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Uvodnik

Spoštovani,

pred vami je dvojna tematska številka *Mednarodne revije za javno upravo*, *International Public Administration Review*, s katero bomo zaključili leto 2013. S posebnim vabilom avtorjem smo se obrnili na strokovnjake javnega sektorja v tujini in v Sloveniji in njihov odziv je bil dober.

Fakulteta posveča veliko pozornost spremembam, ustvarjalnosti in inovativnosti v javnem sektorju. Vključeni smo v mednarodni projekt *Next for Public Administration* (NEXT4PA), ki povezuje izobraževalne visokošolske in strokovne orgnizacije ter predstavnike zaposlenih v javnem sektorju sosednjih držav.

11. in 12. 12. 2013 smo na fakulteti organizirali delavnico o ustvarjalnosti in inovativnosti, na kateri so sodelovali udeleženci iz Avstrije, Italije, Slovenije in strokovnjaki iz Nizozemske. Pristopi, ki so že uveljavljeni v zasebnem sektorju, so zelo uporabni tudi za organizacije državne uprave in lokalne skupnosti. Ustvarjalnost se lahko spodbuja na različne načine in zaposleni nimajo zadržkov do novosti. Na Nizozemskem ugotavljajo, da je treba pričeti z drugačnimi metodami poučevanja že v osnovni šoli, tako da so kasneje študentje in zaposleni sposobni delovati ustvarjalno.

Med dejavnike, ki najbolj zavirajo razvoj inovativnosti, so strokovnjaki uvrstili zlasti pretirane administrativne postopke in šolske zakonodajne dokumente. Gre za to, da je ena večjih, če ne temeljnih slabosti slovenskega izobraževanja rigidnost oziroma »industrijski model razmišljanja«, ki izključuje fleksibilnost in inovativnost. Učitelj je tako le izvajalec nečesa, kar je »od zgoraj« natančno predpisano. Posledično to pri učencih zavira razvoj ustvarjalnosti, saj zavira ustvarjanje primernega okolja, ki spodbuja nastanek novih idej, radovednost in inovativnost.

Dejstvo je, da slovenski šoli še ne uspeva zadovoljivo ujeti občutljivega razmerja med vlogo, ki poudarja prenos znanja v mlade glave, in drugo vlogo, ki bi morala negovati in spodbujati njihovo ustvarjalnost in inovativnost. Velika količina predelanih podatkov še ne pomeni tudi večjega znanja, če učitelji in učenci ter študentje nimajo priložnosti teh podatkov postaviti v ustrezen kontekst in jih razumeti. Enega od razlogov za tako stanje gotovo pomeni prepričanje oziroma kultura, uveljavljena zadnja leta v naši šolski praksi, da je pomembno pridobivanje znanja, ki omogoča napredovanje v izobraževalnem sistemu. Takšna predstava ima za posledico razvrščanje učencev po zmožnostih in zamaje pojem vseživljenjskega učenja ter smiselnosti učenja za življenje.

Drugo pomembno izhodišče temelji na sodelovanju učitelja z učenci in študenti. Očitno je, da so mentorji bolj odprti in v večji meri sprejemajo učenčeve ideje, hkrati pa od njih tudi veliko pričakujejo. Pri pouku pogosteje

uporabljajo informacijsko in komunikacijsko tehnologijo, učence in študente pa vključujejo v projektno delo. Večji vpliv pri spodbujanju inovativnosti pripisujejo družini, torej domačemu okolju, pomembne pa se jim zdijo tudi osebnostne lastnosti.

Tudi številni drugi šolski sistemi imajo resne težave z iskanjem ravnovesja, kako pri učencih in študentih razvijati ustrezno znanje in kompetence, obenem pa spodbujati njihovo ustvarjalnost. Pogosto jih učimo, da so takrat, ko stvari počnejo in razmišljajo na »pravi« način, nagrajeni z dobro oceno, ko delajo in razmišljajo »narobe«, pa bodo kaznovani. Vzporedno z učenjem, da obstajajo »pravi« in »napačni« načini za razmišljanje in za reševanje problemov, se utrjuje spoznanje, da so napačna vsa drugačna razmišljanja in vse rešitve, ki niso enake pravi. Ko postane tisto, kar je drugačno, »napačno« in je običajno pospremljeno še s kaznijo v obliki slabše ocene, se ustvarjalnost in inovativnost ne razvijata najbolje. Le zakaj bi posameznik tvegal in bil inovativen, če je zato lahko kaznovan.

Zato je izredno pomembno toleriranje napak pri delu, brez katerega ni razvoja ustvarjalnosti in inovativnosti. Zdi se, da naše izobraževanje ni prijazno do napak. Dijaki in študentje se zelo hitro naučijo, da so napake nezaželene, velikokrat tudi kaznovane s slabo oceno. Zelo hitro se naučijo, da je velikokrat bolje narediti nič, kot narediti napako. Ko mladi spoznajo, da nima smisla tvegati napak, preprosto nehajo preizkušati, odneha pa tudi njihova radovednost, ustvarjalnost, originalnost in inovativnost. Ustvarjalnost in inovativnost sta v večji meri značilni za kulturo, ki dopušča tveganje, kot pa za okolje, v katerem je značilno izogibanje napakam. Izredno pomembno je tolerantno okolje, kultura, ki dovoljuje spoznanje, kaj je originalno in kaj konformno. Ustvarjalna kultura ponuja obilo priložnosti za angažiranje posameznika, za konstruiranje znanja in za pogajanja. Prevladuje odprtost komunikacije na vseh ravneh, v ospredju je tvorjenje zaupanja in spodbujanje divergentnosti ter razumevanje odnosov med ljudmi in kulturami.

V okoljih, kjer se mladi naučijo ustvarjalnosti že v obdobju izobraževanja, nimajo težav s prenosom teh znanj tudi v delovno okolje zasebnega in javnega sektorja.

Današnja mladina ni popolnoma drugačna od svojih predhodnikov. Zelo pa se je spremenil svet, v katerem mladi živijo in v katerega bodo odraščali. To pomeni, da je temu svetu treba prilagoditi tudi izobraževanje.

Odgovorna urednica

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1.01 Original scientific article

Outsourcing in Sandy Springs and Other US Cities: Insights for Other Countries

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ABSTRACT

This paper analyses the partnership-based outsourcing model of service transformation in USA local government, focusing on the city of Sandy Springs which became widely known for its large-scale 'turnkey' outsourcing of provision of its services in the mid-2000s. This city has been referred to in the literature as a special case not applicable to other countries, such as the UK, because of their very different contexts. However, there is now a public sector austerity context within which to reassess Sandy Springs' use of turnkey outsourcing to achieve significant cost savings and improve services. The paper reports empirical research which it uses to derive insights for municipalities considering outsourcing. Those insights can help improve both policy and professional practice by outlining key issues for consideration when trying to 'do more with less' money.

Key words: outsourcing, commissioning, turnkey, Sandy Springs

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1 Introduction

The purpose of this paper is to draw insights from cases of large-scale outsourcing of US city governments' service provision, focusing on Sandy Springs which became widely known for its radical 'turnkey' outsourcing in the mid-2000s.

In its extreme form, local government politicians (councillors) meet only once a year to authorise signing of contracts with external providers of their services. Councillors provide political and strategic oversight so the much reduced number of service managers can prepare and issue contracts with private sector companies to run schools, provide social services, collect household waste and collect council tax payments.

Such transformation involves 'reinventing government' (Osborne & Gaebler, 1992). It challenges the traditional conception of public administration, which emphasises political control in the form of a representative system of government and Weberian principles of bureaucracy and in-house production (Hood, 1991; Bevir, 2007; Song, 2007; Zysman, 2004).

Osborne and Gaebler's reinventing government thesis led to a substantial literature on the transferability of policy and practice, which are often so context-specific that simplistic comparative analyses of them can be highly misleading in trying to draw lessons (James & Lodge, 2003). Hence, this paper focuses on insights to inform consideration of outsourcing rather than draw specific lessons to put into practice in other countries.

Bearing that caveat in mind, reinventing government requires 'enabling government' and 'steering rather than rowing' now referred to in the public sector austerity context as 'transformational change'. Separation of 'steering' and 'rowing' refers to the 'unbundling' of public sector services via a purchaser-provider split and has for some time been one of the fastest-growing business models providing new markets for service companies and to some extent also for non-profit service organisations (Fill & Visser, 2000; Burnes & Anastasiadis, 2003). Such unbundling and outsourcing is the foundation of the UK's Open Public Services White Paper (Cabinet Office, 2012).

Analysis of official documents of the city of Sandy Springs and other publicly available materials including news and feature stories in mass media was complemented by interviews in May 2012 with the Mayor and members of the managerial staff (City Manager, Assistant City Manager, and Community Relations Manager) as well as the Chairman of the Governor's Commission on Sandy Springs.

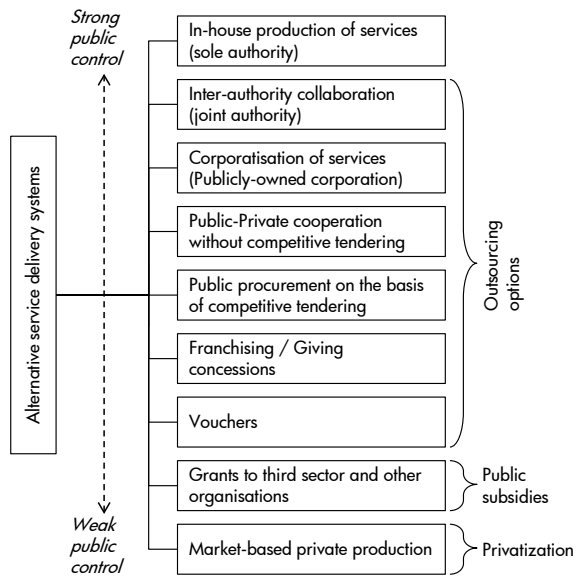
2 Outsourcing: Definition and Scope

Outsourcing involves contracting out to external organisations production of whole services or parts thereof and other value-adding or value-creating activities previously performed by the first organization's own staff (Lei & Hitt, 1995; Perry, 1997). The most common reason for outsourcing public services is a constant search for cost savings (Fill & Visser, 2000; Burnes & Anastasiadis, 2003). Other reasons may include lack of internal expertise, inability to hire new staff, and an unwillingness to invest in new facilities and service infrastructure.

In comparison with this narrow contracting-out perspective, the more holistic commissioning approach requires detailed policy formulation before considering how to deliver the desired objectives (Bovaird et al., 2012). It requires municipalities to "rethink the fundamental purpose of public services and the role of the citizen and the state in meeting individual and collective needs" (Bohl, 2012 p. 4). Such strategic-level innovation is of crucial importance in 'doing more with less' (Gillinson et al, 2010; Gillinson & Sissoko, 2012; Manning, 2013; Valkama et al., 2013).

Nevertheless, contracting is a core part of the process used to source a service after having undertaken a needs analysis and consultation to inform policy making in respect of intended outcomes. Thus questions of what and how to outsource, as well as consideration of the ramifications of large-scale outsourcing, are critical for decision-makers, public managers, service users, and citizens (Burnes & Anastasiadis, 2003). In the private sector, outsourcing usually means contracting out, but public authorities also use many other methods (Savas, 1987; Warner, 2006). Figure 1 relates sourcing options to the strength of public control.

Figure 1: Main means of sourcing public service delivery



Source: Adapted from Osborne & Gaebler (1992) and Valkama (2005).

Table 1 summarises the pros and cons of outsourcing. Although those claimed benefits and risks are case specific, there is some evidence that it may not be possible immediately to reduce (fixed) costs of in-house resources (Kulmala et al., 2006) and that cost savings arising from competitive tendering may diminish after the first round of tendering (Almqvist & Högberg, 2005; Valkama & Anttiroiko, 2007; Bel & Costas, 2006). Moreover, contracts signed in a rush

to achieve immediate cost savings may simply replicate the *status quo* and so result in an 'innovation deficit' (Koulopoulos & Roloff, 2006; Weidenbaum, 2005).

Table 1: Benefits and risks of outsourcing

	Benefits	Risks
Public organizations	- Freedom from constraints of in-house cultures and attitudes. - Enabling focus on core business and setting policy. - Gaining fresh ideas and rethinking outcome objectives. - Obtaining high-level expertise and capacity quickly. - Learning from private sector management theories and practices. - Opportunity to access 'best in class' skills and capabilities.Increasing ability to meet changing market needs. - Gaining a better public image through a modern management style.	- Failure to distinguish between core and non-core functions may lead to inappropriate outsourcing and 'hollowing out' the local state. - Lack of competence needed to design appropriate agreements with service providers. - Lack of managerial and legal skills to monitor and manage external providers. - Reduction of control over specific services. - Fading of competitive markets and in-house competencies in the long run. - Deterioration of service quality and rising costs. - Difficult to return to in-sourcing if outsourcing leads to loss of skills and knowledge. - Reduced flexibility. - Loss of accountability and political reputation. - Privatization by stealth or by default.
Public finance	- Cost savings in annual budgets. - Increased flexibility to reconfigure budgets. - Reduced need for public investments. - Converts fixed costs into variable costs. - Gaining economies of scale and scope. - Reduced liabilities.	- Transaction costs for public purchasers. - Increased costs of governance. - Restrictive public procurement regulations. - Prevents innovative buying and free bargaining. - In-house costs may not fall as far as expected. - Hidden costs for society as a whole.

Source: Adapted from Harland et al. (2005).

The technicalities and administrative procedures of outsourcing may increase the power of bureaucrats and technocrats vis-à-vis political leaders and citizens (Noordhoek & Saner, 2005; Bevir, 2007, Niskanen, 1971) but lack of community and stakeholder engagement in governance of outsourced services leads to a relatively high reversion to in-sourcing of local government services (Lamothe & Lamothe, 2006). Moreover, market-based solutions may lead to the fragmentation of public services. Instead, a more sophisticated approach to outsourcing based on networks and partnerships is the essence of 'smartsourcing', akin to commissioning (Bohl. 2012; Bovaird et al., 2012; Koulopoulos & Roloff, 2006).

3 Outsourcing Developments in US City Governments

Contracting out has a long history in the USA. The Federal Government has used private enterprises in the provision of public services since the early 1900s (Savas, 1987; Burnes & Anastasiadis, 2003) and Lakewood (CA) since the early 1950s and some 25% of Californian cities were organised along the Lakewood-type hybrid model in the late 2000s (Barkin, 2012).

However, when the newly incorporated city of Sandy Springs outsourced provision of practically all its services in 2005, this was possibly the largest outsourcing of local government services in US history and it had a direct influence on other cities, including those with small (less than 30,000) and large (100,000 or more) populations, whether affluent or poor (American City & County, 2007; Porter, 2008; Barkin, 2012; Vives et al., 2010; Palmeri, 2010; Streitfeld 2010).

Nevertheless, many other US cities use several of the sourcing options depicted in Figure 1. In principle, adoption of most of those options is a means by which the risks listed in Table 1 can be reduced because local governments will be less likely to make inappropriate use of contracting out whereby cost savings may be achieved at the expense of reduced outcome effectiveness due to loss of core skills.

Compared with an overdependence on contracting out to the private sector (and certainly to a single company), adoption of the more sophisticated smartsourcing approach can, in principle, also increase the benefits of outsourcing listed in Table 1. This seems to have been the reason why many other US cities adopted the multivendor hybrid model: cost savings were not the only requirement.

4 The Sandy Springs Case

Sandy Springs Georgia has some 94,000 inhabitants but commuters increase the daytime population to 200,000 or so. It is a relatively affluent and well-educated community with below average crime rates (Hartstein, 2010; Woolsey, 2009; City-Data.com, 2012).

Until the mid-2000s, it was administered by Fulton County but demands for independence arose from dissatisfaction with the services provided by the County, residents feeling that they subsidized the services of poorer unincorporated communities in the southern part of the County (Sandy Springs, 2011; Freeman, interview 2012). Democrats had repeatedly blocked efforts "to let a largely Republican and white suburb cleave itself from Fulton County" (Segal, 2012) but elections in 2003 and 2004 resulted in the Republicans gaining control over all three key elements of the state government (Governor, Senate and Representatives) and 94% of local residents voted for independent city status in a local referendum in 2005.

Working within a tight timetable to set up the administrative and service machinery, the Sandy Springs Governor's Commission and committees organized for different service sectors came to the unanimous conclusion that services are best to organize by outsourcing them to the private sector (Porter, 2006; Pioneer Institute, 2010; Porter, interview 2012). CH2M Hill was contracted to provide practically all municipal services with the exception of police and fire (services that the Constitution of the State of Georgia requires

be provided by public workers) and some basic administrative and financial functions and contract management. Hence, with the exception of police and fire, the city retained only a few full-time employees in central administration (The Economist 2012). School and library services remained within the responsibility of Fulton County.

Hence, when City Hall opened its doors, most workers were employees of CH2M Hill or its subcontractors. Nevertheless, from the point of view of citizens the service provider was the city government irrespective of who actually hired the staff providing those services. This was in sharp contrast with the view of political leaders and city management who regarded CH2M Hill as the provider, whether directly or indirectly via its subcontractors, for the next five years (Porter, 2008, p. 45).

Adopting a public-private partnership model resulted in the lowest per capita ratio of municipal employees to residents of 1.51 per 1,000 within the state of Georgia. Compared with similar sized local governments in the US, Carl Vinson Institute of Government of the University of Georgia estimated that Sandy Springs would need for about 828 employees (Pioneer Institute, 2010; Sandy Springs, 2011). This compared with the 271 City employees and 200 positions supplied by the private contractor.

Under this operational model the City Manager supervises the private company which takes care of the general administrative and service functions of the city government, including planning, zoning, municipal infrastructure, information systems, personnel administration, financial management, procurement, communications, legal services and investment planning (Porter, 2008). Hence, the City Manager has to work in communications, finance and other services with company employees but without capacity to hire or fire them. However, if necessary, he can communicate any concerns about performance to the private contractor. He also evaluates if there are unfilled vacancies in the departments for which the company is responsible under the contract. Ultimately, the City may even withhold payment to the company if the vacancy remains unfilled too long (Porter, 2008).

5 The Second Round and a New Sandy Springs Multivendor Model

Due to the exceptional situation, the first-time outsourcing process did not follow the standard outsourcing procedure (O'Looney 1998). Instead, a flexible partnership between the city and company was established and so during the first contract period (2005-2011), the city government 'learnt by doing' as it gained first-hand experience of the implementation of this large-scale partnership-based outsourcing model.

The end of the first contract period provided the opportunity to re-evaluate the whole contract but adoption of a conventional in-house production model

was rejected because anti-government sentiment had been strong from the beginning and the perceived success of the partnership model increased belief in its superiority over other sourcing models.

However, the City wanted the second contracting round to be a comprehensive procurement process to guarantee value for money and encourage innovation, looking beyond the lowest bid to also take into account the reliability of performers, transaction costs and similar factors in order to gain best value from the contract (Sandy Springs, 2011).

Unlike in the first round, there was enough time and capacity to strive for innovative procurement during the second round of outsourcing and it became evident that by splitting (unbundling) the contract it was possible to create greater competition and gain cost savings (Galambos, interview 2012). Another clear change in the second round was the drafting of more detailed contracts, which was not possible earlier due to the hectic preparation process of the first round. In 2011 five companies were selected to provide services for the seven main service tasks (see Table 2).

Table 2: Sandy Springs' contract award values in fiscal year 2012

Service category	Vendor	$ value of contract
Financial Services	Severn Trent Services	1,593,201
Information Services	InterDev	1,040,853
Communications	The Collaborative	594,413
Municipal Court	Jacobs Engineering Group	794,239
Public Works	URS Corporation	3,086,205
Recreation and Parks	Jacobs Engineering Group	790,608
Community Development	The Collaborative	2,226,774
Total		10,126,293

Source: Sandy Springs (2011).

Sandy Springs believes its partnership-based outsourcing has made it possible to invigorate local development, improve infrastructure, and generally meet the needs of citizens in a cost-effective manner. There are also services provided solely by private sector firms, such as refuse collection, for which the city government acts only as regulator setting certain preconditions for service providers (Galambos, interview 2012). The city's risks are mainly restricted to in-house production and budget allocation, the remaining risks being either shared, or the responsibility of each contracted company (Porter 2008).

6 Evidence of Cost Savings and Improved Service Quality

First round cost savings of the partnership-based outsourcing were only a few million dollars compared with typical budgets of cities of similar size to Sandy Springs. Contract values showed no trend between 2007 and 2010 at around $26 million.

It was the second round contracts that brought the most substantial savings, estimated by the City to be almost 30% ($7 million), mainly due to increased competition among service providers in comparison with the first single-company five-year contract. Values of awarded contracts fell, from $26.1 million in 2010 to $24.2 million and further to $17.1 million in 2012 (Sandy Springs 2011).

In addition, partnership-based outsourcing has reportedly increased synergy, efficiency and innovativeness in the use of resources and in service provision because the companies involved have incentives to satisfy purchaser's needs, to renew services, and to take care of cost-effectiveness (Porter, interview 2012).

Pensions costs that are driving other cities into bankruptcy are avoided by Sandy Springs which has virtually no long-term liabilities since the very point of outsourcing is to avoid them (The Economist, 2012). All core personnel liabilities are vested in a private company, with the exception of public safety functions (Porter, 2008).

The city has received several awards, including the 2006 National Council for Public Private Partnerships Award for outstanding use of PPPs, runner-up status in the Pioneer Institute's national Better Government Competition 2010, the Keep Georgia Beautiful award in the Community Improvement category in 2010. There is also evidence of a dramatic improvement in service quality, as indicated for example in the National Citizen Survey of 2010 (Sandy Springs, 2011; Isaacs, 2008; Barkin, 2012; Coffer, interview 2012).

7 Are the Contracting Companies Governing Sandy Springs?

The city reportedly remains properly governed by democratically elected politicians and properly organized by the City Manager. Partnership-based outsourcing is not privatization because there is a clear conceptual difference between them for control of services (Porter, interview 2012). Indeed, the outsourcing model gives the city government more control over service provision than may be generally assumed (Barkin, 2012) and the overall picture of daily seamless collaboration is overtly positive (McDonough, interview 2012).

The City Manager stated that he needs to put less time and effort into personnel issues, such as hiring and firing, and the contract period saves time in annual budgeting processes (Barkin, 2012). Instead, the manager's

work is more about 'management by contracts' and this shifts the focus onto overseeing the execution of contracts and organizing related negotiations whenever needed. Consequently, there is more time for strategic management (McDonough, interview 2012; Porter, 2008). Put simply, companies have not taken over the city hall.

8 Insights from Sandy Springs

The adoption of large-scale outsourcing requires some catalyst in the form of exceptional circumstances, whether the need to assert independence or to avoid bankruptcy. Newly incorporated cities such as Sandy Springs are in an advantageous position of starting from a clean slate, without entrenched systems and legacy employees (and their pensions), legacies which have to be addressed if large-scale outsourcing is to be adopted in other countries. Even if the US cities' contracting out has its roots in neo-liberal ideology and anti-government sentiment, it is in most cases approached rationally and based on comparing the costs of insourcing and outsourcing models. Wasting taxpayers' money on unnecessarily expensive services is unacceptable, whatever the political philosophy and whichever the country.

Residents, service users, unions and other stakeholders in local governments must not only be made to appreciate the need for service transformation, but also see the resulting benefits to themselves and their communities. The crucially important favourable public opinion can be secured and maintained by ensuring high visibility of service improvements, most immediately by focusing outsourcing on high profile 'streets and bins' and other such technical services (parks etc.). The chosen companies must already have gained experience in providing a wide range of local infrastructure services and be big enough to take the risk associated with such an endeavour.

Contracts must not be with only one company in a rush to meet financial targets and should not be too long-term so that potential cost savings missed at the first round of contracting are secured sooner at subsequent re-contracting rounds. Competition must be maintained for service contracts to avoid incumbent provider monopoly. Companies providing outsourced services must develop a good working relationship with the local government to create an overtly positive atmosphere in dealing with potential tensions relating to different interpretations of the contract to meet or even exceed councils' expectations in every area, from financial outcome to responsiveness in service delivery.

Municipalities should understand that over successive rounds of sourcing they may move from one method to another within the many alternative means of sourcing public service delivery. This is likely to be the case as a result of learning-by-doing and to the extent that the outsourcing market's capacity or competitiveness changes over time. As well as learning-by-doing, local governments can learn from each other about the best way of outsourcing

(including contracting out) services, just as has been the case in the USA. Together with focusing contracting out on technical services and using other methods to outsource services interacting directly with their users, learning from best practice will enable risks to be better managed and so reduced.

Although there clearly are risks associated with adoption of new models of service provision, it seems that they are more the result of internal procedures rather than caused by external providers themselves. This is also the case in other countries such as the UK where, on average, municipalities outsourced over a quarter of services in 2012 (YouGov, 2012), a third of total government spending on services going to independent providers (Gash et al., 2013).

Countries wishing to explore the potential transferability of particular forms of outsourcing and strategic partnering should note the small municipal context in the USA which may not be appropriate for countries with demographically large local governments. Furthermore, it is essential to recognise differing governmental and institutional contexts that must be taken into account, for example the USA's federal structure compared with the unitary state model in another country. There may also be differences in other countries in terms of political structures and cultures, municipal functions, fiscal contexts, legal frameworks within which outsourcing and strategic partnerships would take place, and in market structures and capacity for outsourcing so that they are not analytically equivalent to the Sandy Springs case.

In combination, these differences may substantially qualify the potential for outsourcing Sandy Springs style in other countries. In general, however, cost-effective and responsive services, significant savings, appealing cost structure and improved quality of services all help build confidence in the partnership model.

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POVZETEK

ZUNANJE IZVAJANJE V SANDY SPRINGS IN DRUGIH MESTIH ZDA: SPOZNANJA ZA DRUGE DRŽAVE

Ključne besede: zunanje izvajanje, pogodba na ključ, pogodbena oddaja storitev

Namen članka je iz posameznih primerov omogočiti vpogled v obsežno zunanje izvajanje storitev mestnih občin v ZDA, s poudarkom na mestu Sandy Springs, ki je sredi prvega desetletja 21. stol. zaslovelo zaradi radikalnega zunanjega izvajanja »na ključ«.

V skrajni obliki se občinski možje sestanejo samo enkrat na leto, da odobrijo podpise pogodb z zunanjimi izvajalci njihovih storitev. Svetniki pripravijo politični in strateški pregled, tako da zelo zmanjšano število upravnikov storitev lahko pripravi in izda pogodbe s podjetji zasebnega sektorja za vodenje šol, izvajanje socialnih storitev, zbiranje gospodinjskih odpadkov in pobiranje občinskih dajatev.

Na novo postavljena teza Osborna in Gaeblerja o vladanju je spodbudila obsežno literaturo o prenosljivosti politike in prakse, ki imata pogosto tako različen kontekst, da so lahko poenostavljene komparativne analize preveč zavajajoče, da bi se lahko iz njih česa naučili. Zato se članek osredotoča na spoznanja, ki naj osvetlijo razmišljanja o zunanjem izvajanju, namesto da bi podajal posebna navodila, ki naj se v drugih državah udejanjijo v praksi.

Ob upoštevanju tega opozorila redefinicija vladanja zahteva »omogočanje vladanja« in »krmarjenje namesto veslanja«, ki se sedaj navaja v kontekstu zmanjševanja stroškov javnega sektorja kot »preobrazbene spremembe«. Ločitev »krmarjenja« in »veslanja« se nanaša na »izločanje« storitev javnega sektorja z ločitvijo kupca-izvajalca in je bila nekaj časa eden od najhitreje rastočih poslovnih modelov, ki je ustvarjal nove trge za storitvena podjetja in do neke mere tudi za neprofitne storitvene organizacije. Takšno izločanje in zunanje izvajanje je temelj za Belo knjigo odprtih javnih storitev Združenega kraljestva.

Pogodbena oddaja storitev ima v ZDA dolgo tradicijo. Ko je na novo osnovana mestna občina Sandy Springs leta 2005 oddala v zunanje izvajanje skoraj vse svoje storitve, je bila to najbrž največja oddaja storitev lokalne oblasti v zunanje izvajanje v zgodovini ZDA in je neposredno vplivala na druge občine. Seveda se lahko v primerjavi s preveliko odvisnostjo pri sklepanju pogodb z zasebnim sektorjem (in zagotovo z enim samim podjetjem) s pristopom bolj izpopolnjenega »pametnega oddajanja v izvajanje« načeloma povečajo prednosti zunanjega izvajanja. Zaradi tega se zdi, da je veliko drugih mest sprejelo hibridni model z več ponudniki: edina zahteva ni bila prihranek pri stroških.

Raziskava, ki jo članek predstavlja, je vključevala zbiranje tako sekundarnih kot primarnih podatkov. Analiza uradnih dokumentov mesta Sandy Springs in drugega javno dostopnega gradiva, vključno z novicami in reportažami v množičnih občilih, je bila dopolnjena še z intervjuji maja 2012 z županom in člani upravnega osebja (mestnim upravnikom, pomočnikom mestnega upravnika in upravnikom za odnose skupnosti), kakor tudi s predsednikom guvernerjeve komisije v Sandy Springs.

V prvem krogu je bil prihranek pri stroških za zunanje izvajanje na osnovi partnerstva le nekaj milijonov dolarjev v primerjavi s tipičnim proračunom mest podobne velikosti kot Sandy Springs. Drugi krog pogodb pa je prinesel največje prihranke, ki jih je mesto ocenilo skoraj na 30% (7 milijonov dolarjev), predvsem zaradi povečane konkurence med ponudniki storitev glede na prvo petletno pogodbo z enim samim podjetjem. Poleg tega je zunanje izvajanje na osnovi partnerstva domnevno tudi povečalo sinergijo, učinkovitost in inovativnost pri uporabi virov in oskrbi s storitvami, ker so bila udeležena podjetja motivirana za zadovoljitev naročnika, obnovo storitev in skrb za cenovno učinkovitost.

Na splošno v Sandy Springs verjamejo, da je njihovo zunanje izvajanje na osnovi partnerstva omogočilo okrepitev lokalnega razvoja, izboljšave infrastrukture in na splošno zadovoljilo potrebe občanov na cenovno učinkovit način. Nekatere storitve, kakor zbiranje odpadkov, izvajajo samo podjetja zasebnega sektorja, pri čemer mestna oblast deluje le kot regulator, ki določa posebne predpogoje za izvajalce storitev. Tveganje mesta je v glavnem omejeno na lastno proizvodnjo in razporejanje proračuna, druga tveganja pa se bodisi delijo, bodisi so odgovornost vsakega pogodbenega podjetja.

Stroškom za pokojnine, ki vodijo druge občine v stečaj, se je mesto Sandy Springs, ki praktično nima dolgoročnih obveznosti, saj je prav to smisel zunanjega izvajanja, izognilo. Z izjemo zaposlenih v javni varnosti, so bile vse osnovne obveznosti do osebja prenesene na zasebno podjetje.

Zunanje izvajanje na osnovi partnerstva ni privatizacija, saj je zaradi nadzora storitev med njima jasna konceptualna razlika. V resnici model zunanjega izvajanja omogoča mestni oblasti nad izvajanjem storitev več nadzora, kakor se na splošno misli, in celotna podoba tekočega skladnega sodelovanja je očitno pozitivna.

Mestni upravnik je pojasnil, da mora vlagati manj časa in truda v kadrovska vprašanja, kot so zaposlovanje in odpuščanje, in delo upravnika je bolj »upravljanje s pogodbami«, s tem pa se usmerja glavna pozornost na nadzor izvajanja pogodb in organizacijo s tem povezanih pogajanj, kadar so potrebna. Posledično je tudi več časa za strateško upravljanje.

Iz primera Sandy Springs izhaja več spoznanj. Najprej, za uvedbo obsežnega zunanjega izvajanja je potreben katalizator v obliki izjemnih okoliščin, kot je na primer potreba po uveljavitvi neodvisnosti ali nujnost, da se izogne stečaju.

Na novo ustanovljene mestne občine, kot je Sandy Springs, so v prednostnem položaju, ker začenjajo s čisto preteklostjo brez ukoreninjenih sistemov in njihovih zaposlenih (in pokojnin), brez dediščine, s katero bi se bilo treba spopasti, če naj bi se sprejelo obsežno zunanje izvajanje drugje. Čeprav ima pogodbena oddaja storitev v občinah ZDA svoje korenine v neoliberalni ideologiji in protivladni naravnanosti, se k njej v večini primerov pristopa racionalno in na osnovi primerjave stroškov pri modelih zunanjega izvajanja in notranjega izvajanja. Zapravljanje davkoplačevalskega denarja za nepotrebno drage storitve ni sprejemljivo, ne glede na politično filozofijo in državo.

Drugič, prebivalci, uporabniki storitev, sindikati in drugi deležniki lokalnih uprav morajo ne samo razumeti potrebo po preoblikovanju storitev, ampak tudi videti njihove morebitne prednosti zase in svojo skupnost. Odločilno naklonjeno javno mnenje se lahko doseže in vzdržuje z zagotavljanjem očitnih izboljšav storitev, najprej na primer z uvajanjem zunanjega izvajanja na opazne komunalne in druge tehnične storitve. Izbrana podjetja morajo že imeti izkušnje pri zagotavljanju širokega razpona lokalnih infrastrukturnih storitev in biti dovolj velika, da lahko prevzamejo tveganje, povezano z nalogami.

Tretjič, pogodbe se ne smejo sklepati samo z enim podjetjem v pehanju za doseganjem finančnih ciljev in ne smejo biti preveč dolgoročne, tako da se morebitni premajhni prihranki stroškov v prvem krogu sklepanja pogodb lahko dosežejo kasneje, pri ponovnem sklepanju pogodb. Za storitvene pogodbe se mora ohranjati konkurenca, da se prepreči monopol trenutnega izvajalca. Podjetja, ki opravljajo zunanje izvajanje storitev, morajo razviti dobre delovne odnose z lokalno oblastjo, tako da se ustvari pozitivno vzdušje pri obravnavanju morebitnih nesoglasij zaradi različnih interpretacij pogodbe in da zadovoljijo ali celo presežejo pričakovanja občinskega sveta na vseh področjih, od finančnega izida do odzivnosti pri opravljanju storitev.

Četrtič, občine morajo razumeti, da lahko pri procesu zagotavljanja storitev prehajajo od ene metode k drugi metodi izmed mnogih različnih načinov zagotavljanja javnih storitev. To se bo zelo verjetno zgodilo kot rezultat učenja s prakso, kakor se bosta zmogljivost in konkurenčnost trga zunanjega izvajanja spreminjala s časom. Poleg učenja s prakso se lokalne oblasti lahko učijo o najboljših načinih zunanjega izvajanja (vključno s pogodbenim oddajanjem) storitev tudi od drugih, kakor se je to dogajalo v ZDA. Z usmerjanjem pogodbenega oddajanja tehničnih storitev in uporabo drugih metod zunanjega izvajanja storitev ter sodelovanjem z uporabniki lahko učenje iz najboljših praks omogoča boljše upravljanje in zmanjševanje tveganja. Čeprav tveganje, povezano s sprejemom novih modelov zagotavljanja storitev očitno obstaja, se zdi, da je bolj posledica notranjih postopkov, kot da bi ga povzročali zunanji izvajalci.

Petič, države, ki želijo raziskovati možnosti prenašanja posameznih oblik zunanjega izvajanja in strateškega partnerstva, morajo upoštevati pogoje upravljanja v majhnih občinah v ZDA, ki morda niso primerni za države

z demografsko obsežnejšimi lokalnimi upravami. Poleg tega je pomembno prepoznati različnost upravnih in institucionalnih pogojev, ki jih je treba upoštevati, na primer federalno strukturo ZDA v primerjavi z modelom unitarne države v drugi državi. V drugih državah lahko obstajajo tudi razlike glede politične strukture in kulture, funkcij občin, fiskalnega sistema, pravnih okvirov, v katerih bo potekalo zunanje izvajanje in strateško partnerstvo, in v strukturah ter zmogljivosti trga zunanjega izvajanja, ki v marsičem niso identične s primerom Sandy Springs.

Vse te razlike lahko bistveno določajo potencial zunanjega izvajanja po modelu Sandy Springs v drugih državah. Na splošno seveda cenovno učinkovite in odzivne storitve, občutni prihranki, privlačna cenovna struktura in izboljšana kakovost storitev prispevajo k oblikovanju zaupanja v model partnerstva.

1.01 Original scientific article

Comparison of Public and Private Home Care Services for Elderly in Gothenburg Region, Sweden 2013

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ABSTRACT

The purpose of this study is to compare and evaluate the public and private home care services for elderly given economic limitations after delegating them to municipality in the Gothenburg Region. The additional aim is to make politicians conscious about this development. The theoretical model of delegation and decentralization by Cristiano Castelfranchi and Rino Falcone (1998) and the Resource Dependency Theory by Pfeffer and Salancik (1978) constitute the theoretical reference frame. The study is based on an analysis of state regulation, policy documents and semi-structured interviews with the chief responsible for public and private home care services for elderly at the municipal level.

This study reveals that the delegation of care for elderly to the municipalities faced some serious problems not to be solved until 2013 and surprisingly that these problems are especially seen where the recipients of such care don't have a choice on their service provider.

The lesson drawn from the research is that if politicians or other authorities take away the right from people to make their own decisions about their own lives, this inevitably results in dissatisfaction and subsequent reforms.

Key words: home care for elderly, public home care service, private home care for seniors, care for elderly, seniors, NPM, elderly delegation reform

JEL: I11

1 Introduction

This paper is a reaction to a number of critical articles in Gothenburg's media about privatized care services for elderly, which were published in the last year (GP 2012-11-30, p. 38; GP 2012-12-07, p. 12; GP 2013-02-05, p. 6; GP 2013-02-06, p. 9). One gets the impression that there is a severe crisis of quality in care for elderly, resistance towards private care providers and lacking trust

in the political decisions concerning the organization of care for elderly in the Gothenburg Region.

How is this possible? Does all this give a true picture of a nasty situation or do journalists just blow up singular accidents, where in fact there are hardly problems? The constantly returning critical media coverage made me think. What has happened with care for elderly in the Gothenburg Region?

Sweden is known for being one of the wealthiest welfare in the world, especially during the industrial development (Lundberg, 1985; Olsen, 1990; Esping-Andersen, 1999). The central government by tradition transferred "more than three fifths of the nation's Gross Domestic Product" (Olsen, 1990, s. 2). But, it was expected that Sweden would pay the full bill in the future for "high taxes and welfare state subsidies" (Olsen, 1990, p. 7). In the early 1990s the decrease of economic efficiency, crisis and the collapse of communism in Central and East Europe contributed to a new debate on the future welfare model being in the 'middle' between capitalism and communism. The state authorities had to create conditions to increase efficiency and effectiveness of public sector. The subsequent budget cuts in consequence have affected the Swedish care for elderly.

This paper focuses on the practical implications of Edel Reform understood as the delegation of care for elderly to municipality and introduced on 1st January 1992 (Andersson & Karlberg, 2000, p. 1). The reform is a good example of economic liberalization conducted in the spirit of New Public Management - the social movement that is gone across the USA, Europe and other continents, like a fashion to follow, providing a universal receipt on how to manage the public administration in a crisis situation (Osborne and Gaebler 1992; Hood, 1991, 1995; Pollitt & Dan, 2011). Hence I ask: "What have the public and private home care providers in common? What differences can be observed in their understanding of home care services for elderly and working methods? What lessons can be learned from the implementation of the state delegation of home care services for elderly to the municipal authorities?"

The purpose of this study is to compare and evaluate the public and private home care services for elderly, given economic limitations after delegating them to municipalities in the Gothenburg Region. The additional aim is to make politicians conscious about this development. Home care services are understood as social and medical assistance that the elderly ought to receive at their homes to manage everyday situations. This research is based on the analysis of state regulation, policy documents and semi-structured interviews conducted with the middle rang mangers and the first line chiefs responsible for planning, organizing and providing care for elderly in both sectors. The study is located in Gothenburg and Molndal, two neighbouring municipalities within the Gothenburg Region. They run different models of home care services for elderly and it seems that one pattern is superior to the other. The paper is structured as follows: the introduction into the research problem

and purpose is presented in section 1. Section 2 describes previous research about care for elderly in Sweden and the changes in the organization theory. In section 3, the research context and research methodology is explained. In section 4, the analysis of empirical data will follow. Finally in section 5, the research questions will be answered, the result of analysis discussed and conclusions will be drawn.

2 Developments in the Position of Street Level Bureaucrats in Elderly Care in Sweden

Although the scholarly research on welfare practices regarding care for elderly is very diverse (see: Sobis 2012; 2013), I have not found any comparative studies between the public and private home care services seen from the perspective of middle rang managers and first line chiefs. Nevertheless, taking into account their perspective can give a quite different picture of home care services for elderly. One can imagine that working in the home care services for elderly is hard physical work with psychical strain and great responsibility. On the one hand such a job is highly regulated and steered by the state regulations and internal policy documents like e.g., hygiene routines, time schedules, security policy, medical treatment etc. On the other hand such jobs are badly paid, done by female workers especially within the group working in a direct contact with care users. Middle range and first line chiefs work under somewhat better financial conditions, but still not lucrative in payment with respect to their scope of responsibility and actions, when planning, organizing and delivering high level home care services. Notwithstanding the low payment, the requirements to become a middle range chef or even a first line chef involve an academic degree in social work, nursing, or at least the completion of a nurse's assistant program with additional courses or a degree in public management or health care administration.

Moreover, the Social Service Act (2001:453, 3§) demands extensive working experience and there is the expectation to be innovative, creative and flexible. Thus, it is not easy to become a manager in care for elderly; this work is really a challenge. One must be very high motivated to take work in the home care services for elderly independently, if it is occurring in the public or the private regime. Perhaps the bad situation on a labour market, the high level of unemployment, especially among people between 25–44 years old, and the vertical and horizontal segregation on the Swedish labour market can be seen as factors that still induce people to work in the field of home care services for elderly. Many advocate that this work is perceived as a temporary solution before acquiring new skills for new work challenges. Looking at the home pages of National Board of Health and Welfare (Socialstyrelsen), the Swedish Association of Local Authorities and Regions (SKL) or the West Gothenburg County (VGR) – a lot of research is done on care for elderly and a lot of the critique is addressed. Nonetheless, the execution of home care services is somewhat neglected by researchers. Relevant data are not exposed to

the public in a transparent way. All in all previous studies argue the difficult position of street-level bureaucrats, the limitations within which they have to work, and the resulting in problematic motivation among them.

The conditions under which the care workers have to do their work in Sweden has changed tremendously in the last two decades because of the intergovernmental changes that took place after decentralization understood as the delegation of responsibility for this care to municipalities.

Even if municipalities have a better judgment and freedom of choices in decision-making regarding organization of education, transportation, or education i.e., various services, municipality remains only a semi-autonomous organization controlled by central government. Municipalities are expected to follow central government's regulations and directives, which are institutional constraints having an impact on both street-level bureaucrats and on users of care services. Cristiano Castelfranchi and Rino Falcone (1998) have developed a model of delegation and adaptation that combines the issues of delegation and economic decentralization. According to them, delegation and adaptation can affect the cognitive states of A-agent, who beliefs, has goals, intentions and commitments that another B-agent has the capability and willingness to conduct the expected actions. Castelfranchi and Falcone have identified three basic types of delegation: (1) weak delegation that is based on the central government's exploitation and passive achievement; A-actor expects that B-actor just achieves A-actor's goals; (2) mild delegation means that A-actor is indirectly active. There is no formal agreement or request, but A-actor encourages B-actor's behaviours to take action; (3) strict delegation is based on 'an explicit formal agreement' i.e., A-actor achieves the tasks/goals through an agreement with B-actor. In other words, B-actor adopts A-actor´s tasks, because B-actor has received a request or order from A-actor. In analogy to delegation, Castelfranchi and Falcone mention also another important dimension regarding delegation and adaptation i.e., the specification of tasks. The tasks can be "minimally specified (open delegation), completely specified (close delegation) or specified at any intermediate level" (p. 149). Thus, the object of delegation can essentially influence the contractor's autonomy especially the interpretation of tasks that can cause misunderstanding and conflicts among actors involved. There are different levels and types of delegation which "characterize the autonomy of the delegated agent" (p. 152). Collaborative conflicts usually arise "when the provided/proposed help does not match the intended delegation" (p. 156).

The Swedish government advocated for decentralization which was seen as the panacea to solve all economic problems. C. Hood (1991, 1995), J. Pierre (1993) and S. Montin (1997) concluded that the Swedish public reforms towards decentralization were conducted in a typical Swedish way. It involved transferring authority to the local level and outsourcing of service delivery to the private market in order to induce competition between private and public service providers. But what does this typical Swedish way mean in practice?

The Edel-Reform is the prime example of Swedish public reforms based on decentralization and internal control understood in the terms of delegation of care services to municipalities. The Edel-Reform can be seen as the turning point of care services for elderly in Sweden. The reform was conducted in a spirit of New Public Management [NPM] and the major idea was to motivate the public sector to take inspiration from the private sector when providing the municipal services to inhabitants. The consequence was that municipal street-level bureaucracies providing care services for elderly faced an era of austerity characterized by reduction of amount of benefits and public services addressed to seniors.

At the beginning of 1990, older people were perceived as 'bed blockers' and the politicians argued: "cost for care of a person in a specialized ward is higher than in a nursing home" (Andersson & Karlberg, 2000, p. 2). The subsequent right wing government assigned 5.5 billion SEK to restructure social- and health care services. Some amendments during the year of 1992-2011 completed the Edel-Reform e.g., the adjustments of the Social Services Act and the Health Care Act necessitated the social and medical sector to cooperate by creating a synergy effect when providing care services for seniors. The Social Services Act of 1993:390 (SFS: Lag 1993:390) and even the Act on Support and Service for persons with disability of 1993:387 forced municipalities to plan their activities, cooperate with county councils, and other municipal agencies. The Social Services Act of 1997:313 (SFS: Lag 1997:313) modernized the Social Services Act of 1980:620 (SFS: Lag 1980:620) and according to §19 and §20, social welfare committees ought to ensure such care conditions that older people can live independently, safely, and with respect for their autonomy and integrity. This law emphasized that elderly should first get support and assistance at home, and only if absolutely necessary in care facilities. Thus, home care was perceived as the best solution for elderly. The Health Care Act of 1992:567 of 1st July 1992 modernized the Health Care Act of 1982:763 (FSF: Lag 1982:763). According to §24, municipalities were obligated to employ a nurse with a special medical responsibility (MAS) for older people. Since this regulation, it was possible to talk about the Whole-Elderly-Delegation-Reform (Hel-Ädel). Bed-blockers were moved to open care for elderly. The expectation was, among others, to shorten waiting queues for medical treatment for other patients. Some years later, the Government Bill of 1996/97:60 [Reg. proposition 1996/97:60] made palliative and long terminal care the first priority within the Swedish field of care for elderly.

To support economic liberalization, the Swedish Parliament passed the complementary Act on System of Choice (*Lag om valfrihetssystem* – LOV) (SFS Lag 2008:962). This law opened new opportunities for municipalities to increase competitiveness on a market. Municipalities and counties could delegate choice of services to the users. Choice system was regulated by the Public Procurement Act (*Lag om offentlig upphandling* – LOU) that was adjusted many times but opened a market to private alternatives providing services

(Lag 1992:1528; 1994:615; 2007:1091; 2008:962). Municipality or county had only to advertise openly bidders, to approve and sign contracts with those private service-performers who live up to required standards. Regarding health care and social services, all performers have been reimbursed in the same way. Thus competitions concerns only quality and allows individual citizens freely choose from all the approved service providers. Municipality or county is still responsible for all the business occurring on their areas (SKL, 10 December 2012). It should be emphasized that choice system from the beginning was not obligatory and during 2008-2011 was granted 327 million SEK in grants to 248 of 290 Swedish municipalities for introducing free choice system. In 2012, the central government allocated 22 million SEK as the stimulus grants for municipalities to investigate the outcomes of choice system. From 1st January 2010, it is mandatory for all counties and regions to have choice system in primary health care (SFS 2009:140) but not necessarily in social services. In social services, the central government appointed a committee on September 2012 to analyze and evaluate the effects of the introduction of choice system. The investigator will report the results on 15 January 2014. According to information from the Swedish Association of Local Authorities and Regions' (*Svenska Kommuner och Landsting*, SKL) homepage, the Welfare Board has a mandate to decide and distribute stimulus funds among municipalities that have decided to follow the choice system. About ca 254 municipalities have received an incentive payment for this purpose (10 December 2012). Thus, home care services for elderly, perceived as the best solution, could be provided by private firms.

Summing up, the Health Care Act of 1992:567; the Social Services Act of 1993:390; the Act on Support and Service for Persons with Disability of 1993:387, the Public Procurement Act of 1992:1528 (adjusted; 1994:615; 2007:1091; 2008:962) and the Act on System Choice of 2008:962 have been securing the development of care for elderly according to the Edel-Reform and these state regulations opened opportunities for the economic liberalization in Sweden.

These developments could have consequences for the elderly care, but also for the street-level bureaucrats responsible for such care. The developments could even have a varying impact on such workers dependent on whether they work in the public or private sector. These developments in Sweden have clearly witnessed the changes within the social context, in which these people are working, changes in their resources, and perhaps also their objectives and hence their power. All these factors are deemed important from what is known as the Resource Dependency Theory (RDT) as elaborated by Pfeffer and Salancik (1978). RDT is based on three fundamental ideas: (1) Importance of social context; it allows understanding of an organization's choices and taken actions. To study the organization's social context means in practice to make an analysis of its environment. The environment consists of many other stakeholders and organizations existing there and having demands. All organizations are

dependent on resources e.g., capital, labour, material, ready products etc. These resources are in an organization's environment but the resources one organization needs are usually in the hand of other organizations. Resources within the environment constitute a basis of power. Social context or rather knowledge about the organization's environment is informative enough to understand; arising challenges, conflicts, complexity, worked out strategies for action, cooperation and finally organizational behaviours. (2) Importance of strategy; each organization has to have a strategy for reaching its major objectives but also to take opportunities for action to increase the organization's independence, pursue their interests in order to uphold autonomy. However, even legally independent organizations are still dependent on each other only because every time, when organization is acting, it tries to influence other organizations within the environment and in consequence the organization goes into a new dependency. This dependency can be again negotiated with other stakeholders within environment. (3) Importance of power; power and resource dependency are linked together however, power is always relational, situational and potentially mutual. To understand an organization's actions it is necessary to analyze how power is constructed within the organization's environment. This knowledge is important to understand the intra-organizational and inter-organizational relations. RDT seems to share some aspects with institutional theory presented below.

Are these expectations reflected in a change in the beliefs, motivation, goals and problems experienced by street-level bureaucrats in the care for elderly? That will be investigated below.

3 The Context and the Research Method

The empirical part of this study is located in the Gothenburg Region in Sweden that consists of 13 municipalities (Ale, Alingsås, Härrydda, Göteborg, Kungälv, Kungsbacka, Lerum, Lilla Edet, Mölndal, Orust, Partille, Stengusund, Öckerö). This research is about two organizations providing home care services for elderly i.e., a public home service provider from Gothenburg Municipality (*Göteborgs Stad*) steered by no absolute majority and a private home service provider from Molndal Municipality (*Mölndals Stad*) steered by a non socialist majority (M+C+FP+KD) after the 2010 election. These municipalities have developed different models of home care services for elderly. It seems that the variation of political steering has influenced how the politicians have interpreted the care delegation to their municipality and what type of home care services have appeared in both municipalities.

These municipalities are different in wealth and demographics. The regional GDP per inhabitant in 2010 was about 354 000 SEK per inhabitant in Sweden, 461 000 SEK per inhabitant in Gothenburg and 505 000 SEK per inhabitant in Molndal. The municipal tax rate was 31.7% in Sweden, 32.3% in Gothenburg,

31.4% in Molndal. Basic services for elderly and disabled in the form of home care services are covered from the municipal taxes.

The population of Gothenburg was about 520 374 inhabitants. 61 337 inhabitants were in Molndal. The percentage of population being 65 or older living with home assistance was 15.5% in Gothenburg respective 7.8% in Molndal. The elderly, who used 25 hours or more of home assistance per month constituted 33% in Gothenburg and 53% in Molndal (Öppna Jömförelser: Vård och omsorg om äldre, 2012). Municipality gross expenses on assistance for the disabled and aged in Sweden was 18 736 SEK in 2011, in Gothenburg 16 151 crowns, and in Molndal 15 761 crowns, which shows that Gothenburg and Molndal spent less than average on elderly care (Regionfakta, 2011-09-22). Other research (Öppna Jämforelser – vård och omsorg om äldre, 2012) shows that Gothenburg spent approximately 18 468 SEK per inhabitant being 65 and older, and approximately 105 830 SEK per home-care-user at the age of 65 or older in 2011. The corresponding sums for Molndal during the same time are 19 443 SEK per inhabitant respective and approximately 250 130 crowns per home-care-users in age 65 and older.

From the same research appears that 75% of the investigated elderly users of home assistance in Gothenburg were satisfied about the time care performers had for their duties, while in Molndal 83% home care users were positive about this. In Gothenburg 48% and in Molndal 56% the elderly care users say that they can influence the actual use of assigned hours of care. In Gothenburg 78% and in Molndal 86% of the home care users were pleased with their home care performers. According to the elderly, care performers did take the users' points of views and wishes regarding assistance they received into account. The home care users' opportunity to assistant nurses with comments or complaints looked was also better in Molndal (67%) than in Gothenburg (59%). Even the contacts of the elderly and the care providers' response to the elderly needs was better assessed in Molndal than in Gothenburg by the users of home care services. The feeling of security was perceived to be rather low in both municipalities; in Gothenburg only 35% elderly were pleased with security, in Molndal about 40%. All this implies that the way in which home care services are provided in both municipalities proved rather different.

3.1 Home Care Services in Gothenburg Municipality

Gothenburg Municipality has an organization with both administrations and companies. The city has a turnover of 34 billion SEK and the number of employees is 48 600; more than 33 000 of the employees work in 10 district administrations (Angered, Askim-Frölunda-Högsbo, Centrum, Lundby, Majorna-Linné, Norra Hisingen, Västra Göteborg, Västra Hissingen, Örgryte-Härlanda, and Östra Göteborg). It is not transparent how many employees are working in home care.

The older people in Gothenburg Municipality looking for home assistance can get only a municipal home care. Gothenburg does not use a free choice system (LOV). The elderly can find out on the homepage of municipality how they should apply about assistance, how much it will cost. This homepage also presents a case illustrating an assistance administrative executive's judgment including, when the assistance administrative executive rejects the application about a nursing home and opts for home care. The fee for home care service includes such duties like e.g., assistance with meals, personal hygiene, laundry, cleaning, shopping. The older person pays 88 SEK per hour and never pays for more than twenty hours per month i.e. 1 760 SEK monthly. If the person needs health care, it does not cost anything. Emergency medical alarm costs 88 SEK per month per household. The elderly can get so-called fixe-services, which can help the older person with practical things in his/her home to avoid accidents. Such fixe-services are for free, but the elderly pays him/herself any costs for materials. From the home page, it appears that no matter where the elderly live in Gothenburg, they are served a meal that is good, useful, environmentally friendly and pleasurable – cooked and served by knowledgeable and service oriented staff. Food portions consist of varied and nutritious diets and are often adapted for diabetics, if necessary. The food costs 52 SEK per serving or 56 SEK, if the older person also wants to have dessert. The assistance administrative executive assesses the older person's need to get the food delivered home.

3.2 Home Care in Molndal Municipality

Molndal Municipality [Mölndals Stad] has approximately 4800 employees working in ten district administrations. The municipal staffs working in home care within the whole Molndal consists of approximately 180 employees working in different geographic areas: Bifrost/Krokslätt, Centrum/Terrakotta, Stensjön/Pile, Åby/Balltorp, Kållered, and Lindome.

Home services include: (a) various service and fixe-services, (b) personal care, (c) social support and (d) reliving for relatives. Molndal Municipality has seven home care providers: one public (Mölndals Stad) and six private firms providing home care and services. (Aida Vårdservice, CASA Berget, Göteborgs Kyrkliga Stadsmission, Homec, Jakobsdal Vård och omsorg, Kooperativet Olga). The private providers of home care services have to meet formal criteria imposed by the municipal authorities.

The elderly entitled to home care services are allowed to choose their care provider according to the Act on the system of choice, LOV. The aim is to increase the home care users' influence and participation and to create opportunities for them to live independently and remain at their home as long as one desires. Personal assistance includes: washing, cleaning, purchasing of goods and delivery of food. The elderly of 75 years old or more are entitled to support without individual examination. Information about the providers of home care services for seniors is available on Molndal Municipality's home

pages. The quality of public and private home care services is regularly monitored in the same way by Molndal Municipality. Regarding cost for home services, the fee varies depending on the income of the elderly and how much support they need. The maximum charge is 1780 SEK per month. If an old person is entitled to several efforts, the payment is never higher than that amount. Portion cost of cooked food is not included in the maximum charge.

3.3 The Used Empirical Data

To have a better understanding of home care services for elderly, many reports were assessed from the Swedish Association of Local Authorities and Regions (SKL) and the National Board of Health and Welfare (*Socialstyrelsen*). The official reports were expected to provide an understanding on the actual work in the home care services for elderly. However, to my surprise, there was not much on this topic. The research about home care services seem to be marginalized.

This research is qualitative in its character and based on: (1) the state regulations, (2) the municipal policy documents, (3) internal documents from studied organizations, and (4) seven semi-structured interviews conducted with the first line chiefs responsible for the chosen organization's personnel and home care services at users' homes (two from each organization), and two interviews with the middle range managers responsible for the sector and district from the public sector and one manger of quality and working environment from the private organization.

The respondents were expected to share information about (1) the respondent (e.g., position, work duties, formal education, competences etc.), (2) how they perceive the state regulations that the organization has to conform to in everyday work, (3) information about the organization (e.g., organization's major objectives, strategies to fulfil the goals, values, characteristic of users, number employee, sex and diversity among employee, forms of employment, demanded competences, development of skills, diversity, incomes, working methods), and (4) information about the organization's environment (e.g., knowledge about other stakeholders, press coming from them, cooperation with other organizations from environment. Thus, those topics have been anchored in the theoretical frame for the study. However, the respondents also were enabled to tell about issues not included to the interview guide, but which they perceived as important and relevant. The interviews were conducted during the period from November 2012 to March 2013.

It seems important to guarantee anonymity to the respondents from whom I have learned most. On average, the interviews took between one and one and half hour. All interviews were recorded on a digital voice recorder and transcribed afterwards. Each transcript was numbered and divided in the thematic sections before analyzing them. When listening to the respondents

and reading the transcripts, it was clear that the respondents often used similar wording as could be found in the theoretical frame.

4 The Analysis

In this section the result of analysis of interviews and internal documents from the public home care providers in Gothenburg and the private one in Molndal is presented. Respondents No. 1, 2, 3, and 4 are from the public sector. Respondents No. 5, 6, and 7 are from the private business. Abbreviations will be used e.g., R1 or R2 etc. when referring to the interviews.

4.1 About the Respondents' Background and Their Approach to Home Care Services

From the interviews it appears that all the respondents, independently of the sector they work in, have gone through academic education programs: social work, a nursing program, a nurse's assistant program, economy, sociology, psychology, pedagogics in working life and society, public management, or health care administration, i.e., academic programs or corresponding education required for a management position as stipulated by state regulations. Two first line managers (one from public and one from the private sector) have finished education on a bachelor level and completed their degrees with additional courses in a health care administration or public management. Five managers (three from the public and two from the private sector) had more than two academic degrees (a bachelor and master or two masters), they finished also a nursing program with diploma. The most popular combination of formal merits is to have completed a program in nursing and social work, followed by two or three courses in public management, respective health care administration. The respondents have at least a minimum of seven years and at maximum 40 years of working experiences in: health care, care for elderly (nursing homes or home care services) or as social assistant for the elderly or the disabled. On the question What does it imply for you to give home care for elderly? The respondents from both sectors answered in a similar way: "to meet the old persons with respect, support them and give them the feeling of being in focus" (R1), "each person ought to get an individualized care" (R2). Another one argued:

> (…) independently if it is an old or a young disabled person, home care is about to give a human time i.e., to show that you care about that person. It is not thinking in terms of paragraphs, what you are allowed to do, what it is forbidden... You must listen to what the older person needs (R3).

The middle range manager from the private sector on the same question responded that such work involves a huge responsibility because it concerns vulnerable people who need help, and who are unable to manage their own affairs:

> It is important to take responsibility. Someone might say you cannot do it because you depart from a business idea, but it is not true. We do a lot of planning and take into account users' preferences. We consider how to organize home care. We meet home care users and their families to create an individualized care for every older person. The care user is in the centre, not our staff. But obviously you have to get good working conditions and a good working environment for your staff, if you expect that they deliver high quality care. We are doing a good job for our customers (R7).

The first line chief from the same private organization said: "To give home care means to meet the users' basic needs in terms of health care and their stated needs (R5). However this respondent was of the opinion that "care users have higher demands on us than on municipal services. They expect us to be more flexible, they demand more action" (R5)

The respondents' answers seem to be similar. Everybody is talking about the elderly as being in the centre, about respect and human time. However, the remark of respondent 3 from the public home care about paragraphs suggests that this care for elderly is sometimes too bureaucratic. So, let us see what respondents say about the municipal regulations.

4.2 The Respondents about the State and the Municipal Regulations of Care for Elderly

The respondents from both sectors have emphasized that they have to follow the same state regulations when planning, organizing and delivering home care services for elderly, i.e. the Health Care Act of 1992:567; the Social Services Act of 1993:390; the Act on Support and Service for Persons with Disability of 1993:387, the Public Procurement Act of 1992:1528 (adjusted; 1994:615; 2007:1091; 2008:962), the Act on System of Choice of 2008:962 and other regulations of complementary character e.g., the Working Hours Act (1982:673), Systematic environmental work (AFS 2001:01), the general regulations of National Board of Health and Welfare but also their advice on leading system and quality work (SOSFS 2011:9), general advice on reporting obligation under Lex Maria (SOSFS 2005:28) and Lex Sarah (SOSFS 2011:5) and the Law on Protection against Accidents (SFS 2003:778). Thus, the institutional context is the same for both the public and private providers of home care services for elderly.

4.2.1 The Public Sector in Gothenburg

The sector manager from Gothenburg on the question: "What do you think about the state regulations of care for elderly since implementing the Edel-Reform and the following regulations" answered: "The idea was very good, some positive changes were visible, but the promise of collaboration between social services and health was not fulfilled in practice" (R4) hence, the desired organization of care for elderly is still discussed. There is a large group of pensioners, who are more alert for a longer time. When they get

sick then they will need more assistance and probably in nursing homes or special facilities. "Thus, the issue of care for elderly seems to be problematic and it falls between two cracks" (R4). One of the explanations is that different organizations have the different financial resources. The work of each organization is controlled by what they do with this money, while in health care they are confronted all the time with new but expensive medical treatments. The new treatments create a demand for these new services, which are often costly, while organizations have to save money:

> "We have a demanding budget. It's very easy to say, this is our responsibility, or that … but different organizations have different organizational cultures. Then it is very easy to create myths about each other. (…) We always are in a tight spot and we can't go beyond the agreement we have signed" (R4).

The care for elderly is absolutely steered by Health Care Act, Social Services Act, Public Procurement Acts and other regulations. The care providers have to follow a legal process. They learn a lot from signed public procurements, but Gothenburg Municipality does not want to introduce the free-choice system (LOV). It is a political decision however; the politicians want to show that the inhabitants have a free choice but in a "Gothenburg way":

> They started to consider home services from the perspective of assistance administrative executive. If you have received one type of home care service from assistance administrative executive then you can control it yourself. You decide what kind of service you want e.g., I come to you in the morning, you should take a shower according our plan but you say; 'no, I do not want to wash today. I want to go to a park instead' ... We can only measure 'the needs in a moment' (R4).

The same respondent admitted that "the municipality experiences a large turnover on the first line manager positions within the home care services for elderly" (R4), which confirmed the interviews with the first line chiefs, who were very critical towards the municipal practice. One of the respondents argues:

> I'm pretty critical regarding the changes. Before the districts were merged in 2010 from 21 to 10, we had better opportunities to provide a high quality care services for elderly. Changes do not always go hand in hand with something positive. It costs money. The municipal authority created many restrictive functions. They introduced a huge bureaucracy; decision-making is a much longer process now then it was before. The tax-payers money goes to managerial positions. They introduced time standardization for our services addressed to elderly. This occurs at the expense of elderly and that assistance elderly ought to get from us (R1).

Another respondent argued that from the beginning, in the public sector a manager worked in two roles: as an assistance administrative executive and as an entity manager:

> Firstly, I made an inquiry about an older person's needs and character. I was informed about this person's family situation, health problem or social needs. Secondly, I adapted the assistance efforts to this person and was watching that the assistance plan was executed in practice. These two roles had a complementary value. Since 2010, these roles are separated in the name of professionalization; the assistance administrative executive just investigates the needs of older person, while the entity chief takes care about staff and watches that the executive decisions are conducted. Since that, I never received full information about any care user. I couldn't even inform my staff about the needs and character of older person to help this person in the right way. It didn't work. I quitted this work some weeks ago. (R3).

The preliminary conclusion cannot but be that not one respondent is pleased with the municipal regulations that influence the organization and performance of home care services for the elderly in the studied district and all see a destructive and huge bureaucratization of elderly care.

4.2.2 The Private Sector in Molndal

In Molndal, the bourgeois majority governing for multiple terms proved to be much friendly to the implementation of the Act on System of Choice. Six private home care providers have appeared on a common market beside the public sector activities and public home care providers. The investigated private organization providing home care services for elderly is cooperating with the municipality from the beginning. The three interviewed persons are pleased with this cooperation. It was the Municipal Council of Molndal, which accepted the private home care provider in agreement with the Swedish ISO Certification. The private organization had to fulfil all the demands of Quality Management System (ISO 9001:2008) and Environmental Management System (ISO 14001:2004), because the private firms providing care have to follow the same regulations as the public ones. In comparison to Gothenburg, the municipal authorities of Molndal have chosen another way of local development. They do not object to the private home care services. The private actors participate in a competition with the municipal actors on the same market however the municipality still has a supervisory responsibility over the private business. They control a private organization's activities a couple times a year.

The quality and environmental manager asked about the state and the municipal regulations asserts that their organization has no problem with any regulations. Opposite, they are necessary and appreciated. Thanks to regulations, the organization learns how to develop and improve their home care services for elderly:

> The municipality is very careful when controlling the private providers. They look at the smallest details. I would wish they would be as careful when evaluating and monitoring the public care providers. Public providers are not often audited. In my 25 years experience of working in a municipality, it happened very seldom that the National Board of Health and Welfare came to visit and do follow-ups.

> We as a private organization have a lot of follow-ups during a year. If they had really developed the same routines for the public performers, for the sake of learning, it would have essentially contributed to the development of public services. There are many positive things in the public sector, but you can always develop it into something better (R7).

All the respondents emphasized that they have their own follow-ups e.g., users' measurements and own system of documentation. They work actively on the quality of their services. If the National Board changes something they immediately adapt their internal system to the new conditions. They are bounded to the collective staff agreements in the same way as it is in the public sector. A signed procurement contract obligates the private home care provider to follow all the regulations. The respondent said: "It creates order… this activity is highly regulated and it must be in this way" (R7).

Summing up, no manager from both sectors was critical about the state regulations as such, but the respondents' complaints were directed to the municipalities. The difference is that the managers from the public sector complain over the municipal steering, while the managers from the private sector perceive the municipal monitoring as the lessons to learn, to improve care for elderly but they feel to be unjustly treated by the state and municipal authorities.

4.3 Respondents about Organization

The home care services in the public sector have as long a tradition as the Swedish welfare state itself, but not so in the private sector. Hence the municipal managers from Gothenburg have at least 20 years and some even 40 years experience in home care services for elderly. The private care providers appeared on a market in Molndal at the beginning of 1990s, but the investigated private organization has been working since 2009. Thus the respondents from the private sector have in the best case five years experiences. Moreover, according to the respondents' statements, the private organizations providing home care and services for elderly face many prejudices from politicians, other organizations with whom they have to cooperate and even from inhabitants. Below, it will be presented how the managers are presenting their organizations.

4.3.1 The Public Sector

When the district manager was asked about the major objectives of care services for elderly in the public sector, the respondent answered that the goal is that the elderly have an influence on their daily lives, but:

> When you work in the Municipality of Gothenburg there is the Municipal Council i.e., politicians, who give us the objectives. Simultaneously we have our own District Committee that also has its own goals. They look at the goals of

> the Municipal Council and work them out and adapt them to our situation. Those two levels have never gone hand in hand (R2).

The first line chiefs go into more details. One of them said the major goal is: "(…) to follow the Social Services Act and keep the budget" (R3). Another respondent asserts: "to have satisfied employees, who like their work, and to have happy customers. The care users are in a centre and deserve to be treated with respect" (R2). Each first line chief has about 30 employees but not everybody is full-time employed. Respondent 1 emphasized that talented persons, usually students are working temporary as supply-staff (ca 8 persons). They work by the hours and disappear quickly. The second manager worked out own employment strategy:

> I learned quickly how to manage the limited budget. It was a challenge. I found people who were working by the hours. They were inside our organizations, when I had a lot of work to do, but politicians instructed us that we should employ them on a month. Such things are easy to say, but it makes impossible to keep a budget in balance. In the case of care user's death or if old person moved to a nursing home or changed a district, the number of full-time employees must be limited otherwise I have too much staff. It was not smart, but I knew my area and had to be sensitive to it (R3).

Staffs are definitely overrepresented by the females' co-workers, there are about 20 women and 2-3 men that constituted the full time-employment. They provide care to approximately 100 care users and 400 older persons having an emergency medical alarm. Diversity among staff causes that many language skills are present (Arabic, Finnish, Hungarian, Polish, Persian, Spanish). Respondent 1 is of the opinion that this is very positive and necessary in the working group and for home care users but another respondent expressed somewhat mixed feelings about that:

> I had a girl who had Arabic as her mother tongue and an elderly requiring care, who also was talking the Arabic language. I sent her there but it didn't work. She was abused because of the culture. The care user was older than our service staff. According to their culture, the young person cannot deny to perform tasks. Our staff had fallen into a conflict because she knew what she ought to do, while the care user put other requirements. (…) I had to send other staff able to speak English; the user could speak this language a bit. The problem was solved (R3).

This chief was convinced that the formal merits were much more important than anything else and concluded: "You may think that if the care provider speaks the same language as the care user, everything will work out, but it is just not true. Sometimes it is better to use interpreters" (R3).

Regarding the formal merits of staff, Respondent 3 emphasized that it was necessary the personnel had at least completed a nurse's assistance program or corresponding education, could speak the Swedish language and had a driving license because the district is huge and home care providers are working from 7:00 to 24:00 o'clock. It happens that the required formal

merits are not fulfilled; the driving license has usually a decisive importance for getting a job. The driving license in Sweden is expensive, not everybody has it, especially young people who work on hours.

Both interviewed stressed that it is very difficult to recruit adequate staff. The earnings are not impressive, approximately 22 000 SEK for a nurse's assistant and about 36 000 SEK for the first line manager on average. They have to follow the collective agreements and earnings vary due to many factors. When recruiting staff, beyond the formal merits, they pay attention to the values and humanity of potential co-workers. Care workers have to be sociable, friendly, humble and patient. The employer is limited by the insufficient budget and currently cannot propose any development of competences for staff:

> Nowadays, we cannot propose a competence development. I mean, since 2010, when the Municipality of Gothenburg introduced the merging of districts. Before, it was possible to send staff on conferences or courses. But this is no longer possible (R1).

The respondents admitted that many people have left the municipal organization, because the working climate was bad, and communication was lacking. Perhaps it influenced the higher management; they have more focus on staff currently.

Regarding working methods, the municipal home care providers are working according to the municipal pattern of time standardization, in which a time is specified for each task e.g., shower 30 minutes, clothing 15 minutes, breakfast 15 minutes, walk one hour a week or half an hour twice a week etc. In practice the standardization goes pretty far:

> If you use a wheelchair and have been granted a walk, half an hour … We come to you to take you on the walk, but because you have the wheelchair it is difficult to put clothes on. That takes 10 minutes. To put shoes on, it takes again 5 minutes. After this we take the elevator and go out … Then one quarter has passed, we need go back to take the clothes, shoes off … The time is already gone (R3).

Older persons need other services than the personnel assistance e.g., delivery of food, laundry, cleaning, washing windows. To provide these services, the first line chiefs have to cooperate with many procured cleaning companies, companies hiring cars or delivering coffee, or companies producing food for example:

> We do not have time to cook for the elderly, but we see that ready lunches will be delivered directly to a care user's home by the procured company producing food. Care user gets 10 cold meals boxes at once delivery, not liked as much, and which is twice more expensive than from the local food producers. They [Municipality] made us quit the collaboration with our local deliverers because the last ones were not procured. Instead, the food was driven from Uppsala to Gothenburg. A cold food for 10 days! I would never buy it for myself. Elderly need nourishment. Why the elderly should get it? (R3).

Moreover, all the procured companies became additional personnel at older person's home. Thus, around 20-26 unfamiliar people were visiting one user's home. Any continuation in care providing is completely lacking.

4.3.2 The Private Sector

The organization of home care services in the corresponding private company looks quite different. Regarding the major objective, the middle range manager said: "We want to create individualized care, our care users are in the centre" (R7). Another responded added: "Our goals are the high quality of our care and services, pleased users, and good working climate for our staff" (R6). To achieve these goals, the leadership is developing the organization's culture, they are working actively with values, norms for behaviour and such the way of thinking that reflects what the organization stands for etc. All the employees are perceived as the carriers of organization's values, as the ambassadors of organization to the outside world. Respondent 7 explained:

> It's not the easiest task to build an organization from the beginning and at the same time create an organizational culture. After five years, we see how much has been changed. You work through dialogue and communication but you have to translate own values and vision into planning, strategy and execution. I think long-term. But anyone who works with us as nurse or assistant staff does not care about it. Then it's also very important how our vision and strategy should be transferred to our staff. There are various opportunities to maintain dialogue: working meetings, conferences and tutorials. We work with our staffs' values, attitudes and we follow-up difficult questions at different levels (R7).

One of the entity chiefs working in the organization from the beginning confirms and completes this opinion:

> Our business has grown by itself and each entity has created its own little organization, which caused that the whole organization does not yet have the clear procedures, policies, practices, but it is so if you open a new business. Thus, each manager has created own organization based on the person's own idea about how home care for elderly should work in practice. There are many requirements imposed on us from the municipalities and we do our best to follow the state regulations. Nevertheless, it is unique how we are working in each entity. We have failed to create a unified organization. There is lacking a clearly structure and a standardization of some duties. We have got some requirements from the municipalities in which we are operating that we have to fulfil e.g., we must report about how we are working with the elderly, by law we have to report deviations but we hardly talk about that with the first line chiefs from other entities. We need clear lines about what to do, if something happens. There are discrepancies in our behaviours; we invent a wheel each time. There is no collaboration around it. We should standardize what is possible to act in the same way, if something happens. However, each municipality sets different requirements e.g., it is important to have procedures for how our staff should use a care user's private properties like cash or a Visa card when staff is shopping for the elderly (R 5).

The home care users are divided into two groups: those over 75 years who need home services such as laundry, shopping, cleaning, but with time they need a little more personnel care e.g., assistance in talking a shower or personal hygiene, assistance with lunch, or when going on a walk, it grows on. The second group needs more time and care because users have a disability. Waiting time on the granted assistance vary in the municipalities from 24 to 48 hours.

This organization employs about 100 home care providers, 90 women up to 10 men who provide home care services to circa 150–160 users in different municipalities, not only Molndal. 60–65 persons have full-time employment, others (35–40%) work full-time as guest-co-workers or on the hours. For those who work on the hours but want to work on full-time as the guest-co-workers, it's no problem to change the agreement but this organization cannot have only full employment of the same reasons as the respondent from the public sector explained. Regarding the recruitment to home care services, the decisive importance has a work-seeker's skills and working experiences. Diversity is positive perceived but the middle range manager explains:

> It does not matter wherefrom the personnel is, from Thailand, Norway or any other country. Staff must have skills to do the job. They must have gone through the nursing program or equivalent education. The only exception is if job-seeker has worked many years with similar tasks, i.e. has working experience (R7).

A starting salary for a nurse is 24 000 SEK per month, for a nurse's assistant 22 000 – 23 000 SEK, for a first line manager 32 000 – 36 000 SEK. However, staff's earnings are due to many factors e.g., working experiences, additional skills, the collective and the Unions' negotiations. Thus, it is similar situation to the public sector.

The first line chiefs are managing 12–15 employed on average. Regarding the development of competence, the organization follows the directives of National Board of Health and Welfare and the personnel participated in various courses in 2012 e.g., the course on the basis of value within care, courses about the delegation of medicine, rehabilitation, course about the validity of nurse´s assistants, IT-technique. The organization's staff can register for courses organized by the municipality. For some courses the private care providers have to pay e.g., for the course in a palliative care. In other courses they participate without payment. They look for information about the courses on the municipality's home page.

From the interviews with the first line chiefs, it appears that home care as a concept is divided into two types of achievements: first, the care time, which includes social assistance like e.g., assistance in the personal hygiene, in getting up an older person from a bed, in taking a shower, dressing, preparing breakfast, lunch or supper, going on a walk, taking off clothes before bedding time, dosing of medicine etc. However, this care time sometimes demands additional support in form of medical treatment e.g., giving an injection,

bandage changing, rehabilitation, which not always can conduct the ordinary personnel from the home care organization. Then the social workers have to cooperate with other organizations responsible for medical care or rehabilitation. The second type of home care constitutes the various types of home services – the time necessary to keep order in older person's home e.g., shopping, flat cleaning, window cleaning, washing, and even social relations. The elderly can buy additional services – the time, which has not been awarded by the assistance administrative executive e.g., assistance in a garden work, extra window cleaning before Christmas or Easter. The private home care providers fix everything by themselves. Due to physical and psychical health condition demand for care and services varies among care users. However, this private organization has its own concept how to provide the individualized care for the elderly; they keep the continuity of provided care services for the elderly.

This continuity is based on three pillars: (1) person's continuity, which means that as few people as possible visit a user, (2) continuity of time i.e., staff comes always on an appointment in time and stay as long as the time that has been granted. If anything happens, staff calls in advance to a care user and agrees on a different time on the same day, or they agreed about a different day. The user decides what care and services s/he likes and wants, and (3) continuity of care, which means that staff works in a similar way for all the users (R5 and R7). Respondent 6 emphasizes the short ways to make decisions cause that the users feel that they can influence their situation anytime:

> We try to accomplish that our user meets as small number of our staff as possible. We must take into account the staff's holidays, vacation, and sick leave. We send about 3-4 people per month. Other municipalities send about 15-20 people per month to the same user. We have a good continuity; it is the reason why they choose us (R7).

Regarding the home services e.g., the meals for the elderly, the food can be delivered from a restaurant that is close to their flat or they can go there and eat at the restaurant. Some elderly persons want to have the meals prepared at home, but according to the assistance administrative executive the preparation of a meal can take max 15 minutes. Thus, it is a question about good planning:

> Our personnel prepare something at the morning … If you have a plan the day before maybe it is not so complicated to cook a meal at home. The personnel know what things they have to do during a day and they can coordinate all the duties so that it works in practice. We don't have time to cook potatoes, but if you think and if you want, you can do it. I don't know how it is in the municipal home care. I can imagine that they don't want to do something extra, but it is the issue about the high quality of service for the users (R 6).

Summing up, the planning, organizing and providing the home care services by the private provider seems to work in the favour of elderly. One can

wonder: what hinders the public sector that their working patterns differ so much. Both organizations have followed the same regulations and directives.

4.4 Respondents about Organization's Environment

No one organization is working in a vacuum. There are always other stakeholders within an organization's environment having some interest, wishes and pressing their own demands. The home care services independently, if they are conducted by the public or the private organization, they are politically steered and have to interact and cooperate with others in their environment e.g., with care users and their families, assistance administrative executive, personnel of municipalities, co-workers from health care and rehabilitation, contractors, suppliers, and mass media that are blowing up any accident or irregularity.

On the question from which stakeholders within the organization's environment the first line managers felt the most pressure the answers have varied in the public and private sector.

4.4.1 The Public Sector

All respondents admitted that call for efficiency has dominated their activities in the public sector. In this regard, the first line chiefs experience most pressure coming from the Municipality and its assistance administrative executive:

> Economy takes first place since the reform of 2010. It has not reduced the costs of our organization. On the contrary, the costs have increased. They count money all the time. We have got a much lower budget, it hardly covers our activities. Before when we had staff meetings, sometimes we could buy sandwiches or cake to coffee for our staff. Now it's impossible (R1).

Another respondent is critical about the public procurements signed by the politicians that essentially contributed to increasing expenditures, while in official rhetoric the emphasis is on savings, customers in centre and good quality services:

> When the coffee was cheap, I bought 10 kg but we were permitted to buy only organic coffee, very expensive, tasting no well, and sold in a single place. Costs for coffee for our staff tripled, because of this procurement. (…) Why have I to respect the agreement that increases the costs of my entity? (R3)

The same respondent told a story about a home care user who was somewhat exceptional and problematic. The district staff (10–11 persons per month) were afraid to go and meet the exceptional man. Then the first line chief asked about assistance from a private sector providing similar care services for elderly around Gothenburg. It proved that they managed the situation very well and the care user was pleased:

> I asked myself a couple of times how it was possible. They had the nurses, who hardly spoke Swedish, and they could not communicate with him, but still he was very satisfied. What do they do that makes them so good and what makes us wrong? (R3)

One can find many such examples in the collected interviews. The public procurement was perceived as a very sensitive and suspicious issue. There were some expectations that the system of free choices should be really introduced in Gothenburg.

4.4.2 The Private Sector

The respondents from the private organization were reasoning in a totally different way about the interaction and cooperation with other organizations in their environment. Instead of blaming the politicians for creating unjust conditions for participation in the competition for high quality services on the market or blaming the municipalities and the National Board of Health and Welfare for permanent monitoring and follow-ups, the private home care providers have accepted the institutional frame and perceived the external controls as a learning process, working in favour, to improve their activities. They keep good relations with various authorities in order to have them on their side:

> The municipal personnel are positive, open, willingly to cooperate. It is enough to mention our cooperation regarding the courses in which our staff can participate. We have also good cooperation regarding deviations; we have a very good relation with the contact person monitoring deviations. (…) It feels that they care about us (Respondent 6).

The same respondent is critical about the politicians' prejudices about RUT-deduction, which is the Swedish acronym for cleaning, maintenance and wash. RUT was bad interpreted by mass media:

> They usually write negatively about the private care providers; they blow up the importance of profit. Profit is framed as being the only driving force behind private home care services. Mass media hardly want to see the positive side of our working methods with the elderly and what is difference between us and municipal home care services (R 6).

The interactions between the social staff of private home care providers and the personnel of health care proved to be problematic in practice. The state regulations clearly explain that the nurses subordinated to the County Council have to take over some treatments, but:

> The cooperation between social assistants and nurses can be complicated and difficult. Maybe they are overworked but they are unpleasant, always lacking time (…). They are educated in the old system and they are somewhat suspicious towards the private actors on a market with whom they have to cooperate. They just care about their own business. I think that the delegation has some weaknesses (R 6).

Notably is that in the whole Gothenburg's surrounding, there is no private company with nurses. They do exist in the Stockholm area and there, it seems to work quite well.

5 Conclusions

The purpose of this study was to compare the public and private home care services for elderly in two municipalities (Gothenburg and Molndal) in the Gothenburg Region in order to identify the model of home services working in favour for the elderly when both municipalities have been constrained by economic limitations. Three questions were crucial: What do the public and private home care providers have in common? What differences can be observed in their understanding of home care services for elderly and working methods? What lessons can be learned from the implementation of the state delegation of home care for elderly to the municipal authorities?

This study argued that the delegation of care services for elderly delivery into municipality has some unexpected effects. Whereas the public service providers struggle with regulations and goal-displacement, meaning that procedures and processes become more important than outcomes for the clients, this seems to be much less the case for private service providers. They have the client in mind; they are much less bureaucratized and seem to organize their work in a smarter way. They do employ workers on the hours, but on a monthly basis, if anyone wants that, they take care that elderly are assisted by a minimum of personnel. Pfeffer and Salancink (2003) have emphasised the importance of social context, strategy and power. When analysing the interviews and internal policy documents, the private companies seem to have worked out a strategy to keep good relations between their own personnel and the municipal staff. They are willing and open to any interaction and cooperation with other organizations, even the private companies – their competition – providing similar activities. The last ones are perceived as potential partners to cooperate with, because each organization has its profile and provides unique care and services for seniors. The massive controls and follow-ups serve them to learning in order to develop own organization. They are dependent on the users' payment, and thus have to produce services all the time to survive, which makes the private care provider very sensitive. Their managers create opportunities to the competence development of own personnel in cooperation with the municipality or the industry. It is important for them to develop the organizational culture that is friendly for working climate and contribute to keeping care users that would feel that they are in the centre by providing them individualized care adapted to users' needs and expectations. Respect and humility towards users, the continuity of person, time and care constitute a key concepts and successful strategy to survive on a market. The working methods within the studied private organization seem really to serve the elderly, which manifests a respect for the older people's autonomy and integrity in their own homes.

Well now, this is not at all what was expected, given the image of private care providers as depicted in the media. How can this be explained? Did the private care providers give biased answers to the questions posed? It might be the case, but it begs the question, why only the private providers would do so? There are huge differences between the answers given by the managers in the organization of the private and the public home care services for elderly. Why would one be honest and the other not?

Another explanation can be given by the repeated controls by the municipality that especially private companies face. This may induce them to perform better. It is awkward to see that the respondents from the district were complaining about frequent controls and monitoring of their activities, although in comparison to the private care provider these controls proved to be definitely less. Their attitude towards controls is also very different from the attitude of private service providers.

A third explanation is that the public service providers suffer from being part of a larger organization, the municipality as a whole, are faced with reductions in resources because of problematic financial developments caused outside their own organization/department. The permanent pressure coming from the municipality to save money caused that the first line chiefs had to buy equipment beyond the regulations and even bought necessary services from private companies that were not contracted. The financial problems within the district negatively influenced the working climate and the personnel's motivation to work. Some care users refused cooperation with the personnel of public care providers from the district, because of lacking continuity in the care provided and the problematic number of social assistants visiting users per month. The respondents from the public sector blame the politicians for granting too small amounts of resources for activities, but also the higher administrative instances for the administrative reform of 2010. The interviewed persons from Gothenburg are talking in terms of 'We – They'. Many advocate that within the investigated district the elderly do not get the assistance in line with the political promise i.e., they do not live independently, safely, and with respect for their autonomy and integrity in their own homes. Even the public managers and the first line chiefs responsible for planning, organizing and performing care for elderly are not pleased with their working situation. They are talking about their work with embarrassment.

The elderly seem to profit from having a choice between public and private service providers. In the Municipality of Gothenburg the system of choice was artificial, not introduced in a right way, because it was not obligatory. The responsible for the municipal budget politicians, advocating for savings have translated the idea of free choice in a typical Gothenburg way i.e., the free choices of services but not free choices of service providers.

Thus, according to Castelfranchi and Falcone (1998, p.149), the delegation of care for elderly to municipalities in Sweden represents the mild delegation

and the mild adaptation with regard to the specification of tasks at any intermediate level.

We could track what strategies and working methods the middle range managers and the first line chiefs from Gothenburg have developed to keep the district budget in balance. These strategies negatively influenced the quality of the care and services provided to elderly. The first line managers, according to the regulations, could not cooperate with the cheaper suppliers who could provide the equivalent or higher quality meals for the elderly, or buy cheaper coffee for personnel, or hire the cars necessary to work that were not procured by politicians.

Within the Municipality of Molndal, the elderly have seven options to choose. The elderly people are independent in uttering their preferences. The private company has the Swedish ISO Certification and fulfils all the demands of Quality Management System (ISO 9001:2008) and Environmental Management System (ISO 14001:2004). This seems to be advantageous for the elderly. Thus, according to Pfeffer and Salancik (1978) the different social but also political context essentially influenced the strategies for the organization of home care services for elderly conducted by the public and private providers.

This research cannot be generalized, although in my opinion many public and private businesses experience similar situations and dilemmas. The lesson drawn from this research is first and foremost that if politicians or other authorities limit people in their right to make their own decisions about themselves and the type of care they need, this inevitably results in dissatisfaction and because of that subsequent reforms, which not always tackle the real problems.

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POVZETEK

PRIMERJAVA JAVNIH IN ZASEBNIH STORITEV OSKRBE NA DOMU ZA STAROSTNIKE V GÖTEBORŠKI REGIJI, ŠVEDSKA 2013

Ključne besede: oskrba na domu za starostnike, javne storitve oskrbe na domu, zasebne storitve oskrbe na domu, oskrba starostnikov, starostniki, novi javni menedžment, reforma organizacije oskrbe na domu

Članek se odziva na lanskoletne kritične članke o storitvah zasebne oskrbe na domu za starostnike, objavljene v göteborških medijih. Zdi se, da vlada göteborški regiji resna kriza v zvezi s kakovostjo oskrbe starostnikov in obstaja odpor do zasebnih ponudnikov storitev za starostnike, hkrati pa tudi pomanjkanje zaupanja v politične odločitve, ki se nanašajo na organizacijo oskrbe starostnikov. Vendar, ali vse našteto kaže pravo sliko težke situacije ali pa novinarji zgolj napihujejo posamezne incidente, ki v resnici sploh niso problem? Kaj se dogaja z oskrbo starostnikov v göteborški regiji? Švedska je znana kot ena izmed držav z največ sredstvi za socialno skrbstvo na svetu, kar je veljalo predvsem v času industrijskega razvoja (Lundberg, 1985; Olsen, 1990; Esping-Andersen 1999). Prav zato se je pričakovalo, da bo država v prihodnosti plačala račune za »visoke davke in prispevke za socialno državo« (Olsen 1990, str. 7). V zgodnjih devetdesetih letih so upad ekonomske učinkovitosti, kriza in zlom komunizma v srednji in vzhodni Evropi prispevali k novi razpravi o prihodnjem modelu socialnega skrbstva, ki naj bi se srečal nekako na »sredi« med kapitalizmom in komunizmom. Državni organi bi tedaj morali ustvariti pogoje za povečanje učinkovitosti in uspešnosti javnega sektorja.

Članek se osredotoča na praktične posledice reforme Edel, uvedene s 1. januarjem 1992, ki oskrbo starostnikov nalaga občinski upravi. To je lep primer ekonomske liberalizacije v skladu s teorijo novega javnega menedžmenta, ki se je razširila v ZDA, Evropi in drugje in vsebuje priporočila, kako voditi javno upravo v kriznih okoliščinah (Osborne & Gaebler, 1992; Hood, 1991, 1995; Pollitt & Dan, 2011). V tem članku se sprašujemo: Kaj imajo skupnega javni in zasebni ponudniki skrbstvenih storitev na domu? Kakšne razlike lahko opazimo v njihovem razumevanju storitev domače oskrbe za starostnike in v njihovih delovnih metodah? Kaj se lahko naučimo iz prenosa pristojnosti za oskrbo starostnikov na domu z države na občinske oblasti?

Storitve oskrbe na domu pomenijo socialno in medicinsko pomoč, ki naj bi jo starostniki prejeli na domu in naj bi bila namenjena obvladovanju vsakodnevnih življenjskih zahtev. Namen raziskave, ki jo predstavlja ta članek, je primerjati in oceniti javne in zasebne storitve oskrbe na domu za starostnike glede na ekonomske omejitve po prenosu na občine. Raziskava se je izvajala v Göteborgu in Molndalu, dveh sosednjih občinah v göteborški regiji. Tam se namreč izvajata dva različna modela storitev oskrbe starostnikov in zdi se, da

je eden boljši od drugega. Članek naj bi tudi opozoril politike na razvoj teh dogodkov.

Raziskava je osnovana na analizi državnih predpisov, političnih dokumentih in delno strukturiranih pogovorih z vodstvenimi delavci na srednjih ravneh in neposredno odgovornimi vodji za načrtovanje, organizacijo in izvajanje oskrbe starostnikov v obeh sektorjih. Če upoštevamo njihove poglede, lahko dobimo precej drugačno sliko storitev oskrbe starostnikov. Delo pri storitvah oskrbe na domu je težko in naporno fizično delo, ki prinaša tudi precejšnjo odgovornost. To delo v veliki meri usmerjajo državni predpisi in interne politike, kot so higienske rutine, urniki, varnostna politika, medicinska oskrba itd. Delo je slabo plačano, opravljajo pa ga predvsem delavke v okviru skupine, ki opravlja delo v neposrednem stiku z uporabniki oskrbe. Vodstveni delavci na srednji ravni in neposredni vodje delajo v nekoliko boljših finančnih razmerah, vendar njihovo delo še vedno ni dobro plačano in zahteva akademsko stopnjo izobrazbe na področju socialnega dela, zdravstvene nege ali vsaj dokončan program bolniškega negovalca z dodatnimi tečaji ali diplomo iz javne uprave ali zdravstvene administracije. Od njih se pričakuje, da imajo znatne delovne izkušnje ter da so inovativni, ustvarjalni in fleksibilni. Za sprejem takšnega dela je potrebna tudi močna motivacija, ne glede na to, ali se delo izvaja v javnem ali zasebnem sektorju.

Teoretični okvir predstavlja teorija o prenosu pristojnosti in prilagoditev Cristiana Castelfranchija in Rina Falconeja (1998), ki pozna tri načine prenosa: šibek, blag in strog. Avtorja po analogiji s prenosom opisujeta prilagoditev, tj. specifikacijo nalog. Naloge so lahko »minimalno specificirane (odprt prenos pristojnosti), popolnoma specificirane (zaprt prenos pristojnosti) ali specificirane na kateri koli vmesni ravni«. Tako lahko predmet prenosa bistveno vpliva na pogodbenikovo avtonomijo in interpretacijo nalog, kar lahko povzroči nesporazume in spore med udeleženci.

Raziskava kaže, da se prenos pristojnosti za oskrbo izvaja na tipično švedski način, to je s prenosom pristojnosti na lokalno raven in z oddajanjem izvajanja storitev zasebnemu trgu z namenom vpeljave konkurence med zasebnimi in javnimi ponudniki storitve. Reforma Edel in kasnejši predpisi pomenijo preobrat v storitvah oskrbe starostnikov in obdobje varčevanja, ki povzroča krčenje ugodnosti in javnih storitev za starostnike. Novi predpisi so vplivali na spremembe v socialnem okolju, v katerem so delali ponudniki oskrbe, na spremembe v njihovih virih ter mogoče tudi na spremembe v njihovih ciljih in vplivu. Gre torej za dobro znana vprašanja iz Teorije o odvisnosti od virov, ki sta jo obdelala Pfeffer in Salancik (1978) – teorije, ki temelji na pomembnosti socialnega konteksta, strategije in moči in ki omogoča razumevanje notranjih in medsebojnih organizacijskih odnosov.

Predstavljena raziskava skuša dokazati, da ima prenos pristojnosti oskrbe starostnikov na občine nekaj nepričakovanih učinkov. Medtem ko se javni ponudniki storitev bojujejo s predpisi in spreminjanjem ciljev in postajajo

postopki ter procesi pomembnejši od rezultatov za uporabnike, se po drugi strani zdi, da to v veliko manjši meri velja za zasebne ponudnike storitve. Ti mislijo le na uporabnika; so veliko manj zbirokratizirani in zdi se, da svoje delo organizirajo na racionalnejši način. Delavce zaposlujejo na uro, vendar na mesečni osnovi, če kdo tako želi, ter skrbijo, da se pomoč starostnikom opravlja s čim manj različnega osebja. Ob analizi pogovorov in dokumentov se zdi, da so zasebna podjetja izdelala strategijo, ki vzdržuje dobre odnose med njihovim lastnim osebjem in uslužbenci občine. Pripravljeni in odprti so za vsako interakcijo in sodelovanje z drugimi organizacijami, kot možne partnerje za sodelovanje vidijo celo zasebna podjetja, kajti vsaka organizacija ima svoj profil in lahko nudi edinstveno oskrbo in storitve za starostnike. Strog nadzor in spremljanje sta koristna za učenje in razvoj lastne organizacije. Odvisni so od plačila uporabnikov, zato morajo ustvarjati vedno nove storitve, da preživijo; zato so zasebni ponudniki oskrbe zelo prilagodljivi. Njihovi vodstveni delavci ustvarjajo v sodelovanju z občino ali proizvodnjo priložnosti za razvoj konkurenčnosti lastnega osebja. Za njih je pomembno, da razvijajo organizacijsko kulturo, naklonjeno dobremu delovnemu vzdušju in ohranjanju uporabnikov oskrbe. Spoštovanje in skromen odnos do uporabnikov, stanovitnost glede osebe, časa in oskrbe so ključni koncepti in uspešna strategija za preživetje na trgu. Zdi se, da delovne metode preučevanih zasebnih organizacij v resnici služijo starostnikom in njihovemu občutku samostojnosti ter integritete na domu.

To pa ni tisto, kar je bilo pričakovano glede na sliko zasebnih ponudnikov oskrbe, predstavljene v medijih. Ali so bili odgovori zasebnih ponudnikov oskrbe na zastavljena vprašanja pristranski? Morda res, vendar se postavlja vprašanje, zakaj bi bili samo njihovi odgovori takšni? Med odgovori vodstvenih delavcev zasebnih in javnih organizacij s storitvami domače oskrbe starostnikov so ogromne razlike. Zakaj bi bili eni pošteni, drugi pa ne?

Druga razlaga se morda skriva v pogostih nadzornih pregledih občine, s katerimi se soočajo predvsem zasebna podjetja. Morda jih to sili v boljše izvajanje. Hkrati pa se anketiranci iz javnega sektorja pritožujejo nad pogostimi kontrolami in spremljanjem dejavnosti kljub temu, da je pri njih teh kontrol nedvomno manj kot pri zasebnih ponudnikih oskrbe. Njihov odnos do kontrol je tudi precej drugačen od odnosa zasebnih ponudnikov.

Tretja razlaga je, da se javni ponudniki storitev, ki jih bremeni dejstvo, da so del večje organizacije, namreč občine kot celote, soočajo z zmanjševanjem sredstev zaradi finančnih okoliščin, katerih vzrok je izven njihove lastne organizacije. Stalen pritisk občine z zahtevami po varčevanju povzroča, da neposredni vodje nabavljajo opremo, ki ni v skladu s predpisi, in celo naročajo potrebne storitve pri zasebnih podjetjih, s katerimi nimajo sklenjene pogodbe. Finančne težave v regiji negativno vplivajo na delovno vzdušje in na delovno motivacijo osebja. Nekateri uporabniki oskrbe odklanjajo sodelovanje z osebjem javnih ponudnikov oskrbe zaradi nestanovitnosti nudene oskrbe in velikega števila socialnih pomočnikov, ki obiščejo uporabnika v enem mesecu. Anketiranci

iz javnega sektorja obtožujejo politike, da zagotavljajo premalo sredstev za dejavnost, kakor tudi višje administrativne organe zaradi administrativne reforme v letu 2010. Anketirane osebe iz Göteborga govorijo *mi – oni*. Mnogi zagovarjajo stališče, da v preiskovani regiji starostniki ne dobijo takšne oskrbe, kot bi bila v skladu s političnimi obljubami, tj. da ne živijo neodvisno, varno in ob spoštovanju njihove samostojnosti in integritete na lastnem domu. Tudi javni vodstveni delavci in neposredni vodje niso zadovoljni s svojim delovnim položajem. O svojem delu govorijo z zadrego.

Zdi se, da možnost izbire med javnimi in zasebnimi ponudniki storitve pomeni pridobitev za starostnike. V göteborški občini je bil sistem izbire umeten in ni bil uveden na pravi način, ker ni bil obvezen. Politiki, ki so odgovorni za regionalni proračun in ki zagovarjajo varčevanje, so idejo o svobodni izbiri prevedli kot svobodno izbiro storitve in kot svobodno izbiro ponudnika storitve. Tako predstavlja v skladu s Castelfranchijem in Falconejem prenos pristojnosti oskrbe starostnikov na občine na Švedskem blag prenos in blago prilagoditev glede na specifikacijo na katerikoli vmesni ravni.

Lahko zasledujemo, kakšne strategije in delovne metode so razvili vodstveni delavci na srednji ravni in neposredno odgovorni vodje iz Göteborga, da bi ohranili regionalni proračun v ravnotežju. Te strategije so negativno vplivale na kakovost oskrbe in storitev za starostnike. Neposredno odgovorni vodje v skladu s pravili ne morejo sodelovati s cenejšimi dobavitelji, ki lahko za starostnike zagotovijo obroke enake ali višje kakovosti, ne morejo kupiti cenejše kave za osebje, ali najeti avtomobilov potrebnih za delo, ki jih niso predhodno priskrbeli politiki.

V občini Molndal starostniki lahko izbirajo med sedmimi možnostmi. Starostniki lahko neodvisno izražajo svojo izbiro. Zasebno podjetje ima švedski ISO Certifikat in zadovoljuje zahtevam Sistema vodenja kakovosti (ISO 9001:2008) in Sistema ravnanja z okoljem (ISO 14001:2004). Zdi se, da to predstavlja prednost za starostnike. Tako sta skladno s Pfefferjem and Salancikom različen socialni pa tudi politični kontekst bistveno vplivala na strategijo organizacije storitev oskrbe starostnikov na domu, ki jih opravljajo javni in zasebni ponudniki.

Te raziskave se ne da posplošiti, čeprav se po mnenju avtorice veliko javnih in zasebnih podjetij sooča s podobnimi situacijami in dilemami. Iz predstavljene raziskave pa se lahko najprej in predvsem naučimo, da če bodo politiki in drugi organi oblasti ljudem omejevali njihovo pravico do lastnih odločitev o sebi in potrebni oskrbi, bo to neizogibno vodilo v nezadovoljstvo in zaradi tega v nadaljnje reforme, ki pogosto ne rešujejo resničnih težav.

1.01 Original scientific article

The Factor Model of Decentralization and Quality of Governance in European Union

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ABSTRACT

This paper presents a selection of 43 variables collected from various sources, which are used to describe the concepts of decentralization and quality of governance in the EU countries. Decentralization is analyzed from two aspects, fiscal and political, while the quality of governance is, along with certain real indicators, measured in particular with the opinions of citizens. The aim of the research was to determine the factor structure of selected variables and provide guidelines for using best practices in exploratory factor analysis. The exploratory factor analysis classified the selected variables into three factors of fiscal decentralization (Fiscal decentralization, Fiscal centralization and Government expenditure), three factors of political decentralization (Centripetalism, Regional governance, Federalism) and three factors of quality of governance (Quality of European institutions, Quality of national institutions and Enforcement of EU law). Despite the small population observed, the factors showed quite good characteristics and provided a good starting point for further research. In this manner, it was shown that despite a small population, it is possible to develop factor models of suitable quality by using exploratory factor analysis in the sense of best practices.

Key words: fiscal decentralization, political decentralization, quality of governance, exploratory factor analysis, EU countries

JEL: C38, H00, H11, H50, H70

1 Introduction

Institutions direct, shape and limit relationships between people, thus influencing the political, economic and social outcomes in communities. In the traditional sense, the state is an institution with relative sovereignty and own

political, legal, administrative and economic system (Aristovnik & Pungartnik, 2009). With development, the concept of its sovereignty is changing – the sovereignty of the state in the traditional sense no longer exists (Cooper, 2003). In the post-modern global order, in a network of transnational institutions, the sovereignty of the state is only "a seat at the table" (Cooper 2003, p. 44). Because of interdependence, states join integrations, which typically have centralized governance, while at the same time, members decentralize their governance.

In simplified terms, decentralization means the transfer of competence and resources from the centre to the lower levels of governance of a political formation (Aristovnik, 2012). Political formations comprising a large area are difficult to manage. Power and political influence diminishes from the centre towards the periphery, the capacity to implement central politics is limited, while the heterogeneity of preferences is greater with larger spatial extent. The transfer of competence facilitates the coordination of the formation and at the same time addresses the heterogeneity of preferences. In order to solve the aforementioned issues, indirect and decentralized governance was introduced as early as in the Roman Empire – the so-called 'divide et impera' system. The level of (de)centralization may be defined as the structure of organization of administrative institutions in a given country (or other political formation).

The quality of governance is the result of activities of the institutions and is conditioned by the structure of their organization. Gerring et al. (2005, p. 567) cite Montesquieu's statement that quality governance arises from the diffusion of power among multiple independent institutions (the concept of decentralization). They control each other's activities, which ensures a more responsible and better operation (Gerring et al., 2005, p. 568). The latter statements links the areas discussed in our research: the quality of governance and decentralization in the EU countries.

The substantive objective of the research was to develop factor model, making it possible to simplify the data structure of decentralization and the quality of governance. From a methodological perspective, the objective was to design a methodological framework that enables a more detailed treatment of smaller statistical populations.

In the selection of a relevant range of variables defining fiscal and political decentralization and quality of governance, a deductive research approach was applied, using a combination of data sources and relevant theoretical bases. The factor structure of given concepts was determined by means of the exploratory factor analysis. In this manner, the starting hypothesis was verified:

> The application of the relevant range of variables for measuring the level of decentralization and quality of governance in the EU countries enables the formulation of a factor model of three

concepts: fiscal decentralization, political decentralization and quality of governance.

For the extraction of factors in the exploratory factor analysis the maximum likelihood method was applied, while the factors were rotated by applying the direct oblimin rotation, what was done in IBM SPSS Statistics 21 software.

This article is structured in six chapters. The introduction is followed by the theoretical definitions of the areas considered, while the rest of the theoretical part of the article presents a review of the methods and approaches (chapter 3) and the methodology of the second part of the article (chapter 4). The empirical study report in chapter 5 comprises the exploratory factor analysis, which was applied to obtain the factor model of the phenomenon from a range of variables. The results of the research are discussed in the last chapter.

The limitation of the research is primarily in the size of the statistical population, since it is substantially too small for a substantiated statistical inference. The selection of variables was based on a relevant study of sources; however, no previous models were available, on the basis of which the final range of variables could be determined. Considering that the objective of the research was exploratory formulation of basic elements for the definition of the model serving as the starting point for further research, this limitation may be considered as acceptable.

2 Decentralization and Quality of Governance

This chapter presents and substantiates the theoretical bases and range of variables, which can be applied to measure the quality of governance and the political and fiscal aspects of decentralization.

The World Bank defines the quality of governance as "the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies, and the respect of citizens and the state for the institutions that govern economic and social interactions among them." (Dijkstra, 2011, p. 1). Quality is defined by the expectations of the population of a given country on the outcomes that the governing bodies should achieve (Draghici, 2004, p. 2). The quality of governance means the capacity of the state to implement its activities efficiently and free of corruption (Bäck and Hadenius, 2008). Impartial governance enhances the trust of citizens in institutions (Teorell, 2009, p. 21).

Low level of corruption, high bureaucratic efficiency and participation of citizens in the operation of democratic institutions are some of the characteristics of the quality of governance in a given country (Charron, 2009, p. 9). Corruption is the cause and/or effect of the operation of weak national institutions (Judge et al., 2011, p. 102). It is commonly the element of estimates of the quality of institutional activities.

The quality of governance arises from the diffusion of power among multiple independent institutions – they control each other's activities, which ensures a more responsible and better operation. Hooghe at el. (2009, p. 3) also state that structure of government, i.e. the allocation of authority to lower levels, determines the outcomes of its operation. One of the proposed solutions of the issued of corruption (the variable in the Quality of government group) is "to implement inter-regional competition through decentralization" (Fisman & Gatti, 2002). Multi-level governance means greater responsibility as a result of competition, while the system of 'checks and balances' operates on 'two levels' (horizontally and vertically). On the other hand, Gerring et al. (2005. p. 567) believe that democratic institutions achieve better outcomes in unitary, parliamentary and proportional electoral systems, when the goals of centralized authority and broad inclusion are met.

There are certain findings on the positive impact of fiscal decentralization (Kyriacou & Roca-Sagales, 2011) and negative impact of political decentralization (Gerring et al., 2005; Fan et al., 2009) on the quality of governance in a country. Fiscal decentralization has a positive impact on institution; however, this impact is mitigated in the presence of multi-level state structures (Kyriacou & Roca-Sagales, 2011). Liu (2007) identifies a connection between the level of fiscal decentralization and good economic and governance performance, while Ivanyna and Shah (2011, p. 24) establish a negative effect of the decentralization criteria on corruption variables (the Quality of government group of variables in our research).

Our research includes the fiscal and political dimensions of decentralization on the basis of the typology given by Schneider (2003). The meta-analysis of definitions and typologies of decentralization by Dubois and Fattore (2009) was used to facilitate the selection of indicators of decentralization. Dubois and Fattore point out (2009, p. 706) that contradictory findings and partial results on the impact of decentralization on the quality of governance arise from incomplete definitions of multi-dimensional variables and the resulting methodological limitations of the selected criteria (Ketchen & Shook, 1996; Dubois & Fattore, 2009). Liu (Ebel & Yilmaz, 2002) also lists the limitations of the application of standard criteria of fiscal decentralization and mentions the indicators of the OECD and World Bank as more appropriate, since they include qualitative components. Ivanyna and Shah (2011, p. 2) point out that it is necessary to include fiscal, administrative and political component in the structure of decentralization index. In their research, they use their own decentralization indexes, which are unfortunately not published (not accessible).

3 A Review of Methods and Approaches

On the basis of the assessment of previous research in the light of the use of statistical methods, we note that the most commonly used statistical

method in similar research is regression analysis. Gerring et al. (2005) examine the impact of centripetalism on certain indicators of good governance by means of regression analysis. Their statistically significant results confirm the assumption on positive impact of centripetalism on governance. Centripetalism is associated with higher bureaucratic quality, higher tax revenues, improved investment ratings, greater openness and economic prosperity of a country and human development. Depending on the indicator, the author uses data collected by La Porta (et al., 1999), Alesina (et al., 2002), World Bank (economic indicators, indicators of human development) and Marshall and Jaggers (2005).

The regression analysis is used also by Kyriacou and Roca-Sagales (2011) for testing the impact of fiscal indicators on (own) good governance index. They obtain data on fiscal shares of individual levels of government from the OECD data source, and construct the good governance index from four indicators of good governance issued by the World Bank (control of corruption, rule of law, regulatory quality and government effectiveness). The results confirm the assumption on positive impact of fiscal decentralization on the quality of governance (due to competition), which, however, may be limited in the presence of political decentralization.

By using the regression analysis on a sample of 95 countries, Enikolopov and Zuhravskaya (2003, p. 16) determine that the impact of decentralization on economic growth, quality of governance and provision of public goods depends on political centralization – strength of parties and the manner of selection of officials at lower levels of government. They use the following data: IMF's (International Monetary Fund) statistical data for fiscal shares by the administrative tiers, data on political institutions provided by Beck et al. (2001) for the quality of governance, the Corruption Perception Index (Transparency International), individual indicators of good governance issued by the World Bank and certain World Development Indicators (the source of which is the World Bank).

Ivanyna and Shah (2011) determine the negative impact of fiscal and political decentralization on corruption indicators by using the regression analysis. For the indicator of fiscal decentralization, they use the data issued by the World Bank, which are based on the International Monetary Fund and upgraded in the light of estimates of missing values. For the corruption indicator, they use various sources – Transparency International (Global corruption barometer), World Bank Enterprises Survey and Corruption perception index issued by the World Bank.

Altunbas and Thornton (2011) use a sample of 64 countries to confirm the assumption on the negative impact of fiscal decentralization on the degree of corruption, which can be mitigated by the presence of vertical administrative decentralization. As the corruption indicator they use the data from the International Country Risk Guide and from the publication by Knack and

Keefer (1995), while they obtain the data on fiscal decentralization from the publication by Dziobek et al. (2011), which is based on the IMF's statistics, and the data on vertical administrative decentralization from the publications issued by the CIA (2009) and Treisman (2000).

Ahrens and Meurers (2002) use the factor analysis to formulate factors of governance dimensions (transparency, participation, responsibility, predictability) and apply them in a regression analysis, which demonstrates the impact of governance on economic reforms and outcomes in countries in transition. They confirm an indirect impact of governance on the efficiency of reforms, stability of institutional framework, investment rating and economic growth.

Dreher et al. (2007) establish a structural model on the basis of which they derive the corruption index, which comprises approximately 100 countries in the period from 1976 to 1997. They construct a group of potential political factors of corruption, which includes democracy, rule of law, political system, decentralization, political stability, freedom of the press; a group of social factors, which includes religious, language and ethnic fragmentation; and a group of economic factors, which includes the share of trade as a percentage of GDP, the share of natural resources in exports and the size of the public sector.

Suggestions for further research refer to the use of factor analysis and method of main components in the selection of variables of the research (Liu, 2007, p. 103), the inclusion of spatial criteria in the research of institutions and economic development (Shepotylo, 2003, p. 132; Arzaghi & Henderson, 2005, p. 1184; Olsson & Hansson, 2011) the study of determinants of political institutions and determinants of fiscal decentralization (Enikolopov & Zhuravskaya, 2003, p. 36), the increase in the sample (Liu, 2007) and general inclusion of more suitable criteria (Ketchen & Shook, 1996; Dubois & Fattore, 2009; Ebel & Yilmaz, 2002).

The analysis of countries as statistical units is limited to smaller statistical populations; therefore, the power of inference is often weak in this type of research. The problem is even more exposed if we want to study only the selected subgroup of countries. On the other hand, the rising number of different publicly accessible variables measuring the different aspects of quality of governance enables the development of new research approaches. Many researchers define aggregated indicators by considering only the theoretical models. However, contemporary statistical approaches make it possible to reduce data dimensionality and also define indicators as statistically derived latent variables for statistically disadvantageous proportion between the sample size and the number of variables. Our study contributes a case of systematic approach to the research of quality of governance based on the exploratory factor analysis approach which enables the presentation of the characteristics of a group of countries in an intelligible manner.

4 Methods

As mentioned above, exploratory factor analysis was employed in the research. Factor analysis is a multivariate statistical method for data reduction. It is used to analyze the correlation in a specific group of variables (Kujundžić & Ivanković, 2011, p. 81) and simplify the complexity of connections with common dimensions – factors (Bastič, 2006). In principle, there are two types of factor analysis – confirmatory and exploratory. Confirmatory factor analysis is used for testing hypotheses on the basis of previous (theoretical) assumption on dependence between the observed variables and latent concept. Exploratory factor analysis is conducted without previous assumptions on the latent concept. It is assumed that any variable may be related to any factor. Its main goal is to simplify the interdependent variables and identify any possible latent concepts (Suhr, 2012, p. 1). The research, the results of which are presented here, is of inductive type; therefore, exploratory factor analysis was used in the analysis.

The objectives of factors analysis (Rummel, 2011) include: definition of structure and relationships, classification and reduction of data, data transformation, hypothesis testing etc. Exploratory factor analysis reduces the multidimensionality of variables on the basis of common, latent characteristics, which are expressed in factors. The main argument for its use is in the consideration of latent variables that can have an effect on covariance of manifest variables (Costello & Osborne 2005, p. 2).

The adequacy of variables in the model is compared by means of the Cronbach's coefficient of reliability, the Kaiser-Meyer-Olkin statistics, where high values on the interval [0,1] show the relationship between variables and appropriateness of their use in factor analysis, and Bartlett's test of sphericity, which shows the probability of distortion of the data value with the p-value. When the statistical significance of the Bartlett's test is lower than 0.05, the null hypothesis that the correlation matrix is equal to the unit matrix may be rejected.

In the analysis of the factor model, the maximum likelihood method was used for assessing the model. If data are relatively normally distributed, the method is the best choice (Fabrigar et al., 1999). In order to adjust the hypothetical data to real data as much as possible, results are rotated. Rotation simplifies the factor structure, making its interpretation easier and more reliable (Thurstone, 1947; Cattell, 1978). In principle, there are two types of rotations – orthogonal and oblique. The main difference between them is that the former keeps factors uncorrelated, while the latter allows the factor correlation (Rummel, 2011). In our research, the direct oblimin oblique rotation was used, which allows the dependence of rotated factors.

As arguments on the number of factors to be retained – (in)dependent samples of relationship between variables, the following was considered:

- the eigenvalue of the factor is larger than 1 - Guttman-Kaiser criterion (Kootstra, 2004, p. 6, Hair et al., 2010, p. 109);
- retained factors account for at least 60 percent of total variance (Hair et al., 2010, p. 109); and
- the value of variable pattern loading on the factor is greater than 0.4 (Fallon and Schofield, 2004, p. 206).

Benčina (2012, p. 8) states that stable factors are constructed from at least five highly weighted variables (with weights greater than 0.5), whereby the lowest acceptable weight value for the inclusion of variable into the factor is 0.32.

5 Results

The initial dataset consists of three groups of variables chosen by the criteria of relevance and availability, depending on the addressed topics. In accordance with the main objective of the study the selection of analyzed units was limited to 27 EU member countries

On the basis of the findings of several authors, the basic model of 43 variables for the quality of governance and both types of decentralization (Table 1) was constructed from three data sources, The QoG Social Policy Dataset, version 11Nov2010 (Samanni et al., 2010), EUROSTAT (2011) and World Development Indicators (Samanni et al., 2010).

The group of variables for the analysis of the quality of governance (Table 1) includes the variables of trust of citizens in institutions (1–15), the variable Functioning of government (16), Index of objective indicators of good governance (17) and a set of six variables of 'Good governance' issued by the Statistical Office of the European Communities EUROSTAT, which are part of the European Sustainable Development Strategy (19–24). As the indicator of non-quality, the variable of corruption Corruption perception index (18) was also included in the group. It is the most commonly used variable of corruption and is one of the two variables that provide the best outcomes (Judge et al., 2011, p. 96–97).

The selection of variables of the second (Fiscal decentralization) and third group (Political decentralization) in Table 1 was based on various sources. Normally, fiscal variables (variables 25–32) are used as the indicator of fiscal decentralization in research, probably due to their availability (most commonly, the share of the budget by the 'administrative tiers of government' is used) (Panizza, 1999; Enikolopov & Zhuravskaya, 2003; Lessmann & Markwardt, 2010; Kyriacou & Roca-Sagales, 2011; Ivanyna & Shah, 2011). As variables of Political decentralization, our research also includes the following: Public sector employment (33), Measure of unitarism or federalism (34–41) (Gerring et al., 2005), Fractionalization of government parties (42) and Electoral system (43) (Enikolopov & Zhuravskaya, 2003).

Table 1: List of included variables

No.	Var. name	Variable label	Year	Source	
Quality of government					
1	eb_tcj	Trust in the European Court of Justice	1996-2004	Sammani et al., 2010	
2	eb_tcm	Trust in the EU Council of Ministers			
3	eb_tec	Trust in the European Commission			
4	eb_tecb	Trust in the European Central Bank			
5	eb_teca	Trust in the European Court of Auditors			
6	eb_teo	Trust in the European Ombudsman			
7	eb_tep	Trust in the European Parliament			
8	eb_tsec	Trust in the EU Social and Economic Committee			
9	eb_tls	Trust in the legal system			
10	eb_tp	Trust in the police			
11	eb_ta	Trust in the army			
12	eb_tpp	Trust in political parties			
13	eb_tcs	Trust in the civil service			
14	eb_tng	Trust in the national government			
15	eb_tnp	Trust in national parliament			
16	eiu_fog	Functioning of Government	2006		
17	kk_gg	Index of Objective Indicators of Good Governance	2002		
18	ti_cpi	Corruption Perceptions Index	2000–2007		
19	GGI_ic	New infringement cases, number	2009	EUROSTAT	tsdgo210
20	GGI_cl	Transposition of community law, %	2009		tsdgo220
21	GGI_vt	Voter turnout in national and EU parliamentary elections, %	2009		tsdgo310
22	GGI_egov	E-government on-line availability, %	2009		tsdgo320
23	GGI_egov1	E-government usage by individuals, %	2009		tsdgo330
24	GGI_cc	Level of citizens' confidence in EU institutions, %	2009		tsdgo510
Fiscal decentralization					
25	wdi_tr	Tax Revenue (% of GDP)	2011	Sammani et al., 2010	
26	wdi_hmtri	Highest Marginal Tax Rate, Individual (%)	1999–2006		
27	WDI_exps	Expense (% GDP)	2011	WDI2001	
28	tggex	Total general government expenditure (% of GDP)	2009	EUROSTAT	gov_a_main
29	cgex	Central government expenditure (% of GDP)	2009		gov_a_main
30	lgex	Local government expenditure (% of GDP)	2009		gov_a_main
31	cgttr	Central government, total receipts from taxes and social contributions (% of GDP)	2009		gov_a_tax_ag
32	lgttr	Local government Total receipts from taxes and social conributions (% of GDP)	2009		gov_a_tax_ag
Political decentralization					
33	pa_emp	Public sector employment (as % of total employment)	2009	EUROSTAT	gov_dd_edpt1
34	gol_adm	Average District Magnitude	1995–2000	Sammani et al., 2010	
35	gol_dist	Districts, number			
36	gtm_centrip	Centripetalism	1996–2000		
37	gtm_unit	Unitarism	1995–2001		
38	iaep_ufs	Unitary or federal state	1996–2005		
39	iaep_arr	Appointment of regional representatives	1972–2005		
40	no_ufs	Unitary or federal state	2002		
41	RAI	Regional authority index	1950–2006		
42	dpi_tf	Total fractionalization	1996–2009		
43	gol_est	Electoral system	1995–2000		

The analysis of the meaning of variables indicated that the scales of variables from the Quality of government group, measuring the trust of citizens in the EU and national institutions, were inverted. Therefore, the values for variables 1–15 were reversed. The variables included values 1 (tend to trust) and 2 (tend not to trust), which were converted by the formula 3 – y. In addition, inverted orientation was discovered also with the variable gtm_unit (37) from

the group Political decentralization. Since it included values 0, 1 and 2, it was converted by the formula 2 – y.

Most of the variables have quite appropriate characteristics:

- Relative Standard Error of Mean – $se_{My} / m_y < 0.10$, and
- Skewness and Kurtosis < Abs(1).

Some of the variables express a slightly higher relative Standard Error of Mean ($se_{My} / m_y < 0,20$), with

- Skewness and Kurtosis < Abs(2): kk_gg, GGI_ic, iaep_arr, iaep_ufs, RAI and
- Skewness and/or Kurtosis < Abs(4): GGI_cc, lgex, gtm_unit.

The relative Standard Error of Mean of the remnant variables is higher than 0.20 with the highest value at variable gol_adm (0.40; the variable was generated from the end model). Three variables (lgttr, gol_dist and no ufs) express relative Standard Error of Mean lower than 0.35, with Skewness and Kurtosis < Abs(4).

The characteristic of some variables are indeed slightly unpleasant; however, the fact is that those are the values of the characteristics of EU countries' policies. For this reason, only the variable with the worst characteristics (gol_adm) was excluded from further analysis.

The results of the research are factor models of three concepts in consideration, defining dimensions of quality of governance, fiscal and political decentralization. In this way, an idea about the dimensions of concepts under consideration is given.

Characteristics of the models represented by the value of the Cronbach's coefficient of reliability (Cα), as the measure of internal consistency of data, Kaiser-Maier-Olkin measure of sampling adequacy (KMO) and significance of Bartlett's test of sphericity (p_B), are given in Table 2.

Table 2: Characteristics of factor model

Concept	Cα	KMO	p_B
Quality of governance	0.435	0.222	0.000
Fiscal decentralization	0.786	0.664	0.000
Political decentralization	0.049	0.464	0.000

Characteristics of the model (Table 2) represented for the concept Quality of governance showed lower values of Cα and KMO than requested. Nevertheless, the result was a rather good starting point for further exploration. The concept Fiscal decentralization showed a suitable consistency and adequacy of the model, which indicated a good starting point for factor analysis. Only the value of the Cronbach's coefficient of reliability for Political

decentralization was low. The value of the KMO test was also slightly lower than recommended, while no problems were detected with the significance of the Bartlett's test of sphericity (p_B). The analysis showed some weaknesses of the models; however, the results indicated that we were on the right track.

In the factor analysis, we took into account the following methods and limitations: extraction: maximum likelihood; rotation: Direct Oblimin; communalities > 0.400; total variance explained > 0.600; and factor retainment criteria: eigenvalue > 1; variable pattern loading > 0.400; and consideration of cross loadings.

The first step of the factor analysis of the concept quality of government (variables 1 to 24) revealed one variable with lower communality GGI_vt (21) (0.315). After eliminating it, we had to determine to extract four factors only due to the non-convergence of the model. Next we eliminated the variable eb_ta (11) (0.299). Non-convergence of four factors model forced us to narrow down the model to three factors. After eliminating the variable GGI_cc (24) (0.340), a three factor model with the characteristics ($C\alpha = 0.460$; KMO = 0.557 and $p_B < 0.001$) was formulated. The extracted three factors of Quality of governance account for 77.1% of total variance. The model (Table 3) expresses quite acceptable characteristics and pattern loadings.

Table 3: Factor structure of the concept of Quality of Government

ID	PL	Variable	Factor	TVA
		I	Quality of European Institutions	36.5%
1	0.887	eb_tcj	The first factor includes variables of the measure of trust in particular European institutions.	
2	0.952	eb_tcm		
3	0.887	eb_tec		
4	0.930	eb_tecb		
5	0.893	eb_teca		
6	0.719	eb_teo		
7	0.876	eb_tep		
8	0.899	eb_tsec		
		II	Quality of National Institutions	32.7%
9	0.846	eb_tls	The second factor consists of variables of the measure of trust in national institutions, measure of functioning of government, index of objective indicators of good governance, corruption perception index and e-government development and usage indicators.	
10	0.790	eb_tp		
12	0.908	eb_tpp		
13	0.813	eb_tcs		
14	0.880	eb_tng		
15	0.944	eb_tnp		
16	0.806	eiu_fog		
17	0.715	kk_gg		
18	0.842	ti_cpi		
23	0.721	GGI_egov1		
		III	Enforcement of EU law	7.9%
19	–0.745	GGI_ic	The third factor is defined by the number of infringements of obligations of EU members and the extent of transposition of community law.	
20	0.718	GGI_cl		

Legend: ID – identification number of variable defined in Table 1; PL – pattern loadings of variables; Variable – short name of variable; TVA – total variance explained by the factor model.

The last factor with two variables is relatively weak, therefore, it might be reasonable to eliminate it from the model, which would further strengthen the characteristics of the model. Since it accounts for the additional aspect of quality of institutions, it was retained in the result of this research in order to suggest the need to find additional variables that indicate the enforcement of (EU and national) law.

The concept of quality of governance is expressed by three latent variables (Table 3). The quality of European institutions is measured by the variables of trust in EU institutions. The quality of national institutions is measured by the variables of trust, which are well-aligned with three indexes of quality of governance: Functioning of Government (16), Index of Objective Indicators of Good Governance (17), and Corruption Perceptions Index (18). The latent variable Enforcement of EU law measures the quality of governance in the light of compliance with EU law (19, 20).

Variables from the group Fiscal decentralization (under numbers 25–32, Table 1) were merged into three factors, accounting for 80.8% of total variance. The characteristics of the model were: $C\alpha = 0.786$; KMO = 0.664 and $p_B < 0.001$. Pattern loadings were acceptable except for the cross-loaded variable (PL1[1] = –0.533, PL3 = 0.589). Further analysis showed that two variables (WDI_exps (27) and tggex (28)) should be excluded from the model. However, for the sake of expressiveness, in the enter model we retained the basic three factor model (Table 4).

Table 4: Factor structure of the concept of Fiscal decentralization

ID	PL	Variable	Factor	TVA
		IV	Fiscal decentralization	36.0%
30	0.789	lgex	The factor comprises local government expenditure, total receipts from taxes, and social contributions as share of GDP.	
32	0.934	lgttr		
		V	Fiscal centralization	33.8%
25	0.693	wdi_tr	The factor includes tax revenues, central government expenditure, and total receipts form taxes and social contributions as share of GDP	
29	0.937	cgex		
31	1.009	cgttr		
		VI	Government expenditure	11.0%
26	0.628	wdi_hmtri	The factor is built of highest marginal tax rate, and expense and total general government expenditure as share of GDP.	
27	0.589	WDI_exps		
28	0.898	tggex		

The model of variables from the group Political decentralization (under numbers 33–43 in Table 1) displayed the following characteristics: $C\alpha = 0.046$; KMO = 0.464 and $p_B < 0.001$. The model was classified into three factors. Two variables (pa_emp (33) and gol_est (43) demonstrated extremely low communalities in the model, therefore, they were eliminated. This provided a model, where all variables exceed the minimal measure of communalities with KMO = 0.584. The model (Table 5) accounts for 68.7% of total variance.

1 PL – pattern loading; 1 – factor 1.

Table 5: Factor structure of the concept of Political decentralization

ID	PL	Variable	Factor	TVA
		VII	Centripetalism	31.1%
35	1.001	gol_dist	The factor is measured by the number of electoral unites, the measures of centripetalism and political fractionalization.	
36	–0.516	gtm_centrip		
42	–0.407	dpi_tf		
		VIII	Regional governance	13.3 %
39	0.990	iaep_arr	The manner of appointment of regional representatives.	
		IX	Federalism	24.3%
37	–0.899	gtm_unit	The variables of Federalism which refer to the measure of the mode of operation of the state (unitary state, two measures of the level between unitarism and federalism, and regional authority index).	
38	0.536	iaep_ufs		
40	0.680	no_ufs		
41	0.993	RAI		

Despite the fact that the model includes an extremely weak factor, determined by a single variable, the analysis was finished at this stage. In terms of content, it is important to retain a highly informative aspect of regional governance, which may be used in future research to further highlight the concept under consideration.

The factor analysis provided substantively meaningful results, while the structure of concepts is consistent with the expectations. To show the usefulness of the factor model we calculated the regression values for nine latent variables for EU 27 countries. The rank values are given in Table 6.

Ranking of EU countries by regression values of the quality of national governance (II) put Denmark, Luxembourg and Sweden at the top, and Lithuania, Bulgaria, Slovakia and Romania at the bottom of the list. The upper half of the list is populated more or less with old member countries and the lower half with new member countries. Exceptions in the upper part are Cyprus and Hungary, while exceptions in the lower part are Italy, France and Greece. In relation to the trust in EU institutions (I), the EU countries form three groups: the group with high-ranked quality of national institutions and low-ranked EU institutions with the largest difference for Austria, Sweden and UK, the group with similar ranking in both categories with the lowest difference for Malta, Greece, Spain and Slovenia, and the group with low-ranked quality of national institutions and high-ranked EU institutions with the highest difference for Romania, Slovakia, Lithuania and Latvia. The third dimension Enforcement of EU law (III) shows no important distinction between old and new EU member countries. New member countries presumably have not had enough opportunities for infringement yet.

Table 6: Rank values of EU 27 countries for 9 latent variables of the factor model

ID	Country	Rankings for 9 latent variables								
		I	II	III	IV	V	VI	VII	VIII	IX
AUT	Austria	26	6	15	9	16	8	15	16	5
BEL	Belgium	21	14	21	18	9	5	24	13	2
BGR	Bulgaria	14	26	6	19	19	27	13	12	25
CYP	Cyprus	10	7	20	25	4	16	10	22	23
CZE	Check Republic	13	22	16	7	15	23	14	18	15
DEU	Germany	22	10	9	11	26	15	4	14	1
DNK	Denmark	16	1	7	2	3	2	27	1	12
ESP	Spain	17	15	22	13	27	17	16	15	3
EST	Estonia	24	16	8	6	14	21	21	8	26
FIN	Finland	19	5	12	3	17	4	12	20	16
FRA	France	25	19	23	10	21	1	2	6	7
GRC	Greece	18	17	26	27	7	3	6	25	8
HUN	Hungary	1	12	17	16	8	10	5	21	9
IRL	Ireland	3	9	18	24	5	13	20	4	18
ITA	Italy	4	20	27	4	13	9	3	17	4
LTU	Lithuania	11	27	4	12	23	20	17	5	20
LUX	Luxembourg	5	2	19	20	6	18	8	26	21
LVA	Latvia	12	23	2	5	25	24	11	23	24
MLT	Malta	7	8	1	26	2	22	7	27	22
NLD	Netherlands	9	4	11	21	11	6	26	9	6
POL	Poland	15	21	24	8	22	19	9	19	11
PRT	Portugal	6	13	25	17	10	12	18	11	19
ROU	Romania	2	24	14	23	20	26	22	3	14
SVK	Slovakia	8	25	5	14	24	25	19	10	17
SVN	Slovenia	20	18	10	15	18	14	23	7	27
SWE	Sweden	23	3	3	1	12	7	25	2	13
UK	United Kingdom	27	11	15	22	1	11	1	24	10

Legend: ID - abbreviations for the names of countries; I – Quality of European Institutions; II - Quality of National Institutions; III - Enforcement of EU law; IV - Fiscal decentralization; V - Fiscal centralization; VI - Government expenditure; VII – Centripetalism; VIII - Regional governance; IX – Federalism.

Fiscal decentralization consists of three slightly correlated latent variables. They are based on the data of the share of government expenditure at the central and local government level and data of total government expenditure. Ranking list of EU countries, defined by the first dimension (Fiscal decentralization – IV), indicates the top ranks for three Nordic countries (Sweden, Denmark, Finland), followed by Italy, Latvia and Estonia. The lowest degree of fiscal decentralization is observed for Greece, Malta, Cyprus, Ireland, Romania, UK and the Netherlands. The result shows that the degree of fiscal decentralization is most likely the result of a specific national policy. The latent variable of Fiscal centralization (V) was expected to be the opposite to the fiscal decentralization. However, the comparison between the ranks of EU countries in relation to two variables forms three groups of countries:

- higher rank with respect to decentralization and lower rank with respect to centralization for Latvia, Germany, Spain, Finland, Poland, Sweden, France and Lithuania,
- similar ranks with respect to both characteristics for Bulgaria, Denmark, Slovenia and Romania,
- lower rank with respect to decentralization and higher rank with respect to centralization for Malta, Cyprus, UK, Greece and Ireland.

The third dimension of the concept of decentralization is the third pillar of government spending (Government expenditure – VI). The top rankings of government spending belong to France, Denmark, Greece and Finland, while the bottom rankings are occupied by Bulgaria, Rumania, Slovakia, Latvia, Czech Republic and Malta. The results show that EU countries follow different policies of distribution of budget. Since Quality of national governance indicates no correlation with Fiscal decentralization and significant correlation with Fiscal centralization and Government expenditure we could conclude, that Fiscal decentralization has no influence on quality of governance and that countries with more centralized fiscal policy demonstrate better quality of national institutions.

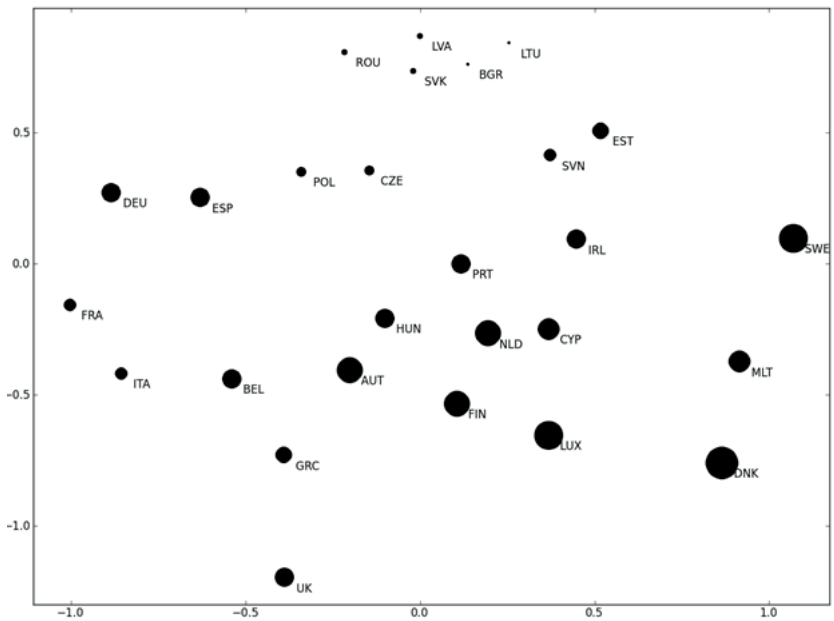
The concept of political decentralism consists of two dimensions (Centripetalism (VII) and Regional governance (VIII)) which express the level of decentralization for all countries under consideration, while the third dimension (Federalism IX) provides reasonable information only for larger countries. The top rankings of centripetalism are held by UK, France, Italy and Germany, while the bottom is occupied by Denmark, Nederland, Sweden and Belgium. The measure of regional governance is the highest for Denmark, Belgium, Romania and Ireland, while the lowest values of the measure are recorded for Malta, Luxembourg, Greece and UK. Federal countries are Germany, Belgium, Spain, Italy and Austria, while non-federal countries are Slovenia, Estonia, Bulgaria, Latvia and Cyprus. As expected, the political picture of EU countries is quite variegated. According to the results of the study, it could be concluded that the existent measures of political decentralization do not enable the comparison of all EU countries, since other characteristics of countries (size, tradition etc.) have significant influence on the value of the indicators.

In consideration of results of the study we present the results of multivariate regression analysis with the variable Quality of national institutions as dependent variable and six latent variables of fiscal and Political decentralization (IV – Fiscal decentralization; V – Fiscal centralization; VI – Government expenditure; VII – Centripetalism; VIII – Regional governance; IX – Federalism) as independent variables.

The graphical presentation in Figure 1 is the result of the projection of the multivariate model to three dimensions. The positions of countries in the two dimensional plain indicates differences/similarities amongst the countries

regarding the six independent variables. The value of independent variables (Quality of national institutions) is expressed by the size of the bullets (larger bullet means better quality). The meanings of the abbreviations of EU countries names are given in Table 6.

Figure 1: Projection of the multivariate model



The figure shows that the new EU member countries are in a similar position with respect to financial and political decentralization, whereas Romania, Latvia, Lithuania and Slovakia are far away from the centre with the lowest level of quality of institutions (the smallest bullets). At the same time, Hungary and Cyprus are placed in the surrounding of old EU member countries with significantly higher level of quality of national institutions (the lager bullets). It is also evident that countries with the highest quality of national institutions are positioned in different regions of the plane. On the basis of this, it may be concluded that there are possible different approaches for reaching higher quality of national institutions.

The multivariate linear regression model indicates only two significant independent variables at the level of 0.1, fiscal centralization ($p_1 = 0.015$) with positive influence and centripetalism ($p_2 = 0.058$) with negative influence. Huber test of robustness of the model indicates that the model is robust with minimal changes in significance of both independent variables ($p_1 = 0.028$; $p_2 = 0.063$). Despite the fact that three countries with the best score in fiscal decentralization received a high score in the quality of national institutions (Sweden, Denmark and Finland), the influence of fiscal decentralization on the quality of national institutions is not significant. This is caused by some

countries with high fiscal decentralization but relatively low quality of governance (Latvia, Czech Republic, Poland and Italy). Therefore, it may be concluded that neither financial nor political decentralization can explain the quality of institution in EU countries. Both centralized and decentralized countries could be found at the top and at the bottom of ranking of the quality of national institutions. In looking for better quality of national institutions, EU countries could follow different approaches; however, they have to consider some quality standard characteristics for successful countries.

6 Conclusions

The main objective of the research plan was to formulate the factor model of decentralization and quality of governance and to formulate a framework for using best practices in exploratory factor analysis over small samples. A short review of the research results is given below.

The developed model represents the logical nature of data. The results of the analysis may be used in several ways. The factor model enables the construction of the structural model of the impact of decentralization on the quality of government. It opens up other possible uses as well, one important task in the future will include the consideration of indicators, in particular with factors that combine a small number of variables (III – Enforcement of EU law, VII – Centripetalism and VIII – Regional governance) and with the model of political decentralization as a whole, where the Cronbach' alpha coefficient does not demonstrate a good reliability of the models. The review of variables of political decentralization indicates that they are not sufficiently drafted, since they do not provide certainty of reliability.

In summary, it may be established that the formulated models of two concepts, i.e. the Quality of governance and Fiscal decentralization, are of sufficient quality. With the available variables, the quality of the formulated model of Political decentralization was insufficient, which was in principle expected, since the measurements of political decentralization are rather partial and inconsistent and make it difficult to assess the state of the concept (political decentralization). However, despite the rather poor result of the consistency test, the model is logical in terms of content and can be used as a basis for further consideration on the definition of the concept.

The analysis of the regression model indicated different models of governance in EU countries, where the level of decentralization cannot explain the level of quality of governance. There are other characteristics which influence the quality of governance. The presented model exposed that fiscal centralization has a significant impact on the quality of institutions. Strong government implies good governance. On the other hand, the quality of institutions in new EU member countries is lower than in old member countries. The level of quality of institutions for Italy, France, Greece and Spain is not significantly higher than for new member countries.

Studies of dimensionality of the basic concept of decentralization and quality of governance are not very common despite the need for comprehensive models of concepts in consideration. In this research, the dimensions of the three aforementioned concepts for the EU countries were defined. In this manner, a logical structure was developed, which can be used for modeling the impact of decentralization on the quality of governance in the framework of the concepts observed, while the analyzed range of variables can also be extended with variables showing the results of the operation of institutions.

The research designed the model of exploratory analysis, which functions over a small number of units, following the outlines and recommendation of authors concerning the procedure of the assessment of models and selection of variables and factors.

The limitation of the research was primarily in the non-availability of studies of databases that would provide a consolidated data model at the initial stage of the research; therefore, certain areas remained unresolved. Furthermore, a tool for factor analysis, called regularized exploratory factor analysis, which was introduced recently in the psychometric literature for analysis of small samples, was not available for this research (Jung, 2011).

The path for further research is clear. The analysis of the states as units is limited by their number, therefore, suitable statistical methods that will provide reliable models and results need to be tested and implemented in this area. On the other hand, several variables, which are used to asses numerous constructs and concepts, are used for the analysis of states. Therefore, it is necessary to highlight those indicators and concepts that will meaningfully describe the conditions of public governance.

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POVZETEK

FAKTORSKI MODEL DECENTRALIZACIJE IN KAKOVOSTI UPRAVLJANJA V EU

Ključne besede: fiskalna decentralizacija, politična decentralizacija, kakovost upravljanja, preiskovalni faktorski model, države EU

Institucije usmerjajo, krojijo in omejujejo odnose med ljudmi in na ta način vplivajo na politične ekonomske in družbe rezultate skupnosti. Politične formacije pokrivajo velike površine, zato jih je težko upravljati. Moč in politični vpliv se zmanjšujeta od centra proti obrobju. Da bi omenjeno težavo rešili, so že v zgodnjih državah uvedli posredno in decentralizirano vladanje. Poenostavljeno povedano pomeni decentralizacija transfer kompetenc in virov od centra k nižjim ravnem upravljanja politične formacije (Aristovnik, 2012). Raven decentralizacije lahko opredelimo kot strukturo organizacije vladnih institucij v izbrani državi ali drugi politični formaciji.

Kakovost upravljanja je rezultat aktivnosti institucij. Gerring et al. (2005. p. 567) navajajo Montesquieujevo trditev, da kakovost upravljanja izhaja iz razpršene moči med številne neodvisne institucije. Te se medsebojno nadzirajo in s tem zagotavljajo bolj odgovorno in boljše delovanje. To je tudi izhodišče naše raziskave o kakovosti upravljanja in decentralizaciji v državah EU.

Osrednji cilj raziskave je bil razviti faktorski model, ki bo omogočil poenostavitev podatkovne strukture kakovosti upravljanja in decentralizacije ter prikaz nekaterih značilnosti pojava v populaciji držav EU. Z metodološkega vidika pa je bil cilj oblikovati metodološki okvir, ki omogoča kakovostno statistično obravnavo manjših statističnih populacij oziroma vzorcev. Zato smo v tem smislu oblikovali tudi hipotezo kot trditev, da je faktorski model mogoče realizirati.

Raziskovalci posvečajo študiju decentralizacije in kakovosti institucij kar precej truda. Svetovna banka definira kakovost upravljanja kot »postopke izbire, nadzora in zamenjave vlad; zmožnost vlade da učinkovito oblikuje in uvaja dobro premišljene politike in spoštovanje državljanov in razmer za institucije, ki obvladujejo ekonomske in družbene interakcije med njimi (Dijkstra, 2011, str. 1). Različni avtorji v zvezi s tem izpostavljajo različne vidike, kot so pričakovanja populacije države v zvezi z rezultati vladanja (Draghici, 2004, str. 2), zmožnost države, da svoje aktivnosti uvaja učinkovito in brez korupcije (Bäck & Hadenius, 2008) in zmožnost države, da zagotavljana nepristransko delovanje institucij (Teorell, 2009, str. 21).

Ugotovitve raziskovalcev glede vpliva decentralizacije na kakovost institucij so različne. Tako lahko zasledimo ugotovitve o pozitivnem vplivu fiskalne decentralizacije (Kyriacou & Roca-Sagales, 2011) in negativnem vplivu politične decentralizacije (Gerring et al., 2005; Fan et al., 2009) na kakovost

institucij v državi. Zanimiva je tudi ugotovitev o slabem vplivu decentralizacije na korupcijo (Ivanyna & Shah, 2011, str. 24).

V naši raziskavi smo v model vključili tako fiskalno kot politično decentralizacijo. Avtorja Ivanyna in Shah (2011, str. 2) sta razvila indeks decentralizacije, ki bi bil morda lahko primeren za primerjanje z rezultati naše raziskave, žal pa ta indeks v času izvedbe naše raziskave še ni bil javno dostopen.

Pri raziskovanju tematike se večina avtorjev naslanja na regresijsko analizo, pri tem skoraj vedno uporabljajo agregirane kazalnike, ki jih razvijejo na osnovi teoretičnih predpostavk. Razvoj latentnih spremenljivk s pomočjo ustreznih statističnih metod (faktorska analiza, strukturno modeliranje) je manj pogosta praksa, zato nekateri avtorji priporočajo bolj pogosto uporabo tovrstnih pristopov (Liu, 2007, str. 103).

Za študijo smo na osnovi priporočil predhodnih raziskav iz nabora številnih spremenljivk izbrali 43 spremenljivk, s katerimi lahko opredelimo pojme kakovosti upravljanja in fiskalne ter politične decentralizacije (tabela 1). Podatke smo obdelali s preiskovalno faktorsko analizo z naslednjima nastavitvama: ekstrakcija – *maximum likelihood* in rotacija – *direct oblimin*. Zanesljivost in ustreznost modela smo preverjali s Cronbach α koeficientom in Barttletovim testom sferičnosti. Pri odločitvah o obdržanju spremenljivk v modelu in o številu faktorjev smo uporabili standardne vrednosti.

Rezultat študije so trije faktorski modeli s po tremi faktorji. Kakovost upravljanja sestavljajo (tabela 3): »kakovost EU institucij« z 8 spremenljivkami, »kakovost nacionalnih institucij« z 10 spremenljivkami in »uveljavljanje evropske zakonodaje« z 2 spremenljivkama. Fiskalna decentralizacija vsebuje tri latentne spremenljivke (tabela 4): »fiskalno decentralizacijo« z dvema spremenljivkama, »fiskalno centralizacijo« s tremi spremenljivkami in »vladno porabo« s tremi spremenljivkami. Politična decentralizacija obsega (tabela 5): »cetripetalizem« s tremi spremenljivkami, »regionalno upravljanje« z eno samo spremenljivko in »federalizem« s štirimi spremenljivkami.

Študija je pokazala, da bi bilo treba za trden model poiskati dodatne spremenljivke, ki bi opisovale fiskalno decentralizacijo in regionalno upravljanje. Kljub temu nam model omogoča lep vpogled v rezultate po državah (tabela 6), kjer smo države EU rangirali glede na regresijske vrednosti faktorjev. »Zaupanje v EU institucije« in »zaupanje v nacionalne institucije« sta si bolj ali manj nasprotni spremenljivki, zato prva ni uporabna za analizo vpliva decentraliziranosti na kakovost institucij po državah. Spremenljivka »uveljavljanje pravnega reda EU« se prav tako nikakor ne vklaplja v razmislek o kakovosti nacionalnih institucij, zato smo za predstavitev rezultatov oblikovali regresijski model z odzivno spremenljivko »kakovost nacionalnih institucij« in s 6 napovednimi spremenljivkami obeh decentralizacij.

Slika 1 prikazuje projekcijo regresijskega modela na dvodimenzionalno polje napovednih spremenljivk, pri čemer je vrednost kakovosti nacionalnih

institucij predstavljena z velikostjo kroga. Iz slike je razvidno, da 9 novih članic nekoliko odstopa od drugih (novih in starih) članic po vrednosti napovednih spremenljivk (5 držav na sredini slike zgoraj in 4 države nekoliko pod njimi). Tri nove članice so se uvrstile v polje načina delovanja starih članic (Madžarska, Ciper in Malta) z večjo kakovostjo nacionalnih institucij od drugih novih članic. Sicer pa je iz grafa očitno, da h kakovostnim institucijam vodijo različni pristopi, saj najdemo države, ki izkazujejo dobro kakovost na dokaj različnih mestih ravnine. Po drugi strani pa imamo na sredini polja več držav z zelo dobro kakovostjo nacionalnih institucij (Avstrija, Nizozemska, Finska, Luxemburg), in le Dansko ter Švedsko ob desnem robu polju. Če iščemo dobre prakse za posnemanje, so to prav gotovo države v sredini polja. Da bi ocenili morebitno primernost skandinavskega modela za druge države, pa bi morali realizirati bolj poglobljeno študijo problematike.

Sam multivariatni regresijski model je pokazal, da statistično značilno vplivata na kakovost nacionalnih institucij le fiskalna centralizacija (pozitivno) in centripetalizem (negativno). Rezultat je posledica dejstva, da so med zelo decentraliziranimi državami take z dobro kakovostjo nacionalnih institucij (Švedska, Danska in Finska) in take z relativno slabo kakovostjo nacionalnih institucij (Latvija, Češka, Poljska, Italija).

Z izvedeno študijo smo torej potrdili izvedljivost modela, ki pa je pokazal, da so poti do kakovostnih nacionalnih institucij v različnih državah različne. S študijo smo prispevali nov vidik obravnave problematike razvoja držav EU in pokazali enega od mogočih načinov statistične obravnave problema. Prihodnje raziskave bi lahko dopolnjevale nabor spremenljivk, primerjavo med indikatorji in upoštevale uporabo nekaterih drugih metod, primernih za obravnavo manjših populacij. Vsekakor pa mora biti iskanje dobrih praks, ki naj usmerjajo politike držav, usmerjeno v iskanje rezultatov homogenih skupin podobnih držav.

1.02 Review article

Innovation and Creativity in Public Sector

UDK: 35:330.341.1:061.1EU

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ABSTRACT

The position of public sector in European countries is significant, especially now when Europe has a goal of smart, inclusive and sustainable growth. The paper examines manners how public sector can contribute to achievement of this goal. The aim of the paper is to investigate the existing modern perspectives on public sector and find out the linkages between them. It deals with the role and importance of intelligence, innovation and creativity in public sector processes. It examines the nature of smart, innovative and creative approach to public sector, their main factors, indicators and variables. The purpose of the paper is to introduce and point out the mentioned approaches that may provide alternatives to previous procedures in public sector. The main findings are based on the main aim of this article, which is to develop a better understanding of innovative, smart and creative approach in public sector with a particular focus on the public involvement.

Key words: creativity, crowdsourcing, governance, innovation, public sector

JEL: L38

1 Introduction

The position of public sector in European countries is significant. Due to different size and scope of public sector in each country, it is difficult to define its unified structure of processes, system of organizations, etc. What is common for every country is the fact that public sector provides public services, driven by a public interest that justifies particular attention from public authorities (Thenint, 2010). They deal with delivery of goods and services in the areas: general public services; defence; public order and safety; economic affairs; environmental protection; housing and community amenities; health; recreation, culture, religion; education and social protection (OECD, 2011).

The variety of public services increases the pressure on using more innovative and creative procedures for their better and more effective providing.

The attempts to improve processes and streamline public services are known as introducing of ICT options, which results in e-governance, or introducing management principles from private sector into public sector, known as New Public Management (NPM) concept. *The European Year of Creativity and Innovation* in 2009 has launched the idea that mainly creativity and innovation should take a central role in all public sector activities. This initiative emphasised that it is imperative to launch, develop and foster creative and innovative approaches not only in private sector, but also in public sector. The transition from smart through innovative to creative approach is a consequence of a need to cross-disciplinary solve world-wide challenges and tasks. The influence of globalisation has caused that it is important to change the existing form of public sector from inefficiency, bureaucracy and other negative features to a modern, smart and creative public sector. The article is dedicated to this issue.

The article is divided into two parts. The first part examines the available literature on innovation and creativity in public sector and it provides theoretical framework and overview of main indicators of smart, innovative and creative approaches to public sector. The second section compares the mentioned approaches and points out the linkages between them. Finally, the article concludes with the fact, that if public sector wants to be innovative and creative, it needs to involve citizens. With regard to the creative approach, using of crowdsourcing and its forms in public sector are highlighted.

The research methodology of the article requires gathering relevant information from the specified literature (Woodman et al., 1993; Borins 2001, 2006; Halvorsen et al., 2005; Giffinger et al., 2007; Vigoda-Gadot et al., 2008; Windrum, 2008; Denhardt et al., 2009; Howe, 2009; Eviakova, 2010; Keifer, 2010; Thenint, 2010; Rothler & Wenzlaff, 2011; Yip, 2011; Eggers & Hamill, 2012) and the methodology of existing projects PUBLIN, European Smart Cities (listed below). The main methods used are causal and content analysis of documents, descriptive method due to better understanding of examined approaches, comparison of relevant indicators, induction, deduction and synthesis in the formation of final findings and proposals.

Based on scientific literature, the research question is: What are the main factors that affect the citizen´s satisfaction with public sector through smart, innovative and creative manners?

2 Smart, Innovative and Creative Perspective on Public Sector

This part deals with the fact that smart, innovative and creative approach in public sector is not only a catchphrase, but an option to change operation of public sector through these manners. We examine theoretical background of smart, innovative and creative approach using a review of significant interesting projects that focus on factors and measurable indicators, which

might help to identify what the nature of presented approaches is. Before we introduce the theoretical definition of various approaches, it is important to stress that public sector carries out its activities through governance and the government is an institutionalised form of the governance.

2.1 Smart Governance

The idea of Smart Governance was complexly developed as a part of the project *European Smart Cities*. It was an initiative of research team from the Centre of Regional Science (at the Vienna University of Technology), from the OTB Research Institute for Housing, Urban and Mobility Studies (at the Delft University of Technology) and from the Department of Geography (at the University of Ljubljana). Regarding to the significance and application of the idea, the research team identified factors and indicators for measuring of Smart Governance (Table 1).

According to Smart Governance Network, smart governance is focused on future of the public services through greater efficiency; community leadership; mobile working and continuous improvement through innovation. Smart Governance uses technology to facilitate and support better planning and decision making. The main reason is improving democratic processes and transforming the ways that public services are delivered through.

Table 1: Factors and indicators of Smart Governance

FACTORS	INDICATORS	LEVEL
Participation in decision-making	City representatives per resident	local
	Political activity of inhabitants	national
	Importance of politics for inhabitant	national
	Share of female city representatives	local
Public and social services	Expenditure of the municipal per resident in PPS	local
	Share of children in day care	local
	Satisfaction with quality of schools	national
Transparent governance	Satisfaction with transparency of bureaucracy	national
	Satisfaction with fight against corruption	national

Source: Own compilation according to Giffinger et al. (2007).

As we can see, the main factors of smart governance are citizen's participation, satisfaction with public services, transparency. The indicators are divided according to the application level into those which should be realised by national government and those which should be priority of local government. With regard to the participation the openness in sense of equal opportunities (share of female representatives) and the interactive approach from citizens (political activity of inhabitants) are very important. In the project *European Smart Cities* education was principally selected as the main public service, others are missing (which we see as a deficiency of this model). Transparency as the third main factor of smart governance is also considered as the main

goal of many governments because it is the most important attribute for building trust in government.

Sometimes it is appropriate to see 'public things' by 'private eyes'. IBM prepared in 2010 a short guideline for public sector how to achieve smart governance through 6 steps. There are namely (1) set & communicate goals; (2) define metrics; (3) define how decisions will be made; (4) communicate policies; (5) measure outcomes; (6) audit.

Setting of goals is the first step, because governance needs to define specific, measurable and directly tied to processes or initiatives goals. We distinguish situational and sustainable goals. Situational goals are based on key performance indicators (KPIs) which measure deficiency in concrete program (e.g. impact on data quality) and they are directly tied to goals or critical factors of success. Sustainable goals should be based on scientific assessment and should point out where organisation wants to be in future. Sustainable goals are directly tied to concrete expectations of government.

Without metrics it is not possible to assess if government achieves its goals. The defining of metrics is necessary as a source of information needed for monitoring.

The third step is oriented on means how to make a decision. There are many types of decision-making models. If council decisions are made by majority, unanimity or super-majority is a representative decision-making model. In contrast, if a local-empowerment model is used, it means that data stewards with delegated authority can make their own decisions without council consultation. The third type of decision-making model is a hierarchical-type model, which is applied when some decisions require speed and authority. Decisions are sent right to the top, or require consultation with other groups. However, there are situations when having a crowd participating in decisions creates ownership, which is desirable, even if it makes decision times longer. Government might use crowd-based decision making – based on social networking solutions, with engagement of more stakeholders. This model is considered as market-based model, because of using internal stakeholders to build buy-in for enterprise-wide decisions.

The fourth step – communicate policy – is about the need for policies to be understood by all people, so it is important to set how well policies are being communicated. It consists of various communication tools, for instance verbal announcements, emails, written documents, special software, and methods such as changes in business glossary definitions, database table structures, encryption or data transformation.

In addition, in order to achieve collective goals, it is important to measure also outcomes, i.e. how well policies achieve sustainable and situational goals. Auditing is the key process and technique underlying many of the measurable steps above. But it is not a yearly or monthly activity; audit should be set up

all the time. The proposed procedure (IBM, 2010) might serve as a guideline for local or state government and their organisations how to achieve smart processes and systems in their governance.

2.2 Innovative Governance

At first we state the taxonomy in relation to innovation in public sector with several types of innovation in public sector and their main characteristics (Table 2).

Table 2: Types of innovation in public sector

type of innovation	notes/examples		characteristics
a new or improved service	online platform, portal health care at home	BY MEANS OF	*use of new technology*
a process innovation	new or altered ways of supplying public goods and services a change in the manufacturing, providing of a service or product		*process improvement* - some types of innovation make administrative processes and the delivery of services faster, more accessible, targeted and/or user-friendlier
an administrative and policy innovation	use of a new policy instrument, changes to thinking or behavioural intentions which may be a result of policy change		*empowerment of staff, citizens or communities* - there are some phases of empowerment (consultation, progressive invitation to participate in the elaboration or even the implementation of new policies or services)
a system innovation	establishment of new system (organizations) or fundamental change of an existing system		*system approach* - based on the coordination of various organizations' activities - fostering inter-organisational collaboration, cooperation and interaction - implementation of systematic data cross-check procedures - implementing integrated, multi-faceted services (single desks / portal delivering a wide range of services)
a conceptual innovation	change in the outlook of involved actors development of new views and new concepts		*involving of private or voluntary sector* - this means opening up some public sector activities (under certain conditions) to private sector competition or also refer to the use of NGOs for support activities, PPPs, the use of private consulting services *empowerment of staff, citizens or communities*
a radical change of rationality	meaning that the worldview or the mental matrix of the employees of an organization is shifting		*involving of private or voluntary sector* *empowerment of staff, citizens or communities*

Source:Own compilation according to Borins (2001, 2006), Halvorsen et. al (2005), Windrum (2008).

Halvorsen et.al (2005) state that there are three views on innovations. According to degree of novelty, there are radical or incremental innovations. Radical innovation has a high degree of novelty and incremental innovation improves already existing products, services or processes. Concerning the initiator of innovation, we distinguish top – down or bottom – up innovations. In the case of public sector, 'bottom' means public employees, civil servants,

mid-level policy makers. The third category distinguishes needs-led and efficiency-led innovation. It considers, whether the innovation process has been initiated to solve a specific problem or to make already existing public goods, services or procedures more efficient.

Another European project, called *PUBLIN* has been executed under EU's Fifth Framework and concerned simultaneously nine countries, Ireland, Israel, Lithuania, The Netherlands, Norway, Slovakia, Spain, Sweden, and the United Kingdom during 2003–2005. The project explored the nature of innovation in social and health services, based on quantitative and qualitative methods. For this article it is important to know the nature of variables (Table 3) for better understanding of what should be done for stimulating innovation in public sector operation. Variables in *PUBLIN* project are similar, but more detailed than in the previous project (*European Smart Cities*). Different is public sector innovation and image (prestige) of public sector. As we can see in the table 3, the term innovation is intertwined with creativity. Creativity and innovation are often considered as terms with the same or similar meaning, but creativity is not the same as innovation. While creativity brings original ideas, innovation can also be understood when something is used according to some pattern, model or an example.

Table 3: Measures and variables of PUBLIN project (innovation in public sector)

Measures/variables	refers to: (description of variable)
Public sector innovation (INNOV)	entrepreneurial actions, creativity, flexibility, a willingness to adopt new ideas, and the initiation of original enterprises to improve people' s services
Responsiveness (RES)	the accuracy and speed of public sector reaction to citizens' demands
Professionalism (PROF)	the professionalism and quality of public personnel as perceived by citizens
Organizational Politics (OP)	the level of political considerations in administrative work and decision- making as perceived by citizens
Leadership and vision (LV)	general views about the quality and vision of leading administrative groups, managers, and senior bureaucrats
Ethics and morality (EM)	attitudes about the ethics, morality, and fairness of civil servants
Trust in government and public administration (TRUST)	the level of citizens' confidence in state authorities and administrative branches
Citizens' satisfaction (SAT)	citizens' satisfaction with groups of institutions and organizations that deliver various services (the public social/health sector, the public educational system, police, the public transportation system, welfare and social security, and employment services
Public sector image (IMAGE)	the reputation and prestige of public bureaucracies in the eyes of citizens

Source: Own compilation according to Vigoda-Gadot et al. (2008).

2.3 Creative Governance

Nowadays, the governance needs to solve increasingly complex societal problems. Indeed, it is the creativity that allows public organizations to be responsive and to develop new and better ways of serving citizens and using resources wisely. According to Dimock (in Denhardt 2013), "creativity is perhaps the most important concept in public administration". On the one hand, there is no single, commonly accepted definition of creativity. On the other hand, the creativity is generally accepted as the major asset and critical input for developing not only private sector, but also public sector. Creativity is a term which is described as "any form of action that leads to results that are novel, useful, and predictable" (Boone & Hollingsworth in Denhardt, 2013, p. 61). Similarly, Woodman, Sawyer and Griffin (1993) indicated that creativity can be viewed as the development of a valuable and useful new product, service, process, or procedure by people working together in a complex social system.

It may seem that creativity has restrictions in public sector due to legal, political, economical and other circumstances, but there are different types of creativity, all of which can help organizations in public sector to solve problems and work better. According to Hollingsworth (1989 in Denhardt 2013) there are four types of creative process as options of involving creativity in public sector:

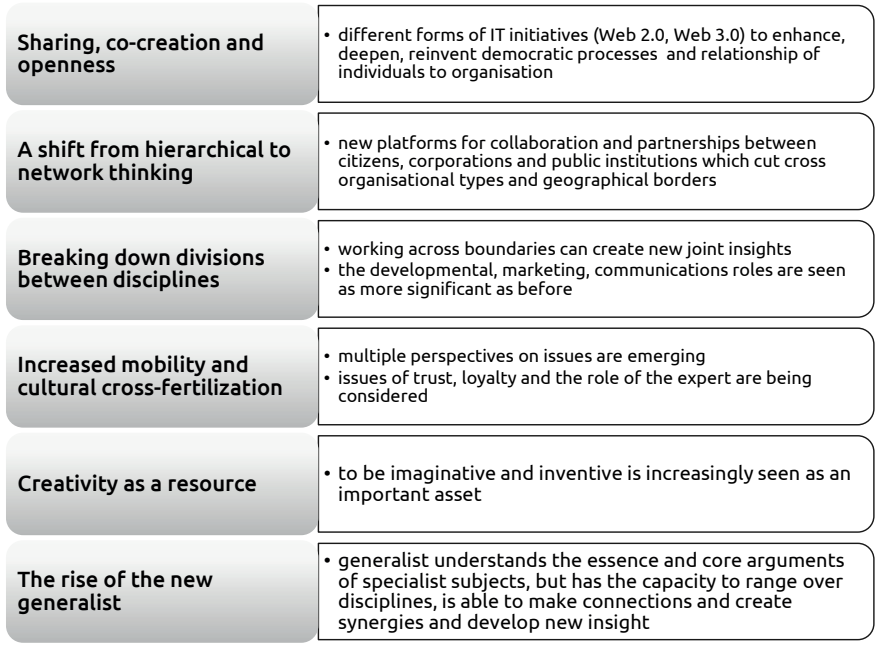
1. Innovation sees the obvious before anyone else does (e.g. some states have innovated by offering multiple services at one site such as offering kiosks in shopping malls or one-stop service centers).
2. Synthesis combines ideas from various sources into a new whole (e.g. a city police department, a state social service agency, and the courts might create a multi-agency approach to dealing with child sexual abuse investigations and prosecutions).
3. Extension expands an idea to a new application (e.g. many jurisdictions have taken the fast-food idea and created drive-through services such as book drops in libraries).
4. Duplication copies a good idea from others (e.g. as cities have experimented and had success with photo-radar technologies in traffic control, other cities have learned from those experiences and followed suit).

According to mentioned definitions of creativity, stating that it brings novelty, Hollingsworth's classification of creative process in public sector can be marked as an intermediate stage between innovative and creative approach. Innovation and creativity in this classification are linked to each other.

Governance is often connected with the term bureaucracy, which is frequently perceived through features like rigid nature, inefficiency, lack of flexibility, negative attitudes to change (Vigoda-Gadot et al., 2008). The reason, why

we have mentioned relation between governance and bureaucracy, is because we see it as the main problem and barrier in good creative governance. Charles Landry (2011) stresses that there is a need to shift the negative perceptions of bureaucracy and those that work in them. He combines two incompatible concepts – creativity and bureaucracy in the idea of 'creative bureaucracy' (Figure 1).

Figure 1: Patterns of creative bureaucracy by Ch. Landry



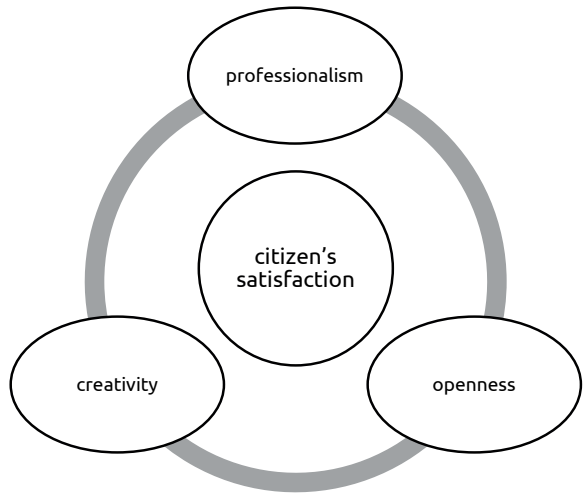
Source: Landry (2011).

According to Charles Landry, who is the author of the concept Creative City (2011), bureaucracy is about structure, hierarchy, rules, routine and process and it is the organizational structure of larger organizations which have systematic procedures, protocols and regulations to manage activity. While bureaucracy is based on order, systems, certainty and predictability, creativity is focused on resourcefulness, imagination and flexibility. His idea of 'creative bureaucracy' is a proposed way of public sector operating.

If we compare smart, innovative and creative approach, we can see intertwining and continuity. They have a common goal which is citizen's satisfaction. Within the smart approach, public sector can reach the satisfaction mainly through transparency and participation. It means that it should be open. According to the innovative approach, citizen's satisfaction can be reached first of all by professional approach of government with characteristics like responsiveness, organizational skills, ethic and moral rules. The creative approach to achievement of citizen's satisfaction is principally based on allowing citizens

to be creative by means of participation and allowing government to create favourable environment for sharing knowledge and cooperation in various disciplines. Combination of governance's professionalism (including skills and knowledge), governance's openness (in sense of transparency and equality of opportunities) and creativity (use of new forms to solve old problems) are the main pillars of the proper functioning of the public sector at present and also the main factors that affect citizen's satisfaction through smart, innovative and creative manners (Figure 2).

Figure 2: Main factors influencing the citizen's satisfaction



Source: Own compilation.

In order to achieve user (citizen) satisfaction Virant (2003, p. 80) mentions the following elements of administration service: information about the service, accessibility in terms of location and time, simplicity of order, procedure and payment, quality of personal contact, expert level and professional appearance of workers, good organisation and conditions of the premises, appropriate response to criticism, comments, suggestions and praise as well as reliability. According to Virant (*ibid*) user satisfaction is essentially affected by the notion of respect for the 'classical' values of public administration operation, namely the principles of legality, legal security and expectation, political neutrality and accountability of the public administration.

Inspired by outcomes of mentioned projects and theoretical models (Giffinger et al., 2007; Vigoda-Gadot et. al, 2008; Landry, 2011), we agree that the most important bureaucratic and governmental outcomes should be citizen's satisfaction, the image of the public sector and trust in governance. The way how to achieve or improve citizen´s satisfaction might be crowdsourcing and its forms.

3 Crowdsourcing and its Forms in Public Sector

Crowdsourcing is the act when some tasks are transferred to an undefined large group of people or community (crowd) through an open call (Howe, 2009). Crowdfunding is understood as a subtopic of crowdsourcing. Both terms are predominantly known from private sector. The objective of crowdfunding is to finance a specific project or enterprise. Contributors are promised immaterial, material or financial rewards. The main principle is that interested users are invited to donate a certain amount for concrete projects via Internet donations. Each project has an initial target budget which should be reached within a limited time frame. If the targeted percentage of the budget is reached, the project is considered successful and can be implemented (Röthler & Wenzlaff, 2011).

The process of crowdsourcing in private sector has the following main phases: The company has a problem → Company presents its problem on the Internet → Internet crowd receives a request for finding solutions → The crowd submits solutions → The crowd votes for the best solution → Company rewards to winners → Company owns a winning solution and benefits from it.

However, crowdsourcing is also an innovative way of solving problems that can be successfully used in the public domain. Several recently launched initiatives showed that the instrument works as one of the creative ways to increase public involvement in solving common problems. This shift is certainly a good sign for the future, whereas nowadays ordinary citizens have only limited opportunities to express their views (elections every 4–5 years) to contribute to the legislative process, and give feedback on the steps taken by the government (Eviakova, 2010). The authors Eviakova (2010), Keiffer (2010) state four kinds of crowdsourcing, which might be used in public sector:

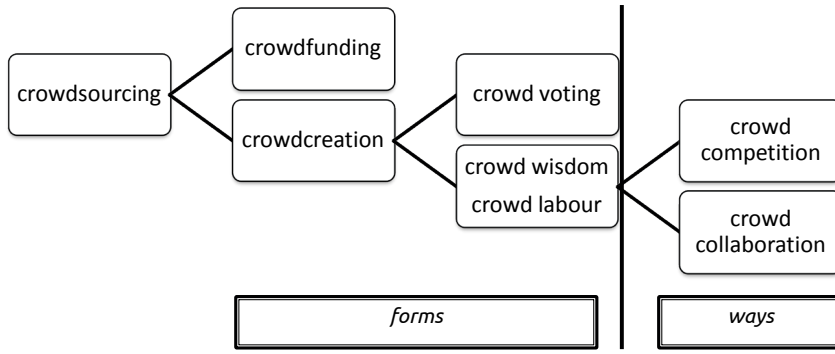
- Crowdfunding (crowd funding various Internet projects and initiatives)
- Crowdcreation (crowd present their own creations – logos, designs, page layouts, etc.)
- Crowdvoting (crowd vote and provide feedback on a new product or service)
- Crowdwisdom (crowd provide information and know-how in order to solve problems or predict future outcomes or help directly organization's strategy).

These kinds of crowdsourcing have a background in private sector view. Eggers and Hamill (2012) mention broader view of the crowdsourcing in public sector. They write about five kinds of crowdsourcing. The first one is crowd competition, when a problem with a defined solution requires creative problem-solving and a contest or prize provides incentives for participants to generate actionable solutions. The second way is crowd collaboration, when citizens combine their ideas and observations. They solve a problem on each other's insights with a degree of specificity. Crowd collaboration is

ideal for building and sharing knowledge, coordinating emergency response efforts and developing citizen-driven policy. Sometimes the government needs to harness knowledge from people who know a problem intimately. The third is crowd labour, which is focused on breaking up monumental effort into thousands of small tasks for the public, such as data validation, translation, data entry or digital archiving. The fourth kind is crowd voting which is particularly good for making simple decisions and ranking options, but not well suited for strategic-level decisions that require organizational buy-in. The last one is crowd funding as a simple way to engage the crowd. The potential of crowd funding activities goes beyond obvious applications, such as disaster-relief efforts, and can include funding start-ups and individual programs within large organizations.

If we summarize both formulated approaches (Eviakova, 2010; Keifer, 2010; Eggers & Hamill, 2012), there is the resulting framework of crowdsourcing composed of two main categories – crowdfunding and crowdcreation. Crowdcreation will consist of three forms and it is crowdvoting, because when crowd votes, its opinion is a part of decision-making. The next form is crowd wisdom (according to Eviakova, 2010 and Keffer, 2010) which is similar to the notion crowd labour (according to Eggers & Hamill, 2012). Both forms mean that the crowd with own knowledge, information, skills, ability, talent can contribute on small tasks of public sector. Based on meaning of crowd collaboration and crowd competition, we can indicate them as the ways of the last two forms above (Figure 3).

Figure 3: Categorization of crowdsourcing in public sector



Source: Own compilation according to Eviakova (2010), Keffer (2010) and Eggers & Hamill (2012).

For proper functioning, crowdsourcing has some conditions. It requires a high degree of transparency, an active and open dialogue between the parties and stakeholders, a financial compensation reflecting the market wage, as well as an Internet platform that would enable the functioning of the entire process from A to Z (Eviakova, 2010). The success of crowdsourcing efforts depends

critically on public involvement. Citizens have to see themselves as active participants rather than individual consumers of public policies and services (Yip, 2011).

There are several ideas how to implement and use crowdsourcing in public sector (according to Eviakova, 2010):

- crowdcreation form:
  - Create a political campaign. Political parties can launch online challenge and introduce key ideas that people want to communicate. The crowd submit proposals for the selection of the media, own graphic and pictorial creations and participate in the online voting to select the best ideas. The winners will receive a reward.
  - Crowdsourcing instead of public tenders. The use of crowdsourcing can be a less expensive and less bureaucratic method for public institutions without the threat of corruption. Selected calls can be launched on the official portal of the office, where subsequently individuals and companies will send their solutions and ideas. This strategy can help to diversify the portfolio of suppliers for selected orders, reduce overall costs and support growth of small and medium-sized enterprises.

The practical case of crowdcreation is the online idea Public Ideavibes which allows stopping making excuses or complaining, but starting to build better, stronger community (http://public.ideavibes.com/contents/about, cit. 2013-09-20).

- crowdwisdom form:
  - Legislation. Government authorities can use collection of suggestions from the representative groups by different methods. One of them can be crowdsourcing which could lead to an increase in the amount of information that will better reflect the needs of the whole country.
  - Database of good practices. The governments often learn from one another. They participate in joint projects, organizing twinning schemes and exchange best practices to solve problems. Imagine that the public and people would be involved and so they might present ideas already in place elsewhere in the world. They should also be able to identify two public entities and propose a method for their cooperation, which would reflect their mutual needs.
  - Fiscal budget proposal. The government can publish initial budget proposal and ask people to send their comments or remarks to it, to vote on selected parts and even design a web simulation of budget distribution between the selected priorities: health, education, defence, social affairs, energy, justice, agriculture, transport, etc. Submitted responses must be supported by relevant arguments. (It is a combination of crowdvoting and crowdwisdom.)

The practical example of such a case is the platform Challenge.gov. U.S. government seeks innovative solutions from the public and brings the best ideas and talent together to solve mission-centric problems through this platform (https://challenge.gov/p/about, cit. 2013-09-20). It works easily, government posts challenges, citizens share them with friends and talented people find solution to the problem. Another example of crowdwisdom form is the VeleHanden project, which is a highly successful crowdsourcing scheme organised by Picturae at the request of the Amsterdam Municipal Archives. With VeleHanden, everyone can help to make the archives accessible online. Because the 'crowd' is providing the necessary metadata, the Military Registers and Population Registers, amongst others, are now being made publically available. The crowdsourcing platform can be 'hired' by national heritage institutes, and is therefore also available for other projects. (http://picturae.com/uk/enrichment/crowdsourcing, cit. 2013-09-20).

- crowdfunding form:
  - Co-financing of public projects. Regional and local authorities can present fundamentally important public initiatives on the web and allow people to support them. This can be achieved in several ways: to become a sponsor, to find a sponsor, or to become a volunteer. Participants exactly know where their money goes, they have the opportunity to participate in a project in their community or fund-raise different kinds of contributions from additional sources.

As we can see, crowdsourcing operates on basic principle – involvement of crowd (citizens). In the first phase, when government starts with forms and ways of crowdsourcing, it is important to understand and to know how to motivate the crowd. Motivators are different. For someone it is enough to have a good feeling that he or she can contribute on improvement of public affairs, others need some reward (finance, prestige, etc.) reciprocally. The issue of citizen's motivation is very important and it requires special attention in academic and practical field.

Finally, we agree with Eviakova (2010) that with a variety of advantages, this method (crowdsourcing) becomes ever more popular in the world, therefore we suggest to governments to learn more about it from existing ideas and include it in the portfolio of options.

4 Conclusion

The public sector consists of various areas (health, education, culture, etc.), levels (local, regional, national), types of organizations and processes, where creativity is needed due to cross-disciplinary solutions of current globalized tasks. The governments as the main executive body of public sector need original and new solutions for socioeconomic development and sustainability. There are several challenges how to achieve it. One of them is the use and application of innovative practices and creativity. Innovation and creativity is

no longer just the domain of the private sector. Major finding of the paper is that there are number of existing and functioning initiatives how the public sector can be creative and innovative. On the one hand, it is important to monitor, disseminate and share good practices and get inspired by them. On the other hand, it is necessary to be aware of the fact, that without citizen's involvement it is not possible to apply innovative and creative approaches in the public sector. Their creativity is the main resource with which the idea of creative public sector can develop.

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POVZETEK

INOVATIVNOST IN USTVARJALNOST V JAVNEM SEKTORJU

Ključne besede: ustvarjalnost, množično zunanje izvajanje, upravljanje, inovacija, javni sektor

Javni sektor lahko opredelimo kot pomemben del vsakega gospodarstva. Toda številne njegove značilnosti so negativne in se kažejo kot neučinkovitost, birokracija in zastarelost. Danes na kompetence, aktivnosti in postopke v javnem sektorju vpliva globalizacija, ki omogoča hitrejši medsebojni prenos informacij. Poleg slednjih so tudi nove tehnologije glavni vir transformacije javnega sektorja v pameten, inovativen in ustvarjalen sektor. Ker se zasebni sektor neprestano trudi, da bi zadovoljil potrebe strank, bi moral biti glavni cilj javnega sektorja zadovoljstvo državljanov. Ta cilj je mogoče doseči z uporabo obstoječih sodobnih pristopov, temelječih na inovativnosti in ustvarjalnosti.

Namen tega članka je z uporabo znanstvene literature najti odgovor na raziskovalno vprašanje: »Kateri so glavni dejavniki, ki vplivajo na zadovoljstvo državljanov z javnim sektorjem na pameten, inovativen in ustvarjalen način?« Članek je razdeljen na dva dela. Prvi vsebuje teoretični okvir glavnih značilnosti in kazalnikov za pameten, inovativen in ustvarjalen pristop k javnemu sektorju. Drugi del se ukvarja s primerjavo omenjenih pristopov in z rezultati v dejavnikih, ki vplivajo na zadovoljstvo državljanov. V zadnjem delu članka je opisano, da je mogoče zadovoljstvo državljanov povečati tako, da ti v javnih zadevah sodelujejo z množičnim sodelovanjem (angl. *crowdsourcing*) in njegovimi oblikami.

Inovativnost in ustvarjalnost nista nova pojma v procesih javnega sektorja, vendar sta od evropskega leta ustvarjalnosti 2009 postala bolj upoštevana. Ideja pametnega, inovativnega in ustvarjalnega javnega sektorja poudarja, da sta za veliko nalog javnega sektorja potrebna interdisciplinaren pristop in razumevanje. Nekatere znanstvene raziskovalne ekipe so pregledale glavne lastnosti in kazalnike pametnih, inovativnih in ustvarjalnih pristopov k javnemu sektorju, rezultat česar so bili pomembni projekti, na primer Evropska pametna mesta in Publin. Članek predstavlja pregled značilnosti teh projektov, nato pa opiše nekatere druge pristope.

Prvi raziskovani pristop k javnemu sektorju je koncept pametnega upravljanja (angl. *Smart Governance*). Raziskovalna skupina s treh univerz (Tehnična univerza na Dunaju, Tehnična univerza v Delftu in Univerza v Ljubljani) je opredelila tri dejavnike, ki so potrebni za pametno upravljanje, in določila devet kazalnikov, kako ga meriti. Posebna značilnost tega pristopa je razdelitev posameznih kazalnikov na lokalno in državno raven. Na podlagi analize in sinteze so glavni dejavniki pametnega upravljanja sodelovanje državljanov, zadovoljstvo z javnimi storitvami in preglednost upravljanja. Dejavnik

sodelovanja v odločanju je sestavljen iz štirih kazalnikov: število predstavnikov v mestnem svetu na prebivalca, politična aktivnost prebivalcev, pomembnost politike za prebivalca in delež ženskih predstavnic v mestnem svetu. Dejavnik javnih in socialnih služb sestavljajo trije kazalniki: odhodki občine na prebivalca v standardu kupne moči (SKM), delež otrok v dnevnem varstvu in zadovoljstvo s kakovostjo šol. Zadnji dejavnik – preglednost upravljanja – sestavljata dva kazalnika: zadovoljstvo s preglednostjo birokracije in zadovoljstvo z bojem proti korupciji.

Pametni pristop dopolnjuje predlog družbe IBM, ki je leta 2010 pripravila kratek priročnik za javni sektor za doseganje pametnega upravljanja v šestih korakih. V njem je opisan celoten proces pametnega upravljanja organizacije od postavljanja in sporočanja ciljev ter določanja metričnih modelov in modelov za odločanje pa do merjenja rezultatov in revizije. Ta pogled vsebuje uporabne nasvete glede uresničevanja pametnih procesov in sistemov v javnem sektorju.

Pametni pristop je zelo povezan z inovativnim pristopom. Vprašanje inovativnosti v javnem sektorju se preučuje na različne načine. Najprej je treba poznati splošno taksonomijo inovativnosti in razlikovati med različnimi vrstami inovativnosti. Nato je mogoče inovativnost raziskovati v povezavi z javnim sektorjem. Inovativnost v javnem sektorju ima posebnosti, ki so lahko del sistema, procesa, javnega izdelka ali storitve. Zanje obstaja veliko definicij. Ta članek na podlagi znanstvene literature (Borins 2001, 2006; Halvorsen et. al, 2005; Windrum, 2008) poda povzetek vrst inovativnosti, njihove lastnosti in primere v javnem sektorju. Glavne vrste inovativnosti v javnem sektorju so nove ali izboljšane storitve, inovativnost v postopkih, inovativnost v administraciji ali politiki, inovativnost v sistemu, konceptna inovativnost in korenita sprememba. Izboljšanje v postopkih je vidno, ko je merljivo. Zato je v delu o inovativnem pristopu omenjen projekt *Publin*, ki so ga v okviru 5. okvirnega programa EU pripravili strokovnjaki iz devetih evropskih držav. Spremenljivke v projektu Publin so podobne kot v prejšnjem projektu Evropska pametna mesta, vendar so bolj podrobne. Struktura ukrepov je sestavljena iz devetih kazalnikov: inovativnosti v javnem sektorju, odzivnosti, strokovnosti, organizacijske politike, vodstva in vizije, etike in morale, zaupanja v vlado in javno upravo, zadovoljstva državljanov in podobe javnega sektorja. Kazalniki so pretežno kvalitativni, ker se nanašajo na splošne poglede in stališča različnih skupin do kakovosti javnih storitev.

V predstavljenih pristopih je vidno, da se pojem inovativnost prepleta s pojmom ustvarjalnost. Ustvarjalnost in inovativnost se pogosto štejeta kot pojma z enakim ali podobnim pomenom, vendar ustvarjalnost ni enaka inovativnosti. Medtem ko ustvarjalnost ustvarja izvirne ideje, se lahko kot inovativnost šteje tudi nekaj, kar je na primer uporabljeno v skladu z nekim vzorcem ali modelom. Del članka o ustvarjalnem pristopu k javnemu sektorju govori o glavnih definicijah o ustvarjalnosti in glavnih vrstah ustvarjalnih procesov. Ustvarjalnost kot sredstvo sodobnega javnega sektorja je glavna

ideja Landryjevega dojemanja »ustvarjalne birokracije«. Tukaj gre pravzaprav za povezavo dveh nekompatibilnih procesov – ustvarjalnosti in birokracije. Bistvo uporabe ustvarjalnosti v javnem sektorju je ustvarjanje in povezovanje različnih področij in učenje od drugih.

S primerjavo pametnega, inovativnega in ustvarjalnega pristopa se je izkazalo, da so ti pristopi med seboj prepleteni in nepretrgano povezani. Imajo skupen cilj – zadovoljstvo državljanov. S pametnim pristopom lahko javni sektor doseže zadovoljstvo predvsem s preglednostjo in sodelovanjem državljanov. To pomeni, da mora biti odprt. Pri inovativnem pristopu je mogoče zadovoljstvo državljanov najprej doseči s strokovnim pristopom vlade, ki ima lastnosti, kot so odzivnost, organizacijske sposobnosti, etika in moralna pravila. Ustvarjalen pristop k doseganju zadovoljstva državljanov temelji na tem, da se državljanom omogoča ustvarjalnost, tako da lahko sodelujejo, vladi pa se omogoča, da ustvari ugodno okolje za deljenje znanja in sodelovanje na različnih področjih.

Kombinacija strokovnosti upravljanja (vključno z veščinami in znanjem), odprtosti upravljanja (v pomenu preglednosti in enakih možnosti) in ustvarjalnosti (uporaba novih oblik za reševanje starih problemov) je torej glavni steber pravilnega delovanja sodobnega javnega sektorja in tudi glavni dejavnik, ki vpliva na zadovoljstvo državljanov na pametne, inovativne in ustvarjalne načine.

V zadnjem delu članka je poudarjen ustvarjalni način za doseganje zadovoljstva državljanov z njihovim dejavnim sodelovanjem, ki ga imenujemo množično sodelovanje (angl. *crowdsourcing*). Ta izraz prihaja iz zasebnega sektorja, kjer se večinoma uporablja njegova oblika množično financiranje (angl. *crowdfunding*), pri katerem se financira projekt ali podjetje. Sodelujočim so obljubljene nematerialne, materialne ali finančne nagrade. Avtorji, ki raziskujejo množično sodelovanje v javnem sektorju (Eviakova, 2010; Keffer, 2010; Eggers & Hamill, 2012), imajo različne poglede na njegove oblike. Vsem pa je skupna ugotovitev, da je množično sodelovanje inovativna oblika, ki jo je mogoče uspešno uporabiti v javnem sektorju.

V članku sta navedeni dve glavni obliki množičnega sodelovanja v javnem sektorju: množično financiranje in množično oblikovanje idej (angl. *crowdcreation*). Množično financiranje deluje po podobnih načelih kot v zasebnem sektorju. Ljudje sofinancirajo javne projekte, iniciative ali programe. Množično oblikovanje idej temelji na uporabi ustvarjalnosti, znanja, informacij, veščin, sposobnosti in talenta ljudi. Po kategorizaciji oblik množičnega sodelovanja v javnem sektorju obstajajo tri vrste množičnega oblikovanja idej: množično glasovanje (*crowd voting*), množična modrost (angl. *crowd wisdom*) in množično delo (angl. *crowd labour*). Preprosto povedano, množično glasovanje je zbiranje mnenja množice z glasovanjem o javnih zadevah. Množična modrost pomeni, da se ideje in predlogi državljanov uporabijo za reševanje javnih problemov, pri množičnem delu pa državljani opravljajo manjša dela. Obliki množične modrosti in množičnega dela sta še množično

tekmovanje (angl. *crowd competition*) in skupno reševanje problemov (angl. *crowd collaboration*). Pri obeh državljani rešujejo probleme v javnem sektorju. Pri množičnem tekmovanju so državljani stimulirani za reševanje problemov, pri skupnem reševanju problemov pa državljani delijo znanje in rešujejo problem, ker ga dobro poznajo.

Možnost interaktivnega sodelovanja državljanov v postopkih v javnem sektorju državljanom omogoča, da predstavljajo svoje ideje, izražajo mnenje o javnih dobrinah in storitvah, prispevajo informacije, znanje in izkušnje za reševanje problemov, napovedovanje prihodnjih rezultatov ali za neposredno pomoč pri strategiji organizacije. Treba je javno predstaviti prednosti, ki jih prinašajo množično sodelovanje in njegove oblike. Zainteresirane strani morajo ustvariti pregledno, finančno »zdravo« okolje z uporabo informacijske tehnologije, v katerem so državljani vključeni v javne zadeve. Motivacija za udeležbo aktivnega državljana je zelo pomembna, ker brez motivacije aktivno sodelovanje ni možno. Pri tem je treba upoštevati, da nekdo potrebuje prepoznavnost in ugled, drugi pa materialne ali finančne nagrade. V zaključku je opisanih nekaj uspešnih primerov uporabe množičnega sodelovanja v javnem sektorju, z ugotovitvijo, da so množično sodelovanje in njegove oblike dobre metode za pravilno delovanje javnega sektorja v državah po svetu danes in v prihodnosti.

1.02 Review article

Creativity and Intangibles in the Public Sector: Sources and Socio-Economic Importance in Slovakia and Slovenia

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ABSTRACT

Development of creative and cultural sector, which is based on internal resources of the territory, can ensure competitive advantage; and several factors of competitive advantage based on resources can be defined. Those factors are human capital, tangible and intangible potential as well as financial resources. The purpose of this paper is to elaborate on the importance of creativity as competitive advantage factor and to assess unique resources (tangible, intangible potential, human capital, financial resources) potentially leading to innovation in two EU member states, Slovenia and Slovakia. The paper presents the case study analysis and comparison of current and potential future situation in creative and cultural industries in Slovakia and Slovenia. The results of the study suggest that the foundations for the development of the creative and culture sectors are quite different in those two countries, and Slovenia tends to exhibit stronger current and potential future position in those industries compared to Slovakia.

Key words: creativity, intangibles, competitiveness, Slovenia, Slovakia

JEL: O30, L80

1 Introduction

Currently, intangible resources have become more important than tangible resources. They are unlimited and their distinctive advantage is inexhaustibility. One of these resources is creativity. The framing, nurturing, as well as ethical and sustainable exploitation of human creativity has become a key focus for economic development linking it to concepts around innovation, design and entrepreneurship. The importance and role of creativity and innovations for the economy has been highlighted by the European Union in strategic documents, for example, in The Treaty of Lisbon and Strategy of EU 2020. To achieve the key aims of the European Union by 2020, three main priorities were identified, namely smart, sustainable and inclusive growth. Smart growth should broaden the values of the EU through growth based on knowledge using education, research, innovations and creativity. This is why the ambitions of the EU are aimed at the strengthening of knowledge and innovations, based on creativity, improving the education system, research, supporting and spreading innovations and knowledge, thus transforming ideas into new products and services (Europe, 2020, 2010; Treaty of Lisbon, 2007). Creativity can provide a source of economic and social resilience also in times of economic down-turn (Suciu & Ivanovici, 2009).

Intangible assets are now recognized as drivers of economic value creation. They are distinctively associated with the leadership, human and intellectual capital, workplace culture, innovation, adaptability, brand equity, reputation and the quality of alliances and network, new processes and technologies that make an organization or business successful or otherwise (Youngman, 2003; Carayannis, 2004; Jarboe, 2007). The most important 'producers' of intangible assets are creative and cultural industries. Being at the crossroads between arts, business and technology, cultural and creative sectors are in a strategic position to trigger spill-overs in other industries. Culture and creativity have direct impacts on sectors such as tourism and are integrated at all stages of the value chain of other sectors such as fashion and high-end industries, where their importance as key underlying assets is increasing (European Commission, 2012).

There is recognition that the role of public sector intangibles also needs to make progress in terms of their measurement and, therefore, allows us to assess their contribution to the productivity growth of the economy and well-being. The intangibles make up an increasing share of many companies' total assets. However, there is a lack of a clear understanding of the importance of intangible investment and assets in the public sector, as they are often regarded as expenditures. Their contribution to the innovation and growth of the economy, including historical and cultural resources, and their role as a competitive asset of a country and intergenerational well-being are not recognized fully. The structure of public sector expenditure, budget and efficiency are crucial for long-term growth, particularly during a period

of fiscal consolidation and austerity. Yet, in the present economic situation, there is an inherent danger that such public sector investment in intangibles – which is important for long term smart, inclusive and sustainable growth and for the society – are understood merely as a 'cost and cut' exercise during austerity policy.

Therefore, the purpose of this paper is to elaborate on the importance of creativity as competitive advantage factor and to assess unique resources potentially leading to innovation in two EU member states, Slovenia and Slovakia. The empirical part of the paper is based on the case study analysis, where the focus is set on highlighting the importance of creative and cultural industries producing crucial intangibles for smart growth and innovation in these two countries. The case study and comparison of the research issues in Slovakia and Slovenia is performed by selected indicators divided into three groups of indicators representing (1) human potential, (2) tangible and intangible potential and (3) financial resources in two European countries (Slovakia and Slovenia). The existing data come from the databases of European statistical office, official documents and analysis on the level of EU. The main thesis related to this part of the paper is that current and potential future situation in creative and cultural industries differs between Slovakia and Slovenia.

The paper is organised as follows. Chapter 2 presents the definition of intangible assets and their specifics in the public sector. Chapter 3 presents the sources of intangible assets, where creativity takes crucial part. Chapter 4 describes the overview of creativity measurement techniques and methodologies, whereas chapter 5 builds on a short case study for Slovenia and Slovakia, where the investigation of unique resources of creativity is presented, followed by a short conclusion.

2 Intangible Assets in Public Sector Organisations

Creativity is a process of generating ideas, expressions and forms, either when looking for new ways of tackling existing problems, of re-interpreting existing realities or searching for new opportunities (Council Conclusions on Culture as a Catalyst for Creativity and Innovation, 2009). Without creative thinking and actions, there would be no evolution or development, as creativity represents a key ingredient of innovations (Kloudová, 2010). According to investment theories, creativity requires a confluence of six distinct but interrelated resources: intellectual abilities, knowledge, styles of thinking, personality, motivation, and supportive environment (Sternberg, 2006). All these resources influence decisively also the intangible assets, their character, number, quality and progress. *International Accounting Standard 38* requires an intangible asset to be identifiable. Generally, the intangible assets include: know-how (processes, manufacturing techniques, inventions, designs, drawings, formulae and more which are used in the production of

products or services), patents, trade marks, domain name, goodwill, designs, database right, and copyright. The intangible assets can be divided also by their relations to production and selling stage. It includes the market-related, customer related, content-related, contract-related, and technology-related intangible assets (IASCF, 2012; IPO, 2012).

The intangible assets are also very important in public sector because of its service orientation. Besides, the main goal of public entities is usually not oriented towards achieving profitability, but rather towards achieving value. The intangible assets in the public sector can be represented by data (such as geographical and statistical data), audio-visual materials (such as photographs and videos) and documents produced or held by government agencies as a part of their public service duties, public sector brands and all their variants such as names, logos, and domain names, specific expertise and know-how of public sector entities, software and patents developed by or for public sector entities, some public real estate properties, because of their prestige or unique historical value. There are also specific assets that are exclusively controlled by the government (e. g. radio frequency spectrum) (Resources for managing intangibles, APIE, 2011). Furthermore, Cinca, Molinero and Queiroz (2001) state that public intangible assets include the internal organisation (ability to innovate, know-how, structural organisation, corporate culture, links and contacts); external structural capital (service, image, transparency), human capital (aptitudes of civil servants, permanent training, condition of services) and social and environmental commitment.

It is worth noting that creativity and innovation in public organisations has been increasingly debated also in the theoretical and empirical literature. Some authors have even developed specific labels for this phenomenon, like e.g. public entrepreneurship (Klein et al., 2009) or commercialisation partnership (Micheli et al., 2012). The increase in the interest can be attributed to two factors: (1) increasing pressures to adopt commercial orientations and competitive market responses; and (2) fiscal pressures and austerity measures undertaken that affect public organisations, which consequently need to adopt entrepreneurial practices (see Mazzarol, 2003, Klein et al., 2009). Entrepreneurial behaviour subsequently demands innovation in the creation of new products, services and process in order to accomplish organisational goals (and sometimes even to survive). This tends to be particularly important, if innovations are needed in order to reduce costs, which is currently very common necessity in the public sector (Setnikar Cankar & Petkovšek, 2013). However, this area of research points out that creativity is prerequisite to achieve innovations, yet public organisations often tend to face various structural barriers and inflexible organisational culture. This is the reason why it is especially important to study creative potential of public organisations, because isomorphism can be applied and taken into account on rather limited scale.

The intangible assets are also an important factor of the innovations, which are now recognised as a vital factor in public sector organisations in meeting the challenges of globalisation and demographic changes, while at the same time, sustaining a high level of services to citizens and businesses (Roste, 2004; Koch et al., 2006; Marr, 2009; Donahue, 2005; Bloch et al. 2010).

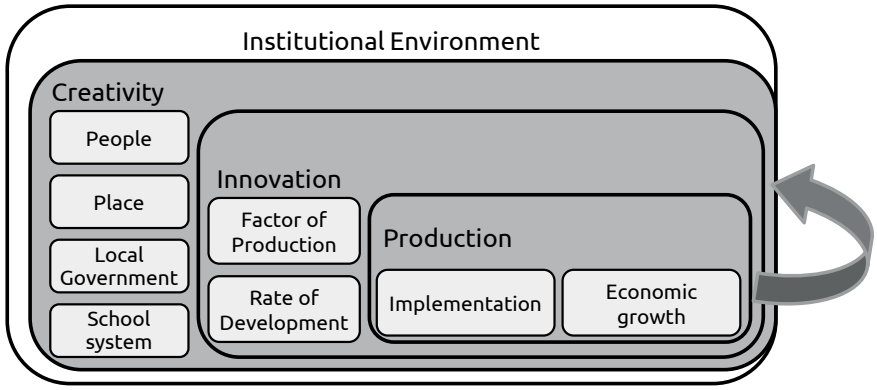
3 Creative and Cultural Industries as Sources of Intangible Assets

As already mentioned, the most important sectors delivering intangible assets are creative and cultural industries. There are several definitions of cultural industries. Cultural industries produce and distribute cultural goods or services "which, at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have" (Convention on the protection and promotion of the diversity of cultural expressions adopted by UNESCO, 2005). The cultural industry, directly or indirectly, represents an important part of the wealth of the society, as this industry includes publishing, music, cinema, audiovisual production and multimedia. Besides, crafts and design are also included in this industry sometimes, and this concept has been widened to incorporate also certain creative industries, such as architecture and different artistic categories (Poussin & Schischlik, 2005). Following, several definitions of creative industries exist as well. We are inclined to definition of Department of Culture, Media and Sport (DCMS) in the United Kingdom, which defines creative industries as "those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property" (DCMS, 1998).

Power (2011) argues that despite differences there is a considerable overlap in considerations, which industries are involved with creative and cultural outputs and those that are concerned with creative inputs and processes. Authors use the terms interchangeably, but also take them as conceptually linked and similar. Indeed, given policy and academic debates in the area it is convenient to use the label 'creative and cultural industries'. This has been confirmed also by the conference of German Ministers of Economic Affairs that defined culture and creative industries in the following way: "Culture and creative industries comprise of all cultural and creative enterprises that are mainly market-oriented and deal with the creation, production, distribution and/or dissemination through the media of cultural/creative goods and services. The most important defining criterion is a market-orientation of the enterprises. This set of enterprises includes all market-oriented companies that are financed through the market, liable to pay turnover taxes or simply all those that want to earn money with art, culture and creativity." (Söndermann et al., 2009). Cultural and creative industries can help to boost economies, stimulate new activities, create new and sustainable jobs, have important spill

over effects on other industries and enhance the attractiveness of territories (Communication from the EC to the EP, 2010). The influence of creativity on the development of national economy is evident from the figure 1.

Figure 1: Creativity and economic growth



Source: Kloudová & Chwaszcz, 2012.

In this context, creative industries are often taken as one of the most promising field of economic activity in developed countries, since they tend to have a great potential to contribute to wealth and job creation (Müller et. al., 2008). Moreover, since they depend on creativity, skill and talent, more developed countries should exhibit comparative and competitive advantage in those fields. This is the reason, why increasing stream of research exists that studies creative industries, and studies tend to be focused either on the contribution of creative industries to the economy, on their role in contributing to the innovations or on the specific innovation activities that are taking place in organisations belonging to the creative sector.

4 Review of the Contemporary Approaches Related to creativity and creative potential measurement

Several approaches have been recognised so far to measure creativity, given the fact that creativity is important source of intangibles. For instance, scaling models, such as the *Balanced Scorecard* (Kaplan & Norton, 1992) or *Business Navigator* (Edvinsson & Malone, 1997) have been utilised with this purpose. This was accustomed to the public sector in the form of *National Intellectual Capital model* by Brooking (1997), Sveiby (1997), and Roos (1997). One of the methodologies suitable for the public intangible assets is also the *Multidimensional Scaling* (MDS) and *Knowledge Balance Sheets* (KBS) implemented at Austrian public universities (Habersam, Piber & Skoog, 2012). Another related approach was developed by Hollanders and van Cruysen (2009), who have utilised the scoreboard approach and suggested potential indicators for measuring creative climate – creative education, self-expression, openness and tolerance, opportunities, creative sector, innovation in R&D

including patents and trademarks. Furthermore, Florida (2002) created a creativity index based on four key components: Creative Class concentration, High Technology Index, Innovation Index, and the Diversity Index. Due to specific European conditions, this methodology was later extended with the 3T's of economic development, that is, Technology, Talent and Tolerance. The structure of creative index 3T illustrates Figure 2.

Figure 2: Creativity index 3T

Talent index	
Human capital index	% of population with the university degree
Creative Class index	concentration of creative class
Technology index	
Innovation index	number of patents per person
High-tech index	% of high-tech industry outputs on the whole outputs
Tolerance index	
Gay index	number of gays on the population of region
Bohemian index	art –oriented population in region
Immigration index	% of immigrants in region

Source: Florida, 2002.

Beside to these approaches, several other distinct methodologies of creativity measurement were developed by various expert groups in the world (e. g. Flemish Index, Hong Kong creativity index etc.). They reflect special features of the territories (Florida et al., 2011). The creative capital theory says that "regional growth comes from the 3Ts of economics development and to spur innovation and economic growth a region must have all three of them" (Florida, 2003).

5 Creative Potential as Competitive Advantage Factor – a Case Study Analysis for Slovakia and Slovenia Based on the Unique Resources Approach

5.1 Methodology description

Creative and cultural industries are based on unique creative and cultural potential which is specific for every region and state and its value is unrepeatable. Development of creative and cultural sector, which is based on internal resources of the territory, can ensure competitive advantage. Several authors (e.g. Ansoff, 1965; Solomon, Marshall & Stuart, 2006; Vaňová, 2006) relate competitive advantage to the concept of uniqueness, whether in terms of use the regional potential suitable for the creation of competitive advantage as well as in terms of defining the competitive advantage. Namely, the approach of competitive advantage based on resources (Barney, 1991, 1997, 2001; Ulrich & Lake, 1991; Powel, 1992; Pfeffer, 1994, 1995; Hall,

1992, 1993; Stewart, 2008 etc.) focuses on the region's resources and the competitive advantage is created through internal resources of the region. The unique resources help to create a unique market position. When considering several theoretical approaches on the exceptional characteristics of the region, several factors of competitive advantage based on resources can be defined. These are human capital, tangible and intangible potential and financial resources of the region (Borseková & Vaňová, 2011). Human potential is an extremely important factor because it plays a key role in the process of identification and exploitation of competitive advantage. Tangible and intangible potential together form the total potential of the region; tangible potential relates to the natural and geographical potential, infrastructure and urban potential, certain elements of socio-demographic potential and cultural potential, whereas the intangible potential relates to the innovation potential, creative potential but also to the elements of cultural potential (e.g. habits and traditions). Financial resources of the territory are a prerequisite for its further development and competitiveness. They are represented by particular type and quality payment transfers, financial management, quantity and value of available capital etc.

The main intent of this chapter is to highlight the importance of creative and cultural industries producing crucial intangibles for smart growth and innovation in two European countries – Slovakia and Slovenia. Based on the literature review, we see the creative and cultural industries as potential source of competitive advantage. Therefore, the analysis of current and potential future situation in creative and cultural industries in those two countries is performed. The selected indicators are utilised to compare current situation in creative and cultural industries. The comparison includes three key factors of competitive advantage, i.e. groups of indicators representing (1) human potential, (2) tangible and intangible potential and (3) financial resources in two European countries (Slovakia and Slovenia). The existing data from European statistical office, official documents and analysis on the level of EU have been utilised in the analysis. In fact, this represents a new approach to measure creative and cultural industries through the crucial factors of competitive advantage based on the unique resources approach, which means that specific level of each of the above stated factors is assessed for both countries.

5.2 Results of the Case Study Analysis

The results of the case study analysis on the unique resources for creative potential are described below. This potential should serve as the specific factor of competitive advantage, and the unique resources should be tangible and intangible potential, human potential and financial resources. Basically, the approach of this case study is based on the identification and presentation of human, tangible and intangible potential as well as financial resources that potentially enable the development and rise of competitive

advantage. Specifically, this approach is first utilized to assess unique resources, particularly in the case of Slovenia, and to compare the findings to another similar country.

5.2.1 Tangible and Intangible Potential

According to definition of tangible and intangible potential, only potential related to the creative and culture industry is evaluated. As the main source of this potential world heritage written in UNESCO is considered. UNESCO World heritage list includes 981 properties forming part of the cultural and natural heritage which the World Heritage Committee considers as having outstanding universal value. These include 759 cultural, 193 natural and 29 mixed properties in 160 countries (UNESCO, 2013). List of UNESCO World Heritage sites in Slovakia and Slovenia is presented in table 1.

Table 1: List of UNESCO World heritage in Slovakia and Slovenia

UNESCO World heritage	Slovakia	Slovenia
Cultural site	- Historic Town of Banská Štiavnica and the Technical Monuments in its Vicinity - Levoča, Spišský Hrad and the Associated Cultural Monuments - Vlkolínec - Bardejov Town Conservation Reserve - Wooden Churches of the Slovak part of the Carpathian Mountain Area (set of 9 churches)	- Prehistoric Pile dwellings around the Alps - Heritage of Mercury. Almadén and Idrija
Natural site	- Caves of Aggtelek Karst and Slovak Karst - Primeval Beech Forests of the Carpathians and the Ancient Beech Forests of Germany	- Škocjan Caves

Source: Adopted from UNESCO (2013).

Table above points out that Slovakia has 5 cultural sites and 2 natural sites; whereas Slovenia has 2 cultural sites and 1 natural site. Culture heritage can be a resource that strengthens the competitive edge of the region and improves the conditions for economic growth. It namely increases tourist attractiveness and subsequently contributes to the development of tourism in the area. The new trends on cultural heritage are composed by its valorisation and its integration, although not just the values of the heritage capital gains are valued, but also social and cultural functions (Farrero, 2012). According to our research results, realised in Slovakia in 2012, the most frequent identified competitive advantage is culture and historical heritage. This competitive advantage occurred in respond of representatives in all Slovak regions on NUTS 3 level. This kind of competitive advantage is based on unique internal resources and has all features and characteristics of real competitive advantage – uniqueness, profitability, compliance of market needs, the existence of imperfect competition, sustainability, and compliance with the external environment. Cultural and historical heritage of the country is based on creativity and is included in cultural and creative industries. This kind

of advantage benefits all target segments in the country, creates a cultural environment in which their inhabitants live, attracts domestic and foreign tourists to visit these interesting places, attracts businesses, particularly in the small and medium-sized enterprises brings business opportunities or employment in the tourism sector (Borseková, 2012). We believe that cultural and historical heritage of Slovakia and Slovenia has the potential to become a competitive advantage of the both countries, especially because it is a potential of high value that is unique and unrepeatable and therefore could be converted to long-term sustainable competitive advantage. This kind of advantage based on creativity, in case of its effective exploitation, can assure increasing of incomes, employment and assure development of territories.

5.2.2 Human Potential

Still more young people are demonstrating their interest in creative industries and prefer creative work instead of work in automatized environment. On the basement of experience from other countries we can assume that employment in creative industries will increase also in the future. As we are speaking about industries with high value added, that are closely related to the latest technologies and processes, it is important for regions and cities to maintain this workforce (Blahovec, 2011). Following, the available data related to human potential in creative and cultural industries is presented. Table 2 presents selected data of tertiary students in the creative fields. The students in humanities have lower share in both countries as is the European average, the same also in arts. In 2009, Slovenia had less journalism and communication studies students as is the European average. However, in Slovakia there were more journalism and communication studies students than is European average. Slovenia had in more architecture and building students than European average in 2009 and the number of Slovak students in the same field was close to the European average. Both countries have the less number of students in humanities and arts as is the European average.

Table 2: Share of tertiary students in the field of education related to culture and creativity in 2009 (as % of total students)

	Humanities	Arts	Journalism and communication	Architecture and building
EU 27	8.7	3.8	1.6	3.9
Slovenia	6.2	1.9	0.5	4.3
Slovakia	4.8	1.7	2.3	3.6

Source: Adopted from Eurostat (2013).

The human potential that is a source of creative and cultural intangibles could be also characterised by the number of persons employed in the cultural sectors. This summary is presented in the table 3.

Table 3: Persons employed in selected cultural sectors (in thousands and as a share of employed persons) in 2009

	Film, video, TV, music, recording and publishing		Programming and broadcasting		Creative arts and entertainment		Libraries, archives, museums and other cultural activities	
	Number	%	Number	%	Number	%	Number	%
Slovakia	-	-	2,600	0.11	7,300	0.31	7,000	0.30
Slovenia	1,000	0.10	3,800	0.40	4,300	0.45	5,000	0.52
EU 27	402,300	0.19	348,600	0.16	1,045,600	0.49	590,300	0.28

Source: Eurostat (2013); own calculations.

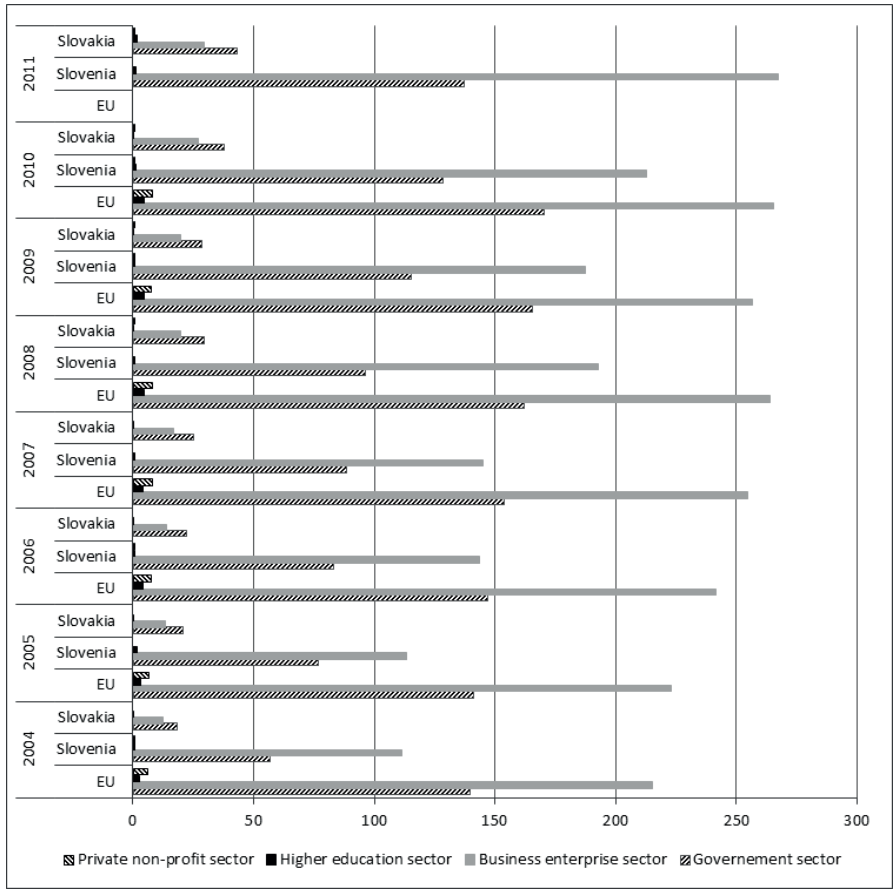
Table 3 presents the number of employed persons in the creative sectors. We count over the number also in percentage as a share all employed persons, which enables cross-national comparisons. In all selected creative areas Slovenia has higher percentage of employees compared to Slovakia. When the percentage of employees in Slovenia is compared with the percentage of European Union average, Slovenia has more employed persons in the area of film, video, TV, music, recording and publishing; creative arts and entertainment. Only the percentage of employed people in libraries, archives, museums and other cultural activities is larger in Slovakia compared to the EU average.

Unfortunately, there is no possibility to make comparison among Slovakia and Slovenia including data within the whole creative industries as these data are missing. There have been no specific data collections or surveys implemented in Slovakia for covering the creative industries. In Slovenia the situation is a little bit better as it was realized in the survey related to human potential employed in areas of publishing, production of films, distribution of films, TV and radio organizations, cinemas, theatres, orchestra and choirs, museums and galleries, cultural homes (ESSnet-Culture final report, p. 222–223). In general, there is a huge gap in the availability of data related with creative industries especially in the 'new' EU member states.

5.2.3 Financial Resources

An important indicator evaluating the available financial resources to creative and cultural industries are research and development (R&D) expenditures. Data for those expenditures is presented in graph 1. This figure illustrates that R&D in Slovak Republic is deeply underfinanced. In comparison with Slovenia, Slovakia supports the research and development by lower volume of finances from all possible sources (government sector, business sector, higher education sector, private non-profit sector), although this spending is well below the EU average also in Slovenia. The greatest difference among countries is in the financial funds granted by the business sector, which indicates the better level of cooperation between the research and educational institutions and businesses in Slovenia compared to Slovakia. Related spending of private non-public sector is negligible in both countries.

Graph 1: R & D expenditure in euro per inhabitant in government, business, higher education and private non-profit sector in Slovenia, Slovakia and EU 27 member states



Source: Adopted from Eurostat (2013).

5.2.4 Unique Resources and Creative Potential in Slovenia and Slovakia

The results of case study in Slovenia and Slovakia show that their prepositions for the developing the creative and culture sectors are different. Slovakia disposes of longer list of cultural and natural heritage. In contrast, Slovenia has more persons employed in the observed cultural and creative sectors; and also the research and development are more financially supported. To build the competitive advantage based on the intangible and tangible resources, as well as on human and financial potential, it is necessary to interconnect all of these potentials. The case study analysis indicates that there is a lack of financial support and the lack of employment in the creative areas in Slovakia. Besides, also the share of students attending 'creativity-based' study programmes is lower compared to Slovenia and the EU average. However, Slovenia does not have so many world heritage sites, but there exists larger

financial support for research and development; and also more persons are employed in the creative and culture industries. The results also indicate that in order to develop creative and culture industries it is not enough to have intangible and tangible culture heritage, but it also needed to be continually supported by financial resources, education; this ultimately results in larger employment in those areas.

It is worth noting that the main ambition of the paper was to include more relevant data related to the crucial competitive advantage factors but because there is a problem with the data availability and the lack of detailed statistics, especially in the Slovakia, we were not able to compare the data in full range. Furthermore, even at the Eurostat level, there are also some problems with the statistics, so the ESSnet project findings suggest that the availability and collection of national data on cultural expenditures should be improved in the future (Bína et al., 2012). The next group of problems is the lack of political support for the development of creative economy. The creative activities should be more supported by the local and national governments (Vaňová, 2010; Petríková, Vaňová & Borseková, 2012).

6 Conclusion

Creative and cultural industries are based on unique creative and cultural potential which is specific for every region and state and its value is unrepeatable. Development of creative and cultural sector, which is based on internal resources of the territory, can ensure competitive advantage. Several authors relate competitive advantage to the concept of uniqueness. The unique resources help to create a unique market position. When considering several theoretical approaches on the exceptional characteristics of the region, several factors of competitive advantage based on resources can be defined. These are human capital, tangible and intangible potential and financial resources of the region. This paper investigates three groups of indicators representing human potential, tangible and intangible potential as well as financial resources in two European countries (Slovakia and Slovenia). The results of case study analysis performed for Slovenia and Slovakia show that the prepositions for the developing of the creative and culture sectors are quite different in those two countries. Attracting and retaining industries with high added value will be crucial in the following years for the both countries and their regions. One of the options how to assure long-term economic growth of the country is orientation on the support of creative industry. Creative industry is based on human creativity and ability to bring new products, which is inexhaustible (Blahovec, 2012), however the awareness on the importance of this industry seems to be very low in both countries (Lloydlová, 2012).

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POVZETEK

USTVARJALNOST IN NEOPREDMETENA SREDSTVA V JAVNEM SEKTORJU: VIRI IN DRUŽBENO-EKONOMSKI POMEN V SLOVENIJI IN NA SLOVAŠKEM

Ključne besede: ustvarjalnost, neopredmetena sredstva, konkurenčnost, Slovenija, Slovaška

Razvoj ustvarjalnega gospodarstva in kulturne industrije temelji na notranjih virih neke družbe oziroma države, pri čemer pa lahko ustvarjalno gospodarstvo in kulturna industrija pomenita tudi konkurenčno prednost neke države. Med dejavnike konkurenčne prednosti države uvrščamo tudi specifične vire, kamor bi lahko uvrstili človeški potencial, opredmetena in neopredmetena sredstva ter finančne resurse. Pri tem velja poudariti, da so neopredmetena sredstva s časom postala bolj pomembna kot opredmetena sredstva, saj so ob zagotavljanju pravih pogojev lahko dejansko neizčrpna.

Med neopredmetena sredstva uvrščamo tudi ustvarjalnost, pri čemer je postalo ustvarjanje pogojev za ustvarjalno delovanje ter etično in trajnostno izkoriščanje ustvarjalnosti eden izmed ključnih pogojev za zagotavljanje gospodarskega napredka, ki temelji na inovativnosti in podjetništvu. Tako dejansko neopredmetena sredstva delujejo kot pospeševalci ustvarjanja ekonomske vrednosti, pri čemer so ti pospeševalci tesno povezani z načinom vodenja, obstoječo organizacijsko kulturo, razpoložljivim človeškim in intelektualnim kapitalom, inovativnostjo, s prilagodljivostjo, z obstojem omrežij, razvojem novih procesov in tehnologij itd.

Neopredmetena sredstva »nastajajo« kot stičišče umetnosti, poslovnega sektorja, raziskovalne dejavnosti ter industrije predvsem v okviru ustvarjalnega gospodarstva in kulture. Njihov strateški »mejni« položaj omogoča prelivanje izkušenj in učinkov med različnimi panogami. V zvezi s tem se vsebina članka osredotoča na prikaz pomena ustvarjalnosti kot dejavnika konkurenčne prednosti. Pri tem so v članku izpostavljeni tudi t. i. edinstveni viri, ki lahko vodijo do inovacij.

Glavni namen članka je podrobneje predstaviti pomen ustvarjalnosti kot dejavnika konkurenčne prednosti, hkrati pa oceniti edinstvene vire (človeški potencial, opredmetena in neopredmetena sredstva, finančne resurse), ki lahko pomenijo osnovo za doseganje inovacij v dveh državah članicah EU, to je v Sloveniji in na Slovaškem. Prispevek temelji na analizi študije primera, pri čemer se osredotoča na primerjavo sedanjega in prihodnjega položaja v ustvarjalnem gospodarstvu in v kulturni industriji v Sloveniji in na Slovaškem.

Rezultati analize študije kažejo, da so osnove za razvoj ustvarjalnega gospodarstva in kulturne industrije precej različne v teh dveh državah, hkrati

pa tudi, da je sedanji položaj teh dveh panog boljši v Sloveniji glede na Slovaško. Tudi v prihodnosti je pričakovati, da se stanje naj ne bi spremenilo. Namreč, rezultati analize kažejo, da je v Sloveniji več ljudi zaposlenih v ustvarjalnem gospodarstvu in v kulturi v primerjavi s Slovaško, hkrati pa Slovenija namenja tudi več finančnih sredstev na prebivalca za raziskave in razvoj, kar je dejansko eden izmed temeljev za razvoj ustvarjalnega gospodarstva in zagotavljanje t. i. pametne rasti.

1.02 Pregledni znanstveni članek

Neposredna uporaba splošno veljavnih načel mednarodnega prava v pravnem redu Republike Slovenije

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IZVLEČEK

Inkorporirana neposredno izvršljiva splošno veljavna načela mednarodnega prava se v pravnem redu Republike Slovenije uporabljajo neposredno. Obstaja problem odsotnosti sistemske ureditve evidence uveljavljenih tovrstnih pravnih norm in zato težavnost njihovega prepoznavanja. Zadrega je večja, ker tudi ni na voljo relevantne strokovno prevedene judikature mednarodenih tribunalov, z izjemo sodb Sodišča Evropske unije. Čeprav splošno veljavna načela mednarodnega prava veljajo v slovenskem pravnem redu *per se*, ni popolnoma jasno, kako naj se odzovejo upravni organi v situacijah, ko so pravice in obveznosti pravnih subjektov hkrati urejene z zakonom in uveljavljenim običajnim mednarodnim pravom, vendar so nasprotujoče.

Ključne besede: splošno veljavna načela mednarodnega prava, običajna pravila občega mednarodnega prava, Ustava RS

JEL: K33

1 Uvod

Ustavna ureditev Republike Slovenije (v nadaljevanju RS) opredeljuje razmerje med mednarodnim pravom in notranjim pravom v 8. členu Ustave RS (v nadaljevanju Ustave), ki določa: »Zakoni in drugi predpisi morajo biti v skladu s splošno veljavnimi načeli mednarodnega prava in z mednarodnimi pogodbami, ki obvezujejo Slovenijo. Ratificirane in objavljene mednarodne pogodbe se uporabljajo neposredno.« Mednarodno pravo torej vstopa v slovenski pravni red v obliki mednarodnih pogodb ter v obliki splošno veljavnih načel mednarodnega prava. Omeniti velja, da v notranji pravni red Slovenije vstopa kot tuje pravo sui generis tudi evropsko pravo, vendar ne v okviru 8. člena Ustave, ampak po določbi tretjega odstavka 3/a. člena Ustave, česar pa v pričujočem prispevku ne bomo raziskovali.

Obstajajo različna mnenja pravnih strokovnjakov, kaj bi morali razumeti pod besedno zvezo »splošna veljavna načela mednarodnega prava«, katero

v strokovni literaturi zasledimo tudi kot izraz »običajna pravila občega mednarodnega prava« (angl. *customary rules of general international law*).[1] Ker ni cilj pričujočega prispevka poglobljena obravnava tega vprašanja, služi kot pravni okvir vsebinskega razumevanja tega termina odločba Ustavnega sodišča (v nadaljevanju US) RS, ki se je opredelilo do tega vprašanja in zapisalo, da ta pojem zajema predvsem mednarodne običaje kot dokaz obče prakse, sprejete kot pravo in splošna pravna načela, ki jih priznavajo civilizirani narodi in sta kot vira mednarodnega prava našteta v Statutu Meddržavnega sodišča v točkah b) in c) prvega odstavka 38. člena (US, U-I-266/04-105). Običajno pravo tvori pomemben del mednarodnega prava, vendar zaradi svoje nezapisane oblike zahteva dokazovanje narave in motivov dejanja (Zemanek & Hartley, 1998, str. 149). Fitzmaurice navaja, da lahko sicer pride tudi do njihove kodifikacije v mednarodnih pogodbah oz. zapisov v različnih mednarodnopravnih dokumentih (Sancin, 2009, str. 51). Sestoji se iz objektivnega in subjektivnega elementa. Dokaz obče prakse je objektivni element, subjektivni pa *opinio juris sive necessitati*, tj. pravna zavest, ki pomeni, da države ravnajo na določeni način zato, ker se zavedajo, da je tako ravnanje za njih obvezno po pravilih mednarodnega prava. Oba pogoja morata biti izpolnjena kumulativno, navaja Schwarzenberger (Thirlway, 1972, str. 46). Splošna pravna načela, ki jih priznavajo civilizirani narodi, pa se lahko razumejo kot največji skupni imenovalec temeljnih načel, zgodovinsko izoblikovanih v okviru notranjih pravnih ureditev (Pogačnik, 1999b, str. 470), npr. načelo zakonitosti, načelo prepovedi retroaktivnosti, načelo *res iudicata*, litispendenca, načelo nedopustnosti neupravičene obogatitve, načelo *lex specialis derogat legi generalis* (Škrk, 2007, str. 282-283), načelo *actor sequitur forum rei* (US U-I-245/00). Türk temu dodaja še načeli, da nihče ne more prenesti na drugega več pravic, kot jih ima sam, in načelo *bona fides* (2007, str. 59). V delih teoretikov Bartoša, Guggenheima, Andrassya, Shawa in Pelleta pa se najdejo še naslednja: načelo prepovedi zlorabe prava; načelo prepovedi neupravičenega obogatenja; načelo prepovedi okoriščenja iz lastne napake; načelo zastaranja; načelo obveznosti povrnitve škode, tako neposredne kot tudi posredne; načelo *nemo plus iuris ad alium transfere potest quam ipse habet*; načelo *estoppel*; načelo pravice do izločitve sodnika, načelo enakosti strank, pravila o dokazih, načelo *audiatur et altera pars*, načelo *res iudicata*, načelo *nemo iudex in sua causa* (Vukas, 1992, str. 259).

V besedilu članka se večkrat navajata izraza »mednarodno običajno pravo« ali »običajna pravila občega mednarodnega prava«. V bistvu gre le za skrajšani zapis besedne zveze »mednarodni običaji kot dokaz obče prakse sprejete kot pravo« iz 38. člena Statuta Meddržavnega sodišča. Pri tem je v tem članku to besedno zvezo razumeti v kontekstu izraza »splošno veljavna načela mednarodnega prava« iz 8. člena Ustave, katere sestavni del je tudi običajno mednarodno pravo . In obratno. Ko se v članku navaja izraz splošna veljavna načela mednarodnega prava iz 8. člena Ustave, se s tem misli tako na mednarodno običajno pravo, kakor tudi na splošna pravna načela, ki jih

1 Več o tem Škrk, 2012, str. 1104–1106.

priznavajo civilizirani narodi, določeni v alineji b) in c) prvega odstavka 38. člena Statuta Meddržavnega sodišča.

Inkorporirano mednarodno pravo se uporablja v slovenskem notranjem pravu neposredno ali pa posredno s predhodno transformacijo ali inkorporacijo v nacionalno zakonodajo. Neposredna uporabnost (angl. *direct applicabillity*) splošno veljavnih načel mednarodnega prava bo v nadaljevanju članka predmet proučevanja, zato se do posredne uporabe mednarodnih norm ne bomo podrobneje opredeljevali.

Bralca naj ne zavede, da v prispevku večkrat predstavljamo konkretne navedbe, ki zadevajo mednarodne pogodbe (angl. *treaty*) in bi zato mogoče naslov tega članka ali posameznih poglavij bil neustrezen. Razlog temu je, da je doktrina bogatejša pri proučevanju problematike neposredne uporabnosti in neposredne izvršljivosti (angl. *self-executing*) norm mednarodnega prava na področju mednarodnih pogodb. Ker v mednarodnem pravu ni hierarhije mednarodnih pravnih virov[2] in imajo mednarodne pogodbe kot vir mednarodnega prava teoretično enako pomembnost kot običajna pravila občega mednarodnega prava in obča pravna načela, bi lahko sklepali, da določene ugotovitve na področju mednarodnih pogodb *mutatis mutandis* lahko veljajo *idem quod* tudi za splošno veljavna načela mednarodnega prava.

2 Opredelitev problema

Norme mednarodnega prava učinkujejo v notranjem pravu samo, kadar je država to določila (Türk, 2007, str. 71). Obstajajo sicer izjeme, imenovane *ius cogens*. Pri tovrstnih imperativnih mednarodnih pravilih ni treba, da bi država sploh sodelovala pri njihovem nastajanju, ampak postane zavezan subjekt tem normam mednarodniega prava v trenutku, ko postane mednarodnopravni subjekt (Platiše, 2005, str. 185). Države se sicer precej razlikujejo glede na postopke, po katerih na svojem ozemlju dajejo veljavo mednarodnem pravu. Večina med njimi sprejema doktrino, da je mednarodno pravo del notranjega pravnega reda. Kljub različnim postopkom v notranjih pravnih redih držav, mednarodno pravo s svojimi zahtevami vendarle učinkuje na njihovem območju (Jennings & Watts, 1997, str. 53).

Glede učinkovanja mednarodnega prava v pravnem redu RS v segmentu splošno veljavnih načel mednarodnega prava, jim slovenska Ustava ne določa izrecno neposredne uporabnosti, medtem ko to naredi v primeru ratificiranih in objavljenih mednarodnih pogodb (Pogačnik, 1999b, str. 472). Ob gramatikalnem razumevanju 8. člena Ustave se zato neukemu bralcu nakazuje dvom, ali se splošno veljavna načela mednarodnega prava sploh smejo uporabljati neposredno v pravnem redu RS. Glede tega vprašanja že obstaja judikatura, ki utemeljuje njihovo neposredno uporabnost. Obstajajo pa še odprta vprašanja predvsem glede prepoznave oz. ugotovitve obstoja tovrstnih norm in njih neposredne uporabe v odločbah upravnih organov.

2 Več o tem Škrk, 1985, str. 149–150, in Villinger, 1997, str. 58.

3 Pravna akulturacija mednarodnega prava v pravnem redu Republike Slovenije

Prevzemanje mednarodnega prava v slovenski pravni red poteka na tri načine. Prvi način je zakonska *ad hoc* inkorporacija (angl. *statutory ad hoc incorporation*). Gre v bistvu za transformacijo mednarodnega prava z aktom zakonodajalca in s tem za posredno uporabo mednarodnega prava, pri tem pa norma mednarodnega prava tudi izgubi naravo mednarodne norme in postane notranjepravna norma. Transformacija mednarodnopravnih norm je npr. značilna za pravna pravila iz področja kazenskega prava zaradi kazenskopravnega načela *nullum crimen nulla poena sine lege praevia*.

Drugi način prevzemanja mednarodnega prava je avtomatična *ad hoc* inkorporacija (angl. *automatic ad hoc incorporation*). Po tem pristopu se mednarodna pravila začnejo uporabljati v notranjem pravnem sistemu samo, če zakonodajni organ sprejme poseben izvedbeni zakon, in sicer brez reformulacije teh pravil (Hofmann, 2008, str. 93). V slovenski pravni ureditvi to konkretno pomeni prevzem mednarodnih pogodb z zakonom o ratifikaciji ali uredbo vlade o ratifikaciji mednarodne pogodbe. S tem aktom mednarodna norma ne izgubi svoje pravne narave in ostane norma mednarodnega prava, saj se ne posega v njeno vsebino.

Tretji način pravne akulturacije mednarodnega prava, ki je relevanten za potrebe pričujočega prispevka, je avtomatska adopcija (angl. *automatic standing incorporation*), kar velja za vstop splošno veljavnih načel mednarodnega prava v pravni red RS, ki so kot takšna sama po sebi, *per se*, vir notranjega prava. Ustava v 8. členu določa, da morajo biti zakoni in drugi predpisi v slovenskem pravnem redu v skladu splošno veljavnimi načeli mednarodnega prava. S tem se deklarira presumpcija njihove inkorporiranosti v slovenski pravni red brez notranje pravnega ratifikacijskega akta, kot to velja za mednarodne pogodbe (Weingerl, 2002, str. 355). To pomeni, da morajo državni organi in posamezniki *ipso facto* in brez kakršnega koli ravnanja spoštovati v mednarodni skupnosti uveljavljena pravila mednarodnega običajnega prava, navaja Cassese (Škrk, 2007, str. 279). Tovrstna mednarodna norma ne izgubi svoje pravne narave in ostane norma mednarodnega prava, saj se ne posega v njeno vsebino.

4 Prepoznavanje vsebine splošno veljavnih načel mednarodnega prava

Pred uporabo uveljavljenih pravil mednarodnega običajnega prava jih je treba prej prepoznati. Edini preverljivi način meritorno ugotovljenega obstoja in vsebine običajnopravnega pravila pred uporabo, navaja Kreća, je primerna razsodba mednarodnega sodišča. Teoretično v takem primeru ne bi šlo za transformacijo običajnopravnega pravila, ampak le za ugotovitev sodišča o obstoju običajnega pravila (Kreća, 2006, str. 23). Graselli navaja, da poleg sodišč tudi upravni organi v Sloveniji sami ugotavljajo vsebino mednarodnega

prava, ki ga neposredno uporabljajo. Pri tem konkretno za sodišča navaja, da upoštevajo vire iz 38. člena [3] Statuta Meddržavnega sodišča vključno s sodnimi odločbami in stališči priznanih mednarodnopravnih strokovnjakov (Šturm, 2002, str. 143).

Poudariti velja, da sodišča in pravni strokovnjaki ne ustvarjajo mednarodnih norm, ampak le ugotavljajo njihov obstoj in jih tolmačijo. Judikatura in doktrina sta torej le pomožna pravna vira, ki pomagata izkristalizirati smisel in pomen treh glavnih formalnih pravnih virov, tj. mednarodnih pogodb, mednarodnih običajev in občih pravnih načel.

Ob pregledu slovenskih spletnih strani ponudnikov elektronskih pravnih vsebin Pravno informacijski sistem RS, Register predpisov Slovenije, TAX-FIN-LEX in IUS INFO lahko opazimo, da na njih ni sistematično zbranih vsebin vseh veljavnih norm s področja mednarodnega prava, ampak so le tiste, ki so bile z aktom ratifikacije objavljane v uradnem listu. Zadovoljivo sistematično je urejeno področje mednarodnih pogodb, ne pa področje splošno veljavnih načel mednarodnega prava, pa čeprav izjemoma obstajajo tudi v zapisani obliki. Z uveljavljenimi normami občega mednarodnega prava se je mogoče seznaniti le toliko, kolikor se te vsebine najdejo v odločitvah US, ki so objavljene v uradnem listu. Vendar v uradnem listu na primer ni mogoče najti Dunajske konvencije o pogodbenem pravu med državami in mednarodnimi organizacijami in mednarodnimi organizacijami med seboj iz leta 1986, čeprav je znano, da se v njej nahajajo kodificirane norme običajnega občega mednarodnega prava, ki veljajo v pravnem redu RS *per se*. Enako velja za Splošno deklaracijo človekovih pravic iz leta 1948.

Ker gre pri splošno veljavnih načelih mednarodnega prava predvsem za nepisane pravne vire, jih bo uporabnik prava našel zapisane in tolmačene v primernih sodbah mednarodnih tribunalov. [4] Pomaga si lahko tudi z judikaturo US, v katerih je dotedaj US že zavrnilo ali prepoznalo nepisane norme mednarodnega običajnega prava in jih komentiralo. [5] V pomoč je lahko tudi strokovna literatura s področja običajnega mednarodnega prava, v kateri priznani mednarodnopravni strokovnjaki obravnavajo konkretne tovrstne zadeve. V angleškem jeziku so na določenih spletnih straneh javno dostopne tudi nekatere pravne vsebine, ki so lahko v pomoč pri prepoznavanju občega običajnega mednarodnega prava. Npr.: Juridical Yearbook na spletni strani http://www.un.org/law/UNJuridicalYearbook/index.htm; League of Nations

3 Statut Meddržavnega sodišča, 38. člen: Sodišče, katerega naloga je odločati v skladu z mednarodnim pravom v sporih, ki se mu predložijo, naj uporablja: a) meddržavne dogovore, bodisi splošne bodisi posebne, s katerimi so postavljena pravila, ki jih države v sporu izrečno pripoznavajo; b) mednarodni običaj kot dokaz obče prakse, ki je sprejeta kot pravo; c) obča pravna načela, ki jih pripoznavajo civilizirani narodi; d) sodne odločbe, s pridržkom določbe 59. člena, in nauk najbolj kvalificiranih pravnih strokovnjakov različnih narodov, kot pomožno sredstvo za ugotavljanje pravnih pravil. Ta določba ne omejuje pravice sodišča, da odloča o zadevi ex aequo et bono, če se pravdne stranke o tem sporazumejo.

4 Npr. judikati Permanent Court of International Justice, International Court of Justice, International Criminal Court, Permanent Court of Arbitration, Dispute Settlement Body, International Tribunal for the Law of the Sea.

5 Npr. v judikatih US U-I-90/91, US Up-97/02, US Up-114/05.

Treaty Series na spletni stravi http://www.worldlii.org/int/other/LNTSer/; United Nations Treaty Series na spletni strani http://treaties.un.org/; Repertoire of the practice of the United Nations with regard to questions of international law na spletni strani http://www.un.org/en/sc/repertoire/; Reports of International Arbitral Awards na spletni strani http://untreaty.un.org/cod/riaa/index.html.

Obstaja pa dodatna ovira. V Sloveniji ni poskrbljeno za natančne pravne prevode relevantnih odločitev mednarodnih sodnih in arbitražnih tribunalov, z izjemo sodb Sodišča Evropske unije[6], niti ni poskrbljeno, da bi bile tovrstne odločitve zbrane na enem mestu. V Združenih državah Amerike je *American Law Institute* izdal zbirko evidentiranih načel z imenom *The Restatement of the Law*, s pomočjo katere se uporabniki prava lahko seznanijo z uveljavljenimi običajnimi pravili občega mednarodnega prava. Takšna zbirka, posebno še če bi bila natančno prevedena, bi lahko bila primeren pripomoček sodnikom in pravnikom v Sloveniji.

Poudariti je, da je prepoznana vsebina običajne norme mednarodnega prava le prvi korak k njeni uporabi. Da bi lahko učinkovala med pravnimi subjekti, mora biti tudi ne le neposredno uporabna (angl. *direct applicability*), ampak tudi neposredno izvršljiva (angl. *self-executing*).

5 Razumevanje besedne zveze »neposredna uporaba norm mednarodnega prava«

Obstaja različno razumevanje pojmov, ki so povezani s predmetom raziskovanja. V tuji literaturi je zaslediti, da se besedna zveza notranjepravna uporabnost (angl. *domestic applicability*) enači z zvezo »notranjepravna neposredna uporabnost« (angl. *domestic direct applicability*), uporablja pa se tudi za označevanja neposredno izvršljivih (angl. *self-executing*) norm (Iwasawa, 1998, str. 46; Conforti & Francioni, 1997, str. 237). Podobno razlikovanja navaja Schermers, kjer se izraz neposredno uporabne norme (angl. *directly applicable*) uporablja kot sinonim za neposredno učinkovite norme (angl. *directly effective*) in za neposredno izvršljive norme (angl. *self-excuting*) (Müllerson, 2000, str. 195).

Kako torej naj razumemo slovensko ustavno določbo v 8. členu, da je mednarodna norma neposredno uporabna (angl. *direct applicability*), glede na raznolikost uporabljanja te besedne zveze v doktrini?

US RS je v judikatu iz leta 1997 zapisalo, da so neposredno uporabne pravne norme tiste, ki urejajo pravice in obveznosti subjektov notranjega prava in jih lahko npr. sodišče neposredno uporabi (US Rm-1/97). Temu je sledilo tudi VS RS, ki je v judikatu iz leta 1998 zapisalo, da neposredna uporaba mednarodnih pogodb pomeni, »da se lahko sodišča ob uporabi njihovih določb neposredno

6 Vlade RS je 22. marca 2007 sprejela sklep št. 02500-1/2007/9 o vzpostavitvi projekta »Prevajanje in redakcija sodb Sodišča Evropskih skupnosti in Sodišča prve stopnje«. Vlada je za njegovo izvedbo zadolžila Službo Vlade Republike Slovenije za zakonodajo.

sklicujejo nanje kot na določila domačih zakonov in, kar je še pomembnejše, uporabijo jih, ne da bi bile pretočene v domačo zakonodajo. To pomeni, da so del notranjega prava, pri čemer imajo celo prednost pred zakoni« (VS II Ips 55/98).

Izraz neposredna uporabnost norm je v slovenskih judikatih torej razumljen kot oznaka za pravila, ki so zaradi svoje natančnosti opredeljevanja pravic in obveznosti subjektov neposredno izvršljiva (angl. *self-executing*). Pri tem se seveda takoj postavlja vprašanje, ali tista splošno veljavna načela mednarodnega prava, ki niso formulirana dovolj natančno, torej niso neposredno uporabna?

Pogačnik pojasnjuje, da je besedno zvezo iz 8. člena Ustave »uporabljajo neposredno« razumeti predvsem kot adopcijo mednarodne pogodbe v pravni red RS v smislu vzpostavitve njihove notranjepravne veljavnosti, ne pa avtomatično tudi v pomenu njihove neposredne izvršljivosti (1999b, str. 481). Torej, pomensko natančneje definira pomen izraza neposredna uporabnost in neposredna izvršljivost. Pogačnik še misli, da glede na samo naravo običajnih norm občega mednarodnega prava ob obstoju modela ustavne adopcije njegove vsebine načelno ni ovir za neposredno izvršljivost, če je le zadevna norma vsebinsko dovolj specificirana (Grad et al., 2002, str. 322). Temu se pridružuje tudi Ilešič, ki pravi, da vsaka neposredno uporabna določba nima tudi neposrednega učinka in nadaljuje, da ima nasprotno lahko neposredni učinek samo določba, ki je neposredno uporabna (1997, str. 1326). Tudi sicer, obstaja spoznanje, da so nekatere norme običajnega mednarodnega prava neposredno uporabne in nekatere ne, ter da so nekatere neposredno uporabne norme hkrati tudi neposredno izvršljive in nekatere ne (Sik et al., 1994, str. 159).

Izhajajoč iz judikatov in pojasnil doktrine je lahko zaključiti, da je besedno zvezo »neposredna uporabnost« razumeti širše, kot nadpomenko (*hipernim*), ki zajema tako neposredno izvršljive mednarodne norme, kot tudi tiste, ki niso dovolj natančne, da bi lahko bile neposredno izvršljive in služijo kot pravni vir oblastem pri oblikovanju pravnih aktov.

6 Razumevanje izraza »neposredna izvršljivost norm mednarodnega prava«

Izraz »neposredna izvršljivost« (angl. *self-executing*) izvira iz ameriškega prava, uporablja pa se za opis pogodbenih določb, ki se neposredno uporabljajo pred sodiščem. Neposredna izvršljivost se v enakem pomenu razume tudi v drugih pravnih sistemih, navaja Leary-eva in nadaljuje, da je kljub temu v različnih pravnih sistemih dejanski pomen neposredno izvršljivih norm zelo različen (1982, str. 70).

V literaturi je zaslediti, da se izraz »neposredna uporabnost« (angl. *direct applicability*) predstavlja v angleškem jeziku tudi kot »neposredna izvršljivost«

(angl. *self executing*), v nemškem jeziku v »unmittelbare Anwendbarkeit«, v francoskem jeziku pa » direct effect« ali tudi »applicabilité directe« (Verhellen, 1996, str. 168). Alen in Pas menita, da ni splošno sprejete opredelitve v pravu ali sodni praksi glede besedne zveze »neposredna izvršljivost«. Poleg tega je njen pomen odvisen od ustavnega prava vsakega pravnega sistema (Ibidem, str. 165). Tudi Rudolf misli, da ne obstaja uveljavljena pravna definicija »neposredno izvršljive« norme, ker je ta izraz iznajdba pravnikov, profesorjev. Gre za materijo notranjega prava posamezne države, katere norme so neposredno izvršljive (Tunkin & Rüdiger, 1988, str. 47–48), zato se dogaja, da je posamezno pravilo, ki temelji na mednarodni pogodbi ali izvira iz mednarodnega običaja, »neposredno izvršljivo« v notranjem pravu neke države, v drugi državi pa nima tega svojstva. Kot primer navaja Rudolf 6. člen Evropske konvencije o človekovih pravicah, ki je v Nemčiji »neposredno izvršljiva« norma, v Avstriji ne in je potrebna normodajna intervencija države, da se to normo lahko uporabi (Ibidem, str. 42). Sodišča različnih držav uporabljajo različne kriterije (ali enake kriterije na različen način) pri ugotavljanju, katero določilo norme je »neposredno izvršljivo«, razmišlja Learyeva podobno in nadaljuje, da je rezultat tega, da se nekatere določila norme uporabljajo neposredno pred sodišči neke države, pred sodišči druge države pa se ne (1982, str. 71). Torej, gre za odvisnost od pravnega sistema posamične države, kako vidi posamezno normo, pravi Tunkin (Tunkin & Rüdiger, 1988, str. 46–47). Mazzeschi pa ima pomisleke, da je problem »neposredne izvršljivosti« le materija notranjega prava, ampak pravi, da gre za mešano problematiko, ki zadeva mednarodno pravo in ustavno pravo. Mednarodno pravo vsebuje nekaj splošnih spoznanj o obstoju »neposredno izvršljivih« pravil. Po drugi strani pa, ker to vprašanje zadeva tudi pristojne organe države oz. proceduro uvajanja teh mednarodnih norm, pa je to tudi materija ustavnega prava države (Randelzhofer & Tomuschat, 1999, str. 207).

Kakšne lastnosti torej mora imeti mednarodna norma, da je lahko neposredno izvršljiva?

Müllerson navaja, da so neposredno izvršljive norme mednarodnega prava tista pravna pravila, ki imajo značilnost, da jih načeloma subjekti posamezne države lahko uporabljajo pred domačimi sodišči v državah, kjer je mednarodno pravo (bodisi iz mednarodnih pogodb, bodisi iz običajnih mednarodnih pravil ali oboje) neposredno uporabno (2000, str. 194–195). Norme, ki so preveč ohlapne in neprecizne, seveda ne morejo biti neposredno izvršljive (Sik et al., 1994, str. 159). Med te pa ne sodijo le tiste, ki urejajo pravice posameznikov, meni Ergec, ampak tudi tiste, za katere sodišče oceni, da imajo legalno moč upravnega akta (Verhellen, 1996, str. 172). Primer tega so take npr. določbe mednarodne pogodbe, ki urejajo ekstradicijo, navajata Jacobs in Roberts (Ibidem).

V doktrini je zaslediti mnenje, da naj bi pri ugotavljanju obstoja neposredno izvršljive norme v mednarodni pogodbi razčistili dve vprašanji. Mogoče je razlikovati dva kriterija, pravita Andre in Wouter, in sicer objektivni in subjektivni

kriterij. Oba morata biti podana skupaj, torej kumulativno. Subjektivni kriterij je treba iskati v namenu in zasledovanih ciljih skleniteljev mednarodne pogodbe. Če pogodbene stranke izrazita strinjanje in deklarirata, da so pogodbeno zapisane obligacije neposredno izvršljive, potem je te norme v izhodišču šteti kot možno takšne. Vendar pa večinoma pogodbene stranke ne izrazita tovrstne volje tako jasno, posebno še, če gre za multilateralne mednarodne pogodbe. Drugi, objektivni kriterij pa pomeni, da mora biti besedilo določil mednarodne pogodbe dovolj jasno in natančno, tako da je lahko neposredno uporaben na sodišču (Alan & Pas, 1996, str. 170–171). Conforti objektivnemu testu dodaja kriterij, da v tekstu pogodbe ni zaslediti predhodne zahteve, da se norma zakonsko konkretizira (Conforti & Francioni, 1997, str. 85). Alan in Pas menita, da je objektivni kriterij odločilen (1996, str. 172).

Podobno glede neposredne izvršljivosti navaja tudi Iwasawa. Meni, da je potrebno predhodno ugotoviti: prvič, ali sta/so pogodbene stranke mednarodne pogodbe same izključile neposredno uporabnost določb pogodbe v celoti. Če je v pogodbi najti takšno določilo, je neposredno uporabnost norm treba zavrniti. Torej, neposredna uporabnost se povezuje s pogodbeno voljo strank. Drugič, če neposredna uporabnost pogodbe ni izključena, se šele pristopi k ugotavljanju posameznih norm, ali so le-te dovolj precizne. Pri običajnem mednarodnem pravu pride torej v poštev pri ugotavljanju neposredne izvršljivosti le-ta, drugi korak (1998, str. 153–154). Podobno razmišlja Perenič, ki pravi, da še preden pride do uporabe mednarodnega prava v notranjem pravu RS, mora pristojni organ razjasniti, ali mora v konkretnem razmerju določen mednarodni akt sploh uporabiti. Za odgovor na to vprašanje mora najprej ugotoviti, ali sploh gre za pravno zavezujoč akt. Ko to ni več sporno, se mora ugotoviti, koga zavezuje. Marsikateri mednarodni pravni akti urejajo samo razmerja med državami pogodbenicami, vse več pa je takih, ki veljajo tudi za posameznike, kot je na primer Evropska konvencija o človekovih pravicah. Pri tem je pomembna tudi ugotovitev, ali je mednarodni pravni akt povsem splošen ali pa je dovolj konkreten, da ga je mogoče uporabiti neposredno, brez dodatnih predpisov v notranjem pravu. Kot tretje vprašanje, ki si ga morajo pristojni organi razčistiti pri uporabi mednarodnega akta v notranjem pravu pa je, ali je ta pravilno umeščen (inkorporiran) v notranji pravni sistem (1996, str. 9).

Navedeni pogoji doktrine v mednarodnem pravu, ki zadevajo »neposredno izvršljivost norm« (angl. *self executing*) mednarodnega prava, so podobni in primerljivi z obstoječo judikaturo Evropske unije, ki sicer direktno ne zadevajo mednarodnega prava, ampak področje evropskega prava, kot prava *sui generis*. Gre za vprašanja neposrednega učinkovanja (angl. *direct effect*) evropskega prava. Evropska unija uveljavlja nov pravni red mednarodnega prava, v dobrobit katerega so države članice prenesle del svojih suverenih pravic, in ta pravni red ne potrebuje nobene zakonodajne intervencije (Škrk, 2005, str. 7), je leta 1963 razsodilo Sodišče Evropske unije v primeru »*Van Gend & Loos*« (SEU Case 26/62), in s tem utemeljilo doktrino neposrednega učinka. To pa

pomeni, če neka pravna odredba neposredno učinkuje, imajo posamezniki pravico, ki jo morajo nacionalna sodišča ščititi (Hartley, 1998, str. 177). Winter navaja, da se s pojmom »neposredni učinek« norme označuje možnost, da se posameznik neposredno sklicujejo na takšno normo v postopkih, ki tečejo znotraj njihovega pravnega reda (Ilešič, 1997, str. 1325). Sodišče je oblikovalo štiri pogoje, da se po določbi prava Evropske unije lahko prizna neposredni učinek, navaja Hartley. Določba norme mora biti: 1) jasna, 2) nepogojna, 3) v obliki prepovedi in 4) ne sme obstajati rezervacija, ki bi uporabo določbe v pravnem redu države članice pogojevala s pozitivno zakonodajo države članice (Sancin, 2009, str. 87).

Proprius signum norm mednarodnega prava, ki jih lahko označimo kot neposredno izvršljive (angl. *self-executing*), so ob lastnem razumevanju uporabnika prava le-teh, njihova: jasnost, brezpogojnost, natančnost, decidiranost, popolnost, in z njimi se urejajo pravice in obveznosti fizičnih in pravnih oseb.

7 Neposredna uporaba splošno veljavnih načel mednarodnega prava

VS RS se je leta 1998 soočilo z revizijsko trditvijo, da Ustava ne dovoljuje neposredne uporabe mednarodnega običajnega prava, vendar je razsodilo, da temu stališču ni mogoče slediti. Res je zapisano v drugem stavku 8. člena Ustave, da se ratificirane in objavljene mednarodne pogodbe uporabljajo neposredno, kar pomeni, da se lahko sodišča ob uporabi njihovih določb neposredno sklicujejo nanje kot na določila domačih zakonov, ne da bi bile prevzete v domačo zakonodajo. Ne pomeni pa tega, da sodnik ne sme uporabiti načel mednarodnega prava. Ko Ustava terja skladnost zakonov s splošno veljavnimi načeli mednarodnega prava (drugi odstavek 153. člena Ustave) in daje s tem tudi prednost načelom pred zakoni, je očitno, da se ob sojenju uporabljajo ta načela (VS, II Ips 55/98). Dodatno je to razvidno iz prvega odstavka 3. člena Zakona o sodiščih[7], ki določa, da je sodnik pri opravljanju sodniške funkcije vezan tudi na splošna načela mednarodnega prava in na ratificirane in objavljene mednarodne pogodbe.

Čeprav splošno veljavna načela mednarodnega prava veljajo v slovenskem pravnem redu per se, ni popolnoma jasno, kako naj se odzovejo upravni organi v situacijah, ko so pravice in obveznosti pravnih subjektov hkrati urejene z zakonom in uveljavljenim mednarodnim pravom, vendar so nasprotujoče.[8]

7 Zakon o sodiščih (Ur. list RS, št. 19/94 in nasl.), 3. člen: »Sodnik je pri opravljanju sodniške funkcije vezan na ustavo in zakon. V skladu z ustavo je vezan tudi na splošna načela mednarodnega prava in na ratificirane in objavljene mednarodne pogodbe.«

8 Npr. Zakon o uravnoteženju javnih financ (Ur. list št. 40/2012) v 188. in 246. členu zapoveduje obvezno prenehanje veljavnosti pogodb o zaposlitvi javnim uslužbencem, kar pomembno odstopa od določb zavezujoče konvencije Mednarodne organizacije dela, št. 158, ki jo je ratificirala Jugoslavija (Ur.l. SFRJ - MP, št. 4/84, 18.5.1984) in na podlagi pravne kontinuitete zavezuje tudi Slovenijo (Akt o notifikaciji, Ur.l. RS - MP, št. 15/92, 13.11.1992). Navedeni določbi ZUJF-a tudi pomembn0 odstopata od zapovedane ureditve z Direktivo 2006/54 ES in z Direktivo Sveta 2000/78/ES, ki zavezujeta Slovenijo na podlagi 288. člena Lizbonske pogodbe,

Več o tem je že znanega, ampak se nanaša na sodnike sodišč in ne na upravne organe, pa vendarje materija lahko relevantna tudi pri iskanju odgovorov, ki se nanašajo na odločanje upravnih organov.

Če sodnik meni, da je zakon, ki bi ga moral uporabiti, neskladen s hierarhično nadrejenimi odločbami mednarodnih pogodb, mora postopek prekiniti in začeti postopek pred US, meni Testen (2003, str. 1488). Novak pa misli, da mora sodnik rednega sodišča ali kateri koli drug državni organ, vključno z upravnimi organi, ki pri reševanju neke zadeve naleti na nasprotujoči si določili mednarodne pogodbe in zakona, zadevo rešiti na podlagi pravil iz mednarodne pogodbe, pri tem pa ne odloči o (ne)veljavnosti določbe domačega zakona, temveč le o njeni (ne)uporabnosti v konkretni zadevi, v kateri je prevladala neposredna uporabna mednarodna norma (1997, str. 30). Podobno meni Zupančič, ki misli, da se 125. člen[9] in 160. člen[10] Ustave ne izključujeta, ker US o neskladju zakona s splošno veljavnimi načeli mednarodnega prava odloča abstraktno, medtem ko redna sodišča odločajo samo za konkretne primere (Zupančič, 2010, str. 8). Testen misli drugače, in sicer, da se določilo 8. člena Ustave ne more uporabljati kot argument, da je Ustava v razmerju do mednarodnih pogodb odstopila od sistema koncentrirane ustavnosodne kontrole ustavnosti zakonov (2003, str. 1488). To utemeljuje z razlagami odločb US št. U-I-154/93, U-I-77/93 in U-I-103/95. Testen še meni, da bi lahko na prvi pogled izhajalo, da je US nakazalo možnost, da zaradi načela neposredne uporabnosti mednarodna pogodba lahko spreminja posamezne zakonske določbe tako, da jih derogira, natančnejše branje pa po njegovi oceni lahko privede le do sklepa, da mednarodna pogodba s posameznimi svojimi neposredno izvršljivimi določbami lahko zakon dopolnjuje (Ibidem, str. 1492). Iz navedenih odločitev I-154/93, U-I-77/93 in U-I-103/95US je v grobem razbrati naslednje:

- sodnik ne odloči po neusklajenem zakonu, ampak po neposredno uporabni normi mednarodnega prava, ki je hkrati tudi neposredno izvršljiva (U-I-154/93);[11]
- sodnik ne odloči po neusklajenem zakonu, kakor tudi ne odloči po sicer neposredno uporabnem pravilu mednarodnem pravu, ker ta mednarodna norma ni neposredno izvršljiva (U-I-77/93);[12]

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ki spreminja Pogodbo o Evropski uniji in Pogodbo o ustanovitvi Evropske skupnosti (UL C 306/01).

9 125. člen URS: »Sodniki so pri opravljanju sodniške funkcije neodvisni. Vezani so na ustavo in zakon.«

10 Prvi odstavek druge alineje 160. člena URS: »Ustavno sodišče odloča o skladnosti zakonov in drugih predpisov z ratificiranimi mednarodnimi pogodbami in s splošnimi načeli mednarodnega prava;«.

11 Odločitev US U-I-154/93 z dne 2/6-1994: »Na podlagi določbe 8. člena Ustave se v času neusklajenosti izpodbijanega Zakona s Protokolom določbe Protokola sicer uporabljajo neposredno, vendar razlogi pravne varnosti narekujejo, da Državni zbor ugotovljeno neskladnost odpravi ob prvi spremembi Zakona.«

12 Odločitev US, U-I-77/93 z dne 6.7.1995: »Take mednarodne pogodbe se na podlagi 8. člena Ustave uporabljajo neposredno, vendar razlogi pravne varnosti narekujejo, da se v zakonodaji operacionalizirajo obveznosti, ki jih je država s temi pogodbami prevzela.«

- sodnik uporabi obe normi, ki se dopolnjujeta, tako zakon kot normo mednarodnega prava (U-I-103/95).[13]

Iz predstavljenega v prejšnjem odstavku so razvidna mnenja, ki se nanašajo na ravnanja sodnikov sodišč, ne nanašajo pa se na ravnanja upravnih organov, razen mnenja Novaka, ki misli, da morajo upravni organi, ki pri reševanju neke zadeve naletijo na nasprotujoči si določili mednarodne pogodbe in zakona, zadevo rešiti na podlagi pravil iz mednarodne pogodbe (1997, str. 30).

Kako naj se torej odzovejo upravni organi v situacijah, ko so pravice in obveznosti pravnih subjektov hkrati urejene z zakonom in uveljavljenim mednarodnim pravom, vendar so nasprotujoče. V bistvu gre za vprašanje skladnosti določenega zakonske norme z določeno normo mednarodnega prava[14] in vprašanje neposredne uporabe norm mednarodnega prava.

Pri odločanju v konkretnih primerih pa je v »določenih« primerih[15] treba neposredno uporabljati Ustavo, in sice ne samo njeno besedilo, ampak tudi razlago Ustave, kakor jo je v svojih dokončnih odločbah (ki so po tretjem odstavku 1. člena Zakona o Ustavnem sodišču obvezne) razvilo US (Stupica, 2013, str. 27). Obrazložitve odločitev US so zato za razumevnaje prava zelo pomembne in zavezujoče.

US je leta 2010 v svoji odločitvi zapisalo: »Upravni organi so /…/ v svojih postopkih dolžni varovati ustavni red ter človekove pravice in temeljne svoboščine, saj ta obveznost ni in ne more biti pridržana le sodiščem. Res je sicer, da so upravni organi skladno z načelom zakonitosti vezani na zakon in ne morejo odkloniti njegove uporabe v primeru dvoma v njegovo skladnost z Ustavo, prav tako pa tudi niso med postopkom upravičeni postaviti zahteve za presojo skladnosti zakona z Ustavo na Ustavno sodišče, saj je ta možnost dana le sodiščem (156. člen Ustave). Vendar pa iz vezanosti upravnih organov na Ustavo in na dolžnost spoštovanja ustavnih pravic posameznikov in pravnih oseb izhaja, da morajo upravni organi v primeru, če bi pri odločanju o pravicah, obveznostih ali pravnih koristih strank morali uporabiti zakon, ki je po njihovem mnenju protiustaven, na to opozoriti nadrejeni organ, ta pa bi moral tako stališče preučiti in v primeru dvoma v ustavnost zakona predlagati ustrezno ukrepanje najvišjim organom izvršilne veje oblasti, ki so skladno z Ustavo in zakonom pristojni in odgovorni za to, da predlagajo spremembo

13 Odločitev US, U-I-103/95 z dne 24.10.1996: »Na podlagi 8. člena Ustave se ratificirane in objavljene mednarodne pogodbe uporabljajo neposredno, kar pomeni, da je sodnik za mladoletnike dolžan upoštevati določbo točke c) 37. člena Konvencije neposredno, tudi če njene določbe niso prevzete v notranje pravo, to je v ZKP. Sodnik za mladoletnike lahko na podlagi izpodbijanih določb ZKP in citirane določbe Konvencije odredi, da se mladoletnik pripre skupaj s polnoletnim le izjemoma, in le pod pogojem, da je skupno prestajanje pripora izključno v mladoletnikovem interesu in v njegovo korist.«

14 URS v drugem odstavku 153. člena določa: »Zakoni morajo biti v skladu s splošno veljavnimi načeli mednarodnega prava in z veljavnimi mednarodnimi pogodbami, ki jih je ratificiral državni zbor, podzakonski predpisi in drugi splošni akti pa tudi z drugimi ratificiranimi mednarodnimi pogodbami.«

15 URS v 15. členu določa, da se človekove pravice in temeljne svoboščine uresničujejo neposredno na podlagi ustave.

protiustavnega predpisa ali pa da vložijo zahtevo za presojo zakona na Ustavno sodišče« (US U-I-39/10-6).

Iz navedene odločitve je mogoče z logičnim sklepanjem razumeti, da:

- so tudi upravni organi, poleg sodišč, dolžni varovati ustavni red ter človekove pravice in temeljne svoboščine;
- upravni organi ne morejo odkloniti uporabe zakona;
- upravni organi morajo zaradi vezanosti na Ustavo in na dolžnost spoštovanja ustavnih pravic posameznikov in pravnih oseb, le opozoriti nadrejene, na verjetno protiustavnost zakona;
- če nadrejeni upravni organ po proučitvi stališča podrejenega upravnega organa oceni, da je stališče glede protiustavnosti zakona utemeljeno, izdela predlog ustreznega ukrepanja najvišjim organom izvršilne veje oblasti.

Videti je, da je takšno razumevanje judikata preozko, saj ne zagotavlja učinkovitega varstva človekovih pravic in temeljnih svoboščin.

Vendar z natančnim branjem obravnavanega judikata lahko vsebino razumemo tudi tako, da se ta nanaša le na primere, ki konkretno ne zadevajo človekovih pravic in temeljnih svoboščin iz II. poglavja Ustave, ampak le na druge primere, ki sicer zadevajo ustavne pravice posameznikov in pravnih oseb.[16] Tej tezi v prid je dejstvo, da je US v istem judikatu glede varovanja ustavnih pravic namreč zapisalo dve formulaciji. Prva se glasi:

- »dolžnost spoštovanja ustavnih pravic posameznikov in pravnih oseb«,

druga formulacija pa se glasi:

- »dolžni varovati ustavni red ter človekove pravice in temeljne svoboščine«.

Pri tem se seveda logično postavi vprašanje, ali je napotilo[17] upravnim organom v judikatu US glede dolžnosti spoštovanja ustavnih pravic posameznikov in pravnih oseb razumeti enako tudi v primerih, ko morajo upravni organi odločati v zadevah, ki zadevajo tudi človekove pravice in temeljne svoboščine iz II. poglavja Ustave? Ali vezanost upravnih organov na načelo zakonitosti res pomeni to, da ob obstoju zakona in norme mednarodnega prava, ki urejata določeno vprašanje pravic in obveznosti posameznika nasprotujoče, vseeno uporabi zakon in prezre veljavno neposredno uporabno in neposredno izvršljivo normo mednarodnega prava, ki je istočasno v hierarhiji pravnih aktov nad zakoni? Ali 15. člen Ustave zaradi načela zakonitosti ne zavezuje

16 Iz judikata US U-I-39/10-6 je razbrati, da pobudnik za začetek postopka ocene ustavnosti ne zatrjuje neskladnost izpodbijanega akta z določbami ustave med 14. in 65. členom, ki opredeljujejo človekove pravice in temeljne svoboščine.

17 Upravni organi so skladno z načelom zakonitosti vezani na zakon in ne morejo odkloniti njegove uporabe v primeru dvoma v njegovo skladnost z Ustavo. Upravni organi morajo opozoriti nadrejeni organ, ta pa bi moral tako stališče preučiti in v primeru dvoma v ustavnost zakona predlagati ustrezno ukrepanje najvišjim organom izvršilne veje oblasti, ki so skladno z ustavo in zakonom pristojni in odgovorni za to, da predlagajo spremembo protiustavnega predpisa ali pa da vložijo zahtevo za presojo zakona na Ustavno sodišče.

tudi upravnih organov k neposrednemu uresničevanju človekovih pravic in temeljnih svoboščin?

Izražena poenostavljena vprašanja nakazujejo na njihovo zanikanje. Katere argumente pa se lahko navede v prid zanikanju postavljenih vprašanj?

Ne gre prezreti, da se je US v obravnavanem judikatu nedvomno izreklo, da so upravni organi človekove pravice in temeljne svoboščine dolžni varovati. Logično je, da to lahko storijo le tako, da jih sami ne kršijo. Ta teza se lahko podkrepi z odločitvijo US iz leta 1996, ko je sicer za sodnike zapisalo, da so le ti dolžni upoštevati človekove pravice in temeljne svoboščine neposredno na podlagi 15. člena Ustave (US Up-155/95). Ker varovanje človekovih pravic in temeljnih svoboščin po odločitvi US U-I-39/10-6 ni pridržana le sodiščem, ampak tudi upravnim organom, je s sklepanjem z argumentacijo *ad simili ad simile* logično, da potem odločitev US Up-155/95, ki govori o neposredni uporabi Ustave po 15. členu, zavezuje tudi upravne organe, kljub načelu zakonitosti.

Temu jih nenazadnje napotuje določba 120. člena ustave, ki določa, da upravni organi opravljajo svoje delo v okviru in podlagi Ustave in zakonov. Torej tudi na podlagi 15. člena Ustave! Tudi ni v nerešljivem nasprotju z določilom 153. člena Ustave, ki določa, da morajo izdani posamični akti upravnih organov temeljiti na zakonu ali zakonitem predpisu. Med zakonite predpise je namreč lahko šteti tudi mednarodne pogodbe (Šturm, 2002, str. 1009). Ker pa med viri mednarodnega prava ni hierahije, se lahko logično v širšem smislu med zakonite predpise uvrsti tudi določene neposredno izvršljive norme običajnega mednarodnega prava, ki imajo v materialnem pomenu potrebne značilnosti predpisa. Za primer vzemimo deklaracijo človekovih pravic, ki v Sloveniji ne velja kot mednarodna pogodba, ampak veljajo v njej določene norme, kot del običajnega mednarodnega prava, ki so po 8. členu Ustave del pravnega reda *per se*.

Navedeni argumenti dajejo podlago za utemeljeno zagovarjanje stališča, da morajo upravni organi v primeru, ko so pravice in obveznosti pravnih subjektov, katere se uvrščajo v II. poglavje Ustave, hkrati nasprotujoče urejene z zakonom in uveljavljeno normo običajnega mednarodnega prava, pri odločanju uporabiti slednjo, in sicer neposredno na podlagi 15. člena Ustave.

8 Sklepne ugotovitve

Pri opredelitvi problema obravnavane tematike je bilo v začetnem delu članka zastavljeno raziskovalno vprašanje, ki zadeva zmožnost prepoznave oz. ugotovitve obstoja splošno veljavnih načel mednarodneg prava in njihovo neposredno uporabo v odločbah upravnih organov.

Splošna veljavna načela mednarodnega prava se v pravnem redu RS po ustaljeni judikaturi US RS uporabljajo neposredno, čeprav to ni izrecno zapisano v Ustavi. Ker gre praviloma za nezapisano materijo veljavnega

mednarodnega prava, obstaja problem prepoznave teh norm, ki veljajo v pravnem redu RS *per se*. Uporabnik prava jih mora prej poiskati v primernih sodbah mednarodnih tribunalov. Pri tem obstaja dodatna ovira. V Sloveniji ni poskrbljeno za prevode v slovenski jezik relevantnih odločitev mednarodnih sodnih in arbitražnih tribunalov, z izjemo sodb Sodišča Evropske unije, niti ni poskrbljeno, da bi bile tovrstne odločitve zbrane na enem mestu. V pomoč je lahko judikatura US, v katerih je do tedaj US že zavrnilo ali prepoznalo nepisane norme mednarodnega običajnega prava in jih komentiralo. Vendar tovrstnih odločitev ni veliko. Pomagamo si lahko tudi s strokovno literatura iz področja običajnega mednarodnega prava, v kateri priznani mednarodnopravni strokovnjaki obravnavajo konkretne tovrstne zadeve in se pri tem sklicujejo na konkretne judikate mednarodnih tribunalov. Očitno je, da problem prepoznavanja splošno veljavnih načel mednarodnega prava obstaja in ni zadovoljivo sistemsko rešen, ampak je to prepuščeno znanju in iznajdljivosti posameznih uporabnikov prava.

Čeprav splošno veljavna načela mednarodnega prava veljajo v slovenskem pravnem redu per se, ni popolnoma jasno, kako naj se odzovejo upravni organi v situacijah, ko so pravice in obveznosti pravnih subjektov hkrati urejene z zakonom in uveljavljeno normo običajnega mednarodnega prava, vendar so nasprotujoče. Z natančnim branjem vsebine judikata US U-I-39/10-6 lahko razumemo dve situaciji. Prva je, da morajo upravni organi, ko sporni zakon ureja ustavne pravice posameznikov ali pravnih oseb, na spornost predpisa opozoriti nadrejeni organ, ta pa mora v primeru potrjenega dvoma predlagati ustrezno ukrepanje najvišjim organom izvršilne veje oblasti, ki so skladno z Ustavo in zakonom pristojni in odgovorni za to, da predlagajo spremembo protiustavnega predpisa ali pa da vložijo zahtevo za presojo zakona na ustavno sodišče. Druga situacija pa je, ko sporni zakon ureja človekove pravice in temeljne svoboščine iz II. poglavja Ustave. V takih primerih obstajajo argumenti, da upravni organ kljub načelu zakonitosti, uporabi na podlagi 15. člena Ustave neposredno izvršljivo normo običajnega mednarodnega prava.

Dr. Anton Olaj je doktor znanosti na področju prava. V svojih raziskavah se predvsem ukvarja s proučevanjem splošno veljavnih načel mednarodnega prava in njihove uporabe v notranjem pravu.

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1.02 Review article

Direct Applicability of Generally Accepted Principles of International Law in Legal Order of the Republic of Slovenia

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ABSTRACT

Self-executing, incorporated and generally accepted principles of international law have been used directly in legal order of the Republic of Slovenia. Systematic records of these identified and enforced norms do not exist. It is difficult for lawyers and judges to get acquainted with them. The predicament is even greater because, with the exception of the Court of Justice of the European Union, a translation of the relevant case law of international tribunals is not available. Generally accepted principles of international law are applicable in Slovenian legal order *per se*. Despite that, it is not entirely clear how administrative bodies should react in situations where the rights and obligations of legal entities are on the one hand regulated by law and customary international law but on the other hand are contradictory.

Key words: *generally accepted principles of international law, customary rules of general international law, the 8th Article of the Constitution of the Republic of Slovenia, the 15th Article of the Constitution of the Republic of Slovenia*

JEL: K33

1 Introduction

The Constitution of the Republic of Slovenia defines relations between international law and domestic law in the 8th Article of the Constitution, which determines: "Laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly." We can see that international law enters into Slovenian legislation in the form of treaties and in the form of generally accepted principles of international law. It should be noted that European law as foreign law *sui generis* also enters into domestic legal order, not in context of the 8th Article of the Constitution, but

according to the provisions of the third paragraph of the 3rd/a Article of the Constitution, which will not be discussed in this paper.

Legal experts have diverging opinions of what is to be understood by the phrase 'generally accepted principles of international law'. In the literature, it can also be traced under the phrase 'customary rules of general international law'.[1] For the purposes of this article, we will use the decision of the Constitutional Court, which will serve as a legal framework for understanding this syntagm. The Constitutional Court states that the term 'generally accepted principles of international law' covers a primarily "international custom, as evidence of a general practice accepted as law" and "general principles of law recognized by civilized nations". They are enumerated as the source of international law in the Statute of the International Court of Justice in bullets b) and c) of the first paragraph of the 38th Article (US, U-I-266/04-105). Customary law constitutes an important part of international law, but due to its unwritten form, it requires a proof of the action's nature and motives. (Zemanek & Hartley, 1998, p. 149). Fitzmaurice states that their codification can also occur in treaties or records in various international documents (Sancin, 2009, p. 51). It consists of an objective and a subjective element. A proof of general practice is an objective element. A subjective element is *opinio juris sive necessitati*. This means that countries act in a certain way because they are aware that such an action is obligatory for them by the rules of international law. Schwarzenberger indicates that both conditions must be fulfilled cumulatively (Thirlway, 1972, p. 46). The general principles of law recognized by civilized nations can be understood as the greatest common denominator of fundamental principles historically formed within a domestic legal system (Pogačnik, 1999b, p. 470), for example the principle of legality, the principle of non-retroactivity, the principle of *res judicata*, the litispidenca, the principle of unjustified enrichment, the principle of *lex specialis derogat legi generalis* (Škrk, 2007, p. 282–283) and the principle *actor sequitur forum rei* (US U-I-245/00). Additionally, Türk appoints two more principles: the first one stating that no one can transfer to another person more rights than they themself have; and the second is the principle of *bona fides* (2007, p. 59). In the works of scholars Bartos, Guggenheim, Andrassy, Shaw and Pell, the following can also be found: the principle of prohibition of abuse of law, the principle of the prohibition of unjustified enrichment, the principle of non-favorable treatment from own mistakes, the principle of limitation, the principle of obligations to compensate for damage, the principle *nemo plus iuris ad alium transfers potest quam ipse habet*, the principle of *estoppel*, the principle of the right to exclusion of a judge, the principle of equality of the parties, the principle of *audiatur et altera pars*, the principle of *res judicata* and the principle of *nemo iudex in sua causa* (Vukas, 1992, p. 259).

The syntagms 'customary international law' and 'customary rules of general international law' are repeatedly stated in this article. It should be mentioned

1 More about this Škrk, 2012, p. 1104–1106.

that this is just short for "international custom, as evidence of a general practice accepted as law", which is written in the 38th Article of the Statute of International Court of Justice. In this article, this phrase is understood in the context of the syntagm "generally accepted principles of international law", specified in the 8th Article of the Constitution and which customary international law is an integral part of. And *vice versa*, when the article states the syntagm 'generally accepted principles of international law', specified in the 8th Article of the Constitution, both "customary international law" as well as "general principles of law recognized by civilized nations" are meant in this case and are specified in bullets b) and c) of the first paragraph of the Statute of the International Court of Justice's 38th Article.

International law is applicable in Slovenian internal law, either directly or indirectly, by previous transformation or adoption into domestic law. The subject of this article's study will be the direct applicability of generally accepted principles of international law, therefore an indirect applicability of international norms will not be defined in more detail.

Readers should not be confused by the article's various references to treaties, while the title of this article does not mention treaties and they are not a theme of this research. The reason is that a doctrine is richer in examining an issue of direct applicability and self-executing norms of international law framed by a treaty. In international law, there is no hierarchy of international legal sources.[2] As a source of international law, treaties theoretically have the same importance as customary rules of general international law and general principles of law. It is logical that certain findings in the field of treaties shall apply *mutatis mutandis idem quod* to generally accepted principles of international law.

2 Definition of the Problem

The norms of international law take effect in domestic law only if the state has determined it (Türk, 2007, p. 71). However, there are exceptions, also known as *ius cogens*. In these types of international imperative rules, it is not required that the state in any way takes part in their formation. These norms become binding on a State at the moment when it becomes an international legal subject (Platiše, 2005, p. 185). Countries vary depending on the procedures by which they give effect to international law on their territory. Most of them accept the doctrine that international law is a part of domestic legal order. In spite of different procedures in domestic legal systems of countries, international law with its demands nevertheless takes effect on their area (Jennings & Watts, 1997, p. 53).

As to the effect of international law in the legal order of the Republic of Slovenia in the segment of generally accepted principles of international law, the Slovenian Constitution does not provide for explicit direct applicability,

2 More about this Škrk, 1985, p. 149–150, and Villinger, 1997, p. 58.

while it does in the case of ratified and published treaties (Pogačnik, 1999b, p. 472). A purely linguistic understanding of the 8th Article of the Constitution indicates doubt whether it is permissible to use generally accepted principles of international law directly. We already know the answer to this question, because there already exists case law that justifies their direct applicability. However, there are still open questions, particularly regarding the recognition of the existence of such norms and their direct application by administrative bodies.

3 Legal Acculturation of International Law in the Legal Order of the Republic of Slovenia

There are three methods of reception of international law in Slovenian legal order. The first is Statutory ad hoc incorporation. It is actually a transformation of international law by an act of legislature and thereby for indirect applicability of international law. In doing so, a norm of international law loses the nature of an international norm and becomes a domestic legal norm. A typical example of transformation of international norms are norms in the field of criminal law because of law principles *nullum crimen nulla poena sine lege praevia*.

The second method to take on international law is automatic ad hoc incorporation. Under this approach, the international rules apply in the domestic legal system only if the legislative authority adopts a specific implementing law without reformulating these rules (Hofmann, 2008, p. 93). In the Slovenian legal framework, this means the adoption of treaties with a law on ratification or with a government decree on ratification. By this act, an international norm does not lose its legal nature, therefore it remains a norm of international law, because it does not interfere with its content.

The third method of the legal acculturation of international law, which is relevant for the purposes of this article, is an automatic standing incorporation. It is valid for the entry of generally accepted principles of international law into domestic legislation, which are as such, *per se*, a source of domestic law. The Constitution, in the 8th Article, specifies that laws and regulations must comply with generally accepted principles of international law. This presumption declares their incorporation into Slovenian legislation without domestic legal instrument of ratification, which also applies to treaties (Weingerl, 2002, p. 355). This means that the public authorities and individuals must *ipso facto* and without any conduct respect in the international community established rules of customary international law, states Cassese (Škrk, 2007, p. 279). By this act, an international norm does not lose its legal nature and remains a norm of international law, because it does not interfere with its content.

4 Identifying the Contents of Generally Accepted Principles of International Law

Before using the established rules of customary international law, they must be previously identified. The only verifiable manner of establishing the existence and contents of a customary rule prior to use, citing Kreča, is suitable judgment of the International Court of Justice. Theoretically, in this case, there is no transformation of a customary rule but only the court's finding of existence of a customary rule (Kreća, 2006, p. 23). Grasselli argues that in addition to the courts, Slovenian administrative bodies themselves also identify content of international law before using it. With courts specifically, he mentions that they take into account the resources of the 38th Article[3] of the Statute of International Court of Justice, including judicial decisions and the views of highly qualified international legal experts (Šturm, 2002, p. 143).

It should be emphasized that the courts and legal experts do not create international norms, they only note their existence and interpret them. Case law and doctrine are only ancillary legal sources that help crystallize the meaning and importance of the three main formal legal sources, i.e. treaties, customary international law and general principles of law.

When reviewing Slovenian websites of providers of electronic legal information Legal Information System of the Republic of Slovenia, Register of Regulations of the Republic of Slovenia, TAX-FIN-LEX and IUS INFO, it can be noticed that there are no systematically collected contents of all applicable norms in the field of international law but only those that have been an act of ratification published in the official gazette. The area of treaties is regulated in a systematic way, but quite the opposite goes for generally accepted principles of international law, even if in exceptional cases they do exist in written form. One can be informed about the established norms of customary international law only as far as the content can be found in the decisions of the Constitutional Court, which is published in official gazette. However, in the official gazette for example, the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations of 1986 cannot be found, although it is known that there are codified norms of customary international law applicable in the legal order of the Republic Slovenia per se. The same goes for the 1948 Universal Declaration of Human Rights.

3 Statute of the International Court of Justice, 38th Article: "1. The Court, whose function is to decide in accordance with international law in such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules explicitly recognized by the states in conflict; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified international publicists, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree on it."

Generally accepted principles of international law are primarily unwritten sources of law. Therefore, they can be found in some of the judgments of international tribunals.[4] Lawyers can also help themselves with the case law of the Constitutional Court, which have been rejected or identified as unwritten norms of customary international law.[5] Specialized literature in the field of customary international law, where recognized international legal experts deal with concrete matters of this kind, may also be of assistance. Some legal contents that may be helpful in recognizing general customary international law are also publicly available on specific websites. For example: Juridical Yearbook at http://www.un.org/law/UNJuridicalYearbook/index.htm; League of Nations Treaty Series at http://www.worldlii.org/int/other/LNTSer/; United Nations Treaty Series at http://treaties.un.org/; Repertoire of the practice of the United Nations with regard to questions of international law at http://www.un.org/en/sc/repertoire/; Reports of International Arbitral Awards at http://untreaty.un.org/cod/riaa/index.html.

But there is an additional difficulty. In Slovenia, there is no legal provision for precise translation of the relevant decisions of international judicial and arbitral tribunals, with the exception of judgments of the European Court of Justice.[6] These types of decisions are also not collected in one place. In the United States of America, the *American Law Institute* has released a collection with the name 'The principles of the Restatement of the Law'. With it, users can familiarize themselves with the established customary rules of general international law. Such a collection, especially if it was accurately translated, would be an appropriate tool for judges and lawyers in Slovenia.

However, the identified content of customary norms of international law is only the first step towards its implementation. In order to take effect between legal entities, it must not only be directly applicable but also self-executing.

5 Understanding the Syntagm 'Direct Applicability' of International Law Norms

The concepts that are connected with the subject of this research can be understood differently. In foreign literature, the syntagm 'domestic applicability' is at times equated with the syntagm 'domestic direct applicability'. It is also used for marking of 'self-executing' norms (Iwasawa, 1998, p. 46; Conforti & Francioni, 1997, p. 237). Schermers puts forward a similar distinction. He argues that the syntagm 'directly applicable' is used as a synonym for 'directly effective' and 'self-executing' (Müllerson, 2000, p. 195).

4 For example: Permanent Court of International Justice, International Court of Justice, International Criminal Court, Permanent Court of Arbitration, Dispute Settlement Body, International Tribunal for the Law of the Sea.

5 For example: US U-I-90/91, US Up-97/02, US Up-114/05.

6 The Government of the Republic of Slovenia in 2007 adopted decision No. 02500-1/9/2007 on the establishment of the project "Translation and Redaction of Judgments of the European Court of Justice and the Court of First Instance" For its implementation, the government entrusted the Job to the Office of Legislation.

Regarding the diversity of application of the sytagm in doctrine, what should therefore be understood by the Slovenian constitutional provision in the 8th Article, which states that the international norm is directly applicable?

In its decision from 1997, the Constitutional Court stated that the directly applicable legal norms are those that govern the rights and obligations of entities of domestic law and may, for example, be applied directly by the court (US Rm-1/97). This was followed by the 1998 decision of the Supreme Court of the Republic of Slovenia, which stated that the direct applicability of treaties means that "the courts in the application of their provisions can directly refer to it as the provisions of domestic law and, more importantly, courts can use them without being streamed into domestic legislation. This means that they are part of domestic law, giving an advantage before the law" (VS II Ips 55/98).

The syntagm 'direct applicability' of norms is thus in the Slovenian judicial decisions understood as a label for rules that are, due to their precision in creating rights and obligations of entities, self-executing. A question arises regarding whether the generally accepted principles of international law that are not formulated in a sufficiently precise manner may not be directly applicable?

Pogačnik explains that the syntagm 'directly applicable' from the 8th Article of the Constitution should be understood primarily as an adoption of treaties into legal order of the Republic of Slovenia in the context of establishment of their domestic validity, but not automatically in the sense of their self-execution (1999b, p. 481). Furthermore, Pogačnik thinks that considering the nature of the customary rules of general international law, in the case of the existence of a model of constitutional adoption of their contents, in principle there is no obstacle for the self-executing, whenever the norm is sufficiently specified (Grad et al., 2002, p. 322). Ilešič joins him, saying that each directly applicable provision is not self-executing and continues by saying that on the contrary only a provision that is directly applicable can have a self-executing effect (1997, p. 1326). Also, otherwise there exists a recognition that some norms of customary international law are directly applicable and some are not, some directly applicable norms are also self-executing and some are not (Sik et al., 1994, p. 159).

Considering the judicial decisions and clarifications of the doctrine, it can be concluded that the syntagm 'direct applicability' must be understood more broadly. It must be understood as a hypernym that includes both self-executing international norms as well as those that are not sufficiently precise to be self-executing and only serve as a source for legal authorities when creating new legal acts.

6 Understanding the syntagm 'self-executing' norms of international law

The syntagm 'self-executing' was derived from U.S. law and is used to describe the contractual provisions that are directly applicable in the courts. The syntagm 'self-executing' is in other legal systems understood in the same sense, indicates Leary, but goes on to say that the real meaning of self-executing rules is very different in different legal systems (1982, p. 70).

It can be observed in the literature that the term 'direct applicability' is in English presented also as 'self-executing', in German 'unmittelbare Anwendbarkeit' and in French 'direct effect' or the 'applicabilité directe' (Verhelle, 1996 , p. 168). Alen and Pas consider that there is no commonly agreed definition in the law or jurisprudence about the syntagm 'self-executing'. In addition, its meaning depends on the constitutional law of each legal system (ibid, p. 165). Rudolf also thinks that there is no established legal definition of a 'self-executing' norm, because this phrase is an invention of lawyers and professors. It is a matter of domestic law of each country which norms are self-executing (Tunkin & Rüdiger, 1988, pp. 47–48), so it happens that a specific rule, which is based upon a treaty or derived from international custom, is self-executing in the domestic law of a certain country, but in another country it does not have these features. Rudolf states the example of the 6th Article of the Convention for Protection of Human Rights and Fundamental Freedoms, which in Germany is a self-executing norm but not in Austria, where a rule-making intervention by the State is necessary in order for this norm to be used (Ibid, p. 42). Leary says that the courts of different countries use different criteria (or the same criteria in different ways) in establishing which norm provision is self-executing. The result is that some norm provisions are used directly in the courts of a certain state but not in the courts of some other state (1982, p. 71). So, the treatment of an individual norm depends on the legal system of each state, says Tunkin (Tunkin & Rüdiger, 1988, pp. 46–47). On the other hand, Mazzeschi thinks that the problem of self-executing norms is not just a matter of domestic law but a mixed issue that concerns both international and constitutional law. International law contains some general knowledge about the existence of self-executing rules. But since this issue also affects the competent authorities of the state and the procedure of implementation of these international norms, it is also a matter of constitutional law (Randelzhofer & Tomuschat, 1999, p. 207).

What qualities must an international norm therefore have in order to be self-executing?

Müllerson states that self-executing norms of international law are those legal rules whose characteristics can be used by entities of individual countries in domestic courts where international law (whether derived from treaties or from customary international law or both) is directly applicable (2000 p. 194–195). Norms that are too imprecise, of course, cannot be self-executing

(Sik et al., 1994, p. 159). Self-executing norms include not only those that govern the rights of individuals but also those that the court evaluates to have the legal power of an administrative act, states Ergec (Verhelle, 1996, p. 172). Such are provisions of a treaty that govern extradition, state Jacobs and Roberts (ibid).

The doctrine recognizes that when establishing the existence of a self-executing norm in a treaty, two issues have to be clarified. Andre and Wouter distinguish two criteria, that is the objective and the subjective criterion. Both must be given together, that is cumulatively. The subjective criterion is to be found in the purpose and aims of the parties of treaty. If the contracting parties express consent and declare that the contractual obligation is recorded as self-executing, then these norms in the baseline can be regarded as such. However, most of the parties do not express such intention so clearly, especially in the case of multilateral treaties. The second, an objective criterion, means that the text of a treaty provision must be sufficiently clear and exact to be self-executing in court (Alan & Belt, 1996, pp. 170–171). Conforti adds a criterion that in the treaty there should not exist a prior request for such norm to be legislatively concretized (Conforti & Francioni, 1997, p. 85). Alan and Pas consider that an objective criterion is crucial (1996, p. 172).

Iwasana has a similar opinion about self-execution. He believes that what needs to be established first is whether the parties of the treaty completely excluded the direct applicability of the treaty provisions themselves. If the treaty contains such a provision, the direct applicability of norms is rejected. In this case, the direct use of norm is associated with the contractual intent of the parties. Secondly, if the direct applicability of a treaty is not excluded, only then the examination of individual rules should take place to find out whether they are sufficiently precise. In customary international law, only the second possibility of determining self-executing is applicable (1998, pp. 153–154). Perenič has a similar opinion and states that even before the international law is used in the domestic law of the Republic of Slovenia, the competent authority must clarify whether a specific international act should even be applied in a certain relation. To get the answer to this question, they must first ascertain whether it is a legally binding act. When there is no longer any dispute, they must determine who is committed to this act. Many international legal acts regulate only relations between the Contracting States, but there is also an increasing number of those that apply to individuals, such as the Convention for Protection of Human Rights and Fundamental Freedoms. It is also important to determine whether the international act is completely general or if it is specific enough to be used directly without additional regulations in domestic law. The third issue that the competent authorities should clarify regarding the use of international acts in domestic law is whether it is properly incorporated in the domestic legal system (1996, p. 9).

These conditions of the doctrine in international law that relate to self-executing norms are similar and comparable to those used in the case law

of the Court of Justice of the European Union and refer to European law. It is a question of direct effect in European law. The European Union represents a new legal order of international law for the benefit of which the states have limited their sovereign rights. This law does not require any legislative intervention (Škrk, 2005, p. 7), which the European Court of Justice ruled in 1963 in the case of 'Van Gend & Loos' (ECJ Case 26/62), thus justifying the doctrine of direct effect. This means that if some legal injunction has a direct effect, the individuals have a right that the national courts must protect (Hartley, 1998, p. 177). Winter argues that the concept of a 'direct effect' of a norm indicates a possibility for an individual to directly refer to such norm in proceedings that run within their legal order (Ilešič, 1997, p. 1325). Citing Hayley, the Court has established four conditions for, according to the provisions of European Union law, the direct effect to be recognized. The provision of the law must be: 1) clear, 2) unconditional, 3) in the form of prohibitions and 4) without reservation that would condition the use of the European legal norm in legal order of Member States on a positive legislation of a Member State (Sancin, 2009, p. 87).

Proprius signum norms of international law, which can be characterized as self-executing at the user's own understanding are: clarity, unconditionality, precision, completeness, editing rights and obligations of natural and legal persons.

7 Direct Applicability of Generally Accepted Principles of International Law

In 1998, the Supreme Court of the Republic of Slovenia faced the audit claim that the Constitution of the Republic of Slovenia does not allow for direct applicability of customary international law but held that this view cannot be accepted. It is true that the second sentence of the 8th Article of the Constitution states that ratified and published treaties are directly applicable, which means that the courts, in the application of their provisions, directly refer to it as the provisions of domestic law, without being streamed into domestic legislation. However, this does not mean that the judge cannot apply the principles of international law. When the Constitution requires the compliance of laws with generally accepted principles of international law (the 153rd Article of the Constitution) and thus gives the advantage of principles before the laws, it is clear that at a trial these principles are used (VS II Ips 55/98). In addition, this is also clear in the 3rd article of the Court Act,[7] which determines that in the course of the judicial function, the judge is bound to the general principles of international law as well as to the ratified and published treaties.

7 Courts Act (Official Gazette of RS, no. 19/94 et seq.) 3rd Article: "In the performance of the judicial function, the judge is bound to the Constitution and the law. In accordance with the Constitution, they are also bound to the general principles of international law as well as ratified and published treaties."

Although the generally accepted principles of international law are used in the Slovenian legal order *per se*, it is not fully clear how the administrative bodies should respond in situations where the rights and obligations of legal entities are at the same time protected by law and well-established international law but are contradictory.[8] More information concerning this issue is already known, but it refers to judges of the courts and not to the administrative bodies. However, the matter may be relevant in finding answers relating to the decisions made by administrative bodies.

Testen thinks that if the judge believes that the law that should be applied is inconsistent with the hierarchical superior provisions of treaties, he must stop the proceedings and initiate proceedings at the Constitutional Court (2003, p. 1,488). However, Novak states that if the judge of a court or any other governmental authority, including administrative bodies, when solving some issues, finds conflicting provisions of treaty and law, they should resolve the matter on the basis of a treaty. In doing so, they do not decide on the (in) validity of a provision of domestic law but only on its (non)applicability in the current case, in which the directly applicable international norm prevailed (1997, p. 30). Zupancic has a similar opinion. He thinks that the 125th and the 160th Articles of the Constitution do not exclude each other, saying that the Constitutional Court decides about conflict between a law and generally accepted principles of international law in an abstract manner, while the ordinary courts decide only for actual cases (Zupancic, 2010, p. 8). Testen argues that the provision of the 8th Article of the Constitution cannot serve as an argument that the Constitution in relation to treaties should withdraw from the system of concentrated constitutional review of constitutionality of laws (2003, p. 1,488). He justifies this with interpretations of Constitutional Court decisions no. U-I-154/93, U-I-77/93 and U-I-103/95. Furthermore, Testen believes that at first glance it could result that the Constitutional Court indicated a possibility for the treaty to change the statutory provisions in a manner that they derogate, due to the principle of direct applicability. But in his opinion, a more precise reading of the decision of the Constitutional Court can only lead to the conclusion that a treaty with individual self-executing provisions can only complement the law (Ibid, p. 1,492). From decisions I-154/93, UI-77/93 and UI-103/95, we can roughly deduce the following:

- A judge does not decide according to the uncoordinated law but according to the directly applicable norm of international law, which is also a self-executing one (UI-154/93).
- A judge does not decide according to the uncoordinated law and he does not decide according to the otherwise directly applicable rule of international law, because this international norm is not self-executing (UI-77/93).

8 For example, Fiscal Balance Act in its 188th and 246th Article deviate significantly from the binding provisions of the ILO Convention no. 158. These provisions also deviate significantly from the provisions of Directive 2006/54 EC and Council Directive 2000/78/EC, which binds on Slovenia on the basis of the 288th article of the Lisbon Treaty (OJ C 306/01).

- A judge uses both legal norms (domestic law and international law), which are complementary (UI-103/95).

The above paragraph presents opinions that relate to practices of judges of courts but do not relate to practices of the administrative bodies, with the exception of Novak who thinks that the administrative bodies who, while resolving some issues, encounter conflicts between provisions of treaties and laws, need to resolve the matter on the basis of the rules of treaties (1997, p. 30).

How should the administrative bodies therefore respond in situations where the rights and obligations of legal entities are at the same time protected by law and established international law but are contradictory? This is in fact a question of compliance of a certain statutory norm with a certain norm of international law[9] and the question of direct applicability of the norms of international law.

When deciding, it is necessary in some cases[10] to directly use the Constitution and not only its wording but also the interpretation of the Constitution, as the Constitution Court developed in its final decisions (which are compulsory according to the 3rd paragraph of the 1st Article of the Constitutional Court Act) (Stupica, 2013, p. 27). The explanations of decisions of Constitutional Court are therefore very important and binding for the understanding of the law.

The Constitutional Court stated in its 2010 decision: "Administrative bodies are / ... / in their procedures obliged to protect the constitutional order and human rights and fundamental freedoms, because this obligation is not and cannot be detained only by courts".

It is true though that the administrative bodies are in accordance with the principle of legality bound to law and cannot refuse its application in case of doubt regarding its compliance with the Constitution. Furthermore, during the process they are not entitled to set requirements for the assessment of compliance of the law with the Constitution on the Constitutional Court, because this option is given only to the court (the 156th Article of the Constitution). However, taking into account the binding of administrative bodies on the Constitution and the obligation to respect the constitutional rights of individuals and legal entities, administrative bodies should in case of deciding about rights, obligations or legal interests of the parties with potentially unconstitutional law, warn a higher authority. The higher authority should examine this and in case of doubt regarding the constitutionality of the law suggest appropriate action of the highest authority of the executive

9 The Constitution, in the second paragraph of the 153rd Article, states: "Laws must be in compliance with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties".

10 The Constitution, in the 15th Article, states: "Human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution".

branch of government, who is in accordance with the Constitution and the law competent and responsible for suggesting change of the unconstitutional provision or requesting a review of the law at the Constitutional Court (U.S. UI-39/10-6).

From this decision, it can be with logical reasoning understood that:

- The administrative authorities, in addition to the courts, are also obliged to protect constitutional order as well as human rights and fundamental freedoms.
- The administrative bodies cannot refuse application of law.
- The administrative bodies are bound by the Constitution and an obligation to respect the constitutional rights of individuals and legal entities, therefore they must 'only' inform superiors about the likelihood of unconstitutional law.
- If higher administrative bodies, after examining the views of a subordinate administrative bodies, consider that the views about unconstitutionality of law are justified, they make a proposal of an appropriate action to the highest authority of the executive branch of government.

It seems that such an understanding of judicata is too restrictive, because it does not provide an effective protection of human rights and fundamental freedoms.

However, by carefully reading the relevant judicial decision, the content might be understood in a manner that it applies only to cases not specifically referring to human rights and fundamental freedoms of the II. Chapter of the Constitution but only to 'other cases' that otherwise affect the constitutional rights of individuals and legal entities.[11] In favor of this proposition is the fact that the Constitutional Court wrote two formulations in the same judicial decision regarding the protection of constitutional rights. The first is as follows:

- "duty to respect the constitutional rights of individuals and legal entities".

The second formulation is as follows:

- "bound to protect constitutional order and human rights and fundamental freedoms".

11 The decision of the Constitutional Court UI-39/10-6 shows that the initiator of proceedings before the Constitutional Court does not claim a lack of compliance with the provisions of the impugned Act Constitution between the 14th and the 65th Article that define human rights and fundamental freedoms.

In doing so, of course, the logical question is whether the 'guidance'[12] to administrative bodies in the judicial decision of the Constitutional Court regarding the obligation to respect the constitutional rights of individuals and legal entities is to be understood the same also in cases where the administrative bodies have to decide on matters that concern the human rights and fundamental freedoms of the II. Chapter of the Constitution. Does the linkage of administrative bodies to the principle of legality really mean that at the existence of the law and the norm of international law, which govern the specific question of the rights and obligations of the individual each in a different, conflicting way, administrative bodies should nevertheless use the law and ignore a directly applicable self-executing norm of international law that is at the same time, in the hierarchy of legal acts in the Slovenian legal order, above the law? Does the 15th Article of the Constitution due to the principle of legality not bind the administrative bodies to direct realization of human rights and fundamental freedoms?

Expressed simplistic questions indicate their own denial. What arguments can be given in favor of the denial of the questions?

Do not forget that the Constitutional Court decision in the actual case undoubtedly stated that the administrative bodies are obliged to protect human rights and fundamental freedoms. Logically, this can only be done when they themselves do not violate them. This hypothesis can additionally be argued with the decision of the Constitutional Court in 1996, when it stated that judges are obliged to respect human rights and fundamental freedoms 'directly' on the basis of the 15th Article of the Constitution (U.S. Up-155/95). The decision of the Constitutional Court U-I-39/10-6 does not reserve the protection of human rights and fundamental freedoms only for the courts but also for administrative bodies, therefore it is by concluding with argument *ad simili ad simile* logical that the decision of the Constitutional Court Up-155/95, which talks about the direct application of the Constitution under the provisions of the 15th Article, is also binding on administrative bodies, despite the principle of legality.

This largely refers to the provision of the 120th Article of the Constitution, which states that administrative bodies perform their work within the framework and on the basis of the Constitution and laws. So also on the basis of the 15th Article of the Constitution! This also is not in an irresolvable conflict with the provisions of the 153rd Article of the Constitution, which states that individual acts and actions of state authorities must be based on a law or a regulation adopted pursuant to law. Treaties can also be considered

12 Administrative authorities are in accordance with the principle of legality bound to the law and cannot refuse to use it in case of doubt in its compliance with the Constitution. Administrative authorities must alert a higher body, which should examine the issue and in case of doubt about the constitutionality of the Act propose appropriate action to the highest authority of the executive branch of government, which according to the Constitution and the law is competent and responsible for proposing a modification of the unconstitutional regulation or filing a request for assessment of law to the Constitutional Court.

as regulations adopted pursuant to law (Sturm, 2002, p. 1009). Since there is no hierarchy among the sources of international law, certain self-executing norms of customary international law, which have in 'material sense' the necessary characteristics of regulation, may logically in a broader sense fall under regulations adopted pursuant to law. Take, for example, The Universal Declaration of Human Rights, which in Slovenia does not apply as a treaty, but there are specified norms as part of customary international law that are, according to the 8th Article of the Constitution, a part of the domestic legal order *per se*.

These arguments provide the basis for informed advocacy positions, stating that administrative bodies must in the case when deciding about the rights and obligations of legal entities that are classified in II. Chapter of the Constitution and are at the same time contradictorily regulated by law and the established norm of customary international law, use the latter that is directly based on the 15th Article of the Constitution.

8 Conclusion

In defining the problem of the topic covered, during the initial part of the paper a research question was posed. It concerns the ability to prove the existence of generally accepted principles of international law and their direct applicability by administrative bodies.

Generally accepted principles of international law are directly applicable in the legal order of the Republic of Slovenia according to settled case law of the Constitutional Court, although this is not explicitly stated in the Constitution. As this is usually the unwritten matter of a valid international law, there is the problem of recognition of these norms that apply in the legal order of the Republic of Slovenia *per se*. The user must locate them first in the relevant judgments of international tribunals. There is an additional obstacle. With the exception of the judgments of the European Union Court of Justice, Slovenia did not take care of appropriate Slovenian translations of relevant decisions of international judicial and arbitral tribunals. Furthermore, such decisions are also not collected in one place. What can be of assistance is the case law of the Constitutional Court, in which the Court already rejected or recognized unwritten norms of customary international law. But there are not a lot of these types of decisions. One can also help oneself with the specialized literature in the field of customary international law in which recognized international legal experts deal with concrete matters of this kind. Obviously, the problem of identifying the generally accepted principles of international law exists and is not systemically solved. It is left to the skills and resourcefulness of the individual users of the law.

Although the generally accepted principles of international law are used in the Slovenian legal order *per se*, it is not fully clear how the administrative bodies should respond in situations where the rights and obligations of legal entities

are at the same time protected by law and well established international law but are contradictory. By carefully reading the contents of the judgment of the Constitutional Court UI-39/10-6, two situations can be understood. The first situation is that the administrative bodies must, in case of a controversial law governing the 'constitutional rights of individuals or legal entities', inform the higher body, which must in the case of a confirmed doubt propose an appropriate action to the highest authority of the executive branch of government. The latter is, in accordance with the Constitution and the law, competent and responsible to propose a change of the unconstitutional regulation or to request a review of the law at the Constitutional Court. The second situation is when the controversial law governs the 'human rights and fundamental freedoms' from the II. Chapter of the Constitution. In such cases, there are arguments that the administrative body, in spite of the principle of legality, should, on the basis of the 15th Article of the Constitution, use the self-executing norm of customary international law.

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1.04 Strokovni članek

Sistemi elektronskih osebnih dokumentov in uporaba e-storitev v izbranih evropskih državah

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IZVLEČEK

Elektronski osebni (e-osebni) dokumenti, ki se že uporabljajo v nekaterih državah Evropske unije, so osrednji predmet obravnave tega prispevka. Po uvodnih definicijah osnovnih pojmov ponujamo primerjalni pregled sistemov e-osebnih dokumentov v izbranih evropskih državah. Primerjava se osredotoča na uporabnost e-osebnih dokumentov v različnih državah glede storitev, ki jih lahko državljani z njimi opravljajo, oziroma v kolikšni meri so posamezne države izkoristile prednosti, ki jih lahko ti dokumenti prinesejo. V drugem delu članka raziskujemo, v kolikšni meri vpeljani sistemi e-osebnih dokumentov spodbujajo državljane k uporabi e-storitev, tako tistih, ki jih ponuja javni sektor, kot tudi tistih, ki jih ponuja zasebni sektor. Rezultati raziskave kažejo, da državljani v državah z vpeljanim sistemom e-osebnih dokumentov bolj pogosto uporabljajo storitve e-uprave ter e-storitve zasebnega sektorja kot pa v državah, kjer sistema e-osebnih dokumentov ne uporabljajo.

Ključne besede: e-identiteta, e-osebni dokumenti, e-storitve, digitalno potrdilo, biometrija, pametne kartice

JEL: Z00

1 Uvod

Ljudje se že od začetka obstoja zavedamo svoje edinstvenosti, zato se želimo razlikovati med seboj in se identificirati. Eden prvih in najbolj razširjenih načinov identifikacije je uporaba osebnega imena in priimka, s čimer zagotovimo identifikacijo in omogočamo lažjo medsebojno komunikacijo. Ime in priimek pa sta dobra identifikatorja samo v ožji skupini posameznikov. Čim ta krog razširimo, se že lahko pojavita vsaj dva posameznika z istim imenom in priimkom, kar seveda ogroža enolično identifikacijo. Zato ta način identifikacije ne ustreza potrebam države in drugih institucij, kjer je nujno potrebna enolična identifikacija.

Kot odgovor na težave z enolično identifikacijo je bilo v zgodovini človeštva razvitih več različnih sistemov. Najbolj znani med njimi so zagotovo posebni osebni dokumenti, ki vsebujejo toliko podatkov o osebi, kolikor jih je potrebno za enolično identifikacijo imetnika. Osebni dokumenti so zadostovali in še zadostujejo za identifikacijo v realnem svetu.

S pojavom interneta in svetovnega spleta ter še posebej z možnostjo opravljanja spletnih storitev na daljavo pa je nastala težnja po zagotovitvi enolične identifikacije oseb na spletu. Tako so se pojavili številni načini zagotavljanja enolične e-identitete posameznikov, katerim so sledili tudi poskusi združevanja e-identitete s klasičnimi osebnimi dokumenti, V nekaterih državah so tako nastali sistemi elektronskih osebnih (e-osebnih) dokumentov. Prvi e-osebni dokumenti so v Evropi bili uvedeni že pred letom 2000 in so v večini držav, ki jih uporabljajo, doživeli pozitiven odziv (Rissanen, 2010, str. 175). Kljub temu je še vedno zaznati strah pred njihovo uporabo, predvsem pred možnostjo zlorab in hranjenjem preveč občutljivih podatkov na enem mestu. A dejstvo je, da se vse več držav odloča, da državljanom omogoča varno opravljanje e-storitev s pomočjo podpisovanja z digitalnimi potrdili, ki so običajno del e-osebnih dokumentov. S tem naj bi zagotovili državljanom varne e-storitve in jih s tem spodbudili k večji uporabi e-storitev.

Čeprav je ta predpostavka prisotna več časa in je ena od glavnih motivov za vpeljavo sistemov e-osebnih dokumentov, do sedaj ni bilo analize njene veljavnosti. Namreč, dosedanje raziskave na tem področju, kot na primer Kubicek s soavtorji (2010a, 2010b) ali Martens (2010), se osredotočajo na primerjalno analizo nacionalnih sistemov e-osebnih dokumentov v različnih državah. Poudarek teh člankov je torej na delovanju sistemov e-osebnih dokumentov in ne na njihovi uporabnosti, kar je fokus tega prispevka.

Cilj tega članka je torej ugotoviti, ali e-osebni dokumenti zares spodbudijo državljane k bolj pogosti uporabi e-storitev. V ta namen najprej uvedemo pojem e-osebni dokumenti ter pregledamo storitve, ki jih državljani lahko z njimi opravljajo. V nadaljevanju prvega dela ponujamo tudi primerjalno analizo uporabe e-osebnih dokumentov v izbranih evropskih državah. Drugi del članka je namenjen empirični analizi razlike med stopnjo uporabe e-storitev v državah, ki uporabljajo e-osebne dokumente ter v državah, ki jih ne. Primerjamo tako uporabo e-storitev, ki jih nudi zasebni sektor kot tudi storitev e-uprave.

2 E-osebni dokumenti in opravljanje e-storitev v izbranih državah

Osebni dokumenti obstajajo že dolgo in so se izkazali kot zelo zanesljivo orodje za izkazovanje posameznikove identitete. Zato se danes mnogi sprašujejo, ali jih je mogoče nadgraditi z e-osebnimi dokumenti. Čeprav e-osebni dokumenti zaenkrat še nimajo integrirane ali poenotene oblike, jim je skupna uporaba tehnologij digitalnega potrdila in digitalnega podpisa, s katerim je omogočeno opravljanje varnih e-storitev. E-osebni dokumenti poleg običajne

identifikacije državljanom lahko ponujajo še celo vrsto možnosti. Jemec (2003, str. 16) ponuja izčrpen seznam teh možnosti, ki vključuje e-identifikacijo in avtentikacijo za opravljanje e-storitev javne uprave in zasebnega sektorja, kvalificiran e-podpis (digitalno podpisovanje), uporabo in izvajanje e-storitev z zaupnimi podatki z možnostjo šifriranja podatkov ter varen prenos zasebnih podatkov preko (javnega) omrežja.

E-osebni dokumenti torej obljubljajo univerzalno, varno in zanesljivo opravljanje storitev, ki jih državljani do sedaj niso mogli (Poller et al., 2011, str. 1–2). Prinašajo vrsto koristi, zlasti spodbujanje hitrejšega razvoja e-uprave in e-Evrope, povečanje zaupanja z uporabo šifriranih podatkov, promocijo in možnost varnega e-trgovanja, e-plačevanje in podobno (Jemec, 2003, str. 16).

Z vidika vpeljave e-osebnih dokumentov je največji premik nastal ob uvedbi biometričnih potnih listin, saj so na ta način mnoge države uvedle osebne dokumente, ki vsebujejo tehnologijo pametnih kartic. A na tem mestu je treba poudariti, da biometrični osebni dokumenti niso nujno tudi e-osebni dokumenti. Res je, da biometrični osebni dokumenti ponujajo nove načine identifikacije, ki slonijo na naprednih in elektronskih tehnologijah, vendar pogosto ne omogočajo elektronske identifikacije za potrebe opravljanja e-storitev na daljavo. Nekatere države, ki so uvedle to tehnologijo, tako še niso izkoristile potenciala, ki jih vgrajena pametna kartica prinaša. Večina držav še vedno uporablja take dokumente le za omogočanje boljše enolične identifikacije, ne pa za zagotavljanje enolične e-identitete in opravljanja storitev na daljavo.

Danes mnoge države že uporabljajo to vrsto osebnih dokumentov, mnoge pa so v procesu sprejemanja le-teh. Vpeljava sistema e-osebnih dokumentov je izredno zahteven in dolgotrajen proces, vendar ga je lažje izpeljati, če se že na začetku načrtuje razširitev sistema in se ustrezno pripravi tudi na možnosti, ki jih prinaša razvoj novih tehnologij. Pri načrtovanju sistema je nujno potrebno upoštevati ne le funkcionalnost sistema, uporabljene tehnologije ali povzročene stroške, ampak tudi različne druge dejavnike, kot so sociološko-kulturni kontekst, pravni sistem, politika ali zgodovinsko ozadje. Vse to namreč vpliva na to, ali bodo spremembe pri državljanih doživele pozitiven odziv ali pa neodobravanje (McKenzie et al., 2008, str. 51).

Razlogov, zakaj prihaja do razlik med državami pri vpeljavi e-osebnih dokumentov in e-storitev, je precej. Tveganja so visoka, vendar so po drugi strani možnosti izredno široke, česar se mnogi zavedajo. Vse več ljudi se namreč zanaša na digitalno tehnologijo. Veliko držav se ukvarja z razvojem tehnologij, ki omogočajo razvoj e-identitet, kot so e-potni listi, e-osebni dokumenti itd. Informacijska doba namreč potrebuje sistem, ki omogoča izvajanje le tega (Tiwari et al., 2011, str. 576). V nadaljevanju predstavljamo izbrane države, ki prebivalcem omogočajo uporabo e-osebnih dokumentov, s katerimi lahko opravljajo določene storitve.

3 Sistemi e-osebnih dokumentov v izbranih evropskih državah

Države so pri načrtovanju in izvedbi sistema e-osebnih dokumentov ubrale različne poti. Zato se e-osebni dokumenti med seboj razlikujejo ne samo v tehnološkem smislu ampak tudi glede na uporabnost. Tabela 1 ponuja vpogled v uporabnost e-osebnih dokumentov v šestih evropskih državah.

Tabela 1: Uporabnost e-osebnih dokumentov v šestih evropskih državah

Država	Leto uvedbe	Omogoča oddajo davčne napovedi (e-davki)	Omogoča elektronsko participacijo na volitvah (e-volitve)	Omogoča opravljanje upravnih storitev (registracija podjetji, sprememba prebivališča …)	Omogoča opravljanje spletnih storitev zasebnega sektorja	Omogoča opravljanje storitev prek mobilnega telefona
Avstrija	2005	DA	NE	DA	DA	DA
Estonija	2002	DA	DA	DA	DA	DA
Finska	1999	NE	NE	DA	NE	NE
Nemčija	2010	NE	NE	DA	DA	NE
Španija	2006	NE	NE	DA	DA	NE
Švedska	2000	DA	NE	DA	DA	NE

Vir: lasten

Iz tabele je razvidno, da so najbolj široko uporabni estonski e-osebni dokumenti. Z njimi je namreč omogočeno opravljanje številnih storitev, ki jih nudi javni sektor, pa tudi opravljanje spletnih storitev zasebnega sektorja. Poleg Avstrije ima Estonija edina razvit sistem opravljanja raznih storitev z mobilnim telefonom, vendar je v Estoniji sistem že delujoč, med tem ko je v Avstriji še vedno v poskusnem obdobju. Najmanj je uporaben finski e-osebni dokument, saj je uporaben le za storitve zasebnega sektorja.

Estonija je ena izmed vodilnih držav na področju e-osebnih dokumentov. Začetki gradnje sistema segajo že v leto 2000, ko je bil sprejet zakon, ki ureja področje digitalnih podpisov. Nato je bila v letu 2001 sprejeta nacionalna osebna izkaznica, ki je državljanom omogočala identifikacijo tako v realnem kot digitalnem svetu. Omenjeno izkaznice so začeli izdajati državljanom 1. januarja 2002. Tako je v letu 2012 že 90 % vseh državljanov Estonije uporabljalo omenjeno osebno izkaznico (Estonian information system's authority, 2012).

Danes državljani Estonije lahko s pomočjo e-osebne izkaznice opravljajo veliko storitev. Tako lahko prek spleta volijo, plačujejo davke, urejajo zdravstvene zadeve, opravljajo bančne storitve ter se tudi povežejo na informacijski sistem šole, ki jo obiskujejo. Opravljanje e-storitev je danes postalo skorajda njihov vsakdan. Redko kje lahko zasledimo, da si prebivalci več ne predstavljajo staromodnega obiskovanja državnih organov in opravljanja storitev osebno, če jih lahko opravijo prek spleta (Valisminsteerium, 2012). Državljanom z e-osebnimi dokumenti je v Estoniji od leta 2007 omogočeno tudi opravljanje storitev z mobilnim telefonom s posebno aplikacijo Mobile-ID, ki omogoča

opravljanje storitev z mobilnim telefonom, pri čemer je mobilni telefon hkrati identifikacijska kartica in čitalnik. Mobile-ID vsebuje enake podatke kot e-osebna izkaznica, za opravljanje storitve pa državljan ne potrebuje čitalnika kartic (Martens, 2010, str. 217).

Nemčija že dolgo velja za eno izmed tehnološko najbolj razvitih držav v svetu, zato ne preseneča, da je v vrhu tudi pri razvoju sistema e-osebnih dokumentov. V letu 2006 se je začela reforma, s katero so v nemškem parlamentu sprejeli zakon o osebnih izkaznicah in digitalnem potrdilu. Na podlagi tega so 1. novembra 2010 izdali prve e-osebne izkaznice (Hornung & Rossnagel, 2010, str. 152). Trenutno e-osebna izkaznica omogoča opravljanje upravnih storitev na daljavo, ki jih je bilo že do sedaj mogoče opravljati z digitalnim potrdilom. Tako na primer je mogoče opraviti spremembo imena ali priimka in spremembo prebivališča na daljavo. Eden glavnih namenov pa je opravljanje komercialnih storitev prek spleta. Omogočeno je namreč, da državljan lahko opravi katero koli storitev prek spleta, ki zahteva varno povezavo, overitev ter enolično identifikacijo. Ponudnik storitve mora zato imeti ustrezen certifikat, da lahko pridobiva podatke stranke. Tako je na primer omogočeno skleniti zavarovanja prek interneta s pomočjo e-osebnega dokumenta. Vse, kar uporabnik potrebuje, je e-osebna izkaznica, čitalnik kartic in programska oprema, ki jo brezplačno naloži ob aktivaciji kartice (Bundesdruckerei, 2013).

Finska je bila ena izmed prvih držav, ki so uvedle e-osebni dokument. Za zamenjavo starih osebnih izkaznic z novimi e-osebnimi izkaznicami so se odločili že leta 1999. Dokument se lahko uporablja za spletne overitve, digitalno podpisovanje dokumentov ter šifriranje e-poštnih sporočil. Finska ima izredno dobro razvit sistem opravljanja e-storitev v zasebnem sektorju. Za opravljanje storitev zasebnega sektorja uporabljajo komercialni sistem TUPAS, katerega delovanje zagotavljajo finske banke. Ta ne deluje po principu digitalnih potrdil, ampak po sistemu uporabniškega imena in gesla ter kode, ki velja le za eno transakcijo. Tako je na primer v letu 2010 ta sistem uporabljala večina prebivalcev, med tem ko pa je sistem e-osebne izkaznice uporabljalo le 10 % prebivalcev. Kar 99,9 % spletnih storitev poteka prek certifikata TUPAC, le 0,1 % pa prek sistema e-osebne izkaznice. E-osebno izkaznico je možno uporabljati tudi namesto vozniškega dovoljenja, vendar je to mogoče tudi s kartico socialnega zavarovanja (Rissanen, 2010, str. 175–181).

Za razliko od ostalih držav ima Švedska tradicijo, da osebnih dokumentov ne izdajajo državni organi, ampak jih izdajajo in distribuirajo zasebni subjekti, kot so banke ali pa poštni uradi. Švedi so se podobno kot Avstrijci odločili za večkartični pristop, kar pomeni, da je za opravljanje storitev prek spleta, bodisi z državo ali zasebnimi subjekti, na voljo več različnih kartic. Za ta način so se odločili tudi zaradi mnenja, da bo večje število ponudnikov vzpostavilo konkurenco, ki bo posledično znižala cene storitev, hkrati pa bo to povzročilo tudi večje povpraševanje med potencialnimi uporabniki (Grönlund, 2010, str. 195-196). Obe vrsti e-osebnih dokumentov, ki jih izdaja država, nista neposredno namenjeni opravljanju storitev prek spleta. Razlog za to je

v izredno dobro razvitem sistemu digitalnih potrdil in digitalnih podpisov. Ti so namreč že od leta 2000 na voljo državljanom in jih izdajajo zasebni subjekti. Namenjeni so tako opravljanju storitev zasebnega sektorja kot za opravljanje storitev na ravni države. Tako lahko na primer z bančno kartico, ki vsebuje digitalno potrdilo in elektronski podpis, državljani opravijo dvig gotovine ali spletno plačilo, hkrati pa lahko z njo oddajo tudi davčno napoved. Zanimivo pri tem je, da isto bančno kartico švedski državljani lahko uporabijo tudi kot osebni dokument in se z njo predstavijo pred uradnim organom. Vse, kar uporabnik potrebuje za uporabo katere koli storitve, je le ustrezen čitalnik kartic ter programska oprema, ki jo lahko naloži ob prvi uporabi kartice prek posebnega spletnega portala (SEIS, 2013).

Španska e-osebna izkaznica je obvezna za vse državljane, starejše od 14 let. Danes je z e-osebnimi izkaznicami v Španiji mogoče opravljati številne storitve s pomočjo e-osebnih dokumentov. Ena vidnejših je uporaba sistema eJustice, ki s pomočjo aplikacije LexNet omogoča sodelovanje s sodno vejo oblasti prek spleta. Tako je mogoča izmenjava dokumentov med strankami in sodiščem na daljavo. Prav tako je mogoča spletna izmenjava dokumentov med državnimi, regionalnimi in lokalnimi organi ter strankami. Državljanom so omogočeni spletni dostopi do različnih registrov ter podatkovnih baz. Tako ima lahko prebivalec vpogled, kateri podatki se o njem zbirajo v neki podatkovni bazi ter kdo in zakaj je do njih dostopal (iDABC, 2009, str. 32–34).

Avstrija je ena izmed prvih evropskih držav, ki je uvedla zakonodajo na področju e-osebnih dokumentov. Zamisel o e-osebni izkaznici je nastala leta 1999, leta 2002 se je začel testni projekt in tako je leta 2005 e-osebna izkaznica na voljo vsem državljanom (Dazzlepod, 2011). E-osebno izkaznico v Avstriji uporablja le 10 % ljudi, saj ta ni obvezna, zato je v bil v Avstriji večkartični pristop nujen. Uporabnik lahko s katero koli kartico opravlja veliko storitev. Na ravni države tako lahko naroči osebne dokumente, zaprosi za potrdilo o nekaznovanosti, odda davčno napoved itd. Prav tako pa je mogoče poslovanje z zasebnim sektorjem, na primer opravljanje bančnih storitev ali spletni nakupi (Dazzlepod, 2011).

4 Vpliv obstoja sistema e-osebnih dokumentov na stopnjo uporabe e-storitev

Praksa v državah, kjer so že vpeljali e-osebne dokumente, je večinoma pokazala, da so ti dosegli pričakovanja in so se izkazali kot prava rešitev za povečevanje stopnje uporabe e-storitev med prebivalci. V nadaljevanju empirično preverjamo osnovanost teh pričakovanj, natančneje pa domnevo, da je stopnja uporabe e-storitev javnega in zasebnega sektorja večja v državah, ki imajo sistem e-osebnih dokumentov, kot v državah, kjer sistema e-osebnih dokumentov še ni.

Za preverjanje te domneve uporabljamo podatke iz Evropskega statističnega urada Eurostat. Kot oceno stopnje uporabe storitev e-uprave smo uporabili

podatke o spremenljivki »E-Government usage by individuals«, tj., odstotka posameznikov starih med 16 in 74 let, ki so v zadnjih treh mesecih uporabili internet za interakcijo z organi državne uprave (Eurostat, 2013a). Kot oceno uporabe e-storitev zasebnega sektorja smo uporabili podatke o spremenljivki »Internet purchases by individuals«, tj., odstotka posameznikov, starih med 16 in 74 let, ki so v zadnjih treh mesecih uporabili internet za spletni nakup (Eurostat, 2013b). Podatke smo zbrali za obdobje od leta 2006 do 2010 za storitve e-uprave oziroma do 2011 za e-storitve zasebnega sektorja. V raziskavo smo vključili podatke o 21 evropskih državah, od katerih je 10 takih, ki imajo sistem e-osebnih dokumentov, in 11 takih, kjer tega sistema še ni. Za preverjanje statistične značilnosti ugotovljenih razlik v povprečni stopnji uporabe e-storitev smo uporabili Studentov *t*-test (Trochim, 2006). Z njim ugotavljamo statistično značilnost razlike med povprečnimi vrednostmi opazovane numerične spremenljivke (v našem primeru torej stopnje uporabe e-storitev) v dveh množicah podatkov (v našem primeru države, ki imajo sistem e-osebnih dokumentov in države, ki sistema še nimajo). Prag značilnosti *t*-testa smo postavili na 99 %. Za izvedbo *t*-testa smo uporabili ustrezno formulo, vgrajeno v programskem paketu za obdelavo preglednic Excel.

4.1 Storitve e-uprave

Tabela 2: Stopnja uporabe storitev e-uprave v evropskih državah z vpeljanim sistemom e-osebnih dokumentov

Država	2006	2007	2008	2009	2010
Estonija	29	30	34	44	48
Avstrija	33	27	39	39	39
Belgija	30	23	16	31	32
Finska	47	50	53	53	58
Italija	16	17	15	17	17
Nemčija	32	43	33	37	37
Nizozemska	52	55	54	55	59
Portugalska	17	19	18	21	23
Španija	25	26	29	30	32
Švedska	52	53	52	57	62
Povprečje	34	33	34	39	41

Vir: Eurostat (2013a)

Iz tabele 2 je razvidno, da so v letu 2010 državljani Švedske uporabljali največ storitev e-uprave, in sicer kar 62 %. Sledi Nizozemska z 59 %, Finska z 58 % ter Estonija z 48 %. V povprečju je v omenjenih državah v letu 2010 uporabljalo omenjene storitve 41 % vprašanih. Podatki tudi kažejo, da se je povprečna stopnja uporabe storitev e-uprave iz leta v leto povečevala.

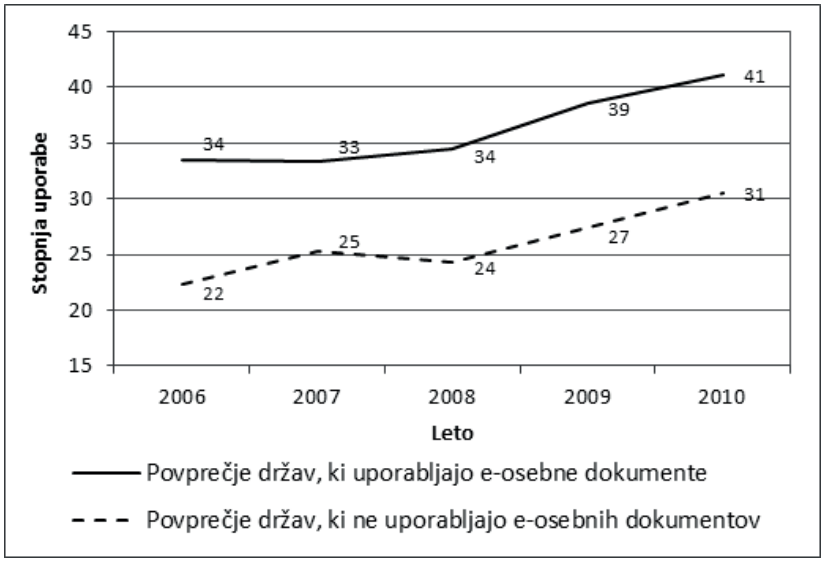
Tabela 3: Stopnja uporabe storitev e-uprave v evropskih državah, ki nimajo vpeljanega sistema e-osebnih dokumentov

Država	2006	2007	2008	2009	2010
Bolgarija	8	6	8	10	15
Češka	17	16	14	24	17
Danska	43	58	44	67	72
Francija	26	38	43	30	36
Grčija	9	12	10	12	13
Irska	26	33	27	28	27
Latvija	25	18	16	23	31
Litva	13	18	20	19	22
Madžarska	17	25	25	25	28
Slovaška	32	24	30	31	35
Slovenija	30	30	31	32	40
Povprečje	22	25	24	27	31

Vir: Eurostat (2013a)

Po podatkih iz tabele 3 je največ uporabnikov e-uprave na Danskem, kjer jih je v letu 2010 uporabljalo storitev e-uprave kar 72 %. Na drugem mestu je Slovenija s 40 %. Najmanj uporabnikov je bilo v Grčiji, samo 13 %, in v Bolgariji 15 %. V povprečju je v letu 2010 v omenjenih državah storitve e-uprave uporabljalo 31 % vprašanih. Podobno kot v državah s sistemi e-osebnih dokumentov, se je tudi tukaj povprečna stopnja uporabe storitev e-uprave iz leta v leto povečevala.

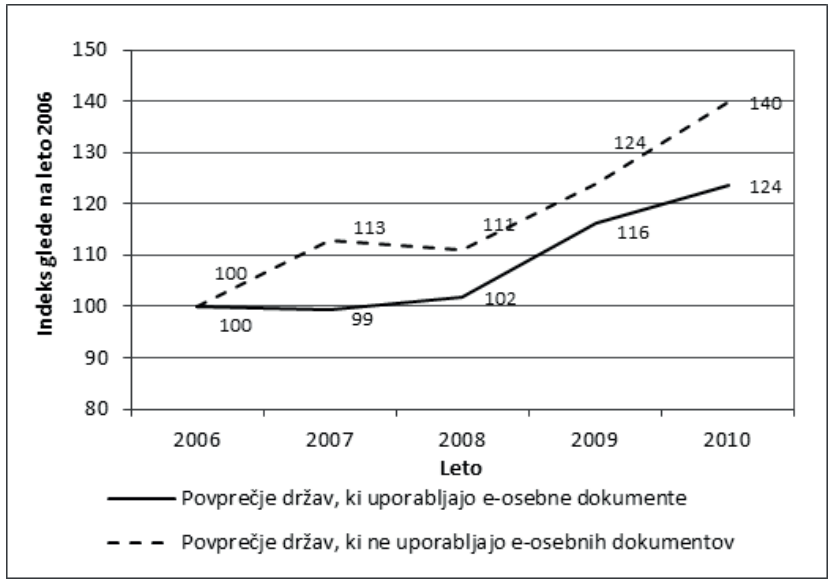
Grafikon 1: Primerjava povprečne stopnje uporabe storitev e-uprave med evropskimi državami, ki imajo vpeljan sistem e-osebnih dokumentov, in tistimi, ki ga nimajo



Vir: lasten na podlagi tabel 2 in 3

Iz grafikona 1 je zelo očitno razvidno, da je povprečna stopnja uporabe storitev e-uprave večja med državami, ki imajo sistem e-osebnih dokumentov, kot med državami, ki sistema še nimajo. Studentov *t*-test pokaže, da je opazovana razlika tudi statistično značilna: stopnja značilnosti (p = 0,0007) je veliko manjša od zastavljenega praga (99 %, oziroma 0,01). S tem potrdimo domnevo, da je stopnja uporabe storitev e-uprave statistično značilno večja v državah s sistemom e-osebnih dokumenti. V nadaljevanju primerjamo še kakšni so indeksi rasti stopnje uporabe storitev e-uprave.

Grafikon 2: Indeks rasti stopnje uporabe storitev e-uprave med evropskimi državami, ki imajo vpeljan sistem e-osebnih dokumentov, in tistimi, ki ga nimajo



Vir: lasten na podlagi tabel 2 in 3

Iz grafikona 2 je razvidno, da se je v povprečju delež uporabnikov storitev e-uprave, povečeval bolj v državah, ki ne uporabljajo e-osebnih dokumentov. V povprečje držav, ki uporabljajo e-osebne dokumente, ni vključena Nemčija, saj je ta na sistem e-osebnih dokumentov prešla šele v letu 2010. Rezultati t-testa v tem primeru kažejo, da opazovana razlika ni statistično značilna: stopnja značilnosti 0,15 je večja od zastavljenega praga 0,01. Tako iz uporabljenega vzorca ne moremo sklepati, da je indeks povečevanja uporabe storitev e-uprave večji v državah, ki še nimajo vpeljanega sistema e-osebnih dokumentov.

Ugotavljamo, da je uporabnikov storitev e-uprave precej več v državah, kjer državljani imajo na voljo e-osebne dokumente. Res je, da se je odstotek uporabnikov skozi leta bolj povečeval v državah, ki ne uporabljajo omenjenih dokumentov, vendar je to mogoče pripisati relativno nizkemu začetnemu številu uporabnikov v nekaterih izmed teh držav. Tako na primer v Bolgariji

majhno povečanje števila uporabnikov pomeni precejšnje povečanje deleža le-teh. Tako je iz grafikona mogoče razbrati, da je v letu 2010 v državah, ki uporabljajo e-osebne dokumente, v povprečju storitve e-uprave uporabljalo 41 % anketirancev, med tem ko pa je v državah, kjer jih niso uporabljali, omenjene storitve uporabljalo le 31 % anketirancev.

Razloge za to je iskati predvsem v tem, da imajo države z že izdelanim sistemom e-osebnih dokumentov že dlje časa razvit tudi sistem opravljanja storitev e-uprave prek spleta. Tako so se državljani, ki so bili zainteresirani za opravljanje storitev e-uprave, za opravljanje le teh odločili že pred uvedbo e-osebnih dokumentov, tako da se število uporabnikov vsako leto ni tako povečevalo kot v državah, kjer še nimajo urejenega sistema e-osebnih dokumentov. Izjema je Estonija, kjer se količina storitev, ki jih lahko državljani opravljajo prek spleta, zvišuje in posledično tudi število uporabnikov storitev e-uprave. Zato ne preseneča dejstvo, da je v Estoniji v primerjavi z letom 2006 število uporabnikov v letu 2010 narastlo za 65 %.

4.2 E-storitve privatnega sektorja

Tabela 4: Stopnja uporabe e-storitev, ki jih nudi zasebni sektor v evropskih državah z vpeljanim sistemom e-osebnih dokumentov

Država	2006	2007	2008	2009	2010	2011
Avstrija	23	26	28	32	32	35
Belgija	14	15	14	25	27	31
Estonija	4	6	7	12	13	16
Finska	29	33	33	37	41	45
Italija	5	7	7	8	9	10
Nemčija	38	41	42	45	48	54
Nizozemska	36	43	43	49	52	53
Portugalska	5	6	6	10	10	10
Španija	10	13	13	16	17	19
Švedska	39	39	38	45	50	53
Povprečje	20	23	23	28	30	33

Vir: Eurostat (2013b)

Iz tabele 4 je razvidno, da so v letu 2011 državljani Nemčije najbolj navdušeni uporabniki e-storitev zasebnega sektorja, in sicer jih je kar 62 %. Za Nemčijo so jih največ uporabljali na Nizozemskem in Švedskem, in sicer povsod 53 % uporabnikov. Najmanj so jih uporabljali na Portugalskem in Italiji, in sicer le 10 % anketirancev. V povprečju je v omenjenih državah v letu 2011 uporabljalo omenjene storitve 33 % vprašanih. Povprečje se je iz leta v leto povečevalo, prav tako pa tudi stopnje uporabe v posameznih državah.

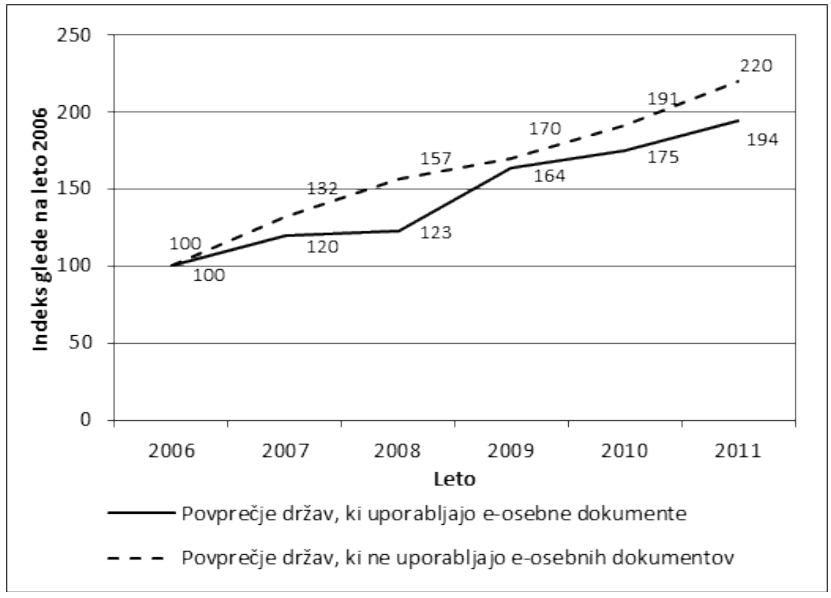
Tabela 5: Stopnja uporabe e-storitev zasebnega sektorja v evropskih državah, ki nimajo vpeljanega sistema e-osebnih dokumentov

Država	2006	2007	2008	2009	2010	2011
Bolgarija	2	2	2	3	3	5
Češka	7	8	13	12	15	16
Danska	31	43	47	50	54	57
Francija	19	25	28	32	40	40
Grčija	3	5	6	8	9	13
Irska	21	26	30	29	28	34
Latvija	5	6	10	8	8	10
Litva	2	4	4	6	7	11
Madžarska	5	7	8	9	10	13
Slovaška	7	10	13	16	19	23
Slovenija	8	9	12	14	17	20
Povprečje	10	13	16	17	19	22

Vir: Eurostat (2013b)

Iz tabele 5 je razvidno, da so v letu 2011 državljani Danske uporabljali največ e-storitev zasebnega sektorja, in sicer kar 57 %. Za Dansko so jih največ uporabljali v Franciji, in sicer 40 %. Najmanj so jih uporabljali v Bolgariji, kjer je le 5 % anketirancev uporabljalo omenjene storitve. V povprečju je v omenjenih državah v letu 2011 uporabljalo navedene storitve 22 % vprašanih. Povprečje se je iz leta v leto povečevalo.

Grafikon 3: Indeks rasti stopnje uporabe e-storitev zasebnega sektorja med evropskimi državami, ki imajo vpeljan sistem e-osebnih dokumentov, in tistimi, ki ga nimajo



Vir: Lasten na podlagi tabel 4 in 5

Iz grafikona 4, ki primerja indekse rasti stopnje uporabe e-storitev zasebnega sektorja, je razvidno, da se je ta stopnja povečevala bolj v državah, ki ne uporabljajo e-osebne dokumente, in sicer kar za 120 %. V državah, kjer uporabljajo e-osebnih dokumentov, pa se je delež uporabnikov med leti 2006 in 2011 povečal za 94 %. Rezultati t-testa v tem primeru kažejo, da opazovana razlika ni statistično značilna: stopnja značilnosti 0,25 je večja od zastavljenega praga 0,01. Tako iz omenjenega vzorca ne moremo sklepati, da je indeks povečevanja uporabe e-storitev zasebnega sektorja večji v državah, ki nimajo vzpostavljenega sistema e-osebnih dokumentov.

Razloge za večjo rast stopnje uporabe e-storitev zasebnega sektorja v državah brez sistem e-osebnih dokumentov je treba iskati predvsem v tem, da imajo države, ki že imajo izdelan sistem e-osebnih dokumentov, že dlje časa razvit tudi sistem opravljanja storitev prek spleta. Tako so se državljani, ki so bili zainteresirani za opravljanje teh storitev, za opravljanje e-storitev zasebnega sektorja odločili že pred uvedbo e-osebnih dokumentov, tako da se število uporabnikov ni povečevalo v tolikšni meri kot v državah, kjer še nimajo urejenega sistema e-osebnih dokumentov.

Izjema je spet Estonija, kjer se količina storitev, ki jih lahko državljani opravljajo prek spleta, zvišuje podobno kot v državah, ki nimajo sistema e-osebnih dokumentov. Opaziti je tudi, da je število uporabnikov, ki uporabljajo storitve e-uprave, približno enako številu uporabnikov e-storitev, ki jih nudi zasebni sektor. Vendar pa se je število uporabnikov storitev, ki jih nudi zasebni sektor, precej bolj povečalo od leta 2006 v primerjavi z uporabniki storitev e-uprave, kar dokazuje, da je bilo uporabnikov e-uprave pred letom 2006 precej več kot uporabnikov e-storitev zasebnega sektorja. Mogoče je opaziti, da ljudje vse več uporabljajo omenjene storitve in posledično tudi zaupajo vzpostavljenemu sistemu.

5 Zaključek

E-osebni dokumenti so se v državah, ki so se zanje odločile, izkazali za resno alternativo dosedanjim osebnim dokumentom. Slednji so namreč v 21. stoletju že precej zastareli, saj ne izkoriščajo možnosti, ki jih prinaša sodobna tehnologija. Med posameznimi državami, ki so uvedle to vrsto dokumentov, so se pojavile številne razlike. Primerjava po izbranih državah glede uporabnosti e-osebnih dokumentov kaže, da je Estonija glede uporabnosti svojega e-osebnega dokumenta precej v ospredju, saj omogoča največ možnosti različne uporabe. E-osebni dokumenti v drugih državah, ki so bile zajete v primerjavo, še ne dosegajo take stopnje uporabnosti, čeprav je mogoče zaznati napredek.

S stalnim posodabljanjem e-osebnih dokumentov se širi tudi možnost njihove uporabe. V primerjavi uporabe različnih e-storitev zasebnega sektorja in storitev e-uprave med izbranimi državami, ki uporabljajo e-osebne dokumente, in tistimi, ki jih ne, ugotavljamo, da je povprečni delež uporabnikov storitev

e-uprave precej (in statistično signifikantno) večji v državah, ki imajo sistem e-osebnih dokumentov. V letu 2010 je v državah, ki uporabljajo e-osebne dokumente, v povprečju storitve e-uprave uporabljalo 41 %, med tem ko pa je v državah, kjer teh niso uporabljali, omenjene storitve uporabljalo le 31 % anketirancev.

Podobno je tudi pri uporabi e-storitev zasebnega sektorja. Stopnja uporabe e-storitev zasebnega sektorja je namreč (statistično signifikantno) večja v državah s sistemom e-osebnih dokumentov. V letu 2011 je e-storitve zasebnega sektorja uporabljalo kar 33 % državljanov, med tem ko jih je v državah brez tega sistema povprečna stopnja uporabe le 22 %. Razloge je treba iskati predvsem v tem, da imajo države, ki že imajo izdelan sistem e-osebnih dokumentov, že dlje časa razvit tudi sistem opravljanja storitev prek spleta. Državljani, ki so bili zainteresirani za opravljanje storitev prek spleta, so se za opravljanje e-storitev zasebnega sektorja odločili že pred uvedbo e-osebnih dokumentov, tako da se število uporabnikov ni vsako leto toliko povečalo kot v državah, kjer še nimajo urejenega sistema e-osebnih dokumentov.

Na področju različnih možnosti uporabe e-osebnih dokumentov zaenkrat ni bilo opravljenih raziskav, vendar bi bile za države, ki se še odločajo za vpeljavo takega sistema, izredno dobrodošle. Predvsem bi bilo treba narediti temeljito analizo zadovoljstva uporabnikov z e-osebnimi dokumenti, s čimer bi ugotovili stopnjo zadovoljstva uporabnikov e-osebnih dokumentov kot tudi razloge za (ne)zadovoljstvo. S tem bi lahko tudi zasnovali nabor možnih izboljšav ter postavili nove smernice razvoja e-osebnih dokumentov, na podlagi katerih bi lahko razvili tak sistem e-osebnih dokumentov, ki bi bil narejen po željah državljanov. Te smernice bi lahko v bodoče predstavljale vodilo Sloveniji na poti k vzpostavljanju ustreznega sistema e-osebnih dokumentov.

Matevž Šušteršič je diplomant upravnih ved (UN). Trenutno zaključuje magistrski študijski program Uprava na Fakulteti za upravo. Tekom študija je dve leti delal v študentskem referatu na Fakulteti za upravo, sodeloval je tudi pri procesu akreditacije študijskih programov. Pripravništvo je opravil v Sektorju za upravno-notranje zadeve na Upravni enoti v Ljubljani.

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SUMMARY

SYSTEMS OF ELECTRONIC PERSONAL DOCUMENTS AND E-SERVICES USAGE IN SELECTED EUROPEAN COUNTRIES

Key words: e-identity, e-personal documents, digital certificate, biometry, smart cards

In this paper, we study electronic personal (e-personal) documents that have already been introduced in a number of European Union (EU) countries. After defining basic concepts in the introductory section, we provide a brief comparative overview of the systems of e-personal documents in selected EU countries. The comparison focuses on the usability of the e-personal documents, in terms of services that citizens can perform as well as the degree to which these systems provide citizens with the potential advantages. In the second part of the paper, we analyze the relationship between the introduced systems of e-personal documents and usage of e-services provided by the private and public sector in the respective countries. The results of the analysis show that citizens of the countries with e-personal documents use e-government and e-commerce services more often than citizens of the countries without e-personal documents.

1.04 Strokovni članek

Vloga Evropskega sodišča za človekove pravice kot mednarodne organizacije za varstvo človekovih pravic v primeru Izbrisani

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IZVLEČEK

Prispevek obravnava pregled informacij v zvezi s primerom »izbrisani« v Sloveniji predvsem skozi prizmo sodelovanja mednarodnih organizacij za varstvo človekovih pravic. Pri tem avtor uvodoma predstavi ključne pojme in njihov pomen ter v nadaljevanju opiše problematiko izbrisa in nastop mednarodnih organizacij za varovanje človekovih pravic, predvsem pravne poti, pritožbe in posledično sodbe Evropskega sodišča za človekove pravice. V nadaljevanju opiše aktualno stanje primera in nakaže odprta vprašanja ter težave, ki še čakajo rešitev, nato pa v sklepnih besedah zaključi s povzetkom ugotovitev in upanjem na boljši jutri za vse vpletene.

Ključne besede: izbris, izbrisani, človekove pravice, mednarodno varstvo človekovih pravic, Evropsko sodišče za človekove pravice

JEL: K23, K33, K42

1 Uvod

S pojmom »izbrisani« se v Sloveniji srečujemo že dolgo časa in redkokateri pojem povzroča tako različne odzive pri naslovnikih, kot prav ta. Od označbe, da gre za ljudi, ki so zavestno izbrali tak položaj, do tega, da gre za posameznike oziroma skupino ljudi, ki so jim bile kršene z slovensko ustavo in mednarodnim pravom zaščitene človekove pravice. Zaradi prepletenosti politike z dogajanjem v zvezi z izbrisanimi se vse skupaj še bolj zavija v nejasnost, kar je bilo očitno tudi v razpravi v DZ dne 24. 09. 2013 glede predloga Zakona o povračilu škode osebam, ki so bile izbrisane iz registra stalnega prebivalstva. [1]

1 Glej posnetek iz arhiva razprav DZ, 17. Seja DZ, z dne 24. 09. 2013 (dostopno na http://www.rtvslo.si/tvslo3/zasedanja_dz).

Vsebino prispevka sestavlja pet poglavij, začenši z uvodom, ki podaja pregled vsebine dela in definicijo uporabljenih pojmov. V nadaljevanju se na podlagi literature, pravnih in spletnih virov predstavi širša problematika izbrisanih, kakšna je (bila) pot rešitve te problematike, vloga mednarodnih organizacij za varstvo človekovih pravic, sodne odločbe in predvsem odločba Evropskega sodišča za človekove pravice ter aktualno stanje v času pisanja tega prispevka.

Za razumevanje prispevka je nujno poenotenje pojmovanja, zato sledi navedba in definicija nekaj najbolj ključnih pojmov, uporabljenih v prispevku, kot so izbris, izbrisani, človekove pravice, mednarodne organizacije, ipd.

Ker je o temi izbrisa že bilo objavljenih nekaj publikacij, ki so navedeni tudi v literaturi, je smiselno povzeti definicijo, ki že obstaja. Enako velja tudi za druge ključne pojme, ki so navedeni v nadaljevanju.

1.1 Človekove pravice

Izraz je eden tistih, ki mu pogosto pripade neslavni naziv »floskula«. To je tako tudi zato, ker veliko ljudi pravzaprav ne ve, kaj naj bi sploh pomenil, saj označuje zelo široko in kompleksno področje.

V osnovi ga sestavljata dva samostojna pojma, človek in pravica. Z izrazom »človek« označujemo pripadnika človeške rase (lat. *homo sapiens sapiens*), ne glede na spol ali druge značilnosti. Z izrazom »pravica« pa stvari, do katerih so ljudje upravičeni ali so zagotovljene svoboščine utemeljene z pravnim aktom, na nacionalni ravni najpogosteje z ustavo oziroma z mednarodnimi pravnimi akti. Vsaka pravica je hkrati tudi obveznost, vendar nikoli za isti subjekt. Tako načeloma pravica posameznika pomeni neko obveznost skupnosti, najpogosteje države.

S splošnim izrazom »človekove pravice« tako označujemo vse pravice, ki jih vsakdo ima izključno na podlagi dejstva, da je človek. V pravni teoriji pa izraz razumemo kot pravne pravice, ki so zaščitene s pravnimi instrumenti. Vendar vse pravice niso pravno zaščitene, lahko so povsem deklaratorne narave in kot take nimajo zagotovljenega pravnega varstva.[2]

Čeprav je sam izraz relativno mlad, se zgodovinsko gledano koncept »človekovih pravic« najbolj zgodaj pojavi že v antiki. Najprej v stari Grčiji, kjer ga morda lahko najbolj povežemo z nauki stoicizma, ki med drugim trdi, da je človeško ravnanje treba vrednotiti in poenotiti v skladu z naravo oziroma naravnimi zakoni. Primer tega lahko najdemo v znani Sofoklejevi tragediji Antigona, kjer le-ta prezre povelje kralja Kreona, da ne sme pokopati svojega mrtvega brata, to nepokorščino pa argumentira s tem, da je ravnala v skladu z večnimi božjimi zakoni. Tudi v starem Rimu se te ideje pojavljajo, in sicer celo tako močno, da dobijo svoje mesto v rimskem pravu. Tako poznamo koncept prava narodov (lat. *ius gentium*), ki prepoznava določene univerzalne pravice, predvsem pa obveznosti, ki presegajo koncept državljanstva.

2 Glej Lampe, 2010, str. 43.

Kot nam kažejo zaznamki na primer sv. Tomaža Akvinskega, se v srednjem veku pod pojmom »naravni zakoni« smatrajo obveznosti osebe, ne njena svoboščina ali pravica. S temi nauki se tako tudi upraviči uporaba suženjstva in tlačanskih razmerij, kar zanimivo v osnovi nasprotuje konceptu »človekovih pravic«, kot jih pojmujemo danes, ko sta ključna pojma na primer »enakost« ali »svoboda«. Paradigma naravnih zakonov se šele v renesansi premakne iz polja dolžnosti proti pravicam oziroma svoboščinam posameznika, na kar močno vplivajo pogoste verske vojne med katoliki in protestanti, ki dosežejo svoj vrh v celinski Evropi v tridesetletni vojni in ne nazadnje leta 1648 sprejeti Vestfalski mir, ki priznava določenim protestantskim ločinam versko svobodo. Sicer resda le za suverena, podaniki so morali še vedno slediti svojemu gospodu v njegovi odločitvi.

Tako se razvoj nadaljuje preko zgodovinske časovnice tja do razsvetljenstva in kot ločnico lahko označimo pojav francoske revolucije konec 18. stoletja, ki uveljavi znane pojme »svoboda, bratstvo, enakost«, ki še danes ostajajo neke vrste osnova koncepta človekovih pravic.

Sam pravni pojem človekovih pravic pa dejansko oblikuje dokument, sprejet v luči še ne videnih grozodejstev tedaj pravkar končane druge svetovne vojne. Dokument, o katerem govorimo, je seveda Splošna deklaracija o človekovih pravicah, ki jo sprejme takrat komaj ustanovljena Organizacija združenih narodov (v nadaljevanju OZN) z Resolucijo Generalne skupščine OZN v izteku leta 1948. Deklaracija je plod zavedanja o grobih kršitvah, tudi na sistemski ravni (genocid!) človekovih pravic in potrebi po varstvu le-teh. Sama po sebi sicer ni pravno zavezujoč dokument, le političen, je pa bila temelj dveh sprejetih mednarodnih konvencij (Mednarodna konvencija o državljanskih in političnih svoboščinah in Mednarodna konvencija o ekonomskih, socialnih in kulturnih svoboščinah), ki pa sta pravno zavezujoči, kar posledično odpre nov proces – mednarodno varstvo človekovih pravic in novo polje pravne vede – mednarodno pravo človekovih pravic.

1.2 Mednarodne organizacije

S tem izrazom razumemo organizacijo, katere članstvo vključuje člane iz vsaj treh držav, ki so vezani na podlagi formalnega dogovora in hkrati izvaja aktivnosti v več državah[3].

Kot navaja Zveza mednarodnih združenj (angl. UIA – *Union of international associations*), je na svetu leta 2012 bilo okoli 8.000 vladnih mednarodnih organizacij (angl. IGO – *international government organizations*) in dobrih 57.000 nevladnih mednarodnih organizacij (angl. INGO – *international non-government organizations*). Njihovi podatkovni zbirki se letno pridruži približno 1.200 novih organizacij.[4]

3 Povzeto po Enciklopediji Brittanici, spletna izdaja.
4 Povzeto po spletni strani Zveze mednarodnih združenj (www.uia.org).

Na področju človekovih pravic deluje več različnih organizacij, tako vladnih kot nevladnih, za potrebe tega prispevka pa posebej velja omeniti OZN, Evropsko Unijo (v nadaljevanju EU) ter Svet Evrope.

1.3 Mednarodno varstvo človekovih pravic

Ta pojem lahko označimo kot proces, ki obsega posameznike, vladne organe ter nevladne organizacije, ki se na mednarodni ravni zavzemajo za spoštovanje človekovih pravic, oziroma nudijo podporo žrtvam pri kršitvah njihovih pravic in uveljavljanju sodnega varstva.

Kot navedeno, se je s sprejetjem pravno zavezujočih mednarodnih konvencij in Splošne deklaracije o človekovih pravicah (vse tri skupaj sestavljajo Mednarodno listino o človekovih pravicah) spodbudil proces mednarodnega varstva človekovih pravic.

Do danes sta bili tako na svetovni ravni izvedeni dve mednarodni konferenci o človekovih pravicah, prva v Teheranu leta 1968, kjer je bila ponovno potrjena doktrina soodvisnosti človekovih pravic, saj se spričo zgodovinskih okoliščin in tedanje blokovske delitve sveta pojem človekovih pravic ni enako uporabljal vse povsod. Druga svetovna konferenca se je odvila na Dunaju leta 1993 in je bila prvo tovrstno srečanje na visoki ravni po koncu hladne vojne. Na njej države članice OZN soglasno sprejmejo deklaracijo in zaključni dokument konference, v katerem se priznava splošna narava človekovih pravic in jih spoznava za nedeljive, soodvisne in povezane.

Pomembnost tovrstnih konferenc in dokumentov je predvsem v tem, da jim mednarodna skupnost priznava razsežnost mednarodnega običajnega prava (angl. *international custom law*). Taki pravni akti imajo status mednarodnih pogodb in so tako v pravni hierarhiji nad državnim pravom, ko države pogodbo podpišejo in ratificirajo. S tem dejanjem se zavežejo, da bodo sprejele potrebne ukrepe za uresničevanje določil teh pogodb. Če tega ne storijo ali celo zavestno kršijo določila pogodb, imajo posamezni subjekti, ki so žrtve teh kršitev, možnost dostopa do regionalnih in univerzalnih mehanizmov, ki državo podpisnico prisilijo v uresničevanje svojih obveznosti na področju človekovih pravic torej zagotavljanju le-teh ali plačevanju odškodnin in morebitnih drugih sankcij, če se tega ne držijo.

Na regionalni ravni Evrope lahko kot tak mehanizem vsekakor prepoznavamo Evropsko konvencijo o varovanju človekovih pravic in temeljnih svoboščin (v nadaljevanju EKČP), ki jo je sprejel Svet Evrope leta 1950, Listino temeljnih pravic EU, Sodišče EU s sedežem v Luksemburgu, Evropsko sodišče za človekove pravice (v nadaljevanju ESČP) s sedežem v Strasbourgu in določena druga specializirana sodišča, kot so na primer Mednarodno kazensko sodišče v Haagu, Mednarodno sodišče za vojne zločine na območju nekdanje Jugoslavije in Ruande v Haagu, ipd.

Pomembna in pravno zavezujoča je Listina temeljnih pravic EU, ki so jo najprej kot politično zavezujoč dokument decembra 2000 na zasedanju Evropskega sveta sprejeli Evropska komisija, Evropski parlament in Svet EU. Listina združuje in potrjuje državljanske, politične, ekonomske in socialne pravice državljanov in drugih prebivalcev EU, ki izhajajo iz ustavnih tradicij in skupnih mednarodnih obveznosti posameznih držav članic EU. Pravno zavezujoča postane s sprejetjem Lizbonske pogodbe, v veljavi je torej od leta 2009. Poleg te pa ne moremo mimo EKČP, h kateri naj bi pristopila tudi EU na podlagi določil iz Lizbonske pogodbe, kar naj bi dodatno okrepilo varstvo človekovih pravic v Evropi. Da bi EU postala oseminštirideseta podpisnica konvencije, bi bile potrebne spremembe konvencijskega sistema, zato so pravosodni ministri EU leta 2010 Evropski komisiji podelili mandat za pogajanja, ta pa preko svojih organov pripravlja pravno rešitev za pristop.

Omeniti velja še naslednje dokumente EU in Sveta Evrope iz področja varovanja človekovih pravic: Direktiva o rasni enakosti (2000-43), Direktiva o enakosti pri zaposlovanju (2000-78), Evropska konvencija o uresničevanju otrokovih pravic, Evropska socialna listina, Evropska konvencija o preprečevanju mučenja in nečloveškega ali ponižujočega ravnanja ali kaznovanja.

1.4 Izbris in izbrisani

S pojmom »izbris« označujemo samovoljno dejanje upravnih organov Republike Slovenije (v nadaljevanju RS), ki so dne 26. 2. 1992[5] izpeljali izbris 25.671 posameznikov iz registra stalnega prebivalstva in jim s tem dejanjem odvzeli status stalnega prebivališča ter ekonomske in socialne pravice vezane na ta status.[6]

Pojem izbrisani pa posledično označuje posameznike, člane omenjene skupine, ki so jim bile s tem dejanjem kršene človekove pravice vezane na status stalnega prebivalca RS, saj jih je država namesto prenosa v register tujcev preprosto izbrisala.

2 Problematika izbrisanih

Ob sicer veličastnem in zgodovinskem dogodku, osamosvojitvi RS in tako prvič pridobljeni lastni državni tvorbi za slovenski narod s 25. 6. 1991, se je posledično zgodilo tudi ne tako veličastno dejanje, to je žal izbris določenih posameznikov iz registra stalnih prebivalcev.

Ob osamosvojitvi so posamezniki, državljani prej Socialistične Republike Slovenije (v nadaljevanju SR Slovenije), avtomatično pridobili državljanstvo

5 Splošno veljaven datum izbrisa, v nekaterih primerih pa je bil izbris izvršen na drug datum. Na primer, če je oseba zaprosila za državljanstvo in je bila njena vloga zavrnjena, je bila izbrisana dva meseca po dokončnosti odločbe o zavrnitvi vloge za državljanstvo. Če je oseba zaprosila za državljanstvo, pa je bil postopek ustavljen, pa je bila izbrisana naslednji dan po ustavitvi postopka.

6 Povzeto po spletni strani Mirovnega inštituta (dostopno na http://www.mirovni-institut.si/izbrisani/opis-izbrisa/).

nove države, RS. V skladu z 39. členom ZDRS[7] je državljan RS namreč vsak, kdor je po dosedanjih predpisih imel državljanstvi SR Slovenije in Socialistično federativne Republike Jugoslavije (v nadaljevanju SFRJ). Skladno s 40. členom ZDRS pa je vsak državljan druge republike, ki je imel na dan plebiscita[8] prijavljeno stalno bivališče v RS in je tu tudi dejansko živel, lahko pridobil državljanstvo RS, če je v roku šestih mesecev od uveljavitve zakona vložil vlogo na pristojnem upravnem organu občine, kjer je bilo bivališče prijavljeno. Mladoletni otroci so pridobili državljanstvo skladno z 14. členom ZDRS, glede na državljanstvo staršev.

Nekateri posamezniki za državljanstvo niso zaprosili iz različnih razlogov, najsi bo iz osebnih razlogov politične narave, zaradi strahu, nezmožnosti dostopa do potrebnih dokumentov iz svojih izvornih republik, saj je v tem času tam divjala grozovita vojna; mnogim je bila prošnja za državljanstvo tudi zavrnjena, predvsem iz razloga, da so bili pripadniki Jugoslovanske ljudske armade[9], kar naj bi veljalo za nevarnost za varnost in obrambo in javni red[10].

S potekom šest mesečnega roka, podanega v ZDRS, so 26. 2. 1992 slovenske oblasti izpeljale izbris 25.671 iz registra stalnega prebivalstva in ljudem odvzele status stalnega prebivališča ter ekonomske in socialne pravice, vezane na ta status. To so počeli arbitrarno lokalni upravni organi, dejanje pa se je zgodilo na podlagi internih navodil Ministrstva za notranje zadeve[11]. Danes vemo, da so interna navodila, ki niso objavljena, neveljavna in nezakonita, kadar imajo eksterne učinke[12].

Bistvo težave izbrisanih ni, kot se pogosto navaja, v državljanstvu posameznikov, ampak v nezakonitem in protiustavnem izbrisu prebivalcev RS, saj bi te posameznike morali premestiti iz registra stalnih prebivalcev v register tujcev z dovoljenjem za stalno prebivanje. Ker so jim tako odvzeli stalno bivališče brez vsake pravne podlage, se je očitno načrtno izvedel poseg v njihove socialne in ekonomske pravice. Temu potrjuje tudi Ustavno sodišče RS (v nadaljevanju Ustavno sodišče) leta 1999 s prvo t. i. sistemsko odločbo[13], ko je sicer odločalo o ustavnosti prvega odstavka 16. člena in 81. člena ZTuj[14] in kjer navaja, da so kršena načela pravne države, ker zakon ni uredil prehoda pravnega statusa državljanom drugih republik, ki so imeli v RS stalno bivališče in so na njenem ozemlju tudi dejansko živeli, v status tujca.

7 Zakon o državljanstvu Republike Slovenije (ZDRS, Ur. l. RS, št. 1l/1991 in novele).
8 Plebiscit o razglasitvi samostojnosti Republike Slovenije, izveden dne 23. 12. 1990.
9 Povzeto po Zrim, 2005, str. 32.
10 Glej Dedić et al., 2003, str. 56–57.
11 Glej Lipovec Čebron in Zorn, 2008, str. 237.
12 Glej odločbo Ustavnega sodišča RS, št. U-I-87/96 (dostopno na http://odlocitve.us-rs.si/usrs/us-odl.nsf/bcaf0777a0b458cac12579c30036ecff/5e6856db97422e7dc1257172002a29e8?OpenDocument).
13 Glej odločbo Ustavnega sodišča RS, št. U-I-284/94 (dostopno na http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/7DCB9FD53D87F68CC125717200280E32).
14 Zakon o tujcih (ZTuj, Ur. l. RS, št. 61/1999 in novele).

Zanimivo je tudi ozadje sprejemanja tega zakona, saj je Demosova večina v tedanjem državnem zboru zavrnila amandma 81. člena, kljub podpori Demosove vlade. Ta amandma bi s sprejetjem avtomatično bil podlaga za izdajo dovoljenj za stalno bivanje osebi, ki si državljanstva RS ni uredila v skladu z ZDRS. Tako tudi iz tega lahko sklepamo, da samo dejanje ni bilo naključno. [15]

Izbris kot tak je bil namreč izveden v tajnosti in je bil vedno polje politične manipulacije in zavajanj ter kovanja političnega kapitala na račun žrtev izbrisa in žrtev naivnosti množic, ki so to sprejemale, ter nikakor ni bil le pravna zmota. V devetdesetih letih tako ni bilo splošno znano, da je bil izbris množičen oziroma sistemski ukrep, nasprotno, omenjali so se le posamezni primeri. [16]

2.1 Pot rešitve primera izbrisani [17]

Pravno gledano je tako šele konec devetdesetih let prejšnjega stoletja s prej omenjeno odločbo Ustavno sodišče razkrilo kršitev ustavnih načel in nezakonitost dejanja državnih oblasti. Ministrstvo za notranje zadeve, ki je kot nadrejeni organ bdelo nad izvajanjem izbrisa, ki so ga sicer izvajali na posameznih upravnih enotah, je namreč zatrjevalo, da je izbrisanim prebivalcem status prenehal po spornem 81. členu ZTuj, veljavnega leta 1991, sam izbris pa so pojasnjevali z uporabo Pravilnika o registru stalnega prebivalstva. Ustavno sodišče je tako ugotovilo, da pravilnik ne določa pravne podlage za izbris in so stalni prebivalci RS, ki niso pridobili državljanstva, upravičeno pričakovali, da se njihov status ne bo spremenil, še posebej ne na izvedeni način. Ugotovilo je, da je bil z izbrisom kršeno ustavno načelo varstva zaupanja v pravo, ki je eno izmed načel pravne države, kot je omenjena v 2. členu Ustave RS [18], ter kršena določba 14. člena Ustave RS, ki govori o prepovedi diskriminacije, saj so tujci iz tretjih držav, ki so dovoljenje za prebivanje pridobili še v času SFRJ, obdržali svoj status, medtem ko je bil pravni status posameznikom iz drugih republik bivše skupne države protipravno odvzet na podlagi arbitrarne presoje.

Kot posledica omenjene odločbe Ustavnega sodišča je bil leta 1999 nato sprejet ZUSDDD [19], kot zakon s katerim naj bi se izvršilo odločbo. Vendar tudi ta zakon ni bil primeren, saj je omogočal pridobitev dovoljenja za stalno prebivanje državljanom držav naslednic SFRJ (torej tujcem), ki so na dan 23. 12. 1990 imeli v RS prijavljeno stalno bivališče in so v RS tudi dejansko živeli, ter tujcem, ki so na dan 25. 6. 1991 prebivali v RS in od takrat tudi neprekinjeno živeli, ne glede na določbe ZTuj ob predpostavki, da izpolnjujejo pogoje določene s tem zakonom. Eden izmed pogojev je bil na primer tudi le trimesečni rok za

15 Glej Dedić et al., 2003, str. 43.

16 Glej Dedić et al., 2003, str. 20–21.

17 Povzeto po spletnem viru (dostopno na http://www.mirovni-institut.si/izbrisani/odlocbe-ustavnega-sodisca/).

18 Ustava Republike Slovenije (Ustava RS, Ur. l. RS, št. 33l/1991 in novele).

19 Zakon o urejanju statusa državljanov drugih držav naslednic nekdanje SFRJ v Republiki Sloveniji (ZUSDDD, Ur. l. RS, št. 61/1999 in novele).

vložitev vloge, kar je kasneje tudi Ustavno sodišče označilo kot neutemeljeno prekratko.[20]

Kot drugo pomembno odločbo Ustavnega sodišča v tem primeru velja navesti še odločbo iz leta 2003[21], v kateri je sodišče presojalo na pobudo Društva izbrisanih prebivalcev Slovenije in drugih presojalo ustavnost ZUSDDD. Pri tem je sodišče potrdilo svoja stališča iz odločbe U-I-284/94 ter dodalo še ugotovitve glede presojanega zakona. Predvsem je sodišče izpostavilo, da zakon izbrisanim državljanom ne priznava stalnega bivališča od datuma izbrisa, da je rok vložitve vlog prekratek, ker ne ureja pridobitve dovoljenja za prebivanje tistim posameznikom, ki jim je bil izrečen ukrep prisilne odstranitve tujca, ker postavlja nejasne pogoje in zato mora zakonodajalec v roku šestih mesecev od objave odločbe v Uradnem listu RS odpraviti nepravilnosti. Za tiste posameznike, ki nimajo nikakršnega bivalnega statusa, pa pripraviti nov zakon.[22]

Odločbo je nekdanji ustavni sodnik, dr. Ciril Ribičič, komentiral kot veličastno[23], podobno kot odločbo, s katero Ustavno sodišče ni dovolilo razpisa referenduma o državljanstvu tistim, ki so ga prejeli na podlagi osamosvojitvenih listin. V primerjavi z odločbo iz leta 1999 lahko rečemo, da je še strožja in predvsem poleg ugotovitve neustavnih določb zakona, ki jih razveljavi, še izrecno določi način izvršitve zakona. Tu gre za zakonsko pooblastilo, ki ga Ustavno sodišče ima, kot neke vrste stopnjevanje sankcij, kadar odločbe na isto temo niso izvršene. Primer izbrisanih je tu lahko rečemo šolski primer, saj ugotovi, da je ZUSDDD, ki je bil sprejet na podlagi prve odločbe, neustaven!

Iz političnih razlogov je odločba ostala neizvršena kar sedem let, vse do sprejema novele ZUSDDD-B v letu 2010. Res je v letih do sprejetja novele Ministrstvo za notranje zadeve predlagalo nekaj spornih zakonskih predlogov, s katerimi naj bi izvršili odločbo sodišča. Največje ogorčenje je tako povzročila zahteva sodišča, da mora ministrstvo neposredno na podlagi odločbe izdati posebne ugotovitvene (dopolnilne) odločbe, s katerimi mora izbrisanim priznati status prebivalca tudi za nazaj. Prišlo je do legalistične dileme, ali lahko upravni organ izda odločbo na podlagi odločbe Ustavnega sodišča oziroma ustave, kar pa je nazadnje izgubilo smisel, ker tak zakon ni bil nikoli sprejet, saj je to nazadnje preprečil referendum.[24]

Celo več referendumov je bilo zahtevanih na to temo[25], s katerimi so se predvsem kupovale politične točke med neukimi volivci. Ustavno sodišče je tovrstne poskuse vedno preprečilo, saj je referendum o takem vprašanju očitno

20 Glej Lipovec Čebron in Zorn, 2008, str. 211.

21 Glej odločbo Ustavnega sodišča RS, št. U-I-246/02 (dostopno na http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/B9DD3A68DBF1FC03C125717200288C2F).

22 Glej Lipovec Čebron in Zorn, 2008, str. 214.

23 Glej komentar v članku z dne 31. 12. 2011 (dostopno na http://www.dnevnik.si/objektiv/komentarji-in-mnenja/1042499117).

24 Naknadni zakonodajni referendum o Zakonu o izvršitvi 8. točke odločbe Ustavnega sodišča št. U-I-246/02.

25 Glej Lipovec Čebron in Zorn, 2008, str. 204–224.

neustaven, vendar pa je enkrat prišlo do vložitve zahteve državnega zbora za prepoved referenduma en dan prepozno, rok je bil zamujen, referendum pa izveden. Rezultat referenduma je bil s stališča razumevanja in upoštevanja človekovih pravic porazen. Na referendumsko vprašanje, ki se je glasilo: »Ali ste za to, da se uveljavi zakon o izvršitvi 8. točke odločbe Ustavnega sodišča Republike Slovenije št. U-I-246/02-28 (EPA 956-III), sprejet v Državnem zboru Republike Slovenije dne 25. 11. 2003«, je ob volilni udeležbi [26] 31,45 % volivcev je kar 94,59 % odgovorilo s »proti«, tako da je zakon, pogosto imenovan tudi »tehnični zakon«, zahtevan z odločbo najvišjega organa na področju ustavne presoje v državi, padel. Pri tem referendumu ne moremo mimo dejstva, da je bila pravzaprav vsaka izbira za izbrisane slaba. Namreč, če je volivec obkrožil »za«, je s tem podprl izdajanje dopolnilnih odločb manjšemu krogu upravičencev od kroga, ki ga je določilo v odločbi Ustavno sodišče. Če pa je volivec obkrožil »proti«, pa je bil na prvi pogled »proti« izbrisanim, vendar pa je mogoča tudi interpretacija, da je bil proti takšnemu neustreznemu zakonu. [27]

Tak rezultat na neki način tudi kaže, kako enotno je bilo javno mnenje v nasprotovanju izbrisanim in kako uspešna je lahko manipulacija in populizem političnih skupin na račun človekovih pravic. Žal ni bil edini tak primer v Sloveniji, ob tem se lahko spomnimo tudi na leta 2012 izvedeni referendum o Družinskem zakoniku, referendum o pravici samskih žensk do umetne oploditve iz leta 2001 in podobno.

Navkljub rezultatom referenduma je bil na koncu prvi sveženj odločb le izdan neposredno na osnovi odločbe Ustavnega sodišča že v letu 2004 (4040 odločb), drugi pa leta 2009 (2581 odločb). [28] Mnenje pravnikov iz leta 2003 [29] je na koncu le obveljalo za formalistično in napačno. Tudi te odločbe pa izbrisanim samim po sebi niso omogočale pravičnega povračila za storjeno škodo (odškodnine), na podlagi tega so se sicer nekateri odločili za odškodninske tožbe proti RS, vendar pred slovenskimi sodišči ni uspel noben pritožnik. [30]

3 Vloga mednarodnih organizacij za varstvo človekovih pravic v primeru Izbrisani

Paradoks varovanja človekovih pravic je v tem, da se le-te varujejo v okviru nacionalnih držav oziroma njihovih ustavnih določb, saj so le te nastale na podlagi človeka, ne neke višje avtoritete (npr. božja za kralja). Človeka kot takega v tem konceptu obravnavamo kot abstraktno bitje, čeprav ni, vedno je pogojen z družbo, ki ji pripada. Ta družba pa je začela človekove pravice

26 Glej Poročilo o izidu glasovanja in izidu naknadnega zakonodajnega referenduma o Zakonu o izvršitvi 8. točke odločbe Ustavnega sodišča št. U-I-246/02 (dostopno na http://www.dvk-rs.si/files/files/porocilo-o-izidu-referenduma-tehnicni-zakon.pdf).

27 Glej Kogovšek Šalamon, 2012, str. 215.

28 Glej Stališče Vlade RS z dne 28. 3. 2012 (dostopno na http://www.mirovni-institut.si/izbrisani/wp-content/uploads/2012/02/stalisce_vlade_RS_izbrisani_28_3_2012.pdf).

29 Glej pravno mnenje devetih ustavnih pravnikov (dostopno na http://www.mirovni-institut.si/izbrisani/wp-content/uploads/2012/02/PF_devet_profesorjev_odlocba_US.pdf).

30 Glej http://www.mirovni-institut.si/izbrisani/odskodnine/.

upoštevati šele z vzponom nacionalne države.[31] Paradoks pa zato, ker pogosto prav te družbe (oz. nacionalne države) same kršijo lastne ustavne določbe, pretežno iz političnih razlogov. Tovrstni paradoks je tudi primer izbrisanih v Sloveniji, pri katerem se je vključilo več mednarodnih organizacij.[32]

Mednarodnih organizacij za varstvo človekovih pravic poznamo kar precej, kot so na primer Human Rights Watch, Amnesty International, Urad visokega komisarja za človekove pravice pri OZN, Evropski Ombudsman, Svet Evrope in druge.[33] Namen teh organizacij pa je predvsem v povezovanju in pomoči na nadnacionalni ravni, zaradi prej omenjenega paradoksa. Vloga mednarodnih organizacij za varstvo človekovih pravic je tako pomembna predvsem, kadar žrtve kršenja teh pravic v svojem nacionalnem okolju iz različnih razlogov (politični, vojni, administrativni, ipd.) ne morejo ali jim ni omogočeno uveljaviti pravic, kot so mišljene. Najsi bo to na način, da se jim sploh ne omogoči izvajanje, da se jim onemogoči sodno varstvo ali kot v primeru izbrisanih, da se ne upošteva odločb lastnega organa, ki je pristojen za presojanje takšnih vprašanj.

Zato je vloga mednarodnih organizacij za varstvo človekovih pravic pogosto zadnja, če ne celo edina možnost za žrtve teh kršitev, ko v nacionalnih državah izčrpajo vse (pravne) poti, do uveljavitve svojih pravic ali vsaj primerne odškodnine za svoje žrtve.

Ker je RS od leta 1993 članica mednarodne organizacije Sveta Evrope, je zavezana upoštevati EKČP, posamezni subjekti, ki so jim pravice kršene, pa imajo možnost tožbe pred ESČP. Glede na izid referenduma o »tehničnem« zakonu oziroma posledici le-tega je bilo edino smotrno za izbrisane ubrati to pot, zato vložitev tožbe na ESČP ni bila nobeno presenečenje, temveč pričakovan korak v nadaljevanju te žalostne zgodbe.

3.1 Evropsko sodišče za človekove pravice in primer Izbrisani

ESČP je mednarodno sodišče, ustanovljeno leta 1959, ki odloča o pritožbah glede kršitev državljanskih in človekovih pravic določenih z EKČP, ne glede na to ali je pritožnik individualna oseba ali država. Od uveljavitve Protokola št. 11 EKČP v letu 1998 deluje kot stalno sodišče in posamezniki lahko nanj naslovijo pritožbe neposredno. Do danes je izdalo več kot 10.000 sodb, ki so za zadevne države zavezujoče in so kot posledico imele spremembo zakonodaj in upravnih praks na več področjih. EKČP je zahvaljujoč sodni praksi ESČP močan in živ instrument pri spopadanju z vedno novimi izzivi na področju pojmov pravna država in demokracije v Evropi. ESČP deluje v lastni stavbi v Strasbourgu in od

31 Glej Ardent, 1998, str. 298.

32 Glej sodbo ESČP: Kurić in drugi proti Sloveniji, odstavek 7 in 12.

33 Več naštetih organizacij dostopnih na http://www.varuh-rs.si/iscete-pomoc/koristni-naslovi/mednarodne-organizacije/.

tam nadzoruje spoštovanje človekovih pravic v kar 47 državah članicah Sveta Evrope, ki so ratificirale EKČP.[34]

Procesne predpostavke omejujejo pritožnike v tem, da je ta načeloma dovoljena šele po izrabi vseh pravnih sredstev v okviru domače nacionalne države, obstajajo pa tudi izjeme tega pravila, in izbrisani so ravno ena teh, saj je bilo očitno, da RS niti odločb lastnega Ustavnega sodišča v tem primeru ne spoštuje, zato so dovolili neposredno pritožbo, saj je upravičeno pričakovati, da pritožniki ne bi bili uspešni z ustavno pritožbo. O tem se je sicer precej razpravljalo, vendar je na koncu obveljala takšna razsodba in primer so sprejeli v presojanje.[35]

Spričo neodzivnosti slovenske države do vprašanja izbrisanih in za dosego svojih pravic se je skupina izbrisanih odločila za pritožbo na ESČP. Zadeva se je tako začela v juliju 2006 s pritožbo št. 26828/06 proti RS, ki so jo po 34. členu EKČP vložili Milan Makuc in deset drugih pritožnikov. Po smrti prvega pritožnika se je zadeva preimenovala v »Kurić in drugi proti Sloveniji«. Pritožnike je v zadevi zastopalo več tujih odvetnikov, specializiranih za varovanje človekovih pravic, iz Rima in Genove, slovensko vlado pa državni pravobranilec.[36]

Pritožba je obsegala domnevno kršenje pravic pritožnikov iz naslova kršitve 8., 13. in 14. člena EKČP.

3.2 Odločitev Evropskega sodišča za človekove pravice v primeru Izbrisani

ESČP je v okviru senata tretjega oddelka dne 13. 7. 2010 razglasil pritožbo št. 26828/06 za sprejemljivo in soglasno odločil, da sta bila kršena 8. in 13. člen EKČP ter da proučitev pritožbe glede 14. člena ni niti potrebna. Poleg same ugotovitve tega dejstva (kar je bila neke vrste potrditev odločb slovenskega Ustavnega sodišča iz let 1999 in 2003) je ESČP toženi Vladi RS navedel tudi primerne splošne in posamične ukrepe, ki jih mora sprejeti skladno s 46. členom EKČP in pridržal odločanje o pravičnem zadoščenju po 41. členu le te.

Vlada RS je 13. 10. 2010 zahtevala, da se zadeva preda v odločanje velikemu senatu na podlagi 43. člena EKČP in 73. člena poslovnika. Zbor velikega senata pa je tej zahtevi 21. 2. 2012 tudi ugodil.[37]

Pri presoji velikega senata pa je prišlo do sodbe, da je poleg kršitve 8. in 13. Člena EKČP treba obravnavati tudi kršitve 14. člena EKČP, saj ta člen vsebinsko dopolnjuje druge navedbe pritožnikov.

34 Povzeto po spletni strani ESČP (dostopno na http://www.echr.coe.int/NR/rdonlyres/28DF43D4-960E-431A-8CCA-367DC9C8BCC1/0/Court_in_brief_SLV.pdf).

35 Povzeto po spletni strani Sveta Evrope (dostopno na http://www.svetevrope.si/res/dokument/download80a7.pdf?id=/r).

36 Glej sodbo ESČP: Kurić in drugi proti Sloveniji, odstavki 1–3.

37 Glej sodbo ESČP: Kurić in drugi proti Sloveniji, odstavek 10.

Veliki senat tako na koncu presoje po skoraj šestih letih od vložitve pritožbe odloči na podlagi razlogov navedenih v sodbi v korist pritožnikov. Pomembnejše ugotovitve velikega senata ESČP v zadevi Kurić in ostali proti Sloveniji so tako soglasne in jih navajam v nadaljevanju:

- ESČP zavrne ugotovitve vlade, da je pritožba stvarno in časovno neskladna z določbami EKČP in je bila vložena prepozno;
- ESČP razsodi, da pritožniki M. Kurić, A. Mezga, T. Ristanović, A. Berisha, I. S. Ademi in Z. Minić po 34. členu EKČP lahko trdijo, da so žrtve zatrjevanih kršitev svojih pravic iz EKČP;
- ESČP soglasno razsodi, da je bil kršen 8. člen EKČP in v povezavi s tem členom tudi kršena 13. in 14. člen EKČP;
- ESČP soglasno razsodi, da bi morala tožena vlada v enem letu od izreka te sodbe vzpostaviti domačo odškodninsko shemo posebej za ta primer.[38]

S to sodbo se je pravno gledano na najvišji možni ravni zgodil zgodovinski preboj, saj so tako izbrisani na mednarodni ravni dobili potrditev, da so žrtve kršenja svojih pravic, in RS ne le potrdilo, da so njena uradna stališča zgrešena, temveč celo določilo odškodnin za pritožnike in dolžnost, da pripravi odškodninsko shemo za ta primer na državni ravni.

Sodba ESČP daje tako ne le zadoščenje pritožnikom in drugim izbrisanim, ampak tudi pravno podlago za zahtevanje pravične reparacije njihove škode, čeprav je to nemogoče ovrednotiti le finančno, še posebej po tolikih letih »življenja« in trpljenja zaradi nepravičnosti države in žal tudi dela slovenske družbe.

4 Aktualno stanje

V luči izreka sodbe ESČP v zadevi Kurić in ostali proti Sloveniji je v Sloveniji prišlo ponovno do vroče javne debate o upravičenosti izbrisanih do odškodnin. Pri tem se ne izbira metod in besed ter spretno premika fokus javnosti iz dejanske težave na neumestne, pogosto neresnične »podrobnosti«.

ESČP je tako naložilo RS pripravo odškodninske sheme v roku enega leta od izreka sodbe (t.j. do 26. 06. 2013). Tega roka RS ni ujela, podala je sicer prošnjo ESČP za podaljšanje roka, vendar ji to ni ugodilo z argumentacijo, da ni pristojno za podaljševanje rokov.[39]

Državni zbor RS je na seji 24. 09. 2013 v prvem branju potrdil osnutek Zakona o povračilu škode osebam, ki so bile izbrisane iz registra stalnega prebivališča, kateri prinaša t. i. odškodninsko shemo. Vendar se je na ta osnutek takoj

38 Glej sodbo ESČP: Kurić in drugi proti Sloveniji, odstavek 415.

39 Povzeto po članku, dostopnem na http://www.delo.si/novice/slovenija/iztekel-se-je-rok-za-pripravo-odskodninske-sheme-za-izbrisane.html

vsul plaz kritik predstavnikov izbrisanih in mednarodne organizacije *Amnesty International*.[40]

Žal pri tem še vedno ostaja grenak priokus, da RS ni zelo vneta za pripravo zahtevane odškodninske sheme za ostale žrtve izbrisa. To lahko sklepamo tako iz raznih izjav pristojnih[41], kot tudi politikov, če le povzamemo del izjav iz seje državnega zbora z dne 24. 09. 2013, ki jih je poudaril Mirovni inštitut. Oženje kroga upravičencev, višina odškodnine in vprašanje dostopa do odškodnine otrokom in dedičem so le nekaj pripomb na predstavljeni zakon.[42]

Poleg omenjenega izmikanja RS pa se opozarja tudi na določena odprta vprašanja[43], ki kljub noveli ZUSDDD-B še vedno tarejo veliko izbrisanih, saj si jih je status v Sloveniji do leta 2009 uredila le slaba polovica.[44]

Glede na dosedanje ravnanje RS v tej zgodbi lahko samo upamo, da bo ta svoje zaveze in dolžnosti upoštevala ter se prenehala norčevati iz lastnih vrednot in pravnih zavez tako ustavne narave, kot mednarodnih aktov, pod zadnje čase zelo priljubljeno krinko omnipotentne »krize«.

5 Sklepne ugotovitve

Razvoj koncepta človekovih pravic in temeljnih svoboščin nas lahko napelje na misel, da so človekove pravice kot take »tisto nekaj«, kar nam vsem pripada že zato, ker smo pripadniki skupne rase, ne glede na vso različnost in enkratnost posameznega človeškega bitja.

Drzno lahko trdimo, da ima vsaka človeška družba z razumevanjem in uvajanjem tega kompleksnega pojma vsaj na neki točki svoje specifične težave. A to samo po sebi ni toliko pomembno, saj je ljudem lastno, da delajo napake in se iz njih učijo, bistveno pri tem je način, s katerim se kot posamezniki, družba in država soočajo in tudi rešujejo. Kar loči zrele družbe od nezrelih, je ravno prava mera samokritičnosti in pripravljenost na učenje, tudi če je to težak in dolg proces. Kot je znano, je vsako zdravilo grenko, in kršenje človekovih pravic je vsekakor bolezensko stanje družbe, ki je zavezana k spoštovanju pravne države, človekovih pravic in demokracije. Vsak tak proces pa ne glede na grenkobo na koncu ponuja sladko nagrado v obliki transformacije subjekta v bolj zrelo obliko in se, tako se zdi, na koncu izplača na več ravneh.

Slovenija je žal pri tem izpitu ne samo grdo padla, temveč celo ves čas trmasto trdi, da temu ni tako in ne želi popraviti svoje nespametne politike na primeru izbrisanih, oziroma to počne na deklarativni ravni. Še več, določene družbene

40 Glej izjave, dostopne na http://www.amnesty.si/j7/kampanje/ostale-kampanje-in-aktivnosti/539-kdaj-bo-slovenija-odpravila-posledice-izbrisa.html#.

41 Več izjav je dostopnih v posameznih člankih na http://www.dnevnik.si/tag/Izbrisani.

42 Glej članek, objavljen na http://www.mirovni-institut.si/izbrisani/drzavni-zbor-razpravljal-o-predlogu-zakona-o-povracilu-skode-osebam-ki-so-bile-izbrisane-iz-registra-stalnega-prebivalisca/.

43 Glej navedena odprta vprašanja na http://www.mirovni-institut.si/izbrisani/odprta-vprasanja/.

44 Glej statistiko, dostopno na http://www.mirovni-institut.si/izbrisani/statistike/?lang=sl.

skupine na tej temi celo poskušajo kovati politične točke na plečih žrtev izbrisa in naivnih in zavedenih volivcev, ki prevzamejo populistično in hujskaško retoriko o »tistih drugih«, ki se jih koncept človekovih pravic pravzaprav ne tiče? Po mojem mnenju gre tu bolj kot ne za nevednost državljanov, ki se ne zavedajo, da smo lahko hitro »izbrisani« tudi vsi ostali, a o tem na kakem drugem mestu.

Rezultati političnih dogodkov, kot je bil referendum o »tehničnem zakonu« in neke vrste nagrajevanje politikov na volitvah, ki z nizkotnimi metodami delijo državljane in druge prebivalce RS na »nas« in »druge« vsekakor kaže na veliko lahkotnost soočanja s kompleksnimi pojmi in aplikacijo le-teh na konkretne situacije. Zato je v primeru izbrisanih še posebej velika odgovornost pravne stroke in upravnega aparata v RS, saj bi vsaj tu pričakovali tisto dodatno mero razumevanja situacije in (pravnih) posledic dejanj, ki so se zgodila. Pri tem velja pohvaliti še posebej ustavnopravne strokovnjake, ki so v imenu ustavnega sodišča izdali obe prelomni odločbi, pograjati pa po eni strani impotentno politiko in brezbrižni upravni aparat, ki navkljub vsej argumentaciji še danes nista sposobna zaključiti ta »največji pravni in civilizacijski škandal in sramoto samostojne Slovenije«, kakor je zadevo večkrat poimenoval bivši ustavni sodnik Matevž Krivic.[45] Žal k njegovim besedam ni mogoče veliko dodati.

Tako v primeru izbrisanih ocenjujem vlogo mednarodnih organizacij za varstvo človekovih pravic, predvsem ESČP, kot razmeroma pozitivno, saj so zmogli narediti tisto, česar sami kot družba in predvsem država očitno še nismo zreli opraviti. Pri tem nam sicer ni olajšanega ničesar, saj bomo to plačali tako ali drugače vsi skupaj, tako na račun finančnih odškodnin, kot padca ugleda na mednarodnem prizorišču, nespametnih upravnih praks in padca zaupanja prebivalstva v institucije. Upamo lahko le, da je bila klofuta ESČP dovolj močna, da nas pri tem strezni, saj nas v nasprotnem primeru, in to ne le v primeru izbrisanih, čaka še precej težka in mučna pot. Pravica ima namreč tisto »neprijetno« lastnost, da vedno izbruhne na površju, ne glede na to, kako močno in globoko jo (po)tlačimo v globino svojega zavedanja, tako tudi ni presenečenje, da so izbrisani pravzaprav zmagali vse odločilne pravne bitke v tem sporu.

Upamo in želimo si le lahko, da bo ta zgodba čim prej zaključena v najboljši meri tako za žrtve izbrisa, kot RS in da bomo sposobni v tem najti modrost, ki bo tovrstne primere za vedno postavila v zgodovinske knjige.

Jure Trbič je diplomant Fakultete za upravo na Univerzi v Ljubljani, kjer zaključuje študij na podiplomskem magistrskem študiju s področja upravnih ved. V karieri je deloval pri projektu reševanja upravnih postopkovnih problemov v sodelovanju s Fakulteto za upravo in Ministrstvom za javno upravo, poleg tega še področjih izvršilnih postopkov, poštnih storitev, poučevanja, založništva, organizacije dogodkov, vodenja, pisanja prispevkov in razvoja inovativnih storitev na področju uprave. Poleg študija dela trenutno kot strokovni vodja v zasebnem Zavodu za upravno poslovanje, kjer je zadolžen za razvoj in strokovno delo zavoda.

45 Glej Dedić et al., 2003, str. 145.

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SUMMARY

THE ROLE OF EUROPEAN COURT FOR HUMAN RIGHTS AS AN INTERNATIONAL ORGANIZATION FOR PROTECTION OF HUMAN RIGHTS IN THE CASE OF ERASED

Key words: erasure, erased, human rights, International protection of human rights, European Court for Human Rights

The paper considers information relating to the case of Erased in Slovenia mainly from the aspect of international cooperation for protection of human rights. The author initially presents key terms and their definitions, the main issues of the erasure and the role of international organizations for protection of human rights; the judicial proceedings and consequently the appeal and the judgment of the European Court for Human Rights (ECHR). The paper describes the current status of the case, the outstanding issues and problems that still await solution.

The paper is divided into five chapters. In the first chapter there is an introduction followed by definition of the terms used: Human Rights, International Organizations and International Protection of Human Rights, Erased, Erasure.

In the second chapter there is the history of erasure, how it took place, who were the victims and why were they put in such a position. It also points out what is the key issue for the erased and subsequently what was the key argument in the case that took place in the courts in Slovenia and later in Strasbourg. Based on the various arguments on how the erasure was made and the political manipulation of the erasure and the erased, the author also suggests that the act itself was no coincidence.

In the late nineties the decision(s) of the Slovenian Constitutional Court revealed the violations of constitutional principles and the unlawful actions of state authorities. While the ministry of internal affairs, who was the supervisory authority in the case, claimed that the erased individuals had no status of citizens in Slovenia because of the provisions in the Aliens Act. The Constitutional Court however decided that the regulation was not a legal basis for the act of erasure and that the erased had the expectations that their status was not changed, especially not in that particular way it was. The court decided that the erasure meant direct violation of various principles, like protection of legitimate expectations and prohibition of discrimination, because other foreigners from third countries did not lose their status like the individuals, citizens from ex-Yugoslavian countries did.

Later in 1999, based on the court's decision Slovenia passed a law aimed particularly at resolving those issues, but even that law was inappropriate

in many ways, for instance, the law did not recognize permanent residence status from the date of the erasure, there was too short time required to submit the application for the erased. In 2003 there was another decision of the Constitutional Court confirming the arguments of the prior decision and requesting a passing of a new law.

Primarily because of political reasons it took seven years to form the law, passed in 2010. Before that there were some attempts form the state authorities to resolve the matter, but all were either unconstitutional or blown away with various ways of public or political pressure. There were even demands for referendum about the topic of erasure, all proposed by the political parties, but they were all dismissed by the Constitutional Court. However one referendum did occur, because of some formal error, and the referendum took place in 2004. It was a lose-lose situation, since both proposed decisions were not in accordance with the decisions of the Constitutional Court. The results were devastating, majority (94.59%) voted against the law that was passed to implement the court decision, but it may have been because of the inappropriate solution that the law offered. From protection of human rights in Slovenia, the referendum was a disgrace.

In spite of the referendum results there were some positive administrative decisions in 2004 and later on in 2009. These decisions did not allow the erased to claim any compensation. Nevertheless, some did sue the state but did not succeed in Slovenian courts.

In the third chapter the author describes the role that the European Court for human Rights (ECHR) played in the case. Slovenia as a member of Council of Europe since 1993 is obligated to take into account the European Convention on Human Rights and Fundamental Freedoms. Any subject that finds his rights are violated can sue the state in front of ECHR, so it was no surprise when a group of erased citizens did that after Slovenia did not fulfill even the decisions of its own Constitutional Court.

The case started in 2006 with the appeal nr. 26828/06 that was submitted on the basis of 34. Article of the European Convention on Human Rights and Fundamental Freedoms by Milan Makuc and ten other individuals. They were represented by foreign lawyers from Rome and Genoa, specialized in field of human rights protection. The Slovenian government was represented by an attorney general. The appeal was centered on the violation of rights from eighth, thirteenth and fourteenth article of the convention.

ECHR made public the decision relating the appeal nr. 26828/06 for acceptable and decided unanimously that there was violation of 8. and 13. article of the ECHR and examining complaints of 14. article was not even necessary.

The Slovenian government demanded that the decision should be reached by the Grand Jury, which was accepted in February 2012. The Grand Jury confirmed the prior decision of the court and added that the violation of

14. article must be taken into consideration since it complemented other statements of the complainants.

After six years the Grand Jury decided in favor of the complainants and in legal terms this decision should be considered a historical breakthrough, because the erased did get a confirmation of their views on the international level. And not only it was confirmed that views of the Slovenian state were wrong, but also the decision demanded some compensation for the complainants in the case and furthermore the obligation for Slovenia to make a compensation scheme for the case at the national level.

In the fourth chapter the author presents the actual state of the case of erased. It is pointed out the ECHR decision lead to a vivid public debate about the eligibility of the erased for the compensation. ECHR demanded that Slovenia prepared a compensation scheme in one year time, but Slovenia did not do it in time (deadline was 26 of June 2013). It did however made a request to ECHR to extend the deadline but the court did not accept that request, based on the argument that it was not authorized to accept such demands.

In the last days of September 2013 the National Assembly of Slovenia confirmed the draft of the law that would made a compensation scheme to work, but it was at once disapproved by the representatives of the erased and Amnesty International. It still seems that Slovenia is not very keen to repair the damage that has been done to the erased or the reputation of Slovenia as a country respecting the rule of law. The issues pointed out are narrowing down the circle of eligible persons for the compensation, the amount of it and how can the children or the heirs of erased that had died access to the compensation.

In the conclusion of the paper the author states his own opinion about the concept of human rights and the described case. It is true that all societies in one way or another have had problems about implementation of the human rights to life. In the case of the erased the role of international organizations for protection of human rights has been positive because they have done what Slovenians themselves have not been able to, namely recognizing the violation of human rights of a minority in their country. The paper is concluded by the wish and the hope for the case of the erased to be soon satisfactorily closed both for the erased and for Slovenia.

Navodila avtorjem

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Vsakemu avtorju pripada 1 tiskan izvod revije in separat članka v e-obliki.

Članki niso honorirani.

Citiranje člankov, izdanih v Mednarodni reviji za javno upravo, pomembno prispeva k uveljavljanju revije. Zato vas glavna urednica prosi, da pregledate arhiv revije na naslovu http://www.fu.uni-lj.si/zalozba/mednarodna-revija-za-javno-upravo/arhiv-stevilk/, kjer najdete članke, izdane v reviji v letih 2003–2013, odnosno od letnika I do letnika XI, ki bi bili morda zanimivi za vašo tematiko, in jih citirate v literaturi svojega članka.

Uredniški postopek:

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2. Članek naj bo lektoriran, v uredništvu se opravlja samo korektura. Izjemoma se po dogovoru z avtorjem besedilo tudi lektorira.
3. Vsi članki se recenzirajo in razvrstijo.[1] Med recenziranjem avtorji in recenzenti niso imenovani. Članki po 1.01, 1.02 morajo za objavo prejeti

1 Članke razvrščamo po tipologiji COBISS:
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1.02 Pregledni znanstveni članek. Pregledni znanstveni članek je pregled najnovejših del o določenem predmetnem področju, del posameznega raziskovalca ali skupine raziskovalcev z

dve pozitivni recenziji, od tega eno od tujega recenzenta. Če recenzenti razvrstijo članek različno, o končni razvrstitvi odloči uredniški odbor.

4. Članek, ki ga je avtor poslal v slovenskem jeziku in sta ga recenzenta razvrstila po 1.01, 1.02, mora avtor nato poslati še v prevodu v angleški jezik.
5. Avtor prejme rezultate recenziranja praviloma v treh mesecih od oddaje članka.

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3. Članek, ki je bil razvrščen po 1.04, 1.05 ali 1.08, naj vsebuje tudi povzetek v angleškem jeziku v obsegu 3 strani. V povzetku prevedite naslov in ključne besede ter predstavite vsebino članka (opredelitev problema in ugotovitve). Prevod povzetka članka tujih avtorjev v slovenski jezik zagotovi uredništvo.
4. Članek naj bo napisan v urejevalniku besedil Word (*.doc, *.docx) v enojnem razmiku, brez posebnih ali poudarjenih črk. Ne uporabljajte zamika pri odstavkih. Razdelki od Uvoda do Sklepnih ugotovitev naj bodo naslovljeni in oštevilčeni z arabskimi številkami.
5. Slike in tabele, ki jih omenjate v članku, vključite v besedilo. Opremite jih z naslovom in oštevilčite z arabskimi številkami. Revijo tiskamo v črno-beli tehniki, zato barvne slike ali grafikoni kot original niso primerni. Če v članku uporabljate slike ali tabele drugih avtorjev, navedite sklic pod sliko, tabelo ali kot sprotno opombo. Enačbe oštevilčite v oklepajih desno od enačbe.
6. Članek naj obsega največ 30.000 znakov.
7. Članku dodajte kratek življenjepis avtorja/avtorjev (do 8 vrstic).
8. V besedilu se sklicujte na navedeno literaturo na način: (Novak, 1999, str. 456).

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namenom povzemati, analizirati, evalvirati ali sintetizirati informacije, ki so že bile objavljene. Prinaša nove sinteze, ki vključujejo tudi rezultate lastnega raziskovanja avtorja.

1.04 Strokovni članek. Strokovni članek je predstavitev že znanega, s poudarkom na uporabnosti rezultatov izvirnih raziskav in širjenju znanja, zahtevnost besedila pa prilagojena potrebam uporabnikov in bralcev strokovne ali znanstvene revije.

1.05 Poljudni članek. Poljudnoznanstveno delo podaja neko znanstveno ali strokovno vsebino tako, da jo lahko razumejo tudi preprosti, manj izobraženi ljudje.

1.08 Objavljeni znanstveni prispevek na konferenci. Predavanje, referat, načeloma organiziran kot znanstveni članek.

1.19 Recenzija, prikaz knjige, kritika. Prispevek v znanstveni ali strokovni publikaciji (reviji, knjigi itd.), v katerem avtor ocenjuje ali dokazuje pravilnost/nepravilnost nekega znanstvenega ali strokovnega dela, kriterija, mnenja ali ugotovitve in/ali spodbija/podpira/ocenjuje ugotovitve, dela ali mnenja drugih avtorjev. Prikaz strokovnega mnenja, sodbe o znanstvenem, strokovnem ali umetniškem delu, zlasti glede na njegovo kakovost.

1.21 Polemika, diskusijski prispevek. Prispevek, v katerem avtor dokazuje pravilnost določenega kriterija, svojega mnenja ali ugotovitve in spodbija ugotovitve ali mnenja drugih avtorjev.

9. Na koncu članka navedite literaturo po abecednem redu avtorjev in vire, po naslednjem vzorcu:

Članek v reviji:

- Gilber, G., & Pierre, P. (1996). Incentives and optimal size of local jurisdictions. *European Economic Review, 40*(1), 19–41.

Knjiga:

- Katzenbach, J., & Smith, D. (1993). *The wisdom of teams*. Cambridge, MA: Harvard Business School Press.

Knjiga z urednikom:

- Keene, E. (Ur.). (1988). *Natural Language*. Cambridge: University of Cambridge Press.

Prispevek na konferenci:

- Bugarič, B. (2002). Od hierarhične k participativni (odprti) javni upravi. *IX. dnevi slovenske uprave. Portorož* (str. 23–29). Ljubljana: Visoka upravna šola.

Internetni vir:

- Tax Administration of the Republic of Slovenia. (n.d.). Pridobljeno 8. 5. 2007, s http://www.durs.gov.si/

Uradna publikacija, poročilo:

- World Bank. (2001). *World Development Indicators*. Washington: World Bank.

Disertacija:

- Richmond, J. (2005). *Customer expectations in the world of electronic banking: a case study of the Bank of Britain* (doktorska disertacija). Chelmsford: Anglia Ruskin University.

Kadar ima publikacija več kot pet avtorjev, navedite samo prvega avtorja, npr. Novak et al. Če navajate dve deli ali več del istega avtorja, letnico označite, npr. 2005a, 2005b … Priporočamo, da uporabite samodejni zapis literature, ki ga omogoča Word 2007 (zapis APA).

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Conference contribution:

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