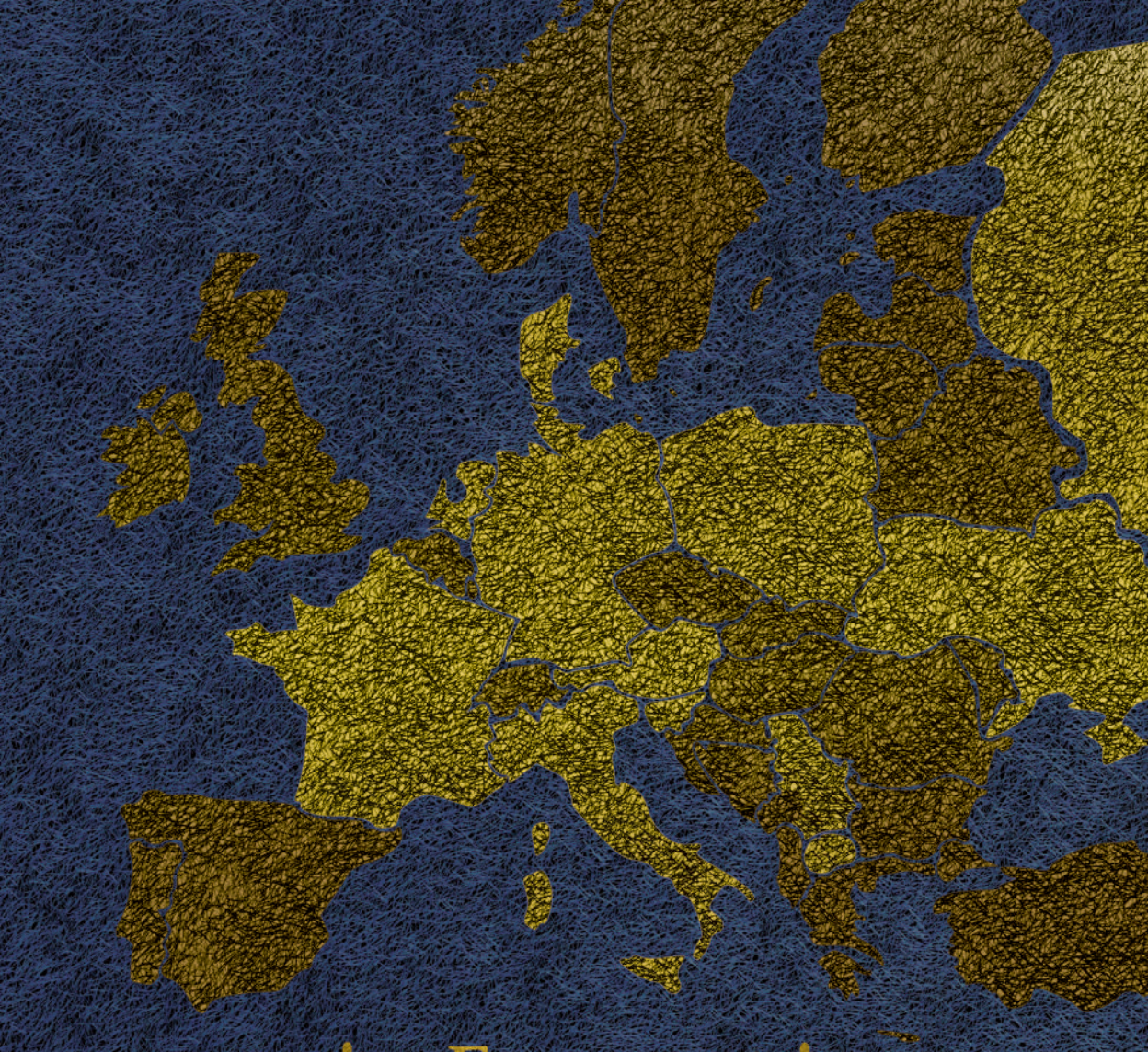

From an Individual to the European Integration Discussion on the Future of Europe

Liber Amicorum in Honour of Prof. Emer. Dr. Silvo Devetak

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Faculty of Law

From an Individual to the European Integration - Discussion on the Future of Europe

Liber Amicorum in Honour of Prof. Emer. Dr. Silvo Devetak
on the Occasion of his 80th Birthday

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THE CENTRAL DILEMMA, FROM WHICH THE STABILITY AND DEVELOPMENT OF MODERN EUROPEAN SOCIETIES DEPENDS: CLASH OF "CIVILISATIONS" OR RESPECT FOR DIVERSITY AND DIALOGUE?

University of Maribor Press

From an Individual to the European Integration Liber Amicorum in Honour of prof. emer. dr. Silvo Devetak

SUZANA KRALJIĆ & JAMINA KLOJČNIK

Abstract »From an Individual to the European Integration, Discussion on the Future of Europe - Liber Amicorum in Honour of Prof. Dr. emer. Silvo Devetak on the Occasion of his 80th Birthday« is a tremendous collection of articles dedicated to Prof. Dr. emer. Silvo Devetak. The nationally and internationally estimated scholars, from eleven states, have written significant articles. These estimated scholars are academics, researchers, colleagues and friends, who shared common ideas, visions, work and research (some for decades) with Professor Devetak. In their articles, which are dedicated to the wide opus of the field of interest of Professor Devetak, they discuss, argue, analyse or overview the topics especially related to public international law, human rights, minorities and EU neighbourhood policy.

Keywords: • European Integration • EU Neighbourhood Policy • Human Rights • Minorities • International Public Law •

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Are European Security Policies Learning Some Lessons from the United States on Migration and Human Rights?

PAOLO BARGIACCHI

Abstract If we compare American and European legal systems, differences are essentially due to the different way of dealing with the culture of security and the relationship between politics and law. Today that gap is narrowing because Europe is changing its approach to security and, when discussing migration, its political quest for more security also involves the limitation of the judicial check and a more formalistic approach to interpreting and applying the law, i.e. two legal solutions that are typical of the US approach to security. Following decades of resilient and extensive protection of human rights in any situation, Member States and the European Commission are seeking for a new and different balance between human rights and security and are ready to trade some political idealism and legal functionalism in the field of migration and human rights for more political pragmatism and legal formalism in the field of security.

Keywords: • Irregular Migration • Security and Human Rights • European and US Approach to Security • Legal Formalism and Functionalism • Judicial Check Over Government •

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1 First Major Difference Between Europe and the US: the Culture of Security. Consequences in Terms of Judicial Checks On the Executive Branch and Admissibility of the Balancing Test Between Human Rights and State Security

If we compare the American and European legal systems, there are some remarkable differences that essentially depend on the different way of dealing with two general issues: the culture of security and the relationship between politics and law. Paragraphs 1-2.2 examine these differences while paragraphs 3-4 suggest that they are slowly diminishing and also that European security policies are learning some lessons from the American approach to security.

Security is a core issue in US politics, even to such an extent that some related notions (imminent threat, continuing threat, etc.) are so widely interpreted that sometimes human rights are severely limited. For instance, some Guantanamo Bay (US Military Prison in Cuba) detainees "*who cannot safely be transferred to third countries in the near term* [...] *and who are not currently facing military commission charges*" are subject to continued, indefinite detention without charge or trial, because their detention "*remains necessary to protect against a continuing significant threat to the security of the United States*" (White House, 2016: 1 and 4).[1] Security is also a core issue in Europe, but its goals are accomplished within a more comprehensive framework of values and interests in which human rights and the rule of law are equally important.

The first consequence that follows from such a difference affects both the scope and content of the judicial check over the Executive Branch.

Judicial deference has been (and still is) a long-established doctrine throughout political and legal history, culture, and tradition of the United States. Above all, in cases of national security, foreign affairs and immigration judicial power yields its competence to the executive and legislative powers.

[1] Should the Periodic Review Board (an interagency body with representatives from several Departments), given current intelligence and other information, determine that a detainee is eligible for transfer or prosecution, then he would be out of this legal limbo: otherwise his continued indefinite detention for the sake of national security would continue.

In the area of immigration, deference "*is particularly powerful* [...] *because 'the power to expel or exclude aliens* [is] *a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' Shaughnessy v. United States ex rel. Mezei, 345 U.S. 2016, 210 (1953)*" (*U.S. v. Peralta-Sanchez*, 2017).

Also in the area of war, national security, and foreign relations "*the judiciary has an exceedingly limited role*", because courts cannot "*impermissibly draw* [...] *into the 'heart of executive and military planning and deliberation,' Lebron, 670 F.3d at 550, as the suit would require the Court to examine national security policy and the military chain of command as well as operational combat decisions regarding the designation of targets and how best to counter threats to the United States*". In one word the Judiciary cannot hinder the ability of Congress and the Executive "*to act decisively and without hesitation in defense of U.S. interests*" (*Al-Aulaqi v. Panetta*, 2014).[2]

Of course, the limited judicial check does not mean that a state of war is "*a blank check for the President when it comes to the rights of the Nation's citizens*" (*Youngstown v. Sawyer*, 1952) and political branches may "*switch the Constitution on or off at will and govern without legal constraints*" (*Boumediene v. Bush*, 2008). American judges have not abdicated their constitutional functions and Guantanamo decisions confirm it. Yet, as discussed below, the Guantanamo jurisprudence - when compared to the bicentennial interpretation by US governments and courts of the relationship between power, law, and territory - seems like a "drop" of European-style functionalism in a "sea" of American-style formalism. In the United States, in fact, the protection of human rights and judicial checks over the Executive Branch are more limited than in Europe.

In Europe there is no room for judicial deference. Primacy of law and judicial interpretation over politics is absolute and politics must defer to the considered opinion of the judiciary, especially of the European supranational courts, i.e. the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).

[2] See also *Vance v. Rumsfeld*, 2012, p. 200 (Congress and the President, not judges, should make the "*essential tradeoffs*" required to manage national security) and *Johnson v. Eisentrager*, 1950: 774 ("*Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to wartime security*") and p. 789 ("*It is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, wisdom, or propriety of the Commander in Chief in sending our armed forces abroad*").

The second consequence that follows from the different culture of security concerns the admissibility of the balancing test between human rights and state security.

In the United States the balancing test is allowed to such an extent that the extrajudicial killing in a foreign country of an American citizen who is a senior operational leader of al-Qa'ida is lawful if the US Government "*has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States*". According to the US Attorney General, in fact, "*based on generations-old legal principles and Supreme Court decisions handed down during World War II*" and the global war on terror, "*US citizenship alone does not make such individuals immune from being targeted*" and the government has the right to use lethal force "*to protect the American people from the threats posed by terrorist*" when capture is not feasible (US Attorney General, 2013).[3]

The balancing test is also applied in the expedited removal procedure, i.e. the process by which an alien can be denied entry and physically removed from the United States. In this case the balance, inter alia, is between "*the nature of the private interest at stake*" (the claim for the Fifth Amendment due process right to counsel) and "*the government's interest, including the additional financial or administrative burden*" the granting of such a right would impose on the government (costs of detention, government's lawyers, "*pay for the increased time the immigration officer must spend adjudicating such cases, distracting the officer from any other duties*", etc.) (*U.S. v. Peralta-Sanchez*, 2017).

The *Peralta-Sanchez* ruling confirms previous case-law in holding that individuals facing the expedited removal procedure under 8 U.S.C. § 1225 have no right to counsel or to a hearing before an immigration judge, because they only "*have a limited interest at stake*" having not been, inter alia, present in the United States "*for some period of time longer than a few minutes or hours*". In other words, as will be discussed below, it is just a formalistic matter of time. In accordance with the formalism that characterizes the US legal system and its interpretation (see § 2.1), in fact, during the inspection and the expedited removal procedure aliens are treated as if they were not within the United States for the purposes of applying

[3] Capture is not feasible if it cannot be "*physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation. Other factors such as undue risks to U.S. personnel conduction a potential capture operation could be relevant*" (US Department of Justice, no date).

some constitutional rights. In fact, an arriving alien, even if they have "*technically effected entry into the United States*", has a very limited interest in remaining (because he has established only a limited presence) compared to that of an alien already living in the United States and placed in a removal proceeding other than that under § 1225. The consequence is that the former, unlike the latter, has no Fifth Amendment due process right to counsel. As time does *not* go by, the scope of human rights protection severely narrows while the "*presence of lawyers will inevitably complicate*" the procedure: human rights protection cannot thwart the government in pursuing its goal to quickly exclude aliens who are inadmissible, while once again human rights must yield to national security.[4]

In Europe, on the contrary, the balancing test between human rights and national security is not allowed. Even when the security risk posed by an individual is so high as to threaten public order and national security, States cannot find a balance between their security risk and the real risk that fundamental rights might be infringed upon, in case of extradition, return or removal to another State. The absolute prohibition against torture or cruel, inhuman or degrading treatment or punishment must be respected "*even in times of emergency or war*". The ban on the balancing test articulated by European supranational courts is always upheld, including when deportation orders are taken against those who play an active role in terrorist organizations and threaten national security (*Saadi v. Italy*, 2008).[5] The ban applies to everyone (including third-country nationals who illegally arrive at EU external borders or illegally enter and reside within the EU) regardless of his

[4] The expedited removal procedure was further enhanced on the grounds that border security is "*critically important*" to national security and "*aliens who illegally enter the United States without inspection or admission present a significant threat to national security and public safety*" (Executive Order 13767. Border Security and Immigration Enforcement Improvements, January 25, 2017, Federal Register vol. 82, no. 18, 8793-97). Orders of expedited removal are issued by officials of several federal agencies (Customs and Border Protection, Immigration and Customs Enforcement, Citizenship and Immigration Services, etc.) who conduct (and usually complete within a matters of hours) the process and make determinations of individuals' claims of eligibility to remain in the United States completely and exclusively. If the individual applies for asylum or expresses a fear of persecution or torture or a fear of return to his home country, then the official must stay the process and refer him to an asylum officer for a credible fear determination. Pending such determination, he is detained.

[5] Saadi, a Tunisian national already arrested in Italy on suspicion of involvement in international terrorism, had been sentenced to twenty years in prison for terrorist charges by a military court in Tunisia. Italy had issued a deportation order because "*the applicant had played an 'active role' in an organization responsible for providing logistical and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad* [and] *consequently, his conduct was disturbing public order and threatening national security*". The deportation order was stayed by Italian courts and by the ECtHR.

legal status (asylum-seeker, displaced person, migrant, suspected or sentenced person) and of the requested measure (return, removal, extradition, etc.).

To deny or grant the balancing test also affects the scope and content of procedural rights of the person concerned and powers of national and supranational courts.

In Europe supranational courts strictly enforce and widely protect procedural rights, whilefull judicial review is, in principle, guaranteed pursuant to Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR) and Article 47 (right to an effective remedy and to a fair trial) of the EU Charter of Fundamental Rights. In order to assess whether or not a trial or a remedy is fair the effectiveness is the main criterion used by courts, and not even the Security Council binding resolutions can displace application and enforcement of human rights. In *Al-Jedda v. the United Kingdom* (2011), the ECtHR held that Security Council resolutions have primacy only if they are "*in line with human rights*" and that the ECHR is not displaced. In *European Commission v. Kadi* (2013), the ECJ held that EU regulations did not enjoy immunity from jurisdiction even if they are only designed to give effect with no latitude to one's black-listing mandated by the Security Council. The ECJ vindicated its own right to "*ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights*". Notwithstanding "*overriding considerations*" concerning the security of the EU or its Member States and the conduct of their international relations, in fact, such judicial review remains "*indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned*". In *Othman v. the United Kingdom* (2012), the ECtHR stayed the extradition to Jordan of a person wanted on terrorism charges due to the real risk that evidence obtained by torture might be admitted during the trial in violation of Article 6 of the ECHR.[6]

[6] The Memorandum of Understanding between the United Kingdom and Jordan (on protection of Articles 3 and 5 of the ECHR) had to be amended by also including protection of Article 6.

2 Second Major Difference Between Europe and the US: the Relationship Between Politics and Law. Consequences in Terms of Interpretation and Application of the Legal System.

2.1 The American Formalism

The second major difference relates to the relationship between politics and law, i.e. how courts and governments interpret, apply and implement the rules of the legal system and the related circumstances of fact.

In the United States the relationship is essentially imbued with formalism rather than with functionalism. In our reasoning the phrase "US formalism" means that legal interpretation is closer to the letter of the law (its literal interpretation) than to the spirit of the law (its teleological interpretation). Formalism often narrows human rights protection because sometimes it makes it possible to split the exercise of powers (especially abroad) by the government and the application of law. Formalism may indeed lead more easily to a strictly territorial (or intra-territorial) interpretation of the relationship between power, law, and territory, as shown, for instance, by the Indian Tribes (*Cherokee v. Georgia*, 1831) and the Insular Cases (*Downes v. Bidwell*, 1901) decided by the US Supreme Court.[7]

The general political rationale behind this kind of formalism lies in the fact that the Constitution and, more generally, the law "*follows the flag*" (i.e. the exercise of powers by the government), but at times "*doesn't quite catch up with it*", especially in case of extraterritorial exercise of that power (Jessup, 1938: I, 348).[8] Based on this premise, for a long time the Judiciary interpreted "*American law instrumentally, in a manner that generally enhanced the autonomy and power of the United States government*" when acting abroad, in order to not "*overly fetter the projection of American power, and American commerce around the globe*" (Raustiala, 2009: 61).[9] Since the 1940s the

[7] Indian Tribes were considered as "*domestic dependent nations*" living in a territory with respect to which "*though plainly sovereign American territory, Congress could draw intra-territorial distinctions*". Indian territory was American "*as far as other sovereigns were concerned*" but remained foreign for the purpose of domestic law (Raustiala, 2009: 84-85). In the Insular Cases, Puerto Rico and other overseas territories were not regarded as being part of the United States for the purposes of applying the Constitution but "*foreign to the United States in a domestic sense*" although "*appurtenant and belonging to the United States*". See also Bargiacchi, 2011: 495-540; Burnett & Marshall, 2001.

[8] It was the Secretary of War Elihu Root who said in relation to the Insular Cases that "*as neas as I can make out the Constitution follows the flag – but doesn't quite catch up with it*".

[9] "*The federal government sought maximum flexibility and efficiency* [...] *without the bringing along all the complex fetters of American legal rights* [so that] *the unusual restraints on governmental power that were built into the*

relationship between power and law was partially reinterpreted by the courts, the formalism, and its rigid "*hermetic territorialism*", gave more way to the functional approach and the Constitution was more often able to catch up with the Flag when abroad.[10]

As anticipated, the Guantanamo jurisprudence recognized some constitutional rights of foreign prisoners by taking a more functional rather than a formal approach to the legal status of the continued American presence at Guantanamo. Piercing the veil of formalism (Guantanamo is abroad) and looking functionally at reality (the US exercises *de facto* sovereignty over the area), the Supreme Court recognized the US effective control and jurisdiction rather than the Cuban formal sovereignty and granted the Constitution's extraterritorial application. In any case, as anticipated, such jurisprudence on the relationship between power, law, and territory, is just a "drop" of European-style functionalism in a "sea" in which legal formalism is still the strongest tide as demonstrated by the three examples set out below.

First example: in habeas corpus cases concerning indefinite administrative detention abroad of foreign nationals, the extraterritorial reach of the writ can be limited by "*practical concerns or obstacles*" that would make "*impractical or anomalous*" its issuing. The reality on the ground (i.e. the circumstances of fact surrounding the situation) is used for limiting the protection of human rights while in Europe, as discussed in § 2.2, it is interpreted instrumentally in a manner that broadens that protection. For instance, in *Johnson v. Eisentrager* (1950: 778-779), a case concerning German soldiers detained at Landsberg prison in post-war occupied Germany, the Supreme Court held that the need to "*transport the petitioners across the seas for hearing*" would have diverted the field commander efforts and attention "*from the military offensive abroad to the legal defensive at home*" and required allocation of human and economic resources: the right of habeas was denied to the prisoners for this reason too. Even in *Al Maqaleh v. Gates* (2010: 107), a case concerning foreign nationals detained at US Military Base in Bagram,

American constitutional order did not overly fetter the projection of American power, and American commerce, around the globe" (Raustiala, 2009: 67).

[10] The effects-based jurisdiction affirmed in *U.S v. Aluminium Co.*, 1945, paved the way for the "murdering wives" cases (*Reid v. Covert*, 1957) in which for the first time the Supreme Court applied the Constitution to US citizens committing crimes in a foreign country so as to avoid that individual rights (such as the trial by jury) could be "*stripped away just because* [those citizens happen] *to be in another land*". See also Vagts, 1982: 591-94.

Afghanistan, the "*circumstances of fact surrounding*" the military base exerted a decisive influence in denying the habeas corpus to the prisoners: the armed conflict raging outside the walls of the base stripped away that constitutional right which had been instead granted to Guantanamo prisoners, because Guantanamo does not lie in a theater of war and therefore is declared a so-called peaceful situation. Notwithstanding all the prisoners are in the same situation (namely under the complete and unfettered control of the detaining power), those held in Bagram are beyond the reach of the Constitution, because, inter alia, troops "*are actively engaged in a war with a determined enemy*" (*Al Maqaleh v- Hagel*, 2013: 349-350). The paradoxical consequence is that the scope of human rights protection depends on the formalistic assessment of factual circumstances.

Second example: in *Sale v. Haitian Centers* (1993: 183), the Supreme Court held that non-refoulement principle did not apply outside the national territory and the government may return asylum-seekers provided they have not yet reached or crossed the national border (for instance, in case of interdiction and return of asylum vessels on the high seas). The Court upheld the formalistic, textual interpretation of the word "*return*" in Article 33(1) of 1951 Refugee Convention advanced by a Presidential Executive Order. Whilst conceding that such strictly territorial interpretation of Article 33(1) "*may even violate* [its] *spirit*", the Court however concluded that "*a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions*"[11]. Once again, the Supreme Court split the exercise of power (the Flag) and the application of the law (the Constitution).

Third example: diplomatic assurances are required by the US Government before transferring foreign nationals to countries whose human rights record displays a real risk of human rights violations. The US only gets the promise from the receiving State that "*appropriate humane treatment measures*" (a lower standard than full protection of human rights) will be guaranteed (U.S. Department of Defense, 2015), but there is no substantive assessment of the real risk of human rights violations occurring after the transfer. The US only relies on the formal assurance

[11] The word "*return*" in Article 33(1) would only be "*referred to the defensive act of resistance or expulsion at the border rather than to transporting a person to a particular destination*" (North, 2011).

offered by the receiving State and the seeking of such formal promise is the only legal requirement to abide by the human rights obligations.

2.2 The European Functionalism

In Europe the general approach to these issues is different, because European courts (especially supranational courts) assess the relationship between politics and law in functional rather than formalistic terms.

In our reasoning the phrase "European functionalism" means that legal interpretation is closer to the spirit of the law (to its teleological interpretation) than to the letter of the law (to its literal interpretation). Functionalism often extends the reach of human rights protection, because it also makes it almost always possible to link the exercise of powers (especially abroad) by governments and the application of law. Functionalism may therefore lead more easily to an extraterritorial interpretation of the relationship between power, law and territory.

Whenever European judges are called upon to protect individuals against human rights violations committed by governments, as will be discussed below, they always apply the "reality on the ground test" and reject literal and formal interpretations of the law. The main consequence is that functionalism almost always links the Flag and the Constitution (ECHR, EU legislation, domestic laws, etc.) and States are usually held accountable for their actions wherever in the world (at home or abroad) those actions may have been committed or their consequences felt. It is no coincidence that personal and territorial models of jurisdiction are widely interpreted and applied so that almost anyone might fall within the jurisdiction of States. For instance, the ECtHR is not far from recognizing that even the simple power to kill exercised abroad brings the victim under State jurisdiction. In *Jaloud v. The Netherlands* (2014), the Court stopped just one step before reaching that conclusion and only a "drop" of American-style formalism in a "sea" of European-style functionalism pushed the Court - at least for the time being - to still "*draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first, such that in the first case there is an*

obligation to respect the person's right to life yet in the second case there is not" (*Al-Saadon v. Secretary of State for Defense*, 2015, para. 95 and 106).[12]

European functionalism also makes circumstances of fact surrounding human rights violations irrelevant for the courts. Human rights may be infringed by a policeman patrolling the peaceful streets of London as well as by a soldier during security operations carried out in occupied Iraq in the aftermath of the war. In the latter case it is also irrelevant whether the violation occurred within a military base under the exclusive control of a State or in the whole region for which the State had assumed authority and responsibility for the maintenance of security (*Al-Skeini v. the United Kingdom*, 2011). Judicial assessment of "*surrounding circumstances*" is therefore one of the greatest differences between American formalism and European functionalism: they weigh too much for American judges (and habeas corpus is denied to Bagram prisoners) and they weigh too little for European judges (and the result is *Al-Skeini* case-law).

As a general rule, in Europe situations concerning human rights are always assessed on a case-by-case basis and with regard to the existing reality on the ground in order to detect any possible real risk of human rights violations for individuals.

The main consequence of the judicial application of the reality on the ground test is that - in case of return, extradition and removal - the test rules out any probative value to the fact that the receiving State is party to relevant international human rights treaties.[13] Given that functionalism prohibits formalistic and literal interpretations of human rights rules and concepts, the sending State must always demonstrate that the receiving State is a "*safe country*", i.e. a country where human rights are generally and consistently protected and there are no substantial grounds "*for believing that there was a real risk that the applicants would be subjected to treatment contrary to Article 3*" (Prohibition of torture,

[12] On the contrary, in 2015 the London High Court held that "*whenever and wherever a Contracting State purports to exercise legal authority or uses physical force*" the victim always falls within its extraterritorial jurisdiction (*Al-Saadon v. Secretary of State for Defense*, 2015, para. 95 and 106). In 2016, however, the UK Court of Appeals disagreed with the High Court and preferred leaving "*for the Strasbourg court to take this further step, if it is to be taken at all*" (*Al-Saadon v. Secretary of State for Defence*, 2016: para. 70).

[13] "*The existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where* [...] *reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of ECHR*" (*Hirsi Jamaa v. Italy*, 2012: para. 128 and 136).

inhuman or degrading treatment or punishment) of the ECHR.[14] The safe country test also applies to EU Member States, because there is no presumption they would respect fundamental rights only because they are members of the EU (*M.S.S. v. Belgium & Greece*, 2011; *N.S. v. Secretary of State*, 2011).

Against this backdrop, it is no coincidence that diplomatic assurances offered by receiving States to European sending States almost never pass the reality on the ground test, even if a memorandum of understanding is in place between States.[15] US-style generic and thin assurances are never allowed by European courts and a substantial case-by-case assessment is always required: assurances may only be accepted if they are "*detailed*", "*reliable*" and "*specific*" enough and provide "*individual guarantees*" that the person, if returned, "*would be taken charge of in a manner adapted to*" his personal situation.[16]

Lastly, European functionalism recognizes the extraterritorial scope of the non-refoulement principle. In line with the UN High Commissioner for Refugees advisory opinion, "*the decisive criterion*" for applying the principle is whether asylum-seekers "*come within the effective control and authority*" of the State wherever it happens, including interdictions at sea (UNHCR, 2007: para. 43). Such interpretation is consistent with the overriding humanitarian object and purpose of the principle and perfectly matches the European teleological approach to human rights legal instruments.

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[14] A State is "*safe*" when "*(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention*" (European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection. (2013). Official Journal of the European Union, L180, pp. 60-95), Article 38(1)).

[15] The British Court of Appeals denied any probative value to the Memorandum of Understanding between the UK and Libya which contained written diplomatic assurances and held that in deportation and extradition cases "*it still remained the duty of the signatory State to determine what risks the deportee would be exposed to upon return even with a memorandum being in place*" (*AS & DD v. Secretary of State*, 2008).

[16] «*Swiss authorities were obliged to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together* [...] *Without detailed and reliable information* [...] *the Swiss authorities did not have sufficient assurances* [and in case of return] *there would accordingly be a violation of Article 3 of the Convention*" (*Tarakhel v. Switzerland*, 2014: para. 120 and 122).

3 Narrowing the Gap Between Differences: an American Model for European Security Policies?

The analysis carried out so far shows, on one hand, that the US formalism often facilitates the splitting up between the extraterritorial exercise of powers by the government and the application of law and, on the other, that European functionalism almost always makes that power fall under the law's rule. It goes without saying that scope and content of human rights protection as well as the overall security model vary depending on the chosen approach.

In the United States the formalism is still the main methodology and legal ideology in assessing facts and circumstances, interpreting and applying rules to the procedures of domestic and international legal systems and still there is no meaningful convergence towards the European functionalism.

In Europe, instead, perhaps a process was set in motion through which the gap between the two sides of the Atlantic Ocean is slowly narrowing with the European side coming a little bit closer to the American one in terms of management of security threats. What is probably changing in Europe is the way of dealing with the two general issues mentioned above: the culture of security and the relationship between politics and law.

In times of growing terrorist threats and unprecedented irregular migration flows, there is an increasing shift towards tighter security of European politics and legislation and some States, right or wrong, are wondering whether the highest level of human rights protection afforded by European courts in the last decades is still "sustainable" with respect to the need of defending their own security from these new threats.

The increasing securitization is also confirmed by: *a*) the amendment or suppression of some fundamental principles of European integration (EU citizens no longer undergo a minimum check when crossing a EU external border and the reintroduction of border controls within Schengen is no longer a truly exceptional measure)[17]; *b*) the massive-scale data collection, treatment and

[17] Since April 2017 EU Member States are obliged to carry out systematic and enhanced checks against relevant databases on all persons, including EU citizens, at all external borders (air, sea and land borders), both at entry and exit. By 2020 it should also be operative both the ETIAS

analysis to identify previously unknown likely suspects and create a general assessment criteria for criminal profiling (see, for instance, European Parliament and Council Directive 2016/681/EU, 2016) [18]; *c*) the renewal and enhancement of EU return policy to make it more effective on the basis of principles (wider use of accelerated, swifter and simplified procedures, of presumptions and inadmissibility grounds, of detention, etc.) and goals (curbing abuses of asylum procedures, prevent and combat irregular migration, etc.) which are similar to those of the US's return policy (Commission Action Plan, 2015[19]; Commission Renewed Action Plan, 2017[20]); *d*) the enhanced cooperation with non-EU States to prevent and manage irregular migration, including the possible establishment of processing centers funded by the EU in African countries (Libya, Chad, Niger, etc.) to identify refugees and hold and turn back migrants. The externalization, or offshoring, processing policy echoes the widely criticized Australian policies of regional resettlement and increases the risk of violations of international human rights law and of the EU turning a blind eye to that reality.

As anticipated, the latest European policies of securitization underpin a different way of dealing with security and with the relationship between politics and law. All of this is having far-reaching legal consequences and serious implications. In fact, the political quest for more security also involves the limitation of the judicial check and a more formalistic approach to interpreting and applying the European legal systems. In other words, it involves two legal solutions that are typical of the US approach to security issues and threats.

(European Travel Information and Authorization System), an automated system to determine who will be allowed to travel to Europe by cross-checking visa-exempt third country nationals' information against all IT-system (Schengen Information System, Europol and Interpol's databases, etc.), and the EES (Entry-Exit System), an automated system to reinforce border check procedures for all non-EU nationals admitted for a short stay in the Schengen area (EES will register name, type of travel document, biometrics and date and place of entry). Lastly, on September 2017, the European Commission proposed to update the Schengen Borders Code to adapt the rules for the reintroduction of temporary internal border controls and better tackle new security challenges such as terrorist threats. Time limits for internal border controls will be prolonged to a maximum period of two years in order to respond to evolving and persistent serious threats to public policy or international security.

[18] European Parliament and Council Directive 2016/681/EU of 27 April 2016 on the use of passenger name record for the prevention, detection, investigation and prosecution of terrorist offenses and serious crime. (2016). Official Journal of the European Union, L119, pp. 132-149

[19] Commission Action Plan (2015) EU Action Plan on return of 9 September 2015, COM(2015) 453 final.

[20] Commission Renewed Action Plan. (2017) Communication on a more effective return policy in the European Union – A Renewed Action Plan of 2 March 2017. COM(2017) 200 final.

Regarding the limitation of the judicial check (especially of the ECtHR), for different reasons but with the same goal of better protecting their own security, States such as France, Ukraine and Turkey derogated from the obligations under the ECHR according to Article 15 (also the UK might soon derogate from these obligations). Furthermore, the ECHR system will be amended by Protocol no. 15, and, once in force, an explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation will become part of the ECHR. It will then be clearer that "*the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions*" and apply and implement the Convention.[21]. The reform will shift the present balance between national courts and ECtHR in favor of the former also because States, right or wrong, believe that the legal understanding of the ECHR as a "living instrument" has gone too far in that it expanded rights and freedoms too much beyond what the framers of the Convention had in mind in 1950.[22]

In other words, derogations, reforms and States' attitude suggest that in times of increasing security threats the European States feel a degree of unease with the present balance of power between governments and supranational courts and are looking for a different judicial framework in which national courts might apply more often the margin of (national) appreciation than the (international) living instrument understanding.

[21] Council of Europe (2013) Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. Explanatory Report, available at: http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf (November 17, 2017), para. 9.

[22] In the UK, the ever-expanding reach of the Convention in violent combat scenarios rather than only in peacetime was termed as a "*judicial diktat*" and a "*form of judicial imperialism*" putting at risk the British armed forces (Ekins, Morgan & Tugendhat, 2015). More in general, the application of ECtHR jurisprudence in the UK law was considered as undermining not only "*the role of UK courts in deciding on human rights issue*" but also the "*sovereignty of Parliament, and democratic accountability to the public*" because Section 3(1) of the Human Rights Act requires "*UK courts to read and give effect to legislation in a way which is compatible with Convention rights as far as it is possible to do so*". As a result, the Conservative Party wants the ECtHR to be no longer binding over the UK Supreme Court and become an advisory body only so as to find "*a proper balance between rights and responsibilities in UK law*". A new British Bill of Rights and Responsibilities should accordingly replace the present Human Rights Act and the "*formal link*" between the British courts and the ECtHR should be broken so that "*the UK courts, not Strasbourg, will have the final say in interpreting Convention rights, as clarified by Parliament*" (Conservatives, 2014: 4-6).

In regard to a more formalistic approach to interpreting and applying rules and procedures, several policies and provisions recently proposed or adopted in the field of migration seem to distance themselves from European functionalism (and the related reality on the ground test) and get a little bit closer to American-style formalism. After all, this shift is almost inevitable once simplification and swiftness of asylum and return procedures and cooperation with third countries become key instruments of the European migration and return policies.

On one hand, in fact, simplification and swiftness sit uncomfortably with that thorough and careful examination of situations concerning asylum-seekers and migrants required by the reality on the ground test and are more easily secured by literal than teleological interpretation of the law. On the other, the enhanced partnership with African countries requires a greater reliance and respect for other nations' sovereignty, assurances and commitments (Commission Communication, 2016[23]). Partnership inevitably allocates and distinguishes competencies, tasks, duties and responsibilities between counterparts, which may weaken the European goal to uphold and promote its own values "*in its relations with the wider world*" (*Treaty of Lisbon*, 2007, article 3, para. 5) and to "*develop a special relationship with neighboring countries* [...] *founded on the values of the Union*" (*Treaty of Lisbon*, 2007, article 8, para. 1[24]). In fact, the more the EU relies on cooperation and assurances from third countries, the less it can command respect for absoluteness and universality of human rights standards. After all, outsourcing human rights protection inevitably lowers these standards and it might eventually lead Europe to turn a blind eye or claim no liability for violations occurring abroad.

In other words, managing irregular migration by relying on simplified and accelerated procedures and cooperation with third countries materialises the risk of lowering human rights standard's and formalism and literal interpretation and application of the law might allow Europe to shirk its responsibilities while pursuing the final goal of strengthening security.

[23] Commission Communication (2016) Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration of 7 June 2016. COM(2016) 385 final.

[24] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01

A number of recent developments in the field of migration support these findings and submissions.

First example: on September 2015, the European Commission proposed the establishment of an EU common list of safe countries of origin which includes Turkey and the Balkan countries (Commission Proposal, 2015[25]). Whilst continuing to be assessed on an individual case-by-case basis, applications for international protection lodged by nationals of safe countries would also be fast-tracked for allowing faster returns if refused. The fear is that the safe-country assumption will actually make the assessment of the application too fast and cursory and the need for faster returns will prevail over the effective protection of human rights. In this respect it is the thought-provoking Action Plan on measures to support Italy in reducing migratory pressure presented by the European Commission on July 2017. The Commission, in fact, urges Italy to develop "*a national list of 'safe countries of origin', prioritising the inclusion of the most common countries-of-origin of migrants arriving in Italy*" (Commission Action Plan, 2017: 4[26]). With this recommendation the Commission reverses the logic of the list of safe countries: third countries should be included on the list following a thorough and careful assessment of their being "*safe*", but in this case the inclusion depends only on the fact that certain countries are the most common countries-of-origin of migrants arriving in Italy. In doing so, however, the true objective of the list becomes to reduce migratory pressure and protect European security at any cost while it should be the other way around, namely to reduce the abuses of the asylum system (clearly unfounded claims, subsequent applications, etc.) after a careful assessment of the human rights situation in foreign countries.

The case of Nigerian nationals is a telling example. In 2016 Nigeria was one of the most common countries-of-origin of migrants arriving in Italy and the recognition rate of asylum application lodged by its nationals (more than 47,000) was so low (8% in the first three quarters) that the abuse of the asylum system is seemingly clear. At the same time, however, the International Organization for Migration "*estimates that 70% of the Nigerian women and children who arrived in Italy in*

[25] Commission Proposal (2015) Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purpose of Directive 2013/32, and amending Directive 2013/32/EU of 9 September 2015. COM(2015) 452 final.
[26] Commission Action Plan (2017) Action Plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity of 4 July 2017, SEC(2017) 399.

2015 and the first five months of 2016 were victims of trafficking".[27] The difference between these two data exposes a failure in the asylum system notwithstanding Italian authorities would apply ordinary asylum procedures, which require careful and thorough examination of the application. If Nigeria were to be included in the list of safe countries, accelerated and streamlined asylum and inadmissibility procedures would then apply and the risk of not being able to identify a victim of trafficking would become considerably greater.

Second example: in March 2016 the EU and Turkey issued a joint statement in order to have all irregular migrants crossing from Turkey into Greek islands returned to Turkey.[28] It is quite clear the formalistic approach towards interpretation and application of the Statement. The European Council and the Commission deny any binding value to the Statement, because it would be a simple press communique setting only political commitments.[29] Such interpretation of the Statement runs counter to the reality on the ground given that the content of its "*action points, thereby enumerating the commitments to which the parties have consented*", the active involvement of EU Institutions in its implementation and relevant international law suggest that it is an international binding agreement.[30] Furthermore, the ECJ dismissed an action for annulment of the Statement on the ground of its lack of jurisdiction. Whilst qualifying the Statement as a binding international "*agreement*", the ECJ held that it "*cannot be regarded as a measure adopted by the European Council*" (or by the EU) but by the EU Member States in their own capacity (*NF v. European Council*, 2017: para. 71-72). The thin and somewhat ambiguous distinction drawn by the ECJ between the

[27] GRETA stands for Group of Experts on Action against Trafficking on Human Beings. GRETA (2017) Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking on Human Beings, GRETA(2016)29 (published on January 30, 2017), para. 15.

[28]EU-Turkey Statement (2016) Press Release 144/16 of 18 March 2016, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/EU-Turkey-statement/ (November 19, 2017).

[29] Some Members of the European Parliament have described the whole situation as a "*farce*" and accused other EU Institutions of switching tactics by calling "*statement*" what was previously called and truly is an "*agreement*" in order to exclude the European Parliament from the legislative process of negotiation (Nielsen, 2016).

[30] "*As noted by the International Court of Justice, international agreements 'may take a number of forms and be given a diversity of names' (Qatar v. Bahrain, para 23)* [...] *What matters is not the form, but the 'actual terms' of the agreement and the 'particular circumstances in which it was drawn up'* [...] *The case-law of the ICJ demonstrates that atypical instruments, such as the minutes of a meeting or a 'joint communiqué' (i.e. a statement), may actually be international agreements*" (Gatti, 2016: 3).

EU agreement and EU Member States agreement reveals a formalistic approach to the reality that it would have been unthinkable just a few years ago in Europe.

The formalism underpinning the Statement is also demonstrated by the generic and undetailed assurances that returns take place "*in full accordance with EU and international law*" (Turkey, for its part, assures the respect of human rights once irregular migrants are returned), that "*all migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement*", and that "*any application for asylum will be processed individually by the Greek authorities*". These kinds of diplomatic assurances (not even binding according to EU Institutions) are much more similar to the formal ones sought by the US Government than to the substantive ones required by the ECtHR in the *Tarakhel* decision. It seems equally formalistic the behavior of the Commission insofar as it laconically responds to the criticism of human rights violations[31] by confirming that returns "*are carried out strictly in accordance with the requirements of EU and international law, and in full respect of the principle of non-refoulement*" and that the situation in the Turkish centers "*complies with required standards*" (Commission Fifth Report, 2017: 5[32]). Political and legal ambiguities surrounding the EU-Turkey Statement raise doubts on true objectives of European States and Institutions. The Statement seems to be a political *escamotage* and a legal shortcut to institutionalizing the US-style scant diplomatic assurances, avoiding a strict application of EU and international law and achieving at any cost the goal of halting irregular migration flows.

[31] The Statement "*raises several serious human rights issues relating to the detention of asylum seekers in the Greek islands, the return of asylum seekers to Turkey as a 'first country of asylum' or 'safe third country' and the Greek asylum system's inadequate capacity to administer the asylum process*". Moreover, returns to Turkey may not meet the requirements of EU and international law as regards, in particular, the safe third country requirement (Council of Europe (2016) The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016. Report of the Committee on Migration, Refugees and Displaced Persons (Parliamentary Assembly) of 19 April 2016. Doc. 140128, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22612&lang=en (November 17, 2017), para. 3.2-3.3.

[32] Commission Fifth Report (2017) Fifth Report on the progress made in the implementation of the EU-Turkey Statement of 2 March 2017. COM(2017) 204 final.

4 Conclusions

Differences between the US and European approaches to security still exist. However the gap is narrowing, insofar as Europe is increasingly adopting US-style attitudes and policies in dealing with the culture of security and the relationship between politics and law. All of this is causing a legal identity crisis given that formalism and limited judicial checks are far from European legal culture and tradition. Following decades of strong and extensive protection of human rights in any situation, States and the European Commission are seeking for a new and different balance between migration, human rights and security. It is almost like States and the Commission are nowadays ready to trade some political idealism and legal functionalism in the field of human rights for more political pragmatism and legal formalism in the field of security. Derogations and reform of the ECHR and Schengen systems, the revised and enhanced return policy, the controversial legal nature and paternity of the EU-Turkey Statement and the increasing reliance on cooperation and assurances from third countries are emblematic clues of the European renewed approach to security. Even if Europe has substantially stayed true to a high standard of human rights protection for the time being, the quest for more security through less judicial control and more legal formalism might eventually lead to instability within the European legal cultures and systems.

Should the formalistic approach of governments clash with the functionalist approach of courts in the near future, there would be the risk that the former might not be so willing to settle the dispute with the latter. The first testing ground might be the lawfulness of enhanced cooperation with third countries in the field of migration. European Institutions and governments have been accused of complicity in abuses committed in Libya against migrants (Nielsen, 2017): should a European supranational court uphold these charges, how would governments react? Would they respect and implement the ruling as always happened in the past or would they take a critical and challenging stance as Visegrad States (Poland, Hungary, Slovakia and Czech Republic) did in the *affaire* of mandatory relocation of asylum seekers decided by the ECJ against their interests (*Slovakia and Hungary v. Council*, 2017)?

It is too early to draw a conclusion, but courts and governments should agree on a new balance between security and human rights so as to avoid, on one hand,

any kind of institutional conflicts and, on the other, the risk that European governments would sooner or later start following more closely some US policies (hearsay evidence,[33] expedited removal procedures, enhanced interrogation techniques, etc.) which, right or wrong in that legal culture, are however far away from the European one in terms of a "*decent respect to the opinions of mankind*" and to... human rights.

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[33] See, for instance, the UK proposals to reform "*the rules for introducing hearsay evidence in criminal trials without requiring a separate determination at the end of submission of all evidence to determine if the submission was justified*" (Stephan, forthcoming).

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From an Individual to the European Integration
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The European External Action Service (EEAS) and the Possible Evolution of a European Diplomatic Service. Myth or Reality?

Ezio Benedetti

Abstract This article aims at ascertaining in a critical perspective the main legal issues and political challenges accompanying the evolution of the European External Action Service (EEAS). It focuses its attention on the problems emerged in the last few years in developing an effective and consistent Common Foreign and Security Policy (CFSP) supported by an operational structure as EEAS is. The idea of a fully operative European diplomatic service is conflicting with the reality of a weak and inconsistent action of the EU in different international scenarios in the last few years which makes the EEAS as a sort of lame duck. Insufficient political leadership and contradicting institutional arrangements, the tendency of bigger Member States to prioritize their national foreign policies, and the habit of some of the smaller ones to act in contradiction with EU strategies and priorities have all hampered effective collective action with a clear and indisputable negative effect on the institution of a credible European diplomatic service.

Keywords: • EEAS • Lisbon Treaty • Common Foreign and Security Policy • Art. 27 (3) TEU • Council Decision 2010/427/EU •

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1 Introduction

The present study focuses on the legal definition and on the analysis of the inter-institutional dimension and of the main objectives of the European External Action Service (EEAS). In 2009 the EEAS was first introduced by the Treaty on the European Union (TEU) in art. 27 (3).[1] This article of the Treaty of Lisbon encompasses that the EEAS will assist the High Representative of the Union for Foreign Affairs (HR) and it will cooperate with EU Member States' own diplomatic services. In performing its activities and in pursuing its goals EEAS consists of officials from the Commission, the Council secretariat and those diplomatic services. The provisions set out in art. 27(3) TEU have been realized with the adoption of Council Decision no. 427 of 26 July 2010 establishing the organisation and functioning of the European External Action Service.[2] The establishment of the EEAS was based on a proposal made by the former High Representative Catherine Ashton.[3] The European Parliament had earlier adopted a resolution on the proposal by a large majority on 8 July 2010. The EEAS was then formally launched on 1 January 2011.

The general idea fostered both by art. 27(3) TEU and by Decision 2010/427/EU is that EEAS should form a central part of the new institutional architecture of the EU's external policies. Assuming that the EEAS may incorporate all elements of the EU's external actions, its structure should be crucial to ensuring future political space for development cooperation and humanitarian aid.

Nevertheless, despite these ambitious goals, this analysis has to take into account the problematic relationship existing between a European diplomatic service in contraposition with national foreign policy dimension, still jealously guarded by

[1] Art. 27(3) TEU: "*In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.*"

[2] Council of the European Union (2010), *Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service*, 2010/427/EU, in *Official Journal of the European Union*, L 201/30, 2 August 2010.

[3] Council of the European Union (2010), *Proposal from the High Representative for Foreign Affairs and Security Council to the Council, Draft Council decision establishing the organisation and functioning of the European External Action Service*, ST 8029/2010, Brussels, 25 March 2010.

each Member State. The general aim is to understand the points of contact and the cleavages existing between the community method and the intergovernmental dimension in such an important area as foreign policy is, so as to be able to hypothesize the role of the European Union as a potential credible international actor and interlocutor in the coming years.

First, it is necessary to stress the strong relation existing between the creation and the development of an idea of "European diplomacy" and the parallel evolution of a legal framework for a Common Foreign and Security Policy (CFSP). This approach is obviously giving for granted some considerations related to the legal status of the European Union, which is unique in the panorama of the existing international organizations; there are therefore considerations regarding the attribution of legal personality to the Union directly linked to its ability to act on the international scene.[4]

The first part of this analysis will make a direct reference to the historical evolution of a CFSP through the succession of Treaties starting from its origins, which can be found in the evolution of the European Political Co-operation (EPC), launched in 1970, foreseen by the European Single Act in 1987, up to the current configuration enacted by the Treaty of Lisbon (Schütze, 2015: 11-12). The analysis introduces the most relevant legal aspects related with EEAS and CFSP contained both in the Treaty on the European Union (TEU) and in the Treaty on the Functioning of the European Union (TFEU). A specific attention will be given to the new role entrusted to the High Representative of the Union for Foreign Affairs and Security Policy (HR) in the framework of EEAS. In this sense, the understanding of the institutional placement of this figure is fundamental. The HR is conceived as a sort of bridge between the Council of the EU and the European Commission and, thus, potentially contradictory actions may arise (Christiansen, 2002: 11-24). Under this perspective it seems self-evident that the personalisation and the interpretation given to this political role is central and has a direct and relevant impact on the concrete results of the CFSP and is capable to achieve through EEAS. Some authors stressed that it can be conceived as the *bras armé* of the High Representative (Johansson et al., 2014).

[4] For the complex and still debated issue of the international legal personality of international organizations see: Sands & Klein, 2001: 470; Bianchi, 2009: 112-145; Portmann, 2010: 112. For an analysis of the legal personality of the European Union after the entry in force of the Lisbon Treaty see: Zanghì, 2010: 347-348; Delgado Casteleiro, 2016; Schütze, 2015: 117-146; Schoutheete & Andoura, 2007.

In the following paragraph the paper focuses its attention on the structure and on the mandate of the EEAS, as well as on the inter-institutional dimension of its functions and powers. It must be stressed that the EEAS is only mentioned in a vague manner by the Treaty of Lisbon; in fact the TEU does not dispose anything as for its structure or functioning. In 2010 these vague dispositions of the Treaties caused and led to a harsh and peculiar "inter-institutional battle" between the European Commission, the European Parliament and the Council of the European Union. This institutional strife was based on the historical and traditional confrontation between the communitarian and intergovernmental dimensions leading the integration process since its origins (Van Elsuwege, 2010: 987-1019). In addition to that, this traditionally differentiated approach to the process of integration was accompanied, in the case of EEAS, by the doubts and issues related to the democratic control over the activities of this service. It can seem that this problem is of secondary importance, but it must be reminded that the "*democratic deficit*" argument has been for many years one of the most sensitive issues still pending on the future and on the evolution of the European integration process (Schütze, 2015: 71-73). Considering the above, it seems quite clear why the Council's Decision 2010/427/EU, which officially established the service, focuses its attention mostly on its administrative structure and on the network of EU delegations in the world, somehow disregarding the decisional process of the EEAS in relation with CFSP objectives.

The conclusions of the analysis will try to highlight if the institution of EEAS and its functioning in the last seven years has led to the evolution of a veritable and consistent European diplomatic service, or if this ambitious goal is still more of a myth than a reality. This conclusion could be real if we take into consideration the different international crisis of the EU and, thus, the External Action faced in this period. Nevertheless it must not be disregarded the fact that the EEAS constitutes a great novelty and potentially an extremely innovative tool in developing a strong Common Foreign and Security Policy of the EU.

2 The Creation of the EEAS: the Rise of a European Diplomacy or the Continuation of Traditional Member States' Foreign Policy?

The creation of the EEAS is the latest development in a series of EU initiatives concerning the enhancement of a unified European foreign policy. Although foreign policy has always been on the agenda of the intergovernmental European summits, it has only risen to prominence with the creation of the Common Foreign and Security Policy (CFSP) in 1993. Ever since then its institution building has been a top-priority during the subsequent meetings of the European heads of state.

Alongside the CFSP other initiatives concerning European cooperation in the field of foreign affairs have emerged. These developments might give the impression that now, after two decades of intensive European debate, this aspect of governance has become increasingly Europeanized. However this is not necessarily true. Due to the delicate position foreign policy authority holds in a state's perception of its sovereignty, EU members have been reluctant to transfer decision-making capabilities to a supranational institution. Nevertheless, it would be unjust to characterize the current foreign policy structure as solely intergovernmental (Schütze, 2015: 267).

The signing of the Treaty of Lisbon in December 2007, which called for the formation of the European External Action Service, is the latest expression of a common will to advance European cooperation in the field of foreign policy. Although the Treaty includes a wide range of modifications in EU governance, it has been widely interpreted as a document aimed at strengthening the international position of the EU (Van Langenhoven & Costea, 2007: 63; Howorth, 2014: 114-118). The European Council underscored this focus by stating their belief that the treaty "*will bring increased consistency to our external action.*"[5]

This new objective could be interpreted as the start of a new era in European integration since the common market had been completed at the beginning of the millennium and the Union had finalized its enlargement towards Eastern Europe. Since the official launch of the EEAS in December 2010, the service has

[5] European Council (2007), *Presidency Conclusions – Annex on 'EU Declaration on Globalisation'*, Brussels. 14 December 2007. Via http://consilium.europa.eu .

been expected to manage and improve the pre-existing European structures on foreign policy, *inter alia* the CFSP, and to enhance Europe's influence in a rapidly evolving, globalized world. These ambitious objectives, along with the appointment of an independent High Representative of the Union for Foreign Affairs and Security Policy have raised the profile of this formerly subordinated aspect of the EU. However, due to its unclear mission and complex structure the EEAS has been difficult to comprehend for the vast majority of European citizens and has even puzzled students of EU law and international politics.

2.1 The Evolution of an European Foreign Policy: From the Single European Act to the Lisbon Treaty

First, in order to better understand the origins of the EEAS, it is necessary to present a genealogy of European cooperation in the field of foreign policy. This is essential since most former agreements have never been abolished and are still functioning, albeit within a new framework. Subsequently, the transformation of the foreign policy that was enacted by the Treaty of Lisbon will be closely examined. Here the focus will be on the prescribed *modus operandi* and the legal framework of both the High Representative and the EEAS. In the final part of this paragraph attention will be paid to the goals that have been set out by several actors involved. This part can be considered as crucial in our analysis in deciding whether the EEAS can be considered a successful organ or not.

After failed attempts to create a European Defence Community (EDC) (Schütze, 2015: 12) in the 1950's and the problems faced by EEC political integration in the 1960's, the European Political Co-operation (Davignon Report)[6], established in 1970, remained the only possible way to enhance political and foreign policy cooperation among Member States. The EPC, however, maintained its independence from the other European institutions until the first major reform treaty, the Single European Act of 1986. Although no fundamental changes were made, the Act codified the roles of the European Council, Commission and Parliament within the still intergovernmental EPC (Schütze, 2015: 13).

[6] Davignon Report (1970) Report by the Foreign Ministers of the Member States on the problems of political unification. Luxembourg. October 27, 1970, Davignon Report, available at: https://www.cvce.eu/content/publication/1999/4/22/4176efc3-c734-41e5-bb90-d34c4d17bbb5/publishable_en.pdf (July 31, 2018)

However, just six years after the signature of the Single European Act, the foreign policy structure did experience a critical transformation; a result of the Maastricht Treaty. This Treaty meant a revolutionary step towards continental integration. While the EEC became part of the larger structure of the European Union, the EPC dissolved and was replaced by the newly created Common Foreign and Security Policy (CFSP) (Schütze, 2015: 15-18).

It cannot be disregarded that the demand for this new Policy was the result of significant developments in Eastern Europe where the collapse of communist regimes left behind a highly instable region. The Maastricht Treaty stated that the CFSP would safeguard the common values and fundamental interests of the Union while aiming to strengthen international security and promote democracy, the rule of law and human rights abroad. These objectives signified the emergence of the EU as a normative power and were to be achieved through systemic European cooperation and joint action. Moreover, the treaty demanded Member States to operate in a spirit of loyalty and ordered its members not to take action contrary to the interest of the Union (Art. 11 (2). Title V. Treaty of Maastricht).

Understandably, the creation of the CFSP created great expectations. However, these hopes faded rapidly when it became clear that the CFSP was not backed by substantial powers. EU capabilities in this aspect were mainly enshrined in Title V of the Maastricht Treaty and stipulated that the CFSP was to remain a completely intergovernmental body in which the national governments maintained full authority. The rationale behind placing CFSP in a pillar separate from the more supranational European Community pillar was to avoid any spillovers from the latter into the former. In addition to this institutional standstill, the Member States also refused to endow the new organ with policy instruments or substantial financial resources. Furthermore, in the field of military and security issues, in which differences between Member States were starkest, the EU remained rather powerless. Although the Treaty text included a possible future opening for European cooperation on these aspects, it explicitly specified that NATO remained the continent's major defence structure (Art. 11 (1). Title V. Treaty of Maastricht).

Although not in the framework of CFSP, the EU succeeded in formulating strategies and structural policies towards its surrounding regions in the following years through other channels.[7]

Besides these institutional activities based on trade and values, the deficient common foreign policy ambition was eventually reinvigorated in the late 1990's. This was due to the protracted conflict in the Balkans and the EU's inability to cope with it (Bindi, 2012: 17). The frustration on both the European and American side resulted in the creation of the European Security and Defence Policy (ESDP) in 1999. This former taboo subject of cooperation in the field of security went through a surprisingly rapid development phase, since only three years after its formation it not only established a permanent European military structure, but it also launched its first crisis operation in Macedonia (Bindi, 2012: 17). In effect, the ESDP allowed the neglected CFSP to become a more active foreign policy actor that was able to put boots on the ground in the form of military and civilian missions.

From the quick overview outlined above, we can conclude that the former bitter and often violent rivalry on the European continent has been transformed into an impressive network of transnational, supranational and intergovernmental cooperation. This is the result of a multitude of treaties, conventions, declarations and accords on effectively every aspect of governance. But, while competences in several fields of authority were completely transferred to a supranational organ, most notably in trade and monetary policy, the field of foreign policy has been significantly less supra-nationalized. In addition to that, the increase in demand for external actions of the EU during the late 1990's and the 2000's, and the subsequent rise of its international profile, created internal and external dissatisfaction with the weakly equipped European institutions. By the early 2000's the EU foreign policy system could best be described as an organ with "*a cumbersome internal structure and a diffuse external representation*" (Paul, 2008).

[7]An initiative of particular interest is the Euro- Mediterranean Partnership that was set-up during a conference in 1995 in which EU countries and institutions met with governing officials of the southern and eastern Mediterranean countries. This partnership aimed at strengthening ties between the EU and its neighbouring countries through the pursuit of shared economic, cultural and political goals. The partnership came under the control of the Commission who allocated the different tasks to various Commissioners. This initiative eventually became integrated with the more structural European Neighbourhood Policy (ENP) that was developed in 2004. In this structure the EU's 16 closest neighbours became individual partner countries on the basis bilateral political relations with the EU (see Gomez, 2005).

The pillar structure, as introduced by the Treaty of Maastricht, created two policy-making regimes with overlapping competences in defining external action. The first pillar included the foreign policy accounts that fall under central European authority, such as trade, development cooperation and humanitarian aid. The supranational Commission led policy-making in this pillar, as it possessed the right of initiative and carried the responsibility for implementation. Moreover, it represented the EU externally in these dossiers. However, the Commission did need a majority in the Council of Ministers in most cases, thereby eroding a bit of the supranational character of this decision-making regime.

The second pillar consisted of the decisions concerning CFSP and was characterized by the intergovernmental method. Here, the Council of Ministers held all authority as no competences were transferred to the EU. During the monthly meetings between the several national foreign ministers resolutions could only be adopted by unanimity. Nonetheless, in practice the Council would still be reliant on the central European institutions. Due to a bigger staff and a wide range of expertise the Commission was often asked to help the Council in both policy-making and implementation. Additionally, the workload of the Council was often too big, causing decisions to be made on a lower level within the bureaucratic machinery of Brussels.

Although the creation of separate pillars aimed at providing a clear structure so that actors, authorities and decision-making procedures were clearly defined, it effectively created the opposite. On many topics of foreign policy both pillars were used and all EU actors were involved. Critics argued that this structure created some malfunctions that caused the EU to punch below its economic and political weight (Crowe, 2006: 107-114; Paul, 2008: 14). Amongst the problems was the looming risk of institutional inconsistency, since within both pillars and at various committees people would work on the same issue while it seldom resulted in the same policy. This was somewhat improved by the installation of a separate High Representative for CFSP in 1999, but it did not completely mitigate the problem due to the reluctance of Member States to empower this position with ample resources. In short, the institutional split in resources and responsibilities impeded the development of a proactive and coherent EU foreign policy.

In addition to the overly complex internal structure, the EU also possessed little simplicity in its external representation. For matters within CFSP continuity was often lacking because of a rotating presidency within the Council. Every six months a new member would head the organ and would change the focus of Europe's foreign policy. This was somewhat improved by the installation of a High Representative for CFSP in 1999, but not to a meaningful extent. Moreover, the plethora of European institutions with foreign policy responsibilities led to confusion in partner countries about whom to approach on what subject. Although the Commission was permanently represented in several third countries, it did not possess full authority and it allegedly also lacked diplomatic professionalism (Spence, 2006: 356-395; London Cameron, 2007). In short, this diffuse external representation impeded the Union in becoming a visible and influential player on the international scene.

The shortcomings of the foreign policy structure, as set up by the Maastricht Treaty, surfaced quickly after its implementation and became increasingly apparent due to the EU's rise to international prominence, especially in economic terms. Soon the need for reform became undeniable and triggered the European heads of state to set up the "Convention on the future of the European Union in 2001". This working group was issued to set up a draft constitution for the EU. This unprecedented path towards unity had a rather general aim towards reforming the EU's legal foundations. As to external action specifically, the Council asked the Convention to make the Union "*stronger in the pursuit of its essential objectives and more present in the world*".[8]

Looking back, this assignment initiated a process that would eventually lead to a fundamental reorganization of the EU's foreign policy structure and the set-up of the Union's own body of representation: The External Action Service (EAS). The Convention presented a draft Treaty adopting a constitution for Europe in July 2003 that would have rigorously rearranged the Union's constellation. Undoubtedly, one of the most affected fields of governance by this document would have been the CFSP.

[8] European Council (2001) Presidency Conclusions, December 12 2001, available at: www.consilium.europa.eu (July 31, 2018)

However, due to the negative referenda outcomes in France and The Netherlands in 2005, the Union had to go back to the drawing board in order to come up with a treaty that was supported by all. The result was a slightly modified document that amended the former European Treaties instead of the constitutional objective of completely replacing them (Schütze, 2015: 34). Signed in Lisbon in 2007, the Reform Treaty nevertheless brought key innovations to the foreign policy system of the EU. Undoubtedly, the most important innovations following the Lisbon Treaty are the revived position of the High Representative and the creation of the EEAS.

2.2 The CFSP and the Provisions Set in the Treaty of Lisbon

It is incontestable that Common Foreign and Security Policy (CFSP) remains weak and underdeveloped compared to other EU policies, even if a significant development occurred since the entry in force of the Treaty of Lisbon. While the reforms adopted by the Lisbon Treaty have, to some extent, strengthened the capacities of the Union, it is clear that its overall international position has weakened in the ten years since the Treaty's signing (Juncker, 2017; see also European Union External Action, 2017). With its emphasis on soft power, preference for legal solutions, and enthusiasm for multilateral diplomacy, the EU has had trouble adjusting to a multipolar world increasingly ruled by power politics. However, there are also deeper structural and legal reasons for the EU's inability to respond adequately to a deteriorating security environment. And some of these reasons are to some extent related with both the legal limits of the CFSP found in art. 27 of TEU as well as to the weak institutional structure of the EEAS, adopted by Decision 2010/427/EU. As we will see, this inadequate legal framework had clear consequences in the difficulties that the EU faced in creating a veritable European diplomatic service during the last seven years of action of the EEAS.

The basic rules of the decision making processes within CFSP are the most serious constraints and remain the most evident brake to its further development and effectiveness in many actual international crisis scenarios (Syria, Libya and Ukraine are but three of possible examples). According to the Treaty of Lisbon the Member States still decide on CFSP issues by unanimity and there is no provision to coordinate the possibility to run their own national policy in parallel (Schütze, 2015: 36). As clearly stated in a recent research paper published by a prominent think tank:

> "*These limitations compound the inherent problems of collective action by a large group of states, such as the diversity of interests, insufficient solidarity, free riding, and fragmented and weak leadership. Both the European economy's current recovery and a political constellation more favourable to reforms improve the chances for incremental steps toward a stronger foreign policy. Increasing the overall level of activity, bringing the member states more fully on board, building alliances to defend global governance, and mobilizing the expertise present in the institutions can help build the confidence and ambition necessary for effective international engagement.*" (Lehne, 2017).

Shortly after the introduction of the euro and just before the EU's big enlargement to Central Europe in 2004, the EU reached the peak of its optimism. This sense of achievement and self-confidence influenced as well its view and role in international relations. The EU was convinced to be the guide and the pillar of a new international order based on human rights and rule of law where multilateral diplomacy would have had a fundamental role in creating elaborated international regimes capable of regulating all dimensions of globalized inter-state cooperation. The European Union saw itself as a model for the future organization of international relations on a regional basis and was convinced that other parts of the world would soon follow its model (Hocking, 2005: 1-15). This was the positive and optimistic spirit that permeated then EU high representative for foreign affairs Javier Solana's first EU security strategy in 2003 as well as the European Neighbourhood Policy (ENP) launched in 2004.[9]

[9] European Security Strategy–A Secure Europe in a Better World, European Union Global Strategy, December 12, 2003 (https://europa.eu/globalstrategy/en/european-security-strategysecure-europe-better-world). See also European Commission (2004), *European Neighborhood Policy Strategy Paper*, Brussels, May 12, 2004, available at: https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/2004_communication_from_the_commission_-_european_neighbourhood_policy_-_strategy_paper.pdf (July 31, 2018).

As already highlighted the failure of the constitutional treaty seemed to backlog the results reached by the CFSP so far, but it is a matter of fact that its foreign policy provisions reappeared – largely unchanged – in the Lisbon Treaty, which was signed in December 2007. Nevertheless, the Lisbon reforms cannot be defined as a revolution. In fact, the most serious limits on the development of an autonomous and effective EU foreign policy were left untouched and further entangled in the endurance of the unanimity principle and in the parallelism between the Member States' national foreign policy and that of the EU.

However, it cannot be disregarded that the Treaty locked the EU's various policies and instruments into a tighter institutional framework designed to guarantee consistency and thus greater effectiveness in its action. The new reform treaty intended that, for the first time, the High Representative was at the core of the new system. Being the chair of the Foreign Ministers' Council and acting at the same time as the deputy President of the European Commission, according to the Treaty of Lisbon the HR should guarantee a closer coordination between Member States and should help overcome the existing gap between foreign and security policy with the Commission's role on development, trade, enlargement and neighbourhood policies. By this point of view, it is clear that the new European External Action Service (EEAS) would include diplomats from the Member States and officials from EU institutions and serve as a coordination platform and a source of expertise and strategic advice.

If we add to the above that under the terms of Article 18 of the Treaty on European Union (TEU), amended by the Treaty of Lisbon, the power lies with the European Council to name the High Representative by a qualified majority and that the Council is also empowered to terminate the mandate before the completion of the 5-year term, by the same procedure It resulted in a crystal clear wording that the role and the will of Member States remain fundamental to guarantee the effectiveness and the consistency of the EEAS action in a medium term perspective.[10]

[10] In other words, irrespective of the wisdom or otherwise of the choice of the current incumbent, the fact is that the High Representative is, above all, nominated by the European Council. The European Parliament is also entitled to pass a motion of censure whereby the members of the European Commission, including the vice-president occupying the position of High Representative (TEU, Art. 17), would have to resign. In the meantime, the European Parliament

The High Representative's attributions are clearly circumscribed by the terms of the TEU. This in turn leaves the EEAS with a very limited space of action and with compressed autonomy. In fact, in full respect of the principle of intergovernmental cooperation, which entangled and characterized the whole evolution of the EU Foreign Policy since its early origins (Schütze, 2015: 267), according to the Treaty of Lisbon it is still the European Council that identifies strategic interests, set goals and defines general foreign policy and security policy orientations of the EU. Thus, despite the novelties introduced by the Treaty in 2007, the High Representative's maneuvering space is extremely limited both in terms of general strategy and definition of priorities and general goals of the CFSP.

However, the new CFSP launched by the Lisbon Treaty is executed by the High Representative and by the Member States using both national and EU resources. In other words, the High Representative implements a policy defined by others, namely the Member States. Her added value is to ensure that the policy remains consistent, to submit proposals to the Foreign Affairs Council (bringing together the Foreign Ministers of the member states), which she chairs, and to represent the European Union on foreign policy issues. Finally, the High Representative has authority over both the European Union delegations throughout the world and the European External Action Service (Schütze, 2015: 268).

It is extremely significant in this perspective that, as already highlighted in the introductory remarks to this article, the new TEU only devotes one paragraph to the EEAS (Art. 27 par. 3), contenting itself with stating that the Service:

> *"shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the [European] Council and of the Commission as well as staff seconded from national diplomatic services of the Member States"* (Art. 27 (3). Treaty of the European Union (Lisbon)).

As for the above, it is crystal clear that Member States still retain the main prerogatives entailed in the exercise of sovereign entitlements related with

submits queries or recommendations to the High Representative and will be inviting her to debate her policy twice each year (see Lehne, 2011).

foreign policy making. In addition to that, two texts attached as annexes to the final document produced by the Inter-governmental conference that adopted the Treaty of Lisbon must be mentioned. These are respectively the TEU Declarations n.13 and n. 14.[11] The first states that the High Representative and the EEAS "*do not affect the responsibilities of the Member States as they currently exist [and] the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States"*. Declaration n. 14 is even more clear and definitive in its approach as it adds that the High Representative and the EEAS "*will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organizations […]".*

As mentioned above, the provisions set in Art. 23 (3) of the TEU were too general and the finer details of how the EEAS was to be organised were set out in a decision by the Foreign Affairs Council, dated 26 July 2010. The negotiated agreement was for the European civil service to provide 60% of the service's total staff of 6,000. The recruitment procedure was to ensure both geographical and gender balance. Summarizing this decision, the service's budget falls under the Common foreign and security policy (CFSP) and is managed by the European Commission, but under the authority of its vice-president, namely the High Representative. The Parliament has the right to oversee the service's budget.

The rules of the game are such that, though tempting, it would be exaggerating somewhat to talk about a "*European diplomatic service*", as the EEAS does not have the prerogatives of sovereignty of a state's diplomatic corps. In substance we can say that, according to its legal basis, as well as referring to its functioning and organisational model, the European External Action Service does not have any mandate to replace the Foreign Affairs Ministries of the Member States. The Heads and the governments of the Member States continue to control the system and the main responsibilities in defining EU's foreign policy priorities and goals. By this point of view, it became immediately clear in 2011 that it would have had required much more common willpower and dexterity for the new EEAS to acquire clarity and visibility.

[11] *Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon*, signed on 13 December 2007. In Official Journal C 326, 26/10/2012. Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT.

2.3 The Action of EEAS After 2011: Institutional Weaknesses, Functional Advantages and Practical Actions' Paradoxes

Since 2009, the foreign policy establishments of the Member States were reluctant to give the EEAS the mandate and the resources needed to become the EU's foreign ministry. On the other hand the European Commission jealously defended its own powers and attributions (Zandee, 2017: 2017). Thus, the EEAS turned progressively into a kind of secretariat, interposed between the Council and the Commission with a weak institutional frame and limited capability to influence or impose decisions on either side.

Retrospectively, it can also be considered an error to locate the institutional center of EU foreign policy at the level of foreign ministers. It is matter of fact that the real players in foreign policy area today are the Prime Ministers and Presidents of Member States, with foreign ministers acting more as mere executors of decisions taken elsewhere. Effective EU foreign policy would require their direct involvement. Therefore, the entire EU foreign policy apparatus remains somewhat detached from the real decision making level.

Nevertheless, over the last seven years some concrete advantages deriving from the EEAS functions and institutional setup have become clear. First, it is indubitable that thanks to the continuity in its key functions, the CFSP machine works better and in a more consistent way than the previous system of a six-month rotating presidency. In addition, the gap between classical foreign policy led by Member States and Commission's trade and aid policies has been somehow reduced.[12] This allows various policy instruments to be more coordinated and coherent. EU delegations in third countries now deal with political matters alongside trade and aid. All of these positive aspects cannot, however, hide the fact that throughout the implementation of the Lisbon Treaty, the EU's international position has been significantly weakened.

The most evident paradox of what can be defined as a missed opportunity is that the EU's Member States obstacles, perplexities and steps undertaken against a possible enhanced collective foreign and security policy capability were

[12]In crisis management, but also when policy papers are defined and outlined in the EU institutions, officials responsible for security and diplomacy are now joined by those responsible for trade, development, and humanitarian affairs (Lehne, 2017: 12).

accompanied by the rapid deterioration of the security environment at the EU's external borders and more. As clearly stated:

> *"In the East, Russia drew the EU into a geopolitical competition for the first time after the end of cold war. A low-level conflict continues in Ukraine, and the EU members bordering Russia feel exposed to pressure from Moscow. Under an increasingly authoritarian President as Erdoğan is, Turkey, a crucial strategic partner for EU, is more and more far away from its European orientation. Turmoil in the Middle East and North Africa has thrown up a number of critical challenges, such as mass migration and terrorism, and there appear to be few prospects of the region returning to stability. All these changes do not just represent temporary setbacks, they reflect a shift in paradigm. The trends in international relations have not conformed to the EU's optimistic expectations. A multipolar world has emerged where authoritarian regimes rule in many countries and power politics have made a comeback. These changes have profound effects on the EU's self-perception as an international actor. Rather than being the vanguard of a new liberal order, the EU now appears to be a besieged, "postmodern" island in a world ruled by realpolitik."* (Lehne, 2017: 5).

One might have expected that the deteriorating overall security situation would have prompted EU actors to pull together and mobilize resources for clear and effective collective actions. However, this was not the case. While the political and security situation in many EU neighbouring countries was deteriorating, the EU's foreign policy remained quite passive. In a business-as-usual mode, it continued to conduct political dialogues with third countries and adopt diplomatic and political declarations without any concrete follow-up. Diplomatic initiatives to resolve the various regional crises remained rare and internal divisions have deepened rather than diminished.

In the rare cases when the HR called Member States for a more active approach, she often ran into a rubber wall from the same States she was advocating to intervene. Frustrated by this approach, both High Representatives Catherine Ashton and her successor, Federica Mogherini, started to avoid controversial policy debates in the monthly foreign ministers' meetings, which therefore progressively lost relevance. Paradoxically, the EU's most visible response to increasing challenges was a lowering of foreign policy ambitions. The original

idea of the European Neighbourhood Policy – that the EU would transform its neighbours into democratic market economies committed to the rule of law and human rights protection, and eventually allow them to share in the benefits of European integration – has never been underpinned by sufficient commitment (Spence, 2006: 151-153).

As for the above, it must not be surprising then that the revised neighbourhood policy of 2015 names stability and security as the only objectives. However, with the exception of migration management, which has recently turned into the top priority of the EU's policies, particularly in the Southern neighbourhood, the overall level of concrete engagement in terms of money, manpower, and high-level attention has not increased, so that even this more modest goal of rebuilding stability is still quite vague and likely to remain elusive.

At this point we cannot, however, forget to mention two recent, promising developments in the EU's international action: the EU Global Strategy (EGS) that Mogherini submitted in June 2016, and the recent decisions to enhance the EU's security and defence capabilities[13]. However, in both instances, whether or not the EU's foreign and security policy capacities will be genuinely enhanced depends on determined follow-up actions adopted by Member States.

[13] »*A fragile world calls for a more confident and responsible European Union, it calls for an outward and forward looking European foreign and security policy. Our citizens understand that we need to collectively take responsibility for our role in the world. This is no time for uncertainty: our Union needs a strategy. We need a shared vision, and common action*« (European External Action Service (2016) *EU Global Strategy 2016*, available at: https://europa.eu/globalstrategy/en/global-strategy-promote-citizens-interests (July 31, 2018); European External Action Service (2017) *Annual Activity Report*. April 29, 2017, available at: http://eeas.europa.eu/background/docs/annual_activity_report_2016_en.pdf (July 31, 2018); European External Action Service (2017) *EU Security and Defence Package*. October 19, 2017. available at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/16693/EU%20Security%20and%20Defence%20package (July 31, 2018); European External Action Service (2017) *EU Security and Defence Package*. October 19, 2017. available at: https://eeas.europa.eu/headquarters/headquartershomepage_en/16693/EU%20Security%20and%20Defence%20package (July 31, 2018).

3 Inter-institutional Relations and EEAS's Functions

After this quite negative and looming picture of EU foreign policy developments in the last decade, we need to deepen the functioning and the inter-institutional dimension of the EEAS after the Lisbon Treaty. In our opinion this is in fact a fundamental dimension which helps in understanding the difficulties and the shortcomings of the veritable and consistent CFSP, despite the innovation introduced in 2007.

Starting from 1 December 2009, the date of the entry into force of the Lisbon Treaty, an intense debate has developed on various legal aspects of the EEAS, which are only mentioned in art. 27 par. 3 of the TEU. In particular, the attention of scholars and researchers focused on the nature of the competences, on the modalities of functioning, on the recruitment criteria of the staff and on the budget of the new service. In the following pages the inter-institutional relations that have led to the development and entry into service of EEAS and the role of the aforementioned institutions in these dynamics will be analyzed in detail. From this point of view it is useful to recall at this point that the service was finally established by Council Decision on 26 July 2010, followed by two staff and financial regulations and a European Parliament Resolution for the adoption of the service budget.[14]

3.1 The EEAS and the Role of the European Commission and of the European Parliament

As already stated, like the European Parliament, the Commission has traditionally played a secondary role in the CFSP, dominated by the national prerogatives of individual Member States and bodies, based on the intergovernmental working method – characterized by unanimity or consensus –adopted by the European Council and by the Council of the European Union.

On the other hand, considering the external action taken by the Union as a whole, the assessments over the Commission's role have changed considerably. The EC manages policies such as trade and development based on the Community

[14] European Parliament (2010*). Resolution n. P7_TA(2010)0370 of the European Parliament of October 20, 2010 on Project of Rectified Budget n. 6/2010. Section II – European Council and Council; Section III – Commission; Section X – European External Action Service.* in Official Journal n. C70E March 8, 2012.

method and a large number of so-called internal policies; however, it cannot be disregarded that these policies have significant implications also outside the Union, namely environmental policies and those relating to the energy sector (Comelli & Pirozzi, 2013: 11). Thus, despite the secondary role foreseen for the Commission in the definition of the CFSP, it should not be a surprise that this institution is counted among those involved in the process of creating the EEAS, together with the Council of the European Union and the European Parliament. More specifically, the EEAS was established by decision of the Council on a proposal from the High Representative, after consulting the European Parliament and after approval by the Commission. Furthermore, the Commission is called upon to provide, together with the General Secretariat of the Council and the Member States, part of the officials, with regard to high-ranking roles, which will form the staff of the service. From this point of view, the Commission has an important weight as it owns most of the assets, understood as spaces and logistics, in the endowment of EEAS.

With regard to the personnel, on the basis of what emerged during the negotiation phase, the Directorate-General for External Relations (DG RELEX) and the Directorate-General for Development (DG DEV) are almost completely transferred within the new service. This element is of fundamental importance if we consider the numbers: in fact, the staff of DG RELEX counted about 1400 people at the time of the establishment of the EEAS, while General Secretariat of the Council counted no more than 200 officials. It is therefore clear that the Commission had a rather high specific weight and "*with a number of staff, [...] will play a significant role in shaping the EEAS2"* (Reslow & Vanhoonacker, 2010: 7). Some authors pointed out that the EC would have had a fundamental role in contributing profoundly to the creation of a European diplomatic culture based on the Community method, instead of inter-governmental tradition that characterized and still characterizes this sphere of action of the European Union.

As for the above, the results clearly state that for its composition and structure the service absorbed the Commission's DG RELEX. The reason behind this choice was to avoid any potential inter-institutional conflicts – of which there was obviously no need given the delicacy of the area in question – between the new figure of the High Representative and the possible Commissioner in charge of the management of DG RELEX in case of non-absorption into service structures.

On the other hand, focusing solely on the absorption of DG RELEX would be too limiting and reductive to fully understand the potentialities of the new EEAS and would be in full contradiction with the modern significance of foreign policy and action on the international scene, based on a multitude of dimensions that go beyond the classical concept of foreign policy, among which the economic one. This approach also explains the consideration for which, despite the transfer of DG RELEX to EEAS, the Commission did not lose its prerogatives in the context of external action and, indeed, potentially ended up increasing it thanks to greater influence on the new service (Reslow & Vanhoonacker, 2010: 8-9). The Commission maintained its prerogatives in two directions: first of all through the appointments of the Commissioners, proposed by President Barroso, aimed at maintaining a certain degree of control in strategic sectors such as, for example, that of commercial policy; secondly through the recognition of certain powers to the Commission itself, as set out in the Council Decision establishing the EEAS. Following the confirmation of his second term, José Manuel Barroso has ensured greater influence by the Commission through the assistance of three Commissioners to the new HR Ashton and, in particular, a Commissioner for Enlargement and Neighbourhood Policy, a Development Commissioner and a Commissioner for Humanitarian Aid; Barroso then ensured that trade policy, an area on which the EU enjoys exclusive competence, fell outside the range of competences of the new HR/Vice President of the Commission (Hillion & Lefebvre, 2010: 3). This approach has been confirmed by President Junker.

With a similar distribution, the Commission and its President have secured responsibility for key areas of the European Union's external action (Juncos & Pomorska, 2015: 240). To this we must add the provisions of the decision establishing the EEAS that attribute the Commission with important prerogatives (Cherubini, 2012: 477). In fact, the Commission remains responsible for the external cooperation programs of the European Union (Decision 2010/427/EU of the Council, Art. 9 (1)), albeit in conjunction with EEAS, and can provide instructions to the EU delegations for matters under its responsibility in accordance with art. 221 par. 2 of the TFEU, instructions to be implemented under the direct responsibility of the head of the delegation (Decision 2010/427/EU of the Council, Art. 5 (3)). In addition, there is the need for an agreement between the Commission, the Council and the HR with

reference to the will to open, close or modify the delegations of the European Union in the world.

At this point it is necessary to briefly outline the role and the structure of EU delegations across the world. As previously mentioned, the Commission directly owns most of the assets. These consist of the Commission's representations in third countries and in international organizations (123 at the time of the establishment of the EEAS and 139 in 2017) and by so-called *liason offices*. Prior to the establishment of the service, the delegations were directly controlled by DG RELEX. With the entry into force of the Lisbon Treaty, the delegations went under the responsibility of the new High Representative and, thanks to the recognition of the single legal personality to the Union, the Commission delegations automatically become delegations of the European Union (Juncos & Pomorska, 2015: 241), even before the service was established in Brussels. However, the Commission maintains a right of *veto* regarding the appointment of Heads of Delegation (Hillion & Lefebvre, 2010: 6).

Another point on which it is useful to focus on is that of the inter-institutional dynamics that led to the establishment of the EEAS with reference to the particular role played by the Commission in this context. In this process, the High Representative negotiated his proposal with the Member States – members of the Permanent Representatives Committee (COREPER) – with the European Commission, but also with the General Secretariat of the Council of the EU and with the European Parliament (Hillion & Lefebvre, 2010: 5). This dynamic of the decision-making process is rather particular considering that it is usually the Commission that takes the initiative, presenting a proposal to the Parliament and the Council called to express themselves and to jointly exercise the legislative function (Tesauro, 2012: 64).

As well as for the Commission, the role of the European Parliament in the context of the CFSP is historically rather limited. The introduction of the CFSP with the Treaty of Maastricht is a prime example of this trend: with the so-called pillar structure, the CFSP is placed under the umbrella of the intergovernmental method, privileging thus the Council, leaving the role of other institutions in the background. In this situation the European Parliament could only make recommendations, legally non-binding that is, and ask questions to the Council, an institution that still defines the strategy and guidelines in this area.

The subsequent amendment Treaties, signed in Amsterdam and Nice, did not introduce significant changes. While in other areas the European Parliament has seen a progressive increase of its prerogatives and its role, thanks above all to the institutionalization of the co-decision procedure introduced with Maastricht and progressively expanded, in the field of the CFSP the Parliament does not have a relevant role even after Lisbon. This should not be surprising, because if we look back at the historical-juridical evolution of this sector (Van Hecke & Wolfs, 2015: 292), it becomes clear that the objective that has animated the changes related to the CFSP has always been to give greater coherence, greater visibility and greater continuity (output legitimacy), leaving the problem of democratic control (input legitimacy) in this sector in the background, or not even considering it.

There are three reasons that justify this dynamic. First of all, foreign policy, in the tradition of national states, is usually under the responsibility of the government, with scarce involvement of the legislature, as it requires a high degree of secrecy and the ability to act quickly according to fluid situations. Such needs for secrecy and speed of action are also reflected in the CFSP and a high involvement of the European Parliament, even if justified for democratic reasons, would undermine the efficiency and coherence of this policy. Secondly, given the fundamentally intergovernmental nature of the CFSP and therefore the primary role played by the Member States, at least from the theoretical point of view, no greater powers would be needed for the European Parliament as the decisions of individual Member States on the matter are subject to democratic scrutiny by their national parliaments. With respect to this consideration, it is useful to note that the progressive increase in the competences of the European Parliament has, according to some, eroded accountability with respect to national Parliaments, thus opening the space for a new role in this sense for the European Parliament. The third element to be considered is related to the special nature of foreign policy, not to be understood from a procedural point of view according to the logic of pillar-type nature, but rather from a content standpoint. Indeed, if policies based on the Community method, such as trade, energy and the environment are mainly based on the creation or codification of norms and lawmaking, the CFSP is mainly linked to the strategic dimension and to the involvement of highly diversified political positions and adoption of actions aimed at pursuing objectives that are considered strategically relevant. Because of this political "sensitivity", continuous contacts and consultations between the Ministries of Foreign Affairs and the diplomatic services of the Member States

are necessary and, in these dynamics, an active involvement of the Parliament would be superfluous, if not even an obstacle.

Even after the entry into force of the Lisbon Treaty, neither the European Parliament nor the national parliaments have the tools to exercise control over the decision making process in the field of foreign and security policy, legitimizing it democratically. The tendency towards which we are assisting is that for which the European Parliament is trying to maximize its influence through the use of formal–such as the budget function – or informal tools – such as reports' drafting – that some Member States are strongly criticizing, calling it in some cases an "*abuse of budgetary power"* (Wisniewski, 2013: 82). Nevertheless, it must not be disregarded that there are two areas in which the European Parliament has formal powers which directly or indirectly concern foreign policy: the signing of international agreements (Art. 218 TFEU) and the budgetary function (Art. 314 TFEU) exercised by the Parliament, together with the Council.

The budgetary function is the most interesting one, as it is the one with which the European Parliament has made the most of its influence on increasing its influence in the CFSP sphere and in the establishment of the EEAS. According to what was established by art. 36 of the TEU, the Parliament's role in the CFSP sphere has no binding implications. The European Parliament is in fact "*regularly consulted*" by the HR on the main choices in the matter, and "*can ask questions or make recommendations"*– legally non-binding – to the same HR and to the Council and «*proceeds twice a year to a debate*» on issues related to the CFSP. The budget function has therefore been, and still is, used by the Parliament to increase its influence in the sector, even threatening the blocking of the EEAS institution through the exercise of the veto concerning the budget function. This is confirmed by Parliament itself in a proposal for the establishment of the EEAS, where it is recommended that "*the EEAS should be an autonomous service that is accountable to European Parliament, both in political and budgetary terms"* (Brok & Verhofstadt, 2010).

It must not be disregarded as well that the Parliament claims in this proposal the right to be consulted on all proposals for Council decisions that fall within its prerogatives, with particular reference to the budget and the international agreements (Brok & Verhofstadt, 2010: 6) – this is the so-called democratic

accountability – and the request for a hearing before the appointment of high-ranking officials of the EEAS. The proposal also recalls the need for the conclusion of a separate agreement between EEAS and Parliament to regulate the relationship before the Council decides on the establishment of the service. This represents the continuation of the tradition of the so-called inter-institutional agreements (IIAs), used by the Parliament over the last two decades to increase its influence, giving rise to a phenomenon that has been defined as "*parliamentarization through the back door"* (Van Hecke & Wolfs, 2015: 294).

The Council Decision 2010/427/EU, setting up the EEAS, takes into consideration only some of the proposals made by the Parliament summarised above and while ignoring the others. In particular, the Parliament is recognized the exercise of its functions of political control in accordance with art. 14 par. 1 of the TEU. Moreover the HR, in compliance with art. 36 of the TEU, undertakes to consult Parliament regularly on the main aspects and choices relating to the CFSP, with the help of the EEAS itself. The right of the European Parliament to access the documents classified under CFSP is established in accordance with procedures to be defined in a specific text. The role of the Parliament in relation to EEAS staff is recognized, as established by art. 336 TFEU and there is an obligation for the newly established service to work in close cooperation with the other EU institutions and with the Parliament in particular (Decision 2010/427/EU of the Council, Art. 3.4). Finally, there is the obligation for the High Representative to present before the end of 2011 a report on the functioning of the EEAS to the Parliament, the Council and the Commission according to the provisions of art. 13 of the Decision. It is through these provisions that the European External Action Service "*will be accountable to the Parliament, both politically and concerning its budget*" (Cherubini, 2012: 477).

Summarising, it can be said that the Parliament ends up covering a greater role than the one foreseen under the provisions of the Lisbon Treaty, both with regard to the establishment of the EEAS and with regard to the CFSP as a whole. This is possible not on the basis of legal provisions – as seen very restrictive for the role of Parliament in this area – but thanks to the capacity of the assembly to leverage its own prerogatives, over all the budgetary ones, to increase its range of action leading the Council, in its decision establishing the EEAS, to do what *de facto* are concessions to Parliament after the threat from the latter of a general *veto* on the budget for EEAS and CFSP.

3.2 The European Council and the Council of the European Union: the Intergovernmental Dimension of the EEAS

The Council of the European Union best represents the intergovernmental dimension of the External Action of the EU in general and of CFSP in particular. Despite being a single institution, the Council can assume different configurations, varying its composition on the basis of the issues to be dealt with. The composition, skills and frequency of its meetings make it the most important institution in the decision-making process concerning foreign policy, both from a legal and a political point of view (Keukeleire & Delreux, 2014: 66).

But the intergovernmental dimension of the External Action depends on, both in terms of role –legally determined by the provisions of the Treaties –and of political influence, of two institutions constituted by the same representatives of Member States: the European Council and Council of the European Union. The primacy of the latter is maintained by the provisions of the Lisbon Treaty (Tesauro, 2012: 64-67); in fact, if the European Council "*identifies the interests and strategic objectives of the Union, sets the objectives and defines the general guidelines*", as provided for by Art. 26 (1) of the TEU, it is up to the Council to elaborate the CFSP and to take "*the decisions necessary for the definition and implementation of this policy"* on the basis of the European Council's guidelines, as set out in the second paragraph of the same article. It is the Council that acts concretely in this area by taking the necessary decisions and implementing them.

Therefore, the Council plays a key role in the definition of the CFSP (Cherubini, 2012: 474). For this reason some authors push themselves to consider the Council as the "*main decision-making institution in the field of CFSP"* (Van Vooren & Wessel, 2014: 370). The Council is a body of the European Union, as already mentioned, with a variable composition. In fact, as specified by art. 16 (6) of the TEU, the Council "*meets in various formations [...] in accordance with Article 236 of the Treaty on the Functioning of the European Union"* and consists of "*one representative for each Member State at ministerial level"* (Art. 16 (2) TEU). The Board is chaired by a six-month rotating Presidency, regulated by art. 236 of the TFEU, with the exception of its configuration as *Foreign Affairs Committee* (FAC) chaired by the High Representative which, together with the *General Affairs* configuration, is the most relevant. If, in general, the Council exercises the legislative and budgetary

functions, as well as those of policy-making and coordination, the same is also true in the area of external relations of the Union.

The FAC is overall responsible for the development of policies in this area on the basis of the priorities and guidelines set by the European Council. In the CFSP area, the FAC clearly plays a major role and is therefore important to analyse, albeit briefly, its composition and its prerogatives. What is relevant is that this Committee is designed to ensure a more systematic cooperation between Member States. In fact, they have the obligation to consult each other in the Council and/or in the European Council for any matter of general interest in the field of foreign policy and common security (Art. 32 TEU). The Council also ensures that Member States comply with the CFSP principles and endeavour to support and not hinder the policies defined in this area (Art. 24 TEU). However, given the size of the agenda and the high number of representatives, there is hardly any exchange of views in the FAC and, in some cases, there is not even material time to allow representatives of the Member States to present their positions (Keukeleire & MacNaughtan, 2008: 122).

It is a matter of fact that most of the decisions are taken in the preparatory stages of the meetings, as often happens when a summit is held, in which the Ministers only confirm what has already been established by their *sherpas* (Van Vooren & Wessel, 2014: 25). For this reason, the internal structure of the FAC is extremely relevant: both the Committee of Permanent Representatives (COREPER) and the Political and Security Committee (PSC) are of major importance (Keukeleire & Delreux, 2014: 69-72). The COREPER consists of two possible formations. The first is COREPER I, formed by deputy permanent representatives of Member States within the Council, is in charge of preparing the meetings for other Council formations. The second, COREPER II, consists of permanent representatives of Member States at the level of ambassadors, a representative of the Commission and other EU institutions and agencies on the basis of the subject matter, and it has the task of preparing the agenda and oversee the work within the FAC.

A relevant role is covered as well by the PSC, which is made up of an ambassador for each Member State, a representative of the Commission and both military and civilian personnel. The PSC monitors and discusses the international situation for the areas falling within the sphere of foreign policy and defence

policy, supporting the Council in defining policies and monitoring their implementation. Therefore the COREPER and the PSC, together with the so-called "working parties" (Keukeleire & Delreux, 2014: 71), divided on a thematic and geographical basis, have a fundamental function in the continuous exchange of information, in the coordination of national policies, in negotiations and in the definition of common strategic visions concerning the External Action of the Union.

With specific regard to the establishment of the EEAS, as already stressed, the Council played a decisive role from two points of view: firstly it was up to this institution to adopt the decision setting up the service, as already specified; secondly, it is the Council, together with the Commission and the Member States, that provided part of the service's staff.

As established by the Council Decision of 26 July 2010, part of the EEAS staff consisted of the bulk transfer to EEAS of a large part of the General Secretariat of the Council[15], which, although less numerically relevant in respect of the transferred staff from the Commission's DG RELEX, enjoyed of greater knowledge and experience both from a legal and an institutional point of view, thus being able to guarantee a certain degree of influence within the new structure (Crowe, 2008). It could therefore be identified as a sort of competition between the Commission and the Council for the increase of their influence within the EEAS, with all the consequences in terms of both work culture – community or intergovernmental – and of operational modalities (Murdoch, 2012: 1021).

4 Some Concluding Remarks and a Hope for the Future

For reasons of space it has not been possible to analyze this article in details the functioning and the internal organization of the EAAS. Nevertheless, it is possible to affirm that its internal organization and structure, as well as its decisional processes, somehow reflect the limits of the EAAS action in particular and of the CFSP in general. In short, the only way for the service to become as autonomous as possible and to better respond to the needs of the EU's external action seems to be to get closer to the Commission, collaborating in the areas of its competence – first and foremost the trade and development policies – a choice

[15] European Council. (2009). Presidency report to the European Council on the European External Action Service. 14930/09, October 23, 2009.

which, moreover, seems to have been made by both Ms. Ashton and Ms. Mogherini, in interpreting their role as High Representatives. In general, however, the degree of autonomy of the service can act as an indicator for the development of the European Union as such. The greater the autonomy of the EEAS is, the greater the commitment of the EU itself to increase the weight of the supranational element compared to the intergovernmental one, especially in sectors dominated by the latter as the CFSP is (Furness, 2013: 123; Cross, 2011: 456; Duke, 2009: 231; Duke, 2012: 98).

It is possible to conclude this contribution affirming that the Lisbon reforms have resulted in a better functioning of the foreign policy machine that, under "fair weather conditions", services relations with third countries with reasonable efficiency. However, when the going gets tough and important policy choices need to be made, the dysfunctionality of the current decision making arrangements, combined with the intrinsic constraints of collective action, hamper the EU's effectiveness as an international actor.

However, it is a matter of fact that over the past seven years the EU has responded to a deteriorating security environment by shifting toward *realpolitik*. The over-optimistic transformative commitments of the past decade have been corrected. The new emphasis in policy documents is on stability and resilience, and the efforts to strengthen military capabilities have gained momentum. But so far, EU foreign policy has not come to terms to the increasing challenges. It has been badly lacking in energy, coherence, and ambition.

Nevertheless, as the overall outlook for European integration has improved in 2017, a window for significantly strengthening EU foreign policy might be opening (European External Action Service, 2017). Foreign policy has never been a driving force of integration, but rather a complementary activity that depended to a large extent on developments in the core areas. The prospects for the EU's future have recently begun to brighten. A sustained economic recovery appears to be under way. This by itself should help to rebuild the EU's international influence and soft power. There is also a greater chance for serious efforts to address the EU's weaknesses and vulnerabilities. The victories of Emmanuel Macron in France and Angela Merkel in Germany have reenergized the French-German axis, even if the situation in Spain, Greece and Italy is still worrying, considering the emergence and the recent triumph, in the Italian case

of anti-European and populist parties as the Five Star Movement and Lega Nord indubitably are.

The Lisbon arrangements have serious design flaws but will remain the EU's operating system for the foreseeable future. Their potential, however, could be much better used. The EU delegations, the military and civilian missions, and the relevant departments of the EEAS and the commission collectively possess greater expertise than many of the bigger Member States. But this resource is at present dispersed among different institutions and not used in a cohesive way. Mobilizing this reservoir of know-how through better reporting systems, more information sharing and greater capabilities for strategic analysis would greatly enhance the situational awareness of the EU and its Member States. An improved understanding of international developments would also enhance the authority of the EU institutions and the credibility of their initiatives and thereby facilitate a much more proactive approach to policymaking. Action along these lines will not produce miracles. Under the best of circumstances, EU foreign and security policy will remain a work in progress for some time. However, after a long period of stagnation, there is now a real opportunity to strengthen EU foreign policy. In light of the serious challenges in the neighbourhood and on the global level, this opportunity must not be missed.

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How Collective Representations Can Contribute to the Analysis of the European Union

Jan Berting

Abstract European integration is an economic, social, political (and sociological) process interwoven with elements, which emanate from the cultural, racial, ethnic, linguistic, religious and regional diversity of Europe. The efficiency of economic and political action, both on the EU and the national level, is thus interdependent with the stability of inter-ethnic, inter-racial, inter-religious and center-region relations within the Community and in each of the member states as well.

Keywords: • Ethnocentrism • Individualism • Collectivism • Holistic Thinking • Collective Identity •

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1 Introduction

An important theme in the publications of Prof. Dr. Silvo Devetak is the analysis of '*Unity, Diversity and Solidarity*' and '*Open minded Multiculturalism*' in the European Union (Devetak, 2017b: 91). But in several cases this analysis goes further than that. The analysis also traces the negative consequences of diversity and of some types of multiculturalism, especially in the Western Balkans (Devetak, 2017a: 133-162).

The EU is 'a conglomerate of political and socio-economic positions which are firmly anchored in the "national interests" of the member-states and combined into common decisions of EU institutions exclusively in accordance with European contractual law. Cultural, ethnic, linguistic, religious and regional diversity is a strong characteristic defining the demographic composition of about 510 million populations of the 28 state members of the European Union' (Devetak, 2017a).

There is, of course, also a geographical diversity, including regional diversity. And we are not likely to forget religious diversity and the religious effects that go together with the increasing immigration, especially the immigration from many African countries.

"*European integration is hence an economic, social, political (and sociological) process interwoven with elements, which emanate from the cultural, racial, ethnic, linguistic, religious and regional diversity of Europe. The efficiency of economic and political action, both on the EU and the national level, is thus interdependent with the stability of inter-ethnic, inter-racial, inter-religious and center-region relations within the Community and in each of the member states as well*", Devetak observes (Devetak, 2017b: 91).

And he adds a bit further on: *"On the all-Europe level are especially present in the last decade a lot of negative trends on the ethnic, racial or religious basis which are already now the source of political instability and social insecurity in some states and could in the future develop into conflicts that can maybe not be managed by means available to the state of law (for instance, racism, xenophobia, criminal acts motivated racism, hate speech, the growing of aggressive nationalism, acceptance of Nazi ideologies, attempts to change the history of WWII, attempts to rehabilitate the collaboration with Nazism and the similar. These are happening in the European societies which are in addition confronted with the diminishing of election participation, growing of distrust of politicians in general and with the greater support of violent extremism which all together are putting in danger the legitimacy of democratic institutions and the peaceful coexistence of populations in Europe*" (Devetak, 2017b: 92).

2 Collective Representations Defined[1]

Devetak's description and analysis of the many dividing lines which traverse our European nations, regions, religious areas and cultures is very useful and impressive. Nevertheless, we are in certain respects trapped on this road when we do not have enough information about the collective representations that precipitate these dividing lines. We cannot understand relations between individuals and groups (societies) without taking into account the roles played by collective representations and collective identities. We need to consider these concepts when we explore the essential elements of social life: in which ways do different social groups perceive their (social) environment and their place within it? What types of interpretation do they give to events, such as encounters with persons and groups with mores that differ from theirs? How do they interpret their relation with nature? The concepts of collective representation and collective identity are closely related, because every interpretation of one's relation with the outside world implies also a conception of oneself.

To understand this problem, it is useful to refer to Plato's *Allegory of the Cave*. In his widely-known allegory, Plato describes symbolically the difficult situation in which we find ourselves as human beings. The world that is revealed by our senses is not the real world, he remarks, but only a far inadequate image of it (Plato, 2002: 279).

[1] The following pages are an adapted version of the text about collective representations and collective identities in Berting, 2006: 27-ff.

To illustrate this human predicament, he uses the allegory of the cave, explained by Socrates to one of his students. Imagine, he says, a number of men sitting in a cave. The men had been sitting there since their very early childhood. They have their legs and their necks chained in such a way that they are totally unable to look behind them. They are only able to see the cave-wall in front of them in the dim light that is filtering into the cave. Behind them there is at a certain distance a blazing fire on a platform. In front of this fire there is a raised path on which persons and objects of all kinds move. The chained men only see their own shadows on the wall before them and the projections of the objects and of the men that move on the path behind them. So for them, the 'real' world is only the shadows on the cave-wall in front of them.

This cave symbolizes the world we live in and which we try to comprehend by using our senses. But this world that we see is only an illusion. The phenomena that we observe are often rapidly changing, unstable and extremely fluid. Our main task in this situation is to find the models or the ideal types of which the phenomena that we perceive are expressions. We must not accept reality as we seem to perceive it as the real world. Rathter, we must try to reject our prejudices and stereotypes, which are products of acquired habitudes. We must try to escape from the cave and acquire fundamental knowledge of the world we live in.

In modern society this task seems to be even more complicated than is was in ancient Athens. We see our world through the lens of collective representations, which we in turn acquired as members of a family in a specific society, in a specific social class, and often as members of a specific religious group and of groups with a specific political orientation. We never see our society as it really is, but always as it appears through our collective representations. Different social groups perceive social reality through different social lenses -*collective representations*- and therefore impart different interpretations of social and cultural events they are confronted with. Moreover, in combination with their collective representations, their sense of belongingness, and their ideas of their (collective) identity may often differ widely. These differences may be in some case the source of oppositions and conflicts between different social groups.

I define collective representations as shared mental images, which persons and collective entities have about the social and natural reality they live in, but also about social worlds with which they do not have an immediate experience. Often

collective representations refer to imaginary worlds or to worlds that we cannot perceive empirically. Collective representations are mental maps of the social scene about which Jodelet says: *'It is a socially developed and shared type of knowledge. This knowledge has a practical meaning and contributes to the construction of a common reality of a social unit'* (Jodelet, 1989: 36).

That is not to say, however, that those groups and persons with specific collective representations are always fully conscious that they are seeing the world through these collective representations. Collective representations may be, according to them, *the images of social reality as it really is*. Following Plato, we can say that they think that what they see on the cave's wall is in fact reality. Those who do not share their view are simply erring, according to them. Such a type of collective representation is in the minds of those persons, who state that modern society is nothing more than a totality of market relations, or those who think that modern society is basically a system of exploitation of workers by a capitalist class. In those cases the collective representation is also a shared *conviction* or a *belief*. It may be so self-evident to those who cherish the collective representation that they reject vehemently the idea that a different and equally 'valid' interpretation of reality may be possible.

Although the cognitive character of collective representations is prevalent, this does not mean that a collective representation is only that. They contain also an *evaluative element*. Participants in social life may be convinced that their collective representation is true and that the collective images of the 'Other' are false. Moreover, collective representations may be judged to be 'good', that is to say, that they are in line with the collective goals of the members of a specific group or, in many cases, to be 'bad' when one is referring to the collective representations of opponents.

Collective representations are very functional for a given social entity. When I say this, I do not mean to say that collective representations do not pose problems in intergroup relations. They do and they often have a serious, even nasty character. In fact, the analysis of such intergroup problems is one of the central themes of this contribution. Nevertheless, the functionality of collective representations for group life is evident. Collective representations are, in the first place, means by which persons and groups orient themselves in an otherwise extremely complex and incomprehensible world. They give indications *about who we are and who are the others*. They offer a grip on a world that otherwise would not

be understandable. But they are also an important source of confusion and disorientation.

Collective representations are connected with an *awareness* of differences between categories of human beings – differences that may be much more refined than the distinction between 'them' and 'us'- and of course of differences between animals and material objects. They give indications about what should and should not be done, and they orient our *feelings of belongingness*. They are certainly also *the source of oppositions* between one's own identity and those of the others, the outsiders. Moreover, they are connected with *feelings of commitment and solidarity*. Collective representations are tied to *codes of inclusion and exclusion,* to distinctions between 'pure' and impure', between 'savage' and 'civilized', between 'natural products' and 'processed products'. They are burdened with metaphors and symbols (Jankélévitch, 1960).

Following the notion of culture as 'covert'[2], it becomes evident that group members are not *fully conscious* of the nature of their collective representations. When we question group members, we can get descriptions about how they see themselves as similar to and different from other groups,' the Others.' Such descriptions omit many things, however. Group members are not aware of these omissions. Here it is useful to introduce the concept of *habitus*, as established with a specific meaning by Bourdieu. The concept seems to be rather similar to the notion of state of mind or mentality (*'état psychique'*) as used by Pareto: a basic tendency in the members of a group or subgroup, produced by biological motives in combination with growing up under specific social, economic and cultural conditions, such as the family structure, the language which structures, by imposing categories, the ways we perceive the outside world. This *'état psychique'* is very stable and almost unchangeable (Pareto, 2017). Bourdieu's concept of habitus comes very near to the preceding one. He states that the collectivity is deposited in each individual in the form of durable dispositions, as mental structures (Bourdieu*,* 1984). *Habitus* is a concept referring to modes of conduct, taste, feelings, which predominate among members of a particular group. It refers

[2] The concept of covert culture refers to the observation that 'culture' is 'inside' us, as a consequence of belonging to a specific group or society.

to acquired tendencies as a member of a specific group or culture, which for the persons concerned are largely unconscious.[3]

Collective representations are, as I said earlier, mental maps, systematic ways of perceiving the outside world. Collective representations are as such conscious constructions. People, when asked, can report about the way they 'see' the outside world. This does not mean, as noted earlier, that the members of a group are always conscious of the fact that they see reality through a collective representation. They may think that the way they perceive reality *is reality as it really is*. But also when they are aware of the fact that their collective representations are not pictures of reality (in the sense of '*Abbildungen*'), they will not be aware in which ways their habitus, acquired as members of their specific culture, determines their way of looking at the world around them, and of interpreting the ways of life of other groups.

Here a comparison with language may be clarifying. When we speak a particular language, especially our mother tongue, we are barely aware of its syntax and grammar. Even less will we be aware of the specific ways in which our language structures our thinking by imposing categories and making distinctions which are far from being universal. When I make a distinction between collective representations, pertaining at least somewhat to the conscious level and habitus, partly belonging to the unconscious level, we must keep in mind that the demarcation-line between the two levels is not rigid. Changing social conditions, especially increasing contact with members of the other groups, the outsiders may raise the level of awareness of our habitus as a hidden side of group life. It follows from what I have said that the collective representations of our *society*, as interpretations of its basic characteristics, of its dynamics, of the possibilities and opportunities to influence its future, inevitablly have an *ideological side*.

[3] *Habitus* seems to be akin to the concept of basic personality type, as elaborated by Kardiner and Linton. This concept is related to the effort to apply to cultures a psychoanalytical approach together with the analysis of the role played by social factors in determining psychological phenomena. Kardiner and Linton state that the basic personality structure 'represents the constellation of personality characteristics which would be congenial with the total range of institutions comprised within a given culture' (Kardiner, 1939: IV). As such it includes techniques of thinking, or idea constellations; the security system of the individual; super-ego formation and attitudes to supernatural beings. 'In general, it represents that which differentiates the personalities of members of two different cultural communities' (Klineberg, 1950: 498).

3 Collective Identities

The concept of collective identity is, as we will see, a very tricky one. A main source of much confusion is the fact that the concept is used both to refer to real and assumed characteristics of groups or nations (the outside view), and to the ways members of groups and nations define themselves as being different from other collectivities (the inside-view).[4]

Another major problem that is connected with the use of the concept of collective identity is the observation that members of a group or community may consider their collective identity *as a reality*. As such they demonstrate a way of *holistic thinking*, which is generally very strong in fundamentalist movements.

So we organize the world around us mentally with the help of one or more collective representations. The ideas about our collective identities – and those of the Others – define our place within these more embracing collective representations of the society, and even of the world, we live in.

What do we mean when we speak about collective identities? Collective identities are strongly tied to the concept of collective representation. Collective identities: 'are the means whereby people define a sense of themselves and others through using different markers, such as cultural features. Identities refer to what people conceive themselves to be, to which collectivities they belong' (Benda-Beckmann & Verkuyten,1995: 17). Collective identity refers to the ways a group sees itself as different –but also as similar- in comparison to other groups. Collective identity is anchored in the consciousness of the members of a group.

We could, indeed, speak about *group consciousness* in the sense of a consciousness of belonging to a social class, a religious group, a nation, an ethnic group, a professional group, an organization, etc. But let us refrain from stretching the concept too far. Collective identity in the sense we use it here is strongly determined by the habitus, the tendencies acquired by the members of a group before coming of age. The members of the group have been 'invaded' by the

[4] In the following analysis I will emphasize the use of the *concept of collective identity that is based on an inside-view*. Under certain circumstances I will use the concept in terms of the outside-view. When this is the case, it will be stated explicitly.

culture of their group before competing structures, except for biological conditions, were present. This is what Freud called '*the primacy principle*'. Later collective identities, especially after growing up, have been grafted on the former, such as professional identities or collective identities related to voluntary associations, which are joined as adults. Habitus plays also a role on this level, because the tendencies acquired in the first period of the life of an individual tend to influence the selection processes later on, such as those related to preferences for certain artistic and professional activities.

Collective identity means that the members of a group have an *awareness of certain differences* that exist between them and those who do not belong to that group. So the concept of collective identity refers to imageries about social and cultural characteristics, habits and physical appearances of the Other and, consequently, of the self. This awareness of differences -*real or imaginary*- is connected with a *consciousness of belonging* to that group and of *exclusion* of those who do not belong. This awareness of differences and this sense of belonging may be very weak and in that case the idea of opposition to the Other may be totally absent. In many cases, however, the collective identity combines with the *idea of opposition*: the types of behavior and the values and norms of the Other are incommensurable with 'our' characteristics as group members. This opposition is often expressed in *a stereotypical way*. Such stereotypes about the Other are part of the inside-view of the members of a group, but they represent in fact, paradoxically, an outside-view on the Other. Those collective stereotypes are often far removed from the self-images of the groups that are 'described' by those stereotypes. Collective stereotypes are 'frozen' images of the Other, which are not susceptible to change when confronted with facts about the Other which are contradictory to the stereotype. National stereotypes, in particular, show a *stubborn resistance to change* and are to a high degree *demonstrations of ignorance*. The situation is often even more complicated when members of different groups interact with each other and opposed stereotypes collide.

4 Ethnocentrism and Xenophobia Accompany the Holistic Thought

It is not surprising that collective identities are a *source of holistic thinking*, a way of thinking in which groups (nations, peoples, social classes, etc.) are regarded *as real entities*, which are considered to be more than the sum of their parts. They are *unique configurations* with *a specific spirit*. In many cases groups with a strong

collective identity have a strong *consciousness of their past*. Such a past is generally *a mixture of facts and myths*. The collective identity of a group has, seen from the inside, a *collective level* -the group can be characterized by its identity, which is manifested by the allegiances and behavior of its members. It has also an *individualistic level*- a member defines his own identity, partially or sometimes totally, in relation to his belongingness to the group. In other words, the collective identity implies the feeling of the members of the group of *attachment* to it. They have *feelings of solidarity* with their group.

The concept of collective identity is also related to the *idea of totality*, not only in the sense of the holistic conception to which I referred earlier, but also in the sense that the group, especially when it concerns large entities such as nations, encompasses and dominates all other differences within the group. This conception of totality may be related in some instances to the conviction of the members of a group -a nation, a religious community, a political party etc. -that *their life-chances are strongly or even exclusively dependent upon the achievements of the group to which they belong.*

5 Open and Closed Collective Identities

Every collective identity implies, I repeat, that a distinction is made between outsiders and insiders, between 'them' and 'us'. In most cases this distinction does not necessarily mean an opposition. It may simply be that the Others speak a different dialect or language, or prefer kinds of food that we abhor, and drink wine instead of 'our' beer. But even when the distinction goes deeper, in the sense I elaborated earlier in this text, the collective identity can be relatively open. We can participate in circles and groups with different collective identities without experiencing problems. As such, most of us have developed in democratic societies personalities with multiple identities.

In which cases are groups with a specific *closed* identity likely to create problems in a democratic society? Problematic collective identities in an open society will have the following main characteristics:

- The members of the group (religious community, ethnic group, minority culture etc.) *hypostatize* their identity, that is, they treat it as a real entity with an internal structure that separates it sharply from other cultural entities (*cultural realism*).
- They present their collective identity as a *collectivity that determines totally, or at least to a very high degree,* all groups and individuals that are considered to be part of this identity. They have a *collectivistic way of thinking or a catascopic approach.* A catascopic approach is one in which the most encompassing entity -here the collective identity- is in the forefront, and from this vantage-point one is looking down upon the smaller units, which are comprised within it. Moreover, the position of the smaller units on their lower level is interpreted as being a *function* of the higher level, that is, all their characteristics are derived from the higher level.
- The members of a group with this closed collective identity *neglect in a systematic way the social and cultural changes of our times.* It is as if the hypostatization or reification of the collective identity forbids the analysis of historical developments. Only one interpretation of the past is accepted, an interpretation that is considered to be functional for the group and that legitimizes its existence.
- The individuals and groups, which are considered to belong to the collectivity with the closed identity, are *imprisoned* within this framework. They do not have choices, which are not a function of this collective identity.

6 The Spirit of the People ('the 'Volksgeist')

Modern, open societies are multicultural. Multiculturalism has, both in the past and in the present, helped enrich society. In most cases, the newcomers in the modern societies develop 'multicultural personalities' in which the cultural or ethnic background of their country of origin is only one of their points of reference. As such, in reality they are not really that different from the majority of the population of their new country.

However, the present discussions about multicultural societies focus on a type of society that is multicultural in a different sense: the coming society is envisaged as one in which '*culture*', '*ethnicity*', '*collective identity*' and '*foreign lifestyles*' are seen as durable, distinct elements in the national landscape. This change necessitates, it is argued by some, an accommodation of the national institutions to this new situation. This need for adaptation is based on the idea that all cultures are equal and have, consequently, the right to be there as *collectivities*. In such discussions the idea of collective identity plays a major role. In fact, with this debate we are resuming the old debate between historicism and universalism that started in the 18th century when Johann Gottfried Herder coined the concept of '*Volksgeist*' ('*Spirit of the People*') in opposition to the ideas of the Enlightenment, emphasizing in this way the uniqueness of each culture. Universal concepts, such as Reality and Truth, do not exist; all norms and ideas originate within a specific cultural context upon which they are dependent. They can only be understood within this specific context. Here we are confronted with radical opposition of historicist thinking to the rational and universal tenets of the Enlightenment (Herder, 1784; Herder, 1774).

In a modern society it is perhaps feasible, but certainly not acceptable for most of its citizens, to organize the major institutions on the basis of this type of collective identity. It would lead to a type of *Apartheid*, a situation that runs counter to the idea of cultural exchanges and cultural enrichment. However, when the *concept of a relatively open collective identity* is used, a modern society can certainly be a multicultural one when it avoids in its policies some nasty pitfalls in dealing with the claims of some groups to have *specific rights as collectivities*, which would curtail the fundamental rights of individuals within the society concerned. This is the case when official policies commit *the fallacy of the wrong level.*

With this concept I want to indicate that during debates about the multicultural society, groups (e.g. ethnic minorities) are treated as realities with a specific collective identity to which individuals are subordinated, instead of conceptualizing groups as gatherings of individuals, who define themselves as belonging to a group with a specific identity. In a modern society each individual has normally different opportunities to belong to several groups with different identities.

7 Use and Abuse of Collective Identities

- It follows from what I have said that the concept of collective identity is a very slippery one that must be used carefully. Moreover, claims of social groups to respect their collective identity must be analyzed critically. An important problem is raised by those groups, which claim a specific closed collective identity. As such they consider themselves in most cases as a collectivity that is morally superior to the outside world that has to adapt to their exigencies. Such claims are not easy to reconcile – or sometimes not at all – with the basic principles of a democratic society. In fact, persons who claim specific rights because they belong to a group with a collective identity, act in a way that is opposed to the democratic principle of the primacy of the individual. They claim certain privileges and rights on the basis of ascription- their belonging to a specific group – which stands in opposition to the individualist principle of achievement or merit that prevails in a modern society. So the claim to respect one's collective identity often goes together with claims to obtain certain rights and scarce means as a member of the specific group or community that claims such a collective identity. In this way the link between individual achievement and reward could be weakened when those collective claims are accepted as valid arguments in a democratic society.
- In a democratic society such collectivistic claims are normally restrained by the political process. But in several cases, groups with a closed collective identity have succeeded to conquer the political power and to install a political regime that is based on their idea of a closed collective identity. Such was the case in Nazi-Germany, where the 'racially pure' were elevated to a higher status than the '*racially impure*'. The same mechanism operated in the Soviet Union and in other communist systems, based on the distinction between the 'true believers' and the 'outcasts'. More recently, we witness this mechanism at play under the fundamentalist Muslim regimes in Iran and until recently in Afghanistan, where the distinction is based on a specific interpretation of Islam. In each of these identified cases, persons obtain rights and privileges on the basis of their conformity to the collective identity, or face exclusion when they refuse to conform or when they are considered by the ruling class to be 'undesirable elements' on other grounds. The unfortunate result of this extreme

collectivist approach is a profound disregard for individual capacities and for the principle of individual merit.

But also in a democracy these collectivistic ways of thinking are not without negative effects. This becomes evident in the discussions about the so-called 'multicultural society' and in policies related to this. Based on ideas about collective identities of (*allochthonous*) minorities, there is a tendency in our democratic societies to accept, among other things, the unequal position of women in comparison to men, polygamy, the toleration of the practice of excision of girls and the application of unjustified positive discrimination.

What I said does not imply that all types of collective claims are related to collectivist identities of the type we described. In many cases collective actions are part and parcel of the democratic processes. This is the case, for example, when workers protest against the proposed shutdown of their enterprise; or when students and staff members of universities oppose envisaged curtailments of universities' resources by the government; or when women demonstrate in favor of the application of the principle of equal pay for equal jobs for both men and women. In those cases the collective action is based on like interests of the individuals concerned. It has nothing to do with the claims of groups with (closed) collective identities.

8 The Unbridgeable Divide Between Individualist and Collectivist Approaches of Social and Cultural Life

The opposition between the individualist and the collectivist perspectives can be considered as the most important divide between the approaches of social and cultural life both in the political discussions and in the social and cultural studies. This divide implies from the beginning a difference between the two approaches with respect to the nature of the autonomy of the individual and the individual's dependency on other persons and on social institutions. In my *Shadows on the Cave's Wall* I presented an elaborate analysis of individualist and collectivist approaches of social and cultural life (Berting, 2012: 55-98).

The individualist approaches have as their starting point that the best way to understand social life is by analyzing the characteristics of the individual organism or of the individual person.

These approaches are a way of thinking that regards the individual person as the primary source for the understanding of our society. They start with the premise of the primacy of the individual as the best way to understand social and cultural life. Within this mainstream of individualist approaches we can discern many varieties. Of course, these varieties significantly complicate the task before us. So we can observe the rise in the 18th century of rational individualism, the coming of personalities who strive for individual autonomy, independence and rational understanding of the world we live in. We can observe also a strong rise of instrumental market-oriented individualism in the wake of the ideology of modernization and globalization. And there is the achievement-oriented individualism that can be observed in expanding large organizations in the period after 1950. Another type of individualism is the revolt against formal rules: populist individualism. And we can also observe in our modern society immoderate assertive egoistic individualism, personal identity individualism and individualistic escapes into virtual worlds (Berting, 2006).

The collectivist approaches reject these individualistic views (Berting, 2006: 157-165). They posit that human behavior results from the characteristics of the (historically) developed social structures, value-systems or cultures. These approaches tend to interpret human behavior as being largely determined by the characteristics of the social and cultural systems in which human beings have been raised and educated. At the same time, they may emphasize the significance of the specific place of different categories of persons within society, e.g. the place they have in a class society or in a caste society. But also this collectivist view is very pluralistic. We can refer to trends that imply a *re-collectivization of society*. In fact, we can observe that modernization not only leads to an increasing individualism, but that at the same time collectivism is mentally reinforced, together with a collectivization of society in certain respects. Collectivism stands in marked contrast to substantial-rational individualism. While individualism implies, as I already remarked, autonomy, independence and self-reliance, collectivism stands for heteronomy, dependence, submission and an image of oneself that is defined by membership and belongingness to an inclusive unit. Another trend in our modern society is the retreat on collective identities. Over the last twenty-five years we have witnessed a strong rise of claims by different groups.

We also have witnessed the rise of universal fundamentalism, often linked with religious connections, and of particularistic fundamentalism. In contradistinction

to universalistic fundamentalism, particularistic fundamentalism is based on the assumed cultural or religious specificity of a collectivity, such as a region, a nation, an ethnic group or a religious community. The closed, exclusive identity that is part of this type of fundamentalism draws, of course, also a sharp distinction between 'us' and the 'outsiders'.

The types of collectivism that I described briefly up to now have a common denominator: all of them are opposed in important respects to the advancement of modernization. The next type of collectivism and collectivization that I will discuss accepts 'modernization' wholeheartedly. It is collectivism within large organizations: paradoxically, it is even part of the very core of this process. This collectivism is an adaptation of the higher and middle echelons of large rationally organized systems to their requirements or exigencies. The rise of this type of collectivism has been observed both in the United States and in Europe. Many employees within this type of organization acquiesce to the organization's system-rationality that has within their way of thinking a higher priority than their own autonomy. Our last example of collectivism in a modern society is the compliance of *consumers with the temptations of the consumers' market.* This is the strong and one-sided orientation of persons to the satisfaction of their needs by the latest products and services that are offered by the markets. This orientation often goes hand in hand with a weak interest for the long-term consequences of this consumerism.

We have seen that theoretical pluralism in the social and human sciences does not only pertain to the divide between individualist and collectivist approaches, but also that both categories of approaches contain different conceptions of the human being, of social interaction and of the nature of the collectivity. This situation is very perturbing in front of the many shadows on the cave's wall. And to this complex situation we must add the observation that many of the shadows that we have mentioned are finally unmasked as being not shadows on the wall at all but, as we have seen, only images in our head that can never be falsified by empirical observations. They 'exist' without any real world outside in spite of the fact that many persons are convinced that they are reflecting an empirical reality.

Living in this complex world of shadows and of (collective) images in our heads, it is imperative that we start with the separation of shadows that reflect in some way an observable reality and those collective representations, which pretend that

they refer to an existing reality, but after a bit scratching at their surface, we discover that they are primarily instruments of deceit.

9 Europe and the European Union

Europe is a patchwork quilt, a diversity of national and regional cultures. But Europe also has a common cultural heritage. And it is a culture still in the making. The creation of the European Union would not have been possible without this common heritage and the desire to have a common future. Paradoxically, Europe's specificity, its common heritage, is threatened by one of its major exponents, the ideology of modernity and modernization. So a very important task that Europe is confronted with is to be at the same time both modernizing while still preserving its specificity and diversity. This task is all the more arduous because, in order to realize it adequately, we must reject outdated interpretations of modernity and modernization, and instead be prepared to directly confront tensions and conflicts which are inherent in the modernization process, like the increasing opposition between individual freedom and system-rationality. Reviving old ideals of nationalism will in no way assist in advancing the laudable goals of modernity and modernization.

As we will see, the ideology of modernization is strongly deterministic and as such it restricts political action largely to adaptation measures to a course that is largely fixed beforehand by scientific and technological developments and international market forces. The future, seen from this perspective, seems to be one of ongoing economic progress, of individualization of social life, and of increasing individualism and liberty.

Nevertheless, present collective representations of the world we live in, including the ideology of modernization, are time-worn and they can lead us easily, in several respects, in the wrong direction. We have to reflect about the possibility of developing other types of collective representations which can guide our future-oriented actions.

The extensive analysis of Europe and the European Union is a very good basis for the further political discussion concerning the desired and feasible direction of our continent. This discussion must be constantly related to the observations set forth in this contribution. We have to avoid collective representations that are not related to an observable social and cultural reality and that are only

pictures in our head. We should be constantly aware that all types of individualism can never exist without collectivist connections and *vice versa.*

Moreover, we should never forget that political, social, economic and cultural life is always permeated by efforts to manipulate many situations. We must remain vigilant to the fact that irrational behavior, far from receding in the process of modernity, is increasing in the wake of individualization of modern life.

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Europas Zukunft - Eine regionalisierte Republik

Winfried Böttcher

Zusammenfassung Im nachfolgenden Artikel gehen wir von der These aus, dass die Europäische Union in ihrer derzeitigen Form nicht reformierbar ist. Der Hauptstörenfried für eine grundlegende Reform ist der Nationalstaat. Wir haben es also mit einer Systemkrise des Nationalstaates zu tun und damit gleichzeitig mit einer Systemkrise der EU, die von den Nationalstaaten dominiert wird. Der Nationalstaat ist nicht bereit, seine Souveränität im notwendigen Maße auf die Ebene der Europäischen Union zu verlagern. Nach wie vor haben die nationalen Interessen Vorrang vor dem Gemeinschaftsinteresse. Der Artikel gliedert sich in drei Teile: Zunächst gehen wir auf die Erfolge der Integrationsbemühungen der vergangenen 65 Jahre ein, zeigen dann die vorhandenen Defizite auf, um am Schluss einen Ausweg in einem anderen, einem regionalisierten Europa zu suchen.

Schlüsselbegriffe: • Erfolge der EU • Defizite der EU • Krise der EU • Europas Zukunft • Europäische Republik •

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1 Vorbemerkung

Einigkeit herrscht in Wissenschaft, Politik und Öffentlichkeit darüber, dass sich die Europäische Union in einer existentiellen Krise befindet. Allerdings gehen die Meinungen darüber auseinander, ob diese Krise wie viele andere vorher gelöst werden kann und die Europäische Union gestärkt daraus hervorgeht oder ob wir ein völlig anderes Europa denken müssen.

Wir gehen davon aus, dass die derzeitige Krise keine ist wie jede andere. Wir haben es mit einer historischen Krise des Nationalstaates zu tun. Nach wie vor haben nationale Interessen Vorrang vor einem notwendigen Gemeinschaftsinteresse, ein Maximum an nationalen Egoismen, ein Minimum an Solidarität. Der sich beschleunigenden, immer unübersichtlicher werdenden Welt steht der Nationalstaat mehr oder weniger hilflos gegenüber.

Für den Wertverlust des Nationalstaates und seine abnehmende Rolle in der Welt kann man zumindest drei Begründungspunkte anführen:

- Die Bevorzugung nationaler Einzelinteressen stehen der Lösung notwendiger gemeinschaftlicher Sachprobleme im Wege. Sie schwächt mittelfristig nicht nur die eigene, sondern auch die europäische Legitimationsbasis.

- Die BürgerInnen verweigern dem Nationalstaat immer öfter ihre Loyalität, da er zunehmend weniger in der Lage ist, für die sozialen Bedürfnisse, die Sorgen und Ängste der Menschen adäquate Lösungen anzubieten. Dies führt zu einem schleichenden Vertrauensschwund zwischen Regierenden und Regierten.

- Dem Nationalstaat fehlt eine Kontrolle über den Kapitalmarkt, den größten deregulierten globalen Markt. 2013 betrug der gesamte Welt-Warenhandel ca. 16000 Milliarden US-Dollar. Der Devisenhandel lag dagegen bei ca. 5000 Milliarden US-Dollar täglich. Daran zeigt sich die Machtlosigkeit der Nationalstaaten besonders deutlich. Zudem wird Druck auf ihn ausgeübt, durch grenzenlose Deregulierung und neoliberale "Überbietungslogik" die Widerstände für die "Fließgeschwindigkeit" des Kapitals auszuräumen.

In den nachfolgenden Überlegungen (vgl. Böttcher, 2011, 2014a, 2014b) gehen wir also davon aus, dass der Nationalstaat die Zukunft nicht mehr gestalten kann. Dies trifft auch auf die Europäische Union zu, ein von Nationalstaaten dominiertes System. Damit ergibt sich die Frage, wie kann eine post-nationale Zukunft gestaltet werden.

Zunächst beschäftigen wir uns mit den zweifellos vorhandenen Erfolgen der Europäischen Gemeinschaft resp. Union, danach gehen wir auf wesentliche demokratische Defizite der EU ein und zeigen zum Schluss einen Ausweg in einem anderen Europa.

2 Erfolge europäischer Kooperation seit 1945

Winston Curchill (1874-1965) hielt am 19. September 1946 in der Universität Zürich seine vielbeachtete Rede über die Zukunft Europas. Zwei zentrale Gedanken werden hier zitiert:

"Wir müssen etwas wie die Vereinigten Staaten Europas schaffen. (...) Der erste Schritt bei der Neugründung der europäischen Familie muß eine Partnerschaft zwischen Frankreich und Deutschland sein. (...) Es gibt kein Wiederaufbauen Europas ohne ein geistig großes Frankreich und ein geistig großes Deutschland" (Churchill, 1946: 179).

Als Churchill 16 Monate nach Kriegsende diese richtungs- und zukunftsweisenden Gedanken formulierte, war der europäische Kontinent am Boden zerstört. Aus dem Krieg waren die USA und die UdSSR als die Weltpolitik bestimmenden Großmächte hervorgegangen. England gehörte zwar zu den großen Drei, war aber nur noch bedingt eine Großmacht, Frankreich vielleicht noch eine Mittelmacht, aber eine zutiefst erniedrigte Nation, und Deutschland politisch entmündigt in vier Sektoren aufgeteilt, unfähig, sich selbst zu ernähren. Die Städte lagen in Schutt und Asche, die Währung war wertlos, die Infrastruktur zerstört, der größte Teil der erwerbsfähigen Männer tot. Die Trümmerfrauen sicherten ein Minimum des Überlebens.

Das Image der Deutschen in der Welt war verheerend. Die deutschen Verbrechen waren in ihrem Ausmaß einzigartig in der Weltgeschichte. Paul Padover (1905-1981), Psychologe und Historiker in der Abteilung für Psychologische Kriegsführung (PWD) schrieb 1944 in einem Brief: "*Niemand wird verstehen, was die Europäer von den Deutschen halten, solange man nicht mit Belgiern, Franzosen oder Russen gesprochen hat. Für sie ist nur ein toter Deutscher ein guter Deutscher*" (Padover, 1999: 144).

Die Hoffnungslosigkeit in Europa war so tiefgreifend, dass man glaubte, es würde Jahrzehnte dauern, bis Europa aus eigener Kraft überlebensfähig wäre. Charles de Gaulle (1890-1970) verkündigte 1945 "voller Überzeugung, daß es 25 Jahre »unermüdlicher Arbeit« bedürfe, bevor Frankreich wiederaufgebaut sei" (Judt, 2006: 112). Diesen Aufbau wollte Frankreich durch Ausbeutung Deutschlands erreichen, durch das Verbot einer Waffen- und Rüstungsindustrie, durch Reparationen wie den Einsatz deutscher Arbeitskräfte in Frankreich, Konfiszierung von Agrarprodukten, Holz, Kohle und Maschinen. Die Ressourcen an Rhein, Ruhr und Saar sollten ausschließlich Frankreich zugutekommen (vgl. Judt, 2006: 140).

Obwohl dieser Fehler schon nach dem 1. Weltkrieg gemacht worden war, bleibt die Haltung Frankreichs verständlich. In 70 Jahren wurde Frankreich dreimal von Deutschland überfallen.

Aber die zunehmende Entfremdung zwischen den vormaligen Kriegsalliierten zwang Frankreich - spätestens nach der Außenministerkonferenz von 1947 in Moskau - umzudenken. Der damalige französische Außenminister und spätere Ministerpräsident Georges Bidault (1899-1983) erklärte im Januar 1948: "*Als Ziel sollte man den Alliierten wie den Deutschen die wirtschaftliche und politische Integration Deutschlands in Europa vorschlagen. (...) Nur auf diesem Wege kann es ein politisch dezentralisiertes, aber wirtschaftlich blühendes Deutschland geben*" (Bidault zit. bei Judt, 2006: 143).

So war es nicht die Einsicht, die Frankreich zu einer Kehrtwende seiner Haltung veranlasste. Vielmehr waren es auf der einen Seite die zunehmend aggressivere Politik Moskaus und auf der anderen Seite der Druck der Amerikaner. Die USA sahen schon früh ein, dass ohne ein wiedererstarktes Deutschland dem Expansionsdrang Stalins nicht begegnet werden konnte. Spätestens nach

Gründung der Bundesrepublik Deutschland verfolgte Frankreich deren Einbindung in zu schaffende europäische Strukturen als die zweitbeste Lösung, um Deutschland zu kontrollieren.

Der erste Erfolg dieses Umdenkens war die Gründung der Europäischen Gemeinschaft für Kohle und Stahl (EGKS) am 23. Juli 1952 in Kraft getreten. Diese erste umgesetzte Initiative europäischen Einigungsbestrebens wollen wir etwas genauer betrachten, während andere Erfolge der 65-jährigen Geschichte der Gemeinschaft nur exemplarisch und kursorisch erwähnt werden.

Zu Beginn der 50-er Jahre des vorigen Jahrhunderts sprachen sowohl Konrad Adenauer (1876-1967), als auch Jean Monnet (1888-1979), von einer Gründung einer deutsch-französischen Union, einer Art Fusion beider Länder.

Am 7. März 1950 gab Konrad Adenauer dem amerikanischen Journalisten Kingsbury-Smith ein Interview, indem er ausführte: "*Eine Union zwischen Frankreich und Deutschland würde einem schwerkranken Europa neues Leben und einen kraftvollen Auftrieb geben. Psychologisch und materiell würde sie von gewaltigem Einfluß sein und Kräfte freisetzen, die Europa sicherlich retten werden. Ich glaube, dies ist die einzige Möglichkeit, die Einheit Europas zu erreichen. Hiermit würde der Rivalitätsgedanke zwischen beiden Ländern verschwinden*" (Adenauer, 1965: 312). Auch Jean Monnet, der Architekt der EGKS, führt in seinen Erinnerungen ähnlich aus, wenn er schreibt*: "Europa soll auf förderalistischer Grundlage organisiert werden. Eine französisch-deutsche Union ist dabei ein wesentliches Element, und die französische Regierung ist entschlossen, sie in Angriff zu nehmen.*" (Monnet, 1978: 376).

Auf diesem Gedanken basiert der Plan einer sektoralen Integration, den Robert Schuman (1886-1963) am 9. Mai 1950 nach einer Abstimmung mit Konrad Adenauer der Öffentlichkeit vorstellte. Kohle und Stahl waren die entscheidenden Voraussetzungen zur Herstellung von Waffen. Somit war die gemeinsame Kontrolle über die französischen und deutschen Ressourcen ein "*Unterpfand des Friedens*".

Der grundlegende Satz des Dokuments lautet: *"Durch die Zusammenlegung der Basisproduktion und die Einrichtung einer hohen Behörde, deren Entscheidungen für Frankreich, Deutschland und die sich anschließenden Länder verbindlich sind, werden die ersten konkreten Grundlagen einer europäischen Föderation geschaffen, die unerläßlich ist für die Wahrung des Friedens*" (Monnet, 1978: 380). Dort werden "*die Methode, die Mittel und das Ziel*" (Monnet, 1978: 380) in einem Satz zusammengefasst.

Nach unserer Auffassung war Europa nie einer Integration näher, wenn auch nur sektoral. Integration wird hier im Sinne Johan Galtungs verstanden als *"Prozess, bei dem zwei oder mehr politische Akteure einen neuen politischen Akteur bilden*" (Galtung, 1968: 375).

Wie leicht nachvollziehbar ist, existiert heute mit der EU zwar ein neuer politischer Akteur auf der Weltbühne, gefesselt aber durch nationalistische, egoistische Einzelakteure, die möglichst wenig Souveränität übertragen wollen. Nach wie vor gilt bei wesentlichen Entscheidungen nicht das notwendige Mehrheitsprinzip, sondern das Veto.

Dennoch gibt es unbestreitbar Erfolge auf dem Wege, Integration zu erreichen. Begonnen hat es mit der Gemeinschaft für Kohle und Stahl, wie oben erwähnt. Dort wurde auch die Grundlage für eine 65-jährige wunderbare Friedensidee gelegt, wenn auch nur für einen Teil Europas. Daran mag man ermessen, welches Glück wir haben. Zu keinem Zeitpunkt in der Geschichte Europas bestand eine solch lange Friedenszeit zwischen so vielen Völkern, ja, man wird erinnert an den Kantschen Begriff "*Zum ewigen Frieden*" (vgl. Kant, 1795/1914). Aus Feinden wurden Nachbarn, aus Grenzen Verbindungslinien. Selbst wenn das europäische Projekt scheitern sollte und nichts übrigbliebe, als der Friede, so hätten sich die Anstrengungen gelohnt. Allerdings führt uns die Ukrainekrise vor Augen, wie zerbrechlich der Friede ist, und wie schnell sich mitten in Europa eine gefährliche Eskalationsspirale entwickeln kann. In diesen Zeiten werden nicht selten Erinnerungen an alte Vorkriegszeiten wach.

Die guten Erfahrungen, die man mit den föderalen Elementen der EGKS gemacht hatte, wollte man 1954 in die europäische Verteidigungsgemeinschaft, die EVG, einbringen. Dies hätte sicherlich zu einer unumkehrbaren politischen Union geführt. Die EVG scheiterte an dem Votum der Französischen Nationalversammlung.

Mit der Unterzeichnung und Ratifizierung der Römischen Verträge von 1957 machte man dann einen großen Schritt in die Richtung, wie sich die EU uns heute zeigt. Mit der Gründung der Europäischen Wirtschaftsgemeinschaft begann das größte Modernisierungsprojekt in Europa seit Beginn der Industrialisierung im ausgehenden 18. Jahrhundert. Es entstand der größte Wirtschaftsblock der Welt.

30 Jahre nach der Verabschiedung der Römischen Verträge brachte die Einheitliche Europäische Akte, die EEA, einen wichtigen Fortschritt in den Integrationsbemühungen. Das Europäische Parlament, erstmals 1979 von den Bürgerinnen und Bürgern direkt gewählt, wurde gestärkt, die Zusammenarbeit zwischen den Institutionen verbessert, Kompetenzen und das Mehrheitsprinzip der Union auf neue Politikbereiche ausgeweitet.

Den größten Sprung nach vorne machte die Gemeinschaft mit dem Vertrag von Maastricht 1992: "*Vertrag über die politische Union und die Wirtschafts- und Währungsunion*". Das Parlament entscheidet in Zukunft mit, der Binnenmarkt wird geschaffen, die politische Zusammenarbeit gestärkt, eine gemeinsame Außen- und Sicherheitspolitik angestrebt und die Währungsidee auf den Weg gebracht.

Weil die Nationalstaaten es verhindern, hat das Parlament zwar erheblich an Bedeutung gewonnen, aber es hat nach wie vor nicht die Möglichkeit, eine europäische Regierung zu wählen. Allerdings konnten die im Europaparlament vertretenen Parteien zum ersten Mal 2014 mit Spitzenkandidaten für den Kommissionpräsidenten um die Gunst der Wähler werben. Gegenüber den bisherigen Gepflogenheiten, den Kommissionspräsidenten in Absprache zwischen den Staats- und Regierungschefs auszuwähen, war dies ein nicht zu unterschätzender Fortschritt. Dahinter kann Europa nicht mehr zurückfallen.

Die Einführung des Euro als Zahlungsmittel 2002 in nunmehr 19 Ländern, bedeutete einen Integrationsfortschritt und einen europäischen Identitätszuwachs. Allerdings liegt auch der unvollendeten Währungsunion der Irrglaube zugrunde, man könne über eine einheitliche Währung Volkswirtschaften einigen. Umgekehrt ist es richtig, erst eine Einigung der Volkswirtschaften macht eine einheitliche Währung möglich und sinnvoll, wie historische Beispiele belegen.

Die Erweiterung der EU um 12 neue ost- und mitteleuropäische Staaten hat, trotz aller Kritik und bis heute nicht bewältigten ökonomischen Folgewirkungen, etwas nicht zu überschätzendes erreicht: sie hat endgültig die Jahrhunderte alte Teilung des geschundenen europäischen Kontinents aufgehoben.

3 Grundlegende demokratische Defizite

Auf mehreren Ebenen der Europäischen Union lassen sich erhebliche Demokratiedefizite ausmachen. Nach unserer Auffassung liegt der entscheidende Geburtsfehler bei der Gründung des europäischen Projekts in der fehlenden Gewaltenteilung und damit in der gegenseitigen Kontrolle der Gewalten. Seit Montesquieu (1689-1755) haben wir gelernt, dass nur eine Gewaltentrennung gegenseitige Kontrolle garantiert und das Omnipotenzstreben der Macht in Schranken hält. In den Römischen Verträgen wird zwar formal mit der Kommission, dem Rat, dem Parlament und dem Gerichtshof ein "*Organgeflecht*" angedeutet, das Gewaltenteilung suggeriert, aber höchst asymetrisch angelegt ist.

Machtausübung und direkte demokratische Legitimation der Macht driften weit auseinander. Nach wie vor ist die eigentliche Legislative der EU der Europäische Rat, besonders in der Form der Staats- und Regierungschefs, wenn auch zunehmend unter Mitwirkung des Parlaments. Der Rat bezieht seine Legitimation aus den Wahlen in den Mitgliedstaaten. Mit den zunehmenden Mehrheitsentscheidungen im Rat wird jedoch selbst dieser Legitimationsanspruch fraglich. Hierbei offenbart sich ein Legitimitätsdilemma insofern, als einerseits Mehrheitsentscheidungen die Effizienz des Systems stärken, andererseits die aus den Mitgliedstaaten abgeleitete Legitimation untergraben.

Das Parlament bezieht zwar seine Legitimation aus Wahlen, wenn auch nach nationalen Regeln und nicht grenzüberschreitend. Dies schlägt sich jedoch nicht in einer umfassenden Souveränität der Gesetzgebung und der Bestellung einer Regierung nieder. Solange dies nicht der Fall ist, bleibt das Demokratiedefizit virulent. Ändern wird sich das kaum, weil die Nationalstaaten nicht bereit sind, ihre Souveränität aufzugeben.

Ein weiteres Hauptdefizit des europäischen Einigungsprojekts liegt in der fehlenden diskursiven Auseinandersetzung der EU mit ihren BürgerInnen.

Die Völker Europas, die eigentlichen die Träger einer zukünftigen europäischen Ordnung sein sollten, bleiben bei dem derzeitigen Konzept außen vor. Die herrschenden Politeliten wissen, was für ihre Völker gut ist oder nicht. Die Völker wurden zwar mit den Direktwahlen für das Europaparlament formal einbezogen, aber mehr oder weniger ohne Wirkung. Von Beginn an war das Projekt Europa eine Angelegenheit der europäischen Eliten, an dem der "normale" Mensch keinen Anteil hatte und heute noch immer nicht hat (s. dazu auch: Habermas 2011,78f.). Die Europäische Union ist ein Rückfall in vorkonstitutionelle Verhältnise. "Jenes Defizit (der Demokratie) ist also nichts weiter als ein vornehmer Ausdruck für die politische Entmündigung der Bürger" (Enzensberger, 2011: 51f.)

Da es keine europäische Öffentlichkeit gibt, weil Diskurse und Kommunikation aber an Verstehen durch Sprache gebunden sind, bleiben Informationen über Europa immer national gefärbt. Da Meinungs- und Willensbildung über Europa sich in Parteien, Parlamenten, Verbänden, Nicht-Regierungsorganisationen vollzieht, findet sie für die Union nur rudimentär statt.

Eine europaweite zivilgesellschaftliche Infrastruktur existiert nicht einmal in Ansätzen. Eine solche Infrastruktur ist aber für jedes demokratische Gemeinwesen unerlässlich. Gleiche Informationen für alle europäischen BürgerInnen ermöglicht erst die notwendige Partizipation und die Akzeptanz von Entscheidungen.

Die vornehmliche Konzentration der Brüsseler Behörden auf ökonomische Sachverhalte, marktrational und bürokratisch, hat bisher wenig Raum für die zunehmenden wohlfahrtsstaatlichen Notwendigkeiten übrig. Das heutige Europa ist in erster Linie ein wirtschaftliches Europa geblieben, was es von Anfang an war. "Was mich am meisten beunruhigt, ist die himmelschreiende Ungerechtigkeit, die darin besteht, dass die sozialisierten Kosten des Systemversagens die verletzbarsten Gruppen am stärksten treffen" (Habermas, 2011: 99).

Da die gegenseitige Blockade der Föderalisten und Unionisten, ein Streit seit der Haager Konferenz von 1948, nicht auflösbar ist und nur kleinste

funktionalistische Fortschritte im Einigungsprozess zulassen, gehen wir davon aus, dass mit den Nationalstaaten Europa nicht zukunftsfähig ist. *"Entweder geht das Europa der Nationalstaaten unter, oder es geht das Projekt der Überwindung der Nationalstaaten unter*" (Menasse, 2012: 107).

4 Der Ausweg - Ein anderes Europa

Wie bereits erwähnt, sind wir davon überzeugt, dass die Europäische Union mit Nationalstaaten als ihren bestimmenden Hauptakteuren nicht reformierbar ist. Sie könnten allerdings der guten europäischen Sache einen letzten Dienst erweisen, indem sie sich im Sinne Hegels aufheben, also auflösen und auf einer höheren Ebene in einer Republik aufgehen.

Diese Vorstellung wollen wir skizzenhaft in eine *"konkrete Utopie*" fassen. Damit meinen wir nicht eine Utopie im naturwissenschaftlich-technischen Bereich (science fiction), was wir auch nicht meinen, sind negative Utopien, die vom Totalverlust der Freiheit des Menschen durch nicht legitimierte Herrschaft ausgehen (George Orwell, 1903-1950; Aldous Huxley, 1894-1963). *»Wenn es aber Wirklichkeitssinn gibt, und niemand wird bezweifeln, daß er seine Daseinsberechtigung hat, dann muß es auch etwas geben, das man Möglichkeitssinn nennen kann.*« (Musil 1930/1933, 2013: 19).

Unser "*Möglichkeitssinn*", eine Vision einer "*konkreten Utopie*" geht davon aus, dass sie geeignet erscheint, eine bessere europäische Gesellschaft zu entwickeln. Hierbei übersteigt der damit verbundene Demokratiebegriff das rein Deskriptive, vielmehr benutzen wir "*konkrete Utopie*" als nützliches Analyseinstrument. Mit ihr wenden wir uns gegen die Erstarrung des Systems, gegen das Steckenbleiben im Vordergründigen, gegen den lähmenden Funktionalismus, gegen die Dominanz der Nationalinteressen, gegen die Ungleichheit zwischen großen und kleinen Ländern, gegen die Bürgerferne im heutigen Lissabon-Europa und vieles mehr. Mit unserer "*konkreten Utopie*" von einem anderen Europa wollen wir kein Idealbild malen. Dies würde allein schon dem Adjektiv *"konkret*" widersprechen. Nein, wir wollen in unserer Kritik an den bestehenden Verhältnissen Mittel und Wege einer Realisierung aufzeigen, die zu einer, wenn auch radikalen, Veränderung der heute vorfindlichen europäischen Gesellschaft führen.

In unserer Auffassung - selbst wenn sie heute noch als Utopie abgetan wird - werden wir durch folgende Tatsachen bestärkt. Viele naturwissenschaftlich-technische Entwicklungen, aber auch gesellschaftlicher Fortschritt, lange vor ihrer Realisation als Utopien gedacht, sind für uns heute selbstverständlich. Was unsere Vorstellung von einem anderen Europa verheißt, wird dann in Zukunft Wirklichkeit sein, "wenn es zu der Zeit verkündet wird, da es noch unmöglich scheint (Hommes, 1974:1576). Wir können uns also voll und ganz Oskar Negt anschließen, wenn er am Ende seines Buches "*Der politische Mensch*" feststellt: *"Nur noch die Utopien sind realistisch*" (Negt, 2010: 560).

Gegenstand unserer "*konkreten Utopie*" ist die regionalisierte Republik nach der Auflösung der Nationalstaaten Frankreich und Deutschland. Die Regionen, im Moment 16 deutsche und 13 französische (ein Neuzuschnitt ist möglich), sind die Träger der 1. Europäischen Republik.

Als Victor Hugo (1802-1885) im Februar 1871 zum Mitglied der sich neukonstitierenden Nationalversammlung in Bordeaux gewählt wurde, hielt er am 1. März 1871 eine Rede über die Zukunft Europas. Dort proklamierte er, durch eine Vereinigung von Frankreich und Deutschland ein Kerneuropa zu bilden. Dies war eine Idee, die der Publizist Ludwig Börne (1786-1837) schon 1836 in seiner Zeitschrift "*La Balance*" geäußert hatte (Lützeler, 1992: 108-118). Hugo beschwor während des deutsch-französischen Krieges 1870/71 die Kriegsgegner: *"Nunmehr wird es in Europa zwei fürchterliche Nationen geben; die eine ist furchtbar, weil sie gesiegt hat, die andere, weil sie verloren hat."* Weder sollte sich die eine dem Siegestaumel hingeben, noch die andere Revanchierungsgelüsten, vielmehr sollten *"wir in Zukunft ein einziges Volk bilden*", eine "*einzige Republik*", "*keine Grenzen mehr*!" rief er aus, "*der Rhein gehört allen! Seien wir eine Republik, bilden wir die Vereinigten Staaten von Europa! Gründen wir die europäische Freiheit, den Weltfrieden«* (Hugo zit. n. Lützeler, 1992: 178).

Im Nachhinein kann man nur ausrufen: Ach, hätten unsere Vorfahren doch auf den Dichterfürsten gehört, wieviel unsägliches Leid wäre den Völkern erspart geblieben.

Mit einer Aufhebung der beiden wichtigen Nationalstaaten könnte der zentrale Denkansatz des regionalen Föderalismus als Lebens- und Ordnungsprinzip in einer 1. Europäischen Republik praktisch umgesetzt werden. Zwei große bestimmende Kulturströmungen des alten Europa könnten in einem großen

Strom zusammenfließen, unter Beibehaltung regionaler Kulturen als Erinnerung an Vergangenheit und Vermächtnis für eine humane Zukunftsgestaltung.

In einer solchen Republik, in der zwei große Völker ihre Interessensgegensätze überwinden, werden auch die vier Hauptfragen des Gesllschaftssystems gelöst:

- "Die Ordnungsfrage nach dem richtigen Gebrauch der gegebenen Produktionsmöglichkeiten;
- die politische Frage nach der Machtverteilung;
- die soziale Frage nach den notwendigen Korrekturen zum Schutz der wirtschaftlich Schwachen und Benachteiligten;
- die moralische und vitale Frage nach den Voraussetzungen des Glücks, dem Sinn des Wirtschaftens und Lebens" (Röpke 1961, zit. n. Kohlhase 1988: 61).

Eine solche Republik, nur aus Frankreich und Deutschland bestehend, würde fast 50 Prozent des Bruttoinlandprodukts der 27 EU-Staaten und fast 150 Millionen Einwohner ausmachen. Spielen wir zunächst die Idee nur für Frankreich und Deutschland durch, obwohl wir uns gut vorstellen können, dass Belgien und Luxemburg von Beginn an mitmachen wollen. Bei den Niederlanden sind wir eher skeptisch.

Konkret geht es also um den Austritt von Frankreich und Deutschland aus der Europäischen Union, vereint im gemeinsamen Willen, einen Systemwechsel in Europa herbeizuführen.

Der neue europäische Kernstaat, die regionalisierte Republik, besteht aus zwei gleichberechtigten Häusern, dem Völkerhaus und dem Regionenhaus. Sie hängen voneinander ab, kontrollieren sich gegenseitig und teilen die Macht.

Beginnen wir mit der Verfassung für das neue System. Wie bei allen modernen Verfassungen, so auch die hier zu konstituierende, legt die Grundstrukturen des politischen, demokratischen Systems fest. Es werden die Menschen-, Bürger- und Sozialrechte, die politische Willens- und Entscheidungsbildung, die Institutionen in ihren Kompetenzabgrenzungen, Gewaltenteilung,

Rechtsstaatlichkeit, Sozialstaatlichkeit, Ämter und Fürungspositionen festgeschrieben.

"*Die zweite wesentliche Funktion ist die Legitimierung der konstituierten Ordnung. Die Legitimation einer bestehenden politischen Ordnung bedeutet, dass diese Ordnung als gut und gerecht, das heißt als legitim, anerkannt wird. Die Verfassung kann eine politische Ordnung dadurch legitimieren, dass sie auf den Ursprung und die besonderen Umstände ihrer Gründung zurückverweist. Im Akt der Verfassungsgebung haben »we the people«, wie es in der amerikanischen Verfassung von 1787 heißt, beschlossen, sich eine Verfassung zu geben. 1949 gibt sich das »deutsche Volk« das Grundgesetz und damit eine neue Ordnung*" (Vorländer, 1999: 17f.). (Nach dem Fall der Berliner Mauer 1989 hat sich das wiederzuvereinigende deutsche Volk keine neue Verfassung gegeben, für uns ein Geburtsfehler der neuen Bundesrepublik, der sich noch heute bemerkbar negativ macht).

Aus allen Schichten der deutschen und französischen Regionen wird ein paritätisch zusammengesetzte, gemeinsame, verfassungsgebende, Versammlung mit der Ausarbeitung einer Verfassung beauftragt. Nach der Verabschiedung wird ein regionenweites Referendum abgehalten. Für eine Annahme der Verfassung bedarf es einer Zustimmung von zwei Dritteln der Wähler, jeweils aus beiden Ländern.

Gehen wir noch kurz auf die beiden Häuser der Republik und die Souveränitätsfrage ein. Grundsätzlich haben wir es insofern mit einem neuen System zu tun, weil direkte und repräsentative Demokratieelemente unauflöslich miteinander verschränkt sind. Dies ist im Sinne einer partizipativen Beteiligung der BürgerInnen der Republik.

Die beiden Legislativorgane sind das Völkerhaus und das Regionenhaus. Das Völkerhaus, die erste Kammer der Republik, setzt sich aus je zwei Abgeordneten pro angefangener Million Einwohner zusammen, die direkt gewählt werden. Im Moment wären das 297 Abgeordnete. Aus dem Parlament heraus und diesem verantwortlich wird dann eine neue Regierung gebildet, mit einem Minimum an Zuständigkeiten. Alles, was nicht ausdrücklich in die Kompetenz des Völkerhauses und der aus ihm hervorgegangenen Regierung fällt, ist in den Regionen verortet.

Die Bevölkerung der Regionen wählt pro Region, unabhängig von ihrer Größe, 6 Abgeordnete in das Regionenhaus. Im Moment wären dies 174 Abgeornete. Alle Gesetze, die nicht ausdrücklich in die Souveränität der Regionen fallen, bedürfen der Zustimmung beider Häuser.
Jede der 29 Regionen dieser neuen Republik hat eine eigene Verfassung und ist weitgehend souverän, etwa vergleichbar den Schweizer Kantonen.

An der Umsetzung regionaler Politik sind möglichst viele Individuen, Gruppen und Interessen zu beteiligen. Je breiter die Basis der Beteiligung am Zustandekommen einer Entscheidung ist, desto weniger Widerstand ist durch Partikularinteressen zu erwarten. So soll auch das Regionalparlament möglichst genau die Interessen der Region abbilden. Dies setzt aber voraus, dass wir es nicht mehr mit einem Parteienparlament alten Stils zu tun haben. Parteien, Bürgerinitiativen, Einzelinteressen, Gewerkschaften, Unternehmer, NGOs, unabhängige Arbeitervertretungen oder wie auch immer sich Interessen bündeln und artikulieren, können sich für das Regionalparlament zur Wahl stellen. Sperrklauseln widersprechen diesem Demokratieansatz. Aus dem Parlament wird ein Regionalrat gebildet, der zusammen mit einer Verwaltung die Politik ausführt. Der Regionalrat ist jederzeit nach in der Verfassung festgelegten Regeln abrufbar.

Die höchste Instanz der Region ist der Bürgerentscheid, der zu jedem Thema nach einem festgelegten Quorum durchgeführt werden kann. Das Ergebnis ist für alle in der Region Ansässigen bindend.

Um unsere Idee kurzfristig in Gang zu setzen, könnte man mit einer deutsch-französischen Staatsbürgerschaft, die später in einer Republikbürgerschaft aufgeht, beginnen. Auch wäre die deutsch-französische Verteidigungsgemeinschaft und ein Finanz- und Wirtschaftsrat möglich, zumindest mit einem gemeinsamen Mandat für internationale Verhandlungen versehen. Auch könnte der französische Sitz in der UNO in einen gemeinsamen französich-deutschen Sitz umgewandelt werden. Dies sind einige wenige von vielen Möglichkeiten einer beginnenden Integration, an deren Ende dann die 1. Europäische Republik stünde, wenn man das Projekt denn überhaupt will.

Mit diesem Vorschlag verfolgen wir nicht mehr und nicht weniger als den Menschen zur Zentralinstanz der Demokratie zu machen. Dies kann er aber nur

im unmittelbaren Umfeld der Gemeinde, der Region sein. Der Mensch als überstaatliches Wesen ist in seiner Region, wo er direkt von politischen Entscheidungen betroffen ist, selbst Träger der Politik. Die regionale Zivilgesellschaft ist ihre eigene Herrin über die politisch notwendig zu treffenden Entscheidungen. Im Idealfall ist jeder Bewohner/jede Bewohnerin einer Region auch aktiv in der Politik, wenn auch auf unterschiedlichen Ebenen. Region und Person, Regionalismus und Subsidiarität stehen in einem unauflöslichen Bedingungsverhältnis zueinander. Jede Person mit eigener Identität lebt in einer spezifischen Region mit eigener Regionsräson. Die jeweilige Region hat ein bestimmtes Daseinsgesetz, nach welchem sie geworden ist, bestimmte Lebensbedingungen, die sie unverwechselbar zu der spezifischen Region machen, die sie ist. Dies kann man beziehen auf räumliche Ausdehnung, auf eine bestimmte soziale und/oder politische Vefasstheit, auf eine Stammeszugehörigkeit, auf eine besonders erbrachte Leistung u.ä. Eine solche Besinnung auf die eigene Regionsräson integriert die jeweils sprachlichen und kulturellen Besonderheiten und die Viefalt von Lebensentwürfen zu einem unverwechselbaren Gefühl mit einer individuellen und regionalen Identität. Die alten nationalstaatlichen Identitäten verblassen allmählich und werden in einer regionalisierten Republik mehr und mehr überlagert. Neben den starken regionalen Identitäten bildet sich allmählich ein republikanisches Gemeinschaftsbewusstsein heraus, das altnationale Identitäten aufhebt, auch dies im Sinne Hegels.

Dieses neue System einer regionalisierten Republik bildet ein variables regionales Gesellschaftssystem heraus, in dem jede Region nach ihrer eigenen Regionsräson leben kann. In Abwandlung eines Gedankens von Jacob Burckhardt (1818-1897) existiert mit der Region "ein Fleck auf der Welt", wo eine "größtmögliche Quote" der Bewohner "Bürger in vollem Sinne sind..." (vgl. Burckhardt 1905/1941: 81f.)

Eine regionalisierte Republik wirkt als lebendiger Regionalismus, nahe beim Alltag der Menschen, der möglichst mit solidarischer und partizipativer Beteiligung aller Betroffenen die anfallenden Probleme zu lösen vermag.

Das Europa der Zukunft wird humanistisch, regional und republikanisch oder es wird gar nicht sein.

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Political Considerations of Turkey's Accession to the EU

Bojko Bučar

Abstract The paper deals with the contentious issues of Turkey's accession to the EU. While it is clear that all candidate countries have to fulfill the formal criteria of joining the EU there seem to exist also informal criteria that in the case of Turkey has created additional obstacles. The paper analyzes arguments that are most often voiced in connection with strong reluctance to Turkish membership in the EU: its Muslim faith, not being a European country, geopolitical risks and the size of the country. Each argument is analyzed separately and the paper demonstrates how each may be viewed from a different perspective and how drawbacks may also be seen as advantages. EU's enlargement is in the end a political decision and Europe's political elites bear the primary responsibility for European unification and peace and development in the region.

Keywords: • Turkey • European Union • Accession Criteria • Enlargement Fatigue • Islam •

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1 Introduction

This paper will explore the informal criteria of accession to the EU that have been contentious as far as the accession of Turkey to the European Union (EU) is concerned. As with most foreign policy issues, there is no single theory that definitively explains foreign relations behavior which is why this paper will instead focus on a mixture of realism and constructivism as theories that most accurately explain the state of affairs as far as fears and sentiments towards the Turkish accession to the EU are concerned. The informal criteria are categorized and chosen arbitrarily from various sources including mass media reports, statements of politicians, discussions on conferences and similar events. The paper tries to analyze each argument and test its relevance and validity. At the end, some concluding remarks are added.

2 Contentious Issues of Turkey's Accession to the EU

There are formal requirements for a country to enter the European Union (EU): the Copenhagen criteria and the *aquis*. For the sake of argument, let us suppose that these requirements are clear, unambiguous and not subject to interpretation.[1] Let us further suppose that these are objective criteria that every country trying to join the EU must meet and that candidate countries also do not contest these criteria. It seems that, at least superficially, no country objects that both sets of criteria have to be met. The process itself is difficult enough for candidate countries and one could argue that the countries that have most recently sought admission have faced a more arduous path than was the case in the past, at least in part due to an increase in requirements of the *aquis*.

Yet for some countries, accession becomes even more difficult because of informal criteria. Turkey is a good example. In the case of Turkey's quest for admission to the European Union, there seem to exist informal criteria, above and beyond both the Copenhagen criteria and the *aquis,* that can be attributed to fear. Because fear is usually an irrational sentiment it is hard to challenge it

[1] The Copenhagen criteria require for candidate-countries: 1. Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. 2. The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. 3. The ability to take on the obligations of membership, including adherence to the aims of the political, economic and monetary union (European Council (1993/1995). Accession Criteria (Copenhagen Criteria). Available at http://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhague.html (November 21, 2017).

employing rational arguments. However, let us try. As seen through media reports in various European countries, we may enumerate informal criteria in four categories: The Muslim faith predominating in Turkey; the fact Turkey is not a European country; geopolitical risks perceived by some to be associated with Turkey; and, the size of the country. Let us now look into these criteria.

2.1 The Muslim Faith

It often has been asserted that Europe opposed the Islamic religion from its beginning, throughout time and still today. This assertion has little to do with reality despite the fact it persists. Much closer to the truth would be the assertion that Europe from its beginning has a problem with religion in general. Europe has demonstrated a history of intolerance, discrimination, hatred, crusades, religious wars, pogroms (later labeled as holocaust and genocide) and ethnic cleansing. Since the beginning of Christianity there was animosity towards Judaism. Judaism might well have been the predominant religion until the fourth century when Christianity became the official religion of the Roman Empire. Since the seventh century, however, the competition between Islam and Christianity produced conflicts and hatred between both religions. There have been schisms, however, even within Christian faiths. For instance, since the 11th century there has been a schism between the Orthodox and the Roman Catholic Church and since the 17th century between the Catholic and the Protestant Church. If the divisions in Christianity between Catholicism (and Protestantism) and the Orthodoxy is still strong, of course the discord between Christianity and Judaism, let alone Islam, is even stronger.

How contentious religious issues may be can also be shown by the text of the *Charter of Fundamental Rights of the Union*[2] where in the preamble in the English (and French) version it says "/…/ spiritual and moral heritage /…/" while in the German version it reads "/…/ spiritual-religious and moral heritage /…/".[3]

[2] Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

[3] The preamble says "/…/ Conscious of its spiritual and moral (Fr. spirituel et moral; Ger. geistig-religiösen und sittlichen) heritage /…/". We do not claim that this was the reason why the Charter never became part of the *Treaty of Nice*, nor are we claiming that therefore the *Treaty establishing a Constitution for Europe* whose Part II enshrines the Charter was not ratified in all Member States. However, we do have an example where the authentic (linguistic) version of a document was deliberately written in two substantively different versions; hopefully with no dire practical consequences. Proclaimed in 2000, the Charter became legally binding with the entry into force of the Treaty of Lisbon, in December 2009 (Charter of Fundamental Rights of the Union, 2012, Preamble, DE, EN, FR).

This at a first glance minor variance *mutatis mutandis* repeated itself in the discussion on the preamble of the *Treaty establishing a Constitution for Europe*[4] where especially Poland and Spain, yet also some other countries (Germany) were pushing for a wording honoring the Christian heritage of Europe. Here the dispute got more serious, since this wording would encompass the Catholic, Protestant and Orthodox countries, but not the Muslim countries: Turkey, Albania or Bosnia for that matter.[5] The idea has not been abandoned because of the thought that Muslim countries could and should become EU Member States but rather because of France's stand that there should be a strict division of religion and politics.[6] The dispute was settled with the words in the preamble of the *Treaty establishing a Constitution for Europe* which say: "Drawing inspiration from the cultural, religious and humanist inheritance of Europe /.../" (Treaty establishing a Constitution for Europe, 2004, Preamble, p. 3). However, it never entered into force. We may also state that while religion on the one hand in itself has many positive virtues, religious politics on the other hand can often cause great strife and conflict.

In 2004, mass media reported that the Holy See advised against mixed marriages between Catholics and Muslims. Unfortunately, there were no reports that the Council of Europe (CE) would take any measures against such a policy of discrimination.[7] In August 2004, mass media even reported that the then Cardinal Joseph Ratzinger had stated that there was no place for Turkey in the EU. Even after he had been elected in 2005 as Pope Benedict XVI, he caused certain unrest with his public statements on the role of the Islamic religion in history (his speech in Regensburg in 2006). True, once he became Pope he seems to have changed his mind and at the occasion of his visit to Turkey he has promised to Prime Minister Recep Tayyip Erdoğan that he would support Turkish accession to the EU (hopefully this time being infallible) (*Dnevnik* 29. 11. 2006).[8] One can only

[4] Treaty establishing a Constitution for Europe [2004] OJ C310.

[5] Let us remember an interesting historical parallel: since the Turkish sick and wounded could not (as they thought) seek shelter and refuge under the protection of the Red Cross, as early as the Crimean war of 1876 they had to invent the symbol of the Red Crescent.

[6] One could also claim that this traditional French policy derives as a lesson from their religious wars in the 16th century, wars between Catholics and Protestants in France that lasted over 15 years.

[7] It is true however, that individuals belonging to different denominations within Christianity face difficulties if trying to get married in church.

[8] Interestingly enough his reintroduction of masses that in certain circumstances have to be held in Latin (*Dnevnik* 9. 7. 2007) will to a certain extent weaken the argument that Muslims are under a foreign influence since they have to read the Koran in Arabic.

hope that this is a pattern that most politicians would follow: assert certain positions before they are elected but then alter those positions after they have been elected.[9] A variation on this theme occurs where the politicians really are sincere in pre-election positions such that they actually follow through on those positions once elected and in office. For example, at the Copenhagen summit 2003 TV microphones picked up Valéry Giscard d'Estaing, the former French President, saying (supposedly in private) that Turkey will never become a Member State of the EU. Moreover, this incident occurred right after the highest representatives of the people (among them Valéry Giscard d'Estaing) had made public statements to the contrary. It is of little comfort that there are also politicians like the then Danish Prime Minister Anders Fogh Rasmussen who, at the Copenhagen summit, had not informed his colleagues that the cameras were still rolling, since we may not be sure of his motive. It is an adage that politicians are people who think in one way, speak in another and act in yet a third way. The positions advanced by individual politicians are, of course, closely linked to the beliefs and actions of the groups of people they represent. In fact, one researcher (Zalta, 2006: 560) noted that political parties that are aligned with Christianity tend to resent Turkish European identity on the grounds that Turkey is a Muslim country.

The influence that political leaders have on public opinion may also be illustrated by the fact that in 2004 in Germany 73% of respondents viewed Turkish accession to the EU as a positive, while in 2006 the percentage dipped to only 54%. In 2005, the power of the Chancellor passed from Gerhard Schröder, the leader of the Social Democratic Party of Germany (SDP) and advocate of the Turkish accession to the EU, to Angela Merkel, the leader of the Christian Democratic Union (CDU) and an opponent to the Turkish accession to the EU (*Delo* 6. 10. 2006: 8).[10] Of course, scientifically speaking, the change in political leadership together with a shift in the opinions of that new leadership is only one of the possible explanations for the transformation of the public opinion and we

[9] We may remember the opinion of Nicolas Sarkozy, the elected French president in 2007. In his election campaign he clearly stated that there is no room for Turkey in the EU. Soon after he has been elected he was still sending the same message, but with it also the message that the issue of Turkish membership was not a priority. At the same time, he sent his personal diplomatic envoy Jean-David Levitt incognito to Turkey (*Delo* 2. 6. 2007: 8). In the election 2012, he was narrowly defeated.

[10] In June 2005, Germany's center-right leadership under Angela Merkel called for a reappraisal of EU's foreign policy, attributing the failure of France and the Netherlands to ratify the Constitutional Treaty to people's fear of prospective Turkish membership (*Süddeutsche Zeitung,* 6. 2. 2005; *Financial Times,* 6. 3. 2005).

cannot know for sure why it really happened. On the other hand, we should remember that the project of united Europe has always been an undertaking by political elites and not by the masses on the street. Likewise, it has been the product of actions taken by political elites and not by masses at the polls. Voters may and will be used and misused, yet the primary responsibility remains with the politicians.

The issue in essence is, do we really want an EU that is a Christian fortress? The notion of "Fortress Europe" as manifested in the Schengen border regime is problematic enough. Nevertheless, having a Christian fortress would mean Albania, Bosnia and Kosovo could never become members of the EU. Taken to its extreme, the question would be how to remove Muslims from France, Germany, United Kingdom etc. Historical comparisons are surely not inspiring. There are more than three million Muslims in Germany, representing more than 4% of the population, and more than 90% of them identify as Muslims (Pfaff & Gill, 2006: 811).[11] France and United Kingdom also have sizeable Muslim populations.

The situation did deteriorate after the European refugee crises in 2015. The number of refugees, mostly from Islamic countries, skyrocketed. Only Germany received more than 1.1 million asylum seekers in 2015 - by far the highest number in the EU.[12] Unfortunately, although it may also be rationally explained, the residents in most European countries became frightened and many turned to nationalistic and far right political parties. Even Germany, the country most inviting to refugees, had to, in its pre-election period, curb the influx of refugees and adopt more restrictive migrant and asylum policies.

The refugee crisis in Europe coincides with the crises in the Middle East and Northern Africa where the Great Powers did make their substantial contribution and the EU bears its fair share (especially in Libya). However, this is rarely under discussion although terrorist attacks in Europe have intensified since. Despite the efforts of many politicians and groups of civil society, churches included, to disconnect Islam from terrorism, in the eyes of many Europeans there is a direct connection between the Muslim faith and terrorism.

[11] Out of the 3,5 million Muslims in Germany, two-thirds originate from Turkey.

[12] BBC News, 3. 3. 2016, Why is EU struggling with migrants and asylum? Available at: http://www.bbc.com/news/world-europe-24583286 (February 15, 2017).

The coexistence of Christianity and Islam – especially in Europe – would be a clear factual signal that Huntington, in his works called The Clash of Civilizations (1993 and 1996), had been wrong not only conceptually (Barker, 2013) but also in reality. This is clearly something that the EU should communicate to the world and, more importantly, the EU should through its actions prove this to its own population. While Islam is a distinct religion, it is still a religion – and more similar to the Christian religion than one would think. In addition, the peaceful coexistence of religions should serve as a *prima facie* proof of the respect for human rights in a society.

One of the problems concerning the issue of religious animosities is that many people and politicians are loath to speak about it overtly. Religion is a human right and few are willing to admit that they are hostile to it. For example in Ljubljana, the capital of Slovenia, a Member state of the EU, in mass media in 2006 there was a contentious debate on the issue of building a mosque. While there was little direct, open opposition - to the construction of the mosque, disapproval was nevertheless apparent through the actions of the community. For example, objections were lodged to the mosque being built exactly on the spot it had been planned to be built. Concerns raised were on ecological, administrative, security and similar grounds – all ostensibly to the benefit of the Muslim community.[13] There were very few voices that claimed that the Muslims already had a place where they could pray and that therefore there was no need for a mosque that would also serve as a political center which would then constitute fertile ground for possible terrorist activities. Further than that the statements did not go; yet again there was no clear support in favor of building the mosque, neither from political parties, nor from the Catholic or Protestant Churches. Nevertheless, the paradigm of insincerity was clear – let us find any reason that would stop the planned construction and let us not talk about the undesirability of the project as such. Moreover, on the street people were talking

[13] Ecological reasons were raised because of the underground water beneath the building site. However, these objections failed to take into account that there were the town's rubbish dump and other buildings nearby. Some complained that the call for prayer would disturb the otherwise peaceful surroundings (which would probably not be the case with Christian church bells). Some argued on architectural grounds that the building would spoil the skyline of the town, which would not be the case if the building would be in the center of the town. Others asserted administrative arguments such as that the local legislation did not permit such a building on that precise spot and if it did permit it the documents were in conflict with other regulations or they had been adopted in violation of existing laws. Still others raised security concerns, such as that the building site was an area that could easily be flooded (it goes without saying that no such concerns were raised when other buildings were erected there).

about the only real dilemma, whether there should or should not be a mosque in town. In 2004, even a referendum has been instigated to annul certain local zoning laws that did allow for the construction of such buildings. It seems that at least the rule of law was in place since the Constitutional court decided that such a referendum (concerning human rights) could not take place. In the end, thanks to municipal authorities, the construction of the mosque is set to begin in 2018.

2.2 Not a European Country

Hypocrisy is not unknown to Europe. It might well originate from Europe.[14] Therefore, and since the issue of religion is an issue of human rights, Turkish membership in the EU is often not associated with religion, but mutates into an issue whether Turkey is a European state or not. For example in the year 2002 Valery Giscard d'Estaing as the Head of the Convention that brought the *Treaty establishing a Constitution for Europe*[15] publicly stated his opinion in the French newspaper *Le Monde*, that Turkey geographically is not a part of Europe; that it is culturally too diverse; that the accession of Turkey would create a dangerous precedent for other Asian states; and, that Turkey's accession would in fact mean the end of the EU.

Although this is hardly a serious argument we have to deal with it since it is often repeated (Schilling 2007: 104). If we think of Europe in classical geographical terms, the Bosporus is one of the dividing lines between Europe and Asia. Even then we have to admit that Turkey with the regions Edirne, Istanbul, Kirklareli, Tokirdağ and partly Çanakkale is a part of the Balkan Peninsula and therefore of Europe. However, even contemporary geography that combines natural characteristics (geographical limits, fauna and flora) with human artifacts and habitats would yield the same answer.[16] One of the origins of modern Europe has certainly been ancient Greece. This means also Asia Minor where numerous Greek settlements were part of the Hellenic world. Asia Minor has always been part of the European culture also because of the grief suffered by modern Greece

[14] Maybe it has to do with confession, repentance, penance, purge and remission or maybe with the trade in indulgences or pardons.
[15] Treaty establishing a Constitution for Europe [2004] OJ C310.
[16] Interestingly enough, the Republic of Cyprus, which lies to the south of Turkey, has always been considered a European country, primarily due to its predominantly Greek population. Somewhat more debatable is the case of Israel.

as a result of its lost territories. In addition, Byzantium, the Eastern (after the fifth century) the Roman Empire, is surely part of European history, tradition and culture. The Turkish tribes, for example the Germanic or Slavic tribes, came from the East and settled in Asia Minor. They were invited by the Christians to cross the Bosporus. This occurred for the first time in the mid-14th century near Byzantium so the tribes could be used as an army against (probably) the Serbian Tsar Dušan the Great in the north. The tribes were called in a second time by important Orthodox Christians in the Roman Empire who wanted the Roman Emperor Constantine XI removed from the throne, since he had converted to Catholicism and tried to unify the Roman Catholic and Orthodox churches. This second invasion is in Europe remembered as the fall of Constantinople while in Turkey as the liberation of Constantinople (1453).

The Ottoman state emerged at about the same time as other modern European states and expanded in somewhat the same way as all states did. However, the Ottoman state seems to have been somewhat more successful than other states and it succeeded in creating the Ottoman Empire.[17] In 1353 the Osmans crossed the Bosporus for the first time and they have remained on mainland Europe ever since. Although their sea power in the Mediterranean had been crushed in the 16th century, they successfully expanded land-based forces in the north up to Vienna in Austria and Krakow in Poland until the 17th century. All in all the Osmans successfully expanded their power in Europe for some 250 years. There are numerous reasons for the Osman's successful expansion of power, together with their ability to convert numerous people to Islam. One reason is that they protected the Orthodox and Jewish populations from unionist tendencies of the Roman Catholic Church, most brutally manifested in the crusades.[18] On the other hand, the expansion of Turkey brought fear to European elites who tried to claim Christianity as a common denominator for the fight against Muslims, thereby creating an arch-fear for many Europeans. Fear is irrational, based on selected information and lack of knowledge. From the 17th century on the Turks

[17] For unknown reasons – possibly of a pejorative origin - in English, the "Osman" Empire is called the "Ottoman" Empire. Similarly - yet not of a pejorative origin - in English the term "Hapsburg" Empire is spelled with a "p". The Austrians and Germans would always write it with the letter "b", also in the English language: the "Habsburg" Empire. No such national pride may be seen in Turkish texts when they are written in English.

[18] Crusaders were equally brutal towards Muslims, Jews and the Orthodox Christians. After September 11, 2001, the U.S. President George W. Bush mentioned a crusade against the terrorists. Not only the Islamic countries but also orthodox politicians took notice of these words. In the Russian language, the term crusader still today has a negative connotation. Crusades do symbolize a clash of civilizations.

have slowly been pushed out of Europe until the First World War, i.e. for the next 250 years. In sum, there there have been 650 years of Turkish presence in Europe – how much time has to elapse until they are recognized as Europeans?

In cultural terms, the south of Europe has for centuries been under the influence of the Muslim faith. The architecture in southern Spain is heavily influenced by the (Arabic) Muslim culture while that in South East Europe is influenced by the (Turkish) Muslim culture. Today in numerous European countries, we may find mosques and considerable Muslim communities. Traces of Islam and the Turks may be detected in poetry, novels and paintings of numerous European nations. There often is a negative connotation associated with these materials and some would even argue that the European identity emerged as a defense against Islam, first against the Arabs and later against the Ottomans. However, this seems to be an intellectual construction that should be altered in favor of the recognition that both Christianity (with all the three churches) and Islam (as well as Judaism) are part of not only the European history but also the European present.

In political terms, the Ottoman Empire has always been a part of Europe. In the science of international relations the relationship between Italian states are always seen as the preceding pattern of subsequent behavior between European states: as the first modern balance of power system. It is less known that in the Italian wars (1494-1554) when Venice sided with France, four other states (Milan, Mantua, Ferara and Florence) offered financial assistance to the Turks if they would start a war against Venice. Naples, Milan and even the Pope encouraged the Turks to take Venetian territories on the Balkans. Somewhat better known is the alliance between the Turks and France. Francis I. supposedly said to the Venetian ambassador that the Turks are the only protectors of independent states against the Hapsburg Kaiser (of the Holy Roman Empire) Karl V. Because of the balance of power, the Ottoman Empire supported the French dynasty to come to the Polish throne in 1572, and the Ottoman Empire also never recognized the partition of Poland between Austria and Russia. The British Queen Elisabeth I. also sought Turkish support against the Spanish armada. After the Crimean war in 1856, in the Paris Peace Treaty the European powers pledged (for the first time in history) not to interfere, individually or collectively, in the affairs of the Ottoman Empire. Modern Turkey arose in 1923 after the First World War as a result of the Treaty of Lausanne.

In addition, modern Turkey has always been a part of Europe. After the Second World War Turkey was a beneficiary of both the Truman doctrine and the Marshall Plan. In 1953, Turkey cooperated with Greece and Yugoslavia in the Balkan Pact. Turkey is a (founding) member of the North Atlantic Treaty Organization (NATO), the Council of Europe (CE), the Organization for Economic Cooperation and Development (OECD) and the Organization for Security and Cooperation in Europe (OSCE). Each of these organizations were, and basically still are, predominantly European.

Turkey also has a longstanding relationship with the EU. In 1959, Turkey was one of the first, if not the first, country to request membership in the European Economic Community (EEC) and it repeated the request to the EU in 1987. In contrast to Morocco, the EU did not invoke art. 237 of the Rome Treaty that allows only for "any European country" to seek membership. It would seem that Turkey has always been considered a European country (Yakis, 2006: 59-60). Nevertheless, the response of the EU has been gradual, cautious and reserved. Here are just a few of the steps that occurred in this process. First came the Ankara Agreement in 1963 (Agreement establishing an Association 1963)[19] that evolved into a Customs Union in 1996 (Council Decision No 1, 1995).[20] The Helsinki Summit in 1999 declared Turkey a candidate country, i.e. confirmed Turkey's candidacy for accession (Helsinki European Council 10 and 11 December 1999, par. 12)[21]. In 2001, a special Accession Partnership was granted to Turkey. This has since been revised in 2003, 2006 and 2008 (Council Decision of 18 February 2008) [22]. Finally, the accession negotiations started in October 2005 and in principle, it was envisioned that Turkey would become a Member State sometime in 2015. Of course, safeguard clauses were established from the beginning.[23] Compared to previous accessions by other states, the number of

[19] Agreement establishing an Association between the European Economic Community and Turkey [1963] OJ L361/29.

[20] Council Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC). Official Journal of the European Communities, L35, pp. 1-46. According to Protocol of 1970 that stipulated for a 22 years transitional period for the creation of a Customs Union.

[21] Helsinki European Council 10 and 11 December 1999, Presidency Conclusions, available at: http://www.europarl.europa.eu/summits/hel1_en.htm, (April 11, 2017).

[22] Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC (2008/157/EC), Official Journal of the European Union, L51, pp. 4-18.

[23] Point 3 of the Negotiating Framework allows for long transitional periods, limitations, special arrangements and permanent security clauses. The Commission will be able to use it in areas such as the free movement of labor, structural policies and agriculture. Point 13 stipulates that because

negotiating chapters increased from 31 to 35, but compared to previous negotiations, this increase was due only to a different division of the content of the *acquis* and not to additional requirements (and was the same for e.g. Croatia).

Although skepsis on the research of public opinion in Turkey may be justified in Turkey, there seems to be a growing belief that Turkey is not treated equally with other candidate countries (Yakis, 2006: 65). As far as the accession process is concerned, this viewpoint is grossly unjustified since we have seen that in the enlargement process in Eastern Europe the candidate countries encountered numerous demands that have not been met by the old Member States (Bučar & Brinar, 2005). And even after accession the new Member States still do not enjoy all the same rights and privileges as the old Member States (e. g. the free movement of labor, the Shengen regime and the Euro zone). On this issue, the political and intellectual elites of Turkey could do much more by studying experiences of previous and present accession states and disseminating the results to the public at large.

However, if the feeling of unequal treatment stems from the fact that there is a growing sentiment towards granting Turkey instead of membership only a special status, then the resentment of the public and the politicians may well be justified. Today the EU knows only Association Agreements and EU membership, little else. Association Agreements slowly bring a candidate country into a kind of economic area with all the economic benefits granted a Member State. However, most European Free Trade Association (EFTA) countries that had been in the European Economic Area (EEA), wanted to take part also in the decision making process and opted for membership in the EU. We cannot deny that within the EU, there has been an evolvement of the concept of the European Neighborhood Policy (ENP). However, both presently and possibly also in the future, ENP will not serve as a viable substitute for full EU membership (Kahraman, 2005). The same goes for the recently invented concept of a »strategic partnership« suggested by the then Austrian Foreign Minister Benito

the Turkish accession may have considerable financial consequences, the accession negotiations may be concluded after the adoption of the EU financial perspective for the period after 2014, including possible financial reforms (Accession negotiations with Turkey: General EU Position, 12. 10. 2005, Available at:
https://www.ab.gov.tr/files/AB_Iliskileri/Tur_En_Realitons/NegotiatingFrameowrk/Negotiating_Frameowrk_Full.pdf (April 12, 2017)).

Ferrero Waldner.[24] The French president Nicolas Sarkozy devised the idea of a Mediterranean Union as a new intergovernmental organization that for Turkey should become a substitute for EU membership (*Dnevnik*, 8. 6. 2007). There is no doubt that the Mediterranean Sea deserves a more efficient form of cooperation than has been the (EU's) *Euro-Mediterranean Partnership/Barcelona process* (known as Euromed 1995). However, regardless of how efficient the new international organization may become, it will hardly be able to substitute for the EU. The German Chancellor Angela Merkel joined the initiative, as did some other countries, and not surprisingly at the EU summit meeting in March 2008 the French initiative was watered down into the idea of a *Barcelona process: Union for the Mediterranean*.[25] It is an ongoing process, critics would claim with meager results, but clearly, it does not represent a feasible alternative to Turkish membership in the EU. This is probably mature political reasoning and a good thing for the EU as well as Turkey.

2.3 Geopolitical Risks

At first blush, geopolitics may not seem to favor Turkey becoming a member of the EU. Politicians sometimes quickly point to the fact that with Turkey as a Member State the EU would border crisis areas such as Iraq and the Middle East. This of course cannot be denied, yet we should consider at least two things. First, the EU bordered on Yugoslavia when the wars 1991-1995 broke out. This, in the end, did make the EU stronger in the following respects: by developing its Common Foreign and Security Policy (CFSP); and, through sending its first civil and military missions abroad (Albania, Bosnia, Macedonia, Kosovo) and *inter alia* establishing ideas and reforms in both the CFSP and its defense identity, manifested initially in the *Treaty establishing a Constitution for Europe,*[26] and later in the *Lisbon* (*Reform*) *Treaty* not to mention also in other documents, statements of

[24] In favour of a special status, specific cases may be cited that constitute a kind of Europe *à la carte*: Norway is not a Member State but it is in the Schengen regime. Montenegro and Kosovo are likewise not Member States but are in the euro zone. These are all specific cases that even the EU does not want to repeat and should be compared to some other special cases: United Kingdom is a Member State but is not in the Schengen regime and the euro zone, the latter is true for Denmark and Sweden etc. On the other hand, the euro zone and the Schengen regime are part of the *acquis* for all candidate countries.

[25] The EU had just spent some 17 billion Euros on the Barcelona process and therefore the process had to be upheld. In addition, the rivalry between France and Germany led to the solution that all EU Member States should be a part of the Mediterranean endeavors, not only those who lie on its coast.

[26] Treaty establishing a Constitution for Europe [2004] OJ C310.

politicians and experts, etc.[27] While some critics may bemoan the effectiveness of CFSP, yet advocates may well point to the rapid changes and improvements that have been made since the 1990's. In short, the fact that the EU bordered on a crisis area in the end made the EU stronger, not weaker.

The other thing that should be considered in connection with the fear of bordering crisis areas is the fact that the EU is already involved there (as well as in numerous other crises areas around the world). Not being a neighbor does not make the Member States of the EU safer; rather it does create a somewhat more cumbersome way of being present in those crisis areas. In addition, by having a stronger Islamic component to its overall membership, the EU would possibly enhance its credibility and therefore arguably be more effective in its endeavors. One could also claim that if the EU is serious in becoming a global leader – it should encourage, not discourage, membership by states that border those crisis areas. The EU presently has within the CFSP no global strategy and lacks sufficient resources for robust, global security actions. It seems that it would be an asset to have the large Turkish army within the European system and not outside it.[28]

However, let us consider some wider strategic implications. With Turkey as an EU member, two of the three accesses to the Mediterranean Sea (straits of Bosporus, Gibraltar and the Suez Canal) would be in the hands of the EU, as well as the only access to the Black Sea (Bosporus). With the accession of Rumania and Bulgaria in 2007, the EU became a Black Sea power and its position there would only be strengthened by Turkish membership. This would be important both for access to energy as well as for security reasons (Sandawi, 2006). Furthermore, Turkey always had special relations with the Caucasus and the Middle East, as well as with many other Muslim countries (once the Saab Abad pact with Iran and Iraq, today being a member of the Organization of the Islamic Conference etc.). Like Britain with the Commonwealth of Nations, France with its Francophonie etc., Turkey's special relations with other countries should be considered as an asset and not a drawback for the EU. Or, as the significance has been phrased by the Commission: »*Turkey is situated at the regional*

[27] The compromise in the *Reform Treaty* stipulates that the EU High Representative for the CFSP and the External Affairs Commissioner will merge into The High Representative of the EU for Foreign Affairs and Security Policy.

[28] Turkey's peacekeeping troops are present in Afghanistan, Sudan and Kosovo.

crossroads of strategic importance for Europe: the Balkans, Caucasus, Central Asia, Middle East and Eastern Mediterranean; its territory is a transit route for land and air transport with Asia, and for sea transport with Russia and Ukraine. Its neighbors provide key energy supplies for Europe, and it has substantial water resources.« (Baç, 2007: 8).

One also has to consider that in tandem with the issue of European enlargement, another important question has been discussed within NATO – the Europeanisation of the alliance, i.e. strengthening of the so-called "European Security and Defense Identity", a doctrine which had been agreed to at the ministerial meeting of the North Atlantic Council in Berlin in June 1996. Does the EU want to strengthen its "European Security and Defense Identity"? We are inclined to concur with those who think that "the answer to the question whether the EU will achieve a deeper cooperation on security is no longer a matter of 'if' but rather a matter of 'when' and 'how'." (Buharali, 2007: 4) France has advocated for the strengthening of the European "pillar" ever since it had decided to return to the military wing of NATO in December 1995.[29] In 2017, the European Defense Cooperation became upgraded by the Permanent Structured Cooperation (PESCO). One of the issues then becomes whether the European states want to strengthen the European Pillar of NATO. Assuming that the answer is yes, one should remember that they could not draw on NATO resources to do so unless Turkey consents. On the other hand, the United States cannot consent to a stronger and more independent European security system if it does not enshrine Turkey. The United States would, it seems, leave the European defense to the EU, provided it would take responsibility for the whole area, including Turkey.

We may end this argument by saying, perhaps with a hint of hyperbole, that the role of the EU in the world may depend on Turkish accession. In other words, Turkey's accession would surely facilitate the process of the EU becoming even more of a global actor than it presently is. However, the question remains whether this is desirable and/or historically unavoidable? Arguments may go both ways.

[29] Yet the United States refused to place the southern command of NATO in Europe (Allied Forces Southern Europe – AFSOUTH) into the hands of the Europeans and this clearly caused a conflict as shown at the informal meeting of the Defence Planning Committee in Bergen in September 1996. There France even hinted that it could block the whole process of enlargement. Finally, due to the adamant stance of the United States, at the Madrid Summit in July 1997, France announced that it had stopped the process of its full re-integration into the military wing of the alliance.

2.4 Size of the Country

When we speak of the size of the country known as Turkey we must consider several dimensions. The size of the territory has implicitly been discussed above. However, usually the notion of size pertains primarily to the magnitude of the population and consequently to the issue of the decision making process in the EU. In addition, however, size is connected to the issue of the wealth of the country, including issues pertaining to environmental problems, and therefore is related to development.[30]

Turkey at present has a population of some 70 million people. For the EU this is a considerable size and provocatively one often hears that it is the largest European country except for Russia. It has been sometimes cynically claimed that because of its size, Russia can never join the EU and that it would only make sense that the EU would join Russia. In more realistic terms, the fact is that if allowed accession Turkey would become the second largest Member State of the EU after Germany, which has a population of some 80 million people.[31] The population ratio between Member States could even deteriorate in the future since the population growth in less developed countries is always faster than in the developed ones.[32] This seems to be a genuine concern of the larger Member States in the EU, since the decision making process in the EU is linked to the size of the population in Member States. The fact that a large country (by population measurement) would join the EU should, by itself, not be a decisive drawback, save maybe for the self-image of present large Member States, since it would to some extent counterbalance the relation between large and small states in the EU. This will be more the case after Brexit is completed. However, skepticism over Turkey's accession also stems from the fact that Turkey would also be one of the less developed, i.e. poorest EU Member States. History is full of examples where more developed, i.e. wealthier actors, did not want the less developed, i.e. poorer actors, to be able to run the show (let us remember relations in international financial organizations, the endeavors of the non-aligned movement or cases of states like Yugoslavia etc.).

[30] Development means more than sheer economic development but issues of democracy and human rights are discussed below.
[31] In comparison the largest EU countries like the UK, France and Italy each have some 60 million people, while Poland and Spain each some 40 million.
[32] One of the projections states that in 2015 Turkey will have some 82 million inhabitants, in 2020 approximately 86 million and in 2030 some 92 million (Schilling, 2007: 105).

When we come to think of the CAP or the Cohesion Funds and the environmental protection demands in the EU, it becomes clear why the more developed Member States are reluctant to admit less developed states as new members into the EU. Financial matters were among the biggest impediments in the accession process that has led to the 2004 enlargement. At the end, the "big-bang" enlargement of 2004 was underpinned by political decisions but the new members did not receive the same benefits of CAP as were guaranteed to the old members (Bučar & Brinar 2005). The subsequent accession of Bulgaria and Rumania only deepened the problem.

On the other hand, the size of a country does have some economic benefits for other member states. A market of 70 million additional people may surely not be considered as negligible. In addition, the EU can make good use of the additional labor force and of some industrial branches such as tourism etc. Furthermore, there is the problem of both an aging and a shrinking population in Europe in general. Therefore, the German government assessed that Germany alone would need an influx of 12 million people in the next 40 years, i.e. 300,000 a year over the next four decades. On the downside, just the costs associated with providing new housing for such an increased population sounds enormous and infuriates the public (McFadyen, 2017).

Of course, pure cooperative relations between the EU and Turkey could also satisfy the economic needs of the EU and therefore no integration of both entities is really needed. However, in every relationship the interests of both partners always have to be considered. Here we should remember, as already mentioned, that in the past the EFTA countries did enjoy the economic benefits of the European integration process within the EEA. Yet, regardless of that, they demanded to become members of the integration process (e.g. Austria, Sweden etc.). In addition, the environmental issues will not disappear if the country does not join the EU and if not dealt with the environmental issues will rest on the border of the EU with virtually the same detrimental effects.

In short, if such a large country as Turkey would accede to the EU, the present balance of power will certainly be upset. Maybe this could become a soothing element in relations between European (big) states, since they would have to change the traditional relations among them. In addition, as far as economic issues are concerned, the EU has in the past as well as in present negotiated enough safeguard clauses to ease the negative effects. Nevertheless, one can also

easily see that these facts may contradict the fourth Copenhagen criteria: not to affect the internal cohesion of the EU. Since the accession conditions say nothing about the size of a country or of its wealth, these two criteria can hardly be directly invoked. The political and economic elites may find it useful to consider that the inhabitants of some countries believe that cultural differences are so significant that they actually threaten the social cohesion of the society.

3 Realities in the Accession Process

Not everything discussed so far leads to the conclusion that Turkey is eligible for EU membership. It will have to meet all the formal criteria. Issues pertaining to human rights and Cyprus dispute are surely outstanding. In view of ongoing negotiations under the auspices of the UN, the Cyprus dispute may eventually also be solved, although it is a complicated business (Sözen, 2007; Yakis, 2006: 69). It is also a part of the territory of the EU under foreign occupation.

A much more difficult problem to tackle will be the contentious issues surrounding human rights since they encompass also the defense of the Turkish regime. The evolution of the Justice and Development Party (AKP) and its president Recep Tayyip Erdoğan may be illustrative of the relations with the EU. Immediately after its founding in 2001, AKP won the general elections of 2002 and it has had the increasing support of voters ever since. On the one hand this may be attributed to a general and constant rise in economic performance (between 2002 and 2012 GDP in real terms grew 64% and GDP per capita 43%), while on the other hand the AKP's increasingly popularity could be explained as a rejection of previous governmental policies. The improved economic situation of citizens was matched by substantial labor law reforms (2003) that were a kind of improvement of human rights. In the political field, President Erdoğan managed to curb the power of the military and in 2005 suggested a creation of a joint Turkish Armenian commission to look into allegations of the genocide in the First World War.[33] Small wonder then that in 2005 negotiations began for Turkey's accession to the EU. It appears that this had some influence on promoting human rights, since Turkey initiated its Unity and Fraternity Project to foster democracy and especially the rights of ethnic and religious minorities. In consequence, it seems that some properties expropriated during the rule of

[33] This initiative was rejected by Armenia.

President Mustafa Kemal *Atatürk* have been returned to the Christian and Jewish minorities. In addition, reforms of the right to use the Kurdish language were introduced and a ceasefire agreement with the Kurdish Workers Party (PKK) has been achieved. Nevertheless, in 2010 the negotiations on accession to the EU came to a standstill due to the Cyprus dispute. It is also a fact that President Erdogan has been constantly criticized by the opposition that he is slowly raising the importance of Islam in the country and abandoning the secular path that had been designated by Mustafa Kemal *Atatürk, the first president of modern Turkey.*[34] With increased public protests against the government, media reports on corruption etc. the Turkish government tightened its grip on the freedom of speech, the press, Kurdish minority rights and the like. PKK resumed its armed struggle. The situation deteriorated to the extent that a coup d'état was planned in 2016. The Turkish government not only succeeded in thwarting the coup, but also by declaring an ongoing state of emergency it has arrested tens of thousands of members of the military, police, civil servants, journalists, teachers, professors and others. In April 2017, a constitutional referendum was held that changed the country's political system from parliamentarian to presidential, thereby strengthening President Erdoğan's power even more.

Consequently, voices in the EU that were already critical of Turkey's accession to the EU (notably Austria and the Netherlands) gained increased support from such powerful allies as Prime Minister Angela Merkel of Germany. It was argued that the entry talks, that so far had only been suspended, should end altogether.[35] (Reuters, 1. 10. 2017). The European Parliament even called for a reduction of the funds for Turkey from the Instrument for Pre-accession Assistance, whereby the country was entitled to receive 4.45 billion EUR between 2014 and 2020. Paradoxically, more than a third of this sum is earmarked for areas like democracy and governance, empowerment of civil society, rule of law, and fundamental rights.[36] Turkey responded that it will not, for its part, terminate the stalled negotiation process. However, Turkey has also stated that it no longer needs EU membership.[37]

[34] Women were not anymore banned to have their heads covered with scarfs, the sale and consumption of alcohol became limited etc.
[35] Reuters, 1. 10. 2017, Available at: https://www.yahoo.com/news/turkey-no-longer-needs-eu-membership-wont-quit-123102601.html (2. 10. 2017).
[36] Euobserver, 20. 10. 2017. Available at: https://euobserver.com/enlargement/139571 (21. 10. 2017)
[37] Euobserver, 2. 10. 2017. Available at: https://euobserver.com/tickers/139231 (October 3, 2017)

In international politics, diplomacy is a major tool to bring about changes. Through this lens, it is less clear why negotiations on Turkey's membership are stalled or should terminate altogether. Negotiation on the substance of chapters seems to be a method of persuasion and/or a means to apply pressure on candidate countries to perform in the direction of European law, policies and values. A clear example of this are Turkish policies until suspension of the negotiations. Notably, until negotiations are not completed to mutual satisfaction, the chapters stay open. There is no path forward to accession, that is, if membership is really the goal of negotiations. Political considerations that we have dealt with above, might present a different view.

4 Conclusion

Turkey as a candidate country for accession to the EU does pose both a challenge and a riddle to the EU. While on the one hand the EU recognizes the importance of Turkish accession and the right of the country to strive for membership, on the other hand, it does not really know how to counterbalance the consequences of accession. It almost seems as if the EU hopes that Turkey would never be able to meet the formal requirements for accession. However, as in all previous cases of enlargement, the final decision will always remain a political decision. Yet, it seems that the politicians in the EU, where visionaries have long ago left the scene, cannot come to terms with certain realities. The size of the candidate country poses a real threat to the balance of the decision making process in the EU as well as to existing financial arrangements. Cohesion funds would need considerable readjustment while the EU is still struggling with arrangements and rules within the CAP. Things will only get harsher after Brexit will be completed. In a certain way, the EU seems to be living in the past while it tries to confront contemporary issues with its *Lisbon strategy*. The fear of a new redistribution of existing resources obstructs reforms in favor of creating resources. The result *inter alia* is enlargement and accession fatigue. With Turkish accession to the EU, the balance of power between old Member States may well be upset as would financial obligations and benefits. These are concrete and real fears and sources of hesitation. However, it is difficult to construct formal barriers on such grounds. What can be done is to create informal barriers and what is easier than to refer to democracy and the public opinion. Political elites may easily use mass media and other resources to influence and manipulate the public opinion. In the case of intercultural relations, fears and other negative sentiments are easily

instigated. One may only hope that the elites will recognize their historic task and mission and will start influencing the public accordingly. In this sense, the project of European unification is a project of the elites that are responsible for Europe's destiny. The arguments we have advanced are not intended as a barrister's summation for Turkish membership in the EU, but rather points up that the same arguments may be used both in favor of or against accession. It is a matter of interpretation. Likewise, it seems that punitive measures ("the stick") do not reach the aspired goals. Human rights, which is what the EU is supposed to stand for, seem best to be achieved with "carrots" and diplomacy. This is true despite the fact that diplomacy is sometimes described as the longest distance between two points.

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Using Crisis as a Catalyst to Affect Change

Erhard Busek

Abstract Globalization and Regionalism are the countervailing powers of our time. It is quite clear that we are moving toward a more global, connected world. We have a tendency of integration not only in Europe, but also through global challenges such as climate change, world trade, the gap between the rich and poor population, political conflicts in South East Europe, wars in the Middle East, and international security and crime. This ever-growing shift towards a more connected society around the world is by some defined as a crisis. However, we have to understand that a crisis always comes with a chance to improve on the current societal norms. It is increasingly necessary for visionary policies to tackle these challenges, which have clearly revealed a "window of opportunity" for change.

Keywords: • Regionalism • Political Extremism • International Organisations • Economic Developments • Migration Regimes •

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1 Introduction

Without doubt, Silvo Devetak is one of the most visionary scientists, societal actors and political players whose academic work, as well as civil society initiatives, has contributed to a great extent to the European integration of South Eastern Europe and the European integration process as a whole. His ideas, visions and prospects are especially needed in today's world. Thus, I will in the following paper refer to some thoughts of Silvo Devetak in order to argue that the current, often exaggerated crises, may be seen as a chance and possibility to strengthen the European integration. In his article "*The Vanishing of Multiculturalism is Ruining the Pillars on Which the European Union Has Been Built Up*" (2016), Devetak draws attention to several problems within the EU, such as the explosive gap between the "haves" and "have-nots", negatively connoted migration movements, the perforation of the "unity in diversity" principle or "multiculturalism", rising phobias, such as immigration as a whole, but starting out with the Roma and leading to Islamophobia, and interrelating to that, Islamic extremism. Xenophobia however goes hand in hand with (not only in Europe) growing nationalism and separatism that pretend to give appropriate solutions to so-called "crises", but instead lead to isolation, while opposing Globalization.

2 International Organizations and Regional Integration

In addition to the 28 countries of the European Union (EU) (including Britain, which will leave by 2019), there are other various levels of the European integration process, such as the European Free Trade Association (EFTA) and the European Economic Area (EEA), of which countries like Norway, Switzerland, Liechtenstein and Iceland are connected. One must realize that the EU is holds more economic and political clout and that it is a matter of time before all these countries will in one form or another become integrated and lose their special status. There is also the Council of Europe with its 47 member states, which has done more in the field of culture than in safeguarding the quality of democracy in its member countries. The UN Economic Commission for Europe (UN/ECE) has also survived and now includes the Central Asian states of the former Soviet Union, which are as vocal as ever and cannot imagine being classified as non-European. The same applies for the Organization for Security and Cooperation in Europe (OSCE), which incorporates, in addition to all the republics of the former Soviet Union, the United States, Canada, and Japan as an

observer. There is also NATO (North Atlantic Treaty Organization), which includes Greece and Turkey as equal partners and thus has prevented a serious conflict from erupting in the Aegean. There is also a plethora of regional initiatives, such as the Baltic Council, the Central European Initiative (CEI), the Black Sea Economic Cooperation (BSEC) and the Southeast European Cooperative Initiative (SECI) which all focus on peace and stability, as well as promoting technical cooperation in the different regions and sub-regions in Europe.

Other groupings such as the G-7, G-27, the various roles of the World Bank and the European Bank for Reconstruction and Development (EBRD), as well as the Organization of Economic Cooperation and Development (OECD), are all dealing with many countries, overlapping certain area's of their defined usefulness, and many other issues that makes transparency very difficult.

The situation in countries undergoing political, economic and social transformation varies from country to country. Many new themes are materializing, which has resulted in the attempt to invent new, albeit temporary, explanations and instruments to help us navigate our way through the chaos. The question is whether these temporary instruments will develop into self-perpetuation organizations which might cost the tax-payer money and produce few, if any, results. It would be interesting, for example, to conduct an in-depth evaluation and assessment of the assistance and aid programs that were created for Bosnia and Herzegovina in the aftermath of Dayton. Far too much money was spent and too few results ensued. The EU and international organizations have failed to devise a viable reconstruction strategy for Bosnia and Herzegovina not only economically, but also politically, socially and culturally. If this is not possible to do for an area encompassing 4,5 million inhabitants with all too familiar problems, how can the public expect something different in the future within the whole of the EU and its associate States?

The same is true for Macedonia, (FYROM). On the one side you have the association agreement with the European Union, while on the other side political conflicts bear the risk of civil war.

In this context, the Stability Pact has to be mentioned. It was created after the Kosovo war under the participation of many European countries but also of the United States, Canada and Japan. There were more than 40 states sitting at the

table and in the three designated areas of interest (human rights and democracy, infrastructure, human justice affairs and security). In general, the Stability Pact had a good intention. It involved many countries, giving responsibility to them concerning the situation in Southeast Europe, as well as the opening of a European perspective and a large allowance of money was pledged. But on the other side not too much has happened on the ground, which is can be proved by the ongoing instability, however the situation currently is much different than it was. Society as a whole is moving along better in some the former Yugoslavia Republics (Slovenia, Croatia, Serbia and Montenegro). Macedonia on the contrary seems to be paralyzed by deep political conflicts, while nothing seems to be moving in Bosnia-Herzegovina and Albania. It is to be expected that the socio-economic situation in Romania and Bulgaria will be even worse in the coming years. The global context: this situation is very important, because cross-border crime is prolific in this region. Crime is not solely located in the Balkans, but corruption is rampant and bribery hinders any progress made by police in bringing justice. It is under the author's opinion that there are many people earning huge sums of money through human trafficking and the drug trade.

Wars ravaged parts of the Middle East, most notably in Syria, Iraq and Yemen. This has an impact on the European Union, because the promise made by leaders that the EU will be a peace project, is not yet fulfilled. I even think we are growing ever closer to a Third World War, which is creeping into our societies through terrorism and other activities. Europe is seeking instruments to manage these problems, yet most are not really prepared for this situation. This challenge must be answered –to create more Europe than less. The so-called neo-nationalism is a kind of egoism, because everybody is thinking in a very primitive way: "Everybody is considering him- or herself, only me, I am thinking on myself!"

Many Americans feel that the interests of the US, Europe and Russia will converge in the 21st century because they face similar challenges. I would like to remind that for the EU, Russia is a global factor whereas Southeast Europe has to be seen in a regional context. This does not exclude the possibility of Southeast Europe becoming an area in where the US, Europe and Russia will compete for influence as it was the case in 1914. The time factor has to be observed. We are currently being exposed to the phrase "window of opportunity", but there is the pending danger that this window will soon close. The alternatives are bloody and expensive conflicts, something which Europe cannot afford. In addition to the

problem of expediency, there is the issue of the European integration process, which cannot happen from one day to the next. There is too much to learn from history for this to be possible. The ability and willingness to learn is a prerequisite for the stability of development which requires perseverance.

Since 1989 criticism has been mounted upon leaders regarding the lack of a defined plan and long-term strategy to manage the consequences of the fall of the Iron Curtain, the collapse of Yugoslavia and the end of the Soviet Union. Besides a few calls for a new Marshall Plan, not much has been accomplished. There was a strong tendency to insist that the newly-formed independent states had to come to terms with their new situation on their own. There were national strategies, which tended to reflect the egoism of one state or the other that claimed certain territorial interests or the "right" to be present in one place or another (ie border issues), which can be manifested through the desire to exercise certain spheres of influence. The immensity of the task proved that no country, or for that matter continent, can rightly claim a sphere of influence in a certain area of Central, Eastern or South Eastern Europe.

On the global level, the situation of international organizations appears to be quite complex. Some of them have existed for a long time, such as the United Nations Economic Commission for Europe (UN/ECE). The UN/ECE was established as a regional commission for Europe, yet it has an almost identical membership structure as the OSCE: It is based in Geneva and works together with a wide variety of other international organizations such as the High Commissioner for Refugees, the World Trade Organization (WTO), the International Red Cross Committee (IRCC), the International Labor Organization (ILO) and many others. The UN/ECE was a politically blocked organization in the past as a result of the East/West divide, which did not prevent it, however, from developing quite impressive expertise in the areas of transport, trade, energy, environment and small and medium size enterprise development. These are all areas which are important for thedevelopment of a country. These are all areas which are important for the development of Southeast Europe and the ECE is now playing a crucial role in providing its expertise to many regional initiatives. It is instrumental in its technical support to SECI and on the basis of SECI's success in the region, the ECE is launching the Special Program for the Economies of Central Asia (SPECA). As a result, cooperation with the European Commission has also intensified.

The Central European Initiative (CEI) was launched in 1989 as a regional initiative that included Austria, Italy, Hungary and Yugoslavia and was aimed at strengthening mutual relations among these countries. Czechoslovakia and Poland joined this grouping in 1990 when it was called the Pentagonale and Hexagonale respectively. The CEI now involves 16 countries (Albania, Bosnia and Herzegovina, Bulgaria, Italy, Croatia, Macedonia, Moldova, Austria, Poland, Romania, Slovenia, Slovakia, the Czech Republic, Ukraine, Hungary and Belarus). The CEI has a Center for Information and Documentation located in Trieste, which is predominately supported and financed by Austria and Italy. It consists of a rotating chairmanship and annual ministerial meetings at the highest level.

The CEI focuses on issues of economic and technical cooperation, infrastructure development in transport, energy, telecommunications and agriculture. It also deals with strengthening democratic institutions, observing human rights, minority issues, environmental protection cooperation in science and technology, media, culture, youth programs and tourism. There are currently 15 working groups dealing with these issues and are coordinated by a system of national coordinators from the member states.

The CEI works very closely with the EBRD, which has a special secretariat who deals with the CEI projects in London. This secretariat assists in developing bankable projects for the initiatives and helps with the implementation of projects and training programs. The financing is mainly carried out by special funds which the Italian government has established at the EBRD. The operational unit has an office in both London and Trieste and has its own budget and resources at its disposal.

The impetus behind the Southeast European Cooperative Initiative (SECI) is to create a regional association aimed at encouraging cooperation among its member states and to facilitate their integration into European structures. SECI is not an assistance program, nor will it interfere or conflict with existing initiatives, but rather it is meant to complement them. SECI was launched in December of 1996 on the basis of "Points of Common US-EU Understanding", which stressed that it will facilitate close cooperation among the governments of the region and create new channels of communication among policymakers. Furthermore, SECI emphasizes and coordinates region wide planning, identifies

needed follow-up and missing links. SECI also involves the private sector in regional economic and environmental efforts and helps to create a regional climate that encourages the transfer of know-how and augment investment in the private sector. It is the intention of SECI participating states to jointly discuss common (regional) economic and environmental concerns as opposed to discussing specific political, historical or ethnic differences.

The collapse of the Soviet Union resulted in the formation of what is either known as the Commonwealth of Independent States (CIS) or New Independent States (NIS) - a constellation under the dominance of the Russian Federation and, as some argue, a substitution for the Soviet Union. The developments in and around these states have not really had an impact on Southeast Europe. The Black Sea Economic Cooperation (BSEC), which was formed in June of 1992 in Istanbul, is an initiative which focuses more on this region, namely the countries along the Black Sea, as well as Albania and Moldova. BSEC organizes high level summits to add to its profile. BSEC also aims at identifying and dealing with the tense relations between countries such as Turkey, Greece, Azerbaijan, Armenia, Russia, Ukraine and Moldova. The summits provide an opportunity for the leaders of these countries to meet on a regular basis and exchange ideas, even if only in the form of mutual declarations.

The Presidents of these states signed that Yalta Charter in June of 1998 which officially declared BSEC a regional international organization with a permanent secretariat in Istanbul. It also has observing states such as Austria, Egypt, Israel, Italy, Poland, Slovakia and Tunisia and candidates for observer status such as Bosnia and Herzegovina, Croatia, Cyprus, France, Germany, Jordan, Kazakhstan and Slovenia. The Federal Republic of Yugoslavia, Macedonia, Uzbekistan and Iran have applied for membership.

BSEC works on a governmental level, mainly through the ministers of foreign affairs of the member countries. Ministerial committees deal with issues such as cooperation in the area of science and technology, banking and finance, statistics, health research, transport, energy, agriculture, environment, telecommunications, tourism, crime, illegal migration and smuggling of weapons and radioactive material. The initiative has established the Black Sea Trade and Development Bank, based in Thessaloniki, with EBRD backing and helping to finance BSEC projects.

3 Future Prospects and Chances

The question of the "finalité d'Europe" - the final composition of the continent - is not the only issue with which we are concerned with at the beginning of the new century. There is also the question of the final composition of our world. We cannot evade these questions which will remain to be a theme, even for the future of our youth. One cannot disregard this question, therefore it is better to face it head on and make it a theme of the new century. After all, this will also have a decisive impact on our own independence.

This is the question of a global order with which we are slowly starting to shape. The World Trade Organization is an example of a structure which provides a framework for increasing competition in a global free market. The IMF is often criticized, but we need such an instrument like the World Bank to help steer regional or global crises. The same applies to questions of criminality, communications or cooperation in the field of ecology and the environment.

Apart from that, the gap between the rich and the poor is not only increasing within Europe, but also on the global level to a much broader extent. From a global perspective, Europeans are getting richer while other parts of the world suffer from overpopulation and hunger and are becoming more impoverished. We will also encounter questions which are emerging from the dissolution of borders. Telecommunications and space travel are not the only factor. The fact of the matter is that the world is becoming more inter-connected and too small for us. Is the path to the stars an escape from the problems or from future reality? The 21st Century will shed light on this as well as on the question of our own humanity, where we come from and where we are going.

In the current situation, we have a tremendous change, which we are – as previously mentioned – naming a crisis, but you have to understand, that a crisis is always a chance for adaptation. For sure, things are more difficult, especially by the refugee and migration policies and other open conflicts that might bring us closer to World War III. However, it is an egoism, which is existing and the missing preparedness of right cooperation, but we have movers like economy and business. It is necessary to handle the activities of Russia, climate change and other open problems. We have a lack of leadership, but the civil society will be heard and will make sure that their respective governments act.

The lack of solidarity among the member states is a problem and not only for the European Union. The so-called refugee crisis could be resolved in Europe if all partners within and also beyond the EU were prepared to play their part. If the United States indeed accepted only 10,000 refugees, it would seem more like ridiculing rather than serious politics. After all, it was the strategy of the Bush administration that had been very creative in the wrong direction: it was US policy that failed to contribute to stability in Iraq and Syria, of which most of the refugees have come from, and even from Afghanistan, Pakistan, and so on. The Obama administration has not been able to correct this wrong direction embarked on by his predecessors. With each of their withdrawals from different places, the Americans have left behind them a host of open questions and continued areas of conflict.

The present situation, with its mix of difficult contexts, confronts the EU's limited capacity to handle them. Several countries, not only East European countries, have been hindered by populist governments from taking on responsibility for the refugees and the ensuing social issues. In Europe there is an urgent need for a very open discussion aimed at (re-)defining the role of the EU, not only internally but also globally.

To put it openly and in broad terms: civil society in various countries has recently achieved more than its respective governments, namely in terms of handling the current crises. Silvo Devetak as well stresses the potential of civil society. However, while the strengthening of civil society is a positive development they can only do so much, governments and administrations are still needed in order to move forward sustainably. What has been left of the European vision? Recent developments in the EU member states have been very dangerous. More and more parties have been founded, or are gaining in strength, to work against a unified Europe, against global responsibility, and against active engagement with strengthening the EU. Instead they have considerably increased their aggressiveness against 'the others'. This is a danger, not only for the European Union, but for democracy in general. Better and visionary policies are desperately needed. As Jacques Delors put it in October 2010, on the occasion of the 20th anniversary of German unification: it is necessary to give Europe a soul. By no means did he mean this in a spiritual way; he was concerned with empathy and compassion. In that sense, current crises may prove as the "window of opportunity" to give Europe a soul. Measures to be taken are as follows: strengthening the identity of the European Union; development of the

institutional structure towards effectiveness and democratic legitimacy; the possibility of creating revenue for Europe itself while reducing the arduous process of adjustment among EU Member States; finally, the creation of a common foreign and security policy.

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1914-1918: Fatherland Calls, Intellectuals Answer. French Jusinternationalist and the War

Gian Luigi Cecchini

Abstract The history of the Great War until the end of the Nineties of the Twentieth century (Audoin-Rouzeau & Becker, 1994: 25; 2000) was mainly focused on military and political issues (Prost & Winter, 2004; Prochasson, 2008). After this long period, the need for a cultural history emerged. Such a cultural history is supposed to point out the stance of the intellectuals towards the First World War and to highlight the contribution of the internationalist jurists. In general, the commitment of the intellectuals was remarkable both from the quality and quantity point of view. It would be a mistake then reducing the issue to a scholarly kind of collective hysteria, since it was adhesion to a national pact, as the political jargon has it. On the base of this pact, everyone had to commit towards the Nation under attack. This circumstance did not prevent the intellectuals from critically looking at the war and distance themselves from the war as a political and legal fact.

Keywords: • History • Legal Culture • First World War • Law and International Law • Jusinternationalisation •

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1 Introduction

In France, like in the other European countries, nearly all of the intellectuals advocated ideas similar to those contained in the *Manifesto* of the Ninety-Three, endorsed by prominent German intellectuals[1]. The *Manifesto* was translated in many languages shortly after it appeared so that it was available for review by the main European and American personalities. The *Manifesto* was essentially a rebuttal to the papers on the causes of the First World War that appeared at the beginning of the conflict in Oxford and written by some professors of the Modern History Faculty, like *Why We are at War? Great Britain's Case* (Cianferotti, 2016: 34). The Ninety-Three prominent German scientists, scholars and artists that signed the *Manifesto* claimed Europe was the offspring of the German culture represented, among the others, by such luminaries as Goethe, Kant, Beethoven. The signatories to the *Manifesto* tried to use their status as members of the elite class for endorsing not only the untenable theory of the legitimacy, under the international law, of the invasion of a neutral State like Belgium (Rusconi, 2014: 82), but also the denial of the crimes perpetrated by the German army against the Belgian civilians (Canfora, 1979: 33; Id., 2014[3]). According to their basic assumption, a sort of *state of need* and *self-preservation* drove Germany actions, since Germany thought that France and Great Britain were preparing the same action. Germany, the argument went, could not have stand by passively and risk suicide.

Although the French intellectuals intervened in different ways, in particular those who were already involved in the Dreyfus Affair and who did not gave up even after its solution, they were completely aware that the declaration of war would have excluded any kind of moral or political reserve. The debate at the Academy of Moral and Political Sciences was very intense and the intervention of the philosopher Henri Bergson on August 8th 1914 (Bergson, 2015) about the opportunity or need to expel the German members of the Academy fostered it (Bergson, 1972: 110).

The hate of the French culture for Germany was nothing new, in particular after 1870, but it was not an obstacle to the collaboration between the two sides of the Rhine (Digeon, 1959).

[1] Also published on *Revue scientifique*, 1er juillet-31 décembre 1914, pp. 170-172.

Émile Boutroux, one of the French philosophers that introduced German philosophy in France at the end of the Nineteenth Century, thought that the German war spirit was negative for an analytical and lucid critique. (Boutroux, 2016: 48-52). He presented the war as a modern crusade and denounced the German culture for being violent, proud and passionate (Petyx, 1997: 732).

Intellectuals such as Truc maintained that German 'science' was under attack since the very beginning of the war. Truc highlighted the risks of a cultural clash between France and Germany, a clash that would have exalted the French genius and marginalised the German pedantry, although it would have be at the expense of Kant and Hegel (Truc, 1915: 116).

Ignoring both the spirit of the event and the fact that science was conceived as a tool to foster international cooperation and mutual knowledge, France highlighted its participation in the Panama-Pacific International Exposition in 1915, held in San Francisco, only focusing on its contribution to it, not considering at all the contribution given by other countries and contributors. This nationalist kind of cultural revisionism affected the totality of the French intellectuals, although for a long period of time before the First World War Germany maintained a position of superiority in the science sector. This is one the reasons why the French intellectuals revaluated the Latin and Greek sources of a culture that for a long time suffered the invasive German presence. The editors from their part complied with the patriotic needs and presented series with enticing titles including masterpieces of philosophers, historians, jurists and sociologists (Blondel, 1915; Savarit, 1915; Lamy, 1915; Lamy, 1916; Durkeim & Denis, 1998). Germany and the conflict became the subject of analysis in which science and ideology intertwined, as we can see from the titles of some of the publications (Boutroux, 1915; Bregson, 1915; Durkeim, 1915; Durkeim & Lavisse, 1992; Flach, 1915; Bourgin, 1915). A joint committee was set up and it was named *Committee on war studies and documents*. It summarised the French University's ideas and was composed, among others, by Émile Durkheim, Ernest Lavisse, Henri Bergson, Charles Seignobos, Charles Andler. Their mission was the production of publications aimed at justifying the war of the law (Thiers, 2005: 32).

Nevertheless, it is not possible to limit the commitment of the intellectuals (Irisch, 2015) only to the professional mobilisation, which consists mostly of

adapting their academic works to tie in with their homeland defence needs. The intellectuals used their works while complying with their duty, which is evidenced by the high rate of deaths among the university professors and researchers, most famously the deaths of Charles Peguy (Peguy, 1916-1955), sociologist and anthropologist Robert Hertz and writer Alain Fournier (Alain Fournier, 1913). It was widely believed that intellectuals were a sort of aristocracy exempted from the common destiny of the Homeland, with the only exception being the voluntaries (Lepick, 1998; Roussel, 1989: 45; Galvez-Behar, 2005: 108).

2 Law and Culture War 1914-1918

The two World Wars may be considered as the apical moment of both an "inactive Law" – since the existing rules on *ius ad bellum* and *ius in bello* were not applied – and the "absence of Law" – since some crimes were neither provided for under the international customary law nor under international treaty law. The two World Wars can be considered as two tragic events of the fight "for the Law". The latter formula is both simple and complex, linear and contradictory, and it shows the path that human beings should follow, especially during the most tragic of events such as armed conflicts. The letter here used to write the word "Law"[2] is a capital letter because it best highlights the meaningfulness that the word should have had in the eyes of the public opinion of the Country. This formula should have better justified the sacrifice of many youngsters. This means we should interrogate on the reasons that should have led to the enforcement of the Law as a *value* while the *culture war* was prevalent (Audoin-Rouzeau, 1995: 10; Winter et al., 1994; Audoin-Rouzeau & Becker, 2000; Audoin-Rouzeau & Becker, 2004).

In this article, the culture war is the formula used for justifying the commitment of France in defence of the Law during the Great War (Basch, 1915): a simple formula at face value, but deep down has complex content, since it seems to underpin the existence of a proliferate and generic sense of discomfort. In fact, it is paradoxical and cynical to attempt to legitimate, through the Law, a war that all the Europeans considered a denial of the Law, by only taking into consideration the appeal to the state of exception, to deportations and to the violation of the human rights committed. These considerations might seem

[2] The capitol letter highlights that the Law during the Great War was a fundamental value different from the law *latu sensu* and from the law in force in a certain period.

irreproachable, except that the state of exception was not an exception at that time (Cecchini, 2012: 293). However we were not as aware of the abuse of human rights that took place during and after the Second World War as we are nowadays, since under the *positivism* – the most influent ideology of the first half of the twentieth century (Ferrara, Pianiciola, 2012) – the only rights were those positivized and regulated. Nevertheless the *culture war* of 1914-1918 highlighted how the *force*, in its unprecedented unleashing, overwhelmed different forms of Law; French, German or international. This circumstance restated the issue of the relation between force and law (Liani & Cecchini, 2016). In the case at hand, the appeal to the Law as a legitimizing factor of the conflict brought to the Law's refusal after the war (Basch, 1915) in such an extent that Jean Giono wrote in 1938 "*Le théme de la guerre du Droit est devenu un repoussoir, la critique emportant dans un même souffle toute réflexion sur ce qui avait justifier un tel discours"* (Giono, 1978: 209).

In 1914 famous scholars like Durkheim, Lavisse, Bergson, Seignobs, Andler and Adré Weiss, the only jurist, established the *Committee on war studies and documents (*CWSD*)* that contributed to the definition of a new concept of culture war (Ory & Sirinelli, 1992: 65-66; Becker, 1995: 291-292; Prochasson & Rasmussen, 1996: 196-199). The CWSD publications attempted to answer multiple questions: why was the Law considered to be so crucial in French propaganda at the very beginning of the war? What were the structural circumstances that contributed to better outline the importance of the legal framework? What was the Law that they intended to defend and, in the meantime, to shape at the cost of thousands of lives? Why was the CWSD so interesting? Another important question arises from the previous ones: how was it possible, considering the legal framework of the Committee, that only one international jurist took part? In order to answer these questions we have to first consider that intellectual history plays a part: what was the reason that gave such an importance to that group of intellectuals? Can that group represent the entire French society? Because we cannot fully answer these questions, it can be said that the CWSD's scholars were representative of a significant part of the French culture war between 1914 and 1918. During those years the scholars were the republican élite that represented the mainstream thought, perhaps even the official one, of the French leadership (Thiers, 2005: 25-27). The structure of the Committee was based on a scholars' network that was coordinated by Ernst Lavisse who had contacts inside the public institutions. Lavisse was the mediator between the academic world and the political and administrative circles. The other cornerstones of the group were:

the Dreyfus Affair (Locatelli, 1930; Revel, 1967; Rizzoni, 1973; Lévy, 1992; Dreyfus, 1980; Dreyfus, 2014; Kleeblatt (a cura di), 1980; Silvestri, 2013), the republican ideology (Pettit, 2006; Sirinelli, Vandenbussche & Vavasseur-Desperriers, 2003), a particular *sensibility* towards the political left, although Lavisse had a more moderate approach. The different biographies of the CWSD's scholars highlight the presence of other sticking factors: the *School for Advanced Studies in the Social Sciences* (Bourgin, 1938), the *League of the human rights*, the personal *friendships* like that between Herr (Herr, 1944) and Andler (Andler, 1988: 1915-1917; 1920-1931; 1915; 1916).

The Committee's publications of 1915 are categorized into three categories: one on the 'pangermanism' and the German mentality, one on the origins of the war and the belligerents' responsibilities and the last is the Central Empires barbarity during the war. In this article the appeals, the critical notes and the sources represented by the publications' feature will be discussed (Weiss, 1915: 19). These objective elements had the scope of convincing the people of the goodness of their appeal to the war effort (Lavisse & Andler, 1915: 44). Examining the situation from the outside, we can say that the CWSD's scholars were in the service of their Homeland (Becker; Audoin-Rouzeau, 1995: 290; Prochasson & Rasmussen, 1996: 196-199), but they were not serving the power. They thought that only those who acted in defence of the Law were patriotic fighters and that the Law was invoked as a driving force for the French resistance against the German attack. The CWSD's publications refer to the destiny of the neutral States, which played a major role in making the Law a value-driven factor of mobilisation. In the summer of 1914, the neutral States were involved in the conflict after the German violation of the Luxembourg and Belgian territories. Considering the status of neutrality, we consider that it was assured by specific treaties and that the jurists were used to distinguish the *de jure* neutrality from the *the facto* neutrality. This distinction could have been a good omen for the destiny of other countries that did not wish to be involved in the conflict. The German aggression (Delaunay, 2012: 855-866; Weiss, 1915: 19) offered a chance for an extensive debate among the researchers and the writers of the neutrality charters, considering that until the First World War the State had the exclusive ownership to wage war against a third State (Denis, 1915).

The question regarding *neutrality* refers to international public law and, in general, to the relation between law and moral (Viola, 1990: 670-672). The German

Chancellor at the time, Bethmann Hollweg, considered a "*chiffons de papier*"[3], the Treaty that provided for the Belgian neutrality. This statement shows the German commitment towards international obligations.

Among the CWSD publications, the work of a professor of international law, André Weiss, stands out, which was entitled *La violation de la neutralité belge et luxembourgeoise par l'Allemagne*. In his work, Weiss accurately analysed the Belgian and Luxemburg neutrality Charters, a *status* guaranteed by the Great European Powers and *in primis* Germany. Weiss confuted all of the justifications to the German invasion of those countries made by his German internationalist colleagues. The principle of *need* was relevant in *Roman law*, as we can assume by the Latin brocade "*Necessitas non habet legem, sed ipsa sibi facit legem*", which means that the need do not require a law, since it is the law. The theory, based on this principle (Gareis, 1902[2]: 2, 5, 63; Cavaré, 1961[2]: I, p. 132; Dahm, 1958-1961: I, p. 12. *Contra* Quadri, 1989[V]: 34, 226, 265, 270, 276; Quadri, 1952: 601) and developed by the German authorities, was substituted later with the theory of the *supremacy of the Treaties* – although this theory is easier to be formulated than to be applied since it implies the *supremacy of the law*, something difficult to acknowledge both then and now.

The Law, in its value-driven dimension, is at the heart of the discussion among the CWSD's scholars since they immediately looked at the issue of the war *responsibility* (Droz, 1973; Prost & Winter, 2004). This issue is a classic problem of war law, especially when considering the distinction between *ius ad bellum* and *ius in bello*. The distinction is still valid despite the refrain of the use of force as an instrument for the settlement of internal or international disputes provided for by the UN Charter and the modern democratic Constitutions, except in the case of self-defence or the resistance to aggression. According to the members of the Committee, the war was illegitimate in principle. This assumption is in contrast with the image of a war-like France (Becker, 1977) and it highlights how France had developed a sense of rejection for the armed conflict as a political instrument (Mendès, 1871: 85; Jellinek, 1937: 35: Marx, 1950).

[3] On August 4th 1914, during a dinner with the British Ambassador to Berlin, Sir Edmond Goschen, the German Chancellor reproached Great Britain with doing war to Germany, "une nation de la même famille", for "un chiffon de papier".

The issue of *responsibility* (Droz, 1973: 111; Prost & Winter, 2004: 156) refers to the issue of *ius ad bellum*. In 1914 the international laws that limited the recourse to war were not particularly developed, especially when considering that, nearing the end of the nineteenth century, a codified, and not only customary, treaty law emerged on armed conflicts. The Hague Conventions of 1899 and 1907 were one of the instruments for the pacific settlement of the disputes which were focused on the conduct of the war on land and on sea. In the attempt to reduce the possibilities of war, the Conventions provided for the destiny of the fighters, the prisoners and the civilians. The Great War was an example of heroic acts, but also an example of horrors that nobody would have wanted to see. Therefore the development of the need to respect the rules in time of war was natural.

Before 1914, any law banning the recourse to war was still in existence. Since then, the idea that not only the supremacy of the force over the law, as an instrument of dispute settlement, was contrary to the elementary rules of the humankind, but also that the growing world opinion would not have accepted it. The idea started to spread.

3 The French *jus publicist* Doctrine During the Third Republic

The most influential French *jus publicists* of the Third Republic were Maurice Hauriou and Léon Duguit. They were so influential that their doctrine marked the *belle époque* and became source of inspiration when it was later defined the new nature of the French Republic's political system. Furthermore historians, jurists and politicians of that time contributed in a decisive way to the valorisation of the role of the law's professors, and in particular the professors of international law.

What we nowadays define as a State, in terms of public action, can be found during the First World War, the apical moment of its political centralisation. Although, the hypothesis of a break represented by the Great War is not clearly stated in Duguit and Hauriou's legal thinking. The outbreak of war affects not only the life of the Law faculties, but also affects the behaviour of the professors of law. Thus, for example, the two French scholars participated in the effort of war not only with their academic activity, but also with a civic participation by giving their contribution to the construction of that particular *truth*, which can be synthesised with the expression «war of the law» on the doctrine level.

In November of 1914, Maurice Hauriou delivered a very patriotic speech in which he is the interpreter of the Greek and Latin heritage, represented by France and its allies (Hauriou, 1914: 3). During 1914-1915, both of the French scholars worked within the State administration, although by the end of the war a different civic commitment was placed upon them. On the one hand, Duguit engaged in politics by shaping the 'foreign policy' of the French universities; on the other hand, Hauriou considered the war as a pause and not a step, which led him to public commitment with the elaboration in accordance with the Allies of the most suitable conditions for reaching and maintaining peace. According to Duguit, the period 1914-1918 was the perfect moment for the spread of his thought regarding the Anglo-Saxons world. The war effort needed more rational forms of propaganda, something which the jurists were actively committed to on this front (Thamin, 1916: 142), such as the case of the professor of law of war, Geouffre de La Pradelle, at Columbia University (Fouillée, Charmont & Duguit *et al., 1916*)[4].

Duguit explained his ideas in November 1917 through a paper entitled *The Law and the State. French and German Doctrines* (Duguit, 1917), which was part of a volume written for the *Harvard Law Review*. Finally, it is worth pointing out the study entitled *The Progress of Continental Law in the Nineteeth Century* (Alvarez, Duguit, Charmont, Ripert, 1918) on the European legal thought that includes papers by Alvarez (Alvarez, 1916) and Ripert (Ripert, 1918).

In the same period, John Wigmore and Harold Laski also contributed to the spreading of the European legal thought in the United States. The former studied at Harvard and taught at Northwestern University of Chicago, his previous experience as a visiting professor in Japan; the latter was book reviewer at the *Harvard Law Review* from November 1917 and June 1919. In addition, Hauriou contributed to the *Review* with the work *An Interpretation of the Principles of Public Law*, written for the edition of April 1918 (Epron, 1918).[5]

On October 13 1914, *Le Temps* published the *Manifesto* aforementioned and, among the 93 German artists, university students and intellectuals (Rasmussen,

[4] Arch. Nat., AJ16/1799, Registre, Assemblée de la faculté de droit de Paris du 5 septembre 1914, p.97, citato in *Jus Politicum. Revue de droit politique*, n. 15, *Le droit public et la Première guerre mondiale*, p. 4 nota, nota 12.
[5] The paper first appeared on the *Harvard Law Review* in 1918.

2004: 14) there were Lujo Brentano, Johannes Conrad and Gustav Schmoller, whom were professors of microeconomics; Théodore Kipp, Frantz von Liszt and Paul Laband, professors of law in Berlin and Strasbourg respectively; and Georg von Mayr, professor of political science.

Le Temps published the French answer to the German manifesto on November 8 1914 with the title «Manifeste des université françaises», subscribed by sixteen universities, among which those Bordeaux and Toulouse. For the entire duration of the war, the appeals and petition of the French intellectuals multiplied in the name of law, as shown by the message "… *de la France intellectuelle aux États-Unis d'Amérique*". It was the answer to the Manifesto signed by five hundreds Americans and addressed to the Allies that supported the reasons of the law. Among the signers of the message was Maurice Hauriou, professor at the Toulouse faculty of law, and H. Monnier (Monnier, 1900), professor at the Law Faculty of the University of Bordeaux. However, Léon Duguit did not sign the message.

In his obituary, in memory of his friend Léon Michoud, Hauriou underlined how only three or maybe four German jurists (Hauriou, 1916: 489) wrote the Manifesto of the Ninety-Three in defence of their government. This could convey the impression of a divergence between the German internationalists and the German government. In reality, this was not the case, as was said in other papers on the German internationalist legal thinking.

4 The Legal Offensive Face to the War

The German invasion of Belgium on August 4 1914 after King Albert refused to allow the free passage of German troops immediately created important legal issues and placed the conflict at the legal level. We know the facts: the violation of Belgian neutrality was the deciding factor as to why the British declared war to Germany. Therefore it was logical that the issue of the *force* and the *law* gained a central position in the debate on the war. Likewise, it was logical that all the French jurists supported the idea that the law should have had a supremacy position over the force. Politicians, the press and intellectuals never got tired of highlighting the French commitment towards the defence of the reasons of the law, in particular after the violation of Belgian neutrality (Flach, 1915; Hinzelin, 1916). The so-called *front of the law* helped spread the idea that the importance of

the Law in the French thinking was due, especially after 1870, to the superiority of its élites. The German method[6] and thinking, and the high degree of development of the German institutions, were very fascinated with the French parliamentary organization that was constantly in dilemmas (Stora-Lamarre, 2005). Duguit knew the German language and elaborated a State doctrine in opposition to the German one (Duguit, 1901; Duguit, 1927[3]; Jellinek, 1905).[7]

This *front of the law* is neither new nor temporary, but it is part of the fundamentals of the French Republic structure (Sawicki, 2011: 270-272) and does not deserve be confused with the centuries-old issue of the *just war* (Brunstetter & Holeindre, 2012: 5-18). If the *just war* gives a *moral justification* of the war, the *war of the law* leverages over the *causes of the law*, from which derives the military efforts in defence of the legal principles and the positive law, while the moral is considered as a supplementary element. The war is not and does not become just by itself, but only when it is used in the name of a superior principle, namely the *defence of the law*.

5 The French 'Jusinternationalist' Doctrine in the Run-up to the Outbreak of the Great War: General Outlines

The French 'jusinternationalist' doctrine is the only policy that opened itself to a sociological and legal perspective, making the study of international law more simple as the reflection of the social interaction, which constituted the heart of the international legal order. The French doctrine had the merit of keeping constant contact between Law and Sociology and between law and society. This communicative opening made it possible for the doctrine to extend its research fields to biology and anthropology.

Although these were encouraging premises, the French doctrine was seeking the fundamental aspects of international law in the *material factors* of the *collective will* or in abstract needs focused on values like the *common good*, *social solidarity*, *social interdependence* and *social need*, rather than founding it on the historically verifiable datum of the *collective will* as *dominant will*.

[6] Duguit and Hauriou adopted the German model while delivering seminars at university.
[7] His book. *L'État, le droit obiectif et la loi positive*, the first of the six volumes of *Études de droit public*, was written with the aim of answering to Jellinek's book, *System der subiektiven öffentlichen Rechte*,

In this sense, it assumes that the Authority would only *reveal* and *formulate* the law, whose source is based on the *collective life*'s needs. Nevertheless, these needs are unclear, indeterminate and contradictory, which is why they are open to different interpretations unless those needs transform into a decision of the social body that would satisfy them. Until the transformation occurs, the needs lack of the possibility of being enforced, which constitutes the essence of the law. Therefore, the Authority does not translate or reveal the law, but it formulates the law by creating it without getting inspired by the common good. Thus, the doctrines referring to the social datum or to biology seems to be positive, but in reality they are 'jus-naturalistics', since they assume as rational criterion values predetermined with an abstract and *a priori* method, without checking its validity through the historical experience. In brief, these doctrines are just a variation of the need theory (*necessitas fecit legem*). The *need* is not an objective and absolute datum, but rather a relative since the doctrine juxtaposes the need and the predetermination of the values that measure the need, which are the result of an arbitrary choice. Those values are valid independently from the choices of society and from the social determination to support them with its authority.

Two young international law professors, Albert de Geouffre de Lapradelle (de Lapradelle, 1899a, 1899b) and Nicolas Politis (Politis, 1908: 88; 1927: 44; 1935: 62-110) believed that the international legal life was slowly shaping its structure without losing its idealistic nature, meaning peace and justice were not just a forlorn hope anymore. Nevertheless, from their works we have the impression that the reference to the two Hague peace conferences (1899 and 1907) expressed the *hope* that the growing role of international law, often referred as "droit des gens" (Piédelièvre, 1894), would have been acknowledged as necessary for the regulation of international relations.

The science of international law was far from having reached the level of detail and perfection of public or private law (Despagnet, 1894). However, by 1870, it had a great impetus, as demonstrated by the birth in 1860 of the *Revue de droit international et de legislation comparée* (published in Ghent), the *Institut de droit international* and the *Association pour la réforme et la codification du droit des gens*, later known as *International Law Association*. The nationalist spirit that affected the work of Jean-Louis Halpérin (Halpérin, 1999, 2013, 2015) on the history of international private law had no effect on the decision of the small community

of internationalist jurists of giving birth to a transnational milieu that facilitated the exchange of views among scholars coming from different States.

The French internationalist 'jus-publicistics' immediately showed an interest for the creation of a French school of *jus gentium*, since they were convinced of the ever-widening gap between France and neighbouring countries.

The French internationalists thinking until the First World War is analysed here with reference both to the international law's textbooks of that time and the papers published since 1894 on the *Revue gènérale de droit international public*, directed by Antoine Pillet (Pillet, 1892-1893, 1898; 1899) and by Paul Fauchille (Fauchille, 1916, 1917, 1918, 1927). These papers had a tight relationship with the history of international relations (Bonfils, 1908: 26 and 29).

Albeit the science of law was (and is) often accused of being isolated from the other subjects in the name of an abstract and detached from the factual truth purism (Audren & Halpérin, 2001: 3), the French internationalists – subjected to a deterministic view of humanity – had always showed the willingness to work with historians, philosophers and economists for the moral and material development of the society (Bry, 1891: 34).

It is not the case that the spread of the international law subject in Law faculties played such an important role in the education of most of the political and administrative élite that the internationalist jurist's claimed for their subject the possibility to «*exercer sur la politique une action incessante*» (Merignac, 1905: 26). Diplomats however did not share this aim, as an example of the little regard that the law science had (Pillet, 1901: 7). Besides, the internationalist jurists strongly criticised the Russian policy towards Finland and the British behaviour during the Boer war, both considered contrary to justice, to *jus gentium* and to the universal conscience (Merignac, 1901: 93).

Antoine Pillet had no doubts on the peacemaker role that the law could have had in international relations, since it had the aim of conciliating through "…l'application d'une même norme les intêrêts divergents des nations" (Pillet, 1894: 9). Thus, the works of the French internationalist jurists between the end of the nineteenth century and the beginning of the twentieth century have to be analysed in reference to war and peace, considering also that the nineteenth

century seemed to enshrine the war as «statut d'institution du droit international» (Neff, 2005: 177). The period between 1890 and 1914, marked by intense international disputes and by the interest of the States for the Hague conferences, testifies to the interest of the French internationalist jurists for the international relations' pacification.

6 French 'jusinternationalists' and the International Community

At the beginning of the twentieth century the legal doctrine reacted to the voluntary positivism that had experienced its apogee during the nineteenth century and by founding international law on the willingness of the States, denied the existence of an international legal order, enhancing the singular rights based on the empirical will (Kolb, 2003: 20-29). We refer here to the *Vereinbarung*, or common will theory, and not to the later *collective or social will* theory that never questioned the existence of the international law. The former theory is due to Tripel, who received a great consensus among the *positive law*, also known as *voluntary, contractual or negotiating positivism*. Triepel tried to solve the problem of the founding of international law with the double assumption of the *law as command*, as expression of will, and the *sovereignty as absolut datum* with the distinction between *contract* and *agreement* as a result (Triepel, 1899: 27; 1913: 42). Rolando Quadri best interpreted the latter theory: the realist theory not only recognises the link between history and other subjects, but also foresees the scenarios we are dealing with nowadays (Quadri, 1989[5]: 35-37).

Unlike the internationalists throughout the rest of Europe, the French ones were sure of the existence of an international community above the States. They deduced from this existence the source of legitimation for their subject, since there was no society «sans un ensemble de precepts juridiques qui fassent régnar l'Harmonie entre ses membres en réglementant leurs rapports: *ubi societas, ibi ius*» (Leseur, 1893: 10). It is true that the Authority, which is inherent in each society, organises itself as *ubi societas ibi ius*, but it is also true that it structures itself as *ubi societas ibi auctoritas* (Quadri, 1989[5]: 27).

The jurists were inspired by environmental science, a branch of sociology and biology, therefore they tried to theorise the existence of the international community through anecdotal observation. Whilst the States did not recognise "*la solidarité les unissant comme membres de la communauté internationale*" (Leseur, 1893),

they participated in the Congresses and Conferences held during the nineteenth century (Congress of Vienna, Congress of Berlin form 1871 to 1885, Hague Conferences in 1899 and 1907).

However, these internationalists never doubted that the States could have lived isolated from each other, since it is historically proven that the economic needs and the sharing of the scientific discovery's led the States to relate to each other (de Lapradelle, 1901: 327). Therefore, States could not escape international trade. Trade was the main allegation against China during the Boxer war (1900-1901), since it was charged with detaining a great amount of assets that it did not want to share with the European countries. "*A-t-elle le droit de priver l'humanité des ressources que le nature a desposées pour elle?*" si chiedeva Lapradelle (de Lapradelle, 1901).

Appealing to the biological law of the human societies, the jurists depicted the growing States' interdependence as "*la loi sociale de notre époque*" (Pillet, 1899: 31). Other jurists interpreted in a classic, liberal way the "*loi de l'humanité*" as a general peace factor, given that the States have a mutual interest in avoiding conflicts and wars (Bonfils, 1908: 4).

Paul Leseur, professor of law in Lyon, dealt extensively with the *solidarity* and, in particular, he pointed out that the members of the international community would be driven by an «instinct de solidarité», proof that they needed each other (Leseur, 1893: 94). This idea of *solidarity* was later best theorised by Léon Bourgeois, who brought the two assumptions beyond the platitudes (Koskenniemi, 2014: 284) in which they seemed to be relegated. Moreover, the *de facto* international community – described by the jurists as the international community of law – is still far from including the whole of humanity. The positive international law applies only to sovereign States, since we take for granted the presence of customs, social and political institutions, common procedures, including the way they relate each other (Koskenniemi, 2014: 14). The jurists drew a distinction, like the case of Henry Bonfils in its *Manual*, between a *rational or natural international law*, which applies to all the States and peoples, and a *positive international law*, which was created in Europe by States, and which applied Christian precepts and, thus, it applied only to those States that reached such a level of civilization (Koskenniemi, 2014: 18).

The period between the end of the nineteenth century and the First World War marks the apogee of European colonialism, with which the colonial countries imposed their law without taking into consideration the local customs and legal traditions. In this period, the internationalists had a very hierarchical perspective of the world, so only the natural law's humanitarian principles applied to the States considered by the West to be non-civilised; the same principles that the European States did not respect. Louis Renault appealed to those circumstances for charging the European colonial powers with having abused their power and of having "déclaré des guerres injustifiables", in particular having "*violé les règles les plus élémentaires du droit des gens*" (Renault, 1872: 21-22). Nevertheless, "s'ils étaient nombreux à se montrer sensibles à un discours dénonçant les excès de la colonisation, les juristes ne remettaient nullement en cause la «mission civilisatrice" of France (Merignac, 1905: 17). *International law* seeks to progressively create a universal application (Despagnet, 1894: 60-61) to the extent that some scholars at the beginning of the twentieth century hastily supported its transformation into a *world law*, since it seemed to not be exclusively a European law (Despagnet, 1894: 15).

7 The Relative Interdependence of the States

At the end of the nineteenth and beginning of the twentieth century the group of civilised States that were players on the international relations stage, which were regulated by international law, were neither a supranational community, nor the seed of a universal State. The French internationalists believed that the international community would have neither destroyed the independence of the State nor the freedom and equality (Bonfils, 1908: 1001-1002). The international community was an interstate affair and the jurists considered the States as subjects of international law, or in legal terms they were holders of rights and obligations. There is no doubt that the civil law – so the regulation of the relations between privates – inspired the internationalists in the elaboration of their theories.

The main obligation for States was the respect of international law's norms, unwritten rules that mean an "obligation formelle" (Mérignac, op. ult. cit.: 221). In this regard, that directly involves the States' sovereignty, of which the jurists agree with the politicians and the chancellors who deny the existence of international law in the name of the State's independence. Antoine Pillet held a

different position. According to Pillet, the State's independence was «…le pouvoir de se mouvoir librement dans les limites fixèes par le droit international» (Pillet, 1894: 9). He was opposed to the dualist tendencies based on the separation between the domestic and the international legal order, which he clearly affirmed the supremacy of the international law with the quote: »*Là où le droit national et le droit international sont en conflit, le première doit accepter les conditions que lui dicte le second*« (Pillet, 1895: 593).

Despite this, the international community, as theorised by the doctrine that relates the independent States among each other, seemed far from preventing a new war, albeit the European continent was living a long period of peace after the Eastern crisis in 1875-1878. It was a kind of *armed peace*, in which the arms race did not stop. It was the prelude of a catastrophe foreseen by the French internationalists. Already in 1898, Edgard Rouard de Card thought that there was a heightened chance of a general war through a simplistic act, such as an assassination. (Rouard de Card, 1898: V (1), 727). It is relevant in the fact that Louis Renault, co-winner of the Nobel Prize for Peace in 1907, did not join any of these initiatives despite the various solicitation, because he wanted to maintain his «*pleine liberté t d'appréciation sans subir l'influence naturelle d'un milieu spécial*» (Guieu, 2012: 34, nota 53).

8 The Humanisation of the War

The jurists prefered to consider the war as inevitable, convinced that "a[vait] tojours été et restera[it] la loi irrationelle et fatale des destinées de l'humanité" (Le Fur, 1909: 460).

Moreover, they rejected the idea that war may be a normal or natural state of humanity, because each order had peace as a main aim. Even if the French internationalists consider the war as an awful calamity, they were far from wishing its ban from international relations, since it is considered «*un mal inévitable et parfois nécessire*» (Bry, 1891: 388). Frantz Despagnet also supported this opinion, taking self-defence as an example, a case in which the people are induced to the use of the force in order to defend their rights and to assert their legitimate demands (Despagnet, 1898: 720-721). We can conclude that the doctrine had enshrined the legitimacy of the war, which can be used as *extrema ratio* after having carried out the peaceful solutions and having proved their ineffectiveness. This is the

reason why the internationalists were involved in elaborating war norms (de Lapradelle, 1899: 701) and avoiding inconvenient or clear breach of international humanitarian law. Regarding this, the results of the first Hague conference on the laws and customs of war on land were satisfying. The second Hague conference in 1907 reviewed and developed those results and held a favourable view to the elaboration of the international humanitarian law. Thus, even though the jurists thought war was a probable event, nonetheless they actively committed for peace, focusing on finding the right means for obtaining long-lasting peace in Europe. Three ideas emerged from the debate: a) peace through political equilibrium; b) peace through the confederal model; c) peace through international arbitration.

Concerning the first point, the internationalists sustained that the *notion of equilibrium* had neither legal importance nor *legal principle* value. They limited to consider it as one of the exercise modality of the power guaranteed by the pre-emptive action, the preservation right or the self-defence of the States. *Equilibrium* was the perfect haven for maintaining the balance of power of the European diplomacies after the Treaty of Westphalia (1648), the Treaty of Utrecht (1713) and the final Act of the Congress of Vienna. Although this principle did not prevent the emergence of crisis in Europe like those between Prussia and Austria for the Dukedoms, it guaranteed the existence of the Netherlands and other smaller neutral States alongside the great Empires. However, most of the jurists thought, not without good reason, that the principle gave rise to a series of abuses since it was clear that the great powers at the time had always appealed to it for covering their ambitions and interests.[8]

Between the end of the nineteenth century and the beginning of the twentieth century some jurists lost their perspective and started to doubt about the value that the principle of equilibrium had in international relations. In 1915, Alexandre Merignhac warned that the impetuous of development of certain modern States already led to the desertion of the principle, so there were no reasons to continue defending an old system overtaken by events (Merignhac, 1905: 242). On the contrary, Charles Dupuis, professor at the *École libre de sciences politiques*, thought that the idea of European equilibrium was not deserted, despite it was in competition with the principle of nationality during the nineteenth century

[8] Nowadays, the human rights substituted the principle of equilibrium and they are always invoked as a legitimation factor of the interventions whose aim is the defence of interests.

(Dupuis, 1909: 2). The new lease of life that the principle of equilibrium had at the end of the nineteenth century when Europe was divided into two blocs supported this assumption: the Triple Alliance and the Triple Entente.

Concerning the second point, the jurists of that time harshly critiqued both the project for an European confederation – regardless of the inspiring models of reference (Sully, Abbé de Saint-Pierre, Bentham or Kant) – and the project for a European union made by the federalist Scottish jurist Lorimer and the one made by the confederate German jurist Bluntschli.

The French internationalists strongly criticised these projects, because according to them they were based on the utopia of a European construction composed by many different countries. The situation of Europe at that time was not comparable to the United States, where the people were homogeneously animated by the same spirit and aspirations. Europe, instead, was and is still composed by different countries, each with its own aspirations, often in contrast with each other.

According to Frantz Despagnet (Despagnet, 1984: 169-171) a European union was «contraire à la nature» since it would have been an obstacle to the unavoidable competition between States in all the human being activities (Bonfils, 1908: 1000). By drawing inspiration from the existing Confederations, the jurists thought that the modification of the political structure towards a confederation would inevitably have led to a contraction of the political independence of the member States, causing the sacrifice of the instrument "…plus parfait de civilisation que l'on connaisse, la patrie" (Piédelièvre, 1894: II, 17).

Henry Bonfils formulated the most interesting observations that are still valid. He sustained that the central power tried to grow its power to the detriment of the confederate States. Switzerland evolved from the confederal dimension of the Cantons to a more federal and unitary structure. The German confederation became the German empire lead by Prussia (Bonfils, 1908: 999). According to the French internationalists, the European States would have experienced the same destiny if they had decided to create a confederation.

However, some scholars welcomed the idea of Europe since it would have kept a lid on the impetuous growth of the Anglo-American trade and industry (Fauchille, 1899: 65). The tensions between France and Great Britain hit the apex during the Fashoda crisis that led the jurist Fauchille to call for the creation of a European customs union, which would have been the economic cornerstone of a European State. He also argued that « cet immense Ètat se garantir[ait] de l'éxterieur par de taxes franchement prohibitives mais, dans ses propres limites, il fer[ait] desparaitre toutes les barrières » (Fauchille, 1899: 65).

Considering the third way to reach peace, the jurists unanimously agreed on the *international arbitration* idea because they considered it «made capital de pacification et sourtout le seul qui soit d'application pratique immédiate» (Le Fur, 1909: 441). The widespread procedure used during the nineteenth century seduced the French internationalists who rejected all the ideas intended to create "un tribunal permanent, constitué à l'avance en Cour suprême internationale, pour juger tous les conflits qui se présenteraient" (Bry, 1891: 378) in the attempt to square the procedure with their concept of sovereignty.

The idea of an international Court made its appearance in the projects for a Confederation, which the French school of international law rejected *in toto*. The adoption of the Hague Convention of 1899 for the Pacific Settlement of International Disputes led to the codification and institutionalisation of the optional international arbitration and the creation of a Permanent Court of Arbitration. According to the jurists, this was the result of the development of the «droit des gens» (Despagnet, 1894: 877; Pillet, 1916: 5-31). Nevertheless, the expectations after the Hague conference were soon disappointed, considering the non-existent role of the international arbitration at the beginning of the twentieth century as proven by the Boer war in which Great Britain systematically refused the use of peaceful avenues (Merignhac, 1900: 398). Pillet wondered how the Hague resolutions would have prevented conflicts, which could have happened for trivial reasons in case of a system failure. Thus, for example, the internationalists noted that at the outbreak of the Russo-Japanese war of 1904-1905 any government drew the attention of the belligerents to the fact that The Hague Court had opened a procedure against them. Was it useless? The second Hague Conference of 1907 – which saw the great contribution of the French internationalist Louis Renault – enshrined the principle of *compulsory arbitration*

and the possibility of its application to certain cases without limits, but did not lead to an international treaty on the issue.

The jurists were aware of the *inadequacy* of the second Hague conference's results and the *legal limits* of the conventional procedures for the elaboration of the international law. They were aware of the *failure* of the arbitration procedure, since the arbitrators had no law to apply, and the problems related to the application of the arbitral decision. Thus, the perspectives of an International Court with extensive powers and the general disarmament turned out to be long-term objectives (Le Fur, 1909: 455).

The First World War swayed the theoretical framework of the French 'jusinternationalist' doctrine, but we have to consider that those ideas represented a ground-breaking step for the French 'jusinternationalist' thinking both during and after the War. The French jurists tried to impose the law as a regulatory instrument of international relations and an international peace instrument through the spreading of the idea of growing *interdependence* between States within the international Community, *economic and moral depletion* of the European societies in a time of armed peace, and *need to humanise the war* and *recognising the international arbitration*. They did not question the international Community of that time and, so, they thought neither to eliminate the war from international relations nor to constitute an International Court, nor did they think about the intra-European relations in a confederal perspective. All these issues would have been taken partially into consideration after the First World War, but particularly after the Second World War.

9 French 'Jusinternationalists' and the First World War

In this scenario, the French 'jusinternationalist' thinking was focused on the idea of *solidarity*. Georges Scelle was its major supporter, but he joined later this branch of the doctrine, as inferred from his work *Commentary of the League of Nations*. He thought that the legislative power should not have been composed by States' representatives, but by representatives of the professions from those centred around which the members of the global electorate constitute their identity (Scelle, 1919: 101). In this way, he substituted the political power with the economic one, which fulfilled specific interests. In our view, the States should have interpreted these interests without prejudice to the influence that the lobbies

exercise on the States' representatives of the different international organisations. Scelle's utopic view of the international community brought him to prefigure the end of the State and of the politics itself (de Lapradelle, Politis, 1909: 385). Beyond the stretch of this view of the international community, we notice in those ideas the prefiguration of a cosmopolitan society, absorbed by the economic and technical issues.

Scelle was influenced by the State doctrine of Diguit and refused the dogma of the *autonomy of the willingness* in its contractual version. He noticed a thinly veiled metaphysical hypothetical in contrast with the positivism. In this sense, Scelle, like Kelsen, drew upon the consequences of the critic of the subject's philosophy: that human beings are not free by nature, "ce que nous appelons autonomie de la volonté, c'est un domaine réservé par le Droit à la liberté individuelle. De telle sorte que tout ce que nous appelons liberté est l'envers d'une contrainte" (Scelle, 1933: IV, t. 46: 347).

The law can neither be constructed from the subjects of the law, nor based on the State considered as subject endowed with willingness. This kind of sociological anti-subjectivism could only end up with the *déseincorporation* of the State. Scelle thought that the *moral personality* was a fiction (Scelle, 1932-1934/2008-2010; 1933: 366), because the State is a society like the others and it is a "milieu intersocial" (Scelle, 1933: 341). It is a group of individuals kept together by an involuntary solidarity (Scelle, 1933: 339). Scelle put an end to the *myth* of the State-individual that dissimulates the real nature of the State. The ideology of the State is a shield behind which there are the individuals, whose will is the only true fact. Thus, it is necessary to go beyond this shield for appreciating the nature of the State, the political organism endowed with competences divided among individuals, agents, politicians and citizens. In these terms, the individuals are subjects of law, so that [s]i la notion d'Etat-personne se dissout ainsi dans celle de ses agents ou gouvernants, la notion de souveraineté s'évanouit aussitôt, car elle ne peut appartenir à aucun sujet de droit» (Scelle, 1933: 371). The sovereignty, likewise the freedom of the individuals in the state of nature, is a postulate of the natural law that is unproven and unprovable. Therefore, the doctrine of the fundamental rights of the States emerges from the dogma of the subjective rights. The dogma ignores the real objective nature of the law (Scelle, 2008-2010: 96, 113, 121).

Scelle's project consisted in demonstrating the unity of the Law as both normative order (Scelle, 1933: 35) and technique (Scelle, 2008: 24). The unity of the subject of law, namely the individual, was automatically the corollary of this conceptual unity. Nevertheless, this does not mean that the individual was the centre of the dogmatic construction, since he was considered the subject; inasmuch the law attributed to him the relative competencies. The result was that *willingness* was the driving force, but it was not a source of the law. The source, in fact, should have been sought in the social fact. What Scelle defines as ethical, becomes inside a society «*le sentiment indistinct et collectif du bien et du mal, du bon et du mauvais, de l'utile et du nuisible, du juste et de l'injuste, du social et de l'anti-social, du licite et de l'illicite*» (Scelle, 1932, p. 98). The theory of *custom* is built on the assumption that distinguishes *voluntary fiction* from the *tacit agreement*. According to Scelle, the custom represents the «source intuitive et collective de la règle de droit» (Scelle, 1932: 10). Thus emerges the description of a spontaneous and collective process, whose source of strength is not the individual acceptance by its subjects, but the social contract that it exercises de facto. The fact that it is binding does not belong to the will of the legislator, even in an authoritarian regime, but it belongs to its conformity to the material source of the Law, namely the coincidence with the public interest and need or the social aim. The legislator may shape the law with the most compatible content for the needs of the moment, in the sense that he attributes to the law the element of power that depends on the ethical element (Scelle, 1932: 11).

This fundamental step marks the contrast between the objectivism of Scelle and the one of Kelsen. Scelle opposes to a purely formalistic definition of law, since its vision of the law as a social contract, inspired by Durkheim's sociology, leads to configure the legal order as a set of positive laws that are lawful – in force in a society in a determined moment – and attributable to ethic – the public conscience of a determined society. In the attempt to define a law superior to the positive law, Scelle's doctrine resembles the natural law doctrine. The idea that the law is relative and not immutable – like in the natural law doctrine – is the only difference between the sociologic objectivism and the jusnaturalism (von Verdross, 1935: 201). The ethic is the product of the social fact and not the product of a divine will or of the practical reason as supported by Michel Virally and Philippe Reuter. The ethic establishes the necessary or useful law for a certain society in a certain moment.

In this case, Scelle's theory proposes a realist vision of the legal order, both strongly positivist and far from the abstractions of Kelsen, who was the author of the basic norm that transcends the legal order.

The core of Scelle's theory consists in the relationship between power and law. The power is the condition of effectiveness of the legal norms, which are characterised by other types of norms (moral, religious, etc.), because "*elles sont les seules à être sanctionnées par l'organisation de la puissance publique*" (Scelle, 1932: 5). In other words, the power confers the legal nature to the objective norm and the power of sanction in case of breach of the norm itself. The power represents the factuality of an institutionalised social contract in the form of public power. However, the power is subject to ethical rules and the objective law so that if the legislator does not comply these rules he is subject to a sanction.

According to Scelle, the mismatch between *ethic* and *power* undermines the force of positive law, highlighting its anti-legality (Scelle, 1932: 11). Furthermore, Scelle distinguishes two type of powers: an institutionalised power – the public force – and a spread power – the social fact. The former attributes positivity to the norms that emerge from the social fact, thanks to the intermediation of the legislator. Vice versa, the social fact exercises pressure on the public force when the positive norm does not comply with the ethic.

Kelsen and Scelle expose the law to the mercy of the power, without taking into consideration that the problem of the law consists in the tension between the factuality of the enforcement power and the validity of the legal norm (Virally, 2010: XVI-XVII).

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Law and Politics at the Origins of the Italian School of International Law

Giorgio Conetti

Abstract P.S. Mancini is rightly considered the founder of the Italian School of International Law, even though he never produced systematic theoretical works or general treaties. His main assumption, the necessary identity between State and Nation, this last being the real subject of international law, strongly influenced the following Italian authors, notably P. Fiore, all of them favourable to self-determination on a national basis, but without adhesion to Mancini's theories in their full scope. Mancini's theories were proposed with a political intent, in the course of the Risorgimento's process towards the Italian unity; Mancini himself was a politician and statesman, Minister of Justice and Foreign Affairs, as well as jurist and legislator. His conception of consciousness of national identity, largely tributary to Mazzini ideals, was extended from public to private international law, disposing individuals' nationality as the necessary connecting factor in personal and family's matters.

Keywords: • State • Nation • Self-determination • Freedom • Consciousness •

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1 Mancini: Jurist and Politician

Pasquale Stanislao Mancini (1817-1888) is generally and rightly considered the founder of the so-called Italian School of International Law, even though he was not a systematic theorist and, under many aspects, his ideas descended from contemporary political authors, mainly Giuseppe Mazzini. His fame and public accreditation came from a decisive inauguration lecture, delivered at Turin University on January 22, 1851 on the topic of Nationality as Foundation of International Law. The focal point of his speech was owned largely to the momentum of contemporary political circumstances and was delivered with an open political aim. The following international law authors of the Italian School, active in the second half of the nineteenth Century, and themselves being intellectually a product of the Risorgimento process, the most well-known being Augusto Pierantoni and Pasquale Fiore, shared to some extent Mancini's main assumption of the centrality of the nation as a factor of international law. Mancini considered the nation as the preferable basis for the foundation of independent States, and a necessary condition for friendly international relations, inspired by the principles of equality, self-determination, non-intervention and mutual respect. The critical examination that the later authors addressed regarding Mancini's theories did not have the effect to destroy the concept of the nationality principle as the basis of the future legal order of the humanity, but rather to develop the complex aspects of the manifestation of the national ideal in international relations (Droetto, 1954: 198). While not sharing Mancini's opinions, Dionisio Anzilotti, the main proponent of legal positivism in the Italian doctrine of international law at the beginning of the twentieth century, recognizes that all of the large development of studies deriving from Mancini, known as the Italian School of International Law, that constituted one of the highest and most clever expressions of the Italian genius, linked with the Risorgimento, as being an effective factor of it and offering to it the value of a legal claim (1911: 644).

Mancini was, throughout the course of his life, a jurist and a politician at the same time, engaged in teaching at the university, legal professional activity, drafting new laws, as well as his parliamentary mandate and governmental service as Minister of Justice (1875-1878) and of International Affairs (1881-1885). His propositions, juridically original and politically innovating, obtained a large consent, not only restricted to a specialized legal audience, as they presented themselves as affirmations of principles or proposals for a better order of

international relations (Pene Vidari, 2010: 45). As a jurist he was a reformer, in which he received high acclaim from the public, also owing to his eloquence in speech and writings, aiming to define political or progressive legislative results; he acted as a consistent actor of the process of events that led to Italian unity and to the building and consolidation of the new born State, in which in a new order of international relations was inserted and recognized.

In Mancini's views, the way to obtain a desirable status and international recognition from other sovereign countries was to be found in the full affirmation of the nationality principle. This principle must be considered as the foundation of the liberal internal legal order and the consequent legitimacy of a sovereign State, identifying itself with the nation's consent. This assertion, when pronounced, was one of an utterly revolutionary impact and sounded as a message to the people, a message that provoked a deep impression and reactions. It was similar to a torch for Italy's unification movement (Jayme, 1988: 41). In the 1851 inaugural lecture the message was certainly the result of political design, under the influence and the instruction of the Piedmontese Prime Minister Massimo d'Azeglio, who acted for the institution of a chair of External Public Law and International Law, from 1856 of International Law at Turin University, established by a bill promulgated on November 14, 1850, and managed for the choice of Mancini as titular of the same. But, away from its immediate scope, the tone of the message was a prophetic announcement of a forthcoming new condition of human relations in internal, as well as international, legal order.

Mancini's message derives from many political and philosophic roots, but is a radical consequence of its premises, obtaining the nation's concept from a cultural, historical and spiritual factor and transforming it into a political program. It was then transformed once more from a political aim into a legally binding principle concerning the State's necessary national nature. The proximate intellectuals who inspired the Risorgimento were mostly political writers, Balbo, Gioberti and mainly Mazzini, and also jurist's, namely Romagnosi, Mamiani, Casanova, of whom considered the people's consent as a desirable foundation of the State's government and a condition for peaceful international relations, without reaching the full identification between State and Nation as the content of an international law rule. The deeper source of Mancini's ideas arises from his cultural formation, in the tradition of the Neapolitan illuminists (Genovesi, Pagano, Filangieri, Cuoco), and from his early political career as a liberal constitutionalist, as a member of the Neapolitan Parliament, which was

established on the basis of the Constitution signed on January 12, 1848, but shortly repealed. The restoration of the reactionary monarchical rule constrained Mancini and forced him into exile, albeit in the liberal and constitutional Piedmont; there he started his fundamental contribution to the Risorgimento's achievements and then to political life and the legal progress of the unified Italian State. Moreover, a large influence to the approach, looking for the national characters as factors of the history making, derives from the Neapolitan eighteenth century philosopher Giovan Battista Vico's consideration of the nations as natural societies, producing their own laws and customs (Droetto, 1954: 124 ss.).

2 Nation, Freedom and Peace

Following those intellectual paths, the national ideal, as advocated by the Risorgimento's authors, cannot be separated from the foundation of civil and political liberties. A nation's State, as an expression of self-determination, cannot exist without full accomplishment of the principles of freedom and equality for all citizens. This necessary connection, asserted by the American and French revolutions, adopting the 'illuministic' concept of the nation as a community of free and equals, enriches itself in the romantic and historic nineteenth century, with the consciousness of the cultural and historical common identity, producing the people's will for a common political and statual destiny, where self-determination and Nation State attain a necessary coincidence.

According to these basic assumptions, the Italian School of International Law emphasizes the rules governing international relations as interactions among States that are freely established on national basis, who, sharing the same values of their foundations and of their liberal institutions, shall behave as equal subjects, mutually respectful of their sovereignties: in this international community of being free and equal, intervention, aggression, conquest and imperialistic expansion are clearly out of law and any international disputes must be settled by general recourse (arbitration), which was typically used when Mancini was Minister of Foreign Affairs.

There is an unquestionable connection linking national principles, political freedoms and peaceful relations, which were already emphasized by Mazzini's doctrines that were widely inspired Mancini's theories. According to Mazzini,

friendship and brotherhood among nations are the natural consequence of the equal justice of their foundation. A Nation State and a constitutional State must coincide, and the historical accomplishment of this alliance, when achieved through obtaining liberal institutions supported by national conscience and political consent, may confute the alleged utopia and abstract nature of Mancini's conceptions.

Plainly speaking, the political ideals and action of the Italian Risorgimento's national State and liberal institutions are always connected; the identity and unity of the Nation State have a moral, historical and cultural basis, but these factors must not necessarily be animated by the people's consciousness and consent, but expressed by the plebiscites and the election of the parliament of the united Italian Kingdom. In the process of Risorgimento's political action equality of men, civil and political freedoms, peoples will, national identity and its consciousness coincide: political and national self-determination are synonymous.

The most significant character of the national ideal inspiring the Italian Risorgimento can be found in Mancini's fundamental assumption concerning the importance, but not sufficiency, of the natural, historical and territorial conditions of the identity of language, origin and religion in order to constitute, with their concurrence, a nation; this inert material could be vivified only by the nationality consciousness, that is the only factor capable to establish itself in the internal, as well as in the international legal orders. The common thinking, the moral unity, the condivision of a superior ideal are the conditions for attaining the unity of the Nation State, founded upon the consent and the exercise of freedom, specified by Mancini in the speech he delivered to the Italian Parliament commenting on the plebiscite in favour of the union of the Venetian Provinces with the Italian State (Droetto, 1954: 350).

Many political authors at that time, when considered the difference of the Italian unification process in respect with the establishment of the German Reich in 1870, stressed the originality of the nationality ideals as professed by the Risorgimento and by the process of building the Italian unity, obtained by the national feeling and its expression by people's will, but in contrast with a national identity based only upon naturalistic and historical factors and obtained with authoritarian and militaristic actions (Chabod, 1951: 172 ss.).

Only taking into consideration the immediate connection between common consciousness and common consent as basis of the Nation State, which is a result from self-determination, and the consequent expectation of an international community composed by equal and free national States, established on the same principles, can we appreciate the coherence of the assumption that the Nation constitutes the necessary assertion of the international legal order, which is the natural subject of the international community. Such is the content of the 1851 inaugural lecture by Mancini, but the inspiration and main focus of this lecture can be found in an essay concerning the Holy Alliance of Peoples written by Mazzini in 1849, where the nation is considered a necessary intermediate body between individuals and humanity, and that nations are considered to constitute the individuals of humanity, with the same relations of equality and brotherhood among them as among free, individual men (1849: 168). Freedom and equality of men are necessary in order to constitute a nation; with reference to the rebellion of the Southern States against the United States, Pierantoni argues that real nationality cannot exist where slavery is a political institution (1876: 119).

3 Mancini's Antecedent and Following Authors

As mentioned above, some other Italian authors of the nineteenth century, prior or contemporary to Mancini, accepted the postulate of free national States as a condition to obtain peaceful relations, which, in their views, represent the ultimate aim of a well-founded international law. In Romagnosi's work about the Science of Constitutions, the conclusion was reached that a useful equilibrium, capable to guarantee a stable peace, can be obtained only by the independence of every nation and by the prohibition of every foreign intervention against them (1848: 28-29). Casanova also assumed that the aim of international law must be the conservation of peace (consider that the 1815 Congress of Vienna's settlement) based upon the factual equilibrium of powers, contains factors of future instability as repressive of peoples' aspirations and that the so-called European Concert of Powers produces only compromises based upon force and short-living circumstances. No peace could be attained until the national expectations were not satisfied and the nations continued to be oppressed. Such are his conclusions: "Fight shall take place, hard fight until the justice shall not triumph and the nature shall not be vindicated from the violence received by avidity and ambition. To unite the nationalities, to build the world on the basis of races and languages, as God built it, to accept the natural borders of

mountains, rivers and seas by which he made the great divisions, instead of making artificial rules among the peoples, to solidify the links established by the Providence, to give to the nations freedom, within the constitution of the State and out of it in its international relations, such is the great enterprise to which the statists must devote themselves" (1859: 61).

Once accomplished, the unity of the Italian State contributed to lower the enthusiasm for the political program based upon the centrality of the nation as the factor guiding international relations in favour of more realistic views of their conduct. Mancini himself, as Minister of Foreign Affairs, for contingent political reasons signed the Triple Alliance Treaty, linking Italy in a defensive alliance with the Austrian and German empires. The original proposition of identification of the State with the Nation, this one to be considered the proper subject of the international law, was accepted by successive authors as long as the nation was constituted in statual institutions, not excluding the factual existence of different statual dispositions. Nevertheless, according to the most appreciated author among the Italian writing society of the second half of nineteenth century, Pasquale Fiore, whose work constitutes the synthesis of the evolution of the Italian doctrine (Droetto, 1954: 12), the people's consent, based upon the common national identity, expression of internal and international self-determination, is to be considered as the preferable condition of State's legitimacy. The State, at its best, must be the result of the free association of a people acting for a common destiny according to its prompt or tacit will, resulting from common customs, culture and institutions, under the guide of a government constituted in conformity with the majority's vote. Even more, Fiore consequently stated that the right of people to freely aggregate and give life to a State, mainly when in conformity with their natural and spontaneous national feelings, must obtain protection from the international law's rules against foreign intervention (1890: 92 ss.).

These opinions were abandoned later, when prevailed, also in the Italian doctrine of international law, the legal positivism, following the authority of Dionisio Anzilotti; however when the realism concluded that the State's existence must be considered only an issue of fact, qualified by effectiveness, Anzilotti appreciated Mancini's message as an operating factor of the Risorgimento's process, to whom his doctrine offered the value of a legally founded claim and justified the right of the Italian people to freely dispose of its destiny, building by plebiscites the new united State. According to Anzilotti, the nationality principle must be recognized

by nature as an ideal of justice, though not to be considered a condition of the State's legitimacy (1911: 664).

4 Nation and Private International Law

The unification of Italy on national basis brought, as a consequence, the need to build a new internal uniform legal order by the adoption of newly drafted codes of law, capable to offer solidity to the new born State in accordance with its proper cultural and social identity. Mancini's contribution to this work, as an outstanding jurist and, for a time (1875-1878), Minister of Justice, was of considerable importance in the fields of civil and commercial law. Not to mention his post as Minister for Foreign Affairs, bringing, according to Chabod (1951: 530), an open mind and an internationally oriented approach to his new State's foreign policy, always inspired by the defence of the national independence in foreign and ecclesiastical affairs.

A fundamental development of Mancini's theories is, notoriously, represented by his original conception of private international law, also based on the nationality principle. He had no misgivings that this principle must be also the pillar of this field of law (Storti, 2013: 54). The rules of private international law, preliminary to the 1865 new Italian Civil Code, were practically drafted by himself, according his views concerning the predominance of nationality as connecting factor in matters concerning personal status and capacity, family's relations and successions, and influenced in the following years, other national legislations. His program, sponsored when acting in the capacity of Minister of Foreign Affairs and largely illustrated in the famous report delivered at the 1874 session of the Institut de Droit International, in order to obtain general unification of private international law rules by their adoption in international conventions in conformity with the nationality principle, nevertheless obtained limited results for contingent political circumstances and difference of views concerning the proposed solutions.

The coherence of nationality principle, bringing with itself the mutual respect of national States' sovereignties of equal dignity, enables the States to claim the application of their civil law rules to their citizens everywhere, when such rules concern matters linked to their national identity, and to claim for the duty of other States to respect and apply them.

This theory presented itself as universal validity, asking to be accepted by the international community of States, but it is rather the product of the political exigence to obtain the general and extraterritorial application of the national legal rules to the Italian citizens when concerning their personal and family status. The political necessity of the permanent unity and stability of the national legal order was stressed by Mazzini's essay on the Duties of Man in 1860: "The Mother Country is a community of men, free and equal, linked by common values towards common aim. The Mother Country is not an aggregation but an association and cannot exist without a uniform legal order" (1860: 131).

The foundation of the legal order upon the community of conscience and the national consent brings with itself the application of the legal rules reflecting the national identity of persons. Consequently, Mancini asks for the general extraterritorial application of these national rules qualified as necessary law, leaving freedom of choice of law in contractual relations, always safeguarding the superior interests of the State's public policy (Tonolo, 2013: 69). The aim to be attained is the stability and permanent application of the national law in the fields sensible for the cultural unity of the State, avoiding uncertainty about the personal condition of its citizens. In the 1874 report such intent is clearly stated, criticizing every doctrine that could bear uncertain or excessively discretionary results.

We can recognize in this theory, together with reasons of political utility, a kind of national mysticism as the necessary application of national law, never separable from national community's life, which constitutes an aspect of the nation's mission, which is the affirmation and the spreading of the complex of its spiritual, original characters. Every nation contributes, by this way, with its own original rapport, to the building of the humanity, in mutual of national differences, according to the Mazzini's prophetic words in his 1849 essay on the Holy Alliance of Peoples: "The Nations shall be sisters, free, independent in the choice of the means to attain their common aim and to give the rules of their internal life, but they shall stay together in a Covenant in order to settle their international life" (Mazzini, 1849: 170). Here we can easily find Mancini's inspirations, at the same time of political and juridical quality: national independence and self-determination, freedom and mutual respect among nations, to be linked by covenants for the peaceful settlement of their interactions.

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XENOPOLIS
About an Escape from the Principle of Opposites, Featuring Two Monks and a Woman on the River's Bank, a Doctor and a Philosopher

Krzysztof Czyzewski

Abstract Our community life is currently in a deep crisis. Europe increasingly resembles the village portrayed by Werner Herzog in his film Heart of Glass, where the mystery underlying the life of the village inhabitants was lost and prophets announced the end of the world. With the migrants in arm's reach, we are desperately looking for a scapegoat and are treating Muslims with suspicion. However, entrenching ourselves behind our ramparts, we will not be able to build a rational foundation for our future. Ethnic cleansing, deportations, ghettos, racism and xenophobia: we have experienced them all. They do not offer any solution and are completely irrational. What is at stake here is the centuries' long secret of community life, complete only when it includes the presence of strangers. That is why this story will be about coexistence with strangers.

Keywords: • Borderland • Coexistence • Bridge-building • Xenophobia • Otherness •

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1 The Lost Mystery of Community

We have destroyed the Berlin Wall, opened borders, adopted the Internet, and most of us live in multicultural cities. But the existence of the wall is a living experience of modern Europeans. In view of the rising tide of immigrants, and perhaps, primarily, of the growing weakness of the political centre which we were accustomed to regard as exclusively ours, we began to re-erect walls, set fences and barbed wires along the borders of nation states. At the same time, we are aware that the deepening divisions are less and less a question of the barriers of language, ethnicity or political systems. Today's walls grow across communities living on the same side of the river, and are erected by sharp and confrontational boundaries of cultural identities. The increasing proximity of the Other, one not outside of our world but within our intimate space once reserved for what is familiar and close, builds a new wall which seals our contemporary anxieties and confusion. We realize it more and more clearly that our identity is no longer one with the spirit of community, and that by raging battles in defense of the first value, we have lost much of the spirit of the latter. The problem of the contemporary Europe is not about reinforcement of diversity and differences, but about what Czesław Miłosz called "the connective tissue", the concept on which he based his "native realm." Therefore, a contemporary narrative of Europe is a story of coexistence. Because only coexistence is able to direct this current of thought and action that can once again tear down the wall built on the Old Continent – now not the world of enslavement and Cold War, but one with a growing closeness of the stranger.

Our community life is currently in a deep crisis. Europe increasingly resembles the village portrayed by Werner Herzog in his film *Heart of Glass*, where the mystery underlying the life of the village inhabitants was lost and prophets announced the end of the world. With migrants at arm's reach, we are a society are desperately looking for a scapegoat and are treating Muslims with suspicion. However, if we entrench ourselves behind our ramparts, we will not be able to build a rational foundation for our future. Ethnic cleansing, deportations, ghettos, racism and xenophobia: we have experienced them all. Yet still we do not want to remember that they bring nothing apart from human misery. They do not offer any solution and are completely irrational. We are now faced with many grave and very real problems: environmental, demographic and social ones. Solutions to these problems need to be found both on moral as well as economic

grounds. What they share is the fact that none of them can be tackled "individually". We can only resolve them by acting as a strong community, a community that can be restored in common action with others, embracing our whole neighbourhood here and now and offering hospitality to strangers. This statement should not be seen as an ad hoc remedy resulting from the need to face the challenge of a great wave of migrants that has caused the recent European crisis. What is at stake here is the centuries' long secret of community life, complete only when it includes the presence of strangers. That is why this story will be about coexistence with strangers.

Coexistence teaches us about our own insufficiencies, regarding blood ties, nationality or culture, in establishing a community. In Polish, this characteristic is called *obcowanie,* which literally means "being with the other". It is quite an unusual word, since to express the concept of being together, we are more prone to place emphasis on the things that we have in common, as is the case of other languages which derive from the Latin word *communio*. While looking for the equivalent of the Polish term in other European languages, it is better to look at the word *xsenopolis*, using it not just in reference to a community that is friendly to the Other, but also one that is constituted of Others. Our narrative could start like this…

2 The Story about Two Monks and a Woman on the River's Bank

A long time ago, two monks wandered the earth. The storytellers differ in their description. Some call them Li and Wu, others simply say "a smaller and a bigger monk" or "a younger and an older one", while others would say "one that was listening to his heart and one that was listening to his reason". One thing is certain: they were brethren of a deeply traditional order. The two monks pledged vows of fidelity to principles, including the vow of silence during the day and abstaining from temptation of a woman.

The road they travelled led them to a river. On its bank, the monks were met by a woman. There are different interpretations about this encounter, too. Some say that the woman had crossed the river in the morning, when its water level was still low, and was cut off from her house because of the monsoon rain and flood; others say that the bridge was destroyed; finally there are some who point out that she was dressed in expensive clothes and thus afraid of ruining her silk dress.

One thing that the storytellers have no doubt about is that she was young and beautiful. It is also said that the first monk (let us call him the younger one) turned his eyes away from her and, being faithful to his pledges, crossed the river without paying attention to the woman in need, whereas the older traveller without much thinking, took the woman in his arms and carried her to the other side. The woman thanked him and they parted. And here again, the various versions of the story diverge: some say the younger monk spoke to the older one five minutes later, some say after three hours or after the whole day and the story continued not in the context of a journey but in the comfort of darkness and monastery cell; some others insist that the younger monk tried to initiate a conversation bursting with questions which were met with deep silence until the nightfall.

The only thing that is certain is that the monks' journey changed after the encounter with the woman. While the older monk continued in harmony with himself, enjoying the beauty of the landscape and paying attention to everything he encountered, the younger one could not notice much in his surroundings as he was afraid of meeting another stranger and felt a certain burden being imposed on him. A burden that was invisible yet real (like the past which is gone and yet present). Another thing that is certain is that the younger monk was brimming with questions which were full of accusations against the older monk for carrying the woman in his arms: "This woman squeezed your hips with her smooth thighs, touched your back with her supple breasts, embraced your neck with her graceful shoulders and even possibly touched your cheek with her warm cheek". While the records of the conversation between the two monks do not include all the details, we can reduce it to a few simple questions such as: "How could you break the rules established by our tradition and betray yourself and your order? And for whom? A woman you did not even know? A stranger?"

Even if we accounted for all versions of this story (not only are they numerous but also quite different from each other) we can see that they all provide the unavoidable answer from the older monk: "Brother, I carried and left the woman on the other side of the river. Will you be carrying her with you for the rest of your life?"

3 Exegeses

The oldest tradition says that the monks were Buddhists, followers of Zen. They lived in China. Yet the truth is that they could have been followers of any religion, members of any community, or inhabitants of any country. The vows they pledged are like the vows we make to our faiths, homelands or values. There is no place in the world from which a road, sooner or later, will not lead us to the river on whose bank we will find the Other.

There are different lessons that we can learn from this story. Some people stress how disastrous it is for a man to cherish negative thoughts and feelings. They do not allow us to solve life's problems. Instead, they distance us from the real world. We learn that the things that bring us closer to reality and allow us to effectively deal with it are rooted in spontaneous acts of heart and a life philosophy that allows us to follow the bliss.

Zen schools sometimes "teach" this story to their students as a *koan*, to point to the purity of the older monk's mind. This quality enabled him to recognize the situation, adequately react to it and later continue his journey, fully prepared for its next stage. To cope with the challenges that life brings, our minds need to be open to different possibilities which are significantly limited when they are burdened with negative memories and resentments from the past. In other words, mental dependence on ideas or earlier experiences prevents us from fully living in the here and now. One master of meditation put it even more plainly: "We get mad when somebody throws trash in our house, but we are not protecting ourselves from having our minds filled with trash." Similarly, the Arab mystic, Abu Hassan Bushanja, once said: "The act of sinning is not so harmful as the desire and the thought of it. It is one thing for the body to indulge in pleasure for a moment, and quite another for the mind and heart to chew on it endlessly." The Indian Jesuit priest, Anthony de Mello, added: "Each time I chew on the sins of others, I suspect the chewing gives me greater pleasure than the sinning gives the sinner".

For the Hindu philosopher Jiddu Krishnamurti, the encounter by the river was, first and foremost, a story of "good solitude", as he claimed: "it is only when we give complete attention to a problem and solve it immediately – never carrying it over to the next day, the next minute – that there is solitude ... To have inward

solitude and space is very important because it implies freedom to be, to go, to function, to fly. After all, goodness can only flower in space just as virtue can flower only when there is freedom. We may have political freedom but inwardly we are not free…"

The Christian tradition also has a story about two monks on their pilgrimage to the relics of a great saint. On their way, they are also surprised, not so much by the fact that they saw a beautiful woman as by the fact that the woman was made of flesh and blood. Interpreters of this story place emphasis on the internal value of a human being, which is decided by what takes place in the heart and contrast it with the legalistic morality which was symbolized in the early times of Christianity by the Pharisees. That is why, while discussing this issue, they often bring up the words of Jesus Christ who, as Matthew the Apostle noted: "First clean the inside of the cup and dish, and then the outside will also be clean" or the words of the prophet Isaiah as quoted by Jesus: "These people honor me with their lips, but their hearts are far from me. They worship me in vain; their teachings are merely human rules".

4 The Older Monk, or the Crossing

The deeper we get into the story of the two monks, the more we learn of its interpretations, the more we try to understand its meaning regarding our own context and the more we get convinced that it is a story of coexistence. However, let us not be tempted to say that the encounter by the river lasted only for a very short period of time or that coexistence, as well as its impossibility, are a part of our everyday lives. Even our consciousness resembles this story, as it is written with intense experiences, critical ones, just like an interaction with the Other, which transforms this story into a narrative about life which somewhere at the bottom of our consciousness plants sediments of the essence of long duration.

The older monk, with his natural wisdom and peaceful internal freedom, earns our respect, which is, nonetheless, mixed with some cordial jealousy. It is difficult to deny that there is a significant distance between us, and that we observe his path from our remote place in the world; a place which is much more problematic, laden with interpersonal complications, living conditions, burdened inheritance and cultural prejudices. It seems to us that while our roots are growing deep into the earth, his have branched out towards the heaven.

The distance that has been opened up to us by the older monk creates a space where, as Krishnamurti claimed, our understanding of coexistence can flourish. It allows us to experience a spontaneous act of heart, born out of a real life situation and a need to meet the Other. This makes our earlier beliefs recede into the background, including our oaths and pledges. The situation also requires that, in order to break them, we need to have the courage to expose ourselves to accusations of betrayal and abandoning our own people and ourselves.

This act of heart, which is the cornerstone of coexistence, finds tradition in one of the oldest books in the Bible. It is in the Book of Leviticus where we read: "But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself." This teaching of the Lord to Moses is mentioned several times throughout the Old Testament, whereas in the previous verses of the Book of Leviticus, we read about the love of a neighbour in the sense of loving "your own people", and in the Book of Deuteronomy, we are taught to love "those who are alien, for you yourselves were alien in Egypt". Furthermore, in the Book of Exodus, we read "Do not oppress a foreigner; you yourselves know how it feels to be foreigners, because you were foreigners in Egypt."

The first of these teachings is one of the oldest attempts, if not the oldest, in the Judeo-Christian tradition to establish relations with the Other, in other words, coexistence. It combines two commandments which, in other parts of the Bible, are treated separately, often in opposition to each other as belonging to two different orders: rational and irrational. In the first part of the teaching, we are instructed to treat the newcomer (the other, a wanderer, an immigrant, a refugee, etc.) as our fellow countryman, a compatriot. This inclines both equality in the face of law and tolerance towards diversity (religious, racial, national, etc.). This legislative aspect is particularly important today, as most efforts at establishing a relationship of coexistence, instead of focusing on tolerance and other values that are "intangible" to our reason, rely on the constitutional order guaranteeing the human rights. The Book of Leviticus does not, by any means, ignore this legal aspect of coexistence, but is not limited by it. Its teaching goes further, towards love; a love that means crossing over, which is expressed by the phrase "as thyself". Such love towards a stranger encourages a change in you, abandoning one's own self. This love is not given to us, as our love for ourselves is. That is

why it can be implemented only by means of this crossing, in being with the Other.

5 The Three of Them

This crossing over reveals to us our spiritual development, but also the conflict that is generated by a border and our attempts at guarding it. The two monks and the controversy that arose between them symbolize it. Hence the question for us is: Are we making laws, pledging vows, establishing borders in order to later break them, breach them and cross them? This conflict seems unresolvable as long as we treat those two monks separately, assigning separate paths to each of them and deciding that only one of their truths is the correct one.

It is not an accident that in the story, the monks take the same road and remain companions throughout their journey. Using the language of people who live in the borderlands and who are thus used to living with others, we could say that it is the road that borders them. What connects them and divides them at the same time determines their coexistence. The act of heart by the older monk would not be possible without the border to which the younger monk is so faithful. The border makes us free not because it divides us from something or protects us, but because it creates opportunities for us to cross it.

Our coexistence is also constituted by encounters. Li and Wu could travel together, live under one roof in a monastery, quarrel and beautifully differ, but this is not coexistence. The space, whose "goodness blossoms" opens before them only when they meet the stranger at the river bank. Only then can they become free, in the sense of Krishnamurti's "good solitude". The story talks about crossing the river. All three of them are on the other bank. Later on, as they go further, each takes their own way. A return to the bank is no longer possible. After crossing the river (and let us not forget that this group included not only the older monk and the woman but also the younger monk who did not raise his eyes to look at her) they became different people who found themselves in a different place than they had been to before. Indeed, while building our coexistence, we all change and no one remains exactly like their old selves. Real coexistence is possible as long as we agree to leave our own bank, regardless of whether we agree to the circumstances that characterize our transfer.

6 The Younger Monk, or the Fear

Just as much as we admire, while also maintaining a cool distance from the older monk, the younger monk for whom the situation seems to be overbearing comes across as somebody very familiar. We have all experienced the burden of an unfulfilled meeting with the Other, who remained a stranger to us as we lacked power, the luminous gift of courage, the freedom to change the encounter into coexistence. This burden persists in our morbid memory, misunderstood identity, false ideologies and traditions infected with blind pain or a disastrous sense of superiority, in the primitive instinct of domination, vows pledged by those who are enslaved by fear and their own weaknesses. We carry this burden in our own families where many choices, related to our views, religious beliefs or ethnicity, have had to be made and where the choices of the heart have mixed blood. We carry it in our closest neighbourhood and the borderlands of multicultural communities, where racism, nationalism and other forms of intolerance are people's daily problems. We carry it in the empires built on slavery and colonial conquests. This burden, which is so common that it seems to be a part of us, is inseparable and written into our own fate and the fate of our communities.

That is why the attitude of the older monk is so disturbing. We bombard him with our questions, which we answer ourselves to drown out his answer and to prove not only his departure from the teachings, which are human rules, but also that it is us who know the real truth or untruth about life. Believing we are pragmatic and, out of our conformism and the fear and false understanding of absolute values, we put up a curtain of illusion which prevents us from noticing the space that was opened to us by the older monk and his crossing and luminous path. Believing that we are faithful to our vows, we breach them in the name of a higher necessity, just like the younger monk, possessed by the thought of the sin of the older monk, breached the vow of silence before nightfall.

Let us admit that the attitude of the younger monk perfectly resonates with today's world. We live in a world of post-modernist relativism, blurred borders and a policy of memory where there is a 'fetishization' of the past, a crisis of multiculturalism and globalization that generates unexpected encounters with strangers. It is justified to say that the encounter with the Other at the river bank would not have succeeded in our world. Instead of the liberation that comes

from the act of crossing, it would have brought a never-ending series of conflicts and tensions and become a tool that would be used by all kinds of defenders of particular interests, a pattern that has repeated itself throughout history.

An additional, crucial question is the fate of the younger monk. If his attitude is worryingly familiar to us, then we should not limit our story to the wisdom of the older monk, which implacably targets our weak spots, fundamentally undermines our image of ourselves and at the same time is difficult to access. The narrative of coexistence should follow in the footsteps of the younger monk, as it should search for wisdom in actions that are possible only after what has happened by the river bank. Just like the older monk needed the younger monk for the act of crossing, now the older monk should become a shoulder for the younger monk in his search for himself in the world where the stranger and the monk stand on the same river bank.

The older monk was right when he said that from now on, Li would always go through life together with the Other. He would not get very far if he did not notice or denied this fact. Every radical attempt at a "disposal of the problem", which historically took different forms of extermination and cleansing, might kill him as well, because now he became inseparable with the stranger. We also know that there is no return to the situation from before the encounter at the river, as the alien woman is no longer there, she is already among us, on our side of the river. Thus, the challenge faced by the younger monk is coexistence – building a community with the Other. Ahead, there is another river that he will need to cross. However, if this time he is up to the task, he will not leave the woman at the river bank and continue the journey by himself. He will begin his coexistence with her. His crossing will be completed if the stranger, symbolizing the Other, becomes somebody familiar to him; not a burden, but somebody who is lovingly recognized as a part of himself.

7 Woman, or Beauty and Memory

At the end of this part of our story, let us also ask who the woman encountered by the two monks at the river bank was. She was in equal measure alien and different, beautiful and young. Does this mean that the ancient tellers of this story wanted to suggest some kind of relation here, some kind of "field of attraction"? It is possible that we are wrong to see the gist of this encounter in

the burden of collected frustrations and assumptions that we might overcome or might not. Is it not clear that during our encounters with strangers, there is also a need to lean towards an unknown kind of beauty and a different kind of youth? Does the unknown not seem tempting? Does it not arouse nostalgia or even a memory of something that we have lost? This is something we can either be spontaneously open to, just like Wu, or rapidly turn our eyes away from. Regardless of which one of those two reactions we choose, we affirm our emotional engagement. Coexistence, the subject of this story, has something of a reminder for us: when it becomes real, we feel as though it brings forth the presence of both Eros and Mnemosyne.

8 The Story Continues

Trying to envisage further lives of the characters from the story of the two monks we may ask: What did they do after the encounter at the riverbank? Did the woman continue along the path that the older monk had showed her? Was she able to return the gift she had received from him? Or did she become isolated because the behaviour of the younger monk bred in her a dislike for religion, men or strangers? She might have as well forgotten all about the event, never noticing any connection between the assistance she received from a stranger and her own indifference towards others, towards those in need. Or, even if she supposedly had felt such a connection, she might have not been able to face it, repressing it as a taboo forced by her living conditions, social environment, survival anxiety or other circumstances? And the monks: Did they remain friends? Did the older monk get expelled from the order? Did his closest ones see him as a wise man or just a traitor? What was the life's path of the younger monk? Was it filled with remorse and dialogue with others, or hatred and desire for revenge? The realities of the age of increasing cultural conflicts suggest radical dramatic scenarios including use of violence, exclusion, public lynching, and eruption of low instincts. Did the action determining the identities of the three characters open a process of continuous identity formation or did it enclose their lives within permanently established and intransgressible limits? How, and perhaps, what identity builds coexistence in the contemporary world?

The question of the art of living together, unlike the question of individual truth or freedom, targets the very core of the story of coexistence. Therefore, we should turn our attention now to what would happen next in the lives of the

protagonists of our drama occurring on the borderland of the encounter with the Other (man/woman), and explore the possibilities of overcoming divisions born as a result of the experience of the encounter.

Clearly, before their meeting with the stranger the monks had been travelling together, sharing the road, their faith and friendship. The woman was alone and had not previously been subjected to a refusal of assistance or rejection of a gift from a stranger. It was the meeting at the broken bridge that made their paths cross, breaking old ties and establishing new ones. To cross the river they had to build an invisible bridge, one that was full of tension and interdependencies. Yet can we say for sure that, given what happened at the river, they were able to coexist on the other side? We might obviously assume that they would go their separate paths and never become neighbours. In this way, just like the old monk left the woman on the other bank, we could leave behind a tangle of difficult questions and interpersonal encounters. But making such an assumption only allows us to temporally evade questions that keep returning and are rooted in our everyday existence, calling for practical solutions.

Something made both the two monks and the woman continue their journey, become migrants in need of a crossing. This is a *signum temporis* of the era of globalization, but also touches upon the truth about man in general. "I wish that ship, the Argo'd never spread its sails and soared / between the slate-grey Symplegades, to Colchis". But it did soar, and the plea of Medea's nurse opening Euripides' tragedy about the consequences of travelling beyond the limes of the known world was all in vain. The thousand-years-old recurrent plea to stay at home where everything is safe and familiar. In vain. Thresholds of homes and gates of homelands are crossed, bridges are broken and rebuilt, and life in a multicultural society is an everyday experience of a growing number of people. Nothing, no visa regimes or strengthening of defensive walls will ever change the fact that cultural boundaries move together with the people who bring them into their new communities.

The barriers built on external borders, whether check points or gate guards, are not able to deprive or free people from their cultural boundaries. Moreover, even when being able to deal with them alone, by finding inner strength to cross them or leave them behind, our coexistence with others in a community will make us struggle with them continuously. The older monk could eventually "break free"

from the woman by living in seclusion. However, assuming that his path and that of the young monk's are likely to cross in the future means that the woman will continue to remain a part of the latter's life because of the presence of the man who reacted to the encounter differently than he would. Let us say it again – we could separate them, supposing they would never meet again. But that would never bring us closer to the truth about coexistence. By coexisting with others in multicultural communities, we experience the reality in which the lives of the three characters intertwine.

Let us now look at coexistence by aligning it with the thinking of Józef Tischner. This philosopher and Catholic priest would never have agreed to any character from our story be left alone – the woman on the one bank, the young monk on the other, or the older monk in his seclusion and lofty though lonely wisdom – Tischner would rather have found him a place at the community table.

9 Tischner, or With Whom Should We Live

When asked: "How to live?" Tischner answered: "It does not matter how, it matters with whom". He said these words as he was nearing his own death. His reflections on the meaning of existence titled *How to live?* were published a few years earlier. Here we can find the wisdom of the old monk. The most important in Tischner's thought and attitudes for our discussion is the fact that he makes the philosopher and wise man meet a practitioner of spirituality (we could also say: a practitioner of coexistence as his glossary did not differentiate between the two).

Tischner-practitioner does not sacrifice coexistence for the sake of truth-seeking, as it often happens with poets and philosophers following the daimonion's call, but instead endeavors to validate the truth in the interpersonal drama of coexistence. The author of the *Ethics of Solidarity* advocates not so much insistence on moral principles, but supporting sinners, the weak, the lost and all those who happen to violate these principles, or at least who fall short of them at one time or place. As a deeply religious Christian, he saw not only his place and not always among those who shared his beliefs and values, but first of all among those who thought or acted either differently or imperfectly. Tischner, in this way, broke with the traditional philosophical reflection on "how to live" for the sake of opening up to coexistence "with others". This became of utmost importance to

him because it was able to validate or invalidate a philosophical reflection. For Tischner, the Other is not a person with whom we choose to coexist. Nor is it a person we separate ourselves from, made different by certain attributes that we find attractive such as communion of blood, faith or similarity of worldviews. The Other is any person with whom we share our neighborhood, history or an accidental encounter. The Other is different than us. Tischner's wisdom collected in *How to live* will only acquire its full meaning when it becomes a foundation for our own art of coexisting with the Other.

10 Doctor and Philosopher

Tischner knew of course that coexistence was not an easy art to live by in the social, political and cultural realities of his times. However, the concerns that he voiced regarding community life and solidarity when Poland was under communism or undergoing political transformations (his books written in 1970s and 1980s) are equally relevant and surprisingly current when retold in the Poland of 2016. This can be seen in his observations on the closing of modern societies to the outside world and to foreigners. Tischner's thought in this respect followed from his discussions with Antoni Kępiński – a distinguished Polish psychiatrist and humanist, a precursor of individual and group psychotherapy.

Tischner first met Kępiński in the 1960s through Roman Ingarden. Kępiński's therapeutic ideas seemed to him a type of the Polish philosophy of hope born of the trauma of the Second World War. "He knows more about man than Freud, Heidegger or Lévinas " – he wrote about the Krakow doctor. Kępiński learnt a lot about life from borderlands. He was born in 1918, near Stanisławów (today: Ivano-Frankivsk in Ukraine), during the Polish-Ukrainian war. As a child he was captured by Ukrainians but survived thanks to a Ukrainian nanny. He opposed the discrimination policies towards the Jews during the interwar period and ostentatiously sat in one row with the Jewish students during lectures at the Jagiellonian University. This did not save him from an attack by socialists who once beat him up as they thought that his Medicine Department red hat meant that he was associated with nationalists. He also spent nearly three years in a Francoist concentration camp, where he was heavily beaten and spent one month in the starvation cell. After the war, Kępiński was one of the first psychiatrists who worked with former Auschwitz prisoners. He co-edited "Medical Review – Auschwitz", which was twice nominated for the Nobel Peace Prize, where he

published his studies concerning the survivor syndrome, which became an internationally recognized mental condition.

In 1969, Kępiński was diagnosed with bone marrow cancer. He left the famous surgery ward in the basement of the Kraków Psychiatric Clinic, the room used in the Austrian times for the most ill and aggressive patients, and was placed in the top floor of the Nephrology Clinic where he was visited many times, until his death, by Tischner. Tischner paid tribute to his friend in his essay *Filozofia wypróbowanej nadziei* (*Philosophy of Tested Hope*). On the tenth anniversary of Kępiński's death, when Poland was under Martial Law, Tischner wrote another essay, *Społeczeństwo dialogu (Society of Dialogue)* in which he stressed the idea that they both deeply shared – Gabriel Marcel's rule: "let others be".

11 Pilgrim and Man from Hideouts

The most important of Tischner's texts that reflects his meetings with Kępiński is *Ludzie z kryjówek* (*People from Hideouts*). This essay, which was first published in 1978, written as if on the margins of his deep reading of Kepiński's *Psychopathy*, presents a penetrating analysis of a deeply divided society. Its members are scared of meeting with the Other or opening up to the outside world, equally and obsessively trying to find a scapegoat.

Tischner was aware that Kępiński's language and knowledge derived from the doctor's deep empathy toward his patients and go far beyond individual diseases, approaching universal dimensions. It seemed possible to use them to diagnose people or communities afflicted with the syndrome of closure or the drama of extremely polarized and mutually exclusive attitudes.

This moment in our story of coexistence, when we have reached the other bank and started to ask questions about the consequences of crossing the river, is perhaps the best one to try and enter into a dialogue with the thought and community practice of the doctor and philosopher, with Kępiński and Tischner.

What happened before the meeting of the monks with the woman can be related to the way Tischner defined the pilgrim's ethos: the attitude of a wandering man, heading towards the unknown, not afraid of getting rid of the burden of the past, able to derive from the moment the content they need to continue their journey.

He experiences hope – the most precious, according to the philosopher, gift of life enabling us to build values.

The behaviour of the older monk during the crossing perfectly befits the pilgrim's ethos. If only our lives could be described by a story about a woman in need aided by an old monk who lends his hand and in his action follows both prudence and his heart!

The story may remind one of an episode from the story of Jason, the leader of the Argonauts and later husband to Medea. He, too, at the beginning of his quest for the Golden Fleece, meets a woman on a riverbank who looks old, but it's just a disguise assumed by the goddess Athena, to try our wanderer. Jason is able to meet her request as he carries her to the other side, earning for himself a patron for his further travels and losing a sandal in the river. Since then he will be known as *monosandalos* – one destined to find part of himself outside the *limes* of the known to him world, in a meeting with the strangers. If only was he able to persist in his character until the end of his life! Instead, however, he becomes entangled in a tragedy of a failed encounter with the Other that ends in a merciful act of Athena who kills him with the hull of the Argo – preventing him from committing a suicide.

In the Greek world, Jason was a loser and the win by him of the Golden Fleece became worthless, as on his return he committed a treachery and profaned the gifts of hospitality and love. But in the modern world his failure is not so obvious. He could easily gather support from a great crowd of allies for whom the most precious virtue was his victorious voyage to the top, and not the way he returned i.e. the way he betrayed his earlier vows and promises made to become successful and the way he returned gifts acquired to reach the other, inaccessible shore. He would impress them with the supremacy of his culture over other cultures, which he cunningly used to his advantage, and his confidence in the primacy of the interest of his own nation, kingdom and common good. Even those who find such a mindset personally alien would say: stop idealizing, let's take life the way it is.

"Taking life the way it is" is personified in our story by the younger monk. His behaviour shows many of the same traits which are characteristic of the sharp divisions in today's societies. Noticeably, they are found among those who

barricade themselves behind particular interests and opinions or contribute to an overall increase in support for populist politicians all across Europe who build their popularity on increasing fear of strangers turning national and cultural identity into a fortress against the outside world. Tischner would call them "people from hideouts".

The change that occurred in the younger monk, as he experienced the world from the other side of the riverbank, corresponds perfectly with the behaviour of the "people from hideouts". Upon his encounter with the woman the monk ceased to attentively perceive the outside world. The burden of the past turned his travel into an escape from people and the world. As a result, the "spaces of coexistence" – to use Tischner's term – of both monks (the pilgrim and the man from a hideout) become very different. While the older monk's becomes flexible and responsive to his own and others' needs, the younger monk's remains inflexible, as if stuck in his old ways, serves as an easy pretext to produce accusations against others while hiding one's own weaknesses or sins. The young monk will do everything possible to focus attention on the fact that the older monk broke his vows by touching the woman's body, at the same time hiding breaking his own vows of remaining silent until sunset. Escalation of accusations allows domination over others. It is the most characteristic method of taming your neighbour and the world employed by the people from hideouts.

Tischner, following Kępiński, analyses different forms of psychological games that lead to domination of one man over another. These include hysteria, which turns the space of coexistence into a peculiar theatre of manipulation of human emotions, where others are forced to perform situations directed by the manipulator's own anxiety and prejudice against another person who becomes an enemy: either to be subdued or become an object of aggression. What pushes a hysteric onto the stage, for a psychasthenic becomes a reason of withdrawal into oneself. Playing the game the psychasthenic hides behind a mask of submissiveness and a seemingly meek disposition. However, once the mask is removed, his face reveals anger and jealousy – a syndrome of a servant who has been offered a chance to rule his master. The younger monk's attitude is closest to the obsessive-compulsive disorder known as anankastia.

Anankastic people withdraw into their hideout by an obsessive struggle with evil which they perceive both in themselves and around them. Kępiński wrote about

them: "The fact that their environment is so full of evil is a great consolation to them because it makes them feel superior to their neighbors […] An anankastic person develops a void between himself and the outside world from his early years; instead of relationships based on emotions, develops relations based on duty, dos and don'ts […]. An anankastic person is afraid of life because he has no courage to accept emotional ties with his environment, and emotions are first and most essential subjective manifestation of life; he lives "a second-hand" life i.e. following the dos and don'ts of his social environment. His life is empty, futile and artificial".

His egocentrism is different from that of people suffering from hysteria in the way he tends to justify his actions with high-level ideals aimed at saving people and the whole world. They accuse others of wrongdoing, using all possible ways to infect them with a sense of guilt and forcing them to constantly prove their innocence. As a result, the space of coexistence is dominated by the "moral superiority" of the anankastic person and their aspiration to reach the absolute truth. Accompanying it is the feeling of internal conflict produced by inability of getting rid of perceiving evil in others and in oneself which forces the person deeper into his hideout.

The organization of the space of coexistence described by Kępiński and Tischner is based on fear and on deepening of oppositions. The people from hideouts build their identity on separation, negation and withdrawal. Such people do not trust others, perceiving them only as enemies who need to be subordinated or destroyed. They may even get to know others but that does not help either, because they believe they already know everything about others, even before a meeting takes place. Kępiński strongly believes that our position in the space of coexistence turned into a subordination game, is predetermined against our original will. It is dictated by the social environment and life circumstances, as nobody enters this world with an inborn fear of others. It is the Other who brings out what is dormant in us in its potentiality. Tischner completed Kępiński's analysis with a reflection indicating that "a man possessed" is a lost soul, his closeness is not able to make anyone happy but generates misery instead. "The more you possess a person, the more difficult it is to break the wall separating our close possessed from the close possessors. In such a situation, the most important becomes the question of how to get out of this deadlock. It is the main concern of the philosopher and the doctor which determines their practice of

spirituality. This makes us return to our question about the possibility of coexistence of a group of people, when the circumstances of a difficult encounter with otherness, including anxiety and crossing of cultural boundaries, reveal deep divisions inside it.

12 "I" Favors the Truth if "You" Accepts the Other

Tischner knew that in his reflections on the people from hideouts, revealing the crisis of community life in today's world, he had to go beyond a description of symptoms or a critical analysis of an illness. He was most interested in people's ability to get out of their hideouts and establish a space of coexistence as an inter-human community. This called for a different language and a different approach. Tischner stressed that: "while psychotherapy knows more about the structure of a pathology than about the process of healing, ethics knows more about the structure of guilt than the process of conversion". Filling this gap, in his view, is only possible when the doctor and the philosopher come together. He tried that already in his work *People from Hideouts*, which is of utmost importance for our discussion.

Tischner would not agree with the belittling and relativization of the drama of withdrawal of man and closing of society. He saw it as a deep wound that determines our emotional states and behaviour, a wound that is very difficult to heal: "A passage from the space of hope into the space of a hideout means a fall of a man of a very deep ethical significance. And even though this fall is not a fall into a sin, into a conscious and voluntary guilt, it is nevertheless a fall. A human being lives on the level of dullness, beyond good and evil, is neither guilty nor innocent, his responsibility is in a state of decay. This does not mean, however, that he lost in this way his human dignity. The thing is that all human dignity is reduced to the value of suffering one experiences. A striking feature of the people from hideouts is that they suffer and impose their suffering on others. And, worst of all, their suffering is as great as it is unnecessary".

Another significant step on the path to overcome the closing is to leave the platform of confrontation, on which the "dialectics of oppositions determines the way of coexistence with others". This is probably the greatest challenge. Even more so as it refers to everyone with whom we share existence and everybody with whom we coexist. Those who are right, instead of waiting for recognition

from others, have to start building bridges. This is not easy; neither for people from hideouts, nor for those who are looking at them with pity. Neither the language we use, nor our culture – including the media in which we are immersed – are supportive in this regard. What gives us strength to undertake such a challenge? Kępiński believed in liberation from the captive space of coexistence. The precondition is to be a "deep turnaround in the way we experience values". Tischner follows him in saying that man caught in the network of sick imagination strengthening social divisions "has to digest the self", i.e. to achieve the level of life where he can feel good about himself and feel at home there. Enrootment in the truth about oneself strengthens us in our meeting with the other and allows opening.

The deep social polarization that we are experiencing in 2016 is the reason why we find "people from hideouts" not only among the traditional opponents of openness to others and the world, but also in liberal and cosmopolitan circles. Their openness to the world does not necessarily overlap with their reaching out to their neighbours. Replacement of coexistence with frontlines makes us divided by a wall of prejudice, illusions and unfair judgements. As a result, the experience of our own dignity is based on crooked images and messages poisoning what Kępiński called "information metabolism" and what at the biological, emotional and socio-cultural level determines our community life, i.e. a harmonious exchange of information with our environment. Recovery of the harmony of the information metabolism can be achieved only through experiencing the horizons of the truth. This is possible not by external imposition or instruction but by the "digestion of the self". The next question is: what are the methods that can be used to structure the information metabolism? Kępiński was convinced that it required increased awareness, working on yourself, and a free release of emotional complexes. This cannot be accomplished without a full approval of one's self as well as winning the approval from others. The deeper we explore the possibilities of recovery from hideouts, the better we understand why Tischner once advised a priest preparing for a retreat on the theme of "How to live" that a much more important question is "With whom to live". Strengthening one's spirit of favoring the truth can be accomplished only through another person, and it is also the others that make us withdraw in our hideouts.

Kępiński, guided by empathy towards his patients, so often and unfairly excluded from the community, wrote movingly about the lie of the stage that deceives by looking down on others, about the lie of pedestals that establish the space of coexistence along the principle of oppositions. Tischner thought that the mere revealing of how these lies work might be liberating, but he never stopped at that because one cannot build the ethos of solidarity on negation alone.

Both the doctor and the philosopher agree on two conditions necessary to liberate man from the anxiety that enslaves him in his hideout and subjects to the desire of dominating others: opening to the truth and another person. Both conditions are deeply interconnected. We could say that "the self" of the person living in the hideout begins to favor truth only on the condition that "someone/everyone" from the outside of his hideout dares accept the other person while himself becomes the other one who is in demand in the closing society. Thus, we deal here with a whole set of conditions that make up the process that, once started, can be transformed into a constructive building of the space of coexistence which, once has been marked by resentment of broken relationships, violated boundaries and fear of enslavement. People who have turned actors to manipulate the emotions of others, or shammed service to others to dominate them, or moralized to hide their own sense of guilt to impose it on their alleged enemies – all have to rely on "digesting themselves." And perhaps from this digestion comes the real "glue" of community? Does the meeting of the two monks and the woman on the banks of the river not teach us that elimination of any of the inconvenient particles of the whole will not, in the long run, help anyone in their lives, because it will deprive them of a chance of initiation into the art of living together with someone different from us, and lost will be the most important thing in our human existence? That is the real secret of coexistence. However, we said a moment ago: the process, once started ... Perhaps, we moved too hastily and ignored the necessity of crossing the threshold of the hideout, the most difficult thing to do. Where shall we start from? How to overcome yourself?

13 Crossing, or Dignity

As a practitioner of spirituality, Tischner knew that if man can see the end and cannot see the beginning, he will, in spite of all, love illusion more than the truth. There from the nagging question of the beginning offered by the ethics of hope. Looking for the answer we need to return inside the hideout. There is a fear that makes one look there for a place to hide, but there is also another one, equally strong, the fear of entering the open space outside. The latter is stronger the more, the longer and deeper the stay in the hideout was. One unfortunately believes that "the moment he shows people who he really is, when he shows his "inner self", they will rush to deride him. This disbelief in people constitutes his tragedy. The point is that one dares overcome his disbelief. Because the truth spoken about yourself is always something great, it does not matter if it is the truth of human virtue or guilt. Whoever admits it becomes protected by the truth".

There is, however, another, external side of the threshold of the hideout prone to stigmatize man that was trapped within, sending him to the dock or excluding from the community. In other words, the fear of crossing the threshold finds its justification both internally and externally. It is not enough to tell the people from hideouts of the contemporary world how they should live referring them to a philosophical wisdom that can be transformed into action by an old monk or Tischner's pilgrim. They need to have someone to live with.

The threshold situation that we have mentioned is by no means the beginning of everything. Much happened earlier. People hid in their hideouts, human relationships were broken, meetings with others failed, anxiety and hostility filled the space of coexistence. The threshold we have reached in our story is a potential new beginning. The three characters standing on the other side of the river await a new gesture whose mystery was perfectly captured by Tischner who said that "it is about a gesture of heart and mind thanks to which man evades the principle of opposites". Writing these words, the philosopher refers to the state of man in which his will to liberate his internal energy enabling him to cross the threshold depends on his sense of human dignity. Both Kępiński and Tischner would agree that violation of human dignity is the strongest power entrapping man in his hideout, stronger even than anxiety, internal complexes or undeveloped self-awareness.

Once again we are reminded how important for our existence is the man on the outside, on the other side of the hideout's threshold, the closest neighbour of our difference. He is the only one that can bestow a dignity restoring gesture on the people from hideouts. What happens then can be referred to as "an alignment of space " – both the theatrical stages and pedestals of accusers disappear, the bond based on domination is replaced by the "bond of trusteeship of hope." We can build the situation of a new beginning, letting others be, allowing them to entrust part of their hopes onto the Other, as well as take on themselves part of the latter's hope, we grow together with the people from hideouts to be able to cross the threshold...

The knowledge and community practice of the doctor and the philosopher, of Kępiński and Tischner, would never allow to leave both monks and the woman alone. The situation of a new beginning they found on the other bank demands a break-through, a liberation of the inner power able to overcome the divisions that dominated their space of coexistence after the drama of their meeting with otherness.

Earlier, during the crossing of the river, this was accomplished by the old monk. Who will dare to grant a gesture of heart and reason that allows an escape from the principle of oppositions and prevent entrapment in the hideouts? They are all now "people who have been through a lot", who experienced otherness and violation of borders once regarded as inviolable, they experienced anxiety and deep divisions and the consequences of opening or closing to the Other. Helping the younger monk, with whom he is bound by the ties of belonging to the same order and old friendship, can for the older monk turn out to be much more difficult than his helping the woman. On the other hand, the woman and the younger monk will find it much more difficult to bring themselves to grant a similar gesture to others, because the failure of the meeting on the river could have left unhealed wounds increasing their anxiety and prejudice. The situation they found themselves in together corresponds well to the starting point of our discussion, the reflection on the deep crisis of community life in the contemporary world dominated by the principle of opposites.

Hence, the story of coexistence is a story of two shores. On one shore, we help the Other – we reach out to him or her, breaching our own rules and limitations. We offer help to the weak and the newcomers. As a result, we prepare legal and

systematic tools, such as the European multicultural policies which include – among others – affirmative action and gender quotas. On the other shore, though, these are not enough. The challenge comes not only from others, but also increasingly from those who have not been included in the society, radicalized in their attitudes to strangers and stiffened the boundaries of their national and cultural identity. All together, we are a society "with a past". To continue our life together we need an act of breaking through. It does not matter who will undertake this challenge – although we start to notice the community potential of the woman from the other side of the river. She is the one who accepted the gift from the stranger and eventually overcame her fear towards him. Possibly, it would be her who would do the most to help all three build that invisible bridge.

The most crucial, however, is what prepares us for overcoming the paralysis of the deep inter-human divisions that we experience on the other side of the river. Letting others be: allowing them to believe in the indestructibility of human dignity and tie an inter-human thread of trust.

In this way, the story of coexistence returns to its beginning. The Other, who establishes a real community, does not come from nowhere. Together, we cross over the two shores that need invisible bridges. Each requires a different material. Together with the Other, we prepare ourselves to overcome our hideouts. This is where it all begins, and not for the first time. Those not able to see the beginnings love illusions. A process once started this way can become a constructive process of building coexistence with others whom we encounter in our neighborhood, by fate or on the route. We are offered then a chance to reach good which, as Tischner believed, is *diffusium sui*, self-diffusible, striving to become incorporated in our human coexistence.

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Some Issues of Interpretation of EU Law and International Treaties by the ECJ

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Abstract The text explores two issues: interpretation of the term "law" in Article 19 (1) of the Treaty on the EU and whether there is a certain consistency in the manner in which the ECJ uses the principle of effectiveness and the text as a means of interpretation of EU law and international treaties. A distinction between the situation where the principle of effectiveness addresses the EU legal system as whole, aiming to increase its effect in the internal legal systems of the Member States, and the situation where the principle addresses a particular provision, with the intent to secure its designed effect, might help in disclosing some consistency. In the first situation, the grounds on which the effectiveness are usually searched for are in unwritten, abstract law that is inherent to the founding Treaties or to the nature of the EU legal system. In the second situation, the principle has its stronghold in the text of the provision, context or purpose of the provision. In the interpretation of international treaties the principle was rather used to secure the autonomy of the EU legal system or the freedom of action of the EU institutions at international level.

Keywords: • Interpretation • Effectiveness • Text • EU law • International Treaties •

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1 Introduction

The interpretation of EU law and international treaties by the European Court of Justice (hereinafter: the ECJ or the Court) is a topic that cannot be exhausted in the space of 10. 000 words which editors of the book, dedicated to Professor Silvo Devetak,[1] allotted to the authors. Therefore, this article avoids the systematic approach to the subject matter and instead will focus onmore discrete issues of particular significance.

In particular, this article focuses on two issues: first, the meaning of the term "law" in Article 19 (1) of the Treaty on the EU and, second, the relationship of the principle of effectiveness and the text in interpretation of EU law and international treaties. The two issues are interrelated, since "the law" has to be observed in interpretation of EU law.

The relationship between the effectiveness and the text in interpretative practice of the ECJ is mutable and there are situations where the effectiveness finds its support in the nature or implied content of the EU legal system and situations where it draws its strength from the written text itself.

The interpretation of EU law and international treaties, though a legal exercise, is not without political entanglements. The interpretation of the law interacts with politics by influencing various policies and being influenced itself by a political design underpinning the law. Some are of the view, for example, that the nature of a treaty in itself determines the perspective of a judge. Thus, Dupuy is of the opinion that "a treaty that establishes an organization designed to achieve a shared purpose" has the effect of placing the judge in a position of being little more than an organ of a community who will interpret the treaty pursuant to the communal interests, thereby furthering the collective plan (Dupuy, 2011: 126). It might be supposed that the judges of the ECJ have found themselves in such a position.

This article begins with an attempt to define the interpretation. It continues by the presentation of an interpretative function of the ECJ in respect to ascertaining the content of the term "law" in Article 19 (1) of Treaty on the EU.

[1] No textual quotes of Professor Silvo Devetak appear in this article but rather his spirit is evoked.

Then, it explores the relationship of the principle of effectiveness and the text in the interpretation of EU law and international treaties. The focus is on the interpretative practice of the ECJ. The purpose of the article is to cast some light on the interpretation of the term "law" by the ECJ and to try to discern certain consistencies in the changeable approach of the Court to the principle of effectiveness and the text.

2 General Definition of Judicial Interpretation of the Law

Interpretation might be understood as the collection and processing of information to assist in answering a question that is before the court. Information can be contained in various sources such as legal provisions, legal systems, comparative law, the comparative practice of application of the law, history of the legal act, case law, legal doctrine, soft law etc. The collated information has to be analyzed and the relevance and importance of answering the question has to be evaluated. The rules on interpretation contain legal instruction as to where to search for information, how to process it, and ultimately how to use it. Among those instructions are, for example, commands to use ordinary meanings of words, to read the provision in its context and in the light of its object and purpose, to explore the legal history of the provision, to take care of autonomous concepts, to investigate any practice of the application of a provision, to evaluate the relevance of changing social circumstances or to consult general legal principles etc.

This article singles out and considers the principle of effectiveness and the text in interpretation of EU law and international treaties. Generally, the principle of effectiveness is based on a presumption that the creators of a legal act intended to produce certain legal results and it instructs the search for information of relevance for interpretation and arranges said information in a way that the interpretation enables the legal act to produce its designed effect. The principle is not explicitly stated in Article 31 of the Vienna Convention on the Law of Treaties but it is implied in the principle of good faith. The Special Rappourteur of the International Law Commission, Sir Waldock, included in his Third Report on the law of treaties the principle of effective interpretation to secure the full effect of the intention of the parties, including the implied intention. He observed that the implied intention has to be disclosed within the space of the four corners – the ordinary meaning of a term, context, object and purpose of a treaty – and noted that the four corners might hold a teleological interpretation within the

legal boundaries of interpretation (Waldock, 1964: 53, 60, 61). He obliviously considered that the teleological interpretation had to be limited. However, the Members of the International Law Commission agreed that the effectiveness was an element of the principle of good faith and thus it was not expressed explicitly.

Another version of the effectiveness in interpretation of international treaties is known under the French name "*l'effet utile*". That version of effectiveness is based on the presumption of normative economy, on the supposition that there is nothing superfluous in a treaty: each word has its function in building the meaning of the provision and has to be taken into account. The ICSID arbitral tribunals frequently invoke that version (Fauchald, 2008: 301).

In this article, the term "text" will include all various elements designated in Article 31 of the Vienna Convention on the Law of Treaties, such as ordinary meaning, context, object and purpose, preamble and annexes. "Ordinary meaning" is an instruction that terms in the text have an ordinary, natural or usual meaning except if the creator expressly indicated a particular, specific meaning. »Context« consists of all parts of the text that can extend information relevant for clarification of the meaning of an interpreted provision. »Object and purpose« are exposed in a preamble or are derived from the text as a whole or from part of the text and they have to be taken into account by clarifying the meaning of an interpreted provision. »Preamble and annexes« are inseparable parts of a legal act. Therefore, all numbered elements relate to the text of a legal act and thus the term "text" will be used in that very broad meaning. It might be said that such an approach includes contextual and teleological interpretation. Still, the purpose of the article is to contrast the roles of the principle of effectiveness and other methods that have a stronghold in the text. Usually a textual approach, reduced to the ordinary meaning method, is seen as bringing certainty and predictability to the interpretation process. However, there are opposite views in favour of a teleological approach (Paunio & Lindroos-Hovinheimo, 2010).

The founding Treaties of the EU do not contain rules on the interpretation of EU law. However, one rule in Article 19 (1) of the Treaty on the EU states that the ECJ "shall ensure that in the interpretation and application of the Treaties the law is observed." The founding Treaties do not, however, define the term "law". Opposite to the founding Treaties, the Charter of the Fundamental Rights

of the EU and, in particular, the Official Explanation of the Charter, contains the relevant provisions on interpretation of the Charter.

The issue as to how the court interprets the law is important. Legal foreseeability is a vital element of legal security and, consequently, of the rule of law. It is not enough that legal provisions are clear and precise enough. To predict their effect it is necessary to know how the court interprets them. The predictability of the interpretation is however located on a slippery slope. Some writers have pointed out this problem. The famous international lawyer Lauterpacht wrote: '…as a rule they (rules of interpretation) are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means… it is a fallacy to assume that the existence of these rules is a secure safeguard against arbitrariness or partiality.' (Lauterpacht, 1949: 53). In a similar vein, Brown and Kennedy wrote the following concerning interpretation of EU law: *"Interpretation of law is in no way an exact science but rather a judicial art. In the end, it is a matter of judicial instinct, and because the judge proceeds instinctively, the process cannot be reduced to a series of mechanical rules*." (Brown & Kennedy, 1994: 301).

Writers state that the distinctive nature of EU law has resulted in the ECJ developing "its own style of interpretation" (Brown & Kennedy, 1994: 301.) or that the autonomy of the EU legal order enables the ECJ to attach "specific normative importance" to each of the various methods of interpretation existing in international or national law (Lenaerts & Gutiérrez-Fons 2014: 6). Grimmel asserted that: "The European legal system has developed its own form of legal reasoning that is distinct from other national or international legal orders." (Grimmel, 2012: 531). Writing about the rules on interpretation he directed attention to the possible criticism of an interpretative method of the ECJ: "…it might be objected that the Court just picks the forms of argument that best support its interests, such as strengthening its own power or expanding the ambit of European law. This would mean that the working methods of the European Court are just a façade and do not effectively shape the decision-making process of the judges, who detach themselves from the legal texts before them."(Grimmel, 2012: 532). Grimmel rejected that criticism,and argued that if hiding political logic behind the veil of legal phrases has indeed become regular practice it will be revealed and challenged, as contrary to the European legal standards. (Grimmel, 2012: 533).

It is generally accepted that national authorities haveconsiderable discretion when interpreting international treaties (Waldock, 1964: 54, para. 6; Linderfalk, 2015: 179). Frequently available sources of information offer more meanings of a provision and thus enable more interpretations. There is no precise rule of interpretation that would point at the »right« meaning. Hence an interpreter is free to chose the rule or rules of interpretation which they believe is the most appropriate under the circumstances. On the other side, it is also accepted that arbitrariness is not allowed in interpretation. (Waldock, 1964: 54, para. 8). The European Court of Human Rights (hereinafter: the ECtHR) leaves to national authorities a broad discretion in the interpretation of internal law but does not accept an arbitrary interpretation (*Al-Dulimi and Montana Management Inc. v. Switzerland*, *:* para. 145) Recently, in a judgment the ECJ stated: "in order to satisfy the requirement for legal certainty, Member States must ensure that the interpretation that must be given to such a notion can be deduced in a sufficiently clear, precise and foreseeable manner from the national law at issue using methods of interpretation recognized by the national law" (*Marco Tronchetti Provera and Others*, *C-206/16*: para. 46). The same might be expected from the EU.

The fundamental Treaties do not contain the provision on interpretation of EU law except Article 19 (1) of the Treaty on the EU. However, there is settled case law that in interpreting a provision of EU law the ECJ considers "not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part" (*FlibTravel International and Léonard Travel International*, 2016: para. 18.) It might be said that the quoted passage expresses the main or regular interpretative model, used by the ECJ, but that it is not an exclusive model and thatthe ECJ uses other methods in interpretation of EU law as well. This article does not explore that regular and probably most frequently used model of interpretation but rather investigates the changing relationship between the principle of effectiveness and the text in the interpretative practice of the ECJ. Before turning to that discussion, however, this article will first consider the interpretation of the term "law" in Article 19 (1) of the Treaty on the EU.

3 Interpretation of the Term "Law" in Article 19 (1) of the Treaty on the EU by the ECJ

The interpretation should clarify the meaning of the term "law" in Article 19 (1) since the Treaty on the EU does not define the term. The clarification should include ascertaining both the nature of "the law" and the nature of EU law since Article 19 (1) implies the existence of the law beyond, and some authors said over, the founding Treaties (Hartley, 1998: 131).

Concerning the clarification of the term "law" it might be noted that the ECJ has usually invoked Article 19 (1) as the legal basis of its general jurisdiction but it did not specify explicitly the meaning of the term (*H. v Council and Others, C-455/14 P*: para. 40; *Elitaliana v Eulex Kosovo, C-439/13 P*: para. 42). However, the jurisprudence of the Court discloses its comprehension of "the law". One of the cases where the Court touched upon the meaning of the term "law" is *Brasserie du pêcheur* where it stated that: "Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty (now Article 19 of the TEU) of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States." (*Brasserie du pêcheur, C-46/93*: para. 27.), Thus, the phrase "the law" found in Article 19 (1) serves as an instrument of interpretation of EU law, particularly when a specific provision necessary to providing the effect of EU law is missing. That "law" consists of general principles derived from EU law or general principles common to legal systems of the Member States. According to the quoted passage, these general principles include also "generally accepted methods of interpretation." The ECJ uses the implied content of the founding Treaties, the nature of the EU legal system or commonalities of legal systems of the Member States as a source of general principles of EU law that form "the law" from Article 19(1). Hartley wrote that the ECJ has also sometimes said that a particular provision of a founding Treaty manifests a general principle and takes the provision itself to be the evidence of the existence of a general principle in EU law (Hartley, 1998: 130). Obviously, such methods of identification of general principles results in a significant amount of unpredictability and leaves the ECJ broad discretion in arriving at its

interpretation. In *Mangold* the ECJ ascertained that the principle of non-discrimination on the ground of age existed as a general principle of Community law (*Mangold, C-144/04*: paras. 67, 75 and 76). Exasperated by the ECJ's finding, Herzog and Gerken, published their criticism in the EU Observe under title "Stop the European Court of Justice" (Herzog & Gerken, 2008). The authors challenged *inter alia* the finding of the Court that the principle of non-discrimination concerning age existed as the general principle of EU law. According to them only two of the Member States had some reference to prohibition of discrimination based on age in their domestic legal systems and neither of the applicable international treaties included such a prohibition.

However, the situation is much better when we consider the general principles in the field of fundamental rights. It is well known that originally the founding Treaties did not contain provisions on human rights, except for the prohibition of discrimination based on nationality and the principle of equal pay for equal work for both men and women. Pressed by a pragmatic reason to preserve the supremacy of EC law over national law, the ECJ recognized the existence of human rights or fundamental rights, as the Court named them, in EC law in the form of the general principles of EC law (Hartley, 1998: 132). In *Stauder* the ECJ found that fundamental human rights are "enshrined in the general principles of Community law and protected by the Court" *(Stauder v Ulm*, *C-29/69*: para. 7). In the following four years the ECJ defined the sources of these general principles as "the constitutional traditions common to the Member States" (*Internationale Handelsgesellschaft v Einfur-und Vorratsstelle Getreide*, *C-11/70*: para. 4) and "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories" (*Nold v Commission*, *C-4/73*: para. 13). The Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter: the ECHR) was mentioned in *Nold* and soon it was distinguished as the instrument of particular importance in judicial confirmation of the existence of human rights in the form of general principles. The following definition was frequently used: "fundamental rights form an integral part of the general principles of law, whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatorie. The ECHR

has special significance in that respect…" (*ERT*, *C-260/89*: para. 41; *Roquette Frères, C-94/00*: para. 23).

Thus there are relatively established means of ascertaining the content of the general principles of EU law in the field of human rights. The ECJ explores comparable internal provisions on human rights in the Member States and the provisions of the ECHR but the case law of the ECtHR plays the decisive role. Having been invited, for example, to answer the question whether the right to privacy extends to business premises, the ECJ investigated internal legal systems of the Member States, the text of Article 8(1) of the ECHR and the case law of the ECtHR. Discovering considerable differences between the legal systems of the Member States in respect to the issue, and finding nothing in the text of Article 8(1) of the ECHR and in the case law of the ECtHR that would support the existence of the right to privacy with respect to business premises, the ECJ ascertained that the right to privacy did not cover business premises (*Hoechst AG v Commission*, *C-46/87*: para. 17; *Dow Benelux NV v Commission*, C-85/87: para. 28).[2] Following later developments in the case law of the ECtHR, however, the ECJ modified its position (*Roquette Frères, C-94/00*: para. 29).

The adoption of the Charter of the Fundamental Rights of the EU has changed the situation only in formal sense. The ECJ interprets EU law now in light of the Charter, but the content of the provisions of the Charter is specified by the ECHR and the case law of the ECtHR. The ECJ has maintained that the official Explanation of the Charter instructs that "the meaning and scope of the guaranteed rights are determined not only by the text of the ECHR, but also, in particular, by the case-law of the European Court of Human Rights…" (*Direcţia Generală Regională a Finanţelor Publice Braşov, C-205/15*: para. 41; *DEB, C-279/09*: para. 35). Besides, Article 6(3) of the Treaty on the EU in Lisbon version has left the general principle of EU law intact.

The other issue surrounding the interpretation of the term "law" relates to ascertaining the nature of "the law" from Article 19(1) and making a

[2] Referring to *Hoechst,* the former president of the ECJ Iglesias wrote: "… a study of the abundant case law which, starting with the *Rutili* judgment, refers to the European Convention on Human Rights, shows that irrespective of the theoretical explanation of the legal authority of the Convention as a means of identifying general principles, the Court of Justice in fact applies its provisions as an integral part of Community law" (Iglesias, 1995: 175).

determination of its relevance for the interpretation. The findings of the ECJ pertaining to the rule of law in the EU are very informative for answering the question. The Court stated that the EU is founded on the principle of the rule of law by virtue of Article 6 of the Treaty on EU; that the EU respects fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional provisions common to Member States; and, that the EU institutions are subject to review of the conformity of their acts with general principles of law,just as the Member States are, when they implement EU law (*Advocaten voor de Wereld, C-303/05*: para. 45; *Unión de Pequeños Agricultores v Council, C-50/00* P: para. 38; *Annibaldy, C-309/96*: para. 12). Obviously, the ECJ has firmly interconnected the rule of law and the respect for human rights and observed human rights in the form of general principles of EU law as "the ruling law", the law transcending secondary EU law and national law relevant for the application of EU law. "The ruling law" does not transcend the founding Treaties but instead is an instrument to be used for their interpretation. (*ERT*, *C-260/89:* para. 41; *Carpenter, C-60/00*: para. 46). Lenaerts and Gutiérrez-Fons also linked Article 19 and the rule of law through interpretation. According to them, Article 19 requires interpretation of all EU acts which will manifest that the EU is based on the rule of law (Lenaerts & Gutiérrez-Fons, 2014: 4).

In spite of the fact that the ECJ interprets "the law" from Article 19 (1) as being composed of the general principles of EU law that have their origins in the implied content of founding Treaties; or in some particular provisions of the founding Treaties; or in commonalities of internal legal systems of the Member State; nevertheless, the case law of the ECtHR adds a broader European dimension to these concepts. The ECHR has become "a 'constitutional instrument of European public order' in the field of human rights" (*Loizidou v. Turkey, 15318/89*: para. 75; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, *45036/98:* para. 156; *Al-Dulimi and Montana Management Inc. v. Switzerland*, *5809/08:* para. 145). The European public order in the field of human rights includes 47 Member States of the Council of Europe and extends beyond the EU. Just as the ECJ provides uniformity in effect of the EU law in the Member States through its interpretation, the ECtHR provides uniformity in effect of the ECHR in 47 Members of the Council of Europe through its interpretation. Hence there is a very strong political reason for the primacy of the case law of the ECtHR in determining "the ruling law" from Article 19. Thus the vice-president of the ECJ Lenaerts justified the pressing need of using the case

law of the ECtHR for interpretation of fundamental rights, *inter alia*, by improving "the consistency with which the Convention is applied by the competent courts of both the wider and the narrower Europe" (Lenaerts, 2000: 10). On the other side, in spite of the fact that the EU is not a party to the ECHR, the ECJ is not only a passive beneficiary of the case law of the ECtHR but also an active participant in its development. No doubt the ECtHR takes into account the judgments of the ECJ when it interprets the ECHR.

We conclude this section by an observation that when the ECJ interprets the founding Treaties and EU secondary law, it observes both the general principles derived from the substance of EU law and the commonalities of the legal systems of the Member States in particular when it is necessary to secure full and uniform effect in legal systems of the Member States. Using the case law of the ECtHR to ascertain the existence of the general principles in the field of fundamental rights and to clarify their meaning, the ECJ goes beyond the autonomy of the EU legal system and establishes the channel of legal communication with the broader Europe and the rest of the world.

4 The Principle of Effectiveness and the Text in Interpretation of EU Law

It here might be well for us to draw a useful distinction between the situation when the principle of effectiveness addresses the system of EU law as whole, aiming to increase its effect in the internal legal systems of the Member States, versus the situation when it addresses a particular provision or instrument of EU law with the intent to provide its designed effect. The distinction might be relevant as it may seem that the relationship between the principle of effectiveness and the text is not necessarily the same in these two situations. In the first situation the ECJ argues that the nature of the legal system or an implied content of the founding Treaties requires such a kind of effect. In the second situation the ECJ refers to the text of an interpreted provision, its context or purpose arguing that they require such effect. There are exceptions in regard to both situations.

The ECJ formulated its general position on the effectiveness of the Community legal system in internal law of the Member States early. The Court found that the nature of a legal system established by the founding Treaties forbids the Member

States to "introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty" (*Wilhelm v Bundeskartelamt, C-14/68*: para. 6).

In *Royer* the ECJ used the principle of effectiveness as a version of good faith. The Court found that the freedom of a Member State to choose forms and methods of implementation of a directive upon Article 189 of the Treaty on the EEC is not unlimited but qualified by the obligation "to choose the most appropriate forms and methods to ensure the effectiveness of the directives" (*Royer, C-48/75:* para. 75). Choosing forms and methods to make a directive ineffective would be a misuse of freedom; it would be contrary to principle of good faith.

The ECJ has gone further in *Simmenthal*. The Court in that case advanced two arguments for the finding that EC law is controlling over any provision of national law that is in conflict with EC law. The first was that an opposite conclusion "would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community." The second argument was that any conclusion to the contrary would undermine the effectiveness of Article 177 of the Treaty on the EEC since the national court would be prevented immediately from applying Community law in compliance with the decision or the case law of the Court (*Simmenthal, C-106/77*: paras. 18-20).

In *Francovich* the ECJ rested its decision on the implied content of the founding Treaty. The Court stated that the full effect of Community law could not be realized unless individuals had at their disposal adequate remedies for redressing a breach of Community law by a Member State (*Francovich, C-6/90 and C-9/90*: para. 33). According to the Court, a liability of a Member State "for loss and damage caused to individuals as a result of breaches of Community law… is inherent in the system of the Treaty" and it is a principle of Community law (*Francovich, C-6/90 and C-9/90*: paras. 35 and 37). In addition to the principle implied content of the founding Treaty, the Court found some support for that principle in Article 5 of the Treaty on the EEC that obliged Member States to take all measures for fulfillment of the obligations arising out of EC law and to facilitate the achievement of the Community's aims (*Francovich, C-6/90 and C-9/90*: para. 36). Articles 169 and 170 of the Treaty explicitly entitle both the

Commission and a Member State to take measures against a Member State for a breach of EC law but neither those specific Articles nor any other Articles confer such a right directly upon an affected individual. The text of Article 5 was very broad, but read in the context of Articles 169 and 170, it could not bestow an entitlement directly upon an individual.

Along the same lines, the principle of effectiveness of EU law instructs national courts to interpret national law in conformity with EU law. The Court stated that the obligation to interpret national law in conformity with EU law was inherent in the system of the Treaty on the FEU, because it enables national courts "to ensure the full effectiveness of EU law..." (*Glencore Agriculture Hungary, C-254/16*: para. 34).

In the cases discussed above, the principle of effectiveness was inclined to be more a general principle of EU law inherent to "the law" in Article 19 (1) of the Treaty on the EU that requires full and uniform effect of EU law in internal law of the Member States, rather than a standard interpretative principle. It found its support more both in an abstract law derived from the written law and in the nature of the legal system rather than in the written text.

It is interesting to consider the relationship between the principle of effectiveness and the text in the building of the doctrine of direct effect. For the purpose of this article, we will differentiate two phases in development of the doctrine: the initial phase concerning the direct effect of the founding Treaties and the second phase related to the direct effect of the secondary sources. There is no Treaty provision that has addressed the direct effect of founding Treaties, but Article 189 of the Treaty on the EEC defined the secondary sources and definitions include an explicit or implicit determination of their direct applicability. That fact, but also some external political factors, influenced the Court differently to establish the relationship between the principle of effectiveness and the text in the process of development of the doctrine concerning the secondary sources.

It is well known concerning the founding Treaties that the principle of direct effect originated in *Van Gend en Loos* in 1962. Analyzing the objectives behind and the preamble of the Treaty on the EEC, the Court demonstrated that the Treaty applied not only to the Member States but also to peoples and individuals who might be affected by acts of the institutions and who are invited to take part in the governance of the Communities through the European Parliament. In

Article 177 of the Treaty on the EEC (now 267 of the TFEU) the Court found evidence of the intention of the Member States to allow individuals to invoke EC law, including the founding Treaties, before national courts. The doctrine might be motivated by the intention of the ECJ to extend the power of the supervision over the Member States' fulfillment of the obligations, reserved for the Commission upon the Treaty, to the concerned individuals via national courts and thus to increase the effectiveness of the Treaty (*Van Gend en Loos, C-26/62*: 12, 13). It should be added that the Court reached this conclusion in spite of opposite views of the three Governments submitted during the proceedings. At that time it was half Members of the EEC. There was nothing in the text of the Treaty on the EEC which would be a general prohibition of the direct effect. Article 169 and 170 reserved the supervisory power for the Commission and a Member State but there was no indication of exclusiveness in that respect.

The second phase of the development of the direct effect doctrine in respect of the secondary sources could not have bypassed the particular provisions regulating their direct applicability in Article 189 of the Treaty on the EEC and faced some external factors that influenced the Court's position in respect to the effectiveness and the text. The questions referred to the ECJ in *Grad (C-9/70*), and *Lesage* (*C-20/70*) related to direct effect of decisions and in *SACE*, *van Duyn* and *Marshall* (*C-33/70*) related to direct effect of directives. The answers of the ECJ were based on the interpretation of Article 189 of the Treaty on the EEC (later 249 of TEC and now 288 of TFEU).[3]

[3] Article 189 stated:
"For the achievement of their aims and under the conditions provided for in this Treaty, the Council and the Commission shall adopt regulations and directives, make decisions and formulate recommendations or opinions.
Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State.
Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means.
Decisions shall be binding in every respect for the addressees named therein.
Recommendations and opinions shall have no binding force."

The involved Member States - Germany (cases *Grad*, *Lesage* and *SACE*), Italy (*SACE*), and the United Kingdom (*Van Duyn v. Home Office, C-41/74,* and *Marshall v. Southampton and South-West Hampshire Area Health Authority*, C-152/84) - denied direct effect of decisions and directives. Article 189 (2) explicitly provides regulations with direct applicability but it is silent concerning decisions and directives. Both the text of Article 189 (3) and its application in practice inform that directives have to be implemented in internal legal systems of the Member States and consequently it is expected that they produce their effect via internal law. This essentially was an argument against the direct effect of directives. Thus Becker and Campbell observed that "… according to the wording of the TEC it (directive) is not applicable *within* the Member State's legal systems, and therefore it lacks the first and indispensable pre-condition of direct effect" (Becker & Campbell, 2007: 409). In the *Grad*, *Lesage*, *SACE* and *van Duyn* cases the ECJ found that decisions and directives have direct effect. In *Marshall,* the Court drewa distinction between "vertical" and "horizontal" direct effect and concluded that directives do not have a horizontal direct effect. In the last case the ECJ modified its method of interpretation.

In *Grad*, *Lesage*, *SACE* and *van Duyn* the ECJ employed two main arguments in favour of direct effect of decisions and directives. The Court referred to the parts of the text of Article 189 that informs on the binding nature of decisions and directives and the Court explained that direct effect enhances the effectiveness of these acts. Further, the Court considered the context of the relevant provisions on directives and decisions: the definition of regulation in paragraph 2 of Article 189 and Article 177 of the Treaty on the EEC. To neutralize the fact that Article 189(2) provides direct applicability of regulations only, the ECJ developed the theory on drawing a distinction between direct applicability and direct effect. While the regulations have direct applicability that does not exclude the direct effect of other acts. The fact that Article 177 empowers the national courts to refer to the ECJ questions about the validity and interpretation of all acts of the institutions implies the conclusion that an individual can invoke these acts before national courts. In *Marshall,* the Court qualified its conclusion on the binding nature of directives by stressing that the binding nature of a directive exists only in respect to "each Member State to which it is addressed". The argument that direct effect increases the effectiveness of a directive disappeared.

The all numbered interpretations concerning direct effect of the secondary sources are characterized by a selective approach to the text. The same

importance was not attributed to the words that inform on the binding nature of acts, the words in favour of direct effect, on one side, and to the words that inform about the competence of domestic authorities to choose form and means of achieving the result intended by a directive, the words that imply transposition of the content of a directive in internal law and thus oppose direct effect, on the other side. Obviously, the ECJ emphasized the importance of the parts of the text convenient for the desired interpretation. Disappearance of the argument on the effectiveness in *Marshall* is significant. The ECJ changed the relationship between the effectiveness and the text. The effectiveness played the chief role until *Marshall* and in that case disappeared. The explanation of the significant change might be found at Hartley, who wrote:

"The reason given by the Court in *Marshall* for holding that directives cannot have horizontal direct effect was that 'according to Article 189 (249) of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. In other words, a directive is not binding on private individuals; therefore, it cannot impose obligations on them. This is a sound legal argument of the traditional kind. It will, however, be clear by now that the Court does not usually attach very much weight to such arguments: it is more concerned with policy. Moreover, one would have thought that the Court's policy of enhancing the effectiveness of Community law would have led it to come down in favour of horizontal direct effect. If the question had arisen for decision ten years earlier, this might well have been the result; but since then two national courts of considerable influence, the French *Conseil d'Etat* and the German *Bundesfinanzhof*, have rebelled against the whole idea that directives can have direct effect. This was obviously a serious matter and, while the European Court refused to retreat from the position it had adopted, it probably considered it expedient not to pass on any further" (Hartley, 1998: 207).

The building of the legal system by increasing its effectiveness by interpretation is not only a judicial exercise but a political one also since it interferes in a division of political power. Hartley's explanation shows that external factors, such as the resistance of some leading national courts, may influence the way by which the Court relies on the principle of effectiveness and the text.

The situation when the principle of effectiveness addresses a particular provision or a particular instrument will be analyzed by reference to a few cases. Dutch law, for example, required that an insurance intermediary reside in the Netherlands. Having in view the situation of the Netherlands national who resided in Belgium, but had the business of an insurance intermediary in the Netherlands, the College van Beroep voor het Bedrijfsleven asked the ECJ whether that Dutch provision was in accordance with the freedom of services and in particular with the provisions of Articles 59 and 60 of the Treaty on the EEC. The ECJ sought information for the answer in the text of the Articles and quoted the part on the progressive abolishion of restrictions during the transitional period (*Coenen v Sociaal-Economische Raad*, *C-39/75*: para. 5). Then, the Court interpreted the provision in the following way: "…a requirement that the person providing the service must be habitually resident within the territory of the State where the service is to be provided may… have the result of depriving Article 59 of all effectiveness, in view of the fact that the precise object of that Article is to abolish restrictions on freedom to provide services imposed on persons who do not reside in the State where the service is to be provided" (*Coenen v Sociaal-Economische Raad*, *C-39/75*: para. 7). Obviously, the Dutch provision was contrary to the intention of the Member States clearly expressed in the text of Article 59 and deprived the text of its intended effect.

The ECJ was asked to decide whether the legal relationship between a private debt collection agency and a debtor was covered by the Unfair Commercial Practices Directive (Council Directive 2005/29/EC, 2005: 22) The Court considered first whether a debt collection activity fell within the scope of the Directive. The relevant information to answer this inquiry was found in the text of Articles 2(c-d) and 3(1) as well as in Recital 13 of the Directive. The concept of "commercial practices" was defined in a broad formulation in Article 2(d) including "any… course of conduct…directly connected with… the sale…of a product to consumers…" Article 2(c) defined the term "product" to mean "any goods or service including immovable property, rights and obligations…". Article 3(1) foresaw the application of the Directive "during and after a commercial transaction in relation to a product." The relevant part of Recital 13 stated: "In order to support consumer confidence the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution" (*Gelvora, C-357/16*: paras 19, 20). As the debt collection activity consisted of the repayment of the credit in installments and as

the provision of a credit is a type of service, the ECJ subsumed the activity under the term "product" (*Gelvora, C-357/16:* paras 22, 23). Further, the Court read the words "directly connected with the sale of a product" to mean "any measure taken in relation not only to the conclusion of a contract but also to its performance, and in particular the measures taken in order to obtain payment for the product" (*Gelvora, C-357/16:* para. 21). Thus the Court came to the conclusion that although a debt collection agency did not directly provide the consumer with the credit service, the recovery of debts which had been assigned is the activity covered by the concept of "commercial practice" (*Gelvora, C-357/16:* para 25). Further, the Court stated: "…if the application of the Unfair Commercial Practices Directive were excluded in respect of credit repayment transactions in the event of the assignment of a debt, that could call into question the effectiveness of the protection afforded to consumers by that directive, since professionals could be tempted to separate the recovery phase, in order not to be subject to the protective provisions of that directive" (*Gelvora, C-357/16:* para. 28). The Court extended the effect of the Directive beyond the relationship of a trader and a consumer so as to cover the third person to whom the trader transferred the claims. The text of Recital 13 lent a degree of support to that interpretation, but the principle of effectiveness was of decisive importance. The effectiveness advanced the goal of the principle of good faith preventing abuse of the right. Without such an extended interpretation, a trader could escape the control of the Directive by transferring the rights to a third person.

The question referred to the Court in *FlibTravel International and Léonard Travel International* was whether Article 96(1) of the Treaty on the FEU was applicable to a taxi service. The applicants in the main proceedings, two bus transporters, asserted that it was. Having established that the text of the provision was intended to govern the national legislation on rates and conditions in transport services that includes elements of support or protection of undertakings or industries, the Court concluded that the purpose of the provision was to prevent supportive or protective measures which would result in favour of some customers (*FlibTravel International and Léonard Travel International*, 2016: paras 19 and 20). The Court read that provision in the context of paragraph 2 of the same Article according to which the Commission can authorize such national legislation taking into account "the requirements of an appropriate regional economic policy, the needs of underdeveloped areas and the problems of areas seriously affected by political circumstances." Reading the text of the provision

in the context the Court replied that Article 96(1) is not applicable to the taxi service. (FlibTravel International and Léonard Travel International, 2016, paras 21 and 22.) Advocate General Wahl explained that the intention of Article 96(1) was to prevent a kind of a State aid in transport of goods that would distort competition. (*FlibTravel International and Léonard Travel International*, 2016: para. 27). The ECJ excluded an opposite interpretation by invoking the principle of effectiveness. The Court stated: "The contrary interpretation…would moreover be such as to undermine the effectiveness of Article 58 TFEU, which implies, in accordance with Article 91 TFEU, that application of the principles governing freedom to provide transport services must be achieved by introducing a common transport policy (…), inasmuch as Article 96(1) TFEU would thus have the effect of directly prohibiting a large proportion of the measures which could be described as restrictions on the freedom to provide transport services without such a rule having been adopted by the EU legislature" (*FlibTravel International and Léonard Travel International*, 2016: para. 23). Thus, under Articles 58 and 91 transport services were excluded from the general provisions on the freedom of services and had to be governed instead by a common transport policy. The case shows that the Court applied the principle of effectiveness to secure the full effect of the provision as it was intended by the Member States. That means that the aim of the principle of effectiveness with respect to a particular provision is not necessarily to extend the effect of the provision but rather to secure the effect designed by the creators of the provision.

The analyzed cases demonstrate that the principle of effectiveness, when invoked to address a particular provision or an instrument, functions much more like a standard interpretative principle that finds its support in the text, context or purpose of a provision. Usually, the principle will not be used to displace the text, but there are exceptions. One very well known case relates to the genesis of the concept of indirect or covered discrimination. *Sotgiu* (*C-152/73*) tackled the question of the proper interpretation of Article 7 of Regulation No 1612/68, which prohibited discrimination based on nationality (Council Regulation, (EEC), 1612/68, 1968: 477). The Court found that the Regulation also forbids the disparate treatment of persons by reason of their place of origin or residence and the Court also established the concept of covered or indirect discrimination. The ECJ explained that the Regulation forbids "not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. This interpretation, which is necessary to ensure the effective working of one of the

fundamental principles of the Community, is explicitly recognized by the fifth recital of the preamble to Regulation No 1612/68 which requires that equality of treatment of workers shall be ensured 'in fact and in law'. It may therefore be that criteria such as place of origin or residence of a worker may, according to circumstances, be tantamount, as regards their practical effect, to discrimination on the grounds of nationality, such as is prohibited by the Treaty and the Regulation" (*Sotgiu, C-152/73*: para. 11). This is an example of a case where the spirit of the provision or the presumed intention of the creators trumped the literal language of the text. Namely, the text referred explicitly only to the nationality of a person and did not mention a place of origin or residence.

5 The Principle of Effectiveness and the Text in Interpretation of International Treaties by the ECJ

The EU is not a Contracting Party to the 1969 Vienna Convention on the Law of Treaties but the ECJ usually invokes the general rule on interpretation from Article 31 of the Vienna Convention and applies it as a customary rule of international law (*El-Yassini, C-416/96*: para. 47; *Jany and Others, C-268/99:* para. 35; *IATA and ELFAA, C-344/04*: para. 40; ClientEarth, C-612/13 P: para. 30). The general rule encompasses the principle of effectiveness that is subsumed in the principle of good faith and all of the various methods related to the text, such as ordinary meaning of terms, contest, object and purpose, preamble and annexes.

The particular characteristics or the nature of the EU legal system were invoked by the ECJ to increase the effectiveness of the system. The Court refers to the particular characteristics of the EU legal system also in the interpretation of international treaties but not to increase their effectiveness. The Court's approach in its interpretation of international treaties departs from the approach of international courts (Odermatt, 2015: 130-139).

The *ClientEarth* case demonstrates how particular characteristics of the EU impacted the effectiveness of Article 4 of the Aarhus Convention. Article 4(4)(c) of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters provides that the access to information may be refused if disclosure adversely affects "…the ability of a public authority to conduct an enquiry of a criminal or

disciplinary nature." The EU is a Contracting Party to the Aarhus Convention. Article 4(2), third subparagraphof Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents empowers the institutions to refuse the access to a document where disclosure would be detrimental for "the purpose of inspection, investigation and audits, unless there is an overriding public interest in disclosure." (Council Regulation1049/2001/EC, 2001: 45). The Regulation serves, *inter alia,* to help implement Article 4 of the Aarhus Convention in EU law. Reasoning that Article 4(2), third subparagraph of the Regulation was not compatible with Article 4(4)(c) of the Aarhus Convention, ClientEarth asked the General Court to declare them incompatible. Since the General Court refused, ClientEarth appealed at the ECJ arguing, *inter alia,* that the General Court did not interpret Article 4(4)(c) of the Aarhus Convention in good faith. The issue was closely connected with the effectiveness of Article 4 of the Aarhus Convention. An overly expansive interpretation of the exceptions, laid down in Article 4(4), only serves to diminish public access to information and therefore reduces the effectiveness of the Article. The ECJ stated that Article 4 of the Aarhus Convention was designed for national legal orders and that by accession to the Aarhus Convention the EU reserved the right to apply the Convention to the existing and future rules on access to documents. (*ClientEarth*: paras. 40 and 41). Having that in mind, the ECJ stated that neither the reference to enquiries of a criminal or disciplinary nature from Article 4(4)(c) of the Aarhus Convention nor the obligation of restrictive interpretation of exceptions could be understood as imposing a precise obligation to the EU. The Court continued: "*A fortiori*, a prohibition on giving to the concept of 'enquiry' [enquête] a meaning which takes account of the specific features of the Union, and in particular the task incumbent on the Commission to investigate [enquêter] any failures of Member States to fulfil their obligations which might adversely affect the correct application of the Treaties and the EU rules adopted pursuant to the Treaties, cannot be inferred from those provisions"(*ClientEarth*: para. 42). The specific features of the Union were invoked to extend the scope of exceptions and thus to diminish the effectiveness of Article 4 of the Aarhus Convention. The argument of the ECJ is not convincing. The procedures in place for the purpose of inspection, investigation and audits exist at the national level and if they are not exempted there, why should they be exempted at the Union's level?

On the other hand, the nature of some treaties, like the WTO agreements, was highlighted to justify a very particular approach to the principle of good faith and its component - the principle of effectiveness - that turned it in favour of the freedom of actions of the institutions. It is settled case law that the WTO agreements do not produce direct effect and that the Court is deprived of competence to review compatibility of the EU legislation with them except in exceptional cases. The main reason for this rule of law is the nature and structure of the WTO agreements and particularly the fact that "the resolution of disputes concerning WTO law is based, in part, on negotiations between the contracting parties. Withdrawal of unlawful measure is admittedly the solution recommended by WTO law, but other solutions are also authorized" (*FIAMM and Others v Council and Commission, joined cases nos. C-120/06 P and C-121/06 P*: paras. 111 and 116). The ECJ reasons that the WTO agreements leave broad discretion to the Contracting Parties in deciding upon the precise methods of fulfilling their obligations under the agreements. Thus, the agreements in and of themselves are not capable of producing direct effect. Even more, the Court believed that such discretion continues to exist even in a situation when the DSB asked for the withdrawal of unlawful measures since "other solutions are also authorized". But, the other solutions may result in a permitted retaliation of harmed trading partners that will affect some exporters in the EU. The competence of the Community courts to review compliance of Community law with the WTO rules would, according to the Court, "effectively deprive the Community's legislative or executive organs of the scope for maneoeuvre enjoyed by their counterparts in the Community's trading partners" (*FIAMM and Others*: para. 119). However, on the other side, the absence of the competence of the ECJ, particularly in respect of the review of the act implementing a decision of the DSB, also effectively deprived exporters, affected by retaliatory measures, of any possibility to seek compensation for losses.

6 Conclusions

Usually the ECJ examines the wording of a provision, its context and its objectives to clarify the meaning of the provision and thus to answer the referred question. This article did not investigate that standard model of interpretation but it tried to explore how the ECJ uses the principle of effectiveness and the text in interpretation of EU law and international treaties.

Bearing in mind that the rules of interpretation give interpreters significant discretion in parsing language in a law, it is not surpising that it is often difficult to predicthow a court will interpret such a law. This is unfortunate since foreseeability, predictability and certainty of interpretation is an important aspect of the legal system and helps promote the rule of law. The EU is based on the rule of law and hence consistency in interpretation on the part of the ECJ is critically important.

While the founding Treaties do not contain the rules on interpretation, one rule in Article 19(1) of the Treaty on the EU obliges the ECJ to observe the law when it interprets the founding Treaties. Years ago the ECJ extended that obligation to the secondary legislation. The Treaty does not define the meaning of the term "law" and its meaning could be derived from the judicial practice of the ECJ. The ECJ understood "the law" in Article 19(1) to be an unwritten law that is implied in the written EU law and that can be distinct from the substance of the founding Treaties, the nature of EU law and commonalities of internal legal systems of the Member States. "The law" which the ECJ has to observe when it interprets and applies EU law serves as an interpretative tool and as a "controlling" or "ruling" law. The ECJ interprets the entire body of EU law, including the founding Treaties, in accordance with the general principles that make "the law". On the other hand, the ECJ uses the case law of the ECtHR as the main interpretative instrument to ascertain the content of the general principles in the field of fundamental rights and to clarify the provisions of the Charter of the Fundamental Rights of the EU. The recognition of the supremacy of the ECtHR in the interpretation of the ECHR has a political significance that helps generate uniformity in the fundamental rights of the 47 Member States of the Council of Europe and in the building of "the European public order in the field of human rights".

The principle of effectiveness as an interpretative principle is based on a reasonable expectation that the creators of a legal act intended to produce certain legal consequences. The principle therefore requires a method of searching for, and arranging of information, relevant for interpretation, which will secure a designed effect. The term "text" was used in its broad meaning to encompass any reliance on the text, the context and the preamble and thus including not only an ordinary meaning method but also contextual and teleological methods.

The distinction between the situations where the principle of effectiveness addresses the system of EU law as a whole, aiming to increase its consequences in the internal law of the Member States, and the situations where the principle addresses a particular provision of law with the intent to secure a designed effect, might be a useful one in disclosing a certain consistency in the ECJ's building the relationship between the principle of effectiveness and the text in interpretation of EU law and thus in increasing predictability of its interpretation in that regard. When the principle addresses the system of EU law as whole, the ECJ usually resorts to unwritten law inherent in founding Treaties or to the nature of the system of EU law or other similar sources whose content cannot be easily and precisely determined. Acting in such a way, the ECJ treats the effectiveness more as the general principle of EU law that requires the full and uniform effect of EU law in internal law of the Member States than the standard interpretative principle. In the situations where the principle addresses interpretation of a particular provision, the ECJ focuses on the written text and finds support for the effectiveness in the text of a provision, in the context or in the preamble. These models of two different approaches are not without exceptions.

When the principle of effectiveness addresses the EU legal system as whole it serves primarily to increase its effect in internal systems of the Member States. However, in interpretation of international treaties the ECJ does not use the principle of effectiveness to increase their effectiveness in the EU legal system but rather to preserve the autonomy of that system and to enable the freedom of action of the EU executive and legislative institutions at the international level.

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From the Council of Europe to the EU – but not a Europe of Regions – The Perspective of the Danish Helsinki Committee on Human Rights, and of the Folmer and Helle Wisti Foundation for International Understanding

Karsten Fledelius

Abstract The Council of Europe supported minority rights and the gradual development of a Europe of Regions. The paper attempts to strike an actual balance of the state of minority rights and of regional development in Europe of today.

Keywords: • Human Rights • European Union • Independent state • OSCE • Collective Rights •

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On the threshold to the Danish chairmanship of the Council of Europe it is important to draw attention to the Council of Europe as the "Basement of the European House" – the foundations on which the whole structure of European cooperation are built up. Many of the values of European cooperation, such as the European Convention on Human Rights and the European-wide ban on the Death Penalty, that are obligatory elements of the value system shared by the members of the EU, have emerged from the Council of Europe. As demonstrated at a conference seminar in the Danish parliament on October 24, 2017 arranged by the Danish Helsinki Committee, much of the most successful work of the Council of Europe has been taken over by the EU and/or the Organization for Security and Co-operation in Europe (OSCE) and integrated so organically that it has led to an almost total ignorance of the original role played by the Council of Europe.

The Danish Helsinki Committee of Human Rights that was formed in 1985 to support the Helsinki Agreement of August 1, 1975, has been given the important task of drawing attention to the citizens and politicians in Europe to the fact that the European Court of Human Rights was founded by the Council of Europe and is still the highest court of appeal for the individual European citizen at a time when all other possibilities in his or her national system of justice are exhausted. Infant democracies with problems of implementing good governance and fair democratic procedures can turn to the Venice Commission of the Council of Europe for guidance and assistance. The Council of Europe has developed important fora of dialogue across the borders to modify the consequences of the splitting up of the continent into sovereign states, emphasizing cooperation and good practice in the way local authorities deal with citizens.

Thus the Council of Europe has supported both minority rights and the gradual development of a Europe of Regions. The paper attempts to strike an actual balance of the state of minority rights and of regional development in Europe of today – one of the major fields of involvement and cooperation of professor Silvo Devetak and his old friend, the late Folmer Wisti. Both natives of small European countries and both originating in the periphery of their homelands, Denmark and Slovenia respectively.

The idea of a "Europe of Regions" as an alternative to a Europe of feuding nation states was a concern of Folmer Wisti, the Founder of the Danish Cultural Institute, since the start of the 1970s. In 1976 he summoned an international conference on that topic in the Throne Hall of Elsinore Castle, along with the British professor and author C. Northcote Parkinson as the provocative keynote speaker. In his view, according to his visionary lecture "The Importance of Small Communities", he said that "*What we have to weaken and partially discard is the idea of nationality; the sacred concept of the nation state… If history is to teach us anything, we may fairly conclude that Europe of the future should be a federation of units of less than national size.*" In Parkinson's view Europe should develop a strong centralized European authority for external security combined with a system of strong regional governments to maintain internal security.

These rather radical views were not supported by everybody. But they provided the movement "Europe of Regions" with the vision of a more flexible, more colourful and varied Europe composed of smaller ethnicities and regional cultures instead of by monolithic nation states. In 1987 it was decided to start the periodical "Regional Contact" and in 1988 Folmer Wisti summed up the results of 10 years of conferences from the Europe of Regions as the establishment of "a Nordic conciliatory intermediary between regions all over Europe, the forum of a dialogue between North and South, East and West in Europe, contributing to the obliteration of the North-South division which imperceptibly has arisen within the EC-area in the approach to European cooperation and unity."

The "Europe of Regions" conference in December 1991, which took place in Vienna became the first of the EoR conferences to be held outside Denmark. Its title was "The Danube Monarch as the Cradle of European Regionalism" and was visited by many high-ranking politicians, particularly from the western parts of disintegrating Yugoslavia. Due to the dissolution of the Soviet Union and the wars in Yugoslavia, regions turned into nation states in the same month.

By June 1991 Slovenia and Croatia had separated from Yugoslavia, pleading the article in the Yugoslav constitution of 1974 that made the exit of one constituent republic of the Socialist Federative Republic of Yugoslavia possible. However in December of that same year the Europe of Regions conference took place in Vienna, in which the UN and EC still did not recognize their independence.

The process of dissolution of Yugoslavia highlighted another problem, namely the reaction of shares of a majority of people becoming a minority in one of the new independent nation states. Local Serbs revolted against the central government both in Croatia and shortly afterwards in Bosnia-Herzegovina. It took about four years and an awful war to stabilize the situation in Croatia and Bosnia, as well as to find an acceptable solution to the future of Bosnia where no nationality was in a majority before the war.

Looking at present-day Bosnia, one is tempted to see the current regionalized structure of the state, which was established as part of the Dayton-Paris Peace Treaty of 1995 as the least evil solution to a very complex situation. It is an arrangement protected by military forces of the EU. Just as the arrangement for Kosovo, separated from Serbia in 1999 and unilaterally declared independence in 2008, is safeguarded by forces from the EU and the UN. It is the same dilemma due to new minorities that were created by new border.

The dissolution of Yugoslavia created a massive headache, but this sort of dilemma was not new to the world. Simply recall the break-up of the Austrian-Hungarian Empire in 1918. It was a regionalized structure based on historical geographical units mostly created in the Middle Ages. In the feudal age historical rights were more important that ethnic rights. What Austria attempted in 1866-68, after its defeat by Prussia and its allies, was to build a combination of dynastic and ethnic rights with regionalization and decentralisation. In many ways it was an imperfect system, but not bad from a geopolitical and macro-economic view. It also gave a great deal of personal freedom for people to move around and settle according to wishes and possibilities. And often people felt more connected with their region or home town than with one or the other part of the Danubian Empire.

After Vienna in 1991 the conference Europe of Regions moved further east, first to Maribor, Slovenia, Odessa, Ukraine, Timişoara, Romania, and lastly to St. Petersburg, Russia in 2003, the last conference to be held. In this phase the conferences and connected activities were based on close cooperation between the team around Professor Devetak in Maribor and the team consisting of Folmer and Helle Wisti in Copenhagen. Together we also published several issues of the periodical Regional Contact. The discussion at the conferences and in the journal was centered around many questions connected with the new

developments in a more united Europe and the institutions and organisations serving it. The European summit in Copenhagen in December 2002 made the decision to enlarge the EU, which would be the biggest enlargement in EU history, implemented in April 2004. As the Danish Prime Minister Anders Fogh Rasmussen declared at the end of the Copenhagen summit: "A New Europe is Born!"

But is it that Europe Professor Parkinson envisaged in his speech in 1976 – a Europe of smaller-than-states regions to maintain internal security, kept together by a strong central European authority for external security? Certainly not. What we have today is a hybrid between a European union of nation states and a geopolitical and value-determined community of citizens, combined with an integrated market and a currency union that does not include all states. On top of that there is a network of institutions and organisations attempting to connect very heterogenic units. The European Union is not unlike the Austrian Empire or its German-Italian predecessor, the so-called Holy Roman Empire (1356-1806).

Can contemporary Europe learn anything from these historical examples? Perhaps the lesson would be the following; a democratic future of a healed Europe must be organized in geographical units on local, regional, national and European level, while based on the rights of the individual citizen without discrimination of ethnic, linguistic, racial or religious origin. Conflicts between individuals and between units have to be solved within a united juridical framework with the European Court of Human Rights at the highest level – according to the rules and conventions agreed upon by the European states.

But what about collective rights? E.g. the right of secession of a region from an existing state? Shall a relative majority be able to decide its fate via a referendum (think Catalonia), or shall there be an absolute, or even qualified majority? And how will the members of the EU react to the wish of the territory in question? The choice to recognize it as an independent, sovereign state with the possibility to inviting it to becoming a candidate of the EU would be extremely challenging.

When Slovakia and the Czech Republic split up in 1993 it was quickly acknowledged internationally because both sides agreed to it. Both became

members of the Council of Europe in 1993 and the EU in 2004. When Montenegro left its union with Serbia in 2006 (until 2003 the state of Montenegro was formally named as Serbia and Montenegro, carrying over the name given from Yugoslavia) it was on the basis of a referendum with more than 55,0 % of the votes being cast in favour of secession – the 55 % was a demand of the EU for recognition of sovereign statehood. Montenegro became a member of the Council of Europe in 2007 and has been accepted by EU as a candidate country.

With the Serb dominated region of Bosnia-Herzegovina, the so-called Republika Srpska (RS), it is another case. For many years it has been the aim of the ruling elite of that region of Bosnia to become an independent state, with the possibility even to unite with Serbia. Under its current president, Milorad Dodik, the RS leads a disloyal policy against the central government of Bosnia-Herzegovina, claiming the right to determine their own fate through a referendum on secession from the BiH. RS has also introduced a separate National Day (January 9) as a provocation against the government in Sarajevo. As such a policy is against the Bosnian constitution as established through the Dayton agreement and Paris peace treaty of 1995, the international community and its High Representative in Sarajevo has used a series of legal and political means to counteract the Bosnian Serb secession policy – supported by military units of the EU placed in BiH. It is unlikely that this policy will change in the foreseeable future. The same thing applies for Bosnian Croat attempts at separating the Croat dominated cantons of the Federation of Bosnia-Herzegovina and their subsequent unification with Croatia.

Thus there is still international opposition against a region wanting to establish itself as independent states or merge with a neighbouring state.

When then the referendum legitimizing its new status is of doubtful legality and the result in the end is the enlargement of a neighbouring state opposed by the former "home country" of the region, basic international rules are violated. There are two very relevant cases now; the Crimea and Catalonia. Both are challenges to the European order established by the Helsingfors Agreement of 1975 and the Paris Agreement in 1990.

Kosovo formally became an autonomous province of Yugoslavia through the peace treaty of Belgrade in June 1999, and then unilaterally declared its

independence in February 2008 is another story. The Union of Yugoslavia ceased to exist in 2003; its successor Serbia-Montenegro in 2006 with the same fate. The Republic of Serbia still claims the province, but actually it ceased to be a part of Serbia proper in 1999, and Kosovo has been recognized by a majority of the EU Member States. That all of the members of the EU and a majority of the members of the UN have still not recognized Kosovo is mostly due to the fact that there are quite a number of such semi-states in the world actually embodying frozen conflicts – e.g. Northern Cyprus and Transnistria.

Such conflicts – and the centrifugal forces in regionalized states like Spain – do make it a little tempting for a complicated country like Ukraine to consider a regionalization. Will it lead to a later splitting up of the largest European country after Russia, like what happened to the Soviet Union and Yugoslavia? Probably the regionalization of a large state or a continent presupposes – as Parkinson suggested – a strong central authority. That crumbled in both cases in 1991. No wonder that the actual government of a country fighting to control separatist provinces in the East has little inclination for regional experiments.

Regarding the rest of Europe's regionalized states like the U.K., Spain and Italy have problems with separatist movements. Only states with a long regionalized tradition like Switzerland, Germany, Austria and the USA seem to have found stability in a regionalized pattern. Most of the states of the EU are not politically regionalized. The nation state has been stabilized by the political process of the EU, contrary to the hopes of Parkinson and others. Neither elites nor peoples in almost all of the countries have any interest in a strong central authority able to keep together a pattern of small regional units, as a substitute of the nation states.

Shall we then forfeit the idea of a regionalized Europe altogether? Perhaps it would be better to simply redefine it. What we need is cross-border cooperation, and a Europe consisting of overlapping geopolitical "mesoregions" would be a complement to the austere pattern of national borders. The Alpen-Adria Region, the Euro-Region along the Rhine, the cooperation of local regions around the Baltic Sea, the Öresund Region between Eastern Denmark and South-Western Sweden are all examples of cooperation between neighbours across national borders. They have the possibility of knitting countries together, creating bridges,

promoting ethnic integration and facilitating movements of human and material resources.

The Öresund Region has been a great success in this respect, e.g. by making it much easier to live in one country and work in another, in this case helped by the bridge and tunnel connecting the twin cities Copenhagen and Malmö. But the refugee crisis has led to the Swedes to unilaterally take control of their borders, breaking the rules of Schengen, which has affected commuter traffic heavily. You now even have to change trains at the border on the regional railway connecting the heavy populated coastal regions of Denmark and Sweden – you even have to show your passport at the border! Hopefully this situation will be normalized to Schengen standards, but unfortunately this will not happen very quickly. It is a serious setback for a win-win development in the most important cross-border region in the Baltic Sea Area.

It is the lack of coordination on policies such as the various refugee policies of the Member States, due to the lack of a strong authority on the union level, which is a burden for the development of a better regionally functioning Europe. The nation state is striking back in times of crisis! As it did in the 1930s. That may remind us of the necessity of a strengthened EU for the security and progress of Europe as a whole. European integration is still something that has to be fought for!

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The European Family and Case Law of the European Court of Human Rights

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Abstract Family is one of the matters that is almost universally governed by the legal system. The family is afflicted by stress and by the influences of change and instability, however legal regulation nonetheless remains relevant. Today family life also needs to be treated transnationally. In Europe this situation of change is tackled specifically by the Council of Europe, where 'likeminded' states adopted the European Convention of Human Rights to set the standard for human dignity throughout Europe. Family is one such issue. The paper provides a general overview of issues setting the limits of protected 'family life', followed by the issue that same-sex families face, as dealt with by the ECtHR in its case law.

Keywords: • Parenthood• Fertility• Same-sex Couples • Family Life • Human Dignity •

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1 Introduction: the State of the Family Through the Lenses of Sociology

Family is one of the matters that is almost universally governed by the legal system. As Parsons states, »marriage and parenthood« are immanently linked to legal regulation, since they cannot be left »simply discretionary with the individuals concerned« (Parsons, 1955: 17). This stems from the relevance of the family for the entire social system.

In contemporary circumstances, the family is afflicted by stress and by the influences of change and instability, however legal regulation nonetheless remains relevant. It is the family that is often taxed and subsidised, or receives various forms of state assistance, although the family is not the subject of penal accountability that it once was. Today family life also needs to be treated transnationally. In Europe this situation of change is tackled specifically by the Council of Europe, where 'likeminded' states adopted the European Convention of Human Rights to set the standard for human dignity throughout Europe. Family is one such issue.

After placing the problem of family in a contemporary, sociological context relative to Europe, this paper provides a general overview of issues setting the limits of protected 'family life', followed by the issue that same-sex families face, as dealt with by the European Court of Human Rights (hereinafter: ECtHR) in its case law. The paper ends with a conclusion on the ECtHR's role in defining what a family is in Europe currently.

Some contemporary authors ponder on the 'liquid' nature of today's observed social life (Bauman, 2000). Such a situation of uncertainty, ambivalence and fluidity in society and among social phenomena also goes for the family in Europe. 'The liquidizing powers have moved from the "system" to "society", from "politics" to "life-policies" – or have descended from the "macro" to the "micro" level of habitation' (Bauman, 2000: 7), all pointing to the family. The liquidizing processes basically correspond to the withering away of the Durkheimian imposing and regulating nature of social institutions.

Bauman's summary assessment of the individual's fate in contemporary conditions is, according to Christodoulidis: "Precariousness is everywhere:

insecurity has become constitutive of experience of social life" (Christodoulidis, 2007: 105, see also Franklin, 2012: 15; Priban, 2007: 4). In sum, society itself is losing its imposing and solid nature vis-à-vis the individual.

2 Today's European Family

As for family, it is not questionable that the typical European family is undergoing a rapid and fundamental change. Daly sums up these changes: (1) as to family forms, living alone has risen sharply, at least as of the latter half of the past century; (2) a fall in fertility is notable, possibly on a European scale during a somewhat shorter period, and (3) a downward movement in the number of marriages is marked, related to parenthood outside wedlock. These three major changes have in sum brought about 'an increasing variation in the composition of households and families' (Daly, 2005: 282). As to family organisation, she finds 'the two income family is now the dominant form in most EU 15 states' (Daly, 2005: 383), the trend not being limited to EU 15 countries. However, she also notes that household chores are not yet equally distributed (Daly, 2005: 384). Although the Parsonian family picture is reversed, Daly still writes of 'the family'. Finally, as to family relations and values, Daly finds a troubling disentanglement between 'coupledom (partnership) and parenthood'. 'Partnership demands mobility and is typically not founded on a long term commitment, whereas the increasingly child-centred family of today requires immobility and stability' (Daly, 2005: 386), which would amount to an internal contradiction within the structure of daily relations. Of course, there is variation in Europe as to these trends: however, as Torres et al. (2008) and Flere & Klanjšek (2013) have established, inter-country variations between family patterns are diminishing in the assertion of some basic trends. Besides these trends, the impact of migration upon the European family situation needs to be mentioned: this has created the 'transnational family', composedof members within various national jurisdictions. This raises a further challenge as to how best understand the family and how to regulate it, particularly regarding regulation, meaning greater physical distance and greater cultural variation (Glynn, 2007; Stavera, 2013: 69-89; Falicov, 2007: 160).

It should also be noted that same-sex unions and same-sex union families are prominent among these changes. Giddens even holds that these unions are 'pioneers' in the meaning of individualisation and de-traditionalization, even for heterosexuals (Giddens, 1992: 85; also see Hodson, 2012).

Another feature underscored by numerous authors was the decline of the family as an institution, having less influence over its members (Popenoe, 2009; Cherlin, 2009). Popenoe was concerned about the family as a societal component, in contrast to the other line of thinking, namely finding new spaces of liberty in the individual choice and open-endedness (Beck and Beck-Gernsheim, 2002).

As drawn by Daly, the picture of the European family at the beginning of the millennium, is one based on empirical data. Theoretical interpretations, however, significantly diverge. Giddens wrote on the matter as early at 1992, arguing for the assertion of 'pure relationships' (Giddens, 1992: 88-9) amongst partners. Giddens finds family to be 'a shell institution' ('emptied of content', 1999: 19), while Beck and Beck-Gernsheim consider it 'a zombie institution' (Beck & Beck-Gernsheim, 2002: 203), no one giving it any credit (even less for the future).

Edwards, McCarthy & Gillies critique post-modern concepts focusing on their inadequacy to address the needs of welfare and social policy, which need the concept of family to provide a focus on daily state policy in the area of welfare and taxing (Edwards, McCarthy & Gillies, 2012: 739). This may be true; however, it does not by itself deny the possible veracity of the thought directed towards championing the end of family.

This empirical and theoretical situation of uncertainty has brought the very idea of family in doubt. Some of the doubts have come almost independently from feminist circles. Thus, in 1971, Mitchell demanded a division the family 'monolithic whole' into production, reproduction, socialization and sexuality (Mitchell, 1971: 107).

Other doubts on family are related to some of the most important theoretical and sociological assertions on the nature of contemporary, 'post-modern' society, 'second modernity' (Beck) and 'fluid modernity' (Bauman). Thus, Bauman would say that family provides an example of the contemporary societal 'liquid' trend, that 'modernity's melting powers' are 'reallocated' and that family is the best example (Bauman, 2000: 6).

3 The ECtHR on the 'Family Life' as Protected by the European Convention of Human Rights

In the continuation of this paper, an attempt will be made to grasp how judgments by the ECtHR, (although established in 1959, it gradually attained its present institutionalisation, which is has been in force since 1998) correlate to the changes in the family indicated above.
Article 8 reads:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

The wording may be depicted as such, suggesting that the state should refrain from interfering in these issues, while some authors have noted that »respect« reads like »manners« rather than law (see Janis et al., 2009: 374). However, later a more active and »flexible« (Kilkelly, 2004: 69) approach was taken by the ECtHR itself on the state needing to establish conditions for enjoyment of this right, for example including »positive structures and laws or procedures that allow family life to be established and conducted privately« (Toner, 2004: 94). The ECtHR also considers this right to be »effective«, i.e. a right *strictu sensu* (for example, *Znamenskaya v. Russia*, 77785/01*,* passed in 2005, pt. 38), although one cannot claim that the practice of the ECtHR has been consequent in the varied cases.

These ECtHR judgments dealing with the protection of 'family life' are numerous[1] and very diverse as to the complaints bringing them about; also varied are the social environments of the 47 member states of the Council of Europe where the ECtHR has jurisdiction. These judgments, being important legal pronouncements by their nature, institutionalise the family, since the ECtHR, although not a supreme court, sets legal standards in various areas protected by

[1] HUDOC, the ECtHR search engine, records 1755 cases of consideration of complaints with respect to the ECtHR Art. 8, with respect to family life (including preliminary ones). Most of these judgments are not repetitions of substance of former ones. Some cases substantively dealing with family may have been considered under other articles (accessed 20 March, 2014).

the European Convention of Human Rights (ECHR) (adopted 1950). We will enquire whether and how much these judgments help in attaining a European concept of the family, from the viewpoint of the ECtHR's position.

We will focus on the judgments relevant for setting the basic limits of the protected 'right to respect of family life', particularly what the ECtHR holds in its case law to be the limits of 'family life' itself. Cases will be chosen in order to uncover not only the static situation, but the evolving definition of 'protected family life' in the judgments. Cases considered are noted ones and have a bearing on the understanding of the limits of family life in Europe, although ECtHR case law is not precedential in the strict sense. For example, in the United Kingdom the Human Rights Act (Section 2 (1)) only demands that domestic courts 'should take account' of the ECtHR pronouncements. However, particularly for 'new' Council of Europe members, the weight is much greater (Arold, 2007).

We will not address how some authors judge the ECtHR case law on family, particularly regarding Article 8 interpretations, from a legal or from an axiological point of view (Spijkerboer, 2009; Hodson, 2012). This issue is beyond the scope of this paper. Rather we will observe case law up until June of 2013.

After a general overview of issues setting the limits of protected 'family life' within ECtHR case law, this paper will discuss, within the same context, with the issue of same-sex families in a special section – in both cases as dealt with by the ECtHR. The paper concludes with a section about the relation between family change, including the change's interpretations by scholars, and the Court's decisions.

These judgments all have one thing in common; that they all relate to Article 8 of the European Convention of Human Rights, which guarantees respect for family life.

The decision making process by the ECtHR will not be considered here, although it should be mentioned that it usually involves initially determining the admissibility and later, adjudicating the proportionality of certain conflicting, legitimate interests, with the ECtHR possibly granting a certain 'margin of appreciation', or discretionary power, to the state at issue.

Before presenting the pertinent case law, it should be noted that the ECtHR considers the ECHR to be 'a living instrument which must be interpreted in the light of present day conditions' (*Johnston and Others v. Ireland*, 9697/82, delivered in 1986, pt. 53; *Marckx v. Belgium*, 6833/74 6833/74, delivered in 1979, pt. 58, repeated in later judgments many a time), allowing the Court to consider new issues in family life and interpret them in light of present social, scientific and technical conditions. All of these are changing fundamentally and at a rapid pace, allowing for the Court to also set new standards as to the protected content of family life.

The ECtHR, of course, is positioned so that it cannot guarantee the realisation of a mere desire to establish a family, which would be senseless, but the very 'existence of family' often being matter of dispute *(E.B. v. France*, 43546/02, delivered in 2008, pt. 41), when considering a dispute involving potential family matters. This is of particular interest.

The ECtHR's point of departure was the 'traditional family' 'arising from genuine and lawful marriage' (*Abdulaziz, Cabales, and Balkandali v. the United Kingdom*, 9214/80 9473/81 9474/82, delivered in 2005, pt. 62). The Court regarded promoting the traditional family as praiseworthy in *Marckx*, (pt. 40). However, this soon proved to be too restrictive and not adjusted to contemporary social life. The Court expanded the notion of family life, as shall be illustrated further herein.

A distinct concern, often an initial one in adjudicating whether 'family life' exists, is whether a situation of 'coupledom' exists within the protection of the 'family life' clause (as marriage is governed within Article 12). In general, whether a partner extramarital relationship, not registered in any manner, constitutes protected 'family life' depends, according to the ECtHR, on 'whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means' (*Van der Heijden v. the Netherlands*, 42857/05 42857/05, delivered on 2012, pt. 50).

Some frontiers of protected 'family life' as defined by the ECtHR arise from the following cases:

Family life exists:

(a) In an early landmark case in the practice of the ECtHR, it established the inadmissibility of the practice of substantive differentiation between 'illegitimate' and 'legitimate' children *(Marckx v. Belgium)*. The case originated from Belgium, where the law at the time did not recognise any legal relationship between mother and child born out of wedlock. Instead, the law allowed for a series of procedures to establish guardianship, adoption or recognition by the mother, which again did not make the child a relative and a potential inheritor of the mother's relatives. The child would only be able to inherit from the mother herself. Recognition by the mother would be possible only after the child's birth; thus, if the mother died before recognition, the child could not inherit from her.

The ECtHR also established, in *Marckx,* that family life 'includes at least ties between near relatives, for instance those between grandparents and grandchildren' (pt. 45). It also scolded the Belgian legislation for 'disregarding the blood ties' (in favour of legal ones) in the context of family life (pt. 55).

The ECtHR found Article 12 pertaining to the right to marry, raised by the Belgian Government, 'as not relevant to the case', indicating an indifference toward whether family life arose from marriage or not.

(b) In the early practice of the Court, at the time of taking over issues from the Commission, the Court dealt with the dissolubility of marriage. Marriage was at the material time (1986 and prior) indissoluble in Ireland. In *Johnston and Others v. Ireland,* 9697/82 (delivered in 1986), a married man, factually and legally separated, lived with another woman who bore him a child. The child's parents, the factual couple, complained of the latter woman's legally uncertain position and the child's illegitimate position, which constituted an inequality in

comparison to children born in wedlock. The ECtHR set the standard for the legitimization of factual families.

(c) An adulterous situation may give rise to 'family life'. In a case from the Netherlands involving the birth of a child before marriage dissolution was finalised, the mother and her future husband were unable to institute proceedings to recognise the latter husband's paternity. The ECtHR found 'family life' to exist and the Netherlands to have violated it, in disallowing paternity recognition to the factual parents (only the husband at the time of birth only could have such a standing), although the legal father was disinterested and unavailable (*Kroon and Others v. the Netherlands*, 18535/91, delivered in 1994, pt. 36).

(d) In a biological father-child relationship dispute, the ECtHR attached greater weight to the social component of parenthood than to the potential biological one (*Nylund v. Finland,* 27110/95, delivered in 1999). Namely, the issue arose where a potential biological father was denied the possibility of testing the paternity of the child. The ECtHR found: "It is justifiable for domestic courts to give greater weight to the interests of the child and the family in which it lives than to the interest of an applicant in obtaining determination of a biological fact " (pt. 2.a, see also *Ahrens v. Germany,* 45071/09, delivered in 2012, pt. 212).

(e) A relationship arising from a genuine marriage, but without consummation yet (*Abdulazis, Cabales, and Balkandali v. United Kingdom*) may also be considered 'family life'. At issue were marriages contracted by female immigrants with legal status in the United Kingdom, who had, since regularising their status in the United Kingdom, married various men-nationals of other, non-Commonwealth nations. The husbands were not granted residence permits in the United Kingdom, in which respect conditions for being granted permits were also stricter for married men than for married women. At issue was whether the contracted marriage represented 'family life'. The Court opined in favour of the applicants on the basis of sexual discrimination, but did not enter into the issue of the existence of family life. This is part of the major current problems of 'transnational families' in the EU (Glynn, 2007).

(f) Lawful and genuine adoption (*Pini and Others v. Romania*, 78028/01 and 78030/01, delivered in 2004), in this case a transnational one, does give rise to protected 'family life', even though the adoption may not have been factually carried out. In this case two girls were not transferred to the Italian adopters, owing to the opposition of the private organisation in whose custody they were. Time lapsed, the girls became opposed to the adoption. The Court upheld the existence of 'family life', but found in the omissions on the part of Romanian authorities insufficient material to find a violation of Article 8.

(g) A Dutch widow, enjoying retirement benefits, started living with another man in a household, without contracting marriage. Authorities decreased her retirement benefits on account of the joint household and dual income. She held this to be unjust. Upon exhausting domestic remedies, she complained to the ECtHR of 'an unjustified interference with her private and family life owing to the considerable reduction in family income occasioned by the events complained of' *(Goudswaard-Van der Lans v. the Netherlands*, 75255/01, delivered in 2001, pt. 3). The Court dismissed the complaints and would not hear the merits, invoking changes in family and mores in the Netherlands: 'many widows were cohabiting with a person to whom they were not married, in a relationship comparable in economic terms to a family unit' (pt. 3). Again, the Court was adjusting to conditions where the practice of private and family life differed from the traditional model.

Family life does not exist:

(a) In *Burden and Burden v. United Kingdom* (13378/05, delivered in 2008), two aged sisters, having lived in the same household throughout their lives and not having married, upon exhaustion of legal procedures in their home country, claimed to have been discriminated against. With respect to the prospective inheritance (upon the death of one of them) a 40 % inheritance tax would need to be paid. They claimed to have been discriminated against in comparison to married heterosexual couples and same-sex partners in civil partnerships, where such tax is waived. The ECtHR found that the state had acted within the margin of appreciation (granted by the ECtHR to the state) when setting limits on the tax

waiver. It further stated that the relationship between sisters was one attained through 'birth', whereas 'marriage remained an institution which was widely accepted as conferring a particular status on those who entered it…. the inheritance tax exemption for married and civil partnership couples pursued a legitimate aim, namely to promote stable committed heterosexual and homosexual relationships by providing the survivor with a measure of financial security'. Thus, it but did not fall within the ambit of family life protection.

(b) In *Van der Heijden v. the Netherlands* (42857/05, delivered in 2012) the applicant Ms Van der Heijden claimed that her rights under Article 8 protection of 'family life' had been infringed by the Netherlands authorities. She had been living in a stable relationship with a man for 13 years, having given birth to a joint child. The man was indicted for murder, and she was summoned by the competent court as a witness. She refused to testify, invoking the privilege granted by the Netherlands criminal procedure legislation to spouses, registered partners and some other relatives. However, Netherlands judiciary did not grant her immunity, and she was even incarcerated for 12 days.

She exhausted all remedies in the Netherlands and applied to the ECtHR, claiming Article 8 'family life' protection. In spite of the Court's expansive definition of family life, the Court did not side with her. It found the 'her relationship with Mr A. [was] in societal terms equal to a marriage and to registered partnership'…[However] states are entitled to set boundaries to the scope of testimonial privilege and to draw the line at marriage and registered partnership' …'The absence of (such) a legally binding agreement between the applicant and Mr A. renders their relationship, however defined, fundamentally different from that of a married couple or a couple in a registered partnership.' (pt. 69) The Court's logic could be summed up: The lack of formalisation of the union allows for prevalence of the partner's legal obligations vis-à-vis the state in this case, because of the very nature of informality. This is in contrast to case law in some other walks of life, where the ECtHR considered factual partnerships on par with marriage and registered partnerships: social security (*Goudswaard-van der Lans v. the Netherlands,* 75255/01, delivered in 2005) and taxation *Feteris-Geerards v. the Netherlands* (21663/93, delivered in 1993). In contrast to the two cases

referred to, in *Van der Heijden* the ECtHR held: 'These are issues governed by different considerations which are not germane to the present case' (pt. 74). The Van der Heijden is case speaks rather clearly for the opinion on the ECtHR's decisions being weak on consistency, inclined toward flexibility of an Anglo-Saxon nature.

(c) Another interesting case ensues from widespread practice of assisted fertilisation in the United Kingdom (*Evans v. United Kingdom*, 6339/05, delivered in 2007). The Court found a lack of existence of family life in a situation where a couple, unable to produce a child naturally, opted for assisted fertilisation and deposited gametes, also giving their consent for production. The embryos were created in hospital conditions. While the woman in question underwent medical treatment and time elapsed, the relationship broke down and the man withdrew his consent to use the embryos, which resulted in a prohibition of their application under United Kingdom law. Ms Evans, after treatment, would not be able to produce new gametes and the existing unified gametes were her only way of producing biological offspring. However, the applicant, upon exhaustion of domestic remedies addressed the ECtHR and, dissatisfied with the ECtHR first instance, addressed the Grand Chamber. The Court expressed sympathy for Ms Evans, but found, however, against her. The UK was not found to have violated the ECtHR in this case.

(d) Bigamy cannot enjoy the protection and respect accorded to 'family life', although only a child's rights were involved. The Netherlands refused to grant a residence permit to a child from the first marriage to a Moroccan who was living in the Netherlands with a second wife and her children. The Court dismissed the complaint without entering into the merits (*E.A. and A.A. v. the Netherlands,* 14501/89 delivered in 1989).

Of course, this international judicial type of limit delineation cannot fulfil the Weberian ideals of completeness, certainty and lack of voidness, but it does supply important guidelines.

4 Same-sex Families

Same-sex families have become the most sensitive issue treated by the ECtHR in recent years as far as 'family life' is concerned (Hodson, 2012). The point of departure advanced by the Court in treating these issues concerns the 'interests of the child' associated with 'parental attachment' (*Keegan v. the United Kingdom,* 28867/03, delivered in 2006, pt. 15; *Berrehab v. the Nethelands*, 10730/84, delivered in 1988; *X, Y and Z v. United Kingdom,* 21830/93, delivered in 1997). In general, as illustrated above, the Court underscores that the nature of family is 'the real existence in practice of close personal ties' (*Lebbink v. the Netherlands*, 45582/99, delivered in 2004, pt. 36**),** which may outweigh biological and legal considerations as well as facts. That biological issues were being overridden was particularly underscored in the *Keegan* case, where the father had never met the daughter, whereas in the case of *K and T v. Finland*, 25702/94, delivered in 2001, the Court dismissed a fiancé who had not established connections with his former girlfriend's daughter and who demanded paternity testing, since there was no 'family life' established (pt. 64).

The Commission (predecessor of the ECtHR) never recognised the existence of 'family life' as ensuing from a same-sex relationship (it ceased to operate in 1998, i.e. filtering issues that would reach the ECtHR [deciding on admissibility]): same-sex relationships 'did not fall within the scope of the right to respect family life' (*Kerkhoven and Hinke v. the Netherlands*, 1992, 21830/93, delivered in 1997).

The ECtHR held a different position on the issue, although the Court's position had evolved with time.

(a) The first signal of change came in *Karner v. Austria* (40016/98, delivered in 2003); the Court acknowledged the succession of tenancy rights for a surviving gay partner. The wording was that the Austrian decisions denying the succession was found by the ECtHR to have violated the right to respect of home, also under Article 8 protection. However, inheritance is not an issue of private, but of family life. The ECtHR dealt with the issue in an indirect way.

(b) But the judgment containing an explicit precedent was the one in *Schalk and Kopf v. Austria* (30141/04, delivered in 2010). In this case, two gay partners were denied the marriage for which they had applied and

received the entire chain of denials necessary to address the ECtHR. The Court found that Austria had not violated the ECtHR, in view of the Convention text, allowing for a wide margin of appreciation to the states in this matter, but noting the speedy evolution of legislation and policy on the matter towards recognition of gay partnerships in Europe. Although the ECtHR did not find in favour of the applicants, it concluded that 'in view of this evolution, the Court considers it artificial that, in contrast to a different–sex couple, a same-sex couple cannot enjoy rights 'for the purposes of Article 8 family life'. Further, it found that the applicants' stable de facto relationship did fall within the scope of 'family life'. Thus, although it did not rule in favour of the applicants, it laid out grounds for the recognition of same sex couples to be recognised as protected 'family life'.

(c) In *Gas and Dubois v. France* (25951/07, delivered in 2012), the ECtHR found that a stable relationship by a cohabiting same-sex couple falls within the right to respect of family life, and that a child conceived by one of them by means of assisted reproduction and born by the same partner, brought up by both of them, constituted 'family life' within the meaning of Article 8. The French courts had previously disallowed adoption of the child by the mother's partner, on the grounds that such an adoption would deprive any mother's future spouse of the right of adoption (pt. 15)[2]. The ECtHR upheld the French Governmental position on the grounds that the state may demand certain conditions to be met for adoption, e.g. marriage or a relationship equal to marriage. Recalling, it did allow same-sex families, it granted the state a margin of appreciation as to conditions for adoption by same-sex couples (and different sex couples, pts. 68-9).

Thus, the ECtHR's position on protected 'family life' arising from same-sex unions has not been fully asserted, allowing the states a margin of appreciation and invoking other technicalities above the general principle of non-discrimination. In principle, however, the ECtHR could

[2] The plea by the French Government did not contain psychoanalytic references on the need for a 'paternal referent' argued previously on its part, but rejected by the ECtHR (*E.B. v. France*, 43546/02, delivered in 2008).

have done the reverse: apply exclusively the non-discrimination principle from Article 14, in conjunction with the 'family life' referred to in Article 8.

(d) Another case that received much support from non-governmental organisations, both in favour and against, was the recent *X and Others v. Austria* (19010/07, delivered in 2013). The case involved a female couple, one of which mothered a child, and the mother's long standing same-sex partner. Austrian authorities denied a request by the mother's partner to adopt the child. Austria was found not to having 'considered the situation as that of an unmarried different sex couple'. The Court thus did not directly rule the Austrian decision erroneous, but found that the procedure, i.e. lack of procedure on the individual appropriateness of the candidate to be adopter (irrespective of her sexual orientation) represented a violation. Whereas the Austrian decisions underscored 'protection of the traditional family', the Court found 'the [Austrian] Government failed to adduce particularly weighty and convincing reasons for excluding second parent adoption in a same-sex couple' (pt. 151).

(e) 'Appearances' of 'family ties' in the case *X, Y and Z v. United Kingdom* did not add up to 'family life' protection under Article 8, in a case involving a woman, a woman reassigned as a man and the (first) woman's child. The couple had lived together before reassignment and continued to live together after in an arrangement which was not registered. The child came about through anonymous donation of male gamete. UK authorities did not fill in the part of the birth registration referring to the father, in spite of both partners' request for the transgendered person to be entered. The Court noted an absence of European standard, 'transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States' (pt. 59). Thus, it found no violation of Article 8, i.e. no 'family life' within Article 8 protection. – One can imagine that with the passing of time 'no generally shared approach' will give way to a certain prevalence in the direction of child centeredness and the social commitment overriding biological arguments.

(f) In a further recent case related to reassignment, *Haamalainen v. Finland* in 2014 (case no. *37359/09)*, deciding on an issue of inscription of change of gender into personal documents, upon reassignment (the state requesting a prior change of marriage into civil partnership by Finnish authorities), what the ECtHR in fact did was fail to recognise the right to enter into marriage to same sex partners. This is an issue on which consent does not exist among European states, a minority of 10 explicitly providing the right to enter into marriage, as statutorily governed (pt. 31 of Judgment). The Court did not opt to lead in such changes.

It is questionable whether the ECtHR could be expected to have done more in the direction of recognition of families with homosexual parents, as Hodson would have, bearing in view the ECtHR's need to consider European consent, which is lacking with respect to this issue.

5 Conclusion

Within the complex issue of current transformation of the European family our focus was on the correlation of the factual changes and the judgments of the ECtHR. Since the end of the 80s, in the period of the operation of the Court as a pan-European institution, it has dealt with and set standards on many issues, some of which may seem antiquated today. One can discern that the European Court, which plays a role in trend-setting for the institutionalisation, as well as following the family and for family law codification in Europe. The ECtHR's standards can be discerned as the following:

- Biological relations are awarded relatively less relevance in comparison to the social closeness and emotional nexus within the family. This may very well be complementary to greater individualisation and the withering away of the single traditional pattern of family;
- The substantive social nexus within the family slowly overrides the formal legal one, while the factual social association of the family gaining recognition as an institution, although this has its internal limits in the nature of legal recognition, as legal recognition cannot be awarded to every liaison, as the ECtHR clearly stated in *Van der Heijden*. It is difficult to 'catch' all individual relationships in their variety in order to grant

them institutional recognition, to recognise where a purely passing, casual relationship is transformed into a stable situation. The situation of LAT ('living apart together'), not yet dealt with in the practice of the ECtHR, is a further example of the difficulty in defining coupledom, as is also the extramarital union, reflected in differences in approach and definition by the Court, highlighted in the *Van der Heijden* case. On the other hand, the family cannot do without some institutionalization, as welfare provisions, taxation, alimony, child support, which are often associated with a family institution concept (in spite of variations within the family concept in various legislations and various aspects of individual legislations). The definition of family is not only a moral issue, but woven into the entire social system.In adjudicating family issues, the ECtHR, wherever confronting the issue, considers the child's interests (*Pini and Others*) case illustrates how difficult it is at an international forum to do so. It demonstrates a 'generosity' (Kilkelly, 2004: 71) towards children, in comparison to some state statutory law. However, it has not accepted the interpretation of the child's socialisation interests within a psychoanalytical, Freudian framework, and particularly not via the necessary 'paternal referent', but through mutual commitment by the parents vis-à-vis the child.

- Same-sex families and other new forms for establishing family life in contrast to the 'traditional family' are gaining recognition, but this is being done cautiously and with reservations, in view of differences in Europe on the issue.

The ECtHR is confronted not only by a great variety, but also 'fluidity' of family relations. Furthermore, the ECtHR is confronted in an even harsher way by the change in the understanding of acceptable behaviour in coupledom and (would be) family relations. The limits set by the ECtHR cannot be understood as leaning towards traditional morality, as could be construed from criticisms by Hodson (2012).

It is discernible that the Strasbourg Court decisions on the family reflect the doctrine 'in light of current society' (Arold, 2007: 83). The ECtHR finds itself in a situation with extremely varied problems and requests demanding remedies and with only very generally worded provisions in the Convention. It thus needs to and does respond flexibly (Arold, 2007: 83; Kilkelly, 2004), which may be interpreted as being in line with Anglo-Saxon common law, although the

particular concepts (a margin of appreciation for national tradition, necessity in a democratic society etc.) are more general or different in their legal nature. Greater consistency in case law would be needed for it to make a more articulate impact on the national law at issue.

As to family life, the relationships indicated above, when encountered by the ECtHR, often lack solidity, a process sometimes reaching a point where it is truly difficult to define the limits of 'family life'. Technologically assisted reproduction, combined again with a variety of coupledom situations, brings about many situations where it is difficult to draw a line to the limits of family life, since limits set at one moment in time may quickly be out of date, owing to ever-changing technological advances. As the ECtHR spells out itself rhetorically: is it at all possible in individual cases to find and ascertain referents as to 'whether the couples live together, the length of their relationship and whether they have demonstrated their commitment to each other' (*Van der Heijden v. the Netherlands*, pt. 50), and whether it can be expected that any court ascertain all these details, let alone an international one? If not fully complying with Bauman's idea of fluid and liquid, the situation is certainly very muddled.

The decisions by the ECtHR do provide certain, although very limited, help for the institutionalisation of family life in contemporary European circumstances, but the variability of cases, the general nature of the Convention provisions and the variability of European society on this issue, a sensitive one, consistency in judgments is wanting.

However, although standards exist for most issues in defining the limits of protected family life, the ECtHR necessarily confronts many issues on a case-by-case basis, although precedence is given to social commitment and the lasting nature of close relationships, as has been demonstrated. Nevertheless, case law is not as consistent as statutory law would be.

In sum, this brings about inconsistency in the understanding of the family, where consistency would be needed. This inconsistency flows particularly from the ECtHR's margin of appreciation doctrine (Kratochvil, 2011; Brauch, 2005), granting differing degrees of discretionary power to states in individual cases, particularly on issues relating to various aspects of morally sensitive issues. The *Lautsi et al. v. Italy* case (30814/06, delivered in the second instance in 2011) is the

best known such flaw in wandering as to extent of margin of appreciation on the part of the ECtHR. The Grand Chamber completely overturned the first instance judgment, although this does not deal with family directly, but with how a mother understood religious freedom.

As to family, there are discrepancies between the *Marckx and Nylund* cases, and the *Van der Veyden* case standing out in not recognising the merits of a long-standing, non-registered partnership. This goes as Spijkerboer, bearing in mind particularly transnational families, ridicules 'Strasbourg case law' as law one would understand as 'concerning the European Convention of State Rights' (Spijkerboer: 2009, 292).

In any case, the need for greater consistency and possibly explicitness in the case of same-sex families (Hodson, 2009) is needed for the ECtHR to make an articulate imprint in Europe on the definition of the family. However, we need to remember it is not a supreme court and the ECtHR's scope is limited. The limitations do not pursue only from the ECtHR not wanting to offend national comprehensions of morality, but also from being under the influence of lobbies, as was clearly evident in *Lautsi*, where 31 conservative members of the European Parliament, numerous religious associations and even governments intervened on behalf of the defendant government of Italy.

Institutional support of this type is necessary and also relevant, since the family is often the subject of societal support and this is not possible when coupledom wanders through 'companionship', 'individualisation', and every day 'reflexivity'. It cannot, for example, be the subject of financial support, of tax incentives when limited to temporary and fluctuating emotionality, as Gilding (2010) and Davy pointed out. Furthermore, although the ECtHR case law is not directly applicable as precedent throughout Europe, it is the only such point of reference. Thus, 'individualisation' - particularly in the expansion of cohabitation (Kasearu & Kutsar, 2010), although more generally in the variety of coupledom arrangements - forms the basis of what may be discerned as convergence within European family life. This is difficult to institutionalise as legally protected 'family life'. However, institutionalisation and a legal concept of family remain essential within the legal and societal systems.

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EU Institutional Frailty: an Opportunity to Rediscover the Principle of Subsidiarity

Laris Gaiser

Abstract The European Communities, which based their development on a functional approach, could be considered the winners of the Cold War. The European Union (EU) is a continuation of the project, but built on a unionist model. The crisis that stressed the EU in the last decade proved that the latter approach is strictly connected with a growing citizens' disaffection toward the common European institutions and bureaucracy. When the level of trust in political institutions declines, they become more vulnerable and instable. A new concept for deeper European integration is needed and might be found in the guidelines concerning active regional cooperation which is already defined in the Maastricht Treaty, but especially in the connected application of the principle of subsidiarity.

Keywords: • European Union • Subsidiarity • Stability • Cohesion • Regional Cooperation •

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1 Introduction

In the past, if European countries developed specific collaboration fields of common interest, which created an atmosphere of mutual confidence for each individual case, then today -post Maastricht Treaty – the methods are different. The functional approach meant a convergence of national interests and represented a mechanism multiplying the strength of each country. The unionist approach is a top down process that sometimes lacks legitimacy and seems to make the common structure feebler. Since 1989 the greatest achievement of the EU is, without any doubt, the enlargement process toward the East. The enlargement made possible the stabilisation and democratization of numerous countries, some of which have never before experienced full independence, and helped to shape the greatest common market area in the world. It was a multilayer process fostered by a unique geopolitical environment on the bridge between the first and the second millennium. The expansion of EU space was based on the firm will of a part of the international community and implied a complex and coordinated approach. The EU's enlargement process, many times anticipated by NATO's enlargement, could be considered the greatest achievement of EU policy in the last twenty years, but today the international scenery is changing, the cohesion and strengthening of institutions has slowed down, and the enlargement process is at a virtual standstill, albeit talks with a few Balkan countries. The international financial crisis, the migration crisis, renewed Russian aggression and geopolitical activity, the former US President Obama's US pivot towards Asia, the MENA instability, Brexit, Presidents Trump's incoherent foreign diplomacy and a proved lack of political leadership are factors influencing the EU's development and stability.

2 The European Union at Crossroad

2.1 The Disconnection

During the last few years the EU has been facing a moment of disconnection: disconnection between the EU and Member States, together with a disconnection between the EU and citizens. Both internal and international issues have shown the EU's lack of strategy and vision, but they have illustrated even more the general weakness of our common institutions. National interest is still an unavoidable concept characterising the final decision of any Member. EU

citizens are far from being unified and very much focused on internal, national affairs. Not having a common vision or common principles means the EU lacks common internal politics. Several fracture lines prevent EU social and political cohesion, putting at risk its own future stability (Gaiser, 2014). According to Radičova (2014), former prime minister of Slovakia, the heterogeneity of national institutions plays a crucial role in the European integration process. Moreover, differences among countries political aims are the effect of correlation between different environments, their institutions and interactions. The consequence is the division of EU countries around three main axes: economic and social institutions (north vs. south), political and civic institutions (east vs. west) and governmental and financial institutions (small vs. big countries, in terms of political heft). Radičova is convinced that there is one more axis among EU Members: countries with a communist history and are currently, or rather still, in the process of transitioning to a fully democratic state vs. older, long-time democratic Member States. The former communist countries face a much more complex road towards common coexistence, which for some require trials and tribulations (Court of Justice of the European Union, 2014). Even though in people's minds the 1989 revolution in Europe, which brought the fall of communism, has become one of the most positive events in modern history, we still cannot say that the majority has enthusiastically embraced the new way of life, formed under the influence of complicated social and economic transformation. The democratization of totalitarian regimes itself was not linear, simple or without perils. Tendencies towards authoritarianism and the undermining of democratic institutions, problems with consolidation of democracy and the establishment of democratic institutions accompanied the transition towards a new regime (Radičova, 2013).

2.2 The Weakness

European politicians are always proud to underline that, even if not perfect, the European Union has been and still is successful in protecting people from a continental war (minus Russian aggression in the Ukraine and terrorism). This statement cannot be denied. So far, the major European nations have not experienced a waged conflict since 1945. This is the longest period of peace on the old continent since the Congress of Vienna in the 19th century. However, times are changing. The international and European balances of power are shifting. Carlo Pelanda (2013) affirms the unionist approach is deepening frictions between EU states and, what is much more important for longstanding

stability, among citizens. Instead of stability, we are facing an era of latent, incessant and political confrontation. Periods of crisis, as well as periods of geopolitical change, are stressful for any international player, but they are even more so for an institution that has no equal in history of international relations or law.

The unification of Germany and the Maastricht Treaty represent the only moments during which different European countries have tried – even before the fall of the Soviet Union – to actively influence a new global order on the basis of growing political collaboration. Unfortunately the following steps, despite their preparation during the negotiations for the Maastricht Treaty, have not achieved the predetermined objectives. The EU has enlarged its borders without shoring up its own institutions and without moving to an 'ever closer union'. It widened without deepening. A choice that after twenty years has made clear all the possible contradictions of the system. It showed the unsuitableness of a unionized monetary, financial and legal system managing crisis with a lack of political unity and democratic support. De Michelis (2013) defines this period as the two lost decades, when European elites have not been able to take advantage of the right insight that they had at the end of the bipolar confrontation. Thus the unionist paradigm resulted in a bind, at least for the moment, according to Pelanda.

The phase of Euro-paralysis, exacerbated in the years after the financial and migration crisis, shows the inadequacy of the European common rules. Specifically on the economic side, the rigidity of Stability and Growth Pact, along with the lack of rebalancing measures among European economies, triggers economic barrenness and impoverishing effects, causing instability. As a paradox, the French strategy to Europeanize Germany, by exchanging its union with the acceptance of a single currency had the effect to Germanize Europe, which is no longer able to manage the political integration since the Treaty of Nice. During the last decade the destiny of the EU has been in the hands of politicians who administrated the Euro as if it were the old German Mark.

The European non-union showed all its weakness during the debt crisis with Greece, Italy and Portugal and during the migration crisis. Instead of quick a common reaction, the EU hesitated in giving appropriate answers, thus deeply compromising its own credibility (Gaiser, 2016).

Due to the above mentioned reasons and according to Eurobarometer reports, the attitude of European citizens toward the EU has been alarmingly decreasing over the last decade.

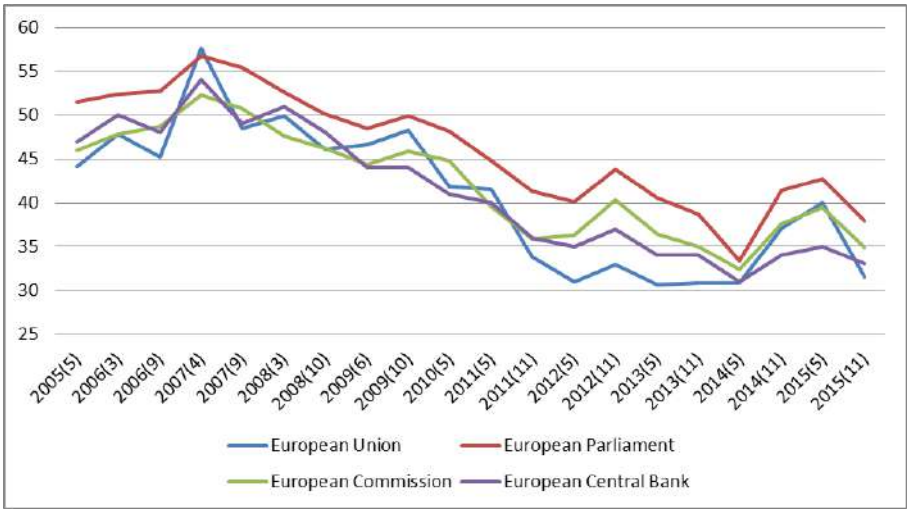

Figure 1: EU-average of citizens claiming that they "tend to trust" the specific institutions of the EU and the EU based on Eurobarometer reports.

The Eurobarometer programme of research published in the spring of 2017 noted a trend reversal recording an average of 47 % of Europeans citizens tending to trust in the EU (Eurobarometer, 2017). Nevertheless the data is still worrying, given that less than half of the EU population does not believe in common institutions.

In Slovenia, a country that owes its independence to the change of the geopolitical scenario at the beginning of the Nineties and especially to the acceptance of the European Communities, understood always as the final safe harbour for this small nation, the support to EU membership reached its peak at 60 % in the spring of 2008, but started decreasing quickly after that and arriving at the lowest point in 2013 when only 34 % of Slovenians had faith in European Union.

Year	Tend to trust
2004	56
2005	55
2006	70
2007	65
2008	60
2009	50
2010	48
2011	38
2012	39
2013	34
2014	37
2015	36
2016	47

Figure 2: Trust of Slovenians toward the EU.

For a long time the EU has been perceived as a guarantee for some kind of political and social stability within the EU-area, but since the start of global financial recession in 2008 public focus has, to a larger extent, shifted to the perceived side effects of European integration and the failure of the EU in handling the financial recession and the following 'Eurocrisis'. Taking also the additional development within the EU-area into consideration, namely the migration crisis, it is undoubtedly becoming harder for the average European citizen to remember the original idea behind European integration (Karv, 2016). When political trust is declining it is usually a sign that the political regime is not performing accordingly to the demands of the citizens. Short-term fluctuations in political trust are usually to be expected, but more long-term trends in declining trust is usually perceived to be more challenging, especially to the political system as a whole. The EU is especially vulnerable for declining levels of political trust, because as a relatively new political regime the EU is still trying to legitimize itself in the eyes of Europeans. The legitimacy of the EU in the minds of the citizens was also hard during the "good years" when the more integrated Eurozone members were performing economically better than the less integrated non-Eurozone EU-members.

3 Reinventing the Europen Union

3.1 A Failed Reconfiguration

The Nineties have been characterized as a period of national State withdrawal. Consequently the Maastricht Treaty codified an ambitious geopolitical ideology based on the Committee of Regions. Politicians and lawyers, following the pan-European ideal of the founding fathers, tried to shape an EU based on Regions: smaller political and territorial entities that could perform better, being closer to the citizens' needs, but also not representing a challenge to EU unity, not being overly powerful. It was strongly pro-European and at same time had an anti-national vision. However, the institutional reconfiguration failed.

The role of State, for years under criticism, regained importance within a setting characterized by a fluidity of international relations, mainly based on strong economic competition that has forced countries to tackle global confrontation in such a way to achieve the best possible outcome in term of profits, development and wealth. States returned to be active economic players, whose role it was to act as catalysts and push through reform strategies that would enable countries to maintain their competitiveness (Gaiser, 2016).

The consequences of these changes have been disorientation at an EU level and the institutional alienation from citizens' horizon. Today, as proved by Brexit, the Union is still a conglomerate of sovereign States; it is not a geopolitical subject and particularly is not felt as a common family by subjects.

The figures reported above show people's disaffection toward the EU. A lack of democratic legitimacy, understood as popular acceptance and not as a governing concept, for super-national institution can be fatal.

Short-term fluctuations are to be expected accordingly to the performance of the European regime, but short-term fluctuations in supranational trust are still commonly regarded to more alarming than short-term fluctuations in trust in national political institutions. It is easier to leave an international political cooperation than to change the national political system. More and more Europeans are starting to question whether there is a future for European integration under the guidance of the EU regime, a development that has been especially evident in the successes of Eurosceptic parties in the two latest European Parliament elections (2009 & 2014). So far the EU seems to always

have been strengthened through crisis, but in the words of David Easton, there is always a limit for the amount of stress a political system can withstand without imploding (Karv, 2016).

The concept of support is important, because it is assumed to provide a political regime with political legitimacy. As an increasingly politicized union, the EU and its legitimacy are dependent on the approval of the EU-citizens.

According to David Easton (1965), the concept of support should be divided into two interrelated but theoretically separable levels of support; specific (utilitarian) and diffuse (affective). At the aggregate level specific support touches on the more observable levels of support and is assumed to function quite rationally: A supports B because A benefits from supporting B. Diffuse support on the other hand indicates more deep held loyalties and does not change solely according to performance. It is also much harder to create.

3.2 The Five Scenarios

In order to encourage a self-critique on the role of EU and to offer a proposal for future development, the European Commission delivered on 1 March 2017 a White Paper presenting five possible future scenarios which range from reducing the Union to a single market all the way to strengthened integration.

In the first *Carrying on* scenario the EU simply would continue to muddle along, achieving some of its goals, underperforming on others, and failing to come anywhere close to achieving others due to lack of ambition or will. The extremes are covered by two other scenarios. In the first, the EU winds back down into a single market, rolling-back some of its follow-on policies, such as employment and social policy, and stops pushing ahead on internal and external security, or better governance of the eurozone. The other extreme scenario describes a major leap forward, with more Europe for all the 27 Member States in 2025, which is the ideal scenario from an integrationist point of view.

The more challenging scenarios appear to be those between the extremes. The Commission has developed two middling alternatives. The *Doing less more efficiently* envisages an EU that engages in much deeper integration on areas such as border management, foreign policy and defence, where it can add most value, while

reducing its ambitions in other areas where it is perceived to add less value, such as securing the core functions of the single market and the common currency. These issues would be left to individual Member States. Its second middle-ground scenario is that Member States that want more integration can go ahead and seize it (a multi-speed EU). This scheme suggests the emergence of more flexible coalitions, featuring a new group on internal security and justice, and one on defence. According to the White Paper, these integrated groupings would also establish separate common budgets (Janning, 2017).

By presenting reflections and scenarios, the Commission has regrettably not provided a clear political vision for Europe, but what is even more interesting is that no scenario makes reference to the role of regions and how they fit into regional cooperation.

Once again, the EU apical institutions are leading the European debate toward scenarios centred on what the Member States want, treating the citizens as a second-order problem. Completely forgetting the indications given by the Maastricht Treaty, European leaders are trying to shape a common house on a structure that will miss solid foundations. A regional approach, wisely coordinated with the States' sovereignty concept, and the respect of the principle of subsidiarity are both sides of the same medal, but especially because they represent a safety net for any institutional instability.

3.3 Bringing Diversities Together

The coexistence of national and supranational identity lies in how to bring closer and hold together diversity. If the respect for regional lands and for the principle of subsidiarity could positively transform the political interaction helping the Union to get, at the same time, a utilitarian and affective support than Pelanda's proposal based on a more functional and less unionist approach, it could be helpful in drawing different future options of EU development. The goal of any solution shall be the preservation of the Union as an institutional framework guaranteeing peace and stability among members, the containment of any potentially lethal tension that could jeopardize the EU future and the boost of citizens' sense of affiliation. Brexit, together with the Catalan independence movement, are the last evidences proving the failure of EU subsidiarity and consequently regional policy. Considering the ongoing situation, it would be preferable to opt once again for a functional approach based on ad hoc

communitarianism of certain areas instead of continuing to pursue a unionist agenda that might lead to undesirable disagreements. Moving one step back today could help the EU take two steps forward tomorrow, especially to preserve the EU as a conflict solving institution, guaranteeing further economic development as well as social security. Within such a scenario, the deepening of regional cooperation inside the EU could be promoted for it to become more institutionalized in order to create a new level of interstate collaboration. Respecting the Union, Brussels could even support the formation of new political entities of the intermediate level between Member States and the Union following the example of those existing in Scandinavia or, more specifically, in the Benelux countries. The need for such macro-regional coordination, based mainly on the logics of economic, cultural and infrastructural cooperation, should be considered a priority.

For example Central European countries historically have disagreements with their neighbours because of their unclear ethnic borders, as well as their geographical position between western and eastern spheres of influence. The addition of a regional level of coordination between Member States and the Union might seem contradictory with the spirit of the EU only if we accept the prevalent, interested, political interpretation of the EU institutional framework. Actually, its functionality should be interpreted as the realization of regional policies sponsored by the European Commission in the last decades and, of course, of the fundamental subsidiarity principle. The Czech Republic, Slovakia, Austria, Hungary, Slovenia and Croatia are nations characterized by a common history, cultural and political inheritance that come from centuries of common life within the Habsburg Empire. Therefore it should not be so difficult to build a new regional system of political and economic coordination to help facilitate reciprocal dialogue, stability and development. This experience has been working for decades in another part of Europe with similar features: the region including Belgium, the Netherlands and Luxembourg. A *Mittel-European* Union would have the advantage of being built in quite a short amount of time on the basis of the common historical inheritance and on an approach based on the already existent founding of macro-regional strategies. Most importantly, it would show its efficacy in protecting Brussels from being a constant scapegoat for the failure of national political choices (Gaiser 2014). Too often it occurs that politicians attribute their own mistakes to the choices made by the EU. Such behaviour helps the surge of nationalists, triggering a big risk for the project of the Common

European Home. The existence of local coordination systems, where it is possible, would support the compensation of tensions and above all it would make local elites responsible for their choices (Gaiser, 2016).

4 The Principle of Subsidiarity

4.1 The State Innefficiency

Subsidiarity is an organizing principle, stating that matters ought to be handled by the smallest, lowest or least centralized competent authority. Political decisions should be made at a local level if possible rather than by a central authority. The Oxford English Dictionary defines subsidiarity as the idea that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level. For the Catholic Church it is a principle of social doctrine that all social bodies exist for the sake of the individuals: what individuals are able to do, society should not take over, and what small societies can do larger societies should not take over. The principle was first formally developed in 1891 by Pope Leo XIII in his Enciclica *Rerum Novarum* as an attempt to articulate a middle course between laissez-faire capitalism and several forms of communism, which subordinate the individual to the state. It was further developed and firmly fixed in the Enciclica *Quadrigesimo Anno* in 1931 by Pope Pius XI, in which it is defined as a fundamental principle of social philosophy, fixed and unchangeable, that one should not withdraw from individuals and commit to the community what they can accomplish by their own enterprise and industry. Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, it is also an injustice and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought to of its very nature to help furnish to the members of the social body, and never destroy and absorb them.

Subsidiarity is a social theory, it is about the economy and it is about the family as a fundamental nucleus of a society. Family, a social unit of human order and the principal unit of a functioning society is also the basis of a multi-generational extended family which is embedded in socially as well as genetically inter-related communities, or nations. This is the link between a single person and the State. States and any other political and social over-structures exist for its citizens but States passing through different evolution phases are today giant bureaucratic structures, rather Leviathans out of control. The modern state is overloaded. An overloaded State is a threat to democracy: the more responsibilities Leviathan assumes, the worse it performs them and the angrier people get, which – as in a vicious circle- makes them demand still more help, more from the state. The Western State passed through three different revolutions:

a) for Hobbes the Leviathan existed to provide security;
b) for John Stuart Mill it was for liberty;
c) for the Fabians it was the welfare of the mankind.

Following the Westphalia treaties the modern state concept was officially born in 1651 when Thomas Hobbes published his Leviathan. The first duty of the state was to provide law and order. There was only a single year in the first half of the seventeenth century that was free from wars between European States (1610) and only two in the second half (1670 – 1682). Europe's nation states focused on competing with one another for secular supremacy. John Locke (1689) reshaped a bit Hobbes and thought that people delegate power to a sovereign for reasons of convenience rather just for fear. David Hume added the division of power and the rule of law to the State concept. In the nineteen century Stuart Mill wanted a minimal, noninterfering state – the night-watchman (Micklethawait & Woolfdridge, 2015). The Victorians, fighting against the so-called Old Corruption of the system that was oppressing the free development of society, insisted that the state solve problems rather than simply collect rents. William Gladstone (1835) wrote at that time in a party manifesto: "nothing should be done by the state which can better or as well done by voluntary effort" (pag.19).

Revered for his thoughts, Gladstone died in 1898, but was seen as a man of a different era. In Europe a more interventionist state became the norm at the beginning of twentieth century. Bismarck created the mightiest Continental state.

The rise of Germany transformed Hegel from a marginal figure – "a nauseating, illiterate, hypocritical scribbler" in Arthur Shopenhauer's famous put-down – into the prophet of a new era. During the consolidation of the Reich, in Great Britain Beatrice and Sidney Webb founded the Fabian Society and established the London School of Economics to train a new breed of social engineers from around the world and create a New Statesman. The welfare state was on the way. The misinterpretation of John Maynard Keynes thoughts opened the way to big government. Keynes was a liberal rather than a socialist. He was an elitist that presented the way of saving capitalism from itself by the careful use of government spending. Keynes firmly believed that the hidden hand of the market needed the assistance of the visible hand of government. Unfortunately people increasingly forgot the caveats of Keynesianism and it became the doctrine of a "New Jerusalem" (Micklethawait & Woolfdridge 2015). The Second World War demonstrated the state's power to deploy resources on the scale not seen before. Dwight Eisenhower proclaimed that "gradually expanding federal government was the price of a rapid expanding national growth" (Perlestein 2001). Lyndon Johnson called his welfare state program "the Great Society" after the title of a book written by Graham Wallas (1914), a close friend of the Webbs. Richard Nixon defined himself a Keynesian and even employed a young Donald Rumsfeld to impose price and income controls. America needed a big state to control communism, to send a rocket on the moon, to police the world and in the words of Senator Joseph Clark (Pen.) "to rid our civilization of the ills that have plagued mankind from the beginning of time" (Samples, 2010). The State became the universal provider. The night-watchman standing guard at the gate became the nanny inside the home and the office. However not a very good nanny. The State accumulated ever more responsibilities and imposed ever more hidden costs to everybody else. But its ability to meet those responsibilities has declined since.

As Friedman (1993) foresaw, temporary government programs became permanent, state enlarged welfare networks, while equality of opportunity became equality of results. Friedman always believed that there was a direct correlation between government intervention and national decline. He took Greek, Roman and British history as an example. Across the West a growing number of people are asking probing questions about the size and the scope of the State, prodded by both the size of the current crisis and the inadequacy of the establishment's response. Left and right politicians are engaged in finding an answer. Conservatives think-tanks, such as Sweden's Timbro, recognize that it is

no longer enough just to preach deregulation. They are increasingly focused on redesigning the State. Left wing think-tanks, such as Britain's Policy Network, recognize that if the Left wants to have a future it needs to conquer its addiction to the almighty State. The social contract between the State and the individual needs to be scrutinized in much the same spirit that Hobbes and Mill re-examined it. In the twentieth century the State has become bloated and overwhelmed. Even if it is run by the most efficient technocrats, the State would still be a gigantic mess: supersized by ambitions it is an enemy of liberty. We are facing the Old Corruption of Victorians memory. The State today is a Master rather than a Servant. Politicians are tempted to burden the state with ever more obligations (Micklethawait & Woolfdridge 2015). The modern State is a threat to liberty, freedom, but especially – and it is the worst part of the problem – to democracy. Democracy sometimes looks as if it were digging its own grave. According to the Freedom House report in 2000 there were 120 countries covering 63% of the world population that had political democracies. Today the numbers are lower. A worrying number of countries have rejected democracy for strongmen. Many people, supposing the Western state is out of fashion and inefficient, are fascinated by the alternative. The authoritarian models however have a problem: it is an elitist nanny, just – sometimes slimmer. In the case of China it is not even slimmer. They know democracy is a big part of the West's problem, but intellectual freedom is needed to come up with breakthrough ideas and broaden cultural freedom to have vibrant cultural industries. Far from being a splendid example of efficiency, China is a country where a fiscal crackdown is also likely. While the central government's debt is only 25% of GDP, the provinces have much higher debts. Fixing the machinery of the state also applies to the machinery of democracy. The spirit of the state servant and security bringer should be recapture. It can be done by subsidiarity. Subsidiarity is a security principle. It makes the single person more responsible. It empowers citizens, but especially subsidiarity decentralize the power stabilizing it. It preserves societies and governments, moving them away from deeper frictions. The European Union, our Common House, is under pressure. Support for the European project is falling drastically. We risk finding on the old Continent with old countries governed by old politics. The EU began as a project of elites. Having seen our continent destroyed by popular passions, our leaders wanted to design a machine that would keep those passions under control. The result is a complex giant with anti-democratic dynamics. Technocrats prefer technocrats and – as Pelanda (2013) pointed out in his book *Europa Oltre*- we discovered that it is true that a

common currency pretends a common government. However we also discovered that a common currency is not bringing us common government. Due to its incapacity to react to its procedures as well as the inadequacy of State governments and political elites, the EU was in the last decade close to falling apart. Unprepared, local, political elites are blaming the EU for all their inefficiency, while the EU is compromising and broadening its duties, thus becoming the target of citizens' dissatisfaction. The combination of inefficient states and a heavy, bureaucratic Union could result in a lethal poison.

4.2 Subsidiarity in the Treaty on European Union

Subsidiarity is a principle that *per se* should decentralize, discharge Brussels' burden and allow democracy to work efficiently, but after reading carefully through EU documents it will be easy to discover subsidiarity as unsuitably formulated. EU documents generally refer to the issue as a principle that governs the distribution of responsibilities between institutions of the Union and the Member States. According to the Treaty Preamble: "community institutions should have only those powers required to complete successfully the tasks they may carry out more satisfactory than States acting independently". The Treaty on the European Union, art.5(3) clearly states: "In area's which do not fall within the Union's exclusive competence, the principle of subsidiarity, laid down in the Treaty on European Union, defines the circumstances in which it is preferable for action to be taken by the Union, rather than the Member States". Moreover the official explanation of the principle that can be found on the EU Parliament (2013) website says that it "seeks to protect the capacity of the Member States to take decisions and to take action and authorizes intervention by the Union when the objective of an action cannot be sufficiently achieved by the Member States. (…) The purpose of including a reference to the principle in the EU Treaties is also to ensure that powers are exercised as close to the citizens as possible". The subsidiarity principle inside EU treaties is nothing else than the warranty of States' sovereignties. Instead of being a solution the EU principle is part of the problem. Subsidiarity becomes a limit. It does not push states to decentralize, to apply the same principle or to reshape themselves in order to survive. It does not pave the way to different networks of collaboration between the EU and the States' levels. Every day more stressed States stress the EU.

According to Juliet Lodge (1986) the principle is a safeguard against integration for integration's sake, something of which the Commission deep culpable in the past. Instead of being shaped for getting policies closer to the citizens, its meaning is misused, becoming the guard against countries refusing to act in common where it can be shown that common action could be more effective. Even Arturo Spinelli supported the subsidiarity principle as keeping open the possibility of advancing integration to ensure transition from cooperation to common action and a higher level of unity. It is, therefore, very far from being primarily a means of ensuring that policy-making will be devolved to the lowest, most appropriate level. Rather, it has to be seen against the concurrent allocation of competences between States and the Union. Herein lies the centripetal federal spectre.

Due to such restrictive interpretation political leaders tried to reshape the understanding of the principle with the Lisbon Treaty. It incorporated the principle of subsidiarity into Article 5(3) TEU, however it also added an explicit reference to the regional and local dimension of the principle of subsidiarity.

It is a first step in the right direction. In the future the interpretation shall be even more expanded according to the original meaning of subsidiarity. It shall become the crown principle ordering all the social and political relations within EU borders. If the divide between the political legitimacy of national parliaments and governments and the competences of the structures in Brussels continues to grow, incontrollable frictions may quickly arise. Devoid of decision-making powers but democratically responsible, local governments will put all the blame on the Union, using them as a scapegoat, which, on the other hand, does not answer directly to citizens. Support for the European project will start falling drastically and the system will come to a seemingly unexpected demise.

Subsidiarity does not affect the International Relations system, given that it does not favour one political order over another. Even if first mentioned as a defined object in the nineteenth century, it was always present in humankind history and many scholars tried to push subsidiarity in their political theories. According to Walter Ullman (1975) there are two competing theories of power in the Middle Ages: an ascending one and a descending one. In the descending theme of power, the authority of the king flows down from God and is therefore not dependent on any support or acceptance by the people. The ascending theme of power can

be traced back to Aristotele's theory of politics, and was recovered in the second half of the eighteenth century as part of the challenge to theocratic-descending ideas of government. In the free cities of northern Italy and Germany the ascending theme was combined with the idea that citizens were not subordinated to the power of the king, but had rights of their own. Citizens established political communities and had genuine claims for bottom up sovereignty. According to Ullman's theory of subsidiarity the elected or those representing the upper stage of the community are accountable only to the people. The Ruler is the representative of the people and is responsible to the people. Rulers must be able, and cannot escape, from deciding for the good of the State and for the good of their citizens. In order to do so, to do it in efficient and correct way, they cannot be overburdened by problems. The less they are under stress the better the decisions are made. The better they can decide the more stable a State is. The more stable the State is, the more citizens trust in it. Subsidiarity is about avoiding overwhelming the Ruler with issues that will hinder its efficiency. Only in this way the highest instance of a subsidiarity system will not avoid its accountability, a responsibility that must be carried out in respect of the rule of law, but also of higher ethics and without back-thoughts. Many times the Austro-Hungarian Empire was an example of multicultural cooperation based on subsidiarity. It was a leading example at least if compared with other contemporary states. Today the EU is many times far from being multicultural and as we have seen is very much far from being an example of efficient subsidiarity.

The EU should move forward, back towards subsidiarity.

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EU and its Member States' Competence Clash in the Field of the Internal Market

Janja Hojnik

Abstract The author argues that in a democratic legal system internal market may not be regulated without sufficient attention being paid to national autonomy and diversity. In this light the principle of subsidiarity requires a withdrawal from the ideal internal market goal and an orientation towards more workable solutions, which take into account that at the present state of integration European citizens primarily direct their legitimacy at their nation states. As the pure host-state approach, based on the principle of non-discrimination, may obstruct free movement of production factors, the author emphasises the importance of the principles of mutual recognition and state of origin. However, these principles enhance the prisoners' dilemma and horizontal competition between national legal orders. Accordingly, the author concludes that an adequate combination of decentralism and centralism is needed in market law.

Keywords: • Subsidiarity • Mutual Recognition • Country of Origin Principle • Decentralisation • Workable Internal Market •

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1 Introduction

In 2007, before the economic crisis even began, the internal market commissioner McCreevy emphasised in his speech in Sofia that *»we need to accept that the nature of the game has changed. (…) The Single Market must become more decentralised (…). We need to improve the ownership in the Member States. And we must strengthen cooperation between the national and EU level«* (McCreevy, 2007). Today this is even more vital, considering that the economic and migration crises strengthened Euro scepticism in most EU Member States, which is evident from increasing nationalism, lack of cross-border solidarity and negative attitudes towards imported goods and foreign workers and services providers. Despite the fact that decentralisation of the EU internal market is contrary to the basic principles of the EU legislation and the case-law from the past two decades and seems, from the legal point of view, rather ambiguous, it is a result of a multi-dimensional split in the EU. Thus, concepts as opposite as disintegration and fiscal union are discussed by both the European leaders and the public on a daily basis. Even though no reasonable person would experiment with the consequences of disintegration of the EU and although it is necessary for the EU to emerge from this crisis together, the EU must nonetheless provide such a form of future integration which will not stubbornly pursue centralism at any cost, but rather will strike an appropriate balance between the necessity of centralism while at the same time providing both its Member States and its nationals with as much autonomy as possible.

The objective of this paper is to highlight some legal approaches which might serve as a starting point for a more decentralised internal market – a market which, on the one hand, would facilitate the free movement and, on the other hand, safeguard the significant national values relating to the culture, tradition and the lifestyle of the people themselves. In this regard, the paper is designed as a contribution to discussions about the future priorities in the field of the internal market.

2 The EU Market Between the Forces of Unification and Diversity

It is beyond doubt that the function of the law is to provide appropriate protection for diverse values in a society. The establishment of an integrated global market and market deregulation have an accelerating effect on the changes both inside and outside the EU, thereby posing new challenges to the law. The last decades saw two different and, in terms of the content, opposite trends of how relations in the society are legally regulated: whilst the first reflects the fact that the exercise of power in many areas has been increasingly internationalised, the second represents a process of localisation, i.e. the emergence of ever stronger local and regional policies aimed at restoring a more direct democratic participation of individuals in the process of decision-making. These processes are especially complex in the EU, which is internally very diverse. In such a diverse system, the appropriateness of uniform rules for all is contentious (Macey, 1990: 281; Markovits, 1999: 189). The appropriateness of legal rules is namely measured by the standard of living in a specific area, considering that inhabitants of wealthier regions are prepared to pay more for health and environmental protection, as well as for public security, than inhabitants of poorer areas. Also, individual's tastes differ from one region to another, thereby influencing the suitability of legal provisions. The majority's attitude towards gambling or pornographic materials, for example, is dependent upon the religious and cultural background of inhabitants in that certain area. Likewise, direct geographical factors can sometimes influence the content of law.[1] This means that advantages and disadvantages of legal rules for inhabitants of certain regions vary and consequently, so does the optimum content of legal provisions (Goldsmith & Sykes, 2001: 790). Toggenburg has therefore metaphorically said that diversity is a wild and chameleon animal with thousands of heads that are hardly kept in a cage of a single legal principle (Toggenburg, 2004).

The internal market was established and completed as the Member States had reached consensus about the need to unlock the Member States' traditionally closed markets, thereby increasing the European economy's global cumulative efficiency. Since the internal market serves as the basis for the entire EU integration, it is questionable whether Member States still remain the subject of market decisions or whether instead the interests of the single market exclude all national responsibilities relating to market regulation. The Member States' institutions are, historically speaking, certainly the primary regulator of the market in their territory. However, the institutions of the EU, as relatively new

regulators of the internal market have, during the last five decades, acquired a central role in this sphere. In this context, there is a question of the proper relationship between these two levels of authority, which is reflected in the antagonism between the demands for some diversity on the one hand and the claims for complete unification of the legal rules in the internal market on the other. This relationship thus concerns the choice between institutional alternatives.[2]

3 Centralist and Decentralist Approaches to a Legal Regulation of the Market

The basic constitutional conflict in the field of the internal market is the dichotomy between centralism and decentralism (Snell, 2002: 32). These are two fundamental approaches to the legal theory when considering the issue of the constitutional legal nature of the EU internal market. Centralism in this context refers to a system in which the EU regulates most of the economic activities and where competences of the Member States are generally excluded (*laissez-faire approach*). Decentralism, on the other hand, refers to a system, in which most aspects of economic regulation are left to the Member States *(laissez-régler approach).* However, even under this approach, the individual Member States are still bound by the principles of free movement of goods, services, persons and capital. Decentralism as used in this paper therefore refers to a limited decentralism, as it is based on a limited autonomy of the Member States. Centralism presupposes a wide-ranging transformation of the internal market rules into a free trade commitment, where upon the market rules form a basis for economic liberalism, open market, and free competition. Decentralism, on the other hand, posits that the only purpose of the rules on free movement is to limit state protectionism and discrimination.

The central problem in this context lies in the fact that both models have their advantages and disadvantages. The centralist model can be inherently more stable in political and economic terms as well as more predictable. The three crucial advantages of a market regulated along centralist lines are the economy of scales, attainment of representativeness of smaller groups and a more appropriate manner of solving negative externalities. The economy of scale is based on the principle of reducing marginal costs and, as such, promotes competitiveness on a global scale; the concept can also be transferred to the field of exercising the

power, as separate financing of activities is often not the most efficient in cases of small local communities (more on this LeBoeuf, 1994: 566). Moreover, Goldsmith and Sykes suggest that the problem of decentralised systems lies in the fact that the political process might not implement policies that are in the best interest of the citizens as a whole.Therefore, an advantage of the centralised system is that it helps promote and facilitate participation and representation on the part of smaller interest groups so that their interests are not marginalized to the benefit of the majority groups. In other words, in a centralist model, smaller interest groups are able to more easily influence the political process, which of course is necessary for them if they are to achieve results favourable for them (Goldsmith & Sykes, 2001: 797). The third important advantage of the centralised system is its ability to manage externalities. Rational local authorities will decide to provide a certain good as long as its benefits are below the marginal costs; however, in the calculation concerned, they will not be interested in taking into account fully the out-of-state costs. In this regard it is useful to establish transnational institutions whose aim is not only to reduce the existing external costs but also to require in advance, via the centralised legislation, that states take into account the non-state interests in which they interfere by taking their own decisions (LeBoeuf, 1994: 568-569).

To the contrary, in *New State Ice Co. V. Liebmann (285 U.S. 262, 311 (1932))* U.S. Supreme Court Justice Brandeis issued a famous dissenting opinion in which he characertized states as laboratories of democracy. This seminal opinion explores the US constitutional ideal of limited federal (centralized) governments with power exercised in a decentralized level by the states. The advantages of a decentralised system can be summarised from a compact statement made by the U.S. Supreme Court Justice O'Connor *(Gregory v. Ashcroft 501 U.S. 452 (1991), 458):*

> »*This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.* (…). *Perhaps the principal benefit of the federalist system is a check on abuses of government power.*«[3]

It can be concluded from the above statement that whereas democratic values are of prime importance in the decentralist system, economic efficiency dominates in centralism. The principles of democracy and economic effectiveness thus often present contradictory values. Should one only choose economic efficiency as a factor of choice between the institutional alternatives, the choice will certainly be oriented towards centralism. On the other hand, if the main goal is preservation of national sovereignty, the decentralist approach will be given preference. In order to try to advance both goals, and when we are considering the various institutional alternatives on the market, it is important to establish an appropriate balance between centralism and decentralism.. Ever since the Treaty of Rome went into effect, economic arguments have prevailed in the internal market establishment process – market liberalisation to increase competitiveness and to achieve economy of scale which is comparable to the production of companies from Europe's competitive markets. In this process, however, it must be taken into consideration that market rules spread to very diverse legal fields and that such centralistic regulation is not always the most justifiable and may contravene the interests of diversity. Affirming the competences of decentralist authorities in certain legal fields may in this respect achieve greater democratic legitimacy of the adopted rules as it preserves diversity of the national rules.

4 Centralism in the EU Market Case-law and Legislation

Although the Court and the EU legislators in no respect advocate complete deregulation, the judgments of the Court and EU secondary legislation in the market field, in many aspects, reflect some level of disdain for the notion that the Member States should be equal partners in the field of international law, thereby considerably limiting their prospects to adopt or preserve diverse market rules. This, however, is disputable considering the undoubted orientation of the citizens towards the Member States as the primary forums of democratic activities.

The EU Court of Justice, which did not stress any political conflict and did not mention the problems relating to the distribution of competences between the Member States and the EU, could actually not refuse to provide constitutional decisions about the distribution of competences between the Member States and the EU relating to the field of the market (Poiares Maduro, 1998: 7). Different

interpretations of the rules governing the internal market namely must lead to determining what institutions should be responsible for regulating the said market (Poiares Maduro, 1998: 103-104. On the role of the EU Court in the process of legal integration see (Armstrong, 1998: 155). Accordingly, the broader the scope of the freedoms is defined, the more centralised the EU system. Thus, the EU Court of Justice functions as an arbiter between diversity and unification of the national rules regulating the market issues. By doing this, the Court's caselaw frequently interfered in the national rules that are a source of national pride, thus triggering nationals' indignation and fear of erosion of their traditional features (Steyger, 1997: 1). A demonstrative example of such disapproval was Italian protests when a praetor from Bolzano referred a question for preliminary ruling on the question whether the traditional Italian pasta rules are in accordance with the EU law. In Italy, a special durum-wheat *(grano duro)* has been used to prepare pasta. The Italian law prohibited marketing of any other kind of wheat. With the support of the Advocate General Mancini (Opinion of 26 April 1986 in the *case 407/85, Drei Gloken v USL Centro-Sud*, [1988] ECR 4233, ECLI:EU:C:1988:401), the Italian government maintained that the prohibition is necessary to protect the Italian customers from buying and eating low-quality pasta.[4] In his opinion, the Advocate General explained that only the Italians know the correct meaning of the words *"spaghetti", "vermicelli", "bucatini", "maccheroni", "rigatoni", "fusilli", "penne", "linguine", "orecchiette", "malloreddus"* etc.[5] Consequently, considering the importance of pasta in the lives of Italians, the Advocate General proposed that the Court confirms the Italian law on durum-wheat. However, the Court did not accept this reasoning and instead concluded that the law presented a (unjustifiable) measure having an effect equivalent to quantitative restrictions. The Italian market therefore had to permit the manufacturer of pasta made from different wheat (*case 90/86, Criminal procedure against Zoni*, [1988] ECR 4285, ECLI:EU:C:1988:403). This centralistic approach is not to be found in relation to the national food tradition only but rather in the national legal tradition in general.[6] It is nevertheless justified to claim that a traditional Italian buyer will continue to buy durum-wheat pasta only and that the market functions in accordance with its own laws influencing the (non-)existence of a certain product (Plauštajner, 2011: 32). However, the very forces of supply and demand, determined by price and quantity, will not necessarily protect the important national interests relating to the tradition and the Member States' desire to provide a high level of consumer protection as well as to maintain national peculiarities and avoid cultural assimilation.

Apart from the caselaw, the secondary legislation too often has led to erosion of national values. In this respect the Directive on units of measurement (Council Directive 80/181/EEC of 20 December 1979 on the approximation of the laws of the Member States relating to units of measurement and on the repeal of Directive 71/354/EEC, *OJ 1980, L39/40 – as amended)* is instructive. The Directive provides that meter is the official unit to measure length and that kilogramme is the official measurement for weight, not mentioning English units of measurement. Consequently, in 1994 Great Britain adopted new rules to amend the Weights and Measures Act of 1985, so as to prohibit the use of English units of measurement for commercial purposes, except as an ancillary label to the decimal units of measurement. This amendment was highly criticised in Great Britain. These criticisms probably may be explained by the opinion Napoleon expressed in relation to the changes of units of measurement proposed by the Paris Academy of science: *»Nothing is more contrary to the organization of the mind, of the memory, and of the imagination. (…) The new system of weights and measures will be a stumbling block for several generations. (…) It's just tormenting the people with trivia.«* (Seymour, 2001). What the French emperor refused was imposed on the British by the before-mentioned Directive, even though it was considered to be an attack on British culture. This conclusion finds support in the case *Thoburn and others (Thoburn v. Sunderland City Council, Hunt v. Hackney London Borough Council, Harman and Another v. Cornwall County Council, Collins v. Sutton London Borough Council*, [2002] EWHC 195 (Admin); [2002] 3 W.L.R. 247*)*, known as the *»metric martyrs«*, which challenged the legality of the changes in weights and measusrements before the English courts. Thoburn was selling fruits and vegetables using an English units of measurement scale, as this was more convenient for his customers, but was criminally prosecuted for this reason. Before the judgment was published, Thoburn said: *»All I did was sell a pound of bananas to a woman who asked for a pound of bananas – what's wrong with that?«* (Dunaway, 2001). The court, however, explained that while the judges realise that the parties before them are hard-working citizens, nevertheless *»(a)ll the specific rights and obligations which EU law creates are by the European Communities Act incorporated into our domestic law and rank supreme."* Lord Justice Laws added that *"our imperial measures, much loved of many, seem to face extinction".*[7] Neil Herron, spokesman for the Metric Martyr Defence Fund, said that the case showed that an Act of Parliament could be overruled by a "mere directive" from *"an entity, a gathering of unelected bureaucrats over which we have no democratic control" ('Metric martyrs' lose court battle, 2002).* The critics of the judgment also emphasised that it is

difficult to understand why it is hard to have an internal market with two units to measure weight, when the UK internal market functioned this way ever since 1864 (Judd, 2005).

Furthermore, Steyger similarly quotes the following words of a British member of the Parliament from the mid-eighties of the past century: *»The Europeans have gone too far. They are now threatening the British sausage. They want to standardise it, by which they mean they'll force the British people to eat salami and bratwurst and other garlic-ridden greasy foods that are TOTALLY ALIEN to the British way of life«* (Steyger, 1997: 1). Such reproaches of centralism are present throughout the development process of EU market law, most recently in the fields of financial services[8] and consumer protection regulation.

From the above considerations one can conclude that although the internal market is beneficial to all the Member States, its scope and effect upon other important national values, such as autonomy, tradition and culture, are contentious. Although a certain degree of uniformity and removal of hindrances is necessary for the EU economy, it still is an undeniable fact that the Member States are diverse and thus unnecessarily rigid rules are not always consistent with democratic ideals, which by definition try to meld divergent views of many. For this reason, it simply is not possible or desireable to choose between the various institutional alternatives on the EU market solely on the basis of economic efficiency.

5 Principle of Subsidiarity and the Internal Market

5.1 Subsidiarity as an Instrument of Flexible Integration

The disparity between the uniform market rules in the EU, on the one hand, and demands for democratic legitimacy on the other, was was recognized and addressed by the Treaty of Maastricht, which articulated the Member States' reservations about the enhanced integration through the principle of subsidiarity. This principle presents the foundation upon which the Member States may advocate decentralism and preservation of certain traditional rules and thereby retain some competences at the national level. This proximity principle requires decisions to be adopted as close to the citizens as possible and that in the fields that are not in its exclusive competence, the EU acts only when the Member States cannot achieve satisfactory results (see Article 5(3) TEU). Subsidiarity is thus the principle most thoroughly assuring democratic legitimacy of the decision-making processes in the EU and thereby diversity in the adopted rules (Scott & Trubek, 2002: 8). As Pernice found, subsidiarity in Europe is *designed "to preserve, to the possible extent, the cultural and political identities of the Member States that have decided not to merge into a great European "melting pot" governed by a centralist bureaucracy«* (Neuman, 1996: 573).

However, the problem with this principle is that it was included in the Treaties as a political compromise to assure acceptance of the Treaty of Maastricht by the Member States and not actually to limit competences of the EU institutions. This is evident, for example, from the Commission's opinion of 1992 that the four fundamental freedoms of the internal market fall among the exclusive competences of the EU (Commission Communication to the Council and the European Parliament, SEC (92) 1990 final, 27. 10. 1992; see also de Burca, 1999: 20; Toth, 1994) and in 1995 in *Bosman (Case C-415/93, Union Royale Belge des Sociétés de Football Association ASBL v Bosman,* [1995] ECR I-4921, ECLI:EU:C:1995:463., The Court concluded that fundamental freedoms, such as free movement of persons, are not subject to the subsidiarity review.[9] Nevertheless, after initial skepticism concerning the value of subsidiarity, legal theory gradually began to emphasise that subsidiarity should be considered more seriously (see Bermann, 1994: 332; Bernard, 1996: 633; Schilling, 1994: 203)[10] and thus recently it has intensively transformed from a political into a legal principle that should assure a more democratically legitimate EU legal system. In this respect also, the Lisbon

Treaty classified the internal market as an area of shared competences (see Article 4 TFEU), thereby formally recognising the importance of subsidiarity in the field of the internal market. These developments signify a mental leap towards a wholly more democratic EU system. The recognition that the internal market does not fall under the exclusive competence of the EU and that, instead, the EU and the Member States share their competences in this field, by itself does not present a threat to the proper functioning of the market. The balance of power certainly still remains in favour of the EU, which may limit the states' competences in this field. However, the EU's current dominance should not preclude a more active role in market regulation by the Member States, as principal stake holders in a well-functioning market of which all citizens have a vested interest, thereby recognising the proper role of the principle of subsidiarity.

The principle of subsidiarity is logically supplemented by the principle of proportionality, which requires that Union action must not exceed that which is necessary to achieve the objectives in question (see Article 5(4) TEU). Like the principle of subsidiarity, the principle of proportionality aims to set limitson economic liberalisation, as was explained by the EU Court of Justice in a matter relating to waste oils,(*Case 240/83, Procureur de la République v Association de défense des brûleurs d'huiles usagées*, 1985 ECR 531, ECLI:EU:C:1985:59. For a comment see Sauter, 1998: 62-63). *"the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest (…)"* (para. 12).

Below, certain general legal concepts are highlighted which might lead to a more decentralised internal market.

5.2 Legal Concepts that Accentuate Market Decentralisation

a) Multi-level Governance of the Internal Market

The main consequence of subsidiarity for the choice between institutional alternatives in the field of the internal market is in its requirement to limit centralism and to recognise the Member States' primary role for market regulation, but under the condition that they do not discriminate against people, goods and services from the other Member States. Recognising the important role that the principle of subsidiarity plays in the EU law leads to the view that

the internal market does not require a market of unqualifiedly uniform rules. This means that the principles of subsidiarity and proportionality work hand in hand to help promote what is termed »a level playing field«, which requires that all the issues relating to the single market be harmonised. What is required by both subsidiarity and proportionality in a broader sense as regards internal market is thus the recognition of the multi-level governance theory (Bernard, 2002: 3). As these levels are sovereign within the framework of their competences, none of them is able to fully subordinate itself to the other levels. One way of looking at this is that the multi-level governance system is at odds between the opposing centrifugal and centripetal forces, and the purpose of regulating the relationships among individual levels of government is to reach an appropriate balance between the contradictory ideas of unification and diversity (see McKinnon, 1997: 73-93; see also Oates, 2006).[11]

b) Permissible Interpretation of Delegation of Competence

In this respect both democratic and economic principles command that the EU institutions shape public law doctrines in such a way that the centre of democratic legitimacy in the EU remains vested in the Member States. This is especially true for interpretation of EU competences recognised in the TFEU. By way of comparison, the U.S. Supreme Court held in *Chevron (Chevron, U. S. A., Inc. v. Natural Resources Defense Council*, Inc., 467 U. S. 837 (1984)*),* that American courts should – in case the Congress has not expressly regulated the issue concerned – adopt permissible interpretation of delegation of competence from democratically more legitimate and responsible levels of government to those less legitimate. Farina described the hidden message of the court as follows: *»Deference is right not because it yields better answers, more efficient answers, or even the answers Congress would have wanted, but because it yields more legitimate answers. The Chevron mystique flows from this promise that the ordinary act of statutory interpretation can advance the larger process of reconciling agencies with constitutional democracy«* (Farina, 1997: 183). In this regard, in the EU, the principles of subsidiarity and proportionality also require that the courts, in cases where the aim of the Treaties with regard to a certain issue is ambiguous, apply the *»chevron type«* of interpretive presumption in favour of the restoration of national institutions' competences and thereby limit broadening of supranational institutions' competences. This should result in the limitation of the latter's normative autonomy if compared to democratically more legitimate Member States – be it in cases where there is ambiguity in the meaning of potentially conflicting EU and national laws or in cases where two possible

legislative bases exist for EU legislation, one requiring unanimity in the Council of EU and the other permitting majority voting (Lindseth, 1999: 699-700). Principles of subsidiarity and proportionality therefore command that within the EU a form of "*market preserving federalism"* is established.

c) Establishment of "Market Preserving Federalism"

Market preserving federalism refers to a concept developed by Weingast, who defined it as a sustainable system of political decentralisation, where the central government's authority to make economic policy must be limited, and instead entrusted to the lower political units (Weingast, 1995: 4-5; Weingast, Montinola & Qian, 1995: 55). According to Weingast, market-preserving federalism limits the degree to which a political system can encroach on markets. It simultaneously induces competition among the lower political jurisdictions while placing restrictions on the economic policy making authority of the national government. As such, market-preserving federalism has played a central role in the economic rise of those nations which have been the richest in the world and assured high growth rates in eighteenth-century England, the United States in the nineteenth and early twentieth centuries and contemporary China. Market decentralism is therefore not only more democratic than centralism, but can also be economically beneficial.

5.3 Country of Origin and Mutual Recognition Principles

The next path to strengthen Member States' role in the internal market regulation is to broaden recognition of both the country of origin principle (COP) and the mutual recognition principle (MRP) (see Jonsson, 2005: 15-17).[12] Both principles share similar meaning in the light of the principle of subsidiarity – i. e. curbing the need to have uniform legal standards, determined by the central EU institutions. Where these principles can function, harmonisation is not necessary. The principles present an avenue for assuring both access to the market and diversity of national market rules, since they enable free movement while the determination and enforcement of standards is decentralised. This aspect of the MRP has been underlined by the Commission in its 1999 Communication on mutual recognition,[13] by proclaiming that the MRP is consistent with the idea of a dynamic approach to the applicability of subsidiarity. Similar effects for the vertical relationship between the EU and its Member States are also achieved by the COP – however, with different effects as regards the (horizontal) relationship

between the Member States. The COP and MRP in this sense present a normative limitation of the EU. Both principles try to solve the problem of diverse national rules on the internal market on a different basis from centralised uniform rules. As such, they present a more democratic alternative to the centralistic regulatory model, considering that the rules of the level, which is closer to the citizens, are applied.

Despite that, MRP and COP in and of themselves do not imply an ideal model for regulating the EU internal market which could fully replace either the decentralist model (which is based on the host state's law) and the centralist harmonisation. This is the case because these principles place Member States in a dilemma similar to the prisoner's dilemma, thereby leading to competition between Member States (so-called competitive federalism – Poiares Maduro (1998: 133); Barnard (2013: 25-27). The result of this competition is that the market becomes the institution, which in turn determines the best regulation. The dangers of the »race to the bottom« can be avoided in a system in which the states have mutual trust in each other, which is certainly not the case in the present EU. This was especially evident in the cases of the Schengen acquis and the monetary union. That is why the internal market operation must not be completely subjugated to the COP and MRP. Instead, harmonisation rules, which must certainly be in line with the principle of proportionality, must continue to play an important (though subsidiary) role.

5.4 De Minimis Principle in the Field of the Internal Market

Furthermore, application of the *de minimis* principle in the field of economic freedoms should be considered as a potential instrument for enhancing democratic legitimacy of the EU internal market rules. As found by the U.S. Supreme Court in *Hughes v. Oklahoma (*441 U.S. 322 (1979)*), »the range of regulations that a State may adopt (…) is extremely broad, particularly where, as here, the burden on interstate commerce is, at most, minimal«* and as *Justice Frankfurter said in his dissenting opinion in H. P. Hood & Sons v. Du Mond (*336 U. S. 525, 567 (1949)*), "Behind the distinction between 'substantial' and 'incidental' burdens upon interstate commerce is a recognition that, in the absence of federal regulation, it is sometimes (…) of greater importance that local interests be protected than that interstate commerce be not touched."*

The *de minimis* rule is known in competition law and requires that the application of Article 101 TFEU (ex 81 EC) is subject to the agreements between the companies having a *significant* restrictive impact on competition. An agreement having only an insignificant (i.e. *de minimis*) effect on the competition falls outside the prohibition of restriction of competition and is thus permissible (*case 5/69, Franz Völk v S.P.R.L. Ets J. Vervaecke*, 1969 ECR 295, ECLI:EU:C:1969:35).[14] Such agreements will then be dealt with under the national law. In contrast to this, according to long-established caselaw, a national measure does not fall outside the scope of the prohibition in Articles 34–35 TFEU merely because the restriction which it creates is slight and because it is possible for products to be marketed in other ways (see joined cases *177/82 and 178/82, Van de Haar* [1984] ECR 1797, ECLI:EU:C:1984:144; *Case 269/83, Commission v France* [1985] ECR 837, ECLI:EU:C:1985:115; *Case 103/84, Commission v Italy*, [1986] ECR 1759, ECLI:EU:C:1986:229). A refutation of this position can be found in the opinion of Advocate-General Jacobs in *Lecler (Case C-412/93, Edouard Leclerc-Siplec v TF1 Publicité*, 1995 ECR I-179, ECLI:EU:C:1995:26*)*,[15] in which he held that in order to establish a violation of Article 34 TFEU (ex 28 EC), one has to prove a *"substantial restriction"* on access to the national market, a stand that reflect *de minimis* test (opinion, para. 42). In this context, Jacobs suggested that it would not be reasonable to use this test in all cases, particularly not in cases of presumptively discriminatory measures, but the Court nevertheless rejected his opinion in full and therefore a state measure can constitute a prohibited measure having equivalent effect even if: a) it is of relatively minor economic significance; b) it is only applicable on a very limited geographical part of the national territory; and c) it only affects a limited number of imports/exports or a limited number

of economic operators (see joined *cases 177/82 and 178/82, Van de Haar; case 269/83, Commission v France; case 103/84, Commission v Italy*).[16]

Nevertheless, certain national rules have been held to fall outside the scope of Article 34 TFEU, if their restrictive effect on trade between Member States is too uncertain and indirect. For example, the Court held in *Burmanjer (Case C-20/03, Burmanjer and Others* [2005] ECR I-4133, ECLI:EU:C:2005:307*)* that the national rules at issue, which made the itinerant sale of subscriptions to periodicals subject to prior authorisation, in any event have an effect over the marketing of products from other Member States that is too insignificant and uncertain to be regarded as being such as to hinder or otherwise interfere with trade between Member States (*Case C-69/88, Krantz* [1990] ECR I-583, ECLI:EU:C:1990:97; *Case C-93/92, CMC Motorradcenter* [1993] ECR I-5009, ECLI:EU:C:1993:838; *Case C-379/92, Peralta* [1994] ECR I-3453, ECLI:EU:C:1994:296; *Case C-44/98, BASF* [1999] ECR I-6269, ECLI:EU:C:1999:440). Furthermore, the applicability of Article 35 TFEU (ex 29 EC) was narrowed in *Italo Fenocchio (Case C-412/97, ED Srl v Italo Fenocchio*, 1999 ECR I-3845, ECLI:EU:C:1999:324*)*. It is evident from the holding in that case that as regards measures that have an effect equal to quantitative restrictions in exports, the *de minimis* test must be used, and under that test the remoteness of the effect of national rules on exports must be assessed (para. 11).

The signs suggesting that the *de minimis* rule is gaining ground can also be found in the field of free movement of services. In this regard, the *Viacom II (Case C-134/03, Viacom Outdoor Srl v Giotto Immobilier SARL*, 2005 ECR I-1167, ECLI:EU:C:2005:94*)* is authoritative. In this case, the parties disputed whether a special municipal tax on advertising by using posters was a part of a »service« which must be paid by the recipient of the service. The recipient of the service in the dispute concerned claimed that such a tax (which for him amounted to more than two hundred Euro) was prohibited by Article 56 TFEU *(ex 49 EC)*. The Court held that such a tax *»is fixed at a level which may be considered modest in relation to the value of the services provided which are subject to it«* and that *»the levying of such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services to be carried out in the territory of the municipalities concerned«* *(*Viacom, para. 38*)*. Accordingly, the tax was not in contravention of Article 56 TFEU, as it was neither discriminatory nor excessive. By examining the amount of the tax in proportion to the overall value of the services contract, the Court

has actually introduced the *de minimis* rule into Article 56 TFEU (Meulman & Waele, 2006: 226). Meulman and Waele thus conclude that at least as regards a service provision, in the future the test of permissible measures could be such that Article 56 TFEU would allow measures which *"apply without distinction, they either consist of minor obstacles to market access or failing that, affect in the same manner in law and in fact both bilateral and unilateral service transactions"* (Knez, 2007: 115). In this regard, the decision in *Viacum II* served as a basis for increased decentralisation in the field of the future regulation of services in the EU.

The *de minimis* rule, on the one hand, allows for a sensible mechanism to reduce centralisation in the field of the internal market and to balance free trade and national autonomy interests. Nevertheless, its application in this field is by no means without faults, which future Courts will need to deal with – including crafting a workable definition of the term *de minimis* in the field of market freedoms and other conditions for its application (e.g. non-discriminatory nature of the disputed national measures) (more in Hojnik, 2013: 25-45).

5.5 Workable Market Versus Ideal Market

An important step towards achieving a more decentralised market might be to strive for what is more realistically obtainable, namely a workable market, rather than a utopian ideal market, which has only limited (or no) prospects of success. As regards the competition law, the Court of Justice took a similar position a couple of decades ago. Thus, in the *Metro I (Case 26/76, Metro v Commission*, 1977 ECR 1875, ECLI:EU:C:1977:167*)*, the Court ruled that competition in complex markets requires certain restrictions in order to function effectively. It emphasised that the requirement that competition shall not be distorted (contained in Article 101 TFEU, ex Article 81 EC) implies *"the existence on the market of workable competition",* meaning *"the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market." (*para. 20*)*. In this regard, the Commission in its 1985 White Paper similarly espoused that a new strategy was needed which, apart from taking into account the objective of completing the internal market *per se*, would also have to support the objectives of constructing and expanding the market as well as its flexibility (COM (85) 310 final, OJ C 136, 1985, p. 1, para. 62). To consider other values besides the economic liberalisation the internal market may not be considered as a perfect market. As EU Judge Jann once said: *»Discussions must*

concentrate on the common market that truly exists and not on the ideal market that has no failures. The latter simply does not exist« (Interview with the Judge Jann, 2002: 100). Thus, the difference between a pure, ideal internal market and a workable internal market is not insignificant; in recognising the fact that there are differences between individual national markets, a workable internal market makes it possible to take into account certain differences in the internal market.

The EU can find a model of how to give precedence to the concept of a workable market over an ideal market by looking to U.S. market law. In many aspects, the U.S. Supreme Court was less strict in supporting the unification of the market law than the EU Court of Justice (Stein & Sandalow, 1982: 25).The EU law developed certain principles which not only prohibit protectionism and discrimination but also are aimed at an integration policy within the framework of which many national rules were abrogated despite the fact that facially they showed no elements of protectionism or discrimination. On the contrary, the U.S. Supreme Court emphasised as early as in 1978 that the test referred to in *Pike v. Church (*397 U.S. 137 (1970)), which held that the power of the states to pass laws interfering with interstate commerce is limited when the law poses and undue burden on business, actually prohibits protectionism, and therefore it was necessary to assess whether the disputed national measure is "*basically an economic protectionist measure, and thus virtually per se invalid, or a law directed at legitimate local concerns that has only incidental effects on interstate commerce*" (explained by the court in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). The US courts have held that under the Commerce Clause, the federalist system recognizes state power to reasoanbly regulate incoming commerce pursuant to legitimate local health and safety objectives, but only to the extent that the nondiscriminatory burden imposed on the national market place does not exceed the putative local benefits. In the *Pike v. Bruce Church* case, the court held that where a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerece is clearly excessive in relation to the putative local benefits. Subsequently, in *Arkansas Elec. Coop. v. Arkansas Public Service Commission,* 461 U.S. 375 (1983), the Supreme Court observed that, as regards the test referred to in *Pike v. Church*, the existence of economic protectionism is of crucial importance. In this case, the court held that economic protectionism is not implicated and the state regulation of the wholesale electrical rates charged by appellant to its members is well within the scope of *»legitimate*

local public interests« particulary considering that, although appellant is tied into an interstate grid, its basic operation consists of supplying power from generating facilities located within the state to member cooperatives, all of which are located with the state of Arkansas. Although appellee's regulation of appellants rates charged to its members will have an incidental effect on interstate commerce, *»the burden imposed on such commerce is not clearly excessive in relation to the putative local benefits.«*

Thus the caselaw shows that many measures which were brought before the EU Court of Justice for alleged violations of the internal market principles were the object of the national legislation in the USA and were not challenged from the point of view of a commercial clause. This point can be illustrated by referrence to a United States case relating to the sale of margarine. In *Plumley v. Massachusetts,* 155 U.S. 461 (1894), In *Plumley v. Massachusetts* (155 U.S. 461 (1894)), the United States Supreme Court considered whether a 1891 Massachusetts law, which banned the manufacture and sale of oleomargarine colored yellow to look like yellow butter produced from pure milk, violated the Commerce Clause of the United State's constitution. The state's interests in passing this criminal law was that the yellow coloring placed in the oleomargarine might lead consumers to wrongly believe they were purchasing butter. The Supreme Court confirmed the constitutionality of the state prohibition, holding that the statute did not interfere with interstate commerce but instead served the important function of protecting the people of Massachusetts »against fraud and deception in the sale of food products.«. The law did not prohibit the sale of oleomargarine altogether, just those forms of it which were colored to look like natural butter.[17]

Contrary to the Supreme Court's ruling in the *Plumley* case, the EU Court of Justice in *Walter Rau* (*Case 261/81*, 1982 ECR 2961, ECLI:EU:C:1982:382) refused to uphold a Belgian law which required all margarine to be sold in cubic packaging, unlike buttter, which did not need to satisfy this product requirement. The court reached this conclusion despite the rationale behind the rule, which was again consumer protection. Instead, the Court itself created a (high) standard of awareness of the European consumers, refusing to allow Member States to determine the level of consumer protection to be applied in their territories (see also *case C-315/92, Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC et Estée Lauder Cosmetics GmbH*, 1994 ECR I-317, ECLI:EU:C:1994:34; *case C-220/98, Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH*, 2000 ECR I-117, ECLI:EU:C:2000:8 and case *C-470/93, Verein gegen Unwesen in Handel*

und Gewerbe Köln e.V. v Mars GmbH, [1995] ECR I-1923, ECLI:EU:C:1995:224). Furthermore, in *Head v. New Mexico Board of Examiners (*374 US 424 (1963)*),* one of the parties owned a newspaper, and the other a radio station, in New Mexico close to the Texas border, and much of the area served by both the newspaper and the radio station lies in Texas. Both of them were enjoined by a New Mexico State Court from accepting or publishing within the State of New Mexico a Texas optometrist's advertising found to be in violation of a New Mexico statute regulating advertising by optometrists. The U.S. Supreme Court held that *»(t)he New Mexico statute, as applied here to prevent the publication in New Mexico of the proscribed advertising, does not impose a constitutionally prohibited burden on interstate commerce« (*pp. 374 U.S. 427-429*)* and that *»(t)he statute here involved does not deprive appellants of property without due process of law or violate their privileges and immunities of national citizenship contrary to the Fourteenth Amendment« (*p. 374 U.S. 432, n. 12*)*. On the other hand, however, in *Ker-Optika (Case C-108/09*, ECLI:EU:C:2010:725*)* the EU Court decided that Articles 34 TFEU and 36 TFEU preclude national legislation which authorises the selling of contact lenses only in shops which specialise in medical devices, although it is hard to see how the New Mexico and the Hungarian rules on trade circumstances in the optics sector differ in the degree of their respective burden on interstate commerce.[18]

In this respect it should also be mentioned, that in more recent caselaw the U.S. Supreme Court even signalled that some state or local protectionism is constitutionally permissible. In 2007, in *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007),* for example*,* the Court upheld county ordinances that required private waste management companies to deliver all of its solid waste to a public facility for processing at a local, municipally-owned facility, thereby displacing out-of -state private competition. Furthermore, only a year later the Court upheld a protectionist tariff on out-of-state municipal bonds, holding that states could tax the interest on municipal bonds issued by other states even when they exempt the interest on their own bonds (*Commonwealth of Kentucky v. Davis*, 553 U.S. 328 (2008)).[19]

The Supreme Court determined that Kentucky was not merely regulating the market by its disparate tax regime, but it was also participating in the market as an issuer of tax exempt bonds, thereby providing states with assurance that the application of a state income tax regime in which holders of tax exempt bonds issued by in-state issuers are afforded a tax exemption that is denied to holders of tax exempt bonds issued by out-of-state issuers is constitutionally permissible. The Supreme Court dismissed the premise that *»every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially an impermissible burden« (Hughes v. Alexandria Scrap Corp*, 426 U.S. 794 (1976), which in fact is in accordance with the renowned Dassonville formula under the EU law.[20] This does not imply, however, that the EU Court of Justice must always adhere to the rulings and reasoning of the U.S. Supreme Court in every case. However, the U.S. Supreme Court decisions do demonstrate that the internal market can operate well despite permitting a certain degree of state autonomy and that, indeed, this autonomy is also necessary in regulating the market with a tradition considerably longer than that of the European tradition.

5.6 »Increasing Revisionism«

Despite the EU Court's general commitment to further develop a perfect single market, it has recently been possible to observe a certain restraint or cooling of its activism,[21] so that the Court is slowly becoming more willing to preserve national autonomy and tradition. Also as regards the assessment of proportionality, the Court is increasingly willing to yield to national courts (see e.g. *case C-256/11, Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic proti Bundesministerium für Inneres*, 2011 ECR I-0000, ECLI:EU:C:2011:734, para. 72). In this regard, Judge Mancini described the EU Court's more recent caselaw as *»increasingly revisionist and not averse to blunting the conquests made in the previous decades (…) one is tempted to conclude that the Court has undergone a process of secularization. Realism is no longer a balance to passion; it has superseded passion and has become a synonym of minimalism«* (Mancini & Keeling, 1995: 406). Similarly, former EU Judge Jann once held: *»today the Court is aware that the judges must establish a balance for a successful market. At one hand, we must do all we can to remove barriers, at the same time, however, we must be aware that there are national interests that must be protected, even when this protection means keeping certain barriers in the functioning of the ideal internal market.«* Similar trends towards increased decentralisation can be noticed with the Commission, which in the summer of 2011 issued a Green paper (COM (2011) 436 final) stating that regional and local

markets are an essential meeting place for producers and consumers (p. 4-5); and, that distribution channels must be shortened by reasons of, *inter alia,* greater autonomy with respect to the agro-industrial sector, cultural and social point of view, and to preserve and support local tradition, etc. (c. 3.1.1.). Although, the Commission has to bear in mind that this tolerance must not lead to considerable economic protectionism and direct discrimination in the internal market, it can be concluded that the Commission is willing to accept less significant restrictions to the internal market which are necessary to grant enhanced legitimacy to the EU law in relation to the citizens and the Member States.[22]

6 Conclusion

The 2008 economic crisis has proven that the market cannot self-regulate. At the same time it is also proving that continuous neo-functional centralisation of issues that are market (un)related is causing consternation to the Member States as well as their citizens. For this reason their interests should in the future be considered more thoroughly, and further market centralisation should proceed with more caution and in a more measured way. The EU's orientation towards increased decentralisation of its internal market mainly requires considering the internal market as a territory without borders, governed by the limitless law of competition. The EU citizens' opinion on the integration will certainly depend on the impact integration will haveon their lifestyle and the national pride, even though the latter is manifested in things apparently as banal as sausages and pasta. Decentralisation does not necessarily mean partitioning of the market, but only reflects a more mature approach to the internal market in which individual levels of authority co-operate without excluding each other – i.e. in which the EU is actually considered as a multi-level governance system. Acknowledging the principle of subsidiarity in the field of internal market therefore requires consideration about the available institutional alternatives, in order to achieve democratically legitimate solutions as economically efficient as possible. The merging of the principle of subsidiarity and the internal market thus only marks the beginning of a complex discussion about the relationship between Member States and the EU and about the link between various values. In this context, it must be taken into account that neither a centralised nor a decentralised internal market will be liked by all – especially not by the companies operating in several Member States which, as a result of a more generally recognised national market autonomy and the importance of its culture and tradition, would have to adjust

to national peculiarities. Similarly, it would not be liked by national courts whose enhanced role in the application of the market provisions of the EU might cause them unwanted worries.[23]

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Notes

[1] Some time ago the Dutch government defended before the Court its Royal Decree that provided a certain percentage of vitamin D in margarine by saying that people form vitamin through sunshine, and in countries in which receive less sunshine, such as the Netherlands, individuals need to increase their vitamin D levels by consuming it through their food and that it is thus legitimate that the legislature addresses the vitamin shortage issue by means of law. *Case C-273/94, Commission v Netherlands*, [1996] ECR I-31, ECLI:EU:C:1996:4; (for a comment see Steyger, 1997: 1). The case came before the EU Court of Justice, because the Commission claimed that the disputed order should have been notified to it at the drafting stage as required by Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations. The EU Court decided for the Commission.

[2] The analyses of institutional alternatives arises from the assumption that the objective is already characterised by the very choice of institution. Accordingly, the answer to the question of who adopts certain rules already implies much about the contents of the rules thus adopted - Komesar emphasises: *"(…) the decision of who decides is really a decision of what decides"* (Komesar, 1994; see also Trachtman, 2001: 3; and Coase, 1998: 95–185).

[3] O'Connor interprets federalism as a decentralist form of governance as compared to a unitary system which was occasionally discussed in the USA as an alternative system.

[4] Pasta made of durum wheat namely does not stick together after cooking.

[5] Despite the fact that the Advocate General on the other hand acknowledged that the purpose of the Italian legislation is also to encourage production of hard wheat, which is in certain regions of Mezzogiorno the only successful yield.

[6] A demonstrative example of this is the removal of the real seat system as contrary to the freedom of establishment – see c*ase C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH* (NCC), [2002] ECR I-9919, ECLI:EU:C:2002:632. See also *case 65/81, Reina v Landeskredit Bank Baden-Württemberg*, [1982] ECR 33, ECLI:EU:C:1982:6, in which the Court subordinated national demographic policy to the free movement principles, without considering, whether the former effectively hindered the latter.

[7] See also *R v Secretary of State for Transport, Ex p Factortame Ltd* (No 2) (C-213/89) [1991] 1 AC 603, 658-659, where Lord Bridge Harwich emphasised the danger of a take-over of the national parliaments' sovereignty by the EU institutions assisted by the national courts enforcing EU law.

[8] EU has established a single European »rule book« for the financial market, dealing with prudential regulation, crisis management and market efficiency. More on this Wymeersch, 2010: 240; and Moloney, 2010: 1317.

[9] The Court has thereby rejected the argument of the German government that the principle of subsidiarity requires such interpretation of Article 45 TFEU that it does not bind private organisations, such as UEFA.

[10] Especially after the Court expressed its resistance to the principle of subsidiarity (e.g. *case C-84/94, United Kingdom v Council*, [1996] ECR I-5755, ECLI:EU:C:1996:431).

[11] Similarly, this multi-level governance system will have to be taken into account when establishing the future fiscal union within the EU. As a matter of fact, the arguments for a decentralised internal market clearly speak against a centralised fiscal union.

[12] The country of origin principle is an unconditional obligation to apply the home Member State law of the service provider, while the application of mutual recognition is conditional. Country of origin contains no comparison between the provisions home and host Member State. Member States can also always try to justify a restriction to the free movement of services as a mandatory requirement. The most important difference seems to be that mutual recognition, at least when applying the narrower discrimination test, includes a comparison between the laws of the Member State where the service provider is established, and those where the service is provided. The law of the host Member State still apply, even if only to the least restrictive extent. No such comparison is carried out under the country of origin principle. The country of origin gives the home Member State exclusive competence, with derogations though, to regulate a service provider. The broad, obstacle based, discrimination test has not replaced the narrow discrimination, based on comparison, in ECJ case law. Thus, mutual recognition seems to give Member States, and national courts faced with a cross border conflict, greater possibility to apply national regulation.

[13] Mutual Recognition in the Context of the Follow-up to the Action Plan for the Single Market. Communication from the Commission to the Council and the European Parliament, COM (1999) 299 final. See more in Fichtner, 2006.

[14] See also Notice on Agreements of Minor Importance, OJ C 368, 22.12.2001, pp. 13-15. The *de minimis* doctrine has been derived from the rule under the Roman criminal law called »*De minimis non curat praetor*«.

[15] See also his opinion in case *C-112/00, Schmidberger v Austria*, 2003 ECR I-5659, ECLI:EU:C:2003:333, para. 65, where he held that: »*It would seem for example out of the question that a brief delay to traffic on a road occasionally used for intra-Community transport could in any way fall within the scope of Article 28. A longer interruption on a major transit route may none the less call for a different assessment.*«

[16] See also European Commission, Free movement of goods, Guide to the application of Treaty provisions governing the free movement of goods, 2010.

[17] Alabama also determines production conditions for margarine – in order for margarine to be able to be sold in the market of Alabama, it has to contain, *inter alia*, 9,000 American units of vitamin A per one pound of weight, unless the margarine concerned is an ingredient of other products (Acts 1943, No. 501, p. 475, §2.). Compare with *Case C-273/94, Commission v Netherlands,* [1996] ECR I-31, ECLI:EU:C:1996:4.

[18] The cross-border sale of alcoholic beverages is quite another story in the U.S. interstate trade. The majority of the U.S. states prohibit direct import of alcoholic beverages from other states to the consumers without a special permit which would be difficult to justify under the EU law – see Douglas, 2000: 1619.

[19] The trial court ruled for Kentucky, relying in part on a "market-participation" exception to the dormant Commerce Clause limit on state regulation. The State Court of Appeals reversed, finding that Kentucky's scheme ran afoul of the Commerce Clause. For a comment see Williams & Denning, 2009.

[20] The Dassonville formula describes a broad interpretation of Art. 34 TFEU (ex Article 28 EC) to include all trade measures or trading rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, into Community trade as measures having an effect equivalent to quantitative restrictions – see *Case 8/74*, *Procureur du Roi* v. *Dassonville,* [1974] ECR 837, ECLI:EU:C:1974:82.

[21] This is evident from the case Keck (joined cases *C-267/91 and C-268/91, Keck and Mithouard*, [1993] ECR I-6097, ECLI:EU:C:1993:905) and both tobacco cases (*case C-491/01, BAT*, [2002] ECR I-11453, ECLI:EU:C:2002:741, and case *C-376/98, Germany v European Parliament and Council*, [2000] ECR I-8419, ECLI:EU:C:2000:544). Further such cases are e.g. case *C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberburgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, ECLI:EU:C:2004:614; *case C-210/06, Cartesio Oktató és Szolgáltató bt,* [2008] ECR I-9641, ECLI:EU:C:2008:723 and *case C-208/09, Ilonka Sayn-Wittgenstein,* ECLI:EU:C:2010:806**.**

[22] In this context, both the EU Court of Justice and the Commission must take into account the fact that Article 27 TFEU (*former Article 15 EC Treaty*) has so far remained unchanged despite all the amendments to the Treaty of Rome. This is a provision obliging the Commission to comply, when drafting proposals aimed to reach its goals relating to the internal market, with the positions which certain economies might be obliged to maintain, due to differences in their development, during the process of establishing the internal market - Oliver, 2010: 12.21 and 12.22.

[23] See e.g. Queen's Bench Division case *W. H. Smith Do-It-All and Payless DIY Ltd v Peterborough City Council*, 1990 (2) CMLR 577 – where Mustill LJ argued strongly against the notion of cost-benefit analysis whereby the courts had to weigh the interests of free movement against the 'socio-cultural' objective of the measure in question. This was considered a matter of political, legislative choice, whereas for courts *"the task would be difficult to the point of impossibility in any but the simplest case"*. Mustill LJ asked rhetorically: *» How could (say) a desire to keep the Sabbath holy be measured against the free-trade economic premises of the common market?«* See more in Rawlings, 1993: 309.

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Protection of Human Rights, Minority Rights and Respect for Cultural Diversity

Vera Klopčič

Abstract The article deals with the legal scope of minority protection, in a historical and comparative context. The issues of the creation of legal standards of minority protection at the international level, the legal status of minorities in Slovenia and the legal protection of the Roma community in Slovenia are particularly highlighted. In recent times, numerous declarations have been adopted on the importance of cultural diversity, the fight against prejudices, racism, xenophobia, and intolerance. Those areas are decisive for the successful integration of vulnerable communities, in particular, Roma and migrants. The author concludes that international documents, as well as the recommendations adopted in the process of monitoring the implementation of international documents, encouraged a dialogue at the political and institutional levels on legal status and improvement of the situation of minorities in Slovenia.

Keywords: • Human Rights • Slovenia • Protection of Minorities • Cultural Diversity • Roma •

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1 Introduction

The protection of human rights, minority rights and respect for cultural diversity occupies a broad area both within the contemporary academic, expert and theoretical discourse as well as in the scope of normative activities as well. In recent decades, interest for these issues significantly increased and became not only a topic for research and studies of various scientific disciplines but also a challenge for the creators of policy documents and strategies aimed at promoting cultural diversity, pluralism and eliminating prejudices and intolerance. These are the areas which prof. dr. Silvo Devetak had discussed in his work and became a well-known expert in both Slovenia and abroad. By his sincere and expert engagement, he made a decisive contribution to upgrading the legal protection of national minorities and all other non-recognized ethnic communities, ensuring respect for human rights and human dignity for all. As early as the 1980's he managed to shine a bright spotlight on the issue of education for co-existence in multi-ethnic societies within the OECD project, which resulted in the international conference and publication.[1] In my life and professional career, I had the distinct privilege to work with him in a wide range of fields, covering the protection of minorities, non-discrimination, introducing concrete proposals and activities for the improvement of the situation of new minorities, including Roma and migrants in Slovenia and neighbouring countries.[2] From this exhaustive list I have selected two thematic subjects for this article:

1. The general approach to the minority protection, particularly in Slovenia.
2. Legal regulation, normative framework and measures for the integration of the Roma.

Research on the legal protection of minority rights has a long tradition in Slovenia, which is manifested in numerous publications, research studies, and debates. The entire functioning of the Institute for Ethnic Studies in Ljubljana, which was established in 1925, is aimed at examining the situation of minorities in Slovenia and abroad, especially in neighbouring countries, and in improving

[1] Devetak, Silvo (ed.), Klopčič, Vera (ed.), Novak-Lukanovič, Sonja (ed.). Vzgoja in izobraževanje v večkulturnih družbah = Education in multicultural societies, (Razprave in gradivo, 18). Ljubljana: Inštitut za narodnostna vprašanja, 1986. 441 pp.

[2] Therefore, it is a privilege for me to have opportunity to present some of these activities and results achieved. However, I mentioned only some of the most important issues which marked our cooperation. List is of course not completed.

the situation of minority communities.[3] Prof Devetak was very active also at the international level, participating, among other things, within the group of legal and other experts and diplomats from Slovenia who proposed and had participated in the preparation of the text of the UN Declaration on the Rights of Members of National or Ethnic, Religious and Linguistic Minorities. In 1980, the Institute for Ethnic Studies organized a conference with the international participation of renowned and famous experts at Brdo pri Kranju on the consensus already reached in the drafting of the text of the UN Declaration.[4]

2 Legal Standards of Minority Protection

Many described the eighteenth-century as the "century of the birth of the rights of citizens", following the historical creation of the concept of human rights in Europe. The theory of the collective dimension of ethnic self-determination of nations as groups prevailed in the twentieth-century– the so-called " century of nations" - when great importance was ascribed to the ethnic principle and to the right of self-determination. Protection of national minorities based on territorial presence gained high attention as a political issue in interstate relations and the system of international protection of national minorities was created. After WWII, the individual dimension prevailed within the scope of universal protection of human rights. One of the results of the ambiguous approach toward minority protection within the normative framework of the United Nations is also a lack of the officially accepted definition of the term "national minorities" at the international level. In the late 1970's, the Special Rapporteur Francesco Capotorti, (1979) proposed the draft definition of the term "national minority" within the framework of the United Nations in his famous "*Study on the rights of persons belonging to ethnic, religious, and linguistic minorities*":

> *"a minority is "a group numerically inferior to the rest of the population of a State, whose members - being nationals of the State- possess ethnic, religious or linguistic characteristics differing from the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language" (*Capotorti, 1976: 5).

[3] Prof. Devetak was director of the Institute in the years 1978-1989 and leader of the project about Slovene national identity and Slovene minorities in neighbouring countries. He was also a member of the UN CERD Committee, which works in the framework of monitoring the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.
[4] The results are published in the issue of Razprave in gradivo, 1980; No. 11-12.

Two decades later, in 1995, the Framework Convention for the Protection of National Minorities/FCNM/, within the Council of Europe, established the role of minorities in the democratic societies within the scope of international protection of human rights. The FCNM, for the first time in history, managed to combine individual and collective dimensions in the unique concept of minority protection. The Convention is the first universal and compulsory international legal document on national minority protection. Its signatories have assumed the obligation to create adequate conditions for the expressing, preserving and promoting of national minority identity. The Convention also strives to provide an atmosphere that is conducive to the promotion of tolerance and dialogue, which in tandem help nurture cultural diversity and, ultimately, the enrichment of every society.

Currently, we are witnessing processes of associating and disassociating societies, which influence also the interpretation and context of the minority protection. On the one hand, supranational forms of integration at the global level are gaining strength. On the other hand, new states following the model of "national state" are being established, strengthening and promoting various connections at both the micro and local levels, based primarily on the principle of common ethnic origin.

3 Minority Protection in Slovenia

In analysing the social context of the policy for the protection of minorities in politics in general in Slovenia, in the period since independence, it should be emphasized that the legal regulation is in substance based not only upon the respect of individual human rights for everyone but also on ensuring collective rights only for some specially defined groups. All inhabitants of Slovenia are entitled to the enjoyment of all human rights without discrimination (Article 14 of the Constitution of the Republic of Slovenia). This principle is further buttressed by the Protection Against Discrimination Act (2016), which ensures the protection of every individual against discrimination irrespective of gender, ethnicity, race, language, religion or belief, disability, age, sexual orientation, sexual identity and sexual expression, social status, property, education or any other personal circumstance (hereinafter: personal circumstance) in various fields of social life; in the exercise of human rights and fundamental freedoms; in the exercise of rights and obligations; and, in other legal relations in the political,

economic, social, cultural, civil or other fields. Both the Constitution and the Penal Code of the Republic of Slovenia prohibit the promotion of racial, religious intolerance. In fact, the Penal Code deems the violation of equality or the dissemination of ideas on the superiority of races as criminal offenses.

All individuals have the constitutionally protected right to express their culture, use language and script, and to express their religious beliefs (Art. 61 of the Constitution), all of which serve to incentivize the preservation of cultural and religious diversity. The content of the art. 61 of the Constitution is included in documents on the realization of the public interest in the field of culture, functioning of libraries, Radio Television of Slovenia, media and laws on education. The following general aims of education are designed to promote mutual tolerance:

- *ensuring the* optimal *development of the individual irrespective of gender, social and cultural background, religion, national affiliation, and physical and mental constitution;*
- *education for mutual tolerance, awareness of gender equality, respecting diversity and cooperation with others, respect of children's rights, human rights and fundamental freedoms, equal opportunities for both sexes, and thus the ability to live in a democratic society;*
- *ensuring equal opportunities for development and education of children from socially less enabling environments.*[5]

The quoted objectives are of the utmost importance for establishing the intercultural dialogue and respect for cultural diversity in Slovenia. All pupils learn about the characteristics of national minorities and the Roma community within the regular curriculum.

Apart from this universal approach to the respect of human rights and non-discrimination, the Constitution lists three minority communities (Italians, Hungarians, and Roma), and additionally provides them with the collective, special rights designed to preserve their individual ethnic identity, language, and culture. Several legal acts in the field of education, culture, political participation, etc. relate to the realization of special rights of the three minority communities.

[5] Organization and Financing of Education Act (official consolidated text) (ZOFVI-UPB5), Page 1830, Official Gazette RS, No. 16/2007 from 23. February 2007.

The legal order gives them special rights and more favourable treatment compared to other residents, which is referred to as "positive discrimination". Funds for exercising these rights are provided from the state budget. Regulation in the legal field is based on the territorial principle, which means that special rights are exercised in the areas traditionally inhabited by these communities. Therefore, the special status of the three minority communities (Italians, Hungarians, and Roma) in individual areas, where they traditionally reside, is defined by sectoral laws and municipal statutes. For example, the Promotion of Balanced Regional Development Act (Official Gazette RS, No. 20/2011) states in Article 14:

> *In preparing the regional development programmes, agreements for the development of regions and measures of regional policy, the specific needs for the development of areas in which members of the autochthonous national communities and the Roma community in Slovenia live, shall be taken into consideration.*[6]

Some sectoral acts contain specific Articles that regulate activities on nationally mixed territories. Thus, for example, the Librarianship Act (Official Gazette RS, No. 92/15) mentions in Article 25 the special role of general libraries in nationally mixed regions:

> *"General libraries in nationally mixed regions shall also provide library activities devoted to members of the Italian and Hungarian national communities and the Roma community. These libraries shall provide members of these communities' communication in their own language.*
> *General libraries referred to in the preceding paragraph shall prepare programmes of activities in agreement with representatives of the national communities.*[7]*"*

[6] Unofficial translation, V.K.
[7] Unofficial translation, V.K.

4 Historical Overview, Legal Status, and Integration of Roma Community in Slovenia[8]

4.1 Historical Overview

According to the historical data, Roma began to settle permanently in Slovenia in the seventeenth and eighteenth centuries.[9] Based on linguistic and other research, the majority of experts consider that the Roma came to Europe from India more than a thousand years ago.[10] Some scholars disagree, however, and take issue with the presumption that India is the Roma homeland. These scholars observe, for example, in support of their scepticism, that the linguistic evidence of the Indian origin of Roma is flawed (Jezernik, 2005: 28). Nevertheless, in the past, in relation to the majority population, Roma people were defined by their nomadic way of living. People linked the Roma people to stealing, begging and criminal activities in general, such as running illegal businesses, which in turn lead to their stigmatization as a group. Throughout history, rigid measures have been adopted both for their forced settlement in individual areas and for their outright expulsion from other areas. Roma communities took root mostly on the isolated settlements and were excluded from social life. The more detailed description of their special lifestyle is delineated in the Decree of the Ministry for Interior from 1916:

> *This decree considers gypsies as nomadic people with a traveling way of life, who do not have a residence, and travel, alone, with families or in groups, to gather means of subsistence by carrying out traveling crafts and trading or by begging or in another irregular manner (*Klopčič, 2007: 38).

The authorities persecuted them and tried to deter them from their nomadic way of life and "force them to work". During the Austro-Hungarian Empire, for example, a number of regulations were adopted to suppress the "Gypsy plague".

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[8] In accordance with the conclusions of the first World Romani Congress (1971) and Slovenian constitutional terminology, the term Roma is used in text, and in the context of citations from the historical documents, the original terminology of documents is quoted.

[9] Based on the direction of arrival, we distinguish three main groups of Roma: Roma in Prekmurje region that settled from Hungarian direction, Roma in regions of Dolenjska, Bela Krajina and Posavje who arrived from Croatia, and Sinti in Gorenjska region.

[10] In the research in this field there are some questions unanswered and a comprehensive approach is still missing. Due to development in integration of results of different disciplines and collection of new data, some leading Roma activists themselves acknowledge that in recent years they changed some points in interpretation on the history of migration and origin of Roma (Hancock, 2006: 69).

The message of the district headquarters in Rudolfovo (today Novo Mesto) from July 25th, 1900 is clear in this respect:

> *All the gypsy children obliged to attend school should be announced by the mayor to the respective district school councils or school leaders to admit them to school. Parents of these children are asked to take care of the necessary dress. Gypsies, who will not send their children to school, should be announced to the district school council. The main part is, for the mayor to force gypsies to work* (Klopčič, 2007: 39).

4.2 Legal Status and Measures for Integration of Roma Community in Slovenia

Today, Roma in Slovenia are traditionally inhabited mainly in the regions of Prekmurje, Dolenjska, and Bela Krajina. They still live on the edge of poverty and on the margins of society. The majority of traditionally settled Roma live in Prekmurje in the municipality of Murska Sobota (settlement Pušča) and in the vicinity of Novo Mesto in Dolenjska region. Roma, who arrived from other parts of the former Yugoslavia, mainly live in major industrial centers: Maribor, Velenje, and Ljubljana.

The provisions on the legal status and protection of Roma community have the character of the constitutive obligations for the Republic of Slovenia at various levels of protection that are complementary to one another:

- ensuring universal human rights and non-discrimination;
- granting special rights of the Roma community as an ethnic group; and
- protection and positive measures to achieve real equality and integration of the Roma community in Slovenia.

The legal basis for regulating the status of the Roma community in Slovenia derives from the constitutional provision of Article 65 of the Constitution of Republic of Slovenia, which is a fundamental legal basis for further regulation by laws and statutes. Article 65 is included in the Chapter on human rights and fundamental freedoms:

> *The status and special rights of the Romany community living in Slovenia shall be regulated by law.*[11]

Compared with the constitutional regulation of the position and special rights of the Italian and Hungarian national communities, which are listed exhaustively by Article 64 of the Constitution of the Republic of Slovenia, Article 65 is modest, since it does not define the collective and individual rights of the Roma community and its members, but instead provides the legislator with nearly unbridled discretion. Until 2007, this constitutional provision was interpreted in two ways: as a mandate to adopt a special law on the Roma community or as a possibility for the situation to be regulated by individual articles in sectoral laws. In 2007, a special law on Roma was adopted, while certain specific areas are regulated in individual articles in the systemic laws, granting special rights to the Roma community. The general approach is based on the presumption that due to the historical circumstances and the poor socio-economic situation of the Roma in the present, the provisions on the equal treatment of each individual are not a sufficient guarantee for the social inclusion of the Roma. Legal bases for improvement of the position of Roma, and for their integration, are designed not only as protection of Roma as a special ethnic community but also as a social disadvantaged social community as well. Therefore, the provisions of the National Programmes of Measures for the Roma and Roma Inclusion Strategies include a more detailed set of measures to improve the status and to promote the integration of Roma.

The *Roma Community Act* (2007) defines the roles to be carried out both by the national authorities and by local self-governing communities in the realization and financing of the special rights of Roma community and regulates the organization of the Roma community at the national and local levels. Article 2 of the Act states that, in addition to the rights and obligations that belong to all citizens of the Republic of Slovenia, special rights are provided to the members

[11]Constitution of the Republic of Slovenia, Official Gazette RS, no. 33/91.

of the Roma community by law[12], due to the special status of the Roma community in the Republic of Slovenia. The provisions on individual segments of protection of the rights of Roma community are covered by fourteen Acts, governing various substantive areas including, among others, education, culture, and political participation.[13]

Roma in Slovenia are defined as an ethnic community and do not have the official status of the "national minority". Nevertheless, upon ratification of the Framework Convention for the Protection of National Minorities, the Slovenian government stated that, in accordance with the Constitution of the RS and its domestic legislation, the provisions of the Council of Europe's Framework Convention for the Protection of National Minorities will be applied to autochthonous Italian and Hungarian national minorities, and to Roma community, living in Slovenia. The protection of national minorities in Slovenia is based on a territorial principle, which means that special rights are guaranteed to national minorities only in areas traditionally inhabited by them. This principle also applies to the concept of the protection of the Roma community. However, the constitutional provision in Article 65 does not distinguish between indigenous and non-indigenous Roma living in Slovenia. Despite this fact, the implementation of the territorial principle in legal regulation, and in practice in some areas of protection, has led to differential treatment of indigenous and non-indigenous Roma in Slovenia. This is the case, in particular, regarding the normative regulation of specific collective rights, i.e. the political participation of Roma at the local level and the institutional cooperation of representatives of the Roma community, which is linked to the area of traditional settlement. By adopting amendments and enhancements of the Local Self-Government Act in May 2002, the political participation of the Roma community on the local level, and a right of members of Roma community to at least one representative in the

[12]Roma Community in the Republic of Slovenia Act (ZRomS-1), adopted by the Government of the Republic of Slovenia on March 30th 2007 (it was published in the Official Journal of RS No. 33/07), came into force on April 28th, 2007.

[13] These are: Local Self-Government Act, Local Elections Act, Voting Rights Register Act, Organization and Financing of Education Act, Pre-School Institutions Act, Elementary School Act, Media Act, Librarianship Act, Exercising of the Public Interest in Culture Act, Promotion of Balanced Regional Development Act, Radiotelevizija Slovenija Act, Financing of Municipalities Act, Cultural Heritage Protection Act, and Criminal Code of the Republic of Slovenia.

municipal council, is limited only to those municipalities where the Roma are traditionally settled[14].

Various ratified international documents also impose the obligations to improve the situation of the Roma community in Slovenia and to abolish the discriminatory treatment of non-traditional groups of Roma. For instance, the Committee of Experts for the implementation of the Charter for Regional or Minority languages in the second Evaluation report on Slovenia, among other things, addressed the issue of the disparate status of traditionally and non-traditionally settled Roma and encouraged the Slovenian authorities to harmonize the level of provision for Romany for all speakers of this language.[15] At the international level, a noticeable trend is that the Roma should be treated as a national or ethnic minority. In the Recommendation No. 1557 (2002) "The legal situation of Roma in Europe", the Parliamentary Assembly of the Council of Europe calls upon the member states to guarantee equal treatment for the Romany minority as an ethnic or national minority group in the field of education, employment, housing, health and public services.[16]

The concept of positive discrimination of Roma in Slovenia, which began in the early 1980's, has constantly evolved and improved through a combination of research, theory and policy measures designed for granting additional special rights for the integration of Roma. This positive evolution is reflected, for

[14] Act Amending the Local Self-Government Act (ZLS-L), Official Gazette RS, no. 51/2002 in the new Article 101 a states: Municipalities of Beltinci, Cankova, Črenšovci, Črnomelj, Dobrovnik, Grosuplje, Kočevje, Krško, Kuzma, Lendava, Metlika, Murska Sobota, Novo mesto, Puconci, Rogašovci, Semič, Šentjernej, Tišina, Trebnje and Turnišče are obliged to provide a right to Roma community to have one representative in the municipal council of the Municipality of their settlement by the regular local elections in 2002.

[15] "Committee of Experts has been informed that some groups of Romany-speakers, such as the Roma in Maribor, are excluded from certain special protection measures, including measures designed to improve Romany-speaking children's access to education, on the grounds that they have arrived in Slovenia more recently. Bearing in mind that the Charter protects languages, as opposed to minorities, and that Romany in Slovenia is protected as a non-territorial language under the Charter, the Committee of Experts encourages the Slovenian authorities to harmonise the level of provision for Romany for all speakers of this language". Second Evaluation report on Slovenia (2007: para 69).

[16] In the Recommendation No. 1557 (2002) "The legal situation of Roma in Europe", Parliamentary Assembly of the Council of Europe recommended to the States to: (d) to develop and implement positive action and preferential treatment for the socially deprived strata, including Roma as a socially disadvantaged community, in the field of education, employment and housing (e) to take specific measures and create special institutions for the protection of the Romany language, culture, traditions and identity and (f) to combat racism, xenophobia and intolerance and to ensure non-discriminatory treatment of Roma.

example, in the adoption of legislation as well as in the preparation and implementation of government measures and strategies aiming to improve the situation of Roma as a socially disadvantaged group in various areas of social life. In 1995, the Government of the Republic of Slovenia adopted the Programme of Measures for Helping Roma, covering the activities of national authorities and public services in this field. Due to the fact that the majority of the Roma population suffer from inadequate living conditions and consequently are socially vulnerable, the National programmes of measures for Roma focused mainly on the regulation of living conditions, employment, and education. The National Programme of Measures for the Roma 2010-2015 was adopted in 2010. These Measures defined not only the obligations of ministries and offices but also addressed the steps to be taken for improving the situation of the Roma including the elimination of intolerance and raising social and cultural capital in Roma settlements. A new National Programme of Measures for the Roma 2017-2021 was adopted in 2017. These new Measures summarize the long-term objectives of the 2010-2015 programme, and define the integration and education of the Roma as a priority. There are also other governmental social inclusion programs as well as a whole set of anti-discrimination legislation that also play an important role in improving the situation of the Roma as a vulnerable social group. It is important that awareness-raising starts in elementary school. In the textbook for the 8th grade of the primary school, for example, the following text refers to the Roma in Slovenia:

> *"In 2007, the Republic of Slovenia protected the Roma in the Slovenian territory by a special law (Article 65 of the Constitution of the Republic of Slovenia). Roma and Sinti began settling on Slovenian territory in the 17th century. The 2002 Population Census showed more than 3,000 members of the Roma community. The number is probably much higher. However, the public denunciation of Roma is still subject to many prejudices in Slovenia. Most Roma lives in the regions of Prekmurje and Dolenjska. Roma communities are quite different from each other in cultural and linguistic terms. Slovenia actively strives to improve the living conditions in Roma settlements, the access of Roma people to education and employment, and their political representation in local authorities (Roma counsellors in municipal councils*[17]."

[17] A textbook for the subject Citizen Education and Ethics for 8th grade of primary school.

5 Conclusion

In the historical context, the recognition of the values of multiculturalism and respect for human rights and ethnic identities as an expression of cultural wealth means a new character in the regulation of the inter-ethnic relations in Slovenia. In this regard, there is agreement among human rights activists, as well as numerous experts and practitioners of government policies. Less consensus of thought exists regarding the measures necessary and required to promote and implement these goals, especially relating to the troublesome and difficult issue concerning the elimination of racism and prejudices. Regardless of the number of documents that proclaim the "right to be different", on the declarative level, some groups, particularly Roma and migrants, are still marginalized and victims of hatred and violence. Despite the progress achieved, Roma and migrants are still vulnerable groups, exposed to discrimination and racism, which is manifested in the public sphere and expressed through various forms of xenophobia, stigmatization, and marginalization.

In general, we could observe that while the activities taking place on the international scene encouraged changes at the political and institutional levels of regulation of the status of some communities, still, there is a long way to go and much remains to be done in order to achieve optimal results in changing the negative attitudes toward the Roma and in fostering better inter-community relations. International instruments in the field, particularly FCNM, can help in providing a roadmap on how best to overcome difficulties in the process of confrontation of theoretical achievements of different disciplines with the situation in practice and to identify and evaluate indicators of progress in comparative perspective. In any case, we can conclude that quoted expert activities in the last decades at least served to create a platform and open a dialogue for constructive discussions involving controversial ideas concerning the essential dimensions and models for improvement of the minority protection in the context of pluralism, elimination of prejudices and multi-ethnic co-existence Slovenia.

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Legal Remedies in the Environmental Law

Rajko Knez

Abstract The article offers an overview of the present legal remedies scheme in the field of the environmental law and the nature conservation law. It starts from three levels system of legal remedies scheme – national level, EU level and the international level. This approach is combined with the procedural viewpoints, in private interest and in public interest. To these two pillars the constitutional remedies are also added. Emphasis is given to non-governmental organisations (NGOs), which act as agents (alter egos) of the environment and the nature. It is of the utmost importance to ensure at least certain involvement of the NGOs in the decision-making procedure, especially in the administrative, but also in the judicial processes. Locus standi and access to the court are of core importance. The article explores and critically assesses the development of the locus standi for NGOs on the international, and especially the EU level.

Keywords: • Environmental non-governmental organisations (NGOs) • Legal Remedies • Environmental Law • Access to the Court • Aarhus Convention •

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1 Introduction

The notion of *legal remedies* concerns the legal procedures available to secure certain rights. It comprehends notions that are broader than only access to the court. It refers not only to the actions of the individuals, but also to the competences of the authorities to secure rights that advance the greater public interests. For this reason, modern legal systems differentiate between *legal remedies in both the private* and *public interest*. In addition to these two main pillars of legal remedies, there are usually also *constitutional* legal remedies available (if a certain country has a Constitutional Court wich possesses such competences).

Beyond these two, or sometimes three, main pillars, legal remedies are regulated also on the international level. In Europe, the two most important judicial bodies are the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). This is a general structure.

However, within this general framework there are also significant variations, i.e., solutions which vary from state to state, among national legal systems (like the rules regarding individuals' access to the court; the competences of national authorities regarding legal remedies in public interest; and, procedural and substantive law conditions to secure certain rights, etc.). However, it is common from the comparative view that certain areas of law are regulated in disparate fashions. This is also true in the case of legal remedies and access to the court in matters pertaining to the environment.

There are several particularities and elements which distinguish the environment, and procedures which refer to environment law provisions, from other areas of law. Namely, rights and obligations to secure protection of the environment are intended to benefit the environment itself (rights) and individuals (obligations) need to obey those obligations. This is the case because the environment, as a titleholder of rights, by itself cannot enforce those rights because as a non-person it logically cannot be a party to any legal, i.e. administrative or court, proceedings.

In order to safeguard environmental rights, when individuals breach environmental regulations it is usually the state, acting to protect the public interest, that has the competences to take necessary enforcement action against

the individuals in breach of the environmental regulation. However, sometimes even the state can be derelict in its obligations to protect the environment, such as, for example, by failing to adopt necessary rules to protect the environment; adopting rules which are insufficient to protect the environment; or, by failing to take appropriate actions (i.e. procedures) against individuals (when needed) for their failure to comply with environmental rules and regulations. In all such cases the environment is going to suffer damage due to the state's failure to adequately carry out its legal mandate to protect the environment for the public good.

In such cases, the role of non-governmental organisations (NGOs) is crucial, as they act as the agent (*alter ego*) of the environment. However, if the access to administrative and court procedures is restricted to NGOs, it is unlikely that they will be of any help. Since the role of NGOs is crucial in the field of environmental law, it is also important to secure for them access to legal proceedings, i.e. administrative, judicial, constitutional and also international legal proceedings. It is from this prospective easier to understand the importance and the role of the *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matter* (hereinafter *Aarhus Convention*).[1] It is also therefore understandable that NGOs should have wider and easier access to legal proceedings than individuals (except in cases where they must act to secure their own legal rights in the sphere of environmental law). Even the Aarhus Convention does not mandate *actio popularis* (United Nations Economic Commission for Europe, 2014: 198).

This article provides an overview of the legal remedies available in the field of environmental law both in the public and private interest realms. Further on, it discusses, constitutionally speaking, the access to international legal reviews to safeguarding the environmental protection rules.

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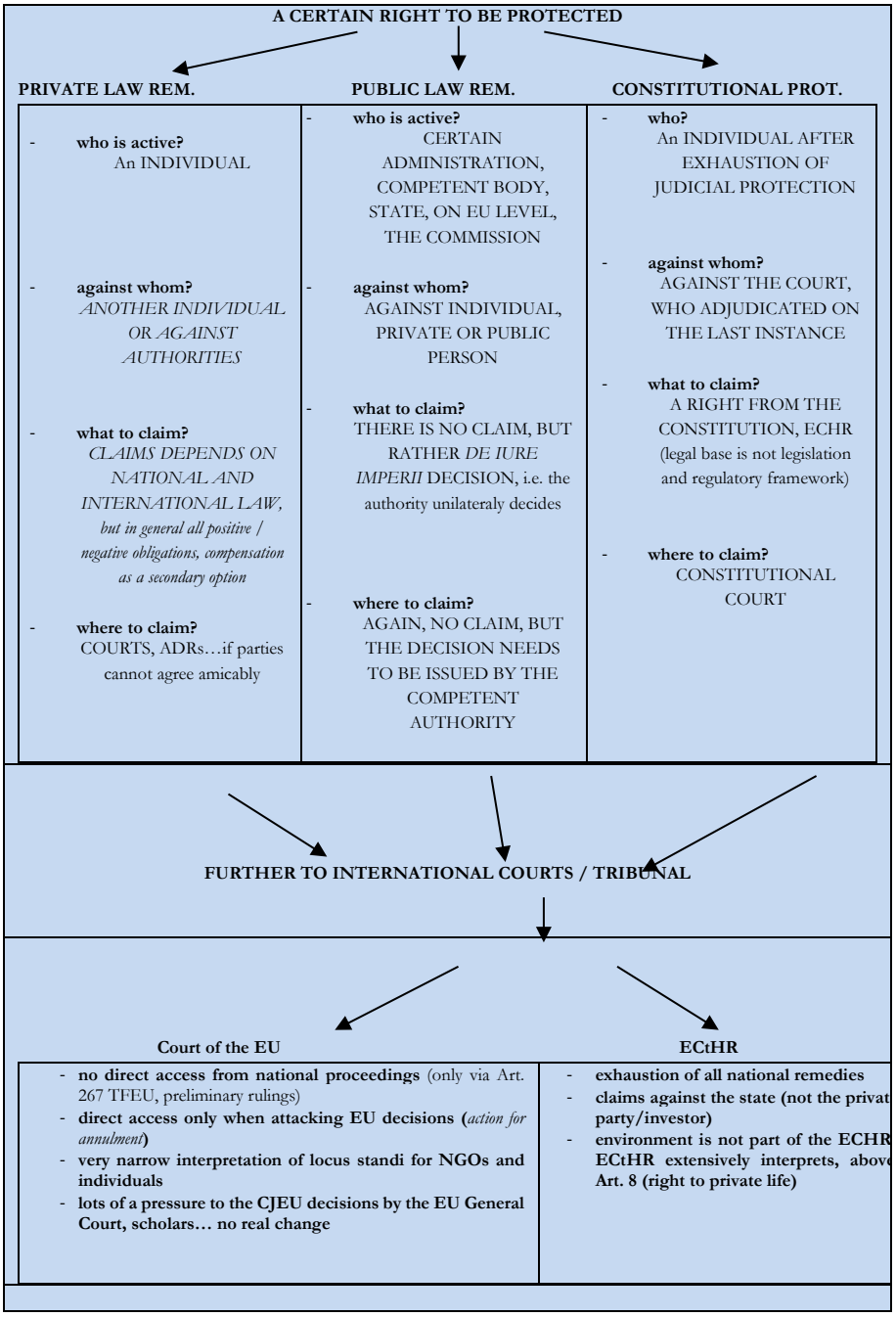
[1] The full text of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in the appropriate language can be found at UNECE (The United Nations Economic Commission for Europe) web page: http://www.unece.org/env/pp/treatytext.html (12.7.2016).

2 An Overview of Available Legal Remedies in the Field of Environmental Law in Europe

2.1 Introduction

As noted above in the introduction, the starting point of this article is an overview of the framework of legal remedies which exist in most countries in modern legal systems. We shall first explore legal remedies *in public* and *in private interests*. The framework can also be presented in the following sketch:


A CERTAIN RIGHT TO BE PROTECTED
PRIVATE LAW REM.
PUBLIC LAW REM.
CONSTITUTIONAL PROT.
- who is active? An INDIVIDUAL
- against whom? ANOTHER INDIVIDUAL OR AGAINST AUTHORITIES
- what to claim? CLAIMS DEPENDS ON NATIONAL AND INTERNATIONAL LAW, but in general all positive / negative obligations, compensation as a secondary option
- where to claim? COURTS, ADRs…if parties cannot agree amicably
- who is active? CERTAIN ADMINISTRATION, COMPETENT BODY, STATE, ON EU LEVEL, THE COMMISSION
- against whom? AGAINST INDIVIDUAL, PRIVATE OR PUBLIC PERSON
- what to claim? THERE IS NO CLAIM, BUT RATHER DE IURE IMPERII DECISION, i.e. the authority unilateraly decides
- where to claim? AGAIN, NO CLAIM, BUT THE DECISION NEEDS TO BE ISSUED BY THE COMPETENT AUTHORITY
- who? An INDIVIDUAL AFTER EXHAUSTION OF JUDICIAL PROTECTION
- against whom? AGAINST THE COURT, WHO ADJUDICATED ON THE LAST INSTANCE
- what to claim? A RIGHT FROM THE CONSTITUTION, ECHR (legal base is not legislation and regulatory framework)
- where to claim? CONSTITUTIONAL COURT
FURTHER TO INTERNATIONAL COURTS / TRIBUNAL
Court of the EU
- no direct access from national proceedings (only via Art. 267 TFEU, preliminary rulings)
- direct access only when attacking EU decisions (action for annulment)
- very narrow interpretation of locus standi for NGOs and individuals
- lots of a pressure to the CJEU decisions by the EU General Court, scholars… no real change
ECtHR
- exhaustion of all national remedies
- claims against the state (not the privat party/investor)
- environment is not part of the ECHR ECtHR extensively interprets, above Art. 8 (right to private life)

2.2 Legal Remedies in Private Interest (Private Law Remedies)

It will usually not be an obstacle for individuals to enter into any legal proceedings, whether administrative or judicial, assuming the individual's own rights are at stake; i.e. a right impacting the individual's legal position. An individual's rights may have a positive or even negative effect on the environment. For instance, assume a case where an individual would like to obtain a building permit. Logically, a building permit touches upon three opposing interests – that of the individual seeking the permit; third persons opposed to the permit, as negatively impacting their legal interests; and, the interest of the environment, itself. This is an example of a proceeding where the individual would like to secure a right which is negative to the environment. However, in a case where an individual is a party to an administrative proceeding to obtain a building permit, but a third party individual intervenes in the proceeding because the proposed new construction by the individual seeking to obtain the building permit will decrease the value of the third party's immovable property (for instance – granting of the requested building permit will enable construction of a factory, which will pollute the environment), then the third party will simultaneously act to protect both his own interests and those of the environment. However, in (frequent) cases where no third party exists to oppose the party seeking the permit, the environment can only be safeguarded through intervention by the state (within the proceeding of issuing the building permit). The problem arises, however, in cases where the state – at the legislative and/or in the administrative level - fails to intervene to ensure that the interests of the environment are adequately protected.

Most cases are decided with the national administrative procedures although rules that are (originally) not national are also applicable. Namely, on the one hand, EU environmental law is regulated by directives and they need to be implemented into the national legal order. That means that both individuals and the State must rely on the rights and obligations that are stipulated under national law. This is true even though the directives originally are adopted by the EU. On the other hand, the ECHR and case law from the ECtHR also needs to be taken into account by administrative and judicial authorities, meaning that, like the EU law, decisions (judgements) issued by the ECtHR are directly applicable in all levels of decision making and adjudicating procedures at the national level and also *ex officio*. The latter is true for both the EU law and decisions by the ECtHR.

The question of which EU legal remedies will be applicable arises only in cases where EU institutions are competent to decide on individual rights and obligations (mostly by the decisions) and to adopt general environmental measures. This is the reason why the national level is the primary level for individuals to claim rights under EU environmental law and for NGO's to claim rights on behalf of the environment. The national level is discussed first, while the level of the EU legal remedies is given less emphasis, because, as is discussed below, the EU level is not particularly accessible to plaintiffs seeking legal remedies in EU environmental law.

2.2.1 National Level

Legal remedies in private interests form the first pillar (see the sketch above). Under this system, the individual can request that his rights be enforced as a primary claim and, as a possible secondary claim, that compensation be awarded. What exactly constitutes a primary claim depends upon the nature of the claim. It might be a claim to stop a nuisance; it might be a claim to reduce emissions; or to stop pollution; or to assure a healthy leaving environment; or to pay restitution, etc. What can be claimed is dependent upon the particularities of each individual legal order and its substantive law. As long as the legal remedy is closely connected with the individual, or if a legal remedy pertains to the individual's legal status and legal position, the procedural law will, most likely, allow him to enter into the procedure, whether administrative or judicial. If a claim is directed towards another individual (like an investor, a neighbour, a polluter, etc.), the access to the court shall be assured (in case the parties cannot amicably settle their dispute).[2]

On the other hand, if a claim is directed towards the authorities, an individual will have to start the administrative procedure first (except in case of claims for compensation). Namely, if the national legal order offers individuals certain legal remedies to be provided by the state, an administrative procedure must be instituted and at the end of that procedure a decision is issued by the authorities. If an individual is not satisfied with the decision of the authorities, he can start a review procedure and, subsequently, a judicial procedure, i.e. the administrative dispute procedure in which the individual can claim the administrative decision

[2] Access to other forms of dispute resolution are usually also possible, like arbitration proceedings, mediation proceedings (ADR), etc. ADR is, however, usually not guaranteed under constitutional or international law.

should either be modified or annulled. It is up to national legal orders to regulate administrative disputes, irrespective of whether they consist of one or two-stage procedures. The administrative procedure is of paramount legal importance since it provides the individual an opportunity to initiate a claim for a legal remedy against the state.

Access for entry into the administrative dispute (claim against the state and its authorities) is not always easy. This is also the case in the field of environmental law. The environmental regulatory framework is very comprehensive, and it goes hand in hand with the fact that often the state also acts as the investor for infrastructure projects which it is administering in the environment. Also, the state acts as a custodian of the environment and many decisions need to be adopted *ex officio* (for instance in the fields of waste management, water management, nature protection, etc.) In numerous situations, the state makes decisions which either directly or indirectly impact the environment and/or nature. It is both unrealistic and impractical to think that each individual should have the right to attack state decisions relative to the environment and nature at the court. A contrary view would most probably cause the collapse of the system and legal chaos. Therefore, the opportunity for judicial review of state decisions in environmental law matters is usually quite limited. Individuals have the right to challenge state decisions only in narrowly prescribed cases where, for example, the state decisions directly impact the individual's rights, such as personal rights, property rights, etc. (for instance, if the state acts as an investor and plans to build a road that would cross the individual's property). In these narrow bands of cases, the individual will be able to argue that either the state plans should be declared invalid (i.e. annulled) or, alternatively, that the individual is entitled to fair compensation for the lost property. However, in such a proceeding, the individual safeguards his own legal interests and not those of the public. Regarding a claim to defend the public interest, the individual will, in most legal systems, not have standing to the administrative or judicial proceedings. On the contrary, only organisations and groups of individuals forming so called non-governmental organisations, whose aim is to safeguard the environment, are have standing to assert the legal claim. This will be discussed in more detail below.

Allowing access (standing) to the courts for individuals to assert non-personal claims against the state is, as indicated above, unimaginable and would also impose (beside above reasons and legal chaos) enormous administrative burdens

on the courts because of the increased volume of cases it would have to process. Therefore, no such right exists, nor is it authorized under the Aarhus Convention (it does not assure the access to the courts for individuals when claiming rights in the public interest against the state, i.e. it does not require *actio popularis*). The same approach has been taken by the CJEU under Art. 263 of the Treaty (TFEU, Action for annulment). If an individual would like to annul a decision of a certain EU authority, it can access the CJEU only in cases where the EU authority's decision directly impacts and concerns the individual. In other cases, the individual lacks standing. Individuals seeking review had to fulfil the conditions contained in the so-called *Plaumann test,*[3] which strictly provides that an act of general application had to affect them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision. The *Plaumann* formula has survived even after the last change of the treaty, and retains its vitality in cases involving decisions in the field of environmental law. Such an approach can be accepted as being rational. The approach is different, however, in cases involving NGOs.

The reason for treating individuals differently from NGOs is because, as noted earlier, NGOs act as agents of the environment (alter ego) and they seek to advance the interests of the environment as opposed to their own. This is their most important distinctive feature.[4] When it comes to NGOs, the *Aarhus Convention*, (and correlatively the obligation of the EU and Member States), obliges both the national and EU legal orders to allow them standing to both administrative and judicial proceedings. In this vein, Arts. 6 and 9 of the Aarhus Convention are of paramount importance. However, based on the jurisprudence of the CJEU, one can agree with the observations of some scholars that the judicial attitude towards the NGOs in the field of environmental law does not follow the spirit of the Aarhus Convention. The jurisprudence is rather conservative (and also national legal orders generally follow in the footsteps of the EU approach). There are many scholarly articles that explore this issue.[5]

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[3] Case 25-62, Plaumann & Co. v Commission of the European Economic Community, ECLI:EU:C:1963:17.

[4] Of course, NGOs can also claim rights that belong, or should belong, explicitly to them, as a legal person, an organisation, and not the rights that would safeguard the environment and the nature. The above statement does not refer to these kind of situations.

[5] The author proposes at least: Schoukens, 2015, which states: "*In a similar manner, the admissibility threshold put forward by the CJEU in its renowned 1963 Plaumann-ruling requires a private party to prove that he or she is in a unique position in relation to the contested administrative or legislative EU act. Not surprisingly,*

Before discussing NGOs standing at national, supranational and international court, let us first discuss paths to the later two courts. An individual can access the supranational level of justice in two basic ways: one is a path to the CJEU and the second is a path to the European Court of Human Rights (ECtHR) in Strasbourg. Each of these two options are discussed in turn below.

2.2.2 The ECtHR Level

Another possible way to gain access to the international level in order to adjudicate environmental law cases is by asserting a claim against the State at the ECtHR. The ECtHR is a court which adjudicates on the substantive legal grounds and which has its own convention (ECHR). There is no specific mention about the environment in the ECHR. However, rulings made by the ECtHR have extended Arts. 2 (right to life) and 8 (right to private life) also to the cases involving environmental protection.[6] According to Art. 35 ECtHR, the plaintiff first shall make use of all legal remedies available at the national level. In this way, the national legal system (especially the national judicial system) has the ability to render a judgment consistent with the ECtHR. If the plaintiff believes this is not the case, he can initiate a procedure at the ECtHR. (Substantially) exhausting all

this rigid interpretation, which has been consolidated by the EU courts ever since, bars public interest organisations, such as environmental NGOs, from directly challenging EU acts before the EU courts. In itself, this would matter little if the possibility to indirectly challenge EU acts through national proceedings – which are subsequently brought before CJEU via the preliminary ruling procedure – would effectively counterbalance this lack of direct access to EU courts in environmental cases. However, even if the EU acts are implemented through national rules, national environmental proceedings often face important obstacles too, such as limited standing at national level and reluctance by the national courts to refer the matter to Luxemburg, turning this detour in an ineffective alternative to direct access to EU courts. The direct position of the environmental NGOs before the EU courts stands in marked contrast with recent international developments in the field of environmental justice. By ratifying the 1998 Aarhus Convention in 2005,the EU committed itself to guaranteeing sufficient access to justice in environmental matters. As is widely known, the Aarhus Convention calls for the recognition of a number of procedural rights for individuals and NGOs with regard to the environment. In order to ensure compliance with the EU's obligations under the Aarhus Convention, the European Parliament and Council passed Regulation *(EC) 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies ('Aarhus* Regulation'*). Some welcomed the Aarhus* Regulation *as a significant step forward in the pursuit of better access to justice at the EU level. However, until today, the internal review procedure has not been particularly successful in altering the predicament of environmental NGOs to the better. Indeed, a quick glance at the recent administrative application of the internal review procedure reveals that most requests for internal review filed by environmental NGOs were rejected by the EU institutions. In most instances, it is upheld that the contested acts do not constitute measures for which internal review is foreseen.*"

[6] Art. 8 of ECHR: "*1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*"

national legal remedies means, at a minimum, that a certain amount of time will be needed to complete the national judicial and (perhaps, in case of the competences) constitutional procedures. However, the ECtHR would like to encourage national courts (primary administrative authorities) to consider the ECHR.

There is bit more activism in the decisions of the ECtHR, especially because the ECtHR was obliged to invoke environmental law cases under Arts. 2 and 8. The ECtHR implicitly recognises that the above-mentioned articles of the ECHR include both a right to live in a healthy environment and to receive information about any real or threatened harm to the environment which may affect those individuals entitled to enjoy the rights guaranteed in both articles.[7]

The ECtHR is not a legislator and the states, having taken part in creating the ECHR, are themselves required to include those rights (the right to live in healthy environment and to receive information) in those already listed under the ECHR (García San José, 2005: 67-68); i.e. the ECtHR jurisprudence needs to be taken into account in national administrative (and, of course, judicial) proceedings. The ECtHR refuses to expand upon the environmental dimension of rights, other than those guaranteed in Art. 8 of the ECHR, and in fact has restricted the protection of Art. 8 to cases where the nucleus of the right guaranteed is clearly affected by the environmental interference (e.g. health). The nature of the right at stake, along with its importance for the individual, seem to be the main factors which would reduce the margin of national discretion. For instance, not only the right to respect private and family life but also, and in particular, the applicants' right to sleep at night which, undoubtedly, is closely linked to their right to health.

[7] Nevertheless, the ECtHR is also struggling with interpretations which would allow individuals easier success in cases of damages related to the environment and human health. Namely, one of the biggest problems usually is submitting sufficient proof to establish the element of causation. For instance, it can be problematic to prove that a cancer was caused by pollution. In the case *Tătar v. Romania* (application no. 67021/01), the ECtHR held unanimously that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, on account of the Romanian authorities' failure to protect the rights of the applicants, who lived in the vicinity of a gold mine, to enjoy a healthy and protected environment. The ECtHR awarded the applicants 6,266 euros (EUR) for costs and expenses. It dismissed, by five votes to two, their claim for just satisfaction. Since the ECtHR found no causal link between the health deterioration of Tatar junior and the pollution, no damages whatsoever were awarded. On this point judges Zupancic and Gyulumyan dissented. Their partial dissent offers an intriguing critique of a rigid adherence to classical causal thinking, as opposed to more modern probabilistic theories. In these cases of exposure to toxic materials, the dissenting judges stated that absolute causality is almost impossible to prove in practice. See also paras. 105-106 of the judgment on this point.

Thus, what is relevant is not so much the objective gravity of the interference suffered by the individual but whether, and to what extent, a right essential to him is affected by that interference. There is a dual aspect in the ECtHR's approach: horizontally, by considering other rights in the ECHR as susceptible to being associated with an environmental harm (e.g., the right to physical integrity (Art. 3) or the right to the peaceful enjoyment of one's possessions (Art. 1 of Protocol No. 1); and also vertically, that is, assuming that those rights which the court has confirmed could be the object of an interference as a consequence of environmental pollution, and that there may be a violation not only when the core of the right is affected but also in its normal and broader content. Thus, where Art. 8 is affected, not only environmental interferences in the applicants' health but also in their well-being should be considered when judging a breach of such provision (García San José, 2005: 68-69).

The ECtHR, nevertheless, interprets Art. 8 very broadly and the ECtHR has found that Art. 8 applies to a wide array of everyday matters impacting the environment and health including industrial emissions and health, exposure to nuclear radiation, natural disasters, passive smoking in detention, environmental risk and access to information, industrial pollution, mobile phone antennas, noise pollution like air traffic, neighbouring noise, road traffic noise, wind turbines and wind energy pharms, industrial noise pollution, rail traffic, emissions from diesel vehicles, urban development, waste collection, waste management, waste treatment and disposal, water supply contamination, etc.[8] One can notice that the areas and the issues to which the jurisprudence of the ECtHR refers, is regulated both by EU and national legislation.

It is therefore necessary, when dealing with cases in national procedures, administrative or judicial, to consider also jurisprudence of the ECtHR. Standards, adopted by the ECtHR, need to be incorporated into the decision-making procedures, administrative and judicial proceedings, and the conclusion might be that at the national level, three legal systems need to be simultaneously applied: *(i)* national provisions, being of legislative nature and also of constitutional nature, *(ii)* the EU law (in same cases rules needs to be applicable – direct effect - or at least consistent interpretation needs to be taken into

[8] For list of cases and there legal summaries, see fact sheet on environment and ECHR, http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf (2.7.2016).

account) and (*iii*) thirdly, also the ECHR together with the jurisprudence of the ECtHR.

This is rather complex. To this, whenever application of the EU rules are to be applied, the political, social, and economic rights enshrined in the Charter of Fundamental Rights of the European Union also need to be taken into consideration. This complicated legal framework can be confusing to even trained lawyers. One then can easily imagine that individuals, lacking legal training, might be quite lost in the complicated maze of legal rules that are applicable (often simultaneously) to a given case. What has been said is true for the substantive aspects of the law that need to be applied to the case, but there is also a procedural view. This is a bit easier. Namely, whenever procedures are commenced at the national level, the path to the ECtHR only leads through the substantive exhaustions of all national legal remedies (Art. 35 ECHR), including the constitutional legal remedies.

3 Conditions for NGOs to Seek Environmentally Related Rights

As discussed above, the NGOs play a paramount role in safeguarding the environment and nature. NGOs must intervene to protect the environment as its agent since the environment cannot claim (i.e. protect) its rights by itself and further since the environment's "official representative" (state authorities) might not represent its best interests all the time. The keenly important role of the NGOs is all the more important when we stop for a moment to consider that under the current framework individuals do not have access to legal remedies except in those farily limited cases where they would like to protect their personal legal rights which might also have, directly or indirectly, positive effects to the environment. However, individuals might (often) like to obtain certain rights which are not for the benefit of the environment. On the contrary, based on these facts, one can be sure that individuals cannot act in the public interest for the sake of the benefits of the environment. This explains why environmental NGOs are extremely important for the protection of the environment and why it is important for them to have access to different administrative and adjudicating processes at both the national and international levels. This further explains why further dialogue is necessary to help improve the overall framework of the legal remedies in the field of environment law, as touched upon below.

The starting point for an explanation of the legal status of the environmental associations andtheir possibilities to have *standing* at courts (also in the EU law not only in the international law) is the *Aarhus Convention*. The *Aarhus Convention* is an important international environmental convention which contains mainly three 'pillars':

- access to information;
- public participation in decision-making procedures; and
- access to justice in environmental matters.

The EU acceded to it in 2005. It was signed by the (then) European Community and subsequently approved by its Decision 2005/370. According to the settled case-law, therefore, the provisions of that Convention now form an integral part of the legal order of the European Union, pursuant to Art. 216(2) TFEU.[9] Currently, the *Aarhus Regulation 1367/2006*[10] deals with the application of its provisions to the institutions and bodies of the EU. As a central issue, Art. 10(1) of the Regulation provides that non-governmental organisations meeting certain criteria are entitled to request an *internal review* by the EU institution or body that has adopted a certain administrative act under environmental law or, in the case of an alleged administrative omission, that should have adopted such an act.

Art. 1 of the Aarhus Convention sets out its objective:

> "*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*"

[9] C-240/09, Lesoochranárskezoskupenie, EU:C:2011:125, paragraph 30 and the case-law cited.
[10] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13–19.

The environmental associations are addressed in the definition of '*the public*' and '*the public concerned*' in Art. 2(4) and (5) of the Convention. These provide:

> "*(4) "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;*
>
> *(5) "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.*"

Art. 9 of the Aarhus Convention contains provisions governing legal remedies in environmental matters. Art. 9(2) concerns procedures which have been the subject of public participation. Art. 9(3) applies to all other environmental-law decisions and Art. 9(4) contains specific procedural principles:

> "*(2) Each Party shall, within the framework of its national legislation, ensure that members of the public concerned*
>
> *a) Having a sufficient interest or, alternatively,*
>
> *b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.*
>
> *What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.*

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

(3) In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

(4) In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.
…"

Although the Aarhus Convention was concluded by the EU and all the Member States on the basis of joint competence, it is nonetheless true that, where a case is brought before the CJEU in accordance with Art. 267 TFEU, it has jurisdiction to define the obligations which the EU has assumed and those which remain the sole responsibility of the Member States in order (for that purpose) to interpret the Aarhus Convention.[11] If the CJEU reaches the conclusion that the provision in question is one of the obligations assumed by the EU, then it has jurisdiction to interpret that provision too. In *Lesoochranárske zoskupenie*,[12] the CJEU had to decide (see more below) the issue of the effect of Art. 9(3) of the Aarhus Convention and held that the provision did not contain a clear and precise obligation capable of directly regulating the legal position of individuals. This already narrows down the road to direct effect in the sense of the respective case law of the CJEU. Centrally, Art. 9(3) refers to criteria to be laid down in national

[11] So-called Slovak Bears case, C-240/09, Lesoochranárskezoskupenie, ECLI:EU:C:2011:125, paragraph 31 and the case law cited.
[12] C-240/09, Lesoochranárske zoskupenie, ECLI:EU:C:2011:125.

law, which makes it clear that a subsequent measure is required for the implementation of the provision.

The history of *standing* for NGOs, and the efforts made to increase their access to justice for the benefit of the environment, is long and complicated, and unfortunately, at the end of the day, too little progress has been achieved. The first notable decision was the case *Greenpeace*, dating back to the 1990's. *Greenpeace* still remains as important judgment bearing on the issue of direct access to the EU courts in environmental matters. *Greenpeace* refused to reconsider the well-established *Plaumann formula.*[13] Rather than relaxing the conditions laid down in the EU Treaty in order to allow individuals having a legal interest in the protection of the environment to gain access to the courts, as the applicants pleaded for, the CJEU opted instead to hold firm to more rigid standards. Also, even the entry into the force of the Aarhus Convention in 2005 it did not change attitude towards more favourable approach of NGOs' *standing.* The *Aarhus Compliance Committee* reacted to the rigid jurisprudence of the EU courts with the findings and recommendations.[14]

There is also one additional viewpoint. Since the NGOs are not being granted *standing* to justice at the EU level, the EU needs to provide NGOs more access at the *preliminary administrative review stage*, meaning that the NGOs would be able to be party to administrative proceedings at the EU level (at the EU institutions). Such access would in turn minimise possible constraints (i.e. allowing NGOs claims to be heard at least by the administration) and the necessity for judicial process by the EU courts (Schoukens, 2015). This approach did not however, at the end of the day, prove to be successful. Namely, this approach was intended only for acts *having individual character*, meaning only decisions adopted by the European Commission. These limitations to "*measures of individual scope*", proved to be difficult obstacles to overcome (see also Wennerås, 2007: 234; Jans, 2005:

[13] Case T-585/93 Stichting Greenpeace Council (Greenpeace International) v Commission [1995] ECR II-2205, ECLI:EU:T:1995:147; Case C-321/95 P Stichting Greenpeace Council and Others v Commission [1998] ECR I-1651, ECLI:EU:C:1998:153.

[14] Findings and recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, Adopted on 14 April 2011, accessible: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/DRF/C32Findings27April2011.pdf (15.7.2016). The reason is that the Committee waited for judgments in Joined Cases C‑404/12 P and C‑405/12 P, Council and Others v Stichting Natuur en Milieu; Council and Others v Vereniging Milieudefensie; ECLI:EU:C:2015:5.

484). There are also several cases[15] in which the NGOs filed lawsuits against EU institutions over their restrictive approach to the internal review procedure, as mentioned above. The EU General court concluded that the limitation of the concept regarding the acts of individual character is not in compliance with Art. 9(3) of the Aarhus Convention. This bold approach by the EU General court was, however, overruled by the CJEU. Even more, in another case[16] the CJEU decided to follow the submissions of the appellants pertaining to the legality review of the *Aarhus Regulation* in the light of Art. 9(3) of the Aarhus Convention. Returning to the basic legal principles underlying the invocability of provisions of an international agreement, the CJEU ruled that provisions of an international agreement can only provide the legal underpinnings for review of an act of EU secondary legislation where the nature and broad logic of that agreement did not preclude it and, additionally, where the provisions at issue were, as regards their content, unconditional and sufficiently precise. With reference to its previous ruling in *Lesoochranárske zoskupenie*,[17] the CJEU held that Art. 9(3) of the Aarhus Convention does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals. By explicitly referring to members of the public who '*meet the criteria, if any, laid down in* (...) *national law'*, the latter provision is subject, in its implementation or effect, to the adoption of a subsequent measure.[18] Consequently, the provision could not be relied upon to review the validity of the *Aarhus Regulation* (Schoukens, 2015).

Both cases followed a very narrow interpretation of the implementation rules. The CJEU is of the opinion that EU environmental decisions will be successfully challenged by the EU courts only in exceptional cases. Thus, it is the Aarhus Convention which is narrowly interpreted that way. It is also questionable whether the CJEU's approach is consistent with international law (Art. 3(5)

[15] Joined cases C-404/12 P and C-405/12 P Council and Others v Stichting Natuur en Milieu and Milieu and Pesticide Action Network Europe (CJEU, 13 January 2015); Joined cases C-401/12 P and C-403/12 P Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht (CJEU, 13 January 2015).

[16] Joined Cases C‑404/12 P and C‑405/12 P, Council and Others v Stichting Natuur en Milieu; Council and Others v Vereniging Milieudefensie; ECLI:EU:C:2015:5.

[17] Case C-240/09 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky [2011] ECR I-01255. For the comments see Eliantonio, 2012: 767; Jans, 2011: 85.

[18] Joined Cases C‑404/12 P and C‑405/12 P, Council and Others v Stichting Natuur en Milieu (n 12) para 48; Council and Others v Vereniging Milieudefensie.

TEU). The CJEU apparently fails to appreciate the exceptional nature of *Lesoochranárske zoskupenie* and rather than expanding the degree of access to the courts through more relaxed conditions instead remains steadfast to the conservative, closed approach towards access to justice at the EU level. At the same time the CJEU expects national courts to be more open to offer *locus standi* for environmental NGOs (and use preliminary ruling reference) (Apolline, 2015).

The development which followed regarding this issue is presented in *Draft findings and recommendations of the Compliance Committee.*[19] Namely, on 1 December 2008, the NGO *ClientEarth*, supported by a number of entities and a private individual, submitted a communication to the Committee alleging a failure by the EU to comply with its obligations under Art. 3, paragraph 1, and Art. 9, paragraphs 2, 3, 4 and 5, of the *Aarhus Convention*. This report is titled as Part II (Part I is mentioned above). In Part I, the Committee focused on the main allegation by examining the jurisprudence of the EU Courts on access to justice in environmental matters generally. In doing so, the Committee considered whether in the *WWF-UK* case[20] the EU Courts had accounted for the fact that the *Aarhus Convention* had entered into force for the EU. The Committee decided not to make specific findings on whether the case itself amounted to non-compliance with the Convention. In addition, while awaiting the outcome of the *Stichting Milieu case*,[21] which was still pending before the EU Courts, the Committee refrained from examining whether *Aarhus Regulation* No 1367/2006, or any other relevant internal administrative review procedure of the EU, satisfied the requirements on access to justice in the Convention. The Committee decided to stay its proceedings and the adoption of its findings with regard to the second part of communication ACCC/C/2008/32 until the CJEU adopted its ruling in joined cases C-401/12 P to C-403/12 P and joined cases C-404/12 P and C-405/12 P.[22] In the findings which followed, the Committee found that the EU fails to comply with Art. 9, paragraphs 3 and 4, of the Aarhus Convention with regard to access to justice by *members of the public* because neither the *Aarhus*

[19] Draft findings and recommendations of the compliance committee with regard to communication ACCC/C/2008/32, (part II) concerning compliance by the European Union.
[20] *WWF-UK Ltd v Council of the European Union*, T-91/07, 2 June 2008; and WWF-UK Ltd v Council of the European Union and the Commission of the European Communities, C-355/08, 5 May 2009.
[21] *Council and Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe*, joined cases C-404/12 P and C-405/12 P, 13 January 2015.
[22] *Council and Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe*, joined cases C-404/12 P and C-405/12 P, 13 January 2015.

Regulation nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs.

The Committee therefore recommends that all relevant EU institutions within their competences take the steps necessary to provide the public concerned with access to justice in environmental matters in accordance with Art. 9, paragraphs 3 and 4 of the Aarhus Convention. If, and to the extent that the EU intends to rely on the *Aarhus Regulation* or other EU legislation to implement Art. 9, paragraphs 3 and 4, the Committee recommends to the EU both that the *Aarhus Regulation* is amended in a way, and that any new EU legislation is drafted in a way, that would make it clear to the CJEU that legislation is intended to implement Art. 9, paragraph 3 of the *Aarhus Convention*; and further, that any new or amended legislation implementing it uses wording that clearly and fully transposes the *Aarhus Convention*. In particular, it would be important to correct failures in implementation that are caused by the use of words or terms that are vague and not sufficiently precise to fully correspond to the terms of the *Aarhus Convention*. In addition, the Committee recommends to the EU that the CJEU assesses the legality of the EU's implementing measures in the light of those obligations and acts accordingly; and, that the CJEU interprets EU law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Art. 9, paragraphs 3 and 4.

4 Conclusions

The conclusion is possible, based on the above, that the legal remedies scheme in cases of the environmental law is rather complex and, most problematically, presently both individuals and NGOs are being denied sufficient access to the courts contrary to the spirit of Aarhus Convention and to the detriment of the environment and nature. This is also true for the access to the administrative and court proceedings on the international level. At the international level, mostly the CJEU, but also ECtHR, expect that the national courts (and administrative authorities) shall allow greater access to decision making and adjudicating procedures.

This is rather logical. On the other hand, and unfortunately with this approach, not all of the decision-making processes are taking place at the national level. To the contrary, a good deal of the decision-making, which does not need the

transposing measures, is taking place on the EU level and accordingly it should be equally important to provide adequate access to the EU courts. But, bearing in mind that as previously discussed, access to the EU courts is severely restricted for NGOs, it is indeed necessarily incumbent on of both the national courts and the national administrative authorities to allow a more open attitude at least towards NGOs, if not the individuals (*actio popularis* is, at the outset, not a proper solution and can cause a substantial deadlock in *de iure imperii* decision-making procedures). Otherwise, there will be actually no legal platform for the NGOs to safeguard and to harbour the protection of the environment and nature – in the public interest.

As noted above, especially in cases where national authorities do not take proper care of the environment and nature, the NGOs remain in the vanguard of environmental protection. Stripped of their ability to carry out this important role by representing the interests of the environment, the whole picture is fully changed. Such a restrictive approach to access to the judicial system unfortunately provides the national authorities with unfettered authority to make decisions and to proceed with projects affecting both the environment and nature, even for those projects that are unnecessarily harmful to the environment and future generations. This is not a criticism of the legislator (whether or national, EU or also on international level) but instead points to the fact that it is the judges that are judicially tasked with the responsibility of interpreting the *Aarhus Convention.*

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The Position of Roma Community in Slovenia in the Light of Legal Regulation and Current Situation (Education, Employment, Health, Housing)

Suzana Kraljić

Abstract Slovenian efforts to improve the situation of the Roma community started with the Constitution of the Republic of Slovenia, which defines in its Article 65, that the status and special rights of the Roma community living in Slovenia shall be regulated by law. A very important milestone occurred in 2007, when Slovenia was the first European union Member State to adopt a legal act which is entirely devoted to the regulation of the position of the Roma community. One of the aims of this legal act was to achieve a higher level of inclusion of the Roma community in the Slovenian society, especially to raise the level of education and well-being of Roma children. Today, after ten years of legal regulation, the author presents an outline of the current situation of the Roma Community, with special emphasis devoted to the current situation relating to education, employment, health and housing.

Keywords: • Gypsy • Minority • Discrimination • Human Rights • Inclusion •

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1 Introduction

Presently, approximately 10 to 12 million Roma people reside in Europe.[1] Most of them, 6 million, live in South and East Europe. Roma people comprise the single largest ethnic minority in Europe. The countries with the largest number of Roma people (by number or percentage) in Europe are: Turkey (2,750,000 – 3,83 % of population), Romania (1,850,000 – 8,32 % of population), Bulgaria (750,000 – 10,33 % of population), Spain (725,000 – 1,60 of population), Russia (825,000 – 0,59 % of population), Serbia (725,000 – 8,18 % of population) and former Yugoslav Republic of Macedonia (197,750 – 9, 59 % of population). 8,500 Roma people, or 0.42% of its population, live in Slovenia (European Commission, 2011: 15-17). Due to the fact that Roma minorities live in virtually all European Union (hereinafter: EU) Member States, they can be considered as a '*trans-border minority*' (Sardelić, 2017). The Roma people are designated as the largest, poorest and youngest ethnic group in Europe (Čvorović & Coe, 2007: 17; FRA, 2014).

Roma people also live in non-European countries (for example in the Near East, Western Asia, the USA and Latin America.) An essential, common characteristic of all Roma people is their common identity and common cultural heritage. In the past, and even today, the term *Gypsy* (Slovenian and Croatian *cigan*; German *Zigeuner*; Italian *zingaro*; Spanish *cingaro*; Hungarian *czigány*; Russian *cygany*) is widely used in a pejorative sense. In particular, Roma people were associated (by some) with natural catastrophes, diseases (e.g., the plague) and also personal accidents of people. Due to the negativity associated with their often nomadic ways of life,[2] they were subjected to systematic destruction (e.g. in Nazi Germany), dis, deportation, ethnic cleansing (Sardelić, 2016) and repression (e.g., forced sterilisation of Roma women (see also *V.C. v. Slovakia* (app. no. 18968/07, 8 February 2012) and *K.H. and Others v. Slovakia* (app. no. 32881/04, 28 April 2009)). Countries wished to stop and destroy their nomadic way of living; limit their movement; and, sever the roots of their Roma language and culture. In the past decades, on both international and national levels, movements have begun

[1] The term '*Roma*' is used to refer to a number of different groups (e.g. Roma, Sinti, Kale, Gypsies, Romanichels, Boyash, Ashkali, Egyptians, Yenish, Dom, Lom, Rom, Abdal) and includes also travellers (European Commission, 2017).

[2] A negative position against Roma people was expressed by Vatican in the past, since in 1563 it prohibited spiritual profession for Roma people, and five years later, Pope Pius V. even excluded them from Roman Catholic Church.

to improve Roma rights. As an example, important initial steps have been taken to recognise and combat *antigypsyism*, as a specific form of racism against Roma and one of the root causes of Roma social exclusion and discrimination (European Commission, 2017: 4). An important milestone occurred at the I. Roma World Congress on April 8 1971 (London) where the Congress adopted the term '*Roma*', which means '*human being*' and represents the way of living of Roma people, rather than variants of "gypsy" with its overall negative connotations. The First World Romani Congress is also significant for having adopted the Roma anthem *Gjelem, Gjelem,* composed by Žarko Jovanović, and Roma flag, as the national emblem of the Roma people.

Gelem, gelem, lungone dromensa *Maladilem bakhtale Romensa* *A Romale katar tumen aven,* *E tsarensa bahktale dromensa?* *A Romale, A Chavale* *Vi man sas ek bari familiya,* *Murdadas la e kali legiya* *Aven mansa sa lumniake Roma,* *Kai putaile e romane droma* *Ake vriama, usti Rom akana,* *Men khutasa misto kai kerasa* *A Romale, A Chavale*	 *The Roma flag is comprised of green and blue traditional colors with the red wheel in the center. Blue is symbolic of both the blue sky and the heavens. The green color, on the other hand, symbolizes the land, nature and farming. The color blue also symbolizes eternal spiritual values; the green earthly values. The wheel in the center symbolizes movement and progress.*

At present, the Roma people enjoy the protection of the international community in the framework of the:

a) United Nations (hereinafter: UN) - UN Regional Working Group on Roma, works in a number of countries with the intention to strengthen the effective exercise of human rights by Roma and Travellers. It supports governmental policies that help promote the inclusion of Roma

people in society, and in particular to nurture their ability to participate in local, regional, national and international decision-making processes (especially Roma women), as well as by working to challenge patterns and practices of discrimination and abuse (OHCHR, 2018);

b) Council of Europe (hereinafter: CE) – CE has a leading role in the process of granting Roma people an international recognition. In 1981, the Standing Conference of Local and Regional Authorities called on CE member states to recognise Roma people (and also other specific nomadic groups (Sami)) as ethnic minorities and to grant them '*the same status and advantages as other minorities enjoy, in particular concerning respect and support for their own culture and language*' (Resolution 125 (1981) on the role and responsibility of local and regional authorities in regard to the cultural and social problems of populations of nomadic origin). Additionally, the European Charter for Regional or Minority languages has determined that regional and minority languages protection shall be appropriately adapted for the protection of non-territorial languages (Art. 1(c)). The Explanatory Report to the European Charter for Regional or Minority languages expressly states that this term is related to the Roma language (see, Art, 1 (Definitions) para. 36 of the Explanatory Report to European Charter for Regional or Minority Languages). The European Court for Human Rights has already made decision in cases related (mostly) to the discrimination of Roma people (for example: *V.C. v. Slovakia* (app. no. 18968/07, 8 February 2012); *K.H. and Others v. Slovakia* (app. no. 32881/04, 28 April 2009); *D.H. and others v. the Czech Republic* (app. no. 57325/00, 13 November 2007); *Moldovan and Others v. Romania (No. 2)* (app. nos. 41138/98 and 64320/01, 12, July 2007); *Nachova and others v. Bulgaria* (app. no. 43577/98, 6 July 2007); *Mižigárová v. Slovakia* (app. no. 74832/01, 14 December 2010; *Bekos and Koutropoulos v. Greece* (app. no. 15250/02, 13 December 2005; *Sampanis and Others v. Greece* (app. no. 32526/05, 5 June 2008, etc.);

c) Organisation for Security and Cooperation in Europe (hereinafter: OSCE) – Roma people as a community have been mentioned for the first time in Art. 40 (Chapter III) of the Concluding Document of OSCE - from Copenhagen (1990): *'The participating States clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and*

discrimination against anyone as well as persecution on religious and ideological grounds. In this context, they also recognize the particular problems of Roma (gypsies)...';

d) European Union (hereinafter: EU) - the European institutions and every EU member state have a joint responsibility to improve the living conditions and integration of the Roma. In 2011, the European Commission called for national strategies for Roma integration and Slovenia adopted in 2017 new *National program of the Action of the Government of the Republic of Slovenia for Roma for the Period 2017-2021;*

e) as well as other international institutions dealing with human rights protection. For example: Central European Initiative for Protection of Minority Rights in Art. 7 of the Instrument of Central European Initiative for Protection of Minority Rights (1994) it is written: '*States recognise the particular problems of Roma (gypsies). They undertake to adopt all the legal administrative or educational measures as foreseen in the present Instrument in order to preserve and to develop the identity of Roma, to facilitate by specific measures the social integration of persons belonging to Roma (gypsies) and to eliminate all forms of intolerance against such persons.'*

These formal protections are necessary to protect the Roma people's culture, given that the Roma frequently are marginalized due to their distinct way of living and because their lifestyle frequently differs from that of the majority populations. Their unique way of living and customs has frequently resulted in their being marginalized and ostracized by the greater society, and being subject to other inequities and racial discrimination.[3]

[3] Teachers at Macinec primary school in Croatia used the following arguments in a court submission to explain their decision to segregate Roma children: »*Roma parents are frequently alcoholics, their children are prone to stealing, cursing and fighting and as soon as the teachers turn their backs things go missing, usually insignificant and useless objects, but the important things is to steal.*« (Amnesty International, 2006: 2). For a more detailed discussion of the stereotypes given Roma people see also Erjavec, Hrvatin & Kelbl, 2000: 20.

2 Roma Community in Slovenia

Roma people are settled on Slovenian territory in smaller groups, in the structure of related families. After Štrukelj (1980: 25), first written sources about the presence of Roma people in Slovenia reach back to the 14th century, in what derives from the Judicial Chronicles by Diocese of Zagreb mentioning a Gypsy from Ljubljana.

The rights of the Roma people as a national community was for the first time codified by constitutional amendment LXVII in 1989 (Lavtar, 2005: 20). Slovenia became an independent state in 1991, and therefore in that same year the 1989 Regulation was transferred into the new Constitution of the Republic of Slovenia (hereinafter: CRS). Article 65 of the CRS provides the legal basis for the current legal regulation of the Roma in Slovenia and stipulates: '*The status and special rights of the Roma community living in Slovenia shall be regulated by law'*. Due to the constitutional provision of Article 65, Slovenia is one of the rare countries (along with Hungary and the former Yugoslav Republic of Macedonia), that provides special rights and recognition to the Roma community as a matter of constitutional law. The CRS does not grant national community status to the Roma community directly, as it has to Italian and Hungarian minorities in Slovenia. Instead, the CRS contains only the instruction that the status and special rights of the Roma community living in Slovenia shall be regulated by law. Constitutional legislation enabled the Roma community, due to its special status usually bound to a weaker position (e.g. economic, social, in society, regarding health, work, etc.), to be exempt from Art. 14 CRS (*principle of equality*) and guarantees them positive protection (so-called *positive discrimination*). The position of the Roma community differs from that of Hungarian and Italian minorities who, by virtue of Art. 64 of the CRS are guaranteed, as a matter of constitutional law, the status of recognised national communities. In spite of the fact that the CRS stipulates that the Roma community has to be guaranteed special rights, this does not lead to the conclusion they are entitled to special constitutional rights. To the contrary, this means only that these special rights are realised through individual legislative acts. The basis for the adoption of these acts is the stipulation set forth in Art. 65 CRS (Lavtar, 2005: 20).

Therefore, while the Roma community in Slovenia does not explicitly have the legal status of a minority (comp. Art. 64 and 65 CRC), it is legally recognized as

a special ethnic community. Following the characteristics provided in the definition of "minority" formulated in 1977 by the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Francesco Capotorti a minority is:

> '*A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*« (United Nationes, 2010: 2).

Comparing Capotorti's definition with the characteristics of the Roma Community in Slovenia, we could come to the conclusion that the Roma community in Slovenia fulfils all of the fundamental criteria comprising a minority:

a) The Roma community in Slovenia has a smaller number than the rest of population (0,42 % of the Slovenian population);
b) the Roma community suffers from a subordinated position;
c) members of the Roma community differ from the rest of population ethically, as well as by language;
d) today, the Slovenian Roma Community has a strong sense of solidarity; and
e) efforts by the Roma community in Slovenia are directed towards the preservation of the Roma culture, tradition and language (Kraljić & Ivanc, 2009).

As previously discussed, Art. 65 of the CRS provides the legal basis for the legislature to enact protective measures for the benefit of the Roma population residing in Slovenia. Consistent implementation of this constitutional provision was insured in 2007 with the adoption of the Roma Community in the Republic of Slovenia Act (hereinafter: RCA). The Slovene Roma people are the first in Europe to benefit from legislation which is devoted specifically to the regulation of the status and special rights of the Roma community. The RCA regulates the competences of state authorities and bodies of local self-government local communities for their enforcement and competences of Roma community in

realisation of their rights and duties determined by law. The RCA is premised on the following ideals: principles of democracy; the principle of equality, equal treatment or principle of equal chances, respectively; the principle of respect for diversity and identity; the principle of prohibition of discrimination; the principle of the right to expression of national identity; the principle of the right to the use of one's own language and writing; the principle of personal dignity; the principle of the right to social protection; the principle of the right to appropriate accommodation; the principle of the right to economic development; the principle of the right to health; the principle of positive discrimination; the principle of the right to preservation and respect for the Roma language; the principle of the right to child rearing and education; the principle of the right to one's own cultural development and information; the principle of the right to free contacts; and, the principle of the right to political participation.

The RCA adheres to and advances the notions of the prohibition of discrimination in any field of social living, and especially in the fields of employment, child rearing, and education, social security, etc.; and the prohibition of discrimination based on personal circumstances, such as nationality, race or ethnic origin, sex, health status, invalidity, language, religious or other belief, age, sexual orientation, education, property status or any other personal circumstances. The RCA stresses that members of the Roma community have, besides the rights that all citizens of the Republic of Slovenia (hereinafter: RS) have, for the successful integration into Slovenian society, and the taking over of responsibilities, special rights determined by delegated acts, executive acts and acts by self-government local communities, i. e., in the field of education, improvement of living conditions, regulation of space and protection of the environment, employment, information, culture, health and social protection and right to participation in public matters referring to Roma people. Special attention is given to Roma women, because they are the most vulnerable to multiple discrimination. Namely, they present a higher risk of social exclusion and poverty as women of native population and minority men (European Union, 2010: 5). Althought the Roma minority in Slovenia has *de iure* been granted fundamental rights, nevertheless somentimes in everday life *de facto* access to such rights is limited or difficult to access. Therefore, in fact the Roma people, despite progressive legislative efforts are still often considered as '*semi-citizens*' (Sardelić, 2016).

4 Legal Regulation and Current Situation (Education, Employment, Health, Housing) – Appropriate or Inadequate?

The RCA does not specify all special rights afforded to Roma citizens in detail, and this is why they are instead regulated by special laws, namely: a) Local Self-Government Act; b) Local Elections Act; c) Voting Rights Register Act; d) Act on Enforcing Public Interest in the Field of Culture; e) Organisation and Financing of Education Act; f) Elementary School Act; g) Kindergarten Act; h) Public Media Act; i) Librarianship Act; j) Promotion of Balanced Regional Development Act; k) Radiotelevizija Slovenija Act. Some of these more specific legislative provisions are discussed next.

4.1 Access to Education

The educational level of Roma people is lower than the general educational level of other members of the population. Therefore, a minimal goal for the Roma children should be that all Roma children complete at least primary education (FRA, 2014: 7). This goal was already included in *Recommendation No R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe* (hereinafter: Rec (2000) 4). Rec (2000) 4 has specially stressed that there is an urgent need to build new and better educational strategies in order to promote a brighter future for the Roma/Gypsy people (hereinafter: Roma people) in Europe. The goals of such strategies should be oriented towards increasing the literacy rates of Roma people; decreasing their drop out school rate; lowering the percentage of Roma students completing just the primary education; and, increasing Roma children's school attendance. The problems faced by Roma people in the field of schooling are largely the result of long-standing educational policies of the past, which led either to dissimilation or to segregation of Roma children at school on the grounds that they were 'socially and culturally handicapped'. Also, Slovenia is confronting these very problems both in kindergartens and higher levels of schools. For example, unfortunately, Roma children that are of pre-school age rarely attends kindergartens. Another problem is that many Roma children speak the Roma language exclusively, but knowing the fundamentals of the Slovenian language is a pre-condition for admission into elementary school. Therefore, the inclusion of Roma children into kindergarten must be given high priority, schools that they can start to learn Slovene, assimilate with other children and the Slovene educational system, and

thereby enhance their odds for successful application to elementary school. If very young Roma children witness rejection already in the kindergarten phase, as members of an already marginalized ethnic group, they more than likely will fail in their educational endeavors throughout all their lives (Zavrtnik Zimic, 2000: 843). A decrease in the number of Roma pupils in the higher classes of elementary school is evident. Roma children, on average, also perform worse academically than other children. The reason for the lower academic achievement rates lies mainly with the fact Roma childrenhave insufficient knowledge of the Slovenian language, since in Roma families the Roma language is mainly spoken. Roma children most frequently only learn and speak the Slovenian language in school, as Roma families live in Roma communities or villages, respectively, where Slovene is not spoken.

The Rec (2000) 4 also provides that the school curriculum, on the whole, and the teaching material, should be designed in such a way so as to take into account the cultural identity of Roma children. Roma history and culture should be introduced in the teaching material in order to reflect the cultural identity of Roma children. The participation of representatives of the Roma community should be encouraged in the development of teaching material on the history, culture and language of the Roma (point 9 of the Rec (2000) 4). The Ministry of Education of the Republic of Slovenia also guarantees additional financial support for Roma children. The Ministry especially provides financial support for school food, text books, excursions, and related items. The Ministry also provides finances for the development of research designed to successfully integrate Roma children in the Slovenia educational system and to standardise the Roma language as a base for studying the Roma language. According to data, in the academic year 2017/2018, 1,998 Roma children were included in Slovenian regular elementary education and 244 in schools with a customized educational system (Inštitut za socialno varstvo, 2018). Homogeneous departments with only Roma children have been summarized by the ECtHR (*D. H. and Others v. Czech Republic, Sampanis and Others v. Greece, Oršuš and Others v. Croatia*) as segregated and discriminatory (Van der Bogaert, 2011). In Slovenia, the segregation of Roma children in elementary schools does not exist. However, because of the poorer language skills of Roma children in both speaking and understanding the Slovenian language, the *National Program 2017-2021* set as goal to integrate Roma children into pre-primary education in kindergartens at least two years before the beginning of the primary school. At the latest at the age of four, Roma children

should generally learn the language (especially Slovene as well as Roma) as well as socialization skills in a, educational institution, which will then enable the children to gain entrance into the elementary school (National Program 2017-2021: 11).

In accordance with point 13 of the Rec (2000) 4, more attention was given also to the employment and education of teachers, who should be provided with specific knowledge and training to help them understand better their Roma pupils. To fulfil this goal, in Slovenia there exist elementary schools that have curricula with optional subjects pertaining to the topic of Roma culture, history and language ('*Roma culture*' (in school year 2013/2014 this subject was offered in 4 schools and selected by 29 pupils) and '*Meetings with cultures and ways of life*' (in school year 2013/2014 this subject was offered in 6 schools and selected by 55 pupils) (Vlada Republike Slovenije, 2015: 11). Special Roma assistants work in 31 schools and kindergartens. Their role is multifaceted. On the one hand, they represent the person in a school or kindergarten to whom Roma children can turn to help overcome various problems (e.g., to overcome creative and linguistic barriers), and in this context, they work with professional staff of the school or kindergarten. On the other hand, it also is their job to act as liaisons between the parents of the Roma children and school or kindergarten staff and administration. The Roma assistants thus represent the main link between the school or the kindergarten and the Roma community (Vlada Republike Slovenije, 2015). But, there are additional obstacles related to the education of Roma children. Due to the fact that Roma children mainly live in isolated villages which are frequently great distances away from other villages, it was recognized that it was often difficult for Roma children to get to school, let alone get there on time for the start of classes. In general, the Roma population usually live in sub-standard living conditions. Results from one research project show, for example, that of 100 Roma children included in the research, 48% live, partially or completely, in barracks (Vonta, 2011). So, sometimes just getting to the school can be impossible, when the school is too far to reach on foot and if the children lack sufficient clothing to keep them warm or dry enough to cope with cold and or wet/snowy weather conditions. Roma children are often unable to study or are forced to do homework in cold, overcrowded homes (Amnesty International, 2006: 1). For this reason, it is also necessary to ensure the improvement of the Roma living conditions, which are often a key starting point for ensuring the increase of school performance of Roma children.

4.2 Employment

Roma children, irrespective of whether they complete secondary school or not, have great problems integrating into the working environment. Generally, Roma women face even greater difficulties in accessing the labour market then is the case with men, because of their frequently lower level of education; inferior qualifications; their traditional non-worker role in the family (as mother, wife, housekeeper (Kher – romska hiša, 2018)); and, due to their frequent pregnancies (European Union, 2010). Namely, Roma people are mainly employed as not qualified workers or as season workers, and some of them even look for season work abroad. Roma people are also involved in public employment programs. Some establish their own craft (i.e., self-employment), but frequently, in order to succeed, have to invest more effort in seeking customers and have to provide goods or services superior to those from persons who are not Roma (Kraljić & Ivanc, 2009).

4.3 Health Conditions and Access to Healthcare Services

At the national level, rights and access to healthcare services, both curative and preventive, are the same for all citizens of the Republic of Slovenia. One of the main goals of the *Resolution on the National Health Care Plan 2016-2025* is to provide quality and accessible public health, in order to improve the health and well-being for all and to reduce health inequalities. These objectives are of paramount importance, and a key starting point in the case of Roma people, in light of the fact that they are one of the most vulnerable groups of the population (Vlada Republike Slovenije, 2017). The frequent social exclusion of the Roma people, and the absence of supportive social networks for them to rely on, are often also confounded by their exclusion from the healthcare systems and thus an increase or intensity in overall poor health. For a variety of reasons, Roma people often fail to seek medical treatment until their state of health is very bad or when they find themselves in an emergency situation (Vlada Republike Slovenije, 2017). To improve their overall health situation, the Slovene Institute of Public Health carried out the following activities: The National Conference on Roma Health; implementation of the program "Promoting health in the Roma community"; publication of contributions on the health of Roma people for Roma radio and Roma newspaper and magazines; and, the active participation in activities organized by the Union of Roma people of Slovenia (Vlada Republike Slovenije,

2015). The Roma people, especially women and children, have a higher incidence of illnesses and diseases like tuberculosis, asthma, diabetes and high blood pressure, as compared with other populations (Minority Protection of Slovenia, 2002: 622). Since many Roma people live in poverty connected to a very high degree of unemployment, this has a destructive effect on their health (for example, they have to cover the costs for medicine, placement in the hospital, etc., by themselves) (Kraljić & Ivanc, 2009).

One of the recognised problems relating to health is also early pregnancies and forced marriages of Roma children. In case of pregnancy, young Roma girls often interrupt their schooling and stay at home and take on the role of wife, mother and housekeeper. In 2013, Slovene Social Work Centers identified 11 cases of forced marriages involving Roma people (Narat et al, 2014). Therefore under the National Health Care Plan, special intention is given to providing education relating to the special health and social risks of earlier pregnancies as well to the topics related to forced marriages (Narat el. al, 2014; Vlada Republike Slovenije, 2015).

4.4 Housing Conditions

It is well-known that Roma people often live in segregated settlements, where the access to public transport and social services is poor. They often live either in assigned residential homes in social poor areas (so called *urban ghettoes*) or in overcrowded housing[4] (European Union, 2010: 6). This, as a rule, is the current situation Roma people face in Slovenia. Roma settlements are, as a rule, situated on the outskirts of (rural) inhabited areas or even separately from other settlements, in isolated areas. Housings in Roma settlements are generally illegal, built on foreign land and not connected to economic public infrastructure. Therefore, the aim the spatial verification of the facilities and condition of Roma settlements; the preservation of the existing locations of Roma settlements; and, their inclusion in the settlement system of the state and the comprehensive urban and infrastructural arrangement of Roma settlements (Vlada Republike Slovenije, 2017). But, there are also some Roma people who live in good housing conditions. Therefore, regarding the housing conditions in Slovenia, Roma people can be divided into three groups:

[4] In Serbia an average number of kin residents per household is being 6.27 (Čvorović & Coe, 2017).

a) to the first group belong Roma people that enjoy excellent living conditions. This group of people, for example, live in urban settlements or in rented apartments in their own houses outside Roma settlements or within developed Roma settlements;
b) to the second group belong Roma people that live in what we might call a middle to lower-range of housing. These people live in dense Roma settlements. Settlements in this classification consist of one or two room houses, constructed from steel or wood;
c) to the third group belong Roma people that have the lowest living culture. They live in isolated, peripheral village communities. The structures they live in are substandard by any measure: they are dark, wet, hygienically neglected, and without regulated sanitary conditions (Horvat, 2005: 21-22).

5 Conclusion

Presently, the Roma people are recognized as the largest, poorest and youngest ethnic group in Europe. Their ongoing poverty is reflected in their everyday life. They are under-educated; face serious labour market obstacles; face discrimination / segregation in education, employment, and housing; they suffer from poor health conditions; and, they lack adequate access to healthcare services. Therefore, it is impossible that any single solution will be able to solve these many difficult problems. Indeed, the resolution of any one of these problems will not resolve the others. And, until all of the problems are tackled, the Roma people will continue to struggle. In order to solve all of these (as well as others) problems that the Slovene Roma population faces, it is necessary to apply a multi-faceted, multi-disciplinary approach that attacks the entirety of the problems facing the Roma people. In other words, these difficult problems must be addressed and solved simultaneously and in an interconnected fashion. In this regard, the integration and cooperation of all domestic, European and international players is necessary in order to ensure further improvements in all areas of the life of the Roma population. This must be done both at the international and domestic level.

Documents, laws, treaties and cases

European Charter for Regional or Minority languages.

National program of the Action of the Government of the Republic of Slovenia for Roma for the Period 2017-2021.

Recommendation No R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe

Resolucija o nacionalnem planu zdravstvenega varstva 2016–2025 »Skupaj za družbo zdravja« (ReNPZV16–25) (*Resolution on the National Health Care Plan 2016-2025):* Uradni list RS, št. 25/16.

Resolution 125 (1981) on the role and responsibility of local and regional authorities in regard to the cultural and social problems of populations of nomadic origin.

Ustava Republike Slovenije (Constitution of the Republic of Slovenia): Uradni list RS, št. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99 in 75/16 – UZ70a)

Zakon o evidence volilne pravice (Voting Rights Register Act): Uradni list RS, št. 98/13.

Zakon o knjižničarstvu (Librarianship Act): Uradni list RS, št. 87/01, 96/02 – ZUJIK in 92/15.

Zakon o lokalni samoupravi (Local Self-Government Act): Uradni list RS, št. 94/07 – uradno prečiščeno besedilo, 76/08, 79/09, 51/10, 40/12 – ZUJF, 14/15 – ZUUJFO, 11/18 – ZSPDSLS-1 in 30/18.

Zakon o lokalnih volitvah (Local Elections Act): Uradni list RS, št. 94/07 – uradno prečiščeno besedilo, 45/08, 83/12 in 68/17.

Zakon o medijih (Public Media Act): Uradni list RS, št. št. 110/06 – uradno prečiščeno besedilo, 36/08 – ZPOmK-1, 77/10 – ZSFCJA, 90/10 – odl. US, 87/11 – ZAvMS, 47/12, 47/15 – ZZSDT, 22/16 in 39/16.

Zakon o organizaciji in financiranju vzgoje in izobraževanja (Organisation and Financing of Education Act): Uradni list RS, št. št. 16/07 – uradno prečiščeno besedilo, 36/08, 58/09, 64/09 – popr., 65/09 – popr., 20/11, 40/12 – ZUJF, 57/12 – ZPCP-2D, 47/15, 46/16, 49/16 – popr. in 25/17 – ZVaj).

Zakon o osnovni šoli (Elementary School Act): Uradni list RS, št. 81/06 – uradno prečiščeno besedilo, 102/07, 107/10, 87/11, 40/12 – ZUJF, 63/13 in 46/16 – ZOFVI-K.

Zakon o Radioteleviziji Slovenija (Radiotelevizija Slovenija Act): Uradni list RS, št. 96/05, 109/05 – ZDavP-1B, 105/06 – odl. US, 26/09 – ZIPRS0809-B in 9/14.

*Zakon o romski skupnosti v Republiki Sloveniji (*Roma Community in the Republic of Slovenia Act - RCA*):* Uradni list RS, št. 33/07.

Zakon o spodbujanju skladnega regionalnega razvoja (Promotion of Balanced Regional Development Act): Uradni list RS, št. 20/11, 57/12 in 46/16.

Zakon o varstvu kulturne dediščine (Cultural Heritage Act): Uradni list RS, št. 16/08, 123/08, 8/11 – ORZVKD39, 90/12, 111/13, 32/16 in 21/18 – ZNOrg.

Zakon o vrtcih (Kindergarten Act): Uradni list RS, št. št. 100/05 – uradno prečiščeno besedilo, 25/08, 98/09 – ZIUZGK, 36/10, 62/10 – ZUPJS, 94/10 – ZIU, 40/12 – ZUJF, 14/15 – ZUUJFO in 55/17.

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A Current Stage of the Local Government Reform in Russia

Maksim Mokeev

Abstract Local self-government is an important and a complicated institution in the federal structure of public administration in Russia. The development of the Russian local self-government is determined by the Constitution of Russia of 1993 and federal and regional legislation. The Federal Law "On the General Principles of the Organization of Local Self-Government in the Russian Federation" of 2003 gave birth to the ongoing contemporary local self-government reform, the current stage of which is marked with numerous amendments that significantly change the fundamental institutions of local self-government and the principles of its regulatory mechanism. The article focuses on the most controversial issues of the reform.

Keywords: • Local Self-government • Public Authorities • Issues of Local Significance • Federal Legislation • Municipality •

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1 Introduction

Local self-government is one of the important institutions recognized and guaranteed by the Constitution of Russia. The Russian Constitution of 1993 has enshrined, as a matter of law, the unique status of local government. The Constitution has excluded local government from the system of State government bodies and provides that the structure of institutions of local government is to be established by the population independently. Local self-government has supposed to take all necessary steps to implement its own powers, independently manage municipal property and the local budgets and carry out other local functions. These constitutional regulations, and also the ratification of the European Charter of Local Self-Government by Russia in 1998, have served as a powerful spur to renew the interest to search for an optimal model of local self-government which would both respect domestic traditions and realities and at the same time correspond to the world standards.

Today, local self-government is simultaneously considered to be both a form of citizens' participation in public affairs (an element of the civil society), as one of the levels of public power, and as a constituent of the market economy (delivering certain services to citizens) (Ermasova & Mokeev, 2016).

In the Russian history, there was no gradual evolutionary development of the system of municipal government. This was not unusual, and was the case for the development of local authorities in most of the contemporary developed countries. Municipal governments were eventually replaced by a strong centralization and total lack of independence at the local level during the Soviet period. Nowadays, with reforms being made, the system of local self-government in Russia is still in a period of transformation and searching for effective forms and models.

In the 1990s, due to the legislation ambiguity, local self-governments, burdened with huge financial deficits, and therefore a lack of financial resources, simply lacked the capacity to carry out all their responsibilities.

Fundamental changes to local self-governments were ushered in by the adoption of the Federal law "On the General Principles of the Organization of Local Self-Government in the Russian Federation" in 2003. In drafting this legislation, the

legislators drew heavily upon not only lessons learned in more than 10 years' of experience of local self-government functioning in Russian Federation but also the best practices taken from abroad.

At the time this law was drafted, municipal reform was driven by three major goals: to bring local governance closer to citizens; to clearly define local government competences; and, to ensure that the financial resources match the functions of local governments at each level.

The reform has introduced a new two-tier model which included three types of territorial entities: settlements (urban and rural), municipal districts (roughly equivalent to a county in the USA or a Landkreis in Germany), and city okrugs (cities standing somewhat apart to cover a range of issues of local significance of both settlements and municipal districts). This two-tier model was supposed to ensure, on the one hand, the closeness of the authorities to residents and, on the other hand, the necessary concentration of resources.

Consequently, the other essential reform goal was to revise the limits of local government competences in order to consider the actual abilities of both levels of local self-government and to ensure the availability and quality of vital local services.

The law has also required that each municipality chose one of the forms of local government that included traditional "strong mayor" and "weak mayor" forms and a new "city manager" form.

2 The Essence of the Current Stage of the Reform

The current stage of the Russian ongoing municipal reform is characterized by frequent, and not always consistent, adjustments of federal legislation that seeks to further multidirectional goals, in the conditions of unchanged constitutional provisions and the absence of clear public policy in the field of local self-government.

The conceptual directions for the development of local self-government are determined by presidential decree of October, 15th, 1999." On the guidelines of public policy in the field of the development of local self-government" the goal of which has been both the further development of local self-government and

an increase of its effectiveness as a precondition of the economic and social development of the democratic State. In order to achieve these goals, this policy should have been aimed at creating conditions for the implementation of the constitutional powers of local governments. At the same time, one of the public policy objectives in the field of local government development in the Russian Federation was the non-interference of State bodies into the competence of local self-government.

In his address to the Federal Assembly on December 12, 2013, the President of Russia paid much attention to enhancing and renewing local government. He emphasized the importance of the general principles of local government organization and the development of strong, independent, financially sustainable local authorities as the most important task for today. The President's proclamation, highlighting the importance of ensuring an appropriate balance between the responsibilities and resources at the local level, in accordance with common sense, as a public policy priority, was supposed to serve as an impetus to help propel the government's efforts to achieve these goals.

At the meeting of the Presidential Council on the Development of Local Self-Government on May 26, 2014, preceding the signing of the Federal Law of May 27, 2014, which, in fact, marked the beginning of the current stage of the municipal reform, Vladimir Putin noted the importance of everyone's understanding that the basis of the system of legal regulation of local self-government in Russia is freedom of choice, as well as the need to ensure the implementation of the key constitutional principles – the independence of local self-government and the federal structure of the country.

However, some of the subsequent changes in federal legislation has had the opposite effect, thereby instead limiting the autonomy of local self-government and calling into question the implementation of constitutional provisions on local self-government. According to some researchers, today Russian local governments are experiencing extreme difficulties and hardships in their development (Babun, 2016: 12).

In general, the amendments to the Federal Law of local self-government adopted in 2014-2017 have given rise to an increased role on the part of regions and regional regulation, the unification of forms of local governments, and have led

to certain changes to the basic principles of the territorial organization. The very idea of delegation of regulatory functions in the field of local government from the federal to the regional level is useful, because it helps foster diversity among the territories in a huge country. Unfortunately, given the current political climate in Russian, regions have obtained the following broad, unprecedented and even ambiguous powers:

- to convert a municipal district into a city okrug;
- to redistribute competences between the settlements and municipal districts;
- to redistribute competences between regional and local governments; and
- to establish the forms of local governments to be established in the municipalities, including their powers, terms of office, accountability, and other matters of the organization of local authorities.

Consequently, the Federal Law created an open field for interference of regions in the affairs of the local self-government and, therefore, has given rise to some controversial issues of local self-government organization and implementation.

3 "Redistribution" of Powers

The key element of the novel legal provisions introduced in 2014-2015 is the issue of "redistribution" of powers between regional and local authorities. Despite the direct meaning of the word, the law does not contain any clear definition and this new institution implies the possibility of transferring powers only from local governments to regional authorities. At the same time, this is not about an agreement concluded between regional and local authorities on the powers transfer, but about a regional law, which simply withdraws a part of municipal competence on local issues. Neither the initiative from local governments nor their consent or citizens' involvement are stipulated. The Federal Law is silent, and therefore provides no guidance, on the need to determine the circumstances or criteria for the redistribution of powers.

Taking into account the fact that one of the main principles of local government organization is its independence, granting the regional authorities the right to redistribute powers on local issues without consideration of the opinion of the

population and local authorities, can be seen both as a violation of the constitutional principles of organizing public authority and of a rejection of the basic principles of delineation of powers and of municipal reform (Savin, 2017: 152; Markvart, 2016: 86).

Such legislative innovations lead de jure to the emergence of joint jurisdiction of state authorities and local self-government, a situation which is not recognized by the Constitution. Furthermore, these legislative provisions have the negative effect of eroding the content of the constitutional category of "local issues", since they allow them to be transferred arbitrarily to the competence of regional authorities (Byalkina, 2014: 1612).

Half of the regions have already exercised this right. In 2015, 28 regions affecting 3200 municipalities adopted laws on redistribution of powers. In 2016, this number jumped to 39 regions affecting an additional 5200 municipalities. In 2017, 42 regions adopted laws impacting 4400 municipalities. And finally, in 2018 47 regions adopted laws impacting 4200 municipalities. The most frequently redistributed powers are in the fields of architecture, urban planning and spatial planning (including authority to approve site plans, land use and development, issue building permits, etc.), electricity, gas and water supply, management of natural resources, road management, transportation services, trade and advertising (Ministry of Justice, 2015-2018).

This practice highlights a serious problem that the experts initially paid attention to: in regions where mechanisms of redistribution of powers are actively implemented, local government is emasculated, and the right to exercise local self-government is being violated. An analysis of regional laws shows that regional authorities are not keen to somehow substantiate their activities on redistribution (Shugrina, 2016: 44).

The Federal Law, while delineating powers that are not subject to redistribution, provides no restrictions on the scope and number of powers that can be redistributed. This means that, at least theoretically, almost all powers can be stripped from the local government and usurped by the regional authorities which, in turn, would lead to de facto dissolution of local self-government in the region (Blagov, 2017: 122; Shugrina, 2016: 46).

Indeed, despite the fact that redistribution of powers has not become a mass phenomenon, and as a regulatory tool it is applied very locally, many experts and practitioners reasonably believe that mechanisms of redistribution of powers, vesting in public authorities the discretion to delegate, or accept different powers, lead to the emasculation of the very essence of the division of powers between the tiers of public authority (Russian Congress of Municipalities, 2017: 70; Shugrina, 2017: 271).

4 The Forms of Local Government

Another controversial issue of municipal reform in 2014-2015 was the establishment of the right to determine forms of local governments, including the manner in which elections of heads of municipalities are to be conducted and, once elected, their roles in local government by regional legislation.

In fact, the Federal Law introduced the right to establish in regional legislation the only possible option for the structure of local governments with no alternatives for the latters, whereas according to the Constitution of the Russian Federation, the structure of local governments is to be determined by the population independently.

Most regions finding themselves in this situation actually have made a conclusion about the necessity and (or) opportunity of imperative regulation and have established specific (45 regions), and sometimes the only possible (36 regions) structures of local government (Ministry of Justice, 2015-2018). Meanwhile, the regulation of the issue may also be dispositive by delegating the right to state a structure of local government by its own decision. Only 4 regions have done so.

The situation has become the subject of judgment by the Constitutional Court of the Russian Federation. In its Decree of December 1, 2015, the Constitutional Court emphasized that the autonomy of local self-government is not absolute, and in a number of specific situations, and in order to ensure a balanced implementation of state and local interests, the establishment of the only possible way of election of heads of municipal districts and city okrugs by the regional laws does not contradict the Russian Constitution, but should be based on criteria stated by these laws. At the same time, for the "first tier" of local self-government – for rural and urban settlements - the Court concluded that setting no alternatives, including the direct elections, was unlawful.

Recently, the regions of the Russian Federation are increasingly using a new way of "election" of the head of the municipality. This new procedure is similar to the competition procedure utilized in electing persons for the office of city-manager – the election by a local legislature among candidates approved by the competition commission.

Under this procedure, 50% of the members of this commission are determined by the Governor of the region. This procedure practically guarantees the success of the candidature proposed by the governor and makes the decision of the local legislature pure pro forma, and the residents of the municipality are completely excluded from the decision-making process (Babun, 2016: 12: Sergeev, 2015: 17).

Introduced in 2015, this model has been established in 31.4 % of the municipalities as of the beginning of 2016. After bringing regional laws into compliance with the requirements of the aforementioned Constitutional Court Decree, as of 2018 the model now is used in 27.8 % of Russian municipalities.

This model, with no alternative in municipal districts and city okrugs, is now in use in 25 regions (Ministry of Justice, 2015-2018).

So, the new model of electing the heads of the local governments has proved to be highly popular in many Russian regions. However, the proliferation of the competitive model for electing the heads of local self-governments led to lively discussions among experts and practitioners of local government. In particular, this model is often criticized because of its obvious focus on achieving the political goals of the state to the detriment of local issues and concerns.

In addition, it is believed that the heads of the local governments, who took office as a result of competitive procedures, lack an elected mandate. This situation is fundamentally incompatible with the constitutional principles of municipal democracy (Maikova & Simonova, 2017: 85; Dzhagaryan, 2016: 69).

Also noteworthy is the rather controversial status of a local official that is placed in office in this fashion. On the one hand, this is an elected official to whom the electoral legislation does not impose requirements, with the exception of, for example, age. On the other hand, the regional law may establish requirements for the level of professional education and (or) professional knowledge and skills

that are preferable for exercising certain state powers delegated to local governments. Such a situation, in fact, gives the impression that the head of the municipality (the mayor) is an ordinary municipal employee, for whom professional qualifications may be established (Shugrina, 2016: 40).

Researchers note that at present, the regions of the Russian Federation select models of local government mainly spontaneously, often under the influence of political and economic conditions. Such an approach does not, however, contribute to the creation of sustainable public systems at the municipal and regional levels. Researches further emphasize that when considering the well-being of local self-government, that is, what in their best interests, the most important aspect is to insure that the citizenry enjoys rational choices and are given the necessary opportunity to provide feedback and have a say as to what transpires in their communities (Maikova & Simonova, 2017: 86; Dzhagaryan, 2016: 71).

Other scholars believe that establishment of the structure of local governments at the regional level itself does not detract from their independence, but instead not only serves as a guarantee of democratic procedures but also ensures objectivity of decisions about the structure of local government. But these novelties of federal legislation can be really appreciated only assuming three conditions are met: there exists genuine federalism; there exists free and competitive elections; and, democratic traditions are adhered to. In the lack of those complicated constitutional mechanisms for the separation of power, its accountability to the population, checks and balances in its organization are replaced by simple administrative subordination mechanisms. Limiting the use of direct democratic tools in the political administration, including elections, is the dominant trend today (Sergeev, 2015: 21).

Unfortunately, the universalization of the competitive model of the election of the head of the municipality, while advancing the state goals, does so to the detriment of local interests, which in the end does not benefit the development of the Russian statehood to the extent that would be the case if municipalities were given the level of autonomy anticipated under the Russian Constitution. Rather than fostering local autonomy, which would ultimately strengthen Russia as a whole (municipality by municipality) this model instead has sadly resulted in local communities being stripped of autonomy, with a concomitant loss of initiative, enterprise and democracy (Dzhagaryan, 2016: 69).

5 Territorial Organisation of Local Government

The final aspect of the contemporary local government reform to be mentioned is the conversion of municipal districts into city okrugs. The practice of creation of city okrugs on the basis of municipal districts has in recent years been actively promoted as a result of two processes: the consolidation of rural settlements by their incorporation, and the transformation of municipal districts, with their rural and urban settlements, into city okrugs. The first process has been going on for more than a year and has affected many regions of Russia. The second one appeared only in 2014, but very quickly became widespread in several regions (Russian Congress of Municipalities, 2017: 74).

The Ministry of Justice of Russia counted 31 of such transformations in 2015. This practice was developed: in 2016- the period 2017 ten new city okrugs appeared. As a result of these transformations a region consisting only of city okrugs appeared in Russia - the Sakhalin Oblast (Ministry of Justice, 2015-2018).

Already in 2017, the above-referenced transformation practice has undergone modifications in the form of the adoption of amendments to the Federal Law on local self-government. In particular, these amendments introduced the possibility of liquidation of a municipal district in connection with the acquisition of the status of a city okrug. A new definition of the "urban district" refers simply to one or several settlements united by a common territory.

If, prior to the adoption of these ammendments, all the options for transforming municipal districts into city okrugs that were implemented did not have a solid legal basis, now the unification of all the settlements that make up the municipal district into one city okrug has ceased to contradict federal legislation.

Such a tendency seems to some researchers to be the most significant example of the invasion of "state interest" into local territorial development issues. Such transformations most often take place at the initiative of regional authorities, who seek to increase management efficiency and save budget funds without taking into account the interests of municipal authorities and local residents, whose opinion on the results of public hearings is advisory in nature (Petuhov, 2017: 7).

Both experts and practitioners believe that these amendments to the Federal Law rather created serious problems for those implementing the law than contributed to improving the legal regulation of territorial organization of local self-government. Besides, there is a potential threat of replacing the two-tier system of a municipal organization, which was one of the basic tenets of the Federal Law on local self-government, with a one-tier system based on quasi-city okrugs. Such a result indeed is both undesirable and counter-productive because it fails to take into account all the subtle and not-too-subtle variations of local government in different regions of Russia (Shugrina, 2017: 12). By way of example, the "quasi" city okrugs are fundamentally different from the union of a couple of bordering municipalities. In other words, a "one size fits all" approach is seriously at odds with intended Federal Law and will stifle innovation and growth at the local level. In this case, the question is raised not only about the availability of local authorities, but in general about the possibility of harmonious development of such a municipality, which includes such inhomogeneous territories.

Such transformations, regardless of whether they envisage the unification of several rural settlements into one large municipality or the creation of a city okrug on the basis of a municipal district, lead to an increase and complication of the territory of a municipality. Creating a vast municipality, with a large number of different types of settlements across the territory physically, distances and isolates local government from residents. In the subjects of the Federation, completely abandoning the settlement level, virtually no self-governing territories remained in the original sense of the term (Petuhov, 2017: 11).

6 Conclusion

Malyy and Nikitenko explain the increasing role of the regions in regulating issues of local self-government organization by the desire of the federal legislator to expand the influence of state authorities on the organization of the local government, to legalize existing, but not always simple and understandable relationships between heads of municipalities (capital cities – city okrugs) and heads of the regions of Russia (Malyy & Nikitenko, 2016: 622). They believe that the more discretion on legal regulation that is given to the regional authorities, the greater the diversity of views and outcomes that will result and therefore increase the variability of legal regulation and the opportunity to choose the most effective legal mechanisms for achieving the goals of municipal administration.

However, Bezvikonnaya emphasizes that the local government reform implemented in Russia continues to maintain its administrative and managerial orientation, ignoring its own social, self-governing nature (Bezvikonnaya, 2017: 63). The consequence of the unsystematic nature of the implemented concepts of reform is the impossibility for municipal authorities to effectively influence the processes occurring in the local community.

The actual blurring of the line between local self-government and state power as a result of contemporary changes in legislation on local self-government is noted in the Report of the All-Russian Association – Russian Congress of Municipalities (Russian Congress of Municipalities, 2017: 70).

Numerous changes, amendments, and additions to the law certainly testify not so much to the shortcomings of lawmaking, but rather to the lack of a clear idea of the legislator about what local self-government is and what place it should take in the system of public power (Malyy & Nikitenko, 2016: 618).

Babun also concludes that at the highest levels of state power there is no understanding of what real local self-government is and why strong and autonomous local self-government is good for the country (Babun, 2016: 14). In addition, the municipal community lacks clarity in the understanding of state policy in the field of local self-government. He argues that without a clearly formulated concept and state policy in the field of local self-government, all other activities will not yield systematic results.

Indeed, analyzing the current stage of the reform of local self-government, many researchers, experts and associations of municipalities declare the need to develop a concept of public policy for the development of local self-government.

Thus, for example, Leonov believes that the purpose of developing the concept should be a clear formulation by the State of the place and role of local self-government in the development of the Russian society at the present stage, securing the key role of self-government in the development of human capital as the main goal of modernizing the country, as well as defining the main activities of state authorities, local governments and citizens on the development of local government in the short and medium term (Leonov, 2017: 127).

It is obvious that the development of a consistent and appropriate state policy in the field of local self-government that would take into account contemporary practices and prospects of cooperation between the authorities and the population as well as the key trends in public administration is the essential condition for ensuring the sustainable development of local government institutions and the full implementation of the constitutional model of local self-government in Russia.

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Refugee Crisis in Europe and International Law

Vladimir Ortakovski

Abstract This article will comment on and analyse the aspects of international law relevant to the refugee crisis, placing an emphasis on the distinction between migrants and refugees. While countries treat migrants according to their national immigration laws, refugees fall under relevant refugee protection and asylum provisions, which can be found in both international law and in national legislations. This article will consider in greater detail the mechanisms of European Union (EU) law which are relevant for the EU response to the European refugee crisis. The article will outline the EU regulations on states' border control and on human trafficking, as well as the EU legal framework on irregular migration; it will also tackle the issue of human rights of irregular migrants. The article provides and answers the question of whether the new legal framework of EU adequately addresses the issue of human rights of refugees and irregular migrants.

Keywords: • Migrants • Macedonia • Fundamental Rights• NGO's • Non-refoulement Principle •

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1 Introduction – the Refugee Crisis in Europe

The phrases "European refugee crisis" and "European migrant crisis" have come into frequent use starting in April 2015 and onwards, when five vessels (small ships and boats) transporting around 2,000 refugees/migrants capsized due to overcapacity, which led to the loss of more than 1,200 lives.

Refugees and irregular migrants come from countries where armed conflicts were waged or are still on-going: from the Middle East (Syria, Iraq, Afghanistan), from Africa (Eritrea, Nigeria, Somalia, Sudan, the Gambia) and from Southern Asia (Vietnam, Bangladesh). According to data by the UN Refugee Agency (UNHCR) from September 2015 more than half a million refugees and irregular migrants who had crossed the Mediterranean Sea predominantly included people from Syria (52 %), Afghanistan (19 %) and Iraq (6 %). A majority consisted of adult men (65 %).[1] The greatest share of refugees came from Syria, where an armed conflict has been going on since 2011, with numbers constantly increasing.

There are several routes used by refugees and irregular migrants on their way to seeking asylum in the EU. Via the *Western Mediterranean* route, irregular migrants and refugees cross the Mediterranean Sea from Morocco and Algeria to Spain. The *Central Mediterranean* route covers the passage from Libya and Tunisia across the Mediterranean Sea to Italy. The *Western Balkan* route is used by the refugees and irregular migrants who cross Turkey and the Aegean Sea in order to reach the Greek islands, and then, from Greece, they take the land route across Macedonia, Serbia, and Hungary. However Hungary took unilateral action and built a border fence with their neighbours, prohibiting the irregular entry into its territory, therefore changing the route to Serbia across Croatia and Slovenia, to Austria. Most hope to end up in Germany.

Armed conflicts in Middle Eastern countries have increased the number of forcefully *displaced persons* on a global scale, and by the end of 2014 this number reached 59.5 million, which is the highest number since WWII.[2] This is a 40 % increase compared to 2011. Out of the 59.5 million, 19.5 million were refugees (14.4 million under the UNHCR mandate and 5.1 million Palestinian refugees

[1] See: *"Refugees and migrants crossing the Mediterranean to Europe", United Nations High Commissioner for Refugees*, 11 September 2015.
[2] See in: *"UNHCR – Global Trends – Forced Displacement in 2014"*. UNHCR, 18 June 2015.

under the UNRWA mandate), and 1.8 million were asylum seekers. The remaining number consisted of internally displaced persons (within the boundaries of their own states). Refugees from Syria constituted the largest refugee group in 2014 (3.9 million – 1.55 million more than the year before), exceeding the number of refugees from Afghanistan (2.6 million), who had made up the largest share of refugees over the last three decades.

2 Definiton of Refugees and Migrants

A *refugee* is "a person who crossed the international border due to a well-founded fear of persecution". The *1951 Convention relating to the Status of Refugees* defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[3]

This definition was created in the aftermath of WWII and it referred to all people who had fled their homes during the war. Over time, the nature of refugees changed, and instead of their movement from East to West, they started to move predominantly from South to North. International law reacted to this by adopting the *1967 Protocol relating to the Status of Refugees*, which surpassed the temporal and geographical restrictions of the definition provided in the Convention.

These two international agreements became the cornerstones of refugee protection and gave rise to the development of other international agreements. This includes the regional instruments: for Africa – the *1969 OAU Convention on Refugees;* for Latin America – the *1984 Cartagena Declaration*; for the European Union – the *Common European Asylum System*.

[3] UN, 1951, Convention relating to the Status of Refugees, art. 1A(2). http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf /

The definition provided in 1969 by the *Organisation for African Unity* includes additional reasons for a refugee status, such as external aggression, occupation, foreign domination or events seriously disturbing public order.

Regarding the legal framework on migrants, we will particularly disect the EU's *Common European Asylum System*.

Protection of a refugee includes the certainty of not being returned to perilous circumstances from which the refugee has fled from; access to a fair and efficient asylum procedure; measures ensuring the respect of fundamental human rights which will allow the refugees to live with dignity and no harm, all the while being assisted in seeking a long-term solution. States have the primary responsibility to ensure the protection.

The majority of refugees worldwide would normally only cross to a neighbouring country, wait for the situation to normalise in their country of origin, and then move back to their homes.

Unlike refugees, *migrants* leave their homes and go to another country for a prolonged period of time, for various reasons. In particular, economic migrants arrive in other countries not because there was a life-threatening armed conflict in their own country, but rather to improve their living standards, to find a job, or, in certain cases, to get educated, to reunify family members, or for other reasons. This means that migrants can return to their own homes, and if this happens, they will continue to receive protection from their own governments.

Migrants are fundamentally distinct from refugees and the international law treats them differently.

However, migrants and refugees frequently use the same pathways and means of transport to reach their destinations. Such travels are frequently irregular, because they lack the necessary documentation. They usually cross the borders outside the border-crossings checkpoints (ie along a highway), or become part of the so-called human trafficking. In practice, countries are often faced with simultaneous irregular entry of both refugees and migrants.

3 Republic of Macedonia and the Refugee Crisis

Being a country with a significant geostrategic position in the Balkan Peninsula, the Republic of Macedonia has become part of the so-called "Western Balkan route", used by refugees for transit. Although dubbed a small country according to the size of its territory and population, the country is located at the crossroads where two corridors intersect: the East-West corridor linking the Black Sea and the Adriatic Sea, and the North-South corridor linking Central Europe and the Aegean Sea (the Thessaloniki port). As the place where Europe, Africa and Asia meet, many significant political and cultural borderlines have crossed their way throughout the history of the Balkans. This refers to the border between the Eastern (Byzantine) and Western Roman Empire; between Islam and Christianity; between Orthodoxy and Catholicism. As a form of expression of the diversities that have crossed their ways through the Balkans we could take the remarkable example of the use of three different calendars up until WWI: a) Muslims were marking their events from the year of Prophet Muhammad's journey from Mecca to Medina, in 622; b) Orthodox Christians were still using the Julian, or the so-called "Old" Calendar; c) whereas Catholics and Protestants had already adopted the Gregorian, or the so-called "New" Calendar.

By mid-June 2015, the Government of the Republic of Macedonia adopted amendments to the Law on Asylum and Temporary Protection, thus changing its policy on the illegal entry of migrants. Before this, migrants were prohibited from transiting through Macedonia, and among those who did so illegally (moving by night, on foot, following the railway tracks or the highway route), the number of casualties was increasing. The amendments to the law made it possible for them to express their intention to make an asylum claim and within three days regularly transit the country.

The opening of the "Macedonian route" enabled the Middle Eastern refugees and the irregular migrants to use the shorter and the cheaper pathway across the Mediterranean Sea to the countries of the EU. Apparently, the passage from the coast of Turkey to the Greek island of Chios, Lesvos and Kos in the Turkish vicinity (just about six kilometres away), was an easier, faster and a cheaper way for refugees and irregular migrants to set their foot on EU land.[4]

[4] Yeginsu, Ceylan (16 August 2015). *"Amid Perilous Mediterranean Crossings. Migrants Find a Relatively Easy Path to Greece"*. New York Times.

In the first six months of 2015 it was Greece that became the EU country receiving the majority of refugees and irregular migrants (until then, it was Italy). By June 2015 124,000 refugees and irregular migrants had entered Greece, representing a manifold increase (by 750 %) compared to the previous year.

However, even though a member of the EU and located at the outer borders of the Schengen Area, Greece failed to treat the refugees and irregular migrants in compliance with the EU rules. Without carrying out the necessary registration and without taking their fingerprints, Greece transported the refugees and irregular migrants to the border with the Republic of Macedonia, from where they continued their journey to Serbia, westward via the Balkan route. Greece requested financial assistance from the EU, which was duly granted. Vincent Cochetel, the Director of the UNHCR Bureau for Europe, pointed out that the conditions and the equipment provided to the refugees on the Greek islands were "completely inadequate", and that the situation in the islands was in "total chaos"[5].

During 2015, a total of 694,679 refugees and migrants transited through the Republic of Macedonia. On 18 June 2015, amendments were adopted to the Law on Asylum and Temporary Protection, since the Macedonian authorities had begun issuing certificates of expressed intention for claiming an asylum. Before that, in the period January-May 2015, a total of 1,249 migrants were detected who had made an illegal entry into the country.

The flow of so many refugees and irregular migrants through the Republic of Macedonia significantly raised the risk of possible consequences to the country's security, such as infiltration of ISIL (Islamic State) cells, terrorism, organised crime, etc.

In the period of 18 June – 31 December 2015, a total of 388,233 certificates were issued to migrants who had expressed their intention to make an asylum claim. The number of refugees/migrants only increased in the month that followed (in July: 17,566; in August: 30,045; in September: 55,318), and in the last three months of 2015 it reached the number of more than 90,000 people per month (in October: 91,350; in November: 94,690; in December: 93,305 people). Taking

[5] See in: *"Migrant 'chaos' on Greek islands – UN refugee agency". BBC News, 7 August 2015.*

into consideration the great number of refugees/migrants transiting the country (up to 10,000 a day), an additional 305,000 refugees/migrants[6] must have been allowed through the country in this period, of whom no statistical records have been made. According to their citizenship, out of the 388,223 reported persons, the majority came from Syria (216,157 or 55.68 %), Afghanistan (95,691 or 24.65 %) and Iraq (54,944 or 14.15 %).

The Republic of Macedonia adopted a decision on 20 February 2016 to cease to allow entry of irregular migrants from Afghanistan, designating them as economic migrants. This decision was reached after other countries falling within the Western Balkan route (Austria, Slovenia, Croatia and Serbia) announced that the Afghanistan migrants would not be allowed to cross their borders. Croatia declared that migrants from Afghanistan were not refugees, but economic migrants, so they returned several hundreds of them back to Serbia who then returned them back to Macedonia. Austria introduced a daily entry limit of 3,200 refugees, and a maximum of 80 asylum claims. UNHCR expressed their concerns that such restrictions could escalate into a humanitarian crisis along the Western Balkan route. According to UNHCR, around 700 Afghanistanis were refused entry to Serbia from Macedonia, which could potentially lead to an increased number of refugees and migrants in Macedonia and Greece. UNHCR requested from all countries along the Western Balkan route to provide the refugees with adequate housing, food and access to the asylum seeking procedure.

4 Fundamental Rights of Refugees

Refugees are persons who have left their country because of either an armed conflict or a direct threat to their lives and property. Their situation has become unbearable and they are forced to move across the borders of their own country, therefore becoming internationally recognised as "refugees", which allows them to become eligible for assistance from other states, UNHCR and other international organisations.

[6] Source: Ministry of Interior, 12 April 2016.

Refugees are granted the fundamental rights that constitute an individual's integrity and dignity, which are enclosed in the *Universal Declaration of Human Rights*. This refers to the following rights:

- freedom from torture or cruel, inhuman or degrading treatment or punishment;
- freedom from slavery;
- recognition as an individual in the law;
- freedom of opinion, conviction and religion;
- freedom from arbitrary arrest and detention;
- freedom from arbitrary interference with privacy, home and family life.

According to the *1951 Convention*, states must provide the following fundamental rights to refugees:

- non-refoulement;
- access to a fair and efficient asylum procedure;
- issuance of travel documents, etc.;
- prompt assistance or protection measures, if necessary;
- measures that will ensure the enforcement of their fundamental human rights, which will enable them to live a life in dignity and safety;
- facilitation in identifying a permanent solution (voluntary repatriation, local integration or a transfer to another country).

States have the primary responsibility to ensure the protection of refuges and asylum seekers. Most important of all is the application of the non-refoulement principle, meaning that a refugee cannot be returned to the country of his/her origin. If refugees or asylum seekers are returned back to their countries of origin, their lives may be endangered.

The longer the refugees stay in the host country, the more rights they become entitled to. This refers to the following rights:

- not to be expelled, unless under well-established, strictly defined conditions (Article 32);
- not to be punished for their illegal entry into the territory of the Contracting State (Article 31);
- right to work (Article 17 and 19);
- right to housing (Article 21);
- right to education (Article 22);
- right to public relief and assistance (Article 23);
- freedom of religion (Article 4);
- right to access to courts (Article 16);
- freedom of movement within its territory (Article 26);
- right to be issued identity papers and travel documents (Article 27 and 28).

Refugees are required to respect the laws and regulations valid in the country of their asylum and to adhere to the measures that have been taken for the preservation of the public order.

However, certain categories of persons are excluded from the right to be protected as refugees. This refers to persons who have been suspected of: a) committing crime against peace, war crimes, crimes against humanity; or b) have been found guilty for committing acts against the principles and aims of the United Nations.

It bears mentioning, however, that refugee protection under the *1951 Convention* is not a permanent one. The refugee status is revoked once the refugee has been voluntarily repatriated to the country of his/her origin or has become integrated or naturalised in the host country of his/her current stay.

5 EU Response to the European Refugee Crisis

How did the EU react to the 2015 European refugee crisis? The EU struggled to manage the crisis, through increasing the funds necessary for financing border controls in the Mediterranean Sea, by developing plans to fight the trafficking in migrants, and by proposing a new quota system in order to redistribute the asylum seekers among EU Member States, thus facilitating the burden borne by the countries at the external borders of the EU (Greece, Italy). Discord emerged among EU Member States, as some countries were willing to admit asylum seekers, while others refused to do admit any.

The Chancellor of Germany, Angela Merkel, encouraged the refugees from Syria that, in case they succeed in arriving in Germany, they will be provided with a temporary stay and an opportunity to apply for asylum. She was driven by the needs of the powerful German economy for a new professional workforce. However, in doing so, she suspended the EU rule stemming from the Dublin Regulation, according to which the first EU country where the asylum seeker arrives becomes in charge of processing the asylum claims.

According to EUROSTAT, EU Member States received 626,000 asylum claims in 2014, which is the highest number since 1992, when it received 672,000 claims. Asylum was granted to more than 185,000 asylum seekers. In this, around two-thirds of the asylum claims were addressed to Germany, Sweden, Italy and France, who then granted asylum to almost two-thirds of the claims. In the first half of 2015 an additional 395,000 asylum claims[7] were addressed to the EU Member States.

[7] See in: *"Over 210,000 first time asylum seekers in the EU in the second quarter of 2015", EUROSTAT, 18 September 2015.*

On 18 March 2016, the EU and Turkey reached an agreement to return back to Turkey those migrants who had illegally entered Greek territory. This EU-Turkey Statement stipulates:

- Turkey will take "any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU" and will receive back "all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016"[8];
- for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to an EU Member State (up to a total of 72,000 Syrian refugees), taking into account the UN Vulnerability Criteria;
- as of April 2016, the EU will open a new Negotiating Chapter with Turkey (Chapter 33);
- the three billion euro of financial assistance promised to Turkey for dealing with the Syrian refugees on its territory will be disbursed by the summer of 2016, with another three billion euro by the end of 2018;
- visa liberalisation for Turkish nationals travelling to EU will come into effect in June 2016, if Turkey meets the necessary conditions.

This agreement should help prevent the irregular entry of migrants into the EU and deter them from their risky travels to Europe, while at the same time encouraging them to travel to the Old Continent regularly, with a possibility of settling there, or at least a portion of around 3 million refugees currently in Turkey. However, observed from the perspective of humanity and human rights, this agreement fails to provide a solution, and even worsens the conditions of Syrian refugees in Turkey, as well as of those sheltered in tents in Greece, at the border of Greece and the Republic of Macedonia.

[8] The EU-Turkey agreement is referred to as: European Council, EU – Turkey Statement, 18 March 2016,
http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/

6 EU Regulation on Border Control and Human Trafficking

The primary objective is to prevent the facilitation, encouragement and exploitation of irregular migrants by criminal groups through human trafficking, and to discourage the use of irregular migrants as a cheap workforce.

In order to reduce irregular migration, to strengthen the border controls and to manage the migration processes, pieces of EU regulation try to impact the factors that trigger the migrants to leave the countries of their origin (Castel & Miller, 2010).

The *Schengen Agreement* established an area where border controls between Member States were lifted. Border checks are carried out at the external Schengen borders, and countries lying along the external borders of the Schengen Area are obliged to implement these checks.

Regarding the external borders, the EU supports its Member States in managing border controls and in providing a high and uniform level of control of persons and surveillance, as a precondition for the establishment of an area of freedom, security and justice. To this end, the *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union "FRONTEX" was established (Regulation 2007/2004).* This regulation applies to any person crossing any border of the Member States.

In 2009, EU established the *Visa Code (Regulation 810/2009),* which regulates the conditions and procedures for issuing visas for short stays and transit through Member States and associated members through the application of the Schengen Acquis. This code requires third-country nationals to hold visas when crossing the external borders of EU, and nationals of some other countries to hold airport transit visas in order to pass through international areas of airports in Member States.

The *European Border Surveillance System "EUROSUR"* was established in 2011 and was commissioned on 2 December 2013. This system should reduce the number of irregular migrants entering the EU and should help facilitate the Member States in responding swiftly to incidents caused by migrants without papers and to cross-border crimes. The system has introduced "National Coordination

Centres", which requires the competent authorities for border surveillance to coordinate their activities.

The *Dublin Rules (Dublin Regulation, No. 604/2013),* in force since 19 July 2013, provide that EU Member States are responsible for the processing of asylum claims within the EU, thereby preventing "asylum shopping", when an application is addressed to more than one EU Member State, or "asylum orbiting", when none of the EU Member States wants to assume the responsibility for the processing of a particular asylum claim. The rule says that the responsibility lies with the first Member State where the asylum seeker has entered the EU and where his/her fingerprints have been taken. If the asylum seeker claims asylum in another EU Member State, he/she will be returned to the Member State where he/she first entered the EU. In regard to asylum seekers, the Dublin Rules impose great responsibility of Member States over the external borders of EU (such as Italy, Spain, Greece, Malta, etc.).

7 EU Legal Framework on Irregular Migration

What is the EU legal framework on the irregular migrants coming from third countries into EU? There are two fundamental problems that relate to the EU legal provisions on irregular migrants.

First, *there is no coherency in the EU migration policies in general.* Even when reviewing the individual legal provisions and policies related to irregular migration, no clear strategic objectives can be identified. The logic behind the EU immigration policies is a contradictory one, especially the ones referring to criminal justice, labour market, foreign policies and development and gender equality (Pop, 2008: 45-59).

The second problem arising from the legal framework on irregular migration is the continued *criminalisation of migration and migrants.* There are such provisions where migrants have been stigmatised as criminals, which only intensifies the distrust between the EU Member States and the migrants. This, in particular, refers to the "adoption of measures which stigmatise migrants, in the absence of a more thorough approach based on detailed guarantees of human rights" (Cholewinski, 2007).

Hence the third and fundamental weakness of the legal framework: *absence of human rights considerations* in the law and the policies in this area. Human rights protection has been positioned as the second most important.

This means that there is no comprehensive migration policy in the EU. Instead, EU legal provisions focus on specific issues related to migration and fail to perceive the migrants as human beings to whom human rights apply. Contradictions inherent to these policies and legal provisions hamper the regulations of migration and place a significant burden the protection of migrants' interests, and those of third countries and EU Member States.

The EU and its Member States "perceive migration as inherently undesired and, in many circumstance, threatening" (Dover, 2008: 113-130). Many official documents of EU de facto criminalise migration. They use such terms as "illegal", instead of "irregular' migration and they fail to clarify that irregular migrants are not criminals just because they have not regulated their status within an EU Member State (Hammarberg, 2009: 383-385).

Any person who has failed to enter a country in a regular way and who has not been subjected to an adequate verification at the border control has indeed entered the country illegally, but this does not make them a criminal.

Criminalisation and stigmatisation of migrants are evident in the human trafficking provisions. The language itself that has been used – "combating illegal migration" or "fighting of illegal migrants" – suggests the perception of migrants as criminals, not as human beings. Those wishing to avoid the negative connotation use such terms as "undocumented" or "irregular" migrants.

8 Human Rights of Irregular Migrants

The issue of human rights seems to have been left aside during political debates within the EU, in a situation when there is no coherency, and criminalisation of migrants continues. EU human rights instruments consider the migrants to be of secondary importance, in a number of ways (Ambrosini, 2013).

"A human being with his or her interests is central to the EU, and the Member States have a responsibility to protect the human rights of all those within their

territory and jurisdiction. There is an individual and collective duty of EU states to protect persons moving across borders and it is incumbent on them to act and co-operate to achieve this purpose." (Kengerlinsky, 2007: 1-19). In practice, the EU fails to implement such a protection of irregular migrants.

The *"Return Directive" (Directive 2008/115/EC)*, in Article 13, provides that a third-country national may get his/her return decision suspended in due court proceedings, as a possibility, not necessarily as an automatic effect from the right to appeal. This means that an immigrant who had appealed the decision for his/her expulsion from an EU Member State could be doing it in vain because, once the expulsion is enforced, a possible court decision in his/her favour would produce no effect.

The lack of human rights protection also becomes evident in the constant support, in many aspects, of national jurisdictions, thus preventing the EU from having its own legislation and strictly its own rules (McNamara, 2013: 319-338). The general principles of the EU in many cases are applied differently in each Member State according to their national agenda, as they are granted the right of discretion to decide on such issues. As a result several Member States refuse to provide protection for migrants, especially for irregular migrants, who are considered to be illegal in the sense that they may cause trouble.

9 Does the New Legal Framework of the EU Adequately Address the Issue of Human Rights of Refugees and Irregular Migrants?

There are *some improvements* as to the ways in which the EU addresses the issue of a greater and effective protection of human rights of irregular migrants.

In the *Return Directive (Directive 2008/115/EC)* some of the provisions refer to human rights protection: the right of migrants to receive free legal assistance (at the request of the migrant, who should be informed of this opportunity, in a language they understands); the returning decision must include clarification of the reasons, both factual and legal; the prohibition to keep a migrant detained during the on-going procedure.

Another positive measure was recently implemented – the European Parliament has adopted a Regulation on surveillance rules within FRONTEX through joint-coordinated operations. On 20 February 2014, the *European Parliament Committee*

on Civil Liberties, Justice and Home Affairs (LIBE) adopted a provision stipulating that units participating in FRONTEX operations should provide safety and dignity for the persons they are rescuing or preventing from reaching the desired destination. There is also an obligation to identify the vulnerable persons, such as victims of human trafficking or migrant children separated from their parents, who should be provided with adequate care.

The new *Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims,* in force since 15 April 2011, makes it mandatory to be transposed into national legislations of EU Member States by 06 April 2013 – is focused more on the protection of victims, as part of their human rights. It makes an explicit reference to the European and international human rights instruments. It has a more comprehensive approach, and in addition to combating organised crime, it also emphasises the protection of victims. Article 2(2) of this Directive includes an explicit provision for "position of vulnerability" and for non-criminalisation of persons who are subjected to human trafficking. In line with this is the provision that a judge may seize or confiscate a property in order to secure the financial resources for victims' assistance and protection. This Directive promoted civil society organisations, including NGOs, stating that Member States must work closely with them (in relation to their initiatives, information campaigns) on research, education and training, and monitoring and evaluation of the impact of these measures on combating the human trafficking.

However, some of these provisions are hard to implement in practice, considering that victims are placed in a vulnerable position, and that human traffickers are in a real position of power over the victims. Because of lack of funds for NGOs and other organisations that should provide the assistance for the vulnerable people, the right to compensation, in practice, is reduced to a symbolic one.

Although it is undeniable that sanctions are imposed against human traffickers, it has to be made sure that the sanctions will not reflect negatively on the victims of the human trafficking. Moreover, it is important to monitor how this Directive is implemented by individual EU Member States, as not all of them have shown readiness to cooperate on this issue.

10 Conclusions

The following conclusions can be deduced from what was presented thus far:

- States treat migrants according to their own immigration rules and procedures, while the refugees are treated in accordance with norms for refugee and asylum seeker protection as defined in both international law and in national legislation. Refusal to admit a refugee or a migrant may inflict grave consequences on their lives and safety.
- In a situation where an enormous number of refugees and migrants arrive in EU countries, it is necessary to give priority to refugees coming from armed conflict zones, such as Syria and Iraq, rather than to economic migrants coming from a number of other countries. The Dublin Regulation should be adapted to newly arising conditions, in that it will require the Member States to register everyone arriving in their territory, along with the requirement to register the migrants / asylum seekers.
- The Republic of Macedonia managed the enormous inflow of refugees and irregular migrants during the 2015 and early 2016 refugee crisis in a satisfactory manner. In March 2016 it closed the irregular border crossings, acting in line with the decisions reached by the countries coming next in the Western Balkan route (Serbia, Croatia, Slovenia and Austria).
- There is no consistent framework for the current EU law and policies on irregular migration. A form exists of criminalisation of irregular migrants, who are left behind, without an adequate human rights-based protection.
- The amendments that have been made to the EU legal framework over the past few years have made some changes for the better, in acknowledging the fundamental human rights of migrants, especially in relation to migrant trafficking.
- The constant refugee crises in Europe imposes the need for EU to re-examine its asylum system in relation to irregular migration and in spirit of the Schengen Agreement. This becomes all the more important in light of the terrorist attacks in France in November 2015, in Belgium in March 2016, etc.

– From a long-term perspective, the EU should develop a mechanism for integration of refugees, especially in the labour market, and to seek ways to use the great inflow of refugees for the reduction of the demographic crisis that has been experienced by most EU countries.

We believe that human rights should take a central position in the European migration policy. The EU should build a coherent migration framework on all levels and in all contexts, without putting certain migrant groups in a privileged position. If human rights were underlying such a policy, Member States would be encouraged to treat all migrants, irregular ones included, with more respect, and this would make sure that the processes of border regulation and the enforcement of such a regulation are carried out in a way that protects the human dignity. However such an approach requires a clearer and more systemic European legal framework on migration (Miller, 2008: 193-197), something which is yet to be achieved.

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Cultural Heritage Protection in Armed Conflicts: Different Legal Perspectives

Antonietta Piacquadio

Abstract This paper analyses the existing international legal regime that aims to protect cultural heritage and then turn to some of the challenges posed by several current conflicts. It suggests to interpret the currently applicable international regime of cultural heritage protection and prosecution, in the light of two different approaches: first, an approach based on individual criminal responsibility for the attack on cultural property/heritage, based on the existing related body of public international law as well as on the jurisprudence of international criminal tribunals; secondly, it describes the approach based on the Responsibility to Protect doctrine, such as developed by the UN in relation to gross violations of human rights that require a response by the international community. The argument made is that if international law is developing quite quickly at the level of individual criminal responsibility, much more problematic is the parallel evolution of a global and shared approach of the responsibility to protect doctrine when related to cultural heritage protection.

Keywords: • Cultural Heritage Protection • Humanitarian Law • Hague Regime • Criminal Tribunals • Responsibility to Protect •

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1 Introduction

The intentional destruction of cultural heritage is a war crime under international law.[1] But, there is no uniform body to prosecute these crimes (Kornegay, 2014: 166). Could destruction of cultural heritage amount to a crime against humanity, and if so, how would these crimes be prosecuted under international law? The recent conflicts in the Middle East and North Africa have been devastating for both humans and the cultural heritage of humanity. While international treaty law has continued to evolve in the effort to protect cultural heritage, several obstacles to effective protection and deterrence persist. In some respects, international treaty law concerning the protection of cultural heritage has not evolved over the past century as much as one might have expected.

This article will first examine the existing international legal regime that aims to protect cultural heritage and then will address some of the challenges posed by the current conflicts in Syria and Mali. The article suggests examining the current legal framework regarding the protection and prosecution of cultural heritage from two different approaches (Francioni & Bakker, 2013). The first approach is based on the concept of individual criminal responsibility for attacks on cultural property, and the article discusses the body of international law that governs the protection of cultural heritage and the further explores how these crimes might be prosecuted under the current body of international law emerging from the International Criminal Tribunal for Yugoslavia (ICTY) jurisprudence, which helps to refine the idea of individual criminal responsibility.[2] The second approach is based on the Responsibility to Protect doctrine, and was developed in response to gross violations of human rights which requires a response the by international community.

[1] UNESCO. (2015). *Director-General Irina Bokova firmly condemns the destruction of Palmyra's ancient temple of Baalshamin, Syria*, (Sept. 8, 2015, 10:17 AM), http://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshami: «*The systematic destruction of cultural symbols embodying Syrian cultural diversity reveals the true intent of such attacks, which is to deprive the Syrian people of its knowledge, its identity and history. One week after the killing of Professor Khaled al-Assaad, the archaeologist who had looked after Palmyra's ruins for four decades, this destruction is a new war crime and an immense loss for the Syrian people and for humanity [...]*»; UN Secretary General. (2015). *Press Release. Calling Attacks 'a War Crime,' Secretary-General Strongly Condemns Destruction of Cultural Heritage Sites in Iraq. March 6, 2015*.SG/SM/16570-IK/701.

[2] Article 3 (d) of the Statute of ITCY contemplates the specific categories of crimes against cultural property, and provisions indirectly include assaults on cultural property within the category of crimes of war or crimes against humanity (see Francioni & Bakker, 2013).

The Responsibility to Protect should be expanded to cover crimes against cultural heritage. This doctrine has been developed in order to address and prevent a (too) narrow range of international crimes: genocide, war crimes or crimes against humanity, ethnic cleansing and their incitement. In the development of this doctrine there was no express intention of bringing crimes against cultural heritage under the mantle of responsibility to protect; however, it is possible to find a clear indication that, at least at the level of individual criminal responsibility, crimes against cultural property may be characterized as war crimes or crimes against humanity. From this perspective, the following argument can be made: if the international law is developing quite quickly and effectively at the level of individual criminal responsibility, it would be quite absurd if States do not face the same responsibility for the very same criminal acts that individuals face under international law (Francioni & Bakker, 2013).

In reviewing several recent developments concerning the application of international law to cultural heritage preservation, to a new understanding of the existing legal instruments and doctrines, thereby opening a path to achieving more effective preservation of cultural heritage.

2 Humanitarian Law and Cultural Heritage Protection

Cultural heritage, in its variety of forms, is the manifestation of a peoples' knowledge, identity, and history. By targeting sites that contain centuries of history and tradition, militant groups aim to annihilate another group's cultural identity and history. As one commentator has explained, these "*[a]cts are motivated by the same intent which drives discrimination, persecution, or genocide — the elimination of diversity, the elimination of those characteristics which defined the 'group as a group', and, ultimately, the elimination of the group from time and space of the territory under the perpetrators' control*" (Vrdoljak, 2011: 18). For this reason, the crime of cultural cleansing committed through the destruction of cultural heritage should be a humanitarian crime and must be codified in the body of international law governing and protecting cultural heritage.

Throughout human history, the destruction of a peoples' cultural identity by way of the targeting and looting of their cultural heritage has been used as a tool of war (Bejesky, 2015: 399-402). In particular, theft of valuable property, including art and cultural artefacts, has been a well-documented tradition of war; one need only look to the museums of the world to see the antiquities taken during war and conquest. In response to this phenomenon, international law has long aimed to stop such acts[3].

In contrast to the law on international responsibility of States, cultural heritage obligations are established in the great majority of cases by multilateral treaties, and to a certain extent by bilateral treaties and agreements in the matter of protection, preservation and cooperation in matters of culture and cultural heritage.

In relation to tangible cultural heritage in the event of armed conflicts, two main groups of obligations can be identified: firstly, the protection and respect of cultural property in the event of militarily occupied territories; secondly, the obligations under the treaty law that mandates the duty to prosecute and impose penal or disciplinary sanctions upon individual perpetrators responsible for the violations of the rules of the protection of cultural property in armed conflicts (read further Hector, 2010: 69-76; O'Keefe, 2006: 236).

Importantly, the first group refers to obligations established by substantive "primary" rules of international law regulating the conduct of hostilities and occupation in relation to cultural property, whereas the second group of obligations would primarily refer to "secondary" obligations of States flowing from their breach of such cultural heritage obligations. The third group refers to

[3] As early as the 1500s, moral theologians and legal philosophers proposed rules that aimed to regulate both the plunder and the destruction of cultural property during times of war (see O'Keefe, 2006).

[3] One of the first modern legal acts that can be considered as forbidding the destruction of cultural property was the U.S. Lieber Code, prepared by Francis Lieber and promulgated by President Abraham Lincoln in 1863. It stated, in pertinent part: «*Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace*». Instructions for the Government of Armies of the United States in the Field, Arts. 35–36, promulgated as General Order No. 100 by Abraham Lincoln (Apr. 24, 1863), (see Gottlieb, 2005: 859–60).

both the 1954 Hague Convention and the 1977 Protocol I to the 1949 Geneva Conventions, both of which oblige their State parties to ensure that adequate criminal regulations and measures are established. In addition, the Second Hague Protocol introduces the principle of universal jurisdiction over the most "serious violations" of the norms on the protection of cultural heritage, and obliges the parties to the Treaty to prosecute or extradite the offender regardless of his or her nationality or the location of the violation committed. The penalized offences not only comprise the destruction of cultural heritage, but also theft, pillage, or misappropriation of cultural material.

The destruction and pillage of property and buildings dedicated to religion, education, art, and science have been prohibited under binding international instruments on war conduct since the Peace Conferences of 1899[4] and 1907.[5]

The notion of protecting immovable property was adopted by the Hague Convention of 1907 on the Laws and Customs of Wars on Land (Gottlieb, 2005). It stated that «*all necessary steps must be taken to spare buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes*»[6]. Unfortunately, World War I and World War II proved that the protections in place for cultural property were insufficient.

All major developments in international law aimed at protecting cultural heritage have been reactionary in nature. Unfortunately, only after there has been significant damage to cultural heritage have more potent measures been instituted to prevent such atrocities (*See* Keane, 2004: 1). In particular, the two World Wars helped the international community realize that an instrument having the sole purpose of protecting cultural property was needed (Gottlieb, 2005). This realization led to the passage of the 1954 Hague Convention, discussed below. Since then, several international treaties have been ratified, usually in response to an event causing grave damage to cultural property, but as one commentator has

[4] Regulations Annexed to the Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, 187 Parry's CTS 429, Article 56.

[5] Regulations Annexed to the Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 208 Parry's CTS 77, Articles 27 and 56.

[6] Convention Respecting the Laws and Customs of War on Land (1907). 36 Stat. 2277 (a907). TS 277. 3. Martens Nouveau Recueil (ser. 3). Available at: https://www.icrc.org/applic/ihl/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument.

lamented: *"[e]very time the protection has increased, this increase has subsequently proven inadequate*" (Keane, 2004: 4).

2.1 Cultural Heritage Protection in International Law.

Treaty law obligations for the protection of cultural property during armed conflict have existed since the nineteenth century, when some of the legal principles governing the conduct of states were first codified in the First and Second Hague Conventions of 1899 and 1907.

Although far from comprehensive, the Hague Rules nonetheless provided that «*In sieges and bombardments all necessary steps must be taken to spare as far as possible, buildings dedicated to religion, art, science […] historic monuments […] provided they are not being used for military purposes*».[7] The exact nature of "military purposes" is not specified in the treaty, but it is generally accepted that the destruction of an opponent's property can only be condoned if called for by the exigencies of war, and then only to the extent necessary to achieve the objective (O'Keefe, 2006).

These early treaties also delineated the responsibilities of an occupying power in regards to the treatment of cultural property as private property, and prohibited the "*seizure, destruction, or willful damage*" of, inter alia, historic monuments and works of art and science.[8]

However, it was not until after the Second World War that the protection of cultural property was addressed in its own treaty. The largely indiscriminate destruction of cultural property during the war created the impetus for the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and its First Protocol of the same year.

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[7] Regulations Annexed to the Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 208 Parry's CTS 77, Articles 27.

[8] Sub-Commission III of the Commission on Responsibilities, established by the Preliminary Peace Conference of Paris in 1919, at the end of First World War, was mandated with investigating and making recommendations as to violations of the laws and customs of war committed by Germany and the Central Powers during the War. In its report the Commission presented, *inter alia*, a draft list of war crimes, which included the "*wanton destruction of religious, charitable, educational and historic buildings and monuments".* Political disagreement, however, thwarted trials before an inter-Allied criminal tribunal, and the Allied Powers sought instead the extradition from Germany of suspected war criminals for trial by national (In Horne & Kramer, 2001: 448–50).

Article 6(b) of the *Charter of the International Military Tribunal at Nuremberg*[9] vested the Tribunal with jurisdiction over war crimes, including "*plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity"*.[10] Thus, the Charter and the ensuing trials, where German Nazis were convicted of the crime of plunder, are considered the first instances where international enforcement of the protection of cultural property occurred.[11]

2.1.1 Specific Treaty Regime: the 1954 Hague Convention and its Two Protocols

The complex set of rules governing the protection of cultural property in the event of an armed conflicts codified after the Second World War, under the 1954 Hague Convention, today binds more than 120 State Parties.[12] This Convention formalized the concept of "cultural property" as an autonomous legal category requiring international protection due to the inherent value of cultural heritage for all people in the world. It also recognizes that such protection is of universal concern, because "*each people make their own contribution to the culture of the world"* (The 1954 Hague Convention, Preamble). The framework established by the 1954 Hague Convention was extended by its Second Protocol (1999) to cover non-international conflicts.[13]

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[9] Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279 (signed and entered into force 8 August 1945) annex ('Charter of the International Military Tribunal at Nuremberg') ('Nuremberg Charter').

[10] See also Control Council Law No *10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, 20 December 1945, 3 *Official Gazette Control Council for Germany* 50 (1946), art II(1)(b) ('*Control Council Law No 10*').

[11] *International Military Tribunal (Nuremberg) Judgment and Sentences*, reproduced in 'Judicial Decisions', (1947) 41 *American Journal of International Law* 172, 237–8, 287, 330 ('*Nuremberg Judgment*'). Chief among the perpetrators was Alfred Rosenberg, head of the Einsatzstab Rosenberg, the special corps created by Hitler and mandated with the plunder of the public artworks and antiquities of Central and Eastern Europe, including the Soviet Union, and of private Jewish-owned collections across the continent. Others involved included Martin Bormann, Hermann Göring and Joachim von Ribbentrop (see Bassiouni & Nafziger, 1999).

[12] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention pmbl., May 14, 1954, 249 U.S.T. 240 [hereinafter The 1954 Hague Convention].

[13] By the 1990s, the 1954 Hague Convention and its First Protocol were being greatly questioned, primarily because they had proven ineffective at preventing, and later sanctioning, damage to and

The preamble to the 1954 Hague Convention states that "*damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world [...]*". It emphasizes that the "*preservation of the cultural heritage is of great importance for all peoples of the world"* The same Convention embodies the belief that cultural heritage should receive international protection . The Convention sets forth protections for cultural property during armed conflict and binds State Parties that choose to ratify it. By emphasizing that cultural property belongs to the heritage of all mankind, the Convention establishes a system of universal protection (Brenner, 2006: 24).

Article 28 requires the High Contracting Parties "*to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the […] Convention"*. Article 28, like the 1954 Hague Convention as a whole, applies to a more selective range of cultural property than does the customary international law applicable during armed conflicts.[14]

The 1954 Hague Convention broadly defines the concept of cultural property. The definition provided in Article 1 includes "*movable and immovable property"* that is culturally important, including archaeological sites, both religious and secular, and museums and other compendiums of history. Articles 2-4 of the Convention require that States that are parties to the Convention (State Parties) protect cultural property by safeguarding and respecting it, both within their own territories and within the territories of other State Parties. Article 18 stipulates that the Convention applies "*in the event of declared war or of any other armed conflict which may arise between two or more of the [State] Parties, even if the state of war is not recognized by, one or more of them"*.

pillaging of cultural property during the Second Gulf War and the Balkan Wars (Kruti Patel, 2011: 7).

[14] Art. 28 is indeed a provision which relates to respect for cultural property, albeit in an adjectival sense: where art 4 of the *Convention* lays down the primary rules relevant to respect, art 28 provides for a special secondary rule in the event of the breach of one of these primary rules – namely, that such a breach is to give rise under the domestic law of the respective parties to the individual criminal responsibility of the perpetrator (*see* Frulli, 2011: 203–217).

It also addresses situations in which only one of the State Parties in conflict is a party to the Convention, stating that "*the Powers which are Parties there to shall nevertheless remain bound by it in their mutual relations*" (see Art. 18).

The 1954 Convention applies to both international and non-international armed conflicts (see Art. 19), and it seeks to protect cultural heritage in times of armed conflict when one or more State Parties is involved. Additionally, the Convention provides for the protection of cultural property during times of peace (Kornegay, 2014: 153, 166). Article 3 requires that State Parties prepare "*for the safeguarding of cultural property"*, by taking measures which they see as "*appropriate"* during times of peace.

Unfortunately, the 1954 Hague Convention contains a major exception for "*cases where military necessity imperatively requires"* destruction of cultural property (see Art. 4). The Convention fails to define the terms "*military necessity"*, thereby leaving a large loophole under which destruction of cultural property could be justified. The Hague Convention relies on State actors to prosecute cultural heritage crimes. This is the main criticism of the Convention: that it lacks a provision for punishing either Parties or individuals who violate its terms (Kornegay, 2014: 153).[15]

Scholars have described the Convention as "*without teeth"* because no international body exists to impose sanctions. Instead, "*the creation and scope of sanctions are left to the parties actually effected by the crime to impose as they see fit"* (Meyer, 1993: 349, 357). If a State Party is the actor that destroys cultural heritage within its borders, then those crimes will never be punished. This is the reason no one was held accountable for the destruction of the Buddhas at Bamiyan; the Taliban would have had to hold the Taliban accountable, clearly, this would never happen.

The First Protocol, written at the same time as the main Convention, refers exclusively to the status of movable cultural objects.[16] This subject was split off from the main Convention because of objections raised by the United States and to make it easier for the United States to ratify the main Convention without having to confront the question of movable objects The Protocol addresses the

[15] The 1977 Additional Protocols to the Geneva Conventions reiterated the obligation to protect cultural property. (see Fleck et al., 2001: 403).

[16] For more detailed discussion of the First Protocol, *see* O'Keefe, 2004: 99. On the problem of domestic implementation of the First Protocol, *see* Matyk, 2000.

obligations of a State Party to prevent the export of cultural objects from occupied territory and to return any such exported cultural objects. It also requires that any cultural property removed from one State Party and placed in the territory of another State Party for safekeeping during armed conflict must be returned at the end of the conflict.[17]

During the 1990s, the 1954 Hague Convention and its First Protocol were being greatly questioned, primarily because they had proven ineffective at preventing, and later sanctioning, damage to and pillaging of cultural property during the Second Gulf War and the Balkan Wars (Kruti Patel, 2011: 7). Some of the key provisions of the Second Protocol were drafted to respond to criticisms outlined in the Boylan Report.[18] Two of the most serious problems in applying the 1954 Hague Convention to the Balkan conflict were, first, the question of treatment of conflicts that had not yet risen to the level of armed conflict, which is covered in Article 19, and, second, lack of clarity as to each State Party's obligation to create a criminal offense under its domestic law. Prosecution of war crimes committed against cultural property in the Balkans relied on the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), which did not rely directly on the State Party's ratification of the 1954 Convention but rather cited it and the earlier Hague Conventions as evidence of customary international law.[19]

This process of review of the 1954 Hague Convention in the 1990s culminated in the adoption on 26 March 1999 of the Second Protocol to the Convention. The Second Protocol covers the same range of cultural property as the *Convention*

[17] At the time that the United States was considering ratification of the First Protocol, the State Department recommended utilizing an opt-out provision that would have relieved the United States of the responsibility to return cultural property removed from occupied territory. The Transmittal of the Convention and First Protocol to the Senate Foreign Relations Committee. The Hague Convention and The Hague Protocol, Treaty Doc. 106-1, 106th Cong., 1st Sess. Iii-iv, ix (1999), *available at* https://www.congress.gov/106/cdoc/tdoc1/CDOC-106tdoc1.pdf. The United States has still not ratified the First Protocol.

[18] For more discussion of the Second Protocol, *see* (Woudenberg & Lijnzaad, 2010; Boylan, 1993).

[19] *See* ICTY, Art. 3(d), *available at* http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf, where «*seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science*» are included as violations of the laws or customs of war. Article 27 of the 1907 Hague Regulations, the 1954 Hague Convention, Article 53 of Additional Protocol I, and Article 16 of Additional Protocol II were cited as «*sources in international customary and treaty law*» to define the elements of the offense in Article 3(d) of the ICTY in 132-35. *Prosecutor v. Strugar*, IT-01-42-T (31 January 2005).

itself. However, the penal sanctions prescribed by Article 28 of the 1954 Convention was generally seen as too weak and ineffective.

The purpose of the Second Protocol, therefore, was to "*improve the protection of cultural property in the event of armed conflict and to establish an enhanced system of protection for specifically designated cultural property*".[20] In essence, the Second Protocol aimed to introduce new elements for the protection of cultural property, and to clarify certain provisions of the 1954 Hague Convention (Patel, 2011). In particular, it established a new category of enhanced protection for "*tangible cultural heritage that is of greatest importance for humanity"* (Art. 10). Accordingly, under the Hague regime States are obliged to spare cultural property, provided that it does not serve for military purposes, from attacks in territories affected by an armed conflict, and abstain from the pillage and removal of cultural objects situated therein.

The Second Protocol narrows the instances in which the waiver for "*military necessity*" would be allowed under the 1954 Convention by restricting the availability of the waiver to instances where "*[the] cultural property has [...] been made into a military objective"*, and there is "*no feasible alternative"* to obtain a similar military advantage (The Second Protocol, Art. 6). Perhaps most importantly, the Second Protocol clarifies the criminal responsibility and jurisdiction as it applies to the Convention and its Protocols (The Second Protocol, ch. 4).

Furthermore, the Second Protocol does not preclude the "*incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law"* (The Second Protocol, ch. 4). Therefore, unlike the 1954 Hague Convention, the Second Protocol clarifies exactly what constitutes an offense and how that offense might be prosecuted. Additionally, the Second Protocol contains a prosecute or extradite clause, requiring the Party in whose territory the offense occurred to either extradite the perpetrators or prosecute them (The Second Protocol, art. 17).

There is a key exception. The Second Protocol goes on to explain that except Non-party States that choose to apply this provision, this Protocol does not apply to "*members of the armed forces and nationals of a State which is not Party to this Protocol,*

[20] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict pmbl., March 26, 1999, 2253 U.N.T.S. 212 [hereinafter The Second Protocol].

except for those nationals serving in the armed forces of a State which is a Party to this Protocol". Those individuals who commit crimes against cultural heritage "*do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them*" (The Second Protocol, Art. 17). This provision therefore exempts from individual criminal liability members of a State not a party to the Second Protocol, unless that State voluntarily chooses to impose criminal liability under this Protocol.

3 The International Criminal Tribunals and Cultural Heritage Protection.

The recent international practice has demonstrated that most treaty rules in relation to States' obligations towards cultural heritage reflect customary international law. Indeed, an explicit recognition of the customary nature of these obligations can be found in the jurisprudence of international courts (Lenzerini, 2013: 41-64). In particular, the ICTY held that the intentional destruction of cultural heritage law is criminalized under customary international law.[21]

Similar conclusions were also reached by the Eritrea–Ethiopia Claims Commission, established by the peace accords concluded in Algiers on 12 December 2000[22] in order to settle the disputes between these two States arising from events which took place during the war of 1998-2000. The Commission found Ethiopia responsible for the destruction of an important archaeological monument in the occupied territory of Eritrea and held that such an act "*was a violation of customary international humanitarian law"*[23] even though the 1954 Hague Convention was not applicable as neither Eritrea nor Ethiopia was a party to it.

[21] See for example *Prosecutor v. Kordić and Čerkez*, ICTY Case No. IT-95-14/2-T, Judgment of the Trial Chamber, 26 February 2001, para. 206; *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98.

[22] Agreement the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, 12 December 2000, UN Doc. A/55/686-S/2000/1183, Annex, http://www.pca-cpa.org/upload/files/ Algiers%20Agreement.pdf [accessed: 10.11.2015].

[23] Claims Commission for Eritrea and Ethiopia, "Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, 28" (2004), 43 ILM (2004) 1249, para. 113.

The hallmark of the savage wars that erupted in Croatia and Bosnia-Herzegovina during and after the dissolution of the former Socialist Federal Republic of Yugoslavia was the premeditated destruction of the cultural heritage of 'enemy' communities, in the form of attacks on the historic cities of Dalmatia and the laying waste of centuries-old mosques, churches, monasteries, libraries, archives and the like in Bosnia-Herzegovina and the Croatian Krajina. In response, the ICTY was granted competence in Article 3(d) of its Statute[24] over the war crime of "*seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science*", a provision which has formed and continues to form[25] the jurisdictional basis of numerous prosecutions before the Tribunal (O'Keefe, 2006: 206).

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[24] *Report of the Secretary-General Pursuant to Security Council Resolution 808 (1993)* UN Doc S/25704 (3 May 1993) annex ('*Statute of the International Tribunal*'), approved and adopted by SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended ('*ICTY Statute*'). See also International Law Commission ('ILC'), *Report of the International Law Commission on the Work of Its Forty-Eighth Session — 6 May – 26 July 1996*, UN GAOR, 51st sess, Supp No 10, UN Doc A/51/10 ch II D ('*Draft Code of Crimes against the Peace and Security of Ma* 24 See *Prosecutor v Strugar (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) ('*Strugar Trial*') and *Prosecutor v Jokić (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-42/1-S, 18 March 2004) ('*Jokić Sentencing Judgment*'), both in respect of the bombardment of the World Heritage site of the Old Town of Dubrovnik on 6 December 1991. (The case of Vladimir Kovačević, also indicted for his role in the attack, was transferred to the judicial authorities of the Republic of Serbia in late 2006.) See also, in relation to the destruction of Muslim and Roman Catholic cultural property across Bosnia-Herzegovina: *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) ('*Blaškić Trial*'), one count (regarding the destruction of religious property in Busovača) being vacated in *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [533] ('*Blaškić Appeal*'); *Prosecutor v Kordić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) ('*Kordić Trial*'), one count (in relation to the mosque at Stari Vitez) being overturned in *Prosecutor v Kordić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [471] ('*Kordić Appeal*'); *Prosecutor v Naletilić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) ('*Naletilić Trial*'); *Prosecutor v Brđanin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) ('*Brđanin Trial*'); *Prosecutor v Plavšić (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-00-39&40/1-S, 27 February 2003) ('*Plavšić Sentencing Judgment*'). (The case of Paško Ljubičić, a commander of Bosnian Croat forces indicted for destruction of mosques, was transferred to the authorities of Bosnia-Herzegovina in mid-2006.) See also, in relation to destruction of and damage to Croat cultural property in Croatia: *Prosecutor v Martić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-11-T, 12 June 2007) ('*Martić Trial*'). In *Prosecutor v Hadžihasanović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) ('*Hadžihasanović Trial*'), while the Trial Chamber found that foreign mujahedin had destroyed certain Serb cultural property in Bosnia-Herzegovina, it held that the first accused was not responsible for their actions.

[25] See *Prosecutor v Prlić (Second Amended Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-74-T, 11 June 2008) ('*Prlić Second Amended Indictment*')

The link between the destruction of cultural heritage, its willful damage and grave violations of humanitarian law has been strengthened. Accordingly, the ICTY found that the destruction of cultural heritage committed with "*the requisite of discriminatory intent*", may amount to persecution, that is, it may be considered as a crime against humanity.[26]

Moreover, if such attacks are directed against cultural or religious property of a given group, they "*may legitimately be considered as evidence of an intent to physically destroy the group"*[27], thus providing evidence of the intent (*mens rea*) requirement for the commission of the crime of genocide under the 1948 Genocide Convention.[28]

More recently, such an interpretation of the willful damage to cultural heritage of a group has also been confirmed in the case law of the Extraordinary Chambers in the Courts of Cambodia (ECCC). Accordingly, intentional acts against cultural property have been considered as crimes against humanity, when committed with a discriminatory intent.[29] Importantly, the nature of international offences against cultural heritage occurring in the course of armed conflicts was addressed in two genocide cases before the International Court of Justice (ICJ). These two judgments directly transposed the *aquis* of the ICTY relating to the cultural dimension of genocide (in particular the judgment in *Kristić*) to the realm of State responsibility. Accordingly, the ICJ held that attacks on cultural and religious property during an armed conflict constitute a violation of international law. Furthermore, such acts may be considered as evidence of a genocidal intent aimed at the extinction of a group.[30]

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[229], as regards the destruction of historic and other Muslim cultural property in Bosnia-Herzegovina, among it much of the historic town of Mostar, including the Old Bridge (Stari Most) from which it takes its name; *Prosecutor v Šešelj (Third Amended Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-03-67-T, 7 December 2007) [34] ('*Šešelj Third Amended Indictment*'), for the destruction of mosques, Catholic churches and a religious archive in Bosnia-Herzegovina.

[26] *Prosecutor v. Kordić and Čerkez*, op. cit., para. 207.

[27] *Prosecutor v. Krstić*, ICTY Case No. IT-98-33-T, Judgment of the Trial Chamber, 2 August 2001, para. 580.

[28] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

[29] Case 002, Indictment, 15 September 2010, Case File No. 002/19-09-2007-ECCC-OCIJ, paras. 1420-1421, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf .

[30] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, p. 43, para. 344; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015.

The example of the ICTY Statute inspired the drafters of the Rome Statute of the International Criminal Court to vest the Court in Articles 8(2)(b)(ix) and 8(2)(e)(iv) with jurisdiction over the war crime of "*intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments"*, whether committed in international or non-international armed conflict[31]. The Rome Statute, like many of the previous treaties, makes clear that one of the purposes of international law is the protection of shared heritage. Even if primary aim of the Rome Statute is not to protect cultural heritage nevertheless at least indirectly it can be used to do so. The jurisdiction of the ICC is limited to the "*most serious crimes of concern to the international community as a whole*" (The Rome Statute, Art. 3) and the Rome Statute defines crimes against humanity as an act committed as part of a widespread or systematic attack directed against a civilian population, including: murder, extermination, enslavement, forcible transfer of a population, imprisonment, torture, rape, persecution, and other crimes (The Rome Statute, Art. 7). Under the Rome Statute, the crime of intentionally destroying cultural heritage could be categorized as either the crime against humanity of persecution or as a war crime as it is defined by the body of international law (The Rome Statute, Arts. 7, 8). Commentators have argued that the crime of persecution is the crime against humanity under which crimes against cultural heritage may fall.[32]

Identical provisions were included in Regulation Number 2000/15 adopted in 2000 by the United Nations Transitional Administration in East Timor ('UNTAET'), which established and empowered special panels within the District Court in Dili for the prosecution of certain serious offences, including war crimes[33] and in the *Iraqi Special Tribunal Statute* promulgated by the Coalition

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[31] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 8(2)(b)(ix) (international), 8(2)(e)(iv) (non-international) ('*Rome Statute*').

[32] O'Keefe, 2006: 235 ("*Since unlawful destruction of cultural property constitutes a war crime in both international and non-international armed conflicts under art 8 of the Rome Statute, it can also constitute a crime against humanity under art 7(1)(h)*"); Vrdoljak, 2011: 24 (stating that the International Criminal Tribunal for the Former Yugoslavia (ICTY) found that destruction of cultural heritage could amount to the crime of persecution and therefore a crime against humanity). Also Gottlieb, 2005: 873–74.

[33] See *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UN Doc UNTAET/REG/2000/15 (6 June 2000) s 6.1(b)(ix) (international) and s 6.1(e)(iv) (non-international) ('*UNTAET Regulation 2000/15*').

Provisional Authority in Iraq,[34] in which the United States, a state not party to the *Rome Statute*, played the dominant role. For the United State's own part, it is worth noting that the *Military Commissions Act* (10 USC §§ 948a–950t), as amended, as applicable to "*any conflict subject to the laws of war*"[35], recognizes the war crime of "*attacking protected property*" (10 USC § 950t(4)) the latter including "*buildings dedicated to religion, education, art, science, or charitable purposes*" (O'Keefe, 2006).

In terms of the specific offences recognized as customary war crimes, customary international law embodies individual criminal responsibility for unlawfully directing attacks[36] against cultural property in the inclusive sense of the term[37].

[34] *Coalition Provisional Authority: Statute of the Iraqi Special Tribunal* (2003) 43 ILM 231, art 13(b)(10) (international), art 13(d)(4) (non-international) ('*Iraqi Special Tribunal Statute*'). Although the Tribunal was replaced on 18 October 2005 by the Supreme Iraqi Criminal Tribunal (also known as the Iraqi High Tribunal), the latter was in substance a continuation of the former: see Iraq, 'Law of the Supreme Iraqi Criminal Tribunal', Law No (10) 2005, in *Official Gazette of the Republic of Iraq*, No 4006, 47th year, 18 October 2005 [International Center for Transitional Justice trans, 12 April 2006].

[35] See *Military Commissions Act of 2009* Pub L No 111-84 §§ 1801–7, 123 Stat 2574.

[36] The customary definition of the word 'attacks' is that reflected in art 49(1) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*'), namely 'acts of violence against the adversary, whether in offence or defence'.

[37] By this is meant all 'institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science', in the words of art 3(d) of the *ICTY Statute*; or, in the words of arts 8(2)(b)(ix) and 8(2)(e)(iv) of the *Rome Statute*, all 'buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments'. It was incorrectly suggested in *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [312] that the war crime recognised in art 3(d) of the *ICTY Statute* applies only in so far as the cultural property in question constitutes 'the cultural or spiritual heritage of peoples', within the meaning of *Additional Protocol I* arts 53(a) and 16. But this was not followed in *Hadžihasanović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) [60], [61], [64] and *Kordić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [89], [92]. Note that the term 'historic monuments' refers in this and similar contexts to immovable property, whether public or private, deserving of legal protection on its own historical, artistic or architectural terms, rather than on account of its contents or purpose see O'Keefe (2006: 27–8, 102).

3.1 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage and Recent UN Resolutions

After the destruction of the Buddhas in Bamiyan by the Taliban in 2001, the United Nations passed a resolution that was later adopted by the United Nations Security Council. The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage[38] was passed as a reaction to the "*growing number of acts of intentional destruction of cultural heritage,"* specifically as a response to the destruction of the Buddhas by the Taliban. The 2003 Declaration was not meant to be binding on States, but instead was meant to reiterate and reinforce the fundamental principles which current international law had put into place (O'Keefe, 2006: 236).

The 2003 Declaration relies on states to take appropriate measures to prevent, avoid, and stop intentional destruction and to adopt appropriate legislative and judicial measures to deal with such acts, much like the 1954 Hague Convention and other treaties do. It suggests that states become parties to the various international treaties, which are the basis of international law protecting cultural heritage. Further, the Declaration addresses criminal liability for both state actors and individuals. A state that intentionally destroys or fails to take appropriate measures to "*prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity*", bears the responsibility for such destruction, to the extent provided for by international law.

The 2003 Declaration was adopted by the United Nations General Assembly in 2003, but began as a resolution passed in 2001. A similar resolution was passed by the United Nations General Assembly on May 28, 2015, in response to the cultural heritage destruction perpetrated by the Islamic State in Iraq and Syria.[39] The 2015 Resolution, named *Saving the Cultural Heritage of Iraq,* was passed shortly after the Islamic State pillaged the Mosul Museum cultural heritage in Iraq. The 2015 Resolution applies more generally, however, to all intentional acts of destruction of cultural heritage committed by the Islamic State. Vice-President of the General Assembly, Álvaro Mendonça e Moura, speaking on behalf of the General Assembly President, expressed concern "*that barbaric and senseless attacks*

[38] UNESCO General Conference, *Records of the General Conference*, UNESCO Doc. 32 C/Resolutions (Vol. 1) (29 September to 17 October 2003) [hereinafter 2003 Declaration].
[39] G.A. Res. 69/281, U.N. Doc. A/RES/69/281 (May 28, 2015).

on irreplaceable [artifacts] of humanity's shared cultural heritage were taking place with alarming frequency not only in Iraq but also in Afghanistan, Syria, Mali and elsewhere".[40]

The 2015 Resolution is not binding, is a document with no legally obligatory wording, and expresses only a relative normativism. The limited scope of this act, which was adopted in the context of a response to a crisis and not armed conflict, and which laid down a set of principles aimed at preventing and discouraging the intentional destruction of cultural heritage by States in their peacetime activities and in the event of armed conflict, is a symptom of the limitations of UNESCO's normative action, which is concentrated, in its most complete form, on the formulation of a concerted international law. Declarations of unilateral international laws, the guarantee of the precedence of international law on national laws, does not fall within UNESCO's scope.

However, despite its non-binding nature, the Declaration is important as it makes clear that the international community will not stand for the destruction of cultural heritage. However, lacking an enforcement mechanism, the Declaration is certainly deficient. Condemnation of acts means nothing if they are allowed to continue unabated and unpunished.

3.1.1 Safeguarding of Culture Heritage in the Normative Power of the Security Council

United Nations Security Council Resolution Number 1483 (2003)[41] inspired the measures that United Nations Resolution Number 2199 (2015) of 12 February 2015 is deploying to reinforce the protection of Iraqi and Syrian cultural heritage. Points 15 to 17 of the Resolution express the substance of this act:

"*15. Condemns* the destruction of cultural heritage in Iraq and Syria particularly by ISIL and Al Nusra Front, whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects;

[40] *Expressing Outrage over Attacks on Cultural Heritage of Iraq, General Assembly Unanimously Adopts Resolution Calling for Urgent Action*, Meetings Coverage and Press Releases, UNITED NATIONS (May 28, 2015), http://www.un.org/press/en/2015/ga11646.doc.htm

[41] S/RES/1483 (2003) of 22 May 2003.

16. *Notes* with concern that ISIL, Al Nusra Front and other individuals, groups, undertakings and entities associated with Al-Qaida, are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks*;*

17. Reaffirms its decision in paragraph 7 of resolution 1483 (2003) and decides that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph [...]."

Resolution 2199, in particular paragraph 17, and before that paragraph 7 of resolution 1483, compare the protection of cultural heritage with unilateralism, in a field traditionally covered by a normative action of UNESCO focused on the formulation of concerted international legislation.[42]

The Security Council has the discretional power to independently weight the facts, which guarantees its autonomy to make decisions and determine how to respond. This discretionary jurisdiction determines the range of powers that the Security Council holds, i.e. the power to act or not to act. Although the reference to Chapter VII is often considered to indicate the mandatory nature of a resolution, in fact the terminology used reveals the change in intensity that the obligations that the Security Council imposes on Member States. In this case, in

[42] The dual normative relationship between paragraphs 15 to 17 of resolution 2199 – relationship with UNESCO's normative action in the field of the protection of cultural heritage and the previous Security Council resolutions aimed at fighting against terrorism – brings the international protection of cultural heritage into the Security Council's normative sphere. Nevertheless, this paradigm shift, which has replaced a unilateral peremptory norm with concerted international legislation, remains constrained by the Security Council's scope of intervention under Chapter VII of the United Nations Charter. This substantial conversion of the international law on cultural heritage places the onus of responsibility for the general interest of humanity in the protection and safeguarding of cultural heritage on the Security Council, which had up until now been the matrix of UNESCO's heritage standards and it was practically its exclusive domain. The Security Council does not act *in abstracto*, it is bound by an *in concreto* qualification process of a situation that is detrimental to the maintenance of international peace and security (see Negri, 2015).

relation to the safeguarding of cultural heritage, only paragraph 7 of Resolution 1483 and paragraph 17 of Resolution 2199 forge the collective responsibility of Member States to fight against the dispersion of Iraqi and Syrian cultural property and to facilitate their restitution. In these two paragraphs, the use of the verb "*decides"* in the present tense does not express merely a wish or an intent, but rather an obligation, the primacy of which, granted by Chapter VII, is imposed on Member States.

By requiring that measures be taken to prevent the sale of Iraqi and Syrian cultural property, assuming a ban on transnational trade in these objects and their restitution, the Security Council imposes on all Member States obligations by which they were previously not bound. Like an international law-maker, the Security Council, by the normative power that it exerts, imposes a mandatory model of conduct on a specific issue, the issue of the looting and illicit trafficking of cultural property, which are linked to the financing and development of terrorism.

Resolution 2199, and in particular paragraph 17 of said resolution, which reiterates the decisions of paragraph 7 of Resolution 1483 on Iraqi cultural property, formulates new obligations to preserve Syrian cultural heritage, underpinned by the fight against terrorism. These resolutions instil a collective discipline, which, far from relieving Member States from their own responsibility, should channel their individual actions and promote the unanimous support of subjects of law for the general interest to humanity of the protection and safeguarding of the cultural heritage of the people.

This collective discipline, laid down by paragraph 17 of Resolution 2199, reinforces the customary law dimension of the obligation to respect the heritage of the people – a normative projection of the general interest to humanity – and consolidates the *erga omnes* nature of this obligation. The impact of this customary law standard must be assessed against the principles on the international responsibility of Member States as they result from the project to codify the State's responsibility for internationally illicit acts adopted by the International Law Commission.[43] Article 48, which covers the invocation of the responsibility

[43] Resolution 56/83 adopted on 12 December 2001 by the General Assembly of the United Nations [A/RES/56/83 (2001)] «*Takes note of the articles on responsibility of States for internationally wrongful acts,*

by a State other than an injured State, specifies that "*any State other than an injured State is entitled to invoke the responsibility of another State, if […] the obligation breached is owed to the international community as a whole*".

4 Applying a "Responsibility to Protect" Strategy to Cultural Protection

Every breach of an international obligation by a State, regardless of the origin of the obligation (treaty or customary law) or its character, entails the international responsibility of that State (Article 1 and 12 of the ARSIWA). As regards the violations of cultural heritage obligations in the event of an armed conflict, this may be invoked, in the vast majority of cases, by a State determined to have been injured, rather than by a third State or their plurality.

In his Millennium Report of 2000, the UN Secretary-General, recalling the failures of the Security Council to act in a decisive manner in Rwanda and the former Yugoslavia, put forward a challenge to Member States: "*If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violation of human rights that offend every precept of our common humanity?"*[44]. In response to Annan's query, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) in 2000. The Commission, in its report "The Responsibility to Protect", was the first body to introduce the expression "*responsibility to protect*".

The report underlined that sovereignty does not only give the state the sole duty of controlling its own affairs, but it also imposes on it a greater responsibility to protect the people inside its borders.[45] Moreover, the Commission proposed that, when a state is no longer able to protect its own population, be it for lack of capacity or for lack of willingness, the responsibility shall be then taken on by the international community.[46]

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presented by the International Law Commission […] and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action».

[44] A/54/2000 (2000), sec. IV (C), para. 217.

[45] "State sovereignty implies responsibility, and the primary responsibility for the protection of people lies within the state itself." (Report of the ICISS, synopsis p. xi).

[46] It also outlined what the RtoP should entail, identifying three aspects: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild. The first one states that effective prevention must address "both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk." (Synopsis, p. XI). On the other hand, the

The Outcome Document of the 2005 United Nations World Summit and the Secretary General's 2009 Report on Implementing the Responsibility to Protect, stipulate the three pillars of their strategy as follows:

- The state carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
- The international community has a responsibility to encourage and assist States in fulfilling this responsibility; and
- The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.[47]

The member states should "*respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection*".[48]

From a legal perspective, these pillars are anchored in established human rights law. Furthermore, the recent ICC trial[49], shows that cultural destruction fits into "war crimes" and "ethnic cleansing." The first two pillars underline the importance of prevention. The member states should provide appropriate

responsibility to react establishes a duty to "respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention" (Synopsis, p. XI). The last aspect of the RtoP is the responsibility to rebuild, aimed at providing, "particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert." (Synopsis, p. XI).

[47] Office of the Special Adviser on the Prevention of Genocide, "The Responsibility to Protect," United Nations, http://www.un.org/en/preventgenocide/rwanda/about/bgresponsibility.shtml; also, see: International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001); United Nations, *A More Secure World: On Shared Responsibilities: Report of the Secretary General's High-Level Panel on Threats, Challenges and Changes* (New York United Nations, 2009); UN General Assembly, Resolution 60/1, "Resolution on the responsibility to protect," October 24, 2015; UN Security Council, Resolution 1674, April 28, 2006.

[48] Id.

[49] ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15

assistance for cultural protection by building local capacity. The third pillar emphasizes the obligation of the international community to respond when the prevention fails. In this context, the member states have a responsibility to respond when a state is failing to protect cultural property.

In 2011, Libya became the first case in which the UN Security Council authorized military intervention citing R2P, based on language used by Muammar el-Qaddafi that was interpreted as threatening and legitimizing genocide. In Resolution 1973, adopted on 17 March 2011, the Security Council demanded an immediate ceasefire in Libya, including attacks on civilians that might be seen to constitute "*crimes against humanity".*[50] The Council authorized member states to take "*all necessary measures"* to protect citizens under threat of attack, but did not allow foreign occupation forces to enter any part of Libyan territory.[51]

R2P has been criticized for infringing upon national sovereignty. Advocates for R2P counter that the only time the international community will intervene in a state without its consent is when the state is no longer upholding its responsibilities as a sovereign. The question is simple: if states have the obligation to protect the cultural heritage within their borders, as the United Nations has repeatedly said that they do, what responsibility does the international community have when the state is unable or unwilling to exercise that obligations? This issue derives from the language the United Nations has used when describing cultural heritage as state property and when calling upon the state to fulfil its obligations to protect such property, not only for the sake of the state, but also for that of humankind at large.

[50] UN Security Council, Resolution 1973, March 17, 2011.

[51] Few days later NATO authorized a strike against Gheddafi's forces. *Background Information on the Responsibility to Protect – Outreach Program on the Rwanda Genocide and the United Nations*, United Nations, http://www.un.org/en/preventgenocide/rwanda/about/bgresponsibility.shtml NATO subsequently and immediately came under scrutiny as intervention quickly transitioned to "regime-change" and allegations that aerial bombardments might have caused civilian casualties. "Crisis in Libya," International Coalition for the Responsibility to Protect, http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-Libya.

5 Some Concluding Remarks

The international law rules on the protection of cultural heritage in armed conflicts would not be effective without an efficient regime governing the consequences of their violation. This article has explored the regime of international protection of cultural heritage, exploring international specific treaty law, including the instruments that govern the treatment of cultural property in time of war, and the jurisprudence of international criminal tribunals. It also explored obligations that are not only established by relevant treaty provisions, but also reflected in and confirmed under customary rules of international law. Moreover, those obligations which relate to the protection of and respect for cultural heritage of great importance to all humankind are ever more often being perceived as effective *erga omnes* under general international law. The second part of the paper explored the possibility tof applying the doctrine of the Responsibility to Protect (RtoP), and in particular trying to expand it to include the protection of cultural heritage. The article also sought to explore the RtoP's effectiveness.

Unfortunately, years after its formal adoption, the doctrine of the RtoP still remains a vague and incomplete project. Indeed, in these perilous times of continuous threats to international security, the international arena has not (and had not) the possibility or the willingness to take "*all necessary measures"* to protect civilians against war crimes, crimes against humanity and genocide. The main problem at the heart of the RtoP is the possibility of the use of force should all other pacific measures prove ineffective. The balance between the two fundamental principles of the UN Charter, namely the prohibition of the use of force and the protection of human rights, still has to be found, and, until that balance is achieved, full implementation of the Responsibility to Protect will be elusive.

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Good Administration and Law of Administrative Procedure in the EU Member States and Ukraine

Andriy Shkolyk

Abstract The idea of good administration is considered by many as the core principle for the modernization of law of administrative procedure and can guide those EU-members, neighboring countries such as Ukraien, that have not adopted a general law on administrative procedure yet. This article will deal with soft law documents of the Council of Europe and the European Parliament directly devoted to good administration and corresponding laws of administrative procedure. Besides, the Model Rules on EU Administrative Procedure that were elaborated by prominent European scholars are outlined. Recent developments of law of administrative procedure in Ukraine as a neighboring country striving to adapt its legislation to acquis communuataire will be analyzed. It will be concluded that the national administrative authorities should be guided not only by procedural rules that one can find in Ukrainian legislation, but also by the soft law documents of the European institutions.

Keywords: • Public Administration • Good Governance • Principles of Good Administration • Soft Law • Codification of Administrative Procedure •

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1 Introduction. Right to a Good Administration as a Fundamental Right

The right to a good administration is relatively new among basic individual rights. The European Convention on Human Rights (ECHR) that was adopted in the framework of the Council of Europe in 1950 did not foresee such a right and was dedicated mostly to the relations of individuals with the judiciary. However, some elements of a contemporary right to a good administration are rooted in that Convention (for example, prohibition of discrimination).

The Charter of Fundamental Rights of the European Union that was published in 2000 and became legally binding for the EU institutions and governments of the Member States by the end of 2009, foresees the right to a good administration in Article 41. According to it, this right includes a number of principles and rules that shall govern relations between individuals and public administration: the right to be heard, the right for every person to have access to their data, the right to be given reasons for a decision of the administration and the possibility of claiming damages caused by the institutions and its servants in the performance of their duties. Besides, Article 42 (right of access to documents) and Article 43 (right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union) of the Charter are undoubtedly connected to the right to a good administration (Charter of the EU rights, 2000: 18-19).

More elements of the above mentioned rights can be found in the Recommendation CM/Rec(2007)7 of the Committee of Ministers of the Council of Europe to Member States on a good administration adopted in 2007. These elements are divided into two sections: principles of a good administration and rules governing administrative decisions. Moreover, the Recommendation considers good administration as an aspect of good governance rather that it is not just concerned with legal arrangements, such as:

- depends on the quality of organisation and management;
- must meet the requirements of effectiveness, efficiency and relevance to the needs of society;
- must maintain, uphold and safeguard public property and other public interests;

- must comply with budgetary requirements;
- must preclude all forms of corruption *(Council of Europe CM/Rec(2007)7,* 2007: 2*).*

Thus good administration covers many aspects of good governance which in turn includes effective public policy provided for by different political actors. Both good governance and good administration are relevant not only for the EU institutions and governments of the Member States, but are crucial for the further development of public policy and public administration in the states that are not yet members of the European Union but are members of the Council of Europe, such as Ukraine. This assertion is additionally confirmed in **t**he Association Agreement between the European Union's Member States and Ukraine that entered into force on September 1 2017. In the preamble of this international treaty good governance is named among common values that are shared by the European Union and Ukraine *(*Association Agreement EU-Ukraine*,* 2014: 2*).*

The Association Agreement gradually forsees the approximation of Ukrainian legislation with that of the EU, as well as effectivly implementing it. In this context it is necessary to highlight the process of adaptation of Ukraine's legislation to *acquis communautaire* started already in 2004 when the Law of Ukraine `On the State Program for Adaptation of Ukrainian Legislation to the Legislation of the European Union` was adopted. Additional impetus was made after the signing and entering into force of the Association Agreement. At the same time we have to admit that legal regulation of public administration and relevant procedural rules did not belong to the priorities of approximation of Ukrainian legislation to *acquis* in **t**he Association Agreement, which is mostly dedicated to economic integration, *inter alia* through a Deep and Comprehensive Free Trade Area. Despite this, one can hardly deny that Ukrainian legislation on administrative procedure that provides legal framework for the right to good administration can and shall be developed according to the standards set up in political and legal acts of the European Union and the Council of Europe. One of the prominent experts in public administration reforms, Wolfgang Rusch, emphasizes that "many principles and aspects of modern administrative procedures are valid not only in the EU accession context. They may be seen as universal and therefore relevant for and to certain extent transferrable to many other countries, in particular to the EU neighbourhood countries in the South

and East when planning and implementing public administration reform activities" (Rusch, 2014: 190).

Therefore the goal of this article is to show why and how modernized ideas of contemporary administrative procedures that provide realization of the right to good administration shall be implemented into legislation of the European Union and Ukraine, being one of the largest EU neighbors, and become normal for everyday practice of relevant public authorities. We do understand that principles and rules of administrative procedure are not the only way to achieve good administration. As Hans Peter Nehl describes, "the notion 'good administration' in the broad sense is nothing but an end to describing the corpus of continuously evolving – legally enforceable and unenforceable – *procedural and substantive* requirements with which a modern administration has to comply" (Hofmann & Turk, 2009: 338). But it is not by chance that procedural requirements are situated in the beginning of this definition, and our attention will also be concentrated on this aspect of public administration.

2 Law of Administrative Procedure as a Tool to Reach Good Administration: Comaparative Analysis

Similar to the right to good administration, the law of administrative procedure does not have an ancient history of its development like the private law. This comparatively new branch of law was mostly formed in twentieth century, starting with the Austrian codification in 1925. During the next ninety years dozens of countries throughout the world, both in civil and common law systems, have adopted general laws on administrative procedure. We venture to estimate that two codifications, the Act on Administrative Procedure of 1946 in the United States of America and the Law on Administrative Procedure of 1974 in the Federal Republic of Germany helped to shape further development of analyzed legislation in many other countries, both developed and developing.

At the same time many modern states, including, France and the Russian Federation, still consider necessity and expediency of such a general law that codifies relevant legislation. It does not lead to the conclusion of complete absence of administrative procedural norms, rather it means that such norms are still scattered in sector-specific laws and regulations (by-laws) of the above mentioned countries. Such a situation also continues to exist in Ukraine, whereas

its parliament, Verkhovna Rada, has not adopted a codified act on administrative procedure yet, despite three attempts to do so (in 2004, 2008 and 2012). The draft of the Law on Administrative Procedure of Ukraine (in previous version – Administrative Procedural Code) is regularly discussed by scholars, politicians and public servants, but it has not been transfigured into Ukrainian legislation.

The law of administrative procedure covers a majority of elements of the right to a good administration. On the other hand, putting these elements (principles and rules) into practice of public administration cannot be imagined without proper procedural rules. According to Wolfgang Rusch "the implementation of the principles of good administration requires a well designed and solid platform consisting of four components: a system of administrative procedures regulating the administrative decision-making process; a clearly structured organization of public administration and its bodies in all policy areas and at all territorial levels; professional, competent an independent personnel; and a system of effective judicial control of administrative actions" (Rusch, 2014: 197).

These components are related to internal aspects of public administration, so that good organization and competent human resources in any government or self-government body are undoubtedly in the public interest. The fourth element, judicial control of administrative actions, is used by private persons in cases of maladministration, when public servants have overdue actions, have not acted in a reasonable time-limit at all, etc. or private interests have otherwise been violated by public bodies. However, an appeal to a court can be seen as an extreme measure that is not used on a daily basis and few people are lucky enough to witness such an experience during their whole life.

On the other hand everyone at one point or another in their life has to deal with the public administration and other public servants. An individual, who enters into an affiliation with the public administration in a specific case, is categorically interested in proper legal regulation, which is mostly provided by procedural rules. This means that the realization of a subjective right to good administration is directly connected with the law of administrative procedure and its quality. Along with this, we are certain that another three components (good organization, competent personnel and effective judicial control of administrative actions) that were claimed as necessary for the implementation of the principles and rules of good administration are also of high importance for

any country. It is not without chance that the text of the already mentioned Recommendation CM/Rec(2007)7 on good administration is based not only on a few earlier recommendations and resolutions of the Committee of Ministers of the Council of Europe on administrative procedures, but also on recommendations regarding the status of public officials, codes of their conduct and judicial review of administrative acts. However, internal organization and work of the public administration as well as external control over administrative actions go beyond this article.

Returning to the law of administrative procedure, it should be highlighted that, in spite of its rather short history of development, the main ideas of this branch of law have been modernized substantially during the past few decades. Many European countries recently adopted new versions of laws on administrative procedure or have amended existing laws, although the branch was not affected by direct harmonization of national legislation with the law of the European Union. For example, the new Administrative Procedure Code of the Czech Republic became effective in 2006, while the first codification of this sphere in former Czechoslovakia was produced in 1928 and based on the Austrian practice. "The main orientation of the new regulation was towards an optimal extent of codification, legality and substantive correctness in decision-making and towards reliable bases of solutions. The performance of public administration has been understood as a service to public (good administration), including the respect for the protection of rights and legitimate interests, the creation of space for their exercising and the protection of good faith" (Stasa & Tomasek, 2012: 63). It should once again be reminded that good administration is one of the key directions for further improvement of law of administrative procedure.

It is also necessary to add that during the 21th century a mode of communications between private persons and public administration changed enormously. Such a method has transformed vastly from traditional forms to electronic ones while e-governance has been declared as one of the development priorities in many countries. Law of administrative procedure has no other choice but to react to these changes, while relevant legal provisions have already been modified in many jurisdictions.

The last aspect can be seen as a common trend for improvement of legislation in any European country (both EU-states and non-EU-states). However, the speed

of adoption and implementation of new or amended rules of administrative procedure are greater or sluggish depending on the state. At the same time convergence of law of administrative procedure in the Member States and neighboring states of Eastern and Central-Eastern Europe cannot be denied. Common standards of administrative procedure have been formulated not only in soft law documents of the Council of Europe, but also in numeral acts of the EU. The European Parliament already adopted two documents that strive to a Union`s regulation, the Resolution of 15 January 2013, with recommendations to the Commission on a Law of Administrative Procedure of the European Union and of 9 June 2016 for an open, efficient and independent EU administration. Prominent scholars in the sphere of administrative procedure from different EU-states have also combined their efforts in the Research Network on EU Administrative Law (ReNEUAL) and prepared the Model Rules on EU Administrative Procedure (published in 2014). These Model Rules were drafted not only for future EU codification, but also to be useful to Member States` authorities who might choose to apply them for their activities when implementing EU law and policies. To our understanding the Model Rules and the aforementioned soft law documents of European institutions might and should inspire all neighboring countries to adopt new or to amend the existing laws on administrative procedure. The following will be an overview of main soft law and doctrinal documents in the analyzed sphere of the last decade.

2.1 Soft Law Documents of the Council of Europe on Administrative Procedure

The above mentioned Recommendation CM/Rec(2007)7 of the Committee of Ministers of the Council of Europe to Member States on good administration is principal, but not the only document strictly related to law of administrative procedure. In fact this Recommendation is based on a number of soft law documents that had been adopted by the Council of Europe during the previous thirty years, including:

- Resolution (77) 31 of the Committee of Ministers on the protection of the individual in relation to the acts of administrative authorities;

- Recommendation No. R (80) 2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities;
- Recommendation No. R (84) 15 of the Committee of Ministers relating to public liability;
- Recommendation No. R (87) 16 of the Committee of Ministers on administrative procedures affecting a large number of persons;
- Recommendation Rec(2002)2 of the Committee of Ministers on access to official documents;
- Recommendation Rec(2003)16 of the Committee of Ministers on the execution of administrative and judicial decisions in the field of administrative law.

However, the role of the Recommendation CM/Rec(2007)7 can be considered as unique, whereas it combined many former ideas and principles in one document. For example, Resolution (77)31 on the protection of the individual in relation to the acts of administrative authorities concentrated mainly on five principles: the right to be heard, access to information, assistance and representation, statement of reasons and indication of remedies. Recommendation CM/Rec(2007)7 undoubtedly develops it, consisting of more ideas for legal regulation of administrative procedure, including rules for costs contribution of private persons, simple and clear language of administrative decision, publication of such a decision, rules for execution of administrative decision, changes to individual administrative decisions (amendments and withdrawals) and the possibility of administrative appeals that can be compulsory in certain cases.

Another substantial difference of Recommendation CM/Rec(2007)7 and previous soft law documents of the Committee of Ministers of the Council of Europe also relates to the scope of ideas and subsequently of legal regulation. The Appendix to the Recommendation CM/Rec(2007)7 that was named the Code of Good Administration foresees rules governing administrative decisions that mean *both* regulatory and non-regulatory decisions taken by public authorities when exercising the prerogatives of public power. Such an approach reminds one of the mentioned Act on Administrative Procedure of the United

States of America in which not only adjudication (procedures resulting in individual administrative decisions), but also rulemaking (procedures resulting in normative acts of public administration) are regulated, though in different sections of this Act. Thus Recommendation CM/Rec(2007)7 goes further, uniting almost all principles and rules of the administrative procedure in one piece of law regardless of a form (an instrument) of public administration`s activity. This approach can be disputed, taking into consideration the distinction of quasi-legislative and executive function of public administration, but it also may be deemed as a technical issue. We believe that the different scope of regulation in this context is mostly based on national models of general laws on administrative procedure. Primarily Austrian legislative tradition, and later the German one, influenced the approach that was used in the Resolution (77)31 of the Committee of Ministers of the Council of Europe. That Resolution was applied to the protection of persons, whether physical or legal, in administrative procedures with regard to any *individual measures or decisions*, which are taken in the exercise of public authority and which are of such nature as directly to affect their rights, liberties or interests (administrative acts). In turn, the US legislative experience and, on a European scale, mainly French legal doctrine that includes all administrative actions to administrative procedure, mostly influenced common regulation for normative and individual administrative acts.

These distinctions have a formal nature but are important for legislators in any jurisdiction. More importantly and visible in the law of administrative procedure for private persons and public officials is the contemporary trend to good administration. One of the key ideas of the trend is that public administration shall satisfy a private person in such a way that he or she will not need any appeals or compensation, despite the possibilities of administrative and judicial reviews. Such satisfaction can be obtained by different methods, but most helpful through participation – an opportunity for private persons to take part in the preparation and implementation of administrative decisions which affect their rights or interests. In addition, when individuals see (and in many cases estimate) that public officials *de facto* implement many other principles of good administration: impartiality, proportionality, taking action within a reasonable time limit, etc. Thus good administration also means that every procedural step of public administration is based on proper conduct of relevant officials; therefore the necessity to use the judiciary for protection of rights and interests will be

minimized. This leads to the conclusion that good administration can facilitate the process of avoiding numerous legal conflicts in contemporary societies.

An overview of soft law documents that were adopted in the framework of the Council of Europe will not be discussed in full without recalling another Recommendation, 1615 (2003) of the Committee of Ministers on the institution of Ombudsman. Paragraph 10.6 of this Recommendation foresaw that the governments of the Council of Europe, following the drafting of a model text by the Committee of Ministers (done in the Recommendation CM/Rec(2007)7), best adopt at a constitutional level an individual right to good administration. Amendements to any national constitution is not a simple procedure in most of European states, yet many countries still consider it. In spite of that we believe that this process should be accelerated, after all it undoubtedly is in public interest.

2.2 Soft Law and Other Documents of the European Union on Administrative Procedure

Development of the competences of the EU means *inter alia* that its citizens are directly confronted with the Union`s institutions, bodies, offices and agencies. Thus the Union`s law on administrative procedure is needed, otherwise private persons will feel groundless differences in relations between national public administrations and the Union`s. Therefore the European Parliament twice adopted special resolutions that were aimed at future regulation on an EU level, namely of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union and of 9 June 2016 for an open, efficient and independent EU administration.

Both resolutions declare that the Union's existing rules and principles on good administration are scattered across a wide variety of sources: primary law, case-law of the Court of Justice of the European Union, secondary legislation, soft law and unilateral commitments by the Union's institutions. Moreover, the fact that the EU lacks a coherent and comprehensive set of codified rules of administrative law makes it difficult for citizens to understand their administrative rights under the Union`s law.

Another justifications for the EU`s law on administrative procedure are already of legal nature. First, the aforementioned right to good administration enshrined in the Article of the Charter of Fundamental Rights of the European Union is legally binding as primary law. Second, Article 298 of the Treaty on the Functioning of the European Union encourages the adoption of regulations to assure that in carrying out their mission, the institutions, bodies, offices and agencies of the Union have the support of an open, efficient and independent European administration. Such public administration can not be achieved without proper procedural rules that display contemporary standards of good administration.

Therefore two resolutions of the European Parliament claim necessity of the Union`s law on administrative procedure that consist of annexes in which principles of good administration and rules governing administrative decisions are developed. Compared with the Recommendation CM/Rec(2007)7 on good administration a majority of provisions of the resolutions have similar contents, but some new ideas for future legislation have been added. For example, the resolution of 15 January 2013 supplements a traditional set of general principles which should govern the public administration with fairness, efficiency and service. The principle of fairness can be defined as creating a climate of confidence and predictability in relations between individuals and the administration. In turn the principle of efficiency and service widens the classical approaches to public administration to well-known among scholar's ideas of New public management and further to the concept of New public service (Denhardt & Denhardt, 2013). Paradoxically the trend to efficiency and effectiveness of public administration also leads to downsizing of the role of law on administrative procedure; however this is a special subject that needs further exploration.

Coming back to the fact that there are already two resolutions of the European Parliament aimed at the Union`s law on administrative procedure but have not succeeded yet can be explained by the complexity of the issue, especially when taking into consideration that an extensive number of sectoral administrative procedures are valid at the level of the EU. It will be relevant to recall that discussions among legal practitioners and politicians about a general law on administrative procedure in the Federal Republic of Germany lasted for almost twenty years but finally resulted in the high-quality law in 1974. Hopefully a

future Union`s law on administrative procedure will also fulfill the expectations which are written. After all, legal doctrine of administrative procedure developed substantially during recent years and the most remarkable result of scientific work in the analyzed area will be outlined in the next paragraph.

2.3 ReNEUAL Model Rules on EU Administrative Procedure

A group of prominent European legal scholars and practitioners created the Research network on EU Administrative Law (ReNEUAL) in 2009 with the goal to prepare a draft of EU administrative procedure law. In 2014 the final document was prepared, titled as the Model Rules on EU Administrative Procedure and published shortly thereafter. Its authors stated that the evolution of the European legal system had reached a point where codification of administrative procedure law "is not only possible but also necessary for EU`s future development as regulatory system" (EU Model Rules, 2014: 6). Among the main shortcomings of existing EU administrative law, the following were named:

- its significant fragmentation into sector-specific and issue-specific rules and procedures that leads to an overburdening complexity of often overlapping norms;
- some procedural elements are addressed within policy-specific rules only partially, which often leads to a lack of transparency, predictability and trust in EU administrative and regulatory procedures and their outcome, especially from the point of view of citizens;
- the absence of a systematic transversal approach in existing administrative procedure law causes lacunae in the procedural rights of private persons.

Te mission of a codification of administrative procedure law at the EU level is to help simplify the legal system, enhance legal certainty, fill gaps in the legal system and thereby further contribute to compliance with the rule of law.

Besides, the ReNEUAL drafters, strongly supporting the aforementioned Resolution of 15 January 2013, considered that the European Parliament took a limited approach that does not fully develop the potential of the future legislation at this stage; especially regarding the scope and depth of the regulation and

includes forms (instruments) of administrative action. The authors of the Model Rules on EU Administrative Procedure significantly supported a widened approach by which not only individual administrative acts (decisions), but also normative acts of public administration and public contracts should be regulated in the future piece of legislation, though in different books (parts).

Thus the proposed Model Rules on EU Administrative Procedure consists of six books that are:

- Book I - General provisions (scope of application, relation of the Model Rules to sector-specific rules and the EU-members law, main definitions);
- Book II - Administrative rulemaking (procedure of adopting of normative acts of general application by public administration);
- Book III - Single case decision-making (procedure of adopting of individual administrative acts);
- Book IV - Contracts (concluding of public or administrative contracts);
- Book V - Mutual assistance (internal procedures aiming at cooperation of public authorities);
- Book VI - Administrative information management (gathering and transmission of information as a central factor for decision-making of any public body).

From the structure of the Model Rules one can observe that external procedures are not directly affecting individuals and regulating relations between public authorities and private persons, whic are covered by the document. Some procedures within public administration in the books V and VI were also added because of the existence of composite procedures and shared administration in the implementation of EU law. In this context innovative definition of composite procedure was proposed as "an administrative procedure where EU authorities and the authorities of a Member State or of different Member States have distinct functions which are interdependent. A composite procedure may also mean the combination of two administrative procedures that are directly linked" (EU Model Rules, 2014: 29).

To sum up this short overview of the Model Rules on EU Administrative Procedure, the document was designed not only for the future EU law in the analyzed sphere, but also for the application in sector-specific legislation, to be able to fill existing lacunae. Thus the Model Rules should be considered as standard protection that may be developed in sector-specific legislation of the EU as well as in relevant national legislation. Inspiration from the Model Rules should absolutely be used by neighboring countries of the EU that are trying to reform their public administration, including Ukraine.

2.4 Legal Regulation of Administrative Procedure in Ukraine: Recent Developments

Ongoing discussions on the very expediency and structure of a general law on administrative procedure among Ukrainian legal scholars, practitioners and politicians and a long-term delay in the adoption of such a law (code) can be considered not only as a negative factor, but it can also be seen as an additional possibility to improve the draft of general law on administrative procedure and to use the newest experiences of foreign countries and particularly of European institutions in the analyzed sphere of legal regulation, as well as updated practice of its implementation.

This means that current rules and procedures for Ukrainian administrative authorities continue to be mostly scattered across different sector-specific laws and regulations. Though at least two exceptions exist, administrative procedural norms can be found in two legislative acts of general nature. First, the Law of Ukraine "On citizens appeals" (1996) consists of some elements of administrative procedure (time-limits for administrative decisions, procedural rights of individuals in the relations with public bodies, procedural obligations of public administration). Second, paragraph 3 of Article 2 of the Code of Administrative Proceedings (Justice) foresees ten criteria, by which administrative courts (were established in Ukraine in 2005) shall examine appealed decisions or actions of administrative authorities. To a considerable extent this criteria corresponds to the principles of a good administration that are envisaged in the aforementioned soft law documents of the Council of Europe and the EU.

However, in a situation when administrative procedural rules are contained mostly in sector-specific laws and regulations and are supplemented by only a few articles of the above mentioned, legislative acts must be changed. In the author's view a lack of general law (code) on administrative procedure in Ukraine is one of the main reasons that do not allow complying with the rule of law in the country. In nother branches of procedural law, especially the judiciary, Ukraine experienced quite a long term history of codification and adopted at least four codified acts: Civil Process Code, Criminal Process Code, Code of Administrative Proceedings (Justice) and the Economic Process Code. Besides, the Code on Administrative Transgression of Ukraine partly regulates proceedings not only in courts, but also in public administration`s bodies. However, this is an example of just partly completed codification. Even relating to only administrative transgressions, the last Code does not regulate proceedings in all areas and various sector-specific laws and regulations are also in force. Very rarely do these sector-specific acts of Ukrainian legislation fully correspond to the contemporary European standards of administrative procedure and to the principles of good administration. Some exceptions do exist (mostly in recent legislation), for example in the Law of Ukraine "On administrative services", adopted in 2012 that provided regulation of one-stop shops in public administration. But it definitely is not enough for relevant legal regulation of administrative procedure as a whole.

At the same time, an adoption of a general law (code) on administrative procedure in Ukraine does not exclude that some sector-specific laws will stay in force and have priority over *lex generalis*. This approach is based on the necessity of legislators considering some of the peculiarities in specific areas of law, for example in tax or competition law. In most jurisdictions it means that a general law on administrative procedure is implemented subsidiarily in these specific areas, whereas some issues are not regulated by sector-specific laws. Such an approach was also confirmed by the drafters of the Model Rules on EU Administrative Procedure who underlined their awareness of careful drafting of the rules governing the relationship between *lex generalis* and *lex specialis*. The authors of the Model Rules proposed to apply them when no specific procedural rules existed; also specific procedural rules shall be interpreted in coherence with and may be complemented by the general law.

Outlined in the previous paragraphs is the issue of administrative actions that shall be codified into a general law on administrative procedure, which has been decided

by the authors of the contemporary draft of Ukrainian law in a traditional way for Eastern and Southern-Eastern Europe. Only procedures for individual administrative acts (decisions) are covered by the draft. Taking into account legislative experience of some EU-members and also that of the Ukrainian administrative courts, which are empowered to resolve public law disputes regarding administrative contracts, at least the procedure concluding the public (administrative) contracts should be added to the draft in a separate chapter.

Another issue connected to the depth of codification in any country relates to the stages of administrative procedure that are covered by a general law (code) on administrative procedure. An issuance of an administrative decision is definitely the principal stage of administrative procedure that can be divided into phases similarly to any judicial process, including:

- commencement of administrative proceeding by the public administration`s body on request of private persons or *ex officio;*
- collection and evaluation of relevant evidence and documents;
- hearing of a case if necessary;
- *stricto sensu* issuance of administrative decision and notification of all interested parties;
- rectification or withdrawal of administrative decision if needed.

After that any administrative decision (that is beneficial or has an adverse effect for a private person`s interests) can be appealed either within a system of public administration or to the competent court. In most national procedure laws only administrative review is included to a general codified act on administrative procedure, whereas judicial review is regulated by a special process law. However some European countries, and in particular the Federal Republic of Germany, located procedural norms on administrative appeal (obligatory stage before the judicial appeal according to the German legislation) to the law of administrative courts. Connecting this issue to the Ukrainian legislation, we have to remember that an administrative appeal is not obligatory stage before judicial appeal here and thus is not used very often by lawyers and their clients. This is one of the reasons why administrative courts in Ukraine deal with more conflicts in the public sphere than their counterparts in other European countries. In the author's point of view, such a legal regulation in Ukraine needs to be changed and legislative experience

of the EU-states with codified acts on administrative procedure would be useful to examine.

The final stage of any administrative procedure is the execution or enforcement of an administrative decision. This stage is unquestionably obligatory – otherwise an issuance of such a decision has no value for private persons. In spite of procedural character of norms on administrative execution, national, general administrative procedure acts of legislation regulate this issue only partly or not at all, leaving this stage to separate laws. This approach is also rooted in the Austrian experience of 1925 when special *Verwaltungsvollstreckungsgesets* was adopted besides the *Allgemeines Verwaltugsverfahrengesets*. In the context of this article we have to add that the modern Model Rules on EU Administrative Procedure do not cover administrative appeal and administrative execution (enforcement) and concentrate mostly on procedure of issuance of administrative decision. This observation does not lead to the conclusion that both final stages of administrative procedure are less important from the point of view of the authors of the Model Rules. In this regard they chose to limit the scope of research and of the final document which consists of six books.

Partly summarizing, a future, final draft of general law (code) of Ukraine on administrative procedure should use provisions laid down in numeral soft law documents of the Council of Europe, the EU, as well as in the Model Rules of EU Administrative procedure and be enacted by the Ukrainian parliament in the nearest future. Otherwise the Ukrainian parliament and government have to adhere to a large number of scattered sector-specific laws and regulations to the contemporary standards of administrative procedure, but in such a way that can not be considered as efficient.

3 Perspectives of the European Union`s and Ukrainian Law on Administrative Procedure

Based on fundamental value of the rule of law, the idea of a good administration shall be considered as the core principle for the modernization of law on administrative procedure. This statement can guide different states and supranational institutions: a few EU-members that have not yet adopted a general law (code) on administrative procedure, neighboring countries such as Ukraine and the EU as a whole.

Good administration cannot be defined in one, even long and complicated sentence. It can be achieved when public administration`s activities are in line with general legal principles (lawfulness, non-discrimination and equal treatment, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy, transparency) and special rules governing administrative decisions (right of private persons to be heard, to have access to one`s file, duty of public administration to state reasons and many others). There are at least two preconditions of a good administration:

1) quality of law and its compliance with contemporary European standards in every jurisdiction;
2) conformity of actual administrative activity with the aforementioned principles.

Thus every jurisdiction in Europe primarily has to improve or even constitute its legislation on administrative procedure according to classical and modern ideas of proper administration; however this is simply not enough. Public officials who implement this legislation have to understand their mission to administrate as good as possible, similar to the best practices principle in the private sector. It is not an easy appointment for public administration in any country, but offers the perspective to make our lives better by reducing of quantity of conflicts in public sphere. On the other hand, the first condition of a good administration, the adoption of improved or new legislation regarding administrative procedure, must be realized. Taking into consideration substantial development of legal doctrine of administrative procedure in recent years, as well as a number of soft law documents of the Council of Europe and the EU's body in the analyzed sphere, every national jurisdiction in Europe can and must do it. Such a notion undoubtedly relates to the EU as a whole that still lacks an appropriate piece of legislation on administrative procedure.

We completely agree with the view of the drafters of the Model Rules on EU Administrative Procedure that procedural rules need to be designed to equally maximize the twin objectives of public law: to ensure that the instruments in question foster the effective discharge of public duties and, at the same time, that the rights of individuals are protected (EU Model Rules, 2014: 4). We do consider that this is true for both kinds of laws on administrative procedure: codified general laws and sector-specific legislative acts. To our mind, national

jurisdictions that have not adopted a general administrative procedure law yet (including Ukraine), possess a rather good possibility to adopt high quality legislation in the analyzed area. They can use provisions laid down in the soft law documents of the Council of Europe and the EU and in the Model Rules on EU administrative procedure as a type of `stand by codification` or as a `boilerplate` to be supplemented with sector-specific norms in policy-specific legal acts (EU Model Rules, 2014: 21).

The final remark will apply to the development of Ukrainian legislation that still lacks a general law (code) on administrative procedure, despite many attempts via the legislative process as well as to its implementation. We do believe that such a necessary legislative act will be adopted by the Ukrainian parliament in 2018. Meanwhile, taking into account that Ukraine joined the Statute of the Council of Europe (1995), obliged to adapt its legislation to *acquis communautaire* (2004) and declared good governance among common values with the European Union (2014), we are convinced that national administrative authorities should be guided not only by administrative procedural rules that one can find in Ukrainian legislation, but also by the aforementioned soft law documents of European institutions.

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The Role of the Law in the Democratic State and the Protection of Human Rights in Times of Mass Migration Phenomenon

Augusto Sinagra

Abstract The paper preliminary deals with the definition of the notion of State and of its most important functions, explaining the essential and characterizing aspects (identity, territorial sovereignty and political and economic independence) and also its changing way of being of its political structure as regard as its democraticity. Then the paper underlines the fundamental distinction of human rights between political and civil rights, on the one hand, and social, economic and work rights on the other. The paper underlines the logic fact that the latter are propaedeutic to the former in order to effectively have the civil and political rights protected and implemented. Third part of the paper deals with the actual problem of mass migrations by examining intended and unintended causes and effects and by assessing whether the so-called "migrants" may be qualified as "refugees" according the general and conventional international rules with specific regards to rights and duties of the State towards foreign nationals for the purpose of protecting fundamental rights and freedoms. In the last part the paper examines challenges and threats brought by mass migrations to individual and State security and to peaceful development of international relations among States pursuant to general and conventional international rules.

Keywords: • Sovereignty • Rights of the Individual • Migrants • Internal Public Order • European Union •

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1 The State, its Way of Being and its Functions

The role of the State, its involvement and its actions of any possible nature towards the ongoing phenomenon of mass migration even on its territory (this will be addressed in the following paragraphs) requires, although synthetically, a clarification – a retrospective analysis – of what the term "State" actually means, both with regard to its organization and its responsibilities and functions.

In times of liberalization of commerce, and an internal free market economy in terms of competing entrepreneurship and thus, accordingly, the concept of globalization or "globalism" often (rightly or wrongly) misunderstood; in a period of "dominating" mainstream thought of reconsideration of the idea of domestic state sovereignty, not to the benefit of a different and overlapping sovereignty, but in terms of a self-destruction end in itself or for the benefit of the international financial powers and of multinational corporations; in a period where the virtues of capitalism have been hijacked because it is being used as an instrument of monetarism for the purpose of enriching the relatively few at the expense and to the detriment, even the impoverishment , the majority, it is an opportune time to emphasize, even in extreme synthesis, that the "State" is the stable political organization of individuals which is recognized in an existential and common destiny collectivity, within a determined spatial area that is called the "territory" of the State.

The primordial function of the State is to achieve the satisfaction of both the individual and collective needs of the population residing within its territory; to provide for the external defence; and, to guarantee both the domestic public order as well as the State's territorial integrity including its economic and political independence.

The internal political organization (which may be variable) has no importance in terms of the (non)democratic nature of the State. A politically authoritative or totalitarian State does not cease to be a State and does not fail to exercise its primordial functions.

The same reflections may be proposed in properly juridical terms in order to identify in the State a subject of international law: a situation in relation to which

the democratic nature of its domestic political organization is completely irrelevant.

The State is and remains the same with regard to the convergence of its structurally constitutive elements identified with the population and its internal political organization, namely the government. The State's territory is a necessary component of its existence and functioning, because of the determination of the spatial limits of extension of sovereign powers of government.

2 The "Democratic" State

By way of general introduction, the following analysis starts by defining the nature of the State, which is organized in the forms and the contents of a democracy, and in which lies the legitimacy of its powers of government, as intended as an expression of its sovereignty, belonging exclusively to the people, who exercise their rights within the limits of the rules set down by the State.

To this notion we must also add that the prevailing idea of the democratic nature of the State, founded on the representative parliamentary democracy, is a nebulous one. It is clear to everybody that the representative democracy, not today but for too long a time, represents nothing and nobody. It is an idea of empty democracy and intentionally functional to an idea of liberal model and economic choices of laissez-faire nature, even them functional to the interests of the oligarchies that govern the economy and, firstly, the monetary policy.

It is time to explore both new forms of democratic government and democratic political organizations that will better represent and advance the popular will. Forms of government that will help ensure the existence of a fully participatory democracy as intended; forms that will transcend the vacuity of rigid formulas and lay waste the fallacy of immutable formalisms, in the sense of effective and democratic participation in the economic decisional processes of the juridical organization of the State. This changes certainly will not come to fruition in indistinct and diffused forms but rather only through the formally organized representations of concrete interest of categories: specific classificiations of work and of workers; of the production branch and thus the entrepreneurs; of the freelance professionals, etc. Thus, representation of concrete interests that only

the membership of the associates to the referring categories could guarantee and effectively represent.

The participatory democracy is not certainly the one evoked in an empty sense by the Lisbon treaty of 2007 which sought to advance the notion of "dialogue" between the institutions of the European Union and the ill-defined "social partners". A truly participatory democracy is not one where there is but empty "dialogue" but instead, as mentioned *supra*, is a democracy that champions and encourages the effective participation in the normative decisional processes on the part of the representatives of the various classes of workers and producers.

3 Sovereignty of the State, Monetary Policy, Foreign and Defence Policy

But there is another implication in terms of concrete policies that characterizes the capacity of a State and that underscores the idea of its "sovereignty": monetary policy providing a State with the full autonomy to issue currency by correlating purchasing power, not to abstract calculations, but rather instead to the effective capacity of its economic system; that is, to its capacity in terms of economic production.

A State that lacks the capacity to issue currency, the proper currency, such as, for example, member States of the European Union where the quantity of the currency is issued and printed by a private company and thus politically irresponsible as the European Central Bank, is a State that on the one hand, is deprived of any economic independence and thus as well short of political one and, on the other hand, is a State that could never pay off the national and international debt because it would be required to resort to credit to do so and in turn also would have to repay the interest on that borrowed money. So the States are condemned to an endless debtor position due to the fact that it would be impossible for them to pay off the public debt resorting to credits aggravated by interest rates.

With respect to what occurred in relation to the monetary policy appears to be subordinate to the second characterizing element of State, namely its foreign policy which, short of any feigning, may only be effectively exercised because it is grounded in the economy or the bayonets of the soldiers. This is not the case in States like Costa Rica which, for proper choice, renounced a policy of external

defence and instead only guarantees the domestic order of the State. To the contrary, it is the case of those States, such as the Italian Republic, which must bear the presence of 113 military bases of the USA or NATO (that is the same thing) as a consequence of an unconditioned surrender that still continues from 8th of September 1943 to the present time, and which not only led to military defeat in war, but has further caused mostly, as the present situation demonstrates, the eradication of its political independence; independence which is grounded not only on the autonomous economic choices and on the full and free administration of monetary policies in the sense indicated above, but is grounded also on the free exertion of the defence policy which signifies autonomous administration of military "means".

4 "Rule of Law" at the Domestic Level and with Regard to International Relations. The "Rule of Law" in the Liberal State in Relation to the Fundamental Rights of the Individual

The »rule of law« has to be understood at least in a general sense. A sense not any more identifiable in the context of international relations, and thus correlated to the measures of the norms of general and conventional international law (in cases where international agreements are concluded without any kind of conditioning), but a sense identifiable only within the State as a parameter of certainty and rightness in the relationships between the private and public legal entities living in the territory of the State, or in the relationships between those and the State considered in its institutional form.

Next, we address and evaluate the right sense of "rule of law" in the liberal State in terms of the recognition and effective guarantee of the fundamental rights of persons, citizens or foreigners, residing in the territory of the State.

The liberal State is particularly generous in the recognition of civil and political rights for the only reason that affording these rights does not cost the State anything; does not affect the State's budget; and, on the other hand, the partial recognition or partial guarantee of economic, social and workers' rights renders the first category of rights illusory and thereby severely limits the effective (meaningful) participation of the affected person in the life of the involved country.

In contrast to both civil and political rights, an effective (that is, meaningful, real and not illusory) recognition and guarantee of social, economic and workers' rights directly affect the budget of the State in terms of costs of salaries, social welfare, social assistance, and healthcare.That is to say, for that set of social measures traditionally called "welfare State".

A last cause for reflection is on the need to reconsider the »way of being« or, stated differently, the way the State »should be« in relation to its primordial function, which is to guarantee protection (in all the senses of this word) to both its citizens and all persons present in its territory, specifically by guaranteeing each of them private and public security.

5 The State and the Mass Migration Phenomenon. Its Causes

A significant problem the State faces as a consequence of the phenomenon of mass migration is how best to achieve its obligation to guarantee the private and public security. Related to this problem is the question of the scope of duties and obligations owed to the significant number of foreigners that generally speaking would not be considered (that is, »defined as«) prejudicially and indiscriminately "refugees" according to the norms of general and conventional international law. To the extent the migrants are provided refugee status, they would be placed on equal footing with foreign nationals and the State would owe them the same duties, and correlatively they would be entitled to the same rights, as would be the case with a foreign national and particularly in the area of the duties owed by the States when it comes to the protection of fundamental rights of individuals.

The phenomenon of mass migration towards the States of the European Continent may be explained on the basis that the migrants have the belief, whether it is real or imaginary, that Europe will offer them well-being and, thus, the possibility of better living conditions, although the reality is that for a long time the European Union has been negatively impacted by a serious economic and occupational crisis. To be added the geographical vicinity of the States of the European Continent (including those of the Balkan Region) and, signally, as mentioned, the member States of the European Union.[1]

[1] For these specific aspects, see Arnaut & Guric (2016).

Greece is the country mostly affected by the mass migration phenomenon. Italy also has been greatly impacted, not only for geographical reasons, but also because of the Italian government's self-imposed incomprehensible indiscriminate (open) policy of reception towards everyone. Italy's very liberal migration policy has led to numerous problems relating to domestic public disorder, inadequate integration (only imaginable but not realistic) of the migrants into Italian society, and of social and economic disorder.[2]

It is not an exaggeration to state that the causes of these continuous migratory waves has been the intentional and premeditated American imperialistic policy that seeks to achieve its objectives of control and subjugation of States (beside the achievement of greater economic benefits by perpetuating the violence of the US dollar in the international economic transactions to the benefit of the interests of North-American public debt) by provoking the States of destination of "migrants" to situations of intentional destabilisation.[3]

Recent world history events confirm this argument. Cases on point incude, for example, the aggression of the United States of America and its allies towards the Socialist Republic of Iraq, as well as to the change of government and regime in Egypt, promoted and sustained by the United States of America. This can also be demonstrated by the aggression of the socialist Serbia, always through the »*legitimate arm*« of the NATO, in which context the United States of America plays a hegemonic role in the administration of the military means, aimed at the vulgar aggression of Libya and the legitimate government of the Colonel Muammar Gaddafi, in corroboration with the French and English "democracies" (aggression perpetuated not only for the oil resources of Libya but mostly for the uranium deposits of the country near the borders with Chad). The aggression towards Libya was also designed to stop the project of the Libyan government to promote a common monetary policy among different States of the African Continent. And it is from Libya, not coincidentally, that the greatest migratory

[2] With regard to the European Union and even, specifically, with regard to the origins (causes) of the phenomenon of the mass migration, see Iosifvic (2016: 145), and bibliography and documents therein cited. In particular, Aso (2015) *Annual Report on the Situation of Asylum in the European Union in 2014* (Valletta, European Asylum Support Office); with regard to Spain see *Spanish police summoned over Ceuta migrant deaths, camp raided near Melilla*, in *Deutsche Welle*, 11 February 2015.

[3] About the consequences of the phenomenon on the International peace and security, see, by last Najetovic (2016: 115), (shortly, *Convegno di Sarajevo*) and bibliography therein cited.

flows of the so-called "refugees" escaping from actually non-existent wars in the States of he African Continent.

In the general context herein outlined, have to be collocated the so-called "Arab springs" that, as recently documented, were long planned, preordained and organized by the American government, which from the very beginning used to call them "Arab springs".

In this destabilising logic has to be included the Ukrainian crisis following the *coup d'état* promoted by the United States. Within this logic is collocated and explained the military, political and financial support of the United States and of the Persian Gulf monarchies to the different fringes and terroristic groups in an anti-Syrian function: the Islamic State is already accepted as an American creature and even in this case in a destabilizing function towards governments and regimes not available to subjugate to the imperialistic American policy, to cede the control of the proper economic system, to renounce to the proper monetary independence and, thus, to renounce to the proper sovereignty.

The last criminal American plan in Syria was impeded by the massive Russian Federation military campaign. And we should remember that (and it is an accepted evidence) 85% of the anti-Assad rioters were not Syrian nationals and were directly armed by the United States and, indirectly, by other so-called occidental States. There is no other valid explaination regarding how these terroristic groups were supplied with transportion, infrastructure and, especially, heavy weaponry.[4]

The American imperialistic policy is the principal, if not sole cause, and it has provoked the unexpected and unprecedented migratory flows, starting right from the States where at a large scale has been determined the intentional domestic "chaos".

[4] To this regard, see the incisive study of Ranaldi (2016). The Author examines the phenomenon of ISIL, its role in the Middle-East Region, in the territories of Iraq and Syria with relative incentive for mass migrations, beside the destabilizing situation in the Northern Africa, with particular situation to the Libyan situation, as a source of threat to the European security in front of these migratory flows never verified since the WWII which involve, precisely, serious problems of security at domestic and European level, beside grave consequences at economic, social and political context.

This imperialistic policy has been justified under the same pretext (now fully discredited), namely to promote and defend fundamental human rights and liberties, while at the same time pretending to impose models of political and economic internal organization of the State, only pretentiously "democratic," but in reality functional to the occidental plutocracies and the international finance.

6 The States destination of migration flows. Characteristic of "migrants". Consequences for the internal public order. The religious element

These kinds of emergencies have to be addressed by the States of destination of these migratory flows. It seems evident that those, who provoked the migratory flows, have been aiming and expecting to provoke destabilisation of the States of destination.

It is to be noted that the majority of the actual "migrants" are both male and young. A very large percentage of these migrants have not left their country of origin in order to escape from situations of war and it seems to be strange if they escaped from wars that they would leave their wives, children and relatives behind in their country.

Nor are the majority of the migrants fleeing to avoid political persecution, which may render them eligible for the "status" of political refugee in the destination countries. Nearly all of the migrants seek refugee status in order to remain in the territory (although formally and temporarily) of the destination State and thereby seek to benefit from the economic benefits related to this status, but most of these migrants do not meet the formal criteria that would give them political refugee "status".[5]

The international cooperation between the so-called occidental States would be worthy, and would produce better results, if the migrants were given more assistance in their countries of origin. If this were the case, then probably most

[5] See, at regard Hitaj (2016: 157) and bibliography therein quoted. See also, with regard to the present phenomena of mass migration and the problems of asylum, Georgieva (2016: 204) for a general and systematic analyze of the issue, see Sinagra & Bargiacchi (2009: 518), bibliography therein cited.

of the tragedies occurring during their migratory trip could be avoided. But if this does not occur in the European Union, and it is clear that the political will for this is absent, we will have to continue to suffer the consequences of the destabilising policies of the involved States (some western countries and particularly France) and of the United States of America.

These mass migration phenomena have led directly to a higher number of crimes being committed by the migrants in the territory of the destination States. This can be explained, at least in part, by the objective impossibility, even in terms of economic capacities, to offer effective and adequate assistance to these persons.

The destructive economic policy of "austerity" implemented by the European Union contributed to the problem in a serious and significant way. Instead of having the intended effect of improving the economy, increasing production and employment, austerity has instead aggravated and continues to aggravate the life conditions of the citizens of the member States of the EU to the benefit of a self-defeating, uncontrolled liberal model economic policy, and in the name of a monetary policy advantageous only for the international finance powers of the USA.

The difficulties inherent in the effective integration of these migrants is not only and exclusively of a religious nature but is accentuated even more in those States which no longer offer any precise identity model in terms of generally shared values (because of a relativism already uncontrollable), of legality in the sense of certainty of law, of political planning or of feelings of conscious affinity of a community of peoples.[6]

The religious element emerges with regard to these uncontrolled migratory phenomena because of the suggestion of the representations of Islam in extremist and aggressive terms and thus in fact it becomes an easy vehicular instrument of persons responsible for terroristic acts. What happened in France and Germany confirms this proposition to be true. These acts are the gravest consequences of the destabilising policy of the United States; with elements of subversion and conspiracy it caused detriment of legitimate governments, while

[6] Kustura (2016: 107) proposes a different way of integration, that is the coexistence within the State of *parallel* societies distinguished by language, culture, ethnicity, religion, etc., recalling a dated *idea* of Meyer (2008: 193-229).

this not being a legitimate prerogative of any third State, of no third State, to interfere in the internal political organization of any other State.

The intentional disintegration of the States coupled with the equally intentional pursuit of economic policies of subjugation are not policies that promote and advance ideals of democracy and fundamental human rights and liberties.[7] In fact, they do just the opposite.

7 The European Union on the Front of Mass Migrations

Mostly due to the devastations provoked in Iraq, Libya and Syria, even the European Union was affected by the phenomenon of mass migration. This phenomenon has been aggravated in terms of containment and "administration" because of the abolishment of the interior frontiers of the Union, without any adequate strengthening of controls in the external borders of the Union. On the contrary, the Schengen Agreement of 14 July 1985 and its application Convention have rendered the administration of the problems addresed in thlis article even more problematic.[8]

Neither the welcoming nor the granting of refugee "status" in favor of these migrants find any legal justification under either the Geneva Convention of 1951 or the relative Protocol of 1967 because, this phenomenon, due to its magnitude, falls outside the limits and the provisions of these international acts.[9]

The enactment of the last Dublin Convention on the determination of the responsible State for processing an asylum application has further aggravated the general situation due to a continuous lack of preventive and necessary harmonisation of domestic legislations in the field of asylum for political reasons; and also in a vacuum of autonomous EU legislation, common to all member States[10].

[7] The connection between integration and security is clearly highlighted by Korac et al. (2016: 236).
[8] On the necessity of an urgent coordination of measures at both the domestic and the EU level, capable under International and foreign law to deal with and "adminsitrate" the phenomenon, see also (Boas, 2015; Caggiano, 2014; Carella, 1992: 903; JeandesBoz, 2008; Costello, 2014; Trevisanut (2008: 367).
[9] To this purpose, see Valvo (2016: 136), and bibliography therein cited.
[10] The Convention, entered into force on 1 September 1997, was replaced by EC Regulation no. 343/2003 (so-called Regulation "Dublin II"), further integrated by EU Regulation 604/2013, known as "Dublin III". See, at this regard Valvo (2015).

The EU Regulation no. 604 of 2013 and the Council Directive no. 55/2001 of the European Community are absolutely inadequate to "administer" the present phenomenon of mass migration.[11]

Still today the European Union appears to be unable to adopt administrative or normative measures that have the ability to effectively deal with and regulate this phenomenon.

The present crisis has induced the competent EU institutions and some member States to agree on the necessity of a radical change of the European legislation both in the field of the processing of asylum applications and in the field of the distribution of the "quota" of migrants on the side of different member States, with a consequential modification of the "Dublin III" regulations with regard to the determination of the State of first entrance as the competent State for processing the asylum application.

These modifications, nevertheless, are still in a negotiation phase regarding not only the determination of the proper "quota", but also the appropriate characteristics and qualifications of the migrants and the eventual preferences demonstrated by member States.[12]

[11] See, in this sense Valvo (2016).

[12] See, on the field, Bargiacchi (2016: 61). From the same Author, see, in general Bargiacchi (2015). See also Valvo (2011). See also, EU Commission, Speech/15/5498, August 2015; EU Commission, *Eight biannual report on the functioning of the Schengen Area* (1 May - 10 December 2015), COM (2015) 675 final, Strasbourg, 15 December 2015, par. 2.1, p. 2; *Directive 2011/95/EU of the Parliament and of the Council, of 13 December 2011 on standards for the qualification of third-country national or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast); Regulation EU no. 604/2013 of the Parliament and of the Council, of 26 June 2013, establishing the criteria and mechanism for determining the Member State responsible for examining the application for international protection lodged in one of the Member States bay a third-country national or a stateless person (recast);* EU Commission *Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member State by a third-country national or a stateless person,* COM (2015) 540 final, 9 September 2015; EU Commission, *State of Union 2015: Time for Honesty, Unity and Solidarity,* Speech/15/5614, Strasbourg, 9 September 2015.

The solution should not involve the suspension of the "Schengen system" with the closure of the internal borders of the European Union. Still less adequate would be the closure of the external borders of the EU.[13]

8 Possible solutions

The only possible concrete solution seems to be the one which stands in contrast to the American policy and to move towards an autonomous presence of the European Union in the Balkan, Middle-East and North-African Region.

The contrast of the destabilizing policy of the United States implies necessarily the need to overcome the political and military alliance represented by NATO which, with the end of the Cold War and demise of the USSR, has eliminated the reason it was created given the absence of the soviet "enemy" and thus the defeat of the "threat" it was created for in the first place.

The containment and the control of mass migration flows (which, among others, threaten the ethnic balances and the historical and cultural identities in the destination States), mandates, as highlighted above, a necessary collaboration with the origin and "transit" States; precisely with Turkey, Egypt and, obviously, Libya, hoping that after the political and economic devastation perpetrated by the occidental "democracies", may return to Lybia a minimum of political domestic order and effective and autonomous governmental authority.

Assistance needs to be granted (and not to provoke wars) to the States of origin of migration through investments which favor economic and occupational development. These States should have the right in conjunction with the local authorities to co-administerand process political asylum applications.

The fact these steps have not been taken, and the overall lack of proactive measures, demonstrates a severe lack of political will and further inaction will only serve the self-defeating purpose of inflicing further destruction on the European Continent. This lack of political will for reform actions is all the more egregious when one considers the ever-increasing number of crimes, vandalistic

[13] On the specific problem of integration, see Ademovic (2016: 182). See also Caldwell (2009); Huysmans (2000).

acts and grave acts of terrorism committed in the States of destination of the migrants.

As mentioned above, among the primordial functions of every State is to guarantee the internal public order and security of the individuals situated in its territory.

The current migration phenomenon to date has not been governable using traditional normative instruments, and instead what is required is the use of appropriate political measures which effectively attack the causes (not the results) of the phenomenon itself; measures as highlighted above.

Imperialistic policies of destabilization, manufactured only ostensibily to protect human rights or to "export democracy" have not only caused the problem but have failed.

The complicated yet solvable problem requires a common (unified) political action (and will of purpose) on the part of the member States of the European Union in military, political and economic terms.

The problem at present, however, is that in the European Union, instead of working together, completely lacks any effective common, unifying foreign policy. To the contrary, the member States still pursue their individualistic (nationalistic) interests even to the conscious detriment of the interests of other member States.

Even more lacking in the European Union is a common and autonomous military policy which which would contribute to containing the consequent effects of the real causes of the phenomenon of the mass migration flows. The dependence of the military policy of the European Union from the NATO in the restricted limits it may be exercised, is also confirmed in the Lisbon Treaty of 2007.

Conclusively, and we reaffirm it again, since the migration crisis stems from economic and political causes it can only be successfuly addressed through political and economic reform.

The real question is whether the political will exists, at the EU level, to find credible and effective solutions, that will help contain and control the mass migration phenomenon, and to guarantee their implementation

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Public Administration and the Problems of Cultural Heritage Diversity in Documents of International Organizations

Janusz Slugocki

Abstract The article presents the new challenges for public administration in the field of protection of cultural heritage. In particular, the author considers a question of a new notion and definition of cultural heritage diversity, formulated in documents of international organizations. The contemporary notion of cultural heritage includes not only tangible culture, but also intangible culture (such as folklore, traditions, language, and knowledge). In addition, according to the documents of international organizations, cultural diversity is very important for the full realization of human rights and fundamental freedoms. These documents also recognized the need to take measures to protect the cultural heritage diversity.

Keywords: • Public Administration • European Administrative Law • Protection of Cultural Heritage • Cultural Diversity • International Organizations •

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1 Introduction

Traditional functions of the State in the field of culture and the related tasks of public administration, including regional and local authorities, are changing. The traditional cultural policy in most European countries concentrates on the support of national or local cultural institutions, and creating optimum conditions for the development of local activities. A general tendency is particularly a division of spheres of responsibility, competences and financial means among the main subjects of public cultural policy: central authorities, regional bodies, and local self-government. Regional and local bodies in today's Europe perform a key role in activating development of culture and the significance of those activities is considerably increasing in the process of the European integration. One of the most important tasks of public administration is the protection of natonal, regional and local cultural heritage (Slugocki, 2004: 325-326).

According to the Council of Europe, culture plays "a key part in understanding other people and respecting diversity" (The Council of Europe, 2014: 1). In general, the conventions of UNESCO on cultural heritage work on both national and international levels. Flego argues that today culture might be considered „as universal, as valuable for all humans, being at work in all recognised human communities" (Flego, 2005: 41). J. Tomlinson considers that „despite the historical tendency for cultures and nations to claim universality as their possession, the appeal to the universal can perhaps be made to work as a construct: as one way of understanding our human condition and of relating in constructive dialogue with others" (Tomlinson, 2005: 23).

Vecco and Srakar underscore that „cultural heritage is an irreplaceable repository of knowledge, and a valuable resource for economic growth, employment and social cohesion. This repository is formed of tangible and intangible aspects, with the latter only garnering attention of the international community in the last two decades" (Vecco & Srakar, 2018: 293).

2 Protection of Cultural Heritage in International Conventions

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict is the first international treaty that focuses exclusively on the protection of cultural property in armed conflict. It was signed at The Hague, Netherlands on 14 May 1954. The Convention includes the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April, 1935. The guiding principles of the Convention and the motivation for its conclusion are summarised in the preamble which states that „damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind". Taking this into consideration, the Convention notes that „the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection".

However, the definition of cultural property, formulated in the Convention, is constructed on the traditional notion and meaning of cultural heritage. According to art. 1 of the Hague Convention, the term `cultural property' covers all movable or immovable property of great importance to the cultural heritage of every people (such as monuments of architecture, art or history; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the cultural property). The protection of cultural property should comprise the safeguarding of, and respect for, such property (art. 2). Party states should, in time of peace, take steps to prepare for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate (art. 3). Further, states are obliged to respect cultural property situated within their own territory, as well as within the territory of other states, by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and, by refraining from any act of hostility, directed against such property (art. 4).

The right to cultural identity has been indirectly protected by the Court under various articles of the Convention, namely: article 8 and the right to lead one's life in accordance with a cultural identity and the right to choose freely a cultural identity; article 9 and the right to a religious identity; and, article 11 and the freedom of association with a cultural purpose (ECHR, 2017: 14).

Another notion of cultural heritage was proposed by the Convention for the Protection of the World Cultural and Natural Heritage, adopted by General Conference of UNESCO at Paris on 14 November 1972. According to art. 1 of the Convention, the „cultural heritage" consists of three categories. In the first category there are monuments, especially architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science. The second category consists of groups of buildings, including groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science. The third category consists of unique sites, e.g. works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

Mirek argues that presently, natural and cultural heritage often treated as one, „refers to the life broadly understood" (Mirek 2017: 23). Culturally significant landscapes are cultural properties and shall be considered as „mixed" cultural and natural heritage. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal (World Heritage Centre, 2017: 19). Bandarin observed the increasing number of cultural landscapes included in the World Heritage List. In his opinion, this „shows the interest of governments, societies and the general public in the conservation of their heritage, their interaction with their natural environment and their commitment to preserving the heritage for generations to follow" (Bandarin, 2009: 4).

The protection and conservation of the natural and cultural heritage are a significant contribution to sustainable development. In practice, the most

important point is recognizing the need to encourage synergies between conservation and development (Rao, 2011: 6).

The Convention aims at the identification, protection, conservation, presentation and transmission to future generations of cultural and natural heritage of Outstanding Universal Value. The criteria and conditions for the inscription of properties on the World Heritage List have been developed to evaluate the Outstanding Universal Value of properties and to guide States Parties in the protection and management of World Heritage properties. Rössler underlines that when a site is inscribed on the World Heritage List, its value is acknowledged at a global level, as the shared heritage of humanity, and „a revolutionary agreement concerning both cultural and natural heritage, the Convention recognises the shared past and destiny of all of humanity, underlining the importance of a dialogue between cultures" (Rössler, 2016: 5).

When a property inscribed on the World Heritage List is threatened by serious and specific dangers, the Committee considers placing it on the List of World Heritage in Danger. States Parties to the Convention recognize the collective interest of the international community to cooperate in the protection of this heritage (World Heritage Centre, 2017: 10).

However, the Convention provides that each State Party recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory belongs primarily to that state (UNESCO, 1998a: 54-56). Piotrowska writes that accession to the World Heritage Convention also created many „commitments, including the key aim of identifying sites of 'outstanding universal value' and providing them with adequate protection, so that they would serve future generations with a full set of their values" (Piotrowska, 2017: 55).

Groizard and Santana-Gallego critically considered the influence of the list of World Heritage Sites (WHS) on a situation of historical heritage in Arab countries. Authors noticed that many of them are in danger in some Arab countries, because „many countries base their development strategies on promoting cultural tourism by making use of their rich historical and artistic heritage. However, the literature has not clarified the benefit of having the nominations that UNESCO grants to the places that house such valuable cultural

patrimony. Therefore, the impact of the loss of this heritage is also unclear" (Groizard&Santana-Gallego, 2018: 285-292).

The contemporary notion of cultural heritage includes not only tangible culture, but also intangible culture (such as folklore, traditions, language, and knowledge). In „Recommendation on the Safeguarding of Traditional Culture and Folklore" UNESCO considered that folklore forms part of the universal heritage of humanity and that it is a powerful means of bringing together different peoples and social groups and of asserting their cultural identity. UNESCO also recognized the extreme fragility of the traditional forms of folklore, particularly those aspects relating to oral tradition and the risk that they might be lost. Under the UNESCO definition, folklore (or traditional and popular culture) is the totality of tradition–based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts. Folklore falling under this definition deserves to be protected in a manner inspired by the protection provided for intellectual productions. Such protection of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests (UNESCO, 1990: 238-243).

It is against this background that UNESCO adopted a resolution called „The oral heritage of humanity", on 12 November 1997, in which UNESCO stressed not only the role played with respect to the cultural diversity of humanity by various forms of popular cultural expression, such as oral traditions, rites and customs, music, dance, popular theatre and craft skills, which are generally transmitted orally, but also the importance of the oral heritage as a source of inspiration for creativity (UNESCO, 1998b: 53-54).

In the Convention for the Safeguarding of the Intangible Cultural Heritage (UNESCO treaty adopted by the UNESCO General Conference on 17 October 2003) intangible cultural heritage refers to „traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and

practices concerning nature and the universe or the knowledge and skills to produce traditional crafts". Intangible cultural heritage means „the practices, representations, expressions, knowledge, and skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage". This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity.

3 Cultural Diversity

The Universal Declaration on Cultural Diversity, UNESCO resolution, adopted on 2 November 2001, noted that culture is at the heart of contemporary debates about identity, social cohesion, and the development of a knowledge-based economy. Respect for the diversity of cultures, tolerance, dialogue and cooperation are among the best guarantees of international peace and security. The Declaration underlines the necessity of undertaking further activity on the basis of recognition of cultural diversity, of awareness of the unity of humankind, and of the development of intercultural exchanges. Cultural diversity is the common heritage of humanity because culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. Policies for the inclusion and participation of all citizens are guarantees of social cohesion. Cultural pluralism gives policy expression to the reality of cultural diversity. Human rights are guarantees of cultural diversity because cultural rights are an integral part of human rights. The declaration affirms linguistic rights as cultural rights in accordance with the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (UNESCO, 2002: 62).

According to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in Paris on 20 October 2005, affirming the cultural diversity is a defining characteristic of humanity because cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all. Cultural diversity is very important for the full realization

of human rights and fundamental freedoms proclaimed among others in the Universal Declaration of Human Rights. This Convention also recognized the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment. Azoulay underlines that since its adoption, the Convention has filled a vacuum with regards to culture in international law and „it has become a reference point for international negotiations and on the role of cultural goods and services for development" (Azoulay, 2017: 5).

The objectives of this Convention are among others: to protect and promote the diversity of cultural expressions; to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world; and, to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels.

According to the Convention, the principle of respect for human rights and fundamental freedoms and cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as the freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. The principle of sovereignty means that States have the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory. In practise, it means that national, regional and local public administration should bear primary responsibility for most tasks in the field of the diversity of cultural expressions. According to another principle of equal dignity of and respect for all cultures, the protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of, and respect for, all cultures, including the cultures of persons belonging to minorities and indigenous peoples. The principle of equitable access is also very important. Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity. The principle of sustainable development creates a wide context for the problems of the diversity of cultural expressions. Cultural diversity is a rich asset for individuals and societies. The protection, promotion and maintenance of cultural diversity are essential requirements for sustainable development for the benefit of present and future generations. In addition, the

principle of the complementarity of economic and cultural aspects of development shows that since culture is one of the mainsprings of development, the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy (UNESCO 2017: 25).

The term "cultural diversity" refers in the Convention to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity are expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used. Another important notion is the term „cultural content" which refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities. "Cultural policies and measures" refers to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services. "Protection" means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions, and "protect" means to adopt such measures.

Azoulay writes that the Convention „recognizes the sovereign right of governments to adopt public policies and preferential treatment measures that nurture creativity, provide access for artists to domestic and international markets and ensure that their works are accessible to the public at large, and in an equitable manner" (Azoulay, 2017: 5). Within the framework of its cultural policies and measures, each State may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory. Such measures may include e.g. regulatory measures aimed at protecting and promoting diversity of cultural expressions; measures aimed at providing public financial assistance; measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and

cultural activities; and, measures aimed at establishing and supporting public institutions, as appropriate.

Peeters argues that this is „a consequence of the fact that protection of monuments is mainly a state's activity", including activity of UNESCO or other organizations, which have national committees in each state. In addition, „ in case of minorities completely deprived of power it is not even possible to enter those committees, and consequently a centralised state does not respect varieties within its borders" (Peeters, 2004: 322).

At present, participation of civil society in governance is very important and civil society should play the fundamental role in protecting and promoting the diversity of cultural expressions. States should encourage the active participation of civil society in their efforts.

4 Cultural Heritage Diversity in European Context

Cultural diversity is also the common European heritage. Moreover, from the perspective of the European continent, one can see an increasing role of European Communities, European Union and the Council of Europe, whose legislation to a varied degree determines the character of cultural heritage protection in European countries (Dobosz, 2004: 304).

The Council of Europe Framework Convention on the Value of Cultural Heritage for Society, was adopted by the Committee of Ministers of the Council of Europe, and opened for signature to member States in Faro (Portugal) on 27 October of 2005 (it entered into force on 1 June 2011). The Faro Convention emphasizes the important aspects of heritage as they relate to human rights and democracy because rights relating to cultural heritage are inherent in the right to participate in cultural life. The Faro Convention recognises that every person has a right to engage with the cultural heritage of their choice, while respecting the rights and freedoms of others, as an aspect of the right to freely participate in cultural life. Rights and responsibilities relating to cultural heritage are the most important question because everyone, alone or collectively, has the right to benefit from the cultural heritage and to contribute towards its enrichment, and everyone, alone or collectively, has the responsibility to respect the cultural heritage of others as much as their own heritage, and consequently the common

heritage of Europe. The exercise of the right to cultural heritage may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others.

The Faro Convention promotes a wider understanding of heritage and its relationship to communities and society. Particularly, it promotes an understanding of the common heritage of Europe. Brown and Hay-Edie write that „a number of policy and conceptual developments in the evolution of the World Heritage Convention, and in conservation generally over the past decade, set the stage for new approaches that engage indigenous peoples and local communities in stewardship of World Heritage" (Brown & Hay-Edie, 2014: 7).

According to the Faro Convention, cultural heritage is comprised of a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time. A heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations. Furthermore, the Faro Convention also promotes an understanding of the common heritage of Europe, which consists of all forms of cultural heritage in Europe which together constitute a shared source of remembrance, understanding, identity, cohesion and creativity, and the ideals, principles and values, which foster the development of a peaceful and stable society, founded on respect for human rights, democracy and the rule of law.

At the national level, States should first of all undertake to recognise the public interest associated with elements of the cultural heritage in accordance with their importance to society, as well as enhance the value of the cultural heritage through its identification, study, interpretation, protection, conservation and presentation. States should promote cultural heritage protection as a central factor in the mutually supporting objectives of sustainable development, cultural diversity and contemporary creativity, and should recognise the value of cultural heritage situated on territories under their jurisdiction, regardless of its origin. At the same time, there are particularly problems of cultural heritage protection of weak ethnic minorities (apart from ethnic minorities possessing their own institutions).

The right to cultural identity has been indirectly protected by the Court under various articles of the European Convention on Human Rights, namely: article 8 and the right to lead one's life in accordance with a cultural identity and the right to choose freely a cultural identity; article 9 and the right to a religious identity; article 11 and the freedom of association with a cultural purpose (ECHR, 2017: 14).

Cahn argued that „apart from the right to maintain a cultural or ethnic minority identity and to lead one's life in accordance with that identity or tradition, with the positive obligations which it entails for the State, Article 8 of the Convention may also apply to the right to freely choose his or her own cultural or ethnic identity, and have that choice respected, where such right is based on objective grounds" (Cahn, 2005:17).

The Preamble of the Treaty on European Union relates to „inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law". The third article of the Treaty declares, in fact, that the Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced. Article 167 (ex Article 151 TEC) states that the Union should contribute to the flowering of the cultures of the Member States, while „respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore".

Cultural heritage is of great value to European society from a cultural, environmental, social and economic point of view (EC, 2016). In particular, cultural heritage is central to the European Agenda for Culture. The European Commission is committed to promoting cultural diversity and protecting cultural heritage in the EU. In November 2007, the European ministers of Culture (Culture Council) agreed on a „European Agenda for Culture", resolution of the Council of 16 November 2007, based on the European Commission's Communication of 10 May 2007.

The European Agenda for Culture sought to address the role of culture in the EU. There is a growing recognition within the EU that culture lies at the heart of the European project and has a unique and indispensable role to play, among

others, in the promotion of cultural diversity and intercultural dialouge. Therefore, a structured dialogue between the political field (EU Commission, Member States, EU Parliament) and the civil society was developed.

The Council presented the opinion that culture and its specificity, including multilingualism, are key elements of the European integration process based on common values and a common heritage - a process which recognizes, respects and promotes cultural diversity.

The promotion of cultural diversity and intercultural dialouge is one of the strategic objectives set out in the European Agenda. Among many activities of public administration in the culture field, it is very important to promote cultural heritage, namely by facilitating the mobility of collections and fostering the process of digitisation, with a view to improving public access to different forms of cultural and linguistic expressions.

In the document of the European Commission on May 2007, „European Agenda for Culture in a Globalizing World", the Commission presented the opinion that „Europeans share a common cultural heritage, which is the result of centuries of creativity, migratory flows and exchanges. They also enjoy and value a rich cultural and linguistic diversity, which is inspiring and has inspired many countries across the world" (EC, 2007: 2).

In the working document of the European Commission on July 2010, „The European Agenda for Culture – progress towards shared goals", the Commission presented the opinion that „culture is not only a fundamental element of society and the lives of individuals, but is also a catalyst for European integration" (EC, 2010a: 3). In the report of the EC on „The implementation of the European Agenda for Culture" the Commission wrote that the adoption of the European Agenda in 2007 opened a new chapter of cooperation on culture policy at the European level, because for the first time, all partners – European institutions, Member States and culture civil society – were invited to pool their efforts on explicitly defined shared goals, which were endorsed by the Council. The Commission stressed that „culture lies at the heart of the European project and is the anchor on which the European Union's 'unity in diversity' is founded. The combination of respect for cultural diversity and the ability to unite around

shared values has guaranteed the peace, prosperity and solidarity the EU enjoys" (EC, 2010b: 2).

The New European Agenda for Culture was adopted on 22 May 2018 and, among other things, proposes to harness the power of culture and cultural diversity for social cohesion and well-being, by promoting cultural participation, mobility of artists and protection of heritage. The New Agenda explains how the European Commission will support EU Member States in tapping into culture's potential to foster innovation, creativity, sustainable growth and jobs. The New Agenda has three strategic objectives: focusing on social, economic and external dimensions. The social dimension is about using the power of culture and cultural diversity for social cohesion. Among other objectives, the document emphasises the need to protect and promote Europe's cultural heritage as a shared resource. Economic dimension includes supporting culture-based creativity in education and innovation, and for jobs and growth. Culture and creativity are important assets for the economy. In particular, culture contributes directly to jobs, growth and external trade. In the 2018 European Year of Cultural Heritage, a lot of activities are taking place at local, regional and national levels across the EU. European cultural diversity is also important in external dimension what means strengthening international cultural relations and, among others, reinforce cooperation on cultural heritage (EC, 2018).

5 Conclusion

In conclusion it should be uderlined that the protection of cultural heritage diversity is perhaps one of the most discussed fields of activity of European, national and local public administration. In the last decades, the notion of cultural heritage enlarged and radically changed its traditional meaning, e.g. the contemporary notion of cultural heritage includes not only tangible culture, but also intangible culture. According to the documents of international organizations, cultural diversity is very important for the full realization of human rights, including the right to cultural identity, and fundamental freedoms. These documents also recognized the need to take measures to protect the cultural heritage diversity. Public administration of all levels should contribute to promoting the role of European, national and local cultural heritage, including cultural heritage of minorities, as the important component of cultural diversity and intercultural dialogue (EC, 2016). One promising solution could be a concept

of the participatory governance of cultural heritage, including the issue of protection of cultural heritage diversity as an integrated element and a strategic resource for a sustainable development.

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Minority Rights as a Value of the EU

Carmen Thiele

Abstract The respect for rights of persons belonging to minorities – a Copenhagen accession criterion – is for the first time regulated by EU primary law in Article 2 TEU of Lisbon for all EU Member States. This provision has a legal effect. Whereas the character of this value is determined, its content remains open. No regulation on minority protection can be found in EU law. The Charter of Fundamental Rights only mentions the membership of a national minority as a prohibiting discrimination ground and the preservation of diversity, but does not regulate a protection of minority rights. The EU is not assigned the competence to regulate minority protection. It remains a national competence of EU Member States. However, not all Member States have provisions on minority protection in their constitutional law. Hence, it is needed to consent on the interpretation of the value's content regarding minority rights in Article 2 TEU.

Keywords: • Minority Rights • Minority Protection • Values • Charter of Fundamental Rights • EU Accession Criterion • EU Law and Constitutional Law •

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1 Introduction

As a supranational organization the European Union (EU) is based on common values, shared by all its Member States, which distinguishes the EU from other international organizations (Terhechte, 2017a: 75, para. 1). Originally Article 6 para. 1 Treaty on European Union (TEU) of Amsterdam (Treaty of Amsterdam, 1997), followed by that of Nice (Treaty of Nice, 2006), established the principles of the EU: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law (Speer, 2001: 985 f.). The Treaty establishing a Constitution for Europe (Treaty establishing a Constitution for Europe, 2004), which did not enter into force, collected for the first time in Article I-2 the values of the EU, which were literally copied in Article 2 TEU of Lisbon (Treaty of Lisbon, 2007). Before the entry into force of the Lisbon Reform Treaty, the characterization of the EU as a community of shared values was based mainly on purposes and common constitutional traditions of its Member States (Sommermann, 2013: 9).

The principles of the EU in the TEU of Amsterdam and Nice have developed into values of the EU in the Reform Treaty of Lisbon. With the TEU of Lisbon the characterization of a community of values has found its regulation in primary law provisions. The values are explicitly regulated in Article 2 TEU: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

For the first time in the TEU of Lisbon, the rights of persons belonging to minorities are mentioned in a primary law regulation of the EU. Until then the protection of minorities was only considered as a criterion for accession to the EU according to the so-called "Copenhagen criteria" of 1993 (European Council, 1993, point 7.A.iii. p. 13), by which a double standard was established: demanding the protection of minorities from candidate States as a precondition for joining the EU, but with no obligations for current EU Member States to protect minorities (Mangiameli, 2013: 135, para. 34). The "Copenhagen criteria" were incorporated into Article 6 para. 1 TEU Amsterdam, except for the protection of minorities (Kaiser, 2005: 155 f.). Only the TEU Lisbon replaced this double standard in Article 2 TEU by inserting the value of rights of persons belonging to minorities for all Member States independently of their date of accession, which will be analysed below.

2 EU as a Community of Values

2.1 Character of Values

The values of the EU have their origin in the fundamental historical and cultural principles as collective preferences of its Member States as the "Masters of the Treaties" (Speer, 2001: 982). These national principles have developed into general principles of law and values of the EU common to all Member States and the EU itself (Mangiameli, 2013: Article 2, p. 118, para. 12). The fundamental political decisions and the established specific rules of EU law characterize the EU nowadays not only as an economic and legal community, but also as a community of shared values.

The values of the TEU are the main core of the identity of the EU (Frenz, 2011: 554, para. 1977). According to Article 2 TEU, "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". This provision does not determine the content or meaning of each of the mentioned values. Therefore, the question arises, what the significance of the recognition of the value "respect for the rights of persons belonging to minorities" is, considering that there is no concrete provision for minority protection in the Charter of Fundamental Rights of the EU (CFR, 2000), nor of an explicit legislative competence of the EU regarding the protection of minorities (Witte, 2004: 111). A further question arises as to whether the values established in Article 2 TEU of Lisbon have a declaratory character or legal effect (Hornung, 2013: 94).

The preamble of the TEU mentions that the inspiration for the European integration process comes "from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law". These principles are common to all EU Member States and the EU itself.

With a focus on fundamental or human rights[1] the provision in Article 2 TEU should be interpreted in conjunction with other articles of the TEU by applying the rules of interpretation of treaty law norms (Vienna Convention on the Law of Treaties, 1969, Article 31). Regarding the EU Member States, Article 2 TEU is formulated as a State obligation and should be directly applicable. Due to the primacy of application of Union law the authorities and courts of Member States are obliged to apply the values of Article 2 TEU in case of conflicts with their national norms (Murswiek, 2009: 485).

Article 3 para. 1 TEU formulates the promotion of its values as one of the key aims of the Union. Therefore, the values acquire a double character through the Treaty provisions: the determination of values in Article 2 TEU and the values as an aim of the EU in Article 3 TEU (Frenz, 2011: 551, para. 1966). The use of the term "to promote" in Article 3 para. 1 TEU indicates that the actors should apply measures to achieve the established aims. Article 3 TEU is not directly applicable and neither subjective rights nor competences of the Union arise from this Treaty norm because of its open formulated provisions (Müller-Graff, 2017: 93, para. 2). However the values in Article 2 TEU are essentially binding, because they constitute the cornerstone within the EU. The promotion of the values according to Article 3 para. 1 TEU is merely related to the external relations of the EU (Frenz, 2011: 578, para. 2068).

Article 2 TEU of Lisbon starts with a new inserted value – the respect for human dignity which corresponds to Article 1 CFR. The Lisbon Reform Treaty, together with the Charter, consolidated the EU not only as an economic community, but especially as a community of shared values. In the descriptions of the CFR the respect for human rights is characterized as a fundamental right and moreover as the real basis of fundamental or human rights (Explanations relating to the CFR, 2007). According to the European Court of Justice (ECJ) the fundamental right to human dignity is part of Union law (*Netherlands v. European Parliament and Council*, 2001).

[1] The term fundamental rights as a rule is used on the supranational level, the term human rights on the international level.

The respect for human rights mentioned as a value in Article 2 TEU is further established in Article 6 TEU. Pursuant to Article 6 para. 1 TEU the Union recognises the fundamental rights set out in the CFR, which has the same legal value as the Treaties. Article 6 para. 2 TEU regulates the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (ECHR as amended by Protocols No. 11 and No. 14, 1950), which is expected for the future.[2]

To safeguard the values Article 7 TEU contains a set of measures: the determination of "a clear risk of a serious breach by a Member State of the values referred to in Article 2" (para. 1), the determination of "the existence of a serious and persistent breach by a Member State of the values referred to in Article 2" (para. 2) and the suspension of voting rights as a political sanction against the EU Member State violating those values (para. 3) (FRA, 2013: 8). The link between the values in Article 2 TEU and the sanction procedure in Article 7 TEU clearly demonstrates the conditionality of EU membership and the fulfilment of the values in the European integration process (Hilf & Schorkopf, 2017: Art. 2, para. 40). Thus, the values of the EU established in Article 2 TEU do not have only a declaratory character, but a legal effect as well (Mangiameli, 2012: 22).

2.2 Values in Internal and External Relations of the EU

The values in Article 2 TEU constitute the fundamental integration process within the EU and of the external relations of the EU with third States (Mangiameli, 2013: 117, para. 9; Terhechte, 2017a: 77, paras. 5, 8). The fundamental values of the EU reflect the self-conception of the EU (Geiger, 2015: 15, para. 1). In this Treaty provision, the homogeneity between the "constitutional" principles of the EU and the constitutions of the Member States is regulated (Rensmann, 2004: 56 f.). Homogeneity can be defined as the similarity of certain legal principles among Member States in a horizontal relationship and between the Member States and the EU in a vertical relationship. Homogeneity fulfils various purposes: to establish a consensus among Member States in the integration process, to guarantee the legitimacy of the EU, to facilitate the European identity and to ensure the functionality of the EU (Mangiameli, 2012: 23 ff.).

[2] See the advisory opinion on the compatibility with EU law of the draft agreement for EU accession to the ECHR, 2014.

The values of the EU are also the basis for the actions of the EU in its external relations with non-EU Member States and other international organizations. According to Article 21 para. 2 lit. a TEU the EU safeguards its values in its external relations. In the framework of the Common Foreign and Security Policy, especially in Article 23 TEU, it is regulated that the Union's action should be guided by the principles laid down in Chapter 1. According to Article 205 Treaty on the Functioning of the European Union (TFEU, 2007) the Union's action on the international scene should also be guided by the principles laid down in Chapter 1 of Title V TEU. Both provisions directly refer to Article 21 para. 1 lit. a TEU and therefore to Article 2 TEU.

In Article 3 para. 5 TEU it is expressly stated that the EU, in its external relations, upholds and promotes its values. Pursuant to Article 8 TEU, in its relationship with neighbouring States, the EU should aim to establish a good neighbourhood, founded on the values of the Union. Finally, according to Article 49 para. 1 TEU, the accession procedure requires the respect and promotion of the values referred to in Article 2 TEU from applicant States (Hanschel, 2012: 996). All of these provisions demonstrate that the values of the EU play a key role in different areas of EU law (Terhechte, 2017a: 77, para. 8).

2.3 Recognition of Minority Rights as a New Value

For the first-time, included in the Lisbon Reform Treaty, were minority rights as individual rights – following the respect of human rights – and encompassed in Article 2 TEU as a new value. A legislative competence of the EU does not arise from this provision. According to the principle of conferral established in Article 5 para. 2 TEU, competences not conferred upon the EU in the Treaties remain with the competence of the Member States (FRA, 2010: 2).

Whereby the respect of human rights is closely related to the ECHR of the Council of Europe, the respect of minority rights can be referred to the principles regulated in the Framework Convention for the Protection of National Minorities (FCNM, 1995) of the Council of Europe (Mangiameli, 2013: 134, para. 34). All EU Member States are State Parties to the ECHR, but not to the FCNM.[3] Worth noting, the ECJ recognized in its jurisprudence (*Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, 2007) that general principles of Union law could also be drawn from international treaties that were not ratified by all EU Member States (FRA, 2010: 20). Still, minority protection is not among the general principles of Union law currently recognized by the ECJ (Kaiser, 2005: 170).

In the Preamble of the FCNM it is recognized that "[…] the protection of national minorities is essential to stability, democratic security and peace in this continent". It is further stated that a pluralist and democratic society should also create appropriate conditions enabling persons belonging to national minorities to express, preserve and develop their identity. The FCNM does not contain individual rights of persons belonging to national minorities, but rather State obligations. The mostly programme-type provisions are not directly applicable. They leave the State Parties "a measure of discretion in the implementation of the objectives which they have undertaken to achieve" (Council of Europe, 1995: 12, para. 11). However, the FCNM is not mentioned in a primary Union law provision as the ECHR in Article 6 paras. 2 and 3 TEU Lisbon. Therefore, the principles of the FCNM regarding the protection of minority rights cannot have the same character for the EU as the ECHR regarding the protection of human rights (Toggenburg, 2014: 6 ff).

It would have been expected that the CFR of the EU, by which the values of the EU developed into a leitmotif of the EU (Meyer, 2015: 180), contain a special provision for the protection of rights of persons belonging to national minorities. This expectation was, unfortunately, not fulfilled.

[3] Belgium, Greece and Luxembourg have signed but not ratified the FCNM, France even did not sign it. Retrieved from: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p_auth=9jury8E0 (16 October 2017).

3 Minority Rights in EU Primary Law

3.1 Minority Rights Under the Non-discrimination Rule in the Charter of Fundamental Rights

Although the CFR of the EU is silent regarding the protection of national minorities, it expressly mentions in Article 21 CFR the membership of a national minority as a criterion of prohibited discrimination.

For the determination of the criterion "membership of a national minority" it would have to refer to the definition of the term national minority, but an internationally agreed definition does not exist on the term national minorities. The definition of this term is questioned under international law (Pentassuglia, 2002: 55 ff.; *Gorzelik and others v. Poland*, 2004). According to the definition proposed by Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is "[a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the state[4] – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language" (Capotorti, 1977: para. 568; see also the definitions of Deschênes, 1985: para. 181; Eide, 1993: para. 29).

The European Parliament[5] recommended the usage of the proposed definition of the Parliamentary Assembly of the Council of Europe, which defines "a 'national minority' as groups of persons in a state who: reside on the territory of that state; maintain longstanding, firm and lasting ties with that state; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state; are motivated by a concern to preserve together

[4] The citizenship criterion was renounced by the Human Rights Committee; HRC, 1994, General Comment No. 23 (Article 27 ICCPR), para. 5.1.

[5] European Parliament Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, 2005, para. 7.

that which constitutes their common identity, including their culture, their tradition, their religion or their language".[6]

The following core elements of the term national minorities can be identified: 1. numerically inferior to the rest of the population of a State, 2. non-dominant political position and 3. ethnic,[7] religious or linguistic characteristics differing from those of the rest of the population. An emphasis must be given to the objective elements: ethnic, religious or linguistic characteristics. Additionally, to the special criterion of membership of a national minority in Article 21 CFR ethnic origin, language and religion are mentioned as further criteria of prohibited discrimination.

The general non-discrimination clause in Article 21 CFR draws upon Article 19 TFEU, Article 14 ECHR and Article 11 Convention on Human Rights and Biomedicine (1997) regarding genetic heritage. Insofar as Article 21 CFR corresponds to Article 14 ECHR, it must be applied in compliance with this conventional norm.[8] The criteria of prohibited discrimination in Article 19 TFEU do not contain the membership of a national minority, but only racial or ethnic origin. Article 14 ECHR, on the contrary, mentions the association with a national minority.

Due to the explicitly stated link to this conventional norm in the explanations to Article 21 CFR, attention should be drawn to Article 14 ECHR and the respective case law of the European Court of Human Rights (ECtHR). Article 14 ECHR does not contain a special provision for the protection of minority rights. This conventional norm only regulates the prohibition of discrimination on concrete grounds, among them the association with a national minority, also national origin, language and religion like in Article 21 CFR. It is generally recognized that for the protection of national minorities the prohibition of discrimination is not sufficient. Affirmative actions are required to put persons belonging to national minorities in a comparable situation with persons belonging to the majority of the population (Pentassuglia, 2002: 90 ff.).

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[6] Council of Europe Recommendation 1201, 1993, Article 1.
[7] The term ethnic on the universal level and national on the European level are used as synonyms.
[8] Explanations relating to the Charter of Fundamental Rights, 2007; according to Article 6 para. 1 TEU and Article 52 para. 7 CFR the provisions of the Charter shall be interpreted with due regard to these non-legally binding explanations.

However, persons belonging to a national minority within the State Parties to the ECHR can make use of the individual complaint procedure according to Article 34 ECHR before the ECtHR based on an alleged violation of a conventional human right in conjunction with Article 14 ECHR.

Unfortunately, the ECtHR generally hesitates to address Article 14 ECHR if it has found a violation of a substantial provision of the ECHR already. Therefore, the number of minority cases based on the material law of the ECHR and expressly on Article 14 ECHR – especially on the ground of belonging to a national minority – is not relatively high (Pentassuglia, 2002: 126 ff.). The ECtHR has dealt with cases on degrading treatment, private and family life, freedom of expression, freedom of association, language and religion etc. concerning persons belonging to a national minority.[9]

In comparison with Article 14 ECHR, which only has an accessory character, the Additional Protocol (AP) 12 to the ECHR (Protocol No. 12 to the ECHR, 2000) contains a general prohibition of discrimination clause. This means that the prohibition of discrimination is no longer limited to the enjoyment of only the rights provided by the ECHR and its AP. The grounds of prohibited discrimination in AP 12 are identical to those of Article 14 ECHR, containing the association with a national minority among others. Most of the Member States are still not State Parties to AP 12.[10]

3.2 Minority Rights Under the Preservation of Diversity Rule in the Charter of Fundamental Rights

Another relevant Charter provision for the protection of national minorities is Article 22 CFR – the respect of cultural, religious and linguistic diversity. According to the report of the EU Network of Independent Experts in Fundamental Rights, two international treaties of the Council of Europe "guarantee the preservation of diversity in Europe" – the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages (ECRML, 1992). The status of ratification

[9] Case law concerning minority rights can be retrieved from: http://hudoc.echr.coe.int/eng (16 October 2017); Moucheboeuf, 2006: 11 ff.; Topidi, 2010: 28 f.

[10] Status of ratification retrieved from: http://www.coe.int/de/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=42VfaEOw (16 October 2017).

of these treaties by EU Member States is interpreted by experts as a "first indication of the willingness of the Member States to respect the right enshrined in Article 22 of the Charter".[11] Presently four Member States still have not ratified the FCNM[12] and eleven the ECRML.[13] Based on these facts, and the absence of a reference to these two international treaties of the Council of Europe in the preamble of the CFR of the EU, whereby explicit reference is made to the ECHR, this interpretation is rightly disputed in literature (Witte, 2004: 115).

Although Article 22 CFR omits to mention minorities at all, the three elements – culture, religion and language – constitute objective criteria of national minorities as seen above. Article 22 CFR is based on Article 6 TEU and on Article 167 paras. 1 and 4 TFEU concerning culture. Respect for cultural and linguistic diversity is also stated in Article 3 para. 3 TEU (Explanations relating to the Charter of Fundamental Rights, 2007).

As minorities are different regarding their culture, religion or language in comparison with the majority of the population within a State, Article 22 CFR is also applicable to them, even if not exclusively designed for them. The triad of the diversity – culture, religion and language – corresponds to international protection of minority clauses, especially Article 27 International Covenant on Civil and Political Rights (ICCPR, 1966) – the only international legally binding norm on the protection of ethnic minorities on the universal level (Arzoz, 2008: 157). It is questioned if Article 22 CFR also acknowledges the preservation of the identity of a national minority. Such a wide interpretation of the provision probably would go beyond the intention of the Convent (Kaiser, 2005: 115 f.).

The Member States comprise of a considerable number of diverse cultures, religions and languages in the EU, which must be respected by the Union (*Spain v. Council*, 2015; Jarass, 2013: Article 22, paras. 2 f.; Hölscheidt, 2014: Article 22, para. 20). As stated in Article 4 para. 2 sentence 1 TEU the European integration process should be based on the respect of the national identity of the Member States, which is determined by their respective cultures. In the preamble of the CFR it is expressed that "[t]he Union contributes to the preservation and to the

[11] EU Network of Independent Experts in Fundamental Rights (CFR-CDF), 2003: 174.
[12] Ratification status FCNM. Retrieved from: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p_auth=z3mp5BE8 (16 October 2017).
[13] Ratification status ECRML. Retrieved from: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/signatures?p_auth=z3mp5BE8 (16 October 2017).

development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States […]". The national identities of the Member States with their cultural, religious and linguistic diversity have a decisive influence in the determination of the identity of the Union (Hölscheidt, 2014: Article 22, para. 15; Bogdandy von, 2003: 186). Based on the values of the EU in Article 2 TEU diversity should be understood as a precondition and not an obstacle to the integration process (Ennuschat, 2006, Article 22, para. 4). If diversity also includes the identity of national minorities, it still depends on the Member States to recognise national minorities living within their territories (FRA, 2010:18).

Article 22 CFR is established as a principle in the sense of Article 52 para. 5 CFR and not as an individual right of persons (Thiele, 2017: 1310, para. 7). According to Article 52 para. 5 CFR this principle needs to be implemented by legislative and executive acts taken by EU organs, and by acts of Member States when they implement Union law. Nonetheless, the obligation to respect diversity influences the interpretation of other fundamental norms (Kingreen, 2016: paras. 2 ff.).

3.3 Minority Rights as Precondition for EU Accession

The protection of national minorities in the EU is formally linked with the enlargement process. One of the criteria for the eastern enlargement formulated by the Copenhagen European Council required the candidate States to respect and protect minorities. It was the first time that the EU declared the protection of minorities as a priority of the Union (Topidi, 2010: 74). In the eastern enlargement process it was especially needed to direct the attention to the issue of national minorities, because of unsolved minority problems in the candidate States that appeared after the changes of their political systems. National minorities were considered to threaten the new state building processes, especially in the former multi-ethnic socialist States like the former Yugoslavia where national problems culminated into armed conflicts (Kaiser, 2005: 258).

According to the Copenhagen document for the eastern enlargement process of 1993 "[m]embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within

the Union." (European Council, 1993, point 7. A.iii. p. 13). The first criterion – called "constitutional statehood" – which belongs to the political requirements of EU accession, contains the fundamental structural principles of democracy, the rule of law and human rights (Bruha & Vogt, 1997: 485 f.). The principles of democracy and human rights found their way into the regulation in Article F TEU of Maastricht and thus already before the Copenhagen document (Treaty of Maastricht, 1992). The principle of the rule of law was introduced later in Article 6 (ex-Article F TEU) of the Amsterdam Treaty (Treaty of Amsterdam, 1997). The respect of minority rights remained the only Copenhagen criteria not incorporated in Article 6 para. 1 TEU (Topidi, 2010: 216). The insertion of minority rights into the Lisbon Reform Treaty and the linkage to human rights in Article 2 TEU of Lisbon (Treaty of Lisbon, 2007) as a value was new.

The political criteria of EU accession (Terhechte, 2017: 904, para. 20) are formulated in a general and vague manner in the Copenhagen document and thus need to be interpreted. No mention was made for which concrete measures have to be taken by the candidate States and no reference on which international norms the protection of national minorities should be based on (Kaiser, 2005: 261 f.). Whereby the EU inserted the rights of national minorities based on the commitments agreed in the framework of the Conference on Security and Co-operation in Europe (Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990). In the Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" of 1991 (1992 *ILM* (31), pp. 1486-1487) as a precondition for recognition, (Hillgruber, 1998: 501) this reference to the CSCE commitments did not find their way into the Copenhagen document of 1993 as a precondition for EU accession.

The content of the minority protection requirement was developed during the accession process by the EU decision making organs (Kaiser, 2005: 262). It was the European Commission that conducted the accession negotiations and published the progress reports (European Commission, 1997, Agenda 2000; Kaiser, 2005: 271). The satisfactory integration of minorities into society was a condition for democratic stability according to the Commission. In States like Latvia (44%), Estonia (38%), Lithuania (20%), Slovakia (18%), Bulgaria (14%) and Romania (13%) minorities accounted for a significant part of the population before they gained accession into the EU. In the progress report, not only was special reference made to the FCNM of the Council of Europe, but also to the

fact that not all the States mentioned above have signed or ratified it yet (European Commission, 1997, Agenda 2000: 41). Since the EU did not possess its own norms regarding the protection of national minorities, it relied on legally binding treaties of the Council of Europe and politically binding documents of the CSCE for analysing the situation of national minority protection in candidate States (Pentassuglia, 2002: 156).

Unfortunately, the Commission did not develop the content of the respect for and protection of minorities as an accession criterion by establishing clear and objective elements applicable to all candidate States equally. It could not be expected either considering the different approaches and regulations of the eastern candidate States and the lack of EU regulations regarding the protection of national minorities (Kaiser, 2005: 290).

The conditions for EU accession are now regulated in Article 49 TEU of Lisbon. This provision relies on Article 2 TEU – the respect of the values of the EU (Terhechte, 2017: 903, para. 18). But a clear definition of the content of the value "respect for the rights of persons belonging to minorities" is not provided.

4 Minority Rights in Constitutions of EU Member States

Provisions on the protection of national minorities can be found less in the constitutions of western (typically democracies for a longer period of time) Member States than of newer central and eastern (newer, independent countries) Member States. One explanation is that the constitutions of the new central and eastern EU Member States were adopted after the changes of their political system in the beginning of the 1990s, whereby the constitutions of western Member States – apart from Finland – were adopted a long time ago (Ferle & Šetinc, 2004: 13).

Another explanation is based on the self-understanding of unitary States like France (Pierré-Caps, 2011: 12) as an indivisible State with a homogeneous community and no differentiation between its members, who are equal citizens "without distinction of origin, race or religion", as stated in Article 1 of the Constitution (*Constitution française*, 1958). For this reason, France did not sign the

FCNM[14] and has made reservations regarding Article 27 ICCPR; according to which this unique minority protection provision on the universal level is not applicable to France.[15]

The recognition of the existence of national minorities is often understood as a danger of separation from the State in contradiction to its territorial integrity. As a matter of fact, State territories in Europe are and will be less and less ethnically homogenous, (Palermo, 2011: 35) which should thus be reflected in legal terms.

4.1. Constitutional Rules of old EU Member States

Among the constitutions of old, western Member States that mention minorities explicitly are; the Finnish, Austrian, Italian and Spanish. Besides looking at the constitutional provisions of these States, attention should also be paid to special international treaties concerning States' obligations towards minority protection where it exists.

Section 17 in the Constitution of *Finland*[16] establishes the right to one's language and culture. National languages of Finland are Finnish and Swedish (para. 1). The same rights to the Finnish-speaking and Swedish-speaking populations of the State on an equal basis are provided (para. 2). Due to this high legal status, the Swedish-speaking population could be considered as a "de facto minority" (Hofmann, 1995: 86). According to Section 17 para. 3 Constitution "[t]he Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture." Pursuant to Article 121 para. 3 Constitution the Sami have linguistic and cultural self-government in their native region, as written in a specific Act.

An autonomous status is provided to the Swedish-speaking Åland Islands in the Act on the Autonomy of Åland of 1920, which was replaced by new legislation in 1951 and 1991 (*Act on the Autonomy of Åland*, 1991). The autonomous status was already granted by a decision made by the League of Nations in 1921, and

[14] Status of ratification. Retrieved from: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p_auth=8MTiqMaL (16 October 2017).
[15] Reservation to Article 27 ICCPR. Retrieved from: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec (16 October 2017).
[16] *Constitution of Finland*, 1999 (731/1999, amendments up to 1112/2011 included).

reaffirmed in the Treaty of Accession of Finland to the EU.[17] The regulation on national minorities in Finland is considered a model for minority rights protection (Hofmann, 1995: 86). Even if it mostly concerns the Swedish-speaking minority, other minority groups also enjoy special rights.

The Federal Constitutional Law of *Austria (B-VG*, 1920, 1962) regulates in Article 8 para. 1 language rights and mentions especially "the rights provided by federal law for linguistic minorities". Article 8 para. 2 establishes that "[l]anguage and culture, existence and preservation of these [autochthonous] ethnic groups are to be respected, safeguarded and to be supported".

The protection of minorities is further regulated in section V of part III of the Treaty of Saint-Germain of 10 September 1919 (*Staatsvertrag von Saint-Germain-en-Laye*, 1920), which, pursuant to Article 149 para. 1 Federal Constitutional Law of Austria, is part of Austrian constitutional law. Section V guarantees an individual minority protection (Hofmann, 1995: 116). Article 67 Treaty of Saint-Germain states that "Austrian nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Austrian nationals." This Article furthermore provides the right to use the minority language and to exercise the minority religion.

Another minority protection right was inserted into an international treaty – the State Treaty for the Re-Establishment of an Independent and Democratic Austria of Vienna of 15 May 1955.[18] Article 7 State Treaty contains the obligation to introduce a special minority protection system for Slovene and Croat minorities in Carinthia, Burgenland and Styria. These minorities are entitled to the same rights on equal terms as all other Austrian nationals (para. 1). This international obligation was implemented by the Law on Ethnic Minorities (*Volksgruppengesetz*) as a federal law of 7 July 1976,[19] which regulates the legal status of ethnic groups in Austria (Hofmann, 1995: 117). The fundamental rights of ethnic minorities were enshrined in the Austrian Federal Constitution in 2000.

[17] *Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Contents. Protocol No 2 on the Åland islands*, 1994; Murray, 2012, pp. 136 f.
[18] *Treaty for the Re-Establishment of an Independent and Democratic Austria of Vienna*, 1955.
[19] *Bundesgesetz über die Rechtsstellung der Volksgruppen in Österreich*, 1976, 1999.

Austria not only recognizes the existence of national minorities within its territory, but also provides a special minority protection system.

The Constitution of *Italy* protects in Article 6 linguistic minorities "by means of appropriate measures".[20] According to Law 482/99, which implements this constitutional provision, language and culture of twelve linguistic minorities are protected.[21] Pursuant to Article 116 Constitution selected regions of minorities are granted "special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law".

A special status was granted to the German-speaking minority in South Tyrol by the Gruber-De Gasperi Agreement of 1946[22] – a bilateral treaty between Italy and Austria. These international norms safeguard the German speaking population of South Tyrol to preserve their cultural identity and customs through an autonomy status. German language was recognized in the local area as an official language in equivalence with Italian language. After a dispute with Austria[23] a new agreement was settled in 1969 ("Package"), consisting of different measures regarding the establishment of an effective autonomy with a considerable level of self-government in South Tyrol.[24]

On the one side, the Constitution of *Spain*[25] differs in Article 2 from the indissoluble unity of the Spanish Nation, while on the other side "it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all". To the classic nationalities belong the Basques, Galacians and Catalans (Hofmann, 1995: 152). Although Article 3 para. 1 Constitution determines Castilian as the official Spanish language of the State, "other Spanish languages shall also be official in the respective Self-governing Communities in accordance with their Statutes"

[20] *Constitution of the Italian Republic*, 1947.
[21] Article 2 Legge, 1999, n. 482 "Regulations on the matter of historical language minorities": Albanian, Catalan, Germanic, Greek, Slovenian, Croatian, French, Franco-Provencal, Friulian, Ladin, Occitan, and Sardinian minorities; Ioriatti, 2012: 3; Jeught van der, 2016: 63.
[22] *Annex IV to the Treaty of Peace with Italy*, 1950, p. 184.
[23] The UN General Assembly reaffirmed that Italy was committed by the Paris Treaty to establish an autonomy with the aim to protect the ethnic South Tyrolean population. Austria was granted the right to a say in the matter. – The status of the German-speaking element in the Province of Bolzano (Bozen), 1960.
[24] After the implementation of the international obligations of Italy the dispute with Austria was declared closed in 1992 (Hofmann, 1995: 100.
[25] *Constitution of Spain*, 1978 with amendments of 1992.

(para. 2). The different linguistic modalities of Spain are part of "a cultural heritage which shall be specially respected and protected" (para. 3). The provisions in Article 143 ff. Constitution regulate the modalities of the establishment of the self-governing Communities (*Comunidades Autónomas*) and their competences. Thereby, the Communities are provided a relatively-high level of competences regarding the protection and promotion of the identity of non-Castilian linguistic minorities in the regions (Hofmann, 1995: 156; Arzoz, 2009: 175 ff).

4.2 Constitutional Rules of New EU Member States

With the breakdown of former socialist multi-ethnic States, new national minorities emerged in Central and Eastern Europe. The constitutions of all new Central and Eastern EU Member States,[26] which joined the EU in 2004 and after, answered to this factual situation and introduced provisions on national minority protection.

The three *Baltic States* – Estonia, Latvia, Lithuania – inherited a relatively large number of Russian-speaking population, especially Estonia and Latvia. The main constitutional provision for the protection of national minorities in Estonia is § 50 Constitution (1992), according to which national minorities have the right to establish self-governing agencies as provided in the National Minorities Cultural Autonomy Act of 1993.[27] Article 49 Constitution states that "[e]veryone has the right to preserve his or her ethnic identity", which is especially applicable to persons belonging to national minorities. The provisions in § 37 para. 4 and § 51 para. 2 Constitution safeguard language rights of national minorities in educational and governmental or local institutions (Thiele, 1999: 107).

The central constitutional regulation for national minorities in Latvia is Article 114, pursuant to which "[p]ersons belonging to ethnic minorities have the right to preserve and develop their language and their ethnic and cultural identity".[28]

[26] Malta and Cyprus, which joined the EU also in 2004, are not included in this survey.
[27] As the first State Estonia had granted in the past cultural autonomy to its national minorities in the Law on Cultural Autonomy of 1925 (Thiele, 1999: 82 f.)
[28] This provision was inserted on *15.10.1998;* Likumu un waldibas rihkojumu krahjums, 1922.

This provision was implemented by the Law "*On the Unrestricted Development and Right to Cultural Autonomy of Latvia's National and Ethnic Groups*" of 1991.[29]

The Constitution of Lithuania does not mention national minorities, but rather "ethnic communities of citizens" in Article 37 and 45 (*Constitution of the Republic of Lithuania*; Kallonen, 2004: 3). They have the "the right to foster their language, culture, and customs" and are entitled "to manage the affairs of their ethnic culture, education, charity, and mutual assistance" independently.

The constitutions of the so-called *Visegrad States* – Poland, the Czech Republic, Slovakia and Hungary – also contain regulations for the protection of the national minorities living on their territories. The main minorities are: in Poland German's, in the Czech Republic the Polish and Roma, in Slovakia the Hungarian and in Hungary the Roma, German and Slovak.

Pursuant to Article 35 Constitution of Poland (1997) "Polish citizens belonging to national or ethnic minorities" are entitled to "the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture" (Kliemkievicz & Mirga, 2001: 365 f.). Furthermore, they have "the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity". A special provision on language rights is provided in Article 27 Constitution, according to which language rights of national minorities can arise from ratified international treaties.

The Constitution of the Czech Republic (1993) mentions minorities in Article 6 in conjunction with the decision-making process, whereby the interests of minorities should be taken into consideration by the majority. Special minority protection provisions are established in Article 24 and 25 Charter of Fundamental Rights and Freedoms as a component part of constitutional order of the Czech Republic.[30] Article 24 Charter demands that the national or ethnic identity of a person should not be used to his or her detriment. Pursuant to Article 25 para. 1 Charter, citizens belonging to a national or ethnic minority are granted "the right to develop with other Members of the minority their own

[29] For minority situation: see Elsuwege van, 2004: 1-58.
[30] Resolution of the presidium of Czech National Council No. 2/1993 Coll. to republication of Charter of fundamental rights and freedoms as component part of constitutional order of the Czech Republic, amended by constitutional act, 1998.

culture, the right to disseminate and receive information in their language, and the right to associate in ethnic associations". According to para. 2 they have "the right to education in their language, the right to use their language in official contact, the right to participate in the settlement of matters concerning the national and ethnic minorities". The concrete implementation of these rights is regulated in the Act on the Rights of Members of National Minorities (2001) (Hofmann, 2001: 643 ff.).

The Constitution of Slovakia (2011) establishes the rights of "*national minorities and ethnic groups" in Article 33 and 34. Pursuant to Article 33 Constitution the m*embership of a national minority or ethnic group should not be to anyone's detriment. Special minority rights are granted in Article 34 Constitution as the right to develop culture, the right to disseminate and receive information in the mother tongue, the right to associate in national minority associations, and the right to set up and maintain educational and cultural institutions. Citizens belonging to n*ational minorities and ethnic groups further have the* right to education in their own language, the right to use their language with authorities, and the right to participate in the solution of their affairs.

The new Constitution of Hungary (*Fundamental Law of Hungary*, 2011), in comparison with the former Constitution (Article 68)[31] does not mention minorities, but rather nationalities. Article XXIX of the new Constitution provides citizens belonging to a nationality the right to freely express and preserve their identity. Nationalities have "the right to use their mother tongue, to use names in their own languages individually and collectively, to nurture their own cultures, and to receive education in their mother tongues" (para. 1). Moreover, they are granted the right to establish their self-government at local and national level" (para. 2). The detailed rules are laid down in a cardinal Act (para. 3). Thus, nationalities living in Hungary enjoy comprehensive protection (Walsh, 2000: 15 ff.).

The *Balkan States* – Slovenia, Croatia, Bulgaria and Romania – have numerous national minorities living on their territory: in Slovenia the Hungarian, Italian and Roma, in Croatia the Serb, in Bulgaria the Turk and Roma, in Romania the Hungarian and Roma among others.

[31] *Constitution of the Republic of Hungary*, 1989, Act XX of 1949.

The Constitution of Slovenia[32] recognizes the three abovementioned autochthonous national minorities, which enjoy a privileged status in comparison with non-autochthonous ethnic groups. Whereby Article 5 and 64 Constitution provide the Italian and Hungarian minorities the status of autochthonous national communities with broad minority rights regarding the preservation of their national identity, including language and education up to the establishment of self-governing communities, the status of the Roman community is only regulated by law as ruled in Article 65 Constitution (Hofmann, 1995, p. 148 f.).

The most important provision for the protection of national minorities in Croatia is Article 15 Constitution,[33] by which equal rights for the members of all national minorities are granted (para. 1). Article 15 para. 4 Constitution guarantees "[t]he freedom of the members of all national minorities to express their nationality, to use their language and script, and to exercise cultural autonomy" (Petričušić, 2002: 609).

The Constitution of Bulgaria[34] contains disperse provisions which are relevant for national minorities. The general prohibition of discrimination principle in Article 6 para. 2 Constitution also includes the ethnic self-identity as a prohibited criterion. Article 29 para. 1 Constitution explicitly prohibits forcible assimilation. Article 54 para. 1 Constitution regulates the right to develop one's own culture in accordance with one's ethnic self-identification. Pursuant to Article 36 para. 2 Constitution citizens whose mother tongue is not Bulgarian have the right to use their own language (Hofmann, 1995: 71).

The Constitution of Romania[35] "recognizes and guarantees the right of persons belonging to national minorities to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity" in Article 6 para. 1. According to Article 32 para. 3 Constitution persons belonging to national minorities are entitled to the right to learn their mother tongue, and the right to be educated in this language (Hofmann, 1995: 123). Special election rights for political participation in the parliament are granted in Article 62 para. 2 Constitution. The right to use the minority language in local public

[32] *Constitution of the Republic of Slovenia*, 1991, with amendments of 1997, 2000, 2003, 2006.
[33] *Constitution of Croatia*, 1990 with amendments of 1997, 1998, 2000, 2001, 2010.
[34] *Constitution of Bulgaria*, 1991 with amendments 2003, 2005, 2006, 2006 - Constitutional Court Judgment, 2006, 2007.
[35] *Constitution of Romania*, 1991 with amendments 2003 on the revision of the Constitution of Romania, 2003.

administration under certain conditions is regulated in Article 120 para. 2, the right to use the minority language before courts in Article 128 para. 2 Constitution.

The abovementioned EU Member States have different models for the protection of national minorities established in their constitutions: from rights to preserve their identity, to the use of minority language in different fields, political participation towards an autonomous status – one of the most effective forms for the protection of national minorities. A model for the constitutional law standardized for all States is difficult to create and recommend because of the existence of very peculiar situations within the States.

As a considerable number of EU Member States, among them Germany[36] and France, do not have minority protection clauses in their constitutions, it would be difficult to affirm a general existence of common constitutional traditions in the Member States regarding the respect for rights of persons belonging to minorities.

5 Conclusion

The provision on values of the EU in Article 2 TEU has legal effect. Thus, the specific value – rights of persons belonging to minorities – is legally binding. While the character of this value is determined, its content is not. No regulation on concrete minority rights can be found in EU law. The content of this value is left to interpretation, especially from the ECJ. An orientation can be taken from international treaties, above all treaties of the Council of Europe like the FCNM.

The ECHR has delivered on offering outstanding protection in human or fundamental rights, as written in Article 6 TEU. The fundamental rights as guaranteed by the ECHR constitute not only general principles of the EU law (para. 3), but also the far-reaching provision in para. 2 provides the accession of the EU to the ECHR. However, the ECHR does not contain a minority protection clause either.

[36] Only the constitutions of Schleswig-Holstein for the Danish minority, Saxony and Brandenburg for the Sorbs contain special minority protection provisions (Hofmann, 1995: 76).

The fact, that the CFR only mentions the membership of a national minority as a prohibiting discrimination ground in a negative way, but does not regulate a special protection of minority rights in a positive way, reveals the lack of a general common willingness supported by all Member States without exception.

The EU as a supranational organization is not assigned the competence to regulate minority protection. It remains a national competence of Member States. Not all Member States contain provisions on minority protection in their constitutional law, especially the old, western States. Therefore, a general existence of common constitutional traditions in the EU Member States regarding rights of persons belonging to minorities can be questioned. Nevertheless, it is needed to consent on the content of the European value regarding the rights of persons belonging to minorities in Article 2 TEU within the EU.

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International Human Rights Law and the Protection of the Elderly in Europe

Sara Tonolo

Abstract The protection of the elderly is a fundamental topic within the international human rights law, strictly connected to the perceived centrality of a person with disabilities as subject of rights. Some problems may arise as much from the absence of a uniform definition of elderly people and of person with disabilities, as from the different national rules on this matter. In fact the rights of elderly people have not yet received the international legal attention they deserve. Many treaties refer to rights that are of particular interest to the elderly, but there is no comprehensive international instrument that adequately addresses the specific protections required for the elderly. Actually, standards that protect older people's rights are scattered throughout various international and regional conventions. There is no doubt that the elderly are protected by human rights treaties, as is any member of society, however, in order to realistically guarantee equal enjoyment of those rights to older persons, states must do more than refrain from violating human rights of every member of society.

Keywords: • Human Rights • Elderly Persons • CRPD • Ageing Society • International Law •

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1 Preliminary Remarks

The Society of the 21st Century is generally defined as an Ageing Society. Recent Studies highlight that future demography will comprise an extraordinary super-aged society and that this demographic trend is, more or less, shared by many states both in developed and developing countries. By 2025, more than 1.2 billion people will be aged sixty or above, and more than seventy percent of them will be residing in what are currently considered developing countries (Economic, Social and Cultural Rights of Older Persons: General Comment 6, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 13th Sess., para.1, UN Doc. E/C.12/1995/16/Rev.1 (1995) [hereinafter General Comment 6]). Actually, Asia and Europe are ageing the most rapidly, as outlined by the WHO report (World Report in Ageing and Health 2015). Such an extraordinary trend will significantly alter society in the sense that a great percentage of the total population will not have adequate mental capacity that is usually required to carry out day-to-day activities.

Older persons historically have been neglected by human rights law, but recently significant demographic changes have renewed the general interest in older persons' human rights. International law addresses this particular challenge to some extent. The purpose of the law, when it comes to the elderly, is to help protect them from abuses, particularly those of an economic, physical or mental nature. More generally, the protection of persons with disabilities is a fundamental issue in the area of international human rights law, as the necessity of considering the needs and concerns of persons with disability is a generally accepted principle (Tonolo, 2013: 273).

2 Human Rights Law and Rights of Older Persons

Human rights law has not sufficiently taken into account the special and unique needs of the elderly. There are many international instruments that recognize specific rights of all persons and are clearly applicable to elderly people as citizens of signatory states, as well as regional human rights conventions.

None of the equality clauses of the 1948 Universal Declaration of Human Rights – UDHR (GA Res. 217 A (III), 10.12.1948), of the 1966 International Covenant of Civil and Political Rights- ICCPR (999 UNTS 171), and of the 1966

International Covenant on Economic, Social and Cultural Rights – ICESCR (993 UNTS 3), mention older persons as well as persons with disability as protected categories. For international human rights law, the principle of non – discrimination and equality is a value in itself that can be derived directly from human dignity (McCrudden, 2004: 581).

Of particular significance to old age is Article 25(1) of the UDHR that states that everyone has the right to security and a 'standard of living adequate for the health and well-being of himself and his family'.

The two Conventions, the ICESCR and the ICCPR, offer generic protection of cultural, economic, social, civil and political rights. For older persons, important specific rights in the ICESCR are the work-related rights (Articles 6–7) and the rights to social security (Article 9), to an adequate standard of living (Article 11), to education (Article 13) and to the highest attainable standard of physical and mental health (Article 12).

The ICESCR itself does not contain any direct references to older persons. In 1995, the Committee on Economic, Social and Cultural Rights (CESCR) released General Comment No. 6 on 'the economic, social and cultural rights of older persons'. The comment provides a legal interpretation of how the ICESCR ought to apply to older persons. It explains that the omission of 'age' specifically as an illegal ground of discrimination was not intentional, but occurred because when the ICESCR and ICCPR were adopted, 'the problem of demographic ageing was not as evident or as pressing as it is now'.

In the ICCPR, 'participation rights' of special concern for older persons are the commitment of states to ensure freedom of expression, assembly and association (Articles 18–19, 21). Article 25 recognises the right of all to participate in the affairs of their own country. Article 26 states 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. The article includes race, colour, sex, language, religion, origin 'or other status' as prohibited grounds of discrimination. 'Age' is not mentioned explicitly, yet might be said to be included implicitly in the 'and other status' language.

Several UN treaties have been created in order to deal specifically with the rights of disadvantaged groups. Although none of these focus specifically on older persons, a few mention 'age'. The Convention on the Elimination of All Forms

of Discrimination Against Women (CEDAW), for example, mentions 'age' in Article 11, in the context of the equal rights of women and men to social security and paid leave. Similarly, the Convention on the Protection of the Rights of Migrant Workers and the Members of their Families (ICMW) includes 'age' in the list of prohibited grounds of discrimination in Article 7. However, it is generally recognized that the elderly population remains a vulnerable group with no legal instrument tailored to its particular needs (Pinzón & Martin, 2003: 918; von Bernstorff, 2007: 1041).

3 The UN Convention on the Rights of Persons with Disabilities

The most useful protection for older persons may be found in the Convention on the Rights of Persons with Disabilities-CRPD, adopted in 2007 and now ratified by about 160 UN members (Convention 30. 3.2007 n. 61/106, GA Res. 61/611, 13.12.2006, A/61/611; 15 IHRR 255.[1]

The CRPD represents the most organic system of rules and guarantees for the protection of vulnerable people, inspiring also other provisions, such as for example those referred to in the Nice Charter (Article 25-recalled by the Lisbon Treaty, OJEU, C 303/17 - 14.12.2007), according to which: "*The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.*"

The General Assembly Mandate, under which the Convention on Rights of persons with disabilities was developed, stipulated that the negotiating Committee was to put into practice the existing human rights in the particular circumstances of persons with disability. In spite of this, the Convention is a core constituent of international human rights law, rather than a subsidiary of existing law. Articles 3 to 9 contain overarching principles to be applied in the implementation of the convention. Article 4 sets out the general obligation to incorporate the terms of the convention into national laws, policies and programs, and to repeal national laws that are inconsistent with the convention.

[1] See Disabilities – Handbook on the Convention on the Rights of Persons with Disabilities and its Optional Protocol (Geneva: OHCHR, 2007: available at: http://www.ohchr.org/english/aboutt/publications/docs/ExclusionEqualityDisabilities.pdf).

It is remarkable the procedural aspect of the Convention, concerning the procedures offered to protect the rights established, reffered to the Committee on the Rights of Persons with Disabilities, competent to carry out consultative activities - to control the respect of the Convention by the States, but also to examine appeals proposed by individuals and associations. Under the Optional Protocol (art. 1), the treaty body is also empowered to receive complaints about violations of rights from individuals and groups of individuals where they have exhausted domestic remedies. The Optional Protocol also establishes an inquiry procedure in relation to gross violations of fundamental rights (*International Legal Materials* 2007, 441).

The purpose (Article 1) of the CRPD states that "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." Article 12, "equal recognition before the law," mentions that "parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity." The latter article implies a possible paradigm shift from substitute decision-making to supported decision-making in order to understand the principals' will and preferences, and to implement their wishes.

Even if older persons may be considered as persons to be protected according to the CRPD rules, and even if they are generally protected under international human rights law, the general protection highlights a wide range of normative gaps, where aspects of the lives of older people are not addressed adequately by existing human rights law, for example: international standards on rights within community-based and long-term care settings for both the caregiver and the person receiving care; legal planning for older age; and, the abolition of mandatory retirement ages.

3.1 Definitions of Older Persons and Problems of Characterization

The definition of «persons with disabilities» was one of the most controversial topics dealt with by the CRPD. Among State delegations, the principal reason for this was concern about the impact of such definitions on different national systems. Article 1 describes persons with disabilities as "…*those who have long – term physical, mental, intellectual or sensory impairments*…". This notion seems open–

ended and propositional, also because it is stated in the rule devoted to the application of the Convention (art. 1) and not in the Article 2, which is specifically aimed at the definition of five key terms used throughout the Convention. Accordingly, it seems possible to extend the application of the Convention to persons with short–term impairments, arising for example from traumatic injuries and disease, and to persons with episodic conditions (e.g. mood disorders, asthma).

On this matter, it should also be noted that Article 1, par.1, asserts that the purpose of the Convention is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities".

The boundaries of the category of persons to benefit from the Convention are also uncertain and variable because they are to be determined domestically.

However the perceived centrality of persons with disabilities as «subjects of rights, able to claim those rights as active members of society» (statement by Arbour, UN High Commissioner for Human Rights on the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities, 5 December 2006, available at http://www.ohchr.org/English/issues/disability/docs/statementhcdec06.doc) must be stressed as a fundamental element to include elderly persons within the field of action of the CRPD. Although certainly not all older persons have disabilities, and while the Convention does not single out elderly people for special protection, nevertheless many of its articles can be utilised by older persons seeking human rights protection.

Moreover, in interpreting the definition of persons to protect, we may also be able to find relevant constructive clues in other sources, such as for example in the 2000 Hague Convention on the International Protection of Adults, internationally in force since 1 January 2009 (The Convention was drawn up under the auspices of the Hague Conference on Private International Law, to replace the 1905 Hague Convention. The text is published in *International Legal Materials*, vol. 39, 2000; 7; see Siehr, 2000: 715; Clive, 2000: 1; Fagan, 2002: 329). The purpose of this Convention is in fact to organize "the protection in international situations of adults who, by reason of an impairment or

insufficiency of their personal faculties, are not in a position to protect their interests" (Art. 1, par. 1: Kayess & French, 2008: 1; Lagarde, 2000: 159).

3.2 Rules of the CRPD Concerning Older Persons

The principles of the CRPD are particularly relevant to older persons: respect for dignity; non-discrimination; full participation and inclusion in society; equality of opportunity; and accessibility (Article 3). Article 8 obliges states to combat stereotypes and prejudices relating to persons with disabilities, including those based on sex and age. Article 12 affirms the right of disabled persons to equal recognition before the law. It requires that states shall recognize that persons with disabilities are to enjoy legal capacity on an equal basis with others in all aspects of life, and that this includes taking appropriate measures to provide access by persons with disabilities to the suppot they may require in exercising their legal capacity Art. 12, para. 1-3).

'Older persons' are referred to in Article 25(b) of the CRPD, which concerns itselfwith the right to health services, and in Article 28(2)(b), which deals with the right to access to social protection and poverty reduction programs. Article 13(1), which governs access to justice, refers to 'age-appropriate accommodations'. Article 16(2) mentions the right to 'age-sensitive assistance' by states to ensure freedom from exploitation, violence and abuse. Other articles in the CRPD that could potentially benefit older persons are Article 9 on accessibility, Article 19 on independent living, Article 20 on personal mobility and Article 26 on habitation.

Even if interpretative clues to protect older persons may be deemed right by the CRPD rules, there are still some normative gaps to solve: international standards on rights within community-based and long-term care settings for both the caregiver and the person receiving care; legal planning for older age; the abolition of mandatory retirement ages; and, legal capacity and equality before the law for older women and men.

4 Soft Law

The implementation of the aforementioned rules concerning human rights of older persons is uncertain and often conditioned by soft law rules. In 1982, the World Assembly on Ageing adopted the Vienna International Plan of Action on Ageing (VIPAA). This was the first UN Human rights instrument on ageing. Its recommendations included avoiding the segregation of the elderly, making available home-based care for elderly persons, rejecting stereotypical concepts in government policies and recognising the value of old age. Twenty years later, the Madrid International Plan of Action on Ageing (MIPAA) was adopted as an updated and greatly expanded version at the Second World Assembly on Ageing. The Political Declaration reaffirmed the commitment to the elimination of age discrimination, to enhance the recognition of dignity in older persons, their inclusion in society, and the promotion of their human rights in general.

In 1991, the UN General Assembly adopted resolution 46/91, the United Nations Principles for Older Persons. It lists principles in five areas which governments are encouraged to include in national policies: independence, participation, care, self-fulfilment and dignity. a Proclamation on Ageing was adopted.

A Proclamation on Ageing was adopted in 1992, a decade after the first World Assembly on Ageing.

The UN Secretary-General's report (2011) on the follow-up to the Second World Assembly on Ageing concludes that some good measures have been introduced since 2002 with regard to older persons' rights. However, these policies are inconsistent among nation-states and do not indicate the presence of a comprehensive legal, policy and institutional framework for the protection of the human rights of older persons. Particularly lacking are mechanisms of participation and accountability. In varying degrees, contributions (Lawson, 2007: 563; Seatzu, 2008: 542) underline deficits in implementation of policies, when available, while others note measures may be effective but insufficient when confronted with large and growing demands. In situations where more structural measures are required, some governments have chosen a welfare approach which may not ensure sustainability or long-term impact on the

enjoyment of human rights without discrimination (UN Secretary-General, 2011).

In sum, the international soft law protection of the human rights of older persons is wide-ranging and while providing useful guidelines for state action in setting standards and influencing domestic policies, however, none of the documents contains legally binding obligations.

As result, implementation can be weak, and states often fail to incorporate these international standards into their domestic policies (see http://social.un.org/ageing-working-group/documents/Table%20HR%20&%20MIPAA%20-%20April%202011.pdf).

5 Regional Systems

Some standards that protect older people's rights are scattered throughout regional conventions. Generally speaking, in the European and Inter-American systems, the provisions on elderly rights are embodied in economic, social, and cultural rights treaties, while the African System protects those rights alongside civil and political rights in a unique instrument. The Council of Europe (COE) Committee of Ministers, in 2014, adopted a non-binding Recommendation on the promotion of the human rights of older persons. While the COE Commissioner for Human Rights does not have a particular focus on older person's rights, the European Court of Human Rights has addressed this topic in a variety of cases (see infra § 6). The European Union has adopted the aforementioned Charter of Fundamental Rights. This Charter, which applies exclusively to the states that are members of the European Union, includes an ambitious and innovative list of human rights covering the range of civil, political, economic, and social rights. In relation to the protection of the elderly, Article 25 states: "The [European] Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life." The Explanatory Report indicates that this right must be interpreted in the light of Article 23 of the Revised European Social Charter and two provisions of the Community Charter of the Fundamental Social Rights of Workers see §6 (CHARTE 4473/00 CONVENT 50 (explaining that Article 25 draws on the revised European Social Charter Article 23), available at http://www.europarl.eu.int/charter (last visited Feb. 24, 2003).

In the African human rights system, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa was adopted in January 2016, but it has not yet come into force. Also within the African regional system, under the African Commission on Human and Peoples' Rights, the Working Group on Rights of Older Persons and People with Disabilities works to protect the rights of elderly people.

The Inter-American human rights system adopted the first binding convention on the rights of older persons, the Inter-American Convention on Protecting the Human Rights of Older Persons on December 12, 2016. [(adopted 15 June 2015, into force since January 2017), A-70.] The purpose of the Convention is to recognize, promote, and protect the rights of older persons, generally defined as people aged 60 or older, except when legislation determines an age that is lesser or higher so long as it is not over 65 years (Art. 2), and establishes that as people age they should continue to enjoy and exercise all human rights and fundamental freedoms on an equal basis with other segments of society. To this end, the Convention draws on existing principles established in nonbinding, or soft law, instruments to enumerate 26 protected rights and also establishes a follow-up mechanism to monitor the implementation of the commitments under the Convention, which includes a reporting procedure and the ability of individuals to submit petitions alleging violations of the Convention to the Inter-American Commission on Human Rights.

The Convention lists general principles related to the rights and fundamental freedoms of older persons, with a focus on equality and non-discrimination stated at Art. 3. Further, the Convention emphasizes the dignity, independence, and autonomy of older persons as well as their physical, economic, and social security. It also calls for the respect and appreciation of cultural diversity, effective judicial protection, proper treatment and preferential care. The Convention lists several general duties of States parties, that have a duty to adopt measures to prevent, punish, and eradicate practices contrary to the Convention and to adopt affirmative measures and make the necessary changes in domestic legislation so that older persons can exercise the rights established in the Convention.

More specifically, Articles 5 through 31 of the Convention list the various protected rights of older persons: the right of older persons to safety and a life

free of violence of any kind; right to receive long-term care; right to work; right to health, including physical, mental, and social health; right to education; right to housing, emphasizing policies that progressively adapt housing solutions so that they are architecturally suitable for older persons, policies that ensure expedited procedures for complaints regarding evictions, and measures to protect older persons from illegal forced evictions; and, the right to accessibility and personal mobility. The rights of older persons receiving long-term care are detailed in Article 12 of the Convention. Article 12 encompasses the right to a comprehensive system of care that promotes the health of older persons, provides social services that cover food and nutrition security, promotes the ability of older persons to live in their own home and maintain their autonomy, and provides services for families and caregivers. To ensure this right is fulfilled, the Convention calls on States parties to establish mechanisms that ensure long-term care services are subject to the free and express will of older persons and that such services have specialized personnel. Additionally, it requires States parties to establish a regulatory framework that ensures access to information for older persons; prevents arbitrary or illegal intrusions in any sphere in which older persons are involved; protects older persons' personal security, freedom of movement, and their integrity in all aspects of their lives - particularly in acts of personal hygiene.

Article 18 of the Convention elaborates on older persons' right to work. The right to work encompasses anti-discriminatory policies and procedures that promote more inclusive labor markets guaranteeing the same rights, benefits, and protections to all workers for similar tasks and responsibilities, regardless of age. In particular, Article 18 includes measures that would facilitate the gradual transition into retirement and expand on labor policies that account for the needs and characteristics of older persons.

The Convention foresees two processes for monitoring and assessing States parties' compliance with its provisions. Article 35 establishes a Committee of Experts composed of individual experts, appointed by States parties, who will be tasked with monitoring and reviewing States' implementation of the Convention through a periodic reporting process. States parties would be required to submit an initial report on their compliance with the Convention within one year of the Committee's first meeting and submit follow-up reports every four years after that. The Committee of Experts will be based at the OAS Headquarters in Washington, D.C. Additionally, Article 36 authorizes individuals, groups of

individuals, and non-governmental organizations to submit complaints of allegations of the Convention by a State party to the Inter-American Commission on Human Rights. States parties may also submit a specific declaration recognizing the competence of the Inter-American Commission to hear inter-State complaints under the Convention. The Convention also expressly authorizes States parties to accept the Inter-American Court of Human Rights' jurisdiction to hear complaints against it involving the Convention.

6 The Protection of Older Persons in the European Human Rights System

The European Human Rights System refers in particular to the treaties adopted within the Council of Europe, which mainly consist of the European Convention on Human Rights (European Convention on Human Rights European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. No. 005.) and the Revised European Social Charter. The 1988 Additional Protocol to the European Social Charter articulates protection for the rights of elderly persons in Article 4 (Additional Protocol to the European Social Charter, opened for signature May 5, 1988, art. 4, E.T.S. No. 128 (entered into force Apr. 9, 1992) (addressing the rights of the elderly to social protection), available at http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm).

Despite the fact that rights of older persons do not appear as such in the ECHR, elderly people do find their way to the ECtHR. This is possible as the right to a fair trial and the right to non-discrimination are fundamental guarantees that can be used creatively to protect elder persons from certain practices such as forced retirement and slow judicial proceedings regarding health or social benefits. Similarly, provisions prohibiting cruel and degrading treatment have special meaning and provide specific protections for the elderly in circumstances such as serving labor prison sentences, serving jail time for a crime, and receiving inhumane treatment in health facilities. Moreover, through the right to property, the elderly may protect their rights to pensions and social security benefits.

In several cases, the ECtHR applied certain civil and political rights recognized in the European Convention on Human Rights to the elderly. In the *Deumeland* case (*Deumeland v. Germany*, 100 Eur. Ct. H.R. (ser. B) (1986), available at

http://www.echr.coe.int), Johanna Deumeland applied for a widow's supplementary pension, arguing that an industrial accident had caused her husband's death. After her death during the proceedings before the ECtHR, her son continued the proceedings and brought the petition to the European Human Rights System upon exhausting domestic remedies. The applicant claimed that the German courts had not given the case a fair hearing within a reasonable time, which violated Article 6 paragraph 1 of the European Convention on Human Rights. The Court assessed the reasonableness of the length of the Deumeland proceedings with regard to criteria established by the Court's case law, namely: the degree of complexity of the case, the behavior of the applicant, and the conduct of the competent courts.

In several cases, the ECtHR affirmed that there is no prohibition in the Convention against the detention in prison of persons who attain an advance age. Nevertheless, a failure to provide the necessary medical care to prisoners may constitute inhuman treatment and there is an obligation on States to adopt measures to safeguard the well-being of persons deprived of their liberty. Whether the severity of the ill-treatment or neglect reaches the threshold prohibited by Article 3 (prohibition of inhuman or degrading punishment or treatment) of the Convention will depend on the particular circumstances of the case, including the age and state of health of the person concerned as well as the duration and nature of the treatment and its physical or mental effects (see *Sawonjuk v. UK*, 29 May 2001; *Priebke v. Italy*, 5 April 2001; *Enea v. Italy*, 17 September 2009). In the case *Contrada v. Italy* (11 February 2014), the Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. It observed in particular that it was beyond doubt that the applicant had suffered from a number of serious and complex medical disorders, and that all the medical reports and certificates that had been submitted to the competent authorities during the proceedings had consistently and unequivocally found that his state of health was incompatible with the prison regime to which he was subjected. The Court further noted that the applicant's request to be placed under house arrest had not been granted until 2008, that is to say, until nine months after his first request. In the light of the medical certificates that had been available to the authorities, the time that had elapsed before he was placed under house arrest and the reasons given for the decisions refusing his requests, the Court found that the applicant's continued detention had been incompatible with the prohibition of inhuman or degrading treatment under Article 3 of the Convention.

About the right to a fair trial, the ECtHR held in several cases that there had been a violation of Article 6 § 1 (right to fair trial) of the Convention in respect to the length of proceedings, having regard more particularly to the fact that in view of the applicants' old age the national courts should have displayed particular diligence in handling these cases (see *Jablonskà v. Poland*, 9 March 2004; *Schlumpf v. Switzerland*, 8 January 2009; *Georgel and Georgeta Stoicescu v. Romania*, 26 July 2011).

5 Conclusive Remarks

Even if the human rights law is recently focusing on older persons, there are many international treaties and conventions offering generic human rights protection that implicitly include the protection of this weak category. In addition to binding law, there are soft law provisions - the MIPAA and General Comment No.6 on the ICESCR being the most prominent - that guide the application of law and add to the overall protection of older people. However, many NGOs, as well as some UN member states, argue that these instruments fail to provide explicit support and are easily subject to ageist interpretation (see, for example, HelpAge International, 2009). These organisations argue for the need for a new international human rights instrument explicitly for the protection on older persons - a Convention on the Rights of Older Persons.

With Resolution 65/182 in December 2010, the UN General Assembly established an Open-Ended Working Group on Ageing for the purpose of strengthening the protection of the human rights for older persons. The task of the group was to evaluate the current international human rights framework for older persons, to identify gaps and how best to address them, and to consider the possibility of additional instruments and measures (UNOEWG 2011). The Human Rights Council appointed the first Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, in May 2014. The goal of the mandate is to address the specific challenges and vulnerabilities of older persons and to strengthen the protection of their human rights at a time when about 700 million people around the world are over the age of 60. In her latest report to the Human Rights Council, Kornfeld-Matte emphasized the issues of accessibility, education, the right to work, and violence and abuse, among others, that particularly affect older persons.

Despite several doubts on the proceeding concerning the adoption of a new convention, it is possible to agree about the fact that the persistence of ageism and age discrimination bears witness to the failure of governments around the world to incorporate older persons' rights in their policies, highlighting the need for a new instrument. Actually, standards that protect older people's rights are scattered throughout various international and regional conventions.

There is no doubt that the elderly are protected by human rights treaties, as is any member of society. However, in order to realistically guarantee equal enjoyment of those rights to older persons, states must do more than refrain from violating human rights. The principles of non-discrimination and equality before the law require that states adopt special measures to protect disadvantaged and vulnerable groups, considering the international standards of protection (Revillard, 2005: 725). Moreover, the "vulnerable group" approach is central to enhancing the protection of those rights because it is applicable in the context of both civil and political, as well as economic, social, and cultural rights (Bucher, 2000: 37).

Bringing the relevant provisions together in one text, as was successfully done for the rights of women, children and disabled people, would bring clarity to both the nature of older people's rights and the responsibilities necessary to protect them.

Notes

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Limitations of National Autonomy in Matters of Nationality in International and EU Law

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Abstract This article will examine the limitations of national autonomy in the area of nationality in international and EU Law. It will be concluded that State autonomy in international law, to a large extent, is unlimited, although it may not encroach upon international obligations in the area of protection of human rights, including the right not to be stateless. In the EU, Member States are (by their national citizenship rules) gatekeepers to EU citizenship. Therefore they must observe general principles of EU law, most notably the principles of proportionality and of sincere cooperation. Member States must exercise their national autonomy in playing their gatekeeper role not only in their national interest but also take into account the interests of the EU and of the other Member States, even without having been formally forced to do so.

Keywords: • (EU) citizenship • National Autonomy • Member State • Proportionality Principle • Principle of Sincere Cooperation •

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1 Introduction

Every State has its own citizens; therefore each State must establish rules on the acquisition and loss of citizenship (nationality). [1] Under international law, it belongs in principle to the reserved domain of each State to decide who its citizens are (Crawford, 2012: 509). In other words, States are free to establish the rules on acquisition and loss of their citizenship. This principle of so-called national autonomy has been codified in international conventions[2] and confirmed by the Permanent Court of International Justice (PCIJ),[3] the International Court of Justice (ICJ),[4] as well as the European Court of Justice (ECJ).[5] However, this autonomy is not absolute. States are, when exercising this competence, subject to a number of important rules deriving from international law (Cambien, 2011: 10). The PCIJ, in its first decision on nationality, discernibly took into account the possibility that limitations of the national autonomy would be developed in international relations and international law:

> '*The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.*'

The cited decision of the PCIJ is almost a century old. Therefore the question arises, to which extent the national autonomy, which in principle still exists, has been limited by developments in international law in the past century, especially during the period after the establishment of the United Nations and of the Council of Europe. In the first part of this article the limitations of the national autonomy in matters of nationality in the sources of international law will be identified, namely international conventions, customary international law and general principles.

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[1] The terms nationality and citizenship are used as synonyms.

[2] See Article 3(1) of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (LNTS Vol. 179, 89) and Article 3 of the 1997 European Convention on Nationality (CETS 166).

[3] See PCIJ Advisory Opinion of 7 February 1923 on *Nationality Decrees Issued in Tunis and Morocco*, Series B No 4 (1923).

[4] See ICJ, *Nottebohm Case* (*Liechtenstein v. Guatemala)* [1955] ICJ Reports 4.

[5] See *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, ECLI:EU:C:1992:295.*

In the second section, the limitations of State autonomy regarding matters of nationality in the law of the European Union (EU) will be investigated. The EU is an international organization that has developed itself in a specific way that is distinct from the 'usual' international organizations. It has a specific character, mainly because its law contains certain limitations of the sovereignty of its Member States. This limitation of sovereignty exists only in areas where the Member States have conferred to the EU exclusive competences. In most areas the competences of the EU and the Member States are shared, however the Member States have kept their exclusive competences in certain areas. Citizenship is, in accordance with the Treaty on the European Union (TEU)[6] and the Treaty on the Functioning of the European Union (TFEU),[7] one of the areas where no competences have been transferred to the EU. However, the Treaty of Maastricht (Treaty on European Union, [1992] OJ C191) introduced in 1992 the concept of citizenship of the Union as a new category, which exists alongside, and not in place of the citizenship of the Member States. Yet both citizenship concepts are closely connected, because the EU citizenship is acquired through the acquisition of the citizenship of a Member State and is lost through the loss of the citizenship of a Member State.[8] This means that the Member State rules on acquisition of their citizenship, in deciding which persons will enjoy the rights connected to the EU citizenship. These rights become especially important when an EU citizen lives and/or is economically active in another Member State other than the Member State of his/her citizenship. This means, that *e.g.* Slovenia decides on which persons Germany will have to grant rights provided for in the EU law. Certain questions arise here. *Firstly*, do the Member States enjoy as much sovereignty as in the international law as regards to their rules on the acquisition and loss of citizenship without any interference from EU law, bearing in mind that the Member States, by granting their citizenship, do not only grant rights under their respective internal laws, but also rights under the EU law? Similarly, this applies to the loss of Member State citizenship, because the individuals in question do not only lose their citizenship rights under their Member State national law, but also the rights granted to them as EU citizens. *Secondly*, must other Member States always recognize (possibly very generous) rules on the acquisition of a Member State citizenship and grant to certain persons, with no

[6] Consolidated version 2016 - OJ C 202.
[7] Consolidated version 2016 - OJ C 203.
[8] This is not expressly provided by the TFEU and according some authors, it might be possible, that EU citizenship is detached from the Member State citizenship, which would mean, that a person could remain an EU citizen in case of loss of his/her (only) Member State citizenship.

real connection ('*genuine link*') to the Member State of their citizenship and the rights under EU law? A similar question might also arise in certain cases of loss of a Member State citizenship. After answering the above two questions the third question arises, namely, do the limitations of the national autonomy in 'general' international law coincide with the limitations that will be identified in EU law. Since the EU is a much closer community of States than the international community in general, far-reaching limitations can be expected under the EU law.

2 Limitations of National Autonomy in International Law

2.1 General Remarks

As pointed out above, national autonomy in matters regarding citizenship is limited by rules of international law. Before discussing those limitations, it must be noted that national autonomy in matters regarding nationality has two aspects; an internal (national) one and an external (international) one. The first refers to the right of States to autonomously govern via the rules on acquisition and loss of their nationality in their domestic legal orders (Crawford, 2012: 510; Cambien, 2011: 10). The latter refers to the question of the effects of the granting nationality of a State compared to other States. In other words, whether and insofar other States have the obligation to recognize the grant or loss of the nationality of a certain State. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (LNTS Vol. 179, 89) provides that other States must recognize a foreign nationality *'in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality*.' This means that a granting of citizenship could be contrary to international law and in such a case other States need not to recognize such citizenship.

The two aspects of national autonomy can be clearly illustrated by the famous *Nottebohm* case.[9] Nottebohm was a German citizen who immigrated to Guatemala in 1905 and continued to live there, but never applied for Guatemalan citizenship. Shortly after the beginning of the Second World War, while on a visit to Europe, he obtained Liechtenstein nationality and returned to Guatemala. In

[9] ICJ, *Nottebohm Case (Liechtenstein v. Guatemala)* [1955] ICJ Reports 4.

1943 he was arrested as an enemy (German) citizen and has his property confiscated. In 1951, Liechtenstein, acting on behalf of Nottebohm, brought a suit against Guatemala before the ICJ. Guatemala objected to the claim, because it did not recognize his Liechtenstein nationality. The ICJ made a clear distinction between the validity of the grant of nationality to Nottebohm and the effects of this grant *vis à vis* Guatemala:

> '*The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has international effect here under consideration.*'

As to the first issue, the Court recognized the principle of national autonomy:

> '*It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation.*'

But the Court took the view that a grant of nationality can only have effect as against third States if it is a manifestation of a *genuine link* between the State and the person in question. It described somewhat poetically this genuine link as follows:

> '*[…] nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.*'

Due to a lack of a genuine link between Liechtenstein and Nottebohm, Guatemala did not have the obligation to recognize his nationality, and the claim of Liechtenstein was not admissible because the requirement of nationality of the claim[10] was not fulfilled:

> '*That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite. Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible.*'

Clearly inspired by the *Nottebohm* decision, some authors take the view that a State should not grant its nationality to a person in the absence of a genuine link between this person and the State (De Groot & Vonk, 2015: 35). Some go even further, saying that a grant of nationality to a person without any factual link would even be contrary to customary international law. [11] The question then arises, what is to be considered as a genuine, factual or relevant link? *De Groot* suggests that the basis of genuine link can be a parentage with a national of that State (*ius sanguinis*), birth within its territory (*ius soli*) or a longstanding domicile on its territory (*ius domicilii*) (De Groot, 2016: 11). Additional grounds can be added, such as marital or extramarital relation to a national of that State, having been educated in that State (*ius educationis*), and even making a considerable investment in that State (*ius investitionis, ius pecuniae*). Not to mention privileged naturalisations of important scientists and sportsmen?[12] It may be obvious that the notion of a genuine link can be very elastic, especially if the grant of nationality serves the interests of a State. Therefore the author does not agree with the view that States should not grant their citizenship in the absence of a

[10] Nationality of the claim is one of the basic requirements for diplomatic protection. See Article 44(a) of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [January 18th 2018].

[11] De Groot and Vonk 2015, p. 45, Citing Ko Swan Sik, Nationaliteit en het Volkenrecht in Nationaliteit in het Volkenrecht en het Internationaal Privaatrecht, Preadvies voor de Nederlandse vereniging voor Internationaal Recth, Kluwer, Deventer 1981, p. 20.

[12] Slovenia even changed its Citizenship Act in 2017 in order to naturalise an American basketball player who lives and works in Spain, to enable him to play for the Slovenian national team that eventually won the European Championship 2017. See Article 13(2) Of the Slovenian Citizenship Act, consolidated version Official Gazette no. 40/17.

genuine link. As long as the grant of nationality is limited to individual cases, it fails to be seen as an infringement of international customary law, even in case of common standards, non-existent or very weak factual bond. However it might make a difference if a State would unilaterally grant its nationality to a large group of inhabitants (and citizens) or even to the whole population of another State.

In the author's opinion the *Nottebohm* decision is largely overestimated. The case was about diplomatic protection, not a case about citizenship in general. Moreover, it was a case about measures during wartime, *i.e.* in very specific circumstances, and it was decided more than half a century ago, during times when migrations were not as common as they are today, especially in an EU context. Today it is not uncommon that a person has a close connection to more than one State. In the author's opinion the decision in the *Nottebohm* case belongs in the past, as Advocate General *Tesauro* put it in the *Micheletti* case,[13] to the '*romantic period of international law'*. The author's viewpoint is shared with *Kochenov* (Kochenov, 2010a: 5) that the requirement of genuine connection is an '*entirely arbitrary and potentially harmful rule of international law*'.

When discussing national autonomy, it must be noted that States, by granting their citizenship, thus exercising their internal autonomy, actually decide who will enjoy rights that are attached to citizenship in their internal legal systems. Hence, States are normally not affected by citizenship rules of other States. To a large extent they are irrelevant for them. This only changes in cases regarding diplomatic protection.[14] Pursuant to Article 3(1) of the 2006 Draft Articles on Diplomatic Protection prepared by the International Law Commission (ILC),[15] the State entitled to exercise diplomatic protection is the State of nationality of the injured person. Article 4 further provides:

'*For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law.*'

[13] *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, ECLI:EU:C:1992:295*. See Para 5.

[14] Other examples are multilateral and bilateral treaties in the area of international trade granting rights to nationals of the States Parties.

[15] http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf [accessed on January 21st 2018].

The wording '*not inconsistent with international law*' implies that the onus is on the party challenging the possession of the nationality of the injured person. According to the ILC commentary an acquisition of nationality that does not comply with international conventions on human rights would be inconsistent with international law.[16] It must be noted that the ILC explicitly rejected the genuine link criterion:

> *'if the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.'*

In cases of multiple nationalities Article 7 of the Draft confirms the rule that a State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national. This rule has already been codified in Article 4 of the 1930 Hague Convention. However, the Draft provides for an exception for the case the nationality of the claimant State is predominant.

The next chapter will involve a deeper analysis into the formal sources of international law, namely international conventions, customary international law and general principles of law in order to identify the limitations of national autonomy in the area of nationality. Special attention will be given to the international conventions, since it is challenging to identify any rules of customary law or general principles of law that are specific to citizenship (De Groot & Vonk, 2015: 45). The two main principles on which acquisition of nationality has traditionally been based are descent from a national (*ius sanguinis*) and birth within state territory (*ius soli).* However, it cannot be said that general principles of international law require from States to grant their nationality either to children of their nationals or to children born on their territory, not even in cases where both conditions are fulfilled.

[16] The ILC Commnetary, pp. 33 - 34 gives as example posssible infringement of Article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women.

Still, certain general principles of law are also applicable to citizenship law. This is in the first place the prohibition of arbitrariness that amounts to the prohibition of arbitrary deprivation of citizenship, which can be considered as a restriction, imposed by the human rights law (De Groot & Vonk, 2015: 45; Crawford, 2012: 522).[17]Two other relevant principles are the principle of proportionality and the prohibition of racial discrimination.

Pursuant to *De Groot* and *Vonk*, the equality of sexes and of illegitimate and legitimate children, are not (yet) general principles of nationality law (De Groot & Vonk 2015: 45). Nevertheless, the first principle is subject to the New York Convention on the Elimination of All Forms of Discrimination against Women (UNTS Vo1. 249, 13), and the second to the 1989 Convention on the Rights of the Child (UNTS Vol. 1577 3). Moreover, according to case law of the European Court of Human Rights, many cases of discrimination of children born out of wedlock can be assessed on the basis of Articles 8 and 14 of the European Convention of Human Rights.[18] Consequently numerous States, parties to the said Conventions, have the obligation to respect both principles in their nationality laws on the basis of conventional rules.

2.2 Limitations in International Conventions

Limitations of national autonomy regarding citizenship can first of all flow from international conventions. These can be specific international conventions on citizenship, as well as more general conventions that also address some issues of citizenship. As soon as States undertake certain commitments regarding citizenship, the States, out of their free will, accept the limitations that the convention imposes on their autonomy. The first multilateral international convention on citizenship was the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (LNTS Vol. 179: 89). The Convention is formally binding only for 21 States, but according to the doctrine, the general principles, codified in Chapter 1 (Articles 1 – 6), have become international customary law (De Groot & Vonk 2015: 45). Articles 1 and 2 confirm the principle of national autonomy, while Article 3 provides that in case of multiple nationalities State Parties can give precedence to their own nationality (the principle of exclusivity). Article 4 relates to multiple nationalities and the

[17] I will return to this issue *infra* 2.3.
[18] See *Genovese v. Malta*, Application no. 53124/09.

exercise of diplomatic protection against the (other) national State(s) of the person concerned, while Article 6 limits the freedom of States to deny the renunciation of citizenship in certain cases. Articles 8 – 11 limit the effects of marriage as to the nationality of married women. It is also important to observe that Article 15 contains the obligation of State Parties to grant their nationality to children of parents having no nationality or having an unknown nationality, born on their territory, if they would otherwise be rendered stateless.

The second important convention on citizenship was the 1957 New York Convention on the Nationality of Married Women (UNTS Vol. 309, 65). This Convention forbids automatic changes of citizenship caused by marriage with a foreigner or the dissolution thereof. That Convention was followed by the 1961 New York Convention on the Reduction of Statelessness (UNTS Vol. 989, 175). Pursuant to Article 1 of the Convention parents who have children, born in the territory, the State Party has the right to acquire the nationality of the State of their birth, if they would otherwise become stateless. Articles 5 – 9 (subject to certain exceptions) forbid the loss of nationality if the person concerned would become stateless.

In 1963, within the framework of the Council of Europe, The Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality with protocols was concluded (UNTS Vol. 643, 221). In 1997 followed the European Convention on Nationality (ECN) (CETS 166), which was the first comprehensive Convention on citizenship ever determined. It is regarded as the most modern source of international law in the area of citizenship. The ECN has 20 State parties signed to it, of which 15 are EU Member States. The Convention is also of paramount importance for States that are not (yet) parties, *e.g.* Slovenia, as it may be considered as an example of good practices. Furthermore, many convention provisions are not new, but rather a systemization of pre-existing rules of customary international law. The ECN, even though not formally binding, influenced recent amendments of the citizenship legislation of non-States Parties as well.[19]

[19] The convention influenced to a large extent the amendments of the Slovenian Citizenship Act in 2002. See Poročevalec Državnega zbora (*Reporter of the Parliament*) no. 73, July 17th 2002, p. 74.

2.3 Development of International Human Rights Law and Citizenship

The right to citizenship was proclaimed as a human right in Article 15(1) of the Universal Declaration of Human Rights (UDHR) (General Assembly Resolution 217 A of December 10th 1945). However, being a declaration of the General Assembly of the United Nations, the binding character of this Declaration has been disputed. In any case, a large part of the Declaration has been codified in international conventions and/or has become international customary law. Pursuant to *De Groot and Vonk*, (De Groot & Vonk 2015: 41) Article 15(1) UDHR has no binding force under international law. However, even if one would consider this provision as binding, its guarantee of citizenship remains rather meaningless. Its main shortcoming is that it does not impose the obligation to confer citizenship to any State. It would be different if Article 15(1) would provide for a right to the citizenship of the State of birth or to the citizenship of the parents (*Cf.* De Groot & Vonk 2015: 41 and the literature cited by those authors.).

In the author's opinion, Article 15(1) UDHR can be regarded as a political statement, proclaiming that no one should become stateless, either because he or she would not acquire any citizenship by birth, or because he or she would lose the only citizenship he or she possesses. This compels States to draft their citizenship rules in such a way that statelessness would not occur, or at least that it would only occur in some very limited cases. The reduction of statelessness has been one of the main aims of all the above mentioned international conventions on citizenship. As it was mentioned before, those conventions do not have numerous signatory States , because States are very cautious in accepting international commitments that are encroaching on their sovereign rights. This means that guarantees against statelessness in those conventions do not 'reach' a large number of States, at least not as conventional obligations.[20] It is therefore important to note that the UDHR has been the fundamental aspect of several international conventions in the area of human rights, with a considerable number of State parties. Various international human rights conventions contain provisions regarding nationality, such as the 1966 International Covenant on Civil and Political Rights (UNTS Vol. 999: 171), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (UNTS vol. 1249:

[20] The most 'successful' is the Convention on the Reduction of Statelessness, that has 70 States Parties.

13) and the 1989 Convention on the Rights of the Child (UNTS 1577 vol. 3). Even the European Convention on Human Rights does not list the right to citizenship as one of the human rights that are protected by it, which has implications for the citizenship regulations of the Member States of the Council of Europe. It follows from the decision of the European Court of Human Rights in the case *Genovese v. Malta*[21] that legitimate and illegitimate children must be treated equally with regards to access to nationality. Genovese was an illegitimate child of a British mother and a Maltese father. According to Maltese rules on the acquisition of nationality, Genovese did not acquire Maltese nationality by birth, because he was born out of wedlock, meanwhile a legitimate child of a Maltese father acquires Maltese nationality *ex lege* by birth. The Court ruled that those rules infringed the right to '*private life*' under Article 8 and the prohibition of discrimination under Article 14 ECHR.

It can be concluded that human rights laws considerably supplemented the relatively scarce body of specific conventions on nationality, especially in fighting statelessness. One must also not underestimate the interaction between various conventions. This relationship must be taken into account when interpreting the conventional texts. One example is Article 1(2) of the 1961 New York Convention on the Reduction of Statelessness, which requires the States Parties to grant their citizenship to children, born on their territory, if they would otherwise be rendered stateless. They may choose between two options. The first is to grant the nationality *ex lege*, already at the moment of their birth. But they can also choose to grant their nationality on a later moment, even upon reaching the majority. This means, that a child would remain stateless for a long period of time. The 1989 Convention on the Rights of the Child however, requires the State parties in Article 7(1) to grant their nationality to a child soon after birth. Waiting until the majority, which is allowed under the 1961 convention, would amount to an infringement of the 1989 convention (*Cf.* De Groot & Vonk 2015: 251).

It has already been discussed above that the prohibition of arbitrary (Crawford 2012: 522 – 523) deprivation of citizenship is to be seen as a limitation of state autonomy in the field of nationality imposed by international human rights law. This prohibition has already been provided for in Article 15(2) UDHR. This view

[21] *Genovese v. Malta*, Application no. 53124/09.

has also been confirmed by the UNCHR 'Tunis Conclusions' of 2014 that consider it as part of international customary law. It follows from the prohibition of arbitrary deprivation of nationality that any loss of nationality must be established by law that is applied in a non-discriminatory way, must serve a legitimate purpose and be proportionate. The procedure leading to the decision on the loss of nationality must comply with requirements of due process of law under international human rights law and the decision must be subject to effective legal remedies (De Groot & Vonk, 2015: 46).

3 EU Citizenship and its Relationship to the Citizenship of the Member States

The citizenship of the Union was first introduced in the Maastricht Treaty, which was established in 1992 (Treaty on European Union, [1992] OJ C191). Article 8(1) of the Treaty Establishing European Community (TEC) read:

> '*Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union*'.

Articles 8a – 8e TEC summed up the rights that were attached to the Union citizenship, starting with the right to move and reside throughout the Union. However, the 'codification' of the EU citizenship in the Treaty raised concerns in several Member States that the EU citizenship would encroach upon their national autonomy in matters of citizenship. Therefore a *Declaration on Nationality of a Member State* was attached to the Maastricht Treaty that read:

> ' ... *the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.*' (Declaration (No 2) on Nationality of a Member State, annexed to the Treaty on European Union, [1992] OJ C191/98).

Denmark, who appeared to have the biggest concerns about EU citizenship, made an explicit declaration on the occasion of the ratification of the Maastricht Treaty, stating:

> '*Citizenship of the EU is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-state. The question of Denmark participating in any such development does, therefore, not arise.*'

The European Council reacted with the following statement, which was actually a confirmation of the principle, already stated in the Declaration on Nationality of a Member State:

> '*The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.*'

The above declarations made it clear that EU Citizenship was not intended to replace the citizenship of the Member States, but was a mere consequence of the possession of a Member State's citizenship. According to the Amsterdam Treaty,[22] the wording of Article 8 TEC (then renumbered to Article 17) was amended by adding a second sentence to Art. 17(1), reading '*Citizenship of the Union complements and does not replace national citizenship.* ' Eventually, according to the Lisbon Treaty, Article 17 TEC became Article 20 of the (TFEU). The wording of this provision was changed again and now reads:

> '*Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union".*
> *Citizenship of the Union shall be additional to and not replace national citizenship.*'

[22] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, [1997] OJ C340.

The above observations might give the impression that citizenship of the EU is secondary to the Member State citizenship, that EU citizens are primarily citizens of their respective Member States and that their EU citizenship comes in the second place (Davies 2011: 5- 9). The ECJ obviously sees this differently. In its decisions, the Court keeps repeating, that EU citizenship is 'destined to be' or 'intended to be' *the most fundamental status of nationals of the Member States.*[23]

Furthermore it is interesting to point out that the introduction of the concept of Union citizenship brought a significant change in the traditional dichotomy between citizens and foreigners. Within the EU the nationality of a person has (to a large extent) lost its primary function, which is to serve as the criterion for the differentiation between privileged own citizens and non-(or considerably less)privileged foreigners. Certainly the relevant distinction is between EU citizens and third country nationals. The gap between these two categories has become even larger. Numerous third country nationals permanently residing in the EU are excluded from the status of EU citizen and they are largely left within the realm of the national law of the Member States (*Cf.* Kochenov, 2010: 12, 22). Also the access to the Member State nationality of their residence and same with EU citizenship, is more difficult for third country nationals than for citizens of other Member States.[24]

4 Limitations of National Autonomy in the EU Law

4.1 General Remarks

The citizenship of the EU and citizenship of the Member States are two independent legal concepts, yet they are closely connected.[25] The EU does not (and is not allowed by the Member States) provide their own rules on the acquisition and loss of the Union citizenship, as it is 'dependent' on the national laws of the Member States. It is the Member States that indirectly, through the application of their own citizenship rules, who decide about the acquisition and loss of the EU citizenship. Consequently, the Member States, according to their

[23] See Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2000:518, para 31; Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind*, ECLI:EU:C:2007:771, para. 32; Case C-50/06 *Commission v. the Netherlands* ECLI:EU:C:2007:325, para. 32 (see also De Groot, 2005: 28 – 30; Cambien, 2012: 15.
[24] See *infra* 4.5.
[25] *Cf.* the Opinion of AG *Poiares Maduro* in the *Rottmann* case, ECLI:EU:C:2009:588, Para 23.

national rules on citizenship, do not only decide to whom they will grant the rights attached to the citizenship in their internal legal systems, but also who will enjoy the rights under EU law, attached to the possession of the EU citizenship. This is a significant difference compared to national citizenship rules in international law.

As it was explained above, the Member States were very reluctant to confer to the EU institutions any part of their sovereign rights regarding citizenship. Consequently, no competences in the area of citizenship have been transferred to the EU in the Treaties and there is no competence to produce any secondary legislation in this area. Therefore, at least on the level of the primary and secondary legislation, EU law does not encroach upon the national autonomy of the Member States because of the lack of competence. Yet it might have been desirable that the EU would have a say about the grant or withdrawal of rights provided for in the EU law, at least by a limited harmonization of the national rules of the Member States. Such a harmonization would be a limitation of sovereign rights of the Member States, but at the same time it might serve their interests as well. Basic rights of EU citizens become most important to them when they reside and/or are economically active in another Member State other than the Member State of their citizenship. That is when they exercise their right of free movement. However, the consequence of the national autonomy in the EU framework is that individual Member States freely determine the group of persons who will have the right to enjoy the rights attached to the EU citizenship in *all the other* Member States. This is not a problem so long as the citizenship rules of the Member States are to a certain extent in balance. However it becomes problematic if some Member States are too generous with granting their citizenship. This might cause friction between Member States.

4.2 Unconditional Recognition of Member State Nationality

4.2.1 Micheletti

The first ECJ decision in the field of nationality was the *Micheletti* case,[26] decided in 1990, thus before the Treaty of Maastricht. Mario Vicente Micheletti was a dentist, who was born, lived and studied in Argentina. Along with Argentinian citizenship he possessed Italian citizenship, because one of his grandparents was Italian. He immigrated to Spain and wanted to establish himself there, invoking his freedom of establishment under Article 44 TEC (now Article 50 TFEU). The Spanish authorities however, refused to recognise his Italian nationality. Pursuant to Article 9 of the Spanish *Código civil,* in cases of dual nationality, where neither nationality is Spanish, the nationality of the country of habitual residence before the arrival in Spain was to take precedence. This meant that Micheletti was treated as an Argentinian, and not an Italian national, and thus did not have the right of establishment on the basis of the Treaty. The ECJ found Spain to be in breach of Union law:

> '*… it must be borne in mind that Article 52 of the Treaty grants freedom of establishment to persons who are 'nationals of a Member State'. Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.*'
> *[…] Consequently, it is not permissible to interpret Article 52 of the Treaty to the effect that, where a national of a Member State is also a national of a non-member country, the other Member States may make recognition of the status of Community national subject to a condition such as the habitual residence of the person concerned in the territory of the first Member State.*'

Since Italy has granted Micheletti its nationality, Spain had to unconditionally recognise Micheletti's Italian citizenship and treat him as an Italian national. It could not restrict the effects of the acquisition of Italian nationality by imposing

[26] *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, ECLI:EU:C:1992:295.

an additional condition for recognizing that nationality, such as the condition of habitual residence in Italian territory (Cambien, 2011: 22; Shaw 2011: 2).

The ECJ's decision in Micheletti imposes an unconditional obligation on the Member States to recognise the granting of nationality by another Member State. This seems to be in contrast to the general view under international law that States do not have to recognize a nationality that is acquired contrary to international law (Cambien 2011: 22; Jessurun d'Oliveira, 2016: 18). It can also be assumed that Micheletti did not have a genuine link with Italy, which would mean, at least following the *Nottebohm* decision, that his Italian nationality would not have effects as against third States. But the ECJ did not apply the genuine link test and the *Nottebohm* case was not mentioned, not even by Spain.

It may be concluded that the ECJ not only confirmed, but even emphasised the principle of national autonomy. Yet it also added a new restriction, namely that it must be exercised with due regard to the Community (in post-Lisbon terminology Union) law.[27] It follows from this dictum that Union law sets direct limitations to the competence of the Member States to determine their rules on nationality. Such is true, both with regarding their competence to police rules concerning acquisition of nationality as well as to their competence to police rules concerning loss of nationality (Cambien, 2011: 48). Since there are no express rules or limitations in the primary and secondary EU legislation, it must be the principles of Union law that provide for limitations of the national autonomy. Even though the Court kept repeating its enigmatic dictum in several decisions,[28] it had not clarified its meaning. It remained unclear which principles of Union law Member States must respect regarding their nationality laws. It also never found a Member State's nationality legislation to be in breach of Union law.[29] The issue remained unclear for almost twenty years, namely until the ECJ decision in the *Rottmann* case in 2010.[30]

[27] Which makes the EU autonomy a relative one. D. Kostakopoulou 2011, pp. 2 – 3.
[28] Case C-179/98, *Belgian State v Fatna Mesbah*, ECLI:EU:C:1999:549; Case C -192/99, *The Queen v. Secretary of State for the Home Department, ex parte: Manjit Kaur*, ECLI:EU:C:2001:106; Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department, (Zhu and Chen)* ECLI:EU:C:2004:639.
[29] Cambien 2011, p. 48. Such might have been the case with Malta in 2014, if it had not adapt its Ciitizenship-for-sale-programme in accordance with the requirements of the European Commission. See *infra*, 4.4.
[30] Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, ECLI:EU:C:2010:104.

4.2.2 Garcia Avello

Micheletti had dual citizenship; one of a Member State and one of a non-Member State. What if the person concerned has citizenships of two or more Member States? Under general international law, each of the national States may treat such a person, as it would be only its citizen. This so-called principle of exclusivity was codified in Article 3 of the 1930 Hague Convention, as well as in national legislations.[31] However, the ECJ decided in the *Garcia Avello* case[32] that this does not apply in an EU context. The case was about the surname of two children of a Belgian mother and a Spanish father. The family lived in Belgium where the children were also born. The children possessed Belgian and Spanish citizenship. The Belgian authorities registered the surname of the children pursuant to compulsory Belgian rules as Garcia Avello (the surnames of their father), meanwhile the Spanish authorities registered the children's surname in accordance with Spanish law, namely Garcia Weber (father's first surname followed by the mother's surname). The Belgian authorities denied the request to change the surnames of the children to Garcia Weber, *inter alia* by invoking Article 3 of the 1930 Hague Convention. The Court ruled that Belgium infringed Articles 12 and 17 TEC (now 18 and 20 TFEU:

> '*Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.*'

As to Article 3 of the Hague Convention, the Court ruled that it does not contain an obligation, but only stipulates the option that States parties give precedence to their own citizenship.

[31] See for example Article 2 of the Slovenian Citizenship Act, official cosolidated version Official Gazette no. 40/17.
[32] Case C-148/02, *Carlos Garcia Avello v Belgian State*, ECLI:EU:C:2003:539.

4.3 The Principle of Proportionality (Rottmann)

In the *Rottmann* case, [33] the ECJ (finally) explained how the EU law influences the national rules on citizenship. Janko Rottmann was an Austrian citizen by birth. In 1995 criminal proceedings were initiated against him in Austria because of major frauds. In the same year he moved to Germany and in 1999 acquired German citizenship by naturalisation. Pursuant to Austrian law he automatically lost his Austrian citizenship.[34] A short time after naturalisation the Austrian authorities informed the German authorities about the criminal proceedings against Rottmann in Austria and the competent German authority (the Freistaat Bayern) withdrew Rottmann's naturalisation with retroactive effect. The reason for the withdrawal was that Rottmann had not disclosed during the naturalisation procedure that he was subject of a criminal proceeding and therefore obtained the German citizenship by fraud. Rottman appealed against the withdrawal, because it would render him stateless, meanwhile the criminal proceedings in Austria would make it extremely difficult to regain his Austrian Citizenship[35]. The ECJ had to answer the question, of whether the loss of the German citizenship, which would cause statelessness, was in accordance with EU law and in particular with the rules on EU citizenship. The view of the German and Austrian Government, as well as of the European Commission was that this case falls out of the scope of EU law because it was a purely internal situation between the German State and its citizen. The Court, however, dismissed this argument, stating:

> *'The situation of a citizen of the Union who [...] is faced with a decision withdrawing his naturalisation [...] placing him [...] in a position capable of causing him to lose the status conferred by Article 17 EC [now 20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.'*[36]

The Court found that deprivation of citizenship that has been acquired by fraud is not contrary to EU law and in particular to Article 17 EC, even if it amounts

[33] Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, ECLI:EU:C:2010:104.
[34] See Article 27(1) of the Austrian *Staatsbürgerschaftsgesetz* (BGBl. 1985, 31).
[35] Only the normal naturalisation procedure was possible, but his criminal past would be an obstacle for the naturalisation. See Article 10(1) of the Austrian *Staatsbürgerschaftsgesetz*.
[36] Para. 42.

to statelessness. Such is also allowed under general international law.[37] It stressed however, that the authorities of a Member State taking a decision in such a case must observe the principle of proportionality under the Union law, and where applicable, under the national law. The ECJ continued:

> *'Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.*
>
> *With regard, in particular, to that last aspect, a Member State whose nationality has been acquired by deception cannot be considered bound, pursuant to Article 17 EC, to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his Member State of origin.*
>
> *It is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin.'*[38]

Since the withdrawal of German nationality was not final, and no decision about the recovery of Rottmann*'s* original nationality has been adopted in Austria, the Court could not answer the question whether or not Austria is obliged under EU law to interpret its domestic legislation in order to avoid the loss of EU citizenship by allowing him to recover the Austrian nationality. Although, if the Austrian authorities would have to adopt a decision on this issue, they would have to observe the principle of proportionality.[39] The German

[37] Namely with Article 15(2) UDHR, Article 8(2)(b) of the 1963 Convention on the Reduction of Statelessness and Article 4(c) ECN.
[38] Para. 56 – 58.
[39] Para. 60 – 63.

Bundesverwaltungsgericht decided on November 11th, 2011,[40] applying the test of proportionality, that the withdrawal of the German citizenship was final.

The decision in the *Rottmann* case is the first and (until now) the only decision of the ECJ, where the Court, to some extent, clarifies the meaning of the due observance of the Union law from the *Micheletti* decision. The decision was extensively discussed in the doctrine. Some authors welcomed it (De Groot & Seling 2011: 27 – 29), while some found that the Court overreached the EU law (Jessurun d'Oliveira 2010: 1028-1033), however others found that it did not go far enough (Kochenov 2010a: 1 – 8).

4.4 Other General Principles

Next to the proportionality principle, other principles of the EU could also be infringed upon either by rules on the acquisition and loss of nationality of a Member State or by the application of the national rules. In his opinion in the *Rottmann* case, Advocate General *Poiares Maduro* explicitly mentioned the duty to respect fundamental rights, the principle of legitimate expectations, the principle of sincere cooperation (now Article 4(3) Article TFEU) and the freedom of movement and residence (now Article 21(1) TFEU). The principle sincere cooperation could be affected if a Member State was to carry out, without consulting Brussels or the other Member States, an unjustified mass naturalisation of nationals of non-Member States or nationals of another Member State.[41] Another, even more clear example offers the Maltese citizenship-for-sale affair.[42] In 2013 the Maltese government announced an amendmet to the Maltese Citizenship Act to introduce the so-called Individual Investor Programme (IIP). Under this programme foreigners and their families would be granted Maltese citizenship in exchange for a considerable donation to the State or investment in the country, without any other requirement. This programme was severely criticised by the European Parliament in the resolution adopted on January 16th 2014, that condemned Member States' citizenship-for-

[40] BverwG, Case 5 C 12.10. See De Groot, 2015a: 383 – 394 and his commentary on the decision pp. 395 – 396.
[41] *Cf.* the Opinion of AG Poiares Maduro, ECLI:EU:C:2009:588, Para. 30.
[42] See extensively over this issue Carrera Nuñez 2015: 293 – 326; *Marrero* González, 2016: 171 - 173.

sale programmes, specifically referring to Malta[43] and called upon Malta to bring its current citizenship scheme into line with the EU's values.[44] Under the thread of an infringement procedure under Article 258 TFEU, the Maltese authorities reached an agreement with the DG Justice of the European Commission about some amendments to the IIP. In order to acquire Maltese nationality, the donor/investor would have to reside in Malta for at least 12 months prior to the naturalisation. The Maltese example clearly demonstrates another limit to the national autonomy, as well as the readiness of the Institutions to take action against a Member State not exercising its autonomy in observance of the EU law.

Let us further concentrate on the freedom of movement and residence. One of the basic rights of the EU citizens is to move their residence to another Member State and to live there, possibly for a very long time. If the law of a Member State provides for the loss of its nationality due to a long-term residence abroad (*e.g.* 10 years), such a rule could be seen as an infringement of the freedom of movement and residence. An EU citizen, who possesses next to the nationality of a Member State the nationality of a non-member State and would lose, due to his/her residence in another Member State, his/her only Member State nationality and with it also EU citizenship. Paradoxically, the EU citizenship would be lost by exercising one of the most basic rights of EU citizens (Jessurun d'Oliveira, 2016: 217). In such a case, the rules on the loss of the citizenship of a Member State as such, not only an 'incorrect' application thereof would be contrary to the EU law.[45] It must be added that the Netherlands, who knew an that a citizen would lose citizenship due to 10 years residence abroad, in 2003 changed its Citizenship Act in such a way that residence in another Member State does not qualify as residence abroad.[46]

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[43] At least two other Member States offer their citizenship for sale, namely Bulgaria and Cyprus (see Carrera Nuñez, 2015: 324.

[44] In this resolution was expresslly stated, that: *'that this way of obtaining citizenship in Malta, as well as any other national scheme that may involve the direct or indirect outright sale of EU citizenship, undermines the very concept of European citizenship.'* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0038+0+DOC+XML+V0//EN [accessed on January 21st 2018].

[45] As we have seen in the *Rottmann* case, it was not the German rules on the loss of nationality that were problematic. An infringement of the EU law could be caused by their application, if the principle of proportionality would not be observed.

[46] See Article 15(1)(c) of the Dutch Citizenship Act *(Rijkswet op het Nederlanderschap)*. See also De Groot, 2005: 28 – 29.

4.5 Indirect Influence of the EU Law on the National Autonomy of the Member States

Until now the question discussed was how far the national autonomy of the Member States in matters of nationality is limited by obligations, arising from the EU law. In the following it will be investigated whether the Member States let the EU law, the concept of EU citizenship especially, influence their national rules. Does the fact that the Member States are closely connected and dependent on each other through the EU citizenship also influence their rules on the acquisition and loss of nationality? One might expect, for example, that the Member States naturalisation requirements would be more favourable for EU citizens than for citizens of third countries. Some Member States have indeed facilitated the naturalisation of EU citizens. Italy requires residence of only four years instead of ten, for Romania residence of four instead of eight.[47] Austria has similar rules.[48] Another benefit awarded to the EU citizens are loosened requirements regarding the renunciation of the original citizenship that can be found in the Citizenship Acts of Germany, Latvia and Slovenia (see Jessurun d'Oliveira, 2016: 222 – 223).

Traditional grounds for the loss of citizenship such as public service in a another State or even military service in another State might not cause the loss of citizenship if this service is in another Member State. Similar can be said as to the voluntary acquisition of the nationality of another Member State. Above has already been mentioned the example of the Netherlands that amended its Citizenship act regarding the loss of citizenship due to long-term residence abroad, if the residence is taken in another Member State.

Interesting is the Irish example. Ireland has, after the decision of the ECJ in the *Zhu and Chen* case, changed its Nationality and Citizenship Act, because it appeared to be too generous. According to the old rule, everybody who was born on the island of Ireland (in the Republic Ireland or in Ulster) became an Irish

[47] See Article 9(1)(d) of the Italian Act No. 91/92 (L. 5 February 1992, n. 91, as amended by Act No. 94/2009), Article 8(2)(b) of the Law on Romanian Citizenship no. 21/1991 (as amended by L. nr.112/2010, 17 June 2010)

[48] At the moment of writing of this contribution amendments to the Austrian Citizenship Act are announced. It is therefore not certain how the rules will be when the book will be published.

citizen (so-called *birthright citizenship*).[49] A highly pregnant Chinese woman went to Belfast to give birth to her daughter and soon after the birth they went to live in England. The ECJ ruled that the child, being an EU citizen, and her non-EU mother[50] had the right to live in the UK. *Handoll* (2012: 8 – 9) observed, that:

> *'It was, to say the least, potentially embarrassing to the Irish government to retain a citizenship regime, with such Community law consequences in another Member State, especially where the right to the company of a parent had been rejected in Irish law.'*

After this decision Ireland rapidly changed its legislation, which involved consulting the UK. Now Irish citizenship is only acquired if the mother has lived three years in Ireland before the birth of the child.[51] The Irish example shows that Ireland, as a Member State, also took into account legitimate interests of the UK, which was probably affected by the former Irish citizenship bureaucracy.

5 Conclusion

States still enjoy a very large autonomy in regulating the acquisition and loss of their citizenship. This is easy to explain. Firstly, the rules about the 'membership of the club' belong to the very core of State sovereignty; they are one of the four elements of Statehood. Secondly, States attach certain rights and duties in their internal legal systems to their citizenship. It is more than logical that States may enjoy the upmost freedom in deciding to whom they will confer or withdraw those rights. Other States, generally speaking, are not affected by the granting of nationality of a certain State. It is only different in rather rare cases, where international law imposes on them certain duties as against citizens of the State. The exercise of diplomatic protection is the most obvious example. However, as has been noted above, the ILC Draft Articles on Diplomatic protection do not impose any concrete requirements to a grant of nationality that would qualify for diplomatic protection. The genuine link criterion has been expressly rejected. The only real limitation is that in cases of multiple nationalities, diplomatic protection cannot be exercised against the other national State(s) of the injured person.

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[49] See Section 6(3). This regulation is based upon the so.-called Good Friday Agreement beteween the British nad Irish Government, concluded in 1998. See Handoll 2012, p. 6.
[50] Because the child was completely dependent on the mother (primary carer). The Court held that the mother had the right to reside with, and care for her child, as this was necessary for the child in practice to enjoy the benefit of her EU citizenship.
[51] See Section 6A(1) as amended by Act No. 38 of 2004 (Jessurun d'Oliveira, 2016: 218).

The most concrete limitations are imposed by international human rights law. States must draft their rules on the acquisition of nationality in such a way that statelessness will not occur. Therefore, they must grant their citizenship to children born on their territory if they would otherwise become stateless. The loss of citizenship is in principle only permitted if the concerned person already possesses or will obtain another citizenship. Deprivation of citizenship may not be arbitrary, even if it does not amount to statelessness. Moreover, the rules on acquisition and loss of citizenship must be drafted and applied in as non-discriminatory manner.

In an EU context, the function of the rules on citizenship is different than in (general) international law. The individual Member States do not only decide to whom they will grant the rights attached to citizenship in their internal legal systems, but even more importantly, they decide to whom the *other Member States* will have to grant rights, provided for in EU law. Moreover, the Member States are on their territory hosting persons, who are not merely citizens of another States (*i.e.* foreigners), but first of all, citizens of the EU. Member States must grant them the rights attached to EU citizenship. These specific circumstances have consequences for the Member States granting their nationality, as well as for the Member States hosting EU citizens from other Member States. The first do enjoy in principle their national autonomy in granting their citizenship, but they must exercise it with due regard to Union law. They, being the 'gatekeepers' to the EU citizenship, must bear in mind, that they are not granting only their own internal citizenship but also the EU citizenship. This means that they are imposing on other Member States the obligation to respect the rights emanating from the EU citizenship. Similarly, when drafting and applying the rules on the loss of citizenship, they must bear in mind that the person in question will not only lose his or her Member State citizenship, but also the citizenship of the EU. Here the principle of proportionality plays an important role.

Since the 'receiving' Member States have the obligation to grant the EU citizens' rights under EU law, they cannot unilaterally decide which nationality to recognize in case of multiple nationalities. If the person concerned has their nationality and the nationality of another Member State, they are, following the *Garcia Avello* case, not allowed to treat such person as being exclusively their own citizen, even though such a right is explicitly recognized in international law. In

cases where the person concerned has the nationality of another Member State and of a non-Member State like Micheletti, Member States are not free to decide which nationality they will recognize and which not. They may also not rely on criteria developed by international law such as the genuine link and the notion of prevailing or effective nationality.

When comparing the limitations of national autonomy in international and EU law, the conclusion can be drawn that the autonomy to grant or withdraw the nationality is in international law to a large extent unlimited, although it may not encroach upon international obligations in the area of protection of human rights, including the right not to be stateless. In the EU it is the Member States' autonomy in matters of citizenship is more limited. In addition to the limitations imposed by international law, they must observe general principles of EU law, most notably the principle of proportionality. Also the principle of sincere cooperation plays an important role. It requires that Member States exercise their national autonomy in playing their gatekeeper role not only in their national interest, but they must also take into account the interests of the EU and of the other Member States, even without having been formally forced to do so, as the Irish example has demonstrated. If a Member State still wants to give precedence to its own interests, the EU institutions probably would react, as we have learned from the Maltese example.

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FROM AN INDIVIDUAL TO THE EUROPEAN INTEGRATION
DISCUSSION ON THE FUTURE OF EUROPE
LIBER AMICORUM IN HONOUR OF PROF. EMER. SILVO DEVETAK
S. Kraljić & J. Klojčnik (eds.)

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The Relations between the Ottoman Empire and the Balkan Peninsula as Observed on the Basis of a Series of Documents of the 16th Century

CHRISTIANE VILLAIN – GANDOSSI

Abstract The documents surveyed by the author: 1) the translation of the »firmans« (rules), issued by the Great Turc in the whole of the 16th century; 2) the coded letters of the baile Vettore Bragadino during the years 1564-1566; 3) bilingual and plurilingual vocabularies and nomenclatures related to Italy and Turkey, show clearly the simultaneous sharing of concepts between the Occident and the Ottoman world. These documents evoke the incessant tensions and frictions on the territories of the Venetian Dalmatian area, that blocked and penetrated Turkish Bosnia and Herzegovina. Complaints were addressed to the »sangaqbey«, the »defterdar, the qadi«… and concerned extortions against capitulations, acts of piracy, enslavement, and other types of humiliation. These documents also testify to the verbal and intellectual organization of this people of the 16th century. They show, moreover, above all, the position that this zone of transition - the Balkans – had in the geostrategic world of the 16th century.

Keywords: • Balkans (Geostrategy of) • Giovani (di lingua) • Venetian (diplomacy) • Firman • (Coded) Messages •

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1 Introduction

The considerable totality of the works of Prof. Silvo Devetak is largely transdisciplinary. A primary theme in his writings concerns the role in history that the Balkan Peninsula has played as mediator.

The present contribution, utilizing a historical perspective, tries to make evident a certain "Europeaniziation" of the Mediterranean territories in which theatre the Ottoman Empire, the Republic of Venice, and above all the countries of the very lengthy transition zone, the Balkans, played an important role. The analysis of diplomatic documents, of commercial treaties, of cryptographic systems, of specialized vocabularies that were used by traders, sheds light on the way in which European territories are interrelated: acceleration of the trading, transformations of practices and of the negotiation networks, and the beginning of a "mundialization" of exchanges. The growth of the commercial territory and the rapid development of the intercultural commercial transactions encouraged the traders to mobilize and to enlarge their competences, especially those that concerned their languages – considered here in their most extensive acceptation.

At the end of the 15th century, a Venetian with an average education was hardly able to imagine the nature of the emerging Turkish nation of the *gens scythica,* a people that originated from the desolate steppe of Asia (Preto,1975: 13). But after the Peace of 1503, the Venetians, who were not afraid of any Christian power, feared Turkish dominance because Constantinople was in a position to issue orders to the Venetian State (Alberi, 1840: 301).

During the 15th century, the Venetians had already lost numerous territories in Albania, in Dalmatia, in the Aegean Sea, and in Peloponnesus. At the same time, their commercial privileges endured severe afflictions. In the following century, they fought in two great wars (1537-1540 and 1570-1573) that led to new losses that restricted further their sphere of influence. This was even more so because the Venetians seemed to have lacked awareness of the world's expansion. Instead, their attention was fixed on the Middle East and at the "Golfo". They barely observed the real revolution that was taking place in the Atlantic and in the Northern part of Europe.

In the 16th century, the Republic of Venice had insufficient grain from the nearby

surroundings to feed its large population. It tried by all means to maintain its trading relationship with the Turkish market. In spite of the crises, the signs of fatigue that were to a large degree provoked not only by the competition with the merchants of Ragusa, England, the Low Countries and France, but also in spite of the misfortunes caused by the war against the privateers, Venice succeeded in maintaining itself until the end of the century. The reasons for this are without any doubt Venice's continued commercial technical superiority and especially its extreme prudence in its diplomatic relations with Constantinople, where it maintained a permanent diplomatic representation. Between 1507 and 1598, Venice was represented under the sultans by thirty-three consuls ('bailes'). On 27 occasions between 1502 and 1595 Venice played an important role in relation to the election of an extraordinary ambassador (Baschet, 1862: 215).

2 The bailo, chief of the Venetian colony

The role that the consuls ('bailo') played was very important, as was the case with the drogmans, who were the interpreters (the 'giovani di lingua') in the domain of commercial matters, especially in the Eastern basin of the Mediterranean. This article will underline the importance of the teachings of the documentary instruments, the theoretical tools, which have contributed to their formation.

By the treaty of the 26th January in 1479, the sultan authorized a baile to be present in the capital of Constantinople and to have the right of jurisdiction over his fellow countrymen. In 1521, it was decided that the baile could not be pursued for the debts of his countrymen (Sanuto, 1879-1903: 454; Alberi, 1840: 87-88).

We know that originally the merchants of Europe, and later on the diplomats, usually recruited their interpreters from among the renegades and the Latin families of Galata (the Navoni, the Grillo, the Olivieri, the Fornetti, etc.) (for the totality of these problems: cf. Hitzel et al., 1997; Bertele, 1932; Gökbilgin, 1965: 121-128). But this selection method had several important drawbacks. In order to avoid these, the European powers adopted another selection method: the recruitment of young children in order to teach them the oriental languages at a very young age. Beginning in 1551, Venice sent young compatriots ('giovani di lingua') to Constantinople in order to prepare them for the profession of drogman, interpreter. When these children were considered capable of fulfilling the job of interpreter, they were included in the staff of the consul and two new

giovani then were selected. The role of the drogman was very important because, according to the bailo Carlo Ruzzini, the drogman 'is the tongue that speaks, the ear that hears, the eye that sees, the hand that gives, the spirit that acts and from whom depends life and destruction of the whole of the trade' (Preto, 1975, 101).

In spite of this importance, during the 16th and the 17th centuries, the consuls complained about the small number of drogmans, who did not have an easy life in Constantinople. They spoke about their lack of discipline, the disorganization among the Turkish women, even their conversion to Islam. Other topics of displeasure among the Senate included acts of 'treason', such as occurred with Michel Cernojeviç, *dragommano grande*, in 1562 of the bailo Andrea Dandolo. Above all, the consuls lamented the drogmans' superficial knowledge of the Turkish language.

2 The Language of the Drogmans Through a Series of »firmans«

In order to illustrate the activities of the baile and his staff in relation with the commercial languages, this article analyzes three types of documents in which the drogmans' activities regarding translation or decipherment (decoding) become apparent, especially as they relate to matters connected with trade. Firstly, Venetian translations made by the drogmans of a series of 'firmans' (rules), issued by the Great Turc, and which cover the entire 16th century; secondly, the coded letters of the baile Vettore Bragadino during the years 1564-1566; and, thirdly vocabularies and nomenclatures, bilingual and plurilingual (with the Turkish and the Italian languages).

Regarding analysis of the firmans, the author reviewed manuscript 83 of the collection of the ancient Turks from the National Library of Paris[1]. This manuscript contains copies of the firmans that were issued by Süleyman Qanuni, Selim II and Murad III, together with letters sent by Murad III to the doge. These 66 documents are dated from 1527 to 1592. Almost all of the firmans, which are translated in Venetian, are signed by the translator-drogman.

[1] "Diplomata varia Turciconem Imperatorum ad Venetas res petinentia Turcice cum Italia interpretation". Cf. the whole analysis of this document: Villain-Gandossi, Ch. Contribution à l'étude des relations diplomatiques et commerciales entre Venise et la Porte ottomane au XVIe siècle, *Südost-Forschungen*, XXVI, 1967: 22-45; XXVII, 1969: 13-47; XXIX, 1970: 290-301.

The theme of these firmans – which have the value of revealing the attitudes of the Ottomans, something too often neglected as a consequence of the lack of analysis in this language – are the answers by the legislator to the requests made by the baile. A series of these requests is related to the prerogatives and obligations of the baile. For example, the baile had the obligation to resolve controversies between Venetian merchants. When a Venetian happened to die within the territory of the Empire, his body and his belongings had to be transmitted to the consul. The *kharag* did not have to be reclaimed from those who came from Venice, whether they originated from Venice or not. When a baile had fulfilled his mission, the new baile had to be accompanied by a *voïvode*, when he arrives in the s*andjak* of Scutari, who assured his protection until his safe arrival in Constantinople. As Nicoara Beldiceanu (Bediceanu, 1976: i) explained very well: "*de nombreux historiens balkaniques prirent soudain conscience que plusieurs siècles du passé de leurs nations sont enfouis dans les archives turques et qu'on ne pouvait par consequent y avoir accès qu'à travers les actes ottomans*".

All controversies between the Venetians and the Ottomans had to be submitted to the *qadi* for resolution. The baile also had to protect his compatriots and attempted to mediate disputes related to commercial activities. Analyzing these firmans, we can observe that Venice, in the middle of the 16th century, had not yet totally lost the control of the Black Sea. A firman of November 1549, for example, indicated the presence of Venetian vessels in the Black Sea for the purpose of buying caviar, fish and other types of merchandise. But the situation was completely compromised at the end of the century. The loss of Cyprus led to the cessation of trade and also the harbors of Syria led to other difficulties.

During the same period, as is testified to by the abundance of firmans, both the Ottoman Empire and the Venetian Republic were strongly oriented towards. the vast front of the Balkans, and its intermediary role, especially after the war of Cyprus. The Venetian flag was no longer respected, first by the European privateers, and later on by the Barbarian privateers. The complicity between the privateers and some 'sangabey' of Dulcigno, the Valona, Durrës is evident. The merchants of Venice were the most exposed to these malfeasance.

The firmans demonstrate these changes very clearly: extortions by functionaries of the Ottoman Empire - *emin*, *amil*, *qadi*, *beylerbey*, *defterdar*, *nisangi* - the rise in the costs of merchandise: a decrease in the volume of purchases by the Ottoman

Empire; a lack of respect of the Capitulations in relation to trade; and, intrusion of Jews into the trade's practice. In spite of all this, it is necessary to note that the number of merchants in Venice, and the volume of their transactions, remained superior in comparison with the other nations. This was due to the Venetians' obsession to continue themselves on the Turkish market. This is understandable, because the Republic had 400,000 inhabitants to feed and it was obliged to import its resources from the countries that were part of the Ottoman Empire. Otherwise, in the event that its purchases of grain would come to an end, the economy of the Ottoman Empire, already the victim of a serious financial and monetary crisis, would endure very heavy losses. The interdependence of the countries comprising the Ottoman Empire is evident (Aymard, 1966: 20). At the end of the 16th century, the number of extortions that were occurring increased even more. To give two examples among one hundred: in Castelnovo, a squadron of *galiotte* attacked some Venetian ships full of merchandise, confiscating both the merchandise and the crew. The crews were enslaved. A second example: four squadrons of *caïqs* arrived at the harbor of Liecena, attacked Bogomoglie and St. George, and committed a great number of murders.

An examination of this series of the firmans that this ancient Turkish manuscript contains reveals the functions performed by the baile. The baile represented the Republic as a diplomat and fulfilled, at the same time, the tasks of a consul. That is to say, he was charged with protecting commerce ("The most important task of a baile of Constantinople is the defense of the: commerce of the nation" wrote Navagero in 1553) (Alberi, 1840: 101). The baile, the texts confirm, also had to oversee the correct functioning of the landing-stages; survey the maintenance of the warehouses; survey the loading of the ships; oversee the nature of the merchandise that was being transported; and, attend to the manner of levying of taxes in the ports. He also had to survey the provision of the Republic and conclude deals with the Court of Constantinople in this field. Within the framework of his consular function, he also had the duty to protect the voyagers that came from Venice.

He appears also as the entitled protector of all the Venetians who resided in the Levant. It is also clear that he spoke on behalf of all "Frenks" (persons coming from Genoa, Florence, Ragusa, the Provence…). In this series de firmans, he was often chosen particularly by the French ambassadors to arrange their affairs: "*In civile concorrono tutte l'altre nazione, anco I Francesi… ed a questa autorità non apportano I Turchi pur un minimo pregiudizio*" (Alberi, 1840: 443).

3 The Coded Messages of the Embassy of the Baile of Venise

In the 16th century, coded writings were favored by all the European embassies, but never so much as was the case in Venice, which had an advanced cryptographic culture, enriched both by experiences and by theories. Both became operative at the moment that the institution arose of representatives and ambassadors in every European court. The supervision of the coded writings, the protection of their invention, and the staff that was connected with it, namely the deputy-secretaries of the codes, all fell under the domain of the *Consiglio dei Dieci* (The Council of Ten.)

On the 18th of February 1564, at the very moment that the Ottoman Empire world revealed its aggressive nature at sea (the attack of Malta), and along the Balkan borders (the Empire threatened Hungary and Vienna), Victor Bragadino was elected as bailo. His mission was to engage in an energetic intervention to end the activities of the privateers of Durazzo and of La Valona.

These coded letters belong to the State Archives of Venice. The author has made a review both of the normal messages (these are the messages sent to the Senate) and of the extraordinary ones. Moreover, the author has made less exhaustive surveys in the Archives of Topkapi Sarayi.[2] For the two years concerned (the 12th of July 1564 - the 15th of June 1566), the author found 141 totally or partially coded messages. This means that, on average, every month 5 or 6 messages were send by the baile. In September and October of 1565, 2 and 3 messages respectively arrived at the Seignorial Seat: this is the moment that the siege of Malta came to an end. Some messages were in duplicate and even triplicate, sent

[2] Archivio di Stato di Venezia (ASV), Senato Dispacci Ambasciatori, Costantinopoli, filza I; filza 4D; ASV, Capi del Consiglio dei Dieci, Lettere di Ambasciatori Costantinopoli, 1563-1570, busta, n 3. And one letter, of the 30th of November 1565, from Topkapi Sarayi; this message was intercepted by the Ottoman Port.

via different ways (Villain-Gandossi, 1978: 52-106).

It is difficult to explain here (without causing too much confusion, and given space limitations) the details of the coding procedures. The author can only point out that in the coded messages one is confronted with four types of codes, according to "the method of substitution with multiple representations",

- with exponents of characters: a/a = de; a/b = e; a/c = r; a/d = ra; a/e = che; a/f = ambasciator, orator; a/h = Spagnoli; a/i = per; a/o = i; a/p = Franza, etc. It is the coded message the most utilized by Bragadino;
- with exponents of numbers: e/1 = a; O/ 6 = b; f/2 = c; l/1, t/2 = e, etc.;
- and two codes with different series of ideograms.

A repertory may contain three categories of coding unities: les characters of the alphabet; the cardinal numbers 0-9, syllables as bigrams, trigrams or polygrams that can be composed words or curtailed or crippled ones (such as *Imperator, Signor, Consiglio diX or nostr, il, quant, tant, clarissim…).* Except for these categories, there can also be elements without any signification that are mixed with the others with the intention to confuse the decoder. The elements are called 'zeroes'[3].

The decoding of the repertories is easy after the decoders have had a certain period of service. That of Bragadin does not offer a major obstacle, even less because the system is applied with an unbelievable slovenliness. The coded letters of Bragadin have a letterhead and reveal in this way the language in which they are written. Further, they are clearly dated, and so betray the place of their origin and signature. Another serious error: in an message that is dated on 27th February1566, the decoding is indicated above the coding.

The Ottoman Empire, expert in the art of cryptography, has no problem with the decoding of the letters of Bragadino.

[3] Generally, the characters A, e, i, o , n, r, and the character & are represented by two or more conventional ones. The characters of Vittore Bragadino contain almost no zeroes.

We can conclude that the analysis of the cryptographic system allows us to appreciate the level of the cultural and professional preparation of those persons who developed these codes and applied them.

4 Vocabularies and lists of concepts

The last section of this paper focuses on the origin and the rise of dictionaries. At the end of the reports of travelers we see the seminal work of dictionaries written in oriental languages, particularly Turkish, as vocabularies. For example, the booklet of Georgievitz, of Dalmatian origin, entitled *De Turcorum ritu et ceremoniis,* was for the first time published in Antwerp in 1544. It immediately was translated into German, Dutch and French.

Stefan Yerasimos (Yerasimos, 1997: 65) has very clearly made evident the division in twelve analogue regroupings of the vocabulary: *nomina coelestia, nomina temporum, nomina hominum, nomina animalium, nomina arborum et fructum*, etc., as well as the dialogues which the languages give "en situation", "*tant en faict de marchandise, qu'aux voiages et aultres traffiques"*, as Berlaimont underlines in 1551 with regard to the utility of the multi-lingual dictionaries (Quemada, 1968: 201). "Before the arrival of the big grammars and dictionaries of the XVIIth century, the voyagers of the XVth -XVIth centuries give us a familiar and daily Turkish, that is far away from the highbrow language of the court and of the lettered that we know from the ottoman texts, and it appears to us as extremely near" (Yerasimos, 1997: 49-66).

Another example is the *Vocabulario nuovo con il quale da se stessi si puo benissimo imparare diversi linguaggi, cioè italiano e gréco, italiano e turco, italiano e tedesco*. This is an anonymous work from 1574, reprinted by Milan Adamoviç (Adamoviç, 1976: 42-69).

These vocabularies are very interesting because they present us with a kind of terminology, called "terms of relations" (Furetière, 1690). They show clearly the simultaneous sharing of concepts between the Occident and the Ottoman world.

For the 16th century, these terms could be classified in such a way that they show the different lexical stratifications, and the simultaneous adoptions between the West and the Ottoman world, via that passage zone that are the Balkans, and the

mechanism of these adoptions. Such a type of research could be discerned, for the most part, by studying the stories of travelers; through an analysis of the correspondence of the bailes of Venice; as well as by reviewing the series of handbooks that have been produced that were used by the drogmans and the young translators ("*giovani di lingua*").

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x x

During the 16th century, the bailo was the Republic's resident agent at the Ottoman Court. The bailo attempted actions against the transgressions and misdeeds of the Uscochi and those people they were engaged in piracy with in the Golfo. These papers demonstrate, moreover, the key role that the Balkans, as a zone of transition, played in the geostrategic world of the 16th century.

The deciphered letters of Vettore Bragadino are very important for better understanding the years coming just before the war of Cyprus, the failure of the papal, Venetian and Spanish expedition of 1570, and the naval campaign that led to Lepanto.

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Multicultural Challenges for Democratic Order

Dragica Vujadinović & Aleksandra Jovanović

Abstract Multiculturalism has been an unavoidable dimension of a contemporary democratic order, which is primarily framed by principles of constitutional democracies related to universal equality. However, multiculturalism must cope also with the overlapping of diverse cultures and ethnicities at the global, regional and national level. The realities of multiculturalism together with international law and the culture of human rights stimulate both individual and collective rights and strives to both recognize and harmonize the differences. Constitutional democracies have to respond to the extremely delicate challenges to balance universalism and particularisms. The introduction to the text will deal with historical-political background for an emergence of multiculturalism. The second chapter will present relevant theoretical considerations about how to achive the above-mentioned balance between universal values and particularities. The third chapter will deal with multicultural nature and challenges of the European Union in that regard, while the final chapter will sum up the interrelation of challenges of multiculturalism in reality and in theory.

Keywords: • Multiculturalism • Democratic Order • Universal Values • Struggle for Recognition • Challenges •

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1 Introduction

Multiculturalism represents a dimension of the post-Second World War human rights revolution. Before the Second World War, League of Nations` group protection and minority rights discourse was in accordance with hierarchical and segregationist ideology. Racialist ideologies were widely accepted throughout the Western world and underpinned both domestic laws and foreign policies. At its extreme, this ideology resulted in Nazism and the Holocaust. The Nazi military conquests were largely grounded on the alleged violations of German minority rights in neighboring countries (Kymlicka, 2012: 2; Vujadinovic, 2016).

The post-Second World War human rights revolution included, according to Kymlicka (2012: 7), three movements, which strived to vanquish the remnants and enduring effects of these older hierarchies: "(1) the struggle for decolonization, concentrated in the period 1948-65; (2) the struggle against racial segregation and discrimination, initiated and exemplified by the African-American civil rights movements from 1955 to 1965; and (3) the struggle for multiculturalism and minority rights, which emerged in the late 1960s".

We could add to that list that a struggle for the recognition of differences among cultures was expressed through all these above-mentioned movements for equal respect and quelling of segregations and hierarchies, but it was also manifested through the so-called new social movements in the Western countries from the 1960's (in particular, for example, the rights of women and LGBT) (Wieviorka, 2005). In addition, the post-Second World War period (starting with the New Deal legislation in the USA in the 1930's) witnessed the beginning of the fiscal and social rights revolution including the introduction of the welfare systems. This movement included the right to education, the right to a pension, the right to health care for the masses, and was a part of the human rights revolution, which occurred after the Holocaust and with the proclamation of the UN Declaration on Universal Human Rights in 1948 (Kymlicka, 2012; Piketty, 2014). The above-mentioned social revolution would not have been possible, however, without the "fiscal revolution", e.g. rise of taxes from 10% in the 1920's; to 30% in the United States and 40 % in Great Britain in the 1970's; and, as high as 50% in Germany and 55% in Northern Europe in the 1980's (Piketty, 2012).

In most Western democracies, explicit state-sponsored discrimination against ethnic, racial or religious minorities had largely disappeared since the1960's and the 1970's (Kymlicka, 2012: 8).

The shift in international law towards the discourse of universal human rights was formalized with the UN Universal Declaration on Human Rights, in 1948. Thereafter, minority rights were individualized, and their protection secured by the anti-discrimination provisions.

Liberal democracies hoped that ensuring basic individual rights would be sufficient to accommodate ethno-cultural minorities, and indeed providing individual civil and political rights did help advance the goal of protecting minorities. However, in time it became increasingly apparent that while providing these basic individual and civil rights was necessary, they were not sufficient to accommodate all forms of ethno-cultural diversity (Kymlicka, 2000). Therefore, minority rights protection as a part of broader multicultural policies, coupled with multicultural policies related to the migration issue, entered the political agenda of constitutional democracies and became an important dimension of the post-Second World War human rights revolution.

Two versions of multiculturalism can be differentiated: 1. The first relates to minority rights regarding multi-nation states. Especially after the 1990's, the revival of minority rights discourse and regulation occurred when the break-up of the USSR called attention to the issue of protection of new emerging minorities in the newly established nation states (Jovanovic, 2009: 361-380); 2. The second version of multiculturalism concerns polyethnic states, whose diversity has stemmed from immigration and resultant sizeable immigrant communities. Examples of these countries are primarily Australia, Canada and the United States, which all had accepted the assimilationist model up until the 1960's (Anglo-conformity model of immigration). However, starting in the 1970's, it increasingly has come to be accepted that the assimilations model has been both unrealistic and unjust. From the 1970's to present, therefore, these countries have accepted a more tolerant viewpoint, the so-called multicultural approach, which both allows and encourages immigrants to maintain various aspects of their ethnic heritage (Kymlicka, 2000: 92).

2 The Concept of Multiculturalism

As already indicated, multiculturalism refers to the legal and political accommodation of ethnic diversity, which emerged in the West after the the Second World War as an engine for replacing older forms of ethnic and racial hierarchy with new relations of democratic citizenship, and which primarily emerged as the arena for matching principles of universalism and differences inside liberal democratic states (Kymlicka, 2012: 2).

Multiculturalism is a matter of Western democratic politics that emerged in the late 1960's-1970's in the context of the broader universal human rights revolution. In addition to the human rights revolution and its byproducts, human migrations towards the West on a global scale precipitated the need for multicultural theory and policies. It is recognized that there were four waves of post-Second World War migrations. The first wave started in the 1960's, and was comprised of so-called »economic migrations« from less developed European countries such as Italy, Former Yugoslavia, Greece, and Turkey to Germany and other wealthy Western countries. The second wave happened in the 1980's, when immigrants from previous Third world colonies (Indonesia, Algiria, Marocco etc.) came into Holland and other EU member states. The third wave of immigration occurred after the EU enlargement in 2004, and involved intra-European migrations from Central and Eastern Europe to the Western European countries. Finally, the fourth wave is related to the current mass influxes if immigrants provoked both by the wars in the Middle East and Northern Africa as well as by impoverishment and hunger elsewhere in Africa and Asia.

Multiculturalism does not mean, as sometimes interpreted, celebration of ethno-cultural diversity of customs, music, cuisine, traditions, folklore, etc. as celebrated at festivals. Reflection on multiculturalism reconsiders the interrelation of pluralism and democracy, the matching of differences inside a universalist perspective, firstly concerning minorities and collective rights (with the main questions being – how are these groups' rights related to individual rights? Can the liberal democracy allow minority groups to restrict individual rights of their members? Or, should it insist that all groups uphold liberal principles?) (Kymlicka, 2000: 90), and secondly, concerning immigrations and higher levels

of diverse population at the global level and a consequental rise in multicultural character in countries.

Reflection on multiculturalism leads us to re-examine the interrelationship between pluralism and democracy; between universal vs. particular rights; and between solidarity vs. diversity, inside Western democratic (multicultural) countries, in two respects: a) concerning internal ethnic, national, transnational minorities and interrelation with the majority and/or b) concerning different social groups with particular affiliations and their struggle for recognition of particular rights (women, LGBT population). We could notice that this second dimension, namely the struggle for recognition of particular identities, is no strictly speaking a multicultural issue, but rather focuses on the issue of the interrelationship between pluralism and universalism, and therefore needs to be considered in the realm of the interrelationship between universal equality and particular differences.

Secondly, reflection on multiculturalism leads us to re-evaluate immigrations into Western countries, from the point of view of the quality of an official multicultural policy, e.g. testing whether the policy is oriented towards assimilation and ghettoization, or towards a democratic, multicultural policy and friendly civic integration. Equally important in this context is the reaction of host citizens toward the policy, meaning either their acceptance of, and tolerance towards, cultural differences or both hidden and open animosity. The democratic multicultural policy and friendly civic integration co-exist together when institutional and linguistic integration is stimulated in a combination with allowing immigrants to maintain their own multiple cultural identities. The assimilation and ghettoization approach implies a rigid preservation of different cultural matrices on the part of immigrants, combined with an unfriendly official host state policy towards them. On the other hand, the more friendly multicultural and official approach, which is accompanied with a civic integration policy, stimulates the processes of acculturation, e.g. the willingness of immigrants to accommodate their own cultural habits to the rule of law and human rights standards.

Thirdly, reflections on democracy and pluralism also encompass a global perspective either of practical or theoretical reconsiderations regarding the interrelationship of liberal democratic orders and intolerant ones (in theory, for example, Rawls` analysis in the *Law of Peoples*, 1999; in reality - issues of human

rights violations in certain undemocratic states where inhuman traditional habits are still either tolerated or even allowed by law. For example, as in Bangladesh forcing the raped female to marry the rapist*).*

As a matter of fact, most nation states have become multicultural. Multiculturalism has become the global theme from the point of view of policy making at both the national and transnational levels, as well as an important topic of theoretical consideration. The critical practical and theoretical question is how best to solve the conflicts between liberal and narrow-mindedprinciples inside liberal democracies and globally (between liberal and intolerant states). The urgent question has also emerged in this context - how best to deal with the current uncontrollable mass migrations.

2.1 Relevant Conceptions of Multiculturalism

Different dimensions and approaches to the issue of multiculturalism do exist in relevant political thought. Some conceptions of the relation between universalism and particularism are related to the arena of both nation-states and international law (Rawls, 1999). Others are related to minority issues and collective rights. Still others consider the issue of immigration and multiculturalism from the points of view of citizenship (Bauböck, 1997; Rosenfeld, 2010) and of cultural and political inclusion (Kostakopolou, 2001). Kymlicka built the most recognizable political theory model of multiculturalism regarding both minorities and migrations and here we will consider his model especially as it pertains to the issue of multicultural policies in the Western European countries.

Our focus will be on theoretical considerations pertaining to multiculturalism based on immigrations, and accordingly, the minority rights dimension of multiculturalism will be left aside in this text.

In the philosophical realm, Rawls` contribution to the discourse on multicultural issues is of primary importance.

In his later contributions on the subject Rawls offered an authoritative normative stance, first, concerning the issues of pluralism and universalism in the

constitutional liberal state, and second, in the global context of interrelations between liberal and intolerant states.

In order to encompass the issue of plurality into his political conception, John Rawls had to depart from an "enlightenment" justification of his political philosophy in his *Theory of Justice* (1971) (a comprehensive philosophical conception of justice as fairness), and instead had to promote a new - political conception of justice. In a self-critical and self-correcting approach, he acknowledged that in a world defined by plurality, no single (comprehensive) epistemological justification of political philosophy is possible, and no single moral perspective is justifiable. More concretely, in order to open his considerations for the issue of pluralism he introduced in his later works the notions of public reason, reasonability and overlapping consensus.

Rawls developed the political conception of justice as fairness for the nation state framework both in *Political Liberalism* (1993) and in texts written before and after that, including in *The Law of the Peoples* (1999), which dealt with the issuse in the international context. Justice as fairness is a moral conception based on political ideals. The framing of political justification by "overlapping consensus" enables controversies, on the one hand, but on the other hand also provides social unity without undemocratic impositions. Overlapping consensus means the method of justification based on constitutional consensus. It connotes deliberation and reasonable agreement, and it leads to "the right" for good reason (deliberation and agreement among different comprehensive doctrines), as opposed to "the right" for the wrong reason (imposed notion of right, as based on the comprehensive conception of good and truth). (Rawls, 1993).

The moral point of view in the context of plurality can only be based on the political perspective defined by free standing normative principles, which have their foundation in intuitive ideas developed in the emerging domain of the democratic political culture of constitutional democracies.

Many authors think that Rawls's switch towards the political conception of justice was a fall from grace, and that it meant losing an uniqueness of his legacy in political philosophy without achieving anything more productive and better in a discoursive realm.

Others, however, share an opposite opinion, namely that the political conception of justice gains (contrary to a comprehensive philosophical conception) a capacity to match reality issues. With this new understanding of justice, Rawls made an effort to build a theoretical framework for matching differences, for balancing principles of universalism and pluralism inside constitutional democratic orders, and for the mutual balancing of liberal-democratic and intolerant states in an international context.

Rawls sums up the interrelationship between public reason and overlapping consensus in his text "Idea of Public Reason Revisited" (1999): "When political liberalism speaks of a reasonable overlapping consensus of comprehensive doctrines, it means that all of these doctrines, both religious and nonreligious, support a political conception of justice underwriting a constitutional democratic society whose principles, ideals, and standards satisfy the criterion of reciprocity. Thus, all reasonable doctrines affirm such a society with its corresponding political institutions: equal basic rights and liberties for all citizens, including liberty of conscience and the freedom of religion. On the other hand, comprehensive doctrines that cannot support such a democratic society are not reasonable."

Rasmussen clarifies Rawls` idea of the "overlapping consensus" in the following terms (2017: 15): "Overlapping consensus is not about trying to find a middle ground between competing comprehensive doctrines. Overlapping consensus is neither about acceptability nor is it about acceptance. Rather overlapping consensus is about the emergence within democratic culture of a set of very strong political values that cannot be overridden by comprehensive doctrines."

Regarding the question of global justice and international law, Rawls made the new shift towards international conception of public reasoning in the *Law of the Peoples*. From the beginning of this book, Rawls clarifies that Law of Peoples refers both to the "conception of right and justice" as well as to "principles and norms" of "international law" (Rawls, 1999: 3). There he tends to build the "realistic utopia", which will reconcile liberal societies with the non-liberal, but decent societies. As Rawls remarks, toleration and public reasoning function well between liberal states from the point of view of global justice; however,"(t)he real tests will come when Law of peoples confront non-liberal societies, which do not have the same political justification as liberal societies do."(Rawls, 1999: 87).

Contrary to "outlaw states", in Rawls` *Law of Peoples* "decent societies do not engage in aggressive war, they have a common idea of justice that includes a decent consultation hierarchy that protects the rights of representation, they respect human rights and they respect a system of law interpreted by judges and other officials" (Rassmussen, 2017: 126). If non-liberal societies meet these standards and principles, liberal societies can consider them as legitimate and tolerate them, and liberal and non-liberal decent societies can cooperate at the international level, e.g. in the context of global justice. Toleration towards decent societies is proposed, but not at the expense of human rights; toleration towards outlaw states does not exist, but only legitimation for forceful sanctions and even intervention.

The human rights perspective is common to liberal democratic and decent societies, but only for the so-called "urgent rights", "a special class of urgent liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide. The violation of this class of rights is equally condemned by both reasonable liberal peoples and decent hierarchical peoples" (Rassmussen, 2017: 78). Rassmussen further explains that a common human rights perspective also exists in this context: "Human rights are class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime`s internal autonomy" (Rassmussen, 2017: 79).

"Urgent rights" are justified politically, in the emerging domain of the political in the international context, where they serve as the point of convergence, of an overlapping consensus while being accepted as a standard by liberal and non-liberal societies, rather than being imposed by liberal societies (Rassmussen, 2013: 90). The advantage of this approach, according to Rawls, is that human rights in this context "cannot be rejected as peculiarly liberal or special to the Western tradition" (Rawls, 1999: 65).

Rawls`effort is *per se* valuable, but scholars have critically remarked that actual developments in international law have far exceeded the standardsRawls took into consideration, like compulsory norms, new mechanisms of control, protocols, the role of non-legal actors like NGOs, the development of emerging domain of the political beyond nation state borders, and relaxing an issue of

national sovereignity and insofar a strict differentiation between national and international context (Rassmussen, 2017: Beitz, 2011).

Here, tit could be added to that list of criticisms that Rawls failed to take into consideration the rising conflicts between liberal and non-liberal cultures and the values inside multi-culturalized liberal nation states, in spite of the fact that conflicts between non-liberal cultural habits and universal norms have been among the major issues of multicultural practice, which cry for theoretical elaboration. Multiculturalism - as being caused by globalization and mass migrations – imposes plenty of these kinds of new challenges and conflicts in the well-ordered states, and Rawls does not have a framework for reasoning with these issues. On the positive side, however, in his later works Rawls started considering much more than only earlier religious differences and post-secular conditions, e.g. he acknowledged to a greater extent the increasing significance of religious identities and conflicts in a post-secular national and international society.

Charles Taylor refers to Rawls` conception of "overlapping consensus" for the international arena in his text "Conditions of an Unforced Consensus on Human Rights" Unforced international consensus on human rights means that "different groups, countries, religious communities, and civilizations, although holding incompatible fundamental views on theology, metaphysics, human nature, and so on, would come to an agreement on certain norms that ought to govern human behavior" (Taylor, 2011: 105). He remarks that the matter of consensus should not necessarily mean the discourse of human rights, because human rights discourse has been the Western one (and other cultures and even pre-modern West would not accept the modern Western conception of individual as the societal focus oriented towards consensus, and individual human rights protection) (Taylor, 2011: 108). The matter of consensus should be certain norms of conduct (independently of different types of their justification): "One can presumably find in all cultures condemnations of genocide, murder, torture, and slavery, as well as of, say `disappearances` and the shooting of innocent demonstrators. The deep underlying values supporting these common conclusions will, in the nature of the case, belong to the alternative, mutually incompatible justifications" (Taylor, 2011: 106).

Taylor mentions a certain convergence of the Western philosophy of human rights with the Reform Buddhism and its emphasis on nonviolence (as an alternative foundation for democracy and human rights) or Gandhi's practice of nonviolent resistance. He states that if the initial consensus is achieved, later can follow the process of "mutual learning" and "fusion of horizons", "in which the moral universe of the other becomes less strange." Out of this will come further borrowing and the creation of new "hybrid forms", like as it had already occurred with Gandhi`s practice of non-violent resistance which was borrowed by the civil rights movement of Martin Luther King (Taylor, 2011: 116). Taylor also indicates, on the basis of Ahmed An-Anima's discussion of *Shari's,* that Islam has also had the capacity for a creative theological development focused around themes of mercy and compassion of God (Taylor, 2011: 120, 121), and that is also a possible convergence with Islam.

Taylor`s point is that convergence and overlapping consensus is possible between peoples adhering to very different spiritual backgrounds. An additional point Taylor makes is that the Westerners have to be able to see their culture as one among many others, not as the dominant one. "To the extent that we can only acknowledge agreement with people who share the whole package and are moved by the same heroes, the consensus will either never come or must be forced." (Taylor, 2011: 116) Otherwise, the West would not be able to understand spiritual paths of others in a way which could lead towards the same goal (Taylor, 2011: 123).

According to Charles Taylor in his book *Multiculturalism and Politics of Recognition* (1992), "multicultural pressures" are felt currently everywhere - in underdeveloped countries (tensions expand between traditional cultures and modernizing trends), in industrial countries (in Canada and elsewhere) tensions expand between different national and ethnic groups.

Taylor speaks about the paradox of democratic pluralism: "While the politics of dignity seeks to promote nondiscrimination among citizens in a `difference-blind` manner, the politics of difference often redefines nondiscrimination as requiring differential treatment based on individual and cultural distinctness" (Taylor, 1992: 286).

Taylor thinks that liberal universalism is not as innocently neutral or nondiscriminatory as it claims to be. He advocates for a democratic character of

multicuturalism, readiness for cross-cultural engagement and the rejection of any kind of Euro centrism or Western Culture imperialism.

Rainer Bauböck offers a normative conception of immigrations from the standpoint of an inclusive citizenship (Jovanovic, 2009: 57-65). According to Bauböck (Bauböck, 1997), identities in modern democratic polities (including the European Union) are shaped by multiple overlapping and changing affiliations of different kinds of social groups and associations, among which the most important are gender, sexual, political, and ideological orientation, religious conviction, as well as class, language, and ethnic culture. "In such polities, democratic representation and citizenship has to combine the traditional liberal precept of equal rights for equal citizens with sensitivity for those collective identities"(Jovanovic 2009: 61). It implies measures for "symbolic recognition" of minority or immigrant community's culture and allocation of resources for enabling these communities to develop without being subjected either to coercive assimilation or enforced segregation.

Bauböck thinks that European identity cannot be based only on the constitutional rights of Union citizens, and the task should be to expand/extend pluralism in the EU beyond the mere recognition of national identities of the Member States and to acknowledge the collective identities of sub-national and transnational minorities. Institutional measures would be related to direct EU measures that go beyond non-discrimination policy and directly allocate group-differentiated rights, material resources and political powers to specifically disadvantaged groups (Jovanovic, 2009).

The same idea of a more inclusive European polity and concept of a constructive, responsible EU citizenship has been offered by the Greek author Theodora Kostakopoulou (2001: 101). According to her, European citizenship has to be placed in a common concern for the future of a pluralist political community, shared by different groups and their engagement in the collective shaping of that common future. Formal inclusion of the third-country nationals who live and work in the EU should be regulated by a Community law concept, and without requiring them to possess the nationality of an individual Member State (Kostakopoulou, 2001: 63) In addition, political democracy has to become more participatory and inclusive, and social policy has to be more just in respect of disadvantaged social groups. She calls upon responsible citizens to fight against

tougher immigration and asylum measures which are burgeoning in many Member States. She also calls for an "ethos of responsibility and respect", and for "virtuous citizenship based on an ethic of the Other" (Kostakopoulou, 2001: 65).

Michel Rosenfeld also speaks about migrations from the standpoint of the citizenship, but in a more realistic way. He considers the issue of migrations and pluralism in the context of contemporary liberal democratic multi-national states, with differentiating functional and identitarian dimension of citizenship (based on the difference between domestic citizens with identitarian citizenship and the immigrants who have been gaining the functional citizenship). He obviously links functional citizenship to the first waves of economic migrants who have already achieved certain rights in the host country, and differentiates between them and the more recent mass immigrants with more or less illegal status. In that context, Rosenfield points to the impacts of global migrations on the status of functional citizenship: "Globalization has led to great increases in migration as people and capital move ever more quickly from country to country and from continent to continent. Immigrants who settle in a new polity and become integrated into its workforce have a strong claim to the substantive benefits of citizenship, even if they are not legally citizens and even if they lack many of the identitarian connections shared by those who are. Arguably, these immigrants are the functional equivalent of those who are already citizens, and as such are entitled to the same civil, social and welfare rights. Moreover, on some views, such immigrants should also be entitled to some, if not all, of the political rights of citizens. And, consistent with these observations, the immigrants should share in the functional attributes of citizenship in their country of adoption, even if they enjoy no identitarian bonds with the existing citizenry within that country" (Rosenfeld, 2010).

Rosenfeld remarks that this trend of decoupling between identitarian and functional citizenship did not lead towards a progressive weakening of the identitarian dimension of citizenship and the establishment of a kind of global citizenship based on personhood and functional equality rather than national origin: "Paradoxically, however, whereas globalization does accelerate the decoupling of functional and identitarian citizenship, it often leads to a strengthening rather than weakening of the latter. Although increased exposure to vast number of national identities ought to foster greater pluralism and broaden the scope of tolerance toward a wide array of different identities, it

actually often results in quite the opposite. Indeed, as immigrants from far afield project an identity that is radically different from that of both majority and the minorities within the host country, the latter may feel seriously threatened and cling more tenaciously to their own identity. In other words, the foreign immigrant with his unfamiliar and more removed culture and habits looms as a far more threatening `other` than the `other` who has long sojourned within the polity and with whom the majority culture has become familiar and fairly well adjusted. This perceived threat is compounded, moreover, when the ebb and flow of global capitalism leads to periodic surges in unemployment which threaten social welfare and which lead to xenophobic attitudes against immigrants" (Rosenfeld, 2010: 234).

As is the case with many other authors, Rosenfeld also remarks that a return to localism, the resurgence of nationalism and ethnically grounded regionalism, has been linked with the globalization and economic and political changes which cause a rise of unemployment in both Western countries and elsewhere as well as rise of immigrations into Western countries. "Under such circumstances, the immigrant may well become perceived as much as posing a material threat as an identitarian one to the citizens of the host state" (Rosenfeld, 2010: 234).

Iris Young, in her book *Justice and the Politics of Difference* (Young, 1990; Dallmyr, 1996: 278-294), tends to steer a course between and beyond the alternatives of atomistic individualism and collectivistic communitarianism, in taking seriously the existence of different ethnic and cultural groups. She departs from liberal accounts of social pluralism, in which groups figure merely as aggregates of individuals or as combinations for the pursuit of shared interests. She takes into consideration historically grown life forms and politics of difference for promoting cultural life forms and group diversity. The liberal program of the equal worth of all persons has had its oppressive aspect of homogenizing universalism, and the politics of difference is opposed to this assimilations ideal. For Young, a democratic politics of difference or democratic multiculturalism "assigns to cultural difference a transitive, transformative, and emancipatory meaning rather than confining it to an `exclusionary` mode." Radical democratic pluralism does not entail either amorphous unity nor pure individuality. "Difference now comes to mean not otherness, exclusive opposition, but specificity, variation, heterogeneity. Difference names relations of similarity and

dissimilarity that can be reduced to neither coextensive identity nor non-overlapping otherness" (Dallmayr, 1996: 284).

Fred Dallmayr alone has advocated for democratic multiculturalism. He contends that new avenues have to be explored both on an institutional level and in political reflection; that multicultural thought has to be improved and enriched; and, that intellectual imagination has to be stimulated. According to Dallmayr, democratic multiculturalism provides the need and opportunity for institutional inventiveness and flexibility (extension of individual rights to groups or collective rights, the establishment of `ethnic federalism`, the promotion of `consociational` policies, bicameralism or multicameralism in parliamentary systems (for representing different constituencies). He says: "None of these devices are free of problems or possible abuses; hence, all need to be carefully screened and calibrated to ensure the democratic character of multiculturalism" (Dallmayr, 1996: 289).

3 Multicultural Policies in the EU Member States

As already mentioned, from the late 1960's to the mid-1990's, the clear trend across the Western democracies has been toward an increased official recognition and accommodation of diversity, through the introduction of multiculturalist policies and minority rights protection inside the official politics (Kymlicka, 2012: 4; Vujadinovic, 2016).

Kymlicka remarks that most multicultural policies towards immigrants in Western countries were lacking integrative intentions and outcomes. Riva Kastoryano also remarks that in Germany, France, Great Britain and the Netherlands "multiculturalism" entered official policies in the 1980's, and had a communitarian form, meaning that immigrant ethnic groups had been regarded primarily as collective entities (Kastoryano 2009: 6). He says: "But in France, Germany, Great Britain and the Netherlands, the term multiculturalism refers, as in the United States, to the supposedly communitarian form of organisation of immigrant population around a common nationality or religion (or both) and the accompanying demand for their specific voices in the public sphere, as with ethnic minorities of African Americans" (Kastoriano, 2009: 5).

It could be added that the communitarian kind of multiculturalism differs from the pluralist/civic/integrative/inclusive type of multiculturalism; with its collectivist approach it leads to the ghettoisation of immigrant groups and to more or less failed multiculturalist policies (Kymlicka, 2009; Vujadinovic, 2016). As Kastoryano remarks: "The reactions to multiculturalism underline the paradoxes of policies that privilege culture and identities while valorizing differences in the search for equality. The accent is then on the controversial consequences of such `openness`: the fragmentation of society into communities turned in on themselves, identifications differentiated from the political community that defy a civic sense of the nation, and finally a politics of difference that, applied by the state, leads to a `clientelism` of political actors and so undermines individual free choice" (Kastoryano, 2009: 9).

It should be mentioned that France does not accept the notion of "minority" - both in the case of regional or religious identities and collective identities of immigrant populations - while it advocates a civic concept of a democratic state governed by equal rights. The French multiculturalist policy, however, gave similar results as the above mentioned communitarian approach, e.g. too weak integration and ghettoisation of immigrant groups (Kastoryano, 2009: 6).

Kymlicka introduced (together with his colleague Keith Banting) the index for practically measuring multicultural achievements in Western countries, including the EU member states. He states that these policy measures and fields represent an emblematic dimension of the post-Second World War "multiculturalist turn". There are eight relevant policy measures for implementing multiculturalism which have been indicative for constitutional, legal, linguistic and cultural treatment of immigrants: 1. The constitutional, legislative, parliamentary affirmation of multiculturalism; 2. The adoption of multiculturalism in curricula; 3. The inclusion of ethnic representatives in public media; 4. The exemption from dress codes; 5. The allowing of dual citizenship; 6. The funding of ethnic group organizations to support cultural activities; 7. The funding of bilingual education or mother-tongue instruction (in Germany it was motivated by expectations that the guest workers will go back to their home countries); 8. The affirmative action for disadvantaged immigrant groups (Kymlicka, 2012: 15).

Jovanović, in regard to the first one among policy measures noted by Kymlicka and Banting, points to the fact that the third-country nationals/immigrants who

have been residing legally on the territory of the EU member states have been mostly deprived of basic political rights. They have no voting rights in Austria, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, and Poland. Legally residing immigrants can vote at local elections, only, in Belgium and Estonia, but cannot be elected to office. All legal immigrants may vote and stand for elections at the local level (under certain conditions) in Denmark, Finland, Ireland, Netherlands, and Sweden (Jovanovic, 2009: 372).

According to the results based on the above-mentioned index, Kymlicka notices that the reduction of multiculturalist policies exists only in the Netherlands, and to some extent in Denmark and Italy. However, the strengthening of multiculturalist policies has happened during the last decade in Belgium, Finland, Greece, Ireland, Norway, Portugal, Spain and Sweden. Measured from 0 to 7, an average score of implemented multiculturalist policies in European countries shows a modest strengthening - from 0.7 in 1980 to 2.1 in 2000, and 3.1 in 2010 (Kymlicka, 2012: 16).

Kymlicka also points to the fact that this modest strengthening of multiculturalist policy measures has been concurrently accompanied with much more intensive civic integration requirements, which are related to the key roles of employment, respect for basic liberal-democratic values (including gender equality), basic knowledge of the host society`s language, history and institutions, and introduction of anti-discrimination laws and policies. The countries that have in recent years shifted most significantly in a pro-multicultural direction, such as Sweden, Finland, Spain, and Portugal, have also introduced more inclusive and less coercive forms of civic integration. Austria, Germany and Denmark have adopted an anti-multicultural form of civic integration, one which is coercive and assimilationist. Besides, these countries have never adopted multiculturalist policies in the first place. Holland abandoned a multicultural policy and introduced in its place a rigid, civic integration policy (Kymlicka, 2012: 20; Vujadinovic, 2016).

According to the results of this Index, and the normative conclusions of Kymlicka, a common and a well-balanced European multicultural and civic integration policy is necessary instead of a divergent one that leaves too much discretion to the member states. It is necessary to accept a more friendly multiculturalist and civic integration policies (Vujadinovic, 2016).

It is possible, however, to remark that the multicultural index and its positive score has been too modest and contributes to statements about failed multiculturalist policies.

Discourse on multiculturalism has become widely unpopular. The right wing politicians Cameron, Merkel and Sarkozy declared the death of multiculturalism in 2011. Already in 2008, the Council of Ministers of the Council of Europe announced the White paper with an official statement that multiculturalism has failed and that it should be replaced by interculturalism, with an explanation that the notion and policy of interculturalism will avoid failed extremes of assimilationist and segregationist multiculturalism (which also contributed to undermining of rights of individuals, particularly of women within minority communities). UNESCO also announced in 2008 the death of multiculturalism and instead advocated interculturalism (Vujadinovic, 2016).

Even the most ardent promoters of multiculturalism like Kymlicka, Modood, Meer (Kymlicka, 2012b), point to the fact that the best forms of multiculturalism are on a par with what is meant under the notion of multiculturalism (inclusive EU policy for differences in the HR rights protection framework). Kymlicka accepts interculturalism as the main political narrative – as more attractive at the moment - if it contributes to the main goal, which is the establishment of the inclusive multicultural policy combined with the friendly civic integration policy (Vujadinovic, 2016).

4 Conclusion - Current Multicultural Challenges

Multicultural policies were officially introduced starting in the 1970's and theories were being built in order to support this trend of factual multiculturalization of nation states, with an aim to enrich democratic orders in a way to be able to make a certain balance between liberal-democratic principles of universalism and individualism and rising strives for a recognition of cultural differences inside the West and globally.

Multicultural/intercultural policies have not met with enough success in spite of the "friendly environment" of human rights protection in the period of the post-Second World War human rights revolution. In the meantime, »official politics« has become less friendly towards the multicultural approach, multiculturalism has

become unpopular among Western peoples, and to make matters worse and complicate things further, there is the ever-rising pressures caused by the immigration crisis.

The development of multicultural policies was the virtue of empowering democratic principles of equal concern for each individual and policies of solidarity and inclusion from the 1970's to 2008. In fact, multicultural policy did not fulfil its aims. While the Indices measurements reflect a certain amount of progress in enacting multicultural policies, democratic multiculturalism is far from being accomplished. Constructing a sustainable and successful public policy which would successfully cope with increasing diversity (with an increasing number of religions, races, ethnicities, and cultures living together) has proven elusive. The failure to ensure that trust can withstand the pressure that diversity can pose does not mean only failure of multiculturalism, but also the failure of democracy (Lenard, 2012; Lenard & Akakpo, 2015).

Theories on multiculturalism and democracy were developed during a time period which we could consider as being friendly or accomodating towards the multiculturalism and they did offer some relevant and hopeful solutions. Unfortunately, however, these theories could also be considered as more or less unsuccessful. In addition, no theories are able to respond effectively to the complicated issues posed by the current mass uncontrollable migrations.

Democratic solutions to the current migrations cannot be found solely in the political arena. A multi-faceted approach is required: one which relies on the level of the politics of solidarity, inclusion, trust, and human rights, although liberal democratic orders should revive that political approach. It also will be necessary to simultaneously take into consideration a new approach to the global economy, with particular attention focused upon the economics of solidarity towards the devastated countries of Africa and elsewhere; upon environmental issues including devastation of agriculture because of global warming; and, upon preventing and ending wars instead of initiating them. As long as primeval issues such as hunger, unemployment, hopelessness, and indeed mere survival are perpetuated by endless wars and conflict ever new waves of immigrations from Africa, Asia, and the Middle East will not stop.

The biggest challenge for democracy is obviously related to the current uncontrollable and unstoppable mass influxes of immigrants from the Middle East, Asia and Africa to Europe. Mass immigrations not only endangers many lives, but also places at risk EU polity and its identity based on solidarity and Charter of HR. Shengen was a kind of "fortress" built to protect the EU from immigrations in the 1980's, but new forms of fortress building are much worse. European Frontier Guard is established. NATO boats are posed in the Mediterranean Sea between Turkey and Greece. Walls are massively built, Shengen is suspended, police and army guards are put on frontiers. Refugees are maltreated in Bulgaria, put into boxes/prison-like containers on the Hungarian border.[1]

The current politics of the EU and Germany towards migrants have become much less the politics of protection of human rights and human dignity, of civic integration and multicultural openness, but much more the politics of controlling migrations and of handling the pre-election campaigns in accordance with anti-immigrant sentiments. Making pronouncements that Libya and other unstable countries are secure, when they are not, has the effect of lending support to governments that support and encourage severe violation of human rights.

Pope Francis spoke about the bankruptcy of humanity in the treatment of migrants in the EU and generally. "What's happening in today's world that, when a bank goes bankrupt, immediately scandalous sums appear to save it, but when there's a 'bankruptcy of humanity,' there isn't one-one thousandth of the same amount to save these brothers who suffer so much?" (PRO ASYL Report for 2015).

New solutions are needed from the point of democratic multiculturalism and democratic politics in general. However, multicultural policies and friendly multicultural theories cannot alone solve these problems. Instead, what is required is a combined effort, like a radical shift in the global economy (for example, accepting the solidarity approach towards devastated economies in Africa and elsewhere), in environmental policies and political decision-making in Europe and the West towards the issue of migrations.

[1] PRO ASYL report for 2015, Amnesty International reports.

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Professor Silvo Devetak was born on 31 December 1938 in Gorizia, Italy. As a child of a Slovenian family, he has been for all his life marked by the existence of the state border dividing his native town and by the unstable situation endured by the Slovenian ethnic minority living under the rule of the Italian authorities. Early childhood experiences greatly influenced his later expert work. He has devoted most of his professional energy towards the research and practical work for protection of ethnic and religious minorities; human rights: and, stimulating international cooperation and integration with a goal of diminishing the effects of state borders.

The expert and professional path of Professor Devetak is turbulent and diverging. His work, even today, is distinguished by scientific integrity and

courage. He always strived to link his expert work with the analysis of current political, economic and social developments on local, regional, inter-regional and international levels. He continuously strived to utilize his scientific knowledge to both search for and advance new and just solutions to the existing problems. When he became a professor at the Faculty of Law in Maribor, Professor Devetak always enthusiastically conveyed his extraordinary knowledge in international law and understanding of contemporary developments to many generations of law students. Developing in young law students the sense for critical observation and ability to form their own personal opinions were high on his scale of teaching endeavours. He excelled on both scores.

Professor Silvo Devetak took his doctor's degree in 1989 at the University of Sarajevo with the thesis "United Nations and Minorities - New Tendencies in the Development of International Law". In 1990 he was nominated extraordinary professor at the University of Maribor and in 1995 he became full university professor for the field of International Law. Until his retirement in 2016, he was chairing the Department for International Relations and International Law at the Faculty of Law in Maribor. In 1997 the Government of Slovenia awarded him with the honourable title "Ambassador of Science of the Republic Slovenia".

In the years 1972 - 1974 and again from 1982 - 1989 he was a member of the Commission for international relations of the Assembly of SR of Slovenia and acted also as a president of its sub-commission for minorities. In this capacity, among other things, he collaborated in formulating the role of the Republics in international relations. He founded the notion of the "common Slovenian cultural space". He endeavoured to open the borders with neighbours, or the European orientation of Yugoslavia; In addition, however, he directed most of his energy to bettering the lives of Slovenian minorities residing abroad in the context of building of European standpoints and standards.

In the years 1974 - 1979 he was a counsellor to the Minister in the Federal Secretariat for External Affairs in Belgrade which was grappling with the challenging questions of how best to deal with borders, minorities and Balkan cooperation. During this same time he also was active diplomatically in actions and negotiations with Italyand the work that he commenced already in 1970 in Ljubljana. In this sense, he was a member of the delegation for negotiations for the Yugoslav-Italian agreement on the regulation of the frontier, i.e. Osimo

Treaty (1970-74). In 1975, these activities culminated in the signing, and three years later the ratification, of the Osimo Treaty that brought about final settlement of the Yugoslav - Italian border. Because he did not agree with certain solutions in this treaty, which affected Slovenia, he wrote a protest letter to the then Yugoslav and Slovenian leadership, resigned his diplomatic career and returned to Ljubljana.

He took up a post as a counsellor of the Government of the SR of Slovenia from 1978-1981. He served first as acting director (1979-1980), then director (1981-1988) and later scientific adviser (1989) of the Institute for Ethnic Studies in Ljubljana. Under the auspices of the Congress of Local and regional Authorities of the Council of Europe (CLRAE), he was in 1989 the initiator for the establishment of the European Centre for Ethnic, Regional and Sociological Studies at the University of Maribor. In 1990, he took professorship at the Faculty of Law, University of Maribor; in 1995. He was elected full professor for the area of international law.

During his professional career, he took part in numerous international activities concerning human rights, racial discrimination elimination, minority protection and cross-border cooperation. Among other things, he was the (last) president of the Yugoslav side of the Yugoslav-Italian Mixed Commission for Minorities, established according to article 8 of the Special Statute of the London's Memorandum of Understanding from 1954 (1974-1977). He was a member of the Yugoslav delegation at the follow-up meeting of the CSCE in Belgrade responsible for minorities issues (1977-1978). He was a member of the Yugoslav delegation to the First World Conference to Combat Racism and Racial Discrimination (Geneva, 1978). He was a member of the Yugoslav delegation at the 34th, 35th and 36th sessions of the UN Commission for Human Rights (between 1978 and 1984 initiator and coordinator of the UN Draft declaration on the rights of minorities which was finally adopted in 1992). He was a member of the UN Committee on the Elimination of Racial Discrimination (1976-84); a member of the Yugoslav Forum for Human Rights and the Legal Protection of Citizens, (1988-90); a co-founder of the Forum for Inter-ethnic Relations in former Yugoslavia (1990), which was aimed at preventing and peaceful resolution of the than present and expected ethnic conflict in the process of dissolution of ex-Yugoslavia; a standing expert of the Federal Union of the European Nationalities (FUEN) from 1985; a member of the expert groups for peace in Bosnia and Herzegovina and for the establishment of the international court for

war crimes (1992-1994); a member of the scientific council of the journal Regions of Europe, edition by the Association of the European Regions – ARE (Barcelona, Strasbourg, from 1990); a member of the consultative council of institute INTEREG (München, from 1993); a coordinator and President of the Programme Council of the Permanent Conference "Europe of Regions" (1997 – 2004 – Copenhagen, Odessa, Brno, Maribor, Timisoara, Sankt Petersburg); a member of the international consultative group of the Secretary General of the Council of Europe, Ms. Catherine Lalumière (1991-93); a councillor and standing expert collaborator of different expert bodies of the European Union (1993-95) and of the European Bank for Reconstruction and Development (EBRD) (1992) and the Council of Europe (1990) for minority questions, regionalism, cross-border cooperation and enlargement of the European organisations; a member of the Group of 6 Advisers of the Council of Europe on trans-frontier co-operation in Central and South East Europe appointed by the Secretary General of the Council of Europe, Mr. Daniel Tarchys (2001 - 2004); a special envoy of the Council of Europe for the assessment and enhancement of cross-border co-operation between Turkey and Georgia-Trabzon, Turkey (2004), Bulgaria-Serbia and Macedonia (2005) and Albania-Greece and Macedonia (2005).

In the turbulent days of 1991, he was the initiator and vice-president of the ad-hoc international expert committee for international recognition of the Republic of Slovenia, which was established on July 12, 1991 in the framework of the CSCE session in Genève. The committee carried out numerous international actions in support of the international recognition of the Republic of Slovenia. The committee was active until February 3, 1992.

His international engagement is marked by the foundation and chairmanship of the international non-governmental organisation "ISCOMET - International Scientific Conference for the Europe of Tomorrow". The NGO ISCOMET, which Professor Devetak chaired from 1989 to the present. ISCOMET was established as an initiative of an international group of experts, who at the time shared a common vision for the development of the inter-ethnic and inter-religious relations in the area of ex-Yugoslavia. The foundation of ISCOMET was formally supported by the Congress of Local and regional authorities of the Council of Europe (CLRAE). On the basis of the recommendation of the then Secretary General of the Councils of Europe, Catherine Lalumière, which she gave in an address to the Council of Ministers and Parliamentary assembly of the

Council of Europe: NGO ISCOMET was on 14 November 1991 on the basis of the Resolution of the Council of Ministers (72) 35 added to the list of international non-governmental organisation that enjoy consultative status with the Council of Europe. In 1998, the Governmental committee of the European Social Charter added ISCOMET to the list of those international non-governmental organisations that are, in the case of violation of the European Social Charter, entitled to submit collective complaints to the committee of international experts responsible for monitoring the implementation of the Charter in the countries that ratified this instrument. Throughout the years ISCOMET has been very active in raising awareness of issues stemming from conflicts and violations of international legal regulations and as a coordinating institution for execution of international projects and organisation of international events.

Professor emeritus Silvo Devetak has, as a result of his expert and project work, significantly contributed to the international recognition of the Faculty of Law Maribor and University of Maribor. He is a regular lecturer in different topics and post graduate study programmes abroad. He regularly is invited to deliver key-note speeches to various international gatherings, discussions and events. His bibliography (even with numerous not listed entries), embraces 594 units, among them 53 original scientific or review articles, 63 professional or popular articles, 55 published scientific and professional conference contributions, 19 independent scientific component parts or chapters in a monograph, 5 scientific or professional monographs (as author or co-author), other entries refer to mentorship, contributions at conferences at home and abroad, studies, editorial ship, interviews, contributions and feedbacks to current issues in society and politics.

Professor Devetak has in his personal capacity been coordinating and taking part in different international incentives and events. Over the last 20 years he has coordinated around 15 large international projects under various programmes of European Union and Council of Europe; he has delivered numerous invited lectures to the scientific meetings and universities all over the world. One of his priorities is to devote his work to enhance cooperation of the European Union with its neighbouring regions. His emphasis has been on the eastern neighbouring region, and in recent years he has focused his attention on studying and seeking solutions to the challenges of migrations whereby the protection of human rights and human dignity must be in the forefront of all endeavours.

Currently (2017 - 2020) he is coordinating the activities for the Slovenian part in the project "Snapshot from the borders - Small towns facing the global challenges of Agenda 2030", which is being coordinated by the community of Lampedusa and Linosa (Italy).

Professor Devetak today remains a critical observer of the contemporary world and actively continues his scientific, expert and project work and he stays faithful to the principles that guided him all his life; these are the principles of preserving peace and co-existence, cooperation, equality, multi-culturalism and protection of the rights and equality of each individual irrespective of her/his ethical origin, religious belief, age, gender, sexual orientation, social position, physical capacity or any other personal characteristic.

University of Maribor Press

Review

Full prof. dr. Ludvik Toplak

The life opus of a diplomat, scientist, lawyer, university professor, in honour of his 80th birthday, is included in a comprehensive monograph of prof. dr. Silvo Devetak. It is entitled From an Individual to the European Integration, Discussion on the Future of Europe, in a total volume of 584 pages, in 28 scientific papers. I would like to thank the editors, prof. dr. Suzana Kraljič and Mrs. Jasmina Klojčnik for a meaningful and systematic selection of texts by top experts and scientists from Slovenia and abroad. Scientific contributions cover the work of prof. Devetak, both regarding legal, political, economic and security, especially international legal and constitutional aspects of the research work of prof. Devetak. Articles are published in the alphabetical order of authors, so every article needs to be evaluated separately.

Paolo Bargiacchi, Elezio Benedetti, Jan Berting, and Winfried Böttcher specifically address the issue of contemporary migration, security, organizational and legal issues in Europe. In his discussion, Bojko Bučar specifically analyses the political aspect of the accession of Turkey to the EU in the context of EU enlargement. Erhard Busek, with exceptional political and diplomatic experience, analyses the impact of crises on legal and political changes in the society. Gian Luigi Cecchini analyses the changes of international law in the context of the First World War. Giorgio Conetti analyses the impact of law and politics on the Italian school of international law. Krzysztof Czyzewski analyses intercultural and interreligious issues from an ethical, legal and social point of view. Rodoljub Etinski analyses the European Court of Justice case law on EU law and international treaties (EU Law and International Treaties). Karsten Fledelius examines the development of the EU from the Council of Europe to the Europe of Regions in perspective, especially in the Scandinavian perspective. Sergei Flere analyses the case law of the European Court of Human Rights in the field of family and related legal issues. Laris Gaiser deals with the issue of subsidiarity, one of the most delicate issues of the practice of the European institutions and the weakness of legal theory, under the heading of the EU Institutional Frailty.

Janja Hojnik analyses the conflict of interest in the internal European market, connected with national entities. Vera Klopčič speaks about the protection of human rights and minorities while respecting cultural diversity. Rajko Knez deals with legal issues in the area of environmental law, which requires international regulation. Suzana Kraljič addresses the legal issues of the Roma community in Slovenia related to education, employment, health and living conditions, also in the light of international law and international institutions.

Maksim Mokayev addresses the issue of modern trends in the local community development and local self-government in Russia. Vladimir Ortakovsky discusses one of the most current political challenges of contemporary Europe under the title of Refugee Crisis in Europe and the International Law, discussing concrete practices and proposals for future regulation, taking into account the human rights of migrants. Antonietta Piacquadio addresses various legal issues concerning the protection of cultural heritage in war conflicts. Andriy Shkolyk analytically compares the development trends of administrative law and administrative procedures in Ukraine and the EU. Augusto Sinagra deals with the role of law in a democratic society and the protection of human rights in the

context of mass migration. Janusz Slugocki deals with administrative and legal issues of cultural heritage in documents of international organizations. Carmen Thiele addresses issues of a minority as an EU value that is unduly regulated by European documents. Sara Tonolo deals with the protection of human rights, the elderly and people with special needs.

Matjaž Tratnik deals with the issue of limiting the autonomy of individual countries with international law and EU law. Christine Villain - Gandossi addresses the question of the legal status of individual entities during the Ottoman Empire in the Balkans. Dragica Vujadinović and Aleksandra Jovanović discuss the legal political issue of multiculturalism and democratic regulation.
All articles and each contribution separately are equipped with all the necessary academic scientific apparatus and categorized as independent. All published discussions represent a set of legally relevant, mainly international legal issues in Europe, confirming the current development and indicating trends based on the analysis of the legal practice, and pointing out legal solutions to the "de lege ferenda". The entire collection from an individual to the European integration, Discussion on the Future of Europe, presents the framework of the work emeritus prof. dr. Silvo Devetak.

University of Maribor Press

Review

Full prof. dr. Vesna Rijavec

Concerns regarding the future of Europe span a wide variety of issues. This proves especially true in today's world where systemic defiance within the EU grows ever stronger and efforts for and against globalisation present a challenge in both policy and law. The present contribution successfully tackles multiple aspects of said topic. As already apparent from the title "From an individual to European Integration", the contribution is centred on a vertical understanding of the problem, covering issues which pertain to individuals or groups of individuals on one edge of the spectrum, all the way up to questions of abstract and institutional nature on the other.

The reader is presented with a plethora of contributions. At first sight, they might not appear logically systemized, however, the sheer scope of the research topic

necessitates a fragmented outcome. It must, however, be stressed, that the diverse nature of contributions does not take away from the quality of each contribution in the slightest. The distinct contributions are each in their own right valuable professional and scientific works. They are based on the use of appropriate (legal) methodology and terminology, featuring a classical and logical structure, making use of graphs and formulae where necessary. Each contribution is backed up by citations and footnotes. While the former connote the veracity of the respective author's conclusions, the latter are meant to expound on select issues and are used sparsely, avoiding superfluous annotations. It is observable, that all contributions make appropriate use of citations and footnotes, appointing the reader to tangent scholarly articles. This holds true even for contributions with intangible subject-matters (e.g. exploring value-based systems). It is also worth pointing out, as a testament to the overall professional quality, that contributions are rich in case law and legal sources. Finally, all contributions also include a concise and full list of easy-to-identify references.

Most of the contributions deal with distinct issues of EU and human rights (ECHR) law, e.g. internal market law, family law, environmental law, minority rights, administrative law, procedural law etc., whilst several contributions explore venues of policy and history as well as philosophical dimensions of the respective issues. This is only logical, taking account of the fact that integration in Europe has become a matter of fierce public discourse, swerving opinions in different Member States on a variety of topics. Policy logically precedes the enactment of law and future challenges are not all confined to 'legalistic' endeavours, but are very much conditioned with social and natural phenomena (e.g. environmental changes). The amalgamation of contributions reflects the relationship of policy and law. Unsurprisingly, several contributions look beyond the state of play and anticipate or postulate what ought to be (*de lege lata*). This further provides added value to the research topic.

In conclusion, a holistic approach to the title's topic is arguably impossible to achieve. This also helps understand the apparent lack of systemisation between the topics. However, any interested reader will find solace with the fact that the contributions presented herein are all highly topical, address an enormous amount of issues (arguably more so than the majority of comparable academic works), provide a look ahead present developments and beyond mere legalistic terms, and follow an internally logical, consistent and methodological approach.

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