http://democracyontheline.org/>

“Stop Soros”: A Fake Governmental Legislation Proposal in the Hungarian Election Campaign



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JÁNOS
KÁRPÁTI

On February 20, 2018, the Hungarian parliament started its spring session with a debate on a “Stop Soros” package of three bills. It was the last session before the parliamentary elections due on April 8. The package focuses on:

- organizations promoting migration,
- taxation of activities “promoting migration,”
- and restrictive regulations for organizations promoting migration as “counter-measures” to their activities.

The adoption of certain parts of the package would need qualified (two-third) majority. The governing alliance of Fidesz-KDNP (The Christian Democratic People’s Party) does not possess this majority at the present time in the parliament. Therefore, the proposals were tabled only for discussion and voting is not expected before the elections.

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With respect to this delay, and considering several grave incoherencies and legal vagueness in the proposals, it is not unrealistic to assume that the proposals are primarily intended for campaigning purposes. But it is also alarming that the package clearly shows an authoritarian intention on behalf of Fidesz. Should the governing party alliance gain a two-third majority in the upcoming elections, it would be able to transform this campaigning material into a real law and real restrictions of the civil society as a whole.

In a broader context, it should be kept in mind that Human Rights Watch, in its *World Report – 2018*, described the rule of Prime Minister Viktor Orbán as an “illiberal democracy.” Mr. Orbán himself had used this expression earlier when referring to his own government.

“Central Europe has become especially fertile ground for populists, as certain leaders use fear of migration elsewhere in Europe to undermine checks and balances on their power at home,” the report said, referring specifically to Hungary and Poland.¹

¹ Roth, K. (2018) “The Pushback Against the Populist

“INDIVIDUALS WHO “VIOLATE THE INTERESTS OF HUNGARIAN NATIONAL SECURITY OR ARE A THREAT TO PUBLIC ORDER” MAY BE ISSUED WITH A “RESTRAINING ORDER,” WHICH WILL KEEP THEM OUT OF AN EIGHT-KILOMETER AREA OF HUNGARY’S SCHENGEN BORDERS

The presented article is an attempt to demonstrate that legal flaws of the text make it practically impossible to incorporate the three bills of the package into the Hungarian legal system.

Challenge,” [in:] *Human Rights Watch*. Available [online]: <https://www.hrw.org/world-report/2018/push-back-against-the-populist-challenge>

OFFICIAL REASONING

In the future it will be substantially more difficult to organize, support, and finance immigration in Hungary if parliament passes the “Stop Soros” legislative package, said Bence Tuzson, Hungarian Minister of State for government communications. According to the minister, the government had conducted a social debate on the legislative package, where more than 600 opinions and recommendations had been received. In light of these recommendations, the bills have been further tightened, he added.²

According to these bills, organizations, which intend to support migration and apply for a permit issued by the Ministry of Interior (on behalf of the Minister) to pursue such activities, must undergo a national security procedure. For that purpose, the Ministry must obtain the opinions of the national security services, the Constitution Protection Office, the Information Office, and the Military National Security Service. The Ministry’s decision can be appealed before a court of law, but only on the basis of procedural reasons.

The proposed legislation requires the applicant seeking to obtain a permit to also be screened, so as to determine whether it receives foreign funding for its activities. The National Tax and Customs Administration of Hungary would carry out this screening.

If anyone organizes, supports or finances migration without a permit, the prosecution service would have the authority to take action. As a first step, the prosecution

² Rogán, K. (2018) “The Stop Soros Legislative Package Will Be Submitted in Stricter Form on Tuesday,” [in:] *Website of the Hungarian Government: Cabinet Office of the Prime Minister*. Available [online]: <http://www.kormany.hu/en/cabinet-office-of-the-prime-minister/news/the-stop-soros-legislative-package-will-be-submitted-in-stricter-form-on-tuesday>

service would issue a warning and remove the organization’s tax number from the relevant register. As a second step, it may impose a monetary fine of up to HUF 1.8 million (app. EUR 6,000), which might be followed by a third step: the prosecution service may press charges before a court of law and may request the termination of the organization. Organizations coming under the effect of such a law would have 90 days to submit their applications to the Ministry of Interior. If an organization receives funding from abroad for the purposes mentioned above, they are required to report the receipt of such funding to the National Tax and Customs Administration of Hungary within three days.

The proposal also includes an immigration financing duty “as a mark of social responsibility.” Those who support such activities are required to pay a 25% “duty” on any money transferred to them from abroad.

Every organization that would come under the effect of the proposed legislation will be required to pay the above duty. The proceeds of the duty would be used for border protection purposes on a mandatory basis. Returns would have to be submitted by the end of the year, and the relevant amount would have to be paid by June 30 of the following year.

Exemption from the payment of the duty could be granted if the organization proves that it does not use its funding for migration purposes or is engaged in humanitarian activities.

If the payment obligation is not fulfilled, a liability extending to double the amount of the duty may come into effect.

Individuals who “violate the interests of Hungarian national security or are a threat to public order” may be issued with a “re-

“HUNGARY, LIKE POLAND AND OTHER EX-COMMUNIST EASTERN MEMBER STATES OF THE EU, HAVE ALL PUSHED A STRONG ANTI-IMMIGRANT STANCE, EVEN THOUGH THE NUMBER OF ASYLUM SEEKERS WHO WANT TO STAY IN THESE COUNTRIES ARE VERY FEW COMPARED TO WESTERN EUROPEAN COUNTRIES

straining order,” which will keep them out of an eight-kilometer area of Hungary’s Schengen borders. The proposed legislation defines in detail which activities qualify as contrary to the interests of national security or as posing a threat to public order.

” INTERPRETATIONS IN THE MEDIA EMPHASIZED THAT THE BILL WAS A KEY PART OF PM ORBÁN'S ANTI-IMMIGRATION CAMPAIGN TARGETING U.S. FINANCIER GEORGE SOROS WHOSE PHILANTHROPY AIMS TO BOLSTER LIBERAL AND OPEN- BORDER VALUES IN EASTERN EUROPE

The Ministry of Interior (on behalf of the Minister) has the right to extend the immigration restraining order to the entire territory of the country if the individual concerned is not a Hungarian national. This type of restraining order can be issued in a state of emergency due to mass immigration.

In his speech in parliament, Minister of State Tuzson said that mass immigration had brought a major security risk to Europe, public security had deteriorated,

and the threat of terrorism had increased. The government will, however, “make every effort to protect Hungary, the Soros plan cannot prevail, its implementation must be prevented, and the relocation of migrants to Hungary is out of the question,” he stressed.³

However, government spokesman Zoltan Kovacs, speaking in a state radio station – Kossuth Radio’s “180 Minutes” program on January 18 – defended the bill, saying that “George Soros’ network is working to ensure that as many people as possible reach Europe, because they believe this is what will ensure the future of the continent.” According to Kovacs, this is a political program in which organizations that help migrants are taking part “disguised as human rights organizations.”⁴

INTERNATIONAL REACTION

After publication of the original proposals on January 18, 2018, several news reports found that the key element of the package was that the legislation would empower the Ministry of Interior to ban non-governmental organizations (NGOs) that support migration and pose a “national security risk.”⁵ The bill would allow for restraining orders that prevent activists from working in areas on the country’s Serbian border, which is a frontier for the European Union, and similar restrictions for foreign nationals anywhere in the country.

³ Ibid.

⁴ Kovács, Z. (2018) “We Will Be Doing Everything Possible to Close Existing Loopholes,” [in:] *Website of the Hungarian Government: Cabinet Office of the Prime Minister*. Available [online]: <http://www.kormany.hu/en/government-spokesperson/news/we-will-be-doing-everything-possible-to-close-existing-loopholes>

⁵ Bare Naked Islam (2018) *Hungary Submits Anti-Muslim Invasion “Stop Soros” Bill to Parliament*. Available [online]: <http://barenakedislam.com/2018/02/18/hungary-submits-anti-muslim-invasion-stop-soros-bill-to-parliament/>

” THE HUNGARIAN HELSINKI COMMITTEE SAID THE BILL WAS UNACCEPTABLE AND SERVED POLITICAL GOALS

Interpretations in the media emphasized that the bill was a key part of PM Orbán’s anti-immigration campaign targeting U.S. financier George Soros whose philanthropy aims to bolster liberal and open-border values in Eastern Europe.⁶ It was also mentioned that Orbán had been embroiled in an escalating “Stop Soros” feud with the 87-year-old Hungarian-born Jew, waging a billboard and media campaign asserting that he would “settle millions from Africa and the Middle East.”⁷ After Gergely Gulyas, the leader of the ruling Fidesz party’s parliamentary group, accused Soros of a “full frontal” attack on Hungary in November 2017⁸, Soros described the ongoing campaign against him as “distortion and lies,” meant to create a false external enemy.⁹

⁶ Than, K. (2018) “Hungary Submits Anti-Immigration ‘Stop Soros’ Bill to Parliament,” [in:] *Reuters*. Available [online]: <https://www.reuters.com/article/us-hungary-soros-law/hungary-submits-anti-immigration-stop-soros-bill-to-parliament-idUSKCN1FY1JE>

⁷ Ibid.

⁸ Al Jazeera (2018) *Hungary Blasted over ‘Stop Soros’ Bill Targeting NGOs*. Available [online]: <https://www.aljazeera.com/news/2018/01/hungary-blasted-stop-soros-bill-targeting-ngos-180118184038476.html>

⁹ Reuters (2018) *Hungary Outlines “Stop Soros” Legislation Against Immigration*. Available [online]: <http://news.trust.org/item/20180117170228-z44xn/>

Pro-government Hungarian media reported that the new legislation could lead to a ban on Soros, who has U.S. and Hungarian citizenship, entering the country.¹⁰

It is important to point out that Hungary, like Poland and other ex-communist eastern member states of the EU, have all pushed a strong anti-immigrant stance, even though the number of asylum seekers who want to stay in these countries are very few compared to western European countries. Last year, the Orbán government introduced a measure requiring NGOs that get more than USD 26,000 (app. EUR 21,000) a year from international sources to register as “foreign-supported,” raising alarm in the EU and the United States.¹¹

The European Commission said in 2017 that it was taking Budapest to the European Court of Justice over its NGO laws as well as a higher education law that targets the Central European University in Budapest founded by Soros.¹²

REACTION OF HUNGARIAN CIVIL ORGANIZATIONS

Human rights groups and critics have criticized the right-wing Hungarian government’s introduction of legislation targeting NGOs that work with refugees and migrants.

¹⁰ Than, K. (2018) “Hungary Submits Anti-Immigration ‘Stop Soros’ Bill to Parliament,” [in:] *Reuters*.

¹¹ Hungarian Spectrum (2017) *Today’s Extra: Interview with Leaders of Three Hungarian NGOs*. Available [online]: <http://hungarianspectrum.org/2017/04/19/todays-extra-interview-with-leaders-of-three-hungarian-ngos/>

¹² Baczyńska and L. Cusack (2017) “EU Steps Up Pressure on Hungary over Soros University, NGO Laws, Migration,” [in:] *Reuters*. Available [online]: <https://www.reuters.com/article/us-eu-hungary/eu-steps-up-pressure-on-hungary-over-soros-university-ngo-laws-migration-idUSKBN1E11CN>

“THERE WAS NO TRANSPARENCY WHATSOEVER IN THE PROCESS, NOBODY COULD CHECK WHAT OPINIONS HAD BEEN REGISTERED TO THE GOVERNMENTAL MAILBOX. THE GOVERNMENT SIMPLY STATED MORE THAN 600 OPINIONS AND RECOMMENDATIONS HAD BEEN RECEIVED

The Hungarian Helsinki Committee, an NGO that has been providing support for the legal and human rights of various groups including asylum seekers and prisoners since 1994, said the bill was unacceptable and served political goals.

“[Its goal] is to stigmatiz[e] certain civil organizations that the government does not like (...) and to distance them from society, and in the end make their operation im-

possible,” the committee, which receives a major chunk of its funding from Soros, said in a statement.¹³

Furthermore, the Károly Eötvös Institute for Public Policy (EKINT), led by former data protection ombudsman László Majtényi, released an assessment of the government’s controversial Stop Soros bill.¹⁴

According to EKINT, the purpose of the bill is to silence NGOs that are critical of the government and restrict organizations from providing legal assistance in human rights cases. Defending human rights and making statements about the government will be tied to a license issued by the Ministry of Interior. If an organization does not have the license, such actions can be subject to penalties. The 25% tax imposed on the organizations that receive the license from the Ministry of Interior would be punitive.

The interior minister would be able to ban anyone from going within 8 km of the border. Another highly controversial point of the proposal is the fact that the Ministry of Interior’s decision may be subjective and arbitrary, and the courts have no right to review the decision in merit.

“It should be clear to everyone: while this law attacks a specific set of NGOs, the government can later use this against anyone,” EKINT writes.¹⁵ “The government can decide at any time to use this law against anyone who is critical of the government health-care policies, education policies,

¹³ Than, K. (2018) “Hungary Submits Anti-Immigration ‘Stop Soros’ Bill to Parliament,” [in:] *Reuters*.

¹⁴ Eötvös Károly Intézet (2018) *Az Eötvös Károly Intézet gyorselemzése a Stop Soros törvénycsomagról*. Available [online]: <http://ekint.org/alkotmanyossag/2018-02-14/az-eotvos-karoly-intezet-gyorselemzése-a-stop-soros-torvenycsomagrol>

¹⁵ Ibid.

tax policies....citing the desire to protect [Hungary’s] sovereignty. Because whoever is not with us is against us.”¹⁶

Moreover Nora Koves, a human rights expert at the Budapest-based Eotvos Karoly Policy Institute, described the bill as “utter nonsense.”

“DOES ‘SUPPORT’ MEAN TO PUBLICLY SPEAK IN FAVOR OF MIGRATION? YOU CANNOT BAN IT, IT WOULD BE THE DENIAL OF ONE OF THE BASIC RIGHTS: FREEDOM OF SPEECH

“It doesn’t make sense, not even in a legal perspective,” she said in a telephone interview to Al-Jazeera. “We have no idea what the bill has to do with Soros. It’s basically just part of the government’s propaganda,” she added,

“This new bill is just the next step along the way of undermining NGOs and distracting public opinion from actual problems like corruption.” The broader campaign against

human rights groups and humanitarian organizations “could mean the end of NGOs” in Hungary, Koves concluded.¹⁷

The content of the package clearly shows that the Hungarian government looks upon any kind of migration as a negative phenomenon and considers punitive actions against those who promote migration in any way as justified. The civil society, however, is trying to defend its autonomy.

The analysis of EKINT has highlighted several legal absurdities and incoherencies of these proposals, which make it practically impossible to incorporate this text into a logical legal system. I try to summarize a few of them.

LACK OF SOCIAL DEBATE

The so-called public consultation required by law in dealing with government proposals in the case of this legislative package consisted of merely an email address (velemenyezés@mk.gov.hu)¹⁸ to receive public opinions.

There was no transparency whatsoever in the process, nobody could check what opinions had been registered to the governmental mailbox. The government simply stated more than 600 opinions and recommendations had been received – and in the light of these recommendations, the bill had been further tightened.¹⁹ It is clear now that the Hungarian government did

¹⁷ Al Jazeera (2018) *Hungary Blasted over ‘Stop Soros’ Bill Targeting NGOs*.

¹⁸ The e-mail address contains the word “opinion” in Hungarian and the extension is that of the Hungarian government.

¹⁹ Magyar idők (2018) *Tuzson bence: Szigorított formában nyújtják be a „Stop Soros” törvénycsomagot*. Available [online]: <https://magyaridok.hu/belfold/tuzson-bence-szigorított-formában-nyújtják-stop-soros-torvenycsomagot-kedden-2795877/>

¹⁶ Ibid.

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THE PACKAGE IS AN INTEGRAL PART OF THE GOVERNMENT'S COMMUNICATION CAMPAIGN THAT DENIES CIVIL ORGANIZATIONS BEING CRITICAL OF THE GOVERNMENT, THE RIGHT TO EXPRESS THEIR VIEWS, AND TAKE PART IN PUBLIC LIFE

not intend to facilitate public consultation on refugee policy, on migration or on civil society. This was a fake debate.

CLARITY

Legal texts should be clearly understandable, and definitions are required to be clean-cut. According to the Hungarian Constitutional Court, it is unconstitutional if it is impossible to interpret the legal text or if different interpretations are possible and thus the consequences of the law are unforeseeable.²⁰ This package of bills introduces legal categories the definitions of which are vague. For instance,

²⁰ Kiadó, O. (2011) *Alkotmánytan I.* Available [online]: http://www.tankonyvtar.hu/hu/tartalom/tamop425/2011_0001_520_alkotmanytan_i/ch04s05.html

nobody knows exactly what is meant by "organizations supporting migration." If "support" stands only for human trafficking, a new law would be redundant: it is already prohibited in the Hungarian penal code.²¹ Does "support" mean giving legal advice to an asylum seeker? According to international conventions, signed and ratified by Hungary as well, everybody has the right to seek asylum.²² If somebody can be punished for giving information to an asylum-seeker about the legal context, it makes it impossible to exercise the right to seek asylum, which is a legitimate action. Or does "support" mean to publicly speak in favor of migration? You cannot ban it, it would be the denial of one of the basic rights: freedom of speech.

Furthermore, what about money transferred from abroad? Regarding foreign financial support, the proposal mentions money transferred to the organization from abroad. It is not clear what kind of donation we speak about here. The political intention is pretty clear but from the legal point of view, into what category should fall, for example, a Hungarian citizen transferring the money from abroad or an international entity transferring the money from its Budapest office?

THE IMMIGRATION FINANCING DUTY

Duties are usually to be paid for some kind of services of the authorities. For example, you ask for an official attestation and you pay for it. "Immigration financing duty" is not a duty; there is no service from the authorities at all. It is actually a fine or a pu-

²¹ 2012. évi V. törvény (Btk.) 353.

²² Article 14 of the Universal Declaration of Human Rights states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." The United Nations 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees guides national legislation concerning political asylum.

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SUCH LEGISLATION IS TYPICAL OF DICTATORSHIPS, NOT DEMOCRACIES

nitive tax – for some kind of activities that are not even defined as illegal according to the Hungarian law.

RESTRAINING ORDER

It contradicts the spirit of the Hungarian constitution if the minister of interior has the right to determine whether an individual violates the interests of Hungarian national security, or is a threat to public order. In the case of Hungarian citizens, it is especially alarming, seen from the criteria of the rule of law, to ban someone from a specific area (8 kilometers from the southern border) of the country. "Ban" is a category of criminal law and it should be solely the up to the courts to have the right to ban someone from somewhere. The institution of a "restraining order" is a circumvention of the rules on "ban" because the Minister of Interior can use it without any court saying that a criminal act has been committed. This legal construction is a breach of the separation of powers since it helps the executive branch to "switch off" jurisdiction in a matter which should clearly belong to criminal law.

CONCLUSIONS

The terminology of this package of bills is highly problematic from a legal point of view. Certain categories (e.g. "supporting migration" or "violate the interests of national security") would enable the government an arbitrary interpretation.

According to the latest campaign slogans of Fidesz, it is important to go to the polls and give Fidesz a two-thirds majority, ensuring the adoption of the "Stop Soros" package. It clearly shows that the package is an integral part of the government's communication campaign that denies civil organizations being critical of the government, the right to express their views, and take part in public life.

Should this text become an actual law, its tools will endanger the very existence of targeted civil organizations. The bills also contain measures that may restrict fundamental rights of individuals, e.g. the freedom of movement. Such legislation is typical of dictatorships, not democracies.

The future of this legislation lies in the outcome of the April 2018 parliamentary elections but the text itself in this campaign period is at least one of the main tools – if not *the* main tool – to convey the basic message of Fidesz. The message that goes somewhere along the lines of: "We will defend you from dangers but at the same time, we expect you to follow suit." In this sense, the package can be considered as a "fake legislation initiative", serving primarily political purposes. ●



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The Curious Case of (De)Centralization in Bosnia and Herzegovina



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ADMIR
ČAVALIĆ

Bosnia and Herzegovina is an exceptional case for liberal debate over decentralization. The political and legal order created by the international community in Dayton, Ohio (1995) resulted in a country divided into two parts, with one district.

Half of the country, called the entity of Republika Srpska, is extremely centralized with only a small percent of local (municipality) political power. The other half, the entity of the Federation of Bosnia and Herzegovina, is extremely decentralized and consists of ten cantons with ten cantonal prime ministers and more than one hundred cantonal ministers. For a long time, it was considered that this kind of political structure was the weakness of Bosnia and Herzegovina and the reason for its future disintegration as a state. But for twenty-

three years, Bosnia and Herzegovina has managed to exist and in the last few years more and more authors and researchers acknowledge that its complexity and decentralization are the main reason why Bosnia and Herzegovina survives as a state, satisfying the needs of political elites. On the other hand, this situation provides an opportunity for excellent insight into the differences between the centralized and decentralized part of Bosnia and Herzegovina, with the highlight on the state of personal and any other freedoms.

This phenomenon, however, poses a number of questions: Are there any (political/economic and other) differences between the centralized and decentralized part of Bosnia and Herzegovina? What are the consequences of the complex political and legal structure of Bosnia and Herzegovina in the context of personal freedom of its citizens? What is the status of personal freedoms in Bosnia and Herzegovina, and what is the greatest challenge in this area?

Another important question that must be addressed is why is the (democratic) decentralization important for liberals? First of all, it improves the general and personal freedoms of the individuals and is an essential factor in achieving economic growth – which may also be observed in the case of Bosnia and Herzegovina. Democratic decentralization in the long run leads to the advancement of personal freedoms. Still, complexity can result in problems regarding the rule of law, which is shown by the *Human Freedom Index*, as the most problematic part of personal freedoms in Bosnia and Herzegovina.

INTRODUCING DECENTRALIZATION IN BOSNIA AND HERZEGOVINA

The small European country of Bosnia and Herzegovina (B&H) is truly unique when it comes to the relationship of decentraliza-

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AUTHORS
AND RESEARCHERS
ACKNOWLEDGE
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IDEALLY,
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AND VILLAGES
AS THEY ONCE
EXISTED ALL OVER
EUROPE

tion and centralization. The peculiar constitutional arrangement of the country, which was primarily crafted due to war during the 1990s and the intervention of the international community, created a decentralized state structure that alongside the central government has entities, cantons, and municipalities as the levels of local government. Such a complex state structure provides specific insight into the consequences of (de)centralization and the comparison of its effects. It also enables an analysis of the impact of decentralization on the human rights of citizens of B&H. Before analyzing the specifics of this country, it is necessary to consider the essence and all the advantages of the decentralization process, especially from the libertarian position.

WHAT IS DECENTRALIZATION?

Decentralization is a process that significantly marks the first decades of the 21st century. Whether it is the decentralization of the Internet and the rise of cryptocurrencies like Bitcoin, or the fact that the OECD area has grown more decentralized over the last two decades, the fact is that decentralization is here and is happening all around us. Although there has been a trend of centralization in the last two hundred years¹, the world has been turning to decentralization, especially in the context of the development of information technologies primarily linked to the Internet.² Whether it is a country, a region, a local community, a department in a company, or cryptocurrencies, this process changes the way people make decisions, but also how the elites are formed. Motives for this are different and range from mainly democratic/political motivations – eastern European countries (decentralization wave in 2000, 2004, 2006: Poland, Slovakia, the Czech Republic, Estonia, Hungary, among others) – to mainly economic/public finances motivation – Greece, Italy, or Portugal.³ In short, decentralization is defined as the process of distributing or dispersing functions, powers, people or things away from a central location or authority.⁴ With the understanding that the “cen-

¹ BitcoinWarrior.net (2014) *WSJ Reports on the Megatrend of Decentralization*. Available [online]: <https://bitcoinwarrior.net/2014/10/wsj-reports-megatrend-decentralization/>

² Sharma, G. (2014) *Weekend Read: The Imminent Decentralized Computing Revolution*. Available [online]: <https://blogs.wsj.com/accelerators/2014/10/10/weekend-read-the-imminent-decentralized-computing-revolution/>

³ Allain-Dupré, D. (2010) *Decentralisation Trends in OECD Countries: A Comparative Perspective for Ukraine*. Available [online]: <https://www.oecd.org/regional/regional-policy/Decentralisation-trends-in-OECD-countries.pdf>

⁴ The Economist. (2009) *Decentralisation*. Available [online]: <http://www.economist.com/node/14298890>

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THE FUTURE
NOW DEPENDS
ON A CONTINUED
COMMITMENT
TO THE ETHOS
OF DECENTRALIZATION,
THE IDEA THAT
EVEN IN POLITICS,
THE CUSTOMER
IS ALWAYS RIGHT

tral authority” is usually government, it is clear why decentralization is desirable from the position of classical liberalism and why its greatest scholars, such as Smith, Hayek, Mises, and Rothbard, glorified decentralization. Adam Smith wrote about the need for greater decentralization and accountability in state projects such as public education, toll roads, harbors, and even paving the streets of London. He emphasized that these should be provided at the local level. Even though public works could be captured or corrupted by special interests, limiting them to localities meant that even when errors or abuses emerged, the extent of the damage was limited.⁵ Nobel Prize-winning economist Friedrich von Hayek stressed that free markets themselves are decentralized systems where individuals

⁵ Mueller, P. (2015) *Was Adam Smith a Libertarian?*. Available [online]: <https://www.libertarianism.org/columns/was-adam-smith-libertarian>

who use prices as their guide produce outcomes without explicit agreement or coordination.⁶ In discussing human rights, Murray N. Rothbard summarized this position as “universal rights, locally enforced”.⁷ Ludwig von Mises is even more radical, leaning towards secession, writing that a nation has no right to say to a province: “You belong to me, I want to take you. A province consists of its inhabitants. If anybody has a right to be heard in this case it is these inhabitants”.⁸

Ideally, decentralization should proceed all the way down to the level of individual communities, to free cities and villages as they once existed all over Europe.⁹ The libertarian position on this matter emphasizes the localization of costs, but also the fact that people closer to the problem know the best solution to solve it. They see these as main advantages of decentralization. As Matt Kibbe concludes, the future now depends on a continued commitment to the ethos of decentralization, the idea that even in politics, the customer is always right.¹⁰

DIFFERENT TYPES OF DECENTRALIZATION

When it comes to governments and decentralization, there is a general trend towards decentralization, though with considerable variation in the degree and type of decentralization across countries.

⁶ Zelkowitz, M. (2011) *Advances in Computers*. New York: Academic Press, p. 3.

⁷ Rockwell, Jr. L. H. (2005) *What We Mean by Decentralization*. Available [online]: <https://mises.org/library/what-we-mean-decentralization>

⁸ Mises L. (2012) *Mises on Secession*. Available [online]: <https://mises.org/library/mises-secession>

⁹ Hoppe, H. (2014) *From Aristocracy to monarchy to democracy, The tale of moral and economic folly and decay*. Auburn: Mises Institute, pp 65.

¹⁰ Kibbe, M. (2012) *Hostile takeover*. New York: Harper Collins Books, p. 332.

“ UNDER DECENTRALIZATION, JURISDICTIONS MUST COMPETE FOR RESIDENTS AND CAPITAL, WHICH PROVIDES SOME INCENTIVE FOR GREATER DEGREES OF FREEDOM

Majority democracies and unitary states have undergone the greatest and most systemic decentralization, while decentralization in consensual democracies and federal states has occurred more at the margins.¹¹ Decentralization – the transfer of authority and responsibility for public functions from the central government to subordinate or quasi-independent governmental organizations and/or the private sector – is, undoubtedly, a complex multifaceted concept. The World Bank lists four standard types of decentralization: political, administrative, fiscal, and market.¹²

¹¹ Cain, B.E. et.al. (2003) *Democracy Transformed?: Expanding Political Opportunities in Advanced Industrial Democracies*. Oxford: Oxford University Press.

¹² World Bank (2001) *What Is Decentralization?*. Available [online]: http://www.ciesin.org/decentralization/English/General/Different_forms.html

Political decentralization allows powerful decisions to be made at lower levels, while administrative decentralization refers to the redistribution of authority, responsibility, and financial resources to enable public services at the lower, local levels. Fiscal decentralization deals with the issue of adequate level of revenues to carry out decentralized functions effectively. Finally, from a libertarian perspective, the most desirable decentralization is economic or market decentralization. It implies switching power and responsibility from the public to the private sector through privatization and deregulation.¹³ For further consideration, however, it is administrative decentralization that is most relevant.

VIRTUES OF DECENTRALIZATION

There are many virtues of decentralization, and many have been previously stated by libertarian authors. Murray sees decentralized government as the best solution for the protection of freedom,¹⁴ while Hayek writes that when the economic power is centralized as an instrument of political power, it creates a degree of dependence scarcely distinguishable from slavery.¹⁵ Rockwell Jr. lists several reasons why decentralization is good.¹⁶

First, under decentralization, jurisdictions must compete for residents and capital, which provides some incentive for greater degrees of freedom, if only because local despotism is neither popular nor produc-

¹³ Ibid.

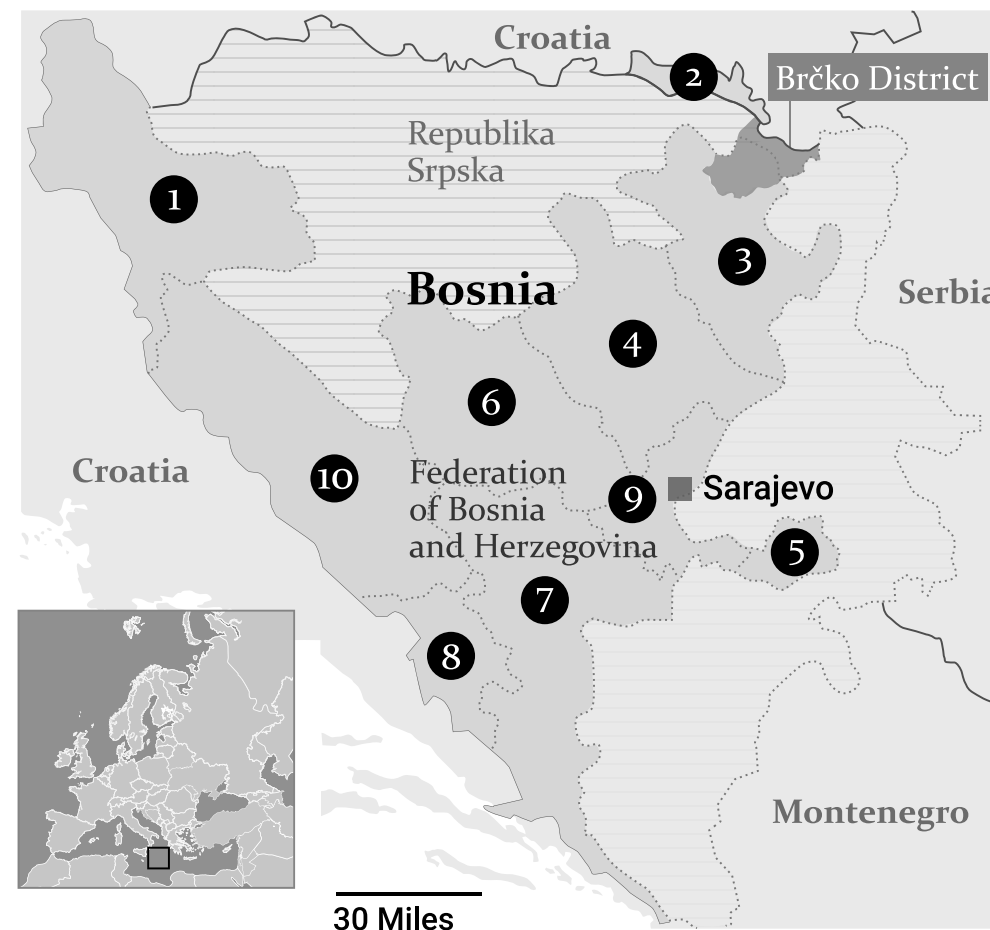
¹⁴ Murray, C. (1988) *In Pursuit of Happiness and Good Government*. Indianapolis: Liberty Fund, p. 266.

¹⁵ Hayek, F.A. (2013) *The Road of Serfdom*. London: The Institute of Economic Affairs, p. 42.

¹⁶ Rockwell, Jr. L. H., op.cit.

¹⁷ Nardelli, A. et al. (2014) *Bosnia and Herzegovina: The World's Most Complicated System of Government?*. Available [online]: <https://www.theguardian.com/news/datablog/2014/oct/08/bosnia-herzegovina-elections-the-worlds-most-complicated-system-of-government>

Figure 1. Map of Bosnia and Herzegovina¹⁷



- | | |
|------------------------------------|--------------------------------|
| 1 Una-Sana Canton 1 | 6 Central Bosnia Canton |
| 2 Posavina Canton | 7 Herzegovina-Neretva Canton |
| 3 Tuzla Canton | 8 West Herzegovina Canton |
| 4 Zenica-Doboj Canton | 9 Sarajevo Canton |
| 5 Bosnia-Podrinje Canton Goražde | 10 Canton 10 |

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UNDER THE TERMS OF THE DAYTON PEACE AGREEMENT, B&H WAS ORGANIZED AS AN ASYMMETRIC FEDERATION UNDER THE PRECEPT THAT IT WOULD PROVIDE A FRAMEWORK FOR INTER-ETHNIC ACCOMMODATION, CREATE CHANNELS FOR DEMOCRATIC CONTESTATION, AND ULTIMATELY BRING PEACE AND STABILITY

tive. Second, localism internalizes corruption so that it can be more easily spotted and uprooted. Third, tyranny on the local level minimizes the damage to the same extent that macro-tyranny maximizes it. Fourth, no government can be trusted to use the power to intervene wisely. With such power, central governments will always invoke good motives even if they are

a purely a mask for power grabs. Fifth, the plurality of governmental forms – a “vertical separation of powers,” to use Stephan Kinsella’s phrase¹⁸ – which prevents the central government from accumulating power.

One libertarian virtue of decentralization is that it provides a “safe space” for a citizen to have political commotion, regardless of the action of central authority. For individuals to be creative and innovative, they must be able to pursue their truth.¹⁹ This is especially important from the human rights point of view. Decentralization allows an individual to have her/his own kind of truth.

Moreover, decentralization also pushes both responsibility and decision-making closer to the coal face, to the people who really know what is going on.²⁰ This is all point of the knowledge problem, stressed by Hayek.

Finally, it is possible to notice the interesting correlation showing that richer countries tend to be more decentralized, if we follow the relationship between subnational government (SNG) spending as a % of GDP and GDP per capita.²¹

DECENTRALIZATION IN BOSNIA AND HERZEGOVINA

When it comes to decentralization in Bosnia and Herzegovina, this special phenomenon could only have resulted from the war during the 1990s. Without a given historical context, it is difficult to understand the cur-

¹⁸ Kinsella, S. (2009) *The Unique American Federal Government*. Available [online]: <http://www.stephankinsella.com/2009/10/the-unique-american-federal-government/>

¹⁹ Allison, J.A. (2015) *The Leadership Crisis and the Free Market Cure*. New York: McGraw-Hill Education, p. 44.

²⁰ Walling-Russell, E. (2012) *50 Ideas You Really Need to Know, Management*. London: Quercus, p. 61.

²¹ Allain-Dupré, D. op.cit.

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BOSNIA AND HERZEGOVINA, WITH A POPULATION OF 3.8 MILLION, HAS THREE PRESIDENTS, 13 PRIME MINISTERS, MORE THAN 180 MINISTERS, AND 700 MEMBERS OF SEVERAL PARLIAMENTS

rent administrative structure of B&H, nor would it have spontaneously developed under normal, peaceful circumstances.

Under the terms of the Dayton Peace Agreement,²² B&H was organized as an asymmetric federation under the precept that it would provide a framework for inter-ethnic accommodation, create channels for democratic contestation, and ultimately

²² The General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Agreement, Dayton Accords, Paris Protocol or Dayton–Paris Agreement, (Bosnian: Dejtonski mirovni sporazum, Serbian: Dejtonski mirovni sporazum, Croatian: Daytonski sporazum) is the peace agreement reached at Wright-Patterson Air Force Base near Dayton, Ohio, United States, in November 1995, and formally signed in Paris, France, on 14 December 1995. The signatories were Franjo Tudman, the president of Croatia, Slobodan Milošević, the president of Serbia - who later was tried at The Hague as a war criminal- and Alija Izetbegović, the president of Bosnia and Herzegovina.

bring peace and stability.²³ Hence, the primary motivation for decentralization was political – to exploit its alleged potential as a management tool for ethnic conflict. This involved a peculiar layering of government structures, from the central to the local level, aimed at balancing political and ethnic fractions.²⁴ In particular, the state structure consists of a central government, two entities, and a single district, a self-governing unit under the jurisdiction of the central government²⁵ (See Figure 1).

Bosnia and Herzegovina, with a population of 3.8 million, has three presidents, 13 prime ministers, more than 180 ministers, and 700 members of several parliaments.²⁶ Nardelli, Dzidic, and Jukic state in the *Guardian* that B&H is the world’s most complicated system of government.²⁷ However, this complexity is to blame for the survival of the country during the twenty-three years following the war.

As summarized by *The Economist*, the government system in B&H puts an emphasis on consensus. Formally or informally, governments in Bosnia and Herzegovina need partners, who often come from different ethnic groups.²⁸ The Bosnians are

²³ United Nation Peacemaker (1995) *General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement)*. Available [online]: <https://peacemaker.un.org/bosniadaytonagreement95>

²⁴ Bojičić-Dželić, V. (2011) “Decentralisation and Regionalisation in Bosnian-Herzegovina: Issues and Challenges”, [in:] *LSEE Papers on Decentralisation and Regional Policy 2*. London: London School of Economics and Political Science.

²⁵ CIA (2018) *The World Factbook*. Available [online]: <https://www.cia.gov/library/publications/the-world-factbook/geos/bk.html>

²⁶ Klix.ba (2015) *Američki analitičar: BiH, zemlja sa tri predsjednika, 13 premijera i bez pristojne vlade*. Available [online]: <https://www.klix.ba/vijesti/bih/americki-analiticar-bih-zemlja-sa-tri-predsjednika-13-premijera-i-bez-pristojne-vlade/151110080>

²⁷ Nardelli, A. et al., op.cit.

²⁸ The Economist (2017), *Why hasn't Bosnia and Her-*

expected to behave like the Swiss, who are champions of compromise.²⁹ Different levels of government and the complexity of the entire system of government create an incentive for political elites to maintain this system and not to divide the country. In short, an extremely decentralized system preserves the existence of B&H as a state.

POWER STRUCTURE IN THE MOST COMPLICATED COUNTRY IN THE WORLD

When it comes to the level of power within a complex administrative structure in Bosnia and Herzegovina, it is mostly located in two entities,³⁰ each having the two largest budgets in the country. The central institutions of B&H are weak, with the bulk of governmental competencies residing in the two entities. The central government has a limited budget, which, because of the blockade from the Republic of Srpska (RS), representatives have not been increasing since. After the entities, cantonal budgets have the biggest power along with Brčko District as a separate unit beside the two entities.

Now, concerning the cantons. In existing constitutional arrangements, in line with the Swiss model, the cantons operate as mini-states. Most of their budgets are spent on education, but also for the judiciary, healthcare, and other local affairs. Below the cantons are municipalities and cities as a unit of local self-government.

zegovina collapsed?, Available [online]: <https://www.economist.com/blogs/economist-explains/2017/11/economist-explains?zid=307&ah=5e80419d1bc9821eb e173f4f0f060a07>

²⁹ Oertig-Davidson, M. (2011) *Beyond Chocolate, understanding Swiss culture*. Basel: Berli books, p. 152.

³⁰ Encyclopedia Britannica (2018) *Bosnia and Herzegovina*. Available [online]: <https://www.britannica.com/place/Bosnia-and-Herzegovina#ref42673>

Simply put, B&H is administratively divided into two entities and one district. While one entity (Federation of B&H) is decentralized with the distribution of powers towards cantons and then municipalities, the other entity (RS) is centralized with municipalities and cities as the lowest levels of local self-government. Knowing this, are there any substantial differences between the two parts of B&H and, if so, what are the effects of these on human rights?

DIFFERENCES BETWEEN TWO ENTITIES

First of all, it is important to note that it is indeed difficult to determine the causes of some social phenomena. According to Nassim N. Taleb, in the complex world, the notion of "cause" itself is suspect.³¹ For this reason, we will only try to look at and perhaps briefly explain some noticeable differences between the centralized and decentralized part of Bosnia and Herzegovina.

It is important to note that the Federation of B&H and the RS are different on many grounds, and not solely regarding their administrative structure. For instance, the Federation of B&H is traditionally more oriented towards industry, while the RS is oriented towards agriculture. Also, in the Federation of B&H, there are almost twice as many inhabitants (mostly Bosniaks and Croats), while in the RS, there are fewer inhabitants (mostly Bosnian Serbs). Geopolitically, the Federation of B&H is more connected with Croatia and the international community, while the RS has special ties with the Republic of Serbia, and more connections to Russia. When it comes to the cantonal level, there are numerous competencies, but the two most important fields in their budget, next to administration costs, are education and healthcare.

³¹ Taleb, N.N. (2012) *Antifragile, Things that Gain from Disorder*. London: Penguin Books, p. 56.

(1)3 EDUCATION SYSTEMS³²

The education system in Bosnia and Herzegovina is largely decentralized, because not only is education not within the jurisdiction of the state,³³ but it is also, as in the case of the Federation of B&H, it is within the jurisdiction of cantonal levels and even in some cases to the competence of municipalities. Unlike the Republic of Srpska, where the Ministry of Education and Culture has the greatest power in defining education in this entity, in Federation of B&H, cantons are regulating the education system. The Federal Ministry only coordinates the planning of the activities in the field of education.³⁴ This means that cantons can make educational curricula themselves or define ways of implementing educational policies.

It is not "one system for the entire society", as stated by David Boaz.³⁵ Cantons maintain all the power not explicitly entrusted to the federal government and are particularly authorized for determining educational policy, which includes the adoption of educational regulations, and the definition and

³² Bosnia and Herzegovina has 13 ministries of education – at the level of the Republika Srpska, the Federation of B&H, ten cantons, and the Brčko District. In addition, there is one ministry at the state level, the Ministry of Civil Affairs, which is responsible for carrying out tasks that are in the competence of B&H and related to the establishment of basic principles of coordination of activities, harmonization of the plans of the entity authorities, and defining the strategy on the international plane, among others, for the field of education. At the level of B&H, there are several strategic documents, agencies, and co-ordination bodies related to education. Nevertheless, lower levels have the highest role in education.

³³ At the state level there is no ministry of education, but the Ministry of Civil Affairs, which has very modest, almost symbolic competencies in education in the country.

³⁴ Federalno ministarstvo obrazovanja i nauke (2018) *Pregled sektora*. Available [online]: <http://www.fmon.gov.ba/Sektor/PregledSektora?id=2>

³⁵ Boaz, D. (2008) *The Politics of Freedom*. Washington, D.C.: Cato Institute, p. 152.

implementation of cultural policy.³⁶ Thus, for example, Canton Sarajevo prepares its own curriculum based on successful examples of some countries in the world.³⁷ On the other hand, the Tuzla Canton plans to introduce the subject of entrepreneurship into its education system.

One of the direct effects of the decentralization of education in the Federation of B&H is that "hot" educational topics, including teachers' problems or strikes, are localized at the canton level. This creates a situation where children in some cantons start their school year on time, while others have extra days of summer break due to the strike of educational unions. Another "hot" issue, namely religious education within the education sector, is also dealt with at the canton level, and each of the cantons has a different policy on this matter (whether the religion as a school subject is optional or not, or whether it enters the grade average).³⁸

On the other hand, there are no variations in the RS, which means that more secular parents (or religious, in the context of future reforms) have no alternative when it comes to the education of their children. This is also the case with language, which is one of the political problems in B&H. The Ministry of Education and Culture in the RS does not recognize the Bosnian language,

³⁶ Večernji list (2009) *Federacija BiH je uzurpirala ovlasti županija u kulturi i obrazovanju*. Available [online]: <https://www.vecernji.ba/federacija-bih-je-uzurpirala-ovlasti-zupanija-u-kulturi-i-obrazovanju-61656>

³⁷ Ibrahimović, N. (2018) *Od naredne školske godine novi kurikulum eksperimentalno u školama*. Available [online]: <http://www.skolegijum.ba/tekst/index/1461/od-naredne-skolske-godine-novi-kurikulum-eksperimentalno-u-skolama>

³⁸ Muminović, D. (2011) *Vjeronauka u bh. školama: Koliko ministara toliko i pravila*. Available [online]: <https://www.nezavisne.com/novosti/bih/Vjeronauka-u-bh-skolama-Koliko-ministara-toliko-i-pravila/88305>

mostly spoken by the Bosniaks.³⁹ The Ministry of Education and Culture in the RS struggles with the right name for the Bosnian language, although Bosnian is defined by the constitution. For this reason, numerous protests and boycotts throughout the RS have been organized from 2015 until today,⁴⁰ but there is still no change because this requires greater consensus within the entity and an intervention without the possibility of the localization of the problem.

A somewhat similar problem exists in the Federation of B&H, which is practicing "two schools under a single roof," i.e. the practice of separating children in one educational institution by ethnicity and accordingly under different education plans and programs, is still localized and reproduced in three cantons. Most of these schools are located in the Central Bosnia Canton (14), followed by the Herzegovina-Neretva Canton (12), and the Zenica-Doboj Canton (6).^{41,42} The local and foreign media usually inaccurately report that the phenomenon of "two schools under one roof" is the problem for B&H.⁴³ This is not true, as it is the problem of the particular cantons,

which makes it easier to solve. Regarding the quality of education, especially higher education, there is no clear data that could be used to look at the differences between two entities. Still, it is evident that although all Bosnian universities lag behind the European standard, the universities in the Federation of B&H are far ahead of those in the RS.⁴⁴

Interestingly, even though private universities are present in the RS, there are cantons in the Federation of B&H that are also liberal in this regard. In the Central Bosnian Canton, private faculties are opened, while in Zenica-Doboj Canton they are outlawed. Consequently, students in B&H often go from one canton to another to study what they want.

CHEAPER AND/OR BETTER HEALTHCARE

Healthcare is another area that differs in between the two entities. The management and financing of healthcare in Republic of Srpska is centralized, unlike the Federation of B&H where this area is regulated even at cantonal levels. The federal level has a coordinating role in the management and financing of programs treating cardiovascular and malignant diseases and the provision of haemodialysis services at the level of the Federation.⁴⁵

Just like in the case of education, the healthcare system in the Federation of B&H is largely decentralized. These administrative differences significantly con-

tribute to the different treatment of patients, i.e. the situation when residents in one part of B&H have less or greater rights in the field of healthcare insurance, easier or more difficult access to healthcare services, and a better or worse quality of these services than residents in other parts of the country.

However, the ratio of the B&H healthcare-related spending as part of GDP is 7.2%, which is similar to the allocation rate in countries of the former Yugoslavia (Croatia 7.5%, Montenegro 6.8%, Slovenia 8.4%, Serbia 8.0%), EU countries (Sweden 8.9%, Norway 8.7%, Italy 9.0%, Austria 9.9%), and countries that were once part of the communist bloc (Romania 5.7%, Russia 5.3%, the Czech Republic 6.8%, Bulgaria 6.9%, Albania 6.2%). There are, however, entity differences, so in the Federation of B&H healthcare-related spending is higher (8.82%) than in the RS (5.58%).⁴⁶ Nevertheless, the domestic healthcare system is the worst in the region.⁴⁷ The real problem is not the issue of financial allocations, but the lack of proper healthcare initiatives and corruption.

In the Federation of B&H, there are significant differences between the cantons themselves, so Sarajevo Canton for healthcare spends as much as the entire budget of some cantons.⁴⁸ Average spending per insured person per canton is uneven and ranges from BAM 466 (app. EUR 238.04) in Central Bosnia Canton to BAM 888 (ap. EUR 453.84) in Saraje-

vo Canton.⁴⁹ This created an initiative to change the whole system because of discrimination.^{50,51}

What is also interesting is that, similar to education, the strikes of healthcare workers are localized and reduced to the canton levels. In general, the Federation of B&H provides better healthcare services with better quality clinics. The best healthcare center is in FB&H.⁵² Some healthcare services are better in the RS, but what makes it different is a healthcare fund which more generously funds certain services (such as In Vitro Fertilization). This is possible due to smaller obligations and fewer users of the fund. Also, the fund covers treatment in the Federation of B&H.⁵³ In practice, B&H citizens have alternatives for using better quality healthcare services in the Federation of B&H and cheaper healthcare insurance in the RS.⁵⁴

ECONOMIC DIFFERENCES

When it comes to economic issues, there are some differences, although it is difficult to determine if they are caused by the de-

³⁹ Aljazeera Balkans (2018) *Salkić: Najteži oblici diskriminacije Bošnjaka u RS-u*. Available [online]: <http://balkans.aljazeera.net/vijesti/salkic-najtezi-oblici-diskriminacije-bosnjaka-u-rs-u>

⁴⁰ Aljazeera Balkans (2018) *Roditelji bošnjačke djece nastavljaju bojkot nastave*. Available [online]: <http://balkans.aljazeera.net/video/roditelji-bosnjacke-djece-nastavljaju-bojkot-nastave>

⁴¹ Aljazeera Balkans (2017) *Bosanski jezik u RS-u: Roditelji će vratiti djecu u škole po provedbi presude*. Available [online]: <http://balkans.aljazeera.net/video/bosanski-jezik-u-rs-u-roditelji-ce-vratiti-djecu-u-skole-po-provedbi-presude>

⁴² Diskriminacija.ba (2017) *Mapa: Dvije škole pod jednim krovom u BiH*. Available [online]: <http://www.diskriminacija.ba teme/mapa-dvije-%C5%A1kole-pod-jednim-krovom-u-bih>

⁴³ Reuters (2017) *Bosnian students keep up their protest against segregated schools*. Available [online]: <https://www.reuters.com/article/us-bosnia-protests-students/bosnian-students-keep-up-their-protest-against-segregated-schools-idUSKBN19B26P>

⁴⁴ Slobodna Bosna (2016) *Svjetska rang lista fakulteta: Univerzitet u Sarajevu na 1850 mjestu, a banjalučki na 3969 poziciji*. Available [online]: https://www.slobodna-bosna.ba/vijest/26791/svjetska_rang_lista_fakulteta_univerzitet_u_sarajevu_na_1850_mjestu_a_banjaluchki_na_3969_poziciji.html

⁴⁵ Huseinović, S. (2017) *Zdravstvo u BiH je „komplicirano“ i „neefikasno“*. Available [online]: <http://www.dw.com/bs/zdravstvo-u-bih-je-komplicirano-i-neefikasno/a-38140412>

⁴⁶ Mujkić, E. (2011) *Sistem zdravstva u Bosni i Hercegovini: stanje i pravci moguće reforme*. Sarajevo: Fondacija Centar za javno pravo

⁴⁷ Aljazeera Balkans (2014) *Zdravstvo u BiH najlošije u regiji*. Available [online]: <http://balkans.aljazeera.net/vijesti/zdravstvo-u-bih-najlosije-u-regiji>

⁴⁸ Aljazeera Balkans (2017) *Bh. zdravstvo: Dobro nam je, tako nam i treba*. Available [online]: <http://balkans.aljazeera.net/vijesti/bh-zdravstvo-dobro-nam-je-tako-nam-i-treba>

⁴⁹ Federalni zavod za programiranje razvoja (2017), *Izveštaj o razvoju Federacije BiH 2016*. Sarajevo: FZPR

⁵⁰ Vukmanić, V. (2009) *Do univerzalne zdravstvene zaštite u Bosni i Hercegovini pregled stanja i preporuke za djelovanje*. Sarajevo: Inicijativa i civilna akcija (ICVA).

⁵¹ Numanović, E. (2017) *Zdravstvena zaštita u BiH*. Available [online]: <http://eu-monitoring.ba/zdravstvena-zastita-u-bih-problemi-decentraliziranog-sistema-medunarodne-politike-i-neophodnost-reforme-zdravstva/>

⁵² Tadić, N. (2016) *Evo zašto je UKC Tuzla najbolji zdravstveni centar u BiH*. Available [online]: <http://ba.n1info.com/a130054/Vijesti/Vijesti/UKC-Tuzla-najbolji-zdravstveni-centar-u-BiH.html>

⁵³ Fond zdravstvene zaštite Republike Srpske (2018) *Zdravstvena zaštita u drugom entitetu*. Available [online]: <https://www.zdravstvo-srpske.org/pitanja-novinar/zdravstvena-zastita-u-drugom-entitetu.html>

⁵⁴ Večernji.ba. (2017) *Trudnice iz Federacije idu po knjižice u RS*. Available [online]: <https://www.vecernji.ba/vijesti/trudnice-iz-federacije-idu-po-knjizice-u-rs-1208932>



NO MATTER WHERE THEY LIVE, CITIZENS OF B&H RECEIVE SIMILAR OR SAME PROTECTION OF RIGHTS REGARDING LEGAL GENDER, PARENTAL RIGHTS, AND THE LIKE

gree of decentralization or other predispositions (such as industrialization of the Federation of B&H). Generally, the residents of the Federation of B&H are relatively richer, with lower net debt per capita.

According to data from 2015, GDP per capita in Bosnia and Herzegovina was BAM 7,473 (EUR 3820.88).⁵⁵ When it comes to entities, data from 2015 show that GDP per capita of the Republic of Srpska is BAM 6,463 (EUR 3,304.48), which is below the average of B&H, while the GDP per capita in the Federation of B&H was BAM 8.010 (EUR 4,095.45), more than BAM 1,500 (EUR 766.93) than in the RS. It should be noted that the GDP per capita in both entities is several times lower than the EU average, and three times lower than in neighboring Croatia.⁵⁶

⁵⁵ Bosnia and Herzegovina uses BAM currency. One euro is 1.96 BAM.

⁵⁶ Ajanović, A. (2017) *RS (ni)je bolji dio BiH*. Available [online]:

When discussing entity economies, it is not possible to ignore the amount of public debt of both entities. The latest comparable data, from June 2016, show that net debt per capita in the Federation of B&H amounted to BAM 2,396 (EUR 1225.06), while in the RS it was 81% higher, with BAM 4,328 (EUR 2212.87) per person. Also, on the basis of indirect taxes, the RS pays much less than the Federation of B&H (BAM 3.3 billion to 1.56 billion – EUR 1,68 billion to 797 million).⁵⁷ This shows that it is much easier to create public debt by a more centralized entity.

However, decentralization also has its own shortcomings, in particular, because of the inability to apply economies of scale in a single economic space, but also because of the enormous bureaucratic apparatus that is partly a consequence of decentralization. This is clearly visible in the *Human Freedom Index*,⁵⁸ regarding the economic freedoms.

B&H has the lowest ratings in terms of the *Size of Government* (score 5.3, out of 10.0) and of the *Legal System and Property Rights* (score 4.2, out of 10.0). This is precisely the price of decentralization that B&H pays. The decentralized system produces a huge government, which is also one of the reasons for the existence and stability of the whole country. The complexity of the decentralized legal system leads to the rule of law not being sufficiently developed and the central government having no influence on reform in this area.

[line]: <http://istinomjer.ba/rs-nije-bolji-dio-bih/>

⁵⁷ Ibid.

⁵⁸ Vásquez, I. and T. Porčnik, (2017) *The Human Freedom Index 2017*. Washington, D.C.: Cato Institute, Fraser Institute, and Liberales Institut. Available [online]: <https://www.cato.org/human-freedom-index>.

This is a long-term obstacle to the lives of citizens of B&H, especially companies and entrepreneurs.

In addition, decentralization complicates and creates more regulation, especially when it comes to regulating business (score 5.3 in the *Human Freedom Index*). Specifically, there are over 400 parafiscal levies⁵⁹ with no central register for them. Each of the levels of government can *ad hoc* impose certain levies on businesses and citizens, which can only be challenged by higher levels of the judiciary in the long run generating cost for the entire society.

HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA

When it comes to human rights in Bosnia and Herzegovina, it can be concluded that, unlike economic freedoms, personal freedoms (according to the *Human Freedom Index*)⁶⁰ have better ratings (7.93 versus 6.61 for economic freedom). The best score in the area of personal freedom B&H received on issues of *identity and relationships* (9.3), *security and safety* (9.0), *religious freedom* (8.8), *association* (8.8), and *expression and information* (8.7).

Regarding identity and relationships, no matter where they live, citizens of B&H receive similar or same protection of rights regarding legal gender, parental rights, and the like. As far as security and safety, government security agencies and police have a remarkable degree of coordination, no matter how complex the system of jurisdiction is. There are sporadic interethnic incidents, but these are mostly local.

⁵⁹ Novalić, N. (2016) *Kako parafiskalni nameti koče bh. privredu: Vlast poslodavcima naplaćuje i kisik*. Available [online]: <https://www.klix.ba/biznis/privreda/kako-parafiskalni-nameti-koce-bh-privredu-vlast-poslodavcima-naplaćuje-i-kisik/160929104>

⁶⁰ Vásquez, I. and T. Porčnik, op.cit.

It is interesting to mention in this context the spectacular operation “Ruben”, which was performed in the entire RS entity, and was presented as an act of arrest on the dozens of people associated with terrorism. It was subsequently found that these people were not related to terrorism and that the police action was an act of force and intimidation. Some people arrested even filed a lawsuit.⁶¹ This discovery led to numerous criticisms, arguing that these activities were to shock the Bosniak returnees who were expelled from the area of RS during the Bosnian war.⁶²

Regarding religious freedoms, they are guaranteed in B&H no matter where the person lives. There are sporadic physical attacks on religious holidays, especially on the returnees in the RS, which are well indexed and observed (8.3 scores for harassment and physical hostilities on the *Human Freedom Index*). Citizens of B&H also have the freedom of association, and the NGO sector is extremely developed, especially in the Federation of B&H (there are associations registered at cantonal level). Freedom of assembly and protest is determined by decentralization, which means it depends on local regulations.

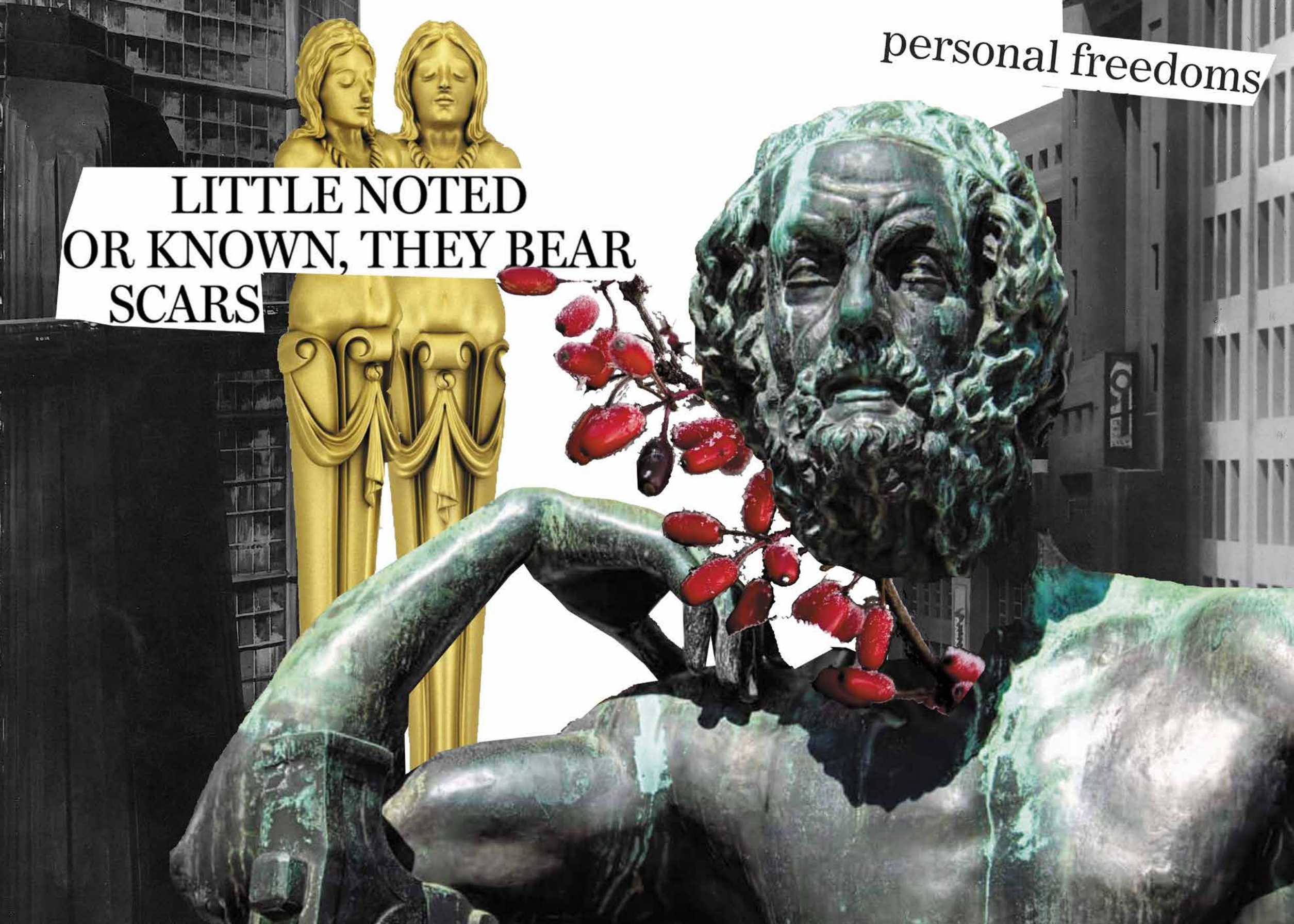
When it comes to Expression and Information, it is indicative that B&H has the worst rating on the indicator *Laws and Regulations That Influence Media* (6.7) on the *Human Freedom Index*. Apart from laws of local character, domestic media is mostly legally influenced by the Communications Regulatory Agency of Bosnia and Herzegovina (CRA), which is centralized, i.e. it oper-

⁶¹ N1 (2016) *Obustavljena istraga protiv uhapšenih u akciji “Ruben”*. Available [online]: <http://ba.n1info.com/a95322/Vijesti/Vijesti/Akcija-Ruben.html>

⁶² Radio Slobodna Evropa (2015) *Akcija “Ruben”: Za osam uhapšenih zatražen pritvor*. Available [online]: <https://www.slobodnaevropa.org/a/akcija-ruben-za-osam-uhapšenih-zatražen-pritvor/27001953.html>

personal freedoms

LITTLE NOTED
OR KNOWN, THEY BEAR
SCARS



”

THERE ARE ALSO DIFFERENCES BETWEEN THE CANTONS IN RESPECT FOR HUMAN RIGHTS, BUT THIS IS NOT WELL DOCUMENTED. SOME CANTONS ARE MORE CONSERVATIVE, WHILE SOME ARE MORE LIBERAL

ates throughout the entire territory of B&H. Still, on the ground, political pressures influence the media, and this was recognized in the Index since the lowest rating for all indicators for B&H is precisely that in relation to *Political Pressure, Control Media* (4.3). However, unlike other countries, this does not mean that the central government controls B&H media. In the Bosnian case, different levels of government and various political parties influence different media, which gives plurality of (controlled) media information. Namely, the cantonal television stations are largely dependent on cantonal authorities controlling them through the budget. Entity television depends on political parties that have the option of re-

placing their leadership. It is most difficult to control a state (central) media, which is generally considered most neutral.

B&H has the worst ratings on individual components of personal freedom regarding the *rule of law* (5.8) and this is the highest price tag of decentralization. A complex legal system does not guarantee *Procedural Justice* (6.9), *Civil Justice* (5.0) and *Criminal Justice* (5.6). However, this is mostly the result of the pressure of political parties, and the influence of the authorities on the judiciary.

There are also differences between the cantons in respect for human rights, but this is not well documented. Some cantons are more conservative, while some are more liberal. Thus, in one canton, a bill on abortion was proposed in 2016 that forbids abortion, fetal trade, hybrid creatures, and euthanasia.⁶³ What is particularly worrying about human rights issues is the fact that the centralized RS usually has autocratic-oriented leaders who increase the sense of dominance of the majority nation in that entity. This is specifically the case with Milorad Dodik, who has been under the sovereignty of this entity for a decade. Such a thing cannot happen in the Federation of B&H, which is based on a broad coalition of winning parties, that eliminates the possibility of obtaining an autocrat to govern all processes. This in turn opens up space for local political bosses, who are controlling individual cantons.

CONCLUSIONS

Decentralization in Bosnia and Herzegovina complicates all the political relations in it, but also keeps this country in existence and

⁶³ Dnevno.ba (2016) *Hrvatski savez HKDU-HRAST i HSP Dr. Ante Starčević: Borit ćemo se za zakon koji štiti život od začeca do prirodne smrti*. Available [online]: <http://www.dnevno.ba/vijesti/hrvatski-savez-hkdu-hrast-i-hsp-dr-ante-starcevic-borit-emo-se-za-zakon-koji-stiti-zivot-od-zaceca-do-prirodne-smrti-41388/>

makes it more stable in the long term. This is precisely the main feature of decentralized systems that appear to be fragile at first, but are still much more stable in the context of extraordinary shocks compared to centralized systems. This happened in 2014 during the “Bosnian Spring” events, which, in fact, only represent the fall of five cantonal governments. The potential revolution was again localized thanks to decentralization.

Importantly, the citizens of B&H have different opinions about (de)centralization. Citizens of the Federation of B&H, for example, seek more centralization through the abolition of cantons, while citizens in the RS, and especially the opposition there, seek more decentralization through the establishment of regions. Based on the presented analysis, it is possible to outline several recommendations:

1. It is necessary to preserve the decentralizing framework of B&H, with the possibility of specific, administrative reforms in the direction of better regionalization and strengthening of the middle and lower levels of government in relation to the entities.
2. It is necessary to improve fiscal decentralization and to establish a fairer system for the transfer of revenues from lower-level taxes. Also, a rise in the budgets of entities should be stopped, compared to lower units' budgets.
3. For the benefit of the stability of relations in the entity, but also in the whole country, the cantonization or regionalization of the RS would be the best option in the long run.

4. It is necessary to make constant efforts to improve human rights in B&H, especially when it comes to minorities that may be discriminated in certain parts of the country.

These topics can be analyzed and explored from different angles, and a lot of research is needed in this direction to get the right conclusions. Future research in this area should pay greater attention to the factual differences between centralized and decentralized parts of B&H, and, based on that, make conclusions about the best possible administrative structure of the country. ●



*

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Watch Out: Paternalism Is Taking over Europe!



*
BILL
WRITZ

Be it alcohol, tobacco, or sugary drinks; individuals have a number of vices that they voluntarily engage in. It has been commonly accepted that we attempt to engage in these “vices” with moderation. However, over the past years, public health advocates have made it their mission to regulate people’s lifestyle directly and indirectly. Consequently, we have seen the emergence of the so-called “Nanny State,” in which the politicians in charge of the regulatory state have deemed themselves competent to determine the right amount of consumption on all of these products. Over the past years, the pressure (and influence) drastically increased, but this has been their mission for decades. After all, British MP Iain Macleod referred to the Nanny State as early as the 1960s. Despite being largely a phenomenon of Northern and Western Europe, the Nanny State is extending to Central and Eastern Europe, encouraged by individual states: such as the United Kingdom, the European Union, as well as international organizations like the United Nations and the World Health Organization. Citizens need to ask questions about the proper role of government when it comes to individuals’ personal freedom, ask for inquiries into the unintended consequences and the general effectiveness of these policies.

ALCOHOL CONSUMPTION

“Alcohol may be man’s worst enemy, but the Bible says love your enemy.” Be that Frank Sinatra, as the origin of this quote,¹ or the loud advocates for prohibition in the 19th and 20th century,² governmental

¹ Kahn, J.M.D. (2016) “Another New Year Another Past, Same Old Hangover?”, [in:] *Huffington Post*. Available [online]: https://www.huffingtonpost.com/joel-kahn-md/another-new-year-same-old_b_8801734.html

² Engs, R. C. (2000) “Phases of Health-Reform Movements”, [in:] *Clean Living Movements: American Cycles of Health Reform*. Praeger Publishers.

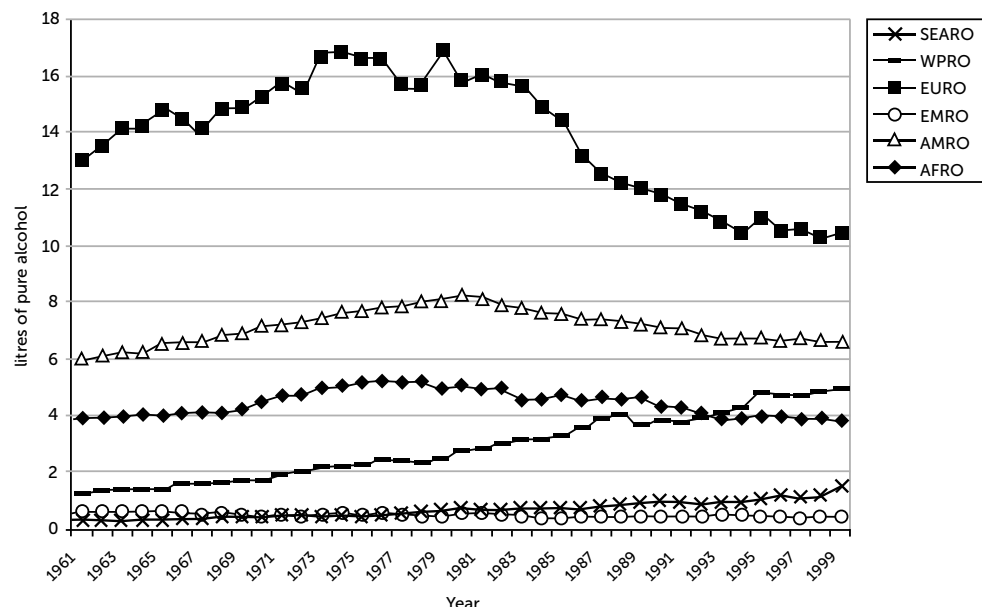
”
NO EVIDENCE
POINTS
TO THE FACT
THAT MINIMUM
PRICING WOULD
ACTUALLY REDUCE
THE CONSUMPTION
OF SPIRITS

positions on alcohol have certainly always been ambiguous. The data displays that the prevalence of drinking has decreased over time: WHO numbers show that European total pure alcohol consumption (in liters) per capita has decreased from 12.5 liters in 1961 to above 10 liters in 1999.³ When considering global total alcohol consumption, it may be observed that there are strong fluctuations that might not necessarily explain a general trend (See Figure 1). For instance, the 1979 spike in European consumption wasn’t significant in setting a trend for its time, given the gradual decline in the following decades. This puts certain headlines about exploding rates of alcohol consumption, such as “Alcohol is the only drug epidemic we’ve got”,⁴ in perspective.

³ WHO (2004) *Global Status Report on Alcohol, Department of Mental Health and Substance Abuse*. Geneva, pp. 9-12.

⁴ McDonald, P. (2015) “Alcohol Is the Only Drug Epidemic We’ve Got. Where’s the National Task Force on That?”, [in:] *The Guardian*. Available [online]: <https://www.theguardian.com/commentisfree/2015/apr/16/alcohol-is-the-only-drug-epidemic-weve-got-wheres-the-national-taskforce-on-that>

Figure 1: Population weighted means of the recorded adult per capita consumption in the WHO Regions 1961-1999



Data from the World Health Organization from 2010 and 2015 suggests that European consumption levels continue to remain between 8 and 11 liters of pure alcohol per adult per capita per year.⁵ (See Figures 2 and 3)

ALCOHOL-RELATED POLICIES: PIGOUVIAN TAXES

While the initial goal of levying taxes in Europe is to raise revenue, it is also increasingly a model to discourage certain behaviors. Examples can be found in increased tobacco and alcohol taxation.⁶ In the at-

tempt to reduce the overall alcohol consumption, fueled by the idea that despite drinking being on a long-term decline, public health advocates in Europe campaign for burdensome taxes on alcoholic beverages.⁷ This is done by varying levels of VAT tax rates on alcohol, but specifically through excise tax rates.

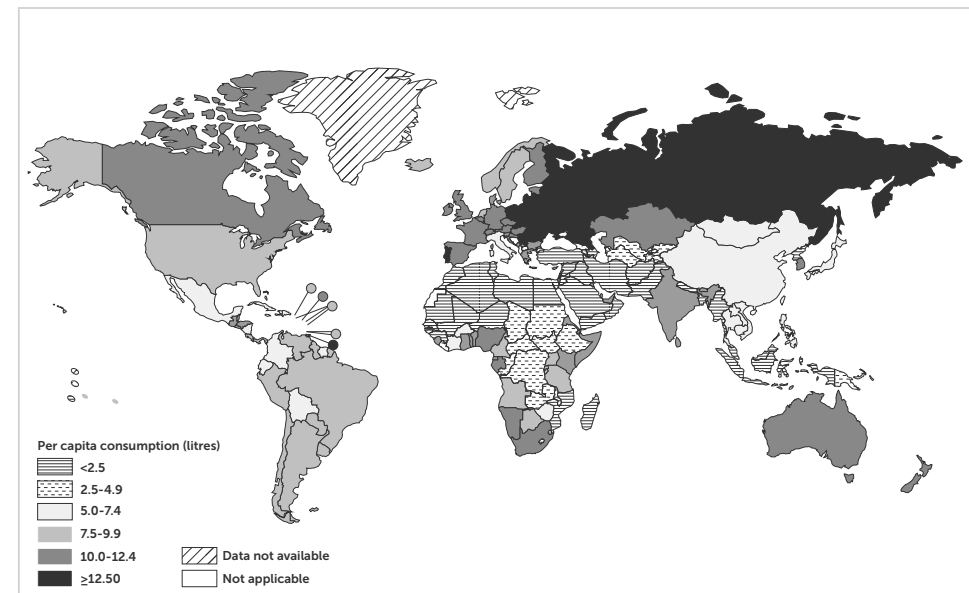
When comparing excise tax rates across Europe, we see that Central and Eastern European countries choose rates that fall below the average of other areas in Europe. Sparkling wine rates in the Czech Republic, Estonia, Croatia, Hungary and Slovakia in 2017 were close to 0 (See Figure 4). In fact, excise taxes on both still and sparkling wine are only high in Western and Northern European countries that have negligible pro-

⁵ WHO (2014) "Total Alcohol per Capital (15+ Years) Consumption, in Litres of Pure Alcohol", 2010, Health Statistics and Information Systems (HSI). Available [online]: <http://gamapserver.who.int/mapLibrary/app/searchResults.aspx>; WHO (2016) *Total Alcohol per Capital (15+ Years) Consumption, in Litres of Pure Alcohol*. Information Evidence and Research (IER). Available [online]: <http://gamapserver.who.int/mapLibrary/app/searchResults.aspx>

⁶ Kofler, G., M.P. Maduro, and P. Pistone (eds.) (2011) *Human Rights and Taxation in Europe and the World*. Amsterdam: International Bureau of Fiscal Documentation (IBFD), p. 521.

⁷ WHO (2012) *European Action Plan to Reduce the Harmful Use of Alcohol 2012-2020*. WHO Regional Office for Europe, pp. 24-25.

Figure 2: Total alcohol per capita (15+ years) consumption, in litres of pure alcohol, 2010

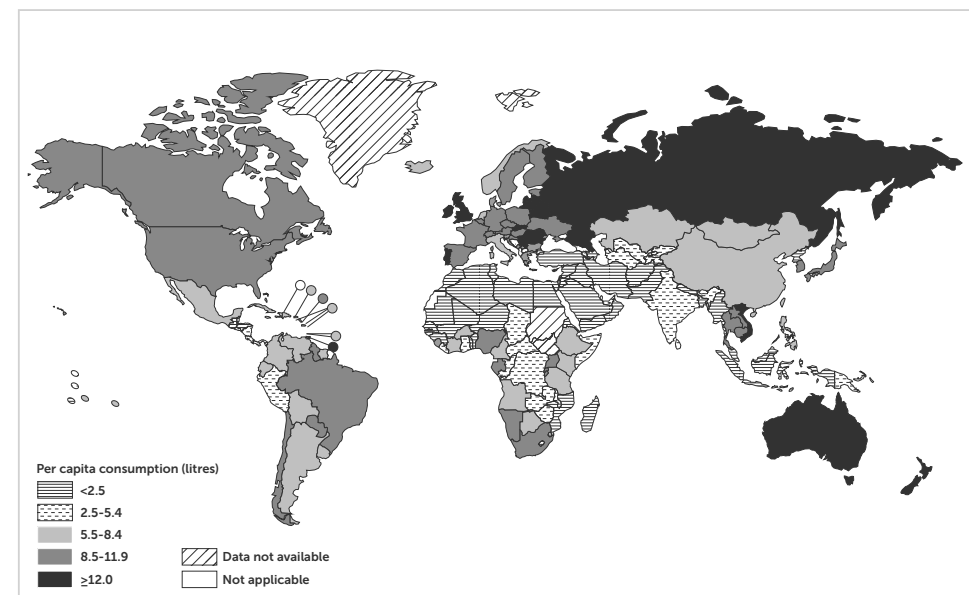


The boundaries and names shown and the designations used on this map do not imply the expression of any opinion whatsoever on the part of the World Health Organization concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Data Source: World Health Organization
Map Production: Health Statistics and Information Systems (HSI)
World Health Organization



Figure 3: Total alcohol per capita (15+ years) consumption, in litres of pure alcohol, projected estimates, 2015



The boundaries and names shown and the designations used on this map do not imply the expression of any opinion whatsoever on the part of the World Health Organization concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Data Source: World Health Organization
Map Production: Health Statistics and Information Systems (HSI)
World Health Organization



Figure 4: Still wine (values in EUR at 3/10/2016)



Minimum Excise Duty: 0 EUR per hectoliter of product

duction rates in these areas, such as the United Kingdom, Ireland, Sweden, Finland or Denmark.⁸

On ethyl alcohol, or what is also known as strong alcohol, we see rates in 2017 that are considerably higher (See Figure 5). Only a handful of states, including Bulgaria, Croatia, and Romania, have excise tax rate below EUR 1000 per hectolitre.

In a comprehensive review on alcohol taxes and the shadow economy in Estonia, Robert Mürsepp explains the correlation between increased excise taxation and developments in illicit trade, stating that “[p]roponents of raising the excise tax under the banner of saving public health, claim that it is possible to increase taxes so that the consumption of alcohol is reduced. While this applies in theory, it is hard to achieve in real life due to the volatile nature of the shadow economy.”⁹ This underlines

that even when consumption goes down under the effect of a certain set of tax policy measures, this does not mean that overall consumption has declined, as the shadow economy plays a significant role in determining consumer behavior.

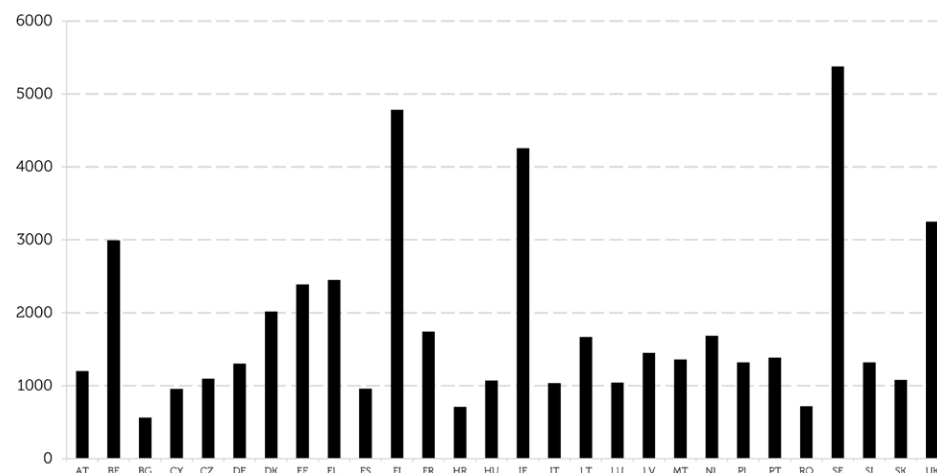
A review of nineteen studies by the Department of Economics of Pennsylvania State University only found two instances that showed a significant and substantial reduction in drinking rates in response to alcohol price rises – “and even these two showed mixed results”.¹⁰ In *The Economics of Alcohol*, Robert Pryce found that heavy drinkers’ price elasticity of demand was only barely distinguishable from zero, and concluded that “[t]he quantity results show that price-based measures will have little effect in reducing heavy consumption because of their small ab-

⁸ European Commission (2017) *Excise Duty Tables* (shows the situation as of July 1, 2017). Brussels.

⁹ Mürsepp, R. (2015) “Alcohol Excise and the Shadow

¹⁰ Nelson, J. P. (2013) *Does Heavy Drinking by Adults Respond to Higher Alcohol Prices and Taxes? A Survey and Assessment*. Pennsylvania: Department of Economics, Pennsylvania State University, p. 11.

Figure 5: Ethyl alcohol (values in EUR at 3/10/2016)



Minimum Excise Duty: 550 EUR or 1000 EUR per hectolitre of pure alcohol

“ AFTER A DECADE -LONG FEUD WITH PRODUCERS, THE SCOTS HAVE CRACKED DOWN ON ALCOHOL CONSUMPTION

solute price elasticity, whilst simultaneously having a large negative effect on consumer surplus for the light drinking majority, because of their large absolute price elasticity.”¹¹

¹¹ Pryce, R.E. (2016) *The Economics of Alcohol: A Collection of Essays*, Doctoral Thesis. Lancaster University, p. 47.

MINIMUM ALCOHOL PRICING

Take the example of minimum unit pricing on alcohol in Scotland. After a decade-long feud with producers, the Scots have cracked down on alcohol consumption. The legislation, which the Scottish parliament passed in 2012, and which the Supreme Court only recently allowed them to implement, sets a minimum price of 50 pence per unit of alcohol, which would lift the lowest price of a bottle of whisky to GBP 14.¹²

The European Court of Justice in Luxembourg had ruled in 2015 (ruling C-333/14) that Scotland would only be allowed to set minimum pricing if it were able to prove that the measure would increase public health.¹³ However, the United Kingdom Su-

¹² O’Leary, E. (2017) “Scotland Becomes Minimum Alcohol Price Trailblazer in Bid to Boost Public Health,” [in:] *Reuters*. Available [online]: <https://www.reuters.com/article/us-britain-scotland-alcohol/scotland-becomes-minimum-alcohol-price-trailblazer-in-bid-to-boost-public-health-idUSKBN1DF1EH>

¹³ Court of Justice of the European Union (2015) *The Scottish Legislation Introducing a Minimum Price per Unit of Alcohol Is Contrary to EU Law If Less Restrict-*

” THE OVERARCHING CONSENSUS IN PUBLIC POLICY IS THAT TAX INCREASES REDUCE CONSUMPTION OF TOBACCO PRODUCTS

preme Court in a 2017 ruling (in the case *Scotch Whisky Association and others (Appellants) v The Lord Advocate and another (Respondents)* (Scotland)) concluded “minimum pricing is a proportionate means of achieving a legitimate aim.”¹⁴ It would stand to reason that the “proportionate means” part of the argument was actually backed up by science, but the opposite is the case as no evidence points to the fact that minimum pricing would actually reduce the consumption of spirits.

Just as the example of increased taxation, setting price limits is unlikely to show the desired results. The empirical evidence support this as the heaviest drinkers’ responsiveness to price changes was statistically indistinguishable from zero.¹⁵ Even

tive Tax Measures Can Be Introduced, Press release N°155/15, Luxembourg. Available [online]: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-12/cp150155en.pdf>

¹⁴ *Scotch Whisky Association and others (Appellants) v The Lord Advocate and another (Respondents)* (Scotland) (2017) UKSC 76.

¹⁵ Manning, W., L. Blumberg, and L.H. Moulton (1995) “The Demand for Alcohol: The Differential Response to Price,” [in:] *Journal of Health Economics*, Volume 14, Is-

more recent studies find that hazardous and harmful drinkers (people who consume more than 17.5 units per week) had a very low response to price changes.¹⁶

In essence, a complete absence of information about price changes is actually more effective. And yet, the United Kingdom’s Supreme Court judges stated in the previously mentioned ruling that minimum pricing was “a proportionate means of achieving a legitimate aim,” because it does not matter whether your policy works or not, as long as you had good intentions.

ALCOHOL-RELATED SALES RESTRICTIONS

The restriction of the exact day and time in which alcohol sales are allowed is a constant topic of debate in public policy at both the national and local level of governments in Europe. Apart from the age-restrictions on alcohol, the sale of alcohol after 10 p.m. is only allowed if storeowners were guaranteed a special license, which can only be acquired if they follow a special course.¹⁷ In countries such as Norway¹⁸ or Sweden,¹⁹ the sale of alcohol is a monopoly of the state. The scientific evidence on

sue 2, pp. 123-48.

¹⁶ Purshouse, R.C., P.S. Meier, A. Brennan, K.B. Taylor, and R. Rafia (2010) “Estimated Effect of Alcohol Pricing Policies on Health and Health Economic Outcomes in England: An Epidemiological Model”, [in:] *The Lancet*, Volume 375, Issue 9723, pp. 1355-1364.

¹⁷ Service-Public-Pro.fr (2018) *Vente d’alcool la nuit, Direction de l’information légale et administrative (Premier ministre), Ministre chargé de l’intérieur*. Available [online]: <https://www.service-public.fr/professionnels-entreprises/vosdroits/F22386>

¹⁸ Strand, S. (2018) “Today’s Vinmonopolet – a modern chain with a social responsibility,” [in:] *Vinmonopolet no*. Available [online]: <https://www.vinmonopolet.no/social-responsibility>

¹⁹ Government Offices of Sweden (2015) *Swedish Alcohol Retailing Monopoly (Systembolaget Aktiebolag)*. Available [online]: <http://www.government.se/government-agencies/swedish-alcohol-retailing-monopoly-systembolaget-aktiebolag/>

the issue is split: some studies have failed to find changes in consumption or a reduction in alcohol-related problems following changes in hours of sale.²⁰ Other studies have reported increases in traffic accidents and assaults.²¹ Even researchers, who seem very supportive of the idea of restricting sales hours, fail to provide sufficient scientific evidence to support the claim definitively.²²

Given this sparse amount of evidence in support of restriction of alcohol sales hours, questions need to be asked about the unintended consequences of this policy. If store owners are already infringing on the law by selling alcohol past a certain time, and, depending on the country they are in, they are already at risk of losing their license, then what could prevent them from running the risk of infringing on other rules and regulations such as selling to minors? Before public policy-makers jump to conclusions about the effectiveness of restricted sales times, they should consider the implications that these policies have not only on the business freedom of the owners or the individual liberty of the consumers, but also which consequences may arise from such a policy. It should remain within the personal freedom of both the consumer and the storeowner to choose the legal products that can be sold.

TOBACCO CONSUMPTION

²⁰ McLaughlin, K.L. and A.J. Harrison-Stewart (1992) “The Effect of a Temporary Period of Relaxed Licensing Laws on the Alcohol Consumption of Young Male Drinkers,” [in:] *International Journal of Mental Health and Addiction*, Volume 27, Issue 4, pp. 409-423.

²¹ Chikritzhs, T. and T. Stockwell (2002) “The Impact of Later Trading Hours for Australian Public Houses (hotels) on Levels of Violence,” [in:] *Journal of Studies on Alcohol and Drugs*, Volume 65, Issue 5, pp. 591-599.

²² Hahn, R.A., J.L. Kuzara, and R. Elder, et al. (2010) “Effectiveness of Policies Restricting Hours of Alcohol Sales in Preventing Excessive Alcohol Consumption and Related Harms,” [in:] *American Journal of Preventive Medicine*, Volume 39, Issue 6, pp. 590-604.

Tobacco consumption has different rates of prevalence across European countries (See Figure 4). Not only do Central and Eastern European countries have a higher overall consumption of cigarettes, they also have a larger rate of 20+ cigarettes/day. Bulgaria, Hungary, Croatia, Latvia, Estonia, Austria, Slovakia, Poland, the Czech Republic, Lithuania, Romania, and Slovenia are all above the EU-28 average on total prevalence of cigarette smokers.²³ [See Figure 6]

SALES DROPS AFTER PRICE INCREASES DO NOT ACCOUNT FOR THE SHADOW ECONOMY

Tobacco-related tax policies are subject to continuous political debate, and are one of the main public policy influences on the products’ consumption. The overarching consensus in public policy is that tax increases reduce consumption of tobacco products, with varying studies setting price elasticity at -0.4.²⁴ International research varies on the extent to which making cigarettes more expensive forces people to quit, and prevents ex-smokers from starting again, or whether it is the best strategy for reducing smoking levels.

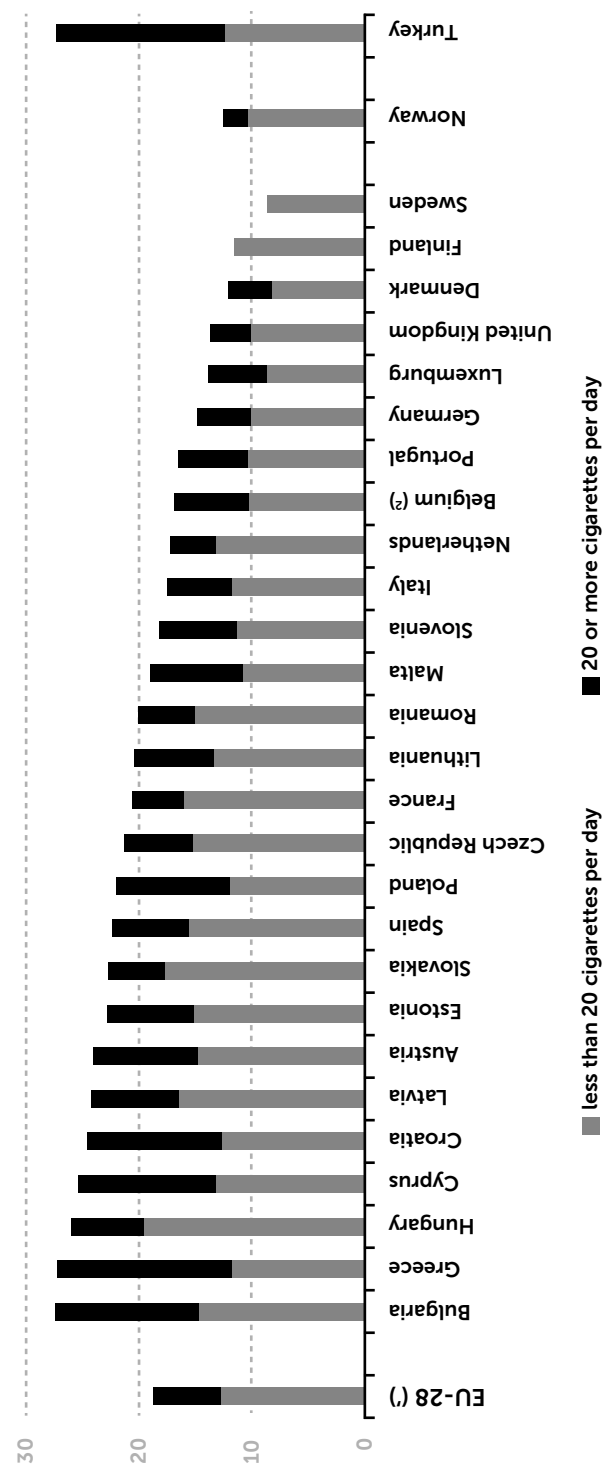
However, setting smoking levels through sales numbers is inherently misleading, due to the prevalence of black market sales. The illicit tobacco trade is a global issue accounting for an estimated 10.4% of the cigarette market worldwide. In addition to being a major funding source for organized crime, the cost to European tax revenues is estimated to amount to EUR 11.3 billion a year.²⁵ This means that a large number

²³ Eurostat (2017) “Tobacco Consumption Statistics,” [in:] *Eurostat Statistics Explained*. Available [online]: http://ec.europa.eu/eurostat/statistics-explained/index.php/Tobacco_consumption_statistics

²⁴ World Bank (1999) *Curbing the Epidemic. Governments and the Economics of Tobacco Control*. Washington D.C.: World Bank.

²⁵ Michalopoulos, S. (2016) “Cheap Whites’: The New

Figure 6: Tobacco consumption in Europe



Note: ranked on the overall proportion of daily smokers. 2014 data for Ireland not available.

(?) Estimates.

(?) Data with low reliability.

of tobacco consumers' behavior does not enter the records of tobacco sales, which distorts the perceived reduction in consumption for those who merely consume these statistics.

In fact, Eastern European countries have been among the largest contributors to this trend of 'illicit whites', meaning cigarettes, which were produced under a legal framework in one country, yet smuggled into another without the payment of customs duties. Belarus is retailer number 1 of illicit whites to the European Union, through a variety of brands. In 2014, the largest part of C&C (Counterfeit and Contraband, including Illicit Whites) in the United Kingdom originated from Belarus, with 15.7%; in Germany, most C&C's came out of the Czech Republic with 20.1%, while in Austria most illicit trade originated from Hungary, with 26.6% of total illegal trade.²⁶

TOBACCO-RELATED POLICIES: PLAIN PACKAGING

A 2014 study conducted at the Department of Economics at the University of Zurich, Switzerland, analyzed the effects of plain packaging on the prevalence of minors who smoke in Australia. It showed that for young people, the neutral packaging had absolutely no effects on their consumption. "Altogether, we have applied quite liberal inference techniques, that is, our analysis, if anything, is slightly biased in favor of finding a statistically significant (negative) effect of plain packaging on smoking prevalence of Australians aged 14 to

17 years". The researchers also added: "[...] if the guiding research question is whether there is a plain packaging effect at all, one must adjust the confidence intervals to take the possibility of 'cherry picking' into account (that is, the possibility of searching for a statistically significant effect over the entire period). Such an adjustment requires the use of uniform confidence intervals, in which case there is again no evidence for a plain packaging effect on smoking prevalence."²⁷

A 2016 study by the School of Economics, Finance and Marketing of the RMIT University in Melbourne, Australia, concluded that the policy didn't hold what it promised and criticized the government of funding biased research. As they concluded, "[i]n the first instance the Australian federal government paid over AUD 3 million of taxpayer funds for a research project to accurately and factually evaluate the impact of the introduction of the plain packaging policy. (...) While it is true to say that research was undertaken, data was collected and then analyzed, it is not clear that the results of that research have been accurately described and disseminated to the Australian government, the Australian community, or the broader international community."²⁸

It appears that the public policy analysts who studied the policy were the same people who advocated for it in the first place. This is rightfully raising serious questions about the policy-making process.

Trend Dominating Tobacco Black Markets," [in:] *Euractiv.com*. Available [online]: <https://www.euractiv.com/section/health-consumers/news/mondaycheap-whites-the-new-trend-dominating-tobacco-black-markets/>

²⁶ KPMG (2014) *A Study of the Illicit Cigarette Market in the European Union, Norway and Switzerland*. Available [online]: http://kpmg.co.uk/creategraphics/2015/06_2015/CRT026736/files/assets/common/downloads/CRT026736%20Project%20SUN%20COMBINED%20v10.pdf

²⁷ Kaul and Wolf (2014) "The (Possible) Effect of Plain Packaging on the Smoking Prevalence of Minors in Australia: A Trend Analysis," [in:] *Working Paper Series*. Zurich: Department of Economics No. 149, University of Zurich, pp. 9-10.

²⁸ Davidson, S. and A. De Silva (2016) *Stubbing Out the Evidence of Tobacco Plain Packaging Efficacy: An Analysis of the Australian National Tobacco Plain Packaging Survey*. Melbourne: RMIT University – School of Economics, Finance and Marketing, p. 11.



WHO'S FCTC 2030 PROJECT IS SUPPORTING TOBACCO CONTROL MEASURES IN COUNTRIES WORLDWIDE, INCLUDING COLOMBIA, EL SALVADOR, JORDAN, MADAGASCAR, AND NEPAL

However, it becomes increasingly clear that plain packaging won't only be applied to a handful of Western European countries. For instance, the Republic of Georgia is being parachuted into a law mandating the plain packaging for all tobacco products.²⁹

The change of heart in Georgia is no chance occurrence. Not only has the United Nations congratulated the country on its decision, the United Kingdom, backed by the World Health Organization, has pledged funding for the policy.³⁰

²⁹ Ossowski, Y. (2017) *New Anti-Tobacco Measures won't work in Georgia, Tsarizm*. Available [online]: <https://tsarizm.com/analysis/2017/05/12/new-anti-tobacco-measures-wont-work-georgia/>

³⁰ UNDP (2017) *UN Supports Comprehensive Tobacco-*

These financial incentives are not limited to Georgia; the WHO's FCTC 2030 project is supporting tobacco control measures in countries worldwide, including Colombia, El Salvador, Jordan, Madagascar, and Nepal. Conditions for obtaining these funds include the "willingness to increase tobacco taxation" or the "ambitions to accelerate implementation of the WHO Framework on Tobacco Control."³¹

By voting for plain packaging, the Georgian parliament has gone beyond the EU's strict directive on tobacco (TPD2), ignoring the EU and WHO advice to go step-by-step. This essentially means that taxpayers in the UK are paying millions of pounds to help implement a policy proven ineffective elsewhere.

The United Nations is not Georgia's only cheerleader in this endeavor. UN officials are using the implementation of these measures as leverage for membership negotiations. United Nations Development Program (UNDP) representatives have said that, "Passage of the draft legislation would align Georgia with its obligations as a Party to the WHO Framework Convention on Tobacco Control (FCTC), and help meet Article 356 of the EU-Georgia Association Agreement, which makes FCTC implementation a precondition for further European integration."³²

Control Legislation in Georgia. New York City. Available [online]: <http://www.ge.undp.org/content/georgia/en/home/presscenter/pressreleases/2017/05/02/un-supports-comprehensive-tobacco-control-legislation-in-georgia.html>

³¹ WHO (2017) *FCTC 2030. Strengthening WHO FCTC implementation to achieve the Sustainable Development Goals*. Geneva. Available [online]: <http://www.who.int/fctc/implementation/fctc2030/en/>

³² Agenda.ge (2017) "UN supports comprehensive tobacco-control legislation in Georgia," [in:] *UNDP Georgia*. Available [online]: <http://agenda.ge/news/78771/eng>

International organizations therefore seem to push policies infringing on personal freedoms in parts of the world, including Eastern Europe. This policy is ill advised; the choices regarding liberal policies on lifestyle choices should be up to individual countries by principle, and shouldn't be dependent on other political priorities. In the same way, Western European countries certainly wouldn't accept that trading relations with China were to be made dependent on an adoption of Chinese authoritarianism.

SMOKING BANS: THE EFFECTS OF SECOND-HAND SMOKE HAVE BEEN OVERBLOWN

The bans on smoking indoors had largely been implemented because early studies believed there to be a correlation between secondhand smoke and heart disease, going as far as claiming a drop in 60% in hospital admissions for cardiovascular diseases; a number which quickly made it into mainstream headlines such as the *Wall Street Journal*.³³ However, upon publication the study only claimed a 40% drop.³⁴

A 2006 study in the Piedmont region in Italy revealed an 11% drop in heart disease, a much smaller drop than the 60% that politicians had promised.³⁵ After a sweeping ban on smoking inside in England, a study

³³ Winslow, R. (2003) "Montana City Smoking Ban Appears to Cut Heart Attacks," [in:] *Wall Street Journal*. Available [online]: <https://www.wsj.com/articles/SB104924037780880000>

³⁴ Sargent, R.P., R.M. Shephard, and S.A. Glantz (2004) "Reduced Incidence of Admissions for Myocardial Infarction Associated with Public Smoking Ban: Before and After Study," [in:] *British Medical Journal*, Volume 328, Issue 7446, pp. 977-980.

³⁵ Barone-Adesi, F., L. Vizzini, F. Merletti, and L. Richiardi (2006) "Short-Term Effects of Italian Smoking Regulation on Rates of Hospital Admission for Acute Myocardial Infarction," [in:] *European Heart Journal*, Volume 27, Issue 20, pp. 2468-2472.

found a heart attack reduction of only 2%.³⁶ That number is so low that it might not be related to the bans at all. A study in New Zealand found no correlation whatsoever.³⁷ Similar US-studies have subsequently appeared in the *Journal for Community Health*³⁸ as well as the *American Journal of Medicine*³⁹, in the United States.

THE FREEDOM TO ACT SELF-DESTRUCTIVELY

In an essay to *The Freeman*, Don Boudreaux expresses his dissatisfaction with the Nanny State. He concludes his analysis of the freedom to enjoy tobacco as follows: "I have my own proposed tobacco settlement. Let's recognize that smoking is voluntary. Let smokers enjoy their cigarettes, and let tobacco companies be regulated only by the market by putting an end to government's odious molestation of smokers and tobacco companies."⁴⁰ There is an inherent right for individuals to act self-destructively, which lies in each and everyone's personal freedom.

³⁶ Sims, M., R. Maxwell, L. Bauld, and A. Gilmore (2010) "Short Term Impact of Smoke-Free Legislation in England: Retrospective Analysis of Hospital Admissions for Myocardial Infarction," [in:] *British Medical Journal*, 340: c2161.

³⁷ Edwards, R., G. Thomson, and N. Wilson, et al (2008) "After the Smoke Has Cleared: Evaluation of the Impact of a New National Smoke-Free Law in New Zealand." A Report Commissioned and Funded by the New Zealand Ministry of Health.

³⁸ Rodu, B., N. Peiper, and P. Cole (2012) "Acute Myocardial Infarction Mortality Before and After State-Wide Smoking Bans," [in:] *Journal for Community Health*, Volume 37, Issue 2, pp. 468-472.

³⁹ Basel, P. et al. (2013) "The Effect of a Statewide Smoking Ordinance on Acute Myocardial Infarction Rates," [in:] *The American Journal of Medicine*, Volume 127, Issue 1, 94.e1-94.e6.

⁴⁰ Boudreaux, D. (1997) *Freeman Essay #13: "The Nanny State,"* [in:] *Café Hayek*. Available [online]: <http://cafe-hayek.com/2017/12/freeman-essay-13-nanny-state.html>

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IN OCTOBER 2011, DENMARK'S LEADING COALITION INTRODUCED A TAX ON FATTENING FOODS AND BEVERAGES: SUCH AS BUTTER, MILK, CHEESE, MEAT, PIZZA, AND OIL, AS LONG AS THEY CONTAIN MORE THAN 2.3% SATURATED FAT. AFTER FIFTEEN MONTHS IN EFFECT, THE SAME PARLIAMENTARY MAJORITY REPEALED THE TAX, AS THE DANES RECOGNIZED THE MEASURE TO BE A FAILURE

As for the lieu of consumption, property rights are key: individuals should be allowed to smoke as much as they want, as long the owner of the property has authorized him/her to do so. Framing the discussion in the fact of "the rights of non-smokers", as it has been done,⁴¹ misses the point of the argument: your ability to ban the act of smoking of another individual should only extend as far as your own property does.⁴²

SUGARY AND "FATTY" PRODUCTS

Sugary products and so-called "fatty" foods have come increasingly under fire for the health concerns that they pose. The lifestyle policies that are already in affect are not as far-reaching as they are in the domains of tobacco and alcohol. However, one notable example of the Danish "fat tax" stands out.

Most of the governmental pushes to limit the consumption of sugar in society, be that the ban on unlimited soda-refills in France or soda taxes in Ireland, ignore the real-life examples of the implementation of such punitive taxes. France has had its soda tax since 2012, yet, rising obesity levels and the absence of long-term studies make its effect difficult to determine as of now. As a matter of principle, evaluating the effect of a single tax increase on a particular product on population-wide obesity rates is generally a complicated task. However, the analysis on specific consumption rates is a case study that has been illustrated by Denmark, after the introduction of its "fat tax".

⁴¹ Katz, J.E. (2005) "Individual Rights Advocacy in Tobacco Control Policies: An Assessment and Recommendation," [in:] *Tobacco Control*, ii36-ii37.

⁴² Skoble, A. (2012) "Smoking Bans: Banning Freedom," [in:] *Libertarianism.org*. Available [online]: <https://www.libertarianism.org/media/around-web/smoking-bans-banning-freedom>

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NUDGE THEORY WAS POPULARIZED AS A CONCEPT BY NOBEL PRIZE WINNER AND AMERICAN ECONOMIST RICHARD THALER, AND HAS SINCE BEEN A BOOMING TREND IN MODERN GOVERNMENT POLICY

In October 2011, Denmark's leading coalition introduced a tax on fattening foods and beverages: such as butter, milk, cheese, meat, pizza, and oil, as long as they contain more than 2.3% saturated fat.⁴³ After fifteen months in effect, the same parliamentary majority repealed the tax, as the Danes recognized the measure to be a failure. Still, a study in the *European Journal of Clinical Nutrition* suggests that in the months during the implemented tax, the sale of these foods fell by between 10 and 15%.⁴⁴ However, this does not account for the stockpiling or hoarding effect that the Danes experienced prior to the introduction of the tax:

"[...] this size of this "hoarding" might also be a part of the explanation for the observed decrease in consumption of fats, at least in the period following right after the introduction of the tax."⁴⁵

In fact, when analyzing the effects over the 15 months during which the tax was in effect in Denmark, we find a marginal drop of 0.9% in consumption of fatty foods and beverages, which lies within the margin of error.⁴⁶

It stands to reason that prior to the introduction of so-called "fat" or "sugar taxes", the preventative unintended consequences that such policies can have should be

first examined. It is to nobody's advantage if consumers chose low-quality products with the same amount of sugar and fat, only to keep their consumption at the same price.

PERSONAL CHOICE

The consumption of fatty foods considered to be unhealthy are a matter of individual choice. In their inherent nature, they represent a trade-off in utility for the consumer. As Ninos Malek writes: "Every time you buy cigarettes or unhealthy food, and every time you do not buy food that's good for you, you are weighing your own costs and benefits."⁴⁷ Consumers wouldn't choose

⁴³ BBC (2012) *Denmark Introduces World's First Food Fat Tax*. Available [online]: <http://www.bbc.com/news/world-europe-15137948>

⁴⁴ Vallgård, S., L. Holm, and J.D. Jensen (2014) "The Danish Tax on Saturated Fat: Why Did It Not Survive," [in:] *European Journal of Clinical Nutrition*, Volume 69, Issue 2, pp. 223-226.

⁴⁵ Jensen, J.D. and S.Smed (2013) "The Danish Tax on Saturated Fat: Short Run Effects on Consumption and Consumer Prices of Fats," [in:] *Food Policy*, Volume 42, October, pp. 18-31.

⁴⁶ Bødker, M., C. Pisinger, U. Toft, and T. Jørgensen (2015) "The Danish Fat Tax—Effects on Consumption Patterns and Risk of Ischaemic Heart Disease," [in:] *Preventive Medicine*, Volume 77, pp. 200-203.

⁴⁷ Malek N.P. (2003) "Fast Food and Personal Responsibility," [in:] *Foundation for Economic Education*. Available [online]: <https://fee.org/articles/fast-food-and-personal-responsibility>

to buy these goods if they were not convinced that it would increase their personal well-being, no voluntary exchange takes place unless both parties benefit.⁴⁸ Stella Zawistowski writes in *The Objective Standard*: “The proper role of government is not to count our calories or to watch our weight but to protect our rights. The government has no moral right to interfere with a food producer’s offerings, a restaurant’s menu, or an individual’s diet. And where the government has created for itself a legal right to do so, such laws should be repealed.”⁴⁹ In essence, freedom implies the eventuality that individuals make choices that aren’t healthy in every aspect, but they have an inalienable right to make these choices regardless.

NUDGE THEORY IN PUBLIC POLICY

Nudge theory was popularized as a concept by Nobel Prize winner and American Economist Richard Thaler, and has since been a booming trend in modern government policy. Nudging is a set of policies, which indirectly push consumers or users to adopt a certain behavior. A prominent example is the pictures of flies put in urinals in men’s bathrooms, in order to improve cleanliness.⁵⁰ However, nudging increasingly becomes a matter of public policy.

In a 2016 article in the *Conversation*, Ivo Vlaev, professor of behavioral science at the University of Warwick, suggested that it is possible to nudge people into drink-

ing less alcohol.⁵¹ In an experiment, he laid out that drinkers reduced their consumption when they got a text message saying: ‘You are in the top 10% of heaviest drinkers.’ In a similar example, HMRC had raised an additional GBP 210 million of tax revenue after sending people tax reminder letters saying that most people in their town had already paid.⁵²

The “nudgers” are spreading among academics and influence public policy makers. Examples of this can be found in the advocacy in the likes of Italian policy advisor Alberto Alemanno, who engaged in repeated advocacy for plain packaging of cigarettes. In early 2010, long before the legislative introduction of plain packaging in France and the United Kingdom, the Italian activist penned *The Case of Plain Packaging for Cigarettes*, with an underlying tone showing clear support for the measure. However, even Alemanno warned against the legal problem of “not establishing a causal link between the measure and the protection of the specific public interest,”⁵³ something France and the UK have consciously ignored. This has, and will lead to, multiple lawsuits by the tobacco industry, as has been the case for the latest EU Tobacco Directive 2014/40/EU, which also increased the size of warning labels on packs of cigarettes.⁵⁴

⁴⁸ Vlaev, I. (2016) “How to Start Nudging People to Drink Less Alcohol,” [in:] *The Conversation*. Available [online]: <https://theconversation.com/how-to-start-nudging-people-to-drink-less-alcohol-57704>

⁴⁹ The Behavioural Insights Team (2013) *Behavioural Insights Tax Trials Win Civil Service Award*. Available [online]: <http://www.behaviouralinsights.co.uk/tax/behavioural-insights-tax-trials-win-civil-service-award/>

⁵⁰ Alemanno and Bonadio (2010) “The Case of Plain Packaging for Cigarettes – an Overview,” [in:] *European Journal of Risk Regulation*, pp. 268–70.

⁵¹ European Union (2014) “Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014,” [in:] *Official Journal of the European Union*, pp. 1.

⁴⁸ Public Broadcasting Service (2000) *On Freedom and Free Markets (Interview with Milton Friedman)*. Available [online]: http://www.pbs.org/wgbh/commandingheights/shared/minitext/int_miltonfriedman.html

⁴⁹ Zawistowski, S. (2014) “Of Freedom and Fat: Why Anti-Obesity Laws Are Immoral,” [in:] *The Objective Standard*. Available [online]: <https://www.theobjectivestandard.com/issues/2009-spring/anti-obesity-laws/>

⁵⁰ Wu, F. H. (2017) “The Nobel Prize and the Urinal Fly,” [in:] *Huffington Post*. Available [online]: https://www.huffingtonpost.com/entry/the-nobel-prize-and-the-urinal-fly_us_59ddaa76e4b07a185aa75f91

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NUDGE THEORY IS JUST STARTING TO SHOW ITS EFFECTS ON PUBLIC POLICY. IT WILL CERTAINLY BE AN INTEGRAL PART FOR THE CREATION OF NEW LIFESTYLE REGULATIONS IN THE UPCOMING YEARS

Nudge theory is just starting to show its effects on public policy. It will certainly be an integral part for the creation of new lifestyle regulations in the upcoming years. Its implementation asks important questions about privacy protection, branding rights, and individual liberty itself.⁵⁵ The mere fact that established news outlets subtitle nudging as “How subtle policy shifts can be in everyone’s best interest”⁵⁶ should

⁵⁵ Zoido-Oses, P. (2014) *The Problem with Nudge Policies Is That They Threaten Our Freedom to Choose to Act Well*. London: The London School of Economics and Political Science. Available [online]: <http://blogs.lse.ac.uk/politicsandpolicy/the-problem-with-nudge-policies-freedom-to-choose/>

⁵⁶ Chu, B. (2017) “What Is ‘Nudge Theory’ and Why Should We Care? Explaining Richard Thaler’s Nobel economics prize-winning concept,” [in:] *Independent*. Available [online]: <http://www.independent.co.uk/>

raise eyebrows regarding the definition of “subtle” and “best interest.” Furthermore, it needs to be pointed out that governmental limits have the characteristic of being difficult to remove, which, as Micah Mattix points out in an article entitled “Freedom and the Nanny State” for *The American Conservative*, makes them different from advertising or other forms of involvement into personal choices.⁵⁷

CONCLUSIONS

Paternalistic lifestyle regulations do not merely infringe on the principles of consumer choice and individual liberty, their applications rarely show any real-life improvement of public health. Given the large amount of unintended consequences, additional data could show in the future that the policies indeed deteriorated public health, as the consequences on black market development through illicit trade, as well as shifts in consumer behavior already display. Public policy makers would be ill advised to jump to emotional responses in light of public health hazards. Rather, they should improve their balance of support for the choices of individual consumers and evidence-based policy-making. •

news/business/analysis-and-features/nudge-theory-richard-thaler-meaning-explanation-what-is-it-nobel-economics-prize-winner-2017-a7990461.html

⁵⁷ Mattix, M. (2014) “Freedom and the Nanny State,” [in:] *The American Conservative*. Available [online]: <http://www.theamericanconservative.com/prufrock/freedom-and-the-nanny-state/>



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Nudging: New Trend in Paternalistic Policies - Cases of Serbia and Croatia



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ALEKSANDAR
NINKOV

Regulatory and other related government policies primarily aim to alter people's incentives and hence change their behavior. If the government wants more people to wear seat belts in their cars, it legally imposes a penalty for driving without a seat belt. If the government wants people to consume less sugar, they propose a regulation that limits the amount of sugar in products being sold on the market or they impose sugar taxes. However, there is another way of influencing citizens' behavior. People can be nudged in a certain direction without the government introducing regulatory bans or implementing high taxes. As any changes in default options, framing or social influences may have a great impact on the choices people make, public policy creators use insights from psychology to create nudges and as such influence people in a subtler way.

One of the most powerful instruments of nudging is a default rule. People tend to stick to their current position, even when a change would be beneficial to them. If inertia and status quo bias have a great influence on behavior, then a default option plays an important role even if individuals are completely free to choose otherwise.

Serbia and Croatia decided to use the influence of default to nudge their citizens towards being organ donors. As such, Croatia has passed a law that presumes peoples' consent to be organ donors unless an individual explicitly makes a decision not to be one. In Serbia, a bill is being proposed with the same content. In both cases, nothing will be legally prohibited and no changes in economic incentives have been introduced, though presumed consent to be an organ donor has shown to result in higher rates of organ donation.

This kind of government intervention raises a series of questions regarding personal freedoms. On the one hand, some authors use the term 'libertarian paternalism'¹ to describe policies based on nudging. The word 'libertarian' is used because freedom of choice is formally preserved. 'Paternalism' means that despite having freedom of choice, decision-making is still influenced in a direction that increases the wellbeing of people.² On the other hand, there are serious critiques of nudging as a new form of influence on behavior that does not respect individuals as independent and capable of following their own goals.³

HUMAN BEHAVIOR AND CHOICE ARCHITECTURE

Many seemingly unimportant and small factors can have a significant influence on our decision-making process. For example, consumers are more likely to buy products that are positioned on the shelf at eye level. Also, people are influenced by what others are doing: if government sends a message that many people support organ donation, it makes us think about becoming a donor.

The way options are framed has a great influence on how people make decisions. As an example, individuals are more likely to accept an operation if the doctor tells them that they have a 90% chance of survival than if they were told that there is only a 10% chance they will die.⁴ When estimating risks and probabilities on their own, people rely on how well they remember events. That is why they estimate that

¹ Thaler, R. H. and C.R. Sunstein (2008) *Nudge: Improving Decisions about Wealth, Health and Happiness*. Yale University Press.

² Ibid.

³ White, M. D. (2013) *The Manipulation of Choice: Ethics and Libertarian Paternalism*. Palgrave Macmillan U.S.

⁴ Thaler, R.H. and C.R. Sunstein (2008) *Nudge: Improving Decisions about Wealth, Health and Happiness*. Yale University Press, p. 36.

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UNLIKE TRADITIONAL WAYS OF DECISION INFLUENCING, NUDGING DOES NOT BAN OR TAX UNDESIRE OPTIONS BY GOVERNMENT OFFICIALS

death from a tornado is more likely than from asthma.⁵ During elections, the order of candidates on a ballot has an impact on the number of votes cast.⁶

Can we explain these systematic deviations from rational behavior? Author Daniel Kahneman⁷ writes about System 1 and System 2 reasoning. The former is fast, intuitive, and unconscious. It uses shortcuts to make a conclusion and uses less energy. The latter is slow, deliberative, requires concentration and uses more energy. When someone gives an answer to the question $2 + 2 = ?$, he/she uses System 1. When an inexperienced driver tries to park a car in a small space, he/she uses System 2.

⁵ Kaneman, D. (2015) *Misliti, brzo i sporo*. Heliks, p. 129.

⁶ Thaler, R. H. and C.R. Sunstein, (2008) *Nudge: Improving Decisions about Wealth, Health and Happiness*. Yale University Press, p. 246.

⁷ Kaneman, D. (2015) *Misliti, brzo il sporo*. Heliks.

System 1 is useful since it does not require deep concentration and consideration all the time. However, System 1 uses shortcuts to come to a conclusion. These conclusions are often very precise, but sometimes they lead to systematic errors. Because the deviations from rationality are systematic, we can predict them. In other words, we can say that in situation X, we will have behavior Y that is biased because of the shortcuts in reasoning.

These shortcuts in reasoning are called heuristics. Some of the most important types include availability heuristics, representativeness heuristics, and anchoring. Availability heuristics are employed in a situation where an individual estimates risk and probability according to emotions. Shark attacks are in fact very rare, but people often overestimate the risk of such an occurrence because when a shark attacks a human being, it stays engraved in our memory and is followed by strong emotions.

Representativeness heuristics imply that people are using categories and classify events by similarity. Anchoring is a situation when a random number influences our estimation. For example, a random price proposed for a product can affect an amount of money that consumers are willing to pay for that product. Additionally, the negotiations of the amount that is to be bought are mainly anchored in the price that was initially proposed, or by the first person to make a bid.⁸

Governments are increasingly using the knowledge about human behavior with an intent to influence citizens' decisions, and nudge them toward certain outcomes. Subjects that shape options are called "choice architects." These agents create

⁸ Ibid., p.116.

a context in which choices are made so they can use factors that influence behavior. It is important to note that, unlike traditional ways of decision influencing, nudging does not ban or tax undesired options by government officials. Choice architects use knowledge from psychology to create efficient and subtle nudges without restricting options available.⁹

For example, a government may send a message to households with information on the usage of electrical energy of their district. If an average usage of energy for the district is lower than the one from the household, there is a large chance a household will lower its own consumption in the future.¹⁰ In this way, households with high usage of electrical energy can be nudged to consume less, thus spending less on electrical energy. Moreover, if government officials want to lower consumption of unhealthy foods and drinks, there is a simple nudge at hand – a removal of these products from the shelves that are placed at eye level for the consumers (this regulation can be seen as illiberal because government regulates private entities, but on the other hand people are still free to buy what they want without any restrictions).

EXAMPLES OF NUDGING

There are a plethora of examples of public policies that may be used to illustrate the phenomenon of nudging. These include cases for the United States and the United Kingdom where special teams have been created to research, propose, and implement nudges.¹¹ They focus chiefly on the following areas:

⁹ Thaler, R. H. and C.R. Sunstein (2008) *Nudge: Improving Decisions about Wealth, Health and Happiness*. Yale University Press.

¹⁰ Ibid. p. 68.

¹¹ <http://www.behaviouralinsights.co.uk/>

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ONE
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SOMEONE ACTIVELY
DECIDES NOT TO BE
A DONOR



STATUS QUO BIAS IS A SIGNIFICANT TRAIT OF HUMAN BEHAVIOR

1. **Social influence and antibiotics overuse:**

the United Kingdom, like many other countries, has a problem with too many prescribed antibiotics.¹² Overuse of antibiotics makes bacteria resistant to drugs.¹³ Therefore, it is crucial for a patient to use an antibiotic only when absolutely necessary. But how do you nudge doctors to prescribe an antibiotic only when necessary? The Behavioral Insights Team experimented whether simple information from the authority can change the behavior of doctors.¹⁴ The top 20% of doctors that were prescribing the largest number of antibiotics in a region received a message from the Chief Medical Officer informing them that 80% of their colleagues are prescribing fewer antibiotics. As most people are strongly influenced by what other people do, this intervention by the Behavioral Insights Team led to a reduction of the number of prescriptions for antibiotics.¹⁵ This could be an important part in the effort to decrease antibiotic overuse.

¹² Hallsworth, M. (2016) "Reducing Antibiotic Prescribing: A New Bit Study Published in the Lancet", [in:] *The Behavioural Insights Team*. Available [online]: <http://www.behaviouralinsights.co.uk/health/1516/>

¹³ WHO (2017) *Antibiotic Resistance*. Available [online]: <http://www.who.int/mediacentre/factsheets/antibiotic-resistance/en/>

¹⁴ Hallsworth, M. (2016) "Reducing Antibiotic Prescribing: A New Bit Study Published in the Lancet", [in:] *The Behavioural Insights Team*. Available [online]: <http://www.behaviouralinsights.co.uk/health/1516/>

¹⁵ Ibid.

2. **Framing and fat intake:** producers of dairy foods sometimes write on their products that they are, for example, 80% fat-free and not that they include 20% fat. In 2011, the United States government forbade companies to declare a percentage of a product that is fat-free without also declaring the percentage of fat the product contained.¹⁶ In other words, the government prohibits companies from framing a percentage of fat in their products in a way that is presenting only the positive side(s) of a product.

3. **Default rules and printing machines:**

the more paper used, the more forests need to be cut down. An experiment at Rutgers University in the USA showed that a change in a default rule could cut paper usage.¹⁷ Instead of 'print on a single side' default, we can change the default to 'print on both sides.' People often stick with a default option. With a 'print on both sides' default, people are nudged to use less paper for printing. This nudge has a greater impact on the reduction of paper being used for printing than a 10% tax on paper products. A change in default rules is sometimes even more effective than other public policies.¹⁸

4. **Speed limits and optical illusion:** how do you nudge drivers to slow down when approaching an unsafe section of a road? Optical illusion can have an important influence – if workers drew white lines on a road that are closer and closer to each other, drivers would be under the illusion that they are accelerating. As a result, drivers would therefore instinctively slow down when approaching an unsafe section.

¹⁶ Sunstein, C. R. (2015) *Choosing not to Choose: Understanding the Value of Choice*. Oxford University Press, p. 67.

¹⁷ Ibid., p. 26.

¹⁸ Ibid., p. 27.

DEFAULT RULES AND ORGAN DONATION: THE CASES OF SERBIA AND CROATIA

One of the most powerful nudges are default rules. Status quo bias is a significant trait of human behavior. People are biased to stick to their current situation. We could have a great opportunity to get a better job, but status quo bias can stop us from even applying for that position. Furthermore, it is very likely that many default options on our mobile phones are not changed. But why do people stick to their current position, even if a change could bring them more benefits? Cass Sunstein, in his book *Choosing Not to Choose: Understanding the Value of Choice*, writes about several reasons why status quo bias is important and powerful.¹⁹ Among some of the main reasons for such human behavior he lists inertia, informal signals, loss aversion, and a sense of responsibility.

Inertia and procrastination explain why active choosing requires energy, effort, and attention. All three are scarce resources. Overcoming default rule can be delayed for a long period of time because of these reasons. In the case of an informal signal, if a choice architect chooses a default rule, people may believe that the default is carefully considered and designed to bring better results. For example, workers can stick to automatic enrollment for a pension and health insurance plan, believing that a group of experts decided that default enrollment to a certain plan is the best solution. Loss aversion and a sense of responsibility explain why, when making a choice, we feel responsible for our actions. On the other hand, if we stick to the default rule, a sense of personal responsibility for an outcome is lost. In addition, we fear that we will make a mistake and experience

¹⁹ Ibid.

a loss if we go out of our comfort zone. In regard to organ donations, there are more people who are willing to be donors after death than the people who sign a donor card.²⁰ The difference between attitudes toward organ donation, and the number of donor cards signed can be explained in several ways.

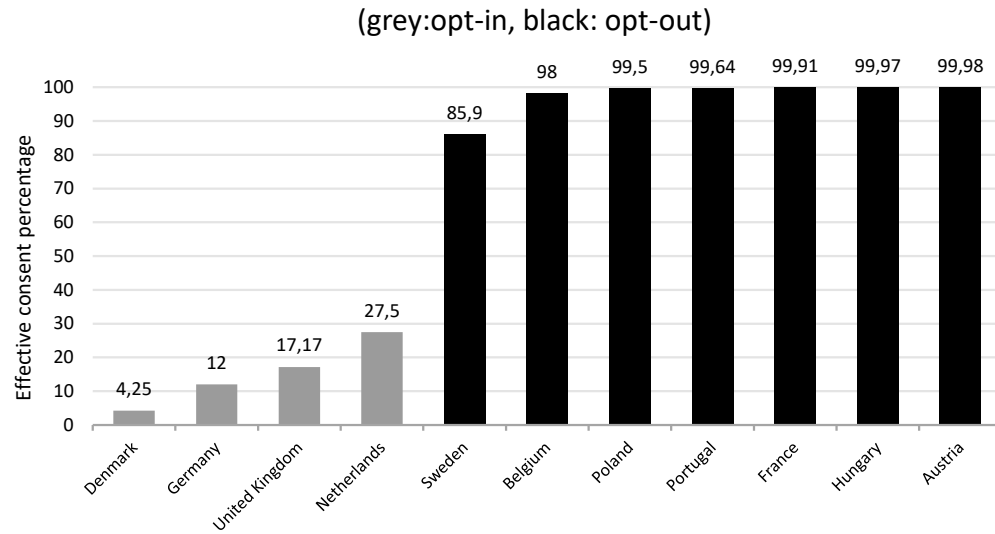
First, citizens might recognize organ donation as socially desirable and noble, but they personally may not want to be a donor themselves. Second, they might want to become donors, but they procrastinate. Third, they may want to sign a donor card, just not now. Fourth, they do not want to think about death. Fifth, organ donation is something that they do not want to think about at all. Most importantly, decision-making can be complicated and can demand various interventions for solving the problem of low donation rates.

One of the solutions for low organ donating rates is a change in default rules. Instead of supposing that citizens are not potential organ donors unless they explicitly make a decision to be donors, we can change rules and define that every citizen is willing to be a donor unless someone actively decides not to be a donor. In other words, a government can redefine what will happen if an individual does not take any action. Figure 1 shows consent rates with different default rules.²¹ Inertia, procrastination, and refusing to think about an issue lead to an increase in consent rates in the opt-out system.

²⁰ Thaler, R.H. and C.R. Sunstein (2008) *Nudge: Improving Decisions about Wealth, Health and Happiness*. Yale University Press., p. 174.

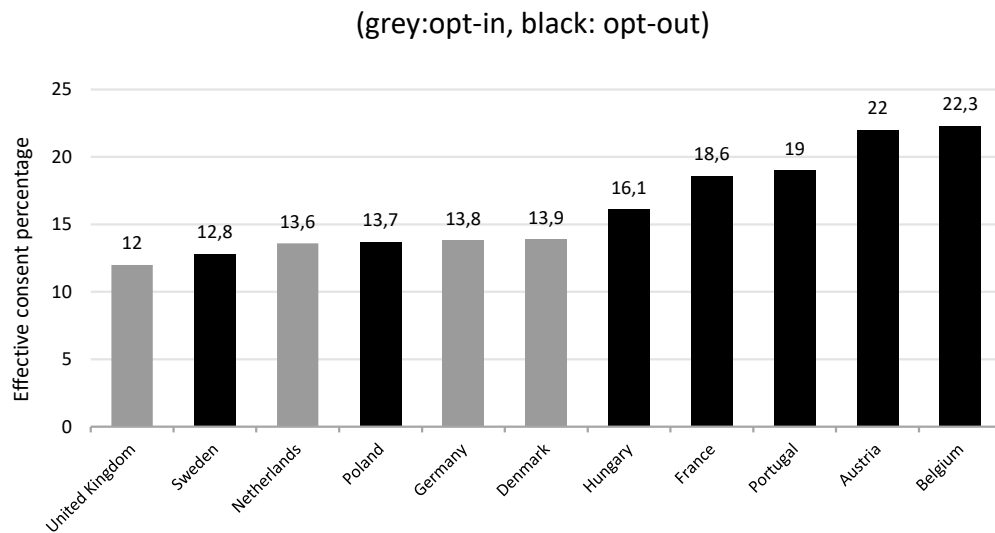
²¹ Note that an individual can stick to opt-out default rule and be considered as a donor, but a family can still reject organ donation. In other words, consent rates and actual donation rates can be very different from each other. The graph presents only effective consent rate, not a number of performed organ donations.

Figure 1: Effective consent rates



Source: Johnson, E.J. and D. Goldstein (2003) "Do Defaults Save Lives?", [in:] *Science*, Volume 302. Available [online]: <http://www.dangoldstein.com/papers/DefaultsScience.pdf>

Figure 2: Number of actual donations per million people



Source: Buck, S. (2015) *A Misleading Chart on Organ Donation Rates*. Available [online]: <http://www.arnoldfoundation.org/a-misleading-chart-on-organ-donation-rates/>

Figure 3: Deceased donors per million (by year, by donor country, based on population at start of year)

Donors used pm	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Austria	20.2	25.0	22.6	23.2	22.7	22.1	24.3	22.9	23.9	23.5
Belgium	24.8	25.7	24.3	29.2	28.8	27.4	25.2	28.0	28.4	30.6
Croatia	17.8	17.4	29.5	33.6	34.3	32.4	33.7	37.6	35.8	31.8
Germany	14.4	14.6	15.5	14.4	12.7	10.7	10.5	10.6	10.1	9.3
Hungary²⁵					6.2	12.6	20.1	17.7	18.0	15.4
Luxembourg	18.6		6.0	17.6	7.6	14.9	7.3	5.3	5.2	15.2
Netherlands	12.3	13.0	13.0	13.3	15.1	15.2	16.1	15.7	13.8	14.3
Slovenia	17.8	16.2	19.5	15.1	22.4	21.9	20.9	25.7	19.9	18.9
All ET	15.6	16.1	16.9	16.8	15.3	14.4	14.9	15.1	14.5	13.9

Source: Eurotransplant. Available [online]: <http://statistics.eurotransplant.org/reportloader.php?report=49044-6113&format=html&download=0>

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CHURCH ALSO HAS A SIGNIFICANT ROLE TO PLAY – SUPPORTING ORGAN DONATION CAN HAVE AN INFLUENCE ON RELIGIOUS PEOPLE

On the other side, consent rates should not be confused with actual donation rates. The number of people who give consent by following default rule is drastically different from the number of people who actually become donors. Families can reject donation even if their relative followed the default rule. Figure 2 presents actual donation rates, not effective consent rates in same countries.

Importantly, a change in default rules without other interventions might not be sufficient for increasing organ donations and transplants. First, it is crucial to have a good healthcare system with well-equipped hospitals, educated and trained doctors, and efficient coordination among the actors. Second, it is important to educate the public and create a sense of trust in the healthcare system. In the end, a family could refuse to give approval for donation if they believe that a system is corrupt, that only rich people can receive an organ, or that doctors behave unethically. The church also has

a significant role to play – supporting organ donation can have an influence on religious people.

Croatia and Serbia decided to implement this nudge and change default rules. Current Serbian law about organ transplantation requires expressed consent for organ donation after death.²² Families can refuse to donate the organs from their deceased relative even if the relative has signed a donor card.

In Serbia, a bill from 2016 is waiting approval in parliament that would regulate organ donation in a different way.²³ This bill is a part of an effort to increase rates of organ transplants. In 2017, Serbia had only 4.2 donors per million residents.²⁴ In contrast, Croatia had 31.8 organ donors per million residents in the same year (See Figure 3). The proposed bill defines different criteria for organ donation. Consent for organ donation is presumed, with families being able to oppose organ donation even if a person expressed consent for donation.

Croatia has a law that is similar to the bill being proposed in Serbia.²⁵ The law was initiated in 2012, but Croatia conducted systematic efforts to raise the number of

²² "Zakon: O Transplantaciji Organa" (2009) [in:] *Sl. glasnik RS*, Volume 72. Available [online]: (http://www.paragraf.rs/propisi/zakon_o_transplantaciji_organa.html)

²³ "Nacrt Zakona o Presađivanju Ljudskih Organa u Svrhu Lečenja – Tekst Propisa" (2016) [in:] *Kompanija Paragraf*. Available [online]: http://www.paragraf.rs/nacrti_i_predlozi/161216-nacrt_zakona_o_presađivanju_ljudskih_organa_u_svrhu_lečenja.html

²⁴ Petrović, L. (2017) "U Srbiji udvostručen broj donora organa", [in:] *B59*. Available [online]: https://www.b92.net/zdravlje/vesti.php?yyyy=2017&mm=10&nav_id=1313444

²⁵ Hungary became a preliminary member of Eurotransplant in 2012 (full membership in 2013).

²⁶ "Zakon o presađivanju ljudskih organa u svrhu liječenja" (2012) [in:] *Zakon*, Issue 144. Available [online]: <https://www.zakon.hr/z/556/Zakon-o-presa%C4%91ivanju-ljudskih-organa-u-svrhu-lije%C4%8Denja>

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FORCED TO CHOOSE, THERE IS A STRONG LIKELIHOOD THAT PROCRASTINATION AND/OR INERTIA WILL NOT OCCUR

transplants in previous years. Default rule is just one of the measures, (See Figure 3). A rise in deceased donors started long before the law had been adopted. There is good coordination and management, national organization of the transplant program, membership in the Eurotransplant, and public campaign.²⁷ Importantly, opting out of the default option must be as easy as possible. If people have to spend hours to opt out and choose not to be donors, then it is not a nudge. Nudging requires that freedom of choice be protected. If there are obstacles for choosing other options that take the form of time-consuming bureaucracy and waiting in a hospital, then freedom of choice is not preserved.

There is also a third way of creating a context in which citizens are making decisions about organ donation. An alternative to default rules is 'forced choosing' – people must choose whether or not they want to be potential organ donors. For example, if an individual wants to get a driver license, he/she must answer a question about or-

gan donating. Mandated choice is implemented in New Zealand – people must mark whether they want to be donors, and it is written on their driver's license.²⁸

The idea of mandated choosing has a number of benefits. First of all, when an individual is forced to choose, there is a strong likelihood that procrastination and/or inertia will not occur. There is no default rule – people cannot just do anything. They are actually forced to make a decision. Secondly, it is controversial to assume anything about organ donation. It is an important question, and all individuals should have an exclusive right to decide what they would do with their body parts.

In this context, being aware just how powerful procrastination and inertia are, it is problematic to claim that a person actually wanted to be a donor just because he/she did not make a decision not to be a donor. In addition, it is much easier for a family to decide whether to allow organ donation if their deceased relative actively made a choice. Such a family may also know about inertia and procrastination. A fact that a deceased person stayed firm with the default rule does not tell us anything about their preferences and wishes on organ donation. On the other hand, choice is mandated and it can be a problem for personal freedoms. An individual does not have an option to decide not to make a choice.

DIFFERENT ORGAN DONATING CHOICE ARCHITECTURES: WHO MAKES A DECISION?

We mentioned three different choice architectures regarding organ donation: presumed rejection to be a donor, presumed consent, and compulsory choice. The

²⁷ Živčić-Čosić, S. et al. (2013) "Development of the Croatian Model of Organ Donation and Transplantation", [in:] *Croatian Medical Journal*, Volume 54(1), pp. 65-70.

²⁸ See: Organ Donation New Zealand. Available [online]: <https://www.donor.co.nz/about-odnz/>



LIBERTARIAN PATERNALISM IN THE HANDS OF CORRUPT GOVERNMENT OFFICIALS CAN SERIOUSLY ENDANGER FREEDOM AND INDEPENDENCE

question is, who has the main role in deciding about organ donation: the individual or their family? Where lies final decision?

Presumed rejection, under current Serbian law, states that an individual must explicitly make a choice if s/he wants to be a donor. However, a family can overrule the decision if 'it can be unequivocally concluded'²⁹ that an individual changed her/his opinion about organ donation. So the decision of a person plays a great role, allowing the family very little space to influence the decision after the death of a relative. This approach also has its drawbacks, primarily that citizens often fail to make a decision to be a donor, even if they wish to be one. But when a person makes an active decision to be a donor, their

family cannot easily, and without a clear reason, reject organ transplantation from their deceased relative.

Presumed consent, on the other hand, uses this failure to make a decision to raise consent rates. But in this model, the family has a much bigger role. In the proposed Serbian law, if a person doesn't take any decision, they are considered to be a donor. But their family decides whether their relative would actually become an organ donor in this situation. In other words: because of inertia, in the opt-out system an individual often sticks to the default rule. Nobody knows their real wishes, we only know that they did not take any action regarding the default option, and in that situation their family makes the final decision. So basically, if someone sticks to the default rule, it allows the family to make the final decision of whether or not their organs will be donated.

Also, in this model, it is problematic to exclude family members from the process. There is no clear and definite answer to the question of what the deceased would have wanted to be done with their organs. Lack of active choice not to be a donor means almost nothing if we know how powerful the default rule is. Because government doesn't have a clear preference, it is reasonable to give the final decision to the family.

The third option may be the best solution if government wants simultaneously to raise consent rates while leaving the decision to an individual. Inertia and status quo bias are no longer a problem; a person must make a choice. Nothing is presumed, so there is not much need for the role of their relatives. This model emphasizes the importance of clear preferences about someone's organs after death. If we

²⁹ See: Article 50 in "Zakon: O Transplantaciji Organa" (2009) [in:] *Sl. glasnik RS*, Volume 72. Available [online]: (http://www.paragraf.rs/propisi/zakon_o_transplantaciji_organa.html)



JUST LIKE IRRATIONALITY OF CITIZENS CAN BE A REASON FOR GOVERNMENT INTERVENTION, IRRATIONALITY AMONG GOVERNMENT OFFICIALS CAN ALSO BE A REASON AGAINST INTERVENTION

agree that just assuming anything about organ donation is controversial, this may be the most plausible option.

NUDGES: PERSONAL FREEDOM AND ETHICAL CONCERNS

Nudges may be divided according to intentions. The nudges of the first type compel people to act in a way that makes them better off (by their own standards). As people have a tendency to behave in an irrational manner, a government can nudge them in the right direction. For example, a government could nudge people to exercise more, consume less sugar, or save more for retirement. However, as Mark D. White elaborates in his book *The Manipulation of Choice: Ethics and Libertarian Paternalism*, the problem is that there is no way for a government to know people's true goals.³⁰ Government officials presuppose that there is a set of universally desirable wishes or outcomes. In other words, different goals are not equally valuable by some external 'objective' criteria. This attitude is far from liberal thinking. Of course, individuals have the freedom to act differently, but firstly they are seen as irrational, and secondly if nudges are so powerful, it could be difficult to choose an option that the government does not consider valuable.

The second type of nudges are measures that influence behavior to solve public problems, such as those of organ donation/transplantation or waste/recycling. The problem with this approach is that a government treats citizens like irrational beings that are not capable of being responsible and independent. Therefore, the government uses the same cognitive failures and biases to nudge them. People are sometimes sticking to default rules be-

cause they are procrastinating, but government officials use the same human characteristics to get different outcomes. They are not treating people as capable of learning and overcoming mistakes.

The third type of nudges is based on government officials having bad intentions or being biased. Libertarian paternalism in the hands of corrupt government officials can seriously endanger freedom and independence. Officials can turn public policies based on nudging in their favor. In addition, government officials are only human, and are prone to making errors in reasoning. Just like irrationality of citizens can be a reason for government intervention, irrationality among government officials can also be a reason against inter-

³⁰ White, M. D. (2013) *The Manipulation of Choice: Ethics and Libertarian Paternalism*. Palgrave Macmillan. US.

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PERSONAL FREEDOM IS ONE THAT SHOULD MAKE US RESPONSIBLE, MORE RATIONAL, AND BETTER INFORMED

vention. Sometimes a government can make a problem even worse, which can lead to the creation of other problems. For example, availability heuristics can cause officials to redistribute a great amount of resources for solving a problem that is not that important. Because people are not good at estimating risks and frequency of some problems, they can think that it requires government action. Or the costs of government intervention can be hidden and not visible at first glance.

By nudging, a government encourages human flaws. If this strategy is designed in a way that takes care of our cognitive flaws, we can act mindlessly and do not have the opportunity to learn from our mistakes. Personal freedom is one that should make us responsible, more rational, and better informed. By manipulating our freedom, nudging takes away those benefits from us. We know that government is taking care of our mindless and irresponsible behavior, so we do not have to.

Mark D. White proposes three solutions for a government to treat people with respect and dignity.³¹ First, government should

³¹ Ibid. p. 137.

provide information. The goal of information should not be to influence behavior, but rather to inform neutrally. For example, many people may not know where and how to sign up for a donor card. Maybe they do not even know that patients are dying due to the shortage of organ donors. In this case, the goal should be to raise public awareness. After that, an individual should have full freedom to choose without being nudged.

Second, it can be effective to educate citizens about their biases and flaws. People often make mistakes when acting instinctively and emotionally, so advising them to take time while making important decisions could be constructive. In the case of organ donations, informing people about status quo bias, and educating them on how to overcome it could possibly bring positive results. In the end, when making mistakes, we learn how to control our biases. A nudge does not teach us that.

Third, a sense of responsibility is very important. If a government takes care of our weaknesses, then there is no reason to be concerned about the consequences of our potentially mindless decisions. If the whole system is designed to use our flaws and generate better results, we do not have an incentive to work ourselves. As soon as government steps back, it is our responsibility if a disaster occurs. If someone thinks that there should be more organ donors, and is willing to become a donor, such a person must ensure not to procrastinate. Different default rules can fix a problem now, but in the long term, people are deprived of responsibility and learning.

CONCLUSIONS

Influencing behavior without setting restrictions can be seen as an attractive measure for both liberals and paternalists. Nudging has already become popular in the West, particularly in the United States and

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INFLUENCING BEHAVIOR WITHOUT SETTING RESTRICTIONS CAN BE SEEN AS AN ATTRACTIVE MEASURE FOR BOTH LIBERALS AND PATERNALISTS

the United Kingdom where special bodies are researching decision-making and proposing public policies that nudge citizens. On the contrary, Serbia does not have such a practice, though a bill to change default rules for organ donating has already been introduced.

It seems like a logical and acceptable solution; if people behave in a mindless and lazy manner, we should change the way in which options are presented so that these traits solve problems within the society. On the other hand, government doesn't restrict anything. Freedom of choice is preserved; no regulatory bans or high taxes are imposed.

Libertarian paternalists claim the same should be done with pension savings, healthcare insurance, pollution, antibiotics overuse, electricity consumption, smoking, and many other issues. People often make systematic mistakes in reasoning, which is why it is claimed a system should be designed to use these mistakes in order

to produce better results. Governments should intervene to save citizens from themselves.

However, there are ethical concerns regarding the freedoms, dignity, respect, and autonomy of individuals. Libertarian paternalists believe that the state should take care of its citizens in the same way that parents take care of their children. Citizens are in trouble because of their flaws, therefore the only solution is governmental supervision. Yet, libertarian paternalists do not think about finding solutions to the fundamental problem – mindless and biased reasoning.

If a government is neutral and does not influence decision-making, people will have an opportunity to make mistakes and learn from them. In this scenario, freedom contributes to the development of an individual. Therefore, citizens could be educated on heuristics and biases, as well as ways to deal with these phenomena when they face problems in their personal lives. •



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Freedom, State, and Religious Education: In Search of Common Ground



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DARIA
HEJWOSZ-GROMKOWSKA

If an outsider takes a look at the religious landscape in Europe, a variety of odd or even schizophrenic behaviors may be observed. On the one hand, some people claim that they do not believe in God, while on the other, they get caught up in the Christmas shopping frenzy. They neither attend masses nor pray; yet they are excited about Eastern spiritual practices, and so they practice yoga instead. They distance themselves from religious symbols, but end up wearing yin and yang on at-shirt. They do not wish to be preached to, yet they are happy to quote the Dalai Lama on random occasions. These practices show that people of the West tend to regard themselves as spiritual but not religious. It also proves that many Europeans, and Americans too, are giving up traditional churches and turning towards spirituality and Eastern tradition.

Although the Western societies are commonly perceived as secular, they exhibit a need of spirituality. Some may say that religion is a private matter, but when a religious fundamentalist commits a crime religion comes out as a destructive power to European values. Sometimes we forget that European values have their origins in Christian tradition, with institutions such as schools and universities originally being funded and

run by the church. From this perspective, Samuel Huntington's thesis about the clash of civilization is still valid, and religion itself plays a leading role in shaping political, sociological, and cultural discourse.¹

SECULARIZATION OF THE STATE AND SEARCHING FOR SPIRITUALITY

According to Peter Berger, modern societies are increasingly secular and plural.² However, it cannot simply be said that 'God is dead' – god still lives, maybe not just the Christian God. This means that people are not atheists *sui generis*, rather they search for a god or gods and they find him/her/ them in different places, not solely in the traditional, hegemonic Church.³

A traditional church – be it Catholic, Anglican, Lutheran – has long been losing its privileged position in the society since the Reformation, Industrial Revolution, and especially after WWII.⁴ Sociologist Thomas Luckmann argues that religion is a private matter, god is silent, and that religion no longer plays a crucial role in public discourse. It must be noted that secularization may be understood as a decline in the role

¹ Huntington, S. (1993) "The Clash of Civilizations", [in:] *Foreign Affairs*, Volume 72, No. 3.

² Berger, P. (1967) *The Sacred Canopy: Elements of a Sociological Theory of Religion*, Garden City New York: Doubleday & Company Inc.

³ See, for example: De Castella, T. (2013) "Spiritual, but Not Religious", [in:] *BBC News Magazine*, January 3. Available [online]: <http://www.bbc.com/news/magazine-20888141>;

Tan, C. (2013) "Why Do Brits Seek Eastern Spirituality When They Have So Much of Their Own?", [in:] *The Spectator*, February 16. Available [online]: <https://www.spectator.co.uk/2013/02/western-feng-shui/>

⁴ Chadwick, O. (1975) *The Secularization of the European Mind in the 19th Century*, Cambridge: Cambridge University Press;

Gellner, E. (1992) *Postmodernism, Reason and Religion*. London and New York: Routledge;

Habermas, J. (2006) "Religion in the Public Sphere", [in:] *European Journal of Philosophy*, Volume 14, Issue 1; Luckman, T. (1967) *The Invisible Religion: the Problem of Religion in Modern Society*. New York: MacMillan.

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LIBERAL STATES
PROVIDE TWO
TYPES OF FREEDOM:
OF RELIGION
AND FROM RELIGION

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THE ISSUE OF THE BURKA IS RELATED TO THE FUNDAMENTAL RIGHT TO RELIGIOUS EXPRESSION

that the Church plays in the Western, liberal state and society.⁵ This does not indicate, however, any struggle with the Church, but rather signifies that it is being ignored and that societies live according to the *"etsi deus non daretur"*⁶ principle.

Nevertheless, people in the West do not resort to apostasy; rather, they abandon traditional religious practices and rituals. Many of them believe that living without God is possible and may perhaps be even better. In his teachings, philosopher Leszek Kołakowski emphasized that faith and religion help human beings overcome every-day absurdities, and may calm existential fears.⁷ This may be the reason why people tend to exhibit a wide range of spiritual practices in the form of myths, legends, esoteric neo-pagan traditions, and off-trail healing methods. These forms of spirituality are competitive to traditional church. People move away from traditional churches and religious rituals, but they still search for non-material values for some

kind of spiritual experiences. This trend was confirmed in the Pew Research Centre survey conducted in the United States – 37% of Americans regard themselves as spiritual but not religious. These people are not affiliated to any religious institution.⁸

The term "spiritual but not religious" has become very popular, recently gaining more and more supporters across the West.⁹ Traditional church is an impostor to these people, while new forms of spirituality offer – just like a free market – many choices and lifestyles. Terence Copley describes spirituality in a rather interesting manner stating that it is "like Lycra underwear according to its advertising claims, spirituality can could itself to fit any personal contour. It is assumed that individuals are expected to conform to a religion and its doctrines: religion is perceived as a take-it-or-leave-it affair. You fit in or you don't. Spirituality is the bespoke tailoring of the personal life, with oneself as the tailor. Spirituality is moving all the time and cannot be captured in a net or formula".¹⁰

CITIZENSHIP, RELIGION, AND FREEDOM: STRANGE BEDFELLOWS OR LONG-TERM PARTNERS?

The terms 'religious' and 'religion' have numerous definitions based on concepts grounded in various disciplines, but what about 'secular' and 'secularization'? These signify something more than a sheer lack of religious institutions in the state and society. Marius Felderhof, a scholar from the University of Birmingham, argues that "pri-

⁸ Per Research Center (2012) *"Nones" on the Rise*. Available [online]: <http://www.pewforum.org/2012/10/09/nones-on-the-rise/>

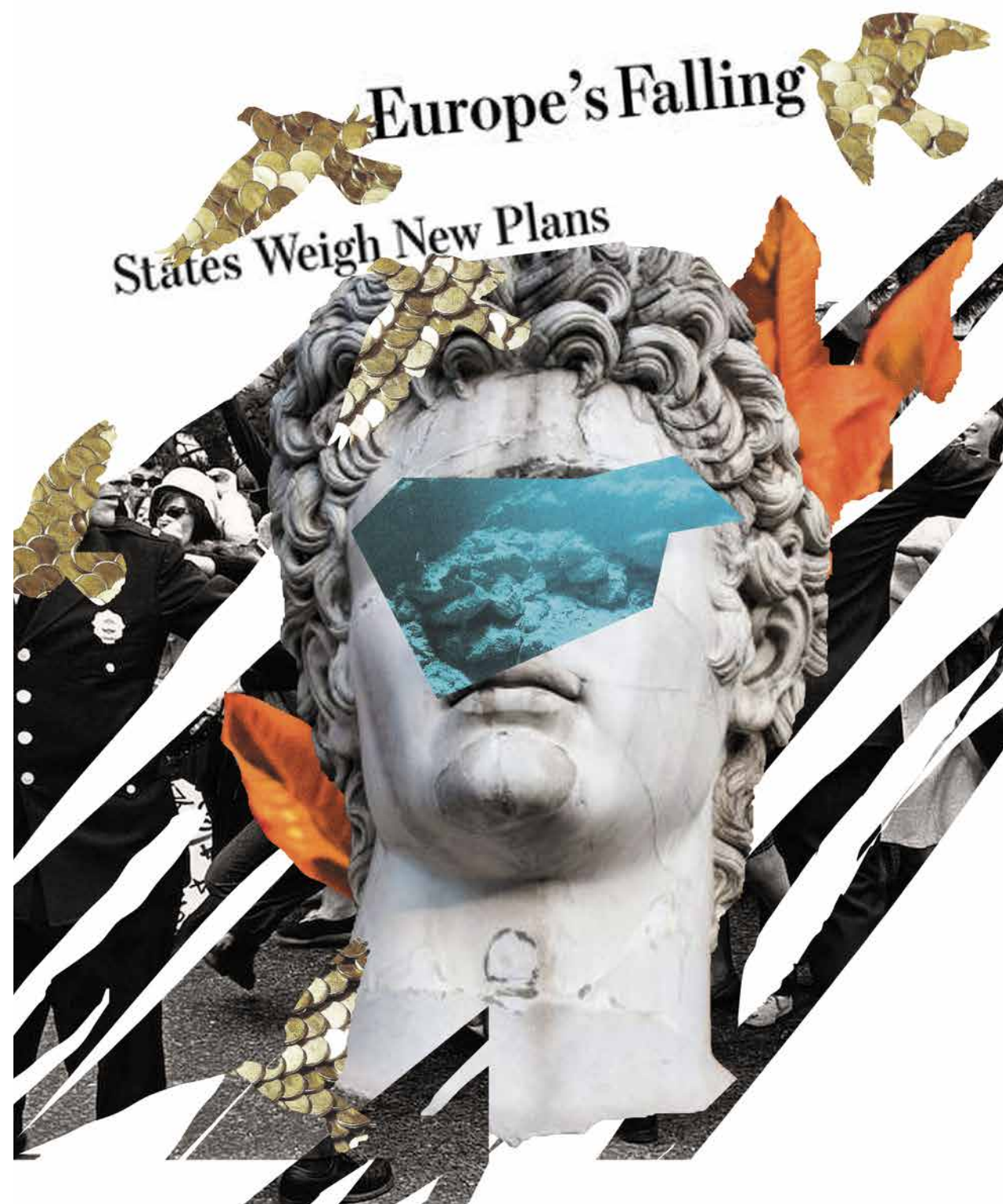
⁹ Heelas, P. (2009) *Spiritualities of Life: New Age Romanticism and Consumptive Capitalism*. UK: Blackwell Publishing, p. 83.

¹⁰ Copley, T. (2005) *Indoctrination, Education and God. The Struggle for the Mind* London: Society for Promoting Christian Knowledge.

⁵ Eade, T. (2012) "Spiritual and Moral Development" [in:] *Debates in Religious Education*, L.P. Barnes (ed.). London and New York: Routledge.

⁶ Even if God did not exist.

⁷ Kołakowski, L. (2001) *The Presence of Myth*. Chicago and London: University of Chicago Press.



or to a modern period, religion was simply what everyone did, i.e. it was how they lived".¹¹ Following Reformation, the word 'secular' emerged and shaped the socio-political aspects of human life. As Marius Felderhof, a scholar researching secularization, observes, 'secular' might refer:

1. "to collective life outside monastic walls (...);"
2. "(...) to the world where people can live their lives free from direct ecclesial influence or control but where religious faith could nevertheless freely express itself and where religious individuals and institutions are active and contribute to public debate and decisions about society's collective life (...)"
3. "(...) to a situation where the state has devised an independent value system that impinges on religious life so that the individuals and institutions are constrained or straightforwardly prevented, from operating according to their own standards and purposes in the public life square".

An example of the latter was the introduction to the Catholic adoption agencies in junction, in order not to favor solely heterosexual couples. This practice is not about equity – as the British government suggested – but precisely about secularism.¹²

Today in the West, we are witnessing the discursive struggle over the place of religion in the social life (e.g. debates on burka, same-sex marriages). Samuel Huntington describes it perfectly as a "clash of civilizations".¹³ Moreover, the terms "religion" and "conflict" often appear together

¹¹ Felderhof, M. (2012) "Secular Humanism", [in:] *Debates in Religious Education*, L. P. Barnes (ed.). London and New York: Routledge, p. 146.

¹² Ibid.

¹³ Huntington, S. (1993) "The Clash of Civilizations", [in:] *Foreign Affairs*, Volume 72, No. 3.

in the public debate. Today, one example of religious conflict in the West is a war waged over headscarves.

Liberal states provide two types of freedom: *of' religion* and *from' religion*.

Let us take a look at France. President Nicolas Sarkozy has spoken out strongly against burkas, stirring up a stormy debate. He claimed that "the burka – a garment covering women from head to toe – reduced them to servitude and undermined their dignity".¹⁴ This attitude is an example of freedom *from* religion. President Barack Obama, contrary to his French colleague, said that freedom is about the possibility of expressing religious beliefs, and the burka is a perfect example of manifesting one's religious convictions.¹⁵ From this point of view, the issue of the burka is related to the fundamental right to religious expression.

The contentious relationship of religion and freedom is also manifested in the matter of same-sex marriages. All three leading world religions (Judaism, Christianity, and Islam) condemn this type of human relationship and perceive same-sex marriage as a heavy sin. Nevertheless, currently, an increasing number of liberal states changed the law to give same-sex marriages the same legal status as opposite-sex marriages have.¹⁶ The religious people who openly criticize same-sex marriages are accused

¹⁴ BBC News (2009) "Sarkozy Speaks Out Against Burka". Available [online]: <http://news.bbc.co.uk/2/hi/europe/8112821.stm>

¹⁵ LaFranchi, H. (2009) "In Battle of the Burqa, Obama and Sarkozy Differ", [in:] *The Christian Science Monitor*, June 23. Available [online]: <https://www.csmonitor.com/USA/Foreign-Policy/2009/0623/p02s20-usfp.html>

¹⁶ See: Perper, R. (2017) "The 25 Countries around the World Where Same-Sex Marriage Is Legal", [in:] *budinessinsider.com.pl*. Available [online]: <https://businessinsider.com.pl/international/the-25-countries-around-the-world-where-same-sex-marriage-is-legal/kw38chk>



CITIZENSHIP AND RELIGION SUPPORT CIVIC ENGAGEMENT AND SOCIAL PARTICIPATION

of being bigots, intolerant, and parochial. Thus, they may experience some kind of ambivalence – on the one hand, they are expected to be tolerant towards other lifestyles (including same-sex couples), while on the other hand they feel obliged to follow religious commandments. The example of same-sex marriage shows how the social tensions in terms of religious issues may emerge.

RELIGIOUS EDUCATION IN COMMUNITY SCHOOLS?

Some scholars (James Arthur, Robert Putnam, Jean Bethke Elshtain, among others) argue that citizenship and religion support civic engagement and social participation.¹⁷

J.B. Elshtain, an American ethicist and philosopher, claims that "those among us who seek a thoroughly secularized society, stripped of any and all public markers and reminders of religion in the view that religion

must be privatized and become invisible to public life, wind up, however inadvertently, weakening our civic life".¹⁸ Moreover, Robert Putnam, an American political scientist who shows the role of the parishes in the local communities, indicates that they help to cumulate social capital (especially bonding). However, he concludes that social capital has been weakening in the local communities, as less people go to churches and attend Sunday schools.¹⁹ James Arthur also points to the significant role of churches and parishes in developing social engagement.²⁰ In the Christian tradition, responsibility is a virtue and participation in social and civic life is a moral duty.

There are two main approaches towards teaching religious education in schools: *from* and *about* religious sources. The former is often confessional in nature, and includes elements of worship, while the latter is phenomenological and academic-oriented.²¹ Most Western state-run schools offer religious education²² (either confessional or phenomenological). When religious education is mandatory in the educational system, it usually employs the phenomenological approach. This is the case for Norway and England and among others. Confessional religious education is usually optional.

¹⁸ Elshtain, J.B. (2001) "Civil Society, Religion, and the Dormation of Citizens", [in:] *Making Good Citizens. Education and Givil Society*, D. Ravitch, J.P.Viteritti (eds.), New Haven-London: Yale University Press, p. 272.

¹⁹ Putnam, R. (2001) *Bowling Alone: The Collapse and Revival of American Community*. New York, London, Toronto, and Sydney: Simon & Schuster Ltd.

²⁰ Arthur, J. (2008) "Christianity, Citizenship and Democracy" [in:] *Education For Citizenship And Democracy*, J. Arthur, I. Davies, and C. Hahn (eds.), Los Angeles, London, New Delhi, Singapore: Sage;

²¹ Barnes, L. P. (ed.) (2012) *"Debates in Religious Education"*. London and New York: Routledge.

²² Pepin, L. (2009) "Teaching about Religions in European School Systems. Policy, Issues and Trends". Network of European Foundations.

¹⁷ See: Arthur, J. (2008) "Christianity, Citizenship and Democracy" [in:] *Education For Citizenship And Democracy*, J. Arthur, I. Davies, and C. Hahn (eds.), Los Angeles, London, New Delhi, Singapore: Sage; Elshtain, J.B. (2001) "Civil Society, Religion, and the Dormation of Citizens", [in:] *Making Good Citizens. Education and Givil Society*, D. Ravitch, J.P.Viteritti (eds.), New Haven and London: Yale University Press; Putnam, R. (2001) *Bowling Alone: The Collapse and Revival of American Community*. New York, London, Toronto, and Sydney: Simon & Schuster Ltd.

As Western societies are more plural and multicultural than in the past, the educational systems of Western states adopted to the challenge of dealing with diversity in the classrooms. This is the case for Norway, for example, where for many years religious education used to be compulsory. Christian-oriented Norway lost in the European Court for Human Rights two cases on religious education in schools (in 2006 and 2008).²³ Before these events, schools had been obliged to teach Christian re-

²³ Leivrik, O. (2010) "Models of Religious Education in the Muslim World: Current Developments and Debates on How to Teach Religion and Ethics in Public Schools", [in:] *International Handbook of Inter-religious Education*. London and New York: Springer.

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RELIGIOUS
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ligion and ethics. The Court found that Christianity was being privileged (2006) and that the school course, *Christianity, religion, and ethics*, violates the human right to be taught in a critical, plural, and objective way. Consequently, the Norwegian curricula must follow the multi-religious approach – 55% of the content of the religion lessons should be devoted to Christianity, 25% to non-Christian religions and issues, and 20% to philosophy and ethics.²⁴

Today, in many Western societies, the debate on religious education is not so much about its presence in the school system as such, but rather about the content of curricula. After all, the main objective of religious education is to promote tolerance and understanding of the *others*. From this point of view, religious education in schools can help in building and maintaining a multi-cultural dialogue. To achieve this goal, policymakers together with the representatives of the Church must accept pluralism as a core value. Teaching about religious issues is nowadays not about converting people, but rather about searching for the common ground between believers and non-believers.

SECULAR SCHOOLS IN POLAND?

In 2015, my colleagues from the *Liberté!* quarterly magazine launched in Poland the "Secular School" campaign. The aim of this endeavor was for the state to stop financing religion classes in Polish schools. Back then, I did not join the initiative because I believed that the problem is not the existence of classes on religion in the school system or who pays for them. The real problem lies in the curricula, or lack

²⁴ Donnelly, J. (2011) "Folgero v Norway 29.06.07 European Court of Human Rights", [in:] *teachdontpreach.ie*. Available [online]: <https://www.teachdontpreach.ie/2011/11/folgero-v-norway-29-06-07-european-court-of-human-rights/>



thereof, in what children are being taught and how this process of education is conducted. After 1989, Poland missed its chance to get it right and to discuss the role and purpose of religious education in Polish schools.

Currently, a class on religion in Poland is optional and financed from the state budget. Each school under the Education Act from 1991 is obliged to provide this course on demand for at least seven pupils (not only Catholics). Even though the legal basis for religious education in Poland is non-discriminatory – no interference between secular orientation and religious orientation – there is one aspect that should be modified. The church, especially the privileged in the Poland Roman Catholic Church with 95% of Poles declaring to be Catholics, should be more open and inclusive when planning and conducting classes on religion. It should invite different groups to cooperate in designing the curricula and handbooks. Additionally, pluralism and a multi-cultural dialogue should be encouraged as a vital part of school curricula.

CONCLUSIONS

Teaching *about* religion in schools is a mandatory element of the school system in most of the European countries, even though some may deem it to be a form of indoctrination. Yet, indoctrination can also be secular, with totalitarian regimes looked upon as an example. From this point of view, the school as a micro-world should simply offer pupils a choice. When religion is removed from public discourse altogether, citizens are deprived of the freedom to define themselves by the means of religion. The same happens when only one “true” religion is imposed on whole societies or states. In such a case, an individual is not left with much choice.

All this has already happened in the past – the option ‘without God’ was known in the communist regimes or Nazi Germany, while the option ‘with God’ was practiced in Portugal or Spain. Therefore, religious pluralism, a multi-cultural dialogue, and a balance between religious and secular claims and demands must be acknowledged and protected.

It is worth remembering that religion is a part of European culture and heritage. The people who think of themselves as liberals should be able to learn from this heritage and, build bridges between the past and the future. We must find a future that is not necessarily secular or radically religious, but rather – a golden mean. ●



✱

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MEMBERS OF 4LIBERTY.EU NETWORK

Free Market Foundation (Hungary) is a think tank dedicated to promoting classical liberal values and ideas. The organization's projects focus on advocating a free market economy and fighting racism. The Foundation's activities involve education, activism, and academic research alike, thus reaching out to different people.

Liberální Institut (Prague, Czech Republic) is a non-governmental, non-partisan, non-profit think tank for the development, dissemination, and application of classical liberal ideas and programs based on the principles of classical liberalism. It focuses on three types of activities: education, research, and publication.

The Lithuanian Free Market Institute (Vilnius, Lithuania) is a private, non-profit organization established in 1990 to promote the ideas of individual freedom and responsibility, free markets, and limited government. The LFMI's team conducts research on key economic issues, develops conceptual reform packages, drafts and evaluates legislative proposals, and aids government institutions by advising how to better implement the principles of free markets in Lithuania.

The F. A. Hayek Foundation (Bratislava, Slovakia) is an independent and non-political, non-profit organization, founded in 1991, by a group of market-oriented Slovak economists. The core mission of the F. A. Hayek Foundation is to establish a tradition of market-oriented thinking in Slovakia – an approach that had not existed before the 1990s in our region.

IME (Sofia, Bulgaria) is the first and oldest independent economic policy think tank in Bulgaria. Its mission is to elaborate and advocate market-based solutions to challenges faced by Bulgarians and the region face in reforms. This mission has been pursued since early 1993 when the institute was formally registered a non-profit legal entity.

The Academy of Liberalism (Tallinn, Estonia) was established in the late 1990s. Its aim is to promote a liberal world view to oppose the emergence of socialist ideas in society.

INESS (Bratislava, Slovakia), the Institute of Economic and Social Studies, began its activities in January 2006. As an independent think tank, INESS monitors the functioning and financing of the public sector, evaluates the effects of legislative changes on the economy and society, and comments on current economic and social issues.

Projekt: Polska (Warsaw, Poland) comprises people who dream of a modern, open, and liberal Poland. It is those to whom a democratic, effective, and citizen-friendly government is a key goal, and who help accomplish this goal while enjoying themselves, forming new friendships, and furthering their own interests.

Liberales Institut (Potsdam, Germany) is the think tank of the Friedrich Naumann Foundation for Freedom dedicated to political issues such as how liberalism can respond to challenges of the contemporary world and how liberal ideas can contribute to shaping the future.

Fundacja Liberté! (Łódź, Poland) is a think tank created in Łódź in 2007. Its mission is to promote an open society, liberal economic ideas, and liberal culture, and to organize a social movement around these ideas. Among the foundation's most recognizable projects are: *Liberté!*, *Freedom Games*, *6. District*. The foundation is coordinating the *4liberty.eu* project on behalf of Friedrich Naumann Foundation.

Republikon Institute (Budapest, Hungary) is a liberal think tank organization based in Budapest that focuses on analyzing Hungarian and international politics, formulating policy recommendations, and initiating projects that contribute to a more open, democratic, and free society.

Civil Development Forum (FOR) (Warsaw, Poland) was founded in March 2007 in Warsaw by Professor Leszek Balcerowicz as a non-profit organization. Its aim is to participate in public debate on economic issues, present reliable ideas, and promote active behavior. FOR's research activity focuses on four areas: less fiscalism and more employment, more market competition, stronger rule of law, and the impact of EU regulations on the economic growth in Poland. FOR presents its findings in the forms of reports, policy briefs, and educational papers. Other projects and activities of FOR include, among others, *Public Debt Clock*, social campaigns, public debates, lectures, and spring and autumn economic schools.

Visio Institut (Ljubljana, Slovenia) is an independent public policy think tank in Slovenia. Aiming for an open, free, fair, and developed Slovenia, the Visio Institut is publishing an array of publications, while Visio scholars regularly appear in media and at public events.

COOPERATING PARTNERS FROM EASTERN PARTNERSHIP COUNTRIES

The Institute for Economic Research and Policy Consulting (Kiev, Ukraine) is a well-known Ukrainian independent think tank, focusing on economic research and policy consulting. IER was founded in October 1999 by top-ranking Ukrainian politicians and scientists, and a German advisory group on economic reforms in Ukraine, which has been a part of Germany's TRANSFORM program. Its mission is to provide an alternative position on key problems of social and economic development of Ukraine.

Svetilnik (Ljubljana, Slovenia) is a non-profit, non-governmental, and non-political association. Its mission is to enlighten Slovenia with ideas of freedom. The goal of the association is a society where individuals are free to pursue their own interests and are responsible for their actions.

New Economic School – Georgia (Tbilisi, Georgia) is a free market think tank, non-profit organization, and NGO. Its main mission is to educate young people in free market ideas. It organizes seminars, workshops, and conferences for education and exchanges of ideas. NESG was founded by Georgian individuals to fill the knowledge gap about the market economy in the country and the lack of good teachers and economics textbooks.

PIOTR BENIUSZYS

POLITICS UNDER THE REIGN OF SOCIAL MEDIA

PAGE 006

Tweets and Facebook posts are frequently quoted in papers and on their websites, occasionally constituting the whole story. The public takes note. People who hitherto disregarded social media as a not-so-serious activity are faced with necessity to reconsider, since most of politics and their country's future seems to be decided there. These citizens, then, enter the stronghold of extremists and see a tendency to increase tolerance towards radical views.

ESZTER NOVA

**CENSORSHIP IS THE LEAST OF THE PROBLEMS: THE POLITICAL
AND ECONOMIC THREATS TO FREEDOM OF THE PRESS IN HUNGARY**

PAGE 034

Under state capture and a quickly enriched oligarchic class, loyal allies of the governing party can hold a considerable share in the media and tilt it towards governmental propaganda. In December 2017, PM Orbán announced his plans to take the rest of the Hungarian media "into Hungarian hands" and with that, he invented media sovereignty, a new tool of authoritarianism. According to him, if the United States and Germany can have 'locally owned media,' then so can he.

IVAN BREGOV

**PERSONAL FREEDOMS UNDER ONGOING TRANSITION FROM TOTALITARIANISM
TO DEMOCRACY: THE CASE OF BULGARIAN JUDICIARY**

PAGE 054

The role of the judiciary is of particular importance for the exercise of rights and the protection of the interests of citizens. If prosecutors do not investigate and accuse equally all criminal suspects, then the state is the protector of crime and aggressor against personal freedom.

JÁNOS KÁRPÁTI

**"STOP SOROS": A FAKE GOVERNMENTAL LEGISLATION PROPOSAL
IN THE HUNGARIAN ELECTION CAMPAIGN**

PAGE 086

According to the latest campaign slogans of Fidesz, it is important to go to the polls and give Fidesz a two-thirds majority, ensuring the adoption of the "Stop Soros" package. It clearly shows that the package is an integral part of the government's communication campaign that denies civil organizations being critical of the government, the right to express their views, and take part in public life. Such legislation is typical of dictatorships, not democracies.

BILL WIRTZ

WATCH OUT: PATERNALISM IS TAKING OVER EUROPE!

PAGE 114

Be it alcohol, tobacco, or sugary drinks; individuals have a number of vices that they voluntarily engage in. It has been commonly accepted that we attempt to engage in these "vices" with moderation. However, over the past years, public health advocates have made it their mission to regulate people's lifestyle directly and indirectly. Consequently, we have seen the emergence of the so-called "Nanny State," in which the politicians in charge of the regulatory state have deemed themselves competent to determine the right amount of consumption on all of these products.

DARIA HEJWOSZ-GROMKOWSKA

FREEDOM, STATE, AND RELIGIOUS EDUCATION: IN SEARCH OF COMMON GROUND

PAGE 144

Today, in many Western societies, the debate on religious education is not so much about its presence in the school system as such, but rather about the content of curricula. After all, the main objective of religious education is to promote tolerance and understanding of the others. From this point of view, religious education in schools can help in building and maintaining a multi-cultural dialogue.

**1800 copies
ISSN 2391-7083**