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**JAN MASARYK REVIEW OF INTERNATIONAL STUDIES  
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Jan Masaryk Review of International Studies is a scholarly, peer-reviewed journal published by the Jan Masaryk Centre for International Studies, University of Economics, Prague. It aims to disseminate original theoretical and empirical research and stimulate debate on international phenomena and processes encompassing international and European politics, diplomacy, economic diplomacy and international law.

Revue mezinárodních studií Jana Masaryka je vydávána Střediskem mezinárodních studií Jana Masaryka, Fakulty mezinárodních vztahů, Vysoké školy ekonomické v Praze. Cílem časopisu je rozšiřovat výzkum a poznání a podněcovat diskuzi v oblasti mezinárodní a evropské politiky, diplomacie, ekonomické diplomacie a mezinárodních práva.

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JAN MASARYK REVIEW OF  
INTERNATIONAL STUDIES  
REVUE MEZINÁRODNÍCH STUDIÍ  
JANA MASARYKA

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# INFORMATION FOR AUTHORS

Articles published in Jan Masaryk Review of International Studies have the character of research articles, consultations and book reviews.

The authors of research articles should inform the reader about the theoretical assumptions and hypotheses, the concepts used, and the method applied in analysing the empirical data. In the discussion, authors will explain their interpretation of their results and theorize on their importance to existing and future research. The general goal of a research article is to publish research results rather than the author's opinions.

A consultation should introduce a certain issue with a focus on International Relations. The authors should present the results of a theoretical or empirical inquiry which provides new facts about a phenomenon under investigation. The general goal of a consultation is to describe the results of empirical research or present a review of literature focused on a specific problem.

The book review briefly introduces a book in the International Relations discipline. It summarizes the research goals, structure and content of the book. The authors should indicate the strong and weak points of the book and identify its target readership. The general goal of a book review is to inform readers about a book and assess its contribution to the field. Alternatively, two or more books can be reviewed and compared.

# INFORMACE PRO AUTORY

Revue mezinárodních studií Jana Masaryka přijímá a po recenzním řízení publikuje stati, konzultace a knižní recenze (recenze neprocházejí recenzním řízením). Původní výzkumné články – stati i přehledové články – konzultace musí respektovat pravidla psaní odborného textu.

Autoři statí informují čtenáře o teoretických předpokladech, hypotézách, pojmech a metodách použitých při analýze empirických dat. V diskusi pak autoři interpretují výsledky výzkumu, objasňují výsledky a vysvětlují význam a přínos výsledků pro stávající i budoucí výzkum. Cílem výzkumného článku je zveřejnění výsledků výzkumu, nikoli prezentace názorů autora.

Konzultace poukazuje na určitou problematiku z oblasti mezinárodních vztahů. Autoři prezentují výsledky empirického výzkumu v podobě podrobné deskripce, která poskytuje nová fakta o zkoumaném fenoménu nebo nabízí nový pohled již poznávanou otázku. Obecným cílem konzultace je popis výsledků empirického výzkumu nebo shrutí a diskuze současné literatury zaměřené na konkrétní problém.

Knižní recenze si klade za cíl stručně představit knihu z oboru mezinárodních vztahů. Shrnuje výzkumné cíle, strukturu a obsah knihy. Autor knižní recenze by měl uvést silné i slabé stránky recenzované knihy, identifikovat její cílové čtenáře. Cílem recenze je informovat čtenáře o knize a zhodnotit její přínos pro rozvoj oboru. Recenze může také představovat a porovnávat dvě nebo více knih.

# INTRODUCTORY MESSAGES

Dear readers,

Jan Masaryk Centre for International Studies, established in 1991, is the oldest academic institution in the Czech Republic engaged for training and research in international relations and diplomacy. During its 25 years' history, the Centre has contributed to the field with more than sixty monographs and hundreds of research reports, journal articles, chapters in edited volumes, conference and policy papers, etc. Its graduates have successfully filled prestigious positions both in the public and private sector and some of them are among the top researchers in the area, not only inside the country but also in a wider international context.

It is a great pleasure for me to announce that the portfolio of the Centre's academic activities is being extended by its own peer-reviewed journal, Jan Masaryk Review of International Studies. I believe that this is a step in the right direction in terms of contributing to contemporary scholarly debates reflecting the difficult times we have been witnessing in world politics for several years. The aim of the Centre is to provide an open, extensive platform for high-quality research that would attract the reader with innovative approaches, insightful thoughts and depth of analysis.

Moreover, it has been a long-term mission of the Centre as well as a more than twenty-year-long tradition to create new opportunities for young researchers to present their work and extend their academic networks. So far, this mission has come to life primarily within the International Conference of Young Scholars, Prague, and its proceedings. It is highly desirable that Jan Masaryk Review of International Studies continues this effort with its author-friendly and academically rigorous editorial approach.

I wish a good start and much success in their future activity to the editorial team and many imaginative, challenging and provoking ideas to the readers.

Štěpánka Zemanová, PhD

Head of the Jan Masaryk Centre for International Studies

Faculty of International Relations, University of Economics, Prague

Dear readers,

I am very pleased to introduce a new scholarly journal in the field of International Relations based in the Czech Republic. The journal is embedded at the Jan Masaryk Centre for International Studies and, as is evident, it shares its name with a department at the Faculty of International Relations, University of Economics in Prague. Jan Masaryk served in the foreign office from the very beginning of the newly established Czechoslovakia, and was appointed foreign minister multiple times as well. He is a figure of legendary status in the Czech Republic and I hope that the newly emerging journal follows this reputation too.

It is my sincere wish that the editors and the whole editorial board will discover authors with insightful and thought-provoking ideas on the one hand and gain faithful readers providing useful feedback on the other. I hope that not only well established authors but also graduate and post-doctoral students will publish their first research outputs in the Jan Masaryk Review of

International Studies. In this way, the Journal can help emerging scholars to enter international forums and debates within the social sciences. I am glad that I can express the hearty support of the Faculty of International Relations for this new publication, since it promotes the Faculty's strategy of internationalization and enhances its status as an institution which has achieved recognition worldwide. I am sure that the Journal will contribute to fulfilling this vision for a long time to come.

Radka Druláková, PhD

Vice-Dean for Research and Doctoral Studies

Faculty of International Relations, University of Economics, Prague

# CHARLIE HEBDO ATTACK: AN ANALYSIS OF CONSEQUENCES AND THE ROLE OF POLITICAL ISLAM IN THE EU

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Pamir Halimzai Sahill<sup>1</sup>

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**Abstract:** Was the attack on Charlie Hebdo offices in January 2015 an act of violence against media freedom or was it an act of revenge for presumed blasphemy? This article, employing a poststructuralist discourse analysis tries to find a broader meaning for Charlie Hebdo Attack (CHA). In this article, texts from EU, media, militant organisations and scholarly works are selected and it is argued that CHA was an act of political violence aimed at achieving certain political goals. It is claimed that post-CHA statements, narratives and discourses from EU or militant organisations create 'self/other' dichotomy as dividing practices which have certain power effects and implications. The 'identity/difference' debate is elaborated through existing discourses and scholarship showing that the 'self/other' dichotomy is multi-layered and multi-fold. This article analyses the role of political Islam in Europe through scholarly discourse and argues that the practices of Muslims in Europe are better understood if seen as political and not as religious or cultural. Finally, the article argues that the *security risk* narrative in Europe is magnified that brings the faulty *Clash of Civilisations* discourse into action which is in sharp contrast to the EU foundations and ideals of freedom and integration.

**Keywords:** Charlie Hebdo Attack (CHA), media freedom, reflectivism, poststructuralism, Foucault, discourse analysis, identity, identity/difference, EU.

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# 1 Overview

On January 07, 2015 two gunmen attacked offices of Charlie Hebdo – a satirical magazine – in Paris, killing 12 people. Media, quoting eyewitnesses, reported that at the time of shooting, the gunmen chanted ‘Allah is Great’ and ‘we have avenged the Prophet Muhammad’ in Arabic (BBC 2015) because Charlie Hebdo was planning to publish cartoons of the prophet of Islam<sup>2</sup>. French media released names of two brothers – Cherif Kouachi and Said Kouachi – involved in the attack. Next day, a gunman killed a policewoman in Paris suburb of Montrouge. On January 09, another gunman, Amedy Coulibaly, ‘took several people hostage at a kosher supermarket at Porte de Vincennes in the east of Paris after a shootout,’ and threatened to kill all hostages unless Kouachi brothers – who were hiding in a café – were allowed to go free (BBC 2015). All three gunmen were finally killed. Al-Qaida in the Arabian Peninsula (AQAP) claimed responsibility for the attack (BBC 2015).

In the wake of events in Paris, French president François Hollande named attackers as ‘terrorists and killers’ and appealed the French people to join hands to defend ‘democracy, freedom and pluralism’ (Hollande 2015). Former French president Nicolas Sarkozy said it was an attack against the ‘civilisation’ and that people must unite against ‘barbarism’ (Sarkozy 2015). Many world leaders condemned the attack as an assault on liberty and press freedom (Vale 2015, The Spectator 2015, The Economist 2015). While Pope Francis defended freedom of expression he also stressed on its limits and political correctness (Francis 2015). Journalists, cartoonists and bloggers as well as masses in France and across the world showed solidarity with Charlie Hebdo and published articles and cartoons defending freedom of speech. Many identified themselves with French phrase *Je Suis Charlie*<sup>3</sup> (The Telegraph 2015, The Guardian 2015). On January 11, many world leaders as well as almost three million people rallied across France to express unity and to defend liberty and the right of free expression (BBC 2015). The next day, thousands of people under the banner of Patriotic Europeans Against the Islamisation of the West (PEGIDA)<sup>4</sup> protested in Dresden against attack on Charlie Hebdo (Jackson 2015).

Framing of Charlie Hebdo Attack (CHA<sup>5</sup>) as an assault on freedom of expression, however, is problematic. That is why, this article assesses whether it was an attack on freedom, press, expression or speech or it was an act carrying broader meaning than that? As noted, the attackers claimed that their attack was an act of revenge for Prophet Muhammad – keeping that in view, the article evaluates the claim and looks into motives and objectives of such acts of violence which are not highlighted in the superficial discourse of mainstream media or at times are presented in reduced form thus restricting broader and comprehensive representations and interpretations. Furthermore, it looks into the consequences of such attacks and finally analyses the role of political Islam in the context of frontier-less European Union (EU) to see if it is a

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<sup>2</sup> In 2011 Charlie Hebdo had published cartoons of Prophet Muhammad. Al-Qaida in the Arabian Peninsula (AQAP) operating in Yemen issued a hit-list in March 2013 which included Stéphane Charbonnier of Charlie Hebdo (Inspire 2013) who was killed in the attack on Charlie Hebdo offices. Furthermore, the magazine came under threats and attacks in the past as well (The Economist 2015).

<sup>3</sup> Trans. ‘I am Charlie.’

<sup>4</sup> Patriotic Europeans Against the Islamisation of the West is a German far-right political organisation, its German name is *Patriotische Europäer gegen die Islamisierung des Abendlandes* and is abbreviated as PEGIDA. It was formed in October 2014 and demands strict immigration laws in Germany and Europe. The organisation began rallying on weekly basis in Dresden since October 2014 and at times the number of participants in marches has reached to 25000 (see: Jackson 2015).

<sup>5</sup> Charlie Hebdo Attack will be abbreviated as CHA from this point in the rest of the article.



security problem or otherwise. Politicians and media see CHA and similar acts of violence as a *problem* that needs to be *resolved* at any case. It is, however, argued that such approach itself is problematic and that an alternative theoretical and methodological International Relations' (IR) framework is necessary to provide a better understanding and see how official, opposition and media discourses construct various and at times, paradoxical realities.

## 2 Theory and methodology

This article employs a poststructuralist theoretical approach, mainly because rationalist and positivist tools of analyses do not delineate CHA and its consequences in efficient and comprehensive forms. For example, a bulk of statements from mainstream media, EU politicians and governments as well as some analysts reduce CHA to a level that it becomes merely an act of *religious terrorism* targeting media freedom. Post-CHA dominant discourse analysed in this article shows that in order to protect liberty from the 'evil' threats and acts of 'terrorism', the EU, European governments and media all feel the need of collective security measures. The problem-solving approaches, as Cox argues, see the world 'with the prevailing social and power relationships' aiming to address the issues so that the relationships and institutions 'work smoothly' (Cox 1981, 128-129).

When it comes to terrorism, such kind of approaches are neither new nor confined to individual acts like CHA. In fact, after September 11, 2001, the dominant discourse in the US and Europe functions in the same way and adheres to problem-solving, preventive and securitising strategies. Since that time, leaders and many scholars – seeing, understanding and analysing global politics from essentialist and foundationalist standpoints and implying causalities – have come up with discourses discussing why and how important it is to form a global alliance to fight against terrorism (Blair 2006). Some try to find ways to prevent violent crime and terrorist attacks (Bjørge 2013) and some conclude that to stop and end suicide attacks, the US should reduce militarily intervening in other countries unless it is unavoidable due to serious threats to national interests (Pape and Feldman 2010).

It is argued that rationalist perspectives and positivist epistemological convictions provide a 'very limited view of international politics' and the causality that they entail, results into reductionism (Dornelles 2002) which ultimately informs shallow and paradoxical discourses that not only shape the views of the populations but also – in the context of governmental practice – further reinforce and strengthen them. This process, at the end, does not even serve the problem-solving purpose but rather masks important phenomena and due to its dominance, suppresses alternative meanings and perspectives and that is what happened after CHA. Once the leaders and the media portrayed and represented CHA as an act of terrorism, it enraged European societies which, endowed leaders with authority and legitimacy to fight against it. Such representations and post-CHA discourse, however, is problematic. That is why, this article – ontologically speaking – sees CHA as a political act having a broader meaning and motives that transcend frontier-less EU and other states.

Methodologically, this paper is using discourse analysis as a framework to understand CHA as a political act with broad meaning and explores the post-CHA arena constructed through media discourse. The reason is, to put it in Der Derian's (1989) words:

International relations requires an intertextual approach, in the sense of critical inquiry into an area of thought where there is no final arbiter of truth, where meaning is derived from an interrelationship of texts and power is implicated by the problem of language and other signifying practices (6).

In addition, as positivists may assume, social reality does not exist *out there*, but is rather formed and made through representations that ‘are not descriptions of a world of facticity, but are ways of making facticity’ (Shapiro 1989, 13-14). The justification for utilising discourse analysis, precisely is due to the reason that texts, statements and words are built into narratives and discourses so that their interpretation gives a representation of the social reality in an inclusive way. In order to find better explanation and answers to questions raised in the previous section of the article, this study follows an accurate and specific method.

Texts for this study are selected using the *second* delimiting model provided by Hansen which is about utilising texts from official or government, opposition and media sources for analysis (2006, 57). In this regard, most of the texts are selected from the day Paris events took place and post-CHA statements, agreements and decisions of the leaders. In addition, some texts from as organisations (like Al-Qaida) are also be used for better understanding and explanation.

The reading and analysis of those texts enables this article to see how certain statements are selected and constructed in media and what those narratives represent. For this purpose, the selected texts from various media outlets are analysed and a broader meaning (Neumann 2008, 61) for CHA is explored. Second, based on the political representation of CHA and writings of Muslim scholars, the motives of militant organisations and significance of such attacks for them are analysed. Finally, the article uses existing literature to explore the role of political Islam in context of the EU.

### 3 CHA and the narratives

As noted in the descriptive timeline of events in the beginning of the article, many EU and non-EU leaders and media outlets interpreted CHA as a terrorist attack on freedom of expression. Multiple news stories, opinion articles, statements and cartoons (briefly discussed in the beginning) established the view that the attack demonstrated nothing but to silence the practice of free expression particularly in France and the EU in general (The Economist 2015, The Guardian 2015, The Spectator 2015, The Telegraph 2015, Jackson 2015, Vale 2015).

Addressing the nation, French president François Hollande stressed that this act of violence had nothing to do with Muslims and appealed his country fellows to stand united, mobilise and be vigilant to defend the ideals of liberalism (Hollande 2015). Former French president Nicolas Sarkozy, however, asked ‘civilized men’ to fight against ‘barbarism’ (Sarkozy 2015) while far-right politician and opposition leader Marine Le Pen said ‘we have to have courage to face reality; terrorism is only a means of Islamic fundamentalism. Behind terrorism is an ideology which developed in our land, our cities’ (Fleming 2015). She said that due to ‘fear and political correctness’ France is in denial of the reality of Islamic fundamentalism. In an interview with BBC journalist Fleming, Le Pen suggested that Schengen agreement should be suspended because without ‘controlling our territory’ the problem of fundamentalism cannot be addressed (Ibid., 2015). She constructed a ‘self/other’ dichotomy by saying that the vision of life of fundamentalists is ‘not ours, their values are not ours, their way of life is not ours. Those who live in our country must follow our rules, our way of life.’ She suggested that ‘massive, uncontrolled immigration’ must be stopped (Ibid., 2015).

Apart from French government and opposition, leaders from EU member states condemned CHA and showed their sympathy and solidarity with France. While reaffirming that Europe will protect the values of pluralism and liberalism, German chancellor Angela Merkel made statements which were aimed at PEGIDA and its anti-Islam marches. She said ‘Islam belongs to Germany,’ and that Berlin is doing everything to integrate migrants into German society ‘regardless of their religion’ (Ghouse 2015).

It is argued that the reaction from the EU somewhat resembles that of two French politicians – Sarkozy and Le Pen. EU commissioner for immigration and home affairs Dimitris Avramopoulos said in a press release ‘Europe must be united to defend its values and freedoms – including freedom of expression and of the press – against those who reject our way of life; those who hate democracy’ (Avramopoulos 2015). He said that events like CHA are a challenge to the EU and beyond, suggesting that EU member states should cooperate and coordinate to end money laundering that finances terrorism, prevent radicalisation and to set up a system to collect passenger data. ‘*Charlie n'est pas mort. L'Europe est Charlie*<sup>6</sup>, (Ibid., 2015)’ he concluded.

On January 19, Foreign Ministers from EU member states met in Brussels to discuss strategies to prevent further attacks. After the meeting, EU foreign policy chief Federica Mogherini announced in a press briefing that EU member states will launch anti-terror projects. She said ministers agreed to take multiples measures like:

[O]n one side, to have security attachés in the European Union Delegations in relevant countries. This means regular contact among professionals on our side and on the country that is hosting the delegation's side to develop cooperation on security issues and counterterroris[m] issue[s]. On the other side, the second thing that I want to do is to improve our communication with Arabic speaking populations, be it in the European Union – we have large communities that are Arabic speaking<sup>7</sup> – and with the larger Arab communities in the World. I think we need to improve our capacity to speak Arabic, read Arabic, [and] explain to the Arabic-speaking population our policies and also to listen to the messages that are coming from the Arab world (Mogherini 2015).

Federica Mogherini said that the ministers have agreed to ask European Parliament (EP) to ‘work on the passengers name record, the PNR,’ and to increase cooperation to prevent financing of terrorist acts, not only within EU but with other countries like the US, Canada, Australia, Japan, Norway, Switzerland, Iceland and UN agencies (Ibid., 2015).

Earlier in a meeting with the delegation of European Jewish Congress (EJC) in Strasbourg Mogherini had said that in terms of security, there should be no divide between EU’s internal and external actions, and that:

The EU is built on a belief that we can combat cross-border phenomena – from combatting the rise of anti-Semitic incitement on the internet, to tackling extremist ideology abroad, one of the priorities in developing a comprehensive strategy to combat emerging threats in the Middle East (Mogherini 2015).

The texts quoted here from media reports and EU political leaders’ statements show how the statements were made and how they finally resulted in a policy discourse. In the beginning news stories suggested that CHA was nothing but an assault on media freedom, so was the initial response of EU and non-EU leaders. Afterwards, on policy level however, EU leaders agreed to combat *terrorism* by taking further security measures. It is argued that the reading of media reports, statements from government officials and EU leaders makes way to advance the debate to identity/difference.

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<sup>6</sup> *Trans. Charlie did not die. Europe is Charlie.*

<sup>7</sup> *This line ‘we have large…… speaking’ was omitted in the text of the statement issued online. However, Mogherini says it in the video version of the statement.*

## 4 'Identity/difference' in post-CHA EU discourse

In 1990s, as (Hülse 2006) argues, many IR scholars 'discovered that the questions of collective identity are important to the understanding of international politics'. Hülse maintains that among the aspects of identity where agreement existed first was that, collective identities are socially constructed, and second, identity and difference imply each other (Ibid., 398). This means that collective identities are mutually constitutive (Clarke 2008), or in the words of (Lebow 2008) 'the 'us' is maintained at the expense of 'others'' (Ibid., 475). Furthermore, sometimes the identity construction takes place as 'us/them' binary and/or sometimes it results into the demonisation of the 'other' (Ibid., 474) through which, dominant or hegemonic collective identity seeks homogenisation. In this regard (Connolly 1989) gives a good example of Christianity that how it constitutes itself as the universal and superior religion thus constructing its barbaric, savage and pagan 'other'. In an effort to create a homogenous social structure, there are two ways: either to conquer and destroy the 'sinful other' or to convert it to Christianity (Ibid., 328). This means that the political process of identity formation entails divisions and sub-divisions in its detail. This process of identity/difference formation and representation constructs borders in a social setup (Neumann 1999, 36) which not only make the 'other' a 'monstrous evil – an evil more monstrous than state-centred violence because it threatens to expose self-subverting characteristics in the global system unless it itself is defined to be the monstrous source of that subversion,' (Connolly 1989, 334) but also further exposes the 'other' to both coercive and productive power relations (Foucault, *Discipline and Punish: The Birth of the Prison* 1991) in an effort to veil the contradictions within the system. For example, in some states – like Pakistan – due to the *problem* of militancy, government has created a 'self/other' dichotomy by saying that extremism and terrorism are foreign and have roots beyond the borders of the state. Government argues that the 'foreign' ideology of militancy is pursued by a minority within the state and that military operations against the minority residing in the tribal areas of the country as well as de-radicalisation (or normalisation) of captured militants will continue. This way, not only the 'other' (in this case, Pashtuns in Pakistan) are killed indiscriminately, monitored, observed and scrutinized continuously but also the state is covering its dominant discourse – that is itself responsible for *radicalising* members of society – sponsorship of transnational militancy and massacres in the northwest of the country. Furthermore, demonising the 'other' speeds up the process of converting the state into a tightly controlled, security entity. Putting it in context of the EU and keeping in view media reports and statements of government officials, opposition and EU leaders, it is argued that after CHA four scenarios of identity/difference emerge in the EU.

First is the 'self/other' dichotomy within the borders France which is represented by the statements of Marine Le Pen. Her 'self/other' binary is twofold. One is the 'French self' which is threatened by the 'Islamist-migrant-other' and the second one is the 'French self' which is destabilised and unable to cope with the problem of fundamentalism because it is located and is part of the 'EU other'. That is why, in Le Pen's view the solution is to freeze Schengen agreement and to stop immigration.

Second scenario presented by Sarkozy brings back *Clash of Civilizations* (Huntington 1996) into the debate by constituting a 'civilised/barbaric' conflict which does not recognise the geographical boundaries within EU or in the world and which constructs two worlds facing each other in oppositional and conflictual relationship. Sarkozy uses the term 'civilised men' that creates an exclusion of women and other genders of the society from his equation.

Third setting is provided by German chancellor Angela Merkel which is confined to German borders. Facing the challenge of PEGIDA marches Merkel owned Islam as a religion that

belongs to Germany however, her 'self/other' binary emphasizes on the integration of all 'others' into 'German-self society' regardless of their religion. In Foucauldian terms (Foucault, *Discipline and Punish: The Birth of the Prison* 1991), it shows how German government wants to use the technology of productive power to normalise and discipline the 'other' in a way that it becomes compatible with the spatio-temporal ideals of the 'self'.

Fourth and the most important representation of 'self/other' binary is set by the EU. It is the most important scenario due to two reasons. One, the 'self/other' formation takes place on a supra-national level with the construction of the supra-national European identity and second, based on that, a discourse takes shape which essentially is 'language in action' (Danaher, Schirato and Webb 2000, 31). Once such discourse dominates in a society, the authorities or governments (in this case the EU) then have the opportunity to regulate, control and direct thoughts and actions (Ibid., 31-32) of populations and exercise their sovereign power through policies and directives. Immediately after CHA, EU leaders issued statements condemning the attack, vowing to protect citizens and defend members of the EU against any threats. The statement by the Commissioner of Immigration and Internal Affairs assigned *Charlie* identity to the entire EU thus reaffirming the frontier-less structure of the Union and recommended a set of measures to address the problem of 'radicalisation'.

Post-CHA statements issued by EU foreign policy chief Federica Mogherini are of high importance and upon analysis, show three layers of 'self/other' formation. The first and second layers of identity/difference are located within EU. One is the 'self' which is driven by its values and beliefs and will do everything to protect the 'Jewish-other' which is challenged and threatened by the 'evil-other'. Second layer of 'self/other' is within EU which Mogherini said is predominantly 'Arabic-speaking-other'. This way, in the frontier-less EU where Schengen agreement is in force and individuals of the union can freely move, reside and work in any member state, borders within member states, cities, towns and neighbourhoods are formed. In other words, EU Schengen states may not have frontiers but the 'self/Arab' dichotomy is a phenomenon that creates social borders among individuals and communities; such borders are embodied and personified. The third and final layer of 'self/other' formation transcends the geographical boundaries of the EU. This layer represents the 'EU-self' and 'Arab-other' binary which is threatening the security of the union.

In order to deal with looming threat(s) from Arabic speaking territories, EU member states agreed to take measures like appointing security professionals (i.e. intelligence officials), cooperating with allies to prevent the flow of finances to militants organisations; asking European Parliament to collect passenger data (which paves the way for profiling and surveillance) and to learn Arabic to *engage* the Arabic speaking world and communities in a dialogue and to understand 'their' *messages*. It is argued that Mogherini's statements are dividing practices isolating the 'Arabic-speaking-other' from the 'European-self'. These dividing practices not only allow EU to influence thoughts and actions of the populations but also gives it power and authority to decide matters. Furthermore, the formation of 'evil other' – threatening the Union and Jewish communities there – in essence blankets the internal discrepancies and flaws within EU system.

The 'us/them' divide within the EU and beyond serves interests of the militant organisations like Al-Qaida and Islamic State<sup>8</sup> that are waging a transnational war; as well as of Eurosceptic political groups (O'Hehir 2015); for example the political parties that Nigel Farage and Marine

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<sup>8</sup> Also called *Islamic State of the Iraq and the Levant* or *Islamic State of Iraq and al-Sham (ISIS)*. The group formally changed the name to *Islamic State (IS)* after announcing its Caliphate (*Khilafah* or *Khilafat* in Arabic) in June, 2014.



Le Pen represent who want to break away from the EU to establish sovereign nation-state structures. The 'us/evil-them' dichotomy is not only contradictory to the EU efforts and ideals of integration but in fact strengthens Eurosceptic discourse especially at a time when far-right political parties and their manifestos are gaining acceptance and when the economic situation in some EU states is fragile. In order to establish and elaborate how militant organisations are benefited through social boundaries within EU, it is important to understand the motives and objectives behind militant attack on Charlie Hebdo and the message it delivers.

## 5 Was CHA only a matter of revenge?

As quoted in the beginning of the article, the two gunmen who attacked Charlie Hebdo premises had claimed that they have taken revenge for the cartoons of Prophet Muhammad. AQAP, which had threatened to attack Charlie Hebdo journalists in 2013, claimed responsibility for the attack. Looking at the media reports and some initial statements, one can simply say that Charlie Hebdo was attacked so that its journalists are punished to death for the blasphemy because it had published cartoons in the past and was going to publish in future. However, it is argued that AQAP or the three gunmen who targeted Charlie Hebdo and a supermarket did not do so *only* to defend Prophet Muhammad. Al-Qaida and other militant organizations operating under the banner and ideology of political Islam have had launched similar attacks in the past as well. Among them the most important one was the attack in New York and Pentagon in September, 2001 that is widely known as 9/11. That attack, culminated in US-led 'war on terror' which has ever since spread its tentacles to the Middle East and Africa. This article claims that CHA was a political act of violence having political motives and objectives. In this regard, analysis and understanding of phenomena of political violence needs utilisation of academic, Islamic and militant organizations' literature as well as media sources.

As the events in Paris were unfolding, media outlets began to publish stories on lives and connections of three attackers namely Cherif Kouachi, Said Kouachi and Amedy Coulibaly. Almost all reports suggested that they had criminal background, were known for Islamist militant activities like recruiting young men for a militant group fighting in Iraq and had connections with AQAP based in Yemen. Reports and analysts suggested that Kouachi brothers were born, raised and *radicalised* in Paris. Cherif Kouachi and Amedy Coulibaly had met in prison after they were convicted and jailed for their support of Islamist militancy while Said Kouachi was trained for attacks in Yemen where he had met Al-Qaida leader Anwar al Awlaki and another militant Umar Farouk Abdulmutallab who was convicted and jailed in the US after his attempt to explode a Nigerian plane in 2009. Reports said that all three attackers were radicalised by Djamel Beghal, a Muslim cleric who was jailed in France on terrorism charges for 10 years (BBC 2015, Coker and Almasmari 2015, Hosenball 2015, Chrisafis 2015, Yahya 2015, Bahout 2015).

Media reports cited above represent how French officials, whether in prison or in the society, failed to prevent CHA despite charging, convicting and jailing two of the attackers. Media reports discussed the social conditions in which three attackers were living and how they were involved in crimes. Viewing it from Foucauldian standpoint, it reveals how social conditions, structures, institutions and power relations are involved in objectifying and subjectivating (Neal 2009) modern subjects. In case of attackers, the teachings of Beghal and media reports on Iraq war are of prime importance (Bahout 2015, Yahya 2015, BBC 2015) because based on that the attackers established connections with AQAP. Furthermore, reports show that militant organisations are well-connected with their members and continue their struggle to wage war against those who are their ideological opponents.

The reason lies in the ‘self/other’ debate on the side of those militant groups who are fighting against their own people and the west with a mission to establish Islamic state across all predominantly Muslim countries. The concept of fighting against those who are different in the Muslim countries resembles the ‘identity/difference’ example Connolly provided (1989, 328; as cited before: Christianity against the ‘savage, pagan other’).

The ‘self/other’ dichotomy presented and promoted by militant organisations has its roots in the academic literature and teachings of Muslim scholars. For example, Sayyid Qutb and Abu A'la Maudoodi in their works (*Milestones* 1981, 2006, and *The Process of Islamic Revolution* 1955) present their ideas of *Ummah* i.e. Muslims of the world share common religion and thus are part of one Ummah or loosely one civilization or one community. This concept forms the basis of brotherhood, one Ummah and advances with the concept of shared homeland which is one Islamic Caliphate or loosely state. During 19<sup>th</sup> and 20<sup>th</sup> centuries scholars created narratives pertaining to identity and concept of nation in Islam, according to which, race, ethnicity, colour, geographical location and language do not determine nationality and/or identity of a human; rather its religion i.e. Islam which makes all Muslims of the world one nation (Iqbal 1934; 1986; 2006). This way, a large binary is formed which divides the earth into two worlds. One is the self, Islamic or Muslim world that is embedded together – regardless any geographical border or location, and the second world – defined and identified through religions – constitutes a large ‘other’.

These statements and narratives took form of Islamist discourse which consequently strengthened the concept of one Ummah and brotherhood in many Muslim countries and that is what Al-Qaida, Al-Shabab, Ansar al-Dine (AAD), Boko Haram, Taliban and now IS; as well as political organizations like Muslim Brotherhood in Egypt, Salafis, and Islamist political parties in Pakistan, India, Bangladesh and elsewhere follow.

Based on that discourse, Osama bin Laden – leader of Al-Qaeda who was killed by US Special Forces on May 02, 2011 in Pakistan – was urging people in predominantly Muslim states to fight against their regimes and unite as one Ummah. He was observing uprisings in the Middle East and North Africa and praised those developments, stating:

We watch with you this great historic event, [...] and we share with you joy and happiness and delight and felicity. [...] We are happy for what makes you happy, and we are sad for what makes you sad. So, congratulations to you for your victories (Wilner 2011).

Following him, Ayman Al-Zawahiri – the current leader of Al-Qaida – also repeatedly called on Muslims to fight in order to liberate their lands (Ahram Online) and then unite to form a unified and one Caliphate. In essence, the ‘identity/difference’ dichotomy is further strengthened when for establishing Islamic Caliphate armed struggle begins. It is argued that the ‘self/other’ binary envisaged by militant Islamist organisations is inward and outward. The inward ‘other’ is defined as every force, group or community which is either resisting or is not compatible with the discourse and practice of establishing an Islamic Caliphate. This oppositional ‘other’ can include the state, government system and institutions as well. Islamist militant groups refuse liberal democracy as a system of governance and aspire a government that is based on the teachings of Quran and Prophet Muhammad. The outward ‘self/other’ binary is beyond borders and represents forces, communities and countries who oppose, struggle or fight against the creation of Islamic state. Quite often, militant groups like Al-Qaida and Taliban describe the west as occupiers and ask their followers to attack western interests, cities and people (Ali 2009, Desai 2007, Fatah 2008). In this sense, the western or European

'other' is represented as an oppressor and evil. This way, militant organisations try to show the Muslims that their fight against the west is a retaliatory, defensive and resistance-based.

It is, therefore, argued that CHA was not just an attack aimed to punish journalists and cartoonists who were accused of committing blasphemy. In fact, it was an act of violence having deep roots in the political ideology and discourse of Islamist militants. For them Prophet Muhammad is a symbol of the Islamic system governance which they want to establish and impose on populations. The attackers who targeted Paris magazine premises in January, as rightly argued by (O'Hehir 2015), targeted the pluralistic liberal society of France to reveal and construct divisions which can serve their political interests. And to some extent, AQAP succeeded in that because the immediate response from EU leaders and later on, the official statements represent the re-production of a larger 'self/other' divide. Militant organisations take advantage of such divisions by gaining sympathy of those who are officially constructed as 'other' within European communities. Furthermore, such official identity/difference fissures provide foundations for Muslims in Europe to alienate themselves from societies, governments and states, as whole.

Until now, it is clear that EU and militant organisations construct and deepen the 'identity/difference' dichotomy through their discourse and certain practices. In other words, acts of violence like CHA reinvigorate and refresh the 'us/them' divide which is inherent in the discourses of both the EU and militants. It was argued that following CHA, the EU discourse accused the 'alien-other-within' and 'outside'. But apart from creating inside/outside social and political borders, the EU discourse also instils fear in the societies by predicting a looming threat of terrorism that needs to be tackled. The analysis so far showed that when such identity/difference cracks are made visible by discursively constructing the 'evil' side of the 'other' then, it is easy for the governments to legitimise their *future* actions under the pretext of providing security.

However, a key question in this regard is whether the EU really faces threat of fundamentalism and terrorism from *within* or is it a way to construct an enemy and put the blame on it for Union's internal failures, inconsistencies and contradictions? In order to find an answer to this question, it is necessary to look at the scholarly debate concerning notions of extremism and fundamentalism of Muslims in Europe to know where EU discourse on 'radicalisation of Muslims' takes roots from. It is argued that a discourse is not formed in vacuum. No matter how dominant a discourse is, it always is, as Foucault argues, historical and transmits power (1980) that influences people.

## 6 Role of political Islam in the EU

Scholars argue that Muslims are the largest religious minority in Europe (Cesari 2007, Pauly 2004) and by country the largest number of Muslims are based in France (Hamel 2002). Majority of Muslims came to Europe as migrants during 1950s, 1960s and 1970s. As far as Islamist movements or Islamism in the West is concerned, there are two predominant views. Adhering to the first view, scholars agree that the first generation of Muslims peacefully coexisted in Europe however the first phase of radical Islam's penetration into European societies occurred during 'the late 1980s and the first half of 1990s' (Vidino 2011) when



Muslim immigrants established jihadi<sup>9</sup> base in Europe. Vidino describes the logic for the establishment of the base in Europe:

Seeking to avoid repression in their native countries, veterans of the Afghan jihad against the Soviet Union and members of various militant organizations from the Middle East and North Africa sought, and in most cases received, political asylum in several European countries. Europe's freedoms, the presence of large diaspora communities, and a lack of attention from local authorities made Europe an ideal logistical base from which militants could continue their activities (Ibid., 1).

In Vidino's view, Muslim militants' base in European countries evolved into a network of having a well-organised structure and chain of command, however, they did not intend to target Europe. The second phase of *jihadism* in Europe was shaped when Osama bin Laden established Al-Qaida as a transnational militant organisation. Under the banner of Al-Qaida's ideology, all Muslim militant groups united to fight together 'against both secular regimes in the Muslim world and their protectors in the West' (Ibid., 2). He argues that although post-9/11 military actions damaged Al-Qaida, but the linkages between extremist groups in Europe increased. Due to the increased linkage, individuals belonging to various groups but sharing Al-Qaida and its affiliate groups' worldview, travelled to Pakistan's tribal areas for training and returned to Europe and the US to launch attacks (Ibid., 25-27).

Keeping in view the rise and consolidation of extremist groups in Europe, Bassam Tibi in his work (Political Islam, World Politics and Europe 2008) claims of a 'civilisational conflict' within Europe between European and Muslim civilisation. While disassociating himself from Huntington's notion of the *Clash of Civilisations*, Tibi, however, does not deny the existence of a conflict which has historical roots (Ibid., 164). The main contrast between Vidino and Tibi's views is that former sees connections beyond borders of Europe and argues Al-Qaida and like-minded groups' worldviews were *imported* by certain groups of Muslims to the Europe to fight against the west; the latter however postulates that Muslims within Europe strive for 'a free space of Islam within Europe' (Ibid., 162) and confirms that the Muslims of Europe are 'embedded in the networking of transnational religion that shapes the worldview and the action of the people'. Tibi maintains that political Islam is putting secular Westphalian order into question. While Europe accepts Muslim immigrants as European citizens, Islamists and Salafis teach Europe-born Muslims that 'they are members of an imagined Ummah, not a European citizenry' (Ibid. 166-167). Tibi adds that Islamists seek to re-establish their Islamic rule and supremacy through de-westernisation and thus a competitive model of globalisation. To some extent a similar view is shared by Meghnad Desai who sees the ideology of global Islamism as the foundation for the activities of Islamist militant groups. This global agenda – predominantly executed by Al-Qaida – confronts the entire world through acts of terror. Global Islamists call Muslims of the world to defend their Ummah (Desai 2007, 97) and to establish a worldwide Islamic governing system.

Since the war in Afghanistan, Iraq and Yemen disrupted Al-Qaida's network and many of its main leaders – including Osama bin Laden – were killed, the importance of that organisation for the revival of Islamic rule (as viewed by the scholars quoted above) has shifted towards IS that emerged in Iraq and Syria and captured large swathes of land during 2014. In the first issue

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<sup>9</sup> The word *jihadi* is used by (Vidino 2011) as a synonym to 'holy war' which is misleading because *jihad* in Arabic means struggle. In context, struggle can be peaceful and violent. The word for violent or armed struggle in Arabic is 'qitaal'.

of magazine called Dabiq (Dabiq 2014), IS declared Caliphate (*Khilafah* in Arabic) in Iraq and Syria which aims at the ‘unification of Ummah’ (Ibid., 38) as well as destruction of democracy.

Scholars of the second view however think that radicalisation is a consequence of the marginalisation of Muslims in Europe. For example, Maha Yahya argues that Muslims of North African descent living in France ‘suffer from considerable inequalities’ (Yahya 2015). In Nielsen’s view ‘the histories, policies and legal structures of the various European countries impose varying constraints on the way Muslim communities and individuals orient themselves’ (2007, 42). By constructing a typology of Muslims’ sense of community in Europe, Nielsen shows that as a result of social marginalisation some gangs of Muslim youths have appeared in a number of districts in European cities. At one side if there are young Muslims who obtain European education and become part of the society; there are Muslims, on the other side, who are involved in organisations and are actively taking part in Islamic activities in order to secure social and political space for themselves in Europe. Apart from other groups, there is a ‘small minority’ of Muslims who want to take ‘radical Islamist political action’ (Ibid., 43). Additionally, Chouki El Hamel in an article in the context of French immigrant Muslims writes that in any country ‘laws are made to serve people including minorities; therefore France has to accommodate the new cultural demands of a significant and crucial community’ (Ibid., 299). With a somewhat similar but interpretivist approach Jocelyne Cesari conceptualises that the relations of domination have in fact placed Islam and West in opposition and that a discourse is imposed on Muslims which at the end makes Islam a security risk (Cesari 2007, 49-53).

The literature reviewed here represents a strong ‘self/other’ representation on both sides i.e. Europe and Muslims. This ‘self/other’ dichotomy, in some scholars’ (cited above) view is the product of European countries’ policies towards Muslims. However, some scholars suggest that it’s not Europe but Muslims (both within Europe and abroad) who are creating oppositional relationship with the West as whole to reach their goal of establishing a worldwide Caliphate. In order to address the problem of Muslims’ integration in Europe (Tibi 2008) suggests a complete shift in Muslims’ ideas and worldviews which he terms as *Europeanisation of Islam*, others like (Pauly 2004) require efforts to be made on both Muslims’ and majority Europeans’ side to coexist peacefully; while some suggest (Hamel 2002, Nielsen 2007) the creation of cultural and social space for Muslims in Europe.

It is argued that the ‘self/other’ binary is magnified by the dominant discourse in the EU which further deepens the divide. Many scholars analysing the role of Islam or Muslims in Europe in essence do not view the actions, activities and narratives of Muslims politically; rather they are seen in religious and cultural contexts. In fact, all actions (even those with a pretext of religion) are political; in some ways some narratives and actions take form of resistance to the existing dominant discourse in Europe. For example, it is a political act on behalf of government to ban veil or *hijab*, the response to such action is also political. If some women, despite the ban, wear a full veil, they are in fact defying the law and protesting for their right of *free choice*. Similarly, the struggle of Muslims for wider space in Europe is also political; they exploit the ideas of multiculturalism and liberalism and demand a space where they can represent and identify themselves freely. Furthermore, the idea of establishment a Caliphate does not exist within Europe and thus does not qualify to be labelled as a security risk.

## 7 Conclusion

This article, using a reflectivist, or precisely, a poststructuralist approach analysed CHA through discourse analysis by selecting texts from media and statements of EU leaders and militant organisations. The article argued that in contrast to what is reported by media, CHA

was a political act of violence aimed at gaining support of Muslims based in Europe. Based on academic work of scholars, this article analysed the formation of 'identity/difference' as a result of official statements from EU leaders. It was discussed how the construction of 'self/other' dichotomy within EU and abroad takes multi-layered forms.

Furthermore, through reading and analysis of ideas, concepts, statements and literature of Muslim scholars and militant organisations it was briefly shown how the concept of Ummah and Caliphate evolved and how militant organisations like Al-Qaida use such concepts to achieve their goals and are constructing a broad 'identity/difference' scene. The article elaborated two strands of scholarship analysing the role of Islam within Europe i.e. scholars who think that global Islamist ideology was imported to Europe and scholars who view marginalisation as a source of radicalisation of Muslims in Europe.

This article concludes that rationalist and positivist approaches do not represent and analyse events like CHA in a broad and comprehensive sense and are not effective in understanding the dividing practices as a result of dominant discourses. Such discourses not only cover or veil flaws in the governance structures of the EU but also provide means and reasons of alienation of Muslims living in Europe. Additionally, positivist approaches analysing attacks and problems of Muslims' integration in Europe or threats to Europe reduce complex phenomena to micro levels and fall short of paying attention to the details – which are not only important to understand those phenomena but also uncover the hidden consequences of reductionist and exclusive discourses for societies.

Finally, it is concluded that the EU, as a supranational entity has long strived for further integration and Europeanisation but as a result of magnification of Islamist security risk, the EU authorities will end up with serving interests of far-right political groups and will introduce security apparatuses which are in sharp contrast with the idea of freedom which will thus have negative consequences for the process of EU integration.

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# "REFORM, RENEGOTIATION, REFERENDUM" – ASSESSMENT OF THE CURRENT BRITISH GOVERNMENTAL EUROPEAN POLICY FROM THE PERSPECTIVE OF LIBERAL INTERGOVERNMENTALISM

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**Abstract:** The UK has gone through more than 60 years of complicated relationship with the European integration that ended up in the so-called “Brexit” after in/out referendum of July 23<sup>rd</sup> 2016. The “awkward” relationship has been reflected in British domestic politics quite strongly over long-term resulting in serious problems of both two major political parties. The aim of this contribution is to assess EU policy of the last two British governments led by David Cameron in the perspective of the “Brexit” debate. The central question of this paper is how did the governmental plan to tackle the referendum looked like and how did it contribute to the final result of the referendum. Analytical framework is based on Cameron’s policy called “Reform, Renegotiation, Referendum”, that was issued in January 2013 after worsening of the EU-UK relationship, applying the theoretical basis of liberal intergovernmentalism. Main emphasis is put on the governmental process of Review of the Balance of Competences, which was initially supposed to be a basis for reasonable debate about the British membership outcomes.

**Keywords:** British European Policy, Brexit, liberal intergovernmentalism, EU, referendum, Review of the Balance of Competences, David Cameron

## Biographical note

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# 1 Introduction

The complicated relationship of the UK with the European integration has gone through very challenging history - from initial post-war mutual mistrust through the three British attempts to enter the thriving “Six”, resulting in British accession in 1973, with subsequent tentative questioning of the British whether this step had been reasonable, i.e. the first in/out referendum in 1975. Later, it went through becoming the “awkward” partner based on the approach of Conservative prime ministers Margaret Thatcher and John Major, then hesitant warming in the times of Labour governments, and finally ending up in the so-called “Brexit” after in/out referendum on July 23<sup>rd</sup> 2016, that resulted directly from European policy of the last two governments led by David Cameron.

This contribution deals with British European policy in the perspective of recent “Brexit” referendum. Cameron’s governmental EU policy is a crucial point of this paper, based on the assumption that its’ shape has resulted from the long-term Conservative party divisions over EU approach. The “awkward” relationship has been reflected in British domestic politics quite strongly over long-term resulting in serious problems of not only Conservatives, but also the other major political parties. My research question stands as follows: How the Conservative stance to the European question, which resulted in pro-Brexit vote in referendum in June 2016, has emerged? Further, relating questions need to be answered. Was there any plan? How did it look like? Did it lead to the actual form of pre-Brexit debates?

To tackle these questions, or rather to track the governmental EU policy, the liberal intergovernmentalism theory (LI) will be applied. The theory anticipates that the main motivation to integrate lies in economic factors. These were definitely main motivators of the UK to access the European Community in the 1970’s, however, this aspect seems more questionable within the current after-Brexit debate. The second LI precondition, the rational behaviour of integration members, may also not be valid though the perspective of EU referendum vote from June 2016 that has mixed up rational policy making on the European level with quite chaotic domestic politics. Nevertheless, very crucial aspect of LI, i.e. that states that can get the most from the cooperation are in a weaker position than the states that are not, may be essential especially regarding economic questions of the British membership in the EU.

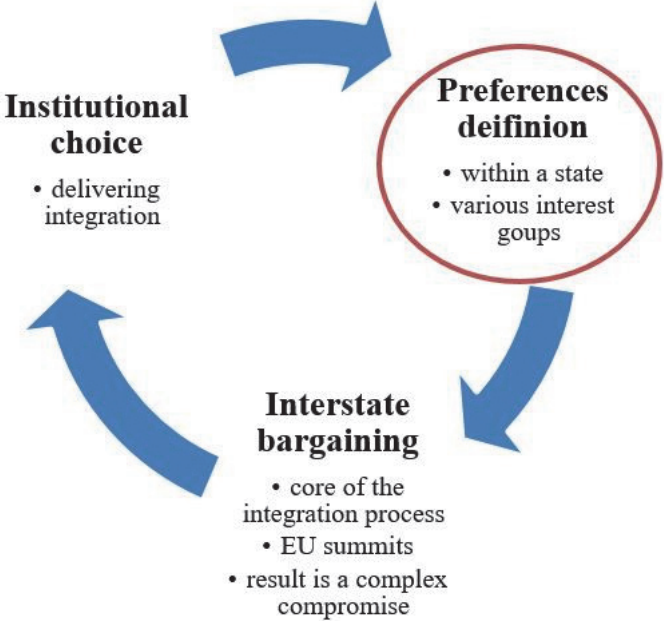
## 2 Theoretical background and research methods

Liberal intergovernmentalism (LI) is regarded by some authors as a baseline theory for studying regional integration, especially the European one (Moravcsik and Schimmelfennig 2009, 67). The theory works with two main assumptions: in an integration, the states are actors and their motivation to integrate is mainly based on economic factors; and the states are behaving rationally. This suggests that integration is a result of rational decision to cooperate of a particular state. “EU integration can best be understood as a series of rational choices made by national leaders. These choices responded to constraints and opportunities stemming from the economics interests of powerful domestic constituents, the relative power of each state in the international system, and the role of institutions in bolstering the credibility of interstate commitments” (Moravcsik 1998, 18), (Leuffen, Rittberger and Schimmelfennig 2013, 46).

According to liberal intergovernmentalists, integration is developed in three stages. First, a state defines its preferences. This part is based on liberal theory of national preference formation which suggests that preferences are mainly of economic characteristics. These are defined by various interest groups within a particular state. Second, governments aware of their economic preferences set are bargaining integration conditions with their partners. According to liberal

intergovernmentalists, the decisive factor for bargaining results is information distribution among negotiating partners as well as distribution of gains from potential cooperation. The latter is of a higher relevance according to LI, because the first one is usually equally distributed in practice, whereas the second is not. The states that can get the most from the cooperation are in a weaker position than the states that are not so much interested and see not that extensive future gains from integration (Kratochvíl 2008, 168–169). This could be easily applied to long-term British approach to European integration, as well as to Cameron’s coalition government 2010–2015, especially in the perspective of economic crisis and a role of financial institutions in it. According to Allen (2013, 120), due to the functioning of the EU, the British prime minister’s role has grown partly because he is supposed to cooperate with other European leaders regularly at European summits. Nevertheless, his stance is often influenced by domestic situation and preferences formation from various interest groups, from euro-sceptic voters of the Conservative party, to the financiers from the City of London that usually hold strong position within the process of UK’s European preferences definitions.

The third stage of the liberal-intergovernmentalist theoretical framework is a creation of integrative institutions, whereas the institutions are meant to control and maintain achieved results from the previous interstate bargains (Moravcsik and Schimmelfennig 2009, 72–73). However, the above described framework has been defined by Moravcsik (1998) as an enclosed process, in the diagram below are the three stages displayed as continuous evolution. This arises from liberal intergovernmentalism critique suggesting that the phases’ changes are parallel. In reality, theoretical re-opening of this process seems justifiable based on the fact that after the in/out referendum, the UK is leaving its present arrangement with the EU, and some form of new relationship is supposed to be negotiated soon. This brings the LI bargaining process back to the initial stage and opens new perspectives concerning the further two stages.



**Diagram 1:** Liberal intergovernmentalist integration process theoretical framework.

For methodological purposes of this paper, the analysis will mainly be based on the first stage, the creation of state preference. A great example how the state preferences are formed is a unique process launched by the British government, Review of the Balance of Competences, to that all the interest groups had an opportunity to contribute and express their views on European competences examined within the UK. This process has resulted in 32 sectoral reviews, which

will be assessed within this paper in order to make overall view on EU competences in the UK. The quite EU-positive results were on the one hand quite crucial for David Cameron when launching the process of in/out referendum, however, not even such sophisticated process did help to convince the majority of British voters to vote for remain in the integration.

### 3 British European policy

#### 3.1 Roots of the current British European policy

The UK has been considered as an “awkward” partner to the European integration since its very existence. There has been many, sometimes quite diverse and ambiguous, reasons that back up this statement. Hesitant British approach to the Continent after the World War II led into dubious French stance to the British accession attempts into the European Communities (EC) in the 1960’s and early 1970’s. When it finally came to the British EC membership in 1973, it had been subsequently questioned by the British themselves in the first in/out referendum in 1975. British approach to the EC/EU has been largely pragmatic. The UK had and still has special cultural and commercial bindings to extensive portion of overseas countries and places, above all to the USA. Compared to the Continent, where in the times after the World War II integration seemed to be the only option, the British had no such ideological and moral perspectives. The decision to take part in the EC had been therefore, as suggested above, pragmatic<sup>11</sup>, as it came in a period of British relative political and economic decline.<sup>12</sup> Highly pragmatic had also been an EC approach of Margaret Thatcher, who intensively promoted the then arising efforts to create European Single Market. For that matter, the Single Market is being supported by British authorities until nowadays and it had been one of the crucial points of the campaign for remaining in the EU during spring 2016.

After the general election in 2010, weak pro-European consensus had been consolidated between the winning Conservatives and Liberal Democrats. The coalition government led by David Cameron did not at first intend to put European policy into the centre of governing agenda. However, the global financial crisis spilled into the Euro-crisis has challenged the whole structure of EU functioning, as well as the British approach. This resulted in the increasing incoherence of governmental European policy, promoting UK’s national interest in the resolution of the Euro-crisis on one hand, and on the other, managing growing conservative Eurosceptic branch demands for an in/out referendum. “Events have once again placed the European question in the epicentre of British politics” (Liddle 2014, 195). This perspective did not change even after last general election in May 2015, when the Conservatives won majority of votes and created one-party government.

#### 3.2 Current British European Policy (2010-2016)

Like many conservative leaders before him, David Cameron found it very difficult to conceptualise his European policy, apart from the coalition agreement due to existence of radical euro-sceptic wing in the Conservative party as well as euro-sceptic population. During preceding 13 years in opposition, the Conservatives had been opposing Labour attempts to adopt the Euro or any new treaty concerning the EU. As banking and fiscal crises deepened in

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<sup>11</sup> “The motivations for his (Harold Macmillan’s) turn to Europe were a mixture of high strategy and low politics, with both economic and foreign policy justifications playing a part” (Liddle 2014, 3).

<sup>12</sup> Dean Acheson, US Secretary of State between 1949 and 1953, has characterized the UK in the post-war period as follows: Great Britain “lost an Empire, but not yet found a role” (Whiteman 2014).

the first years of the new government, there was no more pressure to reopen the Euro issue, however, new concerns had arisen due to enhanced effort of the EU to face the financial crisis through deeper integration (Liddle 2014, 195–196).

Current and previous governmental or even historical Conservative European policy approach has been highly affected by domestic political situation. This complies with liberal intergovernmentalists' first stage of integration process, the preferences definition as a continuous and rather difficult process, very often re-opening after general elections in a country. Conservative European policy roots are to be found in their pre-election programme of 2010. Their main goal was to adjust the Treaty of Accession of the UK to the EC from 1972 so that any future European treaty, that would like to move any powers from Britain to the EU, will have to become a subject of a referendum. The program was received very positively by rather euro-sceptic British public (Fitzgerald 2009, 3-11).

The Conservative Party won the general election in 2010. However, new government had to be created on the basis of coalition agreement with the euro-optimistic Liberal Democrats and the future governmental European policy had been strongly influenced by that fact. As indicated above, there was a commitment in the coalition agreement arising from conservative program, that in the future there will be no transfer of national sovereignty without parliamentary vote. More importantly for this paper, this commitment included also the possibility of a reassessment of existing EU competences in the UK (Brown 2012, 3-4). Following the commitment, in July 2011 came into effect the European Union Bill that enabled a referendum on any proposed EU primary law change. According to O'Ceallaigh and Kilcourse (2013, 1) the bill made it politically very difficult for the British government to participate in any further European integration measures, and this aspect was even strengthened after the David Cameron's veto against the so called fiscal compact at the December 2011 European Council summit.

In January 2012, the so called fiscal compact has been negotiated as a part of the Eurozone and EU fiscal reform in reaction to the Eurozone debt crisis. It was signed in March 2012 by leaders of all then Eurozone members and eight other EU member states, based on the Stability and Growth Pact and aiming at strengthening fiscal discipline. The signatories have pledged to automatic correction mechanism to reduce their national budgets deficits, they have also agreed on informational duty to other members about their intentions to issue new debt, as well as holding regular Euro Summit meetings (Eurozone Portal 2014).

The UK refused to participate already in December 2011 as a response to initial Germany's proposal for a treaty-based fiscal compact at the EU summit in Brussels. David Cameron had a speech at the summit, in which he had expressed his and the governmental concerns about growing integration of the Eurozone that could, according to the governmental statement, lead to "significant threats that need to be addressed by an equally important adjustment of the UK-EU relationship" (Policy Network 2013, 1). David Cameron also demanded that any transfer of power from a national regulator to an EU regulator on financial services would be subject to a veto, that Eurozone banks should face a higher capital requirement, that the European Banking Authority (EBA)<sup>13</sup> should remain in London and the European Central Bank (ECB) should be

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<sup>13</sup> *The European Banking Authority has been established as a part of a new EU supervisory framework in 2011. The supervisory architecture comprises of EBA, responsible for bank supervision, including the supervision of the recapitalisation of banks, the European Securities and Markets Authority (ESMA), which deals with the supervision of capital markets and carries out direct supervision with regard to credit rating agencies and trade repositories, and European Insurance and Occupational Pensions Authority (EIOPA), which is responsible for insurance supervision (European Commission 2014a).*

refused in its attempts to rule that Euro-denominated transactions take place within the Eurozone. The key argument against the fiscal compact was that the Eurozone countries could possibly use the European institutions to weaken British interests in the Single Market. At the same time the Prime Minister admitted that there are risks of isolation of his country in the process. He also stressed, however, that the UK will protect its position and will insist that the EU institutions could not be used to enforce fiscal rules (Watt 2011).

Other member countries follow with ongoing reform program that lead to creation of the Banking Union and moreover, the British representatives received no assurance that their country will escape the financial regulation in the future. “Cameron’s veto did not stop the treaty going ahead, leading only to its not being agreed under full EU auspices. Twenty-five of the EU 27 partners signed a separate intergovernmental treaty, but making full use of the European institutions to implement its provisions.” (Liddle 2014, 209).

After returning back to the UK from the European Summit in Brussels in June 2012, David Cameron promised to set out his European policy in more detail in the future. Already before the summit, over 100 Conservative members of parliament wrote him a letter that suggested arranging an in/out referendum. However, the Prime Minister dismissed these demands already at the summit press conference. He argued that an in/out referendum would be too simplistic as a reaction to the complex question of the EU-British relationship. However, the Conservatives were becoming even more divided over the issue and the Prime Minister had to face this serious challenge (Liddle 2014, 215–220).

Finally, in January 2013, David Cameron delivered a *Bloomberg speech*, in which he made, apart from complex reassessment of the EU-British relationship and its future prospects, an announcement about planned renegotiation of the British EU membership and consequent in/out referendum that would have taken place by the end of 2017, under the condition that David Cameron would remain serving as a Prime Minister after general election on May 8<sup>th</sup> 2015<sup>14</sup>. Justification for this announcement contained three main points that were not unknown in the UK since the very existence of its membership in the EC/EU.

- Over-reach of EU regulation onto national policy-making;
- lack of legitimacy of EU processes and the need for a greater role of national parliaments;
- potential discrimination of non-Euro countries by the Eurozone (Policy Network 2013, 25).

Although the Prime Minister had been against the referendum in the beginning of his government, according to him, it was now inevitable due to “public disillusionment with the EU” (Gov.uk 2014b). According to liberal intergovernmentalist theory, the governmental preferences has been highly influenced by one of the core interests group at that moment – the euro-sceptic electorate unhappy with economic crisis. According to the Policy Network Report for the City of London Corporation, “beyond the initially negative reaction, David Cameron’s speech seems to have opened up a debate on EU reform which most UK partners welcome” (Policy Network 2013, 37). City of London is one of the core British pro-EU interest group with interests in the Financial Single Market. A majority of authors, however, seemed to be more sceptical about the steps of David Cameron. Roger Liddle (2014, 220), for example,

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<sup>14</sup> The possibility that David Cameron will win and serve another term as Prime Minister was not small even before election (ElectionsEtc.com, 2015). In the election, Conservatives won 331 seats and created government, Labour party gained only 232 seats (Financial Times, 2015).



expressed his views about the *Bloomberg speech* with respect to its general pro-European tone the following: “For all Cameron’s fine words, it was a bad day for Britain.” Emerson and Blockmans (2013, 1) suggested that the process after the speech had been “full of political and economics hazards”.

The coalition government relied not only on the in/out referendum<sup>15</sup>, but mainly on the related “review of competences” - redefining the British relationship with the European integration. The whole plan had been summed up in the slogan "reform, renegotiation, referendum" in the *Bloomberg speech*. But while it had been not entirely clear how the government wanted to influence the reform of the EU, which moreover is being already introduced by the European Commission<sup>16</sup>, the redefinition of Britain's relationship with the EU as a basis for future possible future referendum and subsequent renegotiation was prepared initially (Parliament.uk 2014).

Already in July 2012, the Government announced that by the year 2014 will be issued a unique fully extensive survey about the EU-UK relationship. As a reason for this decision, the government announced that the Eurozone crisis is fundamentally changing the cooperation in the EU, which may further lead to further differentiating of the European integration, i.e. the principles of multi-speed Europe, dividing above all non-euro state and the Eurozone. Therefore, the government declared that it wants to actively participate on the future European integration trends (Brown 2012, 3-4), (Gov.uk 2014a).

#### **4 Review of the Balance of Competences<sup>17</sup>**

The Review of the Balance of Competences had been launched by the then Foreign Secretary William Hague in July 2012. In the foreword of the document that presented the Review to the Parliament, William Hague stressed traditionally the importance of the Single Market as well as a broad need for the EU reform after the Eurozone crisis. The main aim of the exercise is an examination of the balance of the EU’s existing competences in the UK through analytical piece of work, involving many Government Departments and taking evidence from representatives from business and other interest groups, the British public and our EU and global partners, i.e. all possible interest groups (Gov.uk 2012, 5).<sup>18</sup>

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<sup>15</sup> *The first EU Referendum Bill had not passed the House of Lords in January 2014, however, the prime minister then said that he will ensure that the referendum will still take place in 2017, under condition that he will still lead a government. The EU Referendum Bill was not a governmental bill, but rather an initiative of the Conservative Party backbenchers. Moreover, the chairman of the Liberal Democrats Nick Clegg did not support the bill, as well as the Labour party (Mason 2013), (Parliament.uk 2014).*

<sup>16</sup> *The five principles defined in the Bloomberg speech by David Cameron, including above all competitiveness and related Single Market importance, as well as the subsidiarity principle, flexibility, democratic accountability and fairness, are highly in compliance with Jean-Claude Juncker’s reform program which aims at Single Market importance and its support by the investment plan (Cameron 2013), (European Commission 2015).*

<sup>17</sup> *For the review structure, please see an attachment.*

<sup>18</sup> *Concerning technical side of the process, review of the balance of competences is “an audit of what the EU does and how it affects the UK” (Gov.uk 2012, 6). Government departments are supposed to consult the Parliament and its committees, business, the devolved administrations, civil society, as well as European partners and the EU institutions to look thoroughly at how the EU’s competences work in practice in the UK. The Departments have started work in autumn 2012 and continuously published reports on various areas of the competences. The review had been completed in the end of 2014. The main aim of the process has been according to the governmental introduction (Gov.uk 2012, 6) to “inform*

The EU competences are defined as “the EU’s power to undertake specific actions” (Gov.uk 2012, 13). They are involved into the EU Treaties and there are three types of them according to their extent: exclusive, shared and supporting.<sup>19</sup> However, for the purposes of the review, a broader and simplistic definition of competence has been used – it is “everything deriving from EU law that affects what happens in the UK” (Gov.uk 2014c, 10).

According to one of the first studies about the review, conducted by European Policy Institutes Network from 2013 to 2014, “the reviews are impressively researched. While understandably giving due place to British interests, they are of general European relevance” (Emerson and Blockmans 2013, 1).

The 32 reviews have been divided into four main parts according to planned issue date. In the next section, an analysis of the four parts’ crucial points, the so-called semesters, will be provided, in order to define whether the reviews had a potential to influence positively the Brexit debate. For this paper, the review crucial points are defined as those important for political debate about in/out referendum.

#### 4.1 Semester I

The first six reviews issued as a part of the first semester of the review cover foreign policy, development policy, taxation, the single market, food safety and public health. All of the reports justified the current state of the European competences, as indicated in the paper appendix. For the political debate, the vital point of the “in” campaign has been a Single Market. On the other hand, foreign policy, especially concerning migration, resonated a lot in the “out” camp.

The highly expected Single Market report follows the same structure as all of the 32 reports. First, historical development of the issue is thoroughly described, then the current state of the EU’s competences in the UK in this area is explained, and finally the report confronts the Single Market with the UK’s national interest and suggests future options and challenges (Gov.uk 2013a). In the *Bloomberg speech* in January 2014, the Single Market was both the core of the David Cameron’s argument for renegotiation and at the same time for UK’s continued membership (Liddle 2014, 228). The report put together a large evidence to define effects of the Single Market on the UK divided into three groups – effects on the economy, effects on economic actors and effects on policy making. Concerning the effects on the British economy, the evidence is mostly in favour of positive effects on the UK (Gov.uk 2013a). Also Centre for European reform suggests in the Annual report that “the Single Market provides the strongest argument for Britain staying in the EU.” (Grant 2014, 4). One of the most integrated parts of the Single Market and also the most emphasised from the British perspective is the wholesale financial services sector (Gov.uk 2013a, 26). On the other hand, several firms active on the domestic markets had seen no gains from the Single Market. The issue that the report stresses the most is a political pressure arising from the existence of the Single Market. “In this area the UK has been broadly successful in enshrining its more liberal economic model into at least some of the DNA of the Single Market.” (Gov.uk 2013a, 49). Nevertheless, the report emphasises growing EU competence in order to make the Single Market work that is not always perceived as necessary. Implementation of the Single Market has brought appreciable economic

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*the public debate on the EU in the UK and Europe”. The review was not supposed to produce specific recommendations for British European policy or to suggest future scenarios (Gov.uk 2012, 12).*

<sup>19</sup> “The EU’s competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU may act only where the EU Treaties so provide and within the limits of the competences conferred on it by the EU Treaties. Where the Treaties do not confer competences on the EU, they remain with the Member States.” (Gov.uk 2013c: 10).

benefits and it has spread the UK's liberal model of policy-making more widely across the EU. According to the report conclusion, the Single Market is now in its most challenging period since its launch in the late 1980s. A broad consensus that the Single market is the core of the EU development is still present among the member states. At the same time, the political will to drive the Single Market development into more politically sensitive areas is under challenge. Institutional development of the Eurozone could also significantly influence development of the Single Market. "All this means that the Single Market could once again be more at the centre of European political debate, which could open up opportunities for Britain." (Gov.uk 2013a, 58).

On foreign policy, the majority of the evidence argued that it has been strongly in the UK's interests to perform its foreign policy through collaboration with the EU. There were only few disadvantages identified and all are basically results of the complicated European decision-making (Emerson and Blockmans 2013, 3). On development cooperation and humanitarian aid which works under shared competences regime, a broad consensus by the review authors had been achieved. The current regime is supported by the review and criticism arise only in the field of possible improvements in implementation of the policy, however not repatriation of competences (Emerson and Blockmans 2013, 3–4). The result of the taxation report is also positive, as well as the Public health report and a report on Animal health and welfare food safety. Nevertheless, the latter illustrates the overall disconnect between professionally informed opinion and the public opinion in the UK<sup>20</sup> (Emerson and Blockmans 2013, 8–12).

## 4.2 Semester II

The second semester covers Single Market for goods, external trade, transport policy, environment, climate change, research, asylum, non-EU immigration, civil judicial cooperation, tourism, and culture and sport. According to Emerson, Blockmans, Peers and Wriglesworth (2014, 2), the second semester of reviews "confirms the findings of the first set", which means that according to the reports contributors, there is no case for repatriation of European competences in the UK.

The report on free movement of goods within the Single Market stresses the importance of free trade and is overall positive about benefits to the UK. However, some contributors to the report, particularly from lobby organisations arguing for a looser relationship with the EU, argued that the importance of the Single Market in goods was overstated, because of the declining importance of goods trade in the British economy, as well as differentiating trade structure, shifting more to the emerging markets (Gov.uk 2014d, 30–31).

The evidence received from respondents to the report on trade and investment generally suggests that the balance of competences in the area of trade and investment is overall beneficial. The main debate focused on whether the benefits of the increased influence that arise from being part of a larger bloc outweigh the costs of the compromises linked to it. Many contributors suggest that the EU's negotiating position in the international environment enables the UK to achieve better results in trade negotiations than it would on its own. On the other hand, being part of the EU limits the UK's ability to prioritise its own interests. Assessments of the impacts were both pro and contra, however, there is suggested that the costs need to be weighed up against the benefits of being part of the Single Market, because it is not possible to

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<sup>20</sup> *In this specific case, the difference is illustrated by the fact, that „only 20 % of consumers were aware that the EU was largely responsible for food safety regulation, while 75 % preferred that it be a UK responsibility. This reflects the view that the UK could do perfectly well by going it alone.“ (Emerson and Blockmans 2013, 11).*



isolate it from the common commercial policy. The report overall suggests, in compliance with the previous report on Single Market, that being in the Single Market has had a net positive impact on UK trade (Gov.uk 2014e, 6; 61–62; 82).

The report on transport suggest that the current balance of competences is “broadly right” (Emerson, Blockmans, et al. 2014, 7), moreover, the field of climate change even needs more EU competences in the UK; research and development, civil judicial cooperation and culture, tourism and sport are assessed as balanced regarding the level they have been defined in EU primary law. More importantly concerning the current after-Brexit debates, the asylum and non-EU immigration field has been supported by the report authors concerning the UK opt-outs and opt-in options (Emerson, Blockmans, et al. 2014, 9–19).

### 4.3 Semester III and VI

The third semester had been issued at a set of 11 reviews covering Single Market for services, financial markets, free movement of persons, cohesion, energy, agriculture, fisheries, competition, social and employment policies and fundamental rights. This selection of topics opened up a possibility of large controversies, concerning the topics which resonated regarding the referendum. Whereas the EU competences have been broadly supported by the reviews for the areas of cohesion, energy, agriculture, fisheries, competition and fundamental rights, the areas of free movement of persons and social and employment policies have been sharply contested. This could be caused by recent changes in migration movements (Emerson, Avery et al. 2014, 30–31). Regarding fourth semester of reports, except for economic and monetary policy, the European competences had all been considered by the interest groups as overall right.

Concerning the report on services, this area plays a stronger role in the UK than in many other EU member states. This implies that the UK economy is disproportionately exposed to the sector changes<sup>21</sup>, as well as that the country is weaker in the EU-based bargains, according to the LI theory. Concerning the main actors, British businesses welcome UK participation in the Single Market for services because of the important commercial opportunities. Services produce a substantial part of the EU HDP, however, trade in services within the Single Market is much less integrated than that of goods (with an exception of financial services). Although services are generally less tradable than goods, evidence submitted to the review attributes this underperformance to a number of factors, particularly to poor implementation of the Services Directive<sup>22</sup> though remaining national restrictions (Gov.uk 2014f, 6; 46–48). Based on this, there were some calls for deeper integration in the area in the report, especially from business organisations. As stated above, they have suggested the Services Directive to be better implemented by the member states as well as to complete quickly the Digital Single Market. Many contributors tried to explain why the advantages of EU action outweighed the

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<sup>21</sup> “UK’s ‘mature services sector’ accounts for 79 % of domestic economic activity, above average for the EU, where the figure is 70 %.” (Gov.uk 2014f, 47).

<sup>22</sup> *The Services Directive was adopted by the European Parliament and the Council on 12 December 2006. The objective is to remove legal and administrative barriers to trade in the services sector to enhance economic growth of the EU. „A Commission evaluation of the implementation of the Services Directive conducted in 2012 found that whilst most Member States had transposed the Directive itself, by this stage, full implementation had yet to be completed. Whilst the economic benefit to date of the Services Directive could be conservatively estimated to be 0,8 % of EU GDP, the Commission estimated that further gains of up to 1,6 % of EU GDP could be realised if all Member States reached the degree of liberalisation of the five Member States with the lowest barriers in any given sector. This would equate to removing all of the existing barriers in various sectors.”* (Gov.uk 2014f, 15–17).

disadvantages for service providers. It was admitted that some service providers not active in international markets may bear some extra costs compared to the active ones, however, the economic analysis showed that the first group benefited a lot from liberalisation in domestic service markets, as well as the consumers did (Gov.uk 2014f, 45).

The financial services and free movement of capital report sums up in a very EU-positive manner the following: access to the Single Market in financial services as well as free movement of capital bring significant benefits for the UK financial services industry and consumers. There are, however, many weaknesses in the EU's current approach to harmonisation and policy-making and the European inter-state cooperation in this area needs to be strengthened within the EU framework (Gov.uk 2014c, 5–6). As stressed in the previous reports, the very existence of the EU Single Market and British involvement has been considered to be critical for the consolidation of the UK's position as a leading international financial centre. The importance of the EU as a market, the passporting regime that enables firms to be authorised in the UK and then operate across the whole Europe, and the role of the Single Market in facilitating access to non-EU markets were stressed. The UK's share of the Single Market in financial services was highly emphasised, as well as the link between the UK's position as a global financial centre and the development of the Single Market, and surveys setting out business support for access to the Single Market (Gov.uk 2014c, 39). "Access to the EU Single Market is key for many financial services firms, and a number of stakeholders emphasised the importance of this in their decisions to locate in the UK" (Gov.uk 2014c, 41). On the other hand, however, the sector has been affected by regulatory reactions of the EU that emerged to face the financial and Eurozone debt crises. Although there had been many concerns about the sector's future at the beginning of imposing of the reforms, in 2014 and 2015 were those concerns not so strong any more. Liddle (2014, 229) suggests that "in wholesale financial services, mutual recognition resulted in the absence of adequate cross-border regulatory standards and supervision. The fact that regulation remained nationally based undoubtedly contributed to the severity of the banking crisis. Britain is held primarily responsible because the UK has been the strongest opponent of Brussels intrusion in the City and the most vocal advocate of light-touch regulation." However, as mentioned in this paper, this approach is not completely up-to-date any more.

## 5 Discussion

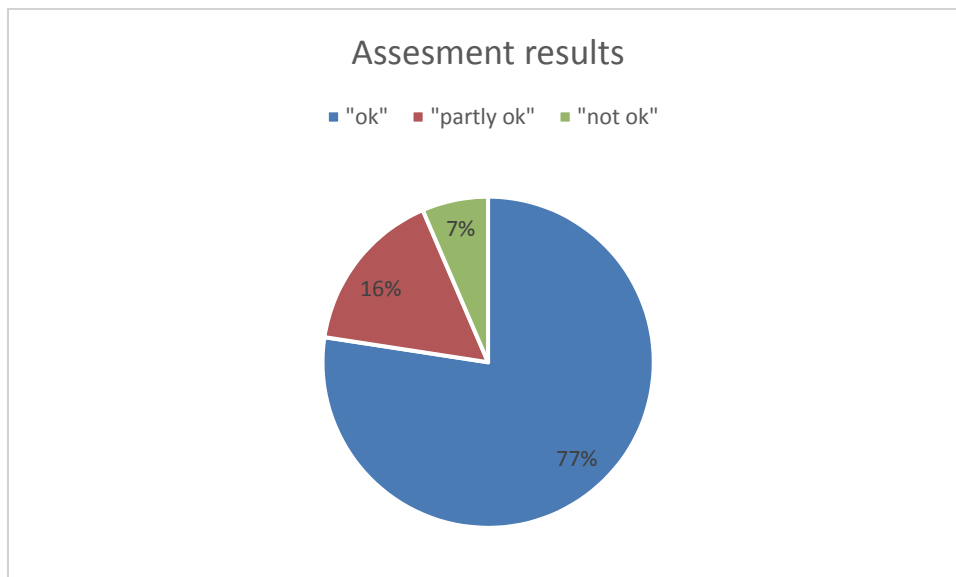
To confirm the outcomes of the sections above, further analysis of reports' conclusion has been made based on Emerson and Avery (2014). It has been examined whether the majority of reports' respondents were in favour of current state of EU competences in particular field, in order to see possible perspectives of the Review for the outcomes of the "Brexit" vote. Each of the 32 reports was analysed and results were captured according to final impression of each of the review. As clear from the following graph, the vast majority of the 32 reports concluded the state of EU competences as right, with no or very few problematic points for British policies. Only 7 % of the reports, i.e. two of them, were concluded with disagreement with current state of competences. Those two areas were the highly controversial Free Movement of Persons and the area of Social and Employment. These two topics became crucial points of the Brexit debate, when the "out" camp based their arguments precisely on these two areas<sup>23</sup>.

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<sup>23</sup> To see more detailed overview of the Review of the Balance of Competences, please see the Appendix.

The questionable outcome of the process stems from very nature of the interest groups that may be interested in such debate – whereas usually pro-integrational businesses and organisations are able to provide unified reports of their positions and formulate it directly, the more-likely Eurosceptic electorate, or the “common people”, do not have such possibilities and end up with expressing their views not ex ante within processes such as the Review, but rather directly when they are asked to. That means that although the majority of reviews gave the impression of EU-positive stance of various interest groups, it showed in the end that the majority of electorate simply did not feel the same. This aspect may explain why the governmental effort to boost sophisticated debate about British EU membership was not successful from the governmental point of view.

To sum up, the whole Review of the Balance of Competences gave a very straightforward impression of beneficial relationship with the European Union. The vast majority of the areas were defined as bringing positive outcomes for the UK. In the end, the only two reports where some, not all, the respondents expressed their fears from growing EU competence, became main pillars of the “out” campaign and thus helped to persuade the British voters to leave the EU in the end.



**Graph 1:** Review of the Balance of Competences – assessment of particular reports’ conclusions – results. For more evidence please see the appendix.

## 6 Conclusion

The main outcome of David Cameron’s governments’ contribution to EU preferences definition before the final reassessment of the British EU membership displayed itself in the two-year process of Review of Balance of Competences. This procedure was an essential part of Cameron’s European policy, motivated by efforts to finally stop internal political divisions in his party as well as country. Although the motivation to launch the process came out rational decision, it showed itself as a basis for unexpected result in the end. The Review was an essential part of a governmental plan defined as “Reform, Renegotiation, Referendum”, that expected boosting sophisticated debate in the UK leading to effective reform of the European Union in the aftermath of the economic crisis, resulting in redefinition of the British membership and ending up with leaving the final decision on informed electorate.

The Review aimed to include all possible interest groups into the debate, in order to provide sophisticated basis for discussions about future relationship of the UK with the European Union. Nevertheless, the only two disputable issues out of 32, that emerged from the process, served in the end as munition for quite opposite purpose than it was initially designed for – i.e. to back up the pro-Brexit stance before the referendum of June 23<sup>rd</sup> 2016.

The process of Review of the Balance of Competences has exposed two main contradictory interest groups that significantly affected the governmental European policy. First, there is rather euro-sceptic population that is traditionally expressing one of the most negative opinion about EU among all of the member states. On the other hand, there is very strong group of supporters of British involvement in the European integration, that seem to be more influenced by the “pragmatic” arguments, usually stemming from economic point of view. As clear not only from the Review, for instance, British financial services sector plays a key role in the economy of the EU and brings benefits to all member states, concerning both the functioning of the markets as well as its future and possible contributions to its ongoing reforms.

The Cameron’s plan to tackle the European question was not successful from the governmental point of view. Neither was the debate about British membership informed and sophisticated, nor the UK redefined its membership in economically reasonable rational manner. Moreover, the pro-out referendum exposed further divisions in the UK as well as in the EU, above all Scottish independence efforts or strengthening extremist anti-integrational political parties across the whole EU.

## 7 Appendix

Semester	Sector of policy	Review	Competence question (ok/partly ok/not ok)	Call for more EU competence
1	Core single market policies	Single Market	ok	
1	Economic, monetary, social policies	Taxation	partly ok	
1	External relations	Development Cooperation and Humanitarian Aid	ok	
1	External relations	Foreign Policy	ok	
1	Sectoral policies	Animal Health and Welfare and Food Safety	ok	
1	Sectoral policies	Health	ok	
2	Core single market policies	Single Market: Free Movement of Goods	ok	yes
2	Core single market policies	Single Market: Free Movement of Persons	not ok	
2	Education, research, culture	Research and Development	ok	
2	Education, research, culture	Culture, Tourism and Sport	ok	
2	External relations	Trade and Investment	ok	
2	Justice and home affairs	Asylum and Non-EU Migration	ok	
2	Justice and home affairs	Civil Judicial Cooperation	ok	
2	Sectoral policies	Environment and Climate Change	ok	
2	Sectoral policies	Transport	ok	
3	Core single market policies	Single Market: Free Movement of Services	ok	yes
3	Core single market policies	Single Market: Financial Services and the Free Movement of Capital	ok	
3	Core single market policies	Competition and Consumer Policy	ok	
3	Economic, monetary, social policies	EU Budget	ok	
3	Economic, monetary, social policies	Cohesion	ok	
3	Economic, monetary, social policies	Social And Employment	not ok	
3	Justice and home affairs	Fundamental Rights	partly ok	
3	Sectoral policies	Agriculture	partly ok	
3	Sectoral policies	Fisheries	partly ok	
3	Sectoral policies	Energy	ok	
4	Economic, monetary social policies	Economic and Monetary Policy	partly ok	
4	Education, research, culture	Education, vocational training and youth	ok	
4	External relations	Enlargement	ok	
4	Justice and home affairs	Police and Criminal Justice	ok	
4	Justice and home affairs	Information Rights	ok	
4	Education, research, culture	Voting, Consular and Statistics	ok	
4	General	Subsidiarity and Proportionality	N/A	

**Table 1:** Structure of the Review of the Balance of Competences. Division of the policies areas and their assessment based on EMERSON, M; AVERY, G. et al., 2014.

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# THE LIBERAL COSMOPOLITAN IDEAL FOR EUROPE: LIBERAL COSMOPOLITAN (AND OTHER) JUSTIFICATIONS FOR EU FREEDOM OF MOVEMENT<sup>24</sup>

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Laura Westerveen<sup>25</sup>

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**Abstract:** From a liberal cosmopolitan perspective, EU freedom of movement can be regarded as a great contribution to equality of opportunity and the granting of basic liberties across national borders. However, the European political and public debate on the right to free movement has become increasingly focused on the advantages and disadvantages of freedom of movement for the economy of member states, with member states arguing for a restriction of the right to avoid supposed consequences as ‘social dumping’ and ‘welfare tourism’, especially after the EU’s enlargement to Eastern Europe. In this paper it is explored whether and how liberal cosmopolitan norms are (still) present in the European Commission’s justifications for EU freedom of movement. The analysis shows that, although liberal cosmopolitan justifications for the right to free movement are still present in the European discourse on EU freedom of movement, these justifications are currently undercut by economically oriented and other utilitarian arguments.

**Keywords:** freedom of movement, right to free movement, liberal cosmopolitanism, EU citizenship, European integration, European Commission

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# 1 Introduction

The right to free movement can be considered as one of the greatest accomplishments of the *European Union* (EU) that is highly appreciated by EU citizens (TNS Opinion and Social 2010). EU freedom of movement does not only encompass the right to free movement for EU citizens and the Schengen area of free movement, but is also a principle that is often closely associated with European integration (TNS Opinion and Social 2013). Thereby, EU freedom of movement can be considered one of the most tangible consequences of European integration, which has become a true institution within the EU (Tomkin 2011, 1; Dølvik and Visser 2009, 492). However, European integration in general and EU freedom of movement in particular, might also pose a challenge to theories of international relations that focus on national communities' right to self-determination and a consequent right to exclude aliens (See, for example, Walzer 1983). With an explicit normative commitment to universal basic liberties and equality of opportunity, liberal cosmopolitanism<sup>26</sup> might qualify as the theory whose normative ideal fits best with the EU's commitment to freedom of movement. From a liberal cosmopolitan perspective, freedom of movement is regarded as both an important (basic) liberty in itself as well as a liberty that can help with the realization of other basic rights (Carens 1987; Bauböck 2009). Therefore, liberal cosmopolitanism views freedom of movement as a required moral duty that should not be restricted because of economic concerns (Carens 1987, 262). However, as is shown in recurrent debates about the alleged disadvantages of EU freedom of movement for the economies and welfare systems of Western European member states, the European political and public debate on the right to free movement has become increasingly focused on the economic case for EU freedom of movement.<sup>27</sup> This economic focus in the European debate on EU freedom of movement might have implications for the feasibility of norms deriving from liberal cosmopolitanism, to inform the European narrative on freedom of movement.<sup>28</sup> In this paper it is therefore explored whether and how cosmopolitan norms are (still) present in the EU's justifications for EU freedom of movement.

To this end, first the evolution of the European right to free movement throughout time will briefly be reviewed. It will be argued that even though the promotion of EU freedom of movement was originally focused on the economic benefits it could entail for the European single market, with the Citizenship Report 2010 and the 2009 Guidelines, it is now recognized as a fundamental freedom for all EU citizens that functions as one of the foundations of the European integration project. This legal evolution of EU freedom of movement has brought the

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<sup>26</sup> *In this paper, liberal cosmopolitanism is referred to as a strand of normative theory in International Relations that starts from the ideas of American political philosopher John Rawls, but argues that Rawls's principles of justice for the domestic level should be equally applied to the international level. As Caney (2005, 3-5) points out: not all liberal cosmopolitans necessarily endorse the same legal or institutional order, but they do share the following moral principles: (1) moral worth is to be attached to individual persons independent of the society or community to which they belong, (2) this moral worth of individual persons applies to everyone equally and (3) the duty to respect someone's individual moral worth is universally applicable and thus binding on everyone.*

<sup>27</sup> *Reflected in recent studies on the impact of EU freedom of movement on the national economies of member states: Ernst & Young (2014); European Citizen Action Service (2014), as well as the letter of the Netherlands, Austria, Germany and the United Kingdom (2013) to the European Council in which they ask the Council to take measures against the 'abuse' of the right to free movement by certain EU migrants and the burden this places on the social welfare systems of the respective states.*

<sup>28</sup> *Next to economic concerns, it is also security concerns that are challenging EU freedom of movement. The reintroduction of border controls by several EU member states in response to the current immigration control crisis shows, for instance, that the Schengen area of free movement is increasingly under threat because of concerns for national security.*

institution closely in line with the liberal cosmopolitan ideal of EU freedom of movement. In the second part, the paper will present a qualitative content analysis of EU documents addressing EU freedom of movement, collected in the period from 2010 onwards. The analysis shows that both liberal cosmopolitan as well as economic justifications are present in the narrative on EU freedom of movement that the documents provide. Next to these two types of justifications, the documents also bring up ‘intergovernmentalist justifications’, which attempt to disprove and mitigate perceived negative consequences of EU freedom of movement at the national and local level. Yet, it is the justifications that refer to the political utility of EU freedom of movement for the unity of the EU (by bringing enormous benefits to EU citizens and functioning as a symbol of the European integration project) that are most dominantly present in the documents. The paper will then conclude that although liberal cosmopolitan norms are indeed (still) present in the justifications for EU freedom of movement as provided in the analyzed documents, it is norms derived from other normative perspectives that are dominant. Based on this analysis, the paper will argue that the liberal cosmopolitan justifications for EU freedom of movement are currently undercut by more dominant consequentialist justifications, which can help legitimizing restrictions of EU freedom of movement because of economic concerns and other non-beneficial consequences.

## 2 The European Right to Free Movement

One of the main objectives of European integration has been the construction of a single European market. In accordance with this objective, the establishment and promotion of EU freedom of movement was originally motivated by the economic benefits that could be reaped from the free movement of labor within the common market (Menz 2002, 723). EU freedom of movement was correspondingly adopted for working people in 1957 with the signing of the ‘Treaty establishing the European Economic Community’ (Treaty of Rome 1957, articles 48-51) when they were granted the right to ‘*move freely within the territory of Member States*’ (article 48, paragraph 3 b) and ‘*to stay in a Member State for the purpose of employment*’ (article 48, paragraph 3 c). However, as recognized by the ‘EU Citizenship Report 2010’ (European Commission 2010, 603), which is part of the so-called ‘Citizenship Package’<sup>29</sup>, ‘*the principle of free movement of persons has developed constantly over the last 40 years to include all EU citizens*’. Thereby the Report explicitly recognizes the evolution of the principle of EU freedom of movement from something that was restricted to working EU citizens, to a right that now applies to every EU citizen regardless of their socio-economic status. Furthermore, the Guidelines on the application of Directive 2004/38/EC (European Commission 2009, 313, p. 3) adopted by the European Commission in July 2009, describe the right to free movement as ‘*one of the fundamental freedoms of the internal market*’ that is ‘*at the heart of the European project*’ and ‘*one of the foundations of the EU*’. This depiction of the right to free movement as a fundamental freedom that is central to European integration, further establishes EU freedom of movement as a basic liberty and a core principle of the EU. This section will provide a short historical review of this evolution, which will function as the starting point for the subsequent analysis.

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<sup>29</sup> *The Citizenship Package was adopted by the European Commission in October 2010 and is composed of three reports (the ‘EU Citizenship Report 2010: Dismantling the Obstacles to EU Citizens’ Rights’, the ‘Report of Progress towards Effective EU Citizenship 2007-2010’ and the ‘Report on the Evaluation of the 2009 European Parliament Elections’)* that evaluate the progress towards enabling the exercise of rights that are conferred upon EU nationals through EU citizenship, including the right to free movement.

It was the ‘Treaty on European Union’ (Maastricht Treaty 1992) that expanded the right to free movement to all EU nationals, with the formation of the European Union and the establishment of EU citizenship in addition to a person’s national citizenship of one of the member states. All EU citizens were subsequently granted the right to ‘*move and reside freely within the territory of the Member States*’ (Maastricht Treaty 1992, article 8 a, paragraph 1). From 1993 onwards, with the entry into force of the Maastricht Treaty, the right to free movement in the EU was thus no longer restricted to working EU citizens, but applicable to all EU citizens solely on the basis of their citizenship of the Union (Tomkin 2011, 4-5). Then in 1997, the ‘Treaty of Amsterdam’ (Amsterdam Treaty, 1997, article 1, paragraph 3) further specified the Union’s aspiration to promote EU freedom movement by stating that the EU aims to ‘*facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice (...)*’ (Amsterdam Treaty 1997, article 1, paragraph 3). Hereby EU freedom of movement is connected to possible concerns for the security of EU member states. The main justification the Amsterdam Treaty provides for facilitating free movement is ‘*to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development*’, amongst others through ‘*the creation of an area without internal frontiers*’ (1997, article 1, paragraph 5). Even though the right to free movement is thus applicable to all EU citizens, the main justification provided for this right, as deduced from the Amsterdam Treaty, continued to be the economic benefit it could bring to the European economies.

However, the development of EU freedom of movement did not stop with the 1997 Amsterdam Treaty. In 2004, the Directive of the European Parliament and the European Council on ‘the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States’ (Directive 2004/58/EC) further clarified and strengthened the right to free movement of EU citizens by setting out all the rules concerning the exercise of free movement rights in one legal document and expanding the right to free movement to family members<sup>30</sup> of EU citizens. More importantly, the Directive also put into place certain safeguards for non-employed EU citizens and their family members to be able to exercise their right to free movement. Yet, the economic purpose of EU freedom of movement remained to be reflected in certain advantages of working EU citizens over non-working EU citizens, when exercising their free movement rights. Nonetheless, the justification that the Directive provides for the right to permanent residence is that this ‘*would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union*’ (Directive 2004/58/EC, paragraph 17).

Next to this, the Directive requires that EU citizens and their family members who have exercised their right to free movement ‘*should enjoy (...) equal treatment with nationals (...)*’ (Directive 2004/58/EC, paragraph 20), that beneficiaries of the right cannot be discriminated against ‘*on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation*’ (Directive 2004/58/EC, paragraph 31) and sets out that restrictions of citizens’ right to free movement can only be justified ‘*on grounds of public policy, public security or public health*’ (Directive 2004/58/EC, paragraph 22). By putting forward the aim of social cohesion and principles of equal treatment and non-discrimination the Directive somewhat shifts the EU’s reasons behind EU freedom of movement towards other values than pure economic gain and paves the way for a more socially

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<sup>30</sup> For a definition of ‘family member’ see article 2 of the Directive.

oriented understanding of EU freedom of movement. Lastly, the Directive allows for member states to adopt ‘*the necessary measures*’ to ‘*guard against abuse of rights or fraud*’ (Directive 2004/58/EC, paragraph 28). With this last provision, the Directive also recognized the possible challenges EU freedom of movement could pose to member states and refers them to the safeguards that are built into EU freedom of movement as to avoid potential abuse and fraud.

A successive and last important piece of EU legislation touching upon EU freedom of movement is the Treaty of Lisbon (Lisbon Treaty 2007), which entered into force in December 2009, that brought about increased powers for the EU institutions in the area of asylum and immigration policy and lists the fundamental aims of the EU, namely ‘*to promote peace, its values and the well-being of its peoples*’ (Lisbon Treaty 2007, article 2 paragraph 1). The Lisbon Treaty also strengthened the principle of non-discrimination of EU citizens and the aims of promoting social justice, cohesion and solidarity within the Union, by stating that the EU ‘*shall combat social exclusion and discrimination, and shall promote social justice and protection (...), shall promote economic, social and territorial cohesion, and solidarity among Member States*’ (Lisbon Treaty 2007, article 1 paragraph 3). Herewith the Lisbon Treaty altered the central focus of European integration to include principles of anti-discrimination, social justice and solidarity and placed the well-being of EU citizens at the center of the European project. However, concerning rights enjoyed on the basis of EU citizenship (including the right to free movement), the Lisbon Treaty also mentions that if necessary ‘*(...) the Council (...) may adopt measures concerning social security or social protection*’ (Lisbon Treaty 2007, article 2 f c, paragraph 35 b), thereby retaining the safeguards for avoiding the overburdening of national welfare systems (Tomkin 2011, 4-5).

In conclusion, as recognized by the European Commission in the Citizenship Report 2010 and the 2009 Guidelines, throughout time EU freedom of movement has become a fundamental freedom for all European citizens, which functions as one of the foundations of the European integration project. EU freedom of movement can then be perceived as being evolved from a means to increasing economic benefit through enhancing the free movement of labor within the EU, to a fundamental principle of the EU that recognizes the right to free movement as a basic liberty for all EU citizens (See also Van der Mei 2005, 107). Through this evolution, EU freedom of movement then, legally speaking, very much approaches the liberal cosmopolitan ideal of EU freedom of movement. At the same time, it must be recognized that certain safeguards for avoiding potential abuse of free movement rights and for securing public safety in the member states, have remained intact. Nonetheless, because principles of anti-discrimination, equal treatment and social justice are listed among the aims of EU freedom of movement in the legal texts, liberal cosmopolitan justifications for EU freedom of movement, which actually refer to these norms, seem to be fairly relevant for justifying EU freedom of movement to the European public. This means that the legal evolution of EU freedom of movement as discussed in this section, possibly made it more likely for liberal cosmopolitan justifications for EU freedom of movement to appear in the European discourse on EU freedom of movement. For this reason, the following analysis will focus on the European discourse on EU freedom of movement from 2010 onwards.

### 3 Methodology

The method used for determining the plausibility of liberal cosmopolitan normative commitments influencing the EU discourse on EU freedom of movement, is a qualitative content analysis (Hermann 2008; Schreier 2014) of recent EU documents that deal explicitly with EU freedom of movement. Especially now that it has become a politically contested issue,



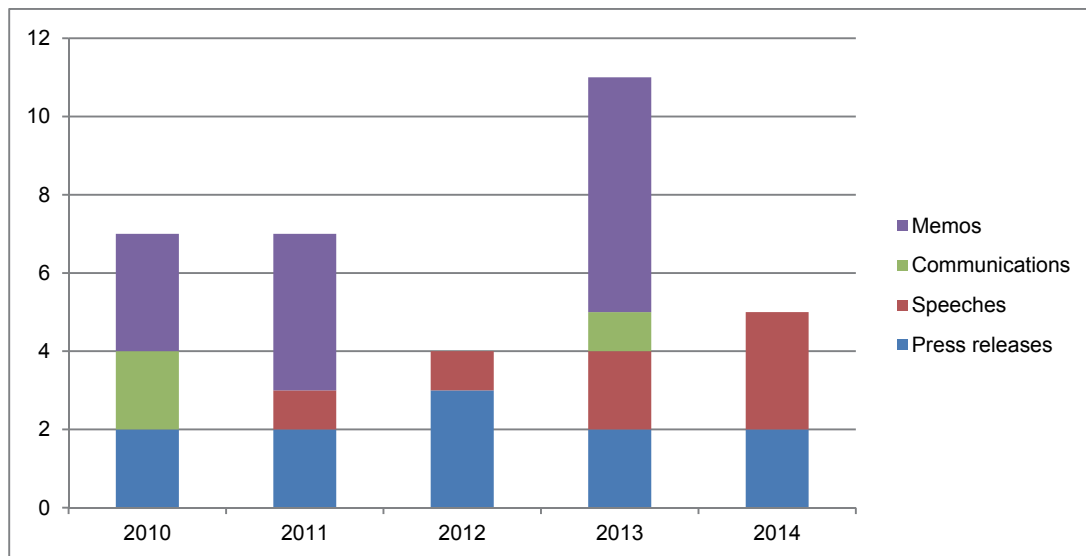
the structure of the European discourse on EU freedom of movement, limits the range of possible conceptions of EU freedom of movement (Neumann 2008, 62; Willig 2014, 341). Because the analysis of all the different narratives on EU freedom of movement within the EU is beyond the range of this research, the analysis focused solely on documents produced by respectively the European Commission and the European Parliament. Being the legislating powers in the respective policy area, these two institutions are expected to have a more European perspective on EU freedom of movement than for instance the European Council, which normally reflects the perspectives of the member states. Since the European Commission is the EU's executive body that determines the Union's objectives and priorities and because of limited space, this paper will only present the findings for the European Commission.<sup>31</sup> The chosen time frame for the documents is 2010 to 2014, having considered that (as discussed in the first section of this paper) after the entry into force of the Treaty of Lisbon in December 2009 and the adoption of the 2009 Guidelines on the application of the right to free movement, the most important EU legislation concerning EU freedom of movement has remained constant.

Finally, only documents that were specifically intended for communication with the European public (including speeches, memos, communications and mostly press releases) were selected. In the light of an increasing euro-skeptic European population, these documents were considered to be most likely to contain carefully thought-out justifications for EU freedom of movement. Although it can be argued that the justifications that the EU provides for EU freedom of movement in these publicly available documents do not necessarily correspond with the justifications the EU deems relevant for EU freedom of movement behind closed doors, they can tell something about how EU freedom of movement is justified vis-à-vis the European public (Hermann 2008, 156). These selection criteria yielded 70 documents (of which 34 were produced by the European Commission and 36 by the European Parliament) for content analysis. The findings of the content analysis of the 34 documents (of which 11 press releases, 13 memos, 7 speeches and 3 communications, see Figure 1) created by the European Commission will be presented in the analysis section of this paper.

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<sup>31</sup> *The findings for the European Parliament and a comparative analysis can be found in my Master thesis entitled 'The Liberal Cosmopolitan Ideal for Europe: Liberal Cosmopolitan Norms in the EU Narrative on EU Freedom of Movement', submitted at the University of Groningen on the 6<sup>th</sup> of July 2015.*





*Fig. 1. Overview Documents European Commission*

### 3.1 Coding Frame

With a view to probing the presence of liberal cosmopolitan norms in the European Commission's justifications for EU freedom of movement, a coding frame was built by means of which the content of the selected EU documents was systematically processed and interpreted. This coding frame was based on academic literature in the closely related field of EU migration policy (Roos and Laube 2015; Helbling 2014; Wood and Landry 2008; Buonfino 2004). This literature currently discerns two dominant justificatory frames for EU immigration and immigrant integration policy. The first type of justifications appeals to the economic benefit that immigration can entail in times of global economic competitiveness, by providing a diverse workforce (Wood and Landry 2008). The second type of justifications rather considers immigration as a security concern and justifies certain types of policies by presenting them as necessary for guaranteeing public safety (Buonfino 2004). It is the last type of justifications that refers to security concerns that is usually considered hegemonic in the European discourse on migration (Buonfino 2004). Whereas these two types of justifications are most commonly found, some authors (Roos and Laube 2015; Helbling 2014) also detect justifications for immigration policy that refer to liberal cosmopolitan norms such as protection, hospitality, equality, social justice, anti-discrimination and fairness.

To identify which sorts of justifications for EU freedom of movement are most prevalent in the European Commission's discourse on freedom of movement, competing types of justifications for EU freedom of movement were distinguished in the coding frame. On the one hand, justifications that referred to liberal cosmopolitan norms as diverse as equality of opportunity, freedom of movement as a basic liberty, social justice and anti-discrimination were incorporated in the coding frame. On the other hand, justifications referring to norms that can be considered oppositional to liberal cosmopolitan values such as economic or political utility were also included in the coding frame. To this purpose, first, a distinction was made between 'deontological' justifications and 'teleological' justifications. The deontological justifications include justifications that depart from certain general moral principles on basis of which EU freedom of movement can be justified, while the teleological justifications include justifications that make a claim for certain positive consequences of EU freedom of movement. Within the deontological type of justifications, justifications that were considered as appealing to a liberal cosmopolitan norm were subsequently placed under a separate heading. These liberal

cosmopolitan norms were further specified as the norms of (1) freedom of movement as a basic liberty, (2) equality of opportunity, (3) anti-discrimination and (4) social justice. Other possible liberal cosmopolitan norms such as hospitality, protection and fairness were also considered in the analysis, but not found to be present in the documents. The teleological justifications were first categorized as either ‘transnationalist’ or ‘intergovernmentalist’, depending on whether the justifications referred to consequences of EU freedom of movement for the EU as a whole (transnationalist) or for separate member states (intergovernmentalist).

The transnationalist justifications were divided into the following categories: (1) economic utility EU, (2) political utility EU, (3) appeal to EU law and (4) security interests EU. Within the justifications pointing at the political utility of EU freedom of movement for the unity of the EU a further categorization was made between justifications appealing to the benefits EU freedom of movement brings to EU citizens and justifications appealing to the symbol EU freedom of movement can denote for the European integration project. Finally, the intergovernmentalist justifications were classified as (1) referring to different safeguards that are built into EU freedom of movement as to avoid potential abuse and fraud, or as (2) referring to the economic benefits of EU freedom of movement for separate member states, or as (3) recognizing the possible challenges EU freedom of movement can provide for member states. These codes and subcodes are presented in Table 1.

1. Deontological	2. Teleological	
1.1 <i>Liberal Cosmopolitan</i>	2.1 <i>Transnationalist</i>	2.2 <i>Intergovernmentalist</i>
1.1.1 FoM basic liberty 1.1.2 Equality of opportunity 1.1.3 Anti-discrimination 1.1.4 Social justice	2.1.1 Economic utility EU 2.1.2 Political Utility EU 2.1.2.1 Benefits EU citizens 2.1.2.2 FoM symbol European integration 2.1.3 Appeal to EU law 2.1.4 Security interests EU	2.2.1 Safeguards for member states 2.2.2 Economic utility member states 2.2.3 Recognition possible challenges member states

**Tab. 1.** Overview Types of Justifications in Coding Frame

## 4 Results

Figure 2 displays the frequency of occurrence of each categorized justification, by showing how many of the documents refer to the respective type of justification. The next three paragraphs will outline the most important manifestations of the three main types of justifications for EU freedom of movement (liberal cosmopolitan, transnationalist and intergovernmentalist) as found in the documents and listed in Figure 2. Hereafter, the implications of these results for the potential of liberal cosmopolitan norms and values to influence the European discourse on EU freedom of movement will be discussed.

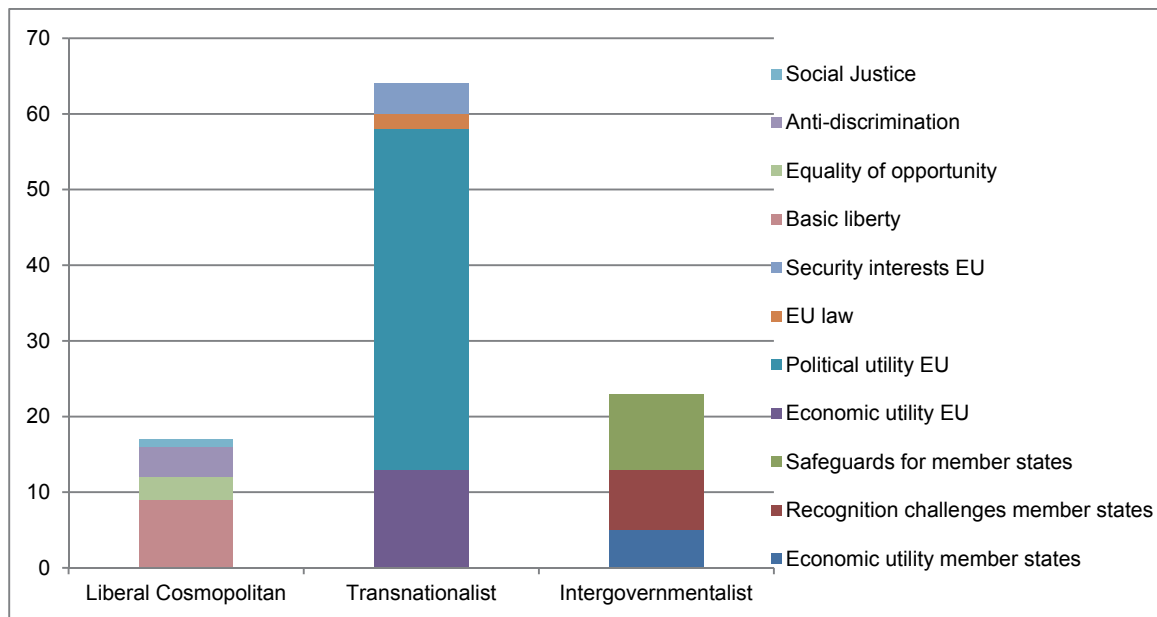


Fig. 2. Overview Frequency of Occurrence Justifications in Documents

#### 4.1 Liberal Cosmopolitan Justifications

Within the category of liberal cosmopolitan justifications, the most prevalent type of justification in the documents, as can be seen in Figure 2, is the one that appeals to the liberal cosmopolitan norm of freedom of movement as a *basic liberty*. This justification argues that (a) the European right to free movement is equivalent to rights conferred upon EU citizens through their national citizenship of one of the member states, (b) this right should be underpinned by other (less fundamental) EU rights and rules and (c) this right must be upheld at all times. Thereby this justification considers any restriction to the right to free movement or obstacle to exercising this right, unjust. Documents, for instance, refer to the right to free movement as a ‘fundamental freedom’ (European Commission 2013, 837) that EU citizens enjoy solely on the basis of their EU citizenship and state that the rules for EU freedom of movement are specifically directed at enhancing the use of free movement rights (European Commission, 2013, 837).

*‘They [EU citizens] should be able to make use of their rights as EU citizens in the same way as they use their rights as national citizens’ (European Commission 2010, 603).*

*‘EU rules on free movement and access to social assistance and social security facilitate the effective exercise of the right to free movement and protect those who genuinely make use of it’ (European Commission 2013, 837).*

In addition, several documents contain references in which it is said that EU freedom of movement should not be ‘undermined’ (European Commission 2012, 78), that any obstacle to the exercise of free movement should be ‘prevented’, ‘removed’ (European Commission, 2013, 536) or ‘dismantled’ and that ‘administrative hurdles’ should be taken away (European Commission 2010, 603). Furthermore, EU freedom of movement is often portrayed as something that needs to be ‘guaranteed’ (European Commission 2011, 1036), defended, or

fought for: ‘(...) *vigilance is required to defend citizens’ right to free movement*’ (European Commission 2012, 481).

*‘The four freedoms anchored in the Treaty cannot be picked and chosen. You will always see me fighting for preserving free movement’* (Viviane Reding, European Commission 2013, 789).

Finally, it emphasized that EU citizens should not lose other basic liberties when exercising their right to free movement: ‘(...) *to ensure that EU citizens do not lose their social security rights when moving within the EU*’ (European Commission 2013, 1041) and that even in extreme cases, the right to free movement of EU citizens should still be upheld.

*However, it must be emphasized that, even in the event of the reintroduction of border controls, EU citizens can in principle enter the territory of another Member State on the simple presentation of a passport or ID card*’ (European Commission 2011, 606).

## 4.2 Transnationalist Justifications

Within the category of transnationalist justifications for EU freedom of movement, both the justification that appeals to the economic utility of EU freedom of movement for the EU and the justification that points at the political utility of EU freedom of movement for the unity of the EU are frequently employed in the documents. The first of these two types of justifications, argues that EU freedom of movement is beneficial for the European internal economy. This justification namely views the absence of internal borders as a competitive asset in an increasingly globalized economy, whereby EU freedom of movement stimulates economic growth. In addition, this justification contends that EU freedom of movement can help solving high unemployment rates by enhancing labor mobility across the Union. Documents, for instance, refer to the ‘strong economic case’ (European Commission 2013, 500) for EU freedom of movement, argue that freedom of movement is ‘(...) *fundamental for the development of the internal market*’ (European Commission 2010, 249) or ‘(...) *central to the success of the Single Market*’ (European Commission 2011, 401) and that ‘*free movement of citizens (...) stimulates economic growth* [emphasis in original]’ (European Commission 2013, 1151).

*‘(...) an area without internal border controls brings huge benefits to the economy’* (European Commission 2011, 608; European Commission 2011, 585).

*‘Openness is the key word to make sure the EU remains an attractive destination. This is crucial if we want to reap the benefits travellers bring to our economy* [emphasis in original]’ (European Commission 2013, 172).

*‘Intra-EU mobility contributes to addressing skills and job mismatches. We have to ask ourselves why some 2 million vacancies remain unfilled in the EU despite the crisis. For me, it means that we need a genuine European labour market, like in the USA. And the Commission is taking concrete actions to achieve this objective’* (Viviane Reding, European Commission 2013, 789).

Furthermore, documents also stress the positive economic consequences of the extension of EU freedom of movement brought about by the EU enlargements of 2004 and 2007. In this way, this justification seems to respond to the discussion about the advantages and disadvantages of EU freedom of movement for the European economy.

*'The recent experience of the 2004 and 2007 enlargements has shown that intra-EU mobility has positive effects on European economies and labour markets. (...) For the EU as a whole the GDP effect of recent intra-EU mobility flows is equivalent to a collective income gain of around 24 billion EUR for EU citizens'* (European Commission 2013, 500).

However, as shown in Figure 2, the second type of transnationalist justifications that refers to the political utility of EU freedom of movement for the unity of the EU is clearly most frequently present in the European Commission's documents. Two variations of this type of justification can be discerned. The first variation points at the benefits EU freedom of movement brings to EU citizens and all those living and travelling within the EU. This justification perceives EU freedom of movement as something that is owed to EU citizens and instrumental in bringing about a true 'citizens' Europe' that meets EU citizens' needs and expectations (European Commission 2010, 603; European Commission 2014, 2266; European Commission 2013, 496). Thereby this justification considers EU freedom of movement as a means for maximizing the benefits that the EU can produce for its citizens. Documents, for instance, stress the importance of EU freedom of movement for the everyday lives of EU citizens by arguing that it is '*vital for everyone living in Europe*' (European Commission 2013, 536) and state that EU freedom of movement is something that citizens take advantage of everyday (European Commission 2011, 608). In addition, some of the documents mention that the European citizens 'count on this' (European Commission 2013, 1151), that they should not be 'disappointed', and that 'concrete results' that improve EU freedom of movement should be delivered to them, as to '*revitalize the link between the citizen and the EU*' (European Commission 2010, 603).

*'An area without internal borders where people can move freely is one of the greatest achievements of European cooperation, and something that really benefits the citizens. It is therefore regrettable this is not respected everywhere (...)'* (European Commission 2010, 1329).

*'Member States and the EU share the responsibility to make the free movement rules work to the benefit of citizens (...)'* (European Commission 2013, 837).

*'The question of how we can strengthen our cooperation and safeguard free movement is extremely important. We owe it to our citizens to make sure Schengen remains an area without border controls'* (European Commission 2013, 496).

The second variation invokes the symbol that EU freedom of movement can denote for the European integration project. This justification argues that EU freedom of movement is the most important achievement of European integration from the perspective of EU citizens and also most closely associated with EU citizenship (European Commission 2013, 837; European Commission 2013, 1151). According to this justification, EU freedom of movement therefore has political utility for the EU in that it can function as the symbol of the European integration project. Documents, for instance, underline that EU freedom of movement is 'the biggest', 'most important', 'most cherished', 'most successful' and 'most tangible' common achievement of European integration (European Commission 2014, 2266; European Commission 2013 535; European Commission 2011, 662; European Commission 2012, 481; European Commission 2014, 206; European Commission 2011, 585). They also consider EU freedom of movement as a pillar of European integration that is central to the European project

(European Commission 2013, 500). Collectively, the two subtypes put emphasis on a possible convergence of the interests of EU citizens and the European integration aim.

*'Schengen has become one of the most powerful symbols of the EU's capacity to improve the lives of its citizens' (European Commission 2010, 251).*

*To EU citizens, free movement is the right most closely associated with EU citizenship. Altogether 56% of European citizens see it as the most positive achievement of the EU (European commission 2013, 837).*

*'The right to free movement is one of the four freedoms already inscribed in the first EU Treaty – a pillar at the very foundation of the European Union' (European Commission 2013, 1094).*

### 4.3 Intergovernmentalist Justifications

By addressing the different safeguards built into EU freedom of movement that allow member states to evade non-beneficial consequences of freedom of movement on their national territory, reassuring member states of the economic utility of EU freedom of movement for their national economy, or recognizing the possible challenges that separate member states can face as a consequence of EU freedom of movement, intergovernmentalist justifications reflect national (and thus not truly EU) perspectives on EU freedom of movement. Nevertheless, intergovernmentalist justifications were detected in the analyzed documents of the European Commission. In fact, Figure 2 shows that the European Commission utilizes intergovernmentalist justifications slightly more often than liberal cosmopolitan justifications. Figure 2 depicts a nearly equal number of occurrences of all variations of this category of justification. The first type of intergovernmentalist justifications points at the different safeguards available to member states as to avoid perceived negative consequences of EU freedom of movement, such as the abuse of free movement rights for illegitimate purposes, the committing of fraud when appealing to free movement rights, or the possible overburdening of member states' welfare schemes (European Commission 2013, 837; European Commission 2013, 789; European Commission 2013, 1151; European Commission 2013, 1041). Herewith, this justification deals with the specific EU rules that apply to EU freedom of movement and its exercise by EU citizens. Documents, for instance, refer to the rule that mobile EU citizens cannot become an 'unreasonable burden' on the welfare system of the host society (e.g. European Commission 2013, 1041). Instead of appealing to the benefits of EU freedom of movement, this justification then refers to certain (legal) guarantees in order to convince member states that the national consequences of EU freedom of movement in their state are harmless.

*"I am as strong in upholding the right to free movement as I am firm in fighting fraud and abuse. Abuse weakens free movement. The Commission stands by the Member States when they make use of all the safeguards provided by EU law [emphasis in original]" (Viviane Reding, European Commission 2013, 789).*

*'At the same time they contain robust safeguards to ensure that the rights afforded to EU citizens are not abused, that the obligations under EU law are respected and that unreasonable burdens are not placed on the social assistance schemes of the host Member States' (European Commission 2013, 837).*



*'EU law includes strong safeguards to prevent abuse of the right to free movement. EU rules on free movement of citizens allow Member States to take effective and necessary measures to fight against abuse, such as marriages of convenience, and fraud, such as document forgery, or other artificial conducts or deceptions solely made to acquire the right to free movement (...)' (European Commission, 2013, 1041).*

The second type of intergovernmentalist justifications refers to the economic benefits EU freedom of movement can bring to separate member states. This justification highlights the economic advantages of the openness of the member states' economies to mobile EU citizens. It argues that this openness stimulates economic growth in all individual member states (European Commission 2013, 1041) and can help the member states in decreasing their unemployment rates (European Commission 2013, 1094; European Commission 2013, 837). Thereby this justification defends EU freedom of movement along the same (economic) lines as the transnationalist justification referring to the economic utility of EU freedom of movement for the EU as a whole, only reflecting a more national perspective on the economic case for EU freedom of movement. In addition, this justification also emphasizes the positive impact of EU freedom of movement on national welfare systems (European Commission 2013, 837; European Commission 2013, 1151). By contrast to the other two transnationalist justifications (that refer to safeguards and recognize possible disadvantages), this justification thus reassures member states of the advantages of EU freedom of movement for their national economies and welfare systems. In this way, it implicitly endorses the prioritization of the economic interests of the national communities over that of individuals.

*'They [mobile EU citizens] help the host country's economy to function better because they help to tackle skills shortages and labour market bottlenecks' (European Commission 2013, 837).*

*'There is no statistical relationship between the generosity of the welfare systems and the inflows of mobile EU citizens' (European Commission 2013, 1041).*

The last type of intergovernmentalist justifications recognizes the possible challenges EU freedom of movement can provide for member states. This justification entails the recognition of the pressure that EU freedom of movement might put on national and local governments, especially in times of economic crisis and high politicization of issues related to immigration, while still upholding the principle of freedom of movement within the EU (European Commission 2013, 1041; European Commission 2013, 837; European Commission 2013, 1094; European Commission 2013, 789). The justification does not argue that the principle of EU freedom of movement should be abandoned, but rather refers national and local authorities to the available EU infrastructure, which can help them when faced with difficult local circumstances caused by EU freedom of movement (European Commission 2013, 1151; European Commission 2012, 78). Thereby it reacts to possible concerns of member states, while pointing out that in cases in which EU freedom of movement might not prove beneficial to local communities the EU institutions support the member states to make it work to their advantage.

*'(...) the Commission recalled that the basic principle of free movement is not up for negotiation, but that the Commission understands that some Member States are experiencing certain fraud and abuse cases' (European Commission, 2013, 1094).*

## 5 Discussion

As Figure 2 shows, the justifications that refer to the political utility of EU freedom of movement for the unity of the EU are clearly most dominant in the discourse on EU freedom of movement, as produced by the European Commission in the analyzed documents. Both the variation of this type of justification that points at the benefits that EU freedom of movement can bring to EU citizens, as well as the variation that invokes the symbol that EU freedom of movement can denote for the European integration project are prevalent in more than half of the documents. Furthermore, the justification that appeals to the economic utility of EU freedom of movement for the EU is also present in almost 40% of the European Commission's documents. What then becomes clear of the provided overview of employed justifications in Figure 2 is that the named teleological justifications are more influential in determining the discourse on EU freedom of movement as produced by the European Commission in the analyzed documents, than the listed deontological justifications. Of these teleological justifications it is mostly the transnationalist type that sets this discourse. Thereby it seems that it is rather utilitarian norms that influence the European Commission's justifications for EU freedom of movement, than liberal cosmopolitan norms.

Nevertheless, liberal cosmopolitan justifications for EU freedom of movement, and primarily the one that perceives EU freedom of movement as a basic liberty, are also present in the European Commission's documents. Yet, the intergovernmentalist justifications, which attempt to disprove and mitigate perceived negative consequences of EU freedom of movement at the national and local level, were brought up somewhat more commonly than these liberal cosmopolitan justifications. If we then turn towards the overall narrative that all the justifications draw of EU freedom of movement, it can be argued that on the one hand EU freedom of movement is indeed justified on the basis of liberal cosmopolitan norms and principles; while on the other hand, EU freedom of movement is also defended by making reference to the positive consequences of increased human mobility within the EU for both the Union and its member states. What can then be concluded is that liberal cosmopolitan norms are indeed (still) present in the justifications for EU freedom of movement as provided by the European Commission in the analyzed documents. However, altogether, norms derived from other normative perspectives appear more often in these justifications. Both the transnationalist and intergovernmentalist teleological justifications in principle run counter to the deontological liberal cosmopolitan justifications.

These teleological justifications namely make the justifiability of EU freedom of movement contingent on its utility for the EU, its citizens, or its member states, whereas the ideal liberal cosmopolitan justifications defend EU freedom of movement as a basic liberty for all EU citizens independent of its consequences for the economies and welfare in the EU and its member states. By adopting such a consequentialist perspective, EU freedom of movement is made conditional on its estimated results, meaning that it can only be advocated if these results are indeed considered beneficial. A case for EU freedom of movement that is solely based on economic justifications can, for instance, not preclude possible future restrictions on the right to free movement, if EU freedom of movement proves to be little economically beneficial after all (as certain member states now seem to imply). Moreover, by utilizing the teleological justifications, the European Commission can easily become involved in the current debate on the advantages and disadvantages of EU freedom of movement for the economies and welfare schemes of member states, as discussed in the introduction. However, from a liberal cosmopolitan perspective the outcome of this debate should not be decisive in arguing for or against EU freedom of movement, because of the intrinsic value of freedom of movement for people's individual autonomy. Lastly, the intergovernmentalist justifications seem to approve

a view that considers member states' interest above that of individual citizens in the EU at large. Hereby these justifications contradict the liberal cosmopolitan principle of attaching moral worth to individual persons independent of their nationality. Thereby the teleological justifications can undermine the principle-based liberal cosmopolitan justifications for EU freedom of movement. By endorsing teleological arguments the European Commission thus risks that liberal cosmopolitan justifications become overlooked.

## 6 Conclusion

In conclusion, this paper has discussed whether and how liberal cosmopolitan norms are still present in the European discourse on EU freedom of movement, now that the European political and public debate has become increasingly focused on the economic case for EU freedom of movement. By reviewing the legal evolution of EU freedom of movement, the paper argued that whereas EU freedom of movement was originally directed at facilitating the construction of the European common market, it is now recognized as a fundamental freedom for all EU citizens independent of their socio-economic status and considered a central pillar of the European integration project. This legal transformation that was completed in 2010 closely linked EU freedom of movement to the liberal cosmopolitan ideal of human mobility. The paper then presented the results of a qualitative content analysis of publicly available documents addressing EU freedom of movement produced by the European Commission in the period from 2010 to 2014. Thereby it showed that the Commission employs three main types of justifications for EU freedom of movement: liberal cosmopolitan justifications, transnationalist justifications and intergovernmentalist justifications.

Yet, it was found that it is not the liberal cosmopolitan justifications that prevail in the documents produced by the European Commission, but rather the teleological transnationalist justifications that are dominant. This led to the conclusion that liberal cosmopolitan norms are indeed (still) present in the EU's justifications for EU freedom of movement as provided by the European Commission in the documents, but so are teleological utility-based arguments. Since these teleological arguments make the justifiability of EU freedom of movement contingent on the positive consequences the free movement of people within the EU can produce, these justifications might undercut the liberal cosmopolitan ideal of EU freedom of movement that regards it as a basic liberty owed to all EU citizens. If the European Commission wants to make EU freedom of movement the symbol of European integration that the documents seem to emphasize and unconditionally defend the right to free movement for all EU citizens, the Commission should consider basing its narrative of EU freedom of movement more on liberal cosmopolitan justifications than on justifications that refer to the economic or political utility of EU freedom of movement.

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# SUPÍ FONDY A JEJICH VLIV NA LIDSKÁ PRÁVA

## VULTURE FUNDS AND THEIR IMPACT ON HUMAN RIGHTS

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**Abstrakt:** Článek se zabývá problematikou supích fondů a jejich vlivem na lidská práva, jmenovitě práva spadající do tzv. druhé generace lidských práv. Hlavním záměrem je prokázat souvislost mezi aktivitami supích fondů a negativním dopadem jejich činnosti na schopnost států dostát svým závazkům vůči obyvatelům v podobě zajištění jejich lidských práv. První kapitola se věnuje charakteristice supích fondů, jejich modu operandi a vysvětluje, jak je jejich činnost provázána s lidskými právy. Ve druhé kapitole jsou uvedeny čtyři případové studie aktivit supích fondů v Argentině, Libérii, Zambii a Islandu a nastíněny jejich konkrétní dopady. Poslední kapitola analyzuje kroky učiněné na půdě OSN s cílem vytvořit mezinárodně-právní rámec pro regulaci činnosti těchto subjektů.

**Klíčová slova:** Supí fondy, lidská práva, Organizace spojených národů

**Abstract:** The article focuses on activities of vulture funds and their negative impacts on the second generation of human rights. The main purpose is to demonstrate the link between vulture funds' scope of business and negative impact on human rights of inhabitants in those states, where foreign debt is partially owned by said funds. The first part of the paper explains the idea behind vulture funds; their business and its connection with human rights. The second part is based on four case studies of countries, which recently had to deal with prosecutions of vulture funds, namely Argentina, Zambia, Liberia and Iceland. Finally, the last part analyses the processes of adoption of resolutions against vulture funds by the United Nations with the scope of creating an international legislative framework.

**Keywords:** Vulture funds, human rights, United Nations

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# 1 Úvod

Lidská práva jsou od nástupu éry globalizace stále více propojena s ekonomickou dimenzí celosvětového dění. V posledních dvaceti letech se tak mezi subjekty stojícími za jejich omezování zařadili i aktéři, kterými se mezinárodní smlouvy na jejich ochranu nezabývaly. Jedním z těchto aktérů jsou i tzv. supí fondy (vulture funds) – hedge fondy skupující státní dluhopisy vybraných zemí s cílem vymoci po emitentovi zaplacení nejen dlužné částky, ale i vysokých úroků sahajících někdy až za hranici etiky.

Téměř nulové povědomí o jejich aktivitách nejen v českém, ale i mezinárodním prostředí, přispívá k pomalému procesu tvorby mezinárodně-právní regulace, jež by jejich činnost mohla účinně regulovat. Žádná publikace věnovaná přímo supím fondům dosud nebyla vydána a autoři článků, kteří věnují pozornost jejich činnosti, píšou své statě ve formátu jednotlivých případových studií. Tím je ovšem celé problematice neprávem ubíráno na globálním charakteru, jak dokládá i struktura této stati. Zatím jediná studie, která pojednává o supích fondech jako fenoménu propojujícím skrze subjekty aktéra a jeho oběti čtyři kontinenty, byla vypracována na půdě Organizace spojených národů (OSN) úřadem zvláštního zpravodaje pro otázky zahraničního dluhu v roce 2010.

Tato stat' si klade za cíl prostřednictvím analýzy aktivit supích fondů v Africe, Latinské Americe a Evropě prokázat dopady podnikání supích fondů na lidská práva tzv. druhé generace. V první kapitole je nejdříve stručně nastíněn historický vývoj i tradiční modus operandi těchto subjektů a následně vysvětlena podstata negativního vlivu této činnosti na hospodářská a sociální práva. Ve druhé kapitole je skrze případy Argentiny, Zambie, Libérie a Islandu prokázána souvislost mezi soudními spory a krácením na lidských právech, jež obyvatele státu v pozici dlužníka postihuje. Rozdílnost stanovisek rozvojových a hospodářsky rozvinutých zemí k odpovědnosti jednotlivých subjektů představuje hlavní překážku pro vytvoření účinného mechanismu na kontrolu činnosti supích fondů. Poslední kapitola se zabývá analýzou procesu schvalování rezolucí předložených orgánům OSN v roce 2014 s cílem vytvořit mechanismus na kontrolu supích aktivit.

## 2 Supí fondy a lidská práva

Trend globalizace a otevřenosti světových ekonomik přispěly ke vzniku řady nestátních aktérů mezinárodních vztahů a umožnily dalším subjektům rozšířit své pole působnosti i do této sféry. Jedním z těchto subjektů jsou i tzv. supí fondy. Tyto fondy, které právní podobou spadají do kategorie hedge fondů investujících do státních dluhopisů, v posledních desetiletích zkomplikovaly hospodářskou situaci v mnoha státech především v Africe a Latinské Americe.

### 1.1. Hedge fondy a jejich funkční rámec

Hedge fondy jsou investičním nástrojem pro společné investování zaměřující se na absolutní obrat. Ke zhodnocení investic využívají bohaté škály investičních příležitostí, přičemž investování do tohoto fondu se řadí mezi vysoce rizikové – prostřednictvím zvolené strategie může fond dosahovat zúročení aktiv v řádu až desítek procent, v obdobné výši však může nastat i znehodnocení.

Mezi nejčastěji využívané investiční strategie hedge fondů patří konvertibilní arbitráž, nákup akcií pod jejich nominální hodnotou, krátké/dlouhé držení aktiv, neutralizace akciových trhů, využívání zvláštních investičních příležitostí, předpověď globálních makroekonomických

událostí, arbitráž fúze a arbitráž relativní hodnoty.<sup>33</sup> Právní struktura hedge fondu bývá stanovena dle daňového prostředí předpokládaných investorů a často jsou založeny jako tzv. offshore společnosti v daňových rájích. Podmínkou přistoupení k fondu je učinění počáteční investice v minimální výši pohybující se od 100 000 do 1 000 000 USD.<sup>34</sup>

Za historicky první hedge fond je považována společnost *A. W. Jones & Co*, kterou založil v roce 1949 Alfred Winslow Jones, jenž ve 40. letech minulého století pracoval jako zástupce šéfredaktora časopisu *Fortune*. Po napsání článku o tehdejších investičních trendech se začal více zajímat o fungování finančních trhů, založil komanditní společnost a na základě vlastních analýz trhu pomocí metody krátkého/dlouhého držení aktiv začal vykazovat kontinuální zisky v řádu až desítek procent v několika po sobě jdoucích obdobích. Výnosový trend firmy *A. W. Jones & Co* přilákal další investory a do konce 60. let 20. století vzrostl počet společností emitujících zisky na principu hedge fondů na více než 150, čímž vzniklo nové investiční odvětví.<sup>35</sup>

V následující dekádě poznamenané strukturální krizí patřilo mezi nejvýnosnější investice obchodování se surovinami. V 80. letech 20. století se vlivem rostoucí inflace, vysokých cen surovin a silného akciového trhu začal postupně smývat rozdíl mezi investicemi do komodit a hedge fondů, neboť manažeři fondů, dosud zabývající se nákupem a prodejem amerických akcií, rozšířili své investice i na nákupy surovin, zahraničních akcií, zahraničních měn a dluhopisů.<sup>36</sup> Do tohoto období spadá i vznik hedge fondů, které později získávají označení supí fondy.

Jednotnou vyčerpávající definici supích fondů bychom nenašli. Mezinárodní organizace zabývající se jejich aktivitami se při jejich identifikaci zaměřují v první řadě na jejich specifický modus operandi. Nezávislý expert OSN pro otázky zahraničního dluhu definoval supí fondy jako „*soukromé komerční subjekty, které koupí, právním převodem nebo jinou transakcí získají závazek s uplynulou dobou splatnosti s cílem vymoci splacení vyšší částky*“.<sup>37</sup> Africká rozvojová banka (ARB) jako supí fondy označuje „*subjekty nakupující dluhopisy na sekundárních trzích za zlomek jejich skutečné ceny a následně vymáhající, často prostřednictvím soudního sporu, jejich skutečnou hodnotu*“.<sup>38</sup> Mezinárodní měnový fond (MMF) pracuje s označením „*supího věřitele, který na sekundárním trhu nakupuje suverénní dluh s výraznou slevou a následně žaluje dlužníka, tj. vládu, o zaplacení plné dlužné částky včetně kumulovaných úroků*“.<sup>39</sup>

Pro supí fondy obecně platí, že jsou kategorií hedge fondů, které využívají strategie nákupu vládních dluhopisů pod cenou při předpovědi globálních makroekonomických událostí. Manažeři těchto fondů skupují na sekundárním trhu dluhopisy chudých či hospodářsky slabých zemí za zlomek jejich nominální hodnoty. Následně vlastníci fondů odmítají participovat na dohodách se zadluženými vládami, které se snaží o restrukturalizaci státního dluhu, a soudně

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<sup>33</sup> *Malkiel a Saha, 2004.*

<sup>34</sup> *Hedge Fund Investing, 2000.*

<sup>35</sup> *McWhinney, 2005.*

<sup>36</sup> *Jaeger, 2003.*

<sup>37</sup> *Mohamadieh, 2015.*

<sup>38</sup> *Tamtéž.*

<sup>39</sup> *Sahay, 2012.*

vymáhají zaplacení celé dlužné částky včetně úroků a penále z prodlení.<sup>40</sup> Dle ARB dosahuje výnosovost supích fondů tří až dvacetinásobku původní investice, což odpovídá čistým výnosům v rádech 300 % - 2000 %.<sup>41</sup>

Zatímco pro domácí dluhové spory mají státy zákony chránící vládu před vyhlášením bankrotu, k posouzení těchto sporů na mezinárodní úrovni žádný mechanismus neexistuje.<sup>42</sup> Jednatelé supích fondů zadlužené státy tradičně žalují u soudů v zemích, jejichž legislativa je investorům příznivě nakloněna (nejčastěji se jedná o soudy v USA, Velké Británii nebo Francii), jak jim to umožňuje mezinárodní právo soukromé.<sup>43</sup>

Prvním fondem, který byl pro své praktiky nazván supím, byl hedge fond *Elliott Associates L. P.* založený v roce 1977. Manažeři fondu nakoupili v roce 1995 za 17,5 milionů USD na sekundárním trhu státní dluhopisy Panamy v nominální hodnotě 28,7 milionů USD. V témže roce požádala Panama o restrukturalizaci veřejného dluhu, se kterou souhlasila většina jejích věřitelů. Společnost *Elliott Associates L. P.* nikoli a v červenci roku 1996 Panamu žalovala o dlužnou částku včetně úroku a penále z prodlení. Následný soudní spor u Nejvyššího soudu v New Yorku tento hedge fond vyhrál a Panama musela dle rozsudku firmě *Elliott Associates L. P.* zaplatit přes 57 milionů USD.<sup>44</sup>

Případ *Elliott Associates L. P. versus Panama* založil mezinárodně-právní precedens o vyjednávání státního bankrotu a otevřel tak cestu investorům k možnosti přinutit státy zaplatit plnou výši jejich dluhů včetně úroků namísto diskontované částky vyjednané MMF nebo jinou mezinárodní institucí.<sup>45</sup> Taková investiční příležitost přilákala řadu dalších hedge fondů. Dle MMF bylo jen v následujících deseti letech po kauze *Elliott Associates L. P. versus Panama* evidováno 54 žalob ze strany hedge fondů vymáhajících splacení vládních dluhů. Můžeme tak mluvit o vzniku nového investičního odvětví.

## 1.2. Hospodářská a sociální práva vs. supí fondy

Stát, jenž se ocitne pod tlakem věřitelů v podobě supích fondů, je nucen začít razantně snižovat svůj veřejný dluh jdoucí za těmito subjekty. Z makroekonomického hlediska to znamená, že stát omezí vládní nákupy statků a služeb, sníží transferové platby a zvýší daňovou zátěž.<sup>46</sup> Tato opatření současně vedou ke zpomalení růstu ekonomiky státu.

V krajních, nikoli však ojedinělých případech, se stát může díky restriktivním nástrojům dostat do situace, kdy nezbytné kroky vedoucí ke snižování veřejného dluhu krátí jeho občany na jejich právech. Jmenovitě se jedná o lidská práva spadající do kategorie práv hospodářských a sociálních, tedy<sup>47</sup>:

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<sup>40</sup> Hanauer, 2011.

<sup>41</sup> *Vulture Funds in the Sovereign Debt Context*, 2013.

<sup>42</sup> Stiglitz, 2013.

<sup>43</sup> Při užití kolizní normy pro výběr práva, kterého se použije pro soukromoprávní vztah s mezinárodním prvkem, jsou důležité tzv. hraniční ukazatele. Jedním z nich je *lex incorporationis* – právní řád, podle něhož byla založena právnícká osoba. Na tento ukazatel se právní zástupci supích fondů odvolávají.

<sup>44</sup> Sassen, 2014.

<sup>45</sup> *Tamtéž*.

<sup>46</sup> *Ochrana*, František et al., 2010.

<sup>47</sup> *Economic and Social Rights, National Economic and Social Rights Initiative*, 2014.

- práva na vzdělání,
- práva na jídlo,
- práva na zdravotní péči,
- práva na bydlení,
- práva na sociální zabezpečení,
- práva na práci.

Stát, jenž se dostane do neudržitelné dluhové spirály, může požádat MMF a Skupinu Světové banky (SB) o finanční pomoc. Za předem dojednaných vládních úsporných opatření poskytují tyto organizace zemím finanční pomoc a vystupují jako mediátor při sjednávání dohod mezi státem a věřiteli. Mezi nejvýznamnější mezinárodní mechanismy na oddlužení patří Iniciativa pro silně zadlužené chudé země (heavily indebted poor countries, HIPC<sup>48</sup>) a Multilaterální iniciativa za odpuštění dluhů (Multilateral Debt Relief Initiative, MDRI) pod správou MMF a SB.

V praxi negativní vliv supích fondů spočívá v bránění vládám využívat získané finanční zdroje k posílení sociálního a hospodářského sektoru. Supí fondy, vymáhající od státu splacení dlužné částky včetně penále a úroků, vedou se státem soudní spor, což nadále zvyšuje výdajovou stránku rozpočtu postiženého státu. Příjmy státu a finanční pomoc od Iniciativy pro HIPC<sup>s</sup> a MDRI, jež jsou v první řadě určeny k zajištění základních hospodářských a sociálních služeb jako je vzdělání či zdravotní péče, jsou tak namísto toho využívány k hrazení soudních výdajů předem takřka prohraných pří.<sup>49</sup>

Zvláštní zpravodaj OSN pro otázky zahraničního dluhu Cephas Lumina ve své zprávě A/HRC/14/21 uvádí, že „průměrný potenciální dopad soudních sporů vedených se supími fondy představuje krácení vládních dotací na vzdělání a zdravotní péči o 18 %, o 59 % na plnění své oddlužovací strategie a o 5 % snižuje budoucí příjmy plynoucí do státního rozpočtu“.<sup>50</sup> Ve zprávě se rovněž odkazuje na údaje ze studie MMF a SB z roku 2008, jež uvádí, že náklady na soudní spor vedený se supím fondem a tedy finanční dopad na zadlužený stát se pohybuje od 0,5 % HDP žalované země až do 49 % HDP, jak tomu bylo v případě Libérie.

Stěžejní dokument OSN, zabývající se explicitně vztahem mezi povinnostmi státu splácet veřejný dluh a zajišťováním lidských práv, je rezoluce A/HRC/RES/20/10 s názvem *Účinky zahraničního dluhu a dalších souvisejících mezinárodních finančních závazků států na plné požívání všech lidských práv, zejména hospodářských, sociálních a kulturních práv*, přijatá v roce 2012, spolu se *Zásadami pro správu zahraničního dluhu a lidských práv* v rezoluci A/HRC/20/23. V těchto dokumentech je zřetelně zakotvena povinnost státu zajistit, aby plnění jeho závazků nikdy nenarušilo jeho základní povinnost, a sice zajištění minimální úrovně všech hospodářských, sociálních a kulturních práv. Současně s tím jsou vlády povinny zamezit přijetí všech opatření, jež by v uspokojení těchto práv občanům omezovala.<sup>51</sup>

Výše zmíněné rezoluce vycházejí ve své formulaci právní odpovědnosti státu z Mezinárodního paktu o hospodářských, sociálních a kulturních právech (1966/1976), který jako první stanovil

<sup>48</sup> Silně zadluženou zemí se dle klasifikace Skupiny Světové banky rozumí země s HNP menším než 695 USD/obyvatele, nebo stát, jehož současná hodnota dluhu je 200 % vzhledem k exportu nebo 80 % vzhledem k HDP. Zdroj: *Heavily indebted poor countries, 2015*.

<sup>49</sup> A/HRC/14/21, 2010.

<sup>50</sup> A/HRC/14/21, 2015, str. 18.

<sup>51</sup> A/HRC/RES/20/10, 2012 a A/HRC/20/23, 2012.



primární úlohou státu jakožto garanta této kategorie práv svým občanům.<sup>52</sup> Právě tento bod se stává hlavním předmětem sporu při pokusech o mezinárodně-právní regulaci supích fondů. Postižené státy apelují na mezinárodní orgány, aby podnikly kroky k potírání nekalých praktik supích fondů při vymáhání dluhu. Naopak státy řadící se do kategorie vyspělých ekonomik poukazují na primární odpovědnost každé země zajistit práva svým občanům. Jejich častým argumentem je, že mezinárodní společenství nemůže nést odpovědnost za chybná rozhodnutí učiněná vládami jednotlivých států v oblasti jejich vlastní hospodářské politiky.

### **3 Dopady činnosti supích fondů na vybrané státy – případové studie Argentina, Zambie, Libérie a Island**

Od prvního případu využití supí metody k soudnímu vymáhání dlužné částky ve sporu *Elliott Associates L. P. versus Panama* byly evidovány desítky analogických kauz, v nichž žalující stranou byly hedge fondy a žalovanou zadlužené státy. Jen do roku 2010 představovaly kauzy vedené proti státům z kategorie HIPCů 34 % z celkového počtu 120.<sup>53</sup> V současnosti se odhaduje, že se pohledávky supích fondů jdoucí za těmito nejchudšími zeměmi světa pohybují v řádu 1,2 – 1,3 miliardy USD.<sup>54</sup>

Následující kapitola předkládá stručnou analýzu vývoje těch případů, jež jsou v současnosti prezentovány jako stěžejní pro argumentaci nezbytného společného postupu mezinárodního společenství k vytvoření právního rámce vedoucího k regulaci hedge fondů. Největší prostor je věnován případu Argentiny, který reprezentuje poslední vítězství supích fondů a který mobilizoval latinskoamerické státy k vytvoření probíhající iniciativy za boj proti supím fondům na půdě OSN. Další dvě studie týkající se Zambie a Libérie představují kauzy týkající se států z kategorie HIPCů, jež jsou považovány za nejzranitelnější. Poslední studie se zabývá dopady aktivit supích fondů během hospodářské krize Islandu v letech 2008–2011, a dokazuje, že ani Evropě se tento fenomén nevyhýbá, byť dopady nejsou pro občany natolik fatální, jako je tomu u obyvatel nejchudších zemí světa.

#### **2.1. Supí fondy v Latinské Americe – případ Argentiny**

Případ, který zvedl v roce 2014 vlnu iniciativy za vytvoření regulativního mechanismu proti podnikání supích fondů, má své kořeny v roce 2001. Tehdy se Argentina ocitla na pokraji bankrotu v situaci hluboké recese. Zemi byly zapovězeny další mezinárodní půjčky, centrální banka hlásila meziroční pokles finančních rezerv ve výši 25 %, meziroční propad HDP v roce 2000 činil 25 %, inflace přesahovala hodnoty 40 % a úspory byly devalvovány o 70 %. Více jak polovina obyvatelstva (53 %) se ocitla za hranicí chudoby a 24,8 % Argentinců se potýkalo dokonce s extrémní chudobou. Na začátku roku 2002 dosahoval veřejný dluh země hodnoty 166,3 % HDP a Argentina neměla jinou možnost než vyhlásit default.<sup>55</sup>

Následovala devalvace měny a restrukturalizace dluhu řízená MMF. Tři čtvrtiny věřitelů s výměnou starých dluhopisů za nové ve směnném kurzu 30 centů za dolar souhlasily. Nové dluhopisy byly navíc indexovány na vývoj HDP, což představovalo novátorský přístup

<sup>52</sup> *Mezinárodní pakt o hospodářských, sociálních a kulturních právech, 2016.*

<sup>53</sup> *Vulture funds and human rights, 2015.*

<sup>54</sup> *Broomfield, 2010.*

<sup>55</sup> *A/HRC/25/50, 2014.*



k restrukturalizaci, jež měl zajistit budoucí prosperitu. Čím vyšší byl meziroční růst HDP, tím více argentinská vláda splácela – zájem Argentiny byl tedy stejný jako zájem věřitelů a to podpora ekonomického růstu.<sup>56</sup> Díky tomu se Argentina brzy vrátila na světový trh jako rovnocenný obchodní partner řady zahraničních subjektů, místo aby se s nálepkou vysokého investičního rizika potýkala s dopady krize další desetiletí.

Až do vypuknutí globální ekonomické krize v roce 2008 dosahoval růst HDP tohoto latinskoamerického státu 8 %<sup>57</sup>, což bylo jedno z nejrychlejších temp na světě. Argentíně se podařilo zvýšit výdaje na veřejnou správu, zdravotnictví, podporu bydlení a vzdělávání z pouhých 9,5 % HDP na 27,7 % za prvních 10 let od defaultu. Díky prorůstové politice, zvýšení transferových plateb a programu na redukci nezaměstnanosti byla v Argentíně snížena úroveň chudoby o 70 % na hodnotu před hospodářskou krizí do roku 2006.<sup>58</sup>

Výše zmíněná restrukturalizace argentinského dluhu proběhla ve dvou vlnách, v letech 2005 a 2010. Na výměnu dluhopisů přistoupilo celkem 93 % věřitelů. Zbývajících 7 % představovalo soukromé investiční subjekty vlastníci dluhopisy v celkové hodnotě 11,5 miliardy USD.<sup>59</sup> Řada z těchto subjektů získala dluhopisy na sekundárním trhu za zlomek jejich nominální hodnoty.

Argentinská vláda k umořování zahraničního dluhu přistoupila odpovědně. Věřitelům, kteří v roce 2005 během první vlny restrukturalizace přistoupili na výměnu dluhopisů, bylo do roku 2014 vyplaceno přes 90 % dlužné částky. Tohoto faktu využila společnost *NML Capital* a rozhodla se vymáhat splacení své nerestrukturalizované pohledávky u newyorského odvolacího soudu. Fond *NML Capital* se začal domáhat okamžitého splacení plné výše dluhopisů včetně úroků a odvolával se při tom na standardní smluvní klauzuli zvanou *pari passu*, jejímž cílem je zajistit stejná práva pro všechny věřitele. Odvolací soud nároky tohoto hedge fondu potvrdil a vydal rozhodnutí, ze kterého vyplývá, že pokud Argentina vyplatila dlužnou částku těm, kdo přistoupili na restrukturalizaci dluhu, musí splatit dluh v plné výši i supům.<sup>60</sup> Jen v případě závazku vůči *NML Capital* se jednalo o 4,65 miliardy USD, což pro fond představovalo 1600% zhodnocení prvotní investice.

Argentina se proti rozsudku odvolala k Nejvyššímu soudu, ten však v červnu 2014 rozsudek nižší instance potvrdil. Tím byl navíc vytvořen precedens pro trestání věřitele, který dobrovolně přistoupí na restrukturalizaci dluhu, čímž se tím dobrovolně připravuje o své výnosy v zájmu zachování hospodářské stability státu-dlužníka. Odvolací soud navíc rozhodl, že pokud by platby věřitelům, kteří přistoupili k restrukturalizaci, prováděla za argentinskou vládu třetí strana (např. zahraniční banka) ve snaze obcházet klauzuli *pari passu*, jednalo by se o pohrdání soudem a tato činnost by byla dle zákona trestně postižitelná. Nejvyšší soud potvrdil i tuto část rozsudku druhé instance a uznal jako oprávněnou i žádost *NML Capital*, aby finanční instituce, které spravují umořovací finanční toky, byly povinny poskytovat informace o stavu aktiv dlužníka. Toto rozhodnutí bude mít významný dopad na mezinárodní finanční systém, neboť nutí poskytovatele finančních služeb zveřejňovat důvěrné informace o finančních transakcích dlužníka s cílem usnadnit věřiteli vymáhání dluhu. Jediným rozsudkem tak byla do sporu mezi

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<sup>56</sup> Stiglitz, 2013.

<sup>57</sup> GDP Data Argentina, 2015.

<sup>58</sup> A/HRC/25/50, 2014.

<sup>59</sup> Tamtéž.

<sup>60</sup> Stiglitz, 2013.

státem a supím fondem vtažena třetí strana, jež je nyní pravomocně nucena se spolupodílet na vyděračských praktikách hedge fondů.<sup>61</sup>

Argentinská vláda dlouho doufala v podporu ze strany mezinárodních organizací i ostatních států a apelovala na zrušení rozsudku, který představoval riziko, že se i zbývající investoři budou domáhat splacení závazků v odhadované výši 15 miliard USD.<sup>62</sup> Nakonec v únoru 2016 došlo po patnácti letech k dohodě mezi vládou a supími fondy. Společnosti *NML Capital* jako hlavnímu věřiteli z nerestrukturalizovaného podílu bude vyplaceno celkem 2, 28 miliardy USD (oproti rozsudku z roku 2014 byla výsledná částka zredukována o více než polovinu, přesto získá fond více než dvanáctinásobek původní investice). Celkem si supí věřitelé mezi sebe rozdělí 6,5 miliardy USD.<sup>63</sup>

## 2.2. Supí fondy v Africe – případy Zambie a Libérie

Zambie je africká země s ročním HDP necelých 25 miliard USD a 15 miliony obyvatel, z nichž přes 85 % žije na hranici chudoby s příjmy menšími než 2 USD na den a jen 60 % je gramotných.<sup>64</sup> Do spárů supího fondu *Donegal International* se dostala v roce 1998, kdy rumunská vláda prodala této společnosti registrované na Britských panenských ostrovech svoji pohledávku v hodnotě necelých 30 milionů USD. Tento dluh měla Zambie u Rumunska od roku 1979, kdy si od něj půjčila 15 milionů USD na nákup zemědělského vybavení z Evropy. Dle investičního plánu chtěla Zambie svůj dluh do 20 let splatit z exportních výnosů po modernizaci zemědělského sektoru.<sup>65</sup> Naneštěstí řada nakoupeného vybavení dorazila do Zambie v nepoužitelném stavu, očekávaná výše zisků z exportu nebyla nikdy dosažena a stát byl donucen vyhlásit default.<sup>66</sup>

Nepříznivé hospodářské situace Zambie se rozhodl využít hedge fond *Donegal International*, založený zkušeným americkým právníkem Michaelem Sheehanem.<sup>67</sup> Na základě své strategie, jež spočívala v předpovědi globálních makroekonomických událostí, nabídl Rumunsku odkoupení zambijského dluhopisu. Fond na rumunskou vládu od jara 1997 kontinuálně naléhal, aby mu pohledávku postoupila dříve, než se Zambie zapojí do programu HIPC's Iniciativy. V memorandu zaslaném rumunské vládě společnost *Donegal International* argumentovala tím, že po zapojení do programu by „*Zambie na základě bilaterálních smluv redukovala své závazky až o 90 % s dobou splatnosti 23 let i více*“,<sup>68</sup> a tudíž je postoupení pohledávky soukromému investorovi pro Rumunsko výhodnější.

V roce 1998 předložila Zambie rumunské vládě vlastní nabídku restrukturalizace dluhu, který po téměř 20 letech dosahoval výše 29,8 milionu USD. Rumunsko na nabídku Zambie nejdříve přistoupilo a oba státy se dohodly na výměně starého dluhopisu za nový v hodnotě 3,5 milionu USD. Dvanáct dní před oficiálním převodem se ovšem Rumunsko bez vědomí Zambie rozhodlo přijmout nabídku společnosti *Donegal International*. Byť byla nabídka tohoto

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<sup>61</sup> Stiglitz, 2013.

<sup>62</sup> A/HRC/25/50, 2014.

<sup>63</sup> Guzman a Stiglitz, 2016 a Andrade, 2016.

<sup>64</sup> Zambia GDP and Economic Data, 2015.

<sup>65</sup> Seager, 2007.

<sup>66</sup> A/HRC/14/21, 2010.

<sup>67</sup> Beattie, 2007.

<sup>68</sup> A/HRC/14/21, 2010, str. 15.

hedge fondu nižší než sjednaná výše nového dluhopisu, pro Rumunsko se pojila s takřka nulovým rizikem. *Donegal International* tak získal zambijský dluhopis v tehdejší hodnotě 29,8 milionu USD za 3,28 milionu USD, tedy za 11 % jeho nominální hodnoty.<sup>69</sup>

V roce 2002 zahájila společnost *Donegal International* soudní řízení se Zambií o splacení dlužné částky. Za kontroverzních okolností, jež zahrnovaly i obvinění z korupce a uplácení veřejných činitelů, se obě strany nakonec dohodly na výměně dluhopisu za nový v hodnotě 15 milionů USD a tříletém umořovacím harmonogramu. Dohoda rovněž obsahovala doložku, podle níž, pokud by se Zambie zpozdila se splácením, se stane okamžitě splatná plná výše původního dluhopisu včetně úroků a penále z prodlení (necelých 43 milionů USD). Zambii se v následujících třech letech podařilo umořit 3,4 milionu USD. Poté vláda přestala společnosti *Donegal International* platit s tím, že dohoda z roku 2002 byla podepsána za pochybných korupčních podmínek, na základě čehož by neměla být právně závazná.<sup>70</sup>

Začátkem roku 2006 podala firma *Donegal International* na Zambii žalobu k britskému Nejvyššímu soudu pro neplnění povinností vyplývajících ze smlouvy, ve které se domáhala splacení původní dlužné částky v plné výši včetně úroků a penále. Dohromady se požadovaná částka vyšplhala na 55 milionů USD (28 milionů GBP).<sup>71</sup> V únoru 2007 soud vynesl rozsudek ve prospěch *Donegal International*, přestože současně shledal vlastníka fondu Michaela Sheehana nepoctivým a záměrně manipulujícím s předkládanými důkazy a společnost kritizoval za úmyslné zadržování evidence, jež byla v kontradikci s jejími zájmy. Zambii bylo soudem nařízeno zaplatit firmě *Donegal International* 15,4 milionů USD, což na jedné straně představovalo značnou redukci od společností požadovaných 55 milionů USD, na straně druhé ovšem také 65 % tehdejších finančních rezerv státu.<sup>72</sup>

Prokazatelné dopady na možnosti státu zajistit občanům základní hospodářská a sociální práva jsou v případě Zambie zaznamenány v závěrečné zprávě Univerzálního periodického přezkumu (UPR), kterému se Zambie podrobila v roce 2012. Dlouhodobě je největším problémem nedostatek vládních výdajů určených pro sektor veřejného zdravotnictví.<sup>73</sup> Na zdravotní péči jsou každoročně uvolňována jen necelá 3 % HDP,<sup>74</sup> přitom počet nakažených virem HIV rok od roku stoupá (v roce 2011 měl pozitivní výsledek na HIV každý sedmý dospělý). V roce 2012 navíc klesly na úkor splácení veřejného dluhu výdaje na redukci úmrtnosti matek a novorozenců.<sup>75</sup> S podfinancováním se potýká také sektor školství. Ačkoli je od roku 2002 základní vzdělání v Zambii bezplatné, kvůli nedostatku veřejných výdajů na vzdělání, které se dlouhodobě drží pod 2,5 % HDP,<sup>76</sup> se země potýká s nedostatkem škol i učitelů. Pro čtvrt milionu dětí zůstává základní vzdělání nedostupné. Navíc 47 % z těch, které do školy nastoupí, nedokončí kvůli začarovanému kruhu chudoby ani základní vzdělání.<sup>77</sup>

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<sup>69</sup> Laryea, 2010.

<sup>70</sup> A/HRC/14/21, 2010, str. 15.

<sup>71</sup> Seager, 2007.

<sup>72</sup> A/HRC/14/21, 2010, str. 15.

<sup>73</sup> A/HRC/RES/22/13, 2013.

<sup>74</sup> *Zambia Health expenditure, 2015.*

<sup>75</sup> A/HRC/RES/22/13, 2013.

<sup>76</sup> *Public spending on education in Zambia, 2015.*

<sup>77</sup> *Zambia Education, 2015.*

I přes podporu Dětského fondu OSN (UNICEF) počet negramotných od roku 1990 vzrostl o 4 %, <sup>78</sup> čímž se i další generace dostává do začarovaného kruhu chudoby.

Druhou africkou zemí, která se potýká s problémem aktivit supích fondů a patří stejně jako Zambie na seznam nejchudších zemí světa, je Libérie. Případ Libérie je o to smutnější, že dva supí fondy figurující v této kauze získaly liberijské dluhopisy během první občanské války v zemi (1989–1996) a první žaloby pro nesplácení dluhu byly podány v době druhé občanské války (1999–2003). Libérie je tak nucena se kromě poválečné krize reprezentované 94 % populace žijící na hranici chudoby, 85% nezaměstnaností a pouhou třetinovou gramotností vyrovnávat s další finanční zátěží. <sup>79</sup>

Libérie si v roce 1978 půjčila 6,5 milionů USD od americké *Chemical Bank*. Tato obchodní banka později prodala diskontované liberijské dluhopisy dvěma hedge fondům, *FH International Financial Services Inc.* a *Sifida Investment Company S. A.* Společnosti se v průběhu druhé občanské války rozhodly využít solidarity mezinárodních organizací, jež se v podobě dotací snažily zajistit minimální životní standard pro obyvatele Libérie, a podaly žalobu pro nesplácení dluhu k soudu v New Yorku. Soud jejich požadavku v roce 2002 vyhověl a přiznal jejich nárok na dlužnou částku v hodnotě 18,4 milionů USD. <sup>80</sup>

Vzhledem ke stupňující se kritice a negativnímu zájmu, kterou si jednání společností *International Financial Services Inc.* a *Sifida Investment Company S. A.* celosvětově vysloužilo, se vlastníci fondů rozhodli odlákat pozornost tím, že liberijské dluhopisy opakovaně přesouvali mezi jednotlivými investory a prodávali třetím stranám. V roce 2008 se dluhopisy dostaly do držení společností *Hamsah Investments Ltd.* se sídlem na Britských Panenských ostrovech a *Wall Capital Ltd.* se sídlem na Kajmanských ostrovech. <sup>81</sup>

Noví vlastníci dluhu v červnu 2008 žalovali Libérii na principu *lex incorporationis* u vrchního soudu v Londýně, který v roce 2009 rozhodl ve prospěch fondů. Libérii tak dluh za těmito subjekty vzrostl včetně úroků o další téměř 2 miliony na 20 milionů USD. Soud rovněž odmítl argument Libérie, že z důvodu probíhající občanské války nebyla v roce 2002 schopna včas adekvátně reagovat na žalobu podanou k americkému soudu, jež byla prekurzorem pro aktuální soudní řízení. Jen pro představu, v roce 2009, kdy byl rozsudek vynesen, představovala částka 20 milionů USD pro Libérii 5 % vládního rozpočtu, byla ekvivalentní ročním výdajům na vzdělání a téměř dvojnásobně převyšovala rozpočet na sektor zdravotnictví. <sup>82</sup>

Zatímco v případě Argentiny představují aktivity supích fondů především překážku pro další rozvoj společnosti v oblasti vzdělání nebo redukci chudoby, případně vzbuzují obavy z měnové reformy a znehodnocení životních úspor občanů, u afrických zemí se dostáváme do roviny existenciální. Zambie se kvůli nedostatečným vládním výdajům na zdravotnictví potýká s dlouhodobým šířením HIV/AIDS. Případ epidemie eboly, která si od propuknutí v roce 2014 vyžádala v západní Africe již přes 11 000 obětí, <sup>83</sup> z toho téměř 5 000 v Libérii, je důkazem dlouhého řetězce příčin a následků, na jejichž začátku stojí také supí fondy.

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<sup>78</sup> *Adult literacy rate, 2013.*

<sup>79</sup> *A/HRC/14/21, 2010.*

<sup>80</sup> *Tamtéž.*

<sup>81</sup> *External debt: vulture funds opposed at the UN, 2014.*

<sup>82</sup> *A/HRC/14/21, 2010.*

<sup>83</sup> *Ebola Outbreak in West Africa – Case Counts, 2016.*

Ebolou nejvíce postižené země (Libérie, Guinea a Sierra Leone) patří mezi HIPC's státy, jejichž velká část státního rozpočtu je vynaložena na splácení veřejného dluhu. Guinea, kde epidemie v březnu 2014 propukla, uvolňuje každý rok jen na umořování dluhu dvojnásobnou částku, než jaká je investována do zdravotnictví. Libérie, ačkoli v posledních pěti letech uvolňuje na sektor zdravotnictví 18 % z celkových veřejných výdajů,<sup>84</sup> čelí především nedostatku zdravotníků – v zemi připadá jeden lékař na 72 000 obyvatel, což je dle údajů Světové zdravotnické organizace druhý nejhorší průměr hned po Tanzanii.<sup>85</sup>

### 2.3. Supí fondy v Evropě – případ Islandu

Důkazem toho, že se supí fondy nezaměřují výhradně na HIPC's a nevyhýbají se ani Evropě, je jejich využití islandského bankovního kolapsu v roce 2008. Než se islandská ekonomika dostala do krize, zažíval Island vlnu hospodářského růstu. Na začátku třetího tisíciletí patřila islandská ekonomika s meziročním růstem HDP kolem 5,5 % mezi nejsilnější ekonomiky světa, v roce 2005 Island dokonce zaujal třetí místo ve světovém v žebříčku HDP/obyvatele.<sup>86</sup>

Privatizace a liberalizace trhu na počátku 90. let 20. století umožnily díky spekulacím na akciovém a hypotečním trhu masivní expanzi tří islandských obchodních bank – *Landsbanki*, *Kaupthing Bank* a *Glitnir Bank*. V důsledku nadměrné, krátkodobými pasivy financované úvěrové expanze a vlny prudkého zadlužování islandských domácností došlo v říjnu roku 2008 k přehřátí ekonomiky. V souvislosti s americkou hypoteční krizí se tyto tři banky postupně ocitly na pokraji bankrotu.

Islandská vláda se ve snaze zabránit bankrotu rozhodla převzít závazky těchto obchodních společností a následně na základě doporučení MMF vybudovala tři nové, „zdravé“ banky – *NBI*, *Arion Bank* a *Islandsbanki*. Ještě než tak stihla učinit, rozhodla se většina klientů zhroutených *Landsbanki*, *Kaupthing Bank* a *Glitnir Bank* prodat svá aktiva u těchto společností, byť jen za malý podíl (až 4 – 6 %) jejich skutečné hodnoty. Tyto diskontované dluhopisy hromadně skoupily supí fondy.<sup>87</sup>

V listopadu 2008 pak ve spolupráci s MMF Island vytvořil nový ozdravený bankovní systém. Do tří nově vzniklých obchodních bank, v nichž ve dvou supí bez vědomí státu získali více než 85% podíl,<sup>88</sup> byly převedeny úvěry z *Landsbanki*, *Kaupthing Bank* a *Glitnir Bank* s diskontem až 70 %, jež odrážela jejich tehdejší reálnou hodnotu po pádu islandské koruny. Supí fondy, které ještě před ustavením nového bankovního systému odkoupily většinu pohledávek jdoucích za vládou převzatými bankami, se ovšem neúčastnily dohod o výměně starých dluhopisů za nové. Pouhým převodem vlastnictví na nové banky tak vláda dala fondům možnost požadovat po dlužnících plnou výši jejich původního závazku, nikoli jen jejich diskontovanou reálnou hodnotu.<sup>89</sup>

Na rozdíl od předchozích případů jdou pohledávky supích fondů za islandskými domácnostmi, nikoli za státem. Supí fondy se snaží z občanů vymáhat splácení plné výše jejich půjček a hypotečních úvěrů, pořízených v době před říjnem 2008, samozřejmě včetně úroků.

<sup>84</sup> *Expenditure on health, total (% of GDP), 2015.*

<sup>85</sup> *Healthcare spending around the world, 2014.*

<sup>86</sup> *Hart-Landsberg, 2013.*

<sup>87</sup> *Mosesdottir, 2015.*

<sup>88</sup> *Hudson, 2011.*

<sup>89</sup> *Hudson, 2011.*



A to přestože odhadovaná hodnota majetku, pořízeného za tyto půjčky, klesla o dvě třetiny. Islandská ekonomika navíc v roce 2008 zažila strmý pád – nezaměstnanost vzrostla z 1 % na 8 %, průměrné mzdy klesly o 5 %, HDP Islandu se propadl do roku 2010 o 9,3 %.<sup>90</sup> Domácnosti, které nejsou schopny kvůli krizi své dluhy splácet, přicházejí o majetek, kterým za své půjčky ručily.

Ve snaze zabránit přímým dopadům na obyvatele zavedl Island v roce 2008 expanzivní fiskální a sociální politiku – navýšil důchody a dávky v nezaměstnanosti, stejně tak jako dobu, po kterou je možné tyto dávky pobírat. Navíc o 108 % zvýšil státní dotace pro umořování hypotečních plateb, čímž za středně- a nízkopříjmové domácnosti převzal asi třetinu jejich úrokových plateb.<sup>91</sup> Aby se soudní vymáhání nároků supích fondů nedotklo občanů, navrhli vládní poradci islandské vládě úplné převzetí závazků jdoucích za těmito subjekty v podobě státních dluhopisů na 30 let. Toto řešení by znamenalo, že se soukromý dluh stane dluhem státním, jak je tomu u Argentiny, Zambie, Libérie a mnoha dalších zemí.

Otázkou ovšem zůstává, jak by se toto řešení promítlo do budoucí hospodářské situace země. Veřejný dluh Islandu se od doby před krizí již více než zdvojnásobil (ze 49,5 % HDP země v roce 2007 vzrostl na 112 % v roce 2014),<sup>92</sup> navíc expanzivní fiskální a sociální politika nadměrně zatěžuje státní rozpočet. Islandská vláda tak sice na první pohled zvládá zabránit supům negativně působit na hospodářská a sociální práva jejích občanů, ovšem zvolená strategie je z hospodářského hlediska dlouhodobě neudržitelná.

### 3. Supí fondy na půdě OSN

Problematika podpory hospodářského rozvoje a s ním spojené otázky zahraničního dluhu jsou pravidelnou součástí programu jednání jak Valného shromáždění (VS) OSN v New Yorku, tak Rady pro lidská práva (RLP) v Ženevě. Supí fondy se bližšího zájmu dočkaly až na konci první dekády 21. století. Následující kapitola se zabývá iniciativami učiněnými na půdě VS a RLP OSN během posledních dvou let, které odstartovala především kauza Argentina versus hedge fond *NML Capital*.

Jak bude ve dvou částech kapitoly na procesu přijímání rezolucí A/HRC/RES/27/30, A/RES/68/304 a A/RES/69/319 ukázáno, mezi jednotlivými skupinami států reprezentujícími hospodářsky rozvinuté nebo naopak rozvojové země nepadají o způsobu regulace činnosti supích fondů shoda. Rozvinuté země, tradičně podporující liberalizaci obchodu a investičních toků, odmítají podpořit iniciativu rozvojových zemí s odůvodněním, že otázky zahraničního dluhu patří tradičně do agendy MMF a SB. Předkládající státy, jež se cítí být supími fondy permanentně ohrožovány, argumentují, že MMF a SB jsou organizace zabývající se hospodářskou situací země ryze z pohledu platební bilance, a zcela opomíjí otázky negativních dopadů na občany, jejichž eliminace patří naopak mezi hlavní cíle OSN.

#### 3.1. Valné shromáždění OSN v New Yorku

Na 68. zasedání VS v září roku 2014 předložila skupina více než 130 rozvojových zemí, sdružených ve skupině G-77, spolu s Čínou návrh rezoluce A/68/L.57/Rev.1 nazvané

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<sup>90</sup> *Iceland – OECD Data, 2015.*

<sup>91</sup> *Hart-Landsberg, 2013.*

<sup>92</sup> *Iceland General government debt, 2015.*



*Za účelem vytvoření multilaterálního právního rámce pro procesy restrukturalizace zahraničního dluhu.* V návrhu dokumentu, jehož iniciátorem byla Argentina, se skupina předkladatelů dovolává vytvoření jednotného právního rámce pro restrukturalizaci.<sup>93</sup>

Tento multilaterální nástroj by dle autorů rezoluce znamenal pro státy, které se potýkají s nemožností splácet své závazky, likvidaci mezinárodně-právní propasti, která v současnosti umožňuje supům neparticipovat na výměně dluhopisů.<sup>94</sup> Text návrhu upozorňuje na politické, ekonomické a sociální dopady zahraničního dluhu a připomíná, že úsilí států o restrukturalizaci by nemělo být omezováno komerčními věřiteli. Vytvoření multilaterálního právního rámce pro restrukturalizaci by dle předkladatelů zajistilo možnost profitovat z iniciativ MMF a SB na pomoc zadluženým zemím.<sup>95</sup>

Hlasování o rezoluci bylo vyvoláno Spojenými státy americkými (USA), které odmítly vyjádřit rezoluci podporu. Podle nich by navrhovaný multilaterální rámec pro procesy restrukturalizace vedl k ekonomické nejistotě států ohledně návratnosti mezinárodních půjček. Tato nejistota by pak brzdila ochotu států poskytovat rozvojovým zemím finanční prostředky, čímž by se celý mechanismus stal kontraproduktivní. Ve svém vysvětlení pozice se USA dále odvolaly na skutečnost, že podobná problematika spadá spíše pod agendu MMF, a neměla by být projednávána na půdě VS OSN.<sup>96</sup>

Odmítavý postoj k předloženému návrhu jménem členských států Evropské unie (EU) vyjádřila Itálie. Negativní stanovisko, předjednané v rámci jednání Evropského hospodářského a sociálního výboru v Bruselu, bylo argumentováno především neadekvátností multilaterálního fóra. Možnost regulace činnosti supích fondů ponechává EU na iniciativách jednotlivých členských zemí.<sup>97</sup>

Rezoluce *Za účelem vytvoření multilaterálního právního rámce pro procesy restrukturalizace zahraničního dluhu* byla pod identem A/RES/68/304 dne 9. září 2014 přijata VS v poměru 124 hlasů pro, 11 proti a 41 zemí se hlasování zdrželo.

EU se podařilo udržet pozici, když Česká republika (ČR), Finsko, Irsko, Maďarsko, Německo, Rakousko a Velká Británie hlasovaly proti, ostatní členské země se zdržely. Jedenáctku všech zemí hlasujících proti přijetí rezoluce doplnily ještě Izrael, Japonsko, Kanada a USA. Naopak pro se vyslovila většina zemí G-77 spolu s Čínou, Brazílií a Indií.

VÝSLEDKY HLASOVÁNÍ VS O REZOLUCI A/RES/68/304	
<b>PRO</b>	Afghánistán, Alžírsko, Angola, Antigua a Barbuda, Argentina, Ázerbájdžán, Bahamy, Bahrajn, Bangladéš, Barbados, Bělorusko, Benin, Bhútán, Bolívie, Botswana, Brazílie, Brunej, Burkina Faso, Burundi, Čad, Čína, Demokratická republika Kongo, Dominika, Dominikánská republika, Džibutsko, Egypt, El Salvador, Ekvádor, Eritrea, Etiopie, Fidži,

<sup>93</sup> A/HRC/RES/27/30, 2014.

<sup>94</sup> *Developing countries propose new global debt rules*, 2014.

<sup>95</sup> A/RES/68/304, 2014.

<sup>96</sup> *External debt: vulture funds opposed at the UN*, 2014.

<sup>97</sup> *Samostatnou právní úpravou limitující maximální výši výnosů z investice disponuje např. Velká Británie a Belgie. Zdroj: Broomfield. 2010.*

	Filipíny, Gabon, Gambie, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Chile, Indie, Indonésie, Irán, Irák, Jamajka, JAR, Jemen, Jižní Súdán, Jordánsko, Kapverdy, Katar, Kazachstán, Keňa, Kiribati, KLDK, Kolumbie, Komory, Kongo, Kostarika, Kuba, Kuvajt, Kyrgyzstán, Laos, Libanon, Libye, Madagaskar, Malawi, Malajsie, Maledivy, Maroko, Mauretánie, Mauricius, Mongolsko, Mosambik, Myanmar, Namibie, Nepál, Nikaragua, Niger, Nigérie, Omán, Pákistán, Palau, Panama, Paraguay, Peru, Rovníková Guinea, Ruská federace, Rwanda, Samoa, Saudská Arábie, Senegal, Seychely, Sierra Leone, Singapur, Spojené Arabské Emiráty, Srí Lanka, Súdán, Surinam, Svatý Kryštof, Svatá Lucie, Svatý Tomáš, Svatý Vincent, Svazijsko, Sýrie, Šalamounovy ostrovy, Tádžikistán, Thajsko, Togo, Tonga, Trinidad a Tobago, Tunisko, Turecko, Turkmenistán, Uganda, Tanzanie, Uruguay, Vanuatu, Venezuela, Vietnam, Zambie, Zimbabwe
<b>PROTI</b>	Austrálie, Česká republika, Finsko, Irsko, Izrael, Japonsko, Kanada, Maďarsko, Německo, Velká Británie, USA
<b>ZDRŽEL SE</b>	Albánie, Andora, Arménie, Belgie, Bosna a Hercegovina, Bulharsko, Černá Hora, Dánsko, Estonsko, Francie, Gruzie, Chorvatsko, Island, Itálie, Korejská republika, Kypr, Litva, Lichtenštejnsko, Lotyšsko, Lucembursko, Malta, Mexiko, Moldavsko, Monako, Nizozemí, Norsko, Nový Zéland, Papua - Nová Guinea, Polsko, Portugalsko, Rumunsko, Řecko, San Marino, Slovensko, Slovinsko, Srbsko, Španělsko, Švédsko, Švýcarsko, Ukrajina

**Tab. 1.** Výsledky hlasování o rezoluci A/RES/68/304. Vypracováno autorkou. (UN votes for rules to stop vulture funds, 2014).

Na základě výše zmíněné rezoluce byl ustaven ad hoc Výbor pro otázky restrukturalizace dluhu, jehož úkolem bylo připravit ve spolupráci s členskými zeměmi OSN, mezinárodními vládními i nevládními organizacemi (zejména MMF a SB) a soukromými subjekty návrh multilaterálního právního rámce restrukturalizace dluhu. Výborem předložený návrh byl přetvořen v návrh rezoluce A/69/L.84 nazvaný „*Základní zásady restrukturalizačních procesů státního dluhu*“, jenž byl jako potenciální přelomový dokument v otázce restrukturalizace dne 10. září 2015 přijat VS pod identem A/RES/69/319.

Rezoluce přinesla 9 základních principů<sup>98</sup>:

- nezasahování do suverénního práva státu na restrukturalizaci,
- dobrý úmysl dlužníka i věřitele,
- transparentnost procesu restrukturalizace,
- nestrannost,
- rovnost věřitelů,
- primát domácí jurisdikce,
- legitimita mezinárodních institucí,
- udržitelnost hospodářského růstu,
- rozhodování prostou většinou věřitelů,

<sup>98</sup> A/RES/69/319, 2015.

kterými by se nově měl řídit každý proces restrukturalizace dluhu. V případě správného uvedení do praxe se může jednat o první krok k vytvoření právně závazného rámce, jenž by zamezil supím fondům dosahovat neúměrné výše profitability.

### 3.2. Rada pro lidská práva v Ženevě

RLP je mezivládní orgán OSN odpovědný za posílení ochrany lidských práv po celém světě. Poprvé se zde téma supích fondů objevilo na 11. zasedání RLP v červnu roku 2009, kdy Cephas Lumina, zvláštní zpravodaj OSN na vliv zahraničního dluhu na lidská práva, okrajově zmínil aktivity těchto subjektů ve své zprávě A/HRC/11/10. V reakci na tuto zprávu byl Cephas Lumina pověřen vypracováním dokumentu zabývajícím se přímo činností supích fondů. Tato studie<sup>99</sup> z roku 2010 na 34 stránkách mapuje přímo „negativní dopad [supích fondů] nejen na proces oddlužení, ale také na možnosti HIPCů vytvářet podmínky nutné k realizaci lidských práv, především práv hospodářských, sociálních a kulturních“<sup>100</sup>.

Ačkoli již existovala samostatná studie na téma supích fondů, v následujících dvou rezolucích přijatých RLP v roce 2012 a 2013 (A/HRC/RES/20/10 a A/HRC/RES/23/11), týkajících se zahraničního dluhu a lidských práv, byly supí fondy zmíněny jen povrchně.<sup>101</sup> Hlavním cílem těchto rezolucí předložených Kubánskou republikou bylo především zařazení tématu zahraničního dluhu na program jednání RLP, a to i přes negativní postoj všech členských zemí EU spolu s Japonskem, USA a Švýcarskem k této iniciativě.

Rezoluce věnující se problematice supích fondů byla pod identem A/HRC/RES/27/30 přijatá RLP dne 26. září 2014. Návrh rezoluce byl předložen Argentinou v návaznosti na předchozí přijetí A/RES/68/304 VS v New Yorku. Cílem dokumentu bylo podpořit proces tvorby multilaterálního právního rámce pro restrukturalizaci zahraničního dluhu a získání mezinárodního uznání negativních dopadů činnosti supích fondů. Dle rezoluce absence právního nástroje, který by proces restrukturalizace učinil předvídatelným, zvyšuje jak sociální tak ekonomické náklady plynoucích z porušování mezinárodního práva.<sup>102</sup>

Stejně jako v předchozím případě bylo hlasování o rezoluci A/HRC/RES/27/30 nazvané *Účinky zahraničního dluhu a dalších souvisejících mezinárodních finančních závazků států na plné požívání všech lidských práv, zejména hospodářských, sociálních a kulturních práv: aktivity supích fondů* vyvoláno USA, jež ve svém stanovisku trvaly na nepřislušnosti RLP k projednávání tohoto tématu. Rovněž upozornily na alibismus některých zemí, které se snaží porušování lidských práv na svém území omlouvat zahraniční zadlužeností.<sup>103</sup>

Jednotnou pozici EU představila Itálie, která nejdříve vyjádřila solidaritu se zeměmi potýkajícími se s finanční krizí. Negativní postoj členských zemí EU k rezoluci pak argumentovala snahou o eliminaci případných duplicit, které by jednání na více multilaterálních fórech způsobilo. Tím také vyjádřila jménem EU plnou podporu MMF, jenž v rámci své agendy pracuje na vytvoření právního rámci pro restrukturalizaci dluhu.<sup>104</sup>

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<sup>99</sup> Dokument je RLP vedený pod identem A/HRC/14/21.

<sup>100</sup> A/HRC/14/21, 2010.

<sup>101</sup> A/HRC/RES/20/10, 2012 a A/HRC/RES/23/11, 2013.

<sup>102</sup> A/HRC/RES/27/30, 2014.

<sup>103</sup> UN votes for rules to stop vulture funds, 2014.

<sup>104</sup> A/HRC/23/L.22 Vote Item:3. UN Web TV, 2015.

Rezoluce A/HRC/RES/27/30 byla na 42. schůzi 27. zasedání RLP přijata v poměru 33 hlasů pro, 5 proti a 9 zemí se hlasování zdrželo. ČR se spolu s Německem, Velkou Británií, Japonskem a USA vyslovila proti přijetí rezoluce. Postoj ČR vycházel kromě koordinace s EU také z přesvědčení, že by nebylo vhodné podpořit rezoluci, která formulací vychází z textů předkládaných Kubou, k nimž ČR v letech 2012 a 2013 rovněž zaujala odmítavé stanovisko.

VÝSLEDKY HLASOVÁNÍ RLP O REZOLUCI A/HRC/RES/27/30	
<b>PRO</b>	Alžírsko, Argentina, Benin, Botswana, Brazílie, Burkina Faso, Čína, Etiopie, Filipíny, Gabon, Chile, Indie, Indonésie, JAR, Kongo, Kostarika, Kuba, Kazachstán, Keňa, Kuvajt, Maledivy, Mexiko, Maroko, Namibie, Pákistán, Peru, Pobřeží Slonoviny, Ruská federace, Saudská Arábie, Sierra Leone, Spojené Arabské Emiráty, Venezuela, Vietnam
<b>PROTI</b>	Česká republika, Japonsko, Německo, Velká Británie, USA
<b>ZDRŽEL SE</b>	Černá Hora, Estonsko, Francie, Irsko, Itálie, Korejská republika, Makedonie, Rakousko, Rumunsko

**Tab. 2.** Výsledky hlasování o rezoluci A/HRC/RES/27/30. Vypracováno autorkou. (Resolutions and Voting Results of 27th HRC Session (A/HRC/27/L.26), 2014)

Z mandátu rezoluce A/HRC/RES/27/30 byl Poradní výbor OSN pro otázky vlivu zahraničního dluhu na lidská práva pověřen vypracováním nové výzkumné zprávy o aktivitách supích fondů a jejich dopadech na lidská práva.<sup>105</sup> Tato zpráva má být prezentována na 33. zasedání RLP v září 2016.<sup>106</sup>

## Závěr

Negativní dopad aktivit supích fondů na hospodářská a sociální práva občanů zadlužené země je nezpochybnitelný. Stát, jehož závazky vůči zahraničním věřitelům dosahují výše až desítek procent HDP, musí snížit veřejné výdaje mimo jiné i na vzdělávání, zdravotnictví nebo sociální služby, aby předešel insolvenční a následnému vyhlášení bankrotu. Zatímco většina států je ochotna pomoci zadluženým zemím a přistoupit na restrukturalizaci dluhu, supí fondy naopak našly ve vládních dluhopisech vhodný nástroj k zúročení investic. Současná nedostatečná mezinárodně-právní legislativa je v tomto ohledu supům nakloněná a zadluženým zemím nezbývá mnoho možností, jak se těmto útokům bránit.

Případy Argentiny, Zambie, Libérie a Islandu jasně prokazují kauzalitu mezi chybějícími vládními výdaji a omezováním hospodářských a sociálních práv. Argentinci se vlivem prohraného soudního sporu s fondem *NML Capital* ocitli před další krizí, jež představuje riziko krácení práv na sociální zabezpečení, práci i zdravotní péči. Zambie a Libérie se nedostatečnou lékařskou péčí z důvodu podfinancování sektoru zdravotnictví potýkají již dlouho. Epidemie eboly a rychlost šíření HIV v těchto zemích však již přerostly v ohrožení toho nejzákladnějšího práva místních obyvatel – práva na život. Případ Islandu naopak ukazuje, že negativním

<sup>105</sup> *External debt: vulture funds opposed at the UN, 2014.*

<sup>106</sup> *Debt restructuring, vulture funds and human rights, 2016.*

dopadům v omezování práva na sociální péči, práci a bydlení je možné efektivně – byť krátkodobě – zabránit prostřednictvím účinné expanzivní fiskální politiky. Vzhledem ke skutečnosti, že se supí fondy zaměřují především na země z kategorie HIPC, je ovšem jen velmi málo států, které by podobnou taktiku k eliminaci dopadů mohly využít.

Mezinárodnímu společenství trvalo přes 20 let, než přes všechny výše zmíněné argumenty byla na půdě OSN přijata rezoluce A/RES/69/319, jejíž 9 principů restrukturalizace dluhu by mohlo přispět k transparentnosti a udržitelnosti procesu oddlužení. Nicméně nadále bude záležet na efektivitě implementace principů a jejich vymahatelnosti, zda učiněné kroky budou dostačující v zamezení vyděračské činnosti supů. Přetrvávající negativní postoj k celé problematice na půdě RLP ukazuje, že jednou z hlavních zbraní hedge fondů je především téměř nulové povědomí o jejich činnosti a potenciálních dopadech.

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