L'EUROPE UNIE

UNITED EUROPE

No. 6 / 2012

Revue d'études européennes

PARIS

TABLE DES MATIÈRES

EDITORIAL

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We are living in the age of crisis, and the solutions that are proposed to alleviate the consequenses of it are not always acceptable for everyone or do not meet the criteria of what we call legitimate expectations. The contraversial age of Prince Metternich (the Concert of Europe) is still bygone and the consensus to be achieved between European nations before introducing radical changes in the European political architecture is an inevitable prerequisite. In history, there have been several strategies that were emerging from the ideas of founding fathers of the European Union, such as Altiero Spinelli and his followers. The question whether the EU, a core institutional framework for Europe should be more centralized is, today, the "hot button" again.

I am sure that most of us believe that "ever closer union" can be possible only in the case we share the common vision. As they say, "the devil is in details" – therefore, the open discussion in academic world must pay attention to many urgent issues, analysing both the advancements and the flops of the current practice in many fields related to EU activities and EU – memberstates relations. The reflection of EU by third countries, widely discussed in this volume can be regarded as an useful source for EU's future strategies.

I am glad to introduce the sequent volume of *L'Europe unie/United Europe*, an academic journal that is clearly guided by the principles as cross-border cooperation, academic freedom, constructive criticism. The current volume incorporates awesome contributions that are divided into six thematic chapters.

First chapter is explaining the EU foreign ambitions, strategies and neighbourhood policy. Dr. David Ramiro Troitinó and Archil Chochia (both from Tallinn University of Technology) are opening the problematics of EU enlargement – the issue that becomes even more crucial today, during the rearrangements in the EU. The comprehensive contribution is complemented with the separate articles on neighbourhood policy towards Caucasus countries (Archil Chochia) and European patterns the standards of free assembly in Georgia (Dali Gabelaia and Dr. Tanel Kerikmäe). Dr. Nina Didenko presents analytical overview on Ukraine-EU relations and Dr. Nicoleta Vasilcovschi contributed with a synoptic overview on Romanian and Bulgarian strategies.

Second chapter, titled as "Arab Spring" starts with deep look offered by devoted researcher Dr Hedi Saidi on impact of Arab Spring to the EU. The article is complemented by excellent contribution of Dr. Belgacem Brahim from Tunisia, revealing the reasons and essence of the backgrounds of these political events.

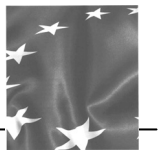
Third chapter of the volume, related to the EU values, ethnic and migration issues is completely written by our colleagues from Tallinn Law School. Issues related to national minorities in the EU is illustrated by the paper of Dr. Evhen Tsybulenko and Paolo Amorosa. Dr. Tatjana Evas proceeds the issue of minorities on the basis of Estonian example and Dr. Lehte Roots summarizes this part of the volume with her wide range analysis on recent migration problems in the EU.

Forth part concerns European Union standards, regulations, law and justice. A colleague from Tallinn Law School discusses the horizontal effect of the Nice Charter in Italian case-law. The current chapter contains paper of Dr. Olga Poperová from Palacky University on "European context of the administrative justice in the Czech Republic" by which administrative justice means "an indubitable contribution for the rule of law". Two following researches discuss two different areas of regulation – the EU aviation law that can be regarded a good example of unity in Europe (Dr. Tanel Kerikmäe and Lelde Plúksna), and the contribution of Dr. Alexandr Svetlicnii on EU merger control, more challenging area of EU regulation.

Fifth Chapter is dedicated to EU environmental policy, health and children. The Chapter starts with innovative approach of Dr Didier Blanc from Université de Perpignon, continues with original comparative approach on sustainable development conducted by Dr. Eric Olszak from Université Catholique de Lille and sums up with the contribution of Albanian expert Anila Nepravishta that studies the issue of violence and corporate punishment of children.

The last Chapter is demonstrating a trilingual feature of the volume as the first time, Italian has been used by two authors. First paper, written by Professor Marcello Pierini, is revealing the political perspectives of the EU. Dr. Simion Costea, Jean Monnet Professor of "Petru Maior" University of Targu-Mures analyses the vision and activity of a vice-president of the European Parliament..The final chord belongs to Dr Colin Swatridge who makes comprehensive overview of the "troubled relationship" between United Kingdom and European Union.

I am sure that the current volume of the journal finds numerous readership among students interested in European integration studies, experts and scholars of EU and non-EU countries, decision makers and professionals from multi-level European administration and politicians who seek for inspiration during these intricate times.



The EU Foreign Affairs and the European Values

Future Enlargements of the EU and limits of the organization

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Abstract: This article tries to explain the problems EU enlargement, the possible problems and obstacles on this way, as well as its connection with the European integration process. This paper talks about the history of the EU building process, the transformation of the community and the possible future scenarios for the organization and its member-states.
Keywords: European Union, European integration, EU membership.

European integration process started with a reduced Community of just six members and was originally thought to be an organization to solve the long-term rivalry between France and Germany, and therefore both these countries became the center of the process. The Benelux countries joined the Community because of their strong links with France and Germany. Italy was divided into two parts, a highly developed north and the less wealthy south. The north needed access to the markets of France and Germany and the south needed support to develop further[1]. The borders of the Community were marked by different visions of the European integration, as the British and its supporters, as Ireland and Denmark, highly dependent on the British economy[2], or by the political situation, as Spain, Portugal and Greece, under military regimes[3], and by the Cold War in two main aspects, the neutral states and the supporters of Soviet Union. The first group was formed by Austria, Sweden and Finland, they had a status of neutrality during the confrontation between west and east, and hence could not participate in the European process because it was seen as a capitalistic tool sponsored by USA against Soviet Union. A larger part of Europe was under the influence of the Soviet Union, and hence there was no possibility of joining the process[4].

The situation changed when British economy was under an important stress and thus the government asked for the accession in order to improve its economic situation. Denmark and Ireland followed the UK. Greece, Spain and Portugal became democracies, the Cold War ended and all the countries affected by it became full members of the organization, expanding the original six members to the current twenty-seven plus Croatia and probably Iceland.

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1 Urwin, W. D. (1994) The Community of Europe: A History of European Integration Since 1945 (The Postwar World). Philadelphia: Trans-Atlantic Publication Inc.
2 Miller, F.; Vandome, A.; McBrewster, J. (2009) European Free Trade Association. London: Alphascript Publishing
3 Chilcote, R.; Hadjiyannis, S.; Lopez, F.; Nataf, D. (1990) Transitions from Dictatorship to Democracy: Comparative Studies of Spain, Portugal and Greece. New York: Taylor & Francis.
4 Sewell, M. (2002) The Cold War (Cambridge Perspectives in History). Cambridge: Cambridge University Press.

Currently, European Union, after the last enlargements, suffers some „enlargement fatigue", as 12 countries joined the Union in 2004 and 2007. Beside the positive effects of the enlargements, it provoked alienation of the European people from Brussels because **the sense of identity**, of belonging to a common process diluted. The world financial crisis is not helping either, as the possible candidates will be net receivers of EU funds. But the problem goes beyond these conjectural difficulties and is located on the borders of the Union. Because the limits of the organization were not clear at the beginning of the process and there were different opinions about it[1]. Europe is a concept defined by geographical space and cultural roots. If we take the EU as an organization for the European subcontinent, its limits were easy to identify during the first enlargements, but as the organization reaches the periphery the limits are not clear anymore. If the limit of expansion would depend on geography with borders in the Urals, Russia, North Cape, Norway and the island of Gavdos in Greece, it will include countries as Belarus, Ukraine, Moldova, Russia, Kazakhstan, Georgia, Azerbaijan, Armenia and Turkey[2].

Europe can also be defined by religion matters, and hence with flexible boundaries in space and time. The cultural concept of Europe started having a strong identity after the fall of the Roman Empire and the beginning of the Middle age, where Christianity was a fundamental part of Europe. Territories as Spain were thought of being occupied and hence subject to liberate. Turkish occupation of the Balkan region was seen as an aggression to Europe, the German expansion eastwards can be explained as an extension of Christianity, and hence an expansion of Europe. Here there was a conflict with Muslim and pagans, the first were expelled from Spain, Sicily, and most of the Balkans, and the pagans were converted or exterminated[3].

The French Revolution changed this identification as new ideas spread all over Europe, and again established a new cultural border of Europe, the separation of powers, the limits of the religion to the personal life of the citizen, as a contrast to other regions of the world were the religion was, and still is, a way of organizing the social life of the believers and the inhabitants of the territory. According to this definition of Europe, the east countries could bend in and out of the concept of Europe, depending on the period and the inclusion of some concepts developed during the French revolution. Turkey, Kazakhstan and Azerbaijan would not be included, even when Turkey is a secular state but does not have a secular society and it is under a constant threat of a regression in terms of religion, consequence of the implementation of the secular state from the elites to the folk[4].

Another way to define Europe would be according to politics, democracy and social states, these principles were define by the French Revolution and were developed in England. The French Empire and the troops of Napoleon spread its political principles in Europe in a more radical version. There is an historical identification of Europe with the ancient Greek, and Athens has been seen as the model of democracy, developed in Europe against the Persian-Asian concept of a supreme ruler with absolute power. The Romans keep the concept of democracy but much more restricted in their Republic and especially a nominal concept during the imperial times with the maintenance of the Senate. It was seen as a contraposition to the barbarians and their political ways. After the collapse of the Empire the Middle Age kept some ideals of democracy with the denomination of the different Kings as primus inter pares, the first among equals, and the role of different parliaments in Europe grew during the period, even when they were not properly democratic institutions they represented some social classes and kept alive the ideal of democracy. The absolutism was defeated by the French revolution in cultural terms, and then democracy came back to Europe as an indissoluble part of it. The Europeans or recent descents from Europeans who brought the idea of democracy from Europe

[1] Pittaway, M. (2003) The Fluid Borders of Europe (Europe: Culture and Identities in a Contested Continent). Milton Keynes: The Open University Worldwid

[2] Kaplan, D.; Hakli, J. (2002) Boundaries and Place: European Borderlands in Geographical Context. Lanham, MD: Rowman and Littlefield Publishers.

[3] Ramos Centeno, V. (2997) Christian Faith, Reason Health and Future of Europe. Madrid: Biblioteca De Autores Cristianos.

[4] Burleigh, M. (2006) Earthly Powers: The Clash of Religion and Politics in Europe from the French Revolution to the Great War. Great Britain: HarperCollins Publishers.

to America and afterwards developed their own way defined even the political system of USA, an old democracy. So, the idea of democracy in Europe is based on a political regime with an historical background. The social state was developed in Europe and has become a hallmark of it. The development of policies of the state following the idea of a society organized in political terms for the benefit of its members, of the citizens. Defining in this way Europe, the limits of the organization are almost reached, with maybe just the Balkan area to be included in the organization[1].

Europe is also a cultural concept, a way of organizing the society in all areas, from economy to literature, from judicial system to common traditions. It is a wide idea with very diffuse border, with intertwined and overlapping facts mixed and defined as Western culture. It can explain the inclusion of for example Cyprus in the EU, but also raise the question of Israel and eventually could wider the borders of Europe to other continents as far as Australia or Canada[2].

An easier way to find the limits of Europe can be analyzing the members of the European associations, as the Council of Europe, organization focus on human rights, democracy and the rule of law, located in France, whose members not belonging to the EU are Albania, Andorra, Armenia, Azerbaijan, Bosnia, Croatia, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Russia, San Marino, Serbia, Switzerland, Turkey and Ukraine. Belarus was a special guest but has been suspended because of its poor democratic records. Israel, Canada and Mexico are observers in the organization and there are two partners for the democracy, Morocco and Palestine[3]. As we see it is a wide concept of Europe, probably as wider as possible. Canada has a special status, and is also included in the defense organization of Europe, NATO.

Eurovision is a European song context, and hence just European states can join it, it includes many countries from outside of the European Union, as Albania, Armenia, Azerbaijan, Belarus, Bosnia, Croatia, Macedonia, Georgia, Iceland, Israel, Moldova, Montenegro, Norway, Russia, San Marino, Serbia, Switzerland, Turkey and Ukraine. Again the conception of Europe is bigger than the EU and includes all the periphery states, even those in the borders of Europe with a diffuse European identity[4].

UEFA is European football governing body, where the European national teams and the clubs play their European competitions. It includes from out of the Union Albania, Armenia, Andorra, Azerbaijan, Belarus, Bosnia, Croatia, Macedonia, Georgia, Iceland, Israel, Kazakhstan, Lichtenstein, Moldova, Montenegro, Norway, Russia, San Marino, Serbia, Switzerland, Turkey and Ukraine[5]. It is the wider concept of Europe taken by any European organization, and hence could be used as the ultimate borders of Europe. It includes also Israel even when geographically is a part of Asia because of political reasons, but also because of the cultural background of the country.

ACCESSION REQUIREMENTS

The EU is an organization that has been expanding since its creation according to some principles, basically:

1- Politics: Democracy and protection of Human rights

2- Economy: Market economy developed enough to integrate in the European market without collapsing in an environment of free competence.

3- Ability to incorporate the EU legislation to the national law and the administrative capacity to implement it

[1] Siedentop, L. (2001) Democracy in Europe. London: Penguin.

[2] Lamm, R. (1995) Humanities In Western Culture, Volume Two: A Search for Human Values: v. 2. Hong Kong: McGraw-Hill Higher Education

[3] http://assembly.coe.int/ASP/AssemblyList/AL_DelegationsList_E.asp

[4] http://www.eurovision.tv/page/news?id=44483&_t=43_countries_represented_at_eurovision_2012

[5] http://www.uefa.com/memberassociations/index.html

4- Geography: Just countries located in Europe can join the Union. As an example Morocco applied to the membership of the European Communities in 1987 arguing that the country has been united culturally with Europe via the Al-Andalus, the European Muslim state of the medieval times located in Spain and Morocco. This argumentation was rejected[1].

The enlargements are also determined by the capacity of the Union to absorb new members in economic terms. Croatia as a new member state in 2013 will not generate any problem joining the Union in economic terms as it is a small country, but other states as Turkey create more problems in this field[2].

CANDIDATE COUNTRIES

At the moment 2012 there are 5 candidate countries to the full membership of the EU: Iceland, Montenegro, the Former Yugoslav Republic of Macedonia, Serbia and Turkey. Macedonia, Montenegro and Turkey will face difficulties joining the Union. The first two countries were part of Yugoslavia and their aspirations can be included with the whole area of Western Balkans and it will help to stabilize the area and hence the borders of the Union. Turkey on the other hand has become a big problem for the EU, as the country is associated to the European Communities since 1963, and the enlargement negotiations seem stagnant.

Enlargements of the European Union

(Source: http://ec.europa.eu/enlargement/countries/index_en.htm)

CROATIA

Croatia will become a full member of the EU in June 2013 being the 28th member of the Union. The collapse of the communist regimes had dramatically consequences in Yugoslavia with the dismemberment of the country and the civil war. Slovenia leaved Yugoslavia with some easiness, but Croatia fought a war of independence against a Yugoslavia lead by Serbia. The conflict spread to

[1] http://www.eu-oplysningen.dk/euo_en/spsv/all/24/
[2] Nugent, N. (2004) European Union Enlargement (The European Union Series). New York: Palgrave Macmillan.

other areas as Bosnia and Kosovo. It meant an armed conflict in Europe in the 90s, something unthinkable in the EU. The end of the conflict meant the independence of Slovenia, Croatia, Bosnia, Macedonia, Montenegro and Kosovo[1].

The war meant a big shock for the Europeans and brought a big instability to the region, with ethnicity as the main trigger for the war. As the war was stopped by the intervention of USA, the EU became involved in the reconstruction of the affected areas. Croatia was one of the main contenders of the war, but rapidly recovered from the conflict adopting European standards in its economy. The **traditional link with Austria and Germany helped the country to overcome the post war crisis** and rebuild the country[2].

Croatia applied for membership in 2003 and was granted the **candidate status in 2004**. The great economic development of the country made easier the negotiations, but there were three main problematic areas:

1- Collaboration with the International Court: Croatia protected some active fighters of the war as national heroes, when they were criminals charged with crimes against humanity and war crimes. The Croatian authorities did not collaborate with the international institutions in the prosecution of these criminals. After the capture by the Spanish police with the collaboration of its Croatian partners, the issue seems settling.

2- Land ownership: As a consequence of the war, and as a discrimination measure against the Serbian and muslin Bosnian population, there were numerous **obstacles for foreigners** to buy real estate in Croatia. It is a typical nationalistic approach giving all the rights to the holders of the Croatian nationality. The conflict also extended to the EU, as Italians could not purchase land in Croatia, especially in the city of Istria, part of Italy until de Second World War. It was solved by bilateral agreements with the European states, but not with Serbia.

3- Border problems with Slovenia: Since the independence there are some disputes over the Gulf of Piran, the national waters, Dragonja River, Žumberak/Gorjanci and the river Mura area. As Slovenia was already a member of the European Union, and all the members have to agree on new accessions, the country blocked the negotiations with Croatia until the problem will be solved. It has been agreed that an **international arbitrator** will solve the problem and both countries will accept its resolutions. As Croatia also have border disputes with Bosnia, Serbia and Montenegro, it seems likely that the **country will reproduce the Slovenian strategy and block the accession of these countries until the disputes are solved**[3].

The different agreements reached before the accession of the country in the field of trade and economic exchanges mean in fact an integration of Croatia to the European market, facilitating the enlargement process. In 2009 EU-Croatia trade was 14.024 billion euros, which constitutes 65.3% of the total trade of the country. But there are still some problems unresolved pointed out by the European Parliament, as the **corruption** of the public administration, still very high for the European institution, judicial reforms, organized crime, the **return of Serbs refugees**, and some other minor economic reforms. Once a EU Member in 2013 Croatia will have veto over next enlargements, and the democratic maturity of the state will define the future of Serbia and Montenegro in the EU[4].

ICELAND

Iceland was a member of the European Free Trade Association since 1970 with strong economic links with its partners. After the following enlargements of the EU to the UK, Ireland,

[1] Glenny, M. (1992)The Fall of Yugoslavia: The Third Balkan War. London: Penguin Books.
[2] Tanner, M. (2010) Croatia: A Nation Forged in War. New Haven: Yale University Press.
[3] MacDowall, A. (2011) The European Project in the Balkans, Part II (World Politics Review Briefings). Wordl Politics Review (online).
[4] Miller, F.; Vandome, A.; McBrewster, J. (2010) Accession of Croatia to the European Union. London: Alphascript Publishing.

Denmark, Portugal, Sweden, Finland and Austria the EFTA was left just for Norway, Lichtenstein, Switzerland and Iceland. The European Communities and Norway, Lichtenstein and Iceland, integrating the facto these countries in the European Single Market, founded the European Economic Area in 1994. The inclusion of Iceland in the **Schengen** agreement facilitated the free movement of people between most of the European Union states and Iceland. It means that Iceland already has included most of the EU legislation into its national legislation in these fields, and hence the integration of the country should not generate problems in terms of integration. Also the size of Iceland in terms of population, around 320000 inhabitants avoids major problems concerning the enlargement.

Iceland as a member of the EEA has access to the European market and also has to pay as the rest of the member states to the Union, with the difference that Iceland cannot influence the decision making as it is not a member of the organization, and afterwards have to implement the decisions taken maybe in important fields for its economy. At the same time, as a member of the market, Iceland cannot receive funds from many of the European policies. During the crisis of 2009 the financial sector of Iceland collapsed with a huge impact in its economy, especially concerning the public debt, as the national currency dropped its value more than 30%. Iceland needed the support of the European currency, the euro, in the international markets, plus the European funding via the EU policies. Therefore, the national government applied for membership in the Union, and after a fast approval of the Commission and of the Council, it started the negotiations[1].

The main problem facing Iceland is the national fishing grounds; because once member of the Union, it should open them to the EU flee in equal terms with the local fleet. Currently **the fishing sector provides jobs for 8% of the Icelanders** and has an important impact in the local population. Beside this problem the membership of the EEA and Schengen, the fluid economic relation with other members of the Union and its size will focus the debate on political issues. The main obstacle for the future of Iceland in the EU will be the national referendum to accept the Accession Treaty, and hence there will be big debate inside the country, even when the national government and the EU will agree easily on the terms of the accession. Some experts were very optmistic, saying that if everything goes as expected Iceland could join the EU at the same time than Croatia, in June 2013, finishing one of the fastest enlargements of the history of the Union[2]. However the process is much more complicated and delayed.

FYR MACEDONIA

Macedonia gained its independence from Yugoslavia in 1991 with not much trouble as Bosnia or Croatia. The country initially had problems in the international world because of its name, the same than a region of Greece and homeland of Alexander the Great. Greece boycotted the international recognition of the country until the name was change from Republic of Macedonia to Former Yugoslav Republic of Macedonia. Both countries did not normalize their relations until 1995, but the problem of the denomination of the country has not been resolved and negotiations are going on. During the war of Kosovo, many ethnical Albanians took refuge in the border areas of Macedonia, already populated by a majority of Albanians and started an independent movement with the aim of creating the Greater Albania, including Albania, Kosovo and a part of Macedonia. It was presented as a war against Slavs by Albanian extremist who were fighting previously in Kosovo against Serbian forces. The war was fast as the Albanians did not get the support of USA as they did in the case of Kosovo. This strange policy of the **Americans, supporting Albanians in Kosovo but**

[1] Bjarnason, M. (2010) The Political Economy of Joining the European Union: Iceland's Position at the Beginning of the 21st Century. Amsterdam: Amsterdam University Press.

[2] Kaute, J. (2010) Warming Up for the EU: Iceland and European Integration: An Analysis of the Factors Contributing to the Changing Perception of Iceland's Political Elites Toward Membership in the European Union. Munchen: GRIN Verlag.

not in Macedonia can be explain as a way to destroy the Serbian regime, its impact over the Balkans and the influence of Russia in the area. The conflict was solved after the American support to Macedonia and the protection of the Albanian minority inside Macedonia with important concessions from the government and finally in 2009 an agreement over the border disputes with Kosovo was reached[1].

The country was granted the **candidate status in 2005** by the European Council; the Stabilization and Association Agreement entered into force in 2004 to help it during its transitional period. Macedonia is receiving currently different funds from the EU through the Instrument for Pre-Accession Assistance. Between 2007 and 2012, it is expected to receive roughly **500 million euros** through the IPA in order to modernize the state. The country is facing different problems for the accession to the Union. Mainly the corruption is widespread in the country. In economic terms the country still needs to increase its economic performance in order to compete in the European Market. The administration of Macedonia is improving but still it has a **reduced capacity to implement** the European legislation, so there is still a big work in Macedonia before the country is in conditions to join the EU[2]. Even fulfilling all the requirements the problem with Greece is still not solved and it can delay the accession of Macedonia sine die as Greece could use its veto right to stop the integration of the country. **Greece argues that the name Macedonia cannot be monopolized** by one country, and that doing so implies a territorial claim over the northern Greek region of the same name. In the coming years no big changes in the situation are expected, following with the standby until the reforms in Macedonia will make the desirable effect.

MONTENEGRO

It was the country of the former Yugoslavia becoming independent in 2006 and soon was recognized by the member states of the EU. During the dramatic period of the Balkan wars, Montenegro was united to Serbia and suffered less than other parts of the region. But under their Association agreement with Serbia there was a possibility of calling for a referendum for the independence, which resulted in the creation of the new country. This particular case of Montenegro provided the country with enough stability to focus on its accession aspirations to the EU.

After several agreements between Montenegro and the EU, the country was granted officially the candidature to the Union in 2010. The **accession negotiations start in June 2012**. The negotiations will focus on judiciary and fundamental rights and justice, freedom and security. The internal problems to adapt to the European standards are basically corruption, organized crime and freedom of expression[3]. On the positive side it's the size of the country that could not generate problems for the Union absorbing it[4], and probably the accession negotiations will speed up the internal reforms of the country. Already the currency of the country is the Euro, and it could have positive and negative effects on the European aspirations of the country. The European institutions decided according to different economic indicators which member state of the Union can join the Eurozone and which country has to reform its economy in order to meet the criteria. But the EU has no influence on third countries and on their currency. Hence the decision of the government of Montenegro of installing the Euro as their national currency was unilateral. When Montenegro will join the EU, the country will have to fulfill the different accession criteria, as democracy or free market, plus the conditions to join the Euro, as budget control or public deficit, making the

[1] Radke, M. (2011) European Union Influence on Violent Ethnic Conflict in Europe: Case Studies of Northern Ireland, Pais Vasco, and FYR Macedonia. Charleston: BiblioBazaar.

[2] Besimi, F. (2009) Monetary and Exchange Rate Policy in Macedonia: Accession to the European Union. Germany: Lambert Academic Publishing

[3] http://ec.europa.eu/enlargement/candidate-countries/montenegro/relation/index_en.htm

[4] http://www.delmne.ec.europa.eu/code/navigate.php?Id=1

requirements more complicated. It will be positive if the country already meets the economic criteria to join the Eurozone, and the Euro will act as an important motor for a free market and more stable monetary policy. But it will be negative **if the country fulfills the requirements for the accession but not for the Eurozone, then it will not be accepted in the Union**[1].

The enlargement to Montenegro will not happen in the short term, and probably will occur at the same time than Macedonia in the middle term unless any external influence will speed up the process. The EU is showing prudence with both states but surely both states will join the Union in some years, the only matter is when they can solve their internal problems.

TURKEY

The relations between Turkey and the EU have been long and problematic. The country suffered a huge transformation after the WW1 and the war against Greece when Mustafa Kemal, the father of all the Turks, abolished the political system of the Ottoman Empire starting the Republic of Turkey. The country tried to modernize following the European model and economic reforms were introduced. Also some social reforms promoting the secularity of the state were developed. It also was the beginning of the creation of the Turkish identity and the beginning of the Turkish nationalism, as contrast to the previous Ottoman Empire that was a multicultural society. It meant the so called exchanges of population forcing Greek leaving the areas where they had been living for thousands of years, or provoking an exodus of Armenians with dramatic consequences named as genocide by the French Republic or USA. The plans of Ataturk included the north part of Iraq, mostly populated by Kurdish in the future state of Turkey, but the British protectorate over Iraq avoided the inclusion of this territory in the new republic[2]. The creation of the modern state of Turkey was always under the surveillance of the army and political freedom was just a chimera. The country experienced a moderate growth and wealthier performance during this time, separating itself from the Arab world and following the example of the European states.

The relations of Turkey with the European Communities started in 1963 with an agreement based on economic terms and **a customs union**, and applied for full membership on 1987, but the events of Cyprus frozen the relations with the Community and lead to a standstill situation. At the same time Turkey was sending important amounts of people as workers to the territory of the Community, especially to West Germany, placing closer the European Communities and Turkey.

After the end of the Cold War, the EU was expanding eastwards and the negotiations with Turkey started again, the country was granted the status of candidate in 1999 and the negotiations began on 2005 but most of the chapters are still open. In economic terms Turkey and the EU signed a **Custom Union in 1995** focus on trade in manufactured products. Hence Turkey started implementing all the EC legislation related with trade into their national legal system. Trade between the EU and Turkey in agriculture and steel products is regulated by separate preferential agreements. The Custom Union meant an important growth in the economic relations between both areas and today, more than half of Turkey's trade is with the EU. Both areas have equilibrium in their imports and exports to each other and the direct investment of the Europeans in the Turkish economy has grown significantly, accounting nowadays for billions of euro. Currently the negotiations are going on in a slow motion, leading the Turkish society to a frustration in its European dream. **The negotiation process is stalled and suggests a delaying tactic of the member states** of the Union to avoid or at least delay as much as possible the accession of Turkey[3].

The problems for the enlargement to Turkey are numerous and very different, touching cultural aspects as well as political or economic issues, which makes the enlargement the most

[1] Morrison, K. (2008) Montenegro: A Modern History. London: I.B. Tauris

[2] Stone, N. (2011) Turkey: A Short History, Norman Stone. London: Thames & Hudson.

[3] Arikan, H. (2006) Turkey and the EU: An Awkward Candidate for EU Membership? Burlington: Ashgate Publishing Ltd.

problematic of the history of the European integration process. The conflictive points could be divided in:

Europeanism of Turkey

There is debate over whether Turkey is European or not based on different aspects. In terms of Geography, the country is **mostly located in Asia**, with a small portion of its territory in Europe. If Turkey is geographically accepted as European, such countries as **Kazakhstan, which has more territory in Europe than Turkey,** could also be accepted in the EU. The geography also has an influence in the external borders of the Union, because if Turkey joins the organization, there will be **no borders from, for example, France till Iran**, and the Europeans will share borders with Iran, Iraq or Syria. It is a situation generating negative reactions among some Europeans because of cultural and security concerns.

Culturally there are also some issues rising suspicion in the EU citizens as the history of the country, traditionally considered an enemy of Europe since the Ottoman troops occupied Greece and the Balkan region, reaching even Wien. The following centuries were a continuous war between the European powers against the Turkish to dismantle their European possessions. The identity can be built as an opposition to someone or something, and in this case Turkey was used as the opposition to Europe. Religion is other cultural issue to take into consideration. Currently there are no members of the Union where the majority of the population is Muslim. There are many Muslim immigrants in the most developed states of the Union, as Germany, France or the Netherlands, but as a minority they do not impose their religion over the social order. Turkey as a secular state should follow the European pattern but an important majority of the population supports a mild Muslim political party, which is changing the secularism of the state. The fear related to religion is, that once in the Union, Turkey will push to have more influence of the Muslim religion over the EU affairs, against the secularism of the organization and the traditional Christian roots of Europe. Also different movements from the Turkish government promoting the Turkish leadership of all the Muslims living in Europe, obscures the relationship with the EU, because a Muslim support to Turkey could be translated in the European elections in a domination of the seats of the European Parliament by Turkish supporters from all over Europe. Religion is also link with another cultural issue, the identity of the European people. There are some fears that accepting Turkey inside the Union will lead to a lack of identification of the Europeans among them and with the institutions of the Union and hence with the integration process, stopping the building of Europe in the middle of the way. It is culturally easier to create an identity between those who share many cultural aspects than with cultural groups more different. Here is not a problem of superiority, or discrimination, it is just a problem of creating a European identity to be the base of the future Union. The case of Turkey is very complicated, as, according to some authors, it is „a very **nationalistic** country", consequence of the policies of Mustafa Kemal and the relative young creation of the Turkish nation. It will clash with the European identity as no other identity than the Turkish will be accepted in the country, at least in the middle term. The nationalistic approach also permeates the government and its policies, creating the doubt if the Turkish know what the EU is and what the integration process is. Of course there are other nationalistic states inside the Union, but with a significantly lower degree than Turkey.

It is also dangerous the new approach of the Turkish government that instead of increasing the cultural convergence with Europe, is promoting a policy focus on **a new Ottoman influence** over the Muslim countries. It is as a childish threat to the EU in order to accelerate the negotiations and the enlargement. This policy is dangerous because is based on religious affiliation and could give hints of the intentions of the country once inside of the Union about religious matters. It also separates Turkey from Europe, leading the country eastwards because of its own will. It seems clear that Turkey could not play both roles as it wish, and should define itself and its aspirations, being a part of

the EU or being the leader of the Muslim world. Also this policy is mostly unrealistic in practical matters, as the Muslim countries are not interested in a revival of the Ottoman Empire in any form, but the Turkish government seems to look at it as a real possibility[1].

The European institutions

As Turkey is a big country in terms of territory and population, and its citizens' fertility rate is bigger than any of the member states, it is likely than in some years Turkey will be more populated than any European country. Once the country is a full member of the organization is going to have the same rights and duties than the other members, without any discrimination. It means that Turkey will be represented in the European Institutions according to its stature and **will be a leading force inside the Union,** moving the Germans and French from the center of the Union. Turkey once a member will have more power in the European Council than any other member state, or more representatives in the European Parliament. The Treaty of Lisbon established a limit in the representation of the member states in the European institutions, and it will equal the Turkish representation to the Germany, but the Treaty will surely be reformed in the future, and the influence of Turkey will grow according to its size. Otherwise it would mean the change of the rules of the European integration just because of Turkey, a clear discriminatory measure against all the principles of the European building process.

Democracy and human rights protection are another concerns related with the European institutions, as the role of the army in the Turkish state. It is a contradiction as **the army has been the leading force of the modernization of the country** and the promoter of the European standards in the society. It has played a role protecting the heritage of Kemal, and hence the Europeanization of the country introducing the reforms from up down, but at the same time it is not acceptable in terms of democracy where the citizens should lead this process, not the army. Recently the Turkish government is reducing the power of the army but at the cost of removing the country from the European model of society in cultural and social terms. The human rights are also a problem, with the **Kurdish** population and their rights as a minority. Here the main problem resides on the fact that the Turkish government does not recognize Kurdish as a minority group as they are seen as Turks, and hence part of the majority. Some improvements have been done in this field, but it is still far from a full normalization of the situation. The question of the **Armenian genocide** is still confronting Turkey and some of the European countries, as France. The Turkish government refuses to recognize a documented historical fact and reacts violently against any contrary opinion, showing very little democratic maturity. Following this example, some authors consider the country is not ready to enter the EU because in case of any conflict in any decision of the EU it could show the same aggressive behavior against the principles of the Union based on dialogue[2].

The capacity of the Union to absorb Turkey

The financial capacity of the Union is medium or even small comparing the EU budget with the national budgets, and it has to pay for all the EU policies. As the EU has its own sources from the member states, whenever Turkey will join the Union will also contribute to the common budget. The problem of absorbing such a big country is **the money the EU will spend on its policies in Turkey,** much more than the money added to the budget by Turkey, and hence the country will be a net receiver in European terms. As Turkey is divided in different areas of development, mainly similar to European standards, (in the area of Istanbul), but the rest of the country is much less developed.

[1] McCormick, J. (2010) Europeanism. Oxford: Oxford University Press.
[2] Peterson, J.; Shackleton, M. (2006) The Institutions of the European Union. Oxford: Oxford University Press.

The **Common Agricultural Policy should be reform** before the enlargement to Turkey because the rural areas of the country will have access the funds, and it will mean a big financial effort for the EU budget. As the historical rights have been abolished, the western members of the Union are going to lose an important support to their farmers as the central and east members get equal treatment, a situation potentially deeper if Turkey joins. The member states of the Union will have to face an important reduction of the agricultural payments to their farmers, and hence there will be a crisis in the countryside of countries as France, Spain or even Germany. As it is a Communitarian policy, the national governments could not subsidize their farmers, with the consequence of an important reduction of working places, production and an increase of the social unrest provoked by the transfer of people from the countryside to the cities. It will be very hard to face for the member states and hence the policy should be reform, maybe against all the tendencies of the European integration, making it national again, or reducing the protection of the farmers. The other possibility is that these states will block the enlargement to Turkey to protect their farmers, an important electoral group.

The second main policy of the EU in budgetary terms, the Regional Policy will face similar challenges, with important transfers of money to Turkey to promote growth in the less developed areas investing in infrastructures, productivity and qualification of the labor force. The member states of the Union will have two possibilities also, **increasing the national contributions to the EU budget**, something unlikely to happen under the current crisis, **or blocking the access of Turkey to the Union.**

This could be the main problem of Turkey joining the organization, because once inside it has to be treated equally, and hence the transfers of money will unbalance the EU budget, focusing on Turkey. The problem comes from the size of the country and its level of development that make impossible the absorption in the current shape of the Union[1].

CYPRUS

The Mediterranean island has been traditionally inhabited by Greek population, but during the times of the Ottoman Empire some people converted to the Muslim religion and there was some immigration from the main land, creating a minority of Muslim people. The island became a part of the British Empire and hence under the control of London. **The British still have nowadays a big influence over Cyprus, with stable military bases** and an important population impact over the island in terms of tourists and permanent residents. Cyprus became independent in 1960 and at this time the Greek Cypriots represented 78% of the population and the Turkish Cypriots 18%, with a small minority of 4% of the population divided between Armenians, Maronites and Latin people. There were different movements in order to unite the island with Greece and some attacks on the Turkish population followed by the consequent retaliation. Finally Turkey decided to attack the island in 1974, officially to protect the Turkish minority, but made an ethnical cleansing in the North forcing the Greek to leave their homes. **The attack was condemned by United Nations as illegal** but the Turkish army remained in the North. Currently the island is divided in two parts with a buffer zone in-between under the control of the UN. The South is control by the Greek Cypriots and the Republic of Cyprus, member of the most important international organizations and full member of the EU. The North is under the control of Turkey, the Turkish Republic of Northern Cyprus; it depends completely on the support of the government of Ankara. There have been peace talks but no agreement has been reach in order to withdraw the Turkish army and reunify the island. Even more, since the occupation of the north **Turkey has been promoting a transfer of population** from the mainland to the island in order to populate the area and increase the Turkish influence over

[1] Fasina, L. (2008) Understanding Regional Development: Absorption, Institutions and Socio-economic Growth in the Regions of the European Union. Frankfurt: Peter Lang Pub Inc.

the territory. It means that Greek people will not be able ever to return to their houses or to recover their material possessions. At the same time, Turkey is investing important amounts of money in the economy of the north to make it stronger and impossible to be absorbed by the South. It is a clear illegal situation with **artificial movements of population following the example of minor Asia and other areas of Turkey formerly populated by Greek and Armenians**[1].

Currently the Turkish government is following a nationalistic behavior promoting the immigration to the island and investing strongly in its economy. The attitude of Turkey should change in order to access the Union, but the government continues to have tense relations with Cyprus, and hence with the EU. As for example with the Single Market and the prohibition of boats from Cyprus to land in Turkish ports, partially solved, or the intention of Turkey to control a possible oil and gas field in the southern national waters of Cyprus. **As all the member states have the right to veto any enlargement it seems unlikely that Turkey will join the Union unless the dispute is solved.** The Turkish government seems blind in this sense, as it still blames the Republic of Cyprus instead trying to solve the situation. It is a widespread attitude in the Turkish state, a lack of self-criticism, because it is seem as an attack to the Turkish nation, and hence under the nationalistic premises of the state, an unacceptable challenge. The situation can be resumed as Turkish are right and the rest are wrong, **if someone tries to think that maybe Turkish are not right, is automatically an enemy of the Turkish nation. The nationalistic behavior of Turkey in the case of Cyprus is going to block the negotiations until Turkey changes its attitude.** The Turkish seem to pretend to follow as if nothing happens in the island, as if it will be something independent from the enlargement, or even blame the perfidy of the Greek who block their European aspiration without any rational reason[2].

The issue of Cyprus involves more international actors than Turkey and Cyprus, complicating the solution to the problem. As some states as France and Germany have shown their rejection to the Turkish accession, they could use the conflict to block the negotiations and delay indefinitely the process without getting directly involved in the maneuver. If Turkey will forget its nationalistic approach and find a good solution for the Greek and Turkish people in Cyprus, the main official obstacle to its accession to the EU will be removed. Then, the real reasons for blocking the negotiations will arise and the member states against the Turkish accession should defend their position publicly.

Positive effects of the Turkish enlargement

Turkey will provide positive effects on the EU as a full member of the organization in four main different fields:

1) The European Union as a peace system: The original target of the European building process was avoiding wars between its members securing the freedoms of its members by sharing in a common organization. Turkey as a full member of the Union will develop the peace system avoiding the possibility of any conflict and solving the current conflicts with Cyprus, the Kurdish and Armenia. It also **will expand the influence of this peace system to the Arab world, increasing the rule of law,** human rights and democracy in the area. It could have a positive influence in territories as Syria, Lebanon or Iran, acting as an example of peaceful society and cohabitation of different nations of different religions with different languages living together. The current position of Turkey in the conflict between Palestine and Israel is very aggressive as Turkey is acting following the new Ottomanism as the leader of the Arab world, and hence the protector of the Muslim population of Palestine. Its position is not helping to solve the conflict, and is strongly different from the position of

[1] Van Der Bijl, N. (2010) The Cyprus Emergency: The Divided Island 1955 – 1974. Great Britain: Pen&Sword Military.
[2] Christou, G. (2004) The European Union and Cyprus. New York: Palgrave Macmillan.

the European Union. The enlargement could act positively on Turkey, changing its position to a moderate approach helping to solve the conflict. It is important to outline that the EU is an idealistic project, and hence it is essential for the organization to keep these principles in order to increase the integration.

2) Economy: Turkey has an economy that is growing very healthily. The enlargement will mean a full access in equal terms without discrimination of the European companies to the Turkish market and consumers. The economic relations with Turkey are currently important for the Union, and its importance will grow if the country joins the Union. Beside the full **access to the Turkish market, the European companies** could install their production centers in Turkish soil with the legal protection of the communitarian law, and hence increasing the competitiveness of the European economy. Currently there is a custom agreement with Turkey and the economic integration of the area with Europe is growing with benefits for both areas.

3) Population: the Turkish population if young and growing very fast comparing to the ageing population of Europe. The enlargement to Turkey will provide the EU with young population to solve its structural problems plus an influx of cheap labor force in order to keep, and increase the European economy and hence reassure the European social system. Europe could face a big problem in terms of population in order **to pay the pensions** of the retired people as the funds come from the current workers. If the number of pensioners is going to grow as expected the EU main economies will have troubles to collect enough money to pay the social system. As **the fertility rate of Europe is low, the influx of young population coming from the accession of Turkey** could solve this problem.

4) The EU as an international actor: The enlargement to Turkey will create more international muscle for the Union. The organization will increase its power in the international world, especially in the area of the Middle East because of the historical tights of Turkey with the region plus **the military power of Turkey,** already member of NATO. The European dependence of oil from the area will be more secure with Turkey as a full member following the common positions of the Union. The main problem here is the nationalistic behavior of Turkey, of its government, and of its army, that could lead to a situation where Turkey will act differently from the common positions, generating internal conflicts to the organization, as for example with the alliance of Turkey and Brazil to solve the Iranian conflict against the position defended by the EU. Anyway, if Turkey can be included in the EU in every sense, not just officially, the benefits for the Union in external policies and external influence will be good.

Future of Turkey and the EU

At the moment the negotiations between the EU and Turkey are developing very slowly and probably will take many years before any agreement is reached. The EU should balance the negative and positive effects to the enlargement to Turkey in order to take a decision. On the other hand, Turkey should learn more about the EU and what it is, and then think if it is worth for them to join the Union. Turkey cannot pretend to change the essence of the Union, and hence Turkey should adapt to the European standards in politics, economy, human rights, democracy or social structures. And the country should be ready for these changes or to refuse the accession. The enlargement process is a free will action from the candidates, and when any state joins any international organization, it has to accept its rules. It cannot pretend to join the organization with special rules for itself. So Turkey should make a big effort to integrate in the EU and its government and population should think if the effort is worthy or not, and then continue with the enlargement process or abandon it.

There are three main options for the future relations between Turkey and the EU:

- Full membership: Turkey after long years of negotiations and delays will join the EU as a full member when its government, economy and society will be ready. On the other side, the EU is not likely to accept a country of big size to the Union in a period of economic crisis, so the enlargement will be paralyzed until a new economic cycle will improve the European economy. Both areas have to be patient with each other and ready for a long-term process.

- Special preferential relations: Former president of France, Sarkozy, with the support of the German premier, Mrs. Merkel, proposed an alternative to the full membership of Turkey, a special association agreement where Turkey and the EU will benefit from an **economic integration without political integration.** The special relation could be developed via the Union for the Mediterranean, an organization created to improve and regulate the relations between the Mediterranean states where the EU acts as a whole, and the Asian and African countries try to act united. The organization is meaningless right now because of different problems, mainly related with the Arab-Israeli conflict and the tremendous differences of the EU and the other Mediterranean states approaches on the conflict. Nevertheless the association could be developed in a way to act as the vehicle of the relations between Turkey and the EU, and as a way to institutionalize the preeminence of Turkey over the Arab world. It could be useful to establish stable relations with Turkey and via this country that will act as a bridge between north and south; west and east in the Mediterranean increase the coexistence between Europe and the Arab world. The Turkish government has rejected this alternative to full membership but if the negotiations will not advance it could become a real option.

- No integration, no cooperation: If the case the EU will not agree on the enlargement or Turkey will refuse the European requirements there could be a total end of the relations between them. Turkey **then will focus on east, trying to become the leader of the Arab world,** something more in the imagination of the Turkish government that in the reality. The economic relations between the EU and Turkey will follow anyway as the current global world will not allow any autarchy in the Turkish economy. In the political field the consequences would be worse, as a rejection of the accession will foster even more **the nationalism** in Turkey with the consequent instability in the borders of the EU and possible armed conflicts in the case of Cyprus. This is the less likely option, being the first two more realistic, but a break between Turkey and Europe could have unpredictable consequences[1].

ALBANIA, BOSNIA AND SERBIA

The three countries are future candidates for membership in the EU. It will mean the enlargement of the organization to all the Balkan states, after Croatia, Montenegro and Macedonia join the Union with the exception of Kosovo, a more problematic case. Integrating the area is one of the main targets of the Union in terms of enlargements for the short and middle term. It will make the Union compact and will provide peace and integration for an area with a conflictive past. **Probably Albania and Serbia will join at the same time the EU near 2020 or 2025, because otherwise the rivalry between Serbs and Albanians** will be extended and used in the Union using the unanimity required for any new enlargement.

Albania formally applied for membership on 28 April 2009 after negotiating a Stabilization and Association Agreement in 2006, much longer period than any other possible candidate of the area[2], outlining the probable difficulties in the negotiations for the full membership still to come. Albania is a relative **poor country** according to the European standards, but is growing economically in the last past years when most of the European states were in crisis. But there are different problems in the Albanian economy and in its aspirations for the accessions in the EU, mainly **corruption, organize crime, weak political institutions, high unemployment rate, and energy problems.** The State is not fighting the

[1] LaGro, E.; Jørgensen, K. (2007) Turkey and the European Union: Prospects for a Difficult Encounter. New York: Palgrave Macmillan.

[2] http://ec.europa.eu/enlargement/potential-candidate-countries/albania/eu_albania_relations_en.htm

criminals and the corruption as the EU has asked, with important political and economic implications, as **a corrupt political class** involved in many illegal activities and a danger for the economic growth and for the free market. The energy sector has problems of supply because it is outdated and inefficient, but the different investments from the Italian company ENEL should solve the problem. Other problems for the integration of the country in the EU are gender and minority political participation, because women and **the ethnic minorities of Greek, Macedonian, Montenegrin, Roma and Aromanians are poorly represented in the national Parliament**. Finally the issue of the **3 million Albanians living in South Serbia, Kosovo and Macedonia could be solved inside the Union,** in a territory without borders rather than the creation of the Great Albania, a nationalistic project already almost forgotten[1]. The problems of Albania and its role in the criminal activities focusing on Europe, as drugs and human trafficking, make the enlargement to Albania very problematic and surely for a middle term, after the enlargement to Montenegro and Macedonia, probably around 2020 or 2025[2].

Serbia signed the Stabilization and Association Agreement in 2008 and its main obstacle to the accession was the judicial collaboration of the Serbian authorities with the international authorities in the cases of war crimes during the Bosnian war. Lately the Serbian government has removed this barrier by the arrest of several **criminals as Gen Mladic and Radovan Karadzic** and Serbia has been officially recognized as a candidate country on March 2012. Another important problem blocking the European path of Serbia is the issue of Kosovo, considered by Serbia as a part of its territory and hence not as an independent territory. The Serbian government is showing a strong will to compromise about the issue, but **locals Serbians are not keen on any agreement about the Serbian sovereignty over Kosovo**. As Serbia will probably join the EU at the same time than Albania, both countries will look actively and international resolution accepting the independence[3]. The conflict of Kosovo spreads also to the relation of Serbia and Montenegro, when the last recognized the independence of Kosovo there were diplomatic retaliations and their bilateral relations were harm. Both countries should collaborate in many issues, as corruption, money laundry, criminality and the **Serbian minority living in Montenegro** in order to succeed in their European aspirations, but as Montenegro is going to join the Union before Serbia, the second must make bigger efforts in the way of reconciliation[4]. The economic situation of Serbia after so many years of conflicts is not as good as other countries applying for membership and some reforms should be included in order to equate it to the European standards. Another important problem is the organized crime and corruption, a negative aspect common throughout the area against which the country is struggling, but is still far from the minimum conditions that can be accepted by the EU[5]. If these problems are solved, Serbia could become a member state of the EU around 2020 or 2025.

Bosnia-Herzegovina suffered dramatically during the Balkan Wars, the country was divided mainly between Serbs, Croatians and Bosniaks, who were killing each other during the conflict from 1992 till 1995. The war finished thanks to the intervention of USA and afterwards the EU got involved in the reconstruction of the country, where still keeps a peacekeeping force and a police mission. Currently the country is divided in two main autonomous areas, the Republic of Srpska, mostly populated by Serbs, and the Bosniak-Croat federation. The **ethnical tensions** are still important, and could block the access to the country to the EU because currently the country is not really working as one united state[6], it is more **an artificial body collaborating on basic issues rather than a proper state**. The relation between both areas should be reinforced via constitutional reforms in order to access as a full member of the EU and secure **the viability of Bosnia as a state**. Other major problems are **corruption and**

[1] Bogdani, M.; Loughlin, J. (2009) Albania and the European Union: The Tumultuous Journey Towards Integration and Accession. London: I.B. Tauris.

[2] http://www.europeanforum.net/country/albania

[3] http://ec.europa.eu/enlargement/potential-candidates/serbia/relation/index_en.htm

[4] Still buying time: Montenegro, Serbia and the European Union, ICG Balkans report (2002)

[5] http://www.europeanforum.net/country/serbia

[6] The EU in Bosnia and Herzegovina: Powers, Decisions and Legitimacy, European Union Institute for Security Studies and European Commission (2011)

organize crime[1], mainly related with the lack of a proper state in the area and hence the impossibility to control the illegal activities. The future of Bosnia Herzegovina in the EU is not clear, as the internal situation is still very unstable and a common administration needs to be built. Probably Serbia and Albania will join before Bosnia; it will help to solve the ethnical confrontation of the area and hence solved the main obstacle of Bosnia joining the Union. **If Serbia and Albania join the Union in 2020, Bosnia could access the organization in 2025.** Other possibility is Bosnia becoming a protectorate waiting to collapse when the international commitment leaves[2].

Kosovo is another problematic territory in the Balkans because it has not been recognized as an independent states by all the members of the EU, and Serbia still consider the area as a part of the country. The **ethnic division** between Albanians and Serbs is still very strong, and the peaceful cohabitation is just granted by the international peacekeeping forces. The **viability of Kosovo** as a proper state is still questionable without the presence of the international troops, and it is an obstacle for Albania and Serbia to join the EU. These two parts plus a representation of the local Albanians and Serbs and the protection of the international community, and especially of the EU with financial and political support of the area should solve the problem[3]. Otherwise the territory will collapse and a new conflict could arise. A practical solution could be the creation of an autonomous region inside Serbia with special relations with the EU, and as Serbia and Albania join the EU, Kosovo will be also part of Serbia with a special status. Kosovo could also become an independent state under the influence of the Albanian majority, with the consequent conflict with the Serbian minority. An independent Kosovo could not survive in the world because of its **poverty**, economic situation and political instability, and hence will have to be annexed to Albania, become a protectorate of the EU or collapse[4]. As these three options are less likely to occur, and the involvement of USA is decreasing leaving the main position to the EU, **a compromise solution from Serbia and Albania is expected.**

European Countries under the European Neighborhood Policy

Eastern Partners of the European Union

(Source: http://eeas.europa.eu/eastern/index_en.htm)

[1] http://ec.europa.eu/enlargement/potential-candidates/bosnia_and_herzegovina/relation/index_en.htm
[2] http://www.europeanforum.net/country/bosnia_herzegovina
[3] http://ec.europa.eu/enlargement/potential-candidates/kosovo/relation/index_en.htm
[4] Weller, M. (2009) Contested Statehood: Kosovo's Struggle for Independence. Oxford: Oxford University Press.

Currently there are in the eastern part of the continent six states under the European Neighborhood Policy, Belarus, Ukraine, Moldova, Georgia, Armenia and Azerbaijan. The main aim of this policy is establishing relations with the border countries of the Union in order to secure the European borders. The EU provides via different actions stability to these states, and hence to the Union itself because the security of the borders start with the security of the neighbors. It can be applied for Belarus, Ukraine and Moldova as they share physical borders with the territory of the EU, but not Georgia, Armenia and Azerbaijan. The main targets are promoting democracy and human rights, access to the European Market in order to develop their economies and hence provide these countries with economic prosperity, and cooperation in areas of common interest as environment, transport, energy or migration. The EU uses different tools for implementing these targets, technical help, political support and economic aid[1].

The relation of the EU with these six countries is **influenced by Russia**, the main power of the region, which still keeps an important political and economic influence over most of these territories even with military presence in some of them. After the collapse of the Soviet Union, Russia, under strong internal changes, did not influence the national political life of these countries, but currently the power of Russia is rising again and its government sees these areas as its natural areas of influence, clashing with the European interest.

BELARUS

The country is under an authoritarian regime with very poor democratic records and even **poorer human rights protection**. The country has difficult relations with the EU and is much closer to Russia[2]. The possible accession of the country to the EU will depend on a change in the regime. An agreement with Russia will be needed as the economy of Belarus is strongly linked with the Russian market. It makes very difficult any approach in terms of membership in the short and middle term, so the possible inclusion of the country will be in the long term. The EU is currently focusing on environmental issues in its relations with Belarus, because other chapters of cooperation are stalled by the internal political situation of the country[3]. The EU banned more than 200 people from the regime travelling to Europe and has frozen funds of some companies involved with the political elites[4]. The country is more likely to stay as a buffer area between the EU and Russia, with some especial agreements in the economy, but a rapid democratization of the country if the current regime collapse combined with a weaker Russian influence could lead the country to the EU. At the moment it does not seem possible a democratic revolution in Belarus after the breakdown of the opposition after the elections of 2010, and hence the country probably will not become member of the Union until the international arena will allow it **in a long term.**

UKRAINE

The country is a priority in the east for the EU. It suffered from a great political unrest with successive governments supporting a closer relation with the EU or other governments supporting special relations with Russia. After the Orange Revolution in 2004 it seemed possible for the country to become an official candidate country to access the EU, but the numerous internal problems stopped the process. The main problem facing Ukraine in order to get closer to the EU is basically its relation with Russia, which is problematic in different aspects like Crimea and Russian population in this area plus the Russian fleet based there, energy dependence on Russian supplies,

1 http://ec.europa.eu/world/enp/welcome_en.htm
2 http://eeas.europa.eu/belarus/index_en.htm
3 Wilson, A. (2011) Belarus: The Last European Dictatorship. New Haven: Yale University Press.
4 http://www.europeanforum.net/country/belarus

or the Russian minority in the country[1]. Also **the enlargement is seen by some Russian leaders as a threat to Russia, and hence unacceptable because of security reasons**. On the other hand Ukraine also has many internal problems, as a high rate of **corruption** and crime, some **democratic deficit** according to the European Standards. The economy of Ukraine is based on market economy where the **privatization and renationalization of public companies** makes unstable the situation. It also has some structural problems that make difficult the integration in the European Market because it lacks enough competitiveness.

The country has made big efforts in terms of democracy and human rights, and its economic relation with the EU has been strengthening in the last years with the European Market. Currently they are negotiating the creation of **a free trade area** between the Union and Ukraine[2]. The economic aid of the Union is helping the country to meet the basic criteria of convergence improving the local situation. If it continues to reform and sits a Democratic regime with a stable market economy the country could get closer to the EU. The Ukrainian parliament rejected in 2010 any perspective joining the NATO[3], a military organization seen as the defense community of the EU and USA, as the enlargement to central and east Europe cited as an example, but at the same time the parliament reassured the compromise of the country with the EU. Ukraine could become a member of the Union **in the medium-long term, but just if the problems with Russia are solved**. Hence, the possibility of an enlargement will depend on the bilateral relations between Russia and Ukraine and a change in the internal Russian politics could accelerate the process or **simply stop it**, so it makes the situation difficult to foresee[4]. The strong support of Poland, whose territory previously included an important part of the current Ukraine, and the historical and cultural links between both countries, mean a **strong Polish support for the candidature of Ukraine**, and hence could pave the way for a future enlargement of the EU eastwards.

MOLDOVA

Currently the country is negotiating an Association Agreement with the EU, considered as a previous step for being accepted officially as a candidate country for joining the Union. The agreement will be focus on economic issues, as **free trade area**, and political issues as democracy. The main internal problems acting as obstacles for the integration of the country in the EU are the **Transdniester conflict**, a pro-Russian separatist region and under the protection of the Russian troops acting officially as peacekeepers, poverty, as Moldova is the poorest country of Europe, emigration, 1 million citizens or half of the working force have left the country in the last years, and political and media freedom. The external relations of Moldova are focus on three main partners, Russia, Romania and the EU with different views, as **Russia wants to keep its influence** over the area and Romania wants to get closer to a country where an important part of its territory, **Bessarabia, was part Romania until 1940 and whose language is the same than Moldovan**. The EU is a priority for the Moldovan government as the best option to keep its independence and raise the living standards of the local population[5].

The Moldavian aspirations could benefit from the close cultural ties with an already member of the Union, Romania, and its **small size, easy to absorb** for the Union if the country can solve its internal problems[6]. Russia will play a determine role in the accession of the country and probably

[1] Kuzio, T.; Umland, A. (2007) Ukraine - Crimea - Russia: Triangle of Conflict (Soviet and Post-Soviet Politics and Society). Stuttgart: Ibidim-Verlag.
[2] http://eeas.europa.eu/ukraine/index_en.htm
[3] http://www.europeanforum.net/country/ukraine
[4] Velychenko, S. (2007) Ukraine, The EU and Russia: History, Culture and International Relations. New York: Palgrave Macmillan.
[5] http://www.europeanforum.net/country/moldova
[6] Lewis, A. (2004) The EU and Moldova. London: Federal Trust for Education & Research.

will not support the integration of Transdniester region in the EU. Because of these reasons the **accession of Moldova could come after Serbia and Albania, perhaps at the same time than Bosnia**.

THE CAUCASUS

The Neighborhood policy includes three Caucasian countries, Georgia, Azerbaijan and Armenia, even when geographically and culturally can be doubts about the Europeanness of these territories. The three territories have in common their Soviet past and hence the influence of the Communism, secular society, Western literature, European art and economic connections. These ex-Soviet Republics have other historical ties with Europe, as the ancient Greek influence, especially in the case of Georgia because of the Black Sea, the Roman Empire, the Byzantine Empire, Christianity in the case of Armenia and Georgia and ethnicity in the case of Georgia. The geographical border between Asia and Europe becomes diluted in the Caucasus as it reaches the periphery of Europe, but a possible enlargement to Turkey will solve the geographical concerns in the enlargements of the EU.

ARMENIA

The country conducts its relations with the EU via a Partnership and Cooperation Agreement from 1999, and became a part of the European Neighborhood Policy in 2004. During the period of 2011-2013 the country benefited for an economic support of the Union of **157 million euro**. Armenia also is included in other programs such as the European Instrument for Democracy and Human Rights. Currently Armenia is negotiating an **Association Agreement** with the EU in order to link closer both areas and establish a **free trade area**[1]. Some domestic issues are influencing the relation of the country with the EU, as the minorities, even when Armenia is a very homogeneous country, just 2% of the population comes from different ethnical groups, but there is a division between Armenians, Hayastantsis from proper Armenia, and Karabakhtsis from the **Armenian diaspora**. New legislation gives the Armenians living abroad, the predominant group in the local politics, the possibility of having **double nationality and hence vote** in the Armenian elections. The organization of the society **in clans** has an influence the political life, and hence on the democratic standards of the state, brings an important obstacle for the European concept of society and democracy, becoming more difficult any possible integration. A major issue is the conflict with Azerbaijan, which should be solved before any possible enlargement because it affects another possible candidate. Other problems are **poverty, corruption**, and the involvement of business in politics, **human rights**, gender representation, and weak media[2].

In the field of international relations Armenia **surprisingly has good relations with Russia, USA, EU and Iran, with difficulties with Azerbaijan and Turkey**[3]. The possibilities of accession to the EU will depend on third parties, as Turkey or Georgia, because the geographical position of the country will make impossible any enlargement if any of those mentioned countries do not access the Union as well. So Armenia is likely to join the Union if Turkey joins the organization and the relations with this country improve. Otherwise Armenia is going to become a strategic partner of the EU, but not a full member of the organization[4].

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1 http://eeas.europa.eu/armenia/index_en.htm
2 Payaslian, S. (2008) The History of Armenia. New York: Palgrave Macmillan.
3 http://www.europeanforum.net/country/armenia
4 Bert, A. C. (2011) Armenia - European Union Relations. Germany: Chromo Publishing

AZERBAIJAN

The relations of the country will the EU are following a parallel way with the Armenian and EU relations: A Partnership and Cooperation Agreement, the inclusion of the country in the European Neighbourhood Policy, the extension of different European funds to Azerbaijan, and currently the **negotiation for an Association Agreement**[1]. On the other hand, the internal situation of both countries is very different, Azerbaijan is a country with important oil and gas reserves and hence with important **financial incomes and a more strategic partner in terms of energy** for the EU. The political system is closer to a dictatorship than a democracy, with **average winning of the ruling party of 88% of the votes and constant accusations of electoral fraud by Western observers**. This political system is closing the country to Russia and separating it from the EU.

Other internal problems are the gender representation, with women clearly discriminated in the political life, the conditions of the refugees from the Nagorno-Karabakh conflict, the relation between **religion and state**, far from the European secularism of the society even when the Azeri government is strongly secular, **corruption and poverty**[2].

The EU sees Azerbaijan as an important partner because its energy supplies, but the integration of the country seems difficult. Beside the internal problems, the fact that **the majority of Azeri people are living in Iran, and the problems with Armenia** could block any accession[3]. The integration could just come with a previous access of Turkey to the EU, and it's probably support for the Azeri bid. So probably the EU will encourage economic relations and currently promotes a **pipeline from Azerbaijan via Georgia to Turkey** as a way to improve the energy independence of Europe and influence the country, but the accession seems really unrealistic nowadays.

GEORGIA

As Armenia and Azerbaijan a Partnership and Cooperation Agreement and the inclusion of the country in the ENP conduct the relations between Georgia and the EU[4]. It is probably the most European state of the Caucasus because its historical relations with the Greek civilization and its integration in the Russian Empire and afterwards in the Soviet Union. In some extend could be said that the Mediterranean influence over Georgia includes the country culturally with the northern shore of the sea. The Mediterranean was long divided between Christians and Muslims, between European and Africans and Asians, the Christian orthodox religion of the country could have helped with the integration of Georgia with the European Mediterranean states and with Russia, being effectively a link between both influences. Also its historical confrontation with the Ottoman Empire situates the country with historical similarities with the Balkan states[5].

The internal situation of the state after the independence from the Soviet Union was extremely unstable, with important conflicts, as in the Georgian territories of **Abkhazia and South Ossetia**, and poor economic performance. After the Rose revolution, the political situation of Georgia changed, closing its relations with the Western world and the EU[6]. But the recent conflict in South Ossetia and the Russian intervention have made clear the difficulties of the country to escape away from the Russian influence. **The main obstacle for Georgia joining the EU is its relation with**

1 http://eeas.europa.eu/azerbaijan/index_en.htm
2 http://www.europeanforum.net/country/azerbaijan
3 Goltz, T. (1999) Azerbaijan Diary: A Rogue Reporter's Adventures in an Oil-rich, War-torn, Post-Soviet Republic. Armonk: M.E. Sharpe.
4 http://eeas.europa.eu/georgia/index_en.htm
5 Gamakharia, J. (2007) The History of Georgia. Tbilisi: Intelekti.
6 Coppieters, B.; Legvold, R. (2005) Statehood and Security: Georgia after the Rose Revolution. Cambridge: American Academy of Arts and Sciences & MIT Press.

Russia, the main power of the area and aggressive in its relation with Georgia because of the Western interest of the Georgian government in Western organizations as NATO or EU.

Beside the fight between the Western world lead by USA and Russia to be the dominant power in Georgia, and hence in the Caucasus, the country has several internal problems making more difficult its approximation to the EU. The gender equality is almost inexistent in the national politics, with an overwhelming majority of men in the parliament and other political institutions, there is a widespread **corruption** strangling the modernization process started by the president Saakashvili, **poverty** is another important internal problem in the country even when **the economic performance has been good in the late years**. There are also environmental concerns about the impact of the construction of a pipeline from Azerbaijan to Turkey[1].

A possible EU enlargement to Georgia seems very unlikely at the moment even when the country has a foreign policy based on that approach mainly because of the current dominance of Russia over the area. Just a change in the Russian policy in the Caucasus and the solution of the conflict with the separatist areas could pave the accession of the country. The geographical situation of the country, even when it has a common border with the Union with the Black Sea, seems **complicating any accession until Turkey joins the Union**, giving unity to the EU territory. These are too many premises to be fulfilled in a short or medium term, and hence any enlargement to Georgia seems very unlikely to happen unless the international situation changes radically. Anyway, there is an obvious European interest in the country, and hence it will foster the bilateral agreements and contacts between both areas and Georgia will become the main partner of the EU in the Caucasus area, influencing also other states located in the area.

RUSSIA

The relations of the EU with Russia are very important for both areas, but in terms of accession to the EU it is a completely chimera to think about Russia joining the European organization. Geographically Russia have some parts of its territory in Europe and the majority of it in Asia, but in terms of population more Russians live in the European side of the country than in Asia. The main ethnic group is Slavic, a predominant group in many other states of Europe. The geographical extension of Russia, **the biggest country of the world**, makes impossible any enlargement because the **Union lacks the capacity to absorb Russia**. Any enlargement to Russia will mean the end of the organization with its current shape leading to a mere free trade area. The cultural matters also have an important influence in the possibilities of expanding the organization to Russia, because **the Russian identity is not really European, and even not Asian**, because the country has created **its own identity** stronger than any identification with Europe, forming its own block.

The political situation of Russia, where the whole population as a minor negative effect coming from the Russian condition vastly accepts the democratic deficit also separates the political systems of the EU and Russia. The especial conditions and historical background of the country have meant a development of **a pseudo democratic regime that the society feels acceptable** but according to the European standards is insufficient. On economic terms Russia has a market economy influenced by the unilateral decisions of the state to protect its interest. It means an important **interference of the State in the economic affairs** with decisions sometimes arguable from a juridical point of view. The Judicial system is united in many cases with the political power, against the basic principle of three independent powers in any European modern state. These are some of the main topics that make Russia different than Europe, and hence impossible to unite to the European integration[2].

[1] http://www.europeanforum.net/country/georgia

[2] Service, R. (2009) The Penguin History of Modern Russia: From Tsarism to the Twenty-first Century. London: Penguin.

Nevertheless it is an important country for the EU in economic and political terms as it is one of the main trade partners for the Union, a supplier of energy and an important consumer of European products. The stature of Russia in the international affairs makes it a containment area for the expansion of the European organization with a buffer area where both contenders dispute the dominance over it with their own weapons. The relations of Russia and the EU also affects the eastern borders of the Union, with **several conflicts with Estonia, Poland** and other states previously under the influence of Soviet Union, stressing even more the possibility of further enlargements eastwards. Obviously the **EU cannot include Russia in the European integration, Russia is not interested either in such integration**, and hence there is no possibilities expanding further the European organization in this area[1]. The relation of Russia and EU will be focus on economic terms from a privilege position as both areas need each other and **the strength or weakness of Russia will determine the enlargement of the EU** to the countries included in the ENP.

THE CASE OF KAZAKHSTAN

The country geographically has an **important part of its territory in the European continent**, **even more than Turkey**, a country accepted as an official candidate to the full membership. Nevertheless Kazakhstan is commonly **considered as an Asian country** and hence without any possibility of joining the EU. Kazakhstan is seen culturally also as Asian although it belonged to the Soviet Union and hence experienced an important influence from the European and Russian communist intelligentsia[2]. The relations between the country and the Union have been focused on energy and transport issues, as an alternative to increase the energetic independence of Europe.

There is a Partnership and Cooperation Agreement working since 1999 but the exclusion of the country from the ENP is an indicator of the impossibility of any enlargement in this direction. Kazakhstan has been included in another group by the EU, the Central Asia states, Kazakhstan Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan, through the European Union and Central Asia Strategy for a New Partnership adopted in 2007. The geographic situation of the country, linked with the rest of Europe via Russia makes also difficult any closer relation with the EU. So, Kazakhstan will not be a member of the EU even in the long term, unless the European cultural perceptions change dramatically[3].

The limits of the organization

The EU clearly will expand in the Balkan area in the coming years and depending on Russia will integrate some eastern areas of Europe. The limits eastwards are clearly define by Russia as the ultimate border of the Union. The Mediterranean area is more complicated because the situation of Turkey, and official candidate for full membership, but with numerous obstacles in its way makes more likely a preference relation than full membership. **The Caucasus states will depend on the enlargement to Turkey to join the Union,** and hence Armenia will face a dichotomy, as it will need a traditional opponent inside the Union to access itself the organization. The southern part of the Mediterranean is not on the EU Enlargement area of the organization because of geographical reasons, as the rejection of the application of Morocco showed. The north of the Union could include Greenland, a territory of Denmark previously part of the European Communities, but its impact in the Union will not be considerable. Other European states as Norway or Switzerland are possible candidates to the membership if their internal opposition changes and the economic

[1] Antonenko, O.; Pinnick, K. (2009) Russia and the European Union: Prospects For A New Relationship. Adington: Rouledge.
[2] Rosten, K. (2005) Once in Kazakhstan: The Snow Leopard Emerges. Lincoln: iUniverse.
[3] http://eeas.europa.eu/kazakhstan/index_en.htm

performance of the Union improve. In the medium term the EU will reach its natural borders and then, an organization based on a continuous enlargement since its creation, will define itself again. Europe then will have to face the own essence of the Union and its practical matters with different options:

1- The European Federal State: The EU will have to increase the integration as a substitute for the territorial enlargement. The necessity of new markets will force the Union to integrate even more its own market. It will also need to obtain market access to other areas of the world. In that sense the EU will focus on larger areas than mere states, and hence will promote the integration of other parts of the world. **To deal with these other communities the Union must integrate politically**, and hence the end of the process will be the creation of the European federal state. This possible scenario has the disadvantage of promoting the creation of similar blocks around the globe because it could lead into a confrontation, in economic, military and political terms, between blocks.

2- The Western Block: the EU once reached its limits for further expansion could include countries culturally belonging to Europe even when geographically are far from the continent. These countries were mainly populated by European people during the expansion of Europe during the last centuries and could include such states as Canada, Argentina or Australia. The improvement on the transportation and in the communication will allow this option, but it is not very likely to happen, as USA is the current leader of the Western World, and would not allow this expansion of the Union. In that sense there could be **an economic integration between the culturally European states around the world including USA**, but the leading force of the process will probably be USA and not the European Union, and hence the result will be very different.

3- The World Union: According to Jean Monnet, the father of Europe, the organization should expand until it includes the world, without geographical borders. As the European integration is a peace process, expanding the project to other parts of the world will finally bring as a result a strong world organization where the conflicts can be solved by peaceful means. Something like the **UN but with real power and effective solving problems** between its members. A hardcore area will lead the integration or central states already with a high level of integration and the rest of states will be less integrated. The **periphery will look forward joining the central core** in order to have more power in the institution. It is a very idealistic scenario, and seems quite unrealistic nowadays but also the EU seemed unrealistic less than 100 years ago.

4- The collapse of the organization: As the Union will reach its limits the identification of the European people with the organization could decrease, as the homogeneity among the members will shrink. The economic integration will lead surely to political integration, and it will need more the European people as the real holders of the sovereignty. The **constant need of new markets will force the organization to expand and stress its limits destroying the identification of the people** and therefore the Union giving pace to a mere trade area.

Probably the EU will become some sort of mixture of these four options because the European building process has shown a great capacity of innovation in economic and political fields, adapting to the new situations by creating new models of integration by including diverse aspects of different theories and practices.

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The European Union and its Policy Towards the Neighbours from South Caucasus

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Abstract: This article explores European Neighborhood Policy towards three former Soviet states from South Caucasus, Armenia, Azerbaijan and Georgia. It investigates how successful these countries have been in implementing necessary reform. As for the European Union, paper tries to show why Europe is interested to be engaged in close cooperation with these republics and run various programmes to support their development. Article also talks about possible problems and difficulties the union wants to avoid facing by preventing their causes locally in the region.
Keywords: European Neighborhood Policy, South Caucasus and Europe, European integration.

INTRODUCTION

The subject of my research is the relationships between the European Union and the countries of South Caucasus, Armenia, Azerbaijan and Georgia, precisely European Neighborhood Policy in South Caucasus until 2011, due to its importance to the EU from one side and these countries from another. The EU is very much interested in keeping and improving stability in the region and its direct cooperation with the countries from this region supports this idea. Therefore, the main question of this paper is why the EU is interested in cooperation with the countries of South Caucasus and what are the factors for this policy?

My hypothesis is that the EU became more concerned about the region and interested in closer cooperation with the countries there due to the fact that the union considers it as an important part of process aimed to solve the cross-border problems, such as drug traffic, illegal immigration, human trafficking, and terrorism.

The aim of this research is to prove that preventing the problems the EU fears to face in the region or due to the situation in South Caucasus is the main motivation for the union to be engaged locally as an active political actor and is starting reason for its policy. My work relies mainly on the researches of different academics working on the issue, the information available on the official website of the EU, including regular reports of the Commission dedicated to the detailed explanation of the plans of the organization in each country and the work progress, as well as the declarations of the European Parliament and the high officials of the EU.

In order to understand the issue fully, studying the policy of the EU is essential, what is the policy in details and why the union initiated the policy with its neighbors. This article will try to explain the matter using theory of neofunctionalism.

THE BEGGING OF THE COOPERATION WITH SOUTH CAUCASUS

After the collapse of the Soviet Union and re-gained independence, the countries of South Caucasus, Azerbaijan, Armenia and Georgia, actively engaged in the bilateral and multilateral programmes of the EU, including the national programmes supporting institutional reforms, Comprehensive Institutional Building Programme (CIB), INOGATE programme supporting energy policy cooperation between the EU and partner countries, TRACECA programme promoting the development of regional transport dialogue and Euro-Asian transport connections, macro-micro financial support, Partnership and Cooperation Agreement (PCA) starting from 1999. The EU has

also established a regional representation in Tbilisi, Georgia, dealing with the regional issues and last but not least, in 2009 Eastern Partnership Programme started working[1].

Describing the EU's cooperation with each country, in Georgian case this cooperation has been stably developing since the 90s. The EU regional representation opened in Tbilisi, the capital of Georgia, in 1995 and it has obviously been a huge factor in developing and improving cooperation with the country, between its government and the institutions of the EU. The representation holds the negotiations with Georgian government over the cooperation programmes, as well as in general it coordinates those programmes. The Partnership and Cooperation Agreement (PCA) that came into power in July 1st, 1999, being a legal and political basis for the cooperation, regulates the cooperation between the EU and Georgia[2]. One more document within European Neighborhood Policy regulating the cooperation between the EU and the country is European Neighborhood Policy Action Plan, being a document that defines strategic goals of the bilateral cooperation for five years, with short-term and long-term priorities[3]. On the basis of the Action Plan, the EU and Georgia take obligation to deepen economic integration and develop political cooperation in the fields such are foreign policy, justice, energetic, transport, fighting poverty, freedom and safety, especially in fields of boarder control and migration, environment protection. The main priorities of the cooperation between the EU and Georgia are described in two documents: the Country Strategy Paper 2007-2013 and National Indicative Programme 2007-2010, each document includes priority fields for cooperation[4]. Furthermore, starting from the 90s, the EU is helping Georgia in solving internal conflicts with its breakaway regions, Abkhazia and South Ossetia, providing various programmes for economic and humanitarian rehabilitation, as well as trust and peace building process. Such programmes include projects on improving living conditions of Internally Displaced Persons (IDPs) and supporting them starting up their own small businesses[5].

For Armenia, the EU has prioritized three fields: strengthening of democratic structure of the government, regular reforms and building of administrational basis, fighting poverty. The EU also has an Action Plan with Armenia that defines the cooperation and the priorities of this cooperation with the country, managing various programmes supporting the development in above mentioned priority fields[6].

The EU's cooperation with Azerbaijan has defined three priority directions being investments in country's infrastructure, economic integration and partnership in exporting the oil from Caspian Sea. Similarly to Armenia and Georgia, Azerbaijan also has an Action Plan with the EU, which defines the aspects of the cooperation between the country the EU[7].

It is important to mention that Neighborhood Policy is dedicated to integrate the partner countries with the EU, but not exactly to membership of them in the union. The policy first of all is devoted to help the partner countries to develop and strengthen their democratic institutions, as well as it provides these countries with privileged relations with the EU and somehow, at least permanently, is an alternative of membership. The cooperation promoted and regulated by this policy should be based on taking obligations on common values such rule of law, minority rights, good relations with neighbors, market economy and sustainable development. Thus, practically the main aim and objective of the policy is to functionally integrate partner countries with the European Union[8].

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7 Ibid.

8 European Commission, "European Neighborhood Policy", available at: http://ec.europa.eu/world/enp/index_en.htm (Accessed on 29.12.2011).

Then president of the European Commission, Romano Prodi, stated concerning the Neighborhood Policy, that: in times of globalization, existence of transnational social society, foreign relations of the EU can not exist without taking into account direct neighbors of the union. That, instead of so-called "diving borders", there should be a path of deeper integration between the EU and its neighbors, which itself will accelerate the political, economical and cultural process of bringing these countries closer to the union[1].

European Neighborhood Policy undoubtedly brings huge perspectives to the countries of South Caucasus. By political dialogue between the countries of the region and the EU, the spectrum of political cooperation between them will naturally be broaden, the conditions of deeper cooperation in the fields of foreign policy and safety will improve, economic and trade relations will progress, cooperation in environment protections and economic sectors will expand (which itself will play an important role in diversification of energy resources for the EU). Furthermore, the interest of the EU is also due to the conflicts in the region, which keeps the region remaining an unstable area very close to the borders of the EU.

EUROPEAN NEIGHBORHOOD POLICY

At the beginning, one may suggest that, there was a little interest in South Caucasus from the EU, or less than in some other regions, but the interest slowly grew and from 2003 the EU has its special representative in the region[2]. When talking about the issues that might have contributed to increase of interests few them could be mentioned, such as o-called Rose Revolution in Georgia, which increased the possibilities in the country for democratic transformation and more cooperation with the west including the EU, as well as the a big role might have been played by the problem that arose between Russian Federation and Ukraine, that resulted in shortages of energy resources to several European countries and once more highlighted the need for diversification of energy resources and in this concern South Caucasus is an important alternative. The same energy resources related matters have also contributed to EU's more active involvement in conflict resolution processes in the region, of course together with the concerns of safety issues in general[3].

Therefore, start-up of the Neighborhood Policy was a very important step, which more clearly defined and more importantly planned the policy towards the partner neighboring countries. In the cases of Armenia, Azerbaijan and Georgia, they all received individual recommendations even before the policy started operating and later report of the commission was based on the individual reports concerning those recommendations. The commission in details studied economic and political situation in each of these three countries, providing afterwards the recommendations to hold reforms, which differed for each country, however some key elements were common, such as recommendation to reform business environment in a country, public sector modernization, resolution of local conflicts only with peaceful ways and through negotiations, improving the situation with human rights. The main differences concerned the advices on how to fight the corruption, due to the fact that the level of corruption varied in each country, situation in Georgia being better, while in Azerbaijan being the worst out of three countries. Additionally, Azerbaijan was advised to take more active steps on its way to join the World Trade Organization, as the rest, Armenia and Georgia had already joint the organization by that time, Armenia joining in 2003 and Georgia in 2000[4].

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1 Prodi, R. (2002) "A Wider Europe - A Proximity Policy as the Key to Stability", Sixth ECSA-World Conference, "Peace, Security and Stability International Dialogue and the Role of the EU".

2 *** "Europa – EU Delegations. Delegation of the EU to Georgia", available at: http://eeas.europa.eu/delegations/georgia/eu_georgia/political_relations/index_en.htm (Accessed on 28.12.2011).

3 European Parliament, "The South Caucasus (Armenia, Azerbaijan, Georgia)", available at: http://circa.europa.eu/irc/opoce/fact_sheets/info/data/relations/relations/article_7242_en.htm (Accessed on 28.12.2011).

4 *** "World Trade Organization. Members and Observers", available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Accessed on 29.12.2011).

Similarly, Armenia got a specific recommendation regarding the modernization of the nuclear power plant Metsamor[1], which was built back in Soviet period, in 1970, and carried some concerns regarding its safety.

The big enlargement of 2004, when ten new members join the EU, meant some new members with Soviet past, as well as it brought the EU geographically closer to few other former Soviet states. And in that same year, it was decided that the European Neighborhood Policy would cover the countries of South Caucasus. The situation in the area for that period was quite problematic, due to lack of democracy and weakness of the democratic institutions in particular, unsolved local conflicts (Abkhazia, Nagorno-Karabakh, South Ossetia), generally high level of corruption, unstable political situation and similar difficulties. Therefore decision to engage more actively in the region in order to improve the situation was a necessary and useful decision, which allowed the EU to have a better understanding of the developments in the countries and possibility to promote needed reforms to overcome the problems. Such commitment would have a direct effect on bring peace and stability on Europe's boarders and thus avoiding the problems caused by the instability in the region.

Three countries of South Caucasus became even closer to the EU geographically after two more new states, Bulgaria and Romania, joined the union. As a result, the problems such as drug traffic, human trafficking, illegal immigration, terrorism, etc. became more worrying to the EU and in order to prevent such issues the union turned to direct cooperation with these three countries. Moreover, geopolitical importance of the region was an additional motivation to the EU, as it opened its direct way to the Central Asia, including its energy resources, which gives the possibility to Europe to lower its dependence on Russian Federation by opening a new energy corridor, trans-Caspian trans-Black Sea. As when it come to energy, South Caucasus plays very important role in the issue, being a part of a the Black Sea region, which has been an important area when it comes to Europe's energy supply, "The Black Sea is a leading theatre in which the new dynamics of energy security are being played out, a theatre in which transit countries as much as producing countries are leading stakeholders"[2].

European Neighborhood Policy gives the possibility to the countries involved to take part in various programmes for deeper cooperation with the EU in the fields of politics, economics, safety, culture, etc. Such activities, which are based on democratic values, protection of human rights, principles of market economy and sustainable development, bring these countries closer to the union, while ultimate goal not necessarily being a membership[3].

Within the Neighborhood Policy, the EU has an individual Action Plans with each state involved in the policy. In those Action Plans, the priorities of the cooperation are defined, priorities that are important specifically for particular country, therefore the plans differ from each other. The Action Plans are composed by involvement of both sides, the EU from one side and the country from another and these plans include issues such as political dialogue, economic cooperation, reforms in social field, creation of market economy, country's access to the European market, cooperation in a field of justice[4]. One part of European Neighborhood Policy is Eastern Partnership, which is devoted to strengthen European dimension of the policy, it sets additional goals to the countries for European integration, covering fields of democracy, stability, economic ad political integration, energy safety, etc.[5].

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1 Poviliunas, A. (2006), "South Caucasus in the Context of European Neighbourhood Policy", *Lithuanian foreign policy review,* available at: http://www.lfpr.lt/uploads/File/2006/Poviliunas.pdf (Accessed on 26.12.2011).

2 Lesser, I. (2007) "Global Trends, Regional Consequences: Wider Strategic Influences on the Black Sea", *Xenophon Paper,* No 4. International Centre for Black Sea Studies publications, p 13.

3 *** "Civil Georgia. European Neighborhood Policy for the region". Available at: http://www.civil.ge/geo/article.php?id=15653 (Accessed on 23.12.2011).

4 Ibid.

5 *** "Europa – Eastern Eastern Partnership Summit to strengthen EU links with Eastern Europe and South Caucasus". Available at:

August war of 2008, between Georgia and Russian Federation, has also contributed to more active cooperation within Eastern Partnership programme, admitted the President of the European Commission Jose Manuel Barroso. The same time underlining that it does not intent to draw new division lines, saying that stability in 21st century will be brought by economy, dialogue and partnership[1].

For Armenia, Azerbaijan and Georgia, involvement in Eastern Partnership is an important step forward in their cooperation and relations with the EU, being essential contribution in courtiers' development. It provides countries with real possibilities to carry on needed reforms and start cooperating with the EU on higher level.

Majority of the scholars working on the issues of European Neighborhood Policy admit that it is in a away Europe's answer and a reaction to newly arisen challenges and problems coming from the region of South Caucasus. Promoting democracy via implementing such policy towards these countries and stabilizing the situation on the EU's borders could be the best prevention measure that the EU could take.

Implementation of European Neighborhood Policy in this region was a result of the existing safety problems in this area, thinks Lilli Di Puppo, suggesting that the EU decided to promote European democratic values in the region in order to challenge unstable situation there. She believes that when in 2006 the President of Azerbaijan, Ilham Aliyev, was warmly received in Brussels despite the ongoing struggle with the situation of human rights in this former Soviet republic, was due to the fact that the country is a strategic partner of the EU because of its geopolitical status, being a direct neighbor of Iran, which, with its nuclear policy, remains to be seen as a threat to the EU's safety[2].

Sabine Fisher, researcher at the Paris-based Institue for Security Studies thinks that the EU has several interests in South Caucasus and only one of them is the energy resource of Azerbaijan. It is also in Europe's interests to bring economic progress, democracy and stability into this region, as it has a direct effect on the EU itself[3].

The EU has fundamental interests in the region, first of all due to the importance of the safety and stability in the region to the safety and stability of the Europe in itself, supposes Elkhan Nuriyev. The matters for concern are extremism, separatism, terrorism, conflicts over territorial disputes, drug and human trafficking, as well as the rise of organized transnational crime[4]. Instability of South Caucasus, especially due to the local conflicts in Abkhazia, South Ossetia and Nagorno-Karabakh, might cause serious problems to the EU, by rise of illegal immigration, drug and arm traffic, increase of the organized crime[5].

DYNAMICS OF THE ACTION PLANS' IMPLEMENTATION

It is interesting to follow the implementation process of the Action Plans, the dynamics of that implementation. And as the Action Plans different in case of each country, implementation process should also be review in each country separately.

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http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/700&format=HTML&aged=0language=DE&guiLanguage = en (Accessed on 28.12.2011).

1 *** "Civil Georgia. EU Offers Close Partnership to its Six Neighbors". Available at: http://www.civil.ge/eng/article.php?id=20070 (Accessed on 26.12.2011).

2 Puppo, L. (2007), "The South Caucasus countries and the ENP: Three different paths to Europe?" Available at: http://www.un-az.org/undp/bulnews45/caucasus.php (Accessed on 27.12.2011).

3 *** "Energy not EU's only interest in South Caucasus", News.Az, available at: http://www.news.az/articles/politics/3268 (Accessed on 26.12.2011).

4 Nuriev, E. (2007), "The EU policy in South Caucasus: The Case of post-soviet Azerbaijan, New opportunities and future prospects". Available at: http://swp-berlin.org/fileadmin/contents/products/arbeitspapiere/SWP_RP_Nuriyev_ks.pdf (Accessed on 26.12.2011).

5 Tangiashvili, N., Kobaladze, M. (2006), "EU- Georgian Neigborhood Relations". Central European University, p 13.

The Progress Report 2009 by European Commission says that Georgian government has reached some important priorities within the Action Plan, particularly mentioning key reforms carried on in the fields of penitential system, fighting corruption, improving business environment in the country. But the report also reads that situation with fighting poverty, unemployment and social policy remains quite difficult and challenging.

Concerning democracy, Commission found important the following steps taken by the government: first of all modernization of election code, hold in a special working group where the members of the opposition parties were included, secondly working on a new constitution within the so-called "second wave of democracy" proclaimed by the President Mikheil Saakashvili, furthermore, important progress was achieved in fighting corruption and taking into account the recommendations from GRECO programme (Group of States against Corruption – Council of Europe).

In the filed of protecting human rights, the principal advancement was achieved by signing United Nation's Convention on the Rights of Persons with Disabilities in July 2009. However, extremely difficult situation remained with the rights of detained and prisoners, due to the fact that detention facilities continued to be overloaded. While regarding the minorities, the government adopted a new national strategy, however it did not fully corresponded with the Council of Europe's Convention for the Protection of National Minorities, as well as Georgia had not signed the European Charter for Regional or Minority Languages.

In other important fields, problematic matter for Georgia remained competition policy, where little has been done in order to improve the situation. Progress was achieved in border control, where the cooperation with other South Caucasus states has been advanced, the same has been done in regards to visa facilitation process, migration issues, fighting drug traffic and human trafficking. Improvements were made in transport system, including the safety of the goods coming from Caspian Basin through Georgia and to Europe[1].

Similarly to Georgia, the Progress Report has been released for Armenia as well concerning country's success in implementation of the Action Plan. Report underlined Armenia's achievements in the field of human rights, via political dialogue with the EU. Success has been made regarding overcoming internal crisis as well, which was due to problematic presidential elections in the country in 2008. Needed reforms were carried on also in the financial and competition policies.

However, problems remain in such sectors as economy, where the inflation stayed high and was lack of direct foreign investments, especially after the global financial crisis. Significant achievement in the field of regional cooperation was conducting the negotiations with Turkey to normalize the relations between two countries, including signing official protocol, but later the protocol was not ratified by Armenian side despite the position of the EU, which supported the signature of such document.

Armenia received principle recommendations for more implementation of the Action Plan, including proposal to compile a working group that would investigate the political crisis after the presidential election in 2008. Furthermore, recommendations concerned the need to improve the electoral environment in the country, freedom of press, judicial system, cooperation between the ruling political party and the opposition political groups, which is essential for country's democratic development.

Concerning country's fight against the corruption, even though its legal system provides quite good environment for improvements, not much has been done and the progress remained minor. Regarding the protection of human rights, even though the success has been achieved, the report suggests that more actions should be made, particularly in penitential system, as well as the reports that beating and torturing the journalists had place in various occasions.

[1] European Commission (2009), "Progress Report Georgia". Available at: http://ec.europa.eu/world/enp/pdf/progress2009/sec09_513_en.pdf (Accessed on 28.12.2011).

As for the situation with the conflict in Nagorno-Karabakh, in 2009 there were six meetings held within so-called Minsk group, but no significant progress has been made and the situation remains unstable, with time to time escalations and gun-fire on the frontline[1].

When it comes to the third country of the region, Azerbaijan, it has achieved an important progress in terms of reaching the goals set by the Action Plan, particularly in economic and social fields, as well as it managed to keep inflation rate low during the years following the global economic crisis of 2008. Considerable improvements have been reached in energy cooperation, where Azerbaijan has taken efforts for developing new energy corridor Nabucco – the EU initiated pipeline, which could link Europe not only with Azerbaijan, but could also allow European consumers to get direct access to gas and oil from other former Soviet republics, Kazakhstan and Turkmenistan, which itself would mean a huge step for Europe in diversification of its energy resources.

Meanwhile the problematic issues remain country's slow progress in joining the World Trade Organization, as Azerbaijan's steps in this direction have been rather dim. As for the protection of human rights in the country, the situation stayed very difficult, including the rights of detained, as well as the freedom of press, as various occasions of beating and torturing civilians and journalists were reported and the situation was called critical[2].

The situation described in these reports of the Commission, showed different picture in all three countries concerning the implementation of the Action Plans, some being more successful in certain fields than others. Better results in achieving progress in strengthening democracy in the country compare to other states from the region had Georgia, where country managed to carry one some necessary reforms, first of improving election environment in the country by reforming its election code. Armenia and Azerbaijan had quite good election legislation, however the progress in improving the environment has been rather disappointing, especially highlighted by the events after the presidential elections in Armenia in 2008, therefore the situation needs urgent measures to be taken.

When it comes to protection of human rights, countries' achievements have also been slightly different. Progress has been reported in each country, but still the situation needs to be significantly improved, in main problems differing from country to country, for example several kidnappings have been reported in Armenia that still need to be investigated, as well as the issues of torturing civilians and journalists in Azerbaijan and the situation in detention facilities in Georgia. Some differences were discovered in countries' achievements when fighting corruption.

Above-described differences could be the result of the diverse political situation in each country, especially concerning the position towards the EU in general. In this regards, Georgian government had a very clear pro-European policy, aiming for better and faster integration with the EU institutions. Armenia, while being involved in Neighborhood Policy and Eastern Partnership, still remains an ally of Russia and does not have very clear pro-Western and pro-European policy.

THEORETICAL EXPLANATION

The theory of neofunctionalism could well help to explain the matter and answer the question of this research. The theory well describes the issue of integration, when having common interests gives more possibility for integration. This theory pays more attention to regional matters rather than to global integration. Neofunctionalists argue that integration in one sector will promote integration in another via spillover effect, in their opinion, supranational institutions and organizations will play a

[1] European Commission (2009), "Progress Report Armenia". Available at: http://ec.europa.eu/world/enp/pdf/progress2009/sec09_511_en.pdf (Accessed on 28.12.2011).

[2] European Commission (2009), "Progress Report Azerbaijan". Available at: http://ec.europa.eu/world/enp/pdf/progress2009/sec09_512_en.pdf (Accessed on 28.12.2011).

main role in integration process[1], the EU is definitely one of such supranational organizations. Neofunctionalism suggests that as a result of integration, the role of national institutions will be lowered, as the power will be transferred to above-mentioned new supranational organizations. The theory argues that integration starts from "low politics" such as economics and will go to "upper politics" such as defense and foreign policies[2].

If we apply the theory of neofunctionalism to the cooperation between the EU and the states of South Caucasus, we may suggest that such closer cooperation and integration will benefit all parties involved and interest groups on both sides. As mentioned above, the EU does not want to draw a new division line, its programmes implemented in the region support such integration and deepening. As for involvement of different interest groups from these countries, important step could be the integration of local youth in different European programmes, where young people from Armenia, Azerbaijan and Georgia have a possibility to better understand European values, culture, ideas. The same time cooperation in some sectors of economy will have a spillover effect and should result in deeper cooperation and integration in economy in general, thus bringing the economies of these three states close to the EU economy and European standards.

CONCLUSION

The aim for this research was to analyze European Neighborhood Policy towards South Caucasus states, namely Armenia, Azerbaijan and Georgia, and try to find out what might be reasons for the EU to engage in such close cooperation with these countries and to have such a policy towards them. This work describes the history of the cooperation between the EU and three former Soviet republics, its development, geopolitical importance of the region in general and for the EU in particular, how did the chances of these countries increased for more integration with the EU after their involvement in the policy actions and what are the main obstacles on this way.

The research shows that preventing possible problems coming from the region, or caused by instability there, definitely is a motivation for the EU to have a special, more close relationship with the region, having special policy towards it and putting in the efforts to reform and modernize the countries there. These possible problems, such as drug traffic, illegal immigration, human trafficking, terrorism, might have a direct effect on the EU itself and therefore becomes a threat to its safety. That is why the EU is very much interested to be more active in the region, being able to monitor the situation very closely, having the possibilities to influence the countries more on their way to modernization and democratization, carrying on necessary reforms, in order to built more successful states, with strong democratic institutions, stable market economy, with the values that are common to Europe and in general, safe and stable, developing country. Stability in the region would mean stability and safety on EU borders in general.

The theory of neofunctionalism was used to prove such position, which pays attention to integration and its importance for cooperating parties, its effects on their future. As the theory suggests, integration in one sector has a spillover effect and causes integration in another, upper sector, thus cause more integration in general and bring parties closer. In case of the EU and the countries of South Caucasus, integration in some sectors gives good grounds for the integration in other sectors, thus making it possible to have the countries more similar to the EU and its way to development.

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[1] Dinana, D. (2000), *Encyclopedia of the European Union*, Macmillan Press, pp. 278-283.
[2] Ibid.

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European Standards for Freedom to Peaceful Assembly in Georgia

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Abstract: Freedom of assembly is a human right, seen as an important tool to achieve Georgia's integration to European Union. Being relatively successful under neighborhood policy framework, Georgia has to tackle the problems that threaten rule of law and the particular right. Current contribution analyses the legal problems (such as scope of the right, blanket restrictions, uncertain norms, unregulated issues) in current Georgia's legislation and offers solutions that are in accordance with European standards for freedom to peaceful assembly.
Keywords: Georgia and Europe, Freedom of assembly, Inconsistency with European standards.

Today, the relations of the European Union with its neighbours are more important than ever. One of the most important allies and neighbours of European Union is Georgia, turning the society and administration to common European understanding of democracy, rule of law and human rights. "Relations between Georgia and the EU are gradually developing into a close, strong and dynamic partnership based on clear common objectives", European Commissioner for Enlargement and Neighbourhood Policy Štefan Füle has recently told participants of the 8th international conference on 'Georgia's European way.'[2] The reforms of Georgia are especially appreciated in the light of long-term political pressure (conflicts with Russia) that was disturbing the integration process with the EU. There is no question that images have great importance in international law. However, the more open the society and the more clearly the principles of the rule of law are followed, the harder it is to lie about the country[3].

Despite of all the efforts, there seems much still to be done. In particular, there is a need "to consolidate democracy, ensure sustainable growth, reduce social and regional inequalities, create jobs and raise standards of living for the people"[4]. This can be achieved not only by strategic activities of the government but also the inclusion of the members of a society who can express their will convincingly and directly influence the governmental strategies that may lead to the policy closer to the European Union ideals. One of the tools is certainly full ensurement of the right to peaceful assembly as a human right. The problems related to this particular human right are expressed by the international call for respect of the right to freedom of assembly, undersigned by members and partners of the Human Rights House Network (HRHN), condemning the recent repression of peaceful demonstrations in Tbilisi and calling upon the Georgian authorities to fully ensure the right to freedom of peaceful assembly in practice and by law[5].

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[1] The publication is a compilation and modification of the Master thesis of Dali Gabelaia, "Influence of European Standards on Development of Legal Framework of the Freedom of Peaceful Assembly in Georgia", supervised by prof. Tanel Kerikmäe in 2011

[2] Füle, Štefan, "European way for Georgia and other Eastern neighbours", ENPI (The European Neighbourhood and Partnership Instrument) Info Centre 25.07. 2011

[3] Kerikmäe, T.; Nyman-Metcalf, K.; Põder, M-L. The August 2008 Russian-Georgian War: Issues of international law, Baltic Yearbook of International Law 10, Martinus Nijhoff, 2011, p.1. The European Court of Human Rights has declared admissible, by a majority, the application in the case of Georgia v. Russia (II) (application no. 38263/08).

[4] Füle, Štefan, *op cit.*

[5] See: http://humanrightshouse.org/Articles/16234.html

Current article concentrates on the analysis of the right to freedom of assembly in Georgia, recognizing that recent amendments the "Law on Assembly and Manifestations"[1] (to be precise some of its provisions) still creates obstacles in adopting European standards concerning protection of the right.[2] Provisions which can be potentially harmful for the free exercising of the right can be divided into several groups: scope of the right (according to definitions), blanket restrictions, vague norms. There are also gaps in law that leave some issues regarding the right unregulated.

The Constitution of Georgia guarantees freedom of assembly by stating that "everyone, except members of the armed forces and Ministry of Internal Affairs, has the right to public assembly without arms either indoors or outdoors without prior permission." The first article of the "Law on Assembly and Manifestations" (the Law) states that it governs relations arising from exercise of the Constitutional right to assemble publicly and without arms, both indoors and outdoors, without a prior permission. Thus the scope of coverage of the right is the same as in Constitution. Due to a narrow understanding of assemblies and manifestations the article is believed to leave unprotected gatherings with other goals than those stated above.[3] To eliminate debates regarding the scope of assemblies, the article needs to be extended to an "intentional, temporary gatherings of several persons for a specific purpose."[4]

The Law was often criticized for using the term 'citizen', thus guaranteeing the right to citizens only. While commenting on Article 3 the Constitutional Court of Georgia (the Court) gave the term a wide interpretation by stating, that it was used with the same concept as 'person."[5] The question of compliance with the Constitution was raised once again.[6] Article 5 paragraph 2 stated that non-citizens of Georgia did not have a right to act as responsible persons. According to Article 3, the term 'responsible person' means trustee and organizer of assembly or manifestation. The same article explained who was regarded as trustee – a person who has been trusted by an initiator of an assemblage or manifestation, and as organizer - a person appointed by an initiator of an assemblage or manifestation to organize and lead the movement.

The restriction imposed by the provision could have been regarded as proportional, only if it concerned assemblies and manifestations of political nature. The defenders of the debated Article and restriction provided by it stated that organization-related activity is always a political activity.[7] The Courts reasoning regarding the issue was as follows: stateless persons who live in Georgia are an integral part of a society. They have special interests in the processes happening in society and take part in them. That makes them subjects to Article 25 of Constitution. Article 27 of Constitution of Georgia limits political activities of non-citizens, but this article cannot be used to deprive citizens of their right to be organizers or initiators of an assembly which does not have a political content.[8] On

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[1] The "Law on Assembly and Manifestations" came into force in 1997. Since that it was amended for six times. In this article, however, we are going to discuss consequences of amendments made to the law in 2009 and 2011, since they caused the most significant changes in terms of protection of the right.

[2] Georgia has acceded the ECHR in 1999 and ICCPR in 1994

[3] See for example, Report of the office of public defender (ombudsman) of Georgia submitted to the Human Rights Council for the 10th session of Universal Periodic Review, p. 6. available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/GE/PD_PublicDefender'sOffice-eng.pdf and European commission for democracy through law (Venice commission), comments on the Law of Assembly and Manifestations of Georgia by Bogdan Aurescu available at http://www.venice.coe.int/docs/2009/CDL(2009)153-e.pdf

[4] M. Nowak, U. N. Covenant on Civil and Political Rights CCPR: Commentary,2005, p.373

[5] See the decision of the Constitutional Court of Georgia on case Georgian Young Lawyers' Association, Zaal Tkheshelashvili, Lela Gurashvili and others v. Parliament of Georgia, #2/2/180-183, 5 November of 2002, (1)

[6] The decision of the Constitutional Court of Georgia on case political union of citizens 'Movement for United Georgia', political union of citizens 'Conservative Party of Georgia', citizens of Georgia – Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, citizens Dachi Caguria and Jaba Jishkariani, Public Defender v. Parliament of Georgia, #482,483,487,502, 18 April of 2011, paragraphs 120 -128

[7] Ibid., paragraph 122

[8] Ibid., paragraphs 126-128

this basis, the Court annulled part of the article which did not allow non-citizens of Georgia to be responsible persons.[1]

To bring the Law in compliance with the Court ruling wording of the discussed article was changed (now it is article 5 paragraph 3) by resent amendments. Now it states that assembly or manifestation can not be organized or conducted by citizens of other states or persons who have not turned 18. These amendments did not change the situation completely, as some groups are still left without guarantees to exercise the right.

Another apparent inconsistency with the principle of non-discrimination is prohibiting persons who have not attained 18 years to organize an assembly. UN Convention on the Rights of the Child[2] recognizes the right to freedom of assembly. Since the organization of an assembly is a difficult process requiring responsibility, a state can specify a minimum age requirement[3] or establish that minor can exercise his/her right if consent of their parents or legal guardians exists.[4] Georgian legislator has to take this into account and grant children after certain age with the ability to organize assemblies.

One more problematic issue regarding the Article 3 was the definition of 'principal'. The latter was used to designate political party, association, company, institution, organization or a group of citizens initiating an assemblage or manifestation. This wording of the article excluded an ability of physical person to be a principal. In defense of Article 3 can be said that it does not contradict with Article 25 of Constitution, as the letter guarantees the right to assembly and not the right to organize it.[5] In its judgment the Court stated that: "restricting the right of individual person to be a principal is the same as limiting person's right to decide on participation in an assembly individually without agreeing it with others."[6] As a result the Court annulled the words "political party, association, company, institution, organization or a group of citizens" of the debated paragraph.

Article 9 of the Law caused a wide debate. The provision limited the right of the participants by prohibiting assemblies within 20 meter radius from the entrance and inside the following buildings: the building of Georgian Parliament, residence of the President of Georgia, buildings of the Constitutional Court and Supreme Court of Georgia, courts, prosecutor's office, police, penitentiary buildings, law enforcement bodies, military units and sites, railway stations, airports, ports, hospitals, diplomatic missions, buildings of governmental institutions, local government bodies, and companies, institutions and organizations of special regime or having armed guards. It also prohibited blockage of the entrances of these objects. Although the aim of the provision was to ensure the effective functioning of the institutions, it was assessed as "a significant and blanket restriction on assemblies on those parts of the public thoroughfare most likely to be sought to be used by those wishing to demonstrate."[7] As these institutions play important role in realization of state or public functions, legislator believed that allowing holding assemblies within 20 meter radius from those buildings could cause a threat to their normal functioning.

Opponents argued that in 20 meters radius from the majority of named buildings there was not enough space for assemblies or the same space fell under the scope of 20 meter radius of another

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1 Ibid.

2 Georgia acceded the Convention in 1994

3 See for instance, Finland's assembly act (1999) or Law on Public Assemblies of the Republic of Moldova (2008)

4 See Guidelines on Freedom of Peaceful Assembly (2010) p.45 available at http://legislationline.org/download/action/download/id/3256/file/FoA_Guidelines_II_Edition_2010_en.pdf

5 The decision of the Constitutional Court of Georgia on case political union of citizens 'Movement for United Georgia', political union of citizens 'Conservative Party of Georgia', citizens of Georgia – Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, citizens Dachi Caguria and Jaba Jishkariani, Public Defender v. Parliament of Georgia, #482,483,487,502, 18 April of 2011, paragraph 130

6 Ibid., paragraph 132

7 European Commission for Democracy through Law (Venice Commission), Comments on the Law of Assembly and Manifestations of Georgia by Finola Flanagan p.8 available at http://www.venice.coe.int/docs/2009/CDL(2009)152-e.pdf

building listed in the Article.[1] With such requirements the right to assembly became a formality. While imposing these limitations the legislator did not "take in due consideration the circumstance that, in order to have a meaningful impact, demonstrations often need to be conducted in certain specific areas in order to attract attention."[2]

Constitutionality of the Article was questioned. Although court agreed that assemblies could be harmful for proper functioning of institutions, it stated that the blanket prohibition was too strict measure which made no difference between the listed buildings and provided a uniform approach to all of them.[3] The Court declared words "within 20 meter radius from their entrance" to be contradictory to Article 25 of Constitution of Georgia. The Court admitted, however, that blanket restriction is justifiable for military or penitentiary institutions. As insuring security in such institutions without restriction of the right will be difficult.[4] In pursuit of legitimate aim – ensuring security and effective functioning of institutions – legislator introduced a new article with a very similar content as the annulled one. According to it, it is still forbidden to hold an assembly inside or within 20 meters from the entrance of the following buildings: prosecutors, police, penitentiary and law enforcement institutions as well as from railway stations, ports and airports. In the part of establishing restrictions in regard to railway stations, ports and air ports amended provision contradicts to the ruling of the Court. Instead of establishing restrictions formally on the basis of 20 meter radius, emphasis should be made on the blocking of entrances of the listed buildings. A new paragraph was added to the discussed article. It states: "Administrative body, near which an assembly is held, shall be entitled to designate a meeting place which will not be exceeding 20 meters limit from the entrance of the building" (article 9 paragraph 4). Conducting an assembly on the court territory is regulated in the same way. In both cases while deciding whether to allow an assembly on their territory or not, relevant authorities must use proportionality principle (the principle is recognized by the article 2 paragraph 3 of the law and is a product of recent amendments to the law).

In its comments on the draft law on amendments to the "Law on Assembly and Manifestations" Georgian Young Lawyers' Association (GYLA) stated that the draft law expands the list of buildings and makes the annulment of the blanket restriction done by the Court useless.[5] Lawyers of GYLA claimed that, despite the importance of the court system, prohibition was not necessary to ensure its safety: "It is vital for society members to have ability to express their opinion regarding issues discussed in courts by means of assembly. If, however, there is a threat that an assembly or manifestation held near the court can endanger its proper functioning, the court as an administrative body can establish a 20 meter radius . . . the same procedure should be established for prosecutor's office as its function also differs from that of other state bodies (e.g. military objects) for which the Court believed the restriction was justified."[6] Legislator partly shared this position and excluded courts from blanket restriction, but not the prosecutor's office. Other opponents were even more radical, claiming that establishing blanket restrictions on assemblies within 20 meter radius from law enforcement bodies "in some cases may result in impossibility of adequately protest, for instance,

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[1] See, for instance, Report of the Office of Public Defender (Ombudsman) of Georgia Submitted to the Human Rights Council for the 10th session of Universal Periodic Review, p.6, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/GE/PD_PublicDefender'sOffice-eng.pdf

[2] European Commission for Democracy through Law (Venice commission), Comments on the Law of Assembly and Manifestations of Georgia by Finola Flanagan p.8 available at http://www.venice.coe.int/docs/2009/CDL(2009)152-e.pdf

[3] The decision of the Constitutional Court of Georgia on case political union of citizens 'Movement for United Georgia', political union of citizens 'Conservative Party of Georgia', citizens of Georgia – Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, citizens Dachi Caguria and Jaba Jishkariani, Public Defender v. Parliament of Georgia, #482,483,487,502, 18 April of 2011, paras 56-61

[4] Ibid., para 59

[5] Comments on the draft law on amendments to the "Law on Assembly and Manifestations" provided by GYLA, p. 5, available at http://gyla.ge/legislature/

[6] Ibid.

because there is not enough space around the building." [1] Articles 11 and 11^1 also contain blanket prohibitions and together with the previously discussed article are the most debatable ones. Article 11 prohibits blocking of traffic intentionally, while 11^1 prohibits deliberate blocking of carriageway by using cars, different constructions or other subjects. (Article 11 states: "It shall be prohibited to block traffic intentionally, including violation of provisions stipulated in Article 11^1 of this Law." Article 11^1 states:" Artificial blockage of a carriageway shall be prohibited unless it is necessary due to the number of people participating in an assemblage or a manifestation. It shall also be prohibited to block a carriageway with the use of vehicles, various structures and /or other objects." This prohibition was government's response to mass protests that were held in Tbilisi. In April of 2009 thousands of opposition supporters went into the street demanding early presidential elections. When opposition unity faded and number of participants reduced significantly, the main avenue of the town was blocked by cages with protestors living inside. The protest continued for more than two months.)

Restrictions imposed by the articles were criticized. Two different lines of criticism could be distinguished.[2] More radical critics asserted that Constitution of Georgia provides and defends right of person (persons) to conduct an assembly or manifestation in any part of the street according their own will, regardless the fact whether the action hinders the movement of transport and other people or not. The right to block the street, either by participants or by using vehicles, temporary constructions or other subjects (as an acute form of expression), must be guaranteed by the law even when hindering of transport is done deliberately by the participants of assembly when it is regarded to be an effective mean to express their opinion, protest or solidarity.[3] In other words prohibition of blocking roads by participants when it is not a consequence of their number but a result of their deliberate actions contradicts with constitutional provisions. Instead such actions "should be regarded as an equally legitimate use of public space as the more routine purposes for which public space is used (such as pedestrian and vehicular traffic)."[4] Another group accepted the restrictions established by the above mentioned articles; however, they believed that Article 11 is vague and may be interpreted as blanket prohibition of any kind of temporary constructions needed for assembly or manifestation.[5] It was claimed that the norm prohibiting blocking of roads by means of temporary constructions applied even when the road was already lawfully blocked (due to the number of participants of the assembly).[6] In this case prohibition of temporary constructions when the road is already blocked sounds illogical.

Freedom of assembly often overlaps with interests of non-participants. To balance competing interests state needs to interfere and restrict the freedom. Restriction, however, must be reasonable providing opportunity to exercise conflicting interests. Thus one of the main objectives of Articles 11 and 11^1 was to provide clear and predictable criteria to overcome the collision between different rights. When claimed to be unconstitutional the question the Court had to answer was whether limitations imposed by the state were proportionate to the legitimate aim.

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[1] Statement made on behalf of the Republican Party by its member Tina Khidasheli regarding the draft law on amendments to the "Law on Assembly and Manifestations" of Georgia, available at http://republicans.ge/index.php?module=A-newsletter&func=display&sid=2818

[2] See the decision of the Constitutional Court of Georgia on case political union of citizens 'Movement for United Georgia', political union of citizens 'Conservative Party of Georgia', citizens of Georgia – Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, citizens Dachi Caguria and Jaba Jishkariani, Public Defender v. Parliament of Georgia, #482,483,487,502, 18 April of 2011, paragraphs 15-20

[3] Ibid., paragraph 17

[4] Guidelines on Freedom of Peaceful Assembly (2007) p.15 available at http://www.osce.org/odihr/24523

[5] See the decision of the Constitutional Court of Georgia on case political union of citizens 'Movement for United Georgia', political union of citizens 'Conservative Party of Georgia', citizens of Georgia – Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, citizens Dachi Caguria and Jaba Jishkariani, Public Defender v. Parliament of Georgia, #482,483,487,502, 18 April of 2011, paragraph 20

[6] Ibid.

Regarding this issue the Court stated that: "The right to freedom of assembly and manifestation includes the right to choose place, time, form and content of the assembly. The aim of the participants blocking the road can be drawing government's or society's attention. In this regard restricting freedom of movement of others can be used for achieving maximum effect. Deliberate blocking of roads turns the rights of non-participants into the instrument of achieving the objective. Providing guarantees for blocking streets at any time and place will cause an unjustified restriction of the right of others. It will be wrong to assert, that Article 25 of Constitution grants the participants of the assembly the right to restrict freedoms of others in order to achieve their aims."[1]

On the other hand, analyzing article 11^1 makes clear that the state can not interfere in order to restore traffic movement, if the road is blocked due to the number of participants. When the movement is impossible because of the number of participants the priority is given to the freedom guaranteed by Article 25. As the Court has stated: ". . . otherwise the freedom of assembly and manifestation will be unattainable to participants of numerous assemblies, as they will be forced to deny their right to assembly and manifestation because of the interests of others."[2]

Another problematic issue is limitation clause introduced by article 2 paragraph 3. It provides basis for interference, but does not contain list of legal aims which can justify state's actions. Instead it refers to the article 24 paragraph 4 of the Constitution of Georgia. The problem is that the latter enlists aims which do not mirror article 11 paragraph 2 of ECHR. Even this limiting clause provides a good basis for interference through wide interpretation.[3] Wording proposed by recent amendments, however, provides even a broader list of aims including "disclosure of information acknowledged as confidential and ensuring the independence and impartiality of justice."

Article 11^2 aims to protect interests of those who leave, work, or have business near the place were an assembly is held. The problem is that in order to protect rights of others the relevant authorities are granted with the power to restrict time and place of the assembly or to propose an alternative place for an assembly only on the basis that people listed in the article should not be prevented from performing their normal activity. This article provides authorities with grounds relying on which any assembly can be restricted, as it is unimaginable to hold an assembly without causing inconvenience. That is why it must be clarified that mere interference in normal life of "others" can not be used as a basis for restriction.

Among other vague norms of the amended law a new wording of paragraph 3 of article 11 must be named. This paragraph prohibits visual disfigurement, injury or any other abusive behavior against buildings, monuments or memorials with historic, archeological, architectural or scientific significance while holding assembly or manifestation. It is not clear what exactly is understood by visual disfigurement or injury or 'other abusive behavior'. This must be specified, because action forbidden by the debated article can cause termination of an assembly.

Article 8 is formulated in a way, which makes spontaneous assemblies unlawful. Though there are no provisions in the law explicitly stating that, the requirement of notification provided by article 5 together with the statement that every notification must be signed by the "organizer and trustee" means in practice that spontaneous assemblies are prohibited whilst they must be undoubtedly protected.[4] Paragraph 98 of the guidelines state that: "The issue of spontaneous assemblies merits special attention with regard to the requirement of prior notification. The law should explicitly provide for an exception from the requirement of prior notification where giving prior notification is impracticable. Furthermore, if there are reasonable grounds for non-compliance with the notification requirement, then no liability or sanctions should

[1] Ibid., paragraph 34.
[2] Ibid., para 38
[3] N. Jarman and M. Hamilton, "Protecting Peaceful Protest: The OSCE/ODIHR and Freedom of Peaceful Assembly", *Journal of Human Rights Practice*, 2009, p.13
[4] European Commission for Democracy through Law (Venice commission), Comments on the Law of Assembly and Manifestations of Georgia by Finola Flanagan p.8, available at http://www.venice.coe.int/docs/2009/CDL(2009)152-e.pdf

adhere."[1] Another question raised regarding this provision concerns the notification period, which is 5 days. The requirement of the provision was even appealed in the Court on the basis that imposition of the notification period restricts the ability to exercise the freedom in regard to actual issues that demand immediate reaction. [2] The court did not find any incompliance with constitutional provision, as in each case depending on the content, scale and urgency of the issue it may require different (sometimes even longer) period to ensure the conduct of assembly. This means that, if the notification period is less than 5 days, the state probably will not be able to provide guarantees to participants to fully exercise the right. So the Court believes that notification period required by law is an optimal period, especially if taking into consideration the practice of other states.[3]

The fact, that an assembly may cause a threat to normal functioning of organization is not a sufficient basis for restricting an assembly. It may be stated that article 10 paragraph 1 subparagraph 'a' contains an indirect reference to simultaneous and counter demonstrations. Since there are no other provisions in the law referring to the issue, it must be stated here, that law must protect counter demonstrations and potential threat of disorder arising from hostility expressed against participants of the peaceful assembly must not be used to justify the imposition of restrictions. The state should make available adequate policing and other resources to facilitate counter-demonstrations within sight and sound of one another. "The State's duty to protect peaceful assembly is of particular significance where the persons holding, or attempting to hold the assembly, are espousing a view that is unpopular, as this may increase the likelihood of violent opposition." [4] "A prohibition on conducting public events in the place and time of another public event would be a disproportionate response, unless there is a clear and objective indication that both events cannot be managed in an appropriate manner through the exercise of policing powers."[5]

The recent amendments were made in order to bring the exercise of the right in compliance with European standards. Indeed, changes (granting the right to organize assembly to stateless persons, moving some buildings out of the list provided by article 9 of the Law, introducing proportionality principle on legislative level, replacing blanket restriction by granting local self-government discretion) are steps taken in the right direction. Introducing proportionality principle - instead of complicated mechanism a mere reference to the relevant articles of international instruments is preferable. Also, there are also a number of issues which are still left beyond the Law regulation (stateless persons, children under 18 can not exercise their rights fully, spontaneous assemblies, counter demonstrations and simultaneous assemblies lack regulation).

The authors believe that taking account the analysis, Georgia would better demonstrate its willingness to meet European standards and, even more important, give its society a better chance to be included to the process of democratization. As stated by European Court of Human Rights, "States must not only safeguard freedom of peaceful assembly, but must also refrain from applying unreasonable indirect restrictions upon that right"[6] And that "the state is required to take measures to ensure that the right to protest does not effectively extinguish or paralyse the right of association". So far, there have been no cases against Georgia at European Court of Human Rights under art 10 of ECHR. The state authorities have to take care in ensuring that it would be seen as *status quo*.

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1 Guidelines on Freedom of Peaceful Assembly (2007), p. 50, available at http://www.osce.org/odihr/24523

2 The decision of the Constitutional Court of Georgia on case Georgian Young Lawyers' Association, Zaal Tkheshelashvili, Lela Gurashvili and others v. Parliament of Georgia, #2/2/180-183, 5 November of 2002, (6)

3 Ibid.

4 European Commission for Democracy through Law (Venice commission), Comments on the Law of Assembly and Manifestations of Georgia by Finola Flanagan, supra n.19, p.8, available at http://www.venice.coe.int/docs/2009/CDL (2009)152-e.pdf

5 European Commission for Democracy through Law (Venice commission), Comments on the Law of Assembly and Manifestations of Georgia by Bogdan Aurescu p.5, available at http://www.venice.coe.int/docs/2009/CDL(2009)153-e.pdf

6 Aldemir v Turkey, App. No. 32124/02, 18 December 2007, para. 41 and Platform "Artze fur das Leben" v Austria (1991) 13 EHRR 204, para. 32; Ouranio Toxo v Greece, App. No. 74989/01, Judgment of 20 October 2005, para. 37

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The Problems of Reform of Public Administration in Ukraine, in European Context

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Abstract: The article is devoted to the main problems of reformation of public administration in Ukraine, possible risks and methods of building the strong state.
Keywords: Strong state, Civil society, Social partnership, Social communications.

Analyzing the special features of governance and world order in the XXI century, Francis Fukuyama put forward a thesis that building of the strong state consists of the creation of new governmental institutions and the consolidation of already established[1]. It means that the question of the type of new governmental structures and what should be saved from already existing, is urgent.

Since in Ukraine there is a need in solving of many problems, which were not solved by other countries, the problem of reformation of state governance is very critical. Particularly, it is one of the factors of the approval of new law about state service, creation of the National Agency of state service issues, introduction of changes in the system of state workers' preparation.

The aim of the article is to analyse the main problems of reformation of the state governance in Ukraine, possible risks and ways of building the strong state.

One of the main problem that Ukrainian society experiences now, is an existence of «zones of indifference» and within its framework a person obeys to the state and does not call it in question. In this case, state power is a power of «position», which is based on the traditional attitude towards hierarchical public relations. Switch to the network social connections means a necessity of change from the power of «position » to the power of «leader». According to C. Barnard, this power could be established only with an acceptance by the object of governance. In this case, a person agrees to recognize in the act of communication the status of power only if four conditions will be fulfilled:

1) a person understands, what is demanded from him;

2) by making decisions, a person is confident that it not contradicts with the goals of the organization;

3) a decision does not contradict the interests of a person;

4) a person is physically and mentally able to do, what is needed[2].

The experience of activity of the governmental structures in Ukraine shows that the existing organization of power is not adapted to the conditions of public communication. There is not only lack in technical funds, information – communication networks, but also lack in the desire of state workers to organize an active dialogue with civil society, listen to public opinion and develop the democratic procedures of achievement of public consensus.

In many cases these problem are connected with the problem of professionalism of managers, who are able to carry out necessary duties. According to Toffler, in the conditions of the informational society, the power of high quality should be effective and achieves goals with minimal sources of power by uniting knowledge, wealth and compulsion. Knowledge, having such indications as flexibility, infinity

[1] Фукуяма Ф. Сильное государство: Управление и мировой порядок в XXI веке: (пер. с англ.) / Фрэнсис Фукуяма. - М.:АСТ:АСТ МОСКВА:ХРАНИТЕЛЬ,2006.-220, [4] с.-(Philosophy).

[2] Барнард Честер. Функции руководителя: власть, стимулы и ценности в организации [Текст]/Ч.Барнард: пер. с англ. В.Кошкина.-М.:Челябинск: Социум, ИРИСЭН, 2009.-332 с.

and wide range of application, is the most democratic source of the power, because does not addict directly from the income or belonging to specific social group[1].

Toffler points an attention to the fact that new informational economics does not accept punctilious bureaucrats; it accepts individualists, radicals, to some extend «commandos» of the business world. In the conditions of «mosaic» democracy, the ability of power to work during mass actions, react on mass movements, mass media is unnecessary, because «mosaic» democracy is an indication of demassified society, where the horizontal self-regulations strengths and the control from the top weakens[2].

According to Rainey, state managers, especially on the top positions, should expertly build their relations with external instances and political powers, effectively act even in the conditions of the interference and restriction from these powers[3].

It is very negative, when in one hand, an extreme becomes the social demagogy and populism and, on the other hand, «deafness» of the institutes of power to the wants, interests and opinions of citizens.

R. Putnam proves that the strong state exists only because of strong society and that is then fair, when Rainey by analysing governance in the governmental institutions of US emphasizes the sense of public opinion about the quality and professionalism of state workers. Particularly, it depends on how public perceives clients of the institution, respect the professional skills of workers of the institution and manager, what is the level of support of mission and goals of organization. Exactly these factors together with improvement of state management, established by the US, conditioned in the reconsideration of content of the activity of state institutions against other organizations[4].

Examples of successful state management actualise the issue of the delegation to the social partners specific managerial authorities on the basis of intellectual potential of self-organization of citizens. T. Carlyle mentions that it is impossible to believe in the collective wisdom of ignorant individuals, therefore, the public should have that intellectual potential, which will provide with self-organization and an opportunity to find a way and methods to achieve a desirable result.

In a society, regardless of power, there is public discourse about the problems both in terms of expectations of negative changes, which are the consequences of suspension of production, crises, political conflicts, depressed mood and stress, and in terms of determining the content of a new life and new power. It is believed that these conditions should favor a pluralist model of interaction between state and civil society institutions, which do not have a monopoly on the privileges and representation of certain groups and the competition is focused around ways to solve pressing problems. This will enable the public sector to learn to work with the state in consultation mode, acquiring the necessary competence and preserving their autonomy.

Such public policy delegation of powers of certain partners on the basis of the intellectual potential of self-organization of citizens leads to the formation of a special system of interdependencies. For example, a common practice in the U.S. transfers the state functions to non-governmental organizations, which is controlled by the government managers, who must have the appropriate skills in collaboration with the public.

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[1] Тоффлер Э. Метаморфозы власти: Знание, богатство и сила на пороге XXI века / Элвин Тоффлер; [Пер. с англ. В.В.Белокосков и др.]. - М.: АСТ, 2001- 669, [1] с.; 21 см.- (Phylosophy).- Библиогр.: с.579-611.

[2] Тоффлер Э. Метаморфозы власти: Знание, богатство и сила на пороге XXI века / Элви Тоффлер; [Пер. с англ. В.В.Белокосков и др.]. - М.: АСТ, 2001- 669, [1] с.; 21 см.- (Phylosophy).- Библиогр.: с.579-611.

[3] Рэйни Хэл Дж. Анализ и управление в государственных организациях / Хэл Дж. Рэйни: Пер. с англ.-[Штернгарца М.З.].- 2-е изд.- М.:ИНФРА-М,2002.-XIV,402 с.

[4] Рэйни Хэл Дж. Анализ и управление в государственных организациях / Хэл Дж. Рэйни: Пер. с англ.-[Штернгарца М.З.].- 2-е изд.- М.:ИНФРА-М,2002.-XIV,402 с.

H. Rainey points out that in this case many of the challenges faced by public managers' tasks are reduced to evaluating the effectiveness of certain actions or alternatives that may be implemented, as well as the spectrum of political forces that shape and provide a variety of features[1].

In this case, the requirements of the state to the non-governmental organizations should be as high as in government offices - qualifications of personnel who involved in the activities, transparency and accountability, and strict observance of laws and human rights.

In connection with this thesis, support the conclusions of the project on the reform of public administration, which indicated that for an active dialogue and partnership between government and civil society organizations, must be met a few basic conditions:

1) policy of the participants of public and state cooperation to promote and support cooperation, regardless of the motivation characteristics of each of the parties;

2) determination of the degree of maturity and capacity development of civil society institutions that are necessary for the interest of public authorities in cooperation with them and for clear and accurate expression of their interests, their promotion and protection;

3) existence of the institutional (legal and organizational) framework for cooperation between the public sector, meaning the established forms of cooperation which have developed in practice, or directly established by the legislation or the agreement reached on the basis of the law;

4) economic independence and stability of civil society organizations, their ability to generate human capital and to mobilize additional resources to address public interest issues[2].

The result of this interaction can be regarded as alternative ways of improving the production and delivery of administrative services, which differ from traditional methods of management and power-bureaucratic activities. This model focuses on strengthening the managerial role of nongovernmental organizations and institutions that require a closer institutional relationship of public and private agencies and to ensure their operational efficiency.

Nowadays, could be seen an increasing role of grass-roots levels of government, which suggests the need for their adequate professionalism and responsibility, the ability to effectively coordinate and improve transparency of the processes of providing administrative services to citizens and the elimination of administrative barriers hampering.

Toffler believes that all social systems and subsystems cannot simultaneously be in complete equilibrium, and therefore cannot be equivalent to the distribution of power between all groups[3]. The art of management is to prevent changes in the balance of power system failure, or do not change toward the struggle for power, which never leads to positive results. Consequently, an important means of improving the system of state power is decentralized and delegated government functions to lower levels of power, which requires them the willingness and ability to deal effectively with the performance of such functions, better coordination and management.

As world practice shows, in order to achieve the efficiency of such a reform is necessary to develop and introduce a special system of indicators to measure the real effectiveness of government and assess its results. Much of the effectiveness of management depends on the status and capabilities of local authorities.

For example, in Ukraine there are over a thousand legal acts, regulating certain matters of organization and functioning of local government, including more than 600 laws. But their position is not fully complying with the European Charter of Local Self-Government, ratified by Ukraine.

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[1] Рэйни Хэл Дж. Анализ и управление в государственных организациях / Хэл Дж. Рэйни: Пер. с англ.-[Штернгарца М.З.].- 2-е изд.- М.:ИНФРА-М,2002.-XIV, p.122.

[2] Реформа государственного управления: институциализация консультаций между институтами власти и неправительственными организациями в странах СНГ.- Unated Nations Development Programme, Bratislava. 2002.- pp. 16-17.

[3] Тоффлер Э. Метаморфозы власти: Знание, богатство и сила на пороге XXI века / Элвин Тоффлер; [Пер. с англ. В.В.Белокосков и др.]. - М.: АСТ, 2001- 669, [1] с.; 21 см.- (Phylosophy).- Библиогр.: p. 576.

The concept of local self-government was established on the basis of different ideologies and results in a contradiction in the logic of its use and the need to create a unified concept of national legislative activities of local government based on the empowerment of local authorities, to strengthen its responsibility for the socio-economic and cultural development of the communities.

Determination of the principles of interaction between the various levels of government appropriate to compare with the basic models of relationships between central government and local governments, which exist in Western Europe (relative autonomy model, model agency, model of the interaction).

In these models could be seen the various options for cooperation, according to which, bodies of regional and local authorities extend their activities in addressing socio-economic problems. Often the only partnership enables to find joint solutions between the center and local communities, especially when the power is vested in the various political parties. Therefore, by the central government in order to minimize deficit of the control over the regions uses structural reorganization - consolidation of administrative units in order to maintain power and control, the concentration of funds and resources; modernization of internal structures and decision-making by local authorities; reducing the cost for local government, because governments are increasingly aware that traditional methods of solving social problems in the regulatory and standardized manner, which is based on a rigid part of the planning, orders and restrictions, fewer works in practice.

Consequently, there is a need for a qualitatively new partnership of administration, capable of interacting with society, for which is the main means of management are communication and social dialogue. It identifies the need for regional and local levels to adapt to local conditions necessary social services, to carry out coordination functions in relation to citizens, to speak in support of innovation, to integrate the political values.

Governments should pay attention to the formation of its image among citizens, which is dependent on what is the role of governments in the development of society; what population think about a given public authority, based on the measurement of public opinion and media analysis; which would the citizens to see citizens the corresponding public authority; how effective the main communication channels, technology and means of influencing the minds and psyche of people, used in the society. In the process of developing and implementing information technology of effectively manifestation of the formation of the image of power (positive image), it is important to reach the identity of power and communication codes. This is typical feature of the institutionalization of power in the information society, where it already serves as the "generalized symbolic means of communication."

If this social communication between governments and citizens do not lead to increased initiative of the latter and their participation in the "communicative reason" (Habermas), there is a problem of social exclusion. To some extent, the reason for this situation lies in the fact that the government itself often creates a situation of uncertainty, in which the individual may not always understand, and where "private gets a shade of universality" (Baudrillard). Therefore, the power may resort to such methods as different access to information about all possible alternatives in a situation of uncertainty; manipulation of communication for the sake of choosing one or the other alternatives; the impact on the forms, means and formats of communication. Toffler writes about the innumerable variety of delusion (and self-delusion), which lies in the huge mass of data, information and knowledge that every day turns the "intellectual governmental mill", using various tactics: oversight, uncertainty, waiting, crumbs, tidal waves, fog affection , the recoil of the big lie, inverted[1]. Thus, it is impossible not to recognize that communication pervades the structure of society and government as a whole, all its levels, speaking a means of social communication and exchange of information, means of communication between subjects and objects of social interaction and the formation of public communication-information

[1] Тоффлер Э. Метаморфозы власти: Знание, богатство и сила на пороге XXI века / Элвин Тоффлер; [Пер. с англ. В.В.Белокосков и др.]. - М.: АСТ, 2001- 669, [1] с.; 21 см.- (Phylosophy).- Библиогр.: pp. 329-330.

relationship and as a means to implement its authority main functions – social dialogue with the people. As a result, the effectiveness of social communications is a major factor in the stability of the power and stability of the socio-political relations.

To the main problems which should be resolved in terms of the effectiveness of social communication are primarily included the following:

1) the problem of inadequacy of public opinion, when the citizens choose a position among the formulated opinions and where, by simple statistical aggregation of opinions made in this way, produce an artifact, which is the public opinion;

2) the problem of monopoly of the opinions of professionals, reviewed by Bourdieu, when we are confronted with the fact that the dominant institutionalized individuals impose political interests under the guise of exposing the interests of their clients' own interests trustees. In this case, as stressed by Bourdieu, professionals serve the interests of their supporters in one (and only one) extent as they serve them, also serve themselves[1];

3) problem of social communication on the social time and space when there is a need to synchronize the activity of collective action, coordination, consistency, timeliness, measurability, and differentiation. It is important to realize that the spread of the meaning of communication in the social space in terms of social time has a different rate and subject to the very meaning of aging. Therefore, public administration is important to consider new, more relevant meanings that overpower the attention of society, and to predict how long these meanings will remain valuable to society.

Conclusions. Thus, the main ways to create a strong government and good governance are considered:

- identification of needs and interests of citizens against the state and their understanding of their own involvement in the expression and defense of national interests;
- study of social conditions and determination of correspondence between of the proposed social goals and preferences of citizens, to define the goals of social policy;
- development of technology, forms and methods of effective social communications in accordance with the peculiarities of social time and space;
- allocation of responsibility for social policy and social programs among the various groups under the overall coordination by the authorities;
- formation of public opinion as part of a communicative process that reflects the essence of the meaning of communication.

In general, the problems of government demonstrate the need for significant changes in the organization and structure of state-government relations. It is recognized that the recent worldwide economic crisis has hit not only the economy but also showed that the citizens need the mental shift of power, forecasting economic and social future. Therefore, there is a need in a strong state and a rational government, which may be the subject of a strong society.

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The European Neighbourhood Policy throughout its "Europeanization": the Case of Ukraine

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Abstract: The European Neighborhood Policy (ENP) offers partner countries a set of tools, techniques and methods to guide them in their transition and to help them to approach the EU. Taking Ukraine as a case example, the authors analyze how these ENP's tools can be used to integrate Ukraine further into the EU.
Keywords: ENP, Ukraine, Europeanization, Partner country, Conditionality, Socialization, Incentives, Integration, Transition, EU.

Both enlargement and neighborhood policy entail the use of 'carrots' and 'sticks' to encourage reforms and improvements in partner countries. EU influence is strongest when a partner country believes it has realistic chances to become a member of the EU but must make further progress before joining. The incentive for reform is weakest if the membership perspective is too far away to be credible. For the EU the challenge of the ENP and enlargement policy is to keep a balance between the promise that this neighborhood country can become a member of the EU and the rigour to push a partner country for further reforms and changes. A further challenge is to persuade neighborhood countries of the benefits of reforms if there is no immediate membership perspective to the EU. And nowadays the EU is facing an additional, internal challenge: enlargement fatigue and the integration capacity of the EU that needs to be reformed before admitting more countries. The ENP explicitly denies partner countries a concrete membership perspective. At the same time it forms an intermediate strategy for them and provides opportunities to develop strong ties with the EU - without making any preliminary rulings about which countries might join in the future. The EU in that case encourages neighboring countries to reforms by offering them other incentives such as a visa liberalization regime or a free trade agreement with the EU. Nevertheless, even when providing partner countries with such incentives, Member States are still reluctant to ease visa restrictions on travel and the Common agriculture policy impedes partner countries' access to the EU agricultural markets. All this means that a conceptual, political and legal gap exists between the EU's enlargement and ENP strategies, requiring substantive change to address neighbor expectations[1].

[1] http://circa.europa.eu/irc/opoce/fact_sheets/info/data/relations/framework/article_7237_en.htm

But despite all these challenges the ENP brings the neighboring countries closer to the EU and fosters stability and security in the EU's vicinity. The process of integration through the ENP creates a degree of interdependence between the EU and the neighboring countries which is difficult to reverse as it has an impact on all reforms undertaken by neighboring countries. Generally it can be seen that cooperation between institutions, administrations of the EU and its neighborhood countries have been fostered since the ENP was launched; economic cooperation and trade liberalization allowed neighborhood countries to be more open to foreign direct investments and international trade; sectoral cooperation in the areas of energy, transport and environment strengthened countries in their convergence with the European norms.

Since the European neighborhood policy was launched a framework for a strong democracy agenda has been developed. The ENP possesses a number of instruments aimed at implementing reforms in partner countries. The European neighborhood policy has the ambition to transform the EU's neighbors and offers them a wide range of tools and initiatives to try to bring them closer to the EU. Thus the EU is trying to avoid the risks of creating new dividing lines by drawing the new neighbors closer to European standards through the ENP[1]. In the Mediterranean and Eastern regions the ENP focuses on a free trade area followed by tighter links in different areas of sectoral development with the European Union[2]. Over time the ENP could offer the most advanced neighbors all aspects of membership except an institutional involvement in decision-making[3].

The EU is transforming its neighborhood using such powerful instruments as conditionality, socialization and adoption of democratic standards and norms in the rapprochement of these countries to the EU. The transformation or Europeanization of these countries cannot succeed if the external pressure from the EU does not coincide with a strong internal willingness of these countries for reforms and democratization. Conditionality exerts a pressure on partner countries to proceed with domestic structural changes and implies a long-term emulation of European norms and values which is primarily useful for adjustments within the EU[4]. Conditionality would require learning from the EU and providing the EU with results such as a continuous institutional and political change or better economic governance. The ENP as a mix of policies uses concepts of enlargement policy for its attempt to promote democracy and changes in its neighborhood through a strong conditionality coupled with significant political and economic incentives[5]. Such incentives can take different forms, e.g. an increase in available funding, an enhanced mobility of goods, visa liberalization and cultural and educational exchanges.

Apart from this conditionality which plays a predominant role in the transformation of neighboring countries, also socialization can be an important factor in bringing these neighborhood countries closer via an intensification of institutional contacts between different actors of partner countries. The partner countries, members of the ENP, can intensify contacts through various initiatives that exist under this policy.

With regard to such an important Eastern European player as Ukraine, the **EU plays a transformative power.** The relations between both sides influence the country and promote its way to Europeanization through conditionality, socialization and democratization processes. The conditionality that the EU offers is not strong enough since the ENP at the moment excludes a membership

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1 European Commission, *Communication from the European Commission: European Neighborhood Policy Strategy Paper,* COM(2004) 373 final, Brussels.

2 European Commission, *Joint communication to the European Parliament, the Council, the European Economic and Social committee and the Committee of the regions*: *A new response to a changing Neighborhood,* COM(2011) 303, Brussels.

3 http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/619&format=HTML&aged=1&language=FR&guiLanguage=en

4 Börzel, T.A. and Risse, T. (2000) *When Europe hits home: Europeanization and domestic change,* European Integration Online Papers, 4(15). Available at http://eiop.or.at/eiop/texte/2000-015a.htm

5 Grabbe, Heather (2006) *The EU's Transformative Power. Europeanization Through Conditionality in Central and Eastern Europe* (Houndmills: Palgrave).

perspective for this country but instead "acknowledges the European aspirations of Ukraine and welcomes its European choice.[1]" For the time being, the "accession carrot", seen as a powerful EU tool to induce democratization and enhance reforms, is not present in the political agenda of Ukraine. Nowadays the most powerful incentives for the Ukrainian side are the ratification of the Association agreement, a visa liberalization regime with the EU and an increase of financial support. Depending on Ukraine's progress in implementing EU's demands, the ENP can offer economic rewards and increase technical and financial assistance through the ENPI. Socialization also plays a significant role in the Europeanization of Ukrainian society. The strongest link between Ukraine and the EU is maintained through different kinds of socialization channels such as regular summits, cooperation councils, ministerial committees, meetings and negotiations. Educational programmes as for example *Erasmus Mundus* and the *Jean Monnet* programmes were opened to Ukraine to intensify contacts of European researchers and students with their Ukrainian counterparts and colleagues. Such an intensification of contacts serves as a powerful instrument that can influence the decision-making process, encourage the demand for the Europeanization and have an impact on the reform progress in Ukraine.

Since Ukraine wishes to see an impact of the ENP on its external dimension and not only to interpret the ENP as a temporary mechanism on its way to an EU membership, the EU also wants to see practical results and a commitment of the Ukrainian government towards an implementation of EU requirements and a pursuit of its reforms. The EU imposes very clear demands on Ukraine's compliance with democratic standards. These include respect of human rights, rule of law and independence of the judiciary and a gradual approximation of Ukrainian legislation to the norms and standards of the EU. In order to comply with such demands, Ukraine needs to build an assertive political elite which can guide the pre-accession process and render the country "Europeanized". This elite should be informed about EU standards and should show a strong political will to undertake all necessary reforms and to create a domestic pressure for an adoption of EU requirements. Such institutional change can push for a substantial change in the political leadership in Ukraine which in turn can intensify the process of Ukrainian integration into the EU.

But at the same time the EU should be clear in its perspectives for Ukraine. Presently the substance of ENP can be questioned as the most important incentive - EU membership perspective - is missing in the country's democratic transformation. A membership perspective could strongly stimulate Ukraine to undertake all necessary reforms on its way to the EU. It is for this reason that the EU should make it clear that the integration of Ukraine into the EU and a membership perspective are possible and realistic but that the outcome of this perspective and the progress on the way to the EU membership depend on the reform development linked to such a move. The EU can of course continue to press for reforms in Ukraine but no matter what the EU can offer, the momentum for reform can only come from within Ukraine. An integration into the EU should be clearly conditional and all incentives would have to be linked to reform objectives. In this respect, "rewards" should be well defined from the beginning in order to be considered sufficient to encourage the political will for internal reforms in Ukraine and to motivate Ukraine to continue its path towards the EU.

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The Economic Diplomacy of Romania and Bulgaria: Importance in the Regional Context

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Abstract: The Economic Diplomacy of a state can contribute to the economic development of that state. We propose a theoretical analysis of the Economic Diplomacy of the newest European Union members. Our paper starts with the presentation of Romanian Economic Diplomacy, its form, and principal objectives. The principal activities and goal of this diplomacy is structured in a theoretical model that we propose. The second part of the paper is the presentation of Bulgarian Economic Diplomacy and contains a description of Bulgarian Economic Diplomacy formation.
Keywords: Economic diplomacy, Energy, Cooperation and information, Romanian and Bulgarian Economic Diplomacy.

1. ECONOMIC DIPLOMACY OF ROMANIA

Romanian Economic Diplomacy is one of the reference areas of the Ministry of Foreign Affairs and it has the following functions: the promotion of Romanian economic interests abroad; to support the objectives of energy security; cooperation with international economic organizations; and the provision of economic expertise for the activities of the Ministry of Foreign Affairs.[1]

The objective of Romanian Economic Diplomacy is to promote economic interests outside of the country, to contribute to the development of external commerce, and to attract investments. Economic diplomacy is organized for this purpose in several ways to support projects of strategic

[1] *Diplomaţia economică,* http://www.mae.ro/node/1418/1 , (accessed on 11.11.2011).

importance for Romania, to develop foreign trade, to promote Romania internationally, and to cooperate with specialized Romanian institutions to allow the expansion of Romanian companies into new markets.

Supporting the objectives of energy security is achieved through the following activities: upholding national energy objectives; promoting the concept of energy diplomacy; supporting EU objectives and projects for energy security; and being actively involved in delivering important energy projects such as the Nabucco and the Pan European Oil Pipeline, PEOP [1].

The objective of the Romanian economic diplomacy is achieved via inter-institutional cooperation on economic issues through the transfer of economic information between the component of economic diplomacy in the Ministry of Foreign Affairs and the business environment, collaboration with institutions which have economic functions, and through the updating of Romanian macroeconomic information.

In the Figure 1, we highlight how economic diplomacy is formed in Romania and its main objectives.

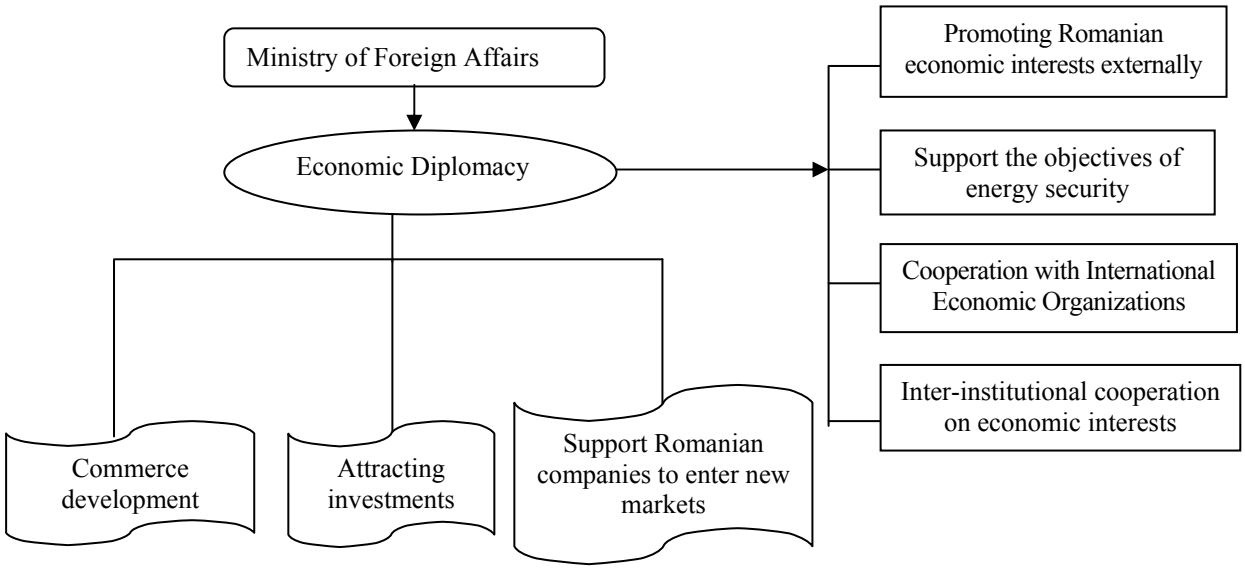

Figure 1: *Romanian Economic Diplomacy – formation and main tasks*
Source: Own representations

Romanian Economic Diplomacy is a field organized in the Ministry of Foreign Affairs and its aims are to develop foreign trade, to attract investment, and to support Romanian companies in the process of internationalization.

Romanian economic diplomacy activities are based on:

- the representation of economic interests abroad;
- supporting the objectives of energy security;
- developing cooperation with international economic organizations;
- inter-institutional cooperation based on economic interests.

The difference between Romanian economic diplomacy and the economic diplomacy of other EU countries is that Romania's priorities and objectives promote the concept of energy diplomacy and energy security.

[1] *Sprijinirea şi promovarea obiectivelor de securitate energetica,* http://www.mae.ro/node/1416 , (accessed on 8.10.2011).

2. BULGARIAN ECONOMIC DIPLOMACY

Compared to the organization of Romanian Economic Diplomacy, Bulgarian Economic Diplomacy is coordinated differently as there are two ministries that coordinate its activities: the Ministry of Foreign Affairs and the Ministry of Economy, Energy, and Tourism.

The Bulgarian Ministry of Economy, Energy, and Tourism assists the National Strategy for Research and Development to contribute to the development of Bulgarian Economic Diplomacy by promoting innovation which is presented in the National Strategy and which aims to improve business conditions and encourage innovations[1].

The lack of funding for innovative projects is a major problem that faces Bulgarian companies since they face many hindrances in initiating and successfully implementing innovative activities. To support Bulgarian economic diplomacy in eliminating this problem, the Ministry of Economy, Energy, and Tourism has proposed several solutions presented in five intervention schemes:

- the voucher;
- home technology system;
- system of tax incentives;
- the system of loan guarantees;
- risk capital scheme.

Conditions for implementing these solutions include:

- analysis point of view of companies;
- knowledge of the target group, the desired impact analysis;
- administrative requirements [2].

Bulgarian economic diplomacy objectives are supported by strategic objectives of the Ministry of Foreign Affairs. These objectives are:

- attracting foreign investment and capital;
- facilitating access of Bulgarian companies to foreign markets within the EU;
- to boost economic relations with the USA, Russia, and with Middle Eastern and Far Eastern countries;
- effective participation of Bulgaria in international infrastructure projects;
- development of foreign trade; participation in international trade; and economic cooperation by facilitating access to resources, energy, and new markets [3].

In the Figure 2, we highlight how Bulgarian economic diplomacy is formed.

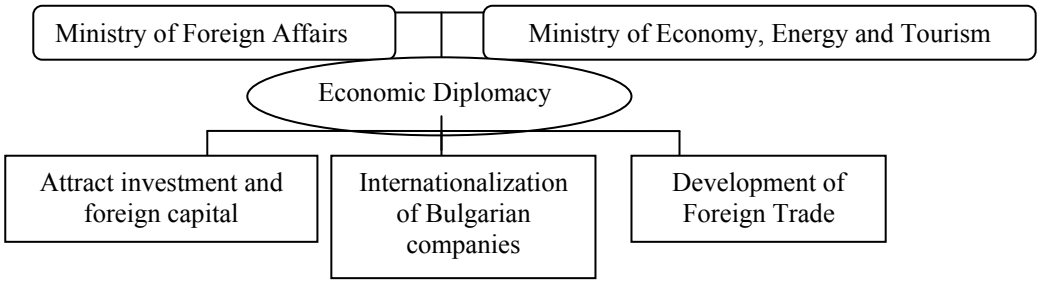

Figure 2: *Economic Diplomacy of Bulgaria: formation and important objectives*
Source: Own representations

[1] *Business Environment and innovations,* http://www.mi.government.bg/eng/ind/econe.html, (accessed on 17.09.2011).
[2] Djarova J. G., Jacob Dencik, Marco Schwegler, *Creating financial incentives for innovation in Bulgaria,* Publisher Ministry of Economy, Energy and Tourism, Sofia, 2007, p.5.
[3] *Mission and strategic goals,* http://www.mfa.bg/en/pages/view/10, (accessed on 17.11.2011).

Bulgarian economic diplomacy is supported bythe Ministry of Foreign Affairs and the Ministry of Economy, Energy, and Tourism. Its objectives are: to support companies in innovative activities and the internationalization process, to attract foreign capital, and to develop foreign trade.

We note that the directions of the respective economic diplomacies of these two European countries from the Black Sea are similar to other EU countries in that they are based on increasing trade and investment, and developing the internationalization process of companies. They differ, as does Greece, by supporting energy policies.

In **conclusion,** we believe that the Economic Diplomacy of the two states from the coast of the Black Sea, Romania and Bulgaria, is structured in the same way as the structure of economic diplomacy of the other states of the European Union. The Economic Diplomacy is coordinated by the Ministry of Foreign Affairs and is developed with different programs of international economic cooperation between the states of the interconnected world. The importance of Romanian and Bulgarian Economic Diplomacy is highlighted by the location of these two states on the coast of the Black Sea, and on the border between Orient and Occident. From an economic perspective this can be an important factor to create better contacts between European states and Asian states.

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The Arab Spring and the EU

Le Printemps Arabe, la Tunisie et l'Union Europeenne

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Abstract: Our concern is to make ignored periods unearth from our shared histories. The Tunisian Revolution celebrated the end of Orientalism. Our purpose is not to mention the big oriental and artistic tradition of the nineteenth century, the noblest one, which took part on its own way to the constitution of a collective heritage, but it is to mention this tarnished orientalism.
Another theory being threatened is the one by Francis Fukuyama, which underlines that with the success of liberal values carried by the Western countries, leads to the end of History. It also threatened the theory of the clash of civilizations dearest to S. Huntington, for during this revolution, we didn't chant hostile slogans to Western countries.
Keywords: UE, Revolution, Orientalism, Tunisian, Constitution, Civilizations, Arab countries.

QUAND LES TUNISIEN (NE) S REECRIVENT LEUR HISTOIRE [1]

La révolution tunisienne a montré l'incapacité de l'ancien président à conquérir les cœurs des tunisien(ne)s. Les Tunisien(ne)s ont compris que la faillite du régime de Ben Ali est d'abord idéologique, ce dernier a révélé qu'il était incapable de susciter pendant son règne chez le peuple tunisien un civisme républicain et à donner un prolongement à des siècles d'histoire et d'expériences politiques en Tunisie. La tyrannie, l'autoritarisme et l'esprit mafieux ont fait que le peuple lui a refusé l'idée de s'identifier au sentiment national et au devenir de la nation. Ainsi il est demeuré périphérique à la Tunisie et à son histoire, vu comme un simple flic. L'absence d'un relais idéologique capable de le défendre au moment où il avait le plus besoin, montre la méfiance voire son rejet par les Tunisiens Il nous livre donc sous forme de carnet de route ses impressions sur cette révolution. On remarque la Tunisie n'est pas en face de son 1789, contrairement à ce qu'affirment certains historiens français [2], dont l'affirmation inverse supposerait que les Tunisiens vivraient leur révolution 220 ans après celle de la France et découvriraient ainsi seulement à l'aube du XXIe siècle les vertus de la liberté fraîchement conquise. On doit repenser la démocratie, établir de nouvelles frontières sur les cartes et les esprits car il y a un retour sur le devant de la scène pour une meilleure prise en compte de leurs aspirations. Et que l'on cesse d'instrumentaliser l'histoire en mesurant le monde à l'aune de l'histoire de la France. D'autres comme le journaliste américain Robert Kaplan dans le New York Times du 16 janvier 2011 écrivent *qu'il ne faut pas se réjouir des évènements du monde arabe car on finirait par regretter des dirigeants avisés comme le roi Abdallah ou stables comme Moubarak*. Et de rappeler que ce sont des élections démocratiques qui ont amené le Hamas au pouvoir à Pour beaucoup le Tiers-monde a finalement accompli sa révolution, et ainsi l'histoire peut être dorénavant enseignée d'une façon égalitaire.

Cet article montre comment les Tunisiens, ces « sans-culottes » du Tiers-monde n'avaient pas besoin du livre rouge ni du livre vert pour faire une révolution qui a étonné tout le monde à

[1] Journal *L'humanité,* Paris, 17 janvier 2011
[2] voir l'article de Jean Tulard paru dans le journal *Le Monde* du 18 janvier 2011.

commencer par eux-mêmes. Il insiste sur le fait que la démocratie est compatible avec la Tunisie, qu'il n' y aura pas de marche arrière possible, tout en regrettant que le message de la révolution a été confisqué par des partis, chacun selon une grille de lecture partisane.

Cette révolution a marqué la fin de l'orientalisme. Je ne parle pas de la grande tradition orientaliste littéraire et artistique du XIX^{ème}, la plus noble, qui a participé à sa manière à la constitution d'un patrimoine collectif, mais de cet orientalisme galvaudé devenu idéologie, dont les propagateurs sont Bernard Lewis et les « néo conservateurs » : *« la démocratie ne peut être qu'imposée par la force », « les Arabes ne comprennent que le langage de la force ».*

Autre théorie mise à mal, celle de Francis Fukuyama soutenant qu'avec le triomphe des valeurs libérales portées par l'Occident, advient la fin de l'Histoire. Or les Tunisiens reviennent à l'Histoire et la réécrivent à leur tour, ils remettent en marche cette Histoire qui leur aurait échappé.

La révolution tunisienne a également mis à mal la théorie du choc des civilisations chère à Samuel Huntington, puisque durant cette révolution, on n'a pas scandé de slogans hostiles à l'Occident. Bien au contraire, les doléances des manifestants étaient : liberté, démocratie et droits de l'homme, doléances qu'on entend tout aussi bien en Occident.

DICTATEUR: UN METIER DANGEREUX [1]

Le jour se lève sur la Tunisie et sur l'Egypte, porteur d'espoir mais aussi d'incertitudes. Le soleil de la liberté commence à briller sur ces deux pays aux civilisations millénaires.

La sage Tunisie s'est révoltée, les héritiers de Carthage se sont rebellés contre leur tyran. Les odeurs du jasmin ont pénétré la maison égyptienne, et, entrés par les fenêtres, ont envahi toute la demeure "pharaonique".

Dans une sage Tunisie occidentalisée à souhait, et vouée au tourisme de masse, franco-français en particulier, une impudente jeunesse vient rompre le charme d'un pays connu essentiellement à travers les pages du catalogue d'un vague exotisme méditerranéen.

Beaucoup de « spécialistes » ont réduit cette révolte à un spasme qui n'aurait d'autre finalité que de permettre au pays de mieux se conformer au paradigme démocratique dont l'Occident continue à vouloir fournir le modèle. En la comparant à celle de la France a connu en 1789, ils lui ont ôté sa singularité, sa fraîcheur et son audace.

Mais la Tunisie ne peut être la France de 1789, les Tunisiens et leur histoire en retard de deux siècles sur l'histoire universelle. Eux aussi innovent par leur attitude, et sont responsables et raisonnables en même temps. En Tunisie comme en Egypte, comment les héritiers de grandes civilisations, carthaginois et égyptiens, pouvaient supporter plus longtemps une telle situation dans laquelle la société repose sur un dénominateur commun, à savoir le mépris ? Ils veulent reprendre leur place dans la marche de l'humanité et quitter la périphérie de l'Histoire.

Et dans ce contexte, les trois mots de la devise française - Liberté – Egalité –Fraternité peut être toujours porteurs d'espérances, de refus de l'injustice, du mensonge et de l'humiliation.

TUNISIE: UN CONCERT DE CONTESTATIONS REPRIS PAR LES ASSASSINS EUX-MEMES. BAS LES MASQUES! [2]

La Tunisie vit depuis mi-décembre des évènements tragiques. À des demandes légitimes de travail se sont additionnées d'autres doléances telles que la revendication pour la liberté, la dignité comme le refus du favoritisme et de la corruption.

Face à ces manifestations populaires, le régime en place a répondu par des balles réelles faisant des dizaines de morts. Bouleversés par ces affrontements meurtriers et par cette

[1] Idem, le 18 janvier 2011.
[2] Journal *L'humanité,* Paris, le 19 janvier 2011

répression sanglante, les défenseurs des Droits de l'homme manifestent partout et dénoncent cette attitude dictatoriale.

Cette révolte n'est nullement surprenante, dans un pays parcouru par un climat de peur entretenu par une clique autocratique et corrompue, où la presse et l'opposition sont muselées, les élections truquées, où ont lieu des arrestations arbitraires, alors que le chômage reste à un taux assez élevé, et que des régions son délaissées.

Mais, pour les Occidentaux, le régime tunisien et son soldat président sont un rempart efficace contre l'islamisme, qu'ils prétendent avoir endigué non sans succès. Or, nous savons très bien que la Tunisie, vu sa situation géographique (regardant tant vers l'Occident que l'Orient), sa place de carrefour des civilisations, ses femmes libres et émancipées depuis 1957, une jeunesse diplômée qui a bénéficié des efforts accomplis dans le domaine de l'instruction depuis plus d'un demi-siècle, son élite humaniste, ne peut verser aussi facilement dans l'extrémisme.

La position du gouvernement français apparaît proprement odieuse. Entre les revendications démocratiques, économiques et sociales légitimes du peuple tunisien et le soutien à un régime au bord de la dérive, la France, qui ne manque pas de donner de leçons sur les Droits de l'homme, a préféré se taire, appelant tout au mieux timidement à l'apaisement.

Or, le régime tunisien n'a en réalité d'autre choix que de se démocratiser ou disparaître. Les concessions faites à la rue ne vont pas calmer les esprits, les Tunisiens veulent le départ de celui que certains ont applaudi et considéré comme leur sauveur contre Bourguiba…il y a de ça vingt-trois ans…une éternité pour beaucoup.

BEN ALI, C'EST FINI… ET DIRE QUE C'ETAIT LE TYRAN DE MON PREMIER PAYS[1]

La peur a changé de camp…

Avant de perdre la bataille de la rue, Ben Ali a déjà, depuis plusieurs années, perdu la bataille de la mémoire et de l'intelligence.

Si le régime « républicain » de Bourguiba a su s'entourer d'une élite, composée surtout d'historiens, capable de le défendre dans les moments de contestation et de crise, au contraire, l'ex-président, ennemi de l'intelligentsia, surnommé fort à-propos « bac moins quatre », s'est entouré dans un ultime réflexe de « super-flic », de vulgaires tortionnaires. L'élite tunisienne est soit emprisonnée, soit obligée de s'exiler. C'est ce qui explique en partie la rapidité de la chute de ce tyran. L'absence totale d'un relais idéologique capable de le défendre au moment où il en avait le plus besoin, montre la méfiance voire le rejet des Tunisiens vis-à-vis de ce régime. Et le fait de travestir certains évènements historiques pour s'attribuer une participation au mouvement national et occuper une place dans les manuels scolaires, n'a rien changé. Il n'a jamais réussi à gagner les cœurs des Tunisiens.

Ignorant, il n'aura jamais lu l'histoire de son pays, sinon, il se serait aperçu facilement qu'on n'humilie pas éternellement un peuple, et que la Tunisie soumise n'a en réalité jamais accepté la domination et la privation de sa liberté.

Il était aussi incapable de comprendre que le trop-plein des frustrations a encore débordé pour la deuxième fois en vingt-trois ans, le chômage y jouant un rôle non négligeable, et que dans le système très libéral qu'il défendait, beaucoup d'entrepreneurs tunisiens ne voulaient pas risquer leur argent dans des projets n'offrant aucune garantie de sécurité, notamment sur le plan juridique; un système gangrené par la corruption et le vol, et qui s'en cache à peine.

Partie des régions exclues économiquement, la contestation/rejet a fait boule de neige, débouchant ainsi sur des doléances politiques.

[1] Journal *L'humanité,* Paris, 20 janvier 2011.

Après la phase sécuritaire des années 90, le régime travaille pour son seul profit, violant de la notion même d'État de droit, et la corruption s'est étendue aux cercles très proches du pouvoir qui s'enrichissent sans aucune limite. La population est exaspérée.

Je pense que l'Europe a suivi aveuglement la ligne dictée par le président italien. Avec l'Italie, la Tunisie entretenait des relations économiques qui vont jusqu'à y faire participer des réseaux mafieux. Ajoutez à cela la peur des autorités italiennes de l'immigration clandestine de jeunes tunisiens arrivés en masse sur des barques au prix de risques énormes, tentant d'échapper à la misère sociale et économique leur impose la Tunisie de Ben Ali.

Alors un dernier mensonge pour la route: après avoir prétendu lutter contre l'islamisme, voilà que vous demandez exil et protection au pire des régimes islamistes du monde, celui des wahabites.

UN JASMIN A L'ODEUR APRE[1]

De tous les pays du monde arabe, la Tunisie était sans doute celui dont on attendait le moins qu'il fasse une révolution et qu'il chasse, à la surprise générale, un général totalitaire et corrompu.

Cet événement extraordinaire a étonné le monde entier. Ce basculement révolutionnaire, cette libération inespérée n'était dans aucun programme politique.

Tous étaient conscients qu'il serait très difficile de déboulonner cette tyrannie épaulée par l'Occident, soutenue et présentée et comme un rempart contre l'islamisme intégriste. Une victoire sur l'une des plus féroce dictature du monde. Un grand nombre de personnes dans le monde se sont félicitées de l'avènement de la révolution tunisienne, allant jusqu'à la comparer à la révolution française de 1789. De leur point de vue, ce mouvement, inédit dans les pays arabes, est un laboratoire révolutionnaire et un exemple pour la reconstruction d'une nouvelle société. Le monde arabe et les pays en voie de développent croiraient-ils avoir trouvé leur propre modèle ?

Car d'autres ont vu tout cela avec méfiance et crainte, alors qu'on les aurait imaginé fêter l'évènement, mobiliser les solidarités et afficher leur soutien. Il suffit d'observer la situation des jeunes réfugiés de l'île de Lampedusa, fêtés hier comme des héros de la révolution, et qui sont actuellement traqués par la police, rejetés, humiliés et poussés vers un retour forcé. Leurs désillusions sont énormes, eux qui croyaient que le pays des droits de l'homme et de l'égalité allait les accueillir à bras ouverts.

Alors que cette révolution est aussi la vôtre, certains avaient plutôt la frousse... Dans le journal New York Times, le journaliste Kaplan écrivait après la fuite de Ben Ali :« *Il ne faut pas trop se réjouir des évènements du monde arabe car on finirait par regretter des dirigeants avisés comme le roi Abdallah ou stables comme Moubarak* ». Et de rappeler que ce sont des élections démocratiques qui ont amené le Hamas au pouvoir.

D'autres, comme Jean Tulard qui écrivait dans le Monde du 18 janvier 2011, que « *les Tunisiens en face de leur 1789, ils découvriront enfin les vertus de la liberté conquise*», s'il s'en félicite, se contente de mesurer l'histoire de la Tunisie à l'aune de l'histoire de la révolution française.

De l'intérieur du pays, les choses sont regardées différemment: si le tyran est éliminé, par contre la feuille de route politique et institutionnelle n'est guère lisible. Les rapaces et les requins de toute espèce apparus un peu partout sont passés aussitôt à l'action pour conquérir le pouvoir.

Pour réussir cette révolution inédite dans le monde arabe, les Tunisiens ont compris que quand les peuples se divisent en identités, religions, ethnies, communautés, ils font toujours le jeu de leurs oppresseurs et le lit de leurs détresses.

[1] Journal *L'humanité,* Paris, 21 janvier 2011.

Ils ont intégré l'idée que ce qui les rapproche qu'ils soient du Sud ou du nord tunisien, par-delà leurs itinéraires différents ou même leurs chemins, leurs conditions socio-économiques très éloignées parfois, ce sont leurs aspirations à un Etat de droit, leurs doléances démocratiques communes.

Ils vivent tous la même situation et leurs espérances se rejoignent dans un horizon des possibles. Ils ont compris et c'est un signe de maturité politique et citoyenne qu'en se relevant ensemble, ils peuvent mettre en place une nouvelle société et réinventer leur histoire future.

Ils peuvent également remettre en marche leur solidarité et leur humanisme longtemps étouffés par la dictature.

L'UE ET LE PRINTEMPS ARABE: DES RELATIONS ALAMBIQUEES

Le printemps arabe est une série de soulèvements populaires ayant commencée en Tunisie en décembre 2010. Les spécialistes lui ont attribué le nom de « révolution du jasmin ».

Ils se sont étendus pour toucher l'Egypte, la Libye, la Syrie ainsi que d'autres pays arabes.

Comment ces soulèvements ont-ils été perçus ?

Quelles ont été les réactions à Bruxelles (siège de l'Union Européenne) ?

Quelles leçons peuvent être tirées ?

-Personne n'avait prédit ces soulèvements ou tout au moins, les signes avant-coureurs de ces soulèvements n'ont pas su être détectés, de plus chaque mouvement de soulèvement a eu lieu dans des conditions nationales particulières.

-Les régimes tenaient leur légitimité d'une menace intérieure (lutte contre le terrorisme intégriste) ou extérieure exagérée.

Ce qui était important pour l'UE était la stabilité dans les pays voisins, par conséquent, le non-respect des droits de l'homme ou de la démocratie passait au second plan.

Il est possible de faire deux constats: tout d'abord, il s'agit de véritables soulèvements populaires, aucune religion, ethnie ou parti politique n'en a pris les rênes. De plus, ces révoltes ne sont pas un combat « contre l'Occident » mais d'une lutte conte les violences à l'individu, l'autoritarisme et l'oppression.

Néanmoins, les évènements qui ont eu lieu aux frontières de l'UE sont importants, car ils ont des conséquences sur sa sécurité.

La politique de voisinage de l'UE vise à la réduction des difficultés, passant par un soutien aux transitions démocratiques, mais aussi au développement économique de ces voisins.

Suite à ces évènements populaires, les pays ont besoin d'être réformés, il est important de mettre en place une véritable coopération entre ces pays et l'UE.

Ce n'est pas l'UE qui doit conduire les réformes, elle doit aider à la transition démocratique mais en aucun cas ne doit soutenir une force politique en particulier, chaque pays devant trouver lui-même ce qui lui convient.

Dans le cadre de ces réformes, il est très probable que les débats aient/auraient lieu à propos de la place que doit occuper la religion dans la société. Toutefois, il ne faudra pas que l'UE cherche à imposer une séparation des pouvoirs dans les sociétés qui émergeront.

L'UE offrira un soutien plus important aux sociétés civiles, et non aux ONG, un soutien plus important va être destiné aux femmes afin qu'elles ne soient plus cantonnées aux sphères privées.

-Le soutien de l'UE se décline en différents points :

* une meilleure appréciation des pays ayant entrepris de prendre mesures adaptées.

* la conditionnalité « more for more » : plus un pays voisin du Sud s'engagera dans les réformes, plus il aura la certitude de recevoir de l'argent et aides européennes.

NE FAITES PAS TOMBER LE JASMIN DES MAINS DES TUNISIENS[1]

Contre ce « changement » dans la continuité…il faut mener cette révolution citoyenne à son terme. Attention à la « hogra » (mépris). Les regards du monde entier sont braqués sur ce petit pays, la Tunisie, devenue en quelques jours le centre du monde, un laboratoire révolutionnaire. Ce pays, qui a trop longtemps dansé sur un volcan, est promu en exemple, sa révolution promue au rang d'expérience universelle.

Tous voyaient une suite prometteuse dans le cheminement de cette expérience inédite dans un pays arabe, une sorte d'un nouveau petit livre rouge que les Tunisiens seraient en train d'écrire.

Mais un gouvernement de désunion nationale vient d'être proclamé au mépris du peuple tunisien.

Bouazizi et les autres, morts pour la dignité se sont retournés dans leur tombe. On reprend les mêmes et on recommence.

Pour faire bonne figure, on attribue à trois opposants trois ministères sans importance. Trois opposants qui n'ont en outre jamais condamné le dictateur et se sont tus lors de la répression sanglante de décembre.

Beaucoup de Tunisiens se rappellent que ces opposants ont souvent servi la soupe au tyran et ont longuement fréquenté les couloirs du pouvoir.

Le peuple avait espéré que tout ce gouvernement mafieux serait évincé totalement de la direction des affaires de notre pays et que les Tunisiens retrouveraient la liberté et reprendraient en main ce qui leur revient de droit.

Malheureusement, nous assistons à une véritable mascarade démocratique, ce nouveau/ancien gouvernement est composé de plusieurs anciens ministres de Ben Ali et du parti au pouvoir depuis 1987. Le RCD, Rassemblement Constitutionnel Démocratique qu'on ne va pas se gêner de transformer en Répression, Corruption et Démagogie est le seul parti réellement reconnu.

Au nom de l'ordre et des « compétences », ce gouvernement confisque cette liberté retrouvée et chèrement payée.

De plus, il n'est pas prêt à ouvrir les archives pour les historiens afin qu'ils puissent étudier ces vingt-trois de règne sans partage et éclairer les Tunisiens sur une période sombre de leur histoire.

Pour la Tunisie, cette société, la plus émancipée, la plus ouverte à la modernité et dans un sens la plus éclairée et la plus laïque, ce gouvernement l'empêche en réalité de laisser la liberté éclore.

LES URNES ONT PARLE. UN SENTIMENT DE DESILLUSION ET DE DECEPTION ENVAHIT LES ESPRITS DE LA MODERNITE

Après le bonheur qui a suivi la chute du dictateur, et l'excitation liée à la tenue de nouvelles élections, leur organisation relativement exemplaire, le sens civique et responsable des Tunisiens, leur soif de démocratie, viennent les désillusions. Alors que le mouvement religieux est resté à l'écart de la révolution - aucun slogan religieux n'a été scandé pendant toute le révolution le vote massif - les 41 % en faveur de la Nahda laissent un goût amer et l'on ressent une déception, une sorte d'incompréhension. Ce peuple magnifique, ce peuple digne et responsable serait-il d'humeur changeante.

En renversant le pouvoir de Ben Ali, on ne pouvait qu'assurer la victoire de ses ennemis les plus farouches. Les islamistes ont été pendant longtemps traqués, persécutés, réprimés, torturés

[1] Journal *La Voix du Nord*, (Lille-France)14 janvier 2012

dans les prisons, tout comme des syndicalistes et des défenseurs de droits de l'homme, et ils l'ont fait savoir à leurs familles, à leurs amis, à leurs voisins et n'ont pas manqué de le mettre en avant également partout lors de leur campagne électorale.

Alors que les militants des droits de l'homme sont restés isolés, minoritaires, oubliés par la population et modérément soutenus par les forces de gauche européennes, les islamistes affirmaient avoir subi en plus de l'absolutisme intellectuel, économique et social, l'absolutisme religieux, ils se présentent par conséquent comme les vraies victimes.

Ils avançaient qu'ils étaient le seul mouvement politique opposé à Ben Ali, eux qui n'ont jamais pactisé avec le diable, l'unique qui avait constamment et résolument manifesté son hostilité au pouvoir de ben Ali , à son épouse et aux Trabelssia.

Nous pouvons dire que la principale qualité de ce mouvement, c'est surtout celui d'être resté aussi structuré, aussi organisé dans la clandestinité.

D'un point de vue politique - moral pour eux - ils s'estiment devoir être récompensés.

Les islamistes ont compris que la faillite de ben Ali est d'abord idéologique, ce qui a révélé qu'il était incapable de susciter pendant son règne chez le peuple tunisien un sentiment national fort et à donner un prolongement réel à des siècles d'histoire et d'expériences politiques en Tunisie.

Disposant de relais un peu partout, le mouvement Ennahda savait très bien que la tyrannie, l'autorité et l'esprit mafieux ont fait que le peuple a refusé à Ben Ali l'idée de s'identifier au sentiment national et au devenir de la nation. Ainsi, il est demeuré périphérique aux valeurs de la nation, vu comme un simple flic corrompu, constamment à l'appât du gain.

Les islamistes voulaient présenter leur succès électoral comme un aboutissement logique et moral de l'histoire tunisienne. Ils savaient très bien, qu'avant de perdre la bataille de la rue, et l'opinion publique tunisienne, le régime de Ben Ali avait déjà perdu celle de l'identité, de la mémoire et de l'appartenance. Il n'a pas su s'entourer d'une élite capable de le défendre dans les moments de contestations et de crises comme fut le cas lors des évènements du Rdaief en 2008 et des émeutes de décembre/janvier 2011.

L'absence d'un relais idéologique capable de le défendre au moment ou il en avait le plus besoin montre la méfiance voire le rejet des Tunisiens envers celui qui avait tourné le dos à leur identité arabo-musulmane. Conscients de la position centrale qu'occupe la bataille identitaire, les islamistes vont gagner les cœurs des Tunisiens et conquérir dans la foulée l'adhésion et la sympathie de 42% de ceux-ci.

DES PEURS ET DES INTERROGATIONS

Mais cette victoire ne doit pas dissiper des peurs et des méfiances. Et bien que le chef d'Ennahda ait déclaré au journal « Le Monde » du 29 octobre 2011, avec le souci de rassurer l'opinion mondiale, qu'il veut marier Islam et modernité, beaucoup de Tunisiens doutent de ces propos, d'autant plus que les Salafistes chantent une « république islamique ».Les femmes tunisiennes sont à l'avant-garde de cette opposition à l'islamisation de la Tunisie qui était si fièrement laïque. Vigilantes, engagées pour la liberté, elles ne veulent en aucun cas revenir en arrière en mettant en cause leur statut du code personnel.

Valeur d'exemple, de symbole et de références, la victoire des islamistes fait disparaître l'idée que le pouvoir et la foi seraient totalement séparés et où l'État de droit ne dépendrait plus de Dieu mais des citoyens souverains. Cette idée échoue avec l'arrivée du gouvernement d'Ennahdha.

Nous sommes conscients que la mise en place d'une réelle démocratie prendra beaucoup de temps et demandera de gros efforts. En effet, après un début spectaculaire, la révolution tunisienne s'est effritée, engendrant une confusion politique, idéologique et l'émergence

d'innombrables partis peu structurés. Pourtant, en même que temps que des élections enfin transparentes, les Tunisiens ont inventé une citoyenneté locale et une nouvelle militance.

Pour le moins, cette expérience humaine est enrichissante tant pour le monde arabe que pour les jeunes démocraties.

LA STRATEGIE DES SALAFISTES[1]

Un grand nombre de personnes dans le monde se sont félicitées de l'avènement de la révolution tunisienne, allant jusqu'à la comparer à la révolution française de 1789.

De leur point de vue, ce mouvement, inédit dans les pays arabes, est un laboratoire révolutionnaire et un exemple pour la reconstruction d'une nouvelle société.

Le monde arabe et les pays en voie de développent croient avoir enfin trouvé leur propre modèle.

De l'intérieur du pays, les choses sont regardées différemment: si le tyran est éliminé, par contre la feuille de route politique et institutionnelle n'est guère lisible. Les rapaces et les requins de toutes eaux sont apparus et passés aussitôt à l'action, le pouvoir attise les convoitises.

On pouvait penser que dans un climat incertain et au milieu d'un désordre préoccupant, les intégristes chercheraient à récupérer la révolution à leur profit, prétextant qu'ils étaient les principaux opposants et ainsi les réelles victimes de la dictature.

En février 2011, les sondages donnaient à ces intégristes 5 % d'intention de vote.

Quelques mois plus tard, ce taux est monté à environ 30%!

Que s'est –il donc passé entre-temps ? Pourquoi le discours islamo-intégriste trouve-t-il un écho favorable auprès de certain (e)s Tunisien(ne)s ?

Habiles dans l'art de la communication, ces intégristes évitent les sujets délicats (statut de la femme, liberté religieuse, droits de l'Homme, forme de l'Etat, positions sur l'Iran, le Hamas …). Ils se présentent comme des démocrates, des humanistes soucieux de l'intérêt général. Leur référence est, non pas le Coran, mais l'histoire, la civilisation et les expériences sociales tunisiennes.

Pour éviter d'inquiéter la population, ils se sont rasés la barbe et ont troqué leurs habits traditionnels contre des costumes à l'occidentale.

Pour séduire l'électorat, ils mettent à la tribune des femmes non voilées (auxquelles ils ne donnent pas la parole), écartent les « anciens » dirigeants et utilisent un langage dans l'air du temps.

Ils ne parlent que de démocratie, de nouvelle constitution,de parlement représentatif, appellent à l'unité nationale et jurent la main sur le cœur qu'ils ne toucheront pas (s'ils seront élus) au statut de la femme et aux libertés individuelles. Parallèlement, réaffirment l'identité de la Tunisie en tant que nation arabo-musulmane, et, rappelant qu'elle était dénaturée par la conception trop occidentalisée imposée par Bourguiba et Ben Ali, s'affichent comme un rempart contre la désislamisation du peuple tunisien

Si le discours est d'apparence rassurant, les pratiques sont sectaires et en fait reprennent l'habituelle stratégie, il s'agit toujours islamiser la société.

À en juger par ces exemples pris parmi tant d'autres :

-Fin janvier 2011, ils ont tenté de fermer les maisons closes à Tunis et à Sousse au nom de la morale.

-Ils s'opposent farouchement aux laïcs qui ont voulu faite inscrire la laïcité dans la constitution tunisienne, sous prétexte que l'Islam est la religion officielle de la population tunisienne.

[1] Journal *Nord Eclair (Lille-France)* le 12 avril 2012.

Ils mènent une politique de dénigrement et de diffamation contre les personnes de gauche.

Grâce aux subsides du Qatar, ils organisent des réunions politiques à grand spectacle, à l'américaine, dans le but de déplacer les foules. Ils ont déjà réussi par ce discours démagogique à séduire certains partis politiques avec lesquels ils ont signé une alliance électorale.

Pendant la campagne électorale, ils ont réussi à ramener le débat voire le cristalliser sur le phénomène religieux. Ainsi, ils se sont présentés, nous l'avons souligné, comme les défenseurs d'une identité musulmane, voulant défendre la religion du peuple contre un pôle laïc athée qui renierait ses origines historiques et au-delà, jusqu'à l'évidence religieuse : « *le peuple tunisien est un peuple musulman* », martèlent les dirigeants d'Ennahda dans leurs discours… comme si un pays de tradition arabo-musulmane ne pouvait pas s'épanouir dans la séparation du religieux et du politique.

En même temps, les Tunisien(ne)s ne sont pas rassurés vis-à-vis de l'ancienne dictature et du retour de la corruption qui l'accompagnait car la justice n'a toujours pas été rendue. Ils voient les mêmes personnes se maintenir à des postes qu'ils détenaient déjà ou qui se sont intégrés dans des partis politiques. Alors que le pôle moderniste utilisait le futur pour exprimer ses programmes politiques et ses options politiques tels que : l'organisation de l'État, les institutions, les libertés, choses lointaines et incompréhensibles pour beaucoup de Tunisiens préoccupés par des soucis plus terre-à-terre, les islamistes parlaient de l'immédiat, et tentaient de donner des réponses orientées socialement aux doléances des Tunisiens : peur de l'avenir, insécurité, chômage, en promettant des aides et/ou en organisant des activités sociales (repas du Ramadan, aides alimentaires).

Les islamistes étaient actifs sur le train politique en utilisant tous les moyens possibles pour influencer le vote y compris en usant de pratiques démagogiques, certains hommes politiques de gauche, respectables au demeurant, se sont montrés trop tentés par le pouvoir et n'ont pas résisté aux opportunités qui leur étaient offertes d'apparaître sur les écrans de télévision. Ils sont entrés dans une course pour la promotion personnelle et un marathon pour l'exhibition de leur ego. À l'affût, les islamistes ont voulu jouer la carte de la modestie et la volonté de servir le peuple. Ils ont bénéficié d'une fidélité aux traditions identitaires et du vote des campagnes tunisiennes restées profondément religieuses.

On observe que les gouvernements américains et anglais misent déjà sur eux, la France restant, elle, hésitante quant à l'attitude à adopter.

Nous sommes conscients que la mise en place d'une réelle démocratie prendra en réalité beaucoup de temps. Car près ce début spectaculaire, la révolution tunisienne s'est quelque peu effritée, engendrant une confusion politique, idéologique et l'émergence d'innombrables partis peu structurés.

En France, n'oublions pas non plus que les liens avec la Tunisie sont historiques, et qu'une importante communauté tunisienne vit dans l'hexagone. Alors, que faisons nous, nous, les défenseurs des droits de l'homme et les laïcs pour soutenir cette jeune et « prometteuse » révolution ?

REGARD SUR LA REVOLUTION DU 14 JANVIER [1]

Au lieu de fêter l'évènement, mobiliser les fraternités, afficher les soutiens et les solidarités, les méfiances et les défiances ont tenu le haut de l'affiche politique. Citons par exemple la désillusion des ces jeunes Tunisiens, hier célébrés comme des héros, à qui aujourd'hui on refuse un titre de séjour à titre humanitaire. Alors que cette révolution est la vôtre/notre.

[1] Journal *La Presse* (Tunisie), 17 août 2011

Tunisiens de l'intérieur, Tunisiens de l'extérieur: Ce qui les rapproche par delà leur itinéraires variés, leurs conditions sociales partagées, ce sont les aspirations démocratiques communes. Ce qu'ils vivent et ce qu'ils espèrent, un horizon des possibles, qu'en se relevant tous ensemble, ils peuvent faire émerger une nouvelle société, réinventer leur histoire future. Ils peuvent remettre en marche leur humanité longtemps étouffée par la dictature.

Les élections de l'Assemblée constituante:

Les Tunisien(ne)s sont invités à voter pour élire l'Assemblée constituante le 23 octobre2011 en Tunisie et les 20-21-et 22 en France.

La nouvelle loi électorale a réservé 19 sièges pour les Tunisiens résidant à l'étranger dont 10 pour la France où la concentration des Tunisiens est la plus forte: 660.000 personnes déclarées officiellement soit 54 % de tous les Tunisiens résidant à l'étranger.

Pour que les Tunisiens à l'étranger deviennent une force de proposition, voici quelques réflexions qui émergent:

- Réhabilitation de la citoyenneté de ces Tunisien (ne)s résidant à l'étranger longtemps marginalisés et exclus par l'ancien pouvoir de ben Ali. Après le 14 janvier, les Tunisiens ont pris conscience pour la première fois de leur citoyenneté et chacun a tenté de l'exercer, de l'exprimer à sa manière, jusque dans la violence parfois. L'onde de conscience s'est propagée pour traverser la Méditerranée et atteindre les Tunisiens de France. Et ceux qui, hier, vivaient dans la peur, le silence, le désintérêt et l'isolement revendiquent aujourd'hui avec force leur droit et leur détermination à prendre leur destin en main.

- Longtemps trahie et occultée, l'histoire de ce pays doit être revivifiée et surtout replacée dans le contexte mondial pour sa contribution à la civilisation humaine: il s'agit d'encourager la production culturelle et de multiplier les expositions publiques pour mieux faire connaître la Tunisie et la faire aimer. Pour réaliser cet objectif, il faut œuvrer pour la création d'instituts culturels tunisiens dans les principales villes européennes et remédier ainsi à un manquement inacceptable car la Tunisie est un pays de tradition francophone qui ne dispose toujours pas de représentations culturelles à l'étranger.

Il est clair que la révolution du 14 janvier a réveillé tous les démons et en particulier ceux que la dictature avait cru avoir étouffés dans l'œuf, comme cette forte disposition des Tunisien(ne)s jusque-là réprimée, à participer à la vie publique et à contribuer à la construction de l'avenir de leur pays.

LE FAUX '89 LIBYEN

D'un article à l'autre, par des approches différentes, nos commentaires poursuivent, de fait, une réflexion qui a en son cœur une de ces questions qui taraudent ceux qui cherchent à comprendre les motifs cachés de la guerre en Libye.

Interrogations politiques et sociologiques, économiques surtout.

Cette réflexion impose pour la présentation de ce conflit meurtrier le déplacement des lieux d'observations (la Tunisie) et des sources d'informations extra-européennes.

D'emblée, je vous précise que je ne suis, (je ne l'ai jamais été ni de près ni de loin) un partisan de Khadafi. Bien au contraire, ce personnage versatile m'a toujours semblé immature, irrationnel et incohérent, son nationalisme arabe m'a souvent inquiété.

Jeune étudiant, j'ai combattu politiquement ses idées et ses partisans.

Une guerre juste, ou une juste guerre...

Cette guerre menée au nom de l'humanisme, de la démocratie par l'OTAN repose en réalité sur une campagne de désinformation de l'opinion publique, qui a été manipulée pour la lui faire

approuver. Chaque guerre commence toujours par l'irruption d'un mensonge véhiculé par les media, consistant à tromper pour faire vendre et accepter la guerre, comme ce la s'est produit pour les deux guerres menées en Irak.

On a d'abord commencé par entendre que Khadafi utilisait son aviation pour bombarder son peuple et qu'il employait quarante mille mercenaires. Les « images » qui auraient dû servir à appuyer ces affirmations n'ont cependant jamais été diffusées.

Informations fabriquées de toute pièces par *Al Jazira,* télévision du Qatar, proche des Islamistes et relayée par Al Arabia, elle oublie d'ajouter que le Qatar, allié de l'OTAN, est partie prenante dans cette guerre, par l'envoi de soldats, d'armes et de munitions.

La participation effective du Qatar s'explique en partie par des motifs économiques, il souhaite faire en effet main basse sur le gaz libyen dans l'ambition de devenir ainsi un géant mondial du secteur.

-La Libye caressait le projet de créer un grand pôle industriel et financier au Proche Orient, entrant alors directement en concurrence avec le Qatar qui poursuivait lui aussi le même objectif.

-Khadafi a toujours dénoncé les liaisons secrètes entre Israel et le Qatar.

La désinformation continue alors pour laisser accréditer que le régime est moribond: on n'a cessé de dire que Khadafi avait déjà quitté la Lybie pour le Vénezuela, que son fils était mort, on a soutenu ensuite qu'il serait en Algérie.

Et on oublie dans le même temps de dire que beaucoup de ces "combattants" de la rébellion sont des partisans d'Al Qaida, et que nombre d'entre eux sont venus d'Afghanistan.

- Le Conseil National de Transition – CNT - a comme objectif de mettre en place un Etat islamiste (discours de son président Abdeljalil le 5 août 2011). Cette question gêne l'OTAN... et Nicolas Sarkozy évite d'en parler lui aussi.

- Des crimes racistes ont été perpétrés contre des Libyens noirs de Benghazi, prétendus mercenaires africains, et des centaines de Libyens ont été massacrés en plein jour (le racisme antinoir a toujours existé à Benghazi).

Silence, car on se bat encore contre le dictateur...

- Des kalachnikov se vendent dans le sud tunisien pour la somme modique de 300 dinars tunisiens (équivalents à 160 euros). À ce rythme, les armes risqueraient de devenir très accessibles aux Tunisiens, aux bandes armées et aux gangs, et les quartiers les plus chauds du Sud tunisien pourraient alors vite ressembler à des favelas brésiliennes.

À la différence des révoltes tunisienne et égyptienne qui étaient populaires, l'insurrection en Libye est minoritaire. Armée et soutenue par l'OTAN (qui a fait la décision), elle n'aurait jamais pu s'emparer du pouvoir sans le soutien de la France et de l'Angleterre.

Mille fois Oui pour le départ politique de Khadafi mais aussi contre la mise en place d'un régime islamiste sur les frontières de la jeune démocratie tunisienne.

Un passé glorieux attendait sur le quai de l'histoire

Les manifestations et les contestations y compris silencieuses avaient jeté bas le benalisme et ses composantes. Les idées nouvelles se nommaient dignité, anti-corruption, révolte et rejet du clan présidentiel

Ben Ali n'est pas fini le 14 janvier 2011 mais en réalité bien avant.

Dans les dix dernières années, on assiste en Tunisie à un basculement sans précédent par la radicalité et la rapidité du développement des manières de critiquer, de rejeter le pouvoir en place et de penser... Il y a un réel changement des valeurs: l'ordre, l'obéissance, l'autorité, l'opportunisme s'effacent au profit de nouvelles comme le courage, l'audace, l'invention politique.

Le domaine politico-social est le plus touché. On passe de la résignation, de la peur, à la solidarité et à au refus. Beaucoup de Tunisiens pensaient d'une manière fataliste la résistance à ce régime dictatorial, tout d'un coup, ils pensaient comme Bouazizi.

Le mérite de Bouazizi est d'avoir montré que la révolution est essentielle dans le domaine des idées, dans celui de l'économique et du social. Mais c'est surtout au chapitre politique que cette révolution a innové le plus radicalement, en substituant à une dictature politique parmi les plus sanguinaires de la planète un principe populaire comme base de légitimité. Mais aussien inventant des formes politiques nouvelles, inédites dans le contexte politique tunisien.

La faillite du régime de Ben Ali, l'incapacité des historiens de son parti de l'époque à susciter un civisme républicain, autrement dit à faire de vingt-trois ans de règne absolu le fondement incontestable d'une légitimité présidentielle, a laissé le pouvoir démuni au moment où il avait eu le plus besoin de s'identifier au sentiment national, d'épouser les doléances politiques et sociales du peuple tunisien et de s'attacher au devenir de la nation tunisienne. Ce régime a manqué de relayeurs pour l'aider à survivre.

C'est dans les prisons que les intellectuels tunisiens qui n'avaient pu s'exiler se trouvaient alors.

Dans ce domaine, Bourguiba a réussi mieux que lui à se présenter en aboutissement logique et moral de l'histoire de la Tunisie. Avant de perdre son fauteuil de président, Ben Ali avait déjà perdu pendant son règne la bataille de la mémoire.

Cette révolution a marqué la fin de l'orientalisme, je ne parle pas de la grande tradition orientaliste littéraire et artistique du XIXe, la plus noble, qui a participé à sa manière à la constitution d'un patrimoine collectif, mais de cet orientalisme galvaudé devenu idéologie dont les propagateurs sont Bernard Lewis et les « néo conservateurs » : « la démocratie ne peut être qu'imposée par la force », « les Arabes ne comprennent que le langage de la force »

Autre théorie mise à mal, c'est la théorie de Francis Fukuyama soutenant qu'avec le triomphe des valeurs libérales portées par l'Occident, advient la fin de l'Histoire. Or les Tunisiens reviennent à l'Histoire et la réécrivent à leur tour, ils remettent en marche cette Histoire qui leur aurait échappée.

La révolution tunisienne a également mis à mal la théorie du choc des civilisations chère à Samuel Huntington puisque cette révolution on n'a pas scandé des slogans hostiles à l'Occident. Bien au contraire, les doléances des manifestants étaient : liberté, démocratie et droits de l'homme qu'on entend tout aussi bien en Occident.

Il faut ouvrir les archives de la dictature tunisienne[1]

Comment garantir un gouvernement provisoire qui tourne le dos à la corruption et la combatte, qui saura créer les conditions d'élections réellement démocratiques ? Comment s'assurer un gouvernement qui rompe définitivement avec le passé ?

À cette question que se pose tout pays qui vient de renverser une dictature, les mouvements de citoyens de l'Allemagne de l'Est ont apporté une réponse il y a vingt ans: en exigeant l'ouverture des archives du régime qui a instauré la dictature et, avant tout, les archives de la répression.

Contrairement à toutes les craintes, l'ouverture des archives de la police politique (Stasi) n'a pas donné lieu à des règlements de comptes ou à des actes de vengeance. Elle n'a pas perturbé la paix sociale, selon l'argument que l'on oppose à toute demande d'ouverture d'archives dites «sensibles» et qui relève d'une fausse croyance. Le résultat le plus tangible et quasi immédiat de l'ouverture des dossiers de la Stasi a été l'éviction de la scène politique et de la fonction publique de personnes compromises avec l'institution de surveillance policière. Quoi de plus légitime que leur mise à l'écart du pouvoir politique et l'opprobre de la société ? Grâce à l'ouverture des archives de l'ancienne Allemagne de l'Est et aux nombreux travaux de recherche qu'elle a permis,

[1] Journal *Libération*, Paris, 22 février 2011.

pour la première fois dans l'histoire, une société a pu comprendre son passé récent, celui qu'elle avait elle-même vécu, se réappropriant de la sorte son histoire.

Les Tunisiens ont eux aussi le droit d'apprendre et de comprendre comment ils ont pu vivre pendant trois décennies sous une dictature. Ils ont le droit de connaître le degré de corruption à tous les niveaux et le nom des responsables. Ils ont le droit de connaître les mécanismes de la terreur policière dont ils ont été les victimes. Pour éviter qu'une telle expérience se répète, ils ont eux aussi le droit et le devoir de se réapproprier leur histoire. A nouveau, le peuple tunisien doit montrer l'exemple. L'ouverture des archives de la dictature et leur consultation pour écrire l'histoire de cette sombre période font partie du processus de démocratisation en cours. Elle est l'une des conditions d'élections démocratiques. L'enjeu est décisif pour l'avenir du monde arabe.

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La Révolution tunisienne: état des lieux

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Abstract: This article is an analysis of on the Revolution in Tunisia in 2011, the starting point of the Arab Spring.

Keywords: Revolution, Constitution, Elections, Dictatorship, Sharia, Polygamy, Islam, Development.

Révolution, révolte, intifadha... on peut longuement épiloguer sur la nature des événements qui ont secoué la Tunisie entre le 17 décembre - date à laquelle Mohamed Bouazizi s'est immolé par le feu à Sidi Bouzid - et le 14 janvier - date de la fuite de Ben Ali. Mais, loin des conjectures théoriques, notre communication se limitera à la recherche d'une explication qui permettrait de mieux comprendre un changement qui semble avoir surpris tout le monde, d'une part, et, essayer d'en cerner les aspects après quinze mois, d'autre part.

Quel que soit le jugement que l'on peut émettre sur la portée de cet événement, on ne peut le dissocier de l'histoire de la Tunisie sur les cinquante dernières années. Seulement l'historien rencontre beaucoup de gêne à appréhender cette tranche de l'histoire de la Tunisie. Bien que la recherche historique ait vu la naissance d'une nouvelle branche, l'histoire immédiate, beaucoup de difficultés se présentent à lui. L'historien est confronté non seulement au problème éternel de l'objectivité mais surtout à l'absence d'un outil de travail indispensable à son métier : les documents d'archives. Ces archives lui resteront en effet interdites pendant longtemps.

Du 17 décembre 2010 au 14 janvier 2011, vingt-sept jours ont suffit pour renverser un régime des plus despotiques et policiers au monde. Ce 14 janvier sera sans doute une date charnière, non seulement dans l'histoire de la Tunisie, mais aussi du monde arabe, voire du

monde entier. Car elle va remodeler la carte politique de cette partie du monde Ô combien stratégique et, par delà, les relations géostratégiques avec ce que cela implique de tensions.

Ce qui s'est passé entre le 17 décembre et le 14 janvier est un changement d'une très grande envergure. C'est la *révolution du jasmin* pour les Européens ; révolution de la figue de barbarie pour quelques intellectuels des régions marginalisées de l'intérieur, berceau de la révolution ; révolution des jeunes pour d'autres ; révolution de la liberté et de la dignité pour le monde de l'information net des médias.

Mise à part cette querelle de concepts, la révolution tunisienne se distingue par plusieurs caractères :

Pour la première fois depuis la fondation de Carthage en 814 avant JC le peuple tunisien, en comptant sur ses propres forces, a pu se débarrasser des gouvernants politiques du pays.

La Tunisie a été durant la période moderne et contemporaine un pays précurseur. Elle est le premier pays arabe et musulman à avoir aboli l'esclavage (1846) ; le premier qui s'est doté d'une constitution (1861), qui a vu la naissance d'un syndicat (1824), qui a aboli la polygamie (1957) et qui a fondé une ligue des droits de l'homme (1974). Pendant ce temps le monde arabe sombrait dans une profonde léthargie. Si bien que certains n'ont pas hésité à penser l'histoire de ce monde arabe par l'avant et l'après Bouazizi.

La révolution a été une révolution pacifique. Les armes ont été totalement absentes du début à la fin. Le bilan humain n'est pas encore définitivement connu. Il est estimé à 300 victimes et 1000 blessés.

Elle a surpris tous les observateurs. Ce qui laisse penser à la spontanéité des masses qui - il faut le dire - n'ont été mobilisées, du moins au début, par aucune direction politique commune. Elles n'avaient pas non plus de chef politique charismatique. Car Ben Ali a vidé le pays par différents moyens de toutes les personnes capables de s'opposer réellement à lui ou de constituer une quelconque menace pour son pouvoir.

La majorité absolue de ceux qui sont descendus dans les rues n'avaient pas reçu une formation politique spécifique, ni subi un endoctrinement par des partis politiques, sans que cela soit synonyme d'absence totale d'une certaine conscience politique. Ce qui les a mobilisés avant tout, ce sont des revendications économiques et sociales, et surtout le droit au travail.

Les révoltés appartiennent à toutes les couches sociales populaires et moyennes de toutes les régions du pays. Ce fut réellement un mouvement populaire dont l'envergure dépasse celle de l'insurrection de 1864 contre le régime des beys.

L'encadrement de la révolution a été le fait de l'U.G.T.T. (Union Générale Tunisienne du Travail) à partir de ses bureaux régionaux. Contrairement aux autres révolutions des pays arabes, les manifestations n'ont jamais eu une mosquée comme point de ralliement et de départ. Le slogan principal fut « liberté, démocratie, justice sociale ». Aucun slogan religieux, pas de slogans nationalistes arabes, pas de slogans anticapitalistes, ni anti-impérialistes, ni antisionistes.

Le rôle des technologies de l'information a été déterminant: les chaînes de télévision comme Al Jazira, France 24, Al Arabia, et surtout le réseau Facebook qui a joué un rôle de premier plan pour enflammer les foules et chauffer les esprits. Ben Ali, lui-même un féru de ces technologies, ne se doutait pas qu'elles seraient une arme qui échapperait à son contrôle. La Tunisie est l'un des premiers pays arabes par le nombre de connectés, avec environ deux millions d'internautes sur dix millions d'habitants.

La révolution n'a pas été suivie par le chaos et par l'anarchie totale. La vie a continué presque normalement. Certes, la tête du régime est tombée mais l'Etat n'a pas disparu et l'administration a fonctionné sans rupture de façon quasi normale (les services publics, les salaires, l'approvisionnement des marchés, les transports, etc,)

Le pays n'a pas connu des scènes de vindicte populaire et de lynchage. Ce qui ajoute au lustre du peuple tunisien, à sa modération d'esprit et à son sens civique.

Quelles sont les causes profondes de cette révolution ? Où faut-il les chercher ? Est-ce dans la recherche d'une identité menacée par une occidentalisation - comme le prétendent les courants islamistes surtout - ou bien dans la détérioration des conditions d'existence de l'écrasante majorité des Tunisiens et dans la corruption d'un système qui a misé principalement sur la force de sa police et de ses agents de renseignement ?

A notre avis ces causes ne sauraient être dissociées de la politique du pays et de son modèle de développement depuis son indépendance en 1956.

Depuis le départ des Français et pendant 54 ans la Tunisie n'a connu que deux présidents: Bourguiba et Ben Ali, deux hommes aux carrures complètement différentes.

Bourguiba a gouverné le pays pendant trois décennies. Fort de sa légitimité historique, forgée durant de longues années de lutte pour l'indépendance, il conduit une politique de modernisation et de développement. Sa réussite la plus prisée, même par ses détracteurs, réside dans l'œuvre sociale qui occupe une place de choix dans le programme de l'Etat qu'il comptait construire. Il généralise l'enseignement pour former des cadres à un état qui en était grandement dépourvu. Il met sur pied une véritable santé publique. Il libère la femme tunisienne surtout du carcan juridique qui en faisait une servante démunie de tous les droits à une quelconque dignité. Dans le même ordre d'idée il a réussi la gageure de la limitation des naissances par un programme de planning familial, passant outre les idées reçues et leurs acceptions religieuses. De fait, il a ainsi jeté les bases d'un état moderne capable d'assurer au peuple un minimum de vie décente. Les résultats ne se sont pas fait attendre : la formation d'une classe moyenne nombreuse qui a assuré au pays une stabilité sociale malgré tout pendant des décennies ; une amélioration effective des conditions de vie de la population. Les indices qui l'attestent ne manquent pas, comme on peut le voir par l'espérance de vie à la naissance qui est passée 51,1 ans en 1966 à 66,4 en 1984, ou par le P.I.B. par habitant qui a grimpé de 91 dollars en 1956 à 1230 dollars en 1988,[1] date de sa déposition par Ben Ali.

Mais Bourguiba, sans qu'on puisse à notre avis l'assimiler à un dictateur, s'est accroché au pouvoir d'une manière rigoriste, malgré sa culture et son caractère d'intellectuel et d'homme éclairé, sans compter son crédit auprès des Tunisiens, autant d'atouts qui le prédisposaient à essayer de doter la Tunisie d'un régime politique démocratique. D'autant plus qu'il a quitté le pouvoir avec les poches vides, chose incroyable dans le Tiers-Monde, voire même dans certains états du monde aux traditions démocratiques reconnues. Personne n'oserait l'accuser de malversations, ni de détournement des deniers publics pour s'enrichir; chose qu'il a interdite même à sa famille. N'a-t-il pas écarté son fils du gouvernement du pays, le jugeant indigne des responsabilités politiques.

Avec Ben Ali, il y a croissance mais sans développement. Car si Ben Ali se vante d'avoir réalisé pendant son règne une croissance moyenne de 5%, elle n'a en fait profité qu'à une minorité du pays aux dépens des classes moyennes et populaires qu'on ne voyait apparaître positivement que dans les statistiques maquillées du pouvoir.

Cette croissance a été utilisée en partie pour améliorer l'infrastructure, par la construction d'autoroutes et d'échangeurs destinés surtout à faciliter la circulation dans la capitale, et d'aéroports. Le pouvoir a lancé aussi une campagne d'électrification et de ravitaillement en eau potable. Le P.I.B. par habitant est passé sous son règne à 5000 dollars. Ben Ali a aussi développé les nouvelles technologies et surtout celle de l'informatique. Sur le plan social il n'a pas renié l'œuvre de Bourguiba. Bien au contraire, il a consolidé les acquis de la femme.

Mais ces réalisations ne constituaient qu'un vernis : et dès qu'on le gratte il laisse apparaître un mal qui minait tout l'édifice, bâti sur la peur d'un régime ayant perdu toute crédibilité. Le fléau du chômage a atteint les 45% parmi les diplômés de l'université et plus de 20% de toute la

[1] ***_Le nouvel état du monde, 1980-1990,_ Paris, La Découverte, p. 410

population active. Ces taux élevés sont la conséquence directe du P.A.S (plan d'ajustement structurel) imposé par les milieux financiers internationaux alors que l'économie tunisienne était en 1987, date d'arrivée de Ben Ali au pouvoir, au bord de la banqueroute.[1]

Les oubliés de la croissance sont surtout les régions de l'intérieur du pays qui enregistrent les plus forts taux de chômage et de pauvreté. Cette contradiction entre la Tunisie côtière ouverte sur le monde extérieur et la Tunisie intérieure plus au moins renfermée sur elle-même remonte en fait à l'histoire ancienne. Cette zone, marginalisée par les pouvoirs centraux qui se sont succédé à la tête de la Tunisie, a été le berceau de tous les mouvements de contestation politique, sociale et religieuse depuis les premières invasions jusqu'à l'époque actuelle (Tacfarinas et Jugurtha à l'époque romaine, Antalas à l'époque byzantine, l'homme à l'âne à l'époque fatimide,[2] Ali ben Gdhahom[3] contre les Husseïnites, Ali ben Khlifa[4] Neffati, Eddaghbaji, les « Fellagas » à l'époque coloniale, la révolte du pain en 1984 et la révolution de 2011.

A cela, il faut ajouter la paupérisation de la classe moyenne (avocats, professeurs du secondaire, artisans, petits industriels, fonctionnaires de l'Etat…), du fait surtout de l'augmentation des prix et de la détérioration de son pouvoir d'achat.

La dégradation des conditions de vie de l'écrasante majorité de la population, l'énormité du chômage et son accroissement continu s'inscrivent dans un climat de corruption générale qui gangrenait tous les rouages de l'état et de l'administration. Une corruption pratiquée par le sommet de l'état ainsi que par les membres de la famille régnante et tous leurs proches. Les frères du couple Ben Ali se sont transformés en une véritable mafia qui usait de tous les moyens, jusqu'à la liquidation physique, pour réaliser ses desseins les plus noirs et les plus nuisibles. Si bien que certains observateurs n'hésitent pas à qualifier le régime de Ben Ali de « kleptocrate ».

La corruption a profité aussi à des cadres dans les appareils de l'Etat (police, justice, douane, administration), qui ont amassé des fortunes énormes dans des temps record.

Pour faire perdurer le système, Ben Ali n'avait qu'un seul choix : terroriser la population et entretenir un climat de peur et de méfiance. Le R.C.D. lui-même, s'est transformé en une agence de renseignement qui épiait tout opposant de quelque tendance qu'il soit. Bref une dictature qui n'a rien à envier à ses semblables en Afrique et en Amérique Latine avec la bénédiction d'ailleurs des gouvernements occidentaux conduits par les Etats-Unis. Cette dictature reposait sur un appareil policier tentaculaire secondé par un nombre incalculable d'indicateurs et de mouchards. Le Tunisien se sentait épié, surveillé, suivi partout ou' il va ; au café au travail, dans la rue. Bref il lui interdit même de penses qu'il pourrait être un citoyen.

S'il est vrai que la peur peut être inhibitrice et paralysante, il n'en est pas moins vrai qu'à un moment donné elle peut se transformer en facteur stimulant qui excite les énergies. L'étincelle qui allait libérer tout le peuple tunisien de la peur fut l'acte de ce jeune chômeur de Sidi Bouzid qui s'est immolé par le feu le 17 décembre 2011. Personne ne pensait que cet acte de désespoir allait déclencher un mouvement de manifestations et conduire à une révolution. Ben Ali, lui-même, confiant dans la solidité de son pouvoir, a beaucoup mésestimé son ampleur. Il croyait qu'il pouvait circonscrire la contestation rapidement comme il l'avait fait en 2008 avec la région minière de Gafsa, autre zone déshéritée. La répression de cette révolte qui a tenu tête au pouvoir pendant près de six mois a été accompagnée par un mutisme honteux de l'Occident qui explique sa surprise au moment de la révolution et l'absurde attitude du gouvernement français et de sa ministre de la défense. Totalement sous la domination de sa femme Leila, Ben Ali n'a d'ouïe que

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1 Timoumi (H), *La Tunisie de 1956 à 1987,* Tunis, Dar Mohamed Ali El Hammi, 2005, p. 159 et suite.

2 *** *Histoire de la Tunisie. Le Moyen Age,* Tunis, S.T.D., p. 224 et suite

3 *** *Histoire de la Tunisie. Les Temps modernes,* Tunis, S.T.D., p. 251 et suite. Voir aussi Ganiage (J), *Les origines du protectorat français en Tunisie (1861-1881),*Tunis, S.T.D, 2ème édition , 1968, p. 1887 et suite.

4 Kraiem (A), *Ali Ben Khalifa an-Naffeti avant 1881 en réaction à l'occupation française de la Tunisie en 1881. Actes du 1er séminaire sur l'histoire du mouvement national, 29, 30 et 31 Mai 1981* p : 145-149. Voir aussi Mahjoubi (A) et Karoui (H), *Quand le soleil s'est levé à l'ouest. Tunisie 1881, impérialisme et résistance,* Tunis, C.R.E.S. 1983.

pour elle. Les rumeurs qui circulent dans le pays sur lui et sa famille n'avaient à ses yeux aucun fondement. Aussi est-il incapable de saisir les changements que ce soit autour de lui ou dans la population. En fait le mécontentement allait gagner même le corps de l'armée qu'il a négligé au profit de la police, laquelle armée a refusé d'obtempérer à ses ordres de tirer sur les foules, faisant de ce refus l'une des raisons majeures de la chute du régime. Ben Ali ne pouvait pas manipuler les différences religieuses, ethniques ou tribales. La Tunisie est un pays homogène et uni. Il a trouvé devant lui, de surcroît, un peuple ouvert depuis les temps les plus reculés aux les autres cultures et surtout à la civilisation française. L'ouverture sur la culture française et sur ses principes, fondés sur le respect des droits de l'homme, remontent aux tous débuts du XIX-ième siècle avec la traduction du code de Bonaparte et surtout avec la première constitution de la Tunisie moderne de 1861, largement inspirée de ses homologues engendrées par la révolution française. Ben Ali a aussi mésestimé le courage du peuple tunisien et particulièrement de la femme tunisienne qui s'est mêlée à l'homme partout dans cette révolution.

Comme il n'y a pas de génération spontanée, et à plus forte raison dans l'évolution des sociétés, traiter la révolution du 14 janvier comme étant un événement sans antécédent, né du néant, c'est aller vite en besogne. La contestation en Tunisie n'a pas commencé le 17 décembre ; ses premières manifestations remontent au moins aux années soixante du siècle dernier. L'œuvre de Bourguiba n'a pas profité seulement à son régime en lui fournissant des cadres ; elle a par la même occasion lancé dans la vie publique et politique des milliers de militants qui ont affûté leurs armes sur les bancs des universités ; comme membres de l'U.G.E.T (Union Générale des Etudiants Tunisiens), au sein de l'U.G.T.T. et dans les mouvements politiques clandestins. Cette contestation à la fois sociale et politique s'exprimait par différents moyens allant des pétitions et des tracts jusqu'à l'utilisation des armes en passant par les grèves et les manifestations dans les rues.

Ces combattants pour les libertés et la justice sociale n'étaient pas totalement isolés face à la machine répressive du pouvoir. Le soutien leur arrivait surtout des défenseurs des droits de l'homme à travers le monde et surtout en France étant donné les liens historiques et séculaires qui la lient à la Tunisie.

Mais les sacrifices consentis par tout le peuple tunisien pour s'opposer à Ben Ali surtout n'ont pas été vains. Et contrairement à ce qu'on peut penser il ne doit son salut qu'à lui-même, armé de beaucoup de courage. Et fidèle à lui-même. Toutefois, quinze mois après le départ du dictateur, quel bilan peut-on dresser ? Quelles sont les étapes accomplies ?

Disons le d'emblée, la révolution tunisienne n'avait ni une direction politique unique ni un programme politique faisant l'unanimité parmi ceux qui sont descendus dans la rue. On peut dire que ce que cherchait tout le monde c'était la démocratie. C'est une idée force qui s'inscrit dans l'air du temps. Ce programme, si c'en est un, s'est traduit par les slogans que scandaient les manifestants à travers toute la Tunisie. Tout en réclamant la chute du régime et le départ de Ben Ali par ce cri « dégage », dont on a entendu l'écho chez tous les peuples arabes qui se sont soulevés (au Yemen, en Egypte, en Lybie, en Syrie et même aux Etats-Unis devant la bourse de New-York), les Tunisiens voulaient la liberté, la dignité et la justice sociale.

D'aucuns pouvaient penser qu'après le renversement de la dictature le pays allait sombrer dans l'anarchie et le désordre. Or, malgré des débordements somme toute limités et compréhensibles en pareille situation, la Tunisie est restée relativement calme. C'est dire combien la tradition étatique était ancrée et solide dans les faits et dans les esprits.

De leur côté les formations politiques étaient obligées de composer entre elles car aucune parmi elles ne pouvaient prétendre à un quelconque leadership. Elles étaient obligées de trouver un modus vivendi et un consensus qui permettent au pays de retrouver son équilibre. De là est née l'idée d'élire une assemblée constituante au suffrage universel pour voter une nouvelle constitution démocratique, conforme aux aspirations du peuple.

Les élections organisées le 23 octobre se sont déroulées dans le calme, sans violence aucune, de façon démocratique et avec beaucoup de transparence, alors que nombreux étaient ceux qui appréhendaient cette première à laquelle était confrontée la Tunisie post-révolutionnaire. Mais le peuple tunisien a encore une fois démontré ce que les observateurs pensaient de son civisme, depuis Aristote jusqu'aux voyageurs venus d'Europe, surtout pendant la période moderne.

De ces élections, la Nahdha, parti de mouvance islamiste, est sorti vainqueur, d'autant que le taux d'abstention a dépassé les 50% et que nombre de ses adversaires se sont présentés en lignes dispersées sur des listes indépendantes. Ainsi sur 217 sièges que compte la constituante, les islamistes en ont raflé 89.

Finalement, sur plus de 100 partis reconnus, quelques uns seulement sont représentés. Ils se réclament de quatre courants idéologiques : les islamistes, la gauche, les libéraux et les nationalistes arabes. Mais leur implantation parmi les masses populaires est très inégale. Car politiquement et socialement le paysage est dominé par trois forces : l'U.G.T.T., la Nahdha et le R.C.D. (le Rassemblement Constitutionnel Démocratique), le parti de Ben Ali, bien que dissout le 9 mars 2011, a en effet donné naissance à de nouvelles formations chez lesquelles on assiste à une tendance réelle vers le rassemblement.

La Nahdha veut profiter pleinement de sa victoire et refuse de former un gouvernement de technocrates présidé par une personnalité indépendante comme le voulaient certains avec à leur tête le P.D.P.(le Parti démocratique progressiste). Seuls les partis du Congrès et Ettakattol ont accepté de se joindre à la Nahdha. Mais les discussions qui se sont concentrées sur le partage des postes politiques ont été laborieuses, surtout parce que Moncef Marzouki, chef du parti du Congrès, tenait absolument à occuper le palais de Carthage, c'est-à-dire la présidence du pays. Mais la Nahdha s'est taillé la part du lion, ne laissant à ses alliés que les miettes. Qu'il s'agit des pouvoirs octroyés au chef du gouvernement, Hamadi Jebali, qui n'est autre que son secrétaire général ou des ministères de l'intérieur, de la justice et des affaires étrangères. .cet engouement pour le pouvoir s'est étendu à l'administration puisque a entrepris de nommer dans les postes de P.D.G., de gouverneur et de délégués ses membres sans même consulter ses partenaires au pouvoir qui semblent avoir accepté le fait accompli. Si bien qu'elle est accusée de népotisme et qu'elle est en train de reproduire l'ancien système.

Un mois après les élections, le 22 novembre 2011, la constituante se réunit en séance plénière pour élire son président. Le 12 décembre Moncef Marzouki, candidat unique, est élu président de la république. Le 14 décembre Hamadi Jebali est chargé de former un gouvernement, qui sera largement critiqué tant sur le nombre de portefeuilles que sur les personnes choisies elles mêmes.

Ainsi dans un laps de temps assez court le pays a su trouver la solution pour combler la vacance du pouvoir qui aurait pu être génératrice de beaucoup de désordres si elle s'était prolongée davantage.

Tournant le dos au consensus qui a prévalu jusqu'aux élections la « troïka » au pouvoir agit comme s'il s'agit d'une assemblée législative. La constituante est désormais divisée entre une majorité qui gouverne et une minorité dans l'opposition. Ces dissensions politiques et les palabres qui s'ensuivent se déroulent sur un fond de contestation sociale, de sit-in et de manifestations.

La troïka qui semble à court d'arguments face à ses détracteurs rejette la responsabilité sur les médias qu'elle accuse d'être à la solde de l'opposition.[1] C'est la première bataille dans laquelle elle laisse des plumes, obligée de faire marche arrière devant la levée de bouclier de la part de la société civile. Les manifestations organisées pour défendre la liberté de presse et d'opinion ont prouvé, malgré les réserves qu'on peut avoir, que l'ensemble des Tunisiens n'accepteront plus jamais une presse à un seul son de cloche, qui chante les mérites des gens au pouvoir.

[1] Le Maghreb ; n° 156, 25 Février

Sur le plan économique et social rien de concret n'a été encore fait, ni pour les 800 000 chômeurs, ni pour les régions de l'intérieur, premier foyer de la révolution.

Le pays souffre de trois problèmes fondamentaux : le chômage, le déficit commercial et les disparités du développement régional auxquels l'équipe au pouvoir n'a pas encore apporté de réponse. Le gouvernement a dû aussi reculer devant la réaction de l'U.G.T.T. suite à une grève des éboueurs qui a largement envenimé la situation entre le syndicat et la Nahdha, particulièrement.[1]

Le gouvernement a multiplié les gaffes sur le plan des relations internationales. La politique extérieure du pays est basée sur deux options : la première consiste à infléchir les orientations du pays vers l'axe arabo-islamique et notamment vers le Qatar et l'Arabie-Saoudite et par conséquent tourner le dos à nos partenaires traditionnels, un pari fort dangereux aux conséquences graves ; la deuxième, c'est l'option « révolutionnaire » de rupture avec la tradition diplomatique de la Tunisie, qui a toujours su manœuvré son esquif au milieu des rapides de la géopolitique mondiale. En faisant fi des codes conventionnels et des disciplines éthiques les nouveaux dirigeants semblent oublier que les politiques prétendument révolutionnaires des dernières décennies ont fini dans l'impasse. Plus grave encore, cette politique étrangère manque de cohérence. Les observateurs ne savent pas où la chercher puisqu'elle est exprimée par trois voix discordantes: le président de la République, le chef du gouvernement et le ministre des affaires étrangères.

Au-delà des tensions politiques et sociales, quatre mois après les élections, la constituante n'a pas encore voté le moindre article de la constitution. Beaucoup de temps a été perdu dans l'élaboration des lois de l'organisation provisoire des pouvoirs publics et les statuts internes de l'assemblée.

La pomme de discorde qui divise la classe politique comme la société civile se réduit à la nature de l'Etat et de la constitution. Faut-il prendre la charia islamique comme source de droit ou pas, et le spécifier dans la nouvelle constitution ?[2] Pour une partie des cadres et militants de la Nahdha et surtout pour les salafistes qui se considèrent comme son bras armé, la Tunisie est un pays musulman; aussi est-il tout à fait naturel que la charia, tirée du Coran et la Sunna, soient les seuls sources des lois qui doivent organiser la vie des Tunisiens et leurs relations avec l'extérieur. Pour le camp adverse, celui des démocrates et des modernistes, une telle option n'est qu'un retour vers le Moyen-Age avec une hégémonie des hommes de la religion et ses corollaires: un Etat théocratique et un régime despotique. La femme et son statut, voté du temps de Bourguiba, est au centre des débats. La Nahdha déclare être pour les droits de la femme avec un bémol concernant l'adoption. Mais certains de ses dirigeants les plus à droite ne cachent pas leur volonté de réviser tout le statut et, en premier lieu, l'interdiction de la polygamie. Aux yeux de ces rigoristes la monogamie est non seulement contraire à la loi divine, mais elle est aussi la cause de la dissolution morale et des fléaux sociaux, comme la prostitution, qui minent la famille et la société entière. Des arguments fallacieux dénués de tout fondement scientifique.

Le pays risque de se diviser en deux camps inconciliables avec ce que cela représente comme menace pour la paix dans le pays et sa stabilité politique sur un fond de crise et de chômage. Manifestation et contre manifestation, les deux camps descendent dans la rue chaque fois qu'ils considèrent qu'un de leurs symboles a subi un outrage. L'exemple du drapeau à la faculté de la Manouba descendu par un salafiste et remplacé par un autre noir[3]; et la profanation du coran à l'intérieur d'une mosquée de la ville de Ben Guerdane en sont les exemples les plus éloquents (bien que l'affaire du coran apparaisse comme un coup monté). Certes, les scènes de violences qui sont le fait des salafistes restent quand même assez limitées et les manifestations se

[1] Idem
[2] Idem ; n° 175, 18 Mars 2012
[3] Idem n° 167 ; 9 Mars 2012. ; n° 172 ; 15 Mars 2012

déroulent dans un calme relatif. Mais cela ne doit pas inciter à tirer des conclusions hâtives. Les salafistes représentent un danger réel pour la démocratie, démocratie qu'ils ne reconnaissent pas, sans la moindre hésitation. D'autant plus que les déclarations des dirigeants nahdhaouis laissent planer beaucoup de doutes sur la nature des liens qui les unissent à cette mouvance radicale. Rached Ghannouchi les traite de ses fils et refuse d'employer la force contre eux. Ce qui explique le laxisme de son gouvernement face aux violences commises par ces derniers contre les journalistes, les intellectuels et les artistes. Par ailleurs si la Nahdha a exprimé par la bouche de son chef qu'elle est contre l'inclusion de la charia dans la constitution elle n'a pas encore dévoilée ses véritables intentions[1]. D'autant que le premier article sur lequel tout le monde semble d'accord, et qui figure déjà dans la constitution de 1959, est un article ambigu et ambivalent, et par conséquent il peut être interprété dans un sens comme dans un autre. Et comme le dit la maxime : « Satan se cache dans les détails ». Ne dit-il pas que la Tunisie est un Etat libre, indépendant et souverain ; sa religion est l'Islam, sa langue l'arabe et son régime la République.

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[1] Idem n° 182; 17 Mars 2012.

EU Values, Ethnic and Migration Issues

La France pendant l'entre-deux-guerres et la Quatrième République - la tentation de la construction européenne pour l'Europe centrale et orientale

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Abstract: As part of a more comprehensive research endeavour, regarding Romanian elites within the French exile, this study argues in favour of the attractiveness of France during the interwar period and the sinuous years of the Fourth Republic, in the eyes of intellectual elites from Central and Eastern Europe. The insight into a certain tradition the French Republic had in this respect, especially regarding its relations with Poland, is furthered by an analysis of the favourable factors making the Republic a safe haven for an anticommunist diaspora seeking an effective way of promoting its message, including the participation of Central and East-European states in the process of European construction. In spite of political instability, France maintained a key role on the stage of international affairs and gained new prominence with its decisive participation in European construction and other major cross-border initiatives.
Keywords: Elites, Eastern Europe, Fourth Republic, Anticommunism, Diaspora.

Il est hors de doute que la France s'est avérée un refuge pour une partie considérable de la diaspora des États communistes après la seconde guerre mondiale - et par ailleurs, il est à noter qu'il ne s'agit pas seulement des élites roumaines, mais aussi d'une couche intellectuelle notable provenant d'autres pays de l'Europe centrale et de l'est. L'avènement des régimes communistes dans cette partie du continent, bien que dénuée de légitimité et favorisée par un contexte géopolitique regrettable, a déclenché des mécanismes sociaux, politiques, économiques et même culturels dont les conséquences nuisibles se font remarquer jusqu'à présent. Or, à l'époque de l'arrivée au pouvoir des régimes totalitaires, le trauma collectif de la guerre était plus vif que jamais, ce qui a favorisé une transition relativement facile vers le communisme, malgré l'opposition importante d'une partie représentative de la société. Ce passage a été accompli par de diverses procédures, variant entre la falsification des élections, jusqu'à la guerre civile et à une pression insupportable pesant sur les épaules des élites politiques, universitaires et de la société civile, pour en citer seulement quelques segments représentatifs. Entre temps, l'Europe occidentale progressait sur la voie de la construction européenne et trouvait de nouveaux modes de coopérer, aussi sur le plan économique, que sur le politique.

[1] Investing in people! Ph.D. scholarship, Project co-financed by the SECTORAL OPERATIONAL PROGRAMME FOR HUMAN RESOURCES DEVELOPMENT 2007-2013 Priority Axis 1. "Education and training in support for growth and development of a knowledge based society". Key area of intervention 1.5: Doctoral and post doctoral programmes in support of research. Contract nr.: POSDRU/88/1.5/S/60185 – "INNOVATIVE DOCTORAL STUDIES IN A KNOWLEDGE BASED SOCIETY"

Pour s'approcher du thème de cette recherche, il faut mentionner que, malgré les explications de nature culturelle qui rendent plus compréhensible le choix d'une partie non-négligeable de l'intelligentzia roumaine de fuir le pays étouffé par les communistes, pour une nouvelle destination - la France dans bien des situations - il reste à éclaircir un aspect définitoire à ce propos. Il s'agit de la situation de la France, qui a rendu possible, voire souhaitable, ce transfert des élites, achevé par des méthodes des plus diverses et captivantes, et qui a favorisé la création d'un véritable pôle de débats au sein d'un noyau fraîchement établi, visant l'avenir si imprévisible à l'époque d'une Roumanie confuse et profondément lésée de plusieurs perspectives. Celles-ci sont en fait d'autres éléments de notre recherche qui valent la peine d'être exposés d'une manière objective, afin de rendre possible un fond abondant pour des comparaisons fructueuses entre les situations générales des deux pays mis en question, la Roumanie et la France, dans les premières années après la Seconde guerre mondiale.

Une image compréhensive de ce cadre comparatif favorisera l'explication du contenu de ce qu'on pourrait appeler un message représentatif de la diaspora roumaine de France, pourvu qu'il y en ait eu un, manifesté et accru au sein d'un espace plus ou moins accueillant à l'égard des idées anticommunistes et réformatrices. Si l'on constate l'existence univoque d'un tel message, ce que nous souhaitons par la suite de notre démarche scientifique, celui-ci serait tout à fait dénué de contenu en l'absence du milieu politique et social qui a apporté sa pierre à sa propagation, ou bien, d'autre part, qui a présenté également des obstacles provenus de diverses sources. Il se justifie donc la tentative d'établir une radiographie de la France post-1945, en parallèle avec une Roumanie ayant connu un contexte totalement différent, afin d'établir non seulement les raisons concrètes des élites d'opter pour la voie sinueuse de la diaspora, mais aussi la mesure dont ces personnalités ont trouvé le soutien désiré dans un contexte plus ou moins favorable à l'expression des idées anticommunistes, même à l'ouest du continent.

Il n'y a rien de surprenant dans l'affirmation que la France a été l'un des pays européens les plus touchés par le fléau d'une guerre commencée aussi à cause de l'échec d'une politique conciliatoire excessive pratiquée par les régimes franco-anglais pendant les deux guerres mondiales.[1] La machine de guerre allemande, reconstruite sous les yeux tantôt suspicieux, tantôt aveugles des alliés, vit son rêve vengeur s'accomplir avec la réitération du Blitzkrieg.

Pourtant, c'est justement de l'espace français que vinrent des attitudes remarquables pendant l'entre-deux-guerres, qui démontrent l'appétit des facteurs décisionnels de la République de s'impliquer de manière active dans les démarches nationales des États de l'Europe centrale et orientale et non seulement. Le tout a commencé par le soutien accordé par le gouvernement français au peuple polonais pendant l'Insurrection de Grande-Pologne, entre 1918 et 1919, ayant le but de reconstruire un pays qui avait été soumis à une troisième partition et qui avait vu une partie de son territoire conquis par l'Allemagne. La France avait d'ailleurs une tradition d'accueillir les citoyens polonais en leur offrant de la protection, comme il s'est passé avec les révolutionnaires de ce pays pendant le XIX^{ème} siècle.[2] Néanmoins, c'est justement cette implication qui aurait un rôle dualiste dans le parcours de l'Europe pendant cette période tumultueuse, vu que l'événement, bien que partiellement réussi du point de vue de la Pologne, n'a fait qu'amplifier un sentiment nationaliste allemand qui éclaterait avec l'avènement du nazisme. Les territoires perdus par l'Allemagne, tels la ville de Gdansk (Danzig) et le corridor polonais de Prusse Orientale, ont été des tâches qui ont alimenté le nationalisme[3], dont les conséquences sont

[1] Stephen R. Rock, *Appeasement in International Politics*, University Press of Kentucky, 2000, p. 78.
[2] Peter D. Stachura, *Poland, 1918-1945: An Interpretive and Documentary History of the Second Republic*, Éd. Routledge, 2004, p. 112.
[3] Amedeo Giannini, *The problem of Danzig*, Istituto per l'Europa orientale, 1932, p. 9.

facilement identifiables si l'on rappelle le fait que le commencement de la Seconde guerre mondiale coïncide avec l'invasion de la Pologne par la Wehrmacht d'Adolphe Hitler.[1]

La valeur de cette implication française dans les devoirs de l'Europe centrale-orientale s'avère très importante, vu que c'est une tendance qui va accompagner l'approche des gouvernements français visant le continent européen tout entier. La même tendance peut être démontrée lors de l'intervention de la France dans la guerre entre la Pologne et l'Union soviétique, qui s'est déroulée entre 1919 et 1921, ayant comme but le contrôle d'un vaste territoire retrouvé dans l'Ukraine et la Biélorussie d'aujourd'hui. Ainsi, ce qui est très important, c'est l'attachement du gouvernement français à l'égard de la lutte anticommuniste, un point fort dans notre investigation. Sous ce principe, à un moment où les alliés de l'État polonais étaient assez faibles, c'est la France qui a envoyé un groupe d'experts militaires comprenant 400 officiers, y inclus quelques Anglais, à l'aide des troupes commandées par Varsovie. Charles de Gaulle se trouvait parmi ces experts militaires.[2] En 1919, la France a organisé le transit du pays par l'Armée bleue, qui contenait également des volontaires français, arrivée au secours des Polonais et qui a abouti à la victoire de ceux-ci contre les bolchéviques, en 1920.

Les relations entre la France et la Pologne ont continué, avec l'arrivée des représentants français de la mission des Alliés en Pologne, comme Jean Jules Jusserand, qui ont contribué au maintien de la paix sous ce territoire où régnait la tension des récentes hostilités.[3] Par ailleurs, l'alliance militaire entre la France et la Pologne, signée le 21 février 1921, orientée contre la double menace de l'Allemagne et l'Union soviétique, continuée par les Traités de Locarno, a garanti la sécurité de l'État polonais pour presque deux décennies.[4] La démarche d'Aristide Briand, sous le mandat du président de la République, Alexandre Millerand, inaugurait par ailleurs une coopération entre la France et la Pologne qui avait le but de s'éteindre au-delà de l'aire militaire, vers une politique étrangère fondée sur des priorités synchronisées, une défensive commune contre les deux pôles de pouvoir qui avaient plus de chances de s'avérer hostiles, l'Allemagne et l'Union soviétique, aussi bien que des liens commerciaux privilégiés.

Allant plus loin, par les Traités de Locarno, on a accompli une démarche commune extrêmement pleine de significations entre les pays alliés de l'Occident et ceux de l'Europe centrale et orientale, afin d'établir des garanties visant le respect des stipulations des Traités de Versailles, mais aussi une tentative de renforcer les contacts avec l'Allemagne, qui devaient être repris. Par l'échec de garantir les frontières orientales de l'Allemagne et le soi-disant *cordon sanitaire* établi par la France pour assurer la protection de la Pologne et de la Tchécoslovaquie, le système de traités de Locarno n'a été, enfin, qu'un autre essai inconsistant d'implémenter un apaisement faible et dangereux.[5]

Malgré cette approche qui comporte une portion considérable d'indécision, la France n'a pas abandonné ses alliés orientaux, ni ses obligations antérieurement stipulées par des traités avec ces derniers. Ainsi, elle a signé de nouvelles ententes avec la Pologne et la Tchécoslovaquie, réitérant l'obligation de s'assurer une assistance militaire réciproque dans le cas où l'Allemagne aurait attaqué.

Néanmoins, il est à noter que l'attitude des occidentaux a abouti à une séparation de l'Europe qui se ressemblait, d'une telle mesure, ou bien qui préfigurait la chaîne d'événements qui allaient se passer deux décennies plus tard, lors de la tombée du *Rideau de fer*, suivant les contours

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[1] Thomas B. Buell, John N. Bradley, Jack W. Dice, John H. Bradley, *The Second World War: Europe and the Mediterranean*, Square One Publishers, 2002, p. 21.
[2] Norman Davies, *White eagle, red star: the Polish-Soviet war, 1919-20*, St. Martin's Press, 1972, p. 95.
[3] *Ibidem*, p. 173.
[4] Peter D. Stachura, *op. cit.*, p. 112.
[5] René Albrecht-Carrié, *France, Europe and the Two World Wars*, Librairie Droz, 1960, p. 106.

des frontières similaires à celles qui n'ont pas été garanties à Locarno.[1] Le gouvernement polonais a eu le mérite de saisir un tel danger dès que sa diplomatie a connu l'échec de ne pas imposer son point de vue en 1925, ce qui a mené à un déclin de ses relations avec l'État français et à un éloignement de la démocratie en Pologne.

La tentative d'achever une politique de défense commune entre la France et ses alliés orientaux, c'est-à-dire la Pologne et la Tchécoslovaquie, n'a jamais atteint un niveau satisfaisant, à cause des échecs mentionnés ci-dessus, auxquels s'ajoute un progrès très lent dans les échanges commerciaux entre ces pays. Seuls les contacts militaires étant valides et dans le contexte d'un réarmement de plus en plus évident de l'Allemagne nazie, le Traité militaire par l'intermédiaire duquel la France essayait de maintenir le rapprochement de l'Europe Centrale et Orientale a été renouvelé en 1939. De nouveau, c'est la Pologne qui a été choisie pour cette démarche, avec la Convention signée le 19 mai à Paris, entre le général Maurice Gamelin, le commandant de l'armée française, et le général Tadeusz Kasprzycki, le ministre des affaires militaires de la Pologne[2] - qui, ultérieurement, sera emprisonné en Roumanie sous le régime d'Antonescu, jusqu'à la fin de la seconde guerre mondiale.[3]

Les dispositions du Traité, confirmées par l'accord politique signé toujours à Paris entre les deux parties, le 4 septembre de la même année, lorsque les intentions d'Adolphe Hitler à l'égard de la Pologne étaient claires, exigeaient une intervention prompte de la France dans le cas d'une attaque, sous les délais de trois semaines. En dépit d'une intervention modeste et extrêmement tardive de la France après le commencement des hostilités, qui a marqué une période embarrassante avant la chute de Paris, restée dans l'histoire comme *le drôle de guerre*, ce qui est important pour notre démarche de recherche est ce qui s'est passé pendant cette courte période tumultueuse en ce qui concerne l'attitude des orientaux envers la France - en tant que refuge - et leur réception là.[4]

Pour détailler, il s'agit de la formation d'une armée polonaise en France, suite à la chute de Pologne, un mois après le commencement de la guerre. Comptant environ 80,000 soldats, ces unités militaires insuffisamment organisées ont représenté un modèle de résistance contre l'oppresseur et ont inspiré des tendances similaires dans la partie centrale et orientale du continent européen. L'implication de l'armée, conduite par le général Sikorski, dans la défense de la France lors du *Blitzkrieg* et même les tentatives d'avertir Paris à propos du danger imminent, témoignent d'une interaction tout-à-fait particulière entre les Français et les Polonais, qui deviendrait une source d'inspiration importante. Malgré l'échec de la défensive, l'armée de Sikorski a trouvé le refuge en Angleterre, ce qui peut être affirmé également du gouvernement polonais en exil, qui a lui-aussi opté pour Paris, entre 1939 et 1940, ensuite Angers, pour se réfugier ensuite de manière permanente à Londres, cette année-là.[5] La valeur symbolique de ces actions a été vraiment inspiratrice, si l'on tient compte seulement du serment du nouveau président de la Pologne, Raczkiewicz, prêté à l'ambassade polonaise de Paris, tandis que l'installation de Sikorski en tant que premier ministre du gouvernement libre polonais s'est passée toujours dans la capitale française.[6]

L'avènement de la seconde guerre mondiale a apporté une faille inévitable dans les relations entre la France et les États de l'Europe centrale et orientale, mais non pas nécessairement entre les Français et les peuples de cette partie du continent. Du point de vue de

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1 Archive des traités de l'Organisation des nations unies, http://treaties.un.org/doc/Publication/UNTS/Volume% 2054/volume-I-1292-English.pdf.

2 Marcel Baudot, *The Historical encyclopedia of World War II,* Éd. Facts on File, 1980, p. 391.

3 Jerzy Jan Lerski, *Historical Dictionary of Poland, 966-1945*, Greenwood Publishing Group, 1996, p. 246.

4 René Souriac, Patrick Cabanel, *Histoire de France, 1750-1995: Monarchies et républiques*, Presses Universitaires du Mirail, 1996, p. 201.

5 Marcel Baudot, *op. cit.*, p. 147.

6 Jerzy Jan Lerski, *op. cit.*, p. 489.

la République, le succès de l'attaque impitoyable des Allemands et la chute de Paris le 14 juin 1940 a arrêté pour une période de quatre ans toute action extérieure constructive de la France à l'égard de l'Orient, lui-même sous la pression du fléau nazi et menacé par celui représenté par les soviétiques. En revanche, les contacts et les collaborations secrets entre les Français et des réfugiés des pays de cette partie de l'Europe a continué au niveau obscur de la résistance. Pendant le régime de Vichy, où le maréchal Philippe Pétain n'était qu'un pion d'Hitler[1], c'est la politique menée en exil qui est reconnue comme représentative pour la volonté de la nation française, incarnée par l'ambition de Charles de Gaulle et ses déclarations inspiratrices à Radio Londres.[2]

Le dessein de notre recherche peut être suivi seulement après la libération de la France, grâce aux événements initiés le Jour-J (6 juin 1944) et culminant par la libération de la capitale le 25 août de la même année.[3] C'est la fin de la Seconde guerre mondiale et l'établissement de la Quatrième République qui constitue le contexte le plus important dans l'étude des interactions de la France avec l'Europe centrale et orientale, dans le contexte de l'immigration de l'intelligentsia des pays de cette aire vers l'Occident, la France en particulier.

Instituée de manière formelle le 13 octobre 1946[4], la Quatrième République a représenté la suite logique des changements intervenus suite à la chute de la Troisième République et le régime du *traître* Pétain. C'est une période qui a duré douze ans et qui a marqué l'une des époques les plus importantes pour l'avenir d'une Europe unie, dans le cas de laquelle la France s'est placée au centre d'une démarche historique, dont les conséquences s'étendent jusqu'à présent. La provocation la plus proéminente pour les facteurs décisionnels du nouveau système démocratique a été, certainement, le franchissement des tremblements dans tous les secteurs de la vie du pays qui ont été provoqués pas les atrocités de la guerre. Ainsi, les directions prises par la République se sont concentrées sur le rétablissement économique et l'achèvement d'une série de réformes sociales qui ont apporté de nouveau de la prospérité à la nation française, tout en accroissant l'attractivité du pays pour les vagues d'immigrants qui ont suivi.

Par exemple, dans un esprit qui est désormais devenu emblématique pour la France, la Quatrième République a instauré des mesures de protection sociale qui sont devenues des sources d'inspiration pour l'Europe occidentale[5]. Sur le plan politique, bien que les institutions du nouveau système aient eu le but d'assurer une stabilité et une prédictibilité tellement nécessaires, dans la pratique, l'alternance au gouvernement a été très sinueuse, de sorte que les dix premières années de la Quatrième République ont connu une moyenne de deux gouvernements par an - un nombre exagéré même dans les conditions existantes après la grande conflagration mondiale.[6]

L'un des problèmes les plus épineux qui sont apparus pour la diaspora des pays de l'est, à la recherche d'un refuge contre les nouveaux régimes oppressifs, dans un État français fraîchement issu des atrocités de la guerre, a été celui des forces politiques qui y ont eu le pouvoir. À cause du Gouvernement de Vichy, dirigé par le Maréchal Pétain, qui avait perdu toute trace de légitimité démocratique et qui était souvent regardé comme une honte nationale, la classe politique entière de la République a subi des changements massifs, lors de l'avènement du Gouvernement Provisoire (1944-1946) et de la transition constitutionnelle[7]. L'un des sentiments troublants était sans doute l'existence d'anciens collaborateurs avec les nazis dans les partis, ce qui n'a fait qu'amplifier la tension sur la scène politique française. Néanmoins, les tendances de

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1 René Souriac, Patrick Cabanel, *op. cit.*, p. 214.
2 *Ibidem*, p. 225.
3 Thomas B. Buell, John N. Bradley, Jack W. Dice, John H. Bradley, *op. cit.*, p. 342.
4 *La quatrième République: bilan, trente ans après la promulgation de la Constitution du 27 octobre 1946*, Université de Nice. Faculté de droit et des sciences économiques, Librairie générale de droit de jurisprudence, 1978, p. 208.
5 Jean Gacon, *1944-1958, Quatrième République*, Messidor/Éditions sociales, 1987, p. 71.
6 Jacques Fauvet, *Quatrième République*, Éd. A. Fayard, 1959, p. 137.
7 Emmanuel Cartier, *La transition constitutionnelle en France (1940-1945): la reconstruction révolutionnaire d'un ordre juridique "républicain"*, Éd. L.G.D.J., 2005, p. 266-267.

l'électorat ont laissé se distinguer deux forces politiques majeures pendant la période investiguée, notamment le communisme et le gaullisme.

Toutes les deux orientations posaient des soucis pour les élites, aussi nationales qu'étrangères, car elles s'attaquaient souvent à la démocratie. Pour exemplifier, le Général Charles de Gaulle (1890-1970) regardait avec une certaine dose de mépris le système multiparti et envisageait pour la France une configuration de l'exécutif basée sur un pouvoir augmenté du président, ce qui s'appelle dans les sciences politiques un système présidentiel. Le référendum du 5 mai 1946 a vu rejeter ce plan, qui proposait également l'instauration d'un parlement unicaméral, pour favoriser une approche orchestrée par le socialiste modéré Léon Blum, lors d'un second référendum organisé le 13 octobre 1946[1]. Ceci a marqué d'ailleurs l'installation *de jure* de la Quatrième République, caractérisée par le bicaméralisme et une balance du pouvoir inclinée vers le Président du Conseil.[2] En revanche, le Président de la République maintenait des prérogatives limitées, en tant que représentant de l'État et, dans certains cas exceptionnels, médiateur entre les branches du pouvoir. Certes, il a maintenu la fonction de commandant suprême de l'armée, mais s'est vu dénuer d'un nombre considérable de rôles détenus auparavant.

Il est à noter que la manière dont la séparation des pouvoirs a été définie par les créateurs de la Quatrième République, bien que démocratique en essence, paraissait être vouée à ne représenter qu'une étape de transition après la guerre, qui marque une stabilité et une réouverture vers la coopération parmi les différentes branches de l'État. Si le cabinet recevait un certain degré d'autonomie face à l'Assemblée nationale, il existait quand même les instruments du contrôle démocratique, qui limitaient les abus et maintenaient les mécanismes de la démocratie. D'autre part, l'idée d'un Président dont le rôle principal semblait être celui de nommer le Président du Conseil et qui était élu par le Parlement (Assemblée nationale et Conseil de la République) s'est avérée inefficace pour un État centralisé comme la France. En outre, l'instabilité au niveau du Conseil des ministres a été amplifiée par la dissolution de la coalition qui a marqué la sortie de la France du climat administratif spécifique à la guerre, appelée *le Tripartisme*.[3] Ce regroupement des communistes, socialistes et républicains (y compris des gaullistes, au début) a connu sa fin en 1947, avec le départ du Parti communiste français et la création, par Charles de Gaulle, du *Rassemblement du peuple français*, un grand mouvement d'opposition qui a collecté des représentants de tous les courants politiques majeurs de l'époque.[4]

Malgré ces défis, il serait incomplet de s'arrêter sur cette instabilité qui a caractérisé, sans doute, la configuration institutionnelle de la Quatrième République. Ainsi, pour suivre la rigueur chronologique dans la description de ce système politique, il faut s'arrêter brièvement sur une démarche qui changerait le cours de l'histoire européenne et, sans aucun doute, l'approche des intellectuels de l'Europe orientale envers la France, en tant que lieu de refuge et réflexion - il s'agit, bien sûr, du commencement de la construction européenne moderne. C'est au sein de la Quatrième République qu'on doit situer le Ministre des affaires étrangères français Robert Schuman, dont la déclaration historique du 9 mai 1950, prononcée sur l'inspiration créatrice de Jean Monnet, a finalement doué les idées séculaires d'unité du vieux continent d'une dimension institutionnelle et d'une voie ambitieuse, voire inouïe à cette époque-là, celle du supranationalisme.[5] La signature du Traité de Paris, le 18 avril 1951, a ouvert un nouvel espoir non seulement à l'occident, mais dans la pensée intellectuelle européenne prise en général, sous le mirage de l'impossibilité de la guerre entre les deux anciens ennemis, la France et l'Allemagne. Six pays ont répondu à l'appel ouvert de Schuman, afin d'organiser en commun, sous la direction

[1] R. C. Van Caenegem, *A Historical Introduction to Western Constitutional Law*, Cambridge University Press, 1995, p. 214-216.
[2] *Ibidem*, p. 217.
[3] Jean Gacon, *op. cit.*, p. 58.
[4] Jacques Fauvet, *op. cit.*, p. 113.
[5] Marie-Thérèse Bitsch, *Robert Schuman, apôtre de L'Europe 1953-1963*, Éd. Peter Lang, 2010, p. 246.

d'une *Haute autorité*, leur production des deux matières premières de la machine de guerre, notamment le charbon et l'acier - la France, l'Allemagne (la République fédérale d'Allemagne), l'Italie et les pays du Benelux (la Belgique, les Pays-Bas et le Luxembourg). L'opposition du sein de la France est venue, tout d'abord, de Charles de Gaulle, qui a exprimé de manière univoque sa méfiance à l'égard du principe du supranationalisme.[1]

Si cette réussite majeure de la Quatrième République, qui a mené dans les plus courts délais à une intégration progressive des espaces économiques des pays participants - grâce aux Traités de Rome de 1957 - est indéniable et a mis en marche un processus qui ne cesse de se faire ressentir dès lors, il est à noter que l'échec du système français connu lors de la Quatrième République a été aussi notable.[2] Ainsi, l'événement qui a troublé l'intelligentzia européenne et qui a eu des répercussions notables sur l'avenir de la France a été celui des *Événements d'Algérie* - un nom que nous contestons et que nous remplaçons par *La Guerre d'Algérie* (le terme a d'ailleurs été adopté de manière officielle le 18 octobre 1999, pour mettre fin aux controverses visant l'encadrement des violences[3]). Quoique les tensions coloniales franco-algériennes aient déjà atteint un niveau troublant vers la fin de la seconde guerre mondiale, c'est la période 1954-1962 qui a normalement défini les hostilités. Sans nous proposer d'insister sur les démarches ou la motivation du Front de libération nationale d'Algérie ou sur le passé colonial de la France et ses implications sur l'Afrique du nord, il faut quand même souligner l'ampleur de la crise déclenchée par ce conflit armé, non seulement pour l'Algérie, mais aussi pour la France. Parmi les expressions, sans doute valides pour une description correcte des événements, on retrouve la guerre civile en Algérie, le combat de guérilla, l'usage de la torture, le terrorisme, la décolonisation et l'insurrection.[4]

Troublant l'image internationale de la France et accaparant l'attention des médias internationaux, la Guerre d'Algérie a rouvert l'accès au pouvoir du Général de Gaulle, dans un climat général de tension. L'intégrité de la République menacée, le Président du Conseil, Pierre Pflimlin, se voit dénué d'alternatives et choisit de présenter sa résignation, le 28 mai 1958, suite à un rendez-vous avec de Gaulle, resté ambigu dans l'historiographie. Déjà depuis deux semaines, le Comité de salut public d'Alger, dirigé par le général Jacques Massu, avait fait appel au retour au pouvoir de Charles de Gaulle, tout en s'opposant au régime de Pflimlin et en menaçant les fondements de l'autorité française dans la capitale algérienne. Le ramassage des forces, y inclus armées, favorable au Comité, a déterminé de Gaulle à affirmer sa disposition d'assumer le pouvoir, le 15 mai.[5]

Face à la pression de la part de l'armée, le Président français, René Coty, a offert le siège du chef du gouvernement à de Gaulle, faisant un appel ferme à l'Assemblée nationale de donner à celui-ci le vote d'investiture. Voilà le commencement de la fin pour la Quatrième République, qui a ouvert la voie vers la révision constitutionnelle, comme de Gaulle l'avait voulu depuis la fin de la guerre. C'est le referendum du 28 septembre 1958 qui a consacré l'avènement de la Cinquième République.

Malgré les tremblements qui ont marqué, sans doute, l'ordre politique et administratif de la Quatrième République, il faut regarder cette période aussi du point de vue du statut des citoyens étrangers, qui ont obtenu le droit d'asile en France, dont les Roumains font l'objet de notre recherche. Afin d'établir les conditions dans lesquelles ceux-ci auraient bénéficié de la

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[1] Hardev Singh Chopra, *De Gaulle and European Unity*, Abhinav Publications, 1974, p. 27-28.
[2] *Ibidem*, p. 223.
[3] Loi n° 99-882 du 18 octobre 1999 relative à la substitution, à l'expression « aux opérations effectuées en Afrique du Nord », de l'expression « à la guerre d'Algérie ou aux combats en Tunisie et au Maroc ».
[4] Voir, pour plus de détails : Hartmut Elsenhans, *La Guerre d'Algérie: 1954-1962. La transition d'une France à une autre. Le passage de la IVe à la Ve République*, Éd. Publisud, 2000. Patrick Buisson, *La guerre d'Algérie*, Éd. Albin Michel, 2009. Daniel Lefeuvre, *Chère Algérie: la France et sa colonie, 1930-1962*, Éd. Flammarion, 2005.
[5] René Rémond, *1958, Le Retour de de Gaulle*, Éd. Complexe, 1998, p. 183-186.

possibilité d'émettre et de promouvoir un message démocratique pour la Roumanie, tombée dans les bras froids du communisme, il est à examiner les stipulations légales visant la condition des étrangers, voire des réfugiés, au sein de la République. La Constitution de 1946, qui est l'autorité suprême de la Quatrième République, met l'accent et consacre dans l'ordre de droit l'importance primordiale de la Déclaration des droits de l'homme et du citoyen de 1789, qu'elle élargit, afin d'inclure de nouveaux droits de nature sociale et économique (par exemple, l'instauration du salaire minimum, des bourses d'études et des droits de retraite sont parmi les mesures les plus importantes qui jouent un rôle dans notre argumentation aussi).

Dans son préambule, reconnu par le Conseil Constitutionnel comme obligatoire du point de vue juridique, dans une décision historique, le 16 juillet 1971[1], la Constitution ne se borne pas à itérer les libertés et les droits acquis à l'époque de la Révolution française, mais elle en consacre de nouveaux, avec le dessein de s'adapter aux temps modernes. Ce qui nous semble le plus significatif est, parmi d'autres, le droit d'asile[2], qui devient une partie du préambule et qui offre un soutien constitutionnel à la diaspora de l'Est, qui se retrouve à la recherche de protection. À part des droits qui tiennent à la protection sociale, le même préambule reconnaît la valeur exceptionnelle du droit international, obligeant ainsi la France à respecter les stipulations des traités et des conventions dont elle faisait partie à ce moment-là, à l'échelle continentale et globale. C'est une démarche encourageante, qui serait plus tard réaffirmée par le préambule de la Constitution de 1958 et qui donnait un espoir supplémentaire à la diaspora, d'autant plus que l'Article 82 garantissait les droits spécifiques des ressortissants d'un autre pays trouvés sur le territoire français.[3]

En ce qui concerne la politique extérieure de la France après la seconde guerre mondiale, c'est l'un des facteurs qui ont favorisé la perception par les élites roumaines de cet espace comme favorable à l'expression d'un message anticommuniste. Une raison à ce propos est le fait que la France a été impliquée dans toutes les grandes démarches sur la scène internationale occidentale, prenant une position contraire au pôle soviétique. L'intégration de la France dans l'Organisation du Traité de l'Atlantique Nord, bien que sinueuse pendant le mandat de Charles de Gaulle, qui a retiré le pays du commandement militaire[4], a représenté une garantie de l'affiliation française au camp des pouvoirs démocratiques. En plus, le pouvoir de la République sur le plan mondial a été démontré également par son inclusion dans le Conseil de sécurité de l'Organisation des nations unies, en tant que membre permanent à droit de véto, à côté de la Grande Bretagne, des États-Unis, de l'URSS et de la Chine. En tant que pouvoir atomique, la France a joué un rôle actif dans tous les grands moments de la politique internationale après la guerre, ce qui lui conférait un statut de premier rang. C'est une raison qui ne doit pas être laissée de côté dans une analyse ultérieure de l'impact du message anticommuniste promu par les Roumains, ayant comme point de départ la République française.

Pour conclure, le paysage ne serait pas complet en l'absence de l'évocation du rôle de la France dans le processus de la construction européenne moderne, dont c'était l'un des six pays fondateurs, mais y ayant une participation tortueuse, si l'on prend en considération la crise de la chaise vide (juillet 1965 - janvier 1966)[5]. Malgré l'existence dans le pays de plusieurs factions

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1 Nadine Poulet-Gibot Leclerc, *Droit administratif: Sources, moyens, contrôles*, Editions Bréal, 2007, p. 46-47.

2 Préambule : « Tout homme persécuté en raison de son action en faveur de la liberté a droit d'asile sur les territoires de la République. »

3 Article 82 : « Les citoyens qui n'ont pas le statut civil français conservent leur statut personnel tant qu'ils n'y ont pas renoncé. Ce statut ne peut en aucun cas constituer un motif pour refuser ou limiter les droits et libertés attachés à la qualité de citoyen français. »

4 Maurice Vaïsse, *La France et l'OTAN, 1949-1996*, actes du colloque tenu à l'École militaire, 8-10 février 1996, à Paris, Éd. Complexe, 1996, p. 227.

5 Jean Marie Palayret, Helen S. Wallace, Pascaline Winand, *Visions, Votes, and Vetoes: The Empty Chair Crisis and the Luxembourg Compromise Forty Years On*, Éd. Peter Lang, 2006, p. 45-46.

communistes, dont on peut citer la Gauche prolétarienne, dont des intellectuels comme Jean-Paul Sartre faisaient partie, c'est la droite qui a fait les règles de la Cinquième République, même avec le successeur du Président de Gaulle, Georges Pompidou. En relançant la position européenne de la France par le sommet de La Haye (1-2 décembre 1969), le nouveau chef d'État a montré une ouverture remarquable vers l'Europe unie et a cultivé une diplomatie plus efficace[1]. La position de la France ne s'est perdue alors non plus sous la coupole américaine-britannique, car la France a gardé une voix propre dans le dialogue avec ses alliés occidentaux. Le même cours favorable à l'approfondissement de la construction européenne a été continué par le successeur de Pompidou, Valéry Giscard d'Estaing, qui a fait preuve également d'un appétit bienvenu pour le développement des droits des citoyens, et ensuite par François Mittérand.

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[1] David Reynolds, *Summits*, Éd. ReadHowYouWant.com, 2010, p. 208-209.

National Minorities in Estonia: 20 Years of Citizenship Policies

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Abstract: Since after collapse of Soviet Union in 1991, Estonia was a permanent target of Russian and, in some cases, international criticism with regard to the situation of the Russian minority and the difficulties of its integration in the social fabric of the new Estonian State. The issue will be analyzed under the light of the citizenship policies put in place by Estonia since the regaining of independence and their effects.
Keywords: Estonia, Minorities, Citizenship.

INTRODUCTION

After collapse of Soviet Union in 1991, Estonia was a permanent target of Russian and, in some cases, international criticism with regard to the situation of the Russian minority[1] and the difficulties of its integration in the social fabric of the new Estonian State. Some Russians, who live in Estonia also believe that they are discriminated. What are the facts behind such assessment? And even if there was no factual basis, why do they have such a perception? It is not an easy question to answer because of several reasons, involving historical profiles in relation to the long Soviet occupation of Estonia but also the current difficult diplomatic relations between Estonia and Russia.

One of the main critical issues in this respect is the one of the so called "gray passports" (persons with undefined citizenship according to the official Estonian terminology) the large number of residents of Estonia that were not in possession of any citizenship (for the largest part Soviet settlers and their descendents) when the new independent state decided for the automatic (re-)acquisition of Estonian nationality, by reinstating in 1992 the Citizenship Act of 1938, only for those who held it before the Soviet occupation and their descendents. The options left to the other residents were to apply for naturalization, gain the citizenship of their country of origin, Russia in the predominant part of the cases, or maintain the undefined status.

The figures were, indeed, staggering: in 1992, almost one third of the population (32%) citizenship's status was undefined[2].

The purpose of these brief notes is to evaluate, 20 years after the renewed Estonian independence, in the light of the latest demographic figures picturing the country's population at 31st December 2011, the effects of the policies and legal acts on citizenship and the implications in relation to the claimed discrimination of non-ethnic Estonian minorities.

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[1] For a short yet effective account of the issues connected to the presence of a large Russian minority in Estonia and their historical background cf. William Hernád, *The Russian Minority in Estonia*, available at http://www.culturaldiplomacy.org/pdf/case-studies/russian-minority.pdf (last checked on 21st May 2012). The large presence of Russian-speakers in the country (from 26000 to 602000 individuals in the period between 1945 and 1989, from 2.7% to 39% of the population, cf. R. Vetik, *Ethnic Conflict and Accomodation in Post-Communist Estonia*, in *Journal of Peace Research 30* (3): pp. 271-280) derives from the policies of "russification" implemented by the Soviet Union, that included the settling of people coming from other regions of the Union in Estonia.

[2] Cf. P. Järve and V. Poleshchuk, *Report on Estonia*, EUDO Observatory on Citizenship, Robert Schuman Center for Advanced Studies, European University Institute, 2010, available at http://eudo-citizenship.eu/docs/CountryReports/Estonia.pdf (last checked on 21st May 2012), p. 1.

ESTONIAN LEGAL ACTS AND POLICIES ON CITIZENSHIP, INTERNATIONAL CRITICISM AND INTERNAL TENSIONS

The most reliable way to start providing elements for an answer to the questions posed above is to give an account of the evaluation of the issue at stake given at the international level[1] and then compare it with the actual Estonian legislation on citizenship and its effects based on the most recent demographic data available today. Indeed, the only recurring criticism received by Estonia in its short independent history from the international community, in relation to human rights standards, is regards minority issues and the high presence of stateless persons living in its territory.

Already in October 1993, the non-governmental organization (NGO) Human Rights Watch issued a report titled *Integrating Estonia's Non-Citizen Minority*[2] that, while noticing some possible points of improvement, did not find any systematic or serious abuses with regard to the laws and policies on the acquiring of citizenship. In 1995, Estonia enacted the new Citizenship Act[3] that maintained the focus on the knowledge of Estonian language as a prerequisite for acquiring citizenship by way of naturalization but made harder the related examinations.

Amendments in the following years have been passed to simplify naturalization procedures. For instance, the one passed by the *Riigikogu* (Parliament of Estonia) on 10th of December 1998 to ease the granting of citizenship to children born in Estonia by stateless parents was particularly welcomed by the international community[4]. According to the new rules, stateless children under the age of 15 born in Estonia could acquire Estonian citizenship through a declarative procedure.

Other legal measures taken in the following years to favor the process of reduction of the number of stateless residents in the country include the waiving, since 2002, of the citizenship test for people with disabilities and the full reimbursement of the expenses sustained for language training in order to pass the test, according to the new article 8(1) of the Citizenship Act entered into force on 1st of January 2004.

After Estonia joined the European Union in the year 2004[5], the debate and tensions in relation to citizenship laws and policies lost force within the international community[6] but continued strongly internally, fueled also by Russia's continued strong stand on the issue.

A major event, of both practical and symbolic significance, boosted further such internal tensions in 2007. In February, the Parliament introduced a law that prohibited the public display of monuments glorifying the Soviet ruling of the country. Accordingly, in the following April, the government decided to relocate a World War II Red Army memorial, the bronzed statue of a soldier, from the center of Tallinn to the military cemetery. This led to the vibrant protest of the Russian-speaking minority, trying to stop the removal, turning into street clashes, causing the death of one person and several wounded, while three hundred people were arrested. The Russian government used the occasion to criticize once again Estonian authorities[7].

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[1] The main sources that will be considered are major NGO Reports and documentary part of procedures within the main human rights fora of international organizations.

[2] Available at http://www.hrw.org/sites/default/files/reports/ESTONIA93O_0.PDF, last checked on 21st May 2012.

[3] English version available at http://www.legaltext.ee/text/en/X40001K6.htm, last checked on 21st May 2012.

[4] The related press release issued by the European Union (13922/98) is available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/ACF2D5.htm and the one of the OSCE High Commissioner on National Minorities can be found at http://www.osce.org/hcnm/52694 (last checked on 21st May 2012).

[5] The issue of the high number of stateless people was widely discussed in the preparatory negotiations for Estonia's accession to EU.

[6] With the notable exception of the activity of the office United Nations' High Commissioner for Refugees, that has continued to underline the issue of the high number of stateless people resident in Estonia, see below.

[7] Cf., for instance, the BBC news articles *Estonia seals off Soviet memorial* (http://news.bbc.co.uk/2/hi/europe/6597497.stm , last checked on 24th May 2012) and *Estonia removes Soviet memorial* (http://news.bbc.co.uk/2/hi/europe/6598269.stm , last checked on 24th May 2012).

On the other hand, the office of the United Nations' High Commissioner for Refugees (UNHCR), the UN Agency that has been tasked by the General Assembly (UNGA) to tackle internationally the issue of statelessness[1], maintained some level of international interest on the issue of statelessness in Estonia also in recent years and keeps doing so. An important example is the submission the UNHCR made in July 2010 in relation to the examination of Estonia's human rights performance within the Universal Periodic Review (UPR)[2], the mechanism of the UN Human Rights Council that since 2006 provides for a general evaluation, every four years, of the human rights record of all UN member States. The submission of UNHCR, in particular, urges Estonia to accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness and enact reforms that would provide Estonian citizenship for every child born on the territory that would be otherwise stateless. Other requests are the implementation of campaigns to encourage stateless persons to apply for Estonian citizenship and a relaxation of the language requirements of the citizenship test, especially for the elderly, the main component in numerical terms of the stateless residents of Estonia.

NEW FIGURES AND RIGHTS OF THE STATELESS

The number of stateless persons in Estonia is steadily decreasing. Since the restoration of Estonian independence more than 153,000 people have received Estonian citizenship. Some permanent residents of Estonia have also received Russian, Ukrainian or other countries' citizenship. The statistic is self-evident - in 1992 the number of stateless persons in Estonia was 32% of the Estonian population, in 1999 - 13% of the Estonian population was stateless. Currently, the number of persons without citizenship is less than 7%[3] of the Estonian population.

According to recently published statistics the number of persons with undefined status has decreased to 93774 persons at the date of 31st December 2011[4]. The data for the year 2011 also shows an encouraging trend: notwithstanding the decreasing number of stateless individuals (and, by logical consequences, of people eligible to apply for naturalization) in 2011, for the first time since 2005, the number of naturalized people (1513) is higher than in the previous year. In 2010, 1184 persons got Estonian citizenship while the highest number of naturalized (22773) goes back to the year 1996, shortly after the new Estonian Citizenship Act was introduced in 1995.

Looking at what practically means to be a permanent resident of Estonia with undefined citizenship status, it can be noted that in terms of freedom of movement, they enjoy even more possibilities than Estonian citizens. This is because the alien's passport issued by Estonia allows free visa travel within the Schengen area and, at the same time, following a decision of the Russian government of 2008, stateless Estonian residents had visa requirements to enter the Russian territory waived, a possibility that is not given to Estonian nationals.

In Estonia, residents with undefined citizenship enjoy, for instance, the same tax benefits and conditions for health care of citizens. The most critical point of difference is political participation[5].

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[1] Cf. Resolution 3274 of 1974 that tasked the UNHCR with examining the claim of individuals in relation to the rights recognized by the Convention on the Reduction of Statelessness. Starting from 1994, the UNGA requested the UNHCR to broaden its activity in relation to statelessness, for instance with A/RES/49/169 of 1995 that requires the UNHCR to actively promote the accession to the international legal instruments aimed at the reduction of statelessness and support States in their implementation.

[2] The text of the cited submission is available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/EE/UNHCR_UNHighCommissionerforRefugees-eng.pdf , last checked on 23rd May 2012.

[3] The source of all the demographic data in the text is the Population Registry of the Estonian Ministry of Interior.

[4] It has to be noted, on the other hand, that deaths make a sizeable percentage of the decrease, cf. the article published on the Estonian Public Broadcasting website on 24th January 2012, *Statelessness declining fastest through deaths* (available at http://news.err.ee/society/8a444447-9722-4703-a549-3e4c804e8b93 , last checked on 30th May 2012).

[5] For an analysis of the issue, see K. Kallas, *Political Participation of National Minorities in Decision Making Process: Case of Estonia and Latvia*, Paper presented at the international workshop focusing on Effective Political, Economic & Social Participation of Minorities, Closing conference 29 – 30 September 2008, Forum Minority Research Institute, Šamorín, Slovak Republic,

Since 1996, non-citizen residents have the right to vote in local elections, but the right to run for and vote in national elections is reserved for Estonian nationals.

CONCLUSIONS

There are several practical and non-practical reasons why the remaining persons with undefined citizenship have not applied for Estonian citizenship.

We suggest the following to be the main ones.

In the first place, the majority of stateless people who wished to obtain Estonian citizenship, have received it already. The remainder very often simply do not have the intention to get it. In recent years some pragmatic considerations were added. As reminded above, stateless persons with Estonian residence permit can travel without visas to the Schengen zone countries, as well as to Russia. Very often stateless persons have relatives in Russia, a fact that makes for them this visa free travel possibility essential. In general, they enjoy extensive rights. Many of them just do not feel the practical need to gain Estonian citizenship or, anyway, the one of their country of origin that they would anyway have the right to obtain.

A second reason is the lingering of the imperial mentality created by the former Soviet Union, a factor particularly significant within the elderly population of Russian heritage, which as stated above makes the largest part of the stateless residents of Estonia. In the Soviet Union, Russians were considered and treated as a leading nation. Even if officially all nationalities were equal, practically Russians and their culture were always more privileged. When Russian settlers and their descendents were suddenly in a completely changed situation after the renewed Estonian independence, this resulted in a certain collapse of identity, a viewpoint which is incidentally favored by the pro-Kremlin Russian media and authorities who continuously claim that Estonian policies are discriminatory towards minorities[1]. Ca. 61% of the remaining stateless persons and 69% of Russian citizens who are permanent residents in Estonia said they did not want to get Estonian citizenship, as they think it is humiliating to pass the language exam[2]. Once again, it should be underlined how this group is made mostly of elderly people that lived most, if not all, of their lives in Estonia as part of the Soviet Union, with their mother tongue, Russian, used as official language. In this respect, as reported *infra*, it would be very difficult to deem Estonian policies as overly restrictive and/or discriminatory if compared, for instance, with the current citizenship policies of other EU member states, showing a trend towards hardening the requirements for naturalization with a clear focus on language testing as the main "selection tool".

A third connected aspect relates to the fact that some stateless persons believe the naturalization procedure to be very complicated. As said above, provided that the other requirements are met, there are two exams to be passed: a language test (B1) and basic questions about the Estonian Constitution (it is possible to consult the text of the Constitution during the exam). Furthermore, as reported above, those who successfully pass the tests are paid back the money they had spent on the language courses. Looking at the practice of other European countries, it is easy to notice a trend towards the raising of the threshold for naturalization requirements in relation to the testing of proficiency in the national language, linked to the growing immigration and political attention to it. Clear examples of such a trend are countries like the Netherlands[3], Germany[1], France[2] and Russia itself. Considering this, it can be argued that the

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available at http://www.niton.sk/documents/2-538-5241-kristina_kallas_iii.pdf, last checked 31st May 2012.

[1] See in more detail *infra*.

[2] Полещук В., «*Неграждане в Эстонии*», издательство «Европа», М., 2005, стр.30

[3] The testing of language knowledge was introduced for the first time by the Nationality Act of 1984, requesting for the applicant for naturalization just to be able to sustain a conversation on everyday matters. The standards for testing were unclear and applied differently within the country. A Royal Decree, in application of the new Nationality Act of 2003, set a formal language testing procedure aimed at acknowledging the more restrictive requirement of sufficient oral and written knowledge of the Dutch language.

criticism towards Estonia in relation to its naturalization procedure derives from political reasons, in the case of Russia, or the objective problem of the high number of stateless residents, but not from the use of standards different than the ones of some of its EU partners, standards that do not receive, at least in the official fora of the international community, accusations of being discriminatory.

As hinted above, a major role in the perception of the Russian-speaking minority on the issue is played by the Russian mass media campaigns against Estonia's treatment of its Russian-speaking minority, in many cases directly voiced by President Putin[3]. It has to be underlined, that, indeed, the lack of Estonian language skills within stateless residents is at the core of the controversy on citizenship policies and this also determines the circumstance under which they do not have access to Estonian media and are exposed only to Kremlin media channels broadly represented in Estonia. Thus they hear only one of the bells, constantly labeling them as victims of discrimination. The Russian criticism towards Estonian treatment of its minorities can be seen as hypocritical and defined as propaganda if compared with the attitude of the Russian government and media towards other countries, seen as more politically close. Indeed their targets are always Latvia and Estonia while ex-USSR states in Asia are almost never criticized by Russia for their mistreatment of the Russian minority.

It is difficult to find facts to argue the existence of discrimination on an ethnic basis in Estonia and surely the legal system provides the means to be protected from it, equally available to all. A part of the Russian-speaking minority has declared its distrust of Estonian courts, but even in that case there would be the possibility to apply for legal remedy to the European Court of Human Rights. The fact that, as of today, the Court of Strasbourg has never condemned Estonia for a case involving discrimination can be seen as a sign of a lack of substance sustaining the claims against inequality in the Estonian legal system.

To compare let us analyze the situation with Ukrainians in Estonia. Ukrainian minority here is the second biggest minority after Russians - 2,1 % of the whole Estonian population. There are strong Ukrainian organizations here, the Ukrainian Cultural Centre, the Greek-Catholic church (the Uniate Church), and a school for children which is also open to Estonians - it is like a museum, a very interesting place. The Centre was supported by both the former president Arnold Ruutel and the current president Toomas Hendrik Ilves, who visited its seat several times. The Cultural Centre obtains a very essential support from the Estonian government – much more than Ukrainian cultural centers in the neighboring states.

A phenomenon to be considered is the fact that a number of Ukrainians in Estonia during Soviet Union times have been also heavily assimilated to Russians and lost their Ukrainian identity. They do not speak Ukrainian, they have a mentality more similar to the one of Russians. Those Ukrainians who retained their Ukrainian identity, appear to be well integrated as other minorities like Tatars, Georgians or Jews appear to be, there are no reports of widespread group related problems. While the issues related to the integration of the Russian minority remain to be solved, important step forward in this respect can be registered. Marju Lauristin, Estonian politician and social scientist, has recently underlined[4] how the situation has dramatically changed since 2007 and

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[1] The Immigration Act of 2004 introduced the requirement for naturalization of proof of sufficient knowledge of the German language.

[2] Already since 1927, the applicant for naturalization had to prove to be sufficiently fluent in the French language through a short interview with a civil servant. Since 1st of January 2012 (Decree 2011-1265), applicants have to hold a diploma given by an institution recognized by the state acknowledging proficiency at B1 level of the Common European Framework of Reference for Languages.

[3] For instance, most recently in an article titled *Russia and the changing world* which appeared on *Moskovskie Novosti* on the 27th of February 2012 (english translation provided by Russian state-owned news agency RIA Novosti at http://en.ria.ru/analysis/20120227/171547818.html, last checked on 21st May 2012).

[4] See the article on the Estonian Public Broadcasting website of 26th April 2012, *5 years later: Bronze Soldier riots not likely to occur again, says Professor*, available at http://news.err.ee/society/0287a0b7-9dfd-4d28-9bae-d7f8f5ddcfa2, last checked on 6th June 2012.

that the Bronze Soldier issue has actually brought many positive developments by creating the need for a more open dialogue between the communities. A key point can be seen in education and, more specifically, the reforms made with regard to Russian-language schools in order to give the means to young Russian-speakers not only to be integrated in the Estonian society from a large point of view but especially to be competitive in the Estonian labor market.

In conclusion, notwithstanding many difficulties and setbacks, the need for adjustments and the still high number of stateless residents, Estonian policies on citizenship, read chronologically within the 20 years' of independence and in combination with the results on integration, are becoming more and more effective towards the goal of a harmonic and functioning society and the overcoming of the consequences of the country's still recent painful history.

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Integration and Ethnic cohesion of the Estonian society

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Abstract: This chapter discusses the main trends and central problematic issues of the Estonian ethnic minority integration policy. The review includes assessment of the legislative and institutional changes, civil and political participation, socio-economic conditions and educational policy. Based on the analysis of the statistical data, sociological reports, review of printed mass media publications and conclusions of the international human rights monitoring bodies it is argued that recent developments in the sphere of cultural-linguistic integration are rather positive while developments in the socio-economic and civil-political spheres are negative. There are growing differences among ethnic groups in terms of political participation and trust, socio-economic conditions and educational achievement.

Keywords: Estonia, Ethnic minorities, Integration policy.

The issues of inter-ethnic relations continue to attract considerable attention in the Estonian society as well as at the international level.[1] According to ethnic background Estonian population is divided as following: 69% Estonian, 26% Russian and 5% other nationalities.[2] Against this background, Estonia largely managed to avoid violent,

[1] The shorter version of this paper has been published in the Estonian Human Rights Report, Tallinn, 2011.

[2] Integration Fact Sheet 2010, Eesti Koostöö Kogu, avaialbe at www.kogu.ee/public/Integration_at_a_glance_2010.pdf [all internet links in this article last accessed on 01.02.2012]

ethnicity based manifestations, except the 2007 Bronze solder events. At the same time, it is difficult to deny that ethnicity does play a role in the socio-economic and political opportunity structures. Where belonging to ethnic minority groups is rarely an advantage.[1] This chapter aims to highlight the main trends and some of the central problematic issues discussed in the Estonian society.[2]

The *2010 Integration Monitoring Report* (2010 IMP) identified a number of positive trends. Thus, interactions between ethnicities and proficiency in Estonian language of ethnic minorities during last five years have increased.[3] The level of political activity and political values among ethnic groups become increasingly shared.[4] The public visibility of cultural projects and support of cultural activities of various minority groups is also gradually increasing. An internet based portal *Etnoweb* financed by the Ministry of Culture was lunched aiming to increase awareness on the activities of cultural societies and to facilitate exchange of information in the cultural space of Estonia.[5]

Conversely, the statistical data and surveys repeatedly indicate important social-economic gap between ethnic groups and very low trust in political institutions by ethnic minorities. In fact, recently a number of Estonian sociologists and political scientist including, Pettai, Hallik, Toomla, Vetik and Heidmets have publicly urged to re-consider the state policy on inter-ethnic integration and to take urgent steps to remedy growing socio-economic divide and the brain drain.[6] Until now, this call for action remains mainly at the academic level with still modest impact on the policy and political levels. Nonetheless, positive trends in public opinion are notable. Thus, the attitudes of ethnic Estonians towards cooperation with ethnic minorities have become more positive. The percent of ethnic Estonians (56,8%) who consider that politics of the Estonian government disturbs cooperation between ethnic communities has also increased.[7] Radical positions in the public sphere among ethnic groups are becoming less frequent. However, at the political level, regrettably, elites and Estonian mainstream media are still rather frequently rely on ethnic stereotyping and consider ethnic diversity as a threat rather than opportunity.

LEGISLATIVE AND INSTITUTIONAL CHANGES

The Citizenship Law and naturalization procedures, requirements on the language proficiency stipulated in the Language Act as well as competencies of the Language Inspectorate, in 2010 remain largely unchanged.

After 2009 state institutional reforms, the Ministry of Culture continued to be a principle ministry responsible for the coordination of the integration policy. Estonian Integration Programme 2008 – 2013 (EIP) is the central policy document determining the aims of the

[1] Saar, E et.al. (ed.) *Immigrantrahvastik Eestis. Immigrant Population in Estonia.* (2009) Eesti Statistika, Tallinn.

[2] Contrary to the definition of the national minority under national law that limits the scope of concerned residents to those who hold Estonian citizenship, in this report in accordance with international law practice, ethnic minorities defined as all permanent residents irrespective of their citizenship whose mother tongue and/or ethnicity is other than Estonian.

[3] Vetik, R et.al. (ed.) *Uuringu Integratsiooni Monitooring 2010 Raport* (2010) Rahvusvaheliste ja Sotsiaaluuringute Instituut, Tallinn, pp. 3-21.

[4] Toomla, R, Mitte-eestlaste ühiskondlik-poliitiline aktiivsus ja osalemine (2010), Tartu Ülikool, Riigiteaduste Instituut, Tartu.

[5] www.etnoweb.ee

[6] See e.g. Toomla (fn. 4); Klara Hallik, Политика натурализации у нас провалилась, Estonian Pubic Broadcasting News (in Russian language version) published on 22.11.2010 available at http://rus.err.ee/radio4/5f5aca44-fd02-4b16-ae3a-74eb1bea4856; Социолог: государство должно задуматься о роли русских в Эстонии, Estonian Public Broadcasting News (in Russian language version) published on 28.09.2010 available at http://www.uudised.err.ee/index.php?26216054; Raivo Vetik, R, Ühtsustunde ohtlik puudumine, Postimees, published on 15.09.2010 available at http://www.postimees.ee/?id=313168

[7] *Integration Monitoring Report*, ibid. fn. 3, p. 44.

integration process. Integration and Migration Foundation Our People (MISA) is the implementing agency of the EIP and the European Fund for the Integration of Third-country nationals. From October 2010, Mari-Liis Sepper is the Gender Equality and Equal Treatment Commissioner. The Commissioner monitors compliance with the requirements of the Gender Equality Act and Equal Treatment Act that was after long prolongations finally adopted in 2009.[1]

The 2010 budget of the EIP consisting of State and international contributions was 128,6 million kroons (8,22 million EUR).[2] According to EIP 2010 Implementation Plan the central priority was to increase Estonian language proficiency among ethnic minorities with special attention to the projects enhancing cooperation and joint media and cultural sphere, which promote contacts and understanding between people of different linguistic and cultural backgrounds. The strong emphasis on cultural activities and Estonian language learning is also reflected in the 2010 EIP budged distribution: 52% on education and cultural integration; 20% social and economic integration; 9% legal and political integration; and 19% administration, publicity, international cooperation and evaluation of the agency.[3]

In the Russian language media the EIP is strongly criticized. The EIP is often considered as a mere rhetoric rather than a real attempt to promote a real sense of integration in the Estonian society. It is argued, that integration in practice is reduced to the imposition of majority language and historical understandings on ethnic minority groups with insufficient efforts to foster two-way integration process involving ethnic Estonians[4] or take steps on the political level to improve socio-economic and political opportunities of ethnic minority groups. This means, that although proficiency in Estonian language is considered important by ethnic minorities[5] they do not share a central assumption of the EIP that a mere improvement in the proficiency of the Estonian language would result in a more cohesive and less divided Estonian society.

CIVIL AND POLITICAL PARTICIPATION

The naturalization rate among ethnic minorities in 2010 continued to fall as well as trust in political institutions and satisfaction with the state of democracy in Estonia.

According to 2010 data on legal status of the population: 24 % of ethnic minorities are stateless, i.e. not holding citizenship of any country, 50% hold Estonian citizenship, 23% citizenship of Russian federation and 3% citizenship of other countries.[6] Still 102,338 residents in Estonia (7,5% of total population) do not have citizenship of any country[7] and thus, do not enjoy full political rights. The rates of naturalization from 2006 are increasingly falling.[8] In 2010 only 1,184 individuals received citizenship thorough naturalization procedure.[9] The number of stateless residents is unlikely to decrease[10] unless citizenship law is liberalized. In relation to the

1 Gender Equality and Equal Treatment Commissioner official internet page http://www.svv.ee/index.php?t=1

2 Reimaa, A, Information Letter 6/2010 (in Estonian), Ministry of Culture, Department of Cultural Diversity, p. 2.

3 Ibid. fn.2.

4 For strong criticism see for example Irina Kablukova, В гробу я видела такую интеграцию!, *День за Днём* (Russian language newspaper) published on 03.11.2010, available at **http://www.dzd.ee/?id=336155**. See also **Deniss Boroditš: tundmatud naabrid, Postimees, published on 25.05.2010; Интеграция умерла! Да здравствует Интеграция! Published on 05.11.2010, Internet Forum Podmoga, Available at http://www.baltija.eu/news/read/13405.**

5 *Integration Monitoring Report*, ibid. fn. 3, p. 19-21.

6 *Integration Fact Sheet 2010*, ibid. fn. 2

7 *Integration Fact Sheet 2010*, ibid. fn. 2.

8 Police and Boarder Guard Statistical data on citizenship and migration, available at http://www.politsei.ee/dotAsset/163198.pdf

9 Ibid, fn. 8.

10 For attitudes among ethnic minorities see *Integration Monitoring Report*, ibid. fn. 3, p. 92; see also Local Russians Distrustful of Government, Estonian Public Broadcasting (in English language version) published on 15.09.2010 available at http://news.err.ee/politics/7924607e-9f53-45b3-923e-4acc81005d35

naturalization policy ethnic groups have opposite opinions "most Russian-speakers still heavily criticize the naturalization policy as overly restrictive and a violation of human rights, while ethnic Estonians hold that the national citizenship politics are normal and adequate by international standards.".[1]

Sociologist Klara Hallik discussing current citizenship policy concludes that largely the 1995 adopted naturalization policy was wrong and could be considered as a failure.[2] It is a failure because the adopted citizenship regime resulted in the high proportion of ethnic minorities with Russian Federation citizenship and even more the substantial group of stateless residents.[3] Moreover, she points that from the political point of view, the fact that naturalization rates almost stopped is an indication of the protest. The protest takes a form of a collective resistance to accept the state citizenship policy.[4] Hallik explains "We [Estonians] have imposed conditions for naturalization, which are completely normal in all states, on those people that in fact are members of our society permanently living here".[5]

Political attitudes among ethnic groups are "surprisingly similar" as well as interest in national politics and levels of political participation.[6] At the same time trust in political institutions and satisfaction with state of democracy in Estonia is drastically different. While ethnic minorities assign high values to democratic freedoms in general, 2/3 (!) of the ethnic minorities are disappointed with democracy in Estonia (20% are very much disappointed and 50% rather disappointed).[7] Toomla concludes that this is a very alarming indicator and something must be done immediately.

The disappointment with the state of democracy in Estonia is also reflected in the extremely low, and in comparison to 2008 further diminished, trust in political institutions. Only 7 % of ethnic minorities trust parliament; 9% trust government; 14% president and 31% police. The trust in public institutions among Estonians is also rather low (18%; 32%, 67% and 60%) but still considerably higher than among ethnic minorities.[8]

SOCIO-ECONOMIC CONDITIONS

The socio-economic gap between ethnic groups continued to grow coupled with rather pessimistic outlook among ethnic groups for the economic well being and quality of life in the future.

The survey measuring self-evaluation of personal economic hardship found that only 6% of ethnic minorities live well with the current income and can save (in comparison with 21% of Estonians).[9] To somehow manage with current income can 44% of ethnic minorities and 51% of ethnic Estonian. While 38% of ethnic minorities have stated that they find it difficult to manage

[1] Poleshchuk, V and Järve, P,(2009) EUDO Citizenship Observatory Country Report: Estonia. http://ec.europa.eu/ewsi/en/resources/detail.cfm?ID_ITEMS=11473

[2] Ibid. Hallik (2010) fn. 6.

[3] Ibid.; see also See also opinion of Raivo Vetik as sited in, Kodakondsuspoliitika tõrgub töötamast, Õhtuleht, published on 19.09.2010, available at http://www.ohtuleht.ee/index.aspx?id=395030

[4] Ibid, Hallik, fn. 6.

[5] Ibid, Hallik, fn. 6. Similarly see opinion of Estonian historian David Vseviov quoted in Hallikk fn.6.

[6] Ibid. Toomla (2010) fn. 4.

[7] Ibid. Toomla (2010) fn. 4; see also Alo Raun, Pronksöö pani Eesti slaavlasi demokraatias pettuma, Postimees, published on 24.09.2010 available at http://www.postimees.ee/?id=317659

[8] Vetik, R, Estonian Integration Strategy (2008-2009) monitoring 2010, presentation available at https://kule.kul.ee/avalik/integratsioon/EIS_monitoring2010_ENG.ppt; see also Veiko Pesur, Usaldus riigiasutuste vastu on venekeelsete inimeste seas väga madal, Postimees, published on 14.09.2010 available at http://www.postimees.ee /?id=312756

[9] *Integration Monitoring Report*, ibid. fn. 3, p. 142.

with the current income (21% of Estonians) and 12% stated that it is not possible to manage with the current income (6% Estonians).[1]

On average income of ethnic minorities is considerably lower.[2] For example the highest income group, i.e. income per family member over 6,000 kroons (383 euro) has 32% of ethnic Estonians and 15% of ethnic minorities.[3] In this context, the most disadvantageous group is ethnic minority woman. Thus, if average Estonian woman earns 70%, then ethnic minority woman on average receives only 55% of the average Estonian men.[4] Ethnic minorities are significantly underrepresented in managerial and senior administrative positions among legislators and senior public officials.[5]

The unemployment rate is very high.[6] According to official statistical data unemployment rate among ethnic minorities in 2010 was 23,4% while for ethnic Estonians 13,4%.[7] Sociologist Iris Pettai discussing high proportion of ethnic minorities among unemployed stated:

"As a solution to this problem Russian speakers are repeatedly offered to learn the language [Estonian]. However, on the example of youth, that has excellent skills in Estonian language but still not competitive on the Estonian labor market, it is evident that this is not a solution. More than that, talented Russian youth do not feel needed in the country where they live and prefer to go to work abroad. In my opinion – it is a tragedy."[8]

This warning and disappointment is equally supported by the findings of the 2010 Human Capital Report.[9] This report identified a growing tendency of young Russian school graduates to continue their studies abroad and leave Estonia.[10] This is coupled with a quite widespread and pessimistic understanding among ethnic minorities that on the labour market employers tend to prefer ethnic Estonians.[11] The Human Capital Report warns that the leaving of young Russians from Estonia is a serious threat to the Estonian society and economy.[12] Against the growing socio-economic disparities among ethnic groups and low representation among public elites this tendency is not unexpected and most likely to continue.

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[1] See also Merje Pors, Narvalanna: parim amet Eestis on eestlane, Postimees, published on 13.12.2010, available at http://www.postimees.ee/?id=356478

[2] *Immigrant Population in Estonia Report,* Ibid. fn. 1.

[3] *Integration Monitoring Report*, ibid. fn. 3, p. 139.

[4] Katharina Viik as quoated in article Vene naiste palgad on Eestis kõige madalamad, Estonian Public Broadcasting News (in English language version), published on 03.02.2010, available at http://uudised.err.ee/index.php?06193258; similarly article Русская женщина зарабатывает в два раза меньше, чем эстонец, Postimees, published on 03.02.2010 available at http://rus.postimees.ee/?id=220078

[5] *Immigrant Population in Estonia Report,* Ibid. fn. 1.

[6] According to Eurostat 2010 data in first Q1 Estonia was the second highest (following Latvia) country in EU in terms of unemployment available at http://cms.horus.be/files/99931/Newsletter/European_Social_Watch_Report_2010.pdf

[7] Statistical Office of Estonia 2010: ML 111: Labour Status of Population Aged 15-74 by Educational level, Ethnic nationality, Indicator and Year, available at www.stat.ee

[8] Pettai (2010) Ibid. fn. 6.

[9] Eesti Koostöö Kogu (ed.) Eesti inimvara raport (IVAR): võtmeprobleemid ja lahendused (2010) Säästva arengu komisjon, Tallinn.

[10] Ibid. fn. 9, pp. 26-27; see also Hille Tänavsuu, Ainult keeleoskusest lõimumiseks ei piisa, *Postimees*, published on 11.12.2010, http://www.postimees.ee/?id=355648; see also Tatjana Kosmõnina, Üha enam vene noori eelistab edasi õppida Venemaal, Estonian Public Broadcasting News (in Estonian language version), published on 25.07.2010, available at http://uudised.err.ee/index.php?06210548

[11] *Integration Monitoring Report*, ibid. fn. 3, p. 144-149; Similarly according to the European Union Minorities and Discrimination Survey 2010, 59% of ethnic minorities in Estonia believe that discrimination is widespread in Estonia, available at http://www.fra.europa.eu/fraWebsite/attachments/EU_MIDIS_DiF5-multiple-discrimination_EN.pdf

[12] Ibid. fn. 9, pp. 26-27. See also e.g. Garri Raagmaa, Kas rahvusvähemused on Eesti inimvara? Õhtuleht, available at http://www.ohtuleht.ee/index.aspx?id=387873

Ethnic minority youth living in Estonian has a very low self-confidence.[1] Thus, more than 30% consider themselves on the lowest rung in the society (in contrast with 12% among ethnic Estonian youth).[2] Marju Lauristin commenting on this statistical data pointed "The fact that there is such a large group of people with low self-esteem is actually the result of very many factors - teachers, parents and local environment, as well as of the media and the Estonian view".[3] The life pessimism is not only a feature of ethnic minority youth. The economic optimism index among ethnic Estonians is considerably higher (54,6 points) than among ethnic minorities (39 points in a 100 point scale). Index is composed from seven criteria related to life quality, level of income and economic outlook for next 6 months.[4]

EDUCATION

Against the general consensus among ethnic groups on the necessity to reform the current educational system and to improve the proficiency in Estonian language there is a general disagreement between ethnic groups on the methods and the necessarily conditions for the success of the reform.

The educational reform in 2010 was actively discussed in Estonian and Russian media as well as by the political elites. Parallel educational systems divided on the basis of the language of instruction (Estonian and Russian) continue to exist where 23% of pupils in Estonia attend Russian medium schools.[5] From 2007 a gradual transition to the Estonian language of instruction started in Russian language secondary and upper secondary schools. As part of this reform in school year 2010/2011 four subjects are taught in Estonian: Estonian literature, Music, Social Studies and Geography.[6]

The responses to the transition to the Estonian language of instruction in Russian language schools are extremely mixed. Although it seems that there is a general consensus among ethnic communities, especially among youth, that proficiency in the Estonian language is an important asset the means to achieve this goal are debated. While majority of Estonians consider it necessary to switch to the Estonian language of instruction as soon as possible Russian community insists on more balanced and gradual transition. The current parallel system of education is clearly unsatisfactory, among other factors, because it is not able to adequately secure the sufficient proficiently in Estonian language of the ethnic minority youth. The abrupt solutions nevertheless could lead to more social problems than solutions. The problematic is not in the lack of motivation but rather in the lack of the qualified personnel and teaching materials allowing smooth and gradual transition to the quality language learning especially in the regions with high density of ethnic minority groups. According to the estimates of the Language Inspectorate still 70% of teachers of the Russian language schools are not sufficiently proficient in Estonian.[7] It is highly questionable whether sufficient human resources exist to guarantee quality education to ethnic minorities in the Estonian language as proposed by ongoing educational reform.

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[1] Low Self-Confidence Among Young Russians a 'Complex Problem', Estonian Pubic Broadcasting News (in English language version) published on 04.11.2010 available at http://news.err.ee/Culture/62b1ff40-3467-41bd-8579-0e44459fb687

[2] Ibid, fn. 1.

[3] Ibid, fn. 1.

[4] Faktum & Ariko *(2010)* discussed in Eestlased on endiselt muulastest optimistlikumad, E24 Majandus, published on 16.06.2010 available at http://www.e24.ee/?id=277242

[5] Integration Fact Sheet 2010, Ibid. fn. 2.

[6] Integration Fact Sheet 2010, Ibid. fn. 2.

[7] Interview with Tomusk, director of the Language Inspectorate, Ethnic Russian Teachers Still Struggle with Estonian, Estonian Pubic Broadcasting News (in English language version) published on 18.08.2010 available at http://news.err.ee/culture/c98c2300-3cac-4a9b-a205-f8b90445379d#comments

The recent study on educational inequalities among ethnic groups points to growing differences in the educational levels of ethnic groups.[1] One of the reasons for growing inequalities are the institutional conditions and political choices adopted after 1991

"instead of a gradual change in the education system the government chose to start a quick transition to teaching in only Estonian language in higher education. At the same time the quality of Estonian language instruction in Russian secondary school was rather poor … it means that Russian speaking school leavers find themselves at a disadvantage in access to higher education. […] We suppose that the termination of public education in the Russian language at the secondary level as well as decreasing follow ups to higher educational institutions has contributed to the lowering of the educational level of young Russians."[2]

The close monitoring is necessary to evaluate whether currently ongoing upper secondary education reform would not contribute even further to the educational inequalities among ethnic groups.

ESTONIAN LANGUAGE LEARNING

Proficiency in Estonian language among ethnic minorities is continuously growing. However, the number of ethnic minorities who are fluent in Estonian language is still rather modest. Interest in language learning among ethnic minorities is high.

The latest statistical data suggest that roughly 50% of ethnic minorities can understand, read, communicate and write in Estonian language on medium and advanced levels.[3] There are two main programs that help to facilitate language learning among ethnic minorities. The first program covers costs of Estonian language learning of stateless residents for naturalization exam.[4] The second program, supported by European Union Social Fund, reimburses costs of Estonian language courses for ethnic minority residents regardless of citizenship who successfully pass language proficiency exam.[5] The reimbursement is limited by the amount of 302 eur for each level of proficiency and can be claimed only *post factum* based on the proof of successful results of the language exam.[6] In 2009−2010 program reimbursed 2,264 applicants. Free of charge language courses, as for example in other EU countries, are still however not widely available. In spite of the apparent demand in such free of charge, quality courses among ethnic minority groups.

ASSESSMENT OF THE DEVELOPMENTS IN ESTONIA BY HUMAN RIGHTS INTERNATIONAL MONITORING BODIES

In 2010 three periodic reports by international human rights monitoring bodies addressed the issues of inter-ethnic relations in Estonia: European Commission against Racism and Intolerance (ECRI); UN Human Rights Committee and UN Committee on the Elimination of Racial Discrimination (CERD). All three reports had a rather critical tone.

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[1] Lindemann, K and Saar, E, (2009) Educational careers of Estonians and Russians in Vetik, R and Helemäe, J. (eds.) Segregated Disparity: The Russian Second Generation in Two Estonian Cities, forthcoming; See also sociologist Elena Helimäe as quoted in article, Уровень образования у второго поколения русских в Эстонии ниже, чем у первого, День за Днём (Russian language newspaper), published on 07.12.2010 available at http://www.dzd.ee/?id=353594

[2] Ibid. fn. 1.

[3] *Integration Monitoring Report*, ibid. fn. 3, p. 3.

[4] Free Language Studies, information available at the internet page of the Integration and Migration Foundation Our People, www.meis.ee

[5] Ibid. fn. 4.

[6] Ibid. fn. 4. According to the estimation provided in the Human Capital Report Ibid. fn. 9, p. 27, the amount of reimbursement is calculated considering 120 hours of teaching hours. This is however generally is not sufficient as required number of hours depending on the student is 240 hours and more.

While acknowledging a number of positive developments in Estonia the ECRI provided a long list of critical points.[1] The ECRI recommends to Estonian authorities to ratify Protocol No. 12 to the European Convention on Human Rights (non discrimination protocol); to ensure provision of free of charge good quality of Estonian language courses irrespective of the success in language exam; establish monitoring mechanisms involving Russian speaking minorities on the work of the Language Inspectorate; enhance provisions of the Criminal Code to strengthen punishment for all racist crimes; ensure quality of education and respect for cultural identity in undertaking educational reforms; raise awareness on the compliance with the Equal Treatment Act and protection provided by this Act; take measures to reduce statelessness and enhance consolations with the representatives of ethnic minorities and combat racism and racial discrimination in policing. Finally ECRI recommends to adopt in consultation with concerted groups a law on the rights of national minorities.

The Human Rights Committee (HRC) in relation to ethnic minorities enjoyment of rights provided under the International Covenant on Civil and Political Rights focused on inequalities on the labor market; low trust among Russian speaking residents in the State and its public institutions as well as lack of initiative on the side of the Estonian state to consider collective reparation for persons deprived of their liberty following the 2007 Bronze Solder events.[2] The HRC recommends state authorities to further strengthen active labor market measures aiming at the professional and language training as well as to take steps to increase confidence and trust of the of Russian speaking minorities in the State and its public institutions.

The CERD in addition to issues pointed by the ECRI and HRC, heavily criticized the "punitive elements in the language regime".[3] The CERD Committee recommends "adopting a non-punitive approach to the promotion of the official language and revisiting the role of the Language Inspectorate". Furthermore, the Committee calls to consider "a dual language approach as regards delivery of public services, particularly in light of the prohibition of discrimination in access to public goods and services as provided for by the State party's legislation". To remedy the extremely low trust in State and public institutions the Committee recommends the State to "redouble its efforts to ensure greater participation by members of minorities in public life, including in Parliament, and take effective steps to ensure that they participate in the administration at all levels".

The responses to the criticism and recommendations of the international reports have been mixed. Minister of Education Tõnis Lukas and member of the parliament Peeter Tulviste have heavily criticized ECRI report especially as concerned discrimination of Roma.[4] At the same time, for example Aleksei Semjonov director of the NGO Legal Information Centre for Human Rights stated that he is not surprised by the critical tone of the ECRI Report.[5] Semjonov pointed that issues criticized by ECRI are well known and widely debated among ethnic Russian community

[1] European Commission against Racism and Intolerance (ECRI) 4th Periodic Report on Estonia available at http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Estonia/EST-CbC-IV-2010-003-ENG.pdf

[2] Concluding observations of the United Nations Human Rights Committee to the third period report submitted by Estonia on the implementation of the International Covenant on Civil and Political Rights.

[3] Concluding observations of the UN Committee on the Elimination of Racial Discrimination.

[4] See e.g. Tulviste: raporti koostasid ebakompetentsed inimesed, Postimees, published on 03.03.2010, available at http://www.postimees.ee/?id=232337; Lukas: mustlaste diskrimineerimine on pastakast välja imetud süüdistus, Postimees, published on 02.03.2010, available at http://www.postimees.ee/?id=231825

[5] Aleksei Semjonov: Нас не удивил критический тон доклада Еврокомиссии, Internet Forum Podmoga, published on 04.03.2010 available at http://www.baltija.eu/news/read/5479; Semjonov: kui riik tahab kodanikega dialoogi, tuleb ÜRO soovitusi täita, Postimees, publishe on 20.10.2010, available at http://www.postimees.ee/?id=329507

and in the Russian language media.[1] Similarly to ECRI the criticism and recommendations included in the CERD Report were heavily criticized in the Estonian language media.[2]

In addition to the state reports in 2010 the European Court of Human Rights (ECrHR) rendered three decisions concerning complaints by Estonian ethnic minorities. In case of *Mikolenko v. Estonia* on a right to reside in Estonia of the former Soviet military servicemen the ECrHR found that Estonia violated Article 5 § 1 of the Convention and awarded non pecuniary damages to the complainant.[3] In the collective complaint *Tarkoev and Others v. Estonia* submitted by the group of retired Soviet military servicemen arguing for the right to the pension for the years of civil service in Estonia not covered by the military pension paid by Russian Federation the ECrHR found no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.[4] Finally, the ECrHR found party admissible collective complaint *Aleksandr Korobov and others v. Estonia,* by seven individuals related to the Bronze Solder events.[5]

In conclusion, positive indicators of the 2010 have been rather peaceful coexistence among main ethnic groups and improving Estonian language proficiency as well as increasingly strong and constructive opinions voiced in the Estonia media by academics calling for reforms of the current integration policy. Negatively, the socio-economic distance between ethnic groups further enlarged, the trust in political institutions further dropped and representation of ethnic minorities among public elites and decision makers remained weak. Thus, if developments in the sphere of cultural-linguistic integration are rather positive then developments in the socio-economic and civil-political spheres are negative. The reactions of the political elites on the criticism of international monitoring bodies, indicate, *inter alia*, that ethnic issues remain highly politicized and emotional. This lack on the political level (but not on academic level) of self-critical assessment on the integration policy is regrettable, potentially leading to the long-term economic development problems and social conflicts.

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3. European Commission against Racism and Intolerance (ECRI) 4th Periodic Report on Estonia available at http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Estonia/EST-CbC-IV-2010-003-ENG.pdf
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5. Hallik, K, Социолог: государство должно задуматься о роли русских в Эстонии, Estonian Public Broadcasting News (in Russian language version) published on 28.09.2010 available at http://www.uudised.err.ee/index.php?26216054;
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[1] Semjonov article from 04.03.2010, ibid. fn. 5.

[2] See e.g. comments in the media by Ilmar Tomusk, in the article by Pors, M (2010) Keeleinspektsioon: raportis avaldatu ei vasta tegelikkusele , Postimees, http://www.postimees.ee/?id=329364; Urmas Paet: keegi ei soovita vene keelt riigikeeleks, Eesti Päevaleht, published on 20.10.2010 available at http://www.epl.ee/artikkel/585707; See opinions of Mart Niklus, Urmas Paet, Mart Nutt, Lauri Vahtre as quoted in article ÜRO soovitus: kakskeelsus Eestile, Õhtuleht, published on 21.10.10 available at http://www.ohtuleht.ee/index.aspx?id=399333&lid=7

[3] *Mikolenko v. Estonia*

[4] *Tarkoev and Others v. Estonia*

[5] *Application no. 10195/08 Aleksandr Korobov and others v. Estonia*

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Irregular Migration in European Union after Lisbon Treaty

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Abstract: The article is examining the current developments of the EU migration policy and legislation making in the field of irregular migration. Lisbon Treaty has given EU more powers to legislate and initiate the policy making also in the field of irregular migration. The article is also stressing the need to use the terms accurately. Illegality and irregularity are words used often interchangeable but they do not have the same meaning. No person is illegal. Finally the article is highlighting the interrelation between irregularity, asylum and problems of EU to control the irregular flows.
Keywords: EU immigration, Asylum, Illegal immigration, Irregular migration, Lisbon Treaty.

INTRODUCTION

EU's immigration control has been the subject to major criticism over the past years.[1] It is said that "the current available instruments in the EU fall short of fulfilling all the needs and providing a comprehensive response"[2] to irregular migration. Massive

[1] Nascimbene B., Di Pascale A., (2011) The 'Arab Spring' and the Extraordinary Influx of People who Arrived in Italy from North Africa, *European Journal on Migration and law* 13, 341
[2] Ibid

migration flows, whether from the sea, land or air seem to be almost always an unexpected event rather than a standardized procedure for some of the Member States. C. Boswell calls this situation a legislative fiasco, and claims that the whole EU migration system is therefore "subject to systematic failure".[1] At the end of the tunnel, when the Member States do find an alternative way to decrease irregular migration, they usually rely on regularization programs that allow states to legalize the irregularly staying persons. The article is giving an overview of the instruments used in tackling irregular migration and

As the IOM Glossary no 25 states there is not uniformly recognised definition for the irregular migration.[2] Word irregular is nevertheless used more and seen as preferable work to explain the migration and migrants who are not recognised by the states as legal immigrants. There are two different options how to tackle the problem of irregularity or illegality. First option is to define who are legal migrants and then all the rest who does not qualify as legal can be called irregular immigrant. Second option is to define what is prohibited and what is called irregular and then stick to this definition irregular or illegal migrant. Why it has been then so difficult to agree upon the mutual understanding or definition of irregularity and illegality? The article will discuss the current EU migration legislation that is designed for the irregular migration control. It will be analyzed whether it might in fact attract and contribute to the irregularity.

To overcome irregularity among migrants is obviously not a simple task to accomplish, since according to Migration Policy Institute, EU had roughly 1.9 million to 3.8 million irregular migrants still in 2008,[3] and nowadays the amount has been estimated to be even higher, nearly 8 million.[4]

Migrating from a country to another is currently relevantly easy, since the ways to travel have became much easier and cheaper than they used to be. This kind of movement has been seen as both "an opportunity and a challenge"[5] for EU, since it does not only bring legally residing aliens, but also those who do not meet the requirements and thus, enter or stay and perhaps work without any right.

Therefore, EU controls migration, since otherwise there would be too many volunteers to enter and start a new life with a hope of a better beginning. It is simply impossible to give a chance for those who do not meet the requirements. There are of course people that cannot stay in their home countries because of wars and persecution, and those whose safety must be guaranteed in any case, but if we leave out asylum seekers, it is sometimes very hard to know the real reason for the entry. This is because, despite of different backgrounds, most immigrants, both regular and irregular, have usually similar motivation and goal in the end, as Fiona Kinsman, the Deputy Head of the Immigration and Integration Unit in the European Commission's Directorate-General for Home Affairs notes.[6]

The creation of Area of Freedom, Security and Justice has neither made the role of the EU nor the national Member States easier in coping with the never ending flows. This being said, we can state that even though the EU has taken irregular migration as a top priority[7] to tackle with and for that reason a large number of resources have been devoted to prevent people from

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1 Boswell C., Geddes A., (2011) Migration and Mobility in the European Union, Palgrave Macmillan, England

2 IOM, (2011) Glossary on Migration, 2nd Edition, Geneva

3 Morehouse C., Blomfield M, (2011) Irregular Migration in Europe, Migration Policy Institute, Transatlantic Council on Migration.

4 Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Population, available at: http://assembly.coe.int/Main.asp?link=/committee/MIG/Role_E.htm accessed 22.05.2012

5 European Commission, (2009), An opportunity and A Challenge – Migration in the European Union. Available on the Internet at: http://ec.europa.eu/publications/booklets/move/81/en.doc accessed 03.06.2012

6 European Migration Network (2012), Combating Irregular Migration: Practical Responses. Summary and Final Conclusions.

7 European Commission, Standard Eurobarometer, Public Opinion in the European Union. Available on the internet at: http://ec.europa.eu/public_opinion/archives/eb/eb71/eb71_std_part1.pdf accessed 17.05.2012

entering illegally and to return those who do not own the right to stay, irregular migration still exists. Irregularity emerges because people 'overstay' their visas, enter illegally or stay although ordered to leave the country. There seems to be lack of enforcement mechanisms and monitoring by the Member States of the persons staying on their territory.

Political scientists like Düvell expresses its opinion that irregular migration is usually linked with several other problems, such as absence of legal immigration channels, confusing, bureaucratic, inefficient and slow application procedures, too rigorous conditions for work permits, which leads to illegal work and different organizational cultures, which are used to protect the country rather than welcoming the newcomers.[1]

As we can see, the EU has internal as well as external factors that attract irregular migrants, but also give great potential to criminal organizations to profit from these vulnerable men, women and children. As in any case when new legislation is prepared, it is very essential to take into consideration certain things, such as human rights and financial expenses caused by maintaining security and freedom. Therefore, the EU is in a difficult situation where a certain group of people should be removed without hindering the rights of mobility of the EU citizens. It could be the case that sometimes solutions to defeat irregular migration are rather impossible, taking into account the difficult situation in the world. This means that the challenge is now for the EU and its Member States to create a strategic and comprehensive method to address and permanently reduce irregular migration.

EU's response to irregular migration can be described as a combination of mostly unsuccessful ideas simply because the EU has not been able to defeat it despite of several action plans. In 2011, 52% of the Europeans answered that immigration was a problem rather than an opportunity for their country and a majority of EU citizens were still worried about illegal immigration, with a European average of 67% with the highest rates in Italy (80%) and Spain (74%).[2]

To understand the lack of enthusiasm of EU's capability to manage irregular migration and its malfunction, it would be relevant to explain the beginning of the Europeanization of the migration policy and law.

As we know one of the key inventions in migration control issues was the Maastricht Treaty and its three pillars structure in 1993. These pillars consisted of European Communities (EC), Common Foreign and Security Policy (CFSP) and Police and Judicial Co-operation in Criminal Matters (PJCC). The idea of these pillars was to increase the Community power in the fields of foreign, security and defence policy, asylum and immigration policy, criminal and judicial co-operation.[3] However, the awareness of constantly growing numbers in irregular entries[4] and the feeling of uncontrolled atmosphere among migrants forced the Member States to cooperate even better.[5]

Behind this stricter control there was also a clear reason - namely the future idea of free movement of persons within the European Community. For that purpose the restrictions and cooperation between the Member States were seen as necessary in order to protect national security.

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[1] Düvell F., Paths into Irregularity: (2011) The Legal and Political Construction of Irregular Migration, in Special Issue, *European Journal of Migration and Law,* Vol. 13(3): 275-195

[2] Transatlantic Trends, Immigration Patterns 2011. Available on the Internet at: http://www.gmfus.org/galleries/ct_publication_attachments/TTImmigration_final_web.pdf accessed 15.10.2011

[3] Treaty of Maastricht on European Union

[4] Kraler A., Rogoz M., (2011), Irregular Migration in the European Union since the turn of the millenium – development, economic background and discourses, CLANDESTINO Working Paper No. 10/2011

[5] Triandafyllidou A. & Ilies, M., (2010) EU Irregular Migration Policies, in Triandafyllidou A. (Ed.) Irregular Migration in Europe – Myths and Realities, Ashgate

The following, Treaty of Amsterdam, was formed in 1997. Its purpose was to update Justice and Home Affairs (JHA) by replacing it under the first pillar and to give a better role for the Commission, the European Parliament (EP), and the European Court of Justice (ECJ) by leaving out the unanimity rule and replacing it with Qualified Majority Voting (QMV) and to transfer the common immigration legislation under the competence of the EU. QMV is a faster way to make decisions compared to unanimity especially in the light of the further coming enlargements of 2004 and 2007. In enlarged European Union there would not be simply possible to get agreement of all 27 EU member states to issue a relevant legislation to tackle irregular immigration at EU level. The EU had for the first time a clear mandate to start legislation procedures in migration.

TFEU made major reforms to EU legislation. It removed the Pillar structure by incorporating it into the Title V called 'Area of Freedom, Security and Justice', made the issues of visas, asylum and immigration as part of the EU-decision making procedures and supervision of ECJ. With these reforms it increased even more the power of the EU institutions, but it did not make major reforms to the migration matters since the current legislation was seen as sufficient enough.[1] In the field of irregular migration the states have been always more keen to cooperate as it can be better justified to the public. It is popular topic among politicians.

IRREGULARITY

The line between being irregular from regular is very thin. Almost any third country national can become irregular after some change of the policy or legislation. Irregular migrants though are not accepted as full members of the society. It is suggested that EU citizens associate irregularity with insufficient border controls, abuse of the social security systems, black labor that will ultimately negatively affect the current labor market and raise the amount of criminals.[2]

It is inevitably impossible to deny that some TCNs are able to enter the EU without being controlled in such a way the current EU standards require. Because of this, these aliens can easily fuse into the society and disappear from the sight of authorities. Especially in the Member States where immigrant society is high. As numbers show this group of people is *pro rata* small. For example in Italy, only 15% of the whole amounts of irregular migrants enter illegally across the land borders and 10% across the sea.[3] We should nevertheless bear in mind that this is the official statistics, number of persons that might have been caught and the reality might be something different and people might become irregular although they have not entered to EU irregularly.

The second way of becoming irregular that the Commission mentions and the most common way of becoming irregular in the EU is to overstay.[4] This means that most irregular immigrants enter regularly[5] as tourists or with time-limited work or study visas, and when their visas expire they cannot get a new one or they simply do not apply for it again. There are surprisingly also people who fail by governmental reasons to process their residence and work permit applications.[6]

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1 Roots L., (2009) The Impact of the Lisbon Treaty on the Development of EU Immigration Legislation, *Croatian Yearbook of European Law and Policy*, V, p. 280-281

2 European Migration Network, (2011) Combating Irregular Migration: Practical Responses.

3 Delicato, V., National Legislation and Good Practices in the Fight Against Illegal Migration - the Italian Model, at 4, CARDS Program – Rome, 1st October 2004.

4 Düvell F., Vollmer B., Improving US and EU Immigration Systems – European Security Challenges. Available on the Internet at: http://cadmus.eui.eu/bitstream/handle/1814/16212/EUUS%20Immigration%20Systems2011_01.pdf? sequence = 1 accessed 14.10.2011

5 Supra note 3

6 Supra note 18

Thirdly, the Commission talks about immigrants that have applied for asylum, but in the end cannot successfully prove to be in need of international protection.[1] 46 Normally these people should be sent back home, but since they are not usually restricted to move, the results will be chaotic. The European Commission does not mention the group of people that have received their regular status as 'a birth gift' from their irregularly staying parents, since in Europe the nationalities are not usually obtained by the place of birth.

Düvell shows by his studies that in reality there is a problem of executing expulsion. He states that irregular migrants are not usually detained and deported or expelled at all, but they get a warning or a fine, and even in the case of deportation, they do not experience any direct enforcement measures (Italy, Greece and UK).[2] Thus, even the Stockholm program suggests that "voluntary return should be preferred, while acknowledging the inevitable need for efficient means to enforce returns where necessary".[3] This obviously led to the spread of irregular migration from one country to another. Another problematical area in the Directive is that a Member State is able to stop the return proceedings at any moment and give an autonomous residence permit or another right to stay legally, such as regularize them in the country without any particular reason to do so.[4] Combined cases García & Cabrera v. Spain are good examples of this kind of practice. The ECJ gave the decision, which made clear that a Member State has a right to decide whether to expel (or not) a person who is staying in its country without any permission. [5] Therefore, if this is so, also the voluntary return should be mandatory, since at the moment it is just a special order without any effect in reality.

We can look at the other EU country facing problems like Greece. Greece does not have the same situation as Italy, it has been claimed that the country is letting 80% of the total EU's irregular persons to come to its territory [6] and though facilitates irregular migration into the EU. Some of the studies show that the majority of the irregular migrants try to avoid criminality in the country since it could jeopardize their stay.[7] Therefore, this fear of increased criminality might be reasonable only if it would be their last solution to survive. This kind of situation might also arise, when labour market would not provide illegal employment anymore. Organized crime that is associated with immigration would be better to keep separated from individual criminal acts, such as stealing. Irregular migration fuels organized crime as Italy's former Prime Minister Silvio Berlusconi once stated. Limited ways of legal access to EU gives possibility to create informal ways to enter. This means that different informal organizations are run by the criminals who bring illegally people to Europe. Irregular immigration is very often facilitated by persons involved in organized crime groups.

According to The Office of the United Nations High Commissioner for Refugees, i.e. The UN Refugee Agency (UNHCR), modern migration is driven by "population growth, urbanization, governance failures, food and energy insecurity, water scarcity, natural disasters, climate change and the impact of the international economic crises and recession." [8]

It is somewhat true that the crises, whether they were economical or political in Europe (recession in 1990's) or humanitarian in third countries (e.g. Arab Spring) cause the irregular

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[1] Ibid

[2] Ibid

[3] European Council, The Stockholm Program – An open and secure Europe serving and protecting citizens (2010/C 115/01), OJ 115/1

[4] Supra note 1

[5] Judgment of 22 October 2009 in cases 261/08 García v. Spain & 348/08 Cabrera v. Spain, [2009], ECJ, Para 66

[6] "Illegal immigration in Greece, Border burden - Greece struggles to deal with a European problem", *The Economist*, 19.08.2010

[7] Vogel D., Cyrus N., (2008) Irregular Migration in Europe – Doubts about the Effectiveness of Control Strategies, Policy Brief No.9, March

[8] Grant S., (2011) Recording and identifying European Frontier Deaths, *European Journal on Migration and law*, Vol 13,(2), p 135-156

migration rates either to descend or to ascend, but as almost every scholar as well as interviewee agreed on, there is no reason to believe that these flows will finally end or only decrease in the future. [1]

Irregular migration is defined by the Commission as those "TCNs who enter the territory of a member state illegally by land, sea and air; persons who enter legally with a valid visa or under a visa-free regime, but 'overstay' or change the purpose of stay without the approval of the authorities; and also the unsuccessful asylum seekers who do not leave after a final negative decision."[2]

Immigrants keep coming to the EU in spite of restrictive policies in most Member States. Large numbers of legal and illegal migrants, together with asylum seekers, comprise this flow. International criminal networks dealing with smuggling and trafficking have emerged in the world to take advantage of people seeking a better life abroad. Crimes like smuggling or trafficking were nonexistent 20 years ago in the Criminal Code of the Member States. The new situation has led the EU to focus on fighting against illegal immigration and stemming the work of human traffickers and smugglers. Nonetheless, the EU needs migrants in certain sectors and regions in order to deal with its economic and demographic needs, thereby creating the dilemma between who to admit and who to restrict.

Bearing in mind the problem of illegal or irregular immigration to the EU, the Seville European Council [3] drew attention to the contribution which the EU's various external policies and instruments, including the development policy, could make in addressing the underlying causes of migration flows. Thus, the Council requested that immigration policy be incorporated into the Union's relations with third countries. In fact migration, visas and irregular movements' issues are under discussion in EU external relations debates.

The term illegal in itself contains a problem because not all people who are moving but who can end up staying illegally in one or another EU Member State can be called illegal, therefore it is preferable to use the term irregular migrant or immigrant. Already, in October 1998, the Schengen Executive Committee (of the Schengen *Acquis*) adopted measures to fight illegal immigration[4]. It said that it was necessary to respect human rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the Refugee Convention, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of all forms of Discrimination against Women and the Convention on the Rights of the Child. The Schengen Executive Committee stressed the need for close cooperation with the competent agency of the countries of origin and transit countries, in accordance with national law in the Schengen States. The need for placing liaison officers in states was mentioned, as also expert missions to the countries of origin and the countries of transit. Intensive controls at authorised border crossing points were implemented. In accordance with Schengen standards, special emphasis was placed on border sectors affected by immigration. Also, intensive police measures at national level, in cooperation with Schengen partners, and the need for the fingerprinting of illegal immigrants was emphasised. The prevention of unidentified foreigners from escaping was also mentioned.[5]

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[1] EU Policy to Fight Illegal Immigration, Press Release. Available on the Internet at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/296&format=HTML&aged=1&language

[2] Communication from a Commission, Policy priorities in the fight against illegal immigration of third-country nationals, Brussels, 19.7.2006 COM(2006) 402 final

[3] Council of the European Union, Seville European Council 21-22 June 2002, Brussels, 24 October 2002 (29.10), 13463/02, POLGEN 52

[4] The Schengen *Acquis* – Decision of the Executive Committee of 27 October 1998 on the adoption of measures to fight illegal immigration, SCH/Com- ex 37 def 2, OJ L 239, 22 September 2000, p. 203-204

[5] Ibid

Under the Schengen measures, those who have entered Schengen states without authorisation and have no right to stay on humanitarian grounds or under international law should be returned to their country of origin or permanent residence immediately. This has to be done systematically. Sanctions against carriers that transport passengers without required entry and transit documents should be established. Exchanged information should be included in Europol and in coordinating the fight against criminal networks involved in smuggling.[1] On 28 February 2002, the EU Council of Ministers adopted a comprehensive plan to combat illegal immigration and the trafficking of human beings in the European Union. Sanctions for carriers also have been agreed upon at the EU level also the cooperation at the Europol level is functioning.

In July 2006, the Commission adopted a communication on policy priorities in the fight against the illegal immigration of third-country nationals, [2] which built on guiding principles and EU achievements. It developed further new priorities and followed a comprehensive approach, striking a balance between security and basic rights of individuals and thus addressed measures at all stages of the illegal immigration process. On 28 November 2002, the Council adopted a return action programme that suggested developing a number of short, medium and long term measures in the field of return of illegal residents, including common EU-wide minimum standards or guidelines. In order to fully implement the Return Action Programme agreed in 2002, the Commission adopted in September 2005 a proposal for a directive [3] on common standards and procedures in Member States for returning third-country nationals residing illegally in the EU. The objective of this proposal was to provide for clear, transparent and fair rules concerning return, removal, use of coercive measures, temporary custody and re-entry, while taking into full account the respect for human rights and fundamental freedoms of the persons concerned. The directive was adopted in 2008 [4].

There is some relief for the persons who had suffered because of the actions of traffickers. People who are trafficked might get residence permits if they cooperate with host country officials. As it is almost impossible for third country nationals, who have no right to enter, to travel without using the services of illegal carriers or traffickers, carriers can be said to facilitate third country nationals' access to the EU.

The motivation underpinning the reaction to irregular and illegal immigration is directly related to the EU's fear of mass influxes of third country nationals coming to the EU. Combating irregular migration at the EU level is not a new phenomenon and decisions adopting common measures were already being made in 1998.[5] From time to time, combating illegal immigration and trafficking has become an important policy issue, which has, in turn, led to the intensive legislating at the EU level.[6]

The EU's policy on irregular and illegal immigration serves multiple objectives. It is about barring the access of third country nationals to the EU, making third parties such as carriers,

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[1] Ibid

[2] Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, COM/2006/0402 final

[3] Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals SEC (2005) 1057 /* COM/2005/0391 final - COD 2005/0167

[4] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals; OJ L 348, 24 December 2008

[5] The Schengen Acquis – Decision of the Executive Committee of 27th October 1998 on the adoption of measures to fight illegal immigration, SCH/Com- ex 37 def 2, OJ L 239, 22 September 2000, p. 203-204

[6] Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, COM/2006/0402 final

liable and responsible for issues previously considered the responsibility of the state.[1] The carriers are also obliged to communicate their passenger data.

Carriers are forced to inspect documents and decide whether passengers have the right to enter the country of destination or, in case of transit, the right to transit through a certain country. Carriers perform these functions in order to avoid facing penalties imposed by EU legislation. States are outsourcing their obligations to control their border controls to third parties, as has been done in other fields such as water or electricity supply, or health or security services, which in many EU countries are now provided by private companies. The relevant training and knowledge of sensitive issues needed when dealing with immigration issues, such as state obligations under international law to respect human rights, the right to asylum and principles of *non-refoulment*, are not given enough attention when immigration policing is outsourced to carriers. The EU has attempted to punish those who facilitate the unauthorised entry, transit or residence of TCNs. In doing so, it has entered a domain of Member States' criminal law usually free of EU involvement, thus broadening the competence of the EU. Because policies are agreed upon at the EU level, the EU 'legitimizes' these actions through relevant directives, regulations, decisions and rules.

The cooperation of Member States on irregular immigration targets also cuts the costs of member states by organising joint returns of irregular immigrants, or those who do not have a right to stay, by facilitating joint flights between Member States.[2] This also involves the assistance of other Member States in case transit through that state is needed in order to return migrants. Also, the mutual recognition of the decision on the expulsion should facilitate the more rapid return of irregular immigrants and cut costs associated with the complicated procedures of recognising decisions delivered by another member state. The cooperation in organizing mutual flights to return back failed asylum seekers Cutting costs is extremely relevant for small Member States such as Estonia, Latvia or Malta. For example, there are no flights from Tallinn to African countries where some of the irregular migrants come from.

Some positive developments have arisen from the various EU developments, such as providing protection for those who might not be voluntary immigrants but who are arriving irregularly or residing in the EU without permission to stay. The victims of trafficking might also receive interim relief. This shows, however, that Member States and the EU are very much aware of the limited access possibilities for the third country nationals. Several years ago, trafficking and smuggling was not so widespread crime, as other ways to move were available or states were more open towards new immigrants. But it is a positive development for third country nationals that states are now obliged to give protection to those who might not voluntarily access the soil of the EU. The optional application of this relief provision on those who were smuggled has to be criticised, however, as very often it is often not clear whether the person was smuggled to the EU or trafficked. Frequently, it can be a borderline case which started with the intention of being smuggled into the EU but ended up with the third country national in question providing certain kind of services to those who helped him or her to cross the EU border. The line between smuggling and trafficking is thin.

Control over the borders and access to the EU is now not only a state responsibility but also the concern of private actors, such as companies, carriers or those who might be in contact with immigrants, such as doctors or other medical workers[3], officials of municipalities, schools,

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[1] Guarding borders, passport and visa control and asylum has been a State responsibility.

[2] Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders.

[3] Italy introduced, in the framework of *Paccetto Sicurezza* at the beginning of 2009, a new legislation where doctors had to report any persons they treated who were residing illegally in the country. For more information, see http://stefanobeccastrini.wordpress.com/2009/02/06/sulla-denuncia-degli-immigrati-clandestini-da-parte-dei-medici/; http://magazine.liquida.it/2009/03/17/obbligo-di-denuncia-dei-clandestini-il-rifiuto-dei-medici/accessed 08.06.2012

neighbours, employers, landlords etc. This has been made clear in the case of the carriers at EU level where directives and decisions have been issued. Persons who assist people in need of international protection without any gain are not exempted from penalties imposed by the Framework Decision and therefore it can be said that EU norms are more restrictive than those imposed by international norms.

CONCLUSION

It can be stated that the European Union has a schizophrenic approach to migration. On the one hand, immigration in encouraged. The Blue Card directive facilitates the access of third country nationals, who are highly skilled workers. Certain EU legislation is also dedicated to students and researchers from third countries. Yet, in purely numerical terms, the number of legislative acts in the field of irregular migration still outnumbers the pieces of legislation adopted in the legal migration field.

Rules and policies sometimes contradict each other and also the idea of a secure and equal Europe. On the one hand there is a policy of opening up immigration into Europe and on the other hand there is a conscious decision to close down access to the EU. Tensions arise between the two approaches because these policies are pulling away in different directions. There is a need for workers to support Europe's ageing population of Europe. Nonetheless, because immigration is sometimes seen as a burden on social systems, schooling, medical care, and a threat to national security and national identity etc. this can lead to the introduction of more control measures for those who are not welcome or wanted in Europe.

These fears are visible and have led to increased cooperation among EU member states in the field of immigration, starting with the control of irregular migration and border control, which then led to cooperation in the field of asylum (Dublin Convention). Only later on could Member States agree upon rules for facilitating legal migration. Rules combating illegal migration easily outweigh those facilitating legal immigration. As the study shows, there are much more regulations on cooperation and activity to combat illegal migration. The policy documents on tackling illegal migration date back to 1998. Schengen was signed even earlier, in 1985, and the Dublin Convention was established in 1990. Migration policy had always been an issue linked to state sovereignty. As a consequence, states resisted including migration in EU-related discussions. The Schengen visa system provided an exception but this derived from inter-state discussions rather than supranational discussions. Schengen was only applicable in some EU member states and the incorporation of Schengen legislation into EU legislation only happened much later.

It seems that Europe is still struggling to come to grips with mobility issues relating to the migration its own EU citizens since issues such as health care, social security and pensions are not fully under the competence of the EU but nonetheless have a major impact on migratory movements and the development of a European economy.[1] This also directly affects the situation of third country nationals. Since Member States cannot adequately manage internal migration within the EU, then it goes without saying that those coming from outside the EU face an even more complicated situation. The blurred and shifting rules at EU level and in Member States affect how the EU is viewed by high skilled workers, scholars and students from third world countries etc. A positive development is that states have finally agreed upon how to receive high skilled workers, scholars and students from third world countries and has given the EU competence to legislate their reception, which further unites EU migration policy. It clarifies rules for third country nationals who desire to legally enter the EU. Nonetheless, the EU is still as an

[1] Look for more information in 'Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', COM(2008) 840 final.

entity itself and third country nationals are not only placed under the discretion of the Member States although they do apply for their visas or residence permits in order to stay in a particular Member State from the national authority in question. Whether we can talk about a perfectly functioning Common European Migration and Asylum System is another issue. Significant changes occurred during the Hague Programme period. In 2004 ten new member states joined the EU and in 2007 two more states joined. It changed the borders, the number on EU inhabitants and also the functioning of the EU itself. Security became a major concern after the terrorist acts in New York in September 2001, in Madrid in 2004 and in London in 2007. The Hague Programme is a perfect example of the EU's reaction to this. Its objectives were to improve the common capability of the Union and its Member States, to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Refugee Convention and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications.

The safety of EU citizens and others residing in EU is crucial but it should not overwhelm the debate on the access of third country national to the EU for the purposes of work, family life or study and research.

It must be mentioned that the idea of a Common European Asylum System was initiated to set up a system that pertained to common values, respect for human dignity and commitment to shared responsibility. This correlated with the goals of the Hague Programme but its implementation is questionable and therefore the assessment of implementation at the Member State level is highly desirable.

The first phase of this system was to set up common minimum standards which, in accordance with the Treaty of Nice, allowed for the transition to co-decision and qualified majority voting. Under the Hague Programme, the system started to move into its second phase of development with the adoption in 2008 of a policy plan.[1] The Commission for example among others has proposed amendments to the Reception Conditions Directive, Qualification Directive and to the Dublin and Eurodac Regulations as part of this plan.[2]

Operational experience has consistently pointed to the need for practical cooperation and in the proposed establishment of the Asylum Support Office the EU sought a coherent and efficient way of responding to these challenges. The Asylum Support Office was finally established at the end of 2009.

While assessing the EU's migration and asylum policy one can say that there is too little stress and attention placed on the capacity of asylum seekers as a workforce. They are already in Europe and can be used for low skilled or high skilled labour. This could be achieved by helping employers to train asylum seekers by giving state aid to those organisations that employed them. Instead of giving a "fish" to the asylum seeker they should be given a "hook" and trained how to fish for themselves. That is contrary to the current situation where the states try to keep asylum seekers out of the labour market by giving them a right to work only after one year if the decision on their asylum claim is still pending. The EU has improved the opportunities available to asylum seekers regarding employment; however, this only applies for those asylum seekers who stay in

[1] 'Policy plan on asylum – An integrated approach to protection across the EU', COM (2008) 360 final

[2] See more about the developments of the proposals in Council note 13703/10 of 27 September 2010. Available http://register.consilium.europa.eu/pdf/en/10/st13/st13703.en10.pdf and Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection

the asylum determination process for over one year.[1]

When the EU migration and asylum system becomes a real common system then all people residing in the EU, regardless of their status, should have the right to work in order to make a living.[2] If we keep differentiating people on the basis of their status – such as students, asylum seekers, family members etc. we cannot talk about a coherent or common policy. The trend to Europeanise migration rules still seems to be quite rushed and fragmentized, and is derived from recent policy goals communicated at Tampere, The Hague and now Stockholm.

Policy making at the EU level in the field of migration and asylum is very often not pro-active but ex post. One can observe it through the development of the legislation but one of the main problems with EU asylum and immigration law lies is its application by the Member States and the lack of control over the application of EU law in Member States.[3] Several achievements were made following the Tampere and Hague Programmes and progress has been achieved to date in this field. Internal border controls have been removed in the Schengen area and the external borders of the Union are now managed with some the help of the Frontex Agency. Visible steps have also been taken towards the creation of a European Asylum System. European agencies such as Europol, Eurojust, the European Union Agency for Fundamental Rights and Frontex are operational in their respective fields of activity.

In spite of these and other important achievements in the area of freedom, security and justice, Europe still faces challenges. Further efforts are required to improve coherence between various policy areas since immigration involves a broad range of other EU policy and Member State areas. Some of those policies affected by migration are not even under the EU competence.

Well-managed migration can be beneficial to all stakeholders. The European Pact on Immigration and Asylum provides a clear basis for further development in this field. Europe will need a flexible policy which is responsive to the priorities and needs of Member States and which enables migrants to take full advantage of their potential. The objective of establishing a common asylum system in 2012 remains and people in need of international protection must be ensured access to legally safe and efficient asylum procedures.

EU legislation has advanced the protection of third country nationals who are in need of international protection. Regarding the rules of legal migration, not all the policy goals have been achieved and also the Stockholm Programme remains to be fulfilled, since common EU residence permits or access to businessmen and other types of investors to EU are still missing. Also, access for retired people trying to enter the EU has yet to be regulated at the EU level and is completely at the discretion of Member States. Indeed, the implementation plan[4] of the Stockholm Programme states: "Access to Europe for businessmen, tourists, students, scientists, workers, persons in need of international protection and others having a legitimate interest to access the Union's territory has to be made more effective and efficient."

Clarifying the EU's immigration rules would be a positive development as it would help clarify and unify the practices of Member States. Up until now, most common rules have taken

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[1] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004

[2] Interestingly, Ireland and Denmark have availed of the 'Reception Directive' opt-out clause to avoid bestowing certain rights on asylum seekers, including employment.

[3] Look also at: Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions Justice, Freedom and Security in Europe since 2005: an evaluation of the Hague Program and Action Plan. An extended report on the evaluation of the Hague Programme, COM(2009) 263 final, SEC(2009) 765 final, SEC(2009) 767 final

[4] Brussels, 3 March 2010, (OR. en) 5731/10, CO EUR-PREP 2, JAI 81, POLGEN 8, Pg.11 or see final Stockholm Program action plan from Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme, COM (2010) 171 final

the form of minimum standards, which has failed to simplify the situation facing third country nationals faced with local, national, European and international rules. However, when the interests of Member States are seen as a priority, less freedom is given to the EU to intervene and more freedom is granted for Member States to decide how they want to regulate immigration in order to avoid the burden that accompanies the implementation of EU rules. As the analysis shows, immigration policy in the EU is pulling in two different directions. Immigration to the EU is strictly controlled on the one hand and simultaneously opened to those who want to enter to EU on the other hand. This has not helped simplify the position of third country nationals wishing to access the EU. Now we have preferences from both the EU and Member States, which has led to blurred rules on relating to third country nationals, which has in turn led to the complex categorization of migrants. Although categorization seems to be inevitable, it has not simplified or clarified the position of the TCN. Instead of simplifying the rules, the EU and Member States have only served to make the rules even more complicated.

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The EU Standards, Regulations, Law and Justice

The Nice Charter after Lisbon Treaty and its Horizontal Effects in Italian Case Law

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Abstract: One of the most saluted advancements brought by the entry into force of the Treaty of Lisbon on December 2009 is the providing of the Charter of Fundamental Rights of the European Union with a binding legal nature (art. 6 para. 1 Treaty on the European Union in the consolidated version). While the introduction of Nice Charter into European primary law has, indeed, a clear political and symbolic value and fledging legal implications for a further enlargement of the scope of European integration towards a constitutional framework, the aim of this brief notes is to inquire upon the impact it had on the decisions of Italian Courts in the relatively short span of time (two years at the time of writing) passed since then. The analysis describes the starting of a slow, confused adaptation led and harmonized with the traditional features of the Italian legal system by the Supreme and the Constitutional Court.
Keywords: Nice Charter, horizontal effects, Italian courts.

One of the most saluted advancements brought by the entry into force of the Treaty of Lisbon on December 2009 is the providing of the Charter of Fundamental Rights of the European Union with a binding legal nature (art. 6 para. 1 Treaty on the European Union in the consolidated version). While the introduction of Nice Charter into European primary law has, indeed, a clear political and symbolic value and fledging legal implications for a further enlargement of the scope of European integration towards a constitutional framework, the aim of this brief notes is to inquire upon the impact it had on the decisions of Italian Courts in the relatively short span of time (two years at the time of writing) passed since then.

The EU Charter of Fundamental Rights has been constantly, since its adoption in 2000, referred to in Italian case-law, but in most cases without a proper explanation of its relevance for the subject matter, both from a substantial and a formal point of view. It has been regarded as a parameter for interpretation, without a proper legal basis for that to happen. That is probably why, at least with regard to first instance tribunals, the Lisbon Treaty seems not to have brought many changes in this respect. Most of them just seem not to have notice, since, in an overwhelming majority of the cases, there is no reference to a different legal value of the Nice Charter[1].

Anyway, even without proper legal argumentation in the text of judgments, it appears that there is a development in the concurrence of norms within the Charter in support of fundamental rights also within relationships between private subjects, so determining horizontal effects.

Looking at specific acts we could recognize different levels with regard to this same phenomenon.

[1] Cfr. L. D'Ancona, *L'efficacia della Carta di Nizza nella giurisprudenza nazionale dopo Lisbona*, on www.europeanrights.eu, 1/2011, p. 2.

For instance, in the Order of Lodi's Tribunal 848/2010 there is a simple reference to Art. 20 and 21[1] of the Charter, as one of the sources in the international legal order upholding the principle of non-discrimination. At the other end of the spectrum, it is possible to find rarer acts which are directly referring to the acquiring, "since the 1st of December 2009", for the Nice Charter "of binding legal value because of the entry into force of the Lisbon Treaty" as the Order of Palermo's Tribunal of 21 November 2010[2], but still fail to investigate further the direct legal relevance of the Charter for the case and the necessary steps for it to be directly applicable in the Italian legal system, especially the limits for the scope of application set by Art. 51 of the Charter itself, so only with regard to the implementation of Union Law.

As a first comment, though, it should be acknowledged that Italian judges, in general, keep into account the Charter of Fundamental Rights and they give legal force to it. The Charter is considered a parameter to respect when inviolable rights ("diritti inviolabili", terminology used in Art. 2 of the Italian Constitution, concept considered by the Italian legal science to be equal to the one of fundamental rights in the EU system) are at stake, at least for the purpose of an interpretative harmonization between the Italian legal system and the European one. Moreover, even if the text of the decisions does not show the weight of the Charter to achieve it, the result of the non-application of internal norms to avoid discrimination is reached and that weight is anyway there[3]. The role to define in depth the new value of the Nice Charter for the Italian legal system is left to the *academia* and, especially, the higher jurisdictions.

Passing to an analysis of the relevant decisions of the Supreme Court (*Corte di Cassazione*)[4], it is possible to find more developed legal reasoning on the new value of the Charter and its effects.[5]

The situation pre-Lisbon Treaty can be explained trough Judgment 26973/2008[6]. According to it, cases for compensation of damages not explicitly provided for in statutory laws (that is the same to say horizontal effects directly applicable through higher sources of law) are necessarily "linked to the lesion of inviolable rights"[7] protected by the Constitution, considering that every kind of international obligation cannot reach the level of juridical force of the supreme principles of the Italian legal order[8]

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[1] Tribunale di Lodi, Ordinanza 848, 23 May 2010, point 3.2.iii. The Order declared illegitimate the refusal of the Italian Football Federation, considered discriminatory, to a football player, national of Togo, to participate in league games because he was lacking a residence permit for a period longer than 12 months. Similar use of not further justified reference to the Charter can be found also in the administrative jurisdiction (as examples, T.A.R Lecce Puglia, sez. I, 1861/2010, 23 August 2010 and T.A.R. Palermo Sicilia, sez. II, 6685/2010, 12 May 2010).

[2] Tribunale di Palermo, Ordinanza, 21 November 2010, my translation.

[3] As examples, the cited Lodi's Tribunal Order 848/2010 and Ragusa's Tribunal Decree, voluntary jurisdiction proceeding 212/10, 16 April 2010. The Udine's Tribunal Order 530/2010, 30 June 2010 (declaring illegitimate to pose limitations on public family support measures that would *de facto* exclude non EU-citizen), that does not only refer to the legal value of the Charter but also explicitly to its capacity to create direct effects, both vertical and horizontal, seems to be in this respect a unique exception until now between decisions pronounced at first instance.

[4] According to Andrea Guazzarotti (*I diritti fondamentali dopo Lisbona e la confusione del sistema delle fonti*, Rivista telematica giuridica dell'Associazione Italiana dei Costituzionalisti, 3/2011, p. 5), the *Cassazione* has referred to the Charter in around sixty decisions between the entry into force of the Lisbon Treaty and July 2011.

[5] Alongside with "simpler" decisions as the one at first instance already discussed above. As an example, I can refer to the Judgment of the Supreme Court of 1st June 2010 (Corte di Cassazione, Sentenza 269/2010, SS. UU., forbidding to include information on the ethnicity of the child in acts related to international adoption) which just refers to Art. 24 of the Charter and that it has acquired the same legal value of the Treaties and the one of 19th of August 2011 (Corte di Cassazione, Sentenza 17401/2011, Sezione lavoro, recognizing the right to paid absence from work for study reasons also to temporary employees), simply citing Art. 21 of the Charter as upholding the principle of non discrimination.

[6] Corte di Cassazione, Sentenza 26973/2008, SS. UU., 11 November 2008.

[7] Id., point 2.11.

[8] According to the so called theory of the counter-limits (*teoria dei controlimiti*), first proposed by the Constitutional in the Judgement 170/1984 (*Granital*, see below p. 4), the *primautè* of European law is counter balanced and limited by the respect of the most fundamental principles set in the first section of the Italian Constitution, Artt. 1-12. In the opinion of some commentators (e.g. R. Chieppa and R. Giovagnoli, *Manuale di Diritto Amministrativo*, Milano 2011, pp.54-55, and A. Randazzo, *La teoria dei controlimiti riletta alla luce del Trattato di Lisbona: un futuro non diverso dal presente?*, on *www.dirtticomparati.it*, 2/2011), the Lisbon Treaty recognizes and brings at European level such systematisation at art. 4 para. 2 of the Treaty on

(such as the constitutionally protected fundamental rights). Indeed, in the legal science many techniques aimed at systematically constructing the horizontal effect of rights (e.g. the doctrine of direct application or the concept of combined use of private law and constitutional norms) can be found, but all of them with at their core the inviolability of rights as sanctioned by Art. 2 of the Constitution.

Even if this general picture still stands, two recent judgments in particular show a different attitude of the Supreme Court towards the Charter after the entry into force of the Lisbon Treaty. In the Judgment 28658/2010[1], the subject matter is analysed through Art. 51 and, while stating that it is not within the domain of Union Law, making the Charter itself not directly applicable anyway, it takes care to underline that, on the other hand, "the Charter certainly represents a privileged tool of interpretation also for internal law and has to be presumed coherent with those values that the Member States and the bodies of the Union have together accepted, as expressed in Art. 6 of the Treaty on European Union"[2]. The Judgment goes on quoting the main sentence of the other Judgment I was referring to, 2352/2010[3], which bears great significance. Indeed, referring to Article 1 of the Charter, it states that "the principles of common European law have the merit to make evident the universal values of the personalistic principle on which the States of the Union are founded. The *filonomachia*[4] of the Supreme Court also includes the interpretative process of compliance of the national and constitutional laws to the non-colliding but promotional principles of the Lisbon Treaty and the Nice Charter that it poses as basis of the common European law"[5].

It is extremely interesting that, while both judgments cite and claim to be following the trail of Judgment 26973/2008, they remind of the changes made by Lisbon Treaty but they fail to link the consequent different legal context in respect to the one in which 26973/2008 was drafted. Moreover, they refer directly only to provisions of the EU Charter as source of law regarding fundamental rights. Judgments 2352/2010 and 28658/2010, while formally keeping the Constitution higher above the protection for fundamental rights as set in the European space, *de facto* placed for the first time in a clear fashion the Charter at the top of the legal tools regulating inviolable rights in the Italian legal system[6]. To put it in an even more practical way, it still feels at least bizarre for someone grown within such system, to read the *Corte di Cassazione* refer to human dignity using as legal basis Art. 1 of the Charter, without ever citing Art. 2 of the Italian Constitution.

Another advancement was made even more recently through Judgment 9422/2011: "the United Sections [of the Supreme Court] recognize compensatory protection, other than in the cases provided for by law, only in the case of a lesion of a person's inviolable rights, and *id est* in presence of an injustice constitutionally and, this Court adds, internationally recognized and qualified."[7]

Again reasoning *a contrario*, finding the Charter not directly applicable as in 28658/2010[8], the Court "slips in" a sentence, "adding", as if it was implicit in precedent case law, that for it to be capable of originating horizontal effects, the right violated should be recognized both constitutionally and internationally. If this may bear little practical effect (the rights protected by the Italian

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the European Union by affirming that "[t]he Union shall respect" the "fundamental structures, political and constitutional […] of Member States".

[1] Corte di Cassazione, Sentenza 28658/2010, II sez., 21 May 2010.

[2] Id., *Motivi della decisione*, par. 2, my translation.

[3] Corte di Cassazione, Sentenza 2352/2010, III sez., 2 February 2010.

[4] *Filonomochia* (or in the more used form *nomofilachia*, literally meaning "defence of the law") is the function entrusted in the Italian legal system in the *Corte di Cassazione* to maintain through its case law a common interpretation of the written law, in a system lacking a binding value of precedent decisions.

[5] Corte di Cass., Sentenza 2352/2010, *cit.*, point 5A, my translation.

[6] Cfr. F. Ferrari, *Il filo d'Arianna dei valori e delle garanzie comuni agli Stati membri nella Carta dei Diritti e nella Convenzione Europea dei diritti dell'Uomo: due esempi di nomofilachia ricettiva*, on www.europeanrights.eu, 2/2011, pp. 3-4.

[7] Corte di Cassazione, Sentenza 9422/2011, III sez., 22 March 2011, *Motivi della decisione*, par. 11, my translation.

[8] In this case because the alleged violated right, the right to free time, is not considered to be an inviolable right recognized by the Charter.

Constitution, quite an old one even if very advanced for its time of drafting, 1947, are all also recognized by the EU Charter), it shows quite a change of attitude in respect to the above analysed Judgment 26973/2008, underlining that only constitutional rights would have to be taken into account for compensatory protection. Of course, it is no coincidence that the entry into force of the Lisbon Treaty is placed in time between the two decisions. Oddly enough, 9422/2011 cites 26973/2008 as if the two were going along exactly the same lines. Anyway, as it can be noticed already through this brief *excursus*, the Supreme Court, as well as the Constitutional Court, tends quite often to mask as continuity advancements in interpretation they make.

Lastly, it is necessary to analyse the case law regarding the subject matter of the Constitutional Court, the main interpreter of the Constitution and especially the judge of the coherence of the other sources of law with it. It is worth notice that also the Constitutional Court used to refer very often to the Charter of Fundamental Rights before its gaining of legal value[1] as a parameter of interpretation for the content of inviolable rights, most probably leading to the same practice in other jurisdictions, as referred upon above.

The first relevant decision to give account of, intervened after 1st December 2009, is Judgment 138/2010[2], quite famous because it is the one in which the Court stated that marriage of people of the same sex is neither forbidden or guaranteed by Italian Constitution, but its regulation stays in the hands of the legislator. It refers to Lisbon Treaty, the new legal value of the Charter and Art. 51 to enquire if the subject matter would fall within the scope of application of the Charter itself. In this respect, the Court states that "it is not necessary, to the ends of the present case, to deal with the" related "problems", because Art. 9 of the Charter already solves the issue: "while recognising the right to marry, it remands to the national laws who regulate its exercise. It has to be added that the explanations concerning the Charter on Fundamental Rights, composed under the authority of the *praesidium* of the Convention which drafted it (and that, while not bearing legal value, represent an undoubtful tool of interpretation), clarify (between other things), with reference to the said Art. 9, that <the Article does not forbid neither imposes the granting of marital *status* to people of the same sex>[3]."[4]

If in 138/2010, for the first time there is a clear reference to the new role of the EU Charter, it is really finally faced only in Judgment 80/2011[5], stating a principle that seems somehow obvious but failed to have been directly expressed before by the Constitutional Court, that is not only the leading authority for the ordinary jurisdiction to look to with regard to fundamental rights but also the main if not unique "translator" of the consequences European law has for a legal system like the Italian one, that still nowadays claims, notwithstanding the recognition, for instance, of direct effects of EU law, to be a strictly dualistic one. "The prerequisite for the application of the Nice Charter is, therefore, that the case brought before the judge is disciplined by European law – because inherent to acts of the Union, to national acts and behaviours implementing law of the Union, or justifications brought by a Member State for a national act otherwise not compatible with the law of the Union – and not only by national norms lacking any link with that law".[6]

So, even if once again through an *a contrario* reasoning, it is easy to draw some consequences, consequences that probably did not need to be reaffirmed through the case law of the Constitutional Court, indeed, because somehow obvious. EU Law (including the norms of the Treaties) is directly applicable, then capable to originate horizontal effects, within the Italian judiciary system, as affirmed

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1 Cfr. A. Guazzarotti, *cit.*, pp. 4-5.
2 Corte Costituzionale, Sentenza 138/2010, 14 April 2010.
3 Cfr. Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, CHARTE 4473/00 CONVENT 49, 11 October 2000.
4 Corte Cost., Sentenza 138/2010, *cit.*, point 10 *Considerato in diritto*, my translation.
5 Corte Costituzionale, Sentenza 80/2011, 7 March 2011.
6 Id., point 5.5 *Considerato in diritto*, my translation.

already in 1984 by the Constitutional Court in the *Granital* Judgment[1], implementing the principles of the *Simmenthal* Judgment of the European Court of Justice[2]. The Charter on Fundamental Rights has, since the entry into force of the Lisbon Treaty, equal legal value as the Treaties, *ergo* its norms are sources of horizontal effects in the Italian legal system, provided of course, as underlined already, that the subject matter falls within the competences of the European Union.

Some commentators have defined the approach in 80/2011 as restrictive or even a *revirement* from *Granital*[3]. I cannot but disagree. Such impression may be given by the fact that, in the developing of the reasoning, especially from the wording used, it is clear that the Court is very much concerned to keep the application of EU law within its limits. The conclusion of the reasoning, though, is in the sentence quoted above: those limits have not changed and they are the competences of the Union. So Judgment 80 is nor restrictive or a *revirement*: it just restates the principle of *Granital*, continuity is really there this time. Of course, the situation is different from 1984: but it is not the principle being different, are the competences of EU and, more in general, the coverage of the Treaties which increased since then (when EU itself did not even exist as such). Moreover, it is understandable, that in presence of a text on fundamental rights becoming binding within the EU system (also considering the permeating nature of fundamental rights capable of compromising the "delicate balance between national sovereignty and derivate supranational powers"[4]) the Constitutional Court, especially in a system of a rooted dualistic culture[5], aware of what that could mean for its prerogatives, feels the need to strongly reaffirm the limits for the application of EU law within the Italian legal order.

In my opinion, the Constitutional Court has made enough efforts to lead with clarity in the systematisation of this new role of the Nice Charter and affirm the boundaries of its application. Still, especially in the daily practice, within the ordinary jurisdiction, the different role of the several tools regarding human rights, relevant for Italian law (the Constitution, the EU Charter on Fundamental Righs, the European Convention on Human Righs, the two UN Covenants of 1966 and ratified international conventions in general), is and will be, surely for at least some years, quite blurred. An evidence of it, even if just a small part of the phenomenon, are the first instance decisions cited above, listing those human rights texts without investigating what they actually mean from a systematic point of view. As Roberto Bin, one of the most renowned Italian experts in constitutional law, put it: in regular practice "the <contamination> between [legal] systems prevails, or maybe better their confusion. The phenomenon observed may well be explained through the principle of entropy. In physics, entropy indicates the tendency of the system towards the most possible <disorder>. […] Entropy represents the loss of initial information […]: order and the related information leave their place to disorder and balance. Contamination is the result, the process is irreversible. […] The norms are meanings which combine with each other increasing entropy, that is mixing, contaminating themselves; the balance equals to the complete confusion and the loss of every information on the sources"[6]. With the foreseen accession of the European Union to the European Convention on Human Rights it is very likely that the picture will become even more confused.

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[1] Corte Costituzionale, Sentenza 170/1984, 8 June 1984.

[2] European Court of Justice, case 106/77, 9 March 1978.

[3] See, for instance, M. Cerase, *Brevi riflessioni sull'efficacia orizzontale della Carta di Nizza*, on www.europeanrights.eu, 5/2011, especially pp. 3-5.

[4] A. Guazzarotti, *cit.*, p. 12.

[5] It has to be noted that some commentators (e.g. F. Lisena, *La Corte costituzionale diventa "monista" (nota a margine della sent. n. 28 del 2010 della Corte costituzionale)*, on www.giustamm.it, 3/2010) suggested that the Constitutional Court could have started a monistic approach by affirming in the Judgment of 28 January 2010 (Corte Costituzionale, Sentenza 28/2010, 28 January 2010) that "European norms […] are binding and hierarchically over placed in respect to Italian ordinary statutory laws through artt. 11 and 117, para. 1 of the Constitution" (my translation). In my opinion the conclusion is too far reaching considering what it rests upon and following acts of the Court still clearly following the dualistic model, as referred above.

[6] R. Bin, *Gli effetti del diritto dell'Unione nell'ordinamento italiano e il principio di entropia*, in *Studi in onore di Franco Modugno*, Napoli 2011, p. 374, my translation.

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6. Guazzarotti, A., *I diritti fondamentali dopo Lisbona e la confusione del sistema delle fonti*, Rivista telematica giuridica dell'Associazione Italiana dei Costituzionalisti, 3/2011
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8. Randazzo, A., *La teoria dei controlimiti riletta alla luce del Trattato di Lisbona: un futuro non diverso dal presente?*, on *www.dirittocomparati.it*, 2/2011
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European Context of the Administrative Justice in the Czech Republic

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Abstract: The article deals with the EU law context of administrative justice. It outlines the key aspects of Administrative Justice according to the EU Law first (section I) and then it concentrates on the Administrative Judiciary in one of the EU member states – in the Czech Republic (section II – VII). System of courts in the Czech Republic is presented in section II. The term "Administrative Justice", its purpose and models of Administrative Justice developing in EU member states shall be investigated in section III. An overview of the interesting history of Administrative Justice in the region, which now constitutes the Czech Republic and which has gone through several totalitarian periods shall be given in section IV. Then the paper concerns the constitutional and legal foundations of the Czech Administrative Justice (section V) and the system of Administrative Justice in the Czech Republic (section VI). It also brings basic information about the procedure before an administrative court and information about the most frequent type of administrative action (section VII). A summary shall be given in the final section (VIII).
Keywords: Administrative Justice, Principle of Non-discriminination, Principle of Effective Judicial Protection, Principle of Fundamental procedural rights, Fair process, Full jurisdiction, Czech Republic.

1. EU LAW CONCERNING THE ADMINISTRATIVE JUSTICE

EU law does not comprise detailed rules on administrative procedure or Administrative Justice, neither for the EU judiciary nor for the courts of member states. National courts (including administrative courts) are constituted by national laws and they follow national laws on procedure within their jurisdiction set also by national laws. Special European provisions may exist, but they do not form a general or extensive system. As a consequence, general principles have been identified by the Court of Justice to fill in this void. However, these principles may modify or extend national provisions, but they do not supplicate for them. There are three key

principles concerning the Administrative Justice in EU member states: a) *Principle of Non-discrimination and Principle of Effective Judicial Protection*[1] and b) *Principle of Fundamental procedural rights*.[2]

a. Principle of non-discrimination and principle of effective protection of subjective rights

These two requirements are intended to establish a balance between the need to respect the procedural autonomy of the legal systems of the Member States and the need to ensure the effective protection of EU rights before the national courts.

Under settled case law of the Court of Justice the principle of non-discrimination means that *"it is for the Member States to choose appropriate rules to protect rights conferred by Community law, on condition however that such rules are not less favourable than those governing similar domestic actions in respect of rights conferred by national law..."*[3] In this context the CJ states that *"each national provision governing enforcement of an EU right before national courts must be examined and weighed not in abstract, but in the specific circumstances of each case, to see whether, taking its purpose into account, it renders the exercise of that right excessively difficult"*.[4]

According to the *principle of effective judicial protection* individuals must have the possibility to enforce their rights that are conferred on them by EU law before a court. It is necessary that individuals have *effective access to a court* (formal aspect) and that *the courts have effective remedies* (material aspect), by which a violation of EU law can be restored. The concept of shared government between European institutions and national authorities is characteristic for the EU, so for EU citizens the right on protection of subjective rights is ensured on two levels – on the EU level and on the national level as well.[5]

There are several remedies on the EU level. The most important for individuals are the appeal on review of the legality of an act taken by an EU institution and intended to produce legal effects *vis-a-vis* third parties (Art. 263 TFEU) and the action for non-contractual liability concerning damage caused by an EU institution (Art. 268 in conjunction with Art. 340, second and third paragraph, TFEU).

The application of EU law as far as individuals are concerned usually occurs at the national level. As mentioned above, which national court is competent to grant the protection and what procedural rules are applicable, is in principle a matter for national law. The national courts are considered as "EU law judge"; they have the task of ensuring an effective application of EU law in the Member State.[6] To guarantee a uniform application of EU law, national courts have the opportunity or obligation to refer preliminary questions concerning the validity and interpretation of EU law to the Court of Justice (Art. 267 TFEU).

System of remedies concerning administrative matters on the national level (specifically in the Czech Republic) shall be studied in sections II-VII.

b. Principle of fundamental procedural rights

The above named principles of non-discrimination and effectiveness are supplemented by the principle of fundamental procedural rights. Under Art. 6, third paragraph, TEU fundamental

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[1] Defined by the ECJ e.g. in joint cases C 430/93 and 431/93, van Schijndel and van Veen versus Stichting Pensioenfonds voor Fysiotherapeuten.

[2] Winkler, R. Administrative Justice in Europe: The EU Acquis, good practice and recent developments. Working paper submitted for the Twinning Project "Support to more efficient, effective and modern operation and functioning of the Administrative Court of the Republic Croatia", p. 8.

[3] Opinion of Advocate General Saggio, Case C-126/97, Eco Swiss China Time Ltd v Benetton International NV, available from http://curia.europa.eu/.

[4] Craig, P. P. de Búrca, G. EU Law: Text, Cases, and Materials, 4th edition, Oxford, New York, 2008, p. 319-321.

[5] Widdershoven, R. In Seerden, R. J. G. H. (ed.) Administrative Law of the European Union, its Member states and the United States, 2nd edition, Antwerpen, 2007, p. 323.

[6] Widdershoven, R. In Seerden, R. J. G. H. (ed.) Administrative Law of the European Union, its Member states and the United States, 2nd edition, Antwerpen, 2007, p. 324.

procedural rights set by the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulted from the constitutional traditions common to the Member States, shall constitute general principles of EU law. They are binding not only on the EU, but also on the member states insofar as they act for EU.[1] The set of fundamental procedural rights is known as *right to fair process* (Art. 6 ECHR[2]) and consists of several procedural rights. Under the case law of the Court of Justice the guarantees of Art. 6 ECHR are not limited to civil rights and obligations or criminal charges,[3] but apply to all procedures held before an authority competent under the national law.[4] As a consequence, the Administrative Justice (and administrative procedure as well) is subject to requirements of Art. 6 ECHR.

The issue of fair process in the specific context of Administrative Justice in the Czech Republic is further investigated bellow (section IV).

II. SYSTEM OF COURTS IN THE CZECH REPUBLIC

The judiciary in the Czech Republic is defined by the Constitution[5] so that *the courts perform their duties as independent authorities* (Art. 82 of the Constitution). The system of ordinary courts is made up of district, regional, superior courts and the Supreme Court (Art. 91, first paragraph of the Constitution). It is supplemented with the Constitutional Court that stands outside the system of ordinary courts (Art. 83 of the Constitution).

There are 86 district courts in the Czech Republic; the district court in the district Brno is called City Court (§ 12 of the Law on Courts and Judges[6]). District courts are the lowest judicial authorities in civil and criminal matters. They are the courts in which the 1st instance proceedings are heard.

There are 8 regional courts in the Czech Republic. The regional court in the capital in Prague is called Metropolitan Court in Prague (§ 11 of the Law on Courts and Judges). Regional Courts are courts of first instance in some matters, both criminal and civil. Regional courts as courts of first instance hear and rule on cases which are complicated and specialized and occur infrequently, e.g. protection of privacy and protection of reputation, cases of commercial nature involving larger financial compensation, bankruptcy etc. (§ 9 (2) of the Civil Procedure Code). In criminal proceedings regional courts as courts of first instance hear charges of more serious crimes. Regional courts as courts of second instance rule on matters that have been decided by a district court at first instance.

Czech procedural law is based on the principle of differentiated substantive jurisdiction, according to which regional courts rather than district courts are competent in some cases for reasons relating to greater specialisation and consistent decision-making. The principle says that district courts have substantive jurisdiction at first instance unless the law states otherwise.

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[1] See Winkler, R. Administrative Justice in Europe: The EU Acquis, good practice and recent developments. Working paper submitted for the Twinning Project "Support to more efficient, effective and modern operation and functioning of the Administrative Court of the Republic Croatia", p. 11.

[2] The European Convention on Human Rights and Fundamental Freedoms and its additional protocols (hereinafter "ECHR").

[3] For detailed information see Dijk, P., van Hoof, G. J. H. Theory and Practise of the European Convention on Human Rights, 3rd edition, Kluwer Law International, Hague, 1998, p. 391-478.

[4] ECJ Case C-185/95 P, Baustahlgewebe GmbH versus Commission of the European Communities.

[5] Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic (ústavní zákon č. 1/1993 Sb., Ústava České republiky), hereinafter "Constitution or Czech Constitution", in English available for example on web pages of the Constitutional Court of the Czech Republic, http://www.usoud.cz/view/1419 (2012/02/24).

[6] Law No. 6/2002 Coll., on Courts, Judges, Lay-judges and the State Administration of Courts (zákon č. 6/2002 Sb., soudech, soudcích, přísedících a státní správě soudů a o změně některých dalších zákonů, hereinafter "Law on Courts and Judges").

Under the Code of Administrative Justice specialized administrative panels have been constituted by regional courts. The panels perform judiciary in public administrative matters that are frequent and do not require great specialisation. Such special administrative matters are ruled on by the Supreme Administrative Court.

There are Superior courts on the third level (§ 25 of the Law on Courts and Judges). There are two Superior courts in the Czech Republic, one seated in Prague with jurisdiction over Bohemia and the other seated in Olomouc with the jurisdiction over Moravia. Superior courts as courts of second instance rule on matters, both civil and criminal, that have been decided by a regional court at first instance.

The Supreme Court is seated in Brno. The Supreme Court is the highest judicial authority in the matters of the court**'s** competence (with the exception of matters concerning the powers of the Constitutional Court and the Supreme Administrative Court) (§ 14 of the Law on Courts and Judges). It has the jurisdiction to decide on extraordinary remedies, both in civil and criminal cases, and it is also competent to decide on the recognition and enforcement of decisions issued by foreign courts on the territory of the Czech Republic, where this is required by a special legal regulation or an international treaty.

The Supreme Administrative Court is, according to the principle of separation of powers, seated in Brno (§ 11 of the Code of Administrative Justice[1]), while other top-level state authorities are seated in the capital. The Supreme Administrative Court of the Czech Republic is the highest judicial authority in matters falling within the competence of administrative courts. The Constitutional Court is a specialized judicial authority. Its principal task is to protect rights under the Constitution, the Charter of Fundamental Rights and Freedoms and other constitutional laws of the Czech Republic. Powers of the Constitutional Court are for example the cancellation of laws adopted by the Parliament and their individual provisions when they contradict the Constitution, the cancellation of regulations adopted by administrative authorities and their individual provisions when they contradict law adopted by the Parliament, decisions on constitutional appeals against legitimate rulings affecting the basic guaranteed rights and freedoms, the review of constitutional actions made by the Senate against the president, decisions on measures necessary for the performance of a binding decision made by an international court, the arbitration of disputes regarding the extent of the competencies of state authorities and self-administration authorities, and the review of international contracts before their ratification with respect to their compliance with constitutional order (Art. 87 of the Constitution).

III. GENERAL INFORMATION ABOUT ADMINISTRATIVE JUSTICE

Judicial review is a procedure by which the courts supervise the exercise of public power on the application of an individual. A person, who feels that an exercise of public power by an administrative authority is unlawful, perhaps because it has violated his or her rights, may apply to an administrative court for judicial review of the administrative act. The Administrative Justice comes up when the remedies within the public administration itself are exhausted. The idea of the Administrative Justice has developed in connection with the guaranty of civil rights and rule of law in a democratic country based on division of powers.[2] It is also related to the transformation of an individual from serf to citizen. While private laws have been protected by courts from time immemorial, the relationship between a state and a serf did not have to be regulated at all, and if the relationship was regulated it only depended on the manorial lord if they followed such a law *("regis*

[1] Act. No 150/2002 Coll., Code of Administrative Justice (zákon č. 150/2002 Sb., soudní řád správní), hereinafter "Code of Administrative Justice", in English available for example on web pages of the Supreme Administrative Court, http://www.nssoud.cz/docs/caj2002.pdf (2012/02/24).

[2] See Mazanec, M. Správní soudnictví, Praha, Linde, 1996, p. 13 ff.

voluntas suprema lex"). A sovereign (later a Leader or a Party) knew best what was good for citizens and they did not consider necessary the execution of their powers to be checked by an independent authority. The idea that even in the sphere of relations of power (political relations) citizen's individual rights are protected by an independent court is quite new.

The basic idea of administrative justice is to extend the protection of individuals' rights so far provided in the field of civil law and criminal law to other relationships between the state and its citizens. Administrative justice means an independent system of supervision of public administration.[1]

Administrative Justice is connected with the idea of separation of state powers. The basic function of Administrative Justice is to establish balance between judicial and executive powers and indirectly between judicial and legislative powers.

A civil judge is such a person in an absolutist state who is authorized by a sovereign to settle private legal disputes between the serfs themselves (i. e. between the persons who are, unanimously, subject to public power). Their influence on the executive branch and legislation is only indirect. The same is valid about criminal justice. On the other hand the task of an administrative judge is to act externally, towards the other state powers, especially towards the executive. They do not decide disputes between the persons who are subject to public power but he check an activity of public power; they decide in a dispute in which there is a citizen (a serf) on one side and an authority (a representative of public power) on the other.

Administrative courts check and balance the executive so that they decide concrete disputes of individual persons. The decision of a concrete dispute is, however, only the means to fulfil a much more important task of an administrative court, and that is to check the legality of making administrative decisions in general. An administrative court on a single concrete example influences an administrative practice even of a whole branch.

Already the traditional discipline has pointed to the fact that "a democratic state likes the ideal of free citizens, and of a liberal state intervening into the sphere of individuals' lives as little as possible. And if the state interventions are necessary they must be set by the law and, if possible, they should be issued or at least checked by a court."[2]

Judicial supervision of the public administration has developed as part of the democratic ideology of civic society. The right to judicial review of administrative acts is a part of the "package" of democratisation measures in transitional post-totalitarian countries. Judicial review is conducted to protect citizens' rights as well as public interest and rule of law.

The term "administrative justice" has various meanings in European countries. Administrative justice can be marked as, for example, the remedial administrative proceedings or the proceedings about public individual rights which are governed by special panels consisting of professionals and non-professionals.[3]

We can distinguish *four basic models of administrative justice*. Courts of general jurisdiction are called to review administrative acts in the Anglo-Saxon model,[4] whereas the French model is based on special administrative courts.[5] In the Prussian (North German) model of administrative justice,

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[1] See Hoetzel, J. Československé správní právo. Praha, Melantrich, 1937, p. 404.

[2] See Neubauer, Z. Státověda a theorie politiky, Praha, Jan Laichter, 1948, p. 300.

[3] See § 86 of the Law No. 121/1920 Coll., that introduces the Constitutional Charter of the Czechoslovak Republic ("zákon, kterým se uvozuje Ústavní listina Československé republiky") and see also Law No. 158/1920 Coll. On administrative justice at district agencies ("zákon o správním soudnictví u úřadův okresních a župních").

[4] Thompson, K., Jones, B. Administrative Law in the United Kingdom. In Seerden, R. J. G. H. (ed.) Administrative Law of the European Union, its Member states and the United States, 2nd edition, Antwerpen, 2007, p. 250 ff.

[5] See e. g. Horáková, M., Tomoszková, V. Správní soudnictví ve Francii. In: Správní soudnictví v České republice a ve vybraných státech Evropy, Praha, Wolters Kluwer, 2010, p. 220 ff. See also Auby, J.-B., Cluzel-Métayer, L. Administrative Law in France. In Seerden, R. J. G. H. (ed.) Administrative Law of the European Union, its Member states and the United States, 2nd edition, Antwerpen, 2007, p. 78 ff Jarnevic, J.-P. Les Jurisdictions administratives en France. In Šínová, R. (ed.), Olomoucké právnické dny, Olomouc, Iuridicum Olomoucense, 2008, p. 665 ff.

administrative courts judge not only the legality of administrative acts but also their efficiency. The panels of administrative authorities consisting of professionals and non-professionals decide the disputes about public individual rights. The system had three instances and the court decided only in the case of the last instance. In the South German model of administrative justice the making of decisions was not solely based on the cassation principle; the decision of an administrative authority could be not only cancelled but also revised. The making of decisions in full jurisdiction was an important characteristic feature. Austrian administrative justice is inspired by the South German model.[1]

Furthermore, there exist jurisdictions of constitutional courts (e. g. fundamental rights complaints) or other courts (e g. civil liability of state) that may subject public administration to judicial review. Finally, other institutions are constituted in modern states to protect individuals' rights, like Ombudsmen or mediation institutions, but they do not fit the above described idea of Administrative Justice. The Ombudsman has been constituted also on the European level to hold the EU institutions, bodies, offices, and agencies to account. Although the decisions of Ombudsmen are formally not binding, the institutions concerned usually comply with them.

The Czech Constitution does not recognize separate system of specialized administrative courts. But, as mentioned above, specialized administrative panels have been established by regional courts as courts of general jurisdiction and the Supreme Administrative Court as the supreme judicial authority specialized exclusively in the field of Administrative Justice.

Review by administrative courts is limited to acts of administrative authorities other than regulations. Regulations adopted by administrative authorities may be reviewed (and avoided) solely by the Constitutional Court in the Czech Republic.

IV. HISTORY OF ADMINISTRATIVE JUSTICE IN THE CZECH REGION

The roots of Administrative Justice in general can be found in England already in the 13th century; in central Europe Administrative Justice was not born until the second half of the 19th century in connection with the beginning of political liberalism.

The Supreme Administrative Court in the Czech Republic was legally established by the Constitution of the Czech Republic in 1993, but it was not created until 2003, when the Code of Administrative Justice entered into force.

The earlier history of administrative judiciary in the regions, which now constitute the Czech Republic, is connected with the history of the Austro-Hungarian Empire (of which the Czech country was a part). The constitutional foundations of Administrative Justice in the Austro-Hungarian Empire were laid down in the so-called "December Constitution", or more precisely in Art. 15 of the Basic State Law on Judicial Power (No. 144/1867 of the Imperial Collection of Laws). This act established the Administrative Court in Vienna *(Verwaltungsgerichtshof)*.

This Court was the sole administrative court serving the Austrian part of the empire. Administrative Justice was thus conceived of as a concentrated and specialized system of judicial review.

It took almost ten years before the Administrative Court actually started to operate and its rules of procedure were adopted. It was effectuated by the Administrative Court Act that is known in the legal doctrine as "the October Act." The author of the Administrative Court Act was Karl von Lemayer, a well-known Austrian administrative lawyer, who later became a member of the court and the president of a chamber. The court's first hearings were held in July 1876.

[1] See for example Mazanec, M. Správní soudnictví, Praha, Linde, 1996, p. 23. See also Danwitz, T. Europäisches Verwaltungsrecht, Berlin-Heidelberg, Springer Verlag, 2008, p. 28 ff; Adamovich, L. K., Funk, C. B., Holzinger, G. Österreichisches Staatsrecht, band 2, Staatliche Organisation, Wien, Springer Verlag, 1998, p. 281 ff.

The act itself was very concise, it comprised fifty articles and it intentionally left extensive room for flexible judicial rule-making. The quality of the Administrative Court Act is well confirmed by the fact that after the break-up of Austria-Hungary in 1918 it remained in force in Austria as well as in the newly created Czechoslovakia. In the Czech region the act stayed in effect until the liquidation of Administrative Justice after the communist takeover in 1948. High quality case law of the Vienna Administrative Court is evidenced by compilations of court reports (edited for example by Dr. Adam Budwinski). The present Czech administrative courts, especially the Supreme Administrative Court, often use the case law of Vienna administrative court in its argumentation and reasoning of decisions. That also proves the high quality of the case law of the Austrian Administrative Court.

The Czechoslovak Republic adopted the Supreme Administrative Court Act as one of its first laws. It was act No. 3/1918 of the Collection of laws. It remained in force until 1952. The first president of the Supreme Administrative Court was Ferdinand Pantůček. He was one of the men involved in the October 1918 overturn of the Habsburg monarchy and a member of the imperial Upper House and later the president of a chamber at the Vienna administrative court. The vice-president of the Court was Dr. Emil Hácha who had been a councillor at the Vienna Administrative Court. He was one of the most important Czech administrative lawyers, but at the same time a tragic figure of the modern Czech history. (Later as the president of the Czechoslovak Republic he signed the document which allowed Germany to annex Czechoslovakia.) After the death of Pantůček, Dr. Hácha was appointed president of the Supreme Administrative Court and he remained in that position until November 1938, when he was elected President of the Czechoslovak Republic.

It is often stressed that Czechoslovak Administrative Justice was based on the Austrian model, but this was not intentional. It was merely a result of development at the time. The original conception was different. The Czechoslovak Constitution 1920 envisaged Administrative Justice based on the Prussian (north-German) model with lower administrative courts to be created within districts and counties. The Supreme Administrative Court was supposed to act only as the court of last instance, deciding solely on matters concerning legality. To put this model into practise, the Administrative Justice before District and County Offices Act (Law No. 158/1920 Coll.) was adopted together with the Constitution of 1920, but the Act never entered into force, probably because of political disagreement. The Supreme Administrative Court as the only administrative court in the Czechoslovak Republic was overloaded. Proceedings before the administrative court were slow and long and even a progressive increase in the number of judges was not sufficient.[1]

During the period of the so called First Republic between 1918 and 1938 the Czechoslovak Supreme Administrative Court was on par with administrative jurisdictions in other European countries. Its judicial activity of the Court is documented in official law reports, named after its editor and president of a chamber of the court Dr. Josef Bohuslav. Bohuslav's report enjoyed a very good reputation. Between 1918 and 1948 tens of thousands of decisions were published in the law report. A lot of decisions of the Supreme Administrative court of the First Czechoslovak Republic are still of some relevance today.

In the period of German Occupation between 1939 and 1945 (the so-called Protectorate of Bohemia and Moravia), the sad role of the Supreme Administrative Court was to interpretate the anti-semitic legislation. Powers of the court were limited because of the separation of domestic judicial powers from those falling under the jurisdiction of the Third Reich.

During the Second World War the Administrative Court in Bratislava was created in the then independent fascist Slovak Republic. After the Second World War an institution called Administrative Court was still envisaged in Art. 137 of the new Constitution (the so-called 9th May

[1] For details see Mazanec, M. Správní soudnictví, Praha, Linde, 1996, p. 27 ff.

Constitution[1]), but immediately after the Communist takeover in 1948 it became clear that independent judicial control of public administration and protection of public-law rights of individuals would not be respected by the new totalitarian regime. Some of the older judges of the Administrative Court were made retired and no new judicial appointments were made. This way the Court was made non-operational. In 1949 the Administrative Court was reseated to Bratislava. According to law the Administrative Court was supposed to be operational until 1952, but there is no clear evidence in the archives that the court really operated.

Administrative Justice was altogether abolished by a constitutional act on court and the prosecution office (No. 64/1952 Coll.) that amended the constitutional provisions on the judiciary and without explanations removed from the Constitution all the provisions on the Administrative Court. All other laws concerning the Administrative Court were abolished by a general clause comprised in the following act (No. 65/1952 Coll.).

The only remnant of the Administrative Justice in Czechoslovakia was the insurance justice (justice in matters concerning employee insurance in case of illness, invalidity and old age). This was transformed into a special type of proceeding on remedies against an administrative decision and became a part of the Civil Procedure Code. The perception of the Administrative Justice changed. It became merely a minor and specific subcategory of Civil Justice.[2]

The idea of the incompatibility of the totalitarian communist establishment with the existence of Administrative Justice was clear-sightedly expressed by the afore-mentioned administrative lawyer Emil Hácha already in 1933: "In the Soviet establishment there is no space for Administrative Justice already for the reason that bolshevism removed the traditional separation of powers and thus also the hierarchy of rules, that is the difference between a law and the rules of lower instance, … , so it is not possible to measure administration using the norm of higher instance at all. Bolshevism could not consistently admit the independence of judges and a judge served as a mere "judicial clerk". … Where Lenin's principle that freedom is a bourgeois prejudice is valid, there is no space for an authority the role of which is to protect the individual's freedom towards the state. … Courts of public law which were abolished in Czechoslovakia in the 50's were replaced by the general supervision of the public prosecutor's office which was aimed at the protection of public interest in the better case but not at the protection of individual rights towards illegal actions of the executive power.

The heritage of the Czechoslovak Supreme Administrative Court, one of the notable European tribunals, was condemned to non-existence. Bohuslav's collection of decisions of the Supreme Administrative Court and other important works about public law disappeared from libraries and were forgotten.

After 1989 was what is often called a renaissance of Administrative Justice. Constitutional foundations were laid down in Art. 36, second paragraph of the Charter of Fundamental Rights and Freedoms which guarantees the right to the review of administrative acts.

In the period between 1992 and 2002 the judicial review of administrative acts was performed on the basis of special provisions of the Civil Procedure Code (Part V of the Civil Procedure Code called Administrative Justice). The review was effectuated by courts of general jurisdiction and performed by regional courts and the Supreme Court of the Czechoslovak Republic, after the split of Czechoslovakia by High Courts of the Czech Republic.

From the legal point of view the Supreme Administrative Court of the Czech Republic was established 1st January 1993, when the Czech Constitution entered into effect. The Constitution (Art. 87, third paragraph and Art. 91, first paragraph of the Constitution) explicitly provides for the Supreme Administrative Court. But the implementing law was not adopted until 2003.

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[1] Constitutional Law No. 150/1948 Coll., Constitution of the Czechoslovak Republic.

[2] For detailed information see Mazanec, M. Správní soudnictví, Praha, Linde, 1996, p. 27 ff. See also web pages of the Supreme Administrative Court, http://www.nssoud.cz/History/art/4?menu=174 (2012/02/24), available also in English.

There were some questionable aspects of the Czech conception of Administrative Justice in the period between 1992 and 2002, when the review of administrative acts was performed by courts of general jurisdiction.

The Constitutional Court repeatedly pointed to the most worrying problem which was the inconsistency of the Czech Administrative Justice with Art. 6 ECHR.[1]

The inconsistency lay in several grounds:

- The judicial review of administrative acts was limited to the review of legality. The administrative court did not review, whether the administrative authority used its discretionary power rightly; the court only reviewed whether the legal limits of the discretionary power were not exceeded, and whether the administrative authority used its discretionary power within legal limitations (lack of propriety review).

- The judicial review did not comprise issues such as protection against the inaction of administrative authority or unlawful interference (lack of protection against unlawful interference and unlawful inaction).

- There were no judicial remedies against judicial decisions in Administrative Justice. The decision of the "first instance" court was final (lack of remedies).

- Administrative justice did not take evidence. Solely evidence given before administrative authorities was relevant for the ruling of the administrative court (lack of full jurisdiction)

The Constitutional Court by its decision (published as No. 279/ 2001 Coll.) annulled the Part Five of the Civil Procedure Code, which had been the legal basis for administrative justice. The Constitutional Court, however, deferred the effect for nearly two years (until 1st January 2003) to provide the legislator with sufficient time to pass new, consistent legislation.[2]

Art. 6 ECHR provides a detailed *right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time*. It mentions the term "tribunal". So the question is if the requirements of Art. 6 ECHR must be met in administrative proceedings held before administrative authorities too. The European Court of Human Rights has already answered this question. The requirements of Art. 6 ECHR shall be applied also to proceedings held by administrative authorities (when ruling on matters relating to civil rights and obligations or charge of administrative offence), not only in proceedings held by courts.[3]

The requirements of Art. 6 ECHR may be applied to administrative procedure only appropriately (by definition of the public administration not completely). The public administration can be neither independent, because it is based on subordination, nor impartial, because it represents public interest. Those requirements that cannot be fulfilled in the administrative procedure must be completely met in the procedure of judicial review.[4]

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[1] Notification No. 209/1992 Coll. of the Ministry of Foreign Affairs, on The European Convention on Human Rights and Fundamental Freedoms and its additional protocols No. 3, 5 and 8 (sdělení č. 209/1992 Sb. Federálního ministerstva zahraničních věcí, o Úmluvě o ochraně lidských práv a základních svobod ve znění protokolů č. 3, 5 a 8).

[2] In English see for example Pomahač, R. Czech Administrative Law, Prague, Charles University, 2004, p. 123-124.

[3] ECHR, 28th June 1984, Campbell and Fell versus U. K., application No.. 7819/77, 7878/77: "…the word «tribunal» in Article 6 para. 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country... In determining whether a body can be considered to be «independent» – notably of the executive and of the parties to the case..., the Court has had regard to the manner of appointment of its members and the duration of their term of office..., the existence of guarantees against outside pressures... and the question whether the body presents an appearance of independence ..."

[4] ECHR, 10th February, 1983, Albert a Le Compte versus Belgium, application No. 7299/75 a 7496/76: „… the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 (Art. 6-1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1."

V. CONSTITUTIONAL AND LEGAL FOUNDATIONS

As mentioned, the Czech Constitution explicitly provides for the Supreme Administrative Court and so lays down the constitutional foundations of Administrative Justice. Art. 91, first paragraph of the Constitution mentions the Supreme Administrative Court as one of the judicial authorities. "The court system comprises the Supreme Court, the Supreme Administrative Court, superior, regional and district courts."

Art. 87, third paragraph of the Constitution provides for an opportunity to entrust the Supreme Administrative Court with the power to annul secondary legislation if it is not in accordance with a statute and the power to decide competence disputes between state authorities and authorities of self-governing units. "A statute may provide that, in place of the Constitutional Court, the Supreme Administrative Court shall have jurisdiction: a) to annul legal enactments other than statutes or individual provisions thereof if they are inconsistent with a statute; b) to decide jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body." No statute provides that the Supreme Administrative Court has the power to annul secondary legislation adopted by administrative authorities and every regulation, both statutes adopted by the Parliament and other regulations adopted by administrative authorities, may be annulled solely by the Constitutional Court. The Code of Administrative Justice provides that the Supreme Administrative Court has the power to decide some competence disputes (competence disputes between authorities of state administration on one side and authorities of self-governing units on the other side, disputes between self-governing units versus each other and disputes between authorities of central state administration versus each other).

Administrative Justice is also predicted in Art. 36 of the Charter of Fundamental Rights and Freedoms that comprises the guaranty of fair process and provides that a person who claims that his or her rights were interfered with by a decision of a public administrative authority may ask a court for review of such decision. The competence of administrative courts is under this article based on a general clause. Every decision of an administrative authority may be reviewed, unless the law explicitly states otherwise (but exclusion of decisions relating to fundamental human rights and freedoms would be unconstitutional).

Detail rules for Administrative Justice are comprised in the Code of Administrative Justice (Act No. 150/2002 Coll.). It provides for jurisdiction and competence of administrative courts, some of the issues concerning the organization of courts and the status of judges, procedure of administrative courts and rights and duties of parties to proceedings and other persons in Administrative Justice.

The jurisdiction of Administrative Justice is laid down so that courts in Administrative Justice provide protection to the individual public-law rights of both natural persons and legal entities and make decisions in other matters provided by the Code of Administrative Justice.

Administrative courts do not decide on private law matters, matters related to civil, labour, family and business law. All matters in which an administrative authority have decided on private law matters are excluded from the jurisdiction of administrative courts; the review of decisions in these matters was left for decision by civil courts in civil law proceedings provided by the Civil Procedure Act.

VI. SYSTEM OF ADMINISTRATIVE JUSTICE IN THE CZECH REPUBLIC

The system of Administrative Justice has been represented in part by 8 regional courts, in which the detachment of their administrative jurisdiction from other matters is solely an issue of internal organization within the court, and secondly by the Supreme Administrative Court, which is the supreme judicial body specialized exclusively in the field of Administrative Justice.

Specialized administrative panels have been established at regional courts to hear the cases related to administrative law. Specialized single-judges rule on solely the cases related to social security law and administrative infractions committed by natural persons

Regional courts as administrative courts provide protection against a decision of an administrative authority, protection against inaction by an administrative authority, and protection against unlawful interference by an administrative authority.

The Supreme Administrative Court rules on cassation complaints and decides on other cases specified by law (§ 12 (1) of the Code of Administrative Justice). A cassation complaint is a type of remedy against a decision of a regional court in matters of Administrative Justice, in which the complainant seeks the annulment of an administrative decision. By deciding on cassation complaints the Supreme Administrative Court as the highest judicial authority in matters related to the jurisdiction of courts of Administrative Justice ensures the unity and legality of decision-making of regional administrative courts.

The jurisdiction of the Supreme Administrative Court also comprises electoral matters and matters of a local referendum, matters of political parties including dissolution of political parties. It also provides protection against unlawful measure of a general nature. The Court is also called to decide some conflicts of competence between administrative authorities. It is also the disciplinary court in matters of judges, state prosecutors and enforcement agents.

VII. PROCEDURAL GUIDE, GENERAL INFORMATION ON THE PROCEDURE BEFORE AN ADMINISTRATIVE COURT

Procedure before a court of Administrative Justice is based on the principle of disposal; this means that the protection of rights within Administrative Justice is provided only on the submission of a claim. Administrative courts do not provide protection ex officio.

The protection can be claimed after the exhaustion of all appropriate remedies, if admissible under a special law. All available remedies within the public administration must be exhausted first and then the protection before an administrative court may be claimed. It is important for a complainant to try all available remedies concerned within the public administration by means of which it might have been possible to redress his or her grievance; otherwise his or her complaint to court would be inadmissible.

A party need not be represented by an attorney in the proceedings held by a regional court but may choose to be represented by an attorney or by any other person.

In accordance with the guarantee of fair process under the Art. 6 ECHR the hearing before an administrative court as any other court is open to the public.

Complaint against an administrative decision is the most frequent type of complaint brought in Administrative Justice. It falls into the jurisdiction of regional courts. Individuals can present cases to the administrative court if they believe a decision of an administrative authority has violated their public-law rights.

Anyone who claims that their rights have been violated by a decision of an administrative authority may seek the cancellation of such a decision, or the declaration of its nullity. If the administrative authority has decided on a penalty for an administrative offence, the person on whom the penalty was imposed may seek a release from the penalty or its reduction within the limits provided by the law by means of a complaint. In such cases the complainant may seek the change of the administrative decision.

The claim can also be made by the attorney general or by the ombudsman if they find a serious reason for the submission to be in the public interest.

The claim can be made only within two months starting with the date at which the administrative decision was notified to the complainant.

The parties to the proceedings are the complainant and the defendant, while the defendant is the administrative authority which has made the last-instance decision.

Full jurisdiction – this is a term used for the power of administrative courts to produce evidence. Full jurisdiction of administrative courts is one of the important changes in the Czech Administrative Justice, which was brought about by the Code of Administrative Justice in 2003.[1] The court produces evidence during the hearing. The court may repeat evidence produced by the administrative authority or add new evidence; it appraises the evidence produced by the administrative authority individually and altogether with evidence produced in the proceedings before the administrative court (§ 77 (2) of the Code of Administrative Justice).

If the complaint is justified, the court cancels the contested decision as unlawful or for procedural faults. The court also cancels the contested decision as unlawful if it finds that the administrative authority exceeded the legally defined limitations of discretionary power, or abused its discretionary power.

If the court decides on a complaint against a decision whereby the administrative authority imposed a penalty for an administrative offence, the court may, if the penalty imposed was apparently unreasonable, either release the complainant from the penalty or reduce the penalty within lawful limits.

If the court cancels the contested administrative decision, it may, depending on circumstances, also cancel the decision of a lower-level administrative authority which preceded it.

If the court cancels a decision, it also declares that it returns the matter to the defendant for further proceedings.

The legal position adopted by the administrative court in the cancellation judgement or a judgement declaring nullity is binding on the administrative authority in subsequent proceedings.

If the court cancels a decision of an administrative authority in a matter in which the court itself produced evidence, the administrative authority must include the evidence among the grounds for a new decision in the subsequent proceedings.

The court shall dismiss a complaint if not justified.

VIII. CONCLUSION

Administrative Justice is an inseparable attribute of the democratic state in the modern world. Everybody's protection of their subjective rights against illegal intervention of public power is guaranteed. The existence and level of Administrative Justice is a significant indicator of democracy of a modern state, or more precisely a significant indicator of the level of protection of public subjective rights. But at the same time the modern public administration shall itself be capable of insuring sufficient protection of public individual rights and the administrative justice shall be called upon only when instruments within the public administration seem to be insufficient. *"Administrative courts are rescuers at moments of necessity."*[2]

So Administrative Justice means an indubitable contribution for the rule of law and the constitutional balance of powers on the national level, but it is also a necessary institution for the functioning of the European Union and its legal order.

To a large extent, EU law concerns execution of public administration in member states, but administrative authorities lacking the quality of "a court or a tribunal" under the Art. 267 TFEU cannot request the Court of Justice of the European Union in Luxembourg to give a preliminary

[1] For detailed information see Svoboda, P. Čl. 6. odst. 1 Evropské úmluvy o lidských právech a nová úprava správního soudnictví. In Vopálka, V. Nová úprava správního soudnictví, Praha, Aspi Publishing, 2003, p. 113 ff; Pomahač, R. Plná jurisdikce správních soudů, Soudní rozhledy, 3/2002, p. 77 ff.

[2] Karel Šimka, judge of the Supreme Administrative Court, at the professional meeting on the 25th January, 2012 on the topic "Broadcast advertising".

ruling concerning the application of EU law. Each EU member state has the obligation to fully implement and apply the large amount of European law, and so the Administrative Justice plays a determinative role for the application of EU law. Otherwise there would be no guarantee that the EU law is applied in the same way in all EU member states.

The stipulation of Administrative Justice in the Czech Republic has gone through substantial changes in the context of the turn of the regime in 1989. The seeking that the proper conception conforms with international and European standards of protection of individual rights and with intentions of the constituent assembly took ten years.

Although the current Czech conception of Administrative Justice is above reproach from the international point of view (particularly Art. 6 ECHR), with respect to the efficiency of protection of public subjective rights continuous reappraisals are necessary.

The last amendment of the Code of Administrative Justice notably revised the provisions concerning the protection against unlawful interference by an administrative authority (other than administrative decision), when it left out the conditions that the interference or its results must last or there is a danger that the interference will be repeated (§ 82 of the Code of Administrative Justice) and it notably has left out the provision stating that the action is inadmissible if the plaintiff claims only the statement that the interference was unlawful. The plaintiff may newly claim just a condemnation that an administrative interference contradicted the law. This is one of the changes that may strengthen the confidence in good administration.

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The EU Aviation Regulation: *Ad Meliora*

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Abstract: The European integration is a process quite visible in the field of aviation regulation. It seems that the EU has been able to make things better (*ad meliora*) for customers and position itself as a competitive economic region towards other superpowers. After achieving the uniform approach shared now by the EU and its member-states, the new challenges such as emissions trading scheme and standards for liability in case of environmental claims and violating customer's rights are still successfully handled. The development of EU aviation law is a relatively good example of unity in Europe, a phenomenon that is not always achieved easily in many other areas of integration.
Keywords: ETS, Emission trading, EU, Aviation, aircrafts, Open Skies agreement, Flights.

INTRODUCTION: "OPEN SKIES CASES"[1]

The new era in European civil aviation begun with so called "Open sky agreements", the large scale project that tested the loyalty of the EU Member States. There is much in stake as by the EU official statistics, today the EU civil aviation exports in 2010 (est.): €46.5billion, the EU civil aviation imports in 2010 (est.): €29.6 billion. The biggest markets for EU civil aviation exports in 2010 in decreasing order of importance are China, United Arab Emirates, United States, Saudi Arabia, Singapore and Australia[2].

The integrationists welcomed ruling of the European Court of Justice (ECJ) in the so-called "open skies" cases, which analyzed the legality of bilateral agreements concluded between eight EU Member States and the United States. By European Commission (statement made in 2002): "Today's judgment is a major step towards developing a new coherent and dynamic European policy for international aviation. In most sectors of the economy, Europe speaks with one voice in international negotiations and takes a leading role in shaping events. Until now, aviation has been excluded from this approach as Member States have pursued their own individual agendas. From now on, it is clear from the Court's ruling that we will all have to work together in Europe to identify and pursue our objectives jointly. The Commission stands ready to play its part".

The relevance of the Court's finding is tremendous as the nationality clauses in the agreements, have been found contrary to the European Union Law. First, the EU Commission had argued that these clauses violate the fundamental right of establishment, under which EU nationals are free to establish businesses throughout the EU. The ECJ confirmed that the clauses concerned discriminate between Community companies on the basis of the nationality of their owners.

[1] The current contribution is extended and modified version of the conference paper of prof. Kerikmäe "Recent Civil Aviation Case-law at European Court of Justice. Civil Aviation Laws under the National Legislations and the International Conventions, Dubai. (ed.) Prof. Jassim Ali Salem Alshamsi. Dubai, United Arab Emirates: United Arab Emirates University Faculty of Law in cooperation with the Dubai Courts & Dubai Civil Av, 2012, (The 20th Annual International Conference).

[2] European Commission, Trade, at http://ec.europa.eu/trade/creating-opportunities/economic-sectors/industrial-goods/civil-aviation/

EU'S EMISSIONS TRADING SCHEME: TRADE WAR?[1]

On December, 2009, the Air Transport Association of America (ATA) and three other U.S. airlines (American, Continental, and United) initiated their warned legal actions in the U.K. with the aim to fight against the inclusion of aviation in the Emissions Trading Scheme (ETS)[2]. The U.S. aircraft claimants brought the case to the U.K. because it was the first of the EU Member States to implement the ETS. As according to the EU law, only the Court Justice of the European Union (CJEU) has the authority to declare EU legislation invalid, therefore the case was referred to the CJEU[3]. In 2011, (Case C-366/10), the Court of the European Union held that the directive including aviation activities in the EU's emissions trading scheme is valid and application of the emissions trading scheme to aviation infringes neither the principles of customary international law at issue nor the Open Skies Agreement.

A number of American and Canadian airlines and airline associations contested the measures transposing the provisions of the Directive. They argued that, in adopting the directive, the EU infringed a number of principles of customary international law and various international agreements such as Chicago Convention, the Kyoto Protocol and the Open Skies Agreement in particular because it imposes a form of tax on fuel consumption, and second, certain principles of customary international law in that it seeks to apply the allowance trading scheme beyond the European Union's territorial jurisdiction.

First the ECJ found the admissibility criteria to test the Directive and held that only certain provisions of the Open Skies Agreement and three principles of customary international law (the sovereignty of States over their airspace, the illegitimacy of claims to sovereignty over the high seas and freedom to fly over the high seas) may be relied upon for the purposes of examination of the directive's validity.

The EU is not bound by the Chicago Convention. As regards the Kyoto Protocol, the parties to the protocol may comply with their obligations in the manner and at the speed upon which they agree and that, in particular, the obligation to pursue limitation or reduction of emissions of certain greenhouse gases from aviation fuels, working through the International Civil Aviation Organization (ICAO), is not unconditional and sufficiently precise to be capable of being relied upon. The Court concludes by stating that the uniform application of the scheme to all flights which depart from or arrive at a European airport is consistent with the provisions of the Open Skies Agreement designed to prohibit discriminatory treatment between American and European operators (See: ECJ press release 139/11 of Dec. 21, 2011).

Airlines and governments from outside the EU will likely step up opposition to new taxes on carbon emissions under the ETS, which is scheduled to take effect at the beginning of 2012. The U.S. State Department and other non-EU governments (including China and India) have already expressed stiff opposition to ETS taxes on airlines and a perceived unilateral effort to restrict market access for non-EU carriers[4].

The ECJ ruling comes at a difficult time for global air carriers already facing high jet fuel costs and a softening outlook on air travel demand. The Association of European Airlines (AEA) warned earlier this month that it expects member airlines to report large operating losses in 2012 as European macroeconomic weakness erodes air travel demand and trans-Atlantic markets remain under stress

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[1] The author has used the compilations of ECJ cases composed by Michael Wukoschitz at http://iftta.org/ International Forum of Travel and Tourism Advocates

[2] R (on the application of The Air Transport Association of America, Inc. and Others) v. The Secretary of State for Energy and Climate Change (Administrative Court), CO/15376/2009.

[3] Bisset M, Crowhurst G. Is the EU's Application of Its Emissions Trading Scheme to Aviation Illegal? Air & Space Lawyer. 2011, Vol.23, Issue 3, p. 1-18.

[4] Fitch: ECJ Emissions Ruling Door to Global Air Dispute, CHICAGO, Dec 21, 2011 (Business WIRE).

due to over-capacity[1]. Furthermore, the US says EU plans for an emissions tax on airlines must be dealt with by the international aviation body. The US thinks its carriers will lose out heavily and it wants the issue dealt with by the International Civil Aviation Organization (ICAO)[2]. Non-EU carriers say the charges are illegal under international law, while the US Secretary of State Hillary Clinton said America would respond with "appropriate action" if the scheme went ahead[3]. So, there is a clear danger for international reprisals as the change in the emissions law would greatly impact for example large US carriers, costing them an estimated $3 billion by 2020[4].

Airlines for America (A4A), the industry trade organization for the leading U.S. airlines, today issued the following statement regarding the decision of the European Court of Justice (ECJ) on the A4A legal challenge to the unilateral application of the European Union Emissions Trading Scheme (EU ETS) to international aviation[5]. Last year, IATA (International Air Transport Association) that represents some 230 airlines comprising 93% of scheduled international air traffic expressed its disappointment in the opinion of the Advocate General of the Court of Justice of the European Union which did not support the air transport industry's challenge to Europe's plan to include international aviation in its emissions trading scheme (EU-ETS) from 2012[6].

If the ATA and the U.S. airline claimants would have prevailed in their legal action, it would have led to great implications for the future of EU climate change policy concerning aviation. Moreover, if their arguments relating to the Chicago Convention would have failed but their Open Skies Agreement-related arguments succeeded, the applicants could lose their battle to have the ETS as a whole declared invalid. However, they would achieve their smallest objective, namely, to prevent the ETS being applied to U.S. airlines. This could leave the door open for other non-EU airlines to review their countries' bilateral aviation arrangements with the EU Member States and perhaps initiate similar legal proceedings[7].

Situation that the Grand Chamber of the U.K Court reached the same outcome, however providing slightly different reasoning, is not surprising. Nevertheless, one may say that the ECJ decision contains some unexpected findings and that the issue and decision itself is pretty controversial. Some legal researchers have shared the thoughts of the decision in this case by stating that it is flawed, namely, "by failing to undertake a rigorous analysis of the issues and adopting shortcuts in reasoning, the ECJ has both established precedents and left questions unanswered, which may have repercussions for international aviation and for other sectors in unanticipated and unpredictable ways, particularly given the relatively limited body of EU law"[8].

Effective from January 1, 2012, the ETS is applicable to every aircraft operator or carrier that arrives at or departs from an airport within the EU, Norway, Iceland, and Liechtenstein. Initially it was decided that if an aircraft has an operating license from the EU country, it will be administered and managed by that country. However for non-EU carriers EU Member States are to be determined and assigned to administer these matters based on their primary routes within the EU. Nevertheless, now the European Union is continuing with the plan to include non-Member State airlines in its emissions trading - scheme-(ETS), despite the agreement reached in October 2010 among the 19Q

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1 Ibid.

2 US rejects European Court ruling on airline emissions, BBC New Business, 21.12.2011.

3 Kahya Damian "Air wars: Fears of trade war over EU airline carbon cap", BBC Business 21.12.2011.

4 Belczyk Jaclyn, Top EU court upholds airline pollution fines, The Jurist, Legal News and Research 21.12.2011.

5 A4A Comment on European Court of Justice Decision, http://www.airlines.org/Pages/news_12-21-2011.aspx. The relations between EU-US may become problematic, despite of fact that On June 18, 2010, the European Commission and the U.S. Federal Aviation Administration (FAA) signed a memorandum of cooperation in the areas of civil aviation research and development and on interoperability between the EU and U.S. air traffic management (ATM) modernization programs, known as SESAR and NextGen, respectively.

6 See IATA press-release at http://www.iata.org/pressroom/pr/pages/2011-10-06-01.aspx

7 Bisset M, Crowhurst G. Is the EU's Application of Its Emissions Trading Scheme to Aviation Illegal?

8 Andrus, Katherine B. Beyond Aircraft Emissions: The European Court of Justice's Decision May Have Far-Reaching Implications. Air & Space Lawyer. 2012, Vol. 24, Issue 4, p.1-16.

Contracting States of the International Civil Aviation Organization (ICAO) to reduce greenhouse gas emissions from aviation[1].

CLEAN SKIES- WHO PAY?

The main goal of the ETS directive is to decrease the global warming and reduce the emission of greenhouse gases, in specific set of situations ETS provisions actually may lead to the increase of global warming. For example, "one possible scenario of this reverse effect is connected with the choice of the optimum flight level. For most aircraft, it holds that the higher the flight level, the lower the fuel consumption and the lower the carbon dioxide emissions. So when an air operator decides to fly at a higher flight level, it decreases carbon dioxide emissions and it benefits from EU ETS. However, there is a higher risk that flying at a higher flight level will take aircraft to supersaturated air where contrails or induced cloudiness form"[2].

The air carriers that fly to and from Europe effective from 2012 must keep tracks of their emissions and purchase the carbon allowances in the case if the gases go beyond the limited amount[3]. As the demand of the CO_2 by airlines is predicted to be about 23 million metric tons of CO_2 for year 2012, continuing to increase and reaching 122 metric tons by 2020, the European Commission had concerns that the amount of emissions from airplanes would diminish the success from the reduction of emissions in other sectors of transportation. Consequently the Commission included aviation in the ETS[4].

Officials estimated that the cost of purchasing carbon allowances will grow by $2.2 billion by 2020, rising from $1.3 billion in 2012 to $3.5 billion[5]. Who will really pay? A number of airlines have informed that starting from the moment ETS will become effective; they will announce new charges for passengers (surcharges). Since the airlines face additional costs on operation of flights and obligatory participation in the ETS, implementation of surcharges is one of the means how to balance the costs. However airlines must be extra careful with imposing such charges, since it may lead to suspicion that the "introduction of surcharges at the same time and at similar levels could be viewed as being consistent with an agreement between airlines which might amount to an infringement of the competition rules, along similar lines to previous surcharges cases"[6].

SAFETY IN THE EUROPEAN AIRSPACE

The European airspace safety standards on theory and practice have been declared as one of the best in the world. Despite the overall tendency of States to improve the safety in the airspace, some of the airlines are still facing problems and do not meet the basic and essential safety standards. Consequently the EU has decided to restrict the airlines found to be unsafe from operating in European airspace[7]. The European Commission has adopted the 19th update on April, 2012, of the European safety list of air carriers which are banned to operate within the EU. It is also called as "the EU air safety list". The decision is based on the unanimous opinion of the Air Safety Committee, composed of representatives of the 27 Members States of the EU, Croatia, Norway, Iceland, Switzerland and of the European Aviation Safety Agency (EASA). The new European air safety list

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1 Andrus, Katherine B. Beyond Aircraft Emissions: The European Court of Justice's Decision May Have Far-Reaching Implications.

2 Hospodka J. Critical Issues of Inclusion of Aviation in EU Emissions Trading System. World Academy of Science, Engineering and Technology. 2011, Issue 59.

3 The battle over clean European skies. Air Cargo World. Oct.2011, Vol. 101, Issue 10, p. 24-30.

4 Bisset M, Crowhurst G. Is the EU's Application of Its Emissions Trading Scheme to Aviation Illegal?

5 The battle over clean European skies. Air Cargo World.

6 Aerospace EU & Competition. The EU ETS: airline surcharges and antitrust law - a case of déjà vu? February 2012.

7 European Commission. Mobility and Transport. http://ec.europa.eu/transport/air-ban/list_en.htm

includes all airlines certified in 21 States, accounting for 279 known air carriers, whose operations are fully banned in the European Union[1].

Some of the newly added air carriers are from Libya, Venezuela, Democratic Republic of Congo, and Equatorial Guinea. As the civil aviation authorities can inspect only those aircrafts which fly to and from the EU airports, the situation if the aircraft is not listed among the banned aircrafts, does not automatically mean that it has passed the safety standards. However, being on the list does not mean that the aircraft in question will be banned from operating in the EU airspace for ever. When the airline deems to be in conformity with the safety standards put upon by the EU, it may request for the European Commission to remove it from the list[2].

NOISE LEVELS[3]

By the judgment given by the ECJ at case C-120/10, European Air Transport SA, EU Member States can establish maximum noise levels, as measured on the ground, to be complied with by airlines overflying areas located near an airport. In order to reduce noise pollution generated by aircraft using EU airports, Directive 2002/301 permitted Member States to adopt restrictive measures known as "operating restrictions'. The Court held that an operating restriction within the meaning of Art. 2(e) of that directive concerned a prohibition on access to the airport in question, whether the prohibition was absolute or restricted.

However, environmental legislation, such as that at issue in the main proceedings, imposing limits on maximum noise levels, as measured on the ground, to be complied with by aircraft overflying areas located near the airport, did not itself constituted a prohibition on access to the airport in question. The Court held that Article 2(e) of Directive 2002/30 must be interpreted as meaning that an "operating restriction" was a prohibition, absolute or temporary, that prevented the access of a civil subsonic jet aeroplane to a European Union airport. Therefore they constitute objective measures which apply to aircrafts fulfilling concrete pre-established conditions based on international certification or standardization.[4]

Consequently, national environmental legislation imposing limits on maximum noise levels, as measured on the ground, to be complied with by aircraft overflying areas located near the airport, did not itself constituted an "operating restriction" within the meaning of that provision, unless, in view of the relevant economic, technical and legal contexts, it could have the same effect as prohibitions of access to the airport in question. Although Member States are authorized to apply the operating restrictions in the airports, however, the burden is on airports to ensure that operating restrictions are obeyed. Thus, in reality, the national air transport authorities and airport operators are applying these restrictions.[5]

COMPENSATION FOR CANCELLATION AND DISCONTINUATION OF FLIGHT

In its judgment in Case C-83/10 (Rodríguez et al v. Air France)[6] the ECJ on Oct. 13, 2011 ruled the following: 'Cancellation', as defined in Regulation 261/2004 must be interpreted as meaning that it also covers the case in which that aeroplane took off but, for whatever reason, was subsequently forced to return to the airport of departure where the passengers of the said aeroplane

[1] European Commission. Press release IP/12/342, 3/04/2012. The European Commission updates the European safety list of airlines subject to an operating ban.
[2] European Commission. Mobility and Transport. http://ec.europa.eu/transport/air-ban/list_en.htm
[3] For this section see: Allard Knook: Case C-120/10, European Air Transport SA 13.10.11, http://ecjblog.com/.
[4] Opinion of Advocate General Cruz Villalon, Case C-120/10, delivered on 17 February 2011.
[5] Ibid.
[6] Case C-83/10. Rodríguez et al v. Air France. 13.10.2011.

were transferred to other flights. The term 'further compensation' must be interpreted to the effect that it allows the national court to award compensation, under the conditions provided for by the Convention for the unification of certain rules for international carriage by air or national law, for damage, including non-material damage, arising from breach of a contract of carriage by air.

'Further compensation', however, may not be the legal basis for the national court to order an air carrier to reimburse to passengers whose flight has been delayed or cancelled the expenses. The latter have had to incur because of the failure of that carrier to fulfil its obligations to assist and provide care. In her opinion in case C- 83/10 (Sousa Rodríguez) delivered on June 28, 2011, ECJ Advocate General Eleanor Sharpston came to the similar conclusions. Both the opinion and the decision follow the court's continuing tendency to strengthen passenger rights and interpret the wording of the EU law in favour of the passengers.

The tensions have been visible in multi governmental system as the EU is. So, in the UK, when district judge ruled under the Montreal Convention in the Lewis & Other's against Thomas Cook Tour Operations Limited, District Judge Arkless said that the European Commission and the European Court of Justice were wrong. He was immediately accused in inability to understand the fundamentals of Community Law over International Law and the questions about her ability to perform in her designated role were raised[1].

In the Case C-204/08, jurisdictional issues were raised for getting compensation because of flight cancellation, i.e., which court should decide on the jurisdiction in the case of air transport from one Member State to another Member State by an airline established in a third Member State. It was decided that in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court having jurisdiction to deal with a claim for compensation is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract. [2]

There are, however, some unanswered questions and room for interpretation of Regulation 261-2004, for example, the answer to a question "Is a passenger entitled to compensation under Article 7 of Regulation (EC) No 261/2004 (1) if the departure time of a flight has been delayed for a period of time falling within the limits defined in Article 6(1) of the Regulation, but the flight arrives at the final destination at least three hours after the scheduled time of arrival?[3]" is still up for a consideration.

There must be a solution as the European Civil Aviation Conference recently stated: So while there is much aviation business that is intra-European, there is much more - and much more still to come - that is intercontinental. While airline ownership and control might still be struggling free of the constraints of national regulation, of a kind long ago set aside in other major industrial sectors, the aviation industry is otherwise almost fully internationalized, whether one is talking about aircraft manufacture and maintenance, air navigation service provision, airport ownership and management, or the supply and support sector. The liberalization of air traffic rights continues in parallel to transform aviation markets across much of the world[4].

RESPONSIBILITY FOR DELAY

European rules awarded airline passengers cash compensation if their flights were cancelled, but not if they were delayed. Some airlines have been fighting their obligation to pay food and hotel

[1] When District Judges get it wrong! See: http://www.air-passenger-rights.co.uk/tag/ecj/

[2] Case C-204/08, Peter Rehder v Air Baltic Corporation.

[3] Reference for a preliminary ruling from the Amtsgericht Düsseldorf (Germany) lodged on 25 November 2011 — Christoph Becker v Société Air France SA .(Case C-594/11)

[4] European Civil Aviation Conference: https://www.ecac-ceac.org//publications_events_news/ecac_news/no45_summer_2011

costs, for instance following the widespread disruption caused by the volcanic ash cloud over much of Europe during the spring 2010. European Commission threatened to take legal action against the Dutch airline KLM which has been reimbursing its passengers for the cost of just one day and one night's delay. Ryanair initially threatened not to reimburse passengers whose flights were cancelled due to the ash cloud, but it backed down under pressure from the UK and Irish authorities[1].

In joined Cases C-402/07 and C-432/07, court interpreted three important matters and concluded as follows:

1) flight which is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as cancelled where the flight is operated in accordance with the air carrier's original planning;

2) passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier;

3) technical problem in an aircraft which leads to the cancellation or delay of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control[2].

Upon reference by the *Augstākās Tiesas Senāts* (Latvia), the ECJ has interpreted Regulation 261/2004 as follows[3]: Article 5(3) of Regulation (EC) No 261/2004 must be interpreted as meaning that an air carrier, since it is obliged to implement all reasonable measures to avoid extraordinary circumstances, must reasonably, at the stage of organizing the flight, take account of the risk of delay connected to the possible occurrence of such circumstances. It must, consequently, provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end. However, that provision cannot be interpreted as requiring, as a 'reasonable measure', provision to be made, generally and without distinction, for a minimum reserve time applicable in the same way to all air carriers in all situations when extraordinary circumstances arise. The assessment of the ability of the air carrier to operate the programmed flight in its entirety in the new conditions resulting from the occurrence of those circumstances must be carried out in such a way as to ensure that the length of the required reserve time does not result in the air carrier being led to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time. Article 6(1) of that regulation is not applicable in the context of such an assessment.

EU Regulation 261/2004 on the compensation and assistance of air passengers provides that, in the event of the cancellation of a flight, the passengers affected have the right to compensation from the air carrier unless they are informed of the flight's cancellation in good time. However, an air carrier is not obliged to pay such compensation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. In 2011, The Court stated that "extraordinary circumstances" may be regarded as covering only circumstances which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond the actual control of that carrier on account of its nature or origin.

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[1] As concluded by Ian Pollock, "Air delay compensation claims suspended by High Court", BBC News, Business 17.08.2011

[2] Joined Cases C-402/07 and C-432/07, Christopher Sturgeon, Gabriel Sturgeon, Alana Sturgeon v Condor Flugdienst GmbH (C-402/07), and Stefan Böck, Cornelia Lepuschitz v Air France SA (C-432/07)

[3] C-294/10 - Eglitis and Ratnieks v. Latvijas Republikas Ekonomikas ministrija

The resulting decision will be welcome confirmation for passengers that routine technical faults are not "exceptional". The court's reasoning in Wallentin-Hermann v Alitalia 2009 recognized that airlines invariably face technical problems. Checking for, and fixing these, is an inherent part of their business. The mere fact that an airline has complied with the legal minimum maintenance requirement will not exempt it from liability when something mechanical goes wrong[1].

Austrian court in the case regarding the flight cancellation for 6 days due to air space closure decided that "all the responsibility for flight cancellation or delay which resulted in extra costs for the passenger must be taken by the operating carrier and therefore it has to pay the compensation. Pursuant to Reg. 261/2004/EC it had been the operating carrier's responsibility to provide free hotel accommodation and telephone calls. Any action for compensation with regard to a failure to comply with these obligations could therefore only be brought against the operating carrier while the tour organizer had had no obligation to provide these services and had not been at fault with regard to the cancellation"[2].

LIABILITY FOR BAGGAGE

Preliminary ruling before ECJ lodged by Audiencia Provincial de Barcelona (national reference: QP/07238-A9, decision as of June 15, 2011): C-410/11 (Pedro Espada Sánchez ea/Iberia) Questions referred (1) Must the limit of 1 000 Special Drawing Rights per passenger, laid down in Article 22 of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, concerning the liability of the carrier in the case of destruction, loss or damage of baggage, considered in conjunction with Article 3(3) of that convention, be interpreted as a maximum limit for each individual passenger where a number of passengers travelling check in their shared baggage together, regardless of whether there are fewer pieces of checked baggage than there are actual travellers? (2) Or, on the contrary, must the limit to damages laid down in Article 22 of the Montreal Convention be interpreted as meaning that, for each piece of checked baggage, only one passenger may be entitled to claim compensation and that, accordingly, the maximum limit applied must be that fixed for a single passenger even if it is proved that the lost baggage identified by a single tag belongs to more than one passenger? The court in Case C-63/09 drew the limits to the liability of air carriers in respect to destruction, loss, damage or delay of baggage. It concluded that "the term "damage" must be interpreted as including both material and non-material damage".[3]

As to the cases regarding to the security issues and baggage, the rules become clearer after the case that started with the incident by which EU citizen Gottfried Heinrich in September 2005 was ordered to leave an aircraft by the security staff of Vienna-Schwechat Airport for boarding the plane with tennis racquets in his baggage as tennis racquets are considered prohibited items. The Court pointed out that national measures implementing Community legislation which impose obligations on individuals must also be published so that the individuals are able to ascertain those obligations. The Court ruled that the annex to Commission Regulation 622/2003 laying down measures for the implementation of the common basic standards on aviation security, as amended by Commission Regulation 68/2004 was not published in the Official Journal of the European Union; therefore it has no binding force since it seeks to impose obligations on individuals[4].

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[1] Richard Colbey "European court rules on airline compensation", The Guardian, Saturday 21 March 2009.

[2] Case: LG Innsbruck 6.12.2011, 1 R 158/11h. See also: Michael Wukoschitz, Austria: tour organizer not liable for costs of extended stay caused by flight cancellation due to the ash cloud crisis.

[3] Case C-63/09, Axel Walz v Clickair SA, European Court reports 2010 Page I-04239

[4] The ECJ slammed the European Commission over no publication of a list of prohibited items on airplanes. Bill Cash's European Journal 11.03.2009

FUTURE DEVELOPMENTS

Advocate General Bot in his recent opinion stated that no temporal or monetary limitations or release from obligations to offer care for the passengers are not contained in EU law. Moreover, if the flight is cancelled, air carrier must ensure help to the troubled passengers and pay compensation. In addition, air carrier is required to provide travellers with a meal free of charge, refreshments and if necessary also a hotel accommodation and transport to and from hotel to the airport, also free of charge. Such obligation is put upon air carriers even if the flight is cancelled due to extraordinary circumstances, i.e., circumstances which cannot be prevented if all reasonable measures are taken up. Nevertheless, compensation is not payable to passengers if cancellation was due to extraordinary circumstances.[1]

Moreover, Parliamentary Transport and Tourism Committee have proposed several ideas which could improve the rights of passengers. Those include clarification of the rights of passengers and accountability of airlines, "refunding, rerouting or rebooking" as a basic right should be provided to passengers, in case of lost or delayed baggage, travellers should be informed on their rights and the actions that can be taken up as well as regarding Persons with reduced mobility or disabilities - the access to all air transport services should be barrier-free.[2]

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[1] Court of Justice of the European Union press release No 32/12 Luxembourg, 22 March 2012, Advocate General's Opinion in Case C-12/11, Denise McDonagh v Ryanair Ltd.

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Illegality of Conduct in EU Merger Control: Should We Trust the "Summary Analysis"?

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Abstract: The paper addresses the problems related to the assessment of ex post illegality of conduct during the ex ante merger assessment under the EU merger control regime. Largely overlooked by legal scholarship and marginalized in the enforcement practice due to its narrow scope of application, illegality assessment and its application under the substantive compatibility test raises important issues related to the relationship between merger control and antitrust enforcement, determination of the Commission's margin of discretion in assessing complex economic matters, role of illegality assessment under the "more economic approach" and its consistency with the principles of predictability and legal certainty. The paper follows the evolution of legal standards for the illegality assessment developed in merger review jurisprudence and subsequently applied in the Commission's enforcement practice. The discussion evolves around the concept of deterrence, its measurement and feasibility of administering the illegality test as an integral part of the substantive merger assessment.
Keywords: EU competition law, EU merger control, Standard of proof, Margin of discretion, Judicial review.

I. INTRODUCTION

One of the inherent difficulties in the effective administration of a merger control regime is in prospective nature of the *ex ante* merger assessment, which implies the estimation of the merger's future effects on competition. In the examination of any scenario of competitive harm the Commission has to consider, not only the factors that would increase the likelihood of such scenario, but also the countervailing factors, that would mitigate possible anti-competitive effects. One of such countervailing factors that the Commission has to consider during the merger assessment process are the disincentives produced by the illegality of the anti-competitive

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conduct, which would affect the undertaking's decision to engage in such conduct post-merger. At first glance the consideration of such legal disincentives appears to be in line with the general preemptive nature of merger control: to deal with possible threats to competition before they are actually realized. In other words, if cumulative disincentives including the deterrent effect caused by the illegality of conduct appear to be insufficient to prevent the anti-competitive scenario, the Commission should request appropriate remedies or declare the concentration incompatible with the common market. In the same way, where the Commission considers that legal disincentives are sufficient to prevent the merged entity from engaging in anti-competitive conduct, or where legal enforcement mechanism would prevent the anti-competitive effects of such conduct, the Commission should act accordingly and approve the proposed merger. However, a deeper examination of the post-merger illegality of conduct, its deterrent effect and its assessment within the *ex ante* merger assessment raises a set of conceptual and methodological problems that will be addressed in the present work.

The role of illegality as a deterrent factor in EU merger control received some attention after the Commission's findings in several merger decisions[1] were dismissed by the Court of Justice (CJ) because the Commission among others did not give due consideration to the specified factor in its merger assessment.[2] Despite the relative novelty of this element that was introduced in the merger assessment algorithm mainly through the above identified merger review jurisprudence, the commentators at that time appeared more concerned about the issues related to the standard of proof, scope of judicial review, and the margin of discretion enjoyed by the Commission in the assessment of complex economic matters.[3] The issue of illegality of conduct received relatively little attention and was readily accepted by the commentators as simply one of the factors that the Commission has to take into account when applying the substantive test of compatibility.[4] Practitioners also have not been much preoccupied with the assessment of illegality considering that the legal standards developed by the CJ allowed the Commission to discharge its responsibilities with little effort[5] and, as a result, the merging parties have almost no chance to be successful in such "illegality defense".[6] Attempts to analyze the role

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1 Case COMP/M.2416 *Tetra Laval/Sidel* (30.10.2001) (hereafter *Tetra Laval/Sidel*), Case No COMP/M.2220 *General Electric/Honeywell* (03.07.2001) (hereafter *GE/Honeywell*).

2 Case T-5/02 *Tetra Laval v Commission* (2002) ECR II-04381 (hereafter *Tetra Laval* GC Judgment), Case C-12/03P *Commission v Tetra Laval* (2005) ECR I-987 (hereafter *Tetra Laval* CJ Judgment), Case T-210/01 *General Electric v Commission* (2005) ECR II-5575 (hereafter *General Electric*).

3 Legal standards related to the merger assessment and merger review appeared in the focus of discussions conducted at the 32nd Annual Fordham Corporate Law Institute Conference on International Antitrust Law & Policy in 2005. *See for example* H. Legal, "Standards of Proof and Standards of Judicial Review in EU Competition Law" in B.E. Hawk (ed.), *2005 Fordham Corp. L. Inst.* (2006), 107-116; T. Reeves & N. Dodoo, "Standards of Proof and Standards of Judicial Review in EC Merger Law" in B.E. Hawk (ed.), *2005 Fordham Corp. L. Inst.* (2006), 117-142; R.M. Steuer, "Standards of Proof and Judicial Review: A U.S. Perspective" in B.E. Hawk (ed.), *2005 Fordham Corp. L. Inst.* (2006), 143-156.

4 *See for example* F. Dethmers, N. Dodoo and A. Morfey, "Conglomerate Mergers under EC Merger Control: An Overview" (2005) 1 *Eur. Comp. J.* 2, 265-291. Authors conclude that "merging parties are not precluded from providing concrete evidence to show that Article 82-type abuses, if in issue, are unlikely to arise given the specific circumstances of the case – i.e. due consideration should be given still to the legal disincentives to engage in certain leveraging activities in view of particular circumstances of the case". *See also* R. Burnley, "Conglomerate Mergers: A Comparison of the EU and US Approaches" in G. Amato and C.-D. Ehlermann (eds.), *EC Competition Law: A Critical Assessment* (2007), 495-518, at 517: "Given that the Commission is also obliged to take into account the deterrent effect of Articles 81 and 82 EC, it is difficult to envisage future prohibitions on this ground alone (the mere intuition that market power on one market may be extended to another market through tying) in the absence of documentary evidence".

5 *See* J.T. Rosch, "The Challenge of Non-Horizontal Merger Enforcement", in B.E. Hawk (ed.) *2007 Fordham Corp. L. Inst.* (2008), 187-200, at 199: "…*General Electric* apparently teaches that the Commission can discharge its responsibilities in this respect with a simple summary finding. The [Non-Horizontal Guidelines] show that the Commission has heard that message."

6 *See* A. Petrasincu, "The European Commission's New Guidelines on the Assessment of Non-Horizontal Mergers – Great Expectations Disappointed" (2008) 29 *E.C.L.R.* 221-228, at 225. Based on the analysis of the emerging Commission's practice the author submits that "the disincentive argument will probably only have limited importance at best. After all, in the case of non-horizontal mergers, it will not usually be possible to qualify a likely foreclosure strategy as a clear-cut violation of Article 82 EC. Furthermore, a detection of such illegal conduct will almost certainly be rather unlikely."

of illegality of alleged conduct in merger assessment, including the problems related to its practical application have been few.[1] As a result, the Commission's enforcement practices, on the matter of illegality that will be discussed in detail below, in the absence of a consistent approach evolved on a case-by-case basis.

The present work was intended to fill the identified gap in the following order. In Section II we are going to identify the narrow circle of factual settings, where the assessment of illegality of future conduct might become an issue in merger investigations. Section III follows the development of legal standards related to the assessment of illegality as formulated by the CJ in the evolving merger control jurisprudence. Section IV follows with the analysis of the Commission's merger control practice in order to monitor how the Commission understood and applied the specified standards in its merger investigations. Since the comparison between the standards formulated by the CJ and their application in the Commission's merger control practice revealed certain divergence between the two, we shall attempt to comprehend the roots and implications of that divergence in Section V. Finally, without providing any clear-cut solutions to the identified problems we shall attempt to formulate general principles that should be considered in formulation of a more consistent approach towards illegality assessment in merger investigations.

II. ILLEGALITY ASSESSMENT: SCOPE OF APPLICATION

In order to delineate the relatively narrow borderlines of the ensuing analysis that could partially explain the relatively low priority attributed to the matter by the academia and practitioners, it should be noted that the assessment of the deterrent effect of illegality of future conduct will be required only in a limited number of factual settings, where the merger could lead to a "significant impediment of effective competition" (SIEC) under the substantive test defined in the Article 2(3) of the ECMR[2] following an exclusionary or leveraging conduct adopted by the merged entity. These anti-competitive scenarios have to be distinguished from a more common situation where the concentration immediately changes the structure of the market and the conditions for competition. To simplify the matters, one can also distinguish between horizontal mergers that after the elimination of a competitor change the structure of the market and consequently reduce competition and non-horizontal (vertical and conglomerate) concentrations that do not immediately change the structure of the relevant markets.[3]

The specifics of the non-horizontal anti-competitive scenarios, some of which could be summarily labeled as conduct-related scenarios (foreclosure) predetermines the Commission's assessment of the likelihood of such scenarios, i.e. the likely anti-competitive conduct followed by anti-competitive effects. In order to satisfy the requisite standard of proof the Commission has to go beyond the mere structural analysis of the relevant market and take into account a multitude of factors that would affect the likelihood of the alleged conduct.[4] Illegality of such conduct and potential punishment for its adoption now appear among the numerous factors that the Commission would have to take into account when assessing the likelihood of the conduct-based anti-competitive scenarios. The ensuing analysis of the legislative provisions suggests that there is nothing in the content of the ECMR, which would exclude the appreciation of the deterrent effect of illegality from the merger assessment process.

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1 *See* T. Kaseberg, "Are Merger Control and Article 82 EC in the Same Market? The Assessment of Mergers Which Facilitate Exclusionary Conduct Under EC Merger Control" (2006) 27 *E.C.L.R.* 409-423. *See also* A. Lindsay, *The EC Merger Regulation: Substantive Issues*, 2 ed., (2006), at 79-83.

2 Council Regulation 139/2004 on the control of concentrations between undertakings, (2004) O.J. L24/1, art. 2(3) (hereafter ECMR).

3 *Tetra Laval* GC Judgment, at 150: "The Court observes that, in principle, a merger between undertakings which are active on distinct markets is not usually of such a nature as immediately create or strengthen a dominant position due to the combination of the market shares held by the parties to the merger."

4 In its *Tetra Laval* judgment the GC emphasized that "it is not the structure resulting from the merger transaction itself which creates or strengthens dominant position…but rather the future conduct in question" *Tetra Laval* GC Judgment, at 154.

For example, Article 2(1)(b) ECMR when addressing the factors to be considered in the merger appraisal mandates the Commission to take into account "any *legal* or other barriers to entry,"[1] which unambiguously highlights the significance of legal rules for the economic decisions made by potential market entrants. This particular instance demonstrates the correlation between legal and economic factors in assessing the effects of a merger on competition. The assessment of legal factors receives special importance in relation to non-horizontal concentrations and conduct-based theories of anti-competitive effects. In contrast to horizontal concentrations that immediately change the structure of the market by reducing the number of competitors, the anti-competitive effects of non-horizontal mergers will be in a larger degree dependant upon success of the alleged anti-competitive strategy/conduct adopted by the undertakings in question. The post-merger conduct of the undertakings on the market can be caught under various legal regimes, including prohibition of the abuse of dominance (Article 102 TFEU, ex Article 82 EC), prohibition of anti-competitive agreements and concerted practices (Article 101 TFEU, ex Article 81 EC) and sector-specific regulation.

The incorporation of the analysis of illegality of conduct in the overall merger assessment framework has been articulated in the Commission's Non-Horizontal Guidelines,[2] adopted in accordance with the jurisprudence of the CJ, which will be discussed later in the present work. The Non-Horizontal Guidelines describe the Commission's assessment of the two main anti-competitive scenarios that might be realized following a vertical merger with non-coordinated effects: (1) input foreclosure and (2) customer foreclosure. Similarly, in case of conglomerate concentrations the foreclosure scenario could be realized through the leverage of strong (but not necessarily dominant!) market position from one market to another by means of tying, bundling and other exclusionary practices.[3] The likelihood of anti-competitive effects under foreclosure scenarios is analyzed under the so-called "ability-incentive-impact" framework,[4] where the Commission evaluates: 1) whether the merged entity due to its market power and other market conditions will be able to foreclose its rivals upstream or downstream (*ability*);[5] 2) whether the merged entity will have an incentive to pursue the alleged anti-competitive strategy (*incentive*);[6] and 3) whether the anti-competitive conduct will not be countered by new entry or countervailing buying power and will ultimately lead to anti-competitive effects (*impact*).[7]

Generally, the incentive was equated to the commercial interests of the merged entity. The sufficiency of incentive was estimated based on the relationship between the profits obtained as a result of the eventual elimination of competition through foreclosure and the losses suffered because of losing the sales to foreclosed customers. The understanding of incentives as commercial interests was upheld by the General Court (the GC) in its *General Electric* judgment. In that case the Commission assumed that GE's dominance on the aircraft jet engine market and Honeywell's dominance on the engine

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1 ECMR, art. 2(1)(b).

2 Commission Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings (2008) O.J. (C 265) 6 (hereinafter Non-Horizontal Guidelines). *See* A.-K. Wolf, "The New EC Guidelines on Non-Horizontal Mergers" (2009) 15 *Colum. J. Eur. L. Online* 55, available at http://www.cjel.net/online/15_2-wolf/

3 Non-Horizontal Guidelines, at 93-118.

4 *See* Case No. COMP/M.2803 *Telia/Sonera* (2002), at 91: "In assessing whether the foreclosure problem is significant, it is necessary to establish not only that the merged entity will have the *incentive* to foreclose, but also whether it has the *ability* to do so, and whether it will have any significant *effect* on competition on the market in question". *See also General Electric*, at 429, where the GC emphasized the need to assess the likelihood that the anticompetitive scenario will realize: "It is not enough for the Commission to put forward a series of logical but hypothetical developments which, were they to materialise, it fears would have harmful effects for competition on a number of different markets. Rather, the onus is on it to carry out a specific analysis of the likely evolution of each market on which it seeks to show that a dominant position would be created or strengthened as a result of the merger and to produce convincing evidence to bear out that conclusion".

5 Non-Horizontal Guidelines, at 33-39, 60-67.

6 Non-Horizontal Guidelines, at 40-46, 68-71.

7 Non-Horizontal Guidelines, at 47-57, 72-77.

starters market were sufficient by themselves to infer that it would be a commercial interest of the merged entity to disrupt the supply of engine starters to competitors in order to strengthen its existing dominance. The GC was persuaded by the estimation that revenues potentially obtained from selling engine starters to competitors were significantly lower than the profits the merged entity would gain by expanding its basis on the markets for jet aircrafts.[1] At the same time, the Commission's overall theory of bundling of avionics and non-avionics products was dismissed by the Court precisely due to the absence of the profit-loss analysis.[2]

The above description of the "ability-incentive-impact" framework defines the place for illegality assessment. As it will be further developed in the following sections, the illegality assessment and its deterrent effect should be considered within the assessment of the incentives. There the Commission examines the disincentive to adopt certain conduct that may be unlawful under competition rules or sector-specific rules at EU or national level.[3]

III. DEVELOPMENT OF LEGAL STANDARDS FOR THE ASSESSMENT OF ILLEGALITY

Illegality of future conduct and fear of detection and prosecution now appear among numerous factors that the Commission has to take into account in the assessment of the likelihood of the adoption of the respective conduct by merged entities. However, initially the Commission and the CJ appeared to be in disagreement regarding the role that these factors should play in the context of merger assessment as well as the methodology that has to be employed by the Commission in considering them. The present section shall address the roots of this disagreement and the development of relevant legal standards in the EU merger review jurisprudence.

The issue of illegality of future conduct was explicitly mentioned by the GC in the *Tetra Laval* judgment. According to the Commission, Tetra would be able to leverage its dominance on the carton market to the PET market and capture those customers that would transfer from carton to PET packaging by supplying them with PET materials and packaging machines manufactured by Sidel.[4] In order to achieve this "channel effect" that would capture future PET customers on this rapidly growing market and therefore create another dominant position, Tetra would have to engage in certain commercial practices such as predatory pricing, price wars and granting of loyalty rebates.[5] In reviewing the Commission's forecast regarding the likelihood of Tetra engaging in these practices the GC noted that according to the established case law dominant undertaking is under the obligation to modify its conduct so as not to impair effective competition on the relevant market, regardless whether the Commission has adopted a decision to that effect.[6] Moreover, Tetra's dominant position on the aseptic carton market was already recognized in the preceding Article 102 TFEU (ex Article 82 EC) judgment and it offered certain commitments to modify its future conduct.[7] In the GC's view, all these circumstances significantly diminished the likelihood of the adoption of abusive practices, which should have been taken into account in the Commission's analysis. The GC held *inter alia* that "when the Commission, in assessing the effects of such a merger, relies on foreseeable conduct, which in itself is likely to constitute abuse of an existing dominant position, it is required to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in

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1 *General Electric*, at 298-299.
2 *See generally* J. Killick, "The GE/Honeywell Judgment – In Reality Another Merger Defeat for the Commission" (2007) 28 *E.C.L.R.* 52-62.
3 Non-Horizontal Guidelines, at 46, 71.
4 *Tetra Laval/Sidel*, at 345, 365.
5 *Tetra Laval* GC Judgment, at 156.
6 Case 322/81 *Michelin* v *Commission* [1993] ECR 3461, at 57; Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, at 23; and Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, at 80.
7 Case T-51/89 *Tetra Pak* v *Commission* (1990) ECR II-309.

such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely".[1]

According to the GC, the Commission had to assess the degree to which the commercial advantages encouraging abusive behavior will be eliminated or reduced as a result of potential detection and prosecution. Needless to say, such assessment without further clarification would require estimation, quantification and comparison of commercial advantages and potential losses caused by prosecution and penalties that might ensue. It should also be stressed that the GC required the Commission to assess how the possibility of detection at both EU and national level based on the actions of the respective competition authorities and courts as well as imposed sanctions will diminish the merged entity's incentives to adopt anti-competitive practices. The decentralization of the enforcement of EU competition law achieved by the adoption of Regulation 1/2003[2] makes this task extremely difficult as the Commission would have to take into account different degrees of regulation and effectiveness of the enforcement on the level of individual Member States concerned.[3]

On appeal to the CJ the Commission objected to the GC's approach towards illegality assessment of future conduct, fear of detection and fines as possible deterrents. The Commission argued that the requirement to carry out such assessment will present virtually insuperable legal and practical obstacles.[4] The Commission also had a systemic objection to the GC's approach. According to the Commission representatives, the very reason for adoption of the ECMR was that an ex-*post* control under Article 102 TFEU (ex Article 82 EC) was not considered to be sufficient for the prevention of such abuses and on that basis it seemed inconsistent to disregard potential leveraging practices merely because of their conflict with Article 102 TFEU (ex Article 82 EC).[5]

The CJ appeared to be more understanding of the practical difficulties related to the illegality assessment and ruled that "it would run counter to the [ECMR's] purpose of prevention to require the Commission...to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at the Community and national level, and the financial penalties which could ensue."[6] However, the CJ immediately clarified that this does not mean that illegality of conduct should be ignored in the process of merger assessment: "[the GC] was right to hold that the likelihood of adoption [of anticompetitive conduct] must be examined comprehensively, that is to say, taking account ... both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful".[7]

Apparently, this over-cautious wording prompted diverging interpretations of the CJ's ruling. For example, the Commission understood the CJ's ruling in a very categorical way: "In our view this clearly means that an [Article 102 TFEU] assessment does not have to be integrated into a merger

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1 *Tetra Pak* v *Commission*, at 159.

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

3 Regulation 1/2003, art. 3(2) regulates the relationship between Articles 101 and 102 TFEU and relevant provisions of the national law. Notably, in contrast to application of the Article 101 where national laws cannot extend over agreements and concerted practices not covered by Article 101(1) the Regulation does not provide for strict adherence to the EU standards in application of the Article 102 and in fact allows Member States to apply more stringent rules on abuse of dominance.

4 *Tetra Laval* CJ Judgment, at 61: 1) the Commission would be required to examine, not only the structural aspects of an undertaking, but rather its propensity to comply with the law, which would constitute a breach of the principle of equality and the presumption of innocence; 2) it would be impossible to apply the test because it is difficult to quantify the risk, which would vary according to the strictness of the competition policy in each Member State; 3) given the standard of proof required by the GC it would be impossible for the Commission to control non-horizontal mergers in accordance with the ECMR.

5 *See* G. Drauz, "Conglomerate and vertical mergers in the light of the Tetra Judgment", *Competition Policy Newsletter* (Summer 2005), 35-39, at 38.

6 *Tetra Laval* CJ Judgment, at 75.

7 *Tetra Laval* CJ Judgment, at 74.

assessment".[1] Another possible reading of the Court's ruling is that "the importance and attention that the Commission should give to this [legal] disincentive varies from case to case, depending mainly on the degree of probability that the companies' illegal conducts may be easily detected and punished by the antitrust authorities".[2] It remained unclear from the CJ's approach how exactly the Commission should assess the deterrent effect of illegality when it is under no obligation to assess the effectiveness of the enforcement regime (detection, penalties, etc.), which will effectively determine the degree of deterrence.

The CJ's approach also raised further questions regarding the Commission's margin of discretion in complex economic assessments and its correlation with the scope of judicial review exercised by the Court and the burden of proof that has to be borne by the Commission. In its approach towards examination of potential illegality of conduct the CJ appears to emphasize the degree of the Commission's discretion by restricting the scope of the Commission's examination and thus relaxing the burden of proof in relation to this particular type of findings. In other words, the CJ's approach seems to suggest that the Commission can satisfy the requisite standard of proof regarding illegality by referring to a limited number of facts. At the same time this would limit the subsequent judicial review that cannot be extended over issues such as likelihood of detection, actions taken by the national competition authorities, potential penalties and other factors that the Commission is not obliged to consider.

The GC provided its own understanding of the CJ's guidance in its *General Electric* judgment: "it follows that, although the Commission is entitled to take as its basis a *summary analysis* [emphasis added], based on the evidence available to it at the time when it adopts its merger-control decision, of the lawfulness of the conduct in question and of the likelihood that it will be punished, it must none the less, in the course of its appraisal, identify the conduct foreseen and, where appropriate, evaluate and take into account the possible deterrent effect represented by the fact that the conduct would be *clearly, or highly probably, unlawful* [emphasis added] under Community law".[3] Hence, the GC on one hand followed the CJ's guidance by moderating its previous requirement and allowing the Commission to satisfy the burden of proof with the "summary analysis." At the same time it seems to contradict the CJ's *Tetra Laval* ruling by insisting that the Commission has, nevertheless, an obligation to evaluate the deterrent effect of illegality, limiting the scope of analysis only to cases where such conduct will be "clearly or highly probably" unlawful.

Some commentators argued that the way the GC has interpreted this requirement appears to suggest that, if leverage would take the form of an abuse of dominance, it seems very unlikely that the merged entity will have the incentive to engage in leverage or other foreclosure conduct.[4] In other words, this would mean that once the Commission established that the alleged conduct will be clearly illegal, it should be compelled to conclude that the alleged conduct is unlikely. Other authors argued that the GC has misinterpreted the CJ's guidance because the "summary analysis" mandated by the GC "seems to encourage precisely the sort of speculative assessment the CJ warned against".[5] Apparently, the GC has chosen a middle road between the *Tetra Laval* approach and the dismissal by the CJ. It can be explained by the GC's acknowledgement of the inherent difficulty of such analysis and its willingness to award the Commission with reasonable chances for presenting "convincing evidence" in support of its arguments.

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[1] *See* G. Drauz, "Conglomerate and vertical mergers in the light of the Tetra Judgment", *Competition Policy Newsletter* (Summer 2005), 35-39, at 38.

[2] *See* L. Prete & A. Nucara, "Standard of Proof and Scope of Judicial Review in EC Merger Cases: Everything Clear After Tetra Laval?" (2005) 26 *E.C.L.R.* 692-704, at 703.

[3] *General Electric*, at 75-76.

[4] *See* G. Monti, *EC Competition Law* (2007), at 266.

[5] D. Howarth, "The Court of First Instance in GE/Honeywell" 27 *E.C.L.R.* 485-493, at 492. Author noted that the GC did not address the CJ's concern that conducting this [illegality] analysis would undermine the preventative function of the ECMR.

Digesting the guidance provided by Court and the Commission's own understanding reflected in the Non-Horizontal Guidelines, some commentators suggested three necessary conditions for the illegality of conduct to be considered as deterrence: 1) the likelihood that the conduct is illegal should be clear; 2) the illegal conduct should be easily detectable; 3) hefty deterrent fines are possible.[1] Nevertheless, as noted by the Commission's representatives, it remains difficult to reconcile the GC's approach in *General Electric* with that of the CJ in *Tetra Laval*. It is also unclear how a summary analysis would not run counter to the ECMR's underlying purpose of prevention or why it would be less speculative than an analysis based on comprehensive investigation.[2]

IV. ILLEGALITY OF CONDUCT IN THE COMMISSION'S MERGER CONTROL PRACTICE

Following the case law on the consideration of illegality and its deterrent effect in merger investigations and incorporation of that factor in the Non-Horizontal Guidelines, the Commission was developing relevant legal standards in its enforcement practice. It is difficult to ascertain whether the Commission was applying a consistent approach towards consideration of illegality due to scarcity of enforcement practice on this issue. Nevertheless, the ensuing analysis of selected merger decisions, where the Commission dealt with the potentially unlawful conduct, allows extracting certain methodological and conceptual problems related to the consideration of illegality among other incentives and disincentives that influence an undertaking's decision to adopt certain commercial practices.

In the *ENI/EDP/GDP* energy merger case through the notified transaction Energias de Portugal (EDP), an incumbent Portuguese electricity company, and the Italian energy company ENI attempted to acquire control over Gas de Portugal (GDP), an incumbent Portuguese gas company.[3] The competitive concerns based on vertical foreclosure theories arose due to the existing market concentration and the importance of gas as a primary fuel for electric power generation, which represented one of the major production costs of the power generation plants.[4] The Commission found strong likelihood of input foreclosure because GDP as an incumbent gas supplier in Portugal would have an ability and an incentive to raise the costs of the electricity generators competing with EDP by increasing the prices for gas or creating other kinds of constrains in gas supply to the EDP rivals' power plants.[5]

Besides the economic analysis of incentives to foreclose based on profit-loss estimations, the Commission had to undertake an assessment whether the alleged conduct will be deterred by the *ex post* application of Article 102 TFEU (ex Article 82 EC). The Commission concluded that foreclosure practices will not necessarily constitute price discrimination "if the contractual provisions in the rival's contract (volume of gas contracted under the TOP clause, duration of the contract, specific clauses) are substantially different from the ones that were included in EDP's contracts or if other external conditions (date of signing of the contract, remaining available capacities, international gas procurement contracts, political stability in producer countries, etc.) are substantially different from the ones that existed at the time of EDP's contracts".[6] The Commission also counted in the lack of transparency as regards the price formulae applied in the gas supply contracts and their great technical complexity, which resulted in the insertion of specific clauses adapted to each customer's needs. All those factors

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1 G. Van Gerwen and A. Tajana, The European Commission's Approach to Vertical Mergers – The New Non-Horizontal Merger Guidelines, in B. Hawk (ed.), *2007 Fordham Comp. L. Inst.* (2008), 201-225, 208.

2 *See* C. Esteva Mosso, Non-Horizontal Mergers – A European Perspective, in B. Hawk (ed.), *2007 Fordham Comp. L. Inst.* (2008), 43-75, at 53.

3 Case No COMP/M.3440 *ENI/EDP/GDP* (2004).

4 *See* case commentary in C. Jones (ed.), *EU Competition Law and Energy Markets*, vol. 2, (2007), at 479-484.

5 *See* case commentary in C. Esteva Mosso, Non-Horizontal Mergers – A European Perspective, in B. Hawk (ed.), *2007 Fordham Comp. L. Inst.* (2008), 43-75, at 70-71.

6 *ENI/EDP/GDP*, at 424.

would significantly reduce the likelihood of detection and will present substantial difficulties in comparing the contracts in order to prove the existence of price discrimination.[1]

The Commission concluded that even despite it's alleged *per se* illegality the above-mentioned conduct would be profitable for ENI because it will have a very limited impact on the quantities of gas sold by ENI to competitors due to the inelastic electricity demand and possibility for passing the increased prices on end-consumers.[2] At the same time, the Commission did not provide any estimation on whether and to what extent potential penalties for abuse of dominant position will countervail the profitability and commercial attractiveness of foreclosure practices.

E.ON/MOL was another energy sector concentration where the Commission based its concerns on the input foreclosure as a result of vertical integration of the gas suppliers and retailers.[3] The Commission's foreclosure theory was based on the non-price discrimination applied by the merged entity towards its downstream rivals, which would increase their costs. The strategy was commercially attractive, as the merged entity would not only put the rivals at a competitive disadvantage increasing their costs, but also would provide additional savings for E.ON/MOL by reducing the quality and flexibility of supply and cutting on the customer service expenses.[4] The Commission concluded that "In view of the merged entity's near monopoly in the access to competitive gas resources and its strategic focus on building new power generation capacities, the merged entity would have, already in the current regulatory scenario…the ability and the incentive to foreclose access to gas to its competitors' new gas-fired power plants and/or to discriminate in its supply to competitors' new gas-fired plants…E.ON's strategy would lead to a slower and less competitive development of new generation capacity in Hungary starting immediately after the transaction…and ultimately lead to higher electricity wholesale prices…As a result…the new entity would reduce its electricity retail competitors' ability to source competitive electricity and would increase its already strong market power in electricity retail, thereby significantly impeding competition."[5] The merging parties submitted that the likelihood of the downstream rivals' foreclosure looks very pessimistic as the Commission ignored the high level and effectiveness of Hungarian energy regulation and the sophistication of other market participants.[6] According to E.ON, the merged entity would not have the incentive to adopt the alleged practices because in light of the relative simplicity of gas supply contracts, such conduct would be easily detected by competitors and penalized by the regulator.[7]

The Commission replied to the parties that it would run counter to the purpose of the ECMR "to require the Commission to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue"[8]. Referring to the GC's position in *General Electric*, the Commission emphasized that the illegality of conduct under Article 102 TFEU (ex Article 82 EC) is required to be considered only in clear-cut situations, which was not the case with the proposed merger.[9] In its "summary analysis," which occupied only two paragraphs of the merger decision, the Commission merely acknowledged that "it would be all the more difficult to consider *ab initio* that the various foreclosure strategies likely to be adopted post-merger would

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1 *ENI/EDP/GDP*, at 425.
2 *ENI/EDP/GDP*, at 426.
3 Case No. COMP/M.3696 *E.ON/MOL* (2005).
4 *E.ON/MOL*, at 430.
5 *E.ON/MOL*, at 729-732.
6 *E.ON/MOL*, at 439.
7 *E.ON/MOL*, at 441.
8 *Tetra Laval* CJ Judgment, at 75.
9 *General Electric*, at 74: "where the Commission, without undertaking a specific and detailed investigation into the matter, can identify the unlawful nature of the conduct in question, in the light of Article 82 EC or of other provisions of Community law which it is competent to enforce, it is its responsibility to make a finding to that effect and take account of it in its assessment of the likelihood that the merged entity will engage in such conduct"

necessarily be considered by the national authorities as discriminatory practices within the meaning of Article 82 EC given that, contrary to what the parties claim, gas supply contracts with traders are generally complex and contain specific clauses adapted to the needs of each negotiating party".[1]

Despite its principled reply to the parties' remarks on the illegality of the alleged practices, the Commission has nevertheless provided some analysis of the likelihood of detection and punishment under the national regulatory framework. It used the opinion provided by the Hungarian Energy Office (HEO), which submitted among others that possible discriminative practices are "very hard to prove using administrative methods (as it is indicated from time to time, the market player which is at a disadvantage fears for its future position on the market, and will rather not submit a complaint at the regulatory or competition authority)."[2] HEO also submitted that although it has the right to control and force market participants to act without discrimination, its actual abilities to use these rights were limited as it was not familiar with the free market prices and did not know about the content of gas supply contracts.[3]

At the end, the Commission has basically rejected the parties' arguments regarding the deterrent nature of the illegality of the alleged practices. What should be noted for the purpose of the present analysis is the way the Commission conducted its evaluation. Referring to the existing jurisprudence on the issue, the Commission explicitly stated that it is under no obligation to conduct a detailed assessment of the national legal rules and potential prosecution for the abuse of dominant position. At the same time, the Commission brought forward the submissions presented by the HEO in order to justify the rejection of the parties' argument concerning the likelihood of detection and prosecution by the sector regulator. This approach that might appear inconsistent at a first glance reflects the existing uncertainty regarding the obligation to carry out the illegality assessment in merger cases. Although the Commission believed that such assessment is not necessary it also had to cater for the GC's standpoint. As a result, rejecting the obligation to consider illegality under Article 102 TFEU (ex Article 82 EC) the Commission made an "in alternative" step and conducted a limited consideration of illegality in order to address the GC's concerns and make sure that its decision will not be challenged for the failure to carry out such assessment.

As it was emphasized above, at times, the Commission seems to proceed in contradiction with the approach towards potential illegality of conduct established in the GC's jurisprudence. While its main objective can be defined as facilitation of the overall merger assessment by requiring the Commission to take into account only such conduct that is clearly unlawful with almost automatic prosecution, the Commission appears to exercise wider discretion in the conduct of such examination. The Commission's decision in *Sovion/HMG*[4] illustrates the contrast in its approaches. In this case the alleged anti-competitive conduct was clearly illegal and easily detectable. Due to the vertical relationship between the parties – Sovion was processing the abattoir by-products resulted from the slaughtering activities carried out by HMG – and high market share of Sovion on the abattoir by-products processing market, the merger raised potential anti-competitive concerns. The Commission set out to verify whether Sovion could foreclose the slaughtering houses competing with HMG by refusing to process their abattoir by-products or increase their costs by raising the processing prices.[5] The Commission ultimately found this strategy unlikely because the processing of HMG's abattoir by-products constituted only negligible portion of the Sovion's revenues. Hence, the foreclosure of competing slaughtering houses will be commercially unprofitable for Sovion.

What is interesting for the present discussion is that the Commission also established that the prices for by-product processing were fully regulated, and Sovion was under statutory obligations to

[1] *E.ON/MOL*, at 443.
[2] *E.ON/MOL*, at 445.
[3] *E.ON/MOL*, at 446.
[4] Case No. COMP/M.3605 *Sovion/HMG* (2004).
[5] *Sovion/HMG*, at 116.

collect and process them for the set price. The Commission concluded that foreclosing practices will be simply impossible under such regulatory regime as they will be immediately detectable and punishable by the competent authorities.[1] Here it was obvious that anti-competitive strategy would not succeed because it would trigger almost automatic detection and punishment thus discounting any supporting arguments based on economic assessment of practices in question.

The Commission encountered very similar situation in *Apax/Travelex* case, where there was a risk of foreclosure of the Apax's (leading VAT refund service provider) competitors from the VAT refund agency services provided by Travelex at a number of UK airports.[2] When assessing the likelihood of foreclosure at Gatwick and Heathrow airports, the Commission found that at these airports Travelex was the sole provider of refund agency services authorized by the British Airports Authority. As a result of its exclusivity, the concession was highly regulated and Travelex was subject to specific contractual non-discrimination and non-exclusivity obligations.[3] More specifically, Travelex was obliged to provide clear audit trails for all of its transactions with all VAT refund operators and had no exclusive arrangement with any VAT refund operator. In addition, any increase in the agency fees was constrained by price controls maintained by the airport authorities.[4] The presence of the direct and stringent regulation prompted the Commission to conclude its investigation without any objections to the merger.

There is also a category of cases where the Commission's illegality assessment was pre-conditioned by the economic assessment, which resulted in finding that the alleged conduct is unlikely. This scenario can be demonstrated on the example of the Commission's assessment of *BT/Radianz* merger.[5] The concentration concerned a vertical integration scenario in which BT, incumbent provider of various telecom services in the UK, sought to acquire Radianz, a provider of extranet services to the financial community. Market participants were concerned that BT would have the ability and the incentives to leverage its position in telecom services market in order to foreclose Radianz's competitors from the downstream market of extranet services, by marketing Radianz's services at unfairly low prices that its rivals would never be able to meet.[6] Along similar lines it was submitted that BT will accord Radianz preferential treatment in respect to a number of services that would enable Radianz to supply superior services in respect of network availability, latency and throughput.[7] The Commission concluded that the alleged foreclosure of the Radianz's competitors would be very unlikely because of the limited geographic scope of the BT's strong market power and the alternatives available to Radianz's competitors.[8] This finding based on the economic analysis of competition on the relevant market deemed the illegality assessment redundant. The Commission limited it to a brief remark that in addition to economic considerations, the BT's obligations[9] under the Directive 2002/21[10] as a holder of "substantial market power" would strengthen the above conclusion.[11] The same approach was taken in *Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio*, where following an economic assessment, the

[1] *Sovion/HMG*, at 177.
[2] Case No. COMP/M.3762 *Apax/Travelex* (2005), at 22-29.
[3] *Apax/Travelex*, at 27.
[4] *Apax/Travelex*, at 31.
[5] Case No. COMP/M.3695 *BT/Radianz* (2005).
[6] *BT/Radianz*, at 36.
[7] *BT/Radianz*, at 37.
[8] *BT/Radianz*, at 41.
[9] This involved *inter alia* the requirement to provide network access at reasonable and non discriminatory terms, price regulation (cost oriented pricing principles), transparency obligations (publication of reference offers, notification of charges, terms, conditions and regulations) and accounting separation.
[10] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), O.J. L 108/33–50.
[11] *BT/Radianz*, at 42.

Commission only mentioned "other antitrust concerns" as additional disincentives, which did not really matter as the economic analysis already allowed concluding that anti-competitive conduct was unlikely.[1]

V. UNDERSTANDING THE COMMISSION'S APPROACH

The preceding analysis of the legal standards developed in the merger review jurisprudence as well as overview of the Commission's enforcement practice related to the issue of illegality of future conduct reveals apparent inconsistency between the two, which negatively affects legal certainty and predictability of the primary merger assessment and secondary merger review. This inconsistency is expressed in the divergence between the legal standards formulated in the case law and their actual application in the Commission's enforcement practice. While the Court's approach decisively moved towards the simplification of the Commission's assessment narrowed down to the "summary analysis", catering to the GC's position, the Commission at times proceeded with a more detailed examination of the applicable legal rules and enforcement mechanisms, both at EU and national level.

There could be several possible explanations for the tendencies observed in the Commission's enforcement practice. The above divergence could be explained by certain ambiguity and inconsistency embedded in the wording of legal standards formulated in the case law. In order to be on the safe side the Commission attempted to address illegality in a concise manner in all cases where the parties raised relevant arguments. In this way the Commission, which in principle disagrees with the GC regarding the legal obligation to take into account illegality of future conduct, in order to protect its decisions from the prospective challenges and review by the GC, did consider illegality on the basis of the available information. At the same time, it remains unclear how the Commission can produce a meaningful appreciation of the deterrent effect caused by the illegality of the alleged conduct if it is under no obligation to consider issues such as legal rules applicable on the EU and national levels, effectiveness of enforcement mechanisms, probability of detection and significance of fines.

A more pragmatic explanation would suggest that the Commission has proceeded on a case-by-case basis and its assessment varied depending on the available information and the arguments advanced by the merging parties.[2] This raises the concern whether the exercise of the Commission's margin of appreciation in assessment of illegality is in line with the standard of proof incumbent upon it under the ECMR. When conducting the illegality assessment the Commission basically provides its estimation whether the existing legal rules and enforcement mechanisms would be sufficient to prevent the anti-competitive conduct from taking place. The Commission addresses the same question when it assesses behavioral commitments offered by the merging parties. The following examples will demonstrate the similarity between the assessment of illegality and the assessment of commitments in merger cases.

In the above cited *Apax/Travelex* case the Commission analyzed the possibility of the transmission of confidential information about Apax' competitors to Apax by Travelex obtained when Travelex was acting as an agent for such competitors.[3] The Commission considered this practice unlikely because Travelex was bound by the contractual confidentiality clauses with its customers and by the statutory/common law provisions governing the breach of confidence. Thus, relying on the mere existence of the contractual and statutory rules prohibiting certain behavior and without entering the

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[1] COMP/M.3680 *Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio* (2005), at 102.

[2] This interpretation is supported by L. Prete & A. Nucara, "Standard of Proof and Scope of Judicial Review in EC Merger Cases: Everything Clear After Tetra Laval?" (2005) 26 *E.C.L.R.* 692-704, at 703. Authors referred to the *ENI/EDP/GDP* case, where the Commission has taken into account the likelihood that the national regulator could promptly and effectively detect, post merger, the foreclosing conducts of the merged entity. In their view, this appears to confirm that, in certain cases, it is feasible for the Commission to take into account - among other factors – the possibility that some practices in breach of Article 102 TFEU could, post merger, be easily and rapidly detected and punished by the EU or national competent authorities.

[3] *Apax/Travelex*, at 32.

discussion on the degree of deterrence the Commission concluded that the flow of confidential information would be therefore unlikely.

This approach contrasts with the Commission's assessment of the commitments regarding the same issue of the transfer of the confidential information in the *Hoechst/Rhône-Poulenc* case.[1] In that case the parties sought to amend the suggested commitments by alleging that although some of the directors were members of the boards in several of the undertakings concerned, legal provisions of French and German law prevented them from passing on confidential information for the purposes of coordinating the behavior of the undertakings concerned. In its reply the Commission emphasized that the required commitments "cannot be subordinated to presumed compliance with national company law provisions of which the Commission has no jurisdiction to act".[2] The Commission reminded the parties about its clearly articulated policies of not accepting the commitments that amount to a mere promise to respect the law and rejected the merging parties' arguments. In order to ensure that the risk of coordination is avoided the Commission continued to insist on purely structural remedies.

The contrast in the Commission's approach is apparent: when assessing the likelihood of anti-competitive conduct in *Apax/Travelex* it impliedly presumed that the contractual and statutory obligations would suffice for the deterrence the merging parties from passing on confidential information to the detriment of their competitors. When analyzing the same issue in the context of the requested commitments in *Hoechst/Rhône-Poulenc*, the Commission swiftly rejected any promises to comply with statutory provisions that prohibit the exchange of confidential information. In none of the two cases the Commission could effectively enforce the legal provisions relied by the parties. In neither case the Commission provided any substantial arguments why it presumed or rejected the merging parties' prospective compliance with the law.

Whatever the reasons for the observed variety in the Commission's assessment and its divergence with the legal standards developed in the jurisprudence might be, the existing discretion in the Commission's approach can be criticized for several reasons. *Firstly*, the ambiguous concept of the "summary analysis" does not allow the merging parties to ascertain what kind of facts and data will be examined by the Commission and can be therefore relied on. *Secondly*, the Commission's discretion in the assessment of the facts related to the illegality of conduct will present certain difficulties for its eventual scrutiny by the Court. *Thirdly*, although formally the analysis of economic and legal incentives form part of the same substantive test that has to be applied by the Commission, the standards for the Commission's assessment of illegality seem to approach those applied to the Commission's assessment of commitments where it enjoys a wider margin of discretion. This convergence in our opinion is not justified as the assessment of commitments takes place only after the Commission has satisfied the requisite burden of proof in finding that unless certain amendments will be implemented the merger should be found incompatible with the common market. The comparison between *Apax/Travelex* and *Hoechst/Rhône-Poulenc* showed that the Commission can meet the requisite standard of proof under the substantive test with the same efforts as under the traditionally more relaxed standard applied to the assessment of commitments where it has wider margin of assessment.

VI. CONCLUSION

The narrow circle of factual settings where such analysis will be necessary conditioned the discussion on the assessment of illegality, its place and role in the EU merger control. This predetermines the practical significance of any approach adopted in the enforcement practice by the Commission or applied by the Court when reviewing the Commission's merger decisions. Nevertheless, the issue of post-merger illegality presented both conceptual and practical dilemma related to its application within the *ex ante* merger assessment.

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[1] Case No. COMP/M.1378 *Hoechst/Rhône-Poulenc* (2004).
[2] *Hoechst/Rhône-Poulenc*, at 31.

The *first* problem is related to the place of illegality analysis within the general framework of merger assessment. Illegality is analyzed as a legal disincentive, which has to be assessed together with other non-legal or economic incentives that basically amount to commercial interests of the undertaking based on profit-loss estimations. The incorporation of the illegality assessment in the general merger assessment framework proved to be difficult because it is hardly feasible to conduct a reasonable economic comparison between commercial incentives and legal disincentives. The problem calls for resolution by legal tools such as legal presumptions as a soft form and policy decision to exclude illegality assessment from the *ex ante* merger assessment as a more resolute solution.

The *second* set of problems arise in relation to the approach formulated by the Court and readily accepted by the Commission in order to overcome insuperable practical difficulties in carrying out a meaningful economic assessment of the deterrent effect of illegality, fear of being prosecuted and sufficiency of the fines and remedies. The approach was purely legal and appeared in form of the "summary analysis", which in fact amounted to the legal presumption of sufficient deterrence in cases of clear-cut illegality. The difficulty in accepting the chosen approach rests with the issues of legal certainty and the Commission's margin of assessment. Despite being an integral part of the substantive test applied under the ECMR, the illegality assessment, confined to a "summary analysis", does not offer the merging parties the same legal certainty as they would have in issues related to commercial interests, and to a lesser degree, consideration of efficiencies. More consistency in application of the "summary analysis" should be warranted by the mere fact that the illegality assessment is ultimately based on the legal presumption of sufficient deterrence in cases of apparent illegality. The merging parties should be able to anticipate in which situations such presumption will be triggered.

Whatever marginal in the sense of practical significance the issue of illegality might appear, it should be kept in mind that relevant legal standards were formulated by Court in cases where the Commission's findings were dismissed due to the lack of the substantial analysis and "convincing evidence" that should be presented in support of the alleged anti-competitive scenarios. The issues of illegality assessment and relevant legal standards were explored and articulated in the context of judgments that clarified standards of proof and judicial review, as well as the Commission's margin of discretion in assessing complex economic matters. This underlines the importance of finding a consistent solution to the above problems that should be in line with general legal standards that govern the Commission's merger assessment and define its obligations under the substantive compatibility test. These considerations call for clearly articulated legal standards that would be integrated into the system, rather than becoming some sort of ambiguous exceptions isolated from the rest of the rules for the simple reason that there is no feasible way to apply them otherwise.

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Bases juridiques dans la perspective d'une codification européenne du droit des contrats

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Abstract: Careful and consistent concern of the European institutions on contract law "codification" shows that this approach is about to leave the sphere of purely academic speculations, to reach the one of positive accomplishments. Obviously, however, each intervention of the European authorities requires a precise legal basis for validity. Yet, it must be pointed out that the treaties do not confer the Union direct jurisdiction in contractual matters and, therefore, those texts that would enable the Union to exercise indirect influence on national legislations should be found. On 11/10/2011, the European Commission presented a Proposal for a Regulation to the European Parliament and the Council on a Common European Sales Law, which is indeed shown as based on Article 114 of the Treaty on the Functioning of the European Union, on harmonization and approximation of legislation for the establishment of the internal market.
Keywords: European Contract Law, Union competence, Subsidiarity, Regulation proposal, Consumer protection.

CONSIDERATIONS PRELIMINAIRES

Etant préoccupée par l'amélioration du fonctionnement du marché intérieur, la Commission européenne a lancé par sa Communication sur le droit européen des contrats [COM (2001) 398)][1] de 2001, un ample processus de consultations publiques concernant le cadre juridique fragmenté du domaine du droit des contrats et de ses implications en la matière du commerce transfrontalier[2]. En juillet 2010, la Commission a adopté un « *Livre vert* » portant sur les actions préconisées relatives à la création d'un droit européen des

[1] Publiée dans le Journal officiel C255/13.09.2011.

[2] Le 15 novembre 2001, le Parlement européen a adopté une *Résolution sur le rapprochement du droit civil et commercial des Etats membres*. La réaction du Conseil européen à la Communication de la Commission européenne du 11 juillet 2001 sur le droit européen des contrats a été exprimée par le truchement du *Rapport du 16 novembre 2001*. Par la Communication du 12 février 2003, la Commission européenne a rendu publique un *Plan d'action en faveur d'un droit européen des contrats*. En 2004 la Commission a publié une Communication [COM(2004)651] ayant pour titre "*Le Droit européen des contrats et le réexamen de l'acquis. La voie à suivre*". En juillet 2010, la Commission a adopté un "*Livre vert*" portant sur les actions préconisées relatives à la création d'un droit européen des contrats pour les consommateurs et les entreprises [COM(2010)348].

contrats pour les consommateurs et les entreprises [COM(2010)348][1]. On a identifié plusieurs options en ce qui est de la nature juridique, le domaine de la mise en œuvre et le contenu matériel du futur instrument de droit européen des contrats, partant d'un instrument au caractère non obligatoire, voué à améliorer la cohérence et la qualité de la législation de l'UE, à un autre au caractère obligatoire, qui constituerait une alternative à la pluralité des régimes préexistants en matière contractuelle, en offrant un seul ensemble de règles en la matière.

En réponse au *Livre vert*, le 8 juin 2011, le Parlement européen a présenté une Résolution[2] par laquelle il a exprimé son appui pour un instrument facultatif par le truchement d'un règlement qui pourrait améliorer l'institution et le fonctionnement du marché intérieur et pourrait amener des bénéfices aux commerçants, aux consommateurs et aux systèmes judiciaires des Etats membres.

La Communication de la Commission « l'Europe 2020 », intitulée « Une stratégie européenne pour une croissance intelligente, écologique et favorable à l'inclusion » [COM(2010)348][3] reconnaît la nécessité de faciliter pour les commerçants et les consommateurs la conclusion des contrats avec des partenaires d'autres Etats membres et de réduire les coûts afférents à celle-ci, notamment par la réalisation de progrès vers un droit européen facultatif des contrats. L'agenda digital pour l'Europe a en considération un instrument facultatif en la matière du droit européen des contrats qui puisse contrecarrer la fragmentation des normes de droit des contrats et stimuler la confiance des consommateurs dans le commerce électronique.

BASES JURIDIQUES GENERALES

La préoccupation attentive et conséquente des institutions européennes relative à la « codification » du droit des contrats relève le fait que cette démarche est en passe de quitter la sphère des spéculations purement académiques, pour gagner celle des réalisations positives.

De manière évidente, chaque intervention des autorités européennes a besoin pour sa validité d'une base légale précise. Dans ce contexte une première observation s'impose : l'Union n'est pas la titulaire de certaines compétences illimitées, les dispositions de l'article 5 paragraphe 2 du Traité sur l'Union européenne (TUE après Lisbonne[4]), statuant que « l'Union n'agit que dans les limites des compétences que les Etats membres lui ont attribuées dans les traités pour atteindre les objectifs que ces traités établissent. Toute compétence non attribuée à l'Union dans les traités appartient aux Etats membres »[5]. Le paragraphe 1 du même article précise que « le principe d'attribution régit la délimitation des compétence de l'Union. Les principes de subsidiarité et de proportionnalité régissent l'exercice de ces compétences ».

L'importance du principe du pouvoir spécialement limité [6] (ou du principe des compétences d'attribution) est relevée par sa reprise, avec persévérance, dans d'autres dispositions du Traité sur l'Union européenne. Ainsi, l'article 1 du TUE (après Lisbonne) dispose que « Les hautes parties contractantes instituent entre elles une Union européenne… à laquelle

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1 Ce Livre vert n'a pas été publié dans le Journal officiel, mais il peut être consulté sur [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:FR:PDF], 31.05.2012

2 On peut consulter la Résolution sur [http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0262+0+DOC+XML+V0//FR], 31.05.2012

3 On peut consulter la Communication sur [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:RO:PDF.],31.05.2012

4 Dans la version consolidée suite aux modifications apportées au Traité de Lisbonne. *Brevitatis causa*, dans le but d'éviter les répétitions et la facilité d'expression, par la suite, dans le cadre de l'ouvrage, au moment où on fera référence au Traité sur le fonctionnement de l'Union européenne et au Traité sur l'Union européenne, on utilisera les abréviations TFUE et TUE.

5 Donc, en vertu du principe du pouvoir spécialement limité (ou le principe des compétences d'attribution), chaque action normative de l'Union doit avoir une ou plusieurs bases légales.

6 Plus amplement sur le principe du pouvoir spécialement limité, voir **Gyula Fabian,** *Drept institutional comunitar,* III-e édition, éditure Sfera juridica, Cluj-Napoca, 2010, p. 64-68.

les Etats membres attribuent des compétences pour atteindre leurs objectifs communs », et l'article 3 paragraphe 6 du TUE (après Lisbonne) ajoute que « l'Union poursuit ses objectifs par des moyens appropriés, en fonction des compétences qui lui sont attribuées dans les traités ». L'article 4 premier paragraphe du TUE (après Lisbonne) se situe sur la même tonalité : « Conformément à l'article 5, toute compétence non attribuée à l'Union dans les traités appartient aux Etats membres ».

L'établissement de la compétence de l'Union dans une démarche législative engendre donc deux problèmes : d'une part il s'impose d'établir si dans le procès de la conception d'un acte législatif, les institutions européennes se maintiennent dans le champ des activités qui leur reviennent et, d'autre part, dans quelle mesure les traités confèrent une base juridique pour intervenir dans ce domaine.

Les organismes législatifs européennes ont donc l'obligation d'indiquer chaque fois dans le préambule de l'acte normatif adopté quelle est la base juridique sur laquelle est né cet acte (par la spécification du domaine de compétence, de l'article du traité), l'absence de cette condition procédurale fondamentale étant susceptible de justifier une éventuelle action en nullité de l'acte normatif respectif.

En même temps, le choix de la base juridique de l'acte normatif communautaire doit reposer sur des éléments objectifs susceptibles de contrôle juridictionnel, parmi lesquels figurent, notamment, le but et le contenu de l'acte. On doit donc chercher des justificatifs qualitatifs et quantitatifs qui permettent à l'Union d'agir. L'Union est une union de droit en ce que ni ses États membres, ni ses institutions n'échappent au contrôle de la conformité de leurs actes à la charte constitutionnelle de base qu'est le traité et que ce dernier a établi un système complet de voies de recours et de procédures destiné à confier à la Cour le contrôle de la légalité des actes des institutions.

Cette obligation de « légitimation » juridique des actes normatifs vise notamment la Commission à laquelle on a attribué, de manière quasi-exclusive, le droit d'initiative législative.

La Commission est dans une telle perspective un organe d'impulsion fondamental de l'activité normative de l'Union[1].

Il faut pourtant préciser que les traités ne confèrent pas à l'Union une compétence directe en matière contractuelle[2] et, en conséquence, il faut trouver ces textes-là qui permettraient à l'Union d'exercer une influence indirecte sur les législations nationales.

On peut penser d'abord à l'article 82 du TFUE (après Lisbonne). Celui-ci permet de prendre des mesures « dans le domaine de la coopération judiciaire dans les matières civiles ayant une incidence transfrontière (....) dans la mesure nécessaire au bon fonctionnement du marché intérieur ». Cependant, l'article 83 ne semble par la suite viser que les mesures de procédure civile – la reconnaissance réciproque entre les Etats membres des décisions judiciaires et extrajudiciaires et leur mise en œuvre, la communication transfrontière des actes judiciaires et extrajudiciaires, la coopération en matière d'obtention des preuves, etc. – et les règles de droit international privé. Donc, pour agir sur la base de cet article, il faudrait interpréter le texte de façon large, en soulignant que les mesures spécialement visées ne sont pas limitatives.

Ensuite, partant de la prémisse que la diversité du droit constitue une entrave au développement du commerce intracommunautaire puisque les considérations économiques justifieraient alors une unification au moins partielle de la législation civile au niveau européen, on

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[1] Chahira Boutayeb, *Droit et institutions de l'Union européenne. La dynamique des pouvoirs,* Paris, L.G.D.J., 2009, p. 83

[2] Après le traité de Lisbonne, les compétences de l'Union sont maintenant réparties par les articles 2 à 6 du TFUE en trois catégories: compétences « exclusives», compétences «partagées» et compétences «complémentaires». La doctrine en ajoute une quatrième: les compétences «parallèles». Les traités fondateurs n'opéraient pas de distinction entre ces différentes catégories, mais elles étaient déjà bien connues dans la jurisprudence et la doctrine. Plus amplement sur les compétences de l'Union, voir Nicolas de Sadeleer, Hugues Dumont, Pierre Jadoul, Sébastien van Drooghenbroeck, *Les innovations du traité de Lisbonne. Incidences pour le praticien*, Edition Bruylant, Bruxelles, 2011, p.25-31.

pourrait appuyer la capacité de l'article 114 du TFU (après Lisbonne), ex-article 94 du TCE, d'offrir une base juridique à l'éventuelle codification européenne en matière contractuelle.

Ainsi, les dispositions de l'article 114 du TFUE statuent que sauf si les traités en disposent autrement, pour la réalisation des objectifs énoncés à l'article 26 du TFUE, le Parlement européen et le Conseil, statuant conformément à la procédure législative ordinaire et après consultation du Comité économique et social, arrêtent les mesures relatives au rapprochement des dispositions législatives, réglementaires et administratives des Etats membres qui ont pour objectif l'établissement et le fonctionnement du marché intérieur.

L'utilisation des dispositions de l'article 114 du TFUE présente l'avantage que l'acte normatif de droit dérivé ainsi consolidé, sera arrêté en procédure législative ordinaire (codécision du Parlement européen/Conseil et vote à la majorité qualifiée) ; en même temps, le rayon d'action ouvert est étendu[1], car, d'une part, il vise « des mesures » sur le rapprochement des législations et non pas de directives, tel que statuent les dispositions de l'article 115 du TFUE[2], et d'autre part, ouvre les perspectives d'harmonisation du droit national (qui est susceptible d'être vaste et de ne pas permettre une marge de manœuvre aux Etats membres) et non pas seulement de leur coordination.

On a soutenu dans la littérature juridique que cette base est susceptible de constituer le fondement pour l'adoption d'un instrument facultatif en matière contractuelle, car celui-ci, étant un moyen qui ne porte pas préjudicie à l'autonomie des Etats membres en matière de législation, pourrait répondre plus convenablement aux exigences du principe de la subsidiarité[3].

Enfin, des voix avisées en la matière[4] ont soutenu que les dispositions de l'ex-article 308 du TCE[5], l'actuel article 352 du TFUE (après Lisbonne) pourrait constituer la base juridique d'une future codification européenne en matière contractuelle. Aux termes de cette disposition (art. 352 du TFUE), la Commission peut proposer au Conseil d'adopter, après approbation du Parlement européen (qui n'était que consulté avant le traité de Lisbonne) des "dispositions appropriées", lorsqu'une action de l'Union paraît nécessaire pour atteindre l'un des objectifs visés par les traités, mais que ces derniers n'ont pas prévu les pouvoirs d'action à cet effet.

Cette base juridique reconnaît à l'Union européenne une compétence supplétive pour les actions nécessaires à l'un des objectifs du traité, sans que celui-ci n'ait pas prévu les pouvoirs d'action correspondants[6].

L'appel aux dispositions de l'article 352 du TFUE est de nature à suppléer l'absence d'une base juridique claire ou explicite dans les traités, pour un champ d'application potentiellement

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1 L'article 114 du TFUE laisse ouverte la possibilité d'adopter aussi des règlements, voire des décisions d'harmonisation.

2 L'article 115 du TFUE (ex-article 94 du TCE) dispose que « sans préjudice de l'article 114, le Conseil, statuant à l'unanimité conformément à une procédure législative spéciale, et après consultation du Parlement européen et du Comité économique et social, arrête des directives pour le rapprochement des dispositions législatives, réglementaires et administratives des Etats membres qui ont une incidence directe sur l'établissement ou le fonctionnement du marché intérieur ».

3 Voir **Gina Orga Dumitriu, Laurenţiu Sorescu, Luminiţa Tuleaşcă, Ramona Mariţiu,** *Răspuns la „Cartea verde a Comisie privind opțiunile de politică în perspectiva unui drept european al contractelor pentru consumatori și întreprinderi*", dans Revista Română de Drept European nr. 1/2011, p. 171.

4 Voir **Vlad Constantinesco,** *La codification communautaire du droit privé à l'épreuve du titre de compétence de l'Union européenne,* dans la Revue trimestrielle de droit européen, nº 4/2008, p. 719-722.

5 L'article 352 du RFUE statue que : « si une action de l'Union paraît nécessaire, dans le cadre des politiques définies par les traités, pour atteindre l'un des objectifs visés par les traités, sans que ceux-ci n'aient prévus les pouvoirs d'action requis à cet effet, le Conseil, statuant à l'unanimité sur proposition de la Commission et après approbation du Parlement européen, adopte les dispositions appropriées. Lorsque les dispositions en question sont adoptées par le Conseil conformément à une procédure législative spéciale, il statue également à l'unanimité, sur proposition de la Commission et après approbation du Parlement européen ».

6 Voir *Le Rapport d'information déposé par la Commission des affaires européennes sur le droit commun européen de la vente* (COM (2011) 635 final/E 6713), disponible sur [www.assemblee-nationale.fr/13/europe/rap-info/i4061.asp],31.05.2012.

vaste (celui des objectifs visés par les traités et non pas seulement du fonctionnement du marché intérieur).

Quel que soit le fondement choisi, ne s'agissant pas d'une compétence communautaire exclusive (article 3 du TFUE après Lisbonne), il sera soumis au principe de subsidiarité posé à l'article 5 paragraphe 3 du TUE (après Lisbonne)[1].

L'article 5 paragraphe 3 du TUE statue qu'« en vertu du principe de subsidiarité, dans les domaines qui ne relèvent pas de sa compétence exclusive, l'Union intervient seulement si, et dans la mesure où, les objectifs de l'action envisagée ne peuvent pas être atteints de manière suffisante par les Etats membres, tant au niveau central qu'au niveau régional et local, mais peuvent l'être mieux, en raison des dimensions ou des effets de l'action envisagée, au niveau de l'Union ».

Ainsi, le principe de la subsidiarité permet l'extension de l'action de l'Union dans les limites de ses compétences, lorsque les circonstances le demandent (la subsidiarité se conçoit de façon positive) ou, inversement, sa limitation ou sa cessation, lorsqu'elle n'est plus justifiée (la subsidiarité se conçoit de façon défensive)[2]. Le respect du principe de subsidiarité est susceptible d'un contrôle *à posteriori* (après l'adoption de l'acte législatif), à travers un recours juridictionnel à la Cour de justice de l'Union européenne.

PROPOSITION DE LA COMMISSION EUROPEENNE DE REGLEMENT AU PARLEMENT EUROPEEN ET AU CONSEIL RELATIVE A UN DROIT COMMUN EUROPEEN DE LA VENTE [COM(2011)635][3] – BASES JURIDIQUES

Le 11.10.2011, la Commission européenne a présenté une Proposition de Règlement au Parlement européen et au Conseil relative à un droit commun européen de la vente, l'objectif général de la proposition **étant** d'améliorer l'institution et le fonctionnement du marché intérieur en facilitant le développement du commerce transfrontalier pour les entreprises et des achats transfrontaliers pour les consommateurs, par la création d'un corps uniforme et volontaire de règles en matière contractuelle.

La proposition prévoit la création, au sein de la législation nationale des États membres, d'un « second régime » de droit contractuel pour les contrats relevant de son champ d'application (contrats qui ont pour objet la vente des biens, la livraison de contenu digital ou la prestation de services connexes). Selon la proposition, le droit commun européen de la vente s'applique exclusivement aux contrats transfrontaliers (conclus entre des professionnels ou entre des professionnels et des consommateurs[4]), seulement sur un fondement volontaire, en vertu de l'accord exprès des parties[5].

Le mécanisme juridique prévu pour sa mise en œuvre n'est pas non plus celui du droit européen commun, du 28-e droit, mais celui, plus exigeant, d'une insertion en bloc dans le droit

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1 Seulement si une compétence est exclusive, elle échappe logiquement à l'empire du principe juridique de subsidiarité.

2 Gyula Fabian, *Droit… œuvre citée*, p. 71.

3 On peut consulter la proposition du Règlement sur [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:RO:PDF], le 29.05.2012. Actuellement, la proposition de la Commission doit être approuvée par les Etats membres de l'UE et par le Parlement européen, qui a exprimé déjà son aide par la votation de la proposition dans la première partie de cette année (IP/11/683).

4 Les dispositions de l'article 4 point 3 de la proposition de Règlement définissent le contrat transfrontalier comme conclu entre un commerçant et un consommateur lorsque : (a) l'adresse indiquée par le consommateur, l'adresse de livraison des biens ou l'adresse de facturation sont situées ans un Etat autre que celui où le commerçant a la résidence habituelle et (b) au moins l'un de ces Etats est un Etat membre. Le point 6 du même article statue que pour établir si un contrat est transfrontalier, le moment relevant est celui de l'accord sur l'application de la législation européenne commune en matière de vente.

5 On n'arrive pas à ne pas remarquer que ce droit facultatif en matière de vente est un droit lacunaire, car il ne constitue pas en ensemble normatif complet (la cause du contrat, la nullité du contrat, la pluralité de créditeurs ou débiteurs, la capacité de conclure des transactions juridiques ne se trouvant pas dans le champ d'action du règlement proposé), de sorte que les normes existantes dans le droit interne de l'Etat membre applicable au contrat continueront à réglementer les aspects résiduels, ce qui constitue une source d'incohérence et d'insécurité juridique dans les rapports contractuels.

de chaque Etat membre, dans le cadre d'un «second régime » de droit contractuel coexistant avec les règles actuelles, qui seraient ainsi celles du « premier régime »[1]. Donc, le droit commun européen de la vente - ensemble unitaire et indépendant de règles de droit contractuel - a été conçu comme un second régime contractuel, venant se superposer aux droits nationaux des Etats membres.

En ce qui est de la base juridique, la proposition est en effet indiquée comme fondée sur l'article 114 du Traité sur le fonctionnement de l'Union européenne, relatif à l'harmonisation et au rapprochement des législations pour la réalisation du marché intérieur, ce qui présenterait, du point de vue de la Commission européenne, l'avantage de la codécision avec majorité qualifiée au Conseil[2].

On peut reprocher à l'initiateur que les dispositions de l'article 114 du TFUE ne constituent pas une base juridique solide pour la démarche législative entreprise, car l'objectif du règlement proposé n'est pas celui d'harmonisation législative.

Ainsi, interprétant l'ex-article 95 (l'actuel article 114 du TFUE), relatif au rapprochement des législations, la Cour de Justice (Allemagne c. Parlement et Conseil C- 376/98, Rec. 2000 I-8419, invalidant la Directive 98/34, sur la publicité en matière de tabac) a considéré que « les mesures visées à l'article 95 TFUE, sont destinées à améliorer les conditions d'établissement et de fonctionnement du marché intérieur. Interpréter cet article en ce sens qu'il donnerait au législateur communautaire une compétence générale pour réglementer le marché intérieur (…) serait incompatible avec le principe de l'article 5-1 du Traité, selon lequel les compétences de la Communauté sont des compétences d'attribution». Selon la même décision, « il importe donc de vérifier que la directive contribue effectivement à l'élimination d'entraves à la libre circulation des marchandises et à la libre prestation des services, ainsi qu'à la suppression de distorsions de concurrence ».

La Cour de justice est allée encore plus loin, statuant qu'un acte législatif qui ne modifie pas les dispositions nationales existantes, ne vise pas l'harmonisation des dispositions législatives, réglementaires et administratives des Etats membres dans le sens de l'article 114 paragraphe 1 du TFU (voir L'Arrêt de la Cour de Justice de l'Union européenne du 2 mai 2006, C-436/03[3]). En conséquence, les mesures législatives qui établissent des réglementations uniformes pour toute l'Union, mais qui se juxtaposent aux mesures nationales, ne peuvent pas se baser sur les dispositions de l'article 114 paragraphe 1 du TFUE, l'institution d'un droit supplémentaire, ou plus précisément supplétif ne pouvant pas être assimilé à l'harmonisation. Selon les allégations du Bundesrat de l'Autriche[4], l'article 114 du TFUE ne devrait pas constituer la base de l'institution

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1 [www.assemblee-nationale.fr/13/pdf/europe/c-rendus/c0231.pdf], 31.05.2012

2 Selon l'exposé des motifs qui accompagne la proposition de règlement, le choix de cette base juridique est justifié par l'objectif de la proposition - l'institution d'un corps unitaire et unique de normes harmonisées en la matière des contrats qui inclut les normes sur la protection du consommateur sous la forme d'une législation européenne commune en matière de vente – ce qui ne représente pas un choix de la loi applicable dans le sens du droit international privé, mais le choix est fait dans le cadre d'un droit national applicable aux normes des droit international privé.

3 On peut consulter l'Arrêt sur [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003CJ0436:EN:HTML], 31.05.2012.

4 On peut consulter l'Avis motivé du Bundesrat de l'Autriche sur la Proposition de Règlement au Parlement européen et au Conseil relative à un droit commun européen de la vente sur. [www.europarl.europa.eu/meetdocs/2009-2014/documents/imco/dv/886/886237/886237ro.pdf], 31.05.2012 ; Le Bundestag de l'Allemagne est arrivé à la même conclusion, suite à un examen comparatif des dispositions de l'article 114 du TFUE à l'article 118 du TFUE. Selon cette dernière disposition légale, introduite par le Traité de Lisbonne, dans le cadre de la procédure législative ordinaire, on peut établir, parmi d'autres, des mesures relatives à l'institution de titres européens de propriété intellectuelle pour assurer une protection uniforme des droits de propriété intellectuelle dans le cadre de l'Union. On a souligné que ces titres coexistent parallèlement aux titres appropriés des Etats membres, sans les modifier ou remplacer. En conséquence, dans la mesure où on a souhaité conférer à l'Union la compétence d'adopter des mesures législatives qui coexistent parallèlement aux réglementations des Etats membres, le législateur communautaire a envisagé précisément et exclusivement cette possibilité, tel le cas du domaine limité des droits de propriété intellectuelle. Dans ces circonstances, on doit avoir des réserves à

« d'instruments de réglementation parallèle » dans des domaines qui appartiennent à la compétence des Etats membres.

On ne peut pas accepter l'argument de la Commission selon lequel l'instrument facultatif constituerait une part de la législation nationale et serait inclus comme tel dans le système juridique de l'Etat membre en cause, car le Règlement européen ne devient pas de cette manière une part constitutive du droit national, mais reste un instrument dérivé de droit européen.

De cette perspective, le « second régime » de droit contractuel (qui ne couvre pas tous les aspects des relations contractuelles) peut fonctionner de la manière la plus indépendante possible, reposant sur le principe d'autonomie, de sorte qu'il n'harmonise et ni moins approche les législations des Etats membres, mais au contraire institue de la concurrence et de la diversité juridique.

Dans les circonstances antérieurement exposées, nous exprimons des réserves relatives à la compatibilité de cet instrument facultatif au principe de subsidiarité, voué d'une part à protéger la capacité de décision et d'action des Etats membres, et d'autre part de légitimer l'intervention de l'union lorsque « les objectifs de l'action envisagée ne sont pas susceptibles d'être réalisés de manière satisfaisante par les Etats membres…, mais grâce aux dimensions et aux effets de l'action envisagée, ils peuvent mieux être réalisés au niveau de l'Union ».

Ainsi, à l'appui de la proposition, la Commission a invoqué les obstacles devant le commerce transfrontalier dont la cause serait constituée par la diversité des législations en matière contractuelle des Etats membres. Dans l'acception de la Commission, l'objectif de la proposition, à savoir la contribution au fonctionnement approprié du marché intérieur et la mise à la disposition d'un groupe facultatif, unitaire de normes de droit des contrats, a une évidente dimension transfrontalière et n'est pas susceptible d'être réalisé de manière satisfaisante par les Etats membres dans le cadre de leurs systèmes nationaux. La Commission a apprécié que par l'adoption des mesures au niveau national, les Etats membres ne seront pas en mesure d'éliminer les coûts supplémentaires de transaction et la complexité juridique qui découlent des différences entre les dispositions nationales en matière contractuelle avec lesquelles les professionnels se confrontent dans le cadre du commerce transfrontière dans l'Union européenne. Les consommateurs continueront à disposer d'une possibilité réduite de choix et d'accès limité aux produits originaires d'autres Etats membres. Aussi, il leur manquera la confiance qui découle de la connaissance de leurs droits. Par conséquent, selon la Commission, l'objectif de la proposition pourrait être mieux réalisé par l'action au niveau de l'Union, en conformité au principe de la subsidiarité.

Il en va de soi que l'effet d'une législation en matière de contrats, commune à tous les Etats membres, ne pourrait pas être réalisé par les dispositions nationales dans le cadre d'un système juridique limité au droit interne.

Mais cela suppose que la législation commune en matière de vente proposée, d'une part soit nécessaire et, d'autre part, présente des avantages évidents, grâce aux dimensions ou effets de celle-ci, par rapport à une action réalisée par les Etats membres. On doit accomplir les deux exigences pour respecter le principe de la subsidiarité.

Dans l'exposé des motifs de la Commission on n'a fourni aucune preuve convaincante (analyse de chiffres) à l'appui de sa position conformément à laquelle le nouvel instrument

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l'égard l'aptitude de l'article 114 du TFUE de servir comme base juridique pour les dispositions européennes, dans tous les autres domaines, dans la mesure où ces dispositions coexistent parallèlement aux dispositions nationales et ne leur portent pas préjudice autrement. On peut consulter l'Avis motivé du Bundestag de l'Allemagne relatif à la proposition de Règlement du Parlement européen et du Conseil concernant le Législation européenne commune en matière de vente (COM(2011) 0635 – C7-0329/2011 – 2011/0284(COD) sur [www.europarl.europa.eu/meetdocs/2009-2014/documents /imco/dv/887/887301/887301ro.pdf], 31.05.2012;

législatif de l'UE en matière de contrats aboutirait à la réalisation de l'objectif de la Commission de stimulation du commerce transfrontière[1].

Dans ces circonstances, l'allégation de la Commission selon laquelle l'Union serait la plus en mesure de solutionner le problème de la fragmentation juridique, n'est, par elle-même, entièrement appropriée que dans le cas où, en vertu d'un jugement de principe, on apprécierait qu'un régime juridique uniforme en la matière aurait pu être institué par un règlement facultatif européen en ignorant les dispositions des Etats membres sous l'aspect des garanties qu'ils leur confèrent.

Il n'est pas dépourvu d'importance aussi le fait que, sans nier que la diversité législative n'est pas tout à fait bénéfique dans les échanges transfrontaliers, il y a aussi d'autres facteurs générateurs d'effets négatifs dans cette matière, comme par exemple les distances géographiques et les différences linguistiques, culturelles et institutionnelles entre les Etats membres, qui sont autant de facteurs sans doute déterminants des difficultés que soulève la conclusion de contrats transfrontaliers.

En même temps, il ne passe inobservé ni le fait que de nombreuses institutions juridiques, qui affectent les rapports contractuels, ne sont pas abordées par l'instrument proposé. Ainsi, le motif 27 précise : « toutes les matières de nature contractuelle ou non qui ne sont pas régies par la Législation européenne commune en matière de vente sont réglementées par les normes de la législation nationale déjà existantes qui ne font pas partie de la Législation européenne commune en matière de vente, applicables en vertu des Règlements (CE) nº 593/2008 et (CE) nº 864/2007 ou de toute autre norme relevante en la matière du conflit de lois. Ces aspects incluent, par exemple, la personnalité juridique, la nullité d'un contrat pour absence de la capacité, pour caractère illégal ou immoral, l'établissement de la langue du contrat, les questions sur la non-discrimination, la représentation, la pluralité de débiteurs et créditeurs, la subrogation des droits des parties, y comprise la cession, la compensation et la confusion, la matière du droit de propriété y compris le transfère de propriété, le droit de la propriété intellectuelle et la matière de la responsabilité civile délictuelle ».

Ainsi, les normes existantes dans le droit interne de l'Etat membre applicables au contrat continueront à réglementer ces aspects résiduels, ce qui crée les prémisses des possibilités de conflits dans la zone de rencontre entre le législation nationale et la législation européenne en matière de ventes et de l'insécurité juridique liée à l'absence d'interprétation uniforme[2].

Il faut accorder de l'attention au fait que, en vertu des dispositions de l'article 114 paragraphe 3 du TFUE, la Commission est tenue d'assurer un niveau élevé de protection des consommateurs, lorsque celle-ci fait des propositions concernant le marché intérieur, selon le cas présent.

A présent, les consommateurs qui font des acquisitions transfrontières dans l'Union européenne ils sont susceptibles de se confronter aux normes différentes, mais le Règlement Rome I [CE (2008)593][3] offre une protection élevée, dans le sens que les consommateurs

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[1] Voir l'Avis motivé de la Chambre des Communes du Royaume Uni de la Grande Bretagne et de l'Irlande du Nord relatif à la proposition du Parlement européen et du Conseil sur la Législation européenne commune en matière de vente, qu'on peut consulter sur [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/887/887051/887051ro.pdf.], 30.05.2011

[2] Cette incertitude résulte du fait que la jurisprudence manque dans la matière et il y a peu d'orientations concernant la manière dans laquelle les instances des Etats membres interpréteront la législation européenne commune en matière de ventes. Il est vrai que les dispositions de l'article 14 de la proposition statue l'obligation des Etats membres de notifier les arrêts judiciaires définitifs portés par les instances judiciaires nationales qui interprètent les dispositions de la Législation européenne commune en matière de ventes ou toute autre disposition du règlement, dans le but de l'institution par la Commission d'une base de données de ces arrêts judiciaires, mais l'institution d'une jurisprudence unitaire, en utilisant les méthodes comparatives, pourrait durer une période extrêmement longue de temps.

[3] Publié dans le Journal officiel de l'Union européenne, nº L177/6/2008.

bénéficient, généralement, d'un plus haut niveau de protection qui résulte des normes non dérogatoires applicables dans leur pays d'origine[1].

En ce qui concerne les contrats conclus avec les consommateurs, en vertu de la proposition de règlement, conformément aux conditions fixées à l'article 6 paragraphe 1 du règlement Rome I, dans le cas où les parties ne choisissent pas la loi applicable, c'est la loi du lieu où le consommateur a sa résidence habituelle. Etant intégrée dans le cadre du système juridique de chaque Etat membre, la législation européenne commune en matière de ventes serait un deuxième régime de droit des contrats, de sorte que lorsque les parties conviennent à y recourir, les dispositions de l'instrument facultatif seront les seules normes nationales applicables dans les matières qui entrent dans son domaine d'application.

Nous pouvons pourtant nous poser la question s'il est vraiment opportun de demander à un consommateur, qui est protégé par la loi à cause de son incapacité de se protéger tout seul, de choisir entre deux systèmes juridiques : le premier, celui national ou le second, à savoir la législation européenne commune en matière de ventes. Evidemment, pour pouvoir choisir en pleine connaissance de cause, le consommateur devra être bien informé et connaître les deux systèmes juridiques, pour apprécier lequel serait le plus avantageux. La vie du consommateur risque d'être extrêmement compliquée s'il est contraint de tenir compte de deux systèmes de règles concurrents dont il devra comprendre les avantages et inconvénients. Dans ces circonstances il y a le risque que la législation facultative ne soit pas utilisée, quelle que soit la qualité de ses règles substantielles.

Dans le contexte des mentions antérieures, on a apprécié que les assemblées parlementaires d'Autriche, d'Allemagne et du Royaume-Uni qui ont contesté la base légale et invoqué le non respect du principe de subsidiarité, que pour documenter juridiquement la proposition du règlement il aurait été nécessaire le recours à la compétence supplétive de l'article 352 du TFUE qui prévoit une clause de flexibilité relative aux domaines de compétence de l'Union européenne. Cette disposition trouve son incidence dans le cas où « *une action de l'Union européenne paraît nécessaire dans le cadre des politiques définies par les traités* », ce qui aurait imposé une autre procédure que celle démarrée par la Commission (réunir l'unanimité dans le Conseil)[2].

Il est de notoriété que cette base juridique a été utilisée pour l'extension des compétences communautaires, par exemple dans les domaines de la politique de développement régional ou de la protection de l'environnement, jusqu'à la date à laquelle, par des modifications du Traité d'institution de la Communauté européenne (TCE), on a introduit des bases juridiques légales pour ces domaines[3].

Avec une référence spéciale aux démarches entreprises dans la direction du droit européen des contrats on a posé la question rhétorique[4]: « l'ampleur d'une telle codification

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[1] Conformément à l'article 6 paragraphe A du Règlement 593/2008 (Rome I), *« un contrat conclu par une personne physique (ci-après nommée « le consommateur »), pour un usage pouvant être considéré comme étranger à son activité professionnelle, avec une autre personne (ci-après nommée « le professionnel »), agissant dans l'exercice de son activité professionnelle, est régi par la loi du pays où le consommateur a la résidence habituelle, à condition que le professionnel : (a) exerce son activité professionnelle dans le pays dans lequel le consommateur a sa résidence habituelle, ou (b) par tout moyen, dirige cette activité vers ce pays ou vers plusieurs pays, dont celui-ci, et que le contrat rentre dans le cadre de cette activité ».* Les dispositions du paragraphe 2 du même article statuent que « *nonobstant les dispositions du paragraphe 1, les parties peuvent choisir la loi applicable à un contrat satisfaisant aux conditions du paragraphe 1. …Ce choix ne peut cependant avoir pour résultat de priver le consommateur de la protection que lui assurent les dispositions auxquelles il ne peut être dérogé par accord en vertu de la loi qui aurait été applicable, en l'absence de choix, sur la base du paragraphe 1 ».*

[2] Dans le même contexte on a soutenu qu'en faisant erronément référence à l'article 114 du TFUE, les auteurs de la proposition du règlement introduisent une distorsion dans le processus législatif européen. De manière incidente, ils déplacent également le centre de décision politique au sein de l'Union. Voir Le rapport du Sénat de Belgique sur la Proposition de Règlement au Parlement européen et au Conseil relative à un droit commun européen de la vente, qu'on peut consulter sur [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/888/888688/888688ro.pdf.], 30.05.2011

[3] Tudorel Ştefan, Beatrice Andreşan Grigoriu, *Drept comunitar,* Ed. C.H. Beck, Bucureşti, 2007, p. 100-103.

[4] Vlad Constantinesco, *La codification..., p.722*

communautaire du droit des contrats ne justifierait-elle pas que les Etats membres, statuant à l'unanimité, consentent clairement à la Communauté européenne une attribution explicite de compétence en la matière ? ».

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EU Environment Policy, Health and Children

Environnement et santé humaine : l'association de politiques publiques au service d'une législation européenne ambitieuse

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Abstract: Public policies in EU are presented according to a sectorial approch. But yet she accounts poorly the transversality of European action. For example, is possible to mention the fructuous relation between Environement and healthy leading to ambitious legislation both to protect the water than the air.
Keywords: EU, public policies, environment, public health, air pollution, water pollution, maritime safety.

La typologie et la clarification des compétences de l'Union européenne opérées par le traité de Lisbonne ne rendent pas compte de l'interpénétration des politiques publiques européennes. Si l'environnement figure parmi les compétences partagées au titre de l'article 4-2 e) TFUE, s'agissant de la protection et de l'amélioration de la santé humaine, l'Union ne dispose que d'une « compétence pour mener des actions pour appuyer, coordonner ou compléter l'action des États membres »[1]. La compétence européenne en matière de santé fait appel à un degré supplémentaire de complexité puisque « les enjeux communs de sécurité en matière de santé publique » appartiennent à la catégorie des compétences partagées. Ainsi la santé publique relevant de l'article 168 TFUE fait l'objet d'une césure : pour « les enjeux communs de santé publique » la mise en œuvre du principe de subsidiarité est possible selon l'article 5-3 TUE puisqu'il s'agit d'une compétence partagée tandis que concernant « la protection et l'amélioration de la santé humaine » une harmonisation législative et règlementaire est exclue conformément à l'article 2-5 TFUE). Ainsi au sein d'un même domaine, deux catégories de compétences coexistent au sein d'un article unique conséquent, dotant la santé publique d'une base conventionnelle. L'article 168 TFUE représente le dispositif unique traitant de la santé publique. L'objectif d'un niveau de protection élevé qu'il énonce relaie l'article 9 TUE (niveau élevé « de protection de la santé humaine »). Ce standard « élevé » est repris par la charte des droits fondamentaux dont l'article 35 intitulé Protection de la santé stipule : Toute personne a le droit d'accéder à la prévention en matière de santé et de bénéficier de soins médicaux dans les conditions (…) Un niveau élevé de protection de la santé humaine est assuré dans la définition et la mise en oeuvre de toutes les politiques et actions de l'Union ».

Loin de ces distinctions conventionnelles, la Commission assure depuis une dizaine d'année une relation entre la protection de l'environnement et de la santé. Ce rapprochement illustre une tendance profond témoignant de la dimension humaine d'une politique de protection de l'environnement dont la finalité est précisément dictée par des considérations sanitaires. Dans son sixième programme d'action pour l'environnement intitulé *Environnement 2010 : notre avenir, notre*

[1] Article 6 a) TFUE.

choix[1] parcourant la période allant du 22 juillet 2002 jusqu'au 22 juillet 2012 la Commission définit quatre grands domaines d'action dont le troisième « Environnement et santé ». L'approche retenue par la Commission mérite d'être reproduite *in extenso* : « Il apparaît de plus en plus largement, et indéniablement, que la santé humaine est affectée par les problèmes écologiques liés à la pollution atmosphérique et aquatique, aux substances chimiques dangereuses et aux nuisances sonores. Il convient d'adopter une approche globale face à l'environnement et à la santé, en plaçant le principe de précaution et la prévention des risques au centre de cette politique et en tenant compte des groupes particulièrement vulnérables tels que les enfants et les personnes âgées »[2]. Cet ambitieux objectif passe par la protection en vertu de standards élevés de deux éléments naturels : l'air (I) et l'eau (II)

I – LA PROTECTION DE L'ATMOSPHÈRE : VERS UN DROIT À LA PURETÉ ET À LA TRANQUILLITÉ DE L'AIR

Bien avant que les institutions européennes aient la capacité de légiférer s'agissant de la protection de l'environnement [3], un ensemble normatif veillait à limiter la pollution atmosphérique. Par la suite, dans le cadre cette fois de la politique de l'environnement, l'Union européenne s'est dotée d'un ensemble législatif ambitieux, régulièrement et récemment révisé suivant des standards élevés de protection[4]. Tel est le cas en particulier en matière de transport, qu'il s'agisse depuis une vingtaine d'année des véhicules terrestres à moteur[5], ou plus tardivement du transport aérien[6].

A côté de la limitation d'émission polluante dans l'atmosphère, la Commission souhaite développer une stratégie en faveur des biocarburants [7] tandis que l'Union est partie à la convention de Stockholm sur les polluants organiques persistants (POP) du 23 mai 2001[8]. Par ailleurs, il est souvent reproché à l'Union européenne d'agir en vertu de textes épars, longs et complexes, pour ne plus encourir de telle critique le cadre règlementaire relatif aux émissions industrielle a fait l'objet d'une refonte et d'une simplification avec la directive du 24 novembre 2010[9]. Il est vrai que la lutte contre la pollution atmosphérique occupe une place centrale dans l'Union européenne en relation avec la lutte contre le réchauffement climatique que ne doivent pas occulter les maigres résultats obtenus à l'issue de la conférence de Durban le 11 décembre 2011. La stratégie de l'Union est présentée suivant le slogan "3 fois 20", c'est-à-dire une réduction de 20% des émissions de gaz à effet de serre, une amélioration de 20% de l'efficacité énergétique

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1 Communication de la Commission au Conseil, au Parlement européen, Comité économique et social et au Comité des régions sur le sixième programme communautaire d'action pour l'environnement, COM(2001)31 final du 24 janvier 2001.
2 COM(2001)31, p. 5.
3 Le titre consacré à « L'environnement » a été inséré par l'Acte unique en 1986 (ex-art. 130 R à T CEE, devenus art. 191 à 193 TFUE).
4 Voir par exemple le règlement 1005/2009 du 16 septembre 2009 relatif à des substances qui appauvrissent la couche d'ozone, JO L 286 du 31 octobre 2009, p. 1.
5 Règlement 510/2011 du 11 mai 2011 établissant des normes de performance en matière d'émissions pour les véhicules utilitaires légers neufs, JO L 145 du 31 mai 2011, p. 1.
6 Communication de la Commission au Conseil, au Parlement européen, Comité économique et social européen et au Comité des régions - Réduction de l'impact de l'aviation sur le changement climatique COM(2005) 459 final du 27 septembre 2005.
7 COM(2006) 34 final du 8 février 2006, JO C 67 du 18 mars 2006.
8 Cette convention a pour objet l'élimination des rejets de douze de ces POP (les douze salopards) : l'aldrine, le chlordane, le dichlorodiphényltrichloréthane (DDT), le dieldrine, l'endrine, l'heptachlore, le mirex, le toxaphène, les polychlorobiphényles (PCB), l'hexachlorobenzène, les dioxines et les furanes.
9 Directive 2010/75 concernant la prévention et la réduction de ces émissions industrielles, JO L 334 du 17 décembre 2010, p. 17.

et une part de 20% d'énergies renouvelables dans la consommation d'énergie de l'Union[1]. La récession ayant touché l'économie européenne en 2008-2009 a eu pour conséquence vertueuse de rendre possible la satisfaction anticipée de ces objectifs[2], de sorte que plus que jamais, l'Union européenne apparaît comme l'espace le plus attentif à la lutte contre le réchauffement climatique.

Est aussi rattachée au thème *Environnement et santé* la lutte contre les nuisances sonores émises principalement par des sources telles que les véhicules et les infrastructures routières et ferroviaires, les aéronefs, etc.[3] D'études médicales en études médicales, l'influence néfaste du bruit sur la santé humaine n'est plus à démontrer[4].

Enfin, à la croisée de la protection de l'air et de l'eau figure l'importante législation européenne relative aux substances chimiques. Après de longues négociations entre le Parlement européen et le Conseil, avec en arrière-plan l'opposition frontale de l'industrie chimique européenne en général et allemande en particulier le règlement 1907/2006 du 18 décembre 2006 a vu le jour[5]. Ce texte concerne l'enregistrement, l'évaluation et l'autorisation des substances chimiques, ainsi que les restrictions applicables à ces substances (REACH). Il oblige les entreprises industrielles fabricant et important des substances chimiques à évaluer les risques résultant de leur utilisation et à s'en prémunir. De sorte qu'il leur appartient d'apporter la preuve de l'innocuité des substances utilisées. Cette inversion de la charge de la preuve représente un progrès significatif. Ces substances chimiques sont soumises à un enregistrement et le cas échéant à autorisation. Simultanément, ce règlement instaure l'Agence européenne des produits chimiques, basée à Helsinki, elle est précisément chargée d'appliquer le règlement REACH.

II – LA PROTECTION DE L'EAU : LA RENCONTRE DE L'ENVIRONNEMENT ET DE LA SANTÉ

La lutte contre la pollution de l'eau emprunte également diverses formes étant précisé que la directive 2000/60 du 23 octobre 2000 incarne sert de socle à la politique européenne dans le domaine de l'eau. Son champ d'application porte sur les eaux intérieures de surface, les eaux de transition (c'est-à-dire les masses d'eaux de surface à proximité des embouchures de rivières, qui sont partiellement salines en raison de leur proximité d'eaux côtières, mais qui sont fondamentalement influencées par des courants d'eau douce), les eaux côtières et les eaux souterraines. Quatre objectifs sont définis par la directive : assurer un approvisionnement suffisant en eau de surface et en eau souterraine de bonne qualité pour les besoins d'une utilisation durable, équilibrée et équitable de l'eau ; réduire sensiblement la pollution des eaux souterraines; protéger les eaux territoriales et marines ; réaliser les objectifs des accords internationaux pertinents).

Concernant le milieu marin, il a fait l'objet d'une directive 2008/56 du 17 juin 2008 établissant elle aussi un cadre d'action européen[6]. L'action de l'Union se déploie également en la matière au titre de la politique des transports visant à sécuriser les transports maritimes. Les circonstances du naufrage au large des côtes bretonnes du navire pétrolier Erika en décembre

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1 Cf. Décision 406/2009 du 23 avril 2009 relative à l'effort à fournir par les États membres pour réduire leurs émissions de gaz à effet de serre afin de respecter les engagements de la Communauté en matière de réduction de ces émissions jusqu'en 2020, JO L 140 du 5 juin 2009, p. 136.

2 Communication de la Commission au Parlement européen, au Conseil, Comité économique et social européen et au Comité des régions - Analyse des options envisageables pour aller au-delà de l'objectif de 20 % de réduction des émissions de gaz à effet de serre et évaluation du risque de «fuites de carbone» COM(2010)265 final du 26 mai 2010.

3 Directive 2002/49 du 25 juin 2002 relative à l'évaluation et à la gestion du bruit dans l'environnement**,** JO L 189 du 18 juillet 2002, p. 12. Cf. également le rapport de la Commission au Conseil et au Parlement européen - Restrictions d'exploitation pour raison de bruit dans les aéroports de l'UE - (Rapport sur l'application de la directive 2002/30/CE), COM(2008) 66 final du 15 février 2008.

4 *Journal du CNRS*, janvier 2007, n° 204.

5 JO L 396 du 30 décembre 2006, p. 1.

6 JO L 164 du 25 juin 2008, p. 40.

1999 ont crûment souligné les lacunes du dispositif communautaire. Dès lors la Commission présente quelques mois plus tard une communication donnant naissance au « paquet Erika I » formé de trois directives[1] et d'un règlement[2] instituant un comité pour la sécurité maritime et la prévention de la pollution par les navires. Ce paquet est rapidement suivi d'un second (Erika 2) formé de la directive n°2002/59 renforçant le système communautaire de suivi du trafic des navires et d'information, quelle que soit leur cargaison (les navires de guerre et les petits bateaux ne sont pas concernés) et du règlement n°1406/2002 instituant une Agence européenne pour la sécurité maritime (AESM). L'AESM est basée à Lisbonne est chargée de veiller au respect de la législation européenne.

Depuis, la sécurité maritime a connu un important renforcement avec la directive n°2009/16 du 23 avril 2009 étendant les obligations d'inspections pesant sur les autorités portuaires des Etats membres et ouvrant davantage les possibilités du bannissement d'un navire par l'Etat du port. Le même jour ont été adoptées les directives °2009/20 relative à l'assurance des propriétaires de navires pour les créances maritimes et la directive n°2009/21 concernant le respect des obligations des États du pavillon définissant un cadre permettant aux Etats membres une application harmonisée des conventions internationales pertinentes de l'Organisation Maritime Internationale. La première a été considérablement édulcorée par rapport à la proposition de la Commission en raison de l'opposition de l'industrie maritime européenne. L'objectif final de la seconde vise la valorisation de la qualité des pavillons européens. Enfin, le règlement n°391/2009 refond les règles et normes communes concernant les organismes habilités à effectuer l'inspection et la visite des navires. Ce règlement reprend une échelle de sanctions financières mises en œuvre graduellement avec comme sanction ultime le retrait de l'agrément. A côté de ces sanctions financières, la succession de naufrages frappant des navires pétroliers a conduit à l'adoption d'une directive 2005/35 du 7 septembre 2005 relative à la pollution causée par les navires et à l'introduction de sanctions en cas d'infractions offrant la possibilité aux Etats membres de prendre des sanctions pénales[3].

Enfin, parmi les textes intéressant la politique européenne de l'eau doit être citée la directive 2007/60 du 23 octobre 2007 relative à l'évaluation et à la gestion des risques d'inondation obligeant les Etats membres à dresser des cartes identifiant les zones à risques et à élaborer des plans de gestion de ces risques. Cette directive est la conséquence des fortes inondations ayant frappé l'Europe au début des années 2000 et ayant causé un nombre important de morts. De cette rencontre opportune entre l'environnement et la santé est née une législation exigeante ayant pour effet un décloisonnement salutaire des politiques publiques de l'Union. A n'en pas douter la stratégie européenne au-delà des mécanismes d'adaptation des législations nationales a pour effet d'influencer l'approche environnementale des États membres.

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[1] Directive n°2000/59 du 27 novembre 2010, directives n°2001/105 et 106 du 19 décembre 2001.
[2] Règlement 2099/2001 du 5 novembre 2002.
[3] JO L 255 du 30 septembre 2005, p. 11.

Les indicateurs du campus durable aux USA et dans l'Union Européenne: une nouvelle forme d'indicateurs de communauté

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Abstract: The middle of the nineties saw opening many initiatives on the North American university campuses and later in the European Union aiming at evaluating their performances compared with Sustainable Development. An attentive examination of the methods used at the same time as the choice of their variables leads us to establish a connection between such initiatives and the use of community indicators. This paper will endeavour to clarify the two approaches while emphasizing the similarities and oppositions between indicators of sustainable campus and community indicators.
Keywords: Indicators, Communities, Well-being, Campus, Sustainable development.

La publication par la CMED (Commission Mondiale sur l'Environnement) du rapport Brundtland en 1987 a suscité depuis une abondante littérature sur le concept du développement durable plus spécifiquement axée sur une approche locale du phénomène, (Hardy et Lloyd, 1994 ; Camagni, Capello et Nijkamp, 1996 ; Theys, 2002 ; Torre et Zuindeau, 2006 ; Zuindeau, 2007). Pour compléter ces différentes contributions relatives au développement durable, des travaux plus spécifiques se sont efforcés de mettre en lumière les problèmes de mesure du développement durable à tous les échelons territoriaux à travers la mise en place de grilles d'indicateurs, (DPPE du Conseil Régional du NPDC, 2003 ; UN, 2003 et 2005 ; UN-ECE, OECD et Eurostat, 2009 ; Lazzeri *et al*, 2006 ; Boutaud, 2010 ; Olszak, 2010). L'existence de ces travaux articulés autour d'une meilleure prise en compte du bien-être sociétal d'une part et d'une déclinaison plus territoriale du développement durable nous conduit à nous focaliser sur certaines initiatives ayant vu le jour principalement aux Etats-Unis et plus largement dans les pays anglo-saxons à partir du début des années 1990 pour s'étendre ensuite aux pays de l'Union Européenne. Ces initiatives qui semblent combiner à la fois ces deux approches, plus précisément les « community indicators » ou littéralement « indicateurs de communauté » sont destinées plus particulièrement à mesurer le bien-être d'une zone géographique clairement délimitée en se plaçant résolument dans une perspective de développement durable, (Besleme et Mullin, 1997 ; Valentin et Spangenberg, 2000 ; Dluhy et Swartz, 2005). Dans le même temps, en se plaçant à un échelon plus étroit d'un point de vue géographique, on doit également prendre en compte un autre type d'initiative qui s'inspire en partie de la précédente caractérisée par la mise en place par de nombreuses universités à partir de la fin du XXème siècle d'une démarche orientée vers le campus durable. Cette démarche s'accompagne également de l'élaboration d'une grille d'indicateurs.

L'objet du présent article consiste à établir les liens qui unissent aujourd'hui les indicateurs de communauté avec ceux issus d'un campus durable. En effet, nous nous efforcerons de mettre en évidence certaines similitudes entre les deux approches. De la même manière, on s'attachera également à montrer en quoi ces deux démarches peuvent diverger sur certains points précis. Dans cette optique, le présent article se composera de deux parties. Dans la première partie, nous présenterons d'abord la démarche visant à élaborer des indicateurs de communautés en nous appuyant sur des expériences existantes aux Etats-Unis. Dans une deuxième partie, nous mettrons en lumière les principales initiatives conduisant à l'élaboration d'indicateurs du campus durable. Nous ferons ressortir ensuite les similitudes et les différences entre les deux approches.

1. LES INDICATEURS DE COMMUNAUTÉ : UN ÉTAT DES LIEUX.

On peut définir les indicateurs de communauté comme ceux permettant de mesurer les interfaces entre les facteurs sociaux, environnementaux et économiques susceptibles d'affecter le bien-être d'une région ou d'une collectivité, une ville par exemple. Ce concept n'est pas novateur dans la mesure où il est apparu pour la première fois aux Etats-Unis en 1910 quand la Russell Sage Fondation avait lancé un certain nombre d'études visant à mesurer localement l'influence des facteurs liés aux loisirs et à l'éducation notamment. Cette approche fut à nouveau à l'honneur à la fin des années 1990 lorsque cette même fondation a réutilisé la même méthodologie ayant pour cadre cette fois-là la ville de Pittsburgh, la différence avec l'approche initiale résidant dans le fait que l'ensemble des facteurs contribuant au bien-être des individus est désormais pris en compte alors que les premières enquêtes ne testaient qu'un facteur isolé, (Philips, 2003). Depuis lors, l'expérience tentée à Pittsburgh a fait tache d'huile aux Etats-Unis ainsi qu'au Canada, en Australie et en Nouvelle-Zélande mais relativement peu au sein de l'Union Européenne à l'exception de certaines expériences initiées localement en Allemagne à Iserlohn, (Valentin et Spangenberg, 2000).

1.1. Les conditions de réussite des initiatives locales

Certains auteurs définissent plus précisément les paramètres indispensables à la réussite d'expériences visant à construire ces indicateurs de communauté (Dluhy et Swartz, 2006). Deux éléments apparaissent principalement :

- Le besoin d'une structure idéologique ou conceptuelle préalable à l'entame de ce type de démarche ;

La réussite des projets d'indicateurs de communauté s'appuie toujours sur des indicateurs se référant à une norme précise, les indicateurs élaborés en dehors de toutes références théoriques diminuent considérablement les chances de parvenir à élaborer des politiques efficaces face à un état des lieux avéré. Les communautés défendent un certain nombre de principes et de valeurs et les indicateurs se doivent de les légitimer. L'expérience initiée par la ville de Seattle [1] est particulièrement significative de cet état d'esprit. En effet, Seattle s'est engagée résolument dans la promotion du développement durable à l'échelle de son agglomération en privilégiant un développement économique respectueux des ressources naturelles, augmentant la qualité de l'environnement et réduisant également la consommation d'énergies. Dans cette optique, il n'est pas étonnant de constater l'existence d'indicateurs comme la consommation d'eau des habitants ou encore la quantité de déchets solides recyclés.

- Utiliser tous les moyens possibles pour recueillir les avis des citoyens préalablement à l'élaboration des indicateurs de communautés ;

Les méthodes utilisées pour construire ces grilles d'indicateurs et leur succès non démenti jusqu'alors tiennent au fait qu'il s'agit dans le cas présent d'une démarche que certains auteurs qualifient de « bottom up » par opposition à une démarche « top down », (Gahin et Peterson, 2001 ; Reed, Fraser et Dougill, 2006). Une démarche « bottom up » se définit par rapport à quatre éléments. Tout d'abord, elle commence toujours par une consultation des citoyens dans les localités qui identifient les forces, les faiblesses, les menaces et les opportunités (démarche connue sous l'acronyme SWOT en anglais !). Les parties prenantes qui regroupent les associations mais aussi des groupes de citoyens identifient ensuite plusieurs scénarios possibles par rapport au devenir de leur collectivité, le plus souvent en y intégrant implicitement ou explicitement les principes de base du développement durable. Une troisième phase consiste à recenser des indicateurs potentiellement utilisables par eux-mêmes en s'appuyant sur leurs propres critères et leurs attentes et procéder ensuite à une sélection parmi l'ensemble. Pour finir, les indicateurs tantôt quantitatifs ou qualitatifs

[1] Seattle, 2000, "*Sustainable Seattle",* http:// www.scn.org/sustainable/about.htm.

seront utilisés pour juger des progrès accomplis par la collectivité par rapport à leurs objectifs initiaux.

A l'inverse, une démarche « top down » se décline le plus souvent en direction d'une zone géographique plus large ou mal déterminée lorsqu'elle concerne un secteur d'activité comme l'agriculture, par exemple. La deuxième phase résulte d'un travail d'experts qui vont identifier les tenants et les aboutissants d'une situation de base, ce qui les conduit alors dans une troisième phase à ne retenir que des indicateurs qui présentent la caractéristique d'être reconnus par l'ensemble de la communauté scientifique. Pour terminer, les indicateurs qui sont pour la plupart des indicateurs quantitatifs servent de tableaux de bord aux experts pour analyser les conséquences d'une modification de l'état initial. Le contexte général de la réussite d'une démarche d'indicateurs de communauté qui privilégie l'approche « bottom up » doit respecter également certaines règles relatives à des paramètres plus estampillés « politique ».

1.2. Les initiatives locales américaines emblématiques

Parmi les initiatives locales américaines emblématiques, deux d'entre elles retiennent tout particulièrement notre attention. La première s'intitule *« Sustainable Seattle, Indicators of Sustainable Community »*. Cette expérience ayant vu le jour initialement en Novembre 1990 constitue le meilleur exemple de ce que doit être un projet réussi d'indicateurs de communauté en respectant dans les grandes lignes, les principes généraux énoncés plus haut. Périodiquement la collectivité de Seattle publie un rapport détaillé retraçant l'évolution des principaux indicateurs qui sont au nombre de 40 et qui se subdivisent en cinq grandes catégories :

- l'environnement ;
- la population et les ressources disponibles ;
- l'économie ;
- la jeunesse et l'éducation ;
- la santé et la gouvernance.

S'inscrivant résolument dans une perspective de développement durable, à l'instar de la précédente, l'expérience de Seattle en a inspiré beaucoup d'autres à travers l'Amérique du Nord.

Dans un deuxième temps, il nous a semblé utile de mentionner une autre expérience d'élaboration d'indicateurs communautaires apparu plus récemment mais qui présente un intérêt dans la mesure où l'on voit apparaître plus explicitement les grands items que l'on retrouve dans la plupart des expériences, il s'agit du projet élaboré par le Comté d'Orange en Californie du Sud[1]. L'action engagée dans ce Comté est significative pour trois raisons :

- elle concerne une zone géographique relativement étroite à l'instar de l'expérience de Seattle ;
- elle concerne une zone a priori plutôt favorisée en terme de climat et de cadre de vie, notamment, beaucoup plus que ne l'est la zone de Seattle à l'origine ;
- elle a fait l'objet d'une évaluation complète après 10 ans d'expérience.

Il convient surtout de mentionner le fait que les indicateurs de communauté du Comté d'Orange sont au nombre de 47 et se répartissent par rapport aux items suivants :

- la situation économique et la conjoncture favorable aux affaires ;
- la technologie et l'innovation ;
- l'éducation ;
- la prospérité et la santé des habitants ;
- la sécurité publique ;
- l'environnement ;
- l'engagement civique.

[1] Un rapport complet est disponible sur le site web suivant http://egov.ocgov.com

Ces principaux items nous semblent tout particulièrement intéressants dans la mesure où ils décrivent assez bien ce qui fait les fondements de l'attractivité d'une zone géographique en même temps qu'ils s'inscrivent également dans une démarche de développement durable. En outre, on retrouve la plupart de ces items de façon plus ou moins détaillée dans une multitude de démarches de mise en place d'indicateurs communautaires. Dans cette optique, on admettra qu'ils constituent une base intéressante de comparaison avec les items qui apparaîtront dans les démarches initiées au sein des campus durables. Il convient à présent d'examiner jusqu'à quel point les indicateurs du campus durable peuvent se prévaloir d'être une nouvelle forme d'indicateurs de communauté.

2. LES INDICATEURS DU CAMPUS DURABLE

Les expériences d'évaluation des performances des universités apparaissent déjà relativement anciennes et ne constitue pas il est vrai une nouveauté, dès le début des années 1960, on a pu observer aux Etats-Unis et au Royaume-Uni principalement, un certain nombre d'initiatives visant à estimer l'efficacité des établissements d'enseignements supérieurs. La mesure de cette efficacité empruntait deux directions, d'abord en se focalisant sur les relations qu'entretenaient les universités avec leur environnement externe, ensuite en mettant en relief l'efficacité de son fonctionnement interne, (Yorke, 1987). Derrière cette prise de conscience qu'une université se devait d'être doublement efficace à la fois dans ses relations externes et dans son fonctionnement interne, il n'est dès lors pas étonnant qu'elles se soient engagées dans des démarches visant à intégrer les principes du DD dans leur stratégie de développement au milieu des années 1990 aux Etats-Unis et au Canada essentiellement, avant de s'appliquer progressivement aux campus européens. Un certain nombre de travaux académiques mettent en lumière les expériences réalisées en Amérique du Nord et plus tard au sein de l'Union Européenne en insistant à la fois sur les raisons ayant poussé les universités à intégrer cette démarche, sur la méthodologie utilisé, les difficultés rencontrées en même temps que sur le choix des indicateurs, (Keniry, 1995 ; Cortese, 1999 ; Van Weenen, 2000 ; Dahle et Neumayer, 2001 ; Shriberg, 2002).

2.1. Les expériences américaines de prise en compte du développement durable au sein des campus

Il apparaît que les universités constituent un lieu idéal pour mettre en œuvre le DD dans la mesure où de par leur surface occupée en hectare au sein d'une zone, en raison du nombre d'étudiants la composant mais aussi à travers les recherches initiées en leur sein dans les multiples facultés et laboratoires attenants. Ainsi, *The College Sustainability Report Card*[1] laisse apparaître 43 indicateurs basée sur les meilleures pratiques des établissements d'enseignements supérieurs en Amérique du Nord dans la promotion du développement durable. Pour l'occasion, nous nous contenterons de faire apparaître les grands thèmes retenus qui sont au nombre de huit :

- la gouvernance de l'université ;
- l'utilisation des sources d'énergies et la lutte contre le changement climatique ;
- la nourriture et le recyclage des déchets organiques ;
- la construction HQE ;
- l'engagement des étudiants ;
- les transports ;
- les investissements soutenables ;
- l'engagement des parties prenantes.

[1] On pourra consulter le site internet: http://www.greenreportcard.org

En faisant apparaître les différents items existant au sein de la plupart des universités et en examinant les conditions ayant abouti au développement de ces initiatives en Amérique du Nord, on ne peut s'empêcher d'observer des similitudes avec les expériences précédemment décrites d'élaboration d'indicateurs de communauté. Les indicateurs du campus durable ne pourraient-ils pas de fait être assimilés à des indicateurs de communauté ?. Répondre à cette question nous oblige dans un premier temps à faire ressortir les similitudes entre ces deux démarches, mais elle nous conduit également dans un deuxième temps à mettre en lumière les spécificités de la démarche initiée au sein des campus.

2.2. Les similitudes entre les deux démarches

En termes de similitudes, la première que l'on peut mettre en évidence entre les deux démarches réside dans leur caractère territorial géographiquement limité à une zone précise et souvent peu étendue. Cela est particulièrement pertinent pour les indicateurs du campus durable cantonnés à un périmètre de quelques hectares pour les plus grandes universités. Même si les expériences communautaires sont censées s'appliquer à des territoires plus larges, une ville ou un comté comme c'est le cas pour Seattle, il apparaît explicitement qu'elles sont d'abord et surtout des expériences locales donnant lieu à des évaluations locales.

Le deuxième point d'accord entre les deux approches est le fait qu'elles laissent une large place aux indicateurs qui constituent la clé de voute des politiques d'évaluation. Bien que le nombre d'indicateurs puissent être variable d'une communauté ou d'une université à l'autre, ils sont censés couvrir et être emblématiques de certaines valeurs à l'origine, le développement durable ou le bien-être d'une société, par exemple.

Un autre point commun réside dans le fait que les deux démarches ne sont pas nées de manières subites mais résultent le plus souvent de réflexions s'appuyant sur des expériences passées et l'utilisation de méthodologies assez similaires. Ainsi, la construction d'indicateurs de communauté constitue une version actualisée et étendue des indicateurs sociaux mis en place aux Etats-Unis dans les années 1960. Dans le même temps, les indicateurs du campus durable n'auraient probablement pas existé si des réflexions approfondies relatives à l'efficacité du fonctionnement d'une université n'avaient pas été au préalable engagées dès les années 1960, (voir supra). Même si l'on doit admettre que les deux démarches sont relativement innovantes dans leur approche respective et ne découlent pas directement de programmes engagés antérieurement, il n'en demeure pas moins qu'elles ont obligatoirement été influencées par des expériences tentées dans d'autres circonstances mais qui présentaient des points communs avec les leurs.

Un quatrième point commun entre les deux est le fait qu'elles impliquent la mise en place d'une équipe en charge de manager le projet et de recueillir les données, les traiter et les restituer à chaque fois à leurs publics concernés. Les divergences peuvent exister dans le management des équipes et dans le nombre de personnes directement rattachées mais pas dans leurs objectifs fondamentaux : mettre en place le système d'information attenant à cette démarche d'abord, procéder ensuite à une évaluation des progrès accomplis et des efforts restant à faire pour parvenir à atteindre les objectifs initialement fixés.

Pour clore le chapitre relatif aux similitudes, il apparaît qu'un dernier élément est commun aux deux initiatives, celui concernant les interactivités possibles entre les deux projets. En effet, si l'on examine les différentes expériences « communautaires », on constate que beaucoup d'entre elles placent les questions d'éducation et plus généralement, les questions de formation au cœur de leur approche. Ainsi, on retrouve cette thématique de façon plus ou moins explicite dans les projets de Seattle et du comté d'Orange. Leur volonté affichée de prodiguer une bonne éducation à la base mais au-delà celui d'un enseignement supérieur de qualité permettant aux jeunes de s'insérer le mieux possible dans la vie active ne laisse aucun doute sur l'importance de l'enseignement supérieur dans les projets communautaires. Dans le même temps, si l'on examine les initiatives visant à

promouvoir le DD dans les campus universitaires, on constate que les relations avec les parties prenantes et plus spécifiquement avec les collectivités locales ne sont jamais absentes. Un exemple particulièrement illustratif nous est fournie par les universités australiennes qui de l'avis même du gouvernement australien représentent des atouts considérables dans les domaines académiques, culturelles et des loisirs pour les collectivités locales, cela se vérifie tout particulièrement lorsqu'il s'agit d'universités petites ou moyennes qui ont intérêt à développer des actions en direction des collectivités pour un bénéfice réciproque. Cela est d'autant plus évident que de nombreuses collectivités locales australiennes financent pour partie certains projets de développement des universités et qu'elles en espèrent des contreparties importantes, (Commonwealth of Australia, 2002).

Un dernier paramètre nous pose quelques problèmes dans la mesure où il se positionne suivant les cas tantôt comme un élément de similitude, tantôt comme un élément de divergence, il se réfère au mode d'approche utilisé dans la construction d'indicateurs, approche « top down » ou approche « bottom up ». L'idée largement répandue et difficilement contestable consiste à dire que les approches « communautaires » privilégient toutes une approche « bottom up » en reposant sur la participation active des citoyens dans l'élaboration des indicateurs , par opposition aux approches « top down » visant à imposer des indicateurs résultant de l'avis d'experts. Que ressort-il des initiatives visant à mettre en place une démarche de campus durable ?. Si l'on passe en revue les différentes expériences nord-américaines, on doit forcément conclure à une approche « bottom-up » et donc à une convergence avec les démarches communautaires dans la mesure où le choix des indicateurs émanent le plus souvent de commissions ad hoc composées de professeurs et d'étudiants. Mais, si l'on observe d'autres expériences tentées au sein de l'Union Européenne et en France, notamment, alors on peut s'interroger sur la convergence entre ces deux méthodes. L'exemple français est intéressant car il semble relever implicitement d'une approche « top down » même s'il nous faut nuancer notre propos. Ainsi, le numéro spécial de la revue « *l'officiel de la Recherche et du Supérieur* » du 17 Décembre 2008 relate avec forces détails la mise en place de l'initiative visant à inscrire les universités françaises dans une démarche de développement durable. Dans ce numéro, on y fait mention explicitement du Grenelle de l'Environnement comme étant à l'origine de la prise de conscience de la responsabilité sociétale des universités, le projet de loi Grenelle 1 les obligeaient d'ailleurs à élaborer pour la rentrée 2009, un « Plan vert pour les campus ». Dans ces conditions, même si certains établissements précurseurs avaient déjà mis en place dès 2007 des initiatives de ce type laissant plutôt croire à une approche « bottom-up » comme celles initiées aux Etats-Unis, la suite nous montre que la plupart des universités ont plutôt cherché à répondre aux exigences gouvernementales, légitimant ainsi une approche « top-down ». Cette approche étant encore plus évidente, lorsque l'on sait que les travaux visant à mettre en place un référentiel « campus durable » se sont fait avec l'aide financière de la Caisse des Dépôts et Consignations, un organisme public. En outre, on constate également que ce type de démarche dans le cas français semble découler en grande partie du lancement du plan campus prévoyant 5 milliards d'euros pour la modernisation du patrimoine immobilier des plus grands sites universitaires. Dans ces conditions, on peut estimer que les expériences françaises de mise en œuvre du campus durable sont influencées fortement par des incitations gouvernementales implicites mais qui légitiment de fait une approche « top down ». L'ambiguïté relative face à ce dernier élément nous semble être une bonne passerelle entre les éléments convergents et divergents des deux approches.

2.3. Les divergences entre les deux approches

L'étude des divergences entre les deux approches laissent selon nous apparaître deux points de rupture : l'existence d'une démarche explicite au regard du DD au sein des universités d'une part et une sélection plus étroite de leurs indicateurs d'autre part. Le premier point de divergence

demeure assez palpable lorsque l'on examine les multiples expériences communautaires d'un côté et celles initiées par les universités de l'autre. Les expériences communautaires ne mentionnent pas toutes explicitement leur rattachement aux principes du DD, même si l'expérience de Seattle le mentionne explicitement dans son titre, de même que celui du Comté d'Orange dans son rapport de présentation qui laisse aussi apparaître cette préoccupation à la lecture de ces objectifs. Si l'on se place maintenant du point de vue des universités, la référence aux principes du DD y est mentionnée explicitement car elle constitue même le cœur du projet, on parlera toujours de campus durable alors que l'on ne parle pas toujours de « communautés durables » même si les démarches de mise en place d'indicateurs légitiment le plus souvent ce type d'approche.

Un deuxième point de rupture apparaît étroitement lié à la nature même de l'organisme chargé de la promotion de la démarche. En effet, il demeure évident qu'une collectivité dispose d'une vision plus large de ce qui découle du bien-être et par extension de ce qu'est la durabilité alors qu'une université se limitera le plus souvent à transposer ces concepts dans un contexte purement universitaire. Par exemple, si une collectivité prendra en compte des indicateurs comme la santé des habitants ou encore le taux d'homicide au sein d'une zone, une université se cantonnera à la santé de ces étudiants et au taux d'homicide sur le campus. Les indicateurs peuvent être identiques, mais leur échelle d'applicabilité diverge à la fois d'un point spatial et au niveau de la population concernée. Dans l'autre sens, la référence explicite au développement durable pour les universités conduisent celles-ci à bâtir toujours des indicateurs prenant en compte le développement durable de manière exhaustive alors que la réciproque n'est pas toujours vérifiée, certaines collectivités privilégieront plutôt un pilier, voire deux piliers mais pas nécessairement les trois en même temps.

3. CONCLUSION

Les années 60 et 70 ont vu l'éclosion d'un certain nombre d'initiatives visant à mesurer le bien-être des collectivités locales en même temps que les performances organisationnelles d'entités comme les campus universitaires. Ces démarches initiées à l'échelle des collectivités ont progressivement évolué vers des projets plus ambitieux visant à y intégrer toutes les facettes conduisant à leur épanouissement et à leur développement. Dans le même temps, les universités se sont engagées vers une plus grande intégration des principes du développement durable dans leur gestion quotidienne. Développées initialement en Amérique du Nord et s'étendant progressivement à d'autres régions du globe comme l'Europe et l'Océanie, ces deux démarches constituent des tentatives originales d'évaluation en même temps que novatrices les conduisant à avoir une vision élargie de leur performance. On a pu noter qu'un grand nombre de similitudes caractérisaient ces deux démarches à la fois dans l'esprit mais également dans la façon de les concevoir initialement mais aussi dans la constitution des équipes chargées de leur suivi. De la même manière, on a pu noter également quelques divergences entre les deux initiatives même si celles-ci peuvent sembler minimes au regard de l'importance de leurs similitudes. Dans ces conditions, on peut estimer que les indicateurs du campus durable sont en réalité des indicateurs de communauté qui se cantonnent à un territoire plus étroit que les premiers en même temps qu'ils s'adressent à un public plus restreint que ceux des collectivités territoriales. Quant à la querelle pouvant s'établir entre une approche « top down » et une approche « bottom up », elle n'a pas vraiment lieu d'être en Amérique du Nord, les multiples expériences observées à la fois dans les collectivités et au sein des universités privilégient résolument une approche « bottom-up ». Le cas de la France où l'on note plutôt une approche de type « top down » pourrait s'expliquer essentiellement en raison de l'omniprésence du secteur public dans l'enseignement supérieur alors qu'aux Etats-Unis elles relèvent majoritairement du secteur privé.

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Cadre juridique pour combattre la violence contre les enfants. Le cas de l'Albanie, en perspective de l'Union Européenne

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Abstract: The corporal punishment against the children have existed time ago and it can be considered one of the most serious violations of the right to life and physical and psychological integration of the child. Violence is not characteristic of a particular nation, or even one time in history. Anywhere at any time there is not stopped the violence, it differs in shape and size. The role of each institution, now, is not only evidence, the purpose of the drafters of concrete implementation measures that significantly affect the prevention of domestic violence. It is true that for many countries, children are exposed to hazards in violation of the convention provides that: we mention here the children in situations of poverty, neglect, exploitation of street children, pornography, child participation in armed conflict, etc. These situations require more care from the international community. "A child may be victim of corporal punishment within the family (household), at school and in the various of institutions of alternative care." International law condemns corporal punishment because they are contrary to the right of physical integrity and dignity.
Keywords: Children's rights, EU, Law, violence.

La Convention des Droits de l'Enfant a consacré beaucoup d'article contre ce problème aussi agressif à la santé des enfants. Par exemple l'article 37 détermine que: "Nul enfant ne peut être soumis ni à la torture ni à des peines ou traitements inhumains ou dégradants", aussi que l'article 19 prévoit les obligations positives des États de prendre des mesures pour protéger les enfants contre toute forme de violence, de brutalité physique ou mentale. On a la possibilité d'ajouter dans ce contexte, la définition de l'article 28: "La discipline scolaire doit être appliquée d'une manière compatible avec la dignité de l'enfant en tant qu'être humain". Enfin c'est vrai que sont nombreuses les instruments internationaux des droits de l'homme qu'exige l'abolition des châtiments corporels à l'égard des enfants.

Le Comite des Droits de l'Enfant du Geneva s'est préoccupée quant à *"la persistance de l'acceptation juridique et sociale des châtiments corporels infligés à des enfants, dans leur famille, à l'école et dans d'autres institutions ainsi que dans les établissements pénitentiaires"*[1].

Il a rappelle à l'ensemble des États parties l'obligation immédiate et inconditionnelle d'interdire expressément par des réformes législatives les châtiments corporels à l'égard des enfants et de mettre en place une action globale de sensibilisation au droit de l'enfant d'être protégé et aux lois destinées à rendre ce droit effectif.

En 2004 la Recommandation de l'Assemblée Parlementaire du Conseil de l'Europe a appelée les États membres à interdire explicitement tous les châtiments corporels[2]. Les conséquences des châtiments corporels concernent non seulement les enfants, mais également la société dans son ensemble.

Généralement les châtiments corporels portent atteinte à plusieurs droits fondamentaux des enfants: le droit à l'intégrité physique et à la dignité, parfois ils peuvent aussi porter atteinte au droit à l'éducation, à la santé et à la vie[3].

[1] L'Observation Générale nr.8 du Comite du Geneva
[2] Assemblée Parlementaire du Conseil de l'Europe, Recommandation 1666 (2004) "Interdire les châtiments corporels des enfants en Europe", 23 juin 2004, n°2.
[3] Construire une Europe pour et avec les enfants, 2007, pg. 9, www.coe.int..

Ils peuvent entraîner des dommages physiques et psychologiques graves à court et à long terme. La violence physique est toujours liée à une violence psychologique qui affecte le bien-être et le développement psychologique de l'enfant: le stress post-traumatique, le dépression. On peut dire aussi que le mineur qui a subi du violence ou des châtiments corporels pendant l'enfance, apporte le risque d'être à nouveau victime de violence plus tard ou d'être auteur de violence quand il devient adulte.

La violence au sein du foyer porte également des conséquences économiques et sociales pour la famille et même la société: on parle ici même des coûts des soins médicaux; l'interruption de l'école.

La violence contre les enfants est souvent résultat d'un ensemble de facteurs personnels, familiaux, sociaux, culturels et économiques.

"Les droits des enfants sont des droits fondamentaux" a déclaré le vice-présidente Viviane Reding, commissaire de la justice a l'UE. "L'UE et ses 27 États membres doivent s'assurer qu'ils sont protégés et que les meilleurs intérêts de l'enfant sont nos principes directeurs. Notamment, la justice adaptée aux enfants doit s'assurer que les droits de l'enfant sont pris en compte chaque fois que les enfants sont impliqués dans les systèmes de justice, soit comme victimes, suspects ou lorsque leurs parents divorcent et ne s'entendent pas sur la garde."[1]

Cependant, la véritable ampleur de la violence contre les enfants ne peut guère être mesurée, car elle est exercée dans les maisons, les écoles et les routes faisant partie de notre mentalité. La maltraitance des enfants et la violation de leurs droits n'est pas seulement un problème familial, social, national ainsi que la violence engendre la violence et ses conséquences peuvent etre transmis de génération en génération.

Les études des ONG révèlent qu'il y a un plus grand risque de violence dans les familles qui souffrent d'un manque de moyens économiques, où les parents sont peu instruits.

Où concentrer les efforts pour prévenir la violence contre les enfants?

Pour parvenir à l'abolition des châtiments corporels, il faut agir dans trois domaines[2]:

-juridique: faire des améliorations des législations pour interdire explicitement toutes formes de violence à l'égard des enfants. Il faut souvent que le législateur prenne ses responsabilités pour faire évoluer les situations.

-politique: instaurant des mesures de prévention et de protection dirigé par l'intérêt supérieur de l'enfant. Il faut mettre en place des politiques et des services oeuvrant pour la prévention de la violence et la protection des enfants.

-sensibilisation des parents, des enfants et de la société: la diffusion de l'information du public sur les risques que présente la violence contre les enfants et l'importance d'une éducation positive. Donc l'opinion publique doit savoir que les châtiments corporels sont contraires aux droits de l'homme, y compris les droits de l'enfant.

L'enfant est l'avenir de l'homme. La reconnaissance de la dignité inhérente à tous les membres de la famille humaine ainsi que le caractère inaliénable de leurs droits sont le fondement de la liberté, de la justice et de la paix dans le monde -j'ai cité ici la préambule de la Convention de l'ONU des droits de l'enfant.

La violence contre les enfants dans la législation albanaise

La violence domestique est traitée et retournée à la mémoire chaque fois que nous avons affaire à des cas extrêmes, en oubliant que la violence et les abus peuvent prendre de nombreuses formes différentes de violence psychologique qui sont «petits» aux actes de violence physique. Pour chaque individu est important de savoir quels sont les moyens juridiques par lesquels il peut protéger sa dignité et la vie. Depuis l'an 1990, l'Albanie a commencé de faire des grands progrès dans le domaine de la législation: on a ratifié les principaux instruments internationaux relatifs aux droits de l'homme, y

[1] http://ec.europa.eu/justice/policies/children/policies_children_intro_en.htm

[2] Construire une Europe pour et avec les enfants, 2007, pg. 19, www.coe.int .

compris ceux des droits des enfants. Il s'agit notamment de la Convention Européenne pour la Protection des Droits de l'Homme et des Libertés Fondamentales, la Convention des Nations Unies sur les Droits de l'Enfant, la Convention sur l'élimination de toutes les formes de discrimination raciale, la Convention contre la torture et autres peines cruelles, inhumaines et les traitements dégradants, la Convention de La Haye sur la protection des enfants et la coopération dans les adoptions à l'étranger, etc. Pour le rapprochement de la législation albanaise interne avec ces instruments internationaux sont adoptés les documents juridiques de base (la Constitution de la République d'Albanie, le Code Pénal, Code de la Famille, etc.) et un ensemble de lois spécifiques et des décisions, pour traiter directement ou par une l'amélioration transversale des droits des enfants et leur protection contre diverses formes de violence.

L'article 54 de la Constitution de la République d'Albanie est le seul article constitutionnel qui prévoit la violence contre les enfants en particulier et direct, en s'assurant les droits fondamentaux des enfants; les enfants ont le droit d'une protection spéciale par l'Etat. Plus précisément, le paragraphe 3 de l'article reconnaît le droit de l'enfant d'être protégé contre la violence et les abus. Il reconnaît également le droit d'être protégé contre l'exploitation et de l'emploi qui endommage la santé ou compromis le développement normal, sont particulièrement protégés dans ce sens en vertu des enfants de l'âge minimum pour travailler (*quic'est-fixé* à la législation albanaise en 16 ans). Le Code Pénal de la République d'Albanie traite les diverses formes de violence contre les enfants plus spécifiquement et directement.

La législation concernant les problèmes des enfants, ces dernières années est considérablement enrichie conformément aux normes internationalement acclamées. En général, la législation albanaise prévoit des peines détaillées pour les auteurs de violences quand on a caractère sexuel ou d'où il vient de la traite. Toutefois, on ne trouve pas des dispositions pour l'indemnisation des victimes de la violence. En général, les lois sur les formes diverses de la violence contre les enfants ont un extérieur générale, dans le sens où ils ne sont pas spécifiques à certains contextes.

- Les dispositions du Code Civil relatives à l'indemnisation ne s'appliquent pas, mais en eux il n'ya pas de différence pour les cas de dommages causés par la violence domestique en abordant cette question en général. Se trouvent des cas rares de la promotion d'une poursuite civile au sein de la procédure pénale.

La violence physique- Le Code Pénal de la République a porté sur trois aspects de la violence physique directement sur les mineurs: 1) une violence physique fatal, 2) pratiques traditionnelles violentes, et 3) la violence physique contre les mineurs de moins de 18 ans qui ont commis des crimes.

1) Les formes graves de la violence physique (violence physique se termine dans la mort) qui s'est exercée contre les mineurs soient traités dans l'article 79/a.1. "L'assassin d'un mineur" dans l'article 81, "assassiner le bébé" et à l'article 93 "L'interruption volontaire de grossesse sans le consentement de la femme" recourant à la violence. Les sanctions prévues en pareil cas, sont très graves[1].

2) Les pratiques traditionnelles de la violence exercées contre les enfants qui sont traités dans le Code Pénal (article 83/"une menace grave pour la vengeance ou vendetta"); et le droit coutumier de prendre la vie de l'enfant pour des raisons d'honneur, s'il a déshonoré la famille et les parents. (article 79/a.1. "Assassiner d'un mineur").

Le Code Pénal également garantit aux mineurs une protection particulière, soient-ils des délinquants ou des victimes de crimes. Les dispositions du Code Pénal protègent également les enfants victims des crimes et délits. Les articles 100, 101, 106, 108 de ce Code assurent la protection des enfants victimes des abus sexuels, en stipulant des condamnations sévères pour les auteurs de ces crimes. Par la suite les articles 114/a et 117/2 du Code Pénal assurent la protection aux enfants qui sont victimes de l'exploitation à des fins de prostitution et de pornographie. Il est à mettre en

[1] Par exemple, l'article 11 du Code Pénal stipule que le meurtre intentionnel d'un jeune sera condamné pas moins de vingt ans d'emprisonnement ou d'emprisonnement a la vie

évidence, à ce point, que l'exploitation des filles mineurs à des fins de prostitution a été très diffusée jusqu'à il y a quelques années. Grâce à la sévérité des sanctions prévues par le Code Pénal contre ce phénomène et les peines lourdes prononcées par les tribunaux à l'égard des trafiquants de prostitution on peut dire qu'il y a une diminution des crimes de cette nature. Dans notre pays il y a eu des enfants trafiqués afin de les exploiter dans des activités criminelles. Pour lutter et punir ces phénomènes dans le Code Pénal on a ajouté l'article 128/b « le Trafic des mineurs », entièrement révisé en 2008. Cette disposition prévoit de lourdes sanctions à prison ferme et des amendes pour avoir recruté, vendu, déplacé, transféré, dissimulé ou accueillie des mineurs à des fins d'exploitation pour : - prostitution ou toute autre forme d'exploitation sexuelle, - travail ou services forcés,

3) En aucun cas, le Code Pénal ne permet pas des châtiments corporels infligés aux personnes de moins de 18 ans qui ont commis des crimes. En outre, le Code de la Procédure Pénale ne permet pas l'utilisation de la violence physique comme une outil pour l'obtention des preuves. L'article 31 du Code Pénal exclut les mineurs de moins de 18 ans à compter de la peine d'emprisonnement à la vie.

La violence sexuelle

La législation albanaise traite la violence sexuelle contre les enfants plus largement que la violence physique. Un certain nombre d'articles du Code Pénal traitent les différentes formes de la violence sexuelle. Ceux-ci comprennent: les relations sexuelles, homosexuelles avec le mineur[1], les relations sexuelles ou homosexuelles violentes avec des mineurs [2], le relations sexuelles, ou homosexuelle avec les cousins[3]; effectuer des actes honteux avec des mineurs[4]; l'exploitation de la prostitution dans des circonstances aggravantes avec des mineurs[5], la distribution, la publicité et la publication de matériel pornographique dans les environnements de mineurs[6], la traite de la mineure à la prostitution[7], etc.

Les sanctions prévues dans le Code Pénal de la République d'Albanie à ceux qui pratiquent la violence sexuelle contre les enfants sont détaillées. Les peines prévues sont données dans chaque cas d'emprisonnement (selon le cas du 5 à 20 ans). Cependant, il n'y a pas aucun article spécifique sur la violence sexuelle contre les enfants exercé sur la rue, la communauté, dans les zones rurales, dans les équipements sportifs,etc. En outre, dans un chapitre à part du Code Pénal il se trouve une section spéciale (section IX du chapitre II) intitulée "Les délits contre les enfants, le mariage et la famille". Les dispositions de ce chapitre (les articles 124 – 129) assurent la protection à quelques catégories d'enfants victimes des crimes qui sont définies précédemment comme des "enfants en danger". Il faut souligner qu'une partie de ces dispositions ont été révisées les dernières années alors que de nouveaux délits sont apparus dans ce domaine. Ces révisions et amendements ont été faits afin de renforcer la lutte contre les phénomènes négatifs, afin de rapprocher notre législation aux principes des conventions internationales en la matière. En 2008, il a été ajouté l'article 124/b qui stipule comme un nouveau délit « le mauvais traitement des mineurs ». Cet article considère comme délits les cas où la personne qui a la responsabilité de l'autorité parentale maltraite le mineur physiquement ou psychologiquement. Il est également considéré comme un délit d'imposer à un mineur de travailler, d'assurer des revenus, de mendier ou de commettre d'autres actions qui nuiraient à son développement normal.

[1] Article 100
[2] Article 101
[3] Article 106
[4] Article 108
[5] Article 114./a.1
[6] Article 117
[7] Article 30

Loi sur les mesures contre la violence dans les relations familiales

L'approbation et l'entrée en vigueur de cette loi[1] sont une étape importante vers l'achèvement du cadre juridique dans le domaine de la violence domestique.

Il est important de mentionner quelques-unes des lacunes qu'il a corrigé: - Dans notre législation précédente il n'y avait pas la définition de la violence domestique. Il élargit le cercle des personnes qui sont appelées membres de la famille, il ne se limite pas à la violence conjugale entre les personnes qui sont dans les relations conjugales. - Il était très important pour cette loi de se conformer à l'orientation des modèles internationaux-il comporte une définition de la violence domestique: les mécanismes, les devoirs des juges, les procédures pénales et civiles, et les dispositions concernant les services d'urgence, la formation des policiers et des juges. Très souvent, lorsque nous parlons de la violence domestique, à tort, nous oublions les victimes les plus vulnérables, les enfants. Il n'ont pas existe dans le Code Pénal les alternatives des mesures de sécurité et des peines liées à "la suspension temporaire et le retrait de la responsabilité parentale» pour des parents mal traitants. La loi a comblé cette lacune prévoyant la suspension ou l'interdiction du droit des délinquants de rencontrer des enfants. Cette loi comporte deux aspects importants: d'abord, il stipule pour les autorités de l'Etat des devoirs et des pouvoirs pour faire face à la violence domestique; prévenir et réduire la violence domestique sous toutes ses formes par des mesures juridiques appropriées. Deuxièmement, la loi permet aux tribunaux d'émettre des ordonnances de protection contre les contrevenants, un mécanisme supplémentaire pour protéger les victimes de violence domestique en accordant une attention particulière aux enfants, les personnes âgées et les personnes handicapées. Le défi pour la mise en œuvre de la présente loi demeurent l'accomplissement de son cadre juridique et un soutien adéquat budgétaire. La loi prévoit la protection des membres de la famille en prenant des mesures urgentes- prises par le tribunal qui délivre des ordonnances de protection: - "L'ordre de protection d'urgence", qui est temporairement accordée par le tribunal dans les 48 heures et est valable jusqu'à la délivrance d'ordonnances de protection.-"L'ordre de protection", qui est délivré d'un tribunal pour fournir des mesures de protection pour les victimes. Le Cour décide dans les 15 jours. Grâce à des ordonnances de protection, le tribunal ordonne la défenderesse / (auteur) de s'abstenir de commettre ou de menacer de commettre un acte de violence domestique de ne pas nuire, de harceler, de contacter ou communiquer directement ou indirectement avec la victime ou des membres de leur famille. Actes de violence s'entend tout acte ou omission par une personne contre une autre personne, d'une violation non seulement physique, mais aussi morale, psychologique, la violence sexuelle, sociale et économique entre les personnes qui sont ou sont été dans la relation familiale.

En cas de violence domestique, les victimes peuvent s'adresser une demande: - A la poste de police le plus proche; -L'unité appropriée de l'administration locale (municipalité); -La Centre de santé où il réside-; La cour avec la demande à prendre les mesures nécessaires.

La loi "Sur la protection des droits de l'enfant"

La réalité dans notre pays montre qu'il y a beaucoup de mineurs qui se trouvent en situation difficile, qui ont besoin de mesures de protection de la part de l'Etat. Ces années ont vu dans le pays beaucoup de phénomènes négatifs qui, entre autres, ont eu des effets même sur la vie et le bien-être des enfants. Suite à l'émigration de masse, les trafics illégaux de toute sorte, la non-application de la loi, des catégories d'enfants en danger ont été créées, telles que : - Les mineurs victimes de divers trafics illégaux, ceux qui sont exploités sexuellement à des buts lucratifs, ceux sont victimes de la traite des êtres humains, les mineurs utilisateurs de drogues, - les mineurs exploités dans divers emplois ou pour en tirer différent profits,- les mineurs, membres des minorités roms, victimes de la discrimination. La loi "Sur la protection des droits de l'enfant" est le premier acte, ou se trouvent tous les droits des enfants, en anticipant la mise en place et le fonctionnement des structures qui garantissent ces droits. Dans son contenu c'est pris en

[1] Loi Nr.9669 du18.12.2006

compte la recommandation de l'Assemblée parlementaire du Conseil de l'Europe "Sur la protection des enfants dans les établissements et à assurer la pleine protection", dans lequel, entre autres mesures nécessaires pour prévenir les châtiments corporels des enfants. Basé sur le contenu de cette loi s'est créée au sein du ministère du Travail, des Affaires □ ten□ e set égalité des chances, l'Agence nationale pour la protection des droits de l'enfant, dont les fonctions sont bien définies légalement.

Cette loi définit les droits et protections que tous les enfants jouissent, les mécanismes responsables, afin d'assurer la mise en œuvre efficace la protection de ces droits et les soins spéciaux pour l'enfant.

a-"La violence contre les enfants" est l'utilisation intentionnelle de la force physique ou d'autres formes de force, que ce soit par la menace ou réelle, contre un enfant ou d'un groupe d'enfants, ce qui entraîne ou est susceptible d'entraîner des blessures, la mort, préjudice psychologique

b-"violence psychologique" englobe les actes qui infligent la santé physique, mentale, le développement moral et social et que, entre autres, ont abouti à limiter la liberté de mouvement, posture dégradants, menaçant, intimidant, discriminatoire, ou se moquant d'autres formes de traitement hostile ou de rejet par les parents, sœur, frère, grand-père, grand-mère, représentant légal, un parent de la famille ou toute autre personne qui a le devoir de s'occuper de l'enfant.

d) „La violence physique" est une tentative ou de tout dommage ou de blessure physique des enfants, y compris de celui-ci châtiments corporels, qui ne sont pas accidentelles"[1].

Conclusions

- Bien que tous reconnaissent le fait de l'égalité des enfants en termes de droits, avec les adultes, ce qui implique nécessairement est l'obligation de respecter ces droits et libertés, comme la majeure partie de la société. Et les droits des enfants sont déjà devenus une réalité tangible, avec la ratification quasi universelle de la CDE. Les défis de notre pays à l'exception de l'adoption de tout un arsenal de lois et de textes de droit pour protéger les enfants, est l'approche des politiques de plus en plus a la mentalité concernant les droits des enfants au niveau européen.

-Le Comité des droits de l'enfant a publié l'Observation générale sur l'article 19 de la Convention relative aux droits de l'enfant.[2] Acela parce que l'intensité de la violence exercée sur les enfants est alarmante. Par conséquent, des mesures pour mettre fin à la violence doivent être renforcées et élargies en vue de mettre effectivement fin à ces pratiques qui compromettent le développement des enfants et des sociétés non-violentes de résolution des conflits potentiels. Cette observation générale est fondée sur les hypothèses fondamentales suivantes: "La violence contre les enfants n'est justifiable et que toute violence contre les enfants est évitable".

-Malgré les changements et les améliorations législatives qui sont faites concernant le traitement des mineurs par le système de justice en Albanie, il n'y a pas encore le tribunal pour les mineurs. – L'Albanie n'a pas crée encore une centre de réadaptation pour traiter les cas d'urgence de la violence contre les enfants; des centres de réadaptation à long terme pour les enfants victimes de violence ou d'enfants qui sont témoins de violence.

-Pendant ce temps, la tendance à impliquer les enfants dans la planification, la mise en œuvre et le suivi des activités sur les ONG se développe de jour en jour.

-La législation est également spécifié pour le type de travail, les conditions de travail, la durée dans les cas où les enfants sont autorisés à travailler, ainsi que les sanctions en cas d'infractions liées au travail des enfants.

-Parmi les dispositions juridiques sur la violence contre les enfants, les définitions relatives au potentiel de prévention des différentes formes de violence contre les enfants dans le processus pénal et ceux associés à purger sa peine par des mineurs sont les plus précisées. On peut dire que dans notre

[1] Article 3 de la Loi
[2] Le 17 Février 2011

pays il y a des lois et des actes légaux très avancés et conformes aux standards internationaux en matière de la protection des catégories des enfants en danger.

-Dans les cas de violence contre les enfants qui se produisent dans les maisons, les institutions ou établissements publics, etc., et qui ne sont pas signalés au procureur, la plupart de ceux cas traité par cas dans la famille ou dans les institutions, sans suivre une procédure particulière.

--Cependant, la législation est viciée parce qu'elle ne prévoit pas de mesures punitives si les citoyens ne signalent pas. Ainsi, les rapports des citoyens demeurent une question de conscience personnelle. Dans le cas de professionnels, il ya une contradiction entre la responsabilité pour les rapports et de responsabilisation pour préserver la confidentialité, dans leur travail avec les enfants.

-Avec la couverture médiatique des cas de violence contre les enfants, sont rendu conscients les cercles politiques, les segments de l'administration publique et l'opinion publique. Dans de nombreux cas, la couverture médiatique des problèmes des enfants a servi à la promotion des organismes spécialisés pour prendre des mesures appropriées pour les enquêtes, les poursuites, etc. Ainsi, dans l'ensemble la couverture médiatique du problème de la violence des enfants a été l'escalade et a servi en tant que prise de conscience positive à de nombreux niveaux.

- La violence, qui n'est rien d'autre, qu'une violation de l'intégrité physique, morale, psychologie, développement sexuel, social et économique, donnant des effets de plus en plus négative , d'abord dans nos familles, ten même temps donne l'effet négatif sur l'ensemble de notre société. La loi met l'accent sur le rôle particulier des ONG qui fournissent des services sociaux et d'aide aux victimes de violence.

- En finale, on peut dire qu'en Albanie il existe un système légale complet, proche des standards internationaux en la matière de la protection des intérêts des mineurs, mais dans l'application de cette législation en pratique on constate beaucoup de défaillances et il reste encore beaucoup à faire pour améliorer cette situation.

- Il est vrai que la violence n'a pas disparu. Elle continuera à exister jusqu'il existent de facteurs qui le provoquent. Mais le travail pour la prévention et la protection contre la violence les mineurs est aujourd'hui une réalité tangible et indéniable. Certes, il faut travailler encore plus et plus.

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The EU Institutions and the EU Member States Facing the World Crisis

Dalla grande crisi, forse, la nuova Europa.

Le decisioni del Consiglio europeo di Bruxelles dell'8-9 dicembre 2011

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Abstract: This short article analyses the decisions of the European Council in 8-9 December 2011 on economic crisis.

Il 2011 che sta volgendo al termine sarà ricordato come un anno difficile, ma solo il 2012 ci dirà quanto davvero lo sia stato! Una speranza ci viene dal Consiglio europeo di Bruxelles dell'8 e 9 dicembre scorsi. Ad un passo dal punto di non ritorno, dall'abisso, come lo hanno definito i principali giornali spagnoli, i Capi di Stato e di governo dell'Ue hanno trovato "parte" di quel coraggio e di quella determinazione che sembravano aver smarrito da moltissimo tempo il coraggio di cedere una porzione di sovranità a favore di una maggiore integrazione delle politiche economiche, la determinazione di farlo a prescindere dal veto inglese.

L'introduzione di meccanismi di uniformità fiscale colmerebbe, seppure parzialmente, il vuoto necessario a rafforzare un'unione monetaria nata su basi più di precarietà annunciata, più ideali che economiche, e perciò inidonee ad affrontare le tempeste dei periodi di gravi crisi economiche interne e/o internazionali.

A mio parere non tutto ciò che poteva essere fatto è stato deciso[1], ciononostante si è andati al di là di quanto ci si poteva attendere alla vigilia del vertice, al di là anche dell'intesa, della vigilia, tra la Merkel e Sarkozy[2].

Gran Bretagna esclusa (autoesclusasi), i restanti 26 Paesi membri dell'Unione si sono impegnati a sottoscrivere entro i prossimi mesi (marzo) importanti modifiche dei Trattati europei: TUE e TFUE.

Le modifiche attengono sostanzialmente i seguenti settori:

1) introduzione dell'obbligo del pareggio di bilancio (c.d. regola d'oro);

2) meccanismi di monitoraggio dei conti pubblici statali e bancari, anche attraverso l'intervento della Commissione europea;

3) l'armonizzazione di settori strategici, tra i quali vi troviamo a) il lavoro (su cui nel nostro Paese è iniziato un dibattito che sembra ignorare gli approdi europei), b) la sicurezza sociale, c) la

[1] Il Presidente del Consiglio italiano Mario Monti a conclusione del consiglio europeo ha dichiarato: «Può darsi che tutto questo non basti, ma non mi sembra un vertice dei fallimenti». "Il vertice «ha preso decisioni di vasta portata che riguardano un quadro più rigoroso con una maggiore credibilità dei meccanismi di rispetto della disciplina di bilancio e la messa a disposizione di una potenza di fuoco degli strumenti anti-crisi per fronteggiare il contagio». Beda Romano - Il Sole 24 Ore - su http://24o.it/PIBNN

[2] Conclusioni del Consiglio europeo dell'8 e 9 dicembre 2011 consultabile al sito: http://european-council.europa.eu/council-meetings/conclusions.aspx?lang=it Molto è stato fatto negli ultimi 18 mesi per migliorare la nostra governance economica e combattere la crisi economica e finanziaria. Abbiamo preso decisioni importanti, esposte nelle presenti conclusioni, che richiedono un'attuazione rapida e vigorosa. Abbiamo deciso di dare priorità alle misure potenzialmente in grado di stimolare al meglio la crescita e l'occupazione. **Gli Stati membri che partecipano al Patto euro plus hanno convenuto di assumere impegni più specifici e misurabili e in particolare, di portare.**

fiscalità. In particolare questi ultimi aspetti hanno tutte le caratteristiche per imprimere un'accelerazione al processo di integrazione in corso (una costruzione europea con un'identità sempre più sovranazionale) ma anche capace di dare un contributo, una spinta a valori quali la solidarietà e la cittadinanza. Resto per comprendere fin dove si spingeranno le previsioni del nuovo Trattato, tuttavia i preannunciati automatismi sanzionatori in caso di disavanzi di bilancio, i maggiori controlli sugli istituti di credito e l'armonizzazione e i temi fiscali, lavoristici e di sicurezza sociale, da sempre intimamente legati alle sovranità statali e mai seriamente intaccati dall'ordinamento europeo, inducono a ritenere che dalla più grave crisi economica e finanziaria in epoca post-industriale, possa nascere una consapevolezza capace di produrre per se stessa una maggiore dimensione politica dell'Unione europea.

Naturalmente i nuovi Trattati dovranno essere ratificati dai 26 Stati membri ma la gravità degli eventi sembra lasciare pochi spazi a ritardi e dilazioni di qualsivoglia natura.

Il Vertice di Bruxelles ha inoltre deciso di anticipare a luglio 2012, anziché al gennaio 2013, l'introduzione *dell'European stability mechanism (Esm),* cioè la nuova versione del fondo salva stati. L'Esm avrà una dotazione finanziaria complessiva di 750 miliardi di euro: 500 miliardi appositamente destinati ai quali si aggiungono i 250 miliardi di euro del *dell'European finance stability facility* (Efsf) che scadrà nel 2013. Tuttavia il nuovo fondo non vedrà, come originariamente immaginato, la partecipazione di operatori privati. A queste misure si aggiungono i 200 miliardi di euro che saranno messi a disposizione del Fondo monetario internazionale (Fmi) che già opera in aiuto di Portogallo, Grecia e Irlanda.

Le note meno positive del vertice, sono individuabili nella mancata previsione di taluni meccanismi per affrontare la crisi: nessuna vera novità è prevista per autorizzare e/o rafforzare i poteri della Bce di intervenire più energicamente sui mercati valutari e finanziari. Non sembrano inoltre previste nuove basi giuridiche affinché la stessa Bce possa intervenire a favore dei Paesi maggiormente in difficoltà, acquistando, ad esempio, massicci titoli del debito pubblico[1]. Ciò appare davvero irragionevole soprattutto se si considerano da un lato le garanzie derivanti dall'introduzione dell'obbligo del pareggio di bilancio, e dall'altro, il monitoraggio e i possibili interventi delle istituzioni europee nelle diverse fasi di vita della gestione della spesa di ogni singolo Stato membro. Non è certamente irrilevante, d'altra parte, che i maggiori poteri in capo alla Bce fossero stati richiesti sia dal Presidente della Commissione José Manuel Barroso, sia dal Presidente del Consiglio europeo Herman Van Rompuy.

Purtroppo il Consiglio europeo non affronta neppure, o se lo fa lo risolve negativamente, la possibilità di emettere titoli del debito pubblico – i titoli di stato definiti anche Eurobond - garantiti da tutti i Paesi dell'eurozona. Su questo c'è la forte opposizione del Cancelliere tedesco Angela Merkel che però subisce, sul punto, un forte attacco sul fronte parlamentare interno.

D'altra parte l'incoerenza tedesca rasenta il paradosso laddove si pensi che da un lato tale atteggiamento vanifica in parte gli enormi sforzi compiuti dagli Stati europei, mentre dall'altro lato la stessa Germania fa acquistare i titoli del proprio debito pubblico rimasti inevasi, dalla sua Banca nazionale, cosa impossibile a molti Stati membri, tra i quali l'Italia (per via di una legge che ne sancisce il divieto e risalente al 1980).

[1] Si vedano le stesse conclusioni della Presidenza del Consiglio europeo all'indirizzo http://european-council.europa.eu/council-meetings/conclusions.aspx?lang=it

La questione Britannica

Il Presidente francese *Charles De Gaulle*, argomentando il veto all'ingresso del Regno Unito nell'allora Comunità economica europea, ebbe a dire che l'Inghilterra era talmente antieuropeista che, dopo aver tentato, ma senza successo, di boicottarne il cammino dall'esterno, ne chiedeva ora l'ingresso per tentare la stessa manovra dall'interno[1]. A distanza di quasi quarant'anni dall'ingresso britannico nell'Unione, potremmo quantomeno convenire con l'allora Presidente francese *De Gaulle* che la percezione di una costante e progressiva azione di rallentamento (ad eccezione del solo mercato interno), sia effettivamente alla base dell'attività britannica verso il processo di integrazione in corso a livello europeo. Fu così ad esempio nel 1985 quando, di fronte all'intransigenza britannica, il rilancio del processo integrazionista dovette essere, per la prima volta nella storia europea, posto in votazione. Al Palazzo sforzesco di Milano, il 28 e 29 giugno 1985, il Presidente del Consiglio italiano Bettino Craxi (Presidente di turno della Comunità) mise ai voti la convocazione di una Conferenza intergovernativa che si concluse con l'adozione dell'Atto Unico Europeo di Lussemburgo e il rilancio dell'Europa, ferma ai Trattati di Roma del '57. Votarono a favore l'Italia, la Francia, la Germania, il Belgio, i Paesi Bassi e il Lussemburgo; votarono contro il Regno Unito, la Danimarca e la Grecia[2]. Al di là dei meriti della Presidenza italiana dell'epoca, che vanno rimarcati, è bene sottolineare che quella era anche l'Europa di François Mitterand e di Helmut Kohl.

La storia del rapporto asimmetrico tra il Regno Unito e l'Unione europea è, d'altra parte, una costante. Questa si è ripetuta con gli Accordi e il successivo Trattato di Schengen, si è riproposta con l'Euro e riaffermata con *l'opting out* relativo alla Carta dei diritti fondamentali dell'Ue. Senza dimenticare, inoltre, l'azione di destrutturazione della Commissione europea operata durante la Vice Presidenza (inglese) di **Neil Kinnock**, nonché, e qui ci fermiamo per pietà, la brutta vicenda del "Trattato che istituiva una costituzione per l'Europa", dove il Governo di Sua Maestà britannica sospese ogni possibile ratifica cogliendo la prima difficoltà esterna.

La deregolamentazione richiesta dalla Gran Bretagna anche al Consiglio europeo di Bruxelles dell' 8 e 9 dicembre 2011 era ed è inaccettabile: non si tratta di soli privilegi (di per sé già assai irritanti) quanto di accordare ad un Paese membro esenzioni nei controlli del bilancio dello Stato e del sistema creditizio, autorizzando costoro a non cedere le ulteriori porzioni di sovranità nel momento in cui tutti gli altri Paesi dell'Unione erano e sono disponibili a farlo in relazione a questioni che attengono le politiche economiche e sui servizi finanziari[3].

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[1] Corrado malandrino. **Oltre il compromesso del Lussemburgo**. Verso L'Europa Federale Walter Hallstein e la crisi della sedia vuota (1965/66). B) Il veto francese all'ingresso della Gran Bretagna nella CEE b) il **veto** francese all'**ingresso** della **Gran Bretagna** nella CEE; http://polis.unipmn.it/pubbl/RePEc/uca/ucapdv/malandrino.pdf

[2] Pierini M., ARAS Edizioni, Fano 2011 "Il Volto dell'Europa che cambia";

[3] Beda Romano, Il Sole 24 Ore http://www.ilsole24ore.com/art/notizie/2011-12-09/gestira-fondo-salva-stati-074950.shtml?uuid=AafbjgSE A bloccare la soluzione a 27, richiesta a gran voce dalla Germania e promossa in questi mesi dalle autorità comunitarie, è stato il primo ministro inglese David Cameron, che ha posto delle condizioni che il presidente francese Nicolas Sarkozy ha definito «inaccettabili». «Molto semplicemente – ha detto il leader francese – per accettare una riforma a 27 del Trattato, David Cameron ha chiesto… un protocollo per esonerare la Gran Bretagna dai regolamenti sui servizi finanziari. "Ciò è stato considerato inaccettabile anche perché parte dei problemi dell'Europa vengono da questo settore".

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Il Parlamento europeo di fronte alle sfide del XXI-st Century. Un caso studio riguardante la visione del suo vice-presidente, Gianni Pittella

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Abstract: ***The European Parliament in front of the challenges of the XXI-st Century. A case-study regarding the vision of its vice-president, Gianni Pittella.***
This article is an eye inside the European Parliament, to see the concrete manner in which its Members can react to the challenges of the XXI-st Century. So, we propose a case-study regarding the vision and activity of its vice-president, Gianni Pittella. He held this position in 2009-2014 and is an experimented MEP.
Keywords: EU, EP, Citizens, Crisis, Arab Spring, Enlargement, Free Movement.

Questo articolo è un occhio all'interno del Parlamento europeo, per vedere il modo concreto in cui i suoi membri possono reagire alle sfide del XXI-st Century. Quindi, proponiamo un case-study per quanto riguarda la visione e l'attività del una personalità del Parlamento Europeo che si è segnalata per la sua visione europeista, all'altezza delle sfide lanciate dal XXI secolo, ma allo stesso tempo realista e aperta in modo pragmatico alla soluzione dei problemi del cittadino.[1]

L'onorevole Gianni Pittella è vicepresidente del Parlamento Europeo, in 2009-2014, dove rappresenta l'Italia all'interno del gruppo Alleanza Progressista dei Socialisti e Democratici[2]. Gianni Pittella è dunque un esponente di spicco delle istituzioni europee, tenendo conto del fatto che il Parlamento Europeo è oggi istituzione co-legislativa dell'Unione, chiamato ad assumere posizioni politiche in tutti i problemi più rilevanti che interessano l'Europa, il mondo e la stessa vita dei cittadini. Rappresentando la voce democratica dei cittadini dell'Unione, il Parlamento Europeo gioca un ruolo decisionale, politico e legislativo di primissimo piano, i suoi capi sono personalità eccezionali a livello europeo e nel campo delle Relazioni internazionali. Il Parlamento Europeo gioca un ruolo decisivo nell'approvazione del bilancio dell'UE, investe con il suo voto la Commissione Europea e la può revocare attraverso una mozione di censura, presenta interpellanze alla Commissione e la sottopone a un controllo democratico. Oltre il 60% della legislazione applicata oggi sul territorio dei Paesi membri è passata per il vaglio del Parlamento Europeo e quasi tutti gli aspetti della vita politica, economica e

[1] This article is originated in the Speech "Laudatio" elaborated and presented by Simion Costea in December 2011: "Gianni Pittella -Doctor Honoris Causa of Petru Maior University". The author tanks to Lecturer Dr. Giordano Altarozzi, which translated this text in Italian, and to Dr. Cornel Sigmirean and Dr. Liviu Marian, which reviewd the speech.
[2] Gianni Pittella MEP, in http://www.europarl.europa.eu/meps/en/4436/Gianni_PITTELLA.html

sociale entrano nella sua sfera di competenza.[1] Tenendo conto delle attribuzioni e dell'incredibile quantità di attività svolte dall'alto foro europeo, il presidente e i vicepresidenti del Parlamento Europeo rappresentano realmente leaders politici di spicco sulla scena internazionale. In diverse occasioni, il primo-vicepresidente Pittella presiede i lavori del Parlamento Europeo e lo rappresenta nei suoi rapporti con i diversi governi, con le parti sociali, con le altre istituzioni dell'Unione, con i grandi gruppi politici europei.

La realtà odierna è dura, le soluzioni europee devono essere promosse da leaders europei capaci e conseguenti. Le sfide del XXI secolo e la crisi economica mondiale hanno posto l'Unione Europea davanti a un bivio. La fiducia dei cittadini nei governi nazionali, negli attori economici, nelle istituzioni comunitarie e nel futuro conosce un drammatico declino. Le tendenze euroscettiche o antieuropee, populiste, estremiste sia di sinistra che di destra, registrano un crescente successo. Nei Paesi continentali, forze politiche sempre più rumorose si pronunciano contro le istituzioni UE, contro l'allargamento dello spazio Schengen, contro la libera circolazione delle persone, contro le comunità etniche e religiose originarie dei nuovi Stati membri, dell'Africa o dell'Asia. Numerose comunità mussulmane si sviluppano accanto ma separatamente dalle società dei Paesi occidentali in cui vivono. Lo spettro del terrorismo continua a rappresentare una minaccia. L'Unione Europea è riuscita solo in modo limitato a imporsi come attore globale sulla scena internazionale. Come è stato sottolineato nel quadro del incontro dei professori "Jean Monnet", svoltasi a Bruxelles, l'Unione Europea ha **bisogno di realismo, di visione, di solidarietà e di volontà** politica per poter rispondere alle sfide del XXI secolo. C'è bisogno **di un'UE più forte e più vasta, dotata di istituzioni più efficienti e più vicine al cittadino.** Il Trattato di Lisbona va in tale direzione, ma solo fino a un certo punto. E in mancanza di una volontà politica, neanche gli strumenti da esso offerti possono essere usati efficientemente. Ecco perché un'Europa più forte e più vasta, al servizio dei suoi cittadini, diviene una necessità assoluta. E in tale contesto i leaders europeisti, come Gianni Pittella, hanno un'enorme responsabilità.

Gianni Pittella si è affermato a Bruxelles e Strasburgo come una personalità forte, capace di concentrare energie in favore di un permanente processo di costruzione europea. Sotto i riflettori, presiedendo numerose sedute plenarie del Parlamento Europeo, come **relatore,** come promotore di risoluzioni, di parere, di dichiarazioni scritte, di interrogazioni parlamentari, come polemista nel confronto con gli euroscettici di sinistra e di destra, ma soprattutto come uomo del dialogo e della costruzione, come buon comunicatore nei rapporti con la stampa e con i cittadini, Gianni Pittella è un attore politico rispettato, pragmatico ed efficiente.

Nei cerchi specializzati, Gianni Pittella è apprezzato per le sue capacità di **negoziatore e conciliatore,** per lo sforzo deposto nella costruzione del consenso europeo inter-partitico e inter-istituzionale. Nel processo decisionale della costruzione europea, questo travaglio di interminabili negoziati tra le diverse istanze dell'Unione, con i 27 governi degli Stati membri rappresentati dal Consiglio dei Ministri, con i 7 gruppi politici, con le delegazioni dei 27, con i rappresentanti delle parti sociali, diventa dunque cruciale.

A testimonianza dell'impegno e della responsabilità assunta, nell'attuale legislatura, iniziata nel giugno 2009, Gianni Pittella si è segnalato per le sue:

- 49 interrogazioni parlamentari (Parliamentary questions)
- 8 proposte di risoluzione (Motions for resolutions)
- 2 dichiarazioni scritte (Written declarations)
- 1 Parere (Opinions/Committee documents/ Documenti delle commissioni parlamentari) [2]
- 141 interventi in sedinta plenaria (debates, plenary speeches).

[1] Ivan, Adrian, *Sub zodia Statelor Unite ale Europei,* Cluj-Napoca, CA Publishing House, 2009. Paun, Nicolae (coord), *Instituţiile Uniunii Europene*, Cluj-Napoca, EFES, 2004.

[2] EP, Gianni Pittella, Parliamentary activities - 7th parliamentary term, in http://www.europarl.europa.eu/meps/en/4436/Gianni_PITTELLA.html

Nella precedente legislatura (2004-2009), Gianni Pittella ha registrato:
- 51 interrogazioni parlamentari
- 8 proposte di risoluzione
- 3 dichiarazioni scritte
- 12 rapporti del Parlamento Europeo
- 1 Parere
- 36 interventi in seduta plenaria (Speeches in plenary)[1].

In virtù delle sue attribuzioni, Gianni Pittella presiede numerose sedute plenarie del Parlamento Europeo, denotando in ciò una notevole esperienza. Deputato europeo dal 1999, l'on. Pittella è al terzo mandato, dopo aver svolto un'importante attività in qualità di consigliere locale e regionale. È laureato in medicina e chirurgia, specializzato in medicina legale e in medicina assicurativa.

Le sue principali direzioni d'azione nel Parlamento Europeo sono orientate in gran parte verso gli ambito delle **Commissioni e delle Delegazioni** di cui fa parte in qualità di membro e membro sostituto: Commissione per il Mercato interno e la Protezione dei Consumatori, Commissione per gli Problemi economici e monetari, Delegazione per le relazioni tra UE e Albania, Bosnia, Serbia, Montenegro e Kosovo, etc. [2]

I documenti promossi da Gianni Pittella mettono in evidenza una solida visione europea, realista e conseguente, costantemente orientata verso soluzioni pragmatice. Gianni Pittella è sostenitore di un'Unione Europea dotata di istituzioni forti ed efficienti, capaci di rispondere alle sfide poste dal XXI secolo e alle aspettative dei cittadini. In diverse occasioni, l'eurodeputato Pittella ha sostenuto il progetto costituzionale europeo[3], il Trattato di Lisbona e la necessaria riforma delle istituzioni UE[4]. Gianni Pittella ha sostenuto con insistenza la ripartizione di risorse finanziarie sufficienti per l'efficace realizzazione delle politiche comunitarie, con l'obiettivo di realizzare un'Europa «utile, unita e competitiva»[5]. Come referente per il budget comunitario del 2006, come in molte altre occasioni, Gianni Pittella ha sostenuto la necessità di destinare somme sufficienti per la realizzazione della politica di coesione, per la crescita economica, per la ricerca scientifica, per l'educazione, lo sport e i giovani, come pure per la politica estera[6].

Gianni Pittella sostiene, nell'ambito della **ricerca scientifica,** una politica europea di finanziamenti consistenti, in grado di incoraggiare la creazione di centri d'eccellenza, ma anche la partnership pubblico-privato, la diffusione dei risultati scientifici, la creazione di reti di cooperazione tra ricercatori. Il 7° Programma Quadro è uno strumento importante soltanto se supportato da un finanziamento adeguato. In assenza di un adeguato sostegno alla ricerca, un gran numero di ricercatori europei emigra verso gli Stati Uniti (circa 90.000 europei lavorano oggi in America nell'ambito della ricerca scientifica). L'UE deve percorrere una lunga strada per colmare il gap che la separa dai suoi

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1 EP, Gianni Pittella, Parliamentary activities – 6-th parliamentary term, in http://www.europarl.europa.eu/meps/en/4436/Gianni_PITTELLA.html

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3 EP, Debate on Future of Europe…., 22 May 2007 – Strasbourg, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20070522+ITEM-012+DOC+XML+V0//RO&language=RO&query=INTERV&detail= 2-210

4 EP, European Council meeting (8-9 March 2007) (debate), Wednesday, 14 March 2007 – Strasbourg, in http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20070314+ITEM-004+DOC+XML+V0//EN&language=EN&query=INTERV&detail=3-066

5 EP, Policy challenges and budgetary means, Tuesday, 7 June 2005 – Strasbourg, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20050607+ITEM-025+DOC+XML+V0//EN&language=RO&query=INTERV&detail=2-220 Raportor buget Tuesday, 6 September 2005 – Strasbourg, European Union general budget for 2006, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20050906+ITEM-031+DOC+XML+V0// EN&language=RO&query=INTERV&detail=2-184

6 EP, Draft general budget for 2006 (Section III) - Draft general budget for 2006 (Other sections), Wednesday, 26 October 2005 – Strasbourg, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20051026+ITEM-002+DOC+XML+V0//EN&language=RO&query=INTERV&detail=3-007

competitori diretti. L'UE spende soltanto l'1,9% del PIL per la ricerca, mentre il Giappone le destina il 3,1% e gli USA il 2,8%.[1]

L'investimento **nell'istruzione** e più in generale nei giovani, nella formazione del capitale umano deve diventare una priorità. Gianni Pittella ha sostenuto con insistenza la necessità di accrescere in modo consistente la quota destinata a programmi europei quali: Socrates, Erasmus, Leonardo da Vinci, e Youth in Action. Allo stesso tempo, ha promosso la creazione di nuovi programmi pilota, come l'Erasmus per giovani imprenditori e l'Erasmus per gli studenti liceali, con età comprese tra i 16 e i 18 anni[2]. Gianni Pittella ha sostenuto anche la necessità di un Patto Europeo per la Gioventù, con lo scopo di accrescere i finanziamenti per le attività di formazione professionale e imprenditoriale, l'apprendimento delle lingue straniere, l'accesso al mercato del lavoro[3]. I finanziamenti per le energie rinnovabili, per l'internet a banda larga, per le piccole e medie imprese, per la lotta alla povertà, hanno rappresentato per lui un'altra priorità.

Gianni Pittella ha sostenuto in continuazione l'esigenza di un'UE più estesa, in cui trovino un posto anche la Romania e i suoi cittadini. Egli si è affermato come un **amico della Romania** fin dalla fase di pre-adesione, sostenendone l'iter europeo. Nella precedente legislatura, Gianni Pittella è stato membro delle Commissioni di cooperazione parlamentare UE-Romania e UE-Moldavia. Attualmente, sostiene il diritto al lavoro e alla libera circolazione dei cittadini romeni e bulgari all'interno dello spazio comunitario, collaborando nei fori europei con i rappresentanti di Romania e Moldavia. [4]

Gianni Pittella sostiene la necessità di un'Europa unita quale **attore politico importante sulla scena internazionale,** pari al suo ruolo finanziario, tenendo conto soprattutto del fatto che l'UE è oggi il più grande donatore del mondo. «Europe must be a full player, not just a player», ha dichiarato Gianni Pittella nel corso di un incontro del luglio 2010 con il premier palestinese Salam Fayyad[5].

Attento alle principali sfide geopolitiche con cui si confronta il Pianeta, Gianni Pittella esprime posizioni chiare e coraggiose, offrendo soluzioni basate sui valori comuni. Nel complesso contesto delle conseguenze della Primavera araba e della situazione iraniana e irachena, Gianni Pittella ha iniziato progetti di risoluzione a sostegno dei diritti umani e della protezione delle comunità cristiane sottoposte ad abusi e violenze. Tra i deputati che hanno firmato accanto all' Gianni Pittella ricordiamo qui: Elmar Brok, Ignacio Salafranca, Ioannis Kasoulides, Joseph Daul, Mario Mauro, Doris Pack, Ria Oomen-Ruijten, Hans-Gert Pöttering, Traian Ungureanu, Hannes Swoboda, Alexander Graf Lambsdorff, Charles Tannock. Il fatto che taluni progetti di risoluzione siano presentati a nome dei principali gruppi politici (socialista, popolare, liberale, conservatore) dimostra ancora una volta che l'attività degli eurodeputati si basa su **negoziati e compromessi**, per il sostegno comune dei valori europei. Il deputato europeo si sa elevare al di sopra delle dispute tra partiti, per perseguire obiettivi superiori. Il deputato europeo deve avere una visione politica reale, che non si fermi alle frontiere delle regioni di sviluppo a cui appartiene, né a quelle del suo Paese o a quelle dell'Europa. La sua visione non deve fermarsi alle Alpi o ai Carpazi, al Mediterraneo o addirittura all'Atlantico.

Contemporaneamente, i rappresentanti delle istituzioni europee non rimangono chiusi in una torre d'avorio. L'attività dei membri del Parlamento Europeo ha come obiettivo **la soluzione dei problemi concreti dei cittadini.** In tal senso Gianni Pittella ha proposto nell'attuale legislatura la "Dichiarazione sulla necessità di un servizio d'emergenza 112 accessibile", documento avviato in collaborazione con i deputati dei principali gruppi politici quali Marian-Jean Marinescu, Ádám Kósa,

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1 Ibidem, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20051026+ITEM-002+DOC+XML+V0//EN&language=RO&query=INTERV&detail=3-007

2 Ibidem, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20051026+ITEM-002+DOC+XML+V0//EN&language=RO&query=INTERV&detail=3-007

3 EP, Commission's annual policy strategy for 2006, Debate, Tuesday, 12 April 2005 – Strasbourg, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20050412+ITEM-031+DOC+XML+V0//EN&language=RO&query=INTERV&detail=2-326

4 *** "Eveniment cultural la Bruxelles", 27 April 2010, in http://www.timpul.md/articol/culorile-moldovei-la-parlamentul-european-22827.html

5 http://www.europa-eu-un.org/articles/en/article_9945_en.htm

Eva Lichtenberger, Gesine Meissner. La Dichiarazione è stata recentemente adottata – il 17 novembre 2011 – con la firma di 483 eurodeputati sui 736 totali, rappresentando dunque un evidente successo. L'iniziativa era necessaria, tenendo conto del fatto che attualmente il servizio 112 via voce esclude milioni di persone, come sono gli utilizzatori sordi, con deficienze auditive e linguistiche. La Dichiarazione sollecita che la Commissione presenti proposte legislative, di modo che l'112 sia pienamente accessibile a tutti, dando priorità ai servizi nel linguaggio dei segni che utilizzano tecnologie video e a quelli con contenuto sotto forma di testo, per assicurarne l'uso da parte delle categorie svantaggiate[1]. Ovviamente, tali misure saranno applicate anche a Lisbona, Talinn, Tîrgu-Mureş, a vantaggio di persone con disabilità.

Il 24 giugno 2010, in un'interrogazione firmata insieme a un gruppo di deputati (tra cui Rovana Plumb, Iliana Malinova Iotova, Pervenche Berès, Stephen Hughes, Alejandro Cercas), Gianni Pittella ha suggerito che la Commissione Europea incoraggi gli Stati dell'Europa occidentale a rimuovere le restrizioni temporanee che riguardano i **cittadini romeni e bulgari in merito all'accesso al mercato del lavoro** dell'Unione Europea. Il documento sottolinea come le barriere imposte alla libera circolazione dei lavoratori rischino di trasformare romeni e bulgari in cittadini europei di seconda categoria[2].

Gianni Pittella si è espresso contro le misure del governo italiano tendenti a discriminare i cittadini di etnia rom, una parte dei quali provenienti dalla Romania. In una proposta di risoluzione del luglio 2008 Gianni Pittella, insieme ad altri eurodeputati (tra cui Jan Wiersma, Kristian Vigenin, Viktória Mohácsi, Marco Cappato, Sarah Ludford, Metin Kazak, Monica Frassoni, Elly de Groen-Kouwenhoven, Giusto Catania), chiedeva la sospensione delle misure del governo italiano destinate alla realizzazione di un censimento delle persone di etnia rom presenti in Italia attraverso la raccolta di impronte digitali, soprattutto in città come Roma, Milano e Napoli.[3] Il Documento europeo criticava il Decreto del governo italiano del 21 maggio 2008 con il quale si dichiarava: «lo stato di emergenza in merito alla situazione dei campi nomadi delle regioni Campania, Lazio e Lombardia»[4], sulla base della Legge nr. 225 del 24 febbraio 1992 in merito alla protezione civile. I prefetti avrebbero ottenuto poteri speciali per l'applicazione di misure di espulsione dei rom dall'Italia. Chiedendo dall'interno delle strutture europee la revisione di tali misure, il documento firmato dall' Gianni Pittella reiterava l'opinione secondo cui: «le politiche che accentuino il fenomeno di esclusione non saranno mai efficienti nella lotta alla criminalità e non contribuiranno alla sua prevenzione» e alla creazione di un clima di sicurezza. [5]

La risoluzione sottolineava la necessità di una strategia a livello comunitario e nazionale «allo scopo di abolire la segregazione dei rom nell'educazione, di garantire un accesso uguale a un'istruzione di qualità per i bambini rom, di assicurare e migliorare l'accesso dei rom al mercato del lavoro, di assicurare un accesso uguale ai servizi medici e alle prestazioni sociali e di accrescere il tasso di partecipazione dei rom alla vita sociale, economica, culturale e politica».[6] Attraverso i posti speciali riservati agli studenti di etnia rom, l'Università „Petru Maior" risponde a tali obiettivi.

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[1] EP, Written Declaration on the need for accessible 112 emergency services Authors : Marian-Jean Marinescu, Ádám Kósa, Eva Lichtenberger, Gesine Meissner, Gianni Pittella, 17/11/2011, Text adopted : P7_TA(2011)0519, Number of signatories : 483 - 17/11/2011, in http://www.europarl.europa.eu/sidesSearch/search.do?type=WDECL&language=RO&term=7&author=4436

[2] EP, Subject: Free movement of workers - temporary restrictions affecting the Romanian and Bulgarian citizens on the European Union labour market. Question for oral answer to the Commission, Rule 115, Rovana Plumb, Iliana Malinova Iotova, Pervenche Berès, Stephen Hughes, Alejandro Cercas, Gianni Pittella, Jutta Steinruck, on behalf of the S&D Group, 24 June 2010, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2010-0096+0+DOC+XML+V0//RO&language=RO

[3] EP, Motion for a Resolution, 7.7.2008, in http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B6-2008-0348+0+DOC+WORD+V0//RO&language=RO

[4] Oficial Journal of Italy no. 122 din 26 mai 2008.

[5] Ibidem

[6] Ibidem

Va sottolineato come le iniziative europeiste da Gianni Pittella abbiano registrato diversi successi, come dimostra il fatto che la strategia europea per i rom rappresenta oggi una preoccupazione concreta delle istituzioni di Bruxelles.

Gianni Pittella sostiene la necessità di combattere la crisi attraverso il ricorso alla solidarietà e alla coerenza europea, attraverso la regolamentazione dei mercati finanziari, attraverso investimenti nella crescita economica, nella ricerca e nell'istruzione. Dopo gli interminabili debattiti pubblici in merito alla crisi, il suo discorso del 22 giugno 2011 presenta una forza suggestiva fuori dal comune e un sicuro impatto mediatico: «L'Europa mi sembra quella squadra di calcio che sta perdendo 2-0 e i cui giocatori pensano di poter recuperare senza passarsi più il pallone e cercando di fare i gol da soli. Ma da soli non si vince nessuna partita. Nemmeno se ci fossero Maradona e Pelé vincerebbero da soli la partita della crisi. La crisi greca in principio era arginabile. Siamo invece andati avanti e siamo ad un punto difficilissimo, che va affrontato mettendo una volta per tutte da parte dannose gelosie e ricette economiche fallimentari.»[1]

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[1] EP, DiscussioniMercoledì 22 giugno 2011 - BruxellesPreparazione della riunione del Consiglio europeo (24 giugno 2011) (seguito della discussione), in http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20110622+ITEM-014+DOC+XML+V0//IT&query=INTERV&detail=3-071-000

Britain and Europe: A Mountain to Climb

DR. COLIN SWATRIDGE

Abstract: Britain has always had reservations about its membership of the EU. The crisis in the eurozone has confirmed Britons in their suspicion of a union which began as a trading partnership, and that is evolving as a federation in order to maintain a currency of which most Britons want no part. The 'summit' meeting of heads of government that took place in Brussels on 8/9 December 2011 proved to be a test of the extent to which Britain is (in Churchill's phrase) 'with Europe, but not of it'. David Cameron's reasons for wielding the veto, and the press reaction to it – in Britain, France, and Germany – are indicative of what has been, and what may continue to be, a troubled relationship.
Keywords: Britain, Cameron, Europe, Euroscepticism, eurozone, Merkel, Sarkozy, Summit, Tobin tax, Veto.

The word 'sovereign' comes from Latin *super*, above; from the Roman *superanus*; and the Old French *soverain*. (The 'gn' ending, as in 'reign' and 'foreign' is first found in c.1400). The term was first applied to states in 1595, and to the territory of an independent state, under a sovereign, in 1715, the year of Waterloo. For Britons, 'sovereign' is more or less synonymous with 'monarch' – Queen Elizabeth II, in her diamond jubilee year, is our 'sovereign'; and since 1817, it is a word that we use to denote one pound sterling. (If this usage fell into abeyance in 1914, with the appearance of the paper pound note, it was revived with the minting of a 'gold' pound coin, bearing the sovereign's head, in 1983). When all these meanings are wrapped up together in the abstract noun 'sovereignty', it is a gift to patriots, conservatives, and Eurosceptics, evoking Churchill, the White Cliffs of Dover, and 1940, our 'finest hour'.

We are wont to divide reality into three: the continuum of British attitudes to Europe might be so divided, into those (rather few) who wish Britain to be 'at the heart of Europe', even, perhaps, to be one of the United States of Europe, who remain loyal to the vision of Schuman and Monnet; those who were content with the Europe of Nations – of sovereign states trading with each other in the single market (or the 'common market' before it was the Union), who regret the Treaty of Lisbon; and there are those, the heirs of the one third of the electorate who voted No to our membership of the EEC in the 1975 referendum, who would have Britain withdraw from the EU, and revert to a Swiss -(or Norwegian-)style 'splendid isolation'.

These three categories of attitude are not coterminous with the views, official or otherwise, of the three main political parties. Only the Liberal Democrats, in the current coalition government, are consistent as a party in their positive attitude towards Europe; there are Europhiles and Eurosceptics (even Europhobes) in both main parties, the Conservatives (the majority party in the coalition), and the Labour Party in opposition. Europe was the anvil on which Margaret Thatcher's government was hammered; and it proved to be the undoing of John Major's hold on his party, likewise. Prime Minister David Cameron may or may not succeed in reconciling the views of his Liberal Democratic junior partners, and Europhile Conservatives like Kenneth Clarke, his Justice Minister, with back-benchers who, in common with Conservative (largely 'tabloid') newspapers, would like there to be a re-run of the 1975 referendum – one that they are confident would say No to Europe.

The European issue is complicated at the moment, of course, by the fragile state of the common currency, and the doubt that has been thrown on the potential of the euro to unite (or even to be a valid symbol of the unity of) a Europe whose members do not all box by the same rules, whose weight was unequal at the outset of the match, and whose outcomes are bloodily unequal in consequence. The fact that Britain obtained an opt-out from the obligation to adopt the euro – that the pound is still and will remain 'sovereign' – strengthens our insular determination to remain independent of the whole dubious enterprise.

I do not wish to survey, or comment upon, the problems of sovereign debt, credit-ratings, and competitiveness within the eurozone here, though; I shall take the events of the week ending 8/9

December 2011, (when European leaders met in Brussels to herald what President Sarkozy of France called a 'new economic age' in which countries would live within their means[1], and David Cameron wielded his veto), as a case-study of the trouble that Britain has with Europe. In so doing, I shall also touch on the trouble that Europe has with Britain. I shall take as my source material representative press reaction to events, in the run-up to, and in the immediate aftermath of the 'summit' meeting.

The Foothills

When does the story begin? Does it begin in 1988, in Bruges, when Mrs Thatcher turned her back on the vision of a federal Europe? Or in 1990, when, having chased socialism in Britain out of the front door, as she thought, she said 'No, no, no!' to the 'socialism by the back door' of the social chapter protecting workers' rights, promoted by the then commission president Jacques Delors? Does it begin with John Major's opt-out from the same social chapter at Maastricht, in 1991, or with Britain's ignominious exit from the Exchange Rate Mechanism (the precursor of the common currency), on 16 September 1992? These bruising quarrels with Brussels contributed to a growing Euroscepticism in Conservative ranks.

It was a Labour government, under Tony Blair, that signed the Treaty of Nice in December 2000. This smoothed the path towards EU expansion in 2004, and in so doing extended Qualified Majority Voting (QMV), in particular in the politically contentious area of industrial relations, working conditions and social exclusion[2]. Conservative unease grew, when Joschka Fischer, then the German foreign minister, was quoted as saying:

The EU is on the brink of becoming a European Federation by the year 2010 (...) I feel sure that Britain will fall in line[3].

Conservatives felt even less like falling in line with the Working Time Directive when that was promulgated, in 2003[4]. This was yet another initiative that seemed (to Conservatives) to privilege the rights of employees over those of employers – a caving-in to the unions whose powers Mrs Thatcher had done so much to curb.

Perhaps this particular story, though – the story of the 'summit' meeting in December 2011, and what we can learn from it about British attitudes – begins when David Cameron was elected leader of the Conservative Party in 2005. One of his first acts was to detach the party from its association with mainstream European centre-right parties (such as those led by Angela Merkel and Nicolas Sarkozy), and to align it with minority parties further to the right, like the Polish Law and Justice Party that no liberal Pole would want anything to do with[5]. From the start, then, Cameron advertised his hostility towards European integration and even a latent nationalism. As prime minister, in coalition with Europhile Liberal Democrats, he has had to repress these instincts and to disappoint the new intake of Eurosceptic back-benchers in his party who looked to him to repair what they thought of as the damage to Britain's sovereignty done by Blair.

It was acknowledged on all sides in Britain that concerted action would have to be taken at a high level to place the euro on a firmer footing, to calm the markets, and to ensure that Greece, Ireland, Portugal, Spain, and Italy would be able to pay their debts. France and Germany sought to introduce a financial transaction (or 'Tobin') tax across Europe; whilst Britain proposed that the European Central Bank (ECB) act as 'lender of last resort' for the eurozone. Cameron met Merkel in Berlin on 18 November – but there was no meeting of minds: Merkel did not persuade Cameron to back a Tobin tax (his understandable, but unrealistic condition being that it be applied globally); and Cameron failed to move Merkel in her implacable opposition to the ECB's printing money. From German's point of view, and very likely from the point of view of much of the eurozone, it looked as if Britain was

[1] Jason Groves and Peter Allen, *The Daily Mail* (2/12/11)
[2] www.eurofound.europa.eu/areas/industrialrelations (30/11/10)
[3] www.civitas.org.uk/eufacts/FSTREAT/TR5.htm (undated)
[4] ec.europa.eu/social (16/12/11)
[5] Władysław Chlopicki, Jagiellonian University of Kraków, in a personal communication (17/12/11)

resisting the Tobin tax out of naked self-interest. It is important to remember though, as ex-prime minister Sir John Major (1990-97) pointed out, that:

If there were such a tax, about 80-85% of the yield would come from the City of London (...). We can't accept a financial transaction tax. I don't think we will have to, but the proposal adds to Euroscepticism[1].

He compared the tax with a 'heat-seeking missile aimed at the City of London'. Clearly, Cameron could no more agree to a Tobin tax than Sarkozy could have agreed to a tax on wine, or Merkel to a tax on executive cars.

Two weeks later, on 2 December, Cameron hopped on a plane to Paris, to meet President Sarkozy. By now it was becoming plain that Berlin and Paris were determined to seize the reins and impose their own order on Europe's unruly horses. Sarkozy was quoted in *The Daily Mail* as saying:

France and Germany, after so many tragedies, have decided to unite their destiny and look to the future together (...). There is a reality that everybody must understand, that everyone has to accept: sovereignty is only possible with others[2].

This was just the kind of talk that enraged Conservative back-benchers, who were already calling on Cameron to seize the opportunity of the crisis in the eurozone, and of the 'Merkozy' drive to renegotiate the terms of the Lisbon Treaty, to repatriate powers ceded to Brussels by Tony Blair. Downing Street damped down talk of treaty change: all that was needed, senior government officials said, was a swift deal to prevent a new economic crisis; a guarantee that the ECB, or the IMF, or the European Financial Stability Facility (EFSF), or all three, would rescue stricken economies. These officials supposed that a treaty change would require a referendum in the UK – and, they knew, a referendum on ceding further powers to Brussels would turn in no time into one on Britain's very membership of the EU.

The 'Summit'

Cameron faced a difficult choice as the all-important meeting of all 27 heads of state approached: either he could sign up to an EU-wide treaty that committed all members to unprecedented fiscal regulation (including the Tobin tax) – in which case his back-benchers would demand revocation of Qualified Majority Voting and the Working Time Directive (among other issues over which member-states had signed away their veto); or he could support, but make no contribution to, an agreement that applied only to the 17 members of the eurozone. This latter was the preferred option – but it was not without risk: the 17 might well agree to measures that would have implications for all EU member-states (a Tobin tax, for instance, would be levied on transactions effected in the City of London by eurozone banks), and where they didn't, Britain might find itself side-lined by France and Germany to the extent that it no longer had a seat at 'the top table'. The 'two-speed Europe' that had been much talked about would have arrived. Cameron decided to go to Brussels resisting demands on the part of the Paris-Berlin axis, and on the part of his Eurosceptic back-benchers: he would face down Commission President Barroso and his 'European Economic government', and EU President Van Rompuy and his 'fiscal federalism'[3]; and he would defy his back-benchers' demand that the UK renegotiate its relationship with the EU.

In an article in *The Times* of 7 December 2011 (headlined: 'Yes to treaty change – but only on our terms') Cameron wrote: „Just as Germany and others have their requirements for treaty change to strengthen fiscal discipline, so Britain has its requirements for treaty change, too. If we are changing the treaty that applies to all EU countries and allowing the eurozone countries to have new rules, it is also important that there are rules to keep the single market fair and open for key industries for Britain, including financial services" [4].

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[1] Nicholas Watt, 'Tobin tax would hit City of London with missile, says Major', in *The Guardian* (19/11/11)
[2] Jason Groves and Peter Allen, 'France and Germany must take charge of Europe, says Sarko', *The Daily Mail* (2/12/11)
[3] Daniel Hannan, 'We'll never get another chance like this...', *The Daily Mail* (4/12/11)
[4] David Cameron, 'Yes to treaty change – but only on our terms', *The Times* (7/12/11)

So, Cameron *was* prepared to countenance treaty change, after all – even one that applied to all 27 EU members; yet he envisaged that the 'new rules' referred to would apply only to the 17 countries of the eurozone. The political editor of *The Times*, Roland Watson, wrote in the same edition of the newspaper: „[Cameron] told his backbenchers not to expect any repatriation of employment or social law, on which they fought last year's general election. His demands would instead be 'practical and focused" [1].

This seems to have been the position agreed between David Cameron and his Liberal Democrat deputy prime minister, Nick Clegg – a onetime Member of the European Parliament, and a fluent speaker of Dutch, German, French and Spanish, married to a Spaniard. Clegg could not have consented to any renegotiation of EU treaties in Britain's exclusive favour; but nor could he have agreed to measures that would have a disproportionately negative effect on Britain's financial services industry. It was a position, perhaps, that it was impossible to maintain; but did this make the veto inevitable, that Cameron wielded in the early hours of 9 December? Was unanimity impossible, given that all 27 EU member states have an interest in, at least, some degree of concerted fiscal discipline? Could Britain have dissuaded the other 26 from introducing the Tobin tax? There was talk of it being levied at as little as 0.01 per cent or less: would the revenue raised have been enough to nurse the ailing euro back to health; would it have been anything more than a minor check on finance-industry excesses? Wasn't a significant check precisely what was needed?

The Climb-Down

Nicolas Sarkozy was quoted in this connection, in *Le Monde*, on the morning of Friday 9 December:

„In order to agree to treaty reform affecting all 27 EU members, David Cameron asked us to insert a protocol in the treaty exempting the United Kingdom from a certain number of financial services regulations. All of us considered this to be unacceptable. It is our view, in fact, that a large part of the world's economic problems arises from deregulation of the finance industry"[2].

In articles in *Le Nouvel Observateur* ('The clash with Great Britain, whose interests are determinedly aligned with those of the City, realises the idea of a two-speed Europe')[3], and *Le Figaro* ('It's a new Europe that Nicolas Sarkozy and Angela Merkel have imposed at the Brussels Summit. A Europe which has lost its unanimity with the spectacular isolation of Great Britain, but one which has gained in coherence')[4], the emphasis was on the veto – on David Cameron's pressing the nuclear button – and its implications for a United Europe. *Der Spiegel* was uncompromising:

Following David Cameron's veto of EU treaty reform, there is plenty of frustration in Europe over Britain's stubborn attitude in the battle against the debt crisis. Prominent members of the European Parliament have strongly criticised the British prime minister and sent him a clear message: Europe doesn't need you[5].

Matthias Krupa in *Die Zeit* was more nuanced; more even-handed:

„Who is responsible for the fork in the road? The British Prime Minister David Cameron who insisted on special clauses in the final resolution to protect the UK's financial sector – or indeed Angela Merkel, who put the treaty amendment at the top of the agenda? A bad hand of cards went to Cameron who is now on the sidelines, having achieved nothing for his country. Knowing the player that Merkel is, she will have factored this in[6]."

'On the sidelines' is exactly where most Britons wanted Britain to be. The news of the veto came too late for publication on 9 December; so it was not until Saturday 10 December that British

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1 Roland Watson, 'Cameron names his price,' *The Times* (7/12/11)
2 'Zone euro: vers un accord à vingt-six?', *Le Monde* (9/12/11)
3 Dominique Nora, 'Accord de Bruxelles indispensable, mais insuffisant', *Le Nouvel Observateur* (9/12/11)
4 Pierre Rousselin, 'Les deux Europe', *Le Figaro* (9/12/11)
5 'Cameron is a coward: European politicians slam British EU veto', *Der Spiegel* (9/12/11)
6 Matthias Krupa, 'Unity dearly bought', *Die Zeit* (9/12/11)

newspapers had the opportunity to pronounce. The headline in *The Daily Mail* was: 'The Day He Put Britain First: Defiant Cameron Stands Up to Euro Bullies – But French Plot Revenge for Historic Veto'. *The Independent* is, by definition, not a Conservative newspaper, yet its headline – 'The EU Leaves Britain' – seemed to lay the blame for the 'fork in the road' on 'Merkozy', not on David Cameron. Ted Jeory in *The Sunday Express*, on 11 December, wrote in a similar vein:

„The Prime Minister, set for a hero's welcome from Tory MPs at Westminster tomorrow, will be confronted by a motion calling for an EU referendum (...) The debate will be seized on by Eurosceptics desperate to keep momentum going following Mr Cameron's decision to walk away in the face of French implacability[1]."

It was left to the politically liberal Guardian (whose headline was: 'Cameron cuts UK adrift') to cast Cameron as the villain, not the hero, of the piece, and to accuse the Prime Minister of 'tragic foolishness':

„Mr Cameron's veto was an act of domestic politics, not an act of international statesmanship. It was a pseudo-Churchillian, pseudo-Thatcherite gesture to appease his anti-European backbenchers." The paper denounced 'the obscenity of a prime minister being compelled to represent the finance interest as the national interest'[2], and lamented 35 years of sneering disengagement on the part of too many of Britain's politicians and opinion-formers in the media.

Nick Clegg's position was interesting: he had agreed with Cameron beforehand that Britain's demands would be 'practical and focused'; and, even after the veto, he claimed that the demands had been 'reasonable and modest'. It was only after discussion with Liberal Democrat colleagues, and in particular with former party leader Lord Ashdown, that he publicly regretted the veto, and that gossip circulated about an unbridgeable rift between Clegg and Cameron that would call the very coalition into question. Ashdown described the outcome of the summit as: 'Gallic payback time for the way in which Cameron went around Europe lecturing Sarkozy on what to do'[3]. As Cameron's deputy, Clegg had to be a little more circumspect. Nevertheless, he made no secret of his displeasure at the sight of Conservative triumphalism.

And what of the opposition Labour Party: what line did party leader Ed Miliband, in particular, take towards what had happened? The Labour Party has never been at one on Europe: trade unionists applauded the terms of the 'social chapter', and welcomed regulation of working hours and conditions; but there has always been a suspicion on the left that the EU is a fundamentally undemocratic institution – and the rise to power of the unelected technocrats Messrs Papademos in Greece and Monti in Italy only reinforced this suspicion. In an article in *The Guardian*, on 10 December, Miliband berated Cameron, predictably enough, for having made a 'weak and tragic choice':

„While Cameron tells us he made his decision to protect British business, it is British business that will lose when Britain is not involved in decisions about their largest export market (...) The truth is that Cameron never wanted a deal at this summit because he knew he was too weak to sell it to his Eurosceptic MPs back home[4]."

His recipe for what Cameron should have done ('he could have built alliances over the preceding months'; 'he could have sought practical protections for our financial services industry'; 'he could have insisted that crucial euro-area meetings affecting Britain should not take place without a British voice in the room') was not altogether convincing. It was rather easier for him to say what he would not have done – what Cameron should not have done, and what the Liberal Democrats should not have sanctioned – than it was to be clear about what he would himself have done if he had been sitting in Cameron's place at the meeting.

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[1] Ted Jeory, 'End of EU is unstoppable', *The Sunday Express* (11/12/11)
[2] 'The English outpatient', *The Guardian* (10/11/12)
[3] Allegra Stratton et al., 'Clegg backs PM but warns Eurosceptic Tories: "Be careful what you wish for"', *The Guardian* (10/12/11)
[4] Ed Miliband, 'A weak and tragic choice', *The Guardian* (10/12/11)

Only the position of Nigel Farage MEP, and leader of the United Kingdom Independence Party (UKIP), is beyond any possibility of doubt: his party is predicated on British sovereignty outside the EU. UKIP is not represented in the House of Commons, but its influence as a home for disaffected Conservatives should not be underestimated. Many Britons will have agreed with Farage when he lambasted Commission President Barroso, Council President Van Rompuy, and Economic Affairs Commissioner Olli Rehn, in the European Parliament, three weeks before the Brussels 'summit': „None of you has any democratic legitimacy for the roles you hold. Into this vacuum steps Angela Merkel, and we are now living in a German-dominated Europe, something this EU was supposed to stop[1]."

It was undiplomatic of him to 'mention the war' (besides, France and Germany were staunch allies now); but in doing so, Farage united the left and the right in Britain. It is the centre that is divided.

It may well be that Cameron's veto was a trump card that he need not have played. Might it be the markets that will decide whether or not 'Merkozy' prevails, and a new fiscal discipline is imposed? Might it be that no 'pact' is acted upon by the 26 – that, for example, Hungary, or Sweden, or the Czech Republic, or other government proves to be as jealous of its 'sovereignty' as Britain is? Might it be that Britain is, after all, drawn into whatever talks are held, and arrangements are made, because it cannot *not* be? If anything is certain, it is that there will be other mountains to climb.

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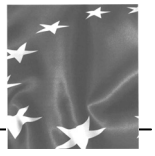

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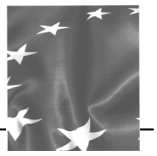

« L'Europe Unie »/ „United Europe" est une revue academique française et internationale d'études européennes, éditée à Paris par :

- Université Catholique de Lille (France)
- Faculté Libre de Droit de Toulouse (Institut Catholique, France)
- Mouvement Européen Nord (Lille, France)
- Association «Confrontations» (Paris, France)
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ISSN: 0248-2851
EAN: 99782749700519

Editeur: Prodifmultimedia Paris
http://www.prodifmultimedia.com