

# Prospects for the European Union: Borderless Europe?



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**Prospects for the European Union:**

Borderless Europe?

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## **PROSPECTS FOR THE EUROPEAN UNION:**

**BORDERLESS EUROPE?**

BUDAPEST, 25–26 OCTOBER 2013

**CONFERENCE PROCEEDINGS**



Institute for Cultural Relations Policy

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## FOREWORD

The third international conference organised by the Institute for Cultural Relations Policy (ICRP) was hosted by Kodolányi János University of Applied Sciences in October 2013. The keynote speakers of the event included diplomats, politicians, academics as well as representatives of the Hungarian Government. During the two days of the conference more than 20 speakers held their presentation.

The lectures and presentations of the “Prospects for the European Union: Borderless Europe” conference have certainly broadened its audience’s knowledge about the institutions of the European Union, migration and accession policies as well as politics, economic policies and minority issues.

Among the speakers were prof. Péter Balázs (former Hungarian Minister of Foreign Affairs and former European Commissioner holding the Regional Policy portfolio), prof. György Schöpflin (member of the European Parliament, member in the Parliament's Constitutional Affairs Committee and Foreign Affairs Committee), H.E. Dr. Gordan Grlić Radman (Ambassador of the Republic of Croatia to Hungary), Dr. László Dux (Director, Department for European Union Justice and Home Affairs and Enlargement, Ministry of Foreign Affairs, Hungary), CSc. Dr. habil. Gyöngyvér Hervainé Szabó (Scientific Director of Kodolányi János University of Applied Sciences) and Martina Maczalova (EU Regional Coordinator of OCEANS Network).

Through their lectures the participants were introduced to various approaches, notions and theories as well as practices regarding different researches on the future of the European Union, while the high quality presentations of guest speakers proved how diverse thoughts are in connection the prospect of the EU.

Therefore, we are grateful to all participants for their contributions to the conference, wishing success to the presenters in their future researches, and hoping that the conference proceedings and the interviews made with the keynote speakers will serve as resources for researchers as well as for a wider audience.

Finally, the editor would like to thank the members of ICRP Advisory Board for assistance and the sponsors for supporting the event and the proceedings.

This proceedings is issued on the responsibility of the Chief Executive Officer of ICRP Geopolitika Kft. Views expressed are those of the authors and do not necessarily reflect those of the Institution or its members.

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Conference website | [http://culturalrelations.org/Pages/borderless\\_europe.html](http://culturalrelations.org/Pages/borderless_europe.html)

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## SECTION I

### ECONOMIC PERSPECTIVES OF THE EUROPEAN UNION

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#### IS THERE A WAY OUT OF THE EURO?

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**Key Words:** *financial crises, Europe, eurozone, European Union, international economic relations, capitalists & financiers, economics, research*

#### **Abstract**

*In 2012 the European monetary crisis continued to challenge the health and very existence of the Eurozone and also threatened to derail the very fragile world economy in its efforts to recover from the 2008 financial crisis. European leaders met repeatedly to cobble together rescue plans for Greece, Italy, and Spain. Though European leaders continue to publicly pledge that they will not allow any failure of the EMU. Other observers have questioned whether the European monetary union in its current form and current membership will survive into the future. The prospects for 2013 and beyond do not look much better. The Nobel Peace Prize Committee has stated that: "The Union and its forerunners have for over six decades contributed to the advancements of peace and reconciliation, democracy and human rights in Europe. The EU is currently undergoing grave economic difficulties and considerable social unrest. The stabilizing part played by the EU has helped to transform most of Europe from a continent of war to a continent of peace". The world famous investor, philanthropist and political contributor, George Soros speaking at the World Economic Forum in Davos, Switzerland (January, 2012) noted that "the euro is now here to stay". He also commented that the immediate crisis may be over but there is no time for complacency and that "austerity is not what Europe needs right now". This essential argument seems to pit northern and southern Europe against each other.*

\* \* \*



**THE DANUBE CHAMBERS OF COMMERCE ASSOCIATION (DCCA) –  
A NEW INTERNATIONAL ORGANISATION TO OVERCOME THE  
ECONOMIC CRISIS AND CREATE WELL-BEING IN THE DANUBE BASIN**

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**Key Words:** *economic chambers, international organisation, sustainable development, competitive economy, Central Europe, Danube Region, exchange of experience and information, development of human resources, European Union, lobby*

**Abstract**

*The Danube Chambers of Commerce Association is one of the newest international organisations in the Danube Region. According to its Statute the purpose of the DCCA is to develop sustainable competitiveness of the economies connected by the River Danube. Members of the organisation are economic chambers from economically diverse countries: Germany, Austria, Hungary, Serbia, Croatia, Romania and Bulgaria. This presentation gives an insight into the strategy, work-plan, achievements and future plans of the DCCA. Established in the summer of 2010, the DCCA wishes to be one of the new dimensions of cooperation, which aims to enforce the common representation and advocacy of the enterprises operating and entrepreneurs living along the Danube. In the last two years many attempts were made to create a single platform of economic opportunities and to enhance economic cooperation in the Danube macro-region especially to overcome the economic crisis. Is it possible to react together to the open questions and remaining challenges in this region, which includes not only some of the most affluent areas in Europe but some of the poorest regions of the continent as well. How can old and new EU-members and non-member states work together to promote regional and cross-border cooperation for further economic growth. In this study we will try to answer these questions and show the importance of the Danube Chambers of Commerce Association to contribute to the development of the Danube region.*

\* \* \*

**1. Introduction**

The Danube is the second longest river in Europe after the river Volga, so it has a decisive role in the economy and history of the people living in this area. Within the European Union, the Danube Region gives home for more than 115 million citizens, and at the same time it is

one of the most important economic areas of the EU.<sup>1</sup> In the course of history several sweeping plans were drawn up for a tighter cooperation between the countries of this area, even for their confederation. Beside this, the first traditional international organisation in Europe was formed in connection with the river Danube: the European Commission of the Danube, which was founded on 30th March 1856.<sup>2</sup> Recently the demand for tighter coordination between the area's economic, social and ecologic processes was drawn up likewise. During the European Council's June 2009 session, 8 EU member states and 6 candidate and third party states respectively requested the European Commission to elaborate the European Danube Strategy, similarly to the Baltic Sea Strategy. The aim was to determine the Danube Region as a common research and development area during the new EU budget period starting from 2014. On this basis, during the 2011 Hungarian EU presidency they managed to elaborate the European Union's Strategy for the Danube Region (EUSDR). (Szatmáry, 2010) The region itself was defined broadly by the EU: 14 states were involved (Germany – Baden-Württemberg and Bavaria – Austria, Slovakia, Czech Republic, Hungary, Slovenia, Croatia, Serbia, Bosnia and Herzegovina, Montenegro, Romania, Bulgaria, Moldavia, Ukraine). Out of them there are currently 9 EU member states, 3 are member states candidates, 2 are defined as third party states. In the realisation of the strategy, the chambers of commerce of the area have taken a serious part.

European Union's Strategy for the Danube Region became the macro regional development and action plan for the states and regions inherent to the Danube's drainage basin. The drafted aims are based on 4 pillars: the connection of the Danube region with other regions, protection of the environment, welfare, well-being and economic development, the strengthening and interconnection of the region's institutions. (Danube Region Strategy, 2011) Out of these general aimed pillars, the chambers of commerce, who have a role in the region's economic development, can contribute to all of them with their institutional abilities. The Danube is a sort of symbol in this strategy: it is not only a strategy for the development of the river itself, but the connection of the joint interests of the states along the river's way. The chambers of commerce can achieve a leading role in this process, as the unification of economic interests will be an important part the strategy.

The chambers of commerce have a long history in the region. The joint forces of different professions and social groups, their concordation and aggregation, and their participation in the guidance of the society and the economy is a fundamental part of the West European modern day social market economy. Accordingly, the chambers of commerce nowadays are situated in the mesosphere of the societies, between the micro-sphere of the citizens and the macro-sphere of the political decision-making. Their main duty is the bilateral mediation; thereby the interaction (cooperation or confrontation) with the government is constant.

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<sup>1</sup> The study was written in and sponsored by the project "Társadalmi konfliktusok – Társadalmi jól-lét és biztonság – Versenyképesség és társadalmi fejlődés" (TAMOP-4.2.2.A-11/1/KONV-2012-0069).

<sup>2</sup> Besides the European Commission of the Danube (Commission Européen du Danube) which had authority over the mouths of the river, a separate commission, the International Danube Commission, was authorised to control commerce and improvements upriver beyond the Danube Delta. But it was organised only after 1918. A new Danube Commission was established after 1945 by seven countries bordering the river, replacing the previous commissions; it is concerned with the maintenance and improvement of navigation conditions of the Danube River, from its source in Germany to its outlets in Romania and Ukraine, leading to the Black Sea.

In the evolution history of these organisations, during the 19th century, the principles of self-government and subsidiarity already appeared which are today's preferred idea in the European Union. The chambers of commerce regarded themselves as organisations set up by the law (and today we can still partly assess this about them), which manage their own affairs independently and in an autonomous way, represent the interests of their members, and take over certain tasks from the state administration concerning their own professional field.

Two factors had contributed significantly over the region's chamber development: the centralised French state administration (the new civil service) and the philosophy of Lorenz von Stein, the local self-government principle that evolved from him (in his works *Lehrbuch der Volkswirtschaft*, 1858 and *Lehrbuch der Nationalökonomie*, 1887) and had a deep impact on the development of chamber organisations. (Fritz, 1896; Strausz-Zachar, 2009) The chambers of commerce that evolved on the European continent were created by the central authority; their powers, tasks, and responsibilities were granted by the monarch's decree, later by the law. Generally they were organised with a compulsory membership system. Their main tasks were to assist with recommendations and petitions the preparation of laws concerned with the represented groups, as well as the representation of the given economic-professional groups' interests towards the government and the society. (See in detail: Strausz-Zachar, 2008.)

The chambers organised according to the continental model became such legal interest groups, which incorporated the entire economic-professional community. They maintained a systematic connection with the government, so by this way they influenced the law creation process and the development of the society as well. Beyond this, they regularly received and committed themselves to tasks regarding the professional civil service, relieving the central government.

We can classify the European chambers as commercial and industrial chambers, craftsmanship and agricultural chambers, as well as the employee (labour) chambers in certain European areas. These organisations deal with the internal interest-equalisation and interest representation work, and they also deal with the easement of production and distribution difficulties, with the promotion of internal and external trade relations, with issues of training and professional consultancy, and they have taken over certain state administrative functions as well. (Kluth, 2005)

The oldest, "so-called traditional activities" (Dunai, 2007. p.17.) of the chambers of commerce include the management of broad international cooperation. The Hungarian supreme authority, the Hungarian Chamber of Commerce and Industry (HCCI) has a determining role in national economic development programs; establishment of economic diplomacy; formulation of economic foreign strategy; furthermore it has an essential role in internal market protection and economic regulation. The HCCI since 2004 has become a full member of the European umbrella organisation for chambers of commerce, the

EUROCHAMBRES<sup>3</sup>, and beyond this it is in contact with nearly 220 chambers of commerce worldwide.

In the relationship with foreign chambers of commerce, an important professional link is guaranteed by company profiles, business meetings, trade and tariffs, industrial intellectual property protection and the compliance with ethical codes. (Dunai, 2007. p.18–19.)

*The chambers of commerce in the institutional system of economic planning  
(according to Temesi, 2010)*

<b>The direction of the activity outside the chamber</b>	<b>Duration of the activity</b>	<b>The main place of the activity in the chamber</b>
Macro sphere institutions	1) Mediation for power, political organisations, to the government, with special regard for the economic guidance, economic policy, economic planning	Elected officials and chamber directors
	2) Representation of interest, assertion of interest The recognition of the interests of the (member) enterprises, and their constant visualisation	Officers and leading employees
Micro sphere, enterprises	1) Civil service tasks Activities according to the law and regulations	Chamber experts and leading employees
	2) Services Maintain, attendance, activities helping the constant functioning, especially: “business development” within this for example the enterprises-development (unique, it deals with certain enterprises), economic development (macro and mezzo levels, as well as collective), and other special development activities (for example: innovation, trade, area-planning etc.), education, professional training, development of international relations	Chamber bureaucracy

## 2. The formation of the DCCA and its organisation

During the 20th century, the region’s chambers of commerce were in a variable intensity relationship with one to another. There was a time after WWI. when all connections had broken. During the Cold War the soviet dictatorship abolished most of the chambers of commerce. After these events, the formation of the Danube Chambers of Commerce Association – DCCA – was an important chapter in the European institutional macro-regional cooperation.

<sup>3</sup> EUROCHAMBRES is the Association of European Chambers of Commerce and Industry. This association is the largest business representative organisation in Brussels (20 million companies, 45 members, a network of 1700 regional and local Chambers). The direct members are national associations of Chambers of Commerce based in the 28 EU countries, EFTA countries, and some Eastern European, Western Balkans and Mediterranean countries.

The creation of the alliance was being planned for several years, but for the implementation, the necessary kick was provided by the adoption of the Danube Strategy. (Kiss, 2011) The founding of the organisation occurred in June 2010 at Budapest, where the chambers of Germany, Austria, Slovakia, Hungary, Croatia, Serbia, Romania, Bulgaria decided to cooperate with each other. The host of the event was Kristóf Szatmáry, president of the Chamber of Commerce and Industry of Budapest, who was also elected to be the first president of the organisation. The vice-presidents of the organisation, according to the founding assembly, are delegated by the Vienna and Belgrade chambers of commerce (namely Brigitte Jank and Dr. Milan Janković). The official language of the initiative became English, although Otto Salze from the chamber of Ulm proposed to accept German as second official language. This proposal was not supported by the founding members. (See: Memorandum of the Inaugural meeting, 2010)

The purpose of the DCCA is to coordinate the functioning of the chambers in the Danube region with supranational instruments, especially in favour for the implementation of the Danube Strategy. The organisation aligns to the traditional mesosphere role of the chambers: it intends to act as an intermediary between the civilian initiatives and the decision making organs of the Danube Strategy. This is why at the first assembly after the Budapest founding they have given high priority for the collection and summarisation of the proposals and economic stimulus plans related to the Danube Strategy. (Compare with: Minutes of Meeting. DCCA General Assembly, 10th Sept. 2010.) The first assembly was held in Pécs, the European capital of culture, where they have adopted the final constitution. This was signed by the representatives of the chambers of Budapest (BKIK), Győr (GYMSKIK), Pécs (PBKIK), Vienna (Wirtschaftskammer Wien), Linz (Wirtschaftskammer Oberösterreich), St. Pölten (Wirtschaftskammer Niederösterreich), Ulm (Industrie- und Handelskammer Ulm), Passau (Industrie- und Handelskammer Niederbayern), Belgrade (Privredna Komora Beograda), Novi Sad (Regionalna privredna komora Novi Sad), Osijek (Hrvatska gospodarska komora, Županijska komora Osijek), Bucharest (Camera de Comerț și Industrie a Municipiului București) and Timisoara (Camera de Comerț, Industrie și Agricultură Timiș), and the chamber of Ruse indicated that is intending to join (Русенска Търговско-Индустириална Камара). (Szatmáry, 2010) Later the chambers of Szeged (CSMKIK), Székesfehérvár (FMKIK), Varaždin (Hrvatska gospodarska komora, Županijska komora Varaždin), Bratislava (Bratislavská regionálna komora SOPK), Arad (Camera de Comerț, Industrie și Agricultură a județului Arad) and Constanta (Camera de Comerț, Industrie, Navigație și Agricultură Constanta) also joined the organisation. (DCCA Brochure, 2012) According to the resolution of the assembly, the yearly membership fee of the member chambers was set in 800 Euros. Member chambers paying the membership fee can delegate 2-2 members into the assembly. The assembly elects the presidency of the organisation, which controls the tasks of the organisation between the assemblies. During the year 2013, two additional Bulgarian chambers signed the constitution and joined as members of the DCCA: Vratsa (Търговско-Промислена Палата – Враца) and Vidin (Видинската търговско-промишлена палата).

### 3. The DCCA's Strategy

The organisation has already started the process of its strategy and its short-term action program in 2010. The strategy is focused mainly on 4 principles and 9 action areas. Basically all of these areas are connected to the aims and priorities of the Danube Strategy. (See: Danube Chambers of Commerce Association Strategy, 2010)

The first principle includes the participation in the joint development of the goals of the Danube Strategy. Throughout this cooperation access to available EU funding for participating chambers will be possible; enabling cooperation between DCCA-members. The DCCA is working that new sources will be incorporated into the Danube Strategy's program after 2014, which can be used by the chamber of commerce members in projects initiated by them. In addition, the priority of the Association is to initiate necessary research to explore potential areas of cooperation between its member enterprises, and also to find out obstacles hindering the exploitation of those business opportunities. (Kiss, 2011)

The second principle of the DCCA Strategy is about the flow of information, about integration and cohesion. To initiate projects and trade between the members of the chambers it is important to ensure the proper flow of information as a central element. "The tool of this can be a modern, internet-based 'business Wikipedia', which can be edited by the membership, and just as where the DCCA can publish its own traditional professional publications." (Kiss, 2011, p.50) Creating that kind of B2B-plattform ("business to business" network), which is also included here, can help for setting up an intensive network of contacts between the participating chamber members. This includes the organisation of exhibitions and trade fairs in the macro-region, and furthermore the opportunities given by the social networking. Different clusters and research networks are also divided into this principle. (See: Danube Chambers of Commerce Association Strategy, 2010)

Another action area of the second principle is the propagation of knowledge transfer, education and business culture. The cultural differences are very strong in the region, in this case the cooperation crescendo helps for the business cultures development and it is impressing into the integration direction. In the field of education the student exchange programs and the successful training methods (best practices) may be referred as a serious development. (Kiss, 2011, p.50–51.) On the other hand the situation of the education of foreign languages cannot be ignored either: one of the biggest issues of the Danube cooperation is the mutual high-level knowledge of the region's languages. (Fekete, 2011)

The fourth action area of the second principle is the participation in different civil society's negotiation forums. With the help of the chamber members, civil initiations can appear in the economic interests. In accordance with the role of the mesosphere of the members of chambers, the DCCA would like to work like a moderator between the initiations of the civil society and the Danube Strategies decision-making bodies. (Danube Chambers of Commerce Association Strategy, 2010)

The third principle is a strategy for environment, commerce and tourism. In this case the advantaged mission for the DCCA is participating in a new type of collaboration of the

Danube Strategy, namely in the “Danube macro-regional program”. In connection with this point the DCCA is pushing for better exploitation of the single market. The DCCA has an important role in investment and trade enhancement and it helps for the formation of the common venture, and the evolving of common standards. (Kiss, 2011)

The fourth principle of the DCCA Strategy is the implementation and promotion of the efficient representation of interests, common aims and projects. If DCCA wants to effectively launch the above mentioned strategic paths, “it has to become a major advocacy association, working with the proper economic weight in order to successfully lobby for the allocation of development resources in Brussels, during the formulation of EU rules and regulations, and at the designation of infrastructure improvements.” (Danube Chambers of Commerce Association Strategy, 2010) The alliance has started yet this advocacy work in 2010 before they adopted the eventual form of the Danube Strategy.

#### **4. DCCA’s activity in the everyday life**

During the first general assembly a proposal was made in order to facilitate the economic recovery of the macro-region: the first mission for the members of DCCA is to assert the bilateral government relations. Moreover, a demand was formalised about the necessity to open an office in Brussels for the above mentioned successful lobby-activities formulated in the Strategy. Until the beginning of this proposal, every chamber tried to increase their influence throughout their own representation in Brussels. (Minutes of Meeting. DCCA General Assembly, 10th Sept. 2010.) The common office was opened successful in 2013 in Brussels: the Chamber of Commerce and Industry of Budapest, the Hungarian Industrial Association, and the Public Benefit Non-profit Ltd. have created together the DCCA’s common advocacy in Brussels.

From the first year the most important initiation of the Association has been to create an information network which is related of the business developments. This would help for the small-and medium-sized businesses to see through the Member States’ tax systems, just as it would help for the legal and economic knowledge transfer network would assist the company cross-border businesses. Behind this proposal, the hurdle of the Danube business cooperation is the lack of the information.

The other pursuit of the DCCA is to transfer the dual training system which has been developed successfully in German and Austrian territories for the rest of the region’s countries. If the formation of apprentices would be in line with labour market needs, it could help to exit from the economic crisis. (Magyar Hírlap Online, 1st March 2011.) For doing this during the first year of the operation of the chamber alliance, several conferences were held in Hungary (Budapest, Győr, Szeged). The SEeDual program, which was presented under the South-East European Transnational Cooperation Program, was a standout momentous during the Association’s progress. During this program 9 chambers submitted a common application: Vienna, Budapest, Győr, Pécs, Bucharest, Timisoara, Ljubljana, Osijek and Belgrade. The aim of this project to investigate the Austrian and German structure of the dual training, to

expand of its assets and based on these issues creating proposals to the members of DCCA. All of these proposals may lead to a lay, which helps for the successful reception and implementation of the dual training model into the economically weaker regions. The first step of this progress is that they are following the German and Austrian model of this dual training system in 12 selected occupational and professional lines in Hungary. If it is successful, then the aim is to expand this model for 200 occupations and professions in the rest of the countries! (Compare with: DCCA – SeeDual Brochure)

While in 2011 the Ulm chamber would have hosted the DCCA annual meeting, because Hungary took over the presidency of the EU Council and because the Hungarian presidency program was based on the Danube Strategy, the general meeting was held in Budapest again in July 2011. The discussion has made it clear that the chambers should be in contact with the national coordinators of the Danube Strategy and with this they should try to increase their lobby-activities for attaining their common aims. The key element of the Danube Strategy is the number 8 priority for the chambers, which means to support the competitiveness of enterprises.<sup>4</sup> The Baden – Wurttemberg area of Germany and Croatia are responsible for doing the reporting and coordinating functions of this element. For this reason, the furtherance of the Croatia's join to the EU has begun the most important priority for the DCCA. (Minutes of Meeting. DCCA II. General Assembly, 9th June 2011.)

Likewise the member states wanted to strengthen the overall integration of the Western Balkans, especially the furtherance of Serbia and Montenegro's accession to the EU. As a result of these thoughts the DCCA started its own project of the Western Balkans. Its purpose is the redevelopment and stabilisation of the non-EU member states through the joining of forces of the region – renovation of “the process of Szeged” (“Szeged + process”): contributing for the consolidation of the stability, for strengthening the confidence and security, for creating democratic societies, strengthening the interregional connections, for transferring Hungary's integration of experiences. (See for further details: Szeged Biztonságpolitikai Központ, 2011)

Another important strategic task is that the DCCA should launch researches for expanding the opportunities for the cooperation of member enterprises. These research projects will also

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<sup>4</sup> The signatory states have formulated 11 joint priorities. To achieve all of them, two countries were nominated for each priority as liable for the implementation of them:

P1: Mobility, development of inter-modality, inland waterways (responsible: Austria and Romania), railways, motorways, air transport (Slovenia, Serbia, Ukraine is interested)

P2: the support of sustainable energy use (Hungary, Czech Republic)

P3: to promote culture and tourism, people to people contact (Bulgaria, Romania).

P4: to restore and maintain the quality of waters (Hungary, Slovakia).

P5: to manage ecological risks (Hungary, Romania).

P6: to preserve the biodiversity, landscapes, the quality of air and soils (Germany - Bavaria, Croatia).

P7: to create a knowledge-based society with the help of research, education, and information technology (Slovakia, Serbia).

P8: to support the competitiveness of the enterprises (Germany – Baden-Wurttemberg, Croatia).

P9: to invest in human resources and skills (Austria, Moldova).

P10: to broaden the institutions and strengthen the collaboration between them (Austria - Vienna, Slovenia).

P11: joint collaboration to tackle challenges posed by security issues and organised crime (Germany, Bulgaria).

Compare with: Danube Region Strategy. Hungarian Presidency. [online] Available at: <[http://dunaregiostrategia.kormany.hu/download/5/a9/10000/Duna\\_Regio\\_Strategia\\_sajtoanyag\\_0.pdf](http://dunaregiostrategia.kormany.hu/download/5/a9/10000/Duna_Regio_Strategia_sajtoanyag_0.pdf)>



help to find out obstacles hindering the exploitation of business opportunities in the Danube area. During the researches the local higher educational institutions of the concerned areas can be involved, just as the professional collaborations between universities of the Danube region. (Fekete, 2011)

The DCCA – under the direction of the Vienna chamber – helped to start the events of the Danube Region Business Forum in 2011. During the businessmen-meeting the aim is to bring together companies, especially small and medium enterprises via B2B meetings as well as the private sector with academia and the public sector of the Region to stimulate growth, innovation and competitiveness in the Danube Region. During the event the enterprises and political-scientific organisations arriving from the countries along the Danube River had a special opportunity for the formation of cooperation. (Minutes of Meeting. DCCA III. General Assembly. 11th July 2012.) So far the topics were the environment-protection technologies, the development of information and communication technologies, and the implementation of the Danube Strategy aims. Furthermore, in 2012 the first financial meeting was also held in Vienna (1st Danube Financing Dialogue), where the issues and the financial relations built for the micro, small and medium enterprises were discussed.

According to the constitution the annual assemblies must be held in different chambers following the Danube's stream direction. However in the last few years, this rule was not applied. The first assembly was held in Pécs (the cultural capital of the EU), the second in Budapest (EU presidency), and in 2012 the assembly was located in Bucharest. The investment forum between the DCCA and China was held here as well, which gave a crucial possibility for network and relationship-building for the organisation. This was preceded by the first businessmen meeting, which was held in Vienna with the Latin American region. ("Latin-America meet Central and Eastern Europe"). This was followed by the American – Central European Business Forum, and then in 2013 – in accordance with the Hungarian foreign policy's eastern opening plan – a meeting was held in Budapest, which incorporated the entire ASEAN-area member states. (See: ASEAN Business Forum in September 2013.)

The fourth assembly was held in Vienna. Between the invited lecturers there were national coordinators of the Danube Strategy P8 priority (the support of competitiveness of the enterprises). Additionally, the Danube's regulation was a central issue as well. Because of the great European 2013 floods, already 19 members of the DCCA have turned towards the European Commission and requested the elaboration of a joint flood-protection concept for the Danube Region and set aside resources for it. The natural disasters cause a great deal of serious negative effects on the region's population and economy. In case new resources will be involved in it, according to the DCCA, the strengthening and the development of the infrastructure along the river will not only protect the inhabitants and the economy, but will make the region more attractive from the point of view of business.

## 5. Summary

The DCCA is one of the most important international co-operations in the Danube region. As an international association it can promote the aims of the EU and contribute to development of the single market and of the cross-bordering social and economic co-operations. Extending these programs to the non-EU member countries will contribute to stabilisation and development of the Eastern and South-Eastern European regions. In connection with the Danube Strategy's aims the organisation can assist with its activity for recovering from the economic crisis as well. The new type of dual training programs has an important function for its development and implementation, furthermore for increasing the competitiveness of enterprises.

As a result it can be said, in the midst of today's economic challenges one of the most important key issues are through networking, which has prominent opportunities among the chambers. This is particularly true for the joint forces collaboration of the cross-bordering and the border areas. Therefore, it is essential for each territorial chamber to recognise their common interests and missions and with it help for expanding the opportunities of the small- and medium-sized enterprises in the Danube-area.

It is important to realise the chambers have a community building function in the micro-region and for the macro-regions the mediator function between different actors (governments, businesses, associations) is essential. For doing this it is important to have political support and also the confidence of entrepreneurs. In this regard the work of the DCCA, which has started yet, seems important and successful in the future.

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## **A MODEL OF THE SAVINGS RATE DECLINE AND OF THE EURO ZONE CRISIS:**

### **THE CASE OF PORTUGAL**

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**Key Words:** *European policy, debt crisis, consumption, savings, fertility rate, Ricardian equivalence, discount factor*

#### **Abstract**

*Recovering the Euro is a matter of increasing savings, and current bail out programs are just not doing that. Using an overlapping generations model, we argue that a decline in the savings rate, such as the one that has been observed in Portugal over the past 30 years, may be motivated by an increase in the discount factor. This is a standard result for macroeconomic models with agents that live for two periods. However, we innovate in proxying empirically the discount factor by a number of items, such as the fertility rate and the marriage rate. A decline in these suggests that people value the present over the future. As such the discount factor increases. As it turns out, both variables are empirically significant in our econometric analysis and have the correct sign. Furthermore, Ricardian Equivalence effects seem to be absent from the savings behaviour of Portuguese households, as increases in public debt are met with decreases in savings by households. Government expenditure is not being perceived as levying higher taxes in the future. Finally, we also show that precautionary saving has become extremely relevant in Portugal with the surpassing of the estimated unemployment threshold of 6.5% causing major shifts from current consumption to savings by households. The empirical implications of our analysis are staggering, as they question the effectiveness of any austerity programme that does rely on higher taxes: these are tantamount to lower savings rate, which in turn increase country default probabilities. The ECB/EU/IMF bail outs that have been conducted in some European countries are effectively raising unemployment and lowering the number of households with the ability to save in the Economy. At the same time, the ability to save is also being dampened by the rolling over policies in public spending finances. In our view, a lower taxes-lower public spending policy would more effectively free the resources necessary for proper savings. Santos (2011) has shown that savings plays a more fundamental role in market assessment of credit default probabilities than any other factor in a principal component analysis. We suggest that European policies for indebted countries should begin targeting this issue.*

\* \* \*

## THE INVESTMENT POLICY UKRAINE AS A FACTOR OF ACTIVATION OF FOREIGN ECONOMIC RELATIONS WITH EUROPEAN UNION

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**Key Words:** *investment climate, the European Union, cross-border region, external economic activity, cross-border cooperation*

### **Abstract**

*The experience of foreign investing in countries – members of the European Union is investigated, the possibility of its use to enhance the foreign economic relations within the border regions formed with the border area of Ukraine, is specified. The influence of the EU investment policy instruments on the foreign relations development in the cross-border regions is defined.*

\* \* \*

### **Introduction**

An important part of the formation of foreign economic relations in border regions is the investment-economic cooperation between border regions of Ukraine and its neighbouring European countries.

Of particular importance is the cooperation in cross-border regions formed on the western border of our country, because there are better opportunities to attract investment resources of the European Union. Additional tools improve the investment component in the development of foreign economic relations within the border regions formed on the border between Ukraine and the EU have rich experience and deep tradition of successful investment policy, which has stood the test of history and has evolved over a long period of time.

## **The analysis of last researches**

Relations between the EU and Ukraine are currently based on the Partnership and Co-operation Agreement (PCA) which entered into force in 1998. At the Paris Summit in 2008, the leaders of the EU and Ukraine agreed that an Association Agreement should be the successor agreement to the Partnership and Co-operation Agreement [7].

The EU-Ukraine Association Agreement is the first of a new generation of Association Agreements with Eastern Partnership countries [1]. Negotiations on this comprehensive, ambitious and innovative Agreement between the EU and Ukraine were launched in March 2007.

In February 2008, following confirmation of Ukraine's WTO membership, the EU and Ukraine launched negotiations on a Deep and Comprehensive Free Trade Area as a core element of the Association Agreement.

At the 15th Ukraine-EU Summit of 19 December 2011, the EU leaders and President Yanukovich noted that a common understanding on the text of the Association Agreement was reached [8].

On 30 March 2012 the chief negotiators of the European Union and Ukraine initialled the text of the Association Agreement, which included provisions on the establishment of a DCFTA as an integral part.

Both the EU and Ukraine expressed their common commitment to undertake further technical steps required to prepare conclusion of the Association Agreement [7].

## **The purpose of the article**

Explore the experience and impact of EU investment policy for the development of foreign economic relations within the border regions formed with Ukraine.

## **Research results**

The European Union and its Member States continue to be the largest donor to Ukraine: since 1991, assistance provided by the European Union alone has amounted to over € 2.5 billion. The European Neighbourhood Policy Instrument (ENPI) allocates € 470 million to Ukraine for the years 2011–2013. This goes to support action in three priority areas: good governance and the rule of law; facilitating the entry into force of the Association Agreement, and sustainable development, including energy and environment. This amount includes funding under the Eastern Partnership for the **Comprehensive Institution Building programme** (€ 43.37 million). The latter is designed to improve the administrative capacity of partner countries and their compatibility with EU institutions, for instance through twinning programmes, professional training and secondment of personnel.

Ukraine will benefit from EU Financial Assistance through existing funding mechanisms and instruments in order to achieve the objectives of the Association Agreement.

The future priority areas of the EU Financial Assistance to Ukraine will be laid down in relevant indicative programmes reflecting agreed policy priorities between the EU and Ukraine. The indicative amounts of assistance will take into account Ukraine's needs, sector capacities and progress with reforms.

EU assistance will be implemented in close cooperation and coordination with other donor countries, donor organisations and International Financial Institutions (IFI), and in line with international principles of aid effectiveness. Through the Neighbourhood Investment Facility (NIF), to which Ukraine is eligible IFI investments could be leveraged. The NIF aims at mobilizing additional funding to cover the investment needs of Ukraine for infrastructures in sectors such as transport, energy, the environment and social issues (e.g. construction of schools or hospitals).

The EU has an active policy aimed at the development of foreign investment within its borders and in the continent as a whole. The fundamental principles of this policy is to focus on the implementation of long-term investment projects that promote economic growth, reduce unemployment and improve the quality of human capital investment to ensure transparency by improving the regulatory framework, promote competition and transparency in market access investments, ensuring equal conditions for investment for entrepreneurs regardless of the country of origin of capital, non-discrimination of foreign investors and so on.

The EU is by far the largest foreign investor in Ukraine. EU member states' FDI were steadily increasing over the period of 2009 – 2012 with the biggest increment in 2011. On the other hand, Ukrainian FDI into the EU decreased over the same period (tab. 1).

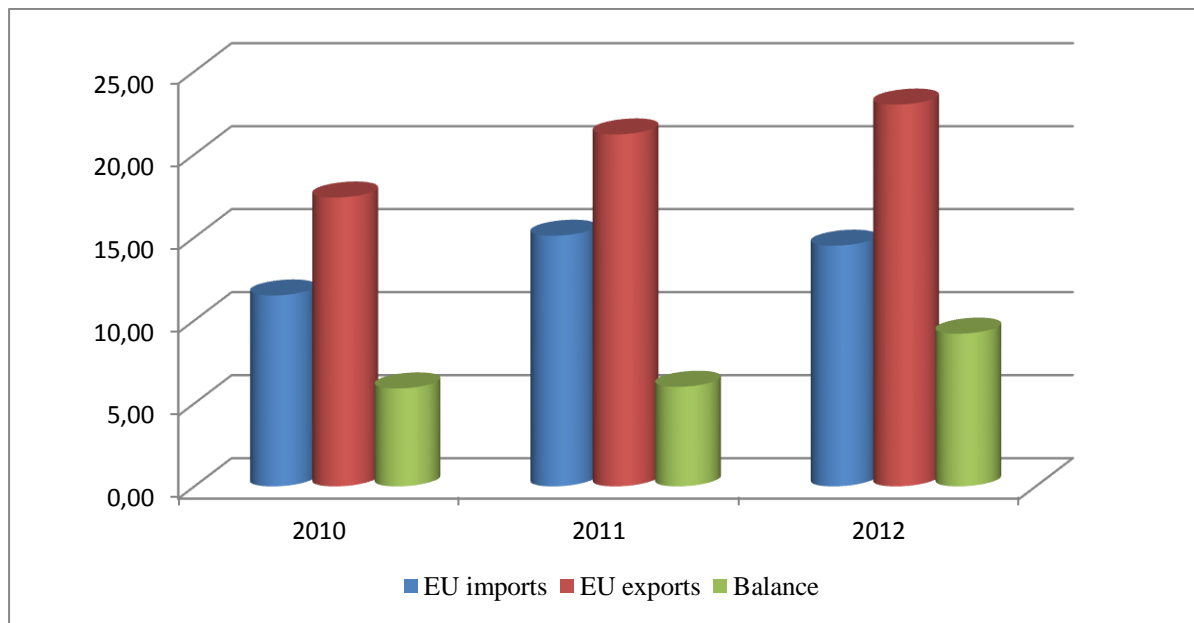
*Table 1. EU27 FDI stocks with Ukraine (million euro)*

	2009	2010	2011	2012
EU27 FDI stocks in Ukraine	14 181	13 164	22 802	23 816
Ukrainian FDI stocks in the EU27	2 570	2 653	1 519	1 953

Source: Eurostat [10]

Although Ukraine needs foreign investment urgently, major barriers exist, including unstable and unpredictable legislation, the lack of an independent judiciary (misuse of courts), corporate raiding, harassment by the tax authorities, failings in the implementation of laws, delays and non-transparency in making VAT refunds, corruption, and a low level of protection of property rights. Trade in goods 2010–2012 portray on the fig.1.



*Fig. 1. Trade in goods 2010–2012, € billions*

Source: [6]

Both parties agree that greater efforts need to be made to improve the situation, and at the EU-Ukraine summit of 25 February 2013 therefore decided to establish a Business Climate Dialogue [5]. In table 2 considered merchandise imports by trade partner EU.

*Table 2. EU27 merchandise imports by trade partner  
(imports excluding intra-EU trade)*

	2010			2011			2012		
	rank	million euro	share (%)	rank	million euro	share (%)	rank	million euro	share (%)
<b>EXTRA EU (27)</b>		<b>1 531 043</b>	<b>100,0</b>		<b>1 724 207</b>	<b>100,0</b>		<b>1 792 055</b>	<b>100,0</b>
China	1	282 509	18,5	1	293 692	17,0	1	289 927	16,2
Russia	3	160 709	10,5	2	199 922	11,6	2	213 257	11,9
USA	2	173 067	11,3	3	191 515	11,1	3	205 794	11,5
Switzerland	4	85 228	5,6	5	93 202	5,4	4	104 544	5,8
Norway	5	78 981	5,2	4	93 813	5,4	5	100 437	5,6
Japan	6	67 258	4,4	6	69 229	4,0	6	63 813	3,6
Turkey	7	42 397	2,8	7	48 143	2,8	7	47 812	2,7
South Korea	8	39 391	2,6	10	36 175	2,1	8	37 861	2,1
India	9	33 308	2,2	8	39 683	2,3	9	37 295	2,1
Brazil	10	33 238	2,2	9	38 939	2,3	10	37 090	2,1
Saudi Arabia	20	16 300	1,1	12	28 440	1,6	11	34 594	1,9
Nigeria	23	14 505	0,9	14	24 416	1,4	12	32 937	1,8
Libyan Arab Jamahiriya	11	29 230	1,9	34	10 444	0,6	13	32 771	1,8
Algeria	14	21 069	1,4	13	27 844	1,6	14	32 597	1,8
Canada	12	24 697	1,6	11	30 406	1,8	15	30 514	1,7
Kazakhstan	21	15 907	1,0	16	22 917	1,3	16	24 413	1,4
Taiwan	13	24 138	1,6	15	24 230	1,4	17	22 524	1,3
Singapore	18	18 760	1,2	19	19 184	1,1	18	21 517	1,2
South Africa	16	20 406	1,3	18	20 557	1,2	19	20 545	1,1

Malaysia	15	20 816	1,4	17	21 321	1,2	20	20 342	1,1
Mexico	26	13 748	0,9	22	16 815	1,0	21	19 364	1,1
Vietnam	31	9 586	0,6	28	12 942	0,8	22	18 514	1,0
Thailand	19	17 344	1,1	20	17 683	1,0	23	16 924	0,9
Indonesia	25	13 902	0,9	23	16 229	0,9	24	15 396	0,9
N.det.Extra	17	19 664	1,3	29	12 894	0,7	25	15 000	0,8
Ukraine	28	11 486	0,8	24	15 095	0,9	26	14 588	0,8
Australia	27	12 454	0,8	25	14 944	0,9	27	14 479	0,8
Azerbaijan	30	9 713	0,6	26	14 903	0,9	28	13 852	0,8
Iraq	38	7 130	0,5	36	9 724	0,6	29	12 758	0,7
Israel	29	11 118	0,7	30	12 739	0,7	30	12 634	0,7

\*Source [10]: Eurostat (Comext, statistical regime 4) Last update: 23.04.2013

The EU common strategy on Ukraine spells out a number of widely defined “strategic goals”:

- to cooperate with Ukraine in the maintenance of stability and security in Europe and the wider world. And in finding effective responses to common challenges facing the continent;
- to increase economic, political and cultural cooperation with Ukraine as well as cooperation in the field of justice and home affairs;
- helping Ukraine to consolidate a full, stable and pluralist democracy governed by the rule of law and respect for human rights;
- supporting the process of economic and social reform in Ukraine and helping in the creation of the conditions for an efficient market economy that will enable the country to be integrated into the world economy;
- promoting rapprochement between the Union and Ukraine, including continuing efforts to secure gradual approximation of EU and Ukrainian legislation;
- continuing co-operation and dialogue in the field of the Union’s common foreign and security policy; and
- strengthening co-operation on non-proliferation and disarmament and in the fields of environment, energy and nuclear safety [9].

## Conclusions

The Parties cooperate to support Ukraine in establishing a fully functioning market economy and gradually approximating its policies to the policies of the EU in accordance with the guiding principles of macroeconomic stability, sound public finances, a robust financial system and sustainable balance of payments, and particular:

- develop Ukraine’s capacity in macro-economic forecasts, inter alia improvement of methodology of elaboration of development scenarios, and monitoring of economic processes, improving the quality of analysis of the factors of impact etc. by exchanging of best practices;
- ensure the independence of the National Bank of Ukraine (NBU) in line with best EU practice, including with the support of EU expertise, also from the ECB [3];

- sharing the experience of the EU, including from ECB, on monetary exchange rate and financial and banking sector regulation and supervision policies, and helping to develop and strengthen Ukraine's capabilities in all those areas;
- reinforce the sustainability and governance of public finances, through implementing fiscal and expenditure reforms, covering also the pension system and public debt management, in particular by:
  - exchanging of information, experience, best practice and performing other measures of development of a medium-term system for forecasting/planning;
  - exchanging of information, experience and the best practice concerning improvement of program-purpose approach in budgetary process, analysis of efficiency and gains of budgetary programs fulfilment, planning and implementation of budget and public debt;
  - taking into account latest assessment of Ukraine's public finance management done by the OECD (SIGMA) and the EU together with the World Bank (PEFA4);
  - exchanging of best expertise from the EU and the EU Member States on pension system reforms with a view of improving the sustainability of Ukraine's pension system;
  - exchanging of best practices on enhancing public debt management in line with international standards.
- reducing the involvement of the State in setting prices and introducing procedures for full cost recovery in line with EU best practices;
- further developing open, competitive and transparent privatisation rules and procedures and their implementation in line with best EU practices.

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## THE IMPORTANCE OF THE PROCESSES OF MODELLING THE STRATEGIC PLANNING IN THE EU

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**Key Words:** *strategic planning, model, enterprise, active and protective alternative, strategy*

### **Abstract**

*The analysing of models of the strategic planning is conducted in the article. The modified model of the strategic planning activity of enterprises is offered with possibility of choice of alternative approaches which are oriented to the favourable and unfavourable state of affairs ("active" and "protective" alternatives) in conditions EU.*

\* \* \*

### **Introduction**

Models of strategic planning are analysed in the article. The modified model of strategic planning of activity of the enterprise with an opportunity of a choice of the alternative approaches focused on a favourable and adverse conjuncture is offered.

In the modern scientific literature the large meaning occupies process of strategic planning [1, 4, 5, 6]. It requires of the chiefs and personnel's skill to use innovative the administrative approaches and modern technologies directed on increase to competitiveness of the enterprises. Thus it is necessary to take into the account, that any enterprise cannot reach the superiority over the competitors on all parameters. For developments of strategy therefore are necessary a choice of priorities which as much as possible would correspond to a market situation and better used strengths of the enterprise. One of variants of the decision of this problem is the application of the modified model of process of strategic planning, which is adequate to external and internal conditions of the enterprise and provides increase of its market cost.

### **The analysis of last researches**

For today of world economy requires of the enterprises of definition of the development on prospect with orientation to satisfaction of needs of the consumers by more effective means,

than at the competitors. To be engaged not only operative, but also strategic problems for that to correct strategic guidelines, to plan and to organise the activity. But such practice is given too many enterprises uneasy, as there is no experience of job in EU conditions and, accordingly, experience of strategic planning.

It is necessary to emphasise, that the foreign researches in the field of strategic planning occupy not the best position. Despite of strong criticism of classical school of planning (for example, from the party R. Pascal, J. Quinn, G. Mintsberh), the offered concepts “of new vision” of planning concern first of all to strategic planning at a level of organisation and in the basis contain the basic postulates of classical school (for example, strategic programming of G. Mintsberh). For this reason the new approaches to understanding of essence of strategic planning and its role in a control system at various levels are necessary.

To the models, distributed in west, which exist in the theory and practice of managements described in the scientific literature [2–5], it is possible to attribute the following:

- Model of strategic planning on a basis “of a strategic blank”;
- Model of strategic planning based on the account of market advantages;
- Model of strategic planning focused on creation and maintenance of competitiveness of the enterprise;
- Model of strategic planning focused on creation of positive image;
- Model of strategic planning which is taking into account the sizes of the enterprises;
- Model Horvath & Partners for structuring of the contents of strategy.

The analysis of the mentioned approaches and appropriate adaptation allow defining the following perspective elements. Definition of the most probable forecast and analysis variance of parameters responsibility in a basis of construction statistically authentic extrapolation. It is necessary to note, that the majority of the foreign enterprises use strategic planning as the tool of achievement of high economic parameters in the activity: the income, profit, profitability etc.

**The purpose of article** is the construction of the modified model of strategic planning of activity of the enterprises with an opportunity of a choice of alternatives of two levels focused on a favourable conjuncture (active “alternatives”) and adverse (“protective” alternatives) in conditions EU.

## Research results

At the present stage overwhelming majority of the enterprises is in a crisis condition, they are characterised by out-of-date technologies, low financial activities, insolvency, non-competitive production and stagnation by processes. Thus all parts of a circuit: manufacture, preparation, processing and realisation of production should function coordinated. Therefore it is necessary to allocate group of alternatives of strategic character focused on development of tactical character, instead of on indemnification of probable threats. Let’s note, that some of alternatives, for example attraction of the investments, can have both tactical protective,

and active offensive of meaning, are defined by a situation and purpose of realisation of the appropriate alternative strategy.

The EU has established a single market across the territory of all its members. 17 member states have also joined a monetary union known as the euro zone, which uses the Euro as a single currency [12]. In 2012 the EU had a combined GDP of 16.073 trillion international dollars, a 20% share of the global gross domestic product (in terms of purchasing power parity). According to Credit Suisse Global Wealth Report 2012 (September), the EU owns the largest net wealth in the world; it is estimated to equal 30% of the \$223 trillion global wealth.

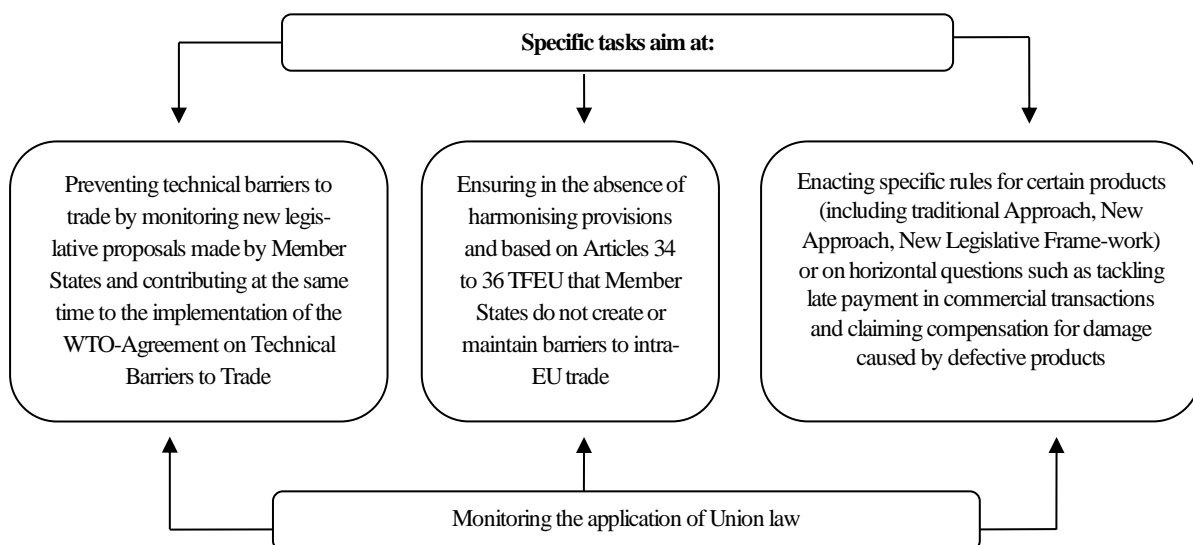
Of the top 500 largest corporations measured by revenue (Fortune Global 500 in 2010), 161 have their headquarters in the EU.[9] In 2007, unemployment in the EU stood at 7% [7]. While investment was at 21.4% of GDP, inflation at 2.2%, and current account balance at -0.9% of GDP (i.e., slightly more import than export). In 2012, unemployment in the EU stood, per August 2012, at 11.4% [7].

There is a significant variance for GDP (PPP) per capita within individual EU states, these range from €11,300 to €69,800 (about US\$15,700 to US\$97,000) [11]. The difference between the richest and poorest regions (271 NUTS-2 regions of the Nomenclature of Territorial Units for Statistics) ranged, in 2009, from 27% of the EU27 average in the region of Severozapaden in Bulgaria, to 332% of the average in Inner London in the United Kingdom. On the high end, Inner London has €78,000 PPP per capita, Luxembourg €62,500, and Bruxelles-Cap €52,500, while the poorest regions, are Severozapaden with €6,400 PPP per capita, Nord-Este with €6,900 PPP per capita [11].

Structural Funds and Cohesion Funds are supporting the development of underdeveloped regions of the EU. Such regions are primarily located in the states of central and southern Europe [8; 10]. Several funds provide emergency aid, support for candidate members to transform their country to conform to the EU's standard (Phare, ISPA, and SAPARD), and support to the former USSR Commonwealth of Independent States (TACIS). TACIS has now become part of the worldwide Europe Aid programme. EU research and technological framework programmes sponsor research conducted by consortia from all EU members to work towards a single European Research Area [13].

The single market for goods is one of the Union's most important and continuing priorities which aims to create a user-friendly environment for businesses and consumers.

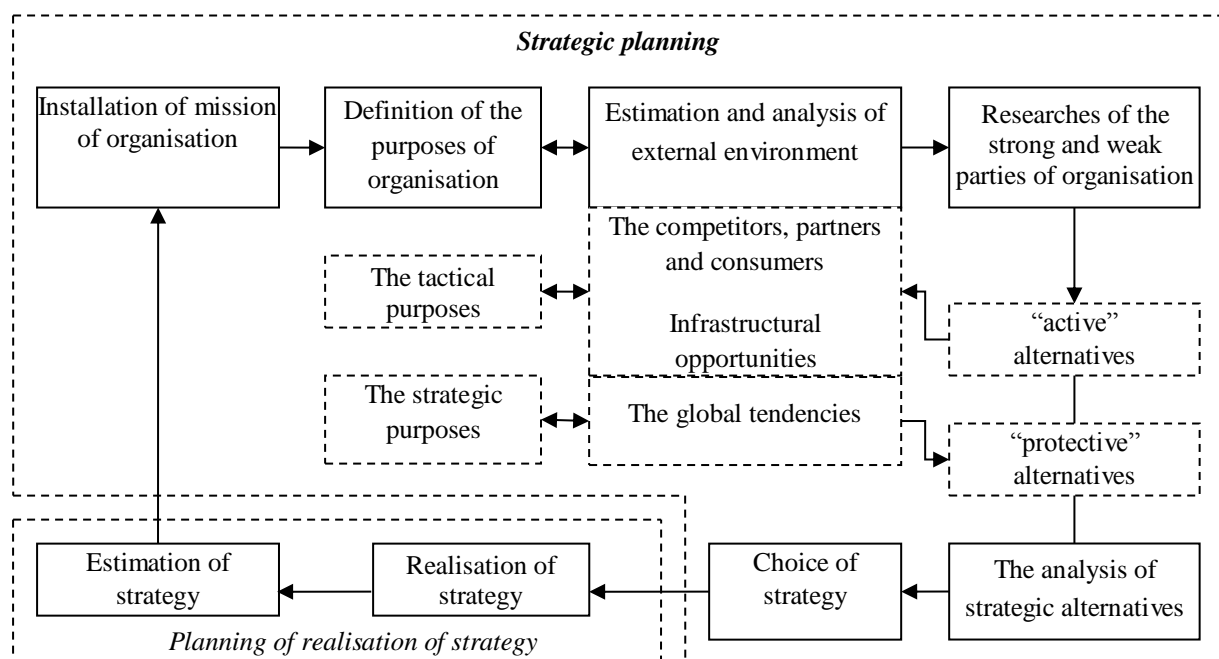
The main objective of the Directorate General for Enterprise and Industry is to contribute to the design, implementation and improvement of regulatory policy and so make the single market work better by removing existing barriers to trade and avoiding the creation of new ones (fig. 1).

*Fig. 1. Specific tasks implementation and improvement of regulatory policy*

\* Own work by author

All these initiatives promote a business and consumer-friendly single market, based on transparent, simple and consistent rules which offer legal certainty and clarity from which businesses (irrespective of their size) and consumers alike can benefit. Moreover, it makes European business better able to compete on world markets and to meet the challenges ahead.

Thus, taking into account said, we offer to consider one of the modified models of strategic planning (fig. 2).

*Fig. 2. Model process of strategic planning*

\* Own work by author

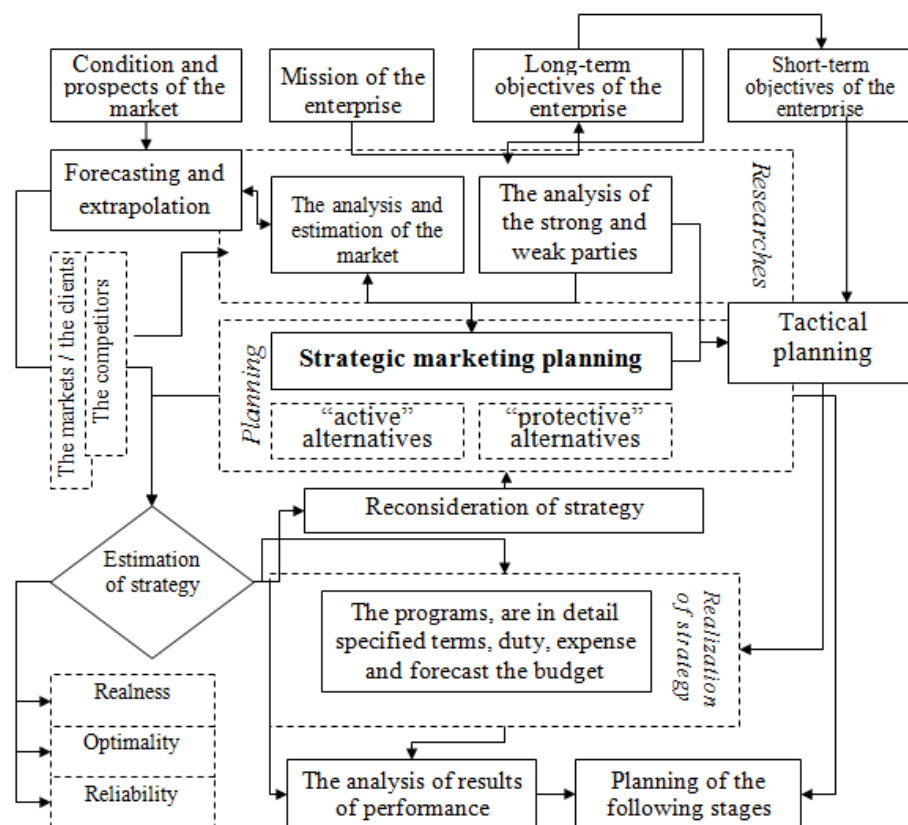


The analysis of models of strategic planning allows on the basis of the carried out researches to offer the modified model of strategic marketing planning of the enterprises (fig. 3).

The given model assumes presence of such components, as the purpose of the enterprise, its strategic and tactical purposes, analysis of internal and external environment, construction of the tactical programs and choice of strategic alternatives, formalisation and realisation of the plans, estimation of the achieved results. Let's notice, that it is expedient to allocate long-term and short-term objectives of organisation, first of which it is necessary to take into account by development of strategy, where as second make a basis for construction on the tactical level of the plans of the enterprise. The analysis of internal and external environment is spent by with study of the strong and weak parties of the enterprise, is investigated, and by the analysis and estimation of the market.

Let's note that it is impossible completely to divide these components of the analysis, as the strong or weak parties of the enterprise are shown, in particular, on the basis of comparison with the competitors, which are the factor of external environment.

*Fig. 3. The modified model of strategic marketing planning of the enterprises*



\* Own work by author

During the analysis and the estimations of the market with the purpose of maintenance of strategic character of the received conclusions spend of forecasting and extrapolation of a condition and prospects of the market. The same forecasts should be taken into account at an estimation of ready strategy. A condition of the market, the prospects of the main clients and partners, behaviour of the basic competitors are the factors, which influence on a market conjuncture is desirable extrapolation in prospect for an adequate estimation of the plans.

Within the framework of the block of planning are selected an opportunity of a choice of alternatives of two levels focused on a favourable and adverse conjuncture. Last are called to provide the minimal satisfactory level of functioning within the framework of crisis. The block of tactical planning are partially born for frameworks actually planning, as the short-term plans are only tool of realisation of strategic marketing planning, on the one hand, and with another, this part quite often plays a key role in maintenance of successful activity of all enterprise and requires close integration of all making enterprise (in figure is not reflected).

The developed strategy of behaviour is subject to check on realness, optimality and reliability. Within the framework of model of strategic marketing planning we shall pay attention to necessity of an estimation of strategy from a position of reliability for maintenance of long term of the period of adequacy of the marketing plans of a market situation. The practical meaning of such check consists in increase of safety factor of the strategic marketing plans first of all at the enterprises of the small and average size. Such enterprises by first can feel on themselves impact of crisis, that is why should spend active politics with the purpose of constant presence of alternatives of protective character, which will allow to go through crisis with the minimal losses.

In case of a rejection of strategy occurs review. The approved strategy is directed to the block of realisation with the purpose of construction of the programs in detail specified terms, duties of separate divisions; account of expenses and modification in predicted the budget. The algorithm of search of strategy is finished by the analysis of results of performance and planning of the following stages, as the strategic character of marketing planning provides a continuity.

Strategic alternative, which consists in diversification of production carries protective character, however can appear unsuccessful in case of inadequate strategic marketing planning of the cost price of manufacture, progress and selling of the stamps, new to the enterprise of the goods. The alternative to orientation on the most mass and cheap kinds of production can appear advantageous in case of an economic crisis and fall of a buying power of the population, however can put the enterprise in unprofitable competitive conditions in a situation of growth in economy. Therefore “protective” strategy should be planned in view of the global tendencies in world and national economies, whereas realizing “active” alternative, it is necessary before a stage of its introduction to carry out the analysis of internal and external environment with the purpose of finding – out of influence of the appropriate actions on a situation in the market and change of the strong and weak parties of organisation owing to such actions.

## **Conclusions**

In job are considered and are offered algorithm of functioning of model of strategic marketing planning of activity of the enterprises taking into account the necessity of an estimation of strategy from a position of reliability for maintenance of long term of the period of adequacy of the marketing plans of a market situation and is provided by an opportunity of a choice of alternatives of two levels focused on a favourable conjuncture and on a case of a negative

conjuncture for maintenance of the minimal satisfactory level of functioning within the framework of crisis. The practical meaning of the offered updating consists in increase of safety factor of the strategic marketing plans at the enterprises of the small and average size.

The increase of efficiency of strategic marketing planning of the enterprises is supposed to be carried out by introduction innovation of model of development based on application of high technologies, commercialisation of results of scientific and technical activity, distribution and use of knowledge, improvement of quality of the goods, creation of information networks for an exchange of knowledge and technologies.

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## SECTION II

### LEGAL AND SOCIETAL CHALLENGES IN EUROPE

#### THE EUROPEAN UNION RULE OF LAW MISSION IN KOSOVO: A *SUI GENERIS JUDICIAL AGENT*. LESSONS LEARNED

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#### **Abstract**

*EU–LEX\* Kosovo is the largest ever civilian mission deployed by the European Union so far, as well as the most expensive one. It is also the first of this kind to be endowed with some executive powers. Its main challenges lie in the justice sector in the north of Kosovo. By looking in the literature on international judicial engineering and organisation, this contribution aims at providing recommendations to the EU Common Security and Defence Policy when it is deemed to deploy a mission EU–LEX mandate like with consistent judicial powers in a highly socio-ethno and politicised environment such as the north of Kosovo. The literature on international justice focuses, by means of a path-dependent historical process, on the way this is guaranteed and pursued by those artificial and hybrid constructions such as international courts and tribunals (e.g. International Court of Justice, International Criminal Court, European Court of Justice, European Court of Human Rights, just to mention a few) which aim at responding to the settlement of disputes either between States or individuals). EU–LEX justice component can be neither looked at as a permanent court or tribunal nor as a temporary one. Rather it can be better viewed as the extended law arm of the European Union with a view at stabilizing its closest periphery. However, its poor performance in the north of Kosovo sheds light on the need for the EU CSDP to re-visit the way it assists the local authorities in a post-conflict endeavour by mentoring, monitoring and advising in the field of rule of law. Such understanding is of utmost importance for enabling the EU's security and defence arm to develop effective judicial tools which can be exploited in other settings where the EU judicial assistance may be considered.*

*\* In the official documents as well as in the literature the following writing format, that is EULEX, is to be found. The author has intentionally used this alternative form in order to highlight the EU actorness in exporting its own LEX (law) in its neighbourhood.*

\* \* \*

## Introduction

Fifteen years ago the European Security and Defence Policy (ESDP) – re-labelled Common Security and Defence Policy by the Lisbon Treaty (December 2009) – was launched at the French-British St. Malo summit (December 4, 1998) by acknowledging the duty for the European Union to be in a position to play its full role in the international arena. In that framework the need for the Union to have the capacity for autonomous action with a view at responding to international crises, by making available its military forces and the means to use them, had been clearly expressed. Four years after the first European Security Strategy was published (December 12, 2003) and it clearly outlined that not solely a single country could deal with the main security challenges on its own, but that the new threats being more diverse, less visible and less predictable are not purely military and cannot be tackled by military means alone. In the same year the first ESDP operation (Operation Concordia) was launched in the Former Yugoslav Republic of Macedonia (FYROM). Since then the European Union has sent more than twenty missions (military and civilian) abroad. The most challenging as well as the most *sui generis* civilian operation so far is the European Union Rule of Law Mission in Kosovo (EU-LEX). Never before had a CSDP operation been endowed with extensive *judicial powers* for the purpose from one hand of *monitoring, mentoring and advising* the local authorities, and from the other hand of having the final say on the kind of the rule of the law to be promoted and enforced. EU-LEX is, however, *de facto* challenged at encouraging its rule of the law in the most contented north and this since the very beginning. There exist historical and contingent factors which can help explaining the lack of cooperation of Kosovo-Serbs living in the northern municipalities, but the goal behind the deployment of EU-LEX and the reconfiguration of its predecessor UNMIK is to enable a rule of law and multi-ethnic based society. The issue is that if this is not achieved in the most rebellious north any serious discussion about rule of law and multi-ethnicity in Kosovo is to be sidelined. *But is EU-LEX able to reach this target?* Its five-years commitment show not much progress in the north where EULEX judges (and prosecutors) are *de facto* the exclusive decision-makers by raising doubts about the legitimacy of its actions, as well as by shedding light on the fallacy of the local ownership principle it claims to pursue. This poor outcome says everything about *external peace-building* activities that even highly sophisticated cannot – and will not – succeed if they are not supported by the local will which may have, as this is the case of Kosovo, a different (cultural) understanding of what the rule of law is or should look like.

## 1. EULEX Co-Justice in Kosovo: An Overview

“Effective and efficient justice systems across Europe will help drive growth, attract investors and increase competitiveness. Trusting that the *rule of law* is fully and efficiently upheld directly translates into the confidence to invest in the *economy*. [...]”<sup>1</sup>  
(European Commission, 2013, emphasis added)

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<sup>1</sup> See European Commission. *2012 General Report on the Activities of the European Union, 2013*, p.68. [pdf] Available at: <[http://europa.eu/generalreport/pdf/rg2012\\_en.pdf](http://europa.eu/generalreport/pdf/rg2012_en.pdf)> [Accessed on 27 December 2013].

The relationship between the establishment of an effective and efficient *justice system* from one hand and the guarantee of *economic growth* from the other hand is clearly highlighted in a recent report by the European Commission and it may help understand the consistent EU's whole commitment in the youngest Balkan State, Kosovo. In this small spot of land, and since December 2008, the European Union largest ever civilian mission EU-LEX<sup>2</sup> is committed *to assist* the local authorities in the development of a sustainable, transparent and accountable judiciary Kosovo-wide on the basis of the *local ownership principle*.

This effort has been proving most difficult in the north of the country so far<sup>3</sup>, where mainly organised crime and corruption proliferate. On the whole, however, an increase in ethnically-motivated crime both against Albanians and Serbs has also been recorded<sup>4</sup> (European Commission, February 8, 2013) throughout the country. In Kosovo the issue of lack of local will and of no possibility to have a serious discussion about the rule of law is still valid today, says Marek Antoni Nowicki<sup>5</sup>. Society in Kosovo is build up on clan ties, big families who consider the *State* simply as another instrument in order to accommodate their own power, replies the President of the UNMIK Human Rights Advisory Panel (HRAP) to the author. Weak institutions in Kosovo, he says, are the problem and this is a recurrent situation in the past and in the present. There are cases, reports Nowicki, where the court decides that there is an illegal construction and establishes that it should be stopped or the building demolished. The issue in Kosovo is: who is going to implement this? Or there has been a circumstance where a lawyer from the Ombudsoffice won the case before the Prishtinë/a court. He was previously fired and the court said to re-take him. He went back to the Ombudsoffice but nobody wanted him. The Ombudsman of Kosovo said not to care about the judgment. The problem, says Nowicki, is that there are powerful people ready to kill you. This is such a society and this is the same for the execution of a court decision.

The European Union Rule of Law Mission in Kosovo (EU-LEX<sup>6</sup>), the EU largest civilian operation ever deployed so far, is thus confronted with a context where there is not solely a lack of local will about *the rule of the law* but a common understanding on what the rule of law is as well. EU-LEX has taken over (some) duties which had been previously carried out by its predecessor UNMIK<sup>7</sup>. A reconfiguration process between the international peacekeeper

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<sup>2</sup> The acronym EU – LEX, instead of EULEX as this is commonly referred to in the literature is intentionally used with the aim of pinpointing the EU's *actorness* while committed to the rule of law in its neighbourhood.

<sup>3</sup> Time of writing – mid-January 2014.

<sup>4</sup> See European Commission. *Report from the Commission to the European Parliament and the Council on progress by Kosovo\* in fulfilling the requirements of the visa liberalisation roadmap (3.4 Fundamental Rights related to the Freedom of Movement)* February 8, 2013, p.18. [pdf] Available at: <[http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/report\\_on\\_progress\\_on\\_kosovo\\_visa\\_liberalisation\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/report_on_progress_on_kosovo_visa_liberalisation_en.pdf)> [Accessed on 8 February 2013].

<sup>5</sup> Marek Antoni Nowicki, human rights lawyer, former member of the European Commission of Human Rights, former international Ombudsperson for Kosovo and currently (time of the interview) president of UNMIK Human Rights Advisory Panel (HRAP). Interview with the author Helsinki Foundation for Human Rights (HFHR), Warsaw, December 5, 2013.

<sup>6</sup> The acronym EU – LEX, instead of EULEX as this is commonly referred in the literature, is preferred with a view at highlighting the EU's *actorness* while exporting its Rule of the Law beyond its own borders.

<sup>7</sup> The United Nations Administration Mission in Kosovo (UNMIK) has ruled Kosovo for almost 10 years since the end of the war in 1999. Its legal basis is the United Nations Security Council Resolution 1244 (1999) which is still in force today. See United Nations Security Council Resolution 1244 (1999) adopted by the Security

*par excellence* and the EU mission took place in mid-June 2008. Originally, the idea was that UNMIK would gradually withdraw from the country, while leaving all its powers to EU-LEX. *De facto*, however, a ghost UAM (United Nations Administration Mitrovicë/a) is still present in the north and last but not least its own legal basis (UNSCR 1244, 10 June 1999), which also gives legitimacy to EU-LEX's deployment on the ground, is still in force. To be said otherwise UNMIK, in fact, never left Kosovo. EU-LEX's commitment in the judicial field in the country has been a first engagement of this kind by the Common Security and Defence Policy<sup>8</sup> (CSDP). When the EU mission deployed in December 2008<sup>9</sup>, it found itself in front of it an *independent*<sup>10</sup> country with a judiciary, as well as the whole administrative apparatus proper of a sovereign State, in the hands of the international administration<sup>11</sup>.

Kosovo's justice system lies on the Yugoslav socialist legislation influenced by Austrian-Hungarian traditions. The applicable legislation comprised the 1978 Law on Regular Courts, the 1979 Law on Minor Offences (various times amended until 1988) and the 1976 Law on Public Prosecutor Office of the Socialist Autonomous Province of Kosovo. Kosovo's judiciary was established in 1974 as part of the Socialist Autonomous Province of Kosovo and various changes took place later on starting from March 1989 when the autonomy was suppressed. At that time Kosovo-Albanians were discriminated from the judiciary and the system turned to be *de facto* politicised so as to guarantee Serbian dominance over the province. Until 1989 and for what criminal justice is concerned the applicable criminal law was the Kosovo Criminal Code and the FRY Criminal Procedure Code of 1977 which recognised upon the investigative judge a robust investigative role considering that he could use the prosecutor's indictment to carry out investigation against a given suspect. To be said otherwise, the investigative judge could decide whether the accused should have been arrested and being held in custody for 30 years before being formally charged<sup>12</sup>. But this also raised problems in the relations with international police officers coming from countries with no tradition of an investigative judge as in Kosovo<sup>13</sup>.

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Council at its 4011th meeting, on 10 June 1999, S/RES/1244 (1999). [pdf] Available at: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>> [Accessed on 5 December 2013].

<sup>8</sup> It is enough to say that the Common Security and Defence Policy (CSDP), as it has been renamed by the Lisbon Treaty entering into force in December 2009, and previously referred to as European Security and Defence Policy (ESDP), is an integral part of the European Union Common Foreign and Security Policy (CFSP) and it was first launched at the French – British St. Malo summit in 1998.

<sup>9</sup> See Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO L 42/92 Official Journal of the European Union February 16, 2008. [pdf] Available at: <[http://www.eulex-kosovo.eu/en/info/docs/JointActionEULEX\\_EN.pdf](http://www.eulex-kosovo.eu/en/info/docs/JointActionEULEX_EN.pdf)> [Accessed on 10 September 2013].

<sup>10</sup> Kosovo declared its unilateral independence on 17th February 2008 and its own Constitution entered into force in mid-June of the same year. See Kosovo Declaration of Independence, February 17, 2008. [online] Available at: <<http://www.assembly-kosova.org/?cid=2,128,1635>> [Accessed on 10 September 2013]. See also Constitution of the Republic of Kosovo, June 15, 2008. [pdf] Available at: <<http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>> [Accessed on 10 September 2013].

<sup>11</sup> For an overview of the various steps carried out by UNMIK in order to re-build the judiciary from scratch in Kosovo, see Table 1.1 UNMIK Justice for Kosovo in the end of this paragraph.

<sup>12</sup> See International Crisis Group 2002 (September 12), II. *The Justice System* (A. *The Legacy of Discrimination: The Pre-1999 Legal System*), in Finding the Balance: The Scales of Justice in Kosovo, Report N. 134, p.3. [pdf] Available at: <<http://www.crisisgroup.org/~media/Files/europe/Kosovo%2032.pdf>> [Accessed on 5 May 2009].

<sup>13</sup> See International Crisis Group 2002 (September 12), II. *The Justice System* (C. UNMIK's early efforts to establish justice), in Finding the Balance: The Scales of Justice in Kosovo, Report N. 134, p.5, in *ibidem*.

The 1999 war brought the judicial system to collapse and since 1989 the majority of judges and prosecutors were Serbians who left Kosovo after 1999<sup>14</sup>. When UNMIK's *experimental effort* ever started in June 1999 no functioning court system was present in Kosovo. Those judges and prosecutors who worked in the country in the previous ten years either left, or were not accepted because they served in the former Serbian system. Additionally, lack of knowledge and experience completed the picture. UNMIK was thus confronted with one of the most difficult task: the re-establishment of the entire judiciary from scratch. In total fifty-five judges and prosecutors were appointed by the Special Representative of the Secretary-General (SRSG) to work in an Emergency Judicial System (EJS) in Kosovo<sup>15</sup>. At that time provisional district courts and prosecutor offices were established in Prishtinë/Priština, Prizren, Mitrovicë/a and Pejë/Peć. Those areas which were not served by a regular district court were benefiting from mobile units. In September of the same year an *ad hoc* Court of Final Appeal and an *ad hoc* Office of the Public Prosecutor were set up and they comprised Albanians only<sup>16</sup>. The EJS established right after the end of the war had the purpose of having hearings for criminal defendants detained by KFOR. One issue of concern was, *inter alia*, that under this critical situation there were lay-judges for criminal hearings only in the Prizren District Court<sup>17</sup>. One main point had already been made clear at the *incipit* of the UN administration that is for enabling a functioning justice system in Kosovo *multi-ethnicity*, together with other main factors<sup>18</sup> had to be guaranteed<sup>19</sup>. It has been reported that no Kosovo Serb was working under the EJS<sup>20</sup>. The issue is that almost fourteen years after the end of the war such multi-ethnic participation has not taken place in the north of the country where, in fact, the Basic and District Court of Mitrovicë/a are operating with EU-LEX judges and prosecutors only. This scenario raises reflections on whether the internationals (UNMIK) and EU-LEX starting from December 2008 have the necessary tools for enabling that *pluralism of*

<sup>14</sup> See Leopold von Carlowitz March 2011, 2. *Justice Reform in Kosovo (2.1 Judicial System)*, in Local Ownership in Practice: Justice System Reform in Kosovo and Liberia, Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper – N. 23, pp.8–9.

<sup>15</sup> See Organisation for Security and Cooperation in Europe Mission in Kosovo Department of Human Rights and Rule of Law – Human Rights Division. *Observations and recommendations of the OSCE legal system monitoring section: Report 2: The Development of the Kosovo Judicial System (10 June through 15 December 1999), Development of Kosovo's Emergency Judicial System*, Pristina, December 17, 1999, p.2. [online] Available at: <<http://www.osce.org/kosovo/13041>> [Accessed on 16 April 2009].

<sup>16</sup> See Organisation for Security and Cooperation in Europe Mission in Kosovo Department of Human Rights and Rule of Law – Human Rights Division. *Observations and recommendations of the OSCE legal system monitoring section: Report 2: The Development of the Kosovo Judicial System (10 June through 15 December 1999), Development of Kosovo's Emergency Judicial System*, Pristina, December 17, 1999, p.3, in *ibidem*.

<sup>17</sup> See Organisation for Security and Cooperation in Europe Mission in Kosovo Department of Human Rights and Rule of Law – Human Rights Division. *Observations and recommendations of the OSCE legal system monitoring section: Report 2: The Development of the Kosovo Judicial System (10 June through 15 December 1999), Problems Facing the Emergency Judicial System*, Pristina, December 17, 1999, p.3, in *ibidem*.

<sup>18</sup> I.e. applicable law, insufficient number of lay judges, insufficient number of judges and prosecutors, security concerns, material needs of the courts, salaries of judges, prosecutors, etc.

<sup>19</sup> See Organisation for Security and Cooperation in Europe Mission in Kosovo Department of Human Rights and Rule of Law – Human Rights Division. *Observations and recommendations of the OSCE legal system monitoring section: Report 2: The Development of the Kosovo Judicial System (10 June through 15 December 1999), Problems Facing the Emergency Judicial System*, Pristina, December 17, 1999, p.4, in *ibidem*.

<sup>20</sup> See Organisation for Security and Cooperation in Europe Mission in Kosovo Department of Human Rights and Rule of Law – Human Rights Division. *Observations and recommendations of the OSCE legal system monitoring section: Report 2: The Development of the Kosovo Judicial System (10 June through 15 December 1999)*, 5. Lack of multi-ethnic participation in the judicial system, Pristina, December 17, 1999, p.6, in *ibidem*.



*participation* (multi-ethnicity) in those complex *ethnic-biographic settings* like Kosovo, whereas external expertise assistance – even highly sophisticated – meets the challenge of providing a common ground. Statements have been rather made on that “[m]any Serbs continue to stay in Kosovo only because of the existence of parallel structures and the support provided by Belgrade and non-governmental organisations.”<sup>21</sup>

UNMIK was deemed to rule Kosovo on a *transitional* basis entrusted with all legislative and executive authority, including the administration of justice<sup>22</sup>. One major problem it had to face was *which laws* should apply in Kosovo, and at beginning it decided that those laws in force prior to 24 March 1999 should apply, provided that they do no conflict with internationally recognised human rights standards. Later on UNMIK admitted the applicability of post-1989 laws by supplementing it with internationally recognised human rights standards<sup>23</sup>. An additional concern was the lack of judges and prosecutors and within this framework UNMIK established, by means of its Emergency Decree 1999/1 of 30 June 1999, a Joint Advisory Council on Provisional Judicial Appointments entrusted with the task of nominating on a temporary basis members of the justice system. This body comprised four Kosovo and three international members and it appointed nine judges and prosecutors (five Albanians, three Serbs and one Turk) who worked in a mobile unit hearing cases Kosovo-wide. Notwithstanding doubts and criticism on the fairness of the process, on the whole the mobile team carried out hearings on 249 detainees and 112 of them were released thereafter<sup>24</sup>. Seven months after the establishment of UNMIK on the ground a Kosovo Joint Interim Administrative Structure<sup>25</sup> (JIAS) was set up and it comprised an Interim Administrative Council (IAC) and 14 Administrative Departments<sup>26</sup>, including the Justice Department. In the justice sector, responsibilities were split between the Department of Justice (within UNMIK), briefly aforementioned, which was in charge of the development of the judiciary and penal management, and the Administrative Department of Justice within the JIAS which was tasked with the administrative functioning of courts. Since these two units shared both spaces and staff the division of labour among the two was not clear<sup>27</sup>. With a view at enabling *local capacity* not UNMIK but the OSCE established the Kosovo Judicial Institute (KJI).

<sup>21</sup> See Marek Antoni Nowicki. *Kosovo pro memoria*, KiM Info Newsletter, February 24, 2006 (unpublished document sent by Marek Antoni to the author, November 30, 2013).

<sup>22</sup> See Section 1 *Authority of the interim administration*, in UNMIK/REG/1999/1 on the Authority of the Interim Administration in Kosovo, July 25, 1999. [online] Available at: <<http://www.unmikonline.org/regulations/1999/reg01-99.htm>> [Accessed on 9 September 2013].

<sup>23</sup> See International Crisis Group 2002 (September 12), *II. The Justice System (B. The Post-War Environment)*, in Finding the Balance: The Scales of Justice in Kosovo, Report N. 134, p.4. [pdf] Available at: <<http://www.crisisgroup.org/~media/Files/europe/Kosovo%2032.pdf>> [Accessed on 5 May 2009].

<sup>24</sup> See International Crisis Group 2002 (September 12), *II. The Justice System (B. The Post-War Environment)*, in Finding the Balance: The Scales of Justice in Kosovo, Report N. 134, pp.3–4. [pdf] Available at: <<http://www.crisisgroup.org/~media/Files/europe/Kosovo%2032.pdf>> [Accessed on 5 May 2009].

<sup>25</sup> See Section 4 Composition of Interim Administrative Council, Section 7 Administrative Departments, Their Leadership and Staff, in UNMIK Regulation No. 2000/1, UNMIK/REG/2000/1, January 14, 2000. [online] Available at: <[http://www.unmikonline.org/regulations/2000/re2000\\_01.htm](http://www.unmikonline.org/regulations/2000/re2000_01.htm)> [Accessed on 5 November 2013].

<sup>26</sup> I. e. Finance and Economic Development, Reconstruction and Donor Co-ordination, Business Administration and Commerce, Education and Science, Culture, Civil Affairs, Justice, Transport, Post and Telecommunication, Health and Social Welfare, Agricultural and Environmental Protection, Civil Security and Emergency Relief, Democratisation and Media Development, Local Administration, Emigration.

<sup>27</sup> See International Crisis Group 2002 (September 12), *II. The Justice System (C. UNMIK's early efforts to establish justice)*, in Finding the Balance: The Scales of Justice in Kosovo, Report N. 134, p.5, in *ibidem*.

However, this body did not have a formal training strategy since its seminars were mostly *ad hoc* (not compulsory) and focused on criminal law<sup>28</sup>. Under the Constitutional Framework for Provisional Self-Government<sup>29</sup> of May 2001 promulgated by the SRSG and the establishment of the so-called Provisional institutions for Self-Government (PISG)<sup>30</sup>, the authority over the judicial system was divided between the PISG and UNMIK<sup>31</sup>.

At the end of March 2000 an Administrative Department of Justice was established. It was responsible for the management of the justice system and correctional service in Kosovo, and it was deemed to implement the policy guidelines of the Interim Administrative Council<sup>32</sup>. One year after the Kosovo Judicial and Prosecutorial Council (KJPC) was funded, behind the cease of function of the Advisory Judicial Commission<sup>33</sup> on 31 December 2000 and the purpose of enhancing the development of an *independent* and *multi-ethnic judiciary* in Kosovo. The KJPC was given responsibility of advising the Special Representative of the Secretary-General (SRSG) on issues concerning the appointment of judges, prosecutors and lay-judges, as well as of hearing complaints against any judge, prosecutor or lay-judge. The Council was to be independent in the exercise of its functions<sup>34</sup>. In terms of composition the Council was to be made up of nine members both local and internationals, while reflecting *multi-ethnicity*<sup>35</sup>. In summer 2002 a Special Chamber of the Supreme Court of Kosovo on

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<sup>28</sup> See International Crisis Group 2002 (September 12), *II. The Justice System (D. The current judicial process – 1. The judiciary)*, in *Finding the Balance: The Scales of Justice in Kosovo*, Report N. 134, p.8, in *ibidem*.

<sup>29</sup> The Constitutional Framework for Provisional Self – Government has been adopted with the purpose of enabling the development of a meaningful *self – government* in Kosovo pending a final settlement, while establishing provisional institutions of self – government in the legislative, executive and judicial sectors with the participation of the local population, in conformity with UNSCR 1244/1999. See UNMIK/REG/2001/9 Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, May 15, 2001. [online] Available at: <<http://www.unmikonline.org/regulations/2001/reg09-01.htm>> [Accessed on 16 April 2009].

<sup>30</sup> The PISG are the Assembly, the President, the Government, the Courts and other bodies and institutions as these are established by the Constitutional Framework. The seat of the PISG is Prishtinë/Priština. See Chapter 1 Basic Provisions (para. 1.5), UNMIK/REG/2001/9 Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, May 15, 2001. [online] Available at: <<http://www.unmikonline.org/regulations/2001/reg09-01.htm>> [Accessed on 16 April 2009].

<sup>31</sup> See International Crisis Group 2002 (September 12), *III. Institutions – building: towards an autonomous judiciary?*, in *ibidem*, p.14.

<sup>32</sup> See Section 1 *Administrative Department of Justice* (paras. 1.1; 1.2 & 1.3), in UNMIK Regulation No. 2000/15 on the establishment of the Administrative Department of Justice, March 21, 2000. [online] Available at: <[http://www.unmikonline.org/regulations/2000/re2000\\_15.htm](http://www.unmikonline.org/regulations/2000/re2000_15.htm)> [Accessed on 15 August 2013].

<sup>33</sup> The Advisory Judicial Commission was established in September 1999 with the purpose of advising the SRSG on issues concerning the appointment of judges and prosecutors, as well as on complaints against any judge or prosecutor. In the exercise of its functions the Commission was to be independent and it was deemed to replace the emergency judicial structures with a permanent one. See Section 1 *The Advisory Judicial Commission* (paras. 1.1 & 1.2), in UNMIK Regulation No. 1999/7 UNMIK/REG/1999/7 on appointment and removal from office of judges and prosecutors, September 7, 1999, p.1. [pdf] Available at: <[http://www.unmikonline.org/regulations/1999/re99\\_07.pdf](http://www.unmikonline.org/regulations/1999/re99_07.pdf)> [Accessed on 20 September 2013].

<sup>34</sup> See Section 1 *The Kosovo Judicial and Prosecutorial Council*, in UNMIK Regulation No. 2001/8 UNMIK/REG/2001/8 on the of the Kosovo Judicial and Prosecutorial Council April 6, 2001. [online] Available at: <[http://www.unmikonline.org/regulations/unmikgazette/02english/E2001regs/RE2001\\_08.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E2001regs/RE2001_08.htm)> [Accessed on 10 September 2013].

<sup>35</sup> See Section 2 *Composition*, in UNMIK Regulation No. 2001/8 UNMIK/REG/2001/8 on the the Kosovo Judicial and Prosecutorial Council April 6, 2001, in *ibidem*.

Kosovo Trust Agency<sup>36</sup> related matters is established by UNMIK<sup>37</sup>. Rules of procedure of the Special Chamber of the Supreme Court were initially laid down under UNMIK Administrative Direction (UNMIK/DIR/2003/13)<sup>38</sup> and replaced by United Nations Administrative Direction No. 2006/17 (UNMIK/AD/2006/17)<sup>39</sup> as amended by United Nations Administrative Direction No. 2008/6 (UNMIK/AD/2008/6) establishing five specialised first instance trial panels and an appellate panel in the Special Chamber<sup>40</sup>.

In 2005 UNMIK decides to replace the previous KJPC, as briefly aforementioned, with the Kosovo Judicial Council (KJC) within the framework of a reorganisation process of the court system in Kosovo. The KJC is intended as a professional body set under the authority of the SRSG and it is independent while carrying out its functions<sup>41</sup>. The KJC is in charge of recruitment, training and appointment, evaluation, promotion, transfer and discipline of both judges and lay judges, judicial and non-judicial personnel<sup>42</sup>. It is responsible for the organisation and proper functioning of courts; the establishment of the geographical location,

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<sup>36</sup> The Kosovo Trust Agency is established as independent body in conformity with section 11.2 of the Constitutional Framework. It should have been endowed with juridical personality and with the capacity to enter into contracts, acquire, hold and dispose of property. See Chapter I: Legal Status, Purposes and Definitions (Section 1 Legal Status of the Kosovo Trust Agency), in United Nations Regulation No. 2002/12 on the establishment of the Kosovo Trust Agency (UNMIK/REG/2002/12), June 13, 2002, p.1. [pdf] Available at: <[http://www.unmikonline.org/regulations/unmikgazette/02english/E2002regs/RE2002\\_12.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2002regs/RE2002_12.pdf)> [Accessed on 6 June 2009]. In fact, and under SRSG Steiner there was a plan to move the KTA to north Mitrovicë/a. However, this project never materialised. See International Crisis Group 2005 (September 13), *IV. The nature of division (A. A city slashed apart – 2. Division fuelled by a collapsed economy)*, in Bridging Kosovo's Mitrovica Divide, Europe Report N. 165, p.12. [online] Available at: <[http://www.crisisgroup.org/~media/Files/europe/165\\_bridging\\_kosovo\\_mitrovica\\_divide](http://www.crisisgroup.org/~media/Files/europe/165_bridging_kosovo_mitrovica_divide)> [Accessed on 30 April 2009].

<sup>37</sup> See *Section 1 Establishment of a Special Chamber (para. 1.1)*, in United Nations Regulation No. 2002/13 on the establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters, (UNMIK/REG/2002/13), June 13, 2002, p.1. [pdf] Available at: <[http://www.unmikonline.org/regulations/2002/RE2002\\_13.pdf](http://www.unmikonline.org/regulations/2002/RE2002_13.pdf)> [Accessed on 5 June 2009]. UNMIK/REG/2002/13 has been amended by UNMIK/REG/2008/4 see e United Nations Regulation No. 2008/4 amending UNMIK regulation No. 2002/13 on the establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (UNMIK/REG/2008/4), February 5, 2008. [pdf] Available at: <[http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/RE2008\\_04.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/RE2008_04.pdf)> [Accessed on 6 June 2009].

<sup>38</sup> See United Nations Administrative Direction No. 2003/13 (UNMIK/DIR/2003/13) implementing UNMIK regulation No. 2002/13 on the establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, June 11, 2003. [pdf] Available at: <[http://www.unmikonline.org/regulations/unmikgazette/02english/E2003ads/ADE2003\\_13.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2003ads/ADE2003_13.pdf)> [Accessed on 5 June 2009].

<sup>39</sup> See United Nations Administrative Direction No. 2006/17 amending and replacing UNMIK Administrative Direction 2003/13, implementing UNMIK regulation No. 2002/13 on the establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, (UNMIK/AD/2006/17), December 6, 2006. [pdf] Available at: <[http://www.unmikonline.org/regulations/unmikgazette/02english/E2006ads/ADE2006\\_17.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2006ads/ADE2006_17.pdf)> [Accessed on 6 June 2009].

<sup>40</sup> See United Nations Administrative Direction No. 2008/6 amending and replacing UNMIK Administrative Direction No. 2006/17, implementing UNMIK regulation No. 2002/13 on the establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters (UNMIK/AD/2008/6), June 11, 2008. [pdf] Available at: <[http://www.unmikonline.org/regulations/unmikgazette/02english/E2008ads/ADE2008\\_06.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2008ads/ADE2008_06.pdf)> [Accessed on 7 June 2009].

<sup>41</sup> See *Section 1 The Kosovo Judicial Council (paras. 1.1 & 1.2)*, in United Nations Regulation No. 2005/52 on the establishment of the Kosovo Judicial Council (UNMIK/REG/2005/52), December 20, 2005, p.1. [pdf] Available at: <[http://www.unmikonline.org/regulations/unmikgazette/02english/E2005regs/RE2005\\_52.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2005regs/RE2005_52.pdf)> [Accessed on 15 May 2009].

<sup>42</sup> See *Section 1 The Kosovo Judicial Council (1.4)*, in United Nations Regulation No. 2005/52 on the establishment of the Kosovo Judicial Council (UNMIK/REG/2005/52), December 20, 2005, p.2, *in ibidem*.

number and structure of the courts in consultation with the Assembly of Kosovo; the provision of technical and financial requirements, support personnel and material resources; the setting of policy and training of judicial personnel, together with the Supreme Court of Kosovo, in whole or in part with the Kosovo Judicial Institute (KJI); the organisation of examinations for qualification of judges through the KJI; the appointment, training, disciplining and dismissing of members of judicial support staff; the provision of information on statistics on the judicial system, and protection of personal data referring to the judicial system<sup>43</sup>.

UNMIK foresaw in 2006 the set-up of Municipal Courts (now Basic Courts under the new legal courts system<sup>44</sup>), Municipal Minor Offences Courts and Departments of Municipal Courts<sup>45</sup> to be understood in the framework of enabling an integrated, impartial and independent justice system. It also established that the official languages in the courts in Kosovo should be Albanian, Serbian and English, as well Turkish in those areas where Turkish communities live<sup>46</sup>. It also agreed over the set-up of the Independent Judicial Commission (the Commission) in charge of administering a judicial and prosecutorial reappointment process for any judicial and prosecutorial post in Kosovo<sup>47</sup>. By the end of 2006 an Independent Judicial and Prosecutorial Commission (IJPC) is established in Kosovo. It is an autonomous body of the KJC and it is charge of carrying out a comprehensive, Kosovo-wide review of the suitability of all applicants for permanent appointments in the position either of judge or prosecutor in Kosovo<sup>48</sup>. The appointment process, to be reviewed under the authority of the IJPC, was to be divided into three phases: selection of judges for the Supreme Court of Kosovo and public prosecutors for the Office of the Public Prosecutor of Kosovo; selection of judges for the District, Commercial Court and the High Court of Minor Offences and public prosecutors for the Offices of the District Public Prosecutors; and selection of

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<sup>43</sup> See *Section 1 The Kosovo Judicial Council (1.7)*, in United Nations Regulation No. 2005/52 on the establishment of the Kosovo Judicial Council (UNMIK/REG/2005/52), December 20, 2005, pp.2–3, *in ibidem*.

<sup>44</sup> A new Law on Courts (Law No. 03/L – 199) entered into force on 1 January 2013. Under the letter of the new law, the Kosovo court system will be made up of basic courts (courts of first instance), the Court of Appeals (second instance court Prishtinë/Priština based) and the Supreme Court (located in Prishtinë/Priština). See Law No. 03/L-199 On Courts, Official Gazette of the Republic of Kosova, Prishtinë/Priština: Year/August V/No. 79, August 24, 2010. [pdf] Available at: <[http://www.md-ks.org/repository/docs/on\\_courts.pdf](http://www.md-ks.org/repository/docs/on_courts.pdf)> [Accessed on 15 September 2010].

<sup>45</sup> See *Section 4 Establishment of Municipal Courts, Municipal Minor Offences Courts and Departments of Municipal Courts (para. 4.1)*, in United Nations Regulation No. 2006/25 on a regulatory framework for the justice system in Kosovo (UNMIK/REG/2006/25), April 27, 2006, p.5. [pdf] Available at: <[http://www.kgjk-ks.org/repository/docs/RE2006\\_25.pdf](http://www.kgjk-ks.org/repository/docs/RE2006_25.pdf)> [Accessed on 5 May 2009].

<sup>46</sup> See *Section 5 Use of languages and alphabets in the justice system*, in United Nations Regulation No. 2006/25 on a regulatory framework for the justice system in Kosovo (UNMIK/REG/2006/25), April 27, 2006, *in ibidem*.

<sup>47</sup> See *Section 7 Judicial Reform*, in United Nations Regulation No. 2006/25 on a regulatory framework for the justice system in Kosovo (UNMIK/REG/2006/25), April 27, 2006, p.6, *in ibidem*.

<sup>48</sup> See *Section 1 The Independent Judicial and Prosecutorial Commission (para. 1.1)*, in United Nations Administrative Direction No. 2006/18 implementing UNMIK regulation No. 2006/25 on a regulatory framework for the justice system in Kosovo (UNMIK/DIR/2006/18), December 28, 2006, p.2. [pdf] Available at: <[http://www.unmikonline.org/regulations/unmikgazette/02english/E2006ads/ADE2006\\_18.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2006ads/ADE2006_18.pdf)> [Accessed on 20 May 2009].

judges for the Municipal Courts and Municipal Courts for Minor Offences and public prosecutors for the Offices of the Municipal Public Prosecutors<sup>49</sup>.

The current largest ever civilian mission EU–LEX is in charge of *monitoring, mentoring* and *advising* its local authorities in the judicial, as well as police and customs, field, on the basis of those institutions which have been *de jure* created by UNMIK and *de facto* endorsed by the Kosovo Constitution of 15 June 2008 which never met the *placet* of the UNSC. And even though UNMIK was supposed to leave its powers to EU–LEX, in fact, its presence in Kosovo is always visible and tangible.

One day before the entering into force of the Kosovo's Constitution, UNMIK issued an administrative direction (Administrative Direction No. 2008/7)<sup>50</sup> establishing the Office of the Disciplinary Counsel (ODC) within the UNMIK Department of Justice<sup>51</sup>. In terms of functions this institution is deemed to investigate the activities of judges, prosecutors or lay-judges working in the judicial and prosecutorial system in Kosovo, as well as to prosecute cases of misconduct before the relevant judicial and prosecutorial disciplinary bodies<sup>52</sup>. Concerning its duties, the ODC is deemed to forward an annual report on the investigations and prosecutions it has carried out to the Kosovo Judicial Council, the Ministry of Justice, the Assembly of Kosovo and the UNMIK Department of Justice<sup>53</sup>. Together with the ODC, the Judicial Audit Unit (JAU) is also established within the UNMIK's Department of Justice. In terms of functions, it is asked to analyse and evaluate the functioning of courts and public prosecutors' offices, as well as specific judicial or prosecutorial activities. As for the ODC the JAU is also asked to forward final reports to the Kosovo Judicial Council, the Ministry of Justice, the Assembly of Kosovo and the UNMIK Department of Justice<sup>54</sup>. Administrative direction No. 2008/7 revoked Administrative Direction No. 2001/4 establishing a Judicial Inspection Unit (JIU)<sup>55</sup> for the purpose of guaranteeing the proper functioning of the judicial

<sup>49</sup> See Section 2 *Appointment Process* (para. 2.3 (a, b & c)), in United Nations Administrative Direction No. 2006/18 implementing UNMIK regulation No. 2006/25 on a regulatory framework for the justice system in Kosovo (UNMIK/DIR/2006/18), December 28, 2006, p.3, *in ibidem*.

<sup>50</sup> See United Nations Administrative Direction No. 2008/7 UNMIK/DIR/2008/7, June 14, 2008 implementing UNMIK Regulation No. 2006/25 on a regulatory framework for the justice system in Kosovo. [pdf] Available at: <[http://www.unmikonline.org/regulations/unmikgazette/02english/E2008ads/ADE2008\\_07.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2008ads/ADE2008_07.pdf)> [Accessed on 5 October 2013].

<sup>51</sup> See Section 1 *Office of the Disciplinary Counsel* (para. 1.1.), in United Nations Administrative Direction No. 2008/7 UNMIK/DIR/2008/7, June 14, 2008 implementing UNMIK Regulation No. 2006/25 on a regulatory framework for the justice system in Kosovo, p.2 *in ibidem*.

<sup>52</sup> See Section 2 *Functions of the Office of the Disciplinary Counsel* (para. 2.1 (a) & (b)), in United Nations Administrative Direction No. 2008/7 UNMIK/DIR/2008/7, June 14, 2008 implementing UNMIK Regulation No. 2006/25 on a regulatory framework for the justice system in Kosovo, p.2 *in ibidem*.

<sup>53</sup> See Section 2 *Functions of the Office of the Disciplinary Counsel* (para. 2.3), in United Nations Administrative Direction No. 2008/7 UNMIK/DIR/2008/7, June 14, 2008 implementing UNMIK Regulation No. 2006/25 on a regulatory framework for the justice system in Kosovo, p.2 *in ibidem*.

<sup>54</sup> See Section 4 *Functions of the Judicial Audit Unit*, in United Nations Administrative Direction No. 2008/7 UNMIK/DIR/2008/7, June 14, 2008 implementing UNMIK Regulation No. 2006/25 on a regulatory framework for the justice system in Kosovo, p.3 *in ibidem*.

<sup>55</sup> The JIU was set up in April 2001 as a unit of the Department of Justice and it was responsible for investigating accusations against judges and prosecutors. See International Crisis Group 2002 (September 12), *II. The Justice System (D. The current judicial process – 1. The judiciary)*, in *Finding the Balance: The Scales of Justice in Kosovo*, Report N. 134, p.7. [pdf] Available at: <<http://www.crisisgroup.org/~media/Files/europe/Kosovo%2032.pdf>> [Accessed on 5 May 2009].

system in Kosovo<sup>56</sup>. In terms of functions the JIU was tasked to investigate complaints against a judge, a prosecutor or a lay-judge in conformity with section 7 of UNMIK Regulation No. 2001/8 of 6 April 2001 on the Establishment of the Kosovo Judicial and Prosecutorial Council<sup>57</sup>.

Kosovo recently re-structured its criminal justice system with a new law on courts, a new law on prosecution, a new criminal code and a new code of criminal procedure entering into force on 1st January 2013. The laws on the Judicial Council and the Prosecutorial Council entered into force in 2011. All the laws briefly aforementioned play a complementary role with the law on Special Prosecution setting forth the exclusive and subsidiary competences of special prosecutors entrusted with the task of investigating and prosecuting, *inter alia*, organised crime, corruption and terrorism. The new courts system is made up of Basic Courts, a Court of Appeal and the Supreme Court. In addition, the law on courts also foresees the establishment of serious crime departments in the Basic Courts and the Court of Appeal to adjudicate serious crimes, including those falling within the exclusive and subsidiary competence of the Special Prosecution<sup>58</sup>.

The understanding of EU–LEX’s judicial commitment in Kosovo today would not be possible if omitting to consider firstly that not solely the EU mission is not in charge of the whole judicial system of Kosovo but of dealing with the *most sensitive crimes*, and that it is entrusted to do so under the authority of UNSCR 1244/1999. Secondly, UNMIK has still those exclusive powers as these are set forth under the letter of its own legal basis (UNSCR 1244, June 10 1999) which is *de jure* still in force in Kosovo. EU–LEX is mandated<sup>59</sup> to promote the *rule of law* and *multi-ethnicity* in its three areas of interventions (police, *justice*<sup>60</sup> and customs) Kosovo-wide. It started its activities on 9th December 2008, while becoming fully operational only in April 2009. Following the entering into force of the *Law on Case Selection and Case Allocation*<sup>61</sup>, adopted by the Assembly of the Republic of Kosovo on 13 March 2008, UNMIK Department of Justice was to hand over, to the Chief EULEX

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<sup>56</sup> See Section 1 *Judicial Inspection Unit*, in United Nations Administrative Direction No. 2001/4 Implementing UNMIK Regulation No. 2000/15 on the Establishment of the Administrative Department of Justice, UNMIK/DIR/2001/4 May 11, 2001. [pdf] Available at: <<http://www.unmikonline.org/regulations/admdirect/2001/ADE%202001-04.pdf>> [Accessed on 6 October 2013].

<sup>57</sup> Section 2 *Functions* (para. 2.2), in United Nations Administrative Direction No. 2001/4 Implementing UNMIK Regulation No. 2000/15 on the Establishment of the Administrative Department of Justice, UNMIK/DIR/2001/4 May 11, 2001, in *Ibidem*, p.2.

<sup>58</sup> European Commission. Report from the Commission to the European Parliament and the Council on progress by Kosovo\* in fulfilling the requirements of the visa liberalisation roadmap. (3.3. Public Order and Security), February 8, 2013, pp.10–11. [pdf] Available at: <[http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/report\\_on\\_progress\\_on\\_kosovo\\_visa\\_liberalisation\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/report_on_progress_on_kosovo_visa_liberalisation_en.pdf)> [Accessed on 8 February 2013].

<sup>59</sup> Its legal basis is Council Joint Action 124/2008/CFSP. See Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, L 42/92 *Official Journal of the European Union* February 16, 2008. [pdf] Available at: <[http://www.eulexkosovo.eu/en/info/docs/JointActionEULEX\\_EN.pdf](http://www.eulexkosovo.eu/en/info/docs/JointActionEULEX_EN.pdf)> [Accessed on 16 April 2009].

<sup>60</sup> This paper focuses on the justice component only by assuming that a rule of law-based society can be achieved only if justice is properly guaranteed.

<sup>61</sup> See Law No. 03/L-053 on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, March 13, 2008. [pdf] Available at: <[http://www.assembly-kosova.org/common/docs/ligjet/2008\\_03-L053\\_en.pdf](http://www.assembly-kosova.org/common/docs/ligjet/2008_03-L053_en.pdf)> [Accessed on 20 April 2009].

Prosecutor and to the President of the Assembly of EULEX Judges, all files information and data referring to cases under investigation, prosecution, or dismissed by UNMIK, and cases that are or have been under the authority of UNMIK international judges<sup>62</sup>. An overview of the mission *co-judicial*<sup>63</sup> commitment from the *incipit* until end-January 2014 shows that EU–LEX *co-judicial* model is not providing the results of a rule of law based society throughout the whole country, as per its own mandate, while being challenged in the north.

*Table 1.1 UNMIK Justice for Kosovo*

Joint Advisory Council on Provisional Judicial Appointments (Emergency Decree 1999/1 June 30, 1999)	➤ Nominate – on temporary basis – members of the justice system (judges and prosecutors)
Emergency Judicial System (EJS), (OSCE December 17, 1999)	➤ No Serb judges & prosecutors, provisional district courts and prosecutor offices were established in Prishtinë/Priština, Prizren, Mitrovicë/a and Pejë/Peć and areas not served by a regular district court benefited from mobile units; a Court of Final Appeal and an <i>ad hoc</i> Office of the Public Prosecutor were set up and they comprised Albanians only
Advisory Judicial Commission (UNMIK Regulation No. 1999/7, September 7, 1999)	➤ Advise the SRSG on issues concerning the appointment of judges and prosecutors, as well as on complaints against any judge or prosecutor
Kosovo Joint Interim Administrative Structure (UNMIK Regulation No. 2000/1, January 14, 2000)	➤ Interim Administrative Council (IAC) ➤ 14 Departments (i.e. Justice)
Administrative Department of Justice (UNMIK Regulation No. 2000/15, March 21, 2000)	➤ Justice system & correctional service management ➤ Implementation of the Interim Administrative Council policy Guidelines ➤ Policy recommendations to Interim Administrative Council
Kosovo Judicial and Prosecutorial Council (KJPC) UNMIK Regulation 2001/8, April 6, 2001	➤ Assist the SRSG on issues concerning the appointment of judges, prosecutors and lay-judges & of hearing complaints against any judge, prosecutor or lay-judge
Provisional Institutions of Self-Government (PISG), May 2001	➤ The President, the Government, the Assembly, the Courts and any other body established in conformity with the Constitutional Framework with the purpose of enabling consistent self-government to Kosovo ➤ judicial authority split between PISG and UNMIK
KTa (UNMIK/REG/2002/12, June 13, 2002)	➤ Independent body set up pursuant to section 11.2 of the Constitutional Framework and endowed with judicial personality ➤ capacity to enter into contracts, acquire, hold

<sup>62</sup> See Chapter IV *Final and Transitional Provisions*, Article 16. 1, Law No. 03/L-053, in *ibidem*.

<sup>63</sup> The term *co-judicial* is here used to underline the joint commitment between EU–LEX officials and their local counterparts, as a direct reflection of the *local ownership* principle EU–LEX's deployment is based upon, in the judiciary.

	and dispose of property of publicly and socially-owned enterprises in the territory of Kosovo
Special Chamber of the Kosovo Supreme Court on Kosovo Trust Agency Related Matters (UNMIK/REG/2002/13), June 13, 2002	➤ To adjudicate cases of the Kosovo Trust Agency Related Matters
Joint Declaration on Recruitment of Judges and Prosecutors of Serb Ethnicity into the Multi-Ethnic Justice System in Kosovo between UNMIK and Belgrade, July 9, 2012	➤ Promote a multi-ethnic judiciary in Kosovo
KJC (UNMIK/REG/2005/52, December 20, 2005	<ul style="list-style-type: none"> <li>➤ To replace the previous KJPC</li> <li>➤ Professional body under authority of SRSG</li> <li>➤ Independent in its functions</li> <li>➤ recruit, train and appoint, evaluate, promote, transfer and discipline both judges and lay judges, judicial and non-judicial personnel</li> </ul>
Municipal Courts, Municipal Minor Offences Courts & Departments of Municipal Courts (UNMIK/REG/2006/25, April 27, 2006)	<ul style="list-style-type: none"> <li>➤ Enable an integrated, impartial and independent justice system</li> <li>➤ Official languages in the courts in Kosovo are Albanian, Serbian and English, as well as Turkish in those areas where Turkish communities live</li> <li>➤ Independent Judicial Commission (the Commission) in charge of administering a judicial and prosecutorial reappointment process for any judicial and prosecutorial post in Kosovo.</li> </ul>
Independent Judicial and Prosecutorial Commission (IJC) UNMIK/DIR/2006/18, December 28, 2006	<ul style="list-style-type: none"> <li>➤ Autonomous body of the KJC</li> <li>➤ carry out a comprehensive, Kosovo-wide review of the suitability of all applicants for permanent appointments in the position either of judge or prosecutor in Kosovo</li> </ul>
Office of the Disciplinary Counsel (ODC), UNMIK Administrative Direction No. 2008/7, June 14, 2008	<ul style="list-style-type: none"> <li>➤ to be established within the UNMIK Department of Justice</li> <li>➤ to investigate the activities of judges, prosecutors or lay-judges working in the judicial and prosecutorial system in Kosovo, as well as to prosecute cases of misconduct before the relevant judicial and prosecutorial disciplinary bodies</li> </ul>
Judicial Audit Unit (JAU), UNMIK Administrative Direction No. 2008/7 UNMIK/DIR/2008/7, June 14, 2008	➤ to be established within the UNMIK Department of Justice

Source: Table by the author

## 2. EU–LEX Co-Justice in the North: *Local Ownership Missed*

“[...] [E]fforts to reform a local justice system may challenge a population’s sense of what is right or wrong, in particular in pluralistic legal orders. For example, justice-related law making that aims at making traditional dispute settlement mechanisms



compatible with international human rights standards might stand in serious contradiction to existing local norms, values and belief systems. Can new justice programmes be locally owned if they challenge local social and legal traditions and bring about change in line with the liberal peace agenda? [...]”<sup>64</sup> (Leopold von Carlowitz, March 2011)

In the previous paragraph a picture of EU–LEX’s *inheritance* in the judicial field has been outlined, while pinpointing that its margin of action is limited since its inception from a legal perspective<sup>65</sup>. But this would not explain *per se* its incapability at promoting the rule of law in the north of Kosovo. EU–LEX took over open UNMIK’s cases when this latter “left” in summer 2008<sup>66</sup>. Whether its predecessor failed to enable *local ownership* in the north of the country, its successor does not seem to provide room for improvements. The marginality of the problem if seen from a geographical/numerical point of view is evident, but if considered in a wider perspective and with a view at building a truly rule of law-based and multi-ethnic society Kosovo-wide disappears. The International Crisis Group noted in 2010 that “[t]he justice system’s weakness is visible above all in Kosovo north of the Ibar River, the small Serb-held zone that Serbia in effect controls. There is no real criminal justice in the North, as its Serbia run-courts cannot cooperate with the UN-mandated Kosovo Police (KP). [...] [T]he North remains a stumbling block in relations between Kosovo and Serbia and between both of these and EULEX.”<sup>67</sup> It is also to be pointed out that enabling justice in Kosovo is challenged by many reasons and not less because Serbian authorities who left after the war in 1999 brought with them all court files<sup>68</sup>. There is acknowledgment on that “UNMIK did too little to build up Kosovo’s own capacity during the decade it ran the territory.”<sup>69</sup> But its successor EU–LEX keeps being challenged still today. Is this solely to be attributed to its doing little or one should assume that, in fact, external actors and the EU have not those tools for dealing with complex *ethnic-biographic settings* Kosovo-like? And could EU–LEX – if yes how – better address the situation on the ground? One thing is almost evident: its success there would translate in the ability of the EU as a whole to enable multi-ethnicity in highly divided societies, while its failure would tell us that it is not equipped for providing a solution to that. A positive outcome in Kosovo is expected for various reasons, and mainly because having a *united, multi-ethnic* and *stable* Kosovo is first of all important for its own inner security. Since 2005, at the time of the status talks, it had already been clearly pointed out that “[t]he international community [...] properly decreed that Kosovo’s final status must not involve

<sup>64</sup> See Leopold von Carlowitz March 2011, *Limited Focus on Justice Sector*, in Local Ownership in Practise: Justice System Reform in Kosovo and Liberia, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper – N. 23, Geneva, p.4.

<sup>65</sup> Reference is here made to its deployment under UNSCR 1244, June 10, 1999 which is the legal basis for its deployment.

<sup>66</sup> See Leopold von Carlowitz March 2011 2. *Justice Reform in Kosovo (2.1 Judicial System)*, in *Ibidem*, pp.10–11.

<sup>67</sup> See International Crisis Group 2010 (May 19), *The Rule of Law in Independent Kosovo*, Europe Report No. 204, p.3. [online] Available at: <<http://www.crisisgroup.org/en/regions/europe/balkans/kosovo/204-the-rule-of-law-in-independent-kosovo.aspx>> [Accessed on 25 May 2010].

<sup>68</sup> See International Crisis Group 2010 (May 19), A. *Background*, in The rule of law in independent Kosovo, Europe Report N. 204, p.2, in *ibidem*.

<sup>69</sup> See International Crisis Group 2010 (May 19), A. *Background*, in The rule of law in independent Kosovo, Europe Report N. 204, p.2, in *ibidem*.

division of its territory.”<sup>70</sup> Following this line the main argument is that “[t]erritorial integrity is the correct policy because partition could provoke further population exchanges inside Kosovo and instability elsewhere in the Balkans [...]”<sup>71</sup> The issue is that almost eight years after, and notwithstanding *formal independence*, division and separation of this part of Kosovo from the rest of the country is still tangible, despite some achievements reached under the EU’s pressure<sup>72</sup>. This scenario may be in part explained because of the *peculiarity* and *distinctiveness* of the north dating back in the history<sup>73</sup>. The importance of Mitrovicë/a was evident under the Ottomans when it was a garrison town located on a significant silver trade route, and since the middle Ages it became a mining industrial hub. Furthermore, in the Yugoslav era it provided a considerable number of jobs<sup>74</sup>. Mitrovicë/a was also one of the locations of the Albanian nationalist movement and under the Ottomans’ administrative arrangements it was situated in the Vilajet of Kosovo. But at a certain point in history it became part of the Sandzak of Novi Pazar (a Serbo-Croatian speaking administrative district which comprised parts of Montenegro, Serbia and it reached south-east Bosnia as well) and it will remain in this configuration until the first Balkan War in 1912, when it will be taken over from Serbia<sup>75</sup>. There are thus historical and contingent explanations behind the separation of the north from the rest of the country which are still visible today.

“Crossing the [Ibar] river feels like traversing a border within the EU’s Schengen zone: there are no signs or formalities, but suddenly everything is different: licence plates, street and shop signs, currency and the language heard on the street. The North is part of Kosovo but feels like part of Serbia [...]”<sup>76</sup>

In February 2002 UNMIK sets up a community office in north Mitrovicë/a to be looked at as a first step for enabling the dismantlement of the parallel structures but it did not turn to be successful<sup>77</sup>. And in the almost ten years of UNMIK administration the divide has not disappeared. In mid-June 2008, and following the changed circumstances on the ground (i.e. Kosovo’s declaration of independence, Kosovo’s Constitution), a UNMIK’s reconfiguration process started while transferring “some” of its powers to EU–LEX. As outlined in the previous paragraph, EU–LEX does not hold the whole Kosovo’s judiciary but only “[t]he

<sup>70</sup> See International Crisis Group 2005 (September 13), *Executive Summary and Recommendations*, in Bridging Kosovo’s Mitrovica Divide, Europe Report N. 165, p.i. [online] Available at: <[http://www.crisisgroup.org/~media/Files/europe/165\\_bridging\\_kosovo\\_mitrovica\\_divide](http://www.crisisgroup.org/~media/Files/europe/165_bridging_kosovo_mitrovica_divide)> [Accessed on 30 April 2009].

<sup>71</sup> See International Crisis Group 2005 (September 13), *Executive Summary and Recommendations*, in Bridging Kosovo’s Mitrovica Divide, Europe Report N. 165, p.i, in *ibidem*.

<sup>72</sup> Reference is here made to the agreements signed under the so-called *EU-Facilitated Dialogue* launched under the EU’s umbrella from March 2011 and chaired by the High Representative of the Union for Foreign Affairs and Security Policy, Catherine Ashton.

<sup>73</sup> For an overview on the *distinctiveness* of the north of Kosovo and its implications for the rule of law and EU – LEX, see Nicasia Picciano. *The European Union Rule of Law Mission in Kosovo Challenged in the Lands of Dichotomous Truths: Lessons Learned*, Saarbrücken: Lambert Academic Publishing 2014, (publication forthcoming).

<sup>74</sup> See International Crisis Group 2005 (September 13), *II. Mitrovica and The North (A. The Region and Its History)*, in Bridging Kosovo’s Mitrovica Divide, Europe Report N. 165, p.2, in *ibidem*.

<sup>75</sup> See International Crisis Group 2005 (September 13), *II. Mitrovica and The North (A. The Region and Its History)*, in Bridging Kosovo’s Mitrovica Divide, Europe Report N. 165, p.3, in *ibidem*.

<sup>76</sup> See International Crisis Group 2010 (May 19), *III. The Judiciary (IV. North Kosovo)*, in The rule of law in independent Kosovo, Europe Report N. 204, p.18, in *ibidem*.

<sup>77</sup> See International Crisis Group 2005 (September 13), *II. Mitrovica and The North (B. Mitrovica since 1999)*, in Bridging Kosovo’s Mitrovica Divide, Europe Report N. 165, p.4.

*most sensitive cases* have been transferred to [it] [...]”<sup>78</sup>. As per 2010 no municipal courts were present in the north of Kosovo and Kosovo-Serbian judges ran justice privately. The same situation is that of prosecutors<sup>79</sup>. The main issue of concern is criminal justice whose proper handling is halted because of political decisions<sup>80</sup>. Today, the justice system in the north is run by EU–LEX judges and prosecutors only which *de facto* neglects that *local ownership* principle being at the outset of any genuine democratic and long-lasting system. The importance of having a functioning judiciary in the northern part of Kosovo is to be understood in the wider EU’s framework and it can be agreed with that “[t]he establishment of an independent and effective justice system is key to building a stable and democratic society in Kosovo.”<sup>81</sup> But it is in this endeavour that *local ownership* is most challenged and this can be explained by acknowledging that any highly sophisticated external judicial expertise assistance should go hand in hand with the local will. To be said otherwise “[...] key determinations on Mitrovica and the north will come from the international community but Albanians and Serbs elites must be willing to make them work.”<sup>82</sup>

EU–LEX is *de facto* challenged at *monitoring, mentoring and advising* together with some “executive powers” its *judicial* local counterpart (also police and customs officials) in a *context* which from one hand is different from that its predecessor (UNMIK) found in 1999, but with a past burden of mutual distrust that only generations (maybe) can lighten. Attempts at enabling a *multi-ethnic* judiciary have already been experienced by UNMIK via the signing of the Joint Declaration on Recruitment of Judges and Prosecutors of Serb Ethnicity into the Multi-Ethnic Justice System in Kosovo on 9 July 2002 between Belgrade and UNMIK<sup>83</sup>. But the results on the ground after years of *external peace-building* seems to counter-demonstrate that multi-ethnicity can be enforced from the outside. One should agree with Marek Antoni Nowicki when he says that “[i]f the public authority does not have the power or will to implement the law one should resign from any serious rule of law discussion.”<sup>84</sup> EU–LEX is *de facto* challenged in northern Kosovo by political issues and this cannot be denied<sup>85</sup>. It is, however, to be questioned what is (or has been) *la raison d’être* behind EU–LEX’s deployment? If one read through its mandate (CJA 124/2008/CFSP) the answer is quite evident: promote the rule of law and further develop multi-ethnicity. But what is the balance

<sup>78</sup> See International Crisis Group 2010 (May 19), B. The Crime Problem, in The rule of law in independent Kosovo, Europe Report N. 204, p.4 (emphasis added).

<sup>79</sup> See International Crisis Group 2010 (May 19), III. The Judiciary (IV. North Kosovo – B. Courts), in The rule of law in independent Kosovo, Europe Report N. 204, p.19, in *ibidem*.

<sup>80</sup> See International Crisis Group 2010 (May 19), III. The Judiciary (IV. North Kosovo – B. Courts), in The rule of law in independent Kosovo, Europe Report N. 204, p.20, in *ibidem*.

<sup>81</sup> See International Crisis Group 2002 (September 12), I. Introduction, in Finding the Balance: The Scales of Justice in Kosovo, Report N. 134, p.1. [pdf] Available at: <<http://www.crisisgroup.org/~media/Files/europe/Kosovo%2032.pdf>> [Accessed on 5 May 2009].

<sup>82</sup> See International Crisis Group 2010 (May 19), VI. Charting a solution (3. Building a vision for settlement), in The rule of law in independent Kosovo, Europe Report N. 204, p.30, in *ibidem*.

<sup>83</sup> See International Crisis Group 2002 (September 12), II. The Justice System (D. The current judicial process – 1. The judiciary), in Finding the Balance: The Scales of Justice in Kosovo, Report N. 134, p.10. [pdf] Available at: <<http://www.crisisgroup.org/~media/Files/europe/Kosovo%2032.pdf>> [Accessed on 5 May 2009].

<sup>84</sup> Marek Antoni Nowicki, 2006 (February 24), *Kosovo pro-memoria KiM Info Newsletter*.

<sup>85</sup> For an overview on the political constraints downsizing EU – LEX’s margin of manoeuvre in the north, see Nicasia Picciano. *The European Union Rule of Law Mission in Kosovo Challenged in the Lands of Dichotomous Truths: Lessons Learned*, Saarbrücken: Lambert Academic Publishing 2014, (publication forthcoming).

after its first five years in-theatre commitment? Kosovo-Serbs keep not participating in the judicial proceedings (either criminal or civil) led under EU–LEX supervision. The problem is also another one in this area: *which law should be applied?* To put it with Marek Antoni Nowicki, it is not possible to speak about the laws of the Republic of Kosovo in the north. This is the starting point. Under UNMIK, he says, it was easier and at least from a certain moment, slowly, very slowly, Serbs have been accepting UNMIK as something which is better than nothing. It is a fact, however, that Kosovo-Serbs in the north do not recognise what comes from the other side of the river<sup>86</sup>.

Departing from the north and by enlarging the perspective, there is recognition that in 2012 on the whole 183 cases concerning abuse of official position and authority, 6 cases of organised crime, 22 cases of trafficking in human beings, 186 narcotic related offences and 24 cases of weapon related offences have been resolved by the courts<sup>87</sup>. At the same time it is acknowledged that the fight against organised crime and corruption remains a challenge for Kosovo, while pinpointing the need of further cooperating with EU–LEX at this purpose<sup>88</sup>. The issue is that both these two types of crimes<sup>89</sup> are most present in the uncontrolled north, where EU–LEX judges and prosecutors are *de facto* the *exclusive decision-makers* by raising doubts about the *legitimacy* of their actions from one hand, and the proclaimed *local ownership* principle which remains more rhetorical than factual from the other hand.

### 3. EU–LEX judges and Prosecutors: Legal Basis

EU–LEX justice component has been *co-located* in the various courts<sup>90</sup> in Kosovo and it *co-exercises de facto* judicial power<sup>91</sup> throughout the country, while pretending<sup>92</sup> to be *status-*

<sup>86</sup> Interview with the author Helsinki Foundation for Human Rights (HFHR), Warsaw, December 5, 2013.

<sup>87</sup> European Commission. *3 Other issues of December Council Conclusions (Consolidating rule of law)*, in Joint Report to the European Parliament and the Council on Kosovo\*’s progress in addressing issues set out in the Council Conclusions of December 2012 in view of a possible decision on the opening of negotiations on the Stabilisation and Association Agreement, JOIN(2013) 8 final, Brussels, April 22, 2013, p.8. [pdf] Available at: <[http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/ks\\_spring\\_report\\_2013\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/ks_spring_report_2013_en.pdf)> [Accessed on 22 April 2013].

<sup>88</sup> European Commission. *3 Other issues of December Council Conclusions (Consolidating rule of law)*, in Joint Report to the European Parliament and the Council on Kosovo\*’s progress in addressing issues set out in the Council Conclusions of December 2012 in view of a possible decision on the opening of negotiations on the Stabilisation and Association Agreement, JOIN(2013) 8 final, Brussels, April 22, 2013, p.8, in *ibidem*.

<sup>89</sup> For a graphic representation about it, see paragraph 1.3.

<sup>90</sup> A new court structure has been introduced in Kosovo on 1st January 2013 and the launch of its implementation is recorded as successful. It has been highlighted that the basic institutions of the judiciary have started to perform their role and that the legislation gives guarantee over the independence of the judicial system. The new law on courts and prosecutors, entered in force on 1st January 2013, replaces the former structures of municipal and district courts by establishing seven basic courts and one court of appeals. The new legal framework is intended to enhance the independence, effectiveness, accountability and impartiality of the judiciary in Kosovo. Together with the new law on courts, the new criminal code and the new criminal procedure code entered into force by the same day. See European Commission. *Joint Report to the European Parliament and the Council on Kosovo\*’s progress in addressing issues set out in the Council Conclusions of December 2012 in view of a possible decision on the opening of negotiations on the Stabilisation and Association Agreement*, JOIN(2013) 8 final, Brussels, April 22, 2013, p.4, pp.8–9. [pdf] Available at: <[http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/ks\\_spring\\_report\\_2013\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/ks_spring_report_2013_en.pdf)> [Accessed on 22 April 2013].

*neutral* over Kosovo's statehood. In fact, its judicial authority lays on the Constitution of the Republic of Kosovo. Under the letter of Article 102 [General Principles of the Judicial System] (3), Chapter VII *Justice System* of the Constitution of Kosovo, it is clearly stated that "Courts shall adjudicate based on the *Constitution* and the law."<sup>93</sup> To be said otherwise, EU–LEX judges are integral part of the justice system in the country and in the north they are the *sole decision-makers*.

EU–LEX judiciary *co-location* in Kosovo is ruled by the Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo (Law No. 03/L-053)<sup>94</sup> adopted by the Assembly of the Republic of Kosovo in conformity with article 65 (1) of the Constitution of the Republic of Kosovo. Concerning the powers of EU–LEX judges these are ruled under Chapter II Competences of EULEX judges, Article 2 General authority of EULEX judges, para. 2.1 whereas it is stated that "[a]n EULEX judge will have the authority and responsibility to perform the functions for cases falling within the jurisdiction of the courts to which he or she is assigned to by the President of the Assembly of EULEX judges, and according to the modalities as established by the present law and by the EULEX Kosovo."<sup>95</sup> Under paragraph 2.2 it is to be read that "EULEX judges will cooperate with the Kosovo Judges working at the different courts to which he or she is assigned to, in accordance with the modalities as established by the present law and by the EULEX Kosovo."<sup>96</sup> Paragraph 2.4 goes further by stating that "[b]esides exercising their judicial functions [...] EULEX judges will *monitor, mentor* and *advise* the Kosovo Judges, in the respect of the principle of independence of the judiciary and according to the modalities as established by the present law and by the EULEX KOSOVO."<sup>97</sup>

EU–LEX judges are involved both in civil and criminal proceedings<sup>98</sup> in Kosovo. Concerning civil cases EU–LEX judges have jurisdiction over those falling within the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters, as well as cases that have been referred to another court in conformity with the applicable law; the jurisdiction of any court of Kosovo regarding appeals and decisions of the Kosovo Property Claims Commission according to the applicable law; any new or pending property related civil cases, including the execution of procedures which fall within the jurisdiction of any court of

<sup>91</sup> Judicial power in Kosovo is held by the courts. See Chapter VII *Justice System*, Article 102 [General Principles of the Judicial System], Constitution of the Republic of Kosovo, June 15, 2008. [pdf] Available at: <<http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>> [Accessed on 25 April 2009].

<sup>92</sup> Over EU–LEX's *legal conundrum* and the implications for its in – theatre performance, see Nicasia Picciano, 2013 (February 8–9), 3 *EULEX's legal conundrum: UNMIK Res. 1244, status-neutrality, mandate*, in EULEX Damocles' Sword in North Kosovo: *Dis-Embeddedness*, The Balkans Dialogue, Conflict Resolution and EU Accession Politics in The Balkans and Turkey, Budapest, pp.241–244.

<sup>93</sup> See Article 102 (3) [General Principles of the Judicial System], Chapter VII *Justice System*, Constitution of the Republic of Kosovo. [pdf] Available at: <<http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>> (Emphasis added).

<sup>94</sup> See Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, Law No. 03/L-053, Republic of Kosovo, March 13, 2008. [pdf] Available at: <[http://www.assemblykosova.org/common/docs/ligjet/2008\\_03-L053\\_en.pdf](http://www.assemblykosova.org/common/docs/ligjet/2008_03-L053_en.pdf)> [Accessed on 29 May 2013].

<sup>95</sup> See Law No. 03/L-053, in *ibidem*.

<sup>96</sup> See Law No. 03/L-053, in *ibidem*.

<sup>97</sup> See Law No. 03/L-053, in *ibidem* (Emphasis added).

<sup>98</sup> This paper focuses on the criminal proceedings only and it is part of a broader research project.

Kosovo, provided that there is suspicion on the attempts at influencing impartiality or the independence of the local judiciary, the local judiciary is not willing or unable to properly deal with the case, or of serious violation of fairness of the proceeding<sup>99</sup>. In terms of panel composition of civil proceedings this will be consisting of three judges and two of them will be EU–LEX judges with one EU–LEX judge presiding<sup>100</sup>.

Concerning criminal proceedings Article 3 of the present law explicitly states under para. 1 that “EU–LEX judges assigned to criminal proceedings will have the jurisdiction and competence over any case investigated or prosecuted by the SPRK<sup>101</sup>.”<sup>102</sup> Under paragraph 2 we find reference over that “[t]he President of the Assembly of EULEX Judges will assign any EULEX judge to the respective stage of the criminal proceeding investigated or prosecuted by the SPRK [...]. The President of the Assembly of EULEX Judges can decide for grounded reasons that an EULEX judge is not assigned to the respective stage of the criminal proceeding.”<sup>103</sup> EU–LEX judges jurisdiction and competence in the field of criminal proceedings covers various cases<sup>104</sup>. Under the letter of article 3, paragraph 3.10, it is to be read that “[t]he Head of the Justice Component will have the authority to request and obtain from the Presidents of the various courts of Kosovo non-confidential information related to cases that could fall under the competence of the EULEX judges.”<sup>105</sup>

In terms of panel composition before criminal proceedings, EU–LEX judges are deemed to exercise their functions with a majority of their members and one of them is the presiding judge. However, the President of the Assembly of EU–LEX judges may establish, for some reasons, that a panel should be of a majority or a total composition of Kosovo judges only, or

<sup>99</sup> See article 5 (1) *Jurisdiction of EULEX judges for civil cases, in ibidem*.

<sup>100</sup> See article 5 (2) and (4) *Jurisdiction of EULEX judges in civil cases, in ibidem*.

<sup>101</sup> The acronym SPRK stands for “Special Prosecution Office of Republic of Kosovo” and it refers to the permanent and specialised prosecutorial office which operates within the Office of the Public Prosecutor of Kosovo.

<sup>102</sup> See Article 3 (1) Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, *in ibidem*.

<sup>103</sup> Article 3 (2), *in ibidem*.

<sup>104</sup> See art. 3, para. 3.3, *in ibidem* and they are the following: assault on legal order of Kosovo; inciting national, racial, religious or ethnic hatred, discord or intolerance; hijacking aircraft, endangering civil aviation safety, endangering maritime navigation safety, endangering the safety of fixed platforms located on the continental shelf; piracy; smuggling of migrants, trafficking in persons; endangering United Nations and Associated Personnel; murder, aggravated murder, hostage taking, kidnapping; violating equal status of residents of Kosovo; torture; all criminal offences against sexual integrity; unauthorised purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substance, unauthorised production and processing of dangerous narcotic drugs and psychotropic substances; causing bankruptcy, damaging creditors, misuse of economic authorisation, entering into harmful contracts, tax evasion, organizing pyramid schemes and unlawful gambling, counterfeit money, unjustified acceptance of gifts, unjustified giving of gifts; grave of theft in the nature of robbery or robbery, fraud, extortion; participating in a crowd committing criminal offence; unauthorised supply, transport, production, exchange or sale of weapons; abusing official position or authority, misappropriation in office, accepting bribes, giving bribes; the crimes listed in articles 30, 31, 32, 33, 34, 138, 141, 149, 215, 219, 222 and 223 of the CCK [Criminal Code of Kosovo] the crimes listed in articles 74–82 of the CCK (Criminal Acts against personal dignity and morality) as amended by UNMIK Regulation No. 2003/1 Amending the Applicable Law on Criminal Offences involving sexual violence; the crimes listed in articles 134, 240, 241, 245 of the CCFRY [Criminal Code of the Former Yugoslavia] national, religious or ethnic hatred, discord or intolerance (article 1, UNMIK Regulation No. 2000/4); trafficking in persons (article 2, UNMIK Regulation No. 2001/4 on the prohibition of trafficking in persons in Kosovo).

<sup>105</sup> See Law No. 03/L-053, *in ibidem*.

that EU–LEX judges are not assigned to particular stages of the proceeding<sup>106</sup>. As it is reported in the following paragraph, EU–LEX judges are, in fact, the *exclusive decision-makers* in the Basic Court of Mitrovicë/a, while the *co-location model*, as laid down under the Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo (L No. 03/L-053), is almost followed in all the other courts in Kosovo.

EU–LEX’s discretionary role in the Kosovo judiciary is self-evident and, last but not least, the Head of the Justice Component may, on the ground of security reasons and behind the proposal of the Chief EULEX Prosecutor or of the President of the Assembly of EULEX Judges, change the venue of a trial or of a particular stage of a criminal or civil proceeding whenever a EULEX judge or a EULEX prosecutor is involved. The President of the Court – entitled to exercise his territorial jurisdiction in the case – will be informed by the Head of the Justice Component of the change of the venue<sup>107</sup>.

Together with judges, the mission is committed to the rule of law by *co-locating* prosecutors who shall carry out their duties while cooperating with the Kosovo public prosecutors working within the various prosecution offices. In terms of structure and functions EU–LEX *prosecutorial co-location* model follows the judicial one. The EU–LEX Chief Prosecutor assigns EU–LEX prosecutors to criminal investigations or proceedings within the SPRK or within the various prosecutor offices. EU–LEX prosecutors also exercise *monitoring*, *mentoring* and *advising* functions to the Kosovo Public Prosecutors as well as beyond cases for which they can exercise their competences. In addition, EU–LEX Prosecutors will exercise their functions under the *exclusive authority* of the Chief EULEX Prosecutor and *will not be* subject to the authority of *any Kosovan institution*<sup>108</sup>.

In terms of competences EULEX prosecutors are mandated to investigate and prosecute crimes falling under the exclusive competence of the SPRK in conformity with the law establishing the SPRK, as well as the crimes, and various form of collaboration to the crimes as these are set forth under the letter of the Law on case selection and case allocation of EULEX judges and prosecutors (article 3, para.3), as well as beyond those listed in the present law<sup>109</sup>. In terms of *co-working model* EU–LEX prosecutors are deemed to exercise their functions in *mixed teams* with local prosecutors. Additional necessary activities falling beyond the letter of the *Law on case selection and case allocation* are ruled by a separate arrangement between the Head of EULEX Kosovo, the Ministry of Justice (MoJ), the Kosovo Judicial Council (KJC), the Office of the Public Prosecutor of Kosovo and the Offices of the District Prosecutor<sup>110</sup>.

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<sup>106</sup> See Article 3(7) *Jurisdiction and competences of EULEX judges for criminal proceedings*, Law No. 03/L-053, in *ibidem*.

<sup>107</sup> See Article 13 (1) *Change of venue for criminal and civil proceedings*, Law No. 03/L-053 in *ibidem*.

<sup>108</sup> See Chapter III *Competence of EULEX Prosecutors*, Article 7 (paras. 1, 2, 3, 4) *General Authority of EULEX Prosecutors*, in *ibidem*.

<sup>109</sup> See Chapter III *Competences of EULEX Prosecutors*, Article 8 (paras. 1 and 2) *Competences of EULEX prosecutors in Kosovo*, in *ibidem*.

<sup>110</sup> See Chapter III *Competences of EULEX Prosecutors*, Article 9 (paras. 1, 2) *Exercise of the competence of EULEX prosecutors assigned to the prosecution offices in Kosovo*, in *ibidem*.

A *joint responsibility* exists between EU–LEX prosecutors and their local counterparts for agreeing on procedural or investigative activity of an alleged criminal conduct. Whenever disagreements arise between EU–LEX Prosecutor and the Kosovo Public Prosecutor on the same case with reference to the content or the performance of a particular act of the proceeding, the matter will be referred, by both of them, to the Chief District Prosecutor who is supposed to take a decision within twenty-four hours. If disagreements persist at the SPRK *mixed teams* level, the Head of the SPRK is deemed to decide on the matter. However, the EU–LEX prosecutor may request a review of the decision undertaken either by the Chief District Prosecutor or the Head of the SPRK within twenty-four hours after being informed. A solution thereof is then to be undertaken in a reasonable time jointly by the EULEX Chief Prosecutor and the Head of the SPRK. *Last but not least* in urgent cases or whenever the delay may imply consequences on either the conduct or the result of the investigation, prosecution or fairness of the proceeding, the EULEX Chief Prosecutor is entitled to adopt any urgent procedural activity or to assign any EULEX Prosecutor or Kosovo Public Prosecutor for the specific need<sup>111</sup>.

A careful reading of the Law on Case Selection and Case Allocation of EULEX judges *and prosecutors* makes it evident that EU–LEX is endowed with an indefinite margin of discretion both in the judicial and prosecutorial field. This is also self-evident if one considers that the Head of EULEX Kosovo, behind the advice of the Head of Justice Component, has the authority to either repeal or modify, in conformity with the procedures as these are established by the Law on Case Selection and Case Allocation, the law itself. By their side, local authorities are recognised the possibility to have consultations with the Head of EULEX Kosovo over the necessity of repealing, amending or changing the law<sup>112</sup>.

The indefinite discretionary authority recognised *de jure* by the *Law on Case Selection and Case Allocation* upon EULEX contributes to provide the EU largest ever civilian mission with a *sui generis judicial agency* that has no precedents in the EU CSDP's realm. At the same time its almost absolute power in the north of Kosovo sheds lights on the fallacy of that local ownership principle it claims to pursue.

#### 4. EU–LEX Co-Location Judicial Model Challenged in the North: Lessons Learned

“For a small country, Kosovo has a multitude of courts: constitutional, supreme and commercial, all with countrywide jurisdiction and seated in Pristina, five district courts (Pristina, Gjilan, Mitrovica, Pejë and Prizren); and 24 municipal courts, plus courts for minor offences [...]”<sup>113</sup>

<sup>111</sup> See Chapter III *Competences of EULEX Prosecutors*, Article 10 (paras. 1, 2, 3, 4) *Joint responsibility of the mixed teams and disputes resolution mechanism*, in *ibidem*.

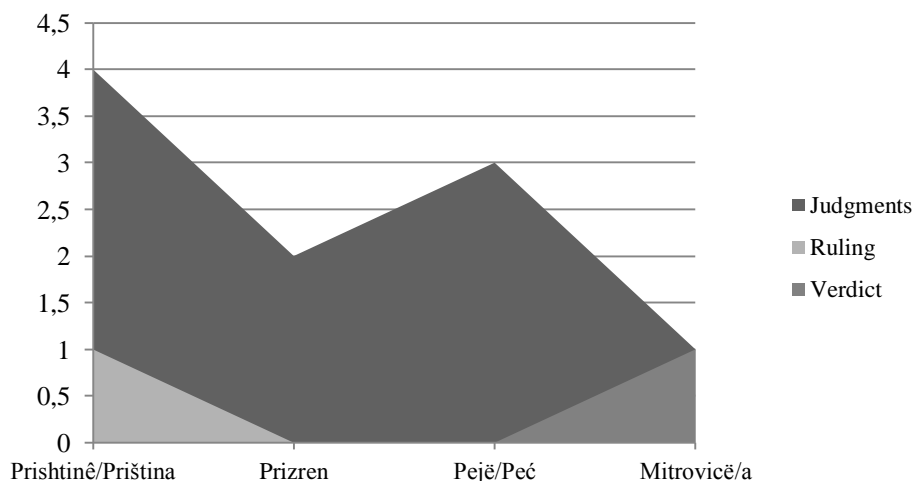
<sup>112</sup> See Chapter IV *Final and Transitional Provisions*, Article 14 (paras.1, 2), in *ibidem*.

<sup>113</sup> See International Crisis Group 2010 (May 19), III. *The Judiciary (A. Courts)*, in *The rule of law in independent Kosovo*, Europe Report N. 204, p.12. [pdf] Available at: <<http://www.crisisgroup.org/~media/Files/europe/balkans/kosovo/204%20The%20rule%20of%20Law%20in%20Independent%20Kosovo.pdf>> [Accessed on 25 May 2010].



EU–LEX judges are co-located in the Basic Courts of Kosovo. Each Basic Court has territorial competence over certain municipalities<sup>114</sup>. Basic Courts are defined under the letter of Article 2 *Definitions*, Chapter I General Provisions of the Law No. 03/L-199 on Courts adopted by the Kosovo Assembly on 22 July 2010 as first instance courts<sup>115</sup>. In terms of jurisdiction (article 11.1 & 2 Subject Matter Jurisdiction of the Basic Court) Basic Courts are competent to adjudicate in first instance all cases, unless otherwise specified by law, to give international support and to decide for acceptance of foreign courts' decisions<sup>116</sup>. Each Basic Court is organised internally in departments<sup>117</sup> and each one of them is competent for specific matters. On the whole there are seven Basic Courts throughout the country and they are Prishtinë/Priština, Gjilan/Gnjilane, Prizren, Gjakova/Djakova, Peja/Peć, Ferizaj/ Uroševac, and Mitrovicë/a. EU–LEX judges and their local counterparts issued a total of twelve *judicial decisions* addressed to a total of fifty-four defendants<sup>118</sup>. The first graph (1.4) below shows the number of typology of judicial decision per each Basic Court<sup>119</sup>, and the second one (1.5) the number of defendants per each Basic Court concerned by the given judicial decisions, as per the end of January 2014. The third graph (1.6) depicts the criminal offences confirmed per number of defendants.

Graph 1.4 EU–LEX *co-judicial decisions* per Basic Court, January 2014



<sup>114</sup> For an overview see *Basic Courts Territorial Competence as per Municipality* at the end of the paragraph.

<sup>115</sup> See Law No. 03/L-199 on Courts, Assembly of the Republic of Kosovo, July 22, 2010, Year/August V/No. 79, August 24, 2010. [pdf] Available at: <[http://www.md-ks.org/repository/docs/on\\_courts.pdf](http://www.md-ks.org/repository/docs/on_courts.pdf)> [Accessed on 15 September 2010].

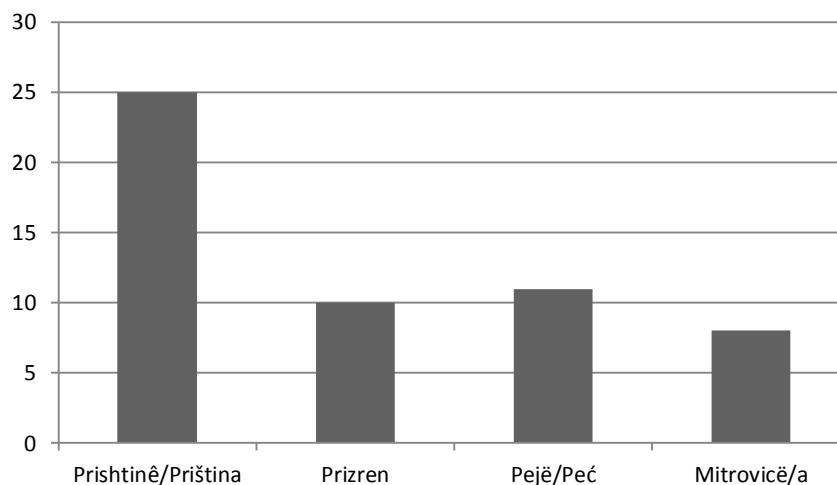
<sup>116</sup> See Law No. 03/L-199 on Courts, *in ibidem*.

<sup>117</sup> The department for commercial matters and the department for administrative cases are both operating in the Basic Court of Prishtinë/Priština for the entire territory of the Republic of Kosovo (article 12.1 & 2 Internal Organisation of the Basic Court), while the department for serious crimes and a general department operate in each Basic Court and in each branch of the Basic Court respectively. In addition, a department for minors operate within the Basic Courts, see article 12. 3, 4 & 5, *in ibidem*.

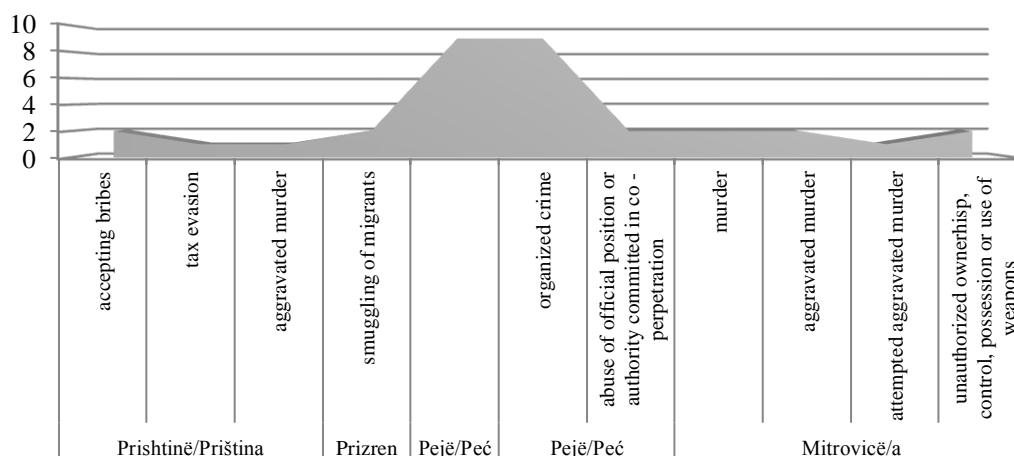
<sup>118</sup> It is to note that defendants had been previously indicted in first instance and each Basic Court, while adopting its own judicial decision, has either acquitted or confirmed the criminal offence, as per indictment. It is not the purpose of this research to look into whether the indictment in first instance has been either confirmed or acquitted, but to provide an overview from one end of EU–LEX's *co-judicial commitment*, and from the other hand to map the criminal offence scenario in Kosovo.

<sup>119</sup> Data are not available for the Basic Courts of Gjilan/Gnjilane, Gjakova/Djakovica, Ferizaj/Uroševac, as per January 23, 2014.

Graph 1.5 Total defendants per Basic Court, January 2014



Graph 1.6 Criminal offences confirmed per number of defendant Kosovo Basic Courts, January 2014

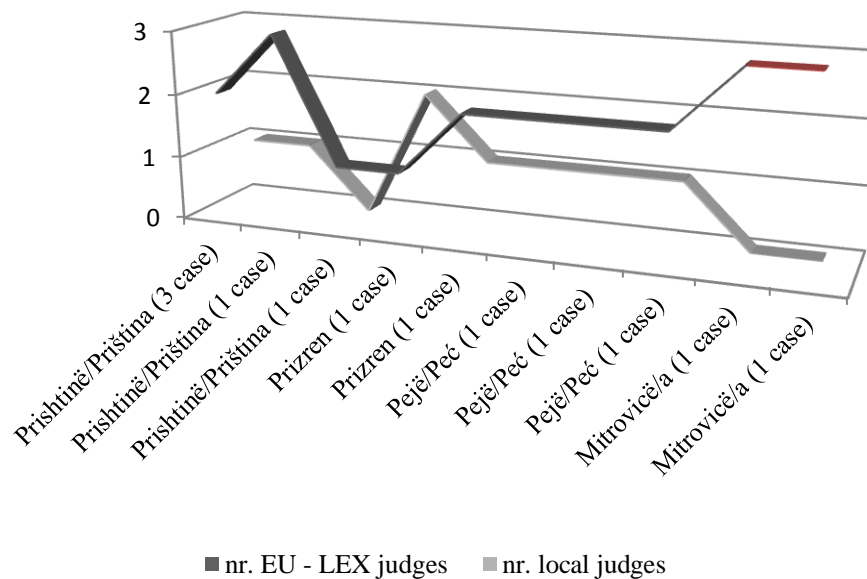


Source: Graph 1.4, Graph 1.5 and Graph 1.6 are by the author. Data have been taken from the Basic Court's criminal proceedings, as these are published on the web-site of EU-LEX Kosovo. For reference's material, see the bibliography.

The picture above portrays the situation whereas the major number per defendant per criminal offence confirmed is organised crime. What is interesting to note is that no criminal offence either for war crime against the civilian population or inter-ethnic crime has been put for trial before the Basic Courts and not even in Mitrovicë/a, in the most contented north. EU-LEX *co-judicial model* in the various Basic Courts in Kosovo reflects the pattern held both in the Supreme Court and the Court of Appeals of Kosovo, as reported in the following pages. One aspect is, however, to be highlighted and it represents from one hand a counter-demonstration of that *local ownership* principle which is at the basis of its own mandate, as well as that

promoting the rule of law is something unachievable without the local will. In addition, the fact that EU–LEX has been unable to preside over criminal proceedings in the north together with their local counterpart since its beginning sheds the light on the incapability of external actors and the EU to enforce its standards/values in complex *ethnic-biographic* settings. The Graph 1.7 below clearly shows that EU–LEX judges are the exclusive judicial decision-makers in the Mitrovicë/a Basic Court, while raising doubts about the legitimacy of their judicial decisions.

Graph 1.7 EU–LEX Co-Judicial Model at Kosovo Basic Courts, January 2014



Source: Graph 1.7 is by the author.

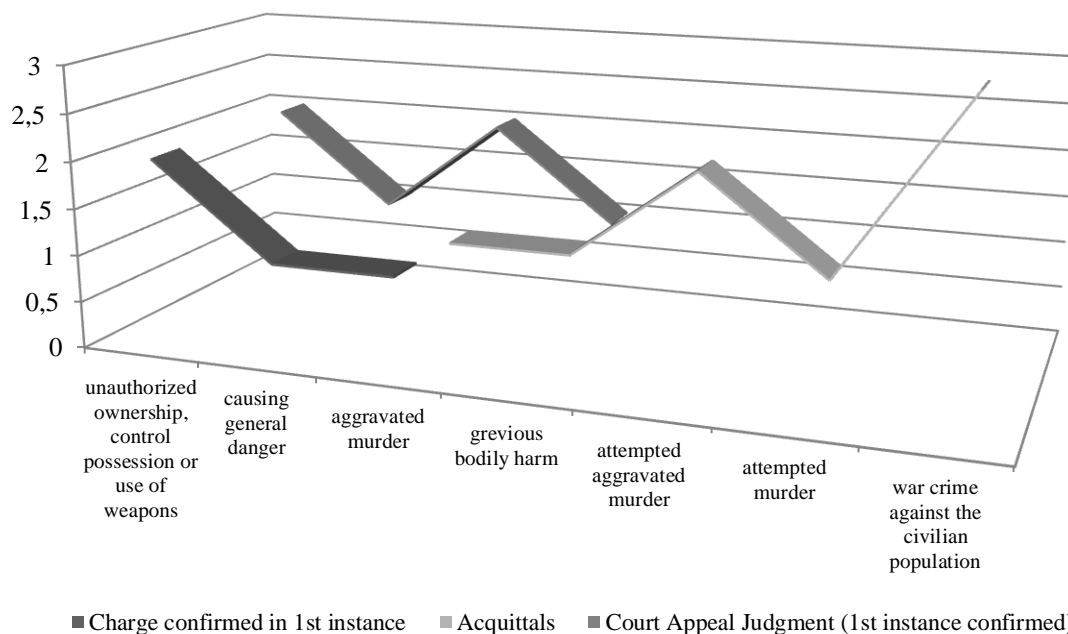
EU–LEX presides over criminal cases in the Court of Appeals of Kosovo. The Courts of Appeals are second instance courts with jurisdiction throughout the Republic of Kosovo. The seat of the Court of Appeals is Prishtinë/Priština<sup>120</sup> and in terms of competencies it is in charge of reviewing all appeals from Basic Courts' decisions, of deciding at third instance, upon the appeal that is permitted by law and for the conflict of jurisdiction between basic courts, of the conflict of jurisdiction between Basic Courts, and other cases as these are provided by Law<sup>121</sup>. The Courts of Appeals comprises five departments<sup>122</sup>, each competent for specific matters. EU–LEX judges at the Court of Appeals of Kosovo issued together with their local counterpart various judgments on previous first instance charges (criminal offences) concerning a total of seven defendants. The Graph 2.1 below displays the charges per number of defendant either confirmed or rejected in the 1st instance court and the respective Court of Appeals' judgments.

<sup>120</sup> See Article 17 (paras. 1 & 2) *The Court of Appeals*, in Law No. 03/L-199 on Courts, Assembly of the Republic of Kosovo, July 22, 2010. [pdf] Available at: <<http://www.assembly-kosova.org/common/docs/ligjet/2010-199-eng.pdf>> [Accessed on 25 September 2010].

<sup>121</sup> See Article 18.1 (1.1, 1.2, 1.3 & 1.4) *Competencies of the Court of Appeals*, in *ibidem*.

<sup>122</sup> A General Department, a Serious Crime Department, a Commercial Matters Department, an Administrative Matters Department, and the Department for Minors. See Article 20 *Internal Organisation of the Court of Appeals*, in Law No. 03/L-199 on Courts, in *ibidem*.

Graph 1.3 Criminal Offences (charge confirmed and acquittals) 1st instance courts and final Judgments of the court of Appeal (as per January 22, 2014)



Source: 1.3 the graph is by the author. For reference's material, see the bibliography.

In terms of panel composition, EU-LEX followed the same model (i.e. one EU-LEX judge presiding and reporting, one EU-LEX judge as panel members and one to two Kosovo judges) as for the Supreme Court and in one case<sup>123</sup> only the panel comprised solely Kosovo judges.

EU-LEX judges sit in the Supreme Court of Kosovo in panels comprising between three EU-LEX judges (one presiding and the other two as panelists) to two EU-LEX judges (one presiding and one panelist member) and two to three Supreme Court Kosovar judges. The Supreme Court is the highest judicial authority in Kosovo, it has jurisdiction over the entire territory of the Republic of Kosovo and its seat is in Prishtinë/Priština<sup>124</sup>. In terms of competencies it can request revision against final decisions of the courts of the Republic of Kosovo and against second instance decisions of the courts on contested issues. It can define legal remedies for issues with unique importance for the application of the laws by the courts in the territory of Kosovo. It can decide on Kosovo Property Agency cases, and other matters as these are defined by law<sup>125</sup>.

In total, seventeen defendants have been charged with various criminal offences by EU-LEX judges and their Kosovar colleagues at the Supreme Court, as the graph below shows, so far.

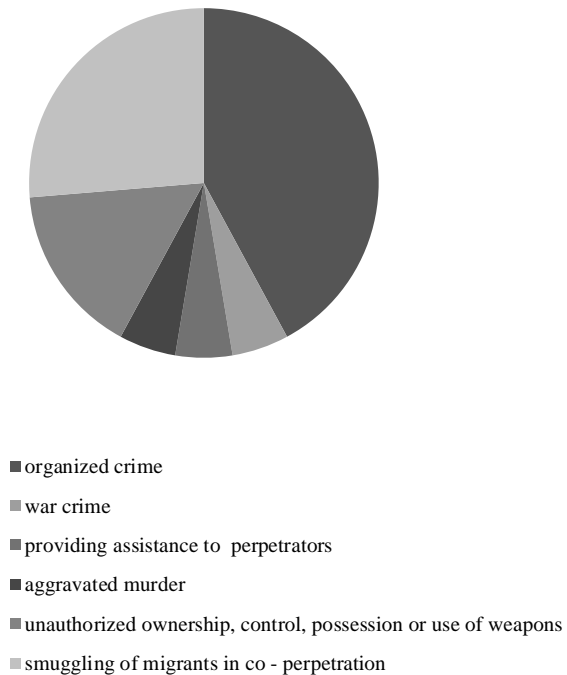
<sup>123</sup> Case PAKR No. 1400/2012 (Appellate Court of Kosovo – Serious Crimes Department), August 19, 2013.

<sup>124</sup> See Article 21 (para.1 & 4) *The Supreme Court*, in Law No. 03/L-199 on Courts, in *ibidem*.

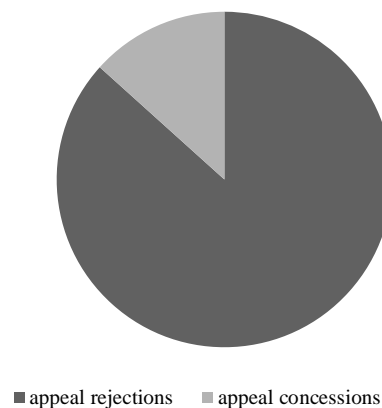
<sup>125</sup> Article 22.1 (subpara.1 – 6) *Competencies of the Supreme Court*, in Law No. 03/L-199 on Courts, in *ibidem*.

## EU-LEX at the Kosovo Supreme Court – Criminal Proceedings, January 21, 2014

Graph 1.1 criminal offences per typology



Graph 1.2 Supreme Court judgments



Source: Both the two graphs are by the author and data have been taken from EU-LEX's web-site where all proceedings, either criminal or civil, are published. The number of charge per criminal offence has been considered for the purpose of the analysis but the various counts per charge have been taken out because this is both out the scope of this research, as well as the expertise of the author. In addition, concerning Graph 2, on the right side, and for what appeal rejections is concerned no distinction has been made on whether the appeal under consideration was issued either by the defendant himself or his/her defence counsel. Rather the aim is to look into EU-LEX's and their counterpart workload. It is also to be acknowledged that since its inception till now it is difficult to trace the whole proceedings history because the various cases have likely moved from one state to the other of the proceedings stage, which implies that data have been updated accordingly on the official website of the mission. Last access January 21, 2014.

The graph above clearly shows that EU-LEX judges and their local counterpart have been mostly dealing with organised crime and smuggling of migrants, followed by war crime, providing assistance to perpetrators, aggravated murder and unauthorised ownership, control, possession or use of weapons. On the whole, and for the cases under considerations, thirteen appeal rejections and two appeal concessions have been issued by EU-LEX and their Kosovar counterparts. The panel compositions for the cases examined before the Supreme Court comprised a total of eleven EU-LEX judges.

This brief overview on EU-LEX's *co-judicial commitment* in Kosovo aims to show that its exclusive decision-making process in the north is a demonstration of its incapability at enabling local ownership, while acknowledging that "[p]ractical cooperation as well as strong

political commitment by the Kosovo authorities to support the work of [the mission] and the implementation of its mandate need to be maintained.”<sup>126</sup>

#### Basic Courts Territorial Competence as per Municipality

Basic Court	Municipality
<b>Prishtinë/Priština</b>	Pristina, Fushë Kosova/Kosovo Polje, Obiliq/Obilić, Lipjan/Lipljan, Podujevë/Podujevo, Glogovac/Glogovac and Graçanica/Gračanica
<b>Gjilan</b>	Gjilan, Kamenicë/Kamenica, Novobërdë/Novo Brdo, Ranillug/Ranilug, Partesh/Parteš, Viti/Vitina, Kllokot/Klokot – Vërboc/Verbovac
<b>Prizren</b>	Prizren Dragash/Dragaš, Suharekë/Suva Reka and Mamushë/Mamuša
<b>Gjakova/Djakova</b>	Gjakova/Djakova, Malishevë/Mališevo and Rahovec/Orahovac
<b>Peja/Peć</b>	Peja/Peć, Deçan/Dečani, Istog/Istok, Klinë/Klina and Junik
<b>Ferizaj/Uroševac</b>	Ferizaj/Uroševac, Kaçanik/Kaçanik, Shtime/Štimlje, Shtërpce/Štrpce and Hani I Elezit/Deneral Janković
<b>Mitrovicë/a</b>	Mitrovicë/a South and Mitrovicë/a North Leposaviq/Leposavić, Zubin Potok, Zvečan, Skenderaj and Vushtrri/Vučitrn

Source: Law No. 03/L-199 On Courts adopted by the Assembly of the Republic of Kosovo pursuant to Article 65 (1) of the Constitution of the Republic of Kosovo (Chapter III *Organisational Structure and Competencies of the Courts*, Article 9 (1) *The Basic Court*), [pdf] Available at: <<http://www.assembly-kosova.org/common/docs/ligjet/2010-199-eng.pdf>> Accessed on 16 September 2013].

## Conclusion

The Common Security and Defence Policy has made consistent steps ahead since the St. Malo summit in 1998, and the European Union Rule of Law Mission in Kosovo (EU–LEX) is probably the most challenging civilian operation ever, as well the one whose final positive performance is most expected. Nevertheless, EU–LEX has been showing that the promotion of the rule of law and multi-ethnicity in complex *ethnic biographic settings* like Kosovo cannot be taken for granted and cannot be assumed to rise behind even consistent external support. Awareness about the existence of a different socio-cultural perception of what is right and/or wrong may help getting things into perspective about the (erroneously) self-perceived hypothesis that by instructing *The Other* on the necessary rules to be followed in order to be part of *The Self* (EU) would enable the former to do that in practice.

<sup>126</sup> See European Commission. 2 *Kosovo addressing short – term priorities of the feasibility study*, in *Joint Report to the European Parliament and the Council on Kosovo\*’s progress in addressing issues set out in the Council Conclusions of December 2012 in view of a possible decision on the opening of negotiations on the Stabilisation and Association Agreement*, JOIN(2013) 8 final, Brussels, April 22, 2013, p.4. [pdf] Available at: <[http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/ks\\_spring\\_report\\_2013\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/ks_spring_report_2013_en.pdf)> [Accessed on 22 April 2013].

AJC	Advisory Judicial Commission
CCK	Criminal Code of Kosovo
CCFRY	Criminal Code of Former Yugoslavia
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
EJS	Emergency Judicial System
ESDP	European Security and Defence Policy
EU-LEX	European Union Rule of Law
FRY	Former Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia
HRAP	Human Rights Advisory Panel
HRFSP	High Representative of the Union for Foreign Affairs and Security Policy
IJPC	Independent Judicial and Prosecutorial Commission
IAC	Interim Administrative Council
JAS	Joint Administrative Structure
JAU	Judicial Audit Unit
JIU	Judicial Inspection Unit
KFOR	Kosovo Force
KJC	Kosovo Judicial Council
KJI	Kosovo Judicial Institute
KJPC	Kosovo Judicial and Prosecutorial Council
KTA	Kosovo Trust Agency
ODC	Office of Disciplinary Counsel
OSCE	Organisation for Security and Cooperation in Europe
PISG	Provisional Institutions of Self – Government
SPRK	Special Prosecution Office of Republic of Kosovo
SRSG	Special Representative of the Secretary-General
UAM	United Nations Administration Mitrovicë/a
UNMIK	United Nations Administration Mission in Kosovo
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution

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### Interviews

Marek Antoni Nowicki, President of the UNMIK Human Rights Advisory Panel (HRAP), Helsinki Foundation for Human Rights (HFHR), Warsaw, December 5, 2013.

## HUMAN TRAFFICKING IN THE EUROPEAN UNION

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**Key Words:** *child-prostitution, prevention, European Union, human trafficking*

### **Abstract**

*The lecture's aim is introducing and defining of the threat of human trafficking concerning the child sex exploitation. My purpose is to clarify the causes of the process and the personality of the traffickers. In my view the most significant fact is the mental and physical effects which are caused by these types of exploitations so it is essential to be talked about it as well. In addition to this I am going to analyse the relationship between the joining of Romania, Bulgaria and the rising of human trafficking. My lecture summarises the steps of the EU and UN against this organised crime. I try to give an answer to this prickly question and the potential chances of prevention.*

\* \* \*

One of our world's biggest problem is human trafficking, a crime which affects all of the world and mean a huge challenge for the authorities of the countries concerning millions of girls and underage women. Human trafficking possesses wide branches including labour exploitation, drug smuggling, begging and sexual exploitation. Out of these, sexual exploitation can be defined as the most tremendous exploitation. Being an unvisible crime it is almost a bigger trade than the drug business, nevertheless the harmful-caused by sexual exploitation- can not be cured properly. Thanks to this fact it is a vast charge on the medical and aid organisations in the EU and all over the world, which requires huge amount sum.

As most of the people are not aware of the difference between human trafficking and smuggling it is essential to define the distinction. Since some cases are mistaken for smuggling most of the evidences remain in slavery. Smuggling is one of the type of illegal migration which is about paying for smugglers for delivering migrants. In contrast with it human trafficking is about slavery, abusing, exploitation and ravishment. The methods and devices are varied, traffickers use different tricks to trap young girls and women.<sup>1</sup> Of course some victims who payed for a better future become slave as they are taken in. Unfortunately a good deal of "ratified" cases exist in poorer regions. Poverty can lead to selling your own children to get by, or sometimes it is the children who make the decision to support their

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<sup>1</sup> Elements of human trafficking: <<http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menuaside>>

family. They are lured by false promises, to be told to have well-paid job, but the reality is that they must work as prostitutes or servants. Most of them underage girls and boys who do not know the local language are not aware of their rights. After being rescued some victims said that they are told not to turn to the police as they are also in the business, so they will be sentenced as an illegal migrant. There is no gainsaying it! As the victims do not dare to identify the traffickers eye to eye the truth never turn out, they will be sentenced as an illegal migrants who are suspected by committing prostituting or illegal working. Due to this fact these victims will not get any medical or mental help in the jail, as they are not defined as victims.<sup>2</sup> The reason of success of these traffickers is that they are from well-organised crime groups. But some also act individually so trafficking business is carried out for instance by families, friends, and relatives. The victims are going to suffer from serious, lifelong mental diseases which makes hard to integrate into the society. It is a severe weight mainly for children who can hardly bear the brunt of this tribulation. According to a UNICEF survey the earlier they go through these outrageous the earlier they will recover from it.<sup>3</sup> Those victims who are between 10–12 years are not able to cure by any mental recovery methods they will carry this stigma for their whole life. The older ones who are from those lucky victims who was rescued can not return to their home as they are stigmatised and their family do not recognise them as innocents. Having unwanted pregnancy and deadly venereal disease their life are sealed forever and they will never have the choice to live like any other common people. Another essential question is who are the traffickers? 52% are men and 42% close to half of them are women, 6% are carried by both. So women are also involved in trafficking, because children and women tend to trust them more than male traffickers. It can be heard about lots of cases when the exploitation proves to be the case, but despite this the victim is the person who is sentenced and not the trafficker. The reason of it is the lack of the well legislation, the penal code of some EU countries do not contain how to define and act on trafficking. Nowadays 27 million people live in slavery and only 1–2% of them are rescued, every year 20,000 children are transported to Greece for forcing them prostitution. These children experience the feeling of defencelessness and despondency. Becoming grownup they keep on doing prostituting or involve in crime as they do not possess any knowledge and did not have the chance to come in for education. The resolution of this problem would be a standard principal which can be a proper guideline to define these cases and convict the right person. With this object a treaty was adopted by the European Commission on 19th June 2012 that set out a standard way about quest and conviction and the rehabilitation of the victims.

One of the biggest transit and emissive country is Greece which is more than 10 million populated country. Every year about 800,000 persons are transited to from Greece to the western areas. Some prostitutes are forced to recruit other girls who are promised job opportunities. In this country children are forced to work as prostitutes or in restaurants, factories and on farms. The most profitable branch of human trafficking is the baby-trade, which is about selling Bulgarian babies for Greek citizens who are not able to adopt child

<sup>2</sup> UNODC-Trafficking in persons to Europe for sexual exploitation [pdf] Available at: <[http://www.unodc.org/documents/publications/TiP\\_Europe\\_EN\\_LORES.pdf](http://www.unodc.org/documents/publications/TiP_Europe_EN_LORES.pdf)>

<sup>3</sup> Trafficking in human beings-European Commission, Eurostat: <[http://ec.europa.eu/anti-trafficking/download.action?nodePath=/Publications/Trafficking+in+Human+beings+-+DGHome-Eurostat\\_EN.pdf&fileName=Trafficking+in+Human+beings+-+DGHome-Eurostat\\_EN.pdf&fileType=pdf](http://ec.europa.eu/anti-trafficking/download.action?nodePath=/Publications/Trafficking+in+Human+beings+-+DGHome-Eurostat_EN.pdf&fileName=Trafficking+in+Human+beings+-+DGHome-Eurostat_EN.pdf&fileType=pdf)>

according to the local legislation, but most of them purchase babies in order to forcing them begging. Bulgarians take advantage of trafficking because of the expansive property. Significant steps were made towards abolishing of human trafficking, pursuant to it Special Legislative Corporation and the National Action Plan were established in 2004.<sup>4</sup> The mutual target is motivating the prevention of human trafficking. It contributes to the chances of cooperation such as informing people, zippy cooperation with the non- governmental organisations as well as guaranting the rights of the exploited persons. Several acts were codified against human trafficking for instance the 3064/2002 act which convicts the victim for 10 years sentence, those who have resort to trafficking services are sentenced 6 months. The act also punishes those who force other to be trafficked persons.

The biggest trafficked region is Bulgaria and Romania thanks to its location as it is a well route between the West and Balkan area where children and women are forced to work as prostitutes within and outside country, in most cases they are transfered to the richer, western countries.<sup>5</sup> After the accession to the EU the country got a lot of criticism. The EU mentioned the corruption and the lack of justice as the biggest problem. The aim of transportation of the children is to deliver them to Italy, Greece, Germany, France and Austria. Lots of children came to Romania and Bulgaria from Afghanistan, Honduras and China.

The solution would be to inform people well and motivate preventive steps in every country. People should be put up to that human trafficking is not equal with the illegal migration, at the same time the migrant can become trafficked person easily. Being a global problem a powerful countenance should be needed. If we can not prevent this serious crime we should help the victims to trehabilitate and reintegrate to the society. Concerning this serious crime, children are in serious danger who can become victims easily. Due to the success of traffickers these children are going to fall prey to lifelong menthal and physical diseases, and never be able to live their life like other common children. Until this deed is not got wise to a fact more and more children fall victim to human trafficking. Day after day the growth of skills of traffickers can be seen and those who buy trafficked persons also mean a serious problem. Every day, the defiances develop greater for those who try to prevent child trafficking and care children who have been trafficked. We can significantly fight this serious crime if our knowledge and our skills overtop the tricks of traffickers.

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<sup>4</sup> OSAC, Greece Crime And Safety Report (2009).

<sup>5</sup> UNICEF-Innocenti Insight, Child Trafficking in Europe, A broad vision to put children first [pdf] Available at: <[http://www.unicef-irc.org/publications/pdf/ct\\_in\\_europe\\_full.pdf](http://www.unicef-irc.org/publications/pdf/ct_in_europe_full.pdf)>



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## THE INDIGENOUS MULTICULTURALISM IN EUROPEAN UNION: CURRENT SITUATION AND CHALLENGES FOR THE FUTURE

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**Key Words:** *The Multiculturalism Policy Index, Norway, Sweden, Denmark, Finland, European Union, the indigenous peoples*

### **Abstract**

*When addressing multiculturalism within the European Union the discussion, and hence the discourse tends to focus primarily on immigrants and national minorities, with occasionally mention of traditional cultural diversity in certain environments. Europe's Indigenous peoples are often left out of public debates. This is despite the fact that it is estimated that there are half a million indigenous peoples living in the Arctic, and at least a quarter of these communities reside within the political borders of European Union Members.*

*This paper will first discuss the current internal policies regarding indigenous peoples in four European countries, Denmark, Finland and Sweden, all members of European Union and Norway.*

*In the second part the paper will examine the European Union's policies and documents concerning Indigenous peoples. It will provide information covering recent developments in policy and the various mechanisms established by the EU to improve the position of European indigenous peoples.*

*The conclusion will present some of the challenges facing Europe and the indigenous peoples as they move into the future.*

\* \* \*

### **Introduction**

The United Nations estimates that globally around 300 million individuals define themselves as indigenous peoples. They live mostly in areas considered critical to the conservation of biodiversity in more than 70 countries. Globalisation and development however presents a threat to their lands, their traditional lifestyles and cultures (EIDHR<sup>1</sup>).

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<sup>1</sup> EIDHR, 2013. Indigenous peoples.

The Arctic was home to approximately half a million indigenous peoples. With the arrival of colonisers seven Arctic states have been established, namely Alaska (the USA), Canada, Denmark, Finland, Norway, Russian Federation and Sweden (Søvndahl Pedersen, 2011).

From the perspective of indigenous peoples the colonisation process created two problems. Firstly, they became minorities within these new Arctic states, states that had developed a history and social structure that did not involve or account for the participation of indigenous peoples and as such generally excluded them from membership of these nations on equitable terms. Secondly, immigrants from the south benefited the most from the development and resources of their traditional lands. Over the years indigenous peoples lost control of their lands and management of the resources leaving them economically powerless. As this occurred their traditional cultures were targeted for annihilation through assimilation programs. Despite the constant oppression some groups have managed to maintain some elements of their traditions and customs, while other groups and individuals migrated to larger settlements to pursue *modern* ways of living. However, the statistics show that the well-being of the majority of indigenous migrants has not risen to the same level as that of the non-indigenous population. (Søvndahl Pedersen, 2011)

#### International documents affecting the indigenous peoples

In the early 1990's the UN established a working group for investigating the rights of indigenous peoples under the Commission on Human rights (predecessor of the UN Human Rights Council). The Commission worked for almost ten years on the draft of the United Nations Declaration on the Rights of Indigenous Peoples<sup>2</sup>. (Søvndahl Pedersen, 2011)

The Declaration<sup>3</sup> establishes a universal framework of minimum standards for the survival, dignity, wellbeing and rights of indigenous peoples around the globe. It encourages cooperative relations between States and indigenous peoples and it addresses individual and collective levels of rights in the area of culture, education, health, employment and language.

Although 144 countries, including the four countries presented in this paper<sup>4</sup> voted in favour of the Declaration<sup>5</sup>, it is a non-binding document, and those countries with the biggest population of indigenous peoples, namely Australia, Canada, New Zealand and the United States all voted against it.

Before the Declaration, two other international documents addressing the rights of indigenous people stand out in significance.

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<sup>2</sup> United Nations, 2011. United Nations Declaration on the Rights of Indigenous Peoples.

<sup>3</sup> OHCHR, 2008. Declaration on the rights of indigenous peoples.

<sup>4</sup> United Nations, 2013. Declaration on the Rights of Indigenous Peoples.

<sup>5</sup> International Work Group for Indigenous Affairs (IWGIA), The UN Declaration on the Rights of Indigenous Peoples.

ILO convention no. 169 on Indigenous and Tribal Peoples was adopted by The International Labour Organisation in 1989. The convention brought about one of the first concrete definitions of indigenous peoples, mentioned below.

The Convention on Biological Diversity<sup>6</sup>, drafted at The World Summit in Rio de Janeiro in 1992 gives indigenous peoples the recognition of their traditional knowledge in the area's of conservation and sustainable use of natural resources and stipulates the importance of free informed consent of indigenous peoples in key decisions<sup>7</sup> concerning them and their traditional lands.

### Who are indigenous peoples?

While a single, universally accepted definition does not exist, modern understandings<sup>8</sup> stress the following features of indigenous peoples: (1) self-identification claims; (2) historical continuity with pre-colonial settlers; (3) strong links to territories and natural resources; (4) distinct social, economic and political systems and distinct language, culture and beliefs; (5) the maintenance and reproduction of their ancestral environments as distinctive peoples and communities.

Article 1 of the International Labour Convention No. 169 defines the indigenous peoples<sup>9</sup> as:

*“(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;*

*(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”*

The operational directive 4.20 of The World Bank explains that the term Indigenous peoples are used in a generic sense to refer to a distinct, vulnerable, social and cultural group. The directive states that the groups have to possess the following characteristic<sup>10</sup>:

- a) “Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;

<sup>6</sup> Secretariat of the Convention on Biological Diversity (SCBD, 2013. History of the Convention.

<sup>7</sup> Secretariat of the Convention on Biological Diversity (SCBD, 2013. Article 8(j) - Traditional Knowledge, Innovations and Practices.

<sup>8</sup> United Nations, 2013. Who are indigenous peoples?

<sup>9</sup> International Labour Organisation, 1989. *Indigenous and Tribal Peoples Convention*, Geneva.

<sup>10</sup> World Bank, 2005. OP 4.10 - Indigenous Peoples.

- b) Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- c) Customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- d) An indigenous language, often different from the official language of the country or region.

## **Indigenous peoples in northern Europe**

In this chapter the history of the Inuit and the Sámi peoples will be briefly outlined as well as the main *organisations* representing their views and interests in the inter-national sphere: the Parliament of Greenland and the Sami Council.

### The Inuit people

The Inuit people are referred to as the people of Greenland Island, under the authority of Kingdom of Denmark. Most of Greenland is covered by permanent ice and unsuitable for permanent settlement. The Greenlanders, or Kalaallit in their own language settled in this hostile environment. Greenland in the Inuit language is also referred as Kallaallit Nunaat (Greenlander's land).<sup>11</sup>

Greenland was settled some 4,500 years ago by settlers whose early culture was mainly based around hunting and who after settlement later diversified into fishing. Waves of European settlement began around 985 AD. The early Danish colonisers were relatively flexible towards the Inuit leading to most Inuit communities to retain their small-scale subsistence economies. Economic modernisation began as a climate warming during the nineteenth-century enabled the transition from hunting to commercial fishing. The Royal Greenland Trade Company was established by the Danish government to exploit these new economic opportunities and it held a monopoly over Greenland trade until 1950. In 1953 Greenland's colonial status was abolished and the island became an integral part of Kingdom of Denmark.<sup>12</sup>

Home Rule in Greenland began in South Greenland in 1862 and North Greenland in 1863. The Boards of Guardians were established at this time and given responsibility for raising living standards in Inuit communities. In the times of the Royal Greenland Trading Company, trade had been separated from public administration. In 1908 the "Act Concerning the Governing of Colonies in Greenland" came in to force and split Greenland into two administrative units, Municipal Councils (serving as local administrative agencies) and Provincial Councils (newly organised for holding greater powers)<sup>12</sup>.

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<sup>11</sup> Minority Rights Group International, World Directory of Minorities and Indigenous Peoples – Denmark: Inuit (Greenlanders), 2008.

<sup>12</sup> Inatsisartut Bureau, 2013. Inatsisartut: The Parliament of Greenland.

In 1950 the two Provincial Councils were merged into a single council, and both men and women over the age of 23 were allowed to vote. Voting right for the Inuit was denied before this date. In 1979 the Provincial Council was given the title of Parliament.<sup>12</sup>

### The Parliament of Greenland

The Parliament or Inatsisartut in Greenlandish is a legislative body that also implements legislative decisions. Following the establishment of Home Rule in 1979, Greenland has been able to legislate and administer its own affairs in almost all areas. The introduction of self-government on 21st June 2009 allowed additional fields of responsibility to be assumed by Greenland's Self-Governing authorities. The legislative power vested in the Inatsisartut provides absolute power over the country's finances (the Treasury). The laws adopted by Inatsisartut, however must not violate the Constitution, the Act on Self-government or international conventions. The laws must also be consistent with ordinary principles of good legislative practice.<sup>12</sup> The fields that remained under the jurisdiction of Danish Government are judicial, defence and monetary policy.<sup>12</sup>

### The Sámi people

The Sámi people are an indigenous group, who settled a region across north-western Russia, Finland, Sweden and Norway. Norway hosts the largest populations of Sámi, but they are also present in Finland, in the Lapland, which is also known as "Sámi-Homeland" and in Sweden (Corson, 1995).

It is believed that the Sámi peoples arrived on the Scandinavian Peninsula just over 10,000 years ago. As they spread across Scandinavia they adapted their traditional lifestyles to suit the conditions they encountered. In mountainous and heavily forested areas they developed hunting and gathering societies, in the inland lake regions they developed societies dependent on lake fishing. Some groups, those who settled away from water sources and mountains in the tundra regions, developed nomadic reindeer herding as their way of life. With time the peoples who made up the dominant ethnic groups of present-day Norway, Sweden, and Finland encroached on the homelands of the Sami due to expanding populations and pressure from competing tribes in the south. When rulers of conquering nations realised the wealth of resources available in the north regions, they moved to cement their claims of sovereignty over Sami lands through settlement and taxation. Finland, Norway and Sweden negotiated a solution to their territorial disputes over these regions in the mid-18th century with Norway's Finnmark borders being established along similar lines to current state borders, and Sweden and Russia dividing the territory that would become modern Finland between their respective Empires (Burmeister Hicks, 2000).

In Finland missionaries insisted that the Sámi gave up use of their own languages and instead use Finnish. The process of forced Christianisation also resulted in pre-Christian religious practices being aggressively prohibited. This meant the culture and world view these practices

preserved were quickly lost to the Sámi people. Sacred indigenous cultural artifacts, especially those related to religion were burnt or confiscated and sent to museums, and Sámi shamans were often killed. Whatever practices and culture that might have survived these processes, were destroyed by the German scorched-earth policy in Finnmark in 1944. These examples are also only the more severe in a history of over 400 years of aggressively destructive assimilationist policies that the Sámi people were subjected to. (Aikio in Corson, 1995).

As late as the 1970s, the Sámi children were forbidden to use their native languages in schools in Norway. Due to the deep and intrinsic connection between Sámi language and the technical aspects of reindeer herding, traditional craftwork and other related activities of the Sámi people, these special parts of the culture seemed likely to become extinct if the Sámi language was lost. (Corson, 1995)

Sami language and culture was considered “harmful” while Norwegian or Swedish language and culture was characterised as “progressive”. This policy of assimilation was continued until the mid-twentieth century (Burmeister Hicks, 2000).

Some of the social conditions of indigenous peoples in Arctic Norway parallel those in Arctic North America, in the far north of New Zealand, or in Australia. While there is relatively little substance abuse among the Sámi, partly because of a long history of prohibition in Scandinavia, high levels of unemployment are a major social problem for Sámi communities, reaching above 20% and affecting all age groups. While younger indigenous people remain unemployed due to the lack of education, the older ones are affected by the decline of traditional employment sources like reindeer herding (Corson, 1995).

### The Sámi Council

The Sámi Council was founded in 1956 to actively represent the Sámi people and their interests, especially in the area of the writing of government policy concerning the Sámi people and their lands. It is one of the oldest indigenous people’s organisations in the world. The Council is a voluntary non-governmental organisation with member units in Finland, Norway, Russia and Sweden.

The Sámi Council’s<sup>13</sup> primary goal is the promotion of the Sámi rights and interests in the four countries where the Sámi are living, through agreements between states and Sámi Parliaments. Other main objectives include the promotion and consolidation of the feeling of affinity among the Sámi peoples, attaining recognition for the Sámi as a nation and maintaining and protecting the economic, social and cultural rights of the Sámi in the legislation of the four<sup>14</sup> states.

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<sup>13</sup> Arctic Council, 2014. Saami Council.

<sup>14</sup> Finland, Norway, Russia, and Sweden.

The Sámi Council is a member of The Arctic Council<sup>15</sup>. It has the position of a Permanent Observer. Permanent observers have full consultation rights in connection to Council's negotiations and decisions as well as they add a valuable contribution to its activities in all areas.

## **Multicultural policies of European Countries**

In order to present the multicultural policies of European Countries that have indigenous peoples, the work of Will Kymlicka and Keith Banting of Queen's University Canada will be used. Their research project describes the policies that are affecting indigenous peoples of Norway, Sweden, Denmark and Finland.

Kymlicka and Banting<sup>16</sup> developed this project to monitor multicultural policies in 21 Western Democracies. The project provides information about multicultural policies in a standardised format as well as from a comparative perspective. The project evaluates policies at three points in time – 1980, 2000, and 2010 – and for three different minorities: (1) immigrant groups, (2) historic national minorities, and (3) indigenous peoples. In this paper I focus solely on the research regarding policies related to indigenous peoples.

A simple qualitative assessment of the nine indicators, discussed below, was made using a “yes”, “partly” or “no” descriptor – “yes” scoring one point, “no” zero points, and “partly” a half point – these values were then used to provide a normative value for every evaluated indicator. In order to examine the indicators documents, program guidelines, legislation and government news releases were examined. Researchers also turned to secondary sources and academic literature where primary documents were not accessible<sup>16</sup>.

### The indicators

A brief explanation of nine indicators is required at this point.

#### *Recognition of land rights/title*

Recognition of land rights and title indicates the level to which country has or has not legally recognised the indigenous peoples' right to the land, with “partially” describing those countries that have policy related to indigenous land usage rights, but without a legislative base.

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<sup>15</sup> The Arctic Council was formally established with The Ottawa Declaration in 1996. The Council is considered a high level intergovernmental forum to provide means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic Indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic. The Council consists out of eight countries: Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, Russian Federation, Sweden, and the United States of America (The Arctic Council, 2014).

<sup>16</sup> Multiculturalism Policy Index, <http://www.queensu.ca/mcp>.



*Recognition of self-government rights*

This indicator examines to what extent the country has or has not recognised self-government rights in its law, with “partially” describing circumstances where indigenous peoples enjoy limited rights of governance in matters affecting them.

*Upholding historic treaties and/or signing new treaties*

The indicator examines the upholding of historic treaties and signing new treaties. This indicator does not have a partial level.

*Recognition of cultural rights (language; hunting/fishing)*

Cultural rights consist of the right to practice language, hunting and fishing practices, religion and other significant parts of one’s identity. For this indicator to be marked as positive two or more cultural rights need to be recognised and if there is only one, the indicator is marked as partially.

*Recognition of customary law*

This indicates to what extent the traditional legal customs and customs still in practice are permitted by the state.

*Guarantees of representation/consultation in the central government*

The ideal version of this indicator is that the indigenous peoples have a guaranteed seat in central government and/or that the government is obliged to consult with them about matters concerning them. Partial situations occur when indigenous peoples have representative bodies that are subordinate to the national government and they are also consulted as a matter of policy on issues that affect them.

*Constitutional or legislative affirmation of the distinct status of indigenous peoples*

This indicator looks at the constitutional or legislative affirmation of the distinct status of indigenous peoples. If the status of indigenous peoples is described in the constitution or legislation, this indicator is considered fully recognised and given one point. However if the status is only affirmed in other policy or legal documents, this indicator is only partially recognised.

*Support/ratification for international instruments on indigenous rights*

Here the researchers look for the ratification of ILO Convention 169. For a “partially” recognised level of this indicator the support for non-binding UN Declaration on the Rights of Indigenous peoples is required.

*Affirmative action*

A “partially” recognised indicator describes the country that does not have a statutory base for affirmative action, however there are initiatives in policy, extending beyond human rights,

which include targeted actions for indigenous peoples. Needless to say: a fully recognised indicator recognises that an affirmative action policy that targets the indigenous population exists.

### Results and evidence – Norway

*Table 1: Multiculturalism Policies for Indigenous Peoples, Scores for Each Indicator, 1980, 2000, 2010 for Norway (Multiculturalism Policy Index, <http://www.queensu.ca/mcp> December 2013).*

Land Rights			Self-Government Rights			Treaties			Cultural Rights			Customary Law			Rep. in Central Government			Distinct Status			International Instr.			Affirmative Action		
1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010
0	0	0.5	0	0.5	0.5	0	0	0	0	1	1	0	0	0	0	0.5	1	0.5	1	1	0	1	1	0	0	0

Recognition of the lands rights and title is very limited in Norway. The Finnmark Act<sup>17</sup> of 2005 provides that the Sámi people have acquired rights to land in the Finnmark region. However, the Finnmark Act is ethnically neutral, meaning that these rights do not belong exclusively to the Sámi. There is also no defined Sámi homeland, as in Finland, however the Finnmark act transferred approximately 95% of the land in Finnmark under the state ownership to the Finnmark Estate. The Finnmark Estate is an independent legal entity which administers the land and natural resources in the Finnmark region and it is governed by a board of six persons, three of which are elected by the Sámi Parliament. The Finnmark Act does not involve changes in the rights of use. It only establishes the Finnmark Commission that will study the issues around the right of ownership.

Recognitions of self-government rights are also very partial, and are mostly limited to culture. Direct representation in the Parliament of Norway has never been a central demand for the Sámi. Sámi people can be elected to the Sami Parliament, which is an advisory body to Norwegian Government. Nevertheless the Finnmark Act<sup>17</sup> requires the consultation of the Sámi in the management of area of the Finnmark Estate. In addition to the Finnmark Act the Norwegian Government and the Sámi Parliament have signed an agreement, which states that consensus between the Sámi Parliament and the Norwegian government must be reached on all policies regarding the Sámi peoples.

Cultural rights are recognised in Norway through the Sámi Language Act (1992)<sup>18</sup>, making both the Sámi and Norwegian official languages in those parts of Norway that have significant Sámi populations. However, the recognition of cultural rights is still limited to language. One could argue that the Finnmark Act also provides the Sámi people with a

<sup>17</sup> The Finnmark Act (2005) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

<sup>18</sup> Sámi Language Act (1992) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

safeguard to develop their language, culture and way of life, however the Act does not target the Sámi only, and it is ethnically neutral. Additionally, the rights of the Sámi in the area of reindeer management were recognised through a general Agreement for the Reindeer Industry and the Reindeer Management Act (1978)<sup>19</sup>.

In 1988 the National Parliament of Norway amended the Norwegian Constitution<sup>20</sup> and with Article 110a the Sámi received constitutional recognition. On 19 June 1990 Norway was the first country to ratify ILO Convention 169<sup>9</sup>. Norway also voted in favour of adopting the United Nations Declaration on the Rights of Indigenous Peoples<sup>2</sup>.

There is no affirmative action in Norwegian legislation; however, employers are obligated by law to make an active effort to promote equality by The Anti-Discrimination Act<sup>21</sup>.

Norway does not have historic treaties and did not sign any new treaties with the Sámi people after it achieved independence. The recognition of customary law is not present in Norway.

### Results and evidence – Finland

*Table 2: Multiculturalism Policies for Indigenous Peoples, Scores for Each Indicator, 1980, 2000, 2010 for Finland (Multiculturalism Policy Index, <http://www.queensu.ca/mcp> December 2013).*

Land Rights			Self-Government Rights			Treaties			Cultural Rights			Customary Law			Rep. in Central Government			Distinct Status			International Instr.			Affirmative Action		
1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010
0	0	0	0.5	0.5	0.5	0	0	0	1	1	1	0	0	0	1	1	1	1	1	1	0	0	0.5	0	0	0

Finland does not recognise any land rights or titles for the Sámi people. They confiscated the Sámi territory under the Taxed Lapp system in late 19th century. The Constitution of Finland<sup>22</sup> also states that *the Territory of Finland is indivisible*.

The recognition of self-government and cultural rights is limited to matters of language and culture. The legislation enables the Sámi parliament to look after the Sámi language and culture as well as to oversee matters relating to the status of their language and culture.

Finland established the Sámi Parliament through the passage of the Sámi Parliament Act (1973)<sup>23</sup>. The government cooperates and communicates the various strategies, policy

<sup>19</sup> Reindeer Management Act (1992) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

<sup>20</sup> Constitution of Kingdom of Norway (2007) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

<sup>21</sup> The Anti-Discrimination Act cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

<sup>22</sup> Constitution Act of Finland (2000) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

programs and legislation, which affect the Sámi peoples to the Sámi Parliament. The Sámi Parliament is positioned within the authority of the ministry of justice, but it is not part of the state administration.

The Sámi have a constitutionally protected right to maintain and develop the Sámi language. In 1995 the Finland Parliament granted the Sámi right to cultural autonomy within the areas of the Sámi Homeland. There is still a lack of rights to land or water use in the pursuit of traditional hunting and fishing activities.

The Sámi have guarantees of representation and consultation in the central government. The advisory board on Sámi Affairs, consisting of 12 members, works directly with the Ministry of Justice in order to coordinate and prepare the issues concerning the Sámi population.

Finland did not sign any treaty with the Sámi people prior to its independence, and it does not recognise the customary law of the Sámi. It does not have any affirmative action present in law or policy.

The Sámi are constitutionally recognised as indigenous peoples in section 17 of the Constitution Act of Finland<sup>22</sup> and in numerous sections of the Sámi Parliament Act<sup>23</sup>.

While Finland voted in favour of United Nations Declaration on the Rights of Indigenous Peoples<sup>2</sup> it did not ratify ILO Convention 169<sup>9</sup> and tribal convention from 1989.

### Results and evidence – Sweden

*Table 3: Multiculturalism Policies for Indigenous Peoples, Scores for Each Indicator, 1980, 2000, 2010 for Sweden (Multiculturalism Policy Index, <http://www.queensu.ca/mcp> December 2013).*

Land Rights			Self-Government Rights			Treaties			Cultural Rights			Customary Law			Rep. in Central Government			Distinct Status			International Instr.			Affirmative Action		
1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010
0	0	0	0	0.5	0.5	0	0	0	0.5	0.5	1	0	0	0	0	0.5	0.5	0.5	0.5	0.5	0	0	0.5	0	0	0

As with the other two Nordic countries Sweden does not recognise any land rights or title. The land was confiscated in late 19th century with the Taxed Lapp Land system and the Swedish Reindeer Grazing Act<sup>24</sup> of 1886. The Taxed Lapp system abolished any previously recognised Sámi land rights and declared the land the property of the Swedish crown.

<sup>23</sup> Sámi Parliament Act (1973) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

<sup>24</sup> Reindeer Grazing Act (1886) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

Despite the fact that the *Skatefall* case, in which the Swedish Supreme Court confirmed the Sámi people's usufructuary right to land in reindeer husbandry, the Sámi were adjudged to not have proper evidential basis for their claim to ownership of the land. Since then no substantive or formal rights to land have been awarded to the Sámi.

Also, similar to the other Nordic countries, the recognition of the right to self-government is partial and limited to matters of language and culture. The Sámi Parliament is an elected body, however, it is categorised as an agency of the central government and is under the authority of the Swedish government. It must carry out the policies and decisions made by the Parliament of Sweden.

Sweden never signed a treaty with the Sámi people and also there is no recognition of customary law. There is no legally binding affirmative action, however, the Discrimination Act<sup>25</sup> from 2009 stipulates active measures in working areas but this does not relate only to the Sámi people.

Cultural rights are recognised but are restricted to agricultural rights. Language is also regulated through the Act Concerning the Right to Use the Sámi Language in Dealings with Public Authorities and Courts<sup>26</sup>, but is limited to the northernmost municipalities in Sweden. In 2009 the Act on National Minorities and National Minorities Languages<sup>27</sup>, expanded geographical areas where the right to Sámi language is accommodated.

As per reindeer husbandry, the Reindeer Husbandry Law (1971)<sup>28</sup> stipulated that only the Sámi who were permitted to carry out reindeer herding would be entitled to special land and water rights. The Sámi Parliament assumed responsibility for the management of the reindeer industry. In 1992 the Swedish Parliament adopted legislative measures stating that traditional Sámi hunting grounds would be accessible and open for all Swedish citizens.

Despite the existence of the Sámi parliament in Sweden, unlike in Finland and Norway, the Swedish government is not obliged to discuss any matters with it.

The Sámi people of Sweden are also partially constitutionally or legislatively recognised as indigenous peoples. As per the National Minorities in Sweden Government Act<sup>29</sup> of 1998 the Sámi are recognised as one of five minorities. The Swedish constitution, drafted in 2010, recognises the Sámi as full-fledged people, and not as minority. The draft Nordic Sámi Convention<sup>30</sup> proposes the status of Sámi peoples as the only indigenous people of Sweden.

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<sup>25</sup> Discrimination Act (2009) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

<sup>26</sup> Act Concerning the Right to Use the Sámi Language in Dealings with Public Authorities and Courts (1999) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

<sup>27</sup> Act on National Minorities and National Minorities Languages (2009) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

<sup>28</sup> Reindeer Husbandry Law (1971) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

<sup>29</sup> National Minorities in Sweden Government Act (1998) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

<sup>30</sup> Scheinin, M., Henriksen, J.B. & Åhrén, M., 2007. The Nordic Sámi Convention : International Human Rights, Self-Determination and other Central Provisions. *Gáldu Čála – Journal of Indigenous Peoples Rights*, (3).

Similar to Finland Sweden voted in favour of adopting the United Nations Declaration on the Rights of Indigenous Peoples<sup>2</sup> but has not ratified ILO Convention C169 Indigenous and Tribal People Convention<sup>9</sup> from 1989.

### Results and evidence – Denmark

*Table 4: Multiculturalism Policies for Indigenous Peoples, Scores for Each Indicator, 1980, 2000, 2010 for Denmark (Multiculturalism Policy Index, <http://www.queensu.ca/mcp> December 2013).*

Land Rights			Self-Government Rights			Treaties			Cultural Rights			Customary Law			Rep. in Central Government			Distinct Status			International Instr.			Affirmative Action		
1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010	1980	2000	2010
1	1	1	1	1	1	0	0	0	1	1	1	1	1	1	1	1	1	1	1	1	0	1	1	0	0	0

Denmark is quite distinct from other countries included in this paper. It is the only country that has recognised the land rights and titles with the Act on Greenland Self-Government<sup>31</sup> from 2009. The act provides access through referendum to independence and sovereignty for Greenland.

The same act also recognises the right to self-government for the Inuit people and also recognises their cultural and language rights, stating that the Greenlandic language is the official language of Greenland. The Greenland Government also governs the fishing and hunting rights through a separate government department, the ministry of fisheries, hunting and agriculture.

Chapter 5, sections 17 and 18 of Act on Greenland Self-Government<sup>31</sup> stipulate that the bills and draft administrative orders from the Danish parliament regarding Greenland, must be submitted to the Greenland Government authorities for comments before it is presented to the Danish parliament.

The preamble of the Act on Greenland Self-Government<sup>31</sup> recognises the people of Greenland as people pursuant to international law with the right of self-determination.

In the past the Danish government did not sign any historic treaties with the Inuit but it did ratify ILO Convention 169<sup>9</sup> and voted in favour of adopting the United Nations Declaration of Human Rights of Indigenous Peoples<sup>2</sup>.

There is no affirmative action present in Danish legislation.

<sup>31</sup> Act on Greenland Self-Government (2009) cited from Multiculturalism Policy Index, <http://www.queensu.ca/mcp/> (13. 12. 2013).

## Overall scores

*Table 5: Overall results of the research (Multiculturalism Policy Index, <http://www.queensu.ca/mcp> 13. 12. 2013)*

		<b>DENMARK</b>	<b>FINLAND</b>	<b>SWEDEN</b>	<b>NORWAY</b>
TOTAL SCORE	1980	6	3,5	1	0,5
	2000	7	3,5	2	4
	2010	7	4	3	5

Kymlicka and Banting<sup>16</sup> clearly explain that the research of the effects of the Multiculturalism Policy Index (the MCP Index) is still in its early stages, and it is premature to make definitive judgments about the “success” or “failure” of multiculturalism, or its “advance” or “retreat”.

However looking at the scores above, it is possible to draw some preliminary conclusions. While the highest possible score is nine, it is clearly evident that due to the self-government of Greenland, Denmark’s scores is the highest, having almost completely met all nine indicators. Based on the score we can conclude that the Inuit on Greenland enjoy a significantly better position than the Sami in Scandinavia.

The rest of the countries’ results are markedly lower. The scores suggest that Norway’s indigenous peoples have more rights recognised than in Finland, with Sweden on the bottom of the list with only one third of indicators being marked as positive.

Thankfully there is one thing that is common to all four countries. Scores do show an increase in the recognised rights or positive actions taken regarding indigenous peoples. Given the present debates surrounding the “retreat” of multiculturalism Kymlicka and Banting<sup>16</sup> do prove that, at least in these countries, policies regarding indigenous peoples are improving over time and multicultural values are playing an increasing role in the governance process.

## The European Union and indigenous peoples

The issues concerning the indigenous peoples of Europe are not a part of the normal discourse of governance at European Union level. It might be suggested that the Europeans collectively are forgetting that the issue of indigenous relations, the resolution of long standings and continuing injustices, as well as the moral imperative for the righting of historical wrongs concerning indigenous peoples are not problems limited to only the United States of America, Canada, Australia or New Zealand. It is important to know, that the Inuit and Sámi are present in Europe and that existence of their culture is important to all of us.

Indigenous peoples’ issues officially entered the EU agenda in 1997. Despite the fact that some progress has been made (EU Council resolution on Indigenous Peoples<sup>32</sup> and UN

<sup>32</sup> European Union, 1998. Council Resolution of 30 November 1998: Indigenous peoples within the framework of the development cooperation of the Community and the Member States. Cited from: Søvn Dahl Pedersen, T., 2009. *The relevance of EU policies on indigenous peoples in EC cooperation with Greenland and the Arctic*.

Declaration on the Rights of Indigenous Peoples<sup>2)</sup> the discrimination and unequal treatment of indigenous peoples persists on a worldwide<sup>33</sup> scale.

The European Union is a major player in the field of international relations. The process of European Integration is anchored by the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. The Treaty of European Union<sup>34</sup> states that the EU fosters the universality and indivisibility of all human rights in Universal Declaration of Human rights<sup>35</sup>. (Søvndahl Pedersen, 2009)

If we look at the foreign policy agenda of the European Union concerning indigenous peoples, Article 11 of the Treaty of European Union<sup>34</sup> states that one of the objectives of the EU's Common Foreign and Security Policy is the development and the consolidation of democracy, the rule of law and the respect for human rights and fundamental freedoms across all nations. The active protection and promotion of human rights is clearly a central pillar of its external relations policies and it is a part of its agenda that is carried out through its communications with third party countries, through development policies and assistance and through its actions within multilateral forums such as the United Nations (Søvndahl Pedersen, 2009).

#### How did the EU policies on indigenous peoples evolve?

The EU position on indigenous peoples moves towards a more complete and more progressive position over. Below each of the main policy documents involved in this shift have been listed chronologically.

The first key documents specifically addressing the issues facing indigenous peoples is the *European Commission Working Document on Support for Indigenous Peoples in Development Cooperation*<sup>36</sup>. This document was the result of raised awareness of the indigenous peoples agenda, which was emphasised at the World Summit on Environment and Development in Rio in 1992. (Søvndahl Pedersen, 2009).

The second key document is the European Council Resolution<sup>32</sup> from November 1998. The document stresses the importance of indigenous peoples' right to self-determination. It is the exact definition of the term "self-determination" that the major discussions were focused on. The Council defined self-determination as effective participation of indigenous peoples in all stages of projects affecting them. The resolution also stresses the importance of the indigenous peoples in conservation and sustainable use of natural resources in their lands as well as their vulnerability due to discrimination and the need for development programs. Perhaps the most important contribution of the resolution is placing indigenous peoples in the

<sup>33</sup> EIDHR, 2013. Indigenous peoples.

<sup>34</sup> Union, E., 1992. Treaty on European Union – Maastricht Treaty, Maastricht. Cited from: Søvndahl Pedersen, T., 2009. The relevance of EU policies on indigenous peoples in EC cooperation with Greenland and the Arctic.

<sup>35</sup> United Nations, 1948. The Universal Declaration of Human Rights.

<sup>36</sup> European Commission, 1998. Working Document of the Commission of May 1998 on support for indigenous peoples in the development co-operation of the Community and the Member States. Cited from: Søvndahl Pedersen, T., 2009. The relevance of EU policies on indigenous peoples in EC cooperation with Greenland and the Arctic.



mainstream of the development agenda by acknowledging that cooperation with them is essential for the elimination of poverty and for sustainable development (Søvndahl Pedersen, 2009).

This was followed by Council Regulation (EC) No 976/1999<sup>37</sup> of 29 April 1999. This Regulation is considered the foundation for the *European Initiative for Democracy and Human Rights*. This legislation made specific reference to support for minorities, ethnic groups and indigenous peoples (Søvndahl Pedersen, 2009).

Report from the Commission to the Council of 11 June 2002<sup>38</sup> on the progress of communication after the Council Resolution in 1998 identified measures that needed to be taken in order to continue and improve the communication with the indigenous peoples. These measures were: continuation of improvement of the integration of this topic into policies and programs, the development of methodology for mainstreaming, request for systematic identification of development projects, further provision the support, enhancement of cooperation within and between the Union and other donors, enhancement of consultation and better information services to smaller organisations. (Søvndahl Pedersen, 2009).

In 2002 the European Commission addressed the internal capacity to deal with the issues concerning indigenous peoples. Through the Council Conclusions on Indigenous Issues the Commission called on several internal actions which included training of EC personnel in the analysis of the political, social, economic and cultural situations in key countries leading to creation of Country Strategy Papers, as well as the inclusion of indigenous minorities in the political dialogue and mainstreaming of the indigenous peoples' issues.

In 2005 the *Joint Declaration On The European Consensus On Development*<sup>39</sup> was published. The key principle for safeguarding indigenous peoples' right to development cooperation was to ensure their full participation and the free and prior informed consent of the communities concerned in the planning of development projects. Through this project the European Community aimed to prevent social exclusion and combat discrimination against all groups.

The Commission and High Representative are proposing to focus further development of the EU's policy towards the Arctic on three key areas: supporting research and channelling knowledge to address the challenges of environmental and climate changes in the Arctic; acting with responsibility by contributing to making economic development in the Arctic is based on sustainable use of resources and environmental expertise; intensifying its constructive engagement and dialogue with Arctic States, indigenous peoples and other partners (Søvndahl Pedersen, 2009).

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<sup>37</sup> The Council of the European Union, 1999. Council Regulation (EC) No 976/1999 Of 29 April 1999. Cited from: Søvndahl Pedersen, T., 2009. The relevance of EU policies on indigenous peoples in EC cooperation with Greenland and the Arctic.

<sup>38</sup> Commission of the European Communities, 2002. Report from the Commission to the Council: Review of progress of working with indigenous peoples, Brussels.

<sup>39</sup> European Union, 2005. *The European Consensus on Development*. Cited from: Søvndahl Pedersen, T., 2009. The relevance of EU policies on indigenous peoples in EC cooperation with Greenland and the Arctic.

When viewed as whole it quickly becomes apparent that the EU has, similarly to the Nordic nations, moved consistently towards a position that embraces the 9 key indicators outlined in the Kymlicka and Banting<sup>16</sup> project.

## Conclusion

In this paper the policies concerning multiculturalism and the indigenous peoples of Europe have been presented.

A brief history and the present day situations of two indigenous peoples that live in Europe: The Inuit and The Sámi people have been outlined. Using Kymlicka's and Banting's research The Multiculturalism Policy Index<sup>16</sup> the current policies of those countries with populations of indigenous peoples in Europe have described. Significant difference was seen in the case of Denmark, which awarded relatively high self-determination rights to the Inuit peoples. Other countries scored positively on approximately half of the nine researched indicators. A very positive conclusion of Kymlicka's and Banting's research is that the normative values of indicators are rising since the beginning of the research, meaning that Finland, Norway and Sweden are improving their policies towards their indigenous peoples.

In the final section the European Union's attitudes towards indigenous peoples were examined. The indigenous peoples agenda was been considered within the context of the integration process, the promotion of human rights and development programs, addressing particularly the issues concerning legislation and multicultural policies. The European Union also played a strong role in adopting the UN Declaration on the Rights of Indigenous Peoples and it has also cooperated with the Arctic Council through several programs and organisations. The Arctic Council (with its members including the Sami Parliaments in Finland, Norway and Sweden and the Parliament of Greenland) is one of the strongest actors in international relations regarding the Arctic.

Some degree of progress has been made recently with the payment of some reparations through the emergence of development programs, new declarations of rights, the establishment of international organisations and improvement of multicultural policies.

However it is important to stress that this is not enough. We all have to be aware that a lot of our actions and the actions of our countries and the European Union at an international level do have an effect on the indigenous peoples of the north. For instance our countries' positions on whaling, on oil management, and global warming which has a profound effect on the arctic, all have direct impacts on indigenous people's lives, culture and lands. To compensate for their wrong-doings against the indigenous peoples, governments should in the name of justice consider also official apologies and, whenever possible reparations for the damage done in the past.

Secondly, it is very important to understand that the indigenous peoples of the North have been suppressed and denied their rights at a very basic level. The most important and profound right that we have as human being is the right to our identities and heritage. This is a

right that has been systematically denied the indigenous peoples of the north due to the severe injustice in the past. It is vital for them, in the future, to be able to live in accordance with their own norms, values and customs, and to participate in decisions made about their own future.

It is evident that a lot of past injustices performed against indigenous peoples have been cleverly hidden and excluded from history books and modern education. A more positive, almost folkloric image of indigenous tribes has been portrayed to the world, with little acknowledgement of their violent and tragic past and in some cases present conditions. It is important for the indigenous peoples that the injustices done to them are known and recognised as the foundation for their equal integration into the dominant society, on their terms. As peoples and citizens possessing human rights they are entitled to preserve, live and develop their identities and cultures. Their culture, identity and right to self-government must be protected and recognised as morally equal, particularly by the ethnic majorities in those nations who have colonised their traditional lands. The European Union, as a promoter of human rights, has the obligation to protect all citizens, including the Sámi and Inuit peoples, and ensure that these rights are not violated by these citizens' respective governments.

It is upon all of us, to recognise other cultures as equal, and to provide them the opportunity for a free development of their culture and identity. The right to this sense of historical connectedness as well as individual and collective identity is something that is taken for granted by most of us each day, yet for many indigenous peoples denied for decades.

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## CULTURAL PLURALISM IN THE EU: NATIONAL OR EUROPEAN IDENTITY?

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**Key Words:** *culture, identity, society, values, common or European identity or fragmentary or national identities, consequences*

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In the European Union there are 27 members with different cultures and identities, and going to be even more... The cultures and identities – which modify our brain from childhood, and give us the style of competences, and rules for life, result in attributes and differences (the essential, national uniqueness). Basically, there is no question about National identity, but European identity? It can be a political, a psychological, a social, and a geological frame. As a political frame, EU is a distance structure, as a geological, social and psychological frame, European identity has a far-flung history already. (as Asian, African, American have) As the conditions and history changes, National identity alters. European identity is not strong enough, easily can be burst by National ones. Nowadays there is no method to form it, even balance with the National ones (as we see in the news). Even though, we have the same problems in global, but we alienate from each other, and foredoomed to conflicts, and misunderstanding. To create a common identity – at least in Europe – would be a solution, and would create an enormous power against crises, military, economic, and other issues.

The question: Is there a common identity in Europe, or we have just separate ones, and we share parts of each other's? Should we give up our own culture and identity, and except a common one? What the limits are? What is a culture, and an identity? Is there any links between them? How can they be described, and can be used for the public good? In advance, we make it sure, that the culture and identity derive from each other. They are connected to a nation, as to people, or to personality. Basically the identity is the uniqueness of a person – in comparison with others, as the culture is for groups of people as well, in its environment or wider society or other regions or nations. In early times, philosophers had an inclination of culture, as a special and “general spirit of a nation ... which should be pursued in the legal system of the country”<sup>1</sup>.

There is no single definition of culture. I selected some of the most basic ones.

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<sup>1</sup> Charles-Louis de Montesquieu (1689–1755): *De l'esprit des lois*.

According to Geert Hofstede, the culture is a collective program of thinking in categories – in a group or society. The culture gives answers for the changes (in different aspects), and means common attributes in the same environment and society. The culture means kind of deeds as well, which are consequences of those, before mentioned ones.

Fons Trompenaars teaches that the culture is a method to solve problems – a premise to define ideas. The culture makes people read, and understand the same way in different situations (direct and symbolic way as well).

The culture an explicit and implicit behaviour, which works through symbols, but in the same time, it is the product of the deeds, a kind of case-map – after Kroeber and Kuchhohn.<sup>2</sup> It contains traditional and historical added values, as thoughts, and rinkles.

We find depths in the culture, as we dig down more and more to the bottom<sup>3</sup>.

The basic transmitter media of a culture is a common language. It is a basic channel for communication, which gives as well the limits of the oral expression between people. Different languages – in the same time – shape otherwise the speech in the style, or the expressions of feelings or greetings etc. The next level is the symbols (1), which are deeds, images, and tools or objects with kind of meaning, which can be identified by the culture. (Other people often not understand them well by translating into own meaning, according to the culture has been learned). The tools can be the language/jargon's words, hairstyles, status symbols, and many other things. The layer after that the heroes of a culture, which can be alive or dead, mythical or real people with kind of attributes, which highly valued in the culture, these can be Barbie – for her beauty, or tale hero like Batman or Robin Hood, or Ludas Matyi, for their brave and strengths, as well Richard the Lionheart for his knight's traits and righteousness, or the French Jean D'Arc for her divine intuitions, and Queen Elisabeth the virgin queen, who made England one of the strongest country at her time.

The rituals basically done needlessly, like ceremonies, or different type of greetings of people. The rituals serve nothing but give visual signs of the oneness of a group or society.

These forehead mentioned symbols, heroes, rituals are OBSERVABLE for an outsider, but the meaning of them can be understood by knowing the values of the culture! If values are not understood, that could be reason for hatred, disagreement, unkind jokes, even conflicts or wars!

The values are innermost essence of culture. Kind of trends, which are define for us the positive and negative. Define what is good or bad, beautiful or ugly, normal or abnormal, rational or irrational... kind of spectacles, which translate the outside world<sup>4</sup>.

All societies and groups have special mental program, which differ from each other in a way. Usually everyone is a member some of these groups or societies, in one time: we are usually daily deal with different layers of the culture, as we are European, as well as member of a

<sup>2</sup> Hidasi, J., 2004. *Interkulturális kommunikáció*. Budapest: Scolar Kiadó.

<sup>3</sup> Hofstede, G. and Hofstede, G. J., 2008. *Kultúrák és szervezetek. Az elme szoftvere*. Pécs: VHE Kft., pp.38–40.

<sup>4</sup> Hofstede, G. and Hofstede, G. J., 2008. *Kultúrák és szervezetek. Az elme szoftvere*. Pécs: VHE Kft., p.40.

nation and region, and family. Also we work somewhere, and we have gender. We live in a social class as well. We all have differences, even in one family, with the same parents.

But WHY these differences exist? We are all humans, and members of various but the same categories like mentioned before, as basically we organise our life the same way.

The answer lays in our human nature, which has a very unique and special organ, an operation system. This is a universal, genetically inherited code (lineament from other species) in any human creature. On top of that, we learn individually the culture as a special code in the group or nation, and it makes us similar to the members of our own group, but make us (sometimes very) different from another one. That is the reason to the cultural shock, or the hatred between people. The personality is an element, which is an edifice of inherited and learned parts, and derives from the own taste and special talents. The specific attributes set the IDENTITY of an individual<sup>5</sup>.

Why could be created different cultures?... We have a very special organ, which gives the limits for us to except/understand/cooperate with other, different cultures – as has been trained before. (I would like to remind you the values which should be understood!)

Our brain is this special organ. It is NOT static, as a computer, but plastic, and able to remap itself topologically or functionally as well (called neuroplasticity)! Certain types of changes are more predominant during specific life ages. Till age 1–2, the kinds are learning as they experience, feel, or see things. Till age 10, a person learns with little effort by experiment, and opens up more and more to different type of topics, as his brain matures. After this age, takes more energy to learn, or change (any function of the brain), but not impossible at all. For all lifetime, the brain able to change its structure (as a result of adaptation of experiences or learning), and change of function (which is an ability to move functions from one to another area) – because of any reason (e.g. Damage, changes of environment, different influences etc.).<sup>6</sup> Environment plays an essential role in the process (society). In some years, if the social stimulation different, the brain, and the personality can be changed (even growing older, or have a family, or going to another work can play the role). The interference of the culture and the identity (BRAIN!) eventuate all of the DIFFERENCES between nations, to create a gap between the values (which invisible, separates the groups from each other), identity (wich roots are in the language and religion, has recognisable characteristics, but not on national level), and structures (derives from the values more than the identity, and visible, identify the group, which the individual belonging to).

Therefore everyone has knowledge of some summarised nation traits, like system for England, order for Germany, power for France. Also the society can be feminine (flexible, easy-going – US, Spain, Italy) or masculine (strong rules, punitive – Japan, Korea, Muslim countries); and individual (important personal values, weaker hierarchy – like western

<sup>5</sup> Hofstede, G. and Hofstede, G. J., 2008. *Kultúrák és szervezetek. Az elme szoftvere*. Pécs: VHE Kft., pp.36.

<sup>6</sup> MacKinnon, D. F., 2011. The Plastic Brain. *Psychology Today*, 25 March 2011. [online] Available at: <<http://www.psychologytoday.com/blog/trouble-in-mind/201103/the-plastic-brain>> [Accessed on 20 October 2013].



societies) or collectivist (strong identity against others, strong power, collective values, individual not important – like Japan)<sup>7</sup>.

At last, compared with the national ones, European Union has symbols (anthem, or flag), but does not have common heroes (we do not say: oh, Mr Barroso, please come and save me). The EU does have remote political rituals (except the election of the European parliament), and has no shared values (except basic ones), which would be unique in comparison with other values. And because of the rules of the system, every nation can speak its own language. So the transmitter channel is not working as well.

Also I would question the national identity! Is there national identity? Certainly there are many – so called – national traits, but in a closer look, they are stereotypes: The nation itself is a new, and just a political structure, from the 20th century. It has regions, different societies, with certain different cultures. The borders been created by the interests of the political powers, therefore not reflect on the cultural/identical boundaries, therefore not just one identity we can speak of in a country!

EU identity applies the same: because of the political and economic purpose, EU has no borders between its allies, but has strong boundaries between its cultures. There is no common language to channel the meaning and alter the differences in identities or thinking methods.

The big question: How to create EU identity: how create stronger impact on the minds? How can be influenced to change with time? What intercourses needed, to resolve the differences, or it is in the same time losing the very own culture?

Until now, EU impact is still weak to affect our everyday life. Still remote and far away, not direct actions on people. The EU system allows the countries to have own political and social structure, as their history, religion and culture drive them. Some basic elements required, as democracy, but no demands on the realisation. Therefore it nurtures the fragmentation than the union. The free borders give opportunity to move freely to another country, but it is created not for mix up cultures or influence them in Europe. The EU system therefore has institutional filters to weaken its influence – as much the nations wanted to hold fast their self-determination. Therefore EU system has not enough power to change significantly the national identities.

The flux can be done by strong impact, and intercourse and influence by the EU system to change minds, to alter not just the thinking, but the differences as well measure up to the level needed. It can be done by various tools (common language, common education, common political structure, and common market, mass media and joint army), but certainly in a long term. Nowadays EU has no power and pretension to come down to the people, and have common structures in national level. EU has a political structure of its own, in an artificial, remote supranational level. Therefore the strong influence of the people still on the waiting

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<sup>7</sup> Hofstede, G. and Hofstede, G. J., 2008. *Kultúrák és szervezetek. Az elme szoftvere*. Pécs: VHE Kft., p.341; 390.

list... and also questionable, (except of the beneficial factors – as common market) nations would want it at all?

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## INTEGRATION PROCESSES AND SENSE OF BELONGING: IRANIAN IMMIGRANTS IN SWEDEN AND HUNGARY

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**Key Words:** *Iranian immigrants, integration, sense of belonging*

### **Abstract**

*Till the end of the XX century the development of the globalisation produced an effect on the process of migration. It became easier for people to settle down in different countries – temporarily or permanently – with the aim of working or studying there. The economical difference between the developed and developing countries contributed to the upward of this tendency, because the developed countries – like Sweden – need more and more labour, and the most of the population of developing countries thinks that the expatriation is the only way out of the destitution. In line with this migration tendency, the importance of the minority issue is constantly growing. In the international public life, in the field of governmental and non-governmental organisations the rights, obligations, status and future of minorities are getting more and more important issues.*

*The purpose of this research is examining the migration and integration processes of Iranian immigrants in Sweden and Hungary. Sweden, which is a well-known host country for migrants, and Hungary, which is a transit country for many people whose real destination is the Western part of Europe. Both of the countries can give other opportunities for migrants or refugees from the Middle East, from Iran. There is no precise statistics about Iranians abroad, but according to formal speech, three-five millions of Iranians are dispersed around the world. Their, who have migrated from different social classes all over the world, main goal was the education. At present, Iranians abroad have created a special kind of world, where their common cultural and social traditions are important, but are far from the original Iranian lifestyle. Through to the study and the presentation we can get a picture about the circumstances of leaving the birth country (Iran), the motivations of integration to the host country, and sometimes the strange situations due to the cultural differences. The language choice and daily using also has an important role in the status of integration: it can be an indication when migrants are searching for a connection with their own ethnic group, or has a categorical rejection onto them. The future plans in different ages of migrants or the lack of these purposes can be interesting too. Have the borders disappeared only physically or has it between people and their mind also? Is this really a borderless Europe? Iranian immigrants have their own answers for the question.*

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## TRANSNATIONAL MIGRATION AND DEMOCRATIC STATES BORDERS

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**Key Words:** *political theory, transnational migration, normative inquiry, democratic states borders, rights of migrants and citizens*

### **Abstract**

*When it comes to the issue of transnational migration and its normative demands on states' borders, some theorists uphold a world of open borders, while others support the full sovereignty of states in matters of migration. While each position offers important insights to the debate, my interest starts with acknowledging that a plausible justification for the right of states to exclude, as well as a more nuanced reflection on how morality imposes limits on this right are still needed. This paper seeks to address the question whether and to what extent border policy can be unilaterally set by states and on what normative grounds (compatible with liberal and democratic theories) migrants can be denied entry to countries and have their rights restricted in today's world. Answering this question means, on the one hand addressing one of the most pressing topic in political theory and international relations, and on the other hand, provide paramount normative grounds for the implementation of desirable migration arrangements at the global level. Furthermore, seeking to shed light on the issue of migration and states' borders in the light of democratic theory implications means departing from current studies of closed and open borders, currently focusing, among other arguments, on states right on territories, rights of freedom to association, distributive justice, libertarianism. The novel approach of porous borders theory, if plausibly justified, seems able to meet both moral concerns, closure of borders and inclusion of others, laying thus the terrain for a fertile investigation that is worth exploring in my paper.*

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## I. Introduction

This paper concerns transnational migration<sup>1</sup>, specifically the rights of would-be migrants and the rights of states to unilaterally set their border policy. According to United Nations estimates, there are 214 million international migrants worldwide, 44 million forcibly displaced people, and another 50 million people are living and working abroad with irregular status. The proliferation of terms to describe the varieties of migrancy – permanent resident, guest worker, illegal alien, refugee, displaced person, asylum seeker – is itself indicative of the scale of the phenomenon. Each term denotes a different type of experience, and a different relationship to the new society and inevitable implications for democratic politics and for the meaning of citizenship (Bellamy, 2008, pp.597–611). Put crudely, the global migration phenomenon seems to “challenge” states’ borders as we understand them today and states try unsuccessfully to “resist” this expanding phenomenon, by erecting new fences and walls, and posting guards at their borders.

Some theorists advocate a world of open borders, while others uphold the full sovereignty of states in matters of migration. Is there any way to reconcile these two clashing philosophical positions? While each offers important insight, my interest starts with acknowledging that a plausible justification for the right to exclude is still needed, as well as a more nuanced understanding of how morality imposes limits on this right. The paper seeks to address the question: *whether and to what extent border policy can (still) be unilaterally set by states and on what normative grounds (compatible with liberal and democratic theories) migrants can be denied entry to countries and have their rights restricted in today’s world*. Answering this research question means, on one hand addressing one of the most pressing topics in political theory and international relations, and on the other, providing normative grounds crucial for the implementation of desirable migration arrangements at the global level.

Migration, as an obvious contemporary manifestation of globalisation, is by definition a trans-boundary phenomenon that no state can address individually. Despite this, it has remained largely the domain of sovereign states.<sup>2</sup> I undertake a philosophical analysis of the “tools”

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<sup>1</sup> By transnational migration I assume the definition given in (Benhabib, 2004, p.10). “Transnational migrations, pertain to the rights of individuals, not insofar as they are considered members of concrete bounded community but insofar as they are human beings *simpliciter*, when they come into contact with, seek entry into, or want to become members of territorial bounded communities”. Leaving out tourists, I usually refer to economic migrants. Nevertheless, a broader definition might include low-skilled labour migration, high-skill labour migration, irregular migration, human trafficking and smuggling, asylum and refugee protection and diaspora. In short, I call them would-be migrants. I refer to “international migration” instead mostly to indicate how binding guidelines created by international human rights regime constrain sovereign nation-states’ will, in dealing with migrants and would-be migrants.

<sup>2</sup> Alexander Betts (2012, pp.1–29) argues that states developed international cooperation and institutionalised global level of governance, with regard to many trans-boundary issues (in the sense that, like migration, they are phenomena that go beyond the capacity of a nation-state) such as climate change, international trade, finance, etc., primarily through United Nations agencies (e.g. WTO, IMF). Despite its inherently trans-boundary nature, international migration does not benefit from the existence of a unitary coherent institutional framework, regulating states responses to international migration. Because of this, sovereign states retain a significant degree of autonomy in determining their migration policies and interact only sporadically with a number of regional or global non-institutionalised actors. I shall consider what are the moral and political implications of both the lack of an international legal framework and the desirability of such increased international cooperation, put in few words, the prospect of global governance.

which liberalism and democratic theory work with, tools that were initially developed to suit the context of the nation-state, and extend them to understand how liberal theorists evaluate immigration policies currently governing movements across borders. Specifically, I aim to “integrate” claims of migrants on the one hand and states on the other, while scrutinizing competing theories establishing the principles at the basis of the current thinking about transnational migration.

The literature presents us with three main positions, two of which are more “extreme”, envisaging “open” or “closed” borders, and the third, more moderate, “porous” borders, which I ultimately aim to enhance in my paper. I am indebted to Benhabib’s porous borders theory for emphasizing that migration policies regulating the terms of *membership* ought not to be viewed as unilateral acts of self-determination *simpliciter*, but rather negotiations in line with “democratic iterations” which tend to eliminate the privilege guaranteed by traditional membership. I will develop her theory focusing primarily on migrants’ *right to membership*, extending her argument to migrants’ *right to first entrance*, the main concern that goes beyond this paper. When it comes to border policies<sup>3</sup> both citizens and foreigners have a say and their interest is negotiated,<sup>4</sup> rather than the latter being subject to the former’s will. Democratic iterations, which are formal (e.g. laws) and informal (e.g. social activism) both shape the demos and includes *others’* say. I analyse whether we can formally establish the desirable extent of such say of *others* and on which grounds, whether moral, ethical, legal and political.<sup>5</sup>

Before mentioning the contribution of this paper, I shall anticipate two shortcomings.

Firstly, this essay drastically oversimplifies the theories of open, closed and porous borders. This essay also lacks more specifically a more nuanced reading of Seyla Benhabib extended work. I aim to present an overview of the main contemporary arguments regarding borders and some suggestions about new avenues to be further explored.

Secondly, it lacks normative clarity with regard to concepts of “democratic iterations” and “negotiation” that could obfuscate the idea, yet at its inception, of a fruitful conceptual relationship between democracy and the account of justice, defining what should be negotiated based on the nature of justification we owe to one another. Clarifying these concepts should help conceptualise the principle of interactivity, left under-theorised in

<sup>3</sup> Border controls are regimes of coercion, which ought to be subject to discourses of justification. Benhabib (2004) and Abizadeh (2008) take this perspective.

<sup>4</sup> The concept of such “negotiation” is very well expressed in Michael Blake’s response to Christopher Heath Wellman (Blake, 2012, pp.748–762) on the latter’s account about the freedom of association. The main idea of Wellman is that citizens of a state have the right to deny entry to foreigners, full stop with no justification. Michael Blake argues instead that citizens might have to deem reconsidering their reasons and might decide that although they cherish more their own national interests, granting entry to foreigners, on the assumption that not doing so will produce an enormous consequent loss of rights by the side of the needy foreigners. Consider the example of the St. Louis boat having aboard German Jewish refugees, which was denied to entry the Cuban and the US borders in 1939, and resulted in the death of many passengers on the boat.

<sup>5</sup> Benhabib (2011, p.145): “if we do not differentiate between morality and legality, we cannot criticize the legally enacted norms of democratic majorities even when they refuse to admit refugees to their midst, turn away asylum seekers at the door, and shut off their borders to immigrants. If we do not differentiate morality and functionality, we cannot challenge practices of immigration, naturalisation, and border control for violating our cherished moral, constitutional, and even ethical believes”.

Benhabib's work, potentially proposing new lenses to look at the relationship between territorial rights of states, democratic sovereignty and immigrants' rights.

My contribution to the current porous border theory<sup>6</sup> is three fold:

- 1) I attempt to defend porous borders theory against criticism of closed borders theory; the extensive work of David Miller and other closed borders theorists;
- 2) I clarify existing ambiguity in the porous borders theory for subscribing to a "bounded" *demos* and the need of a porous boundary that admit an (unspecified) degree of *others'* interest (non-members of the *demos*), but without justifying sufficiently Benhabib's strategy.
- 3) I address the *rights to membership* approach and the strident omission of *the right to first entry*.

In section II, I present my assumptions and the "theoretical puzzle" in order to allow the reader to evaluate whether her intuitions matches my initial ones and ways in which they differ; and in section III, I present the main theoretical positions in the literature of open, closed, and porous borders theories, each of them trying to explain the puzzle, as it is conceptualised in section II.

## II. Assumptions

Echoing Benhabib, I consider migration a matter for non-ideal theory, thus considerations of historical contingencies and actual injustices are taken into account. Contrary to the Rawlsian ideal utopia in *The Law of Peoples*, according to which democratic society, like any political society is a "complete and closed social system", I assume that democratic societies are "interactive, overlapping, and fluid entities, whose boundaries are permeable or porous, whose moral visions travel across borders, are assimilated into other contexts, are then re-exported back into the home country, and so on." (Benhabib, 2004, p.87) In the Rawlsian ideal, according to which we enter a society by birth and exit it by death, no concern about migration arises. Our intuitions strongly conflict with the Rawlsian view of such static world of "self-satisfied people, who are indifferent not only to each other's plight but to each other's charms as well" (92). Rather, supporting the idea that peoples' interactions are "continuous and not episodic; their lives and livelihoods are radically, and not only intermittently, interdependent" (97) Therefore, conditions of entry and exit into liberal-democratic societies and ways in which we think about border policies, unlike the Rawlsian view *are* problematised *qua*.

The next non-ideal assumptions I take, following Beitz (1979), (Young, 2003) and Pogge (2002; 1992), is that of a world with great economic disparities between "peoples" has an impact on migratory movements, causing a "pull" of poorer in the world to higher standards of living. With regard to the central debate on the question to what extent affluent societies

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<sup>6</sup> My contribution is mentioned in this paper uniquely for indicating the direction I aim to explore in my further work.



and persons have obligations to help *others* worse off, among other reasons, I assume that – because the institutional order which involves a complex pattern of interaction and international interdependence that contributes to maintaining the *status quo* or even exacerbates the situation of the poorer – there is a moral obligation on the better off towards the worse off. However, I will not discuss extensively the scope and the content of principles of distributive justice, as it is not my focus. Thus I will make assumptions about *what* we owe to others, focusing on *how*<sup>7</sup> we should meet such obligations, particularly when it comes to would-be migrants at the border.

I will undertake two levels of analysis, whereby the second precedes and constrains the first:

- 1) Institutional: “Where it can be argued that a group shares responsibility for structural processes that produce injustice, but institutions for regulating those processes don’t exist, we ought to try to create new institutions.” (Young, 2003) This explains what kind of regulatory institution is desirable to deal with transnational migration, other than states actors alone.
- 2) Justificatory (normative): what rights migrants have in the democratic negotiation and conversely to what extent the sovereign acts unilaterally in its own interest. My research question addresses mainly this normative point.

Puzzle:

Imagine three idealised solutions to the “global poor problem” – namely different countries, which citizens of some countries are far poorer than others of some other countries – each assuming a liberal egalitarian approach.

1. Closed border theories (e.g. Rawls or David Miller, Michael Walzer) generally claim that massive redistribution from wealthy to poor countries is desirable to equalise such economic and social disparity. Immigration is conditional on serving the national interest; therefore immigration is a solution if it happens to serve some wealthy countries’ interest (e.g. California’s flourishing economy thanks to Mexicans’ skills in agriculture and low salaries). National self-determination prevails in setting its interest.

2) Open border theory (e.g. Joseph Carens) claims that freedom of movement across borders will enable the less fortunate to pursue their goals, and more broadly, better lives. Equality is achieved by means of free mobility. This scenario is implausible in line with the empirical claim that the poor are far more numerous than the ability of wealthy states to receive them;

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<sup>7</sup> Nancy Fraser (Fraser, 2009) addresses the issues of *what* and *how* of justice in drawing a connection between justice and democracy. Benhabib draws upon Nancy Fraser in concluding that politics need be framed in such a manner that there are insiders and outsiders with respect to a given bounded polity. However, like Fraser, she refuses the line of reasoning proposed by closed border theories, which, by taking as a given “fixed” democratic polity, prematurely forecloses the search for other frames, which might be more just and inclusive of others, yet still generate new exclusions. Envisioning an ongoing process of critique, reframing, critique that democratically addresses claims for further reframing inevitably demands transnational regulatory institutions to support the process of framing. These are needed because although the closed polity remains the main decision-maker on transnational migration policy, it results inadequate in dealing with transnational issues on its own.

mass migration of individuals from all corners of the world to small wealthy countries, is of no good for anybody. We therefore discard this proposal.

3) A porous border theory (e.g. Seyla Benhabib) claims that re-distribution and “regulated” migration (in the sense that does not entail “completely” open borders and complete freedom of circulation of individuals) are not mutually exclusive strategies to address the problem; the claim is that the application of both re-distribution and regulated migration “better” pursues the ideal of equality.

Note that the intuition put forward by porous borders theory is that equality (broadly understood) is not the only desirable goal, but there is “more” to it. In case 1) we have equality of all members of all countries after the distribution. In case 3) we also have perfect equality. Yet, we seem to prefer solution 3) to 1). Although we share the idea that a world in which resources are distributed in such a manner, including a systematic transfers from others to us, for us not to desire to move elsewhere, we still have the intuition that something is missing. We share the intuition (compatible with 3) that a well-ordered world both guarantees enough wellbeing for us not to need nor desire to move elsewhere, yet guarantees the choice for any of us to move (and be granted access) elsewhere, if we want to, for any sort of (decent and non-malicious) reasons of our own in the pursuit of our goal. This raises the question what kind of migrants’ reasons count on, faced with a national border and can question the legitimacy of the latter to turning her down with no justification. Should her interests be weighed against the reasons of the host country, rather than the legitimate national interests of the latter prevail *only*? More specifically, what is the desirable moral balancing between concerns towards *everyone*’s interests and the legitimate interests of states?

If the guiding intuition can be supported by good reasons in my paper, the porous border theory is desirable over the other sets of theories, if, and only if, it specifies a clear account of what such a porous border world should entail when it comes to explaining the negotiation between the interests of migrants and states as regards porous border.

### **III. An Outline of the Main Theories**

#### **i. Open Borders Theories**

A fundamental assumption of democratic thought, which stands at the basis of citizenship in Western liberal democracies, is the principle of national sovereignty (Pevnick, 2009). When it comes to contemporary transnational migration (usually, from the Third World to wealthy, Western democracies), the power to admit or exclude aliens is inherent in national sovereignty and considered by most theorists to be essential for any political community. Every state has the legal and moral right to exercise that power in defence of its own national

interest,<sup>8</sup> even if that means denying entry to peaceful, needy foreigners. States may choose to be generous in admitting immigrants, but they are under no obligation to do so.<sup>9</sup> I call this view “closed border theory”<sup>10</sup> as it provides arguments in support of closed borders and border policies that are unilaterally set by states in line with their national interest.

In his book *The Case for Open Borders*, Joseph Carens directly challenges the conventional, “liberal-statist” view on migration that upholds the legitimacy of closed national borders. According to Carens, borders should generally be open and people should normally be free to leave their country of origin and settle in another country, and then have the same rights and obligations as the citizens of the state to which they have moved. While Carens’ argument in favour of open borders has been extensively criticised for being unrealistic and utopian, and for undermining the fundamental principles of the Western democratic political tradition, especially that of state sovereignty and democratic self-determination, there are merits to his argument.

Firstly, Carens should be credited for drawing theoretical attention to the previously taken-for-granted issue of national borders. He challenges our tendency to assume the legitimacy of denying entry to foreigners and forces us to engage normatively with the rights of migrants, the lack of which would constitute an isolation of the theoretical concerns from the empirical world<sup>11</sup> that draws our attention to the fact that migration is an increasing phenomenon as are the human rights concerns on the side of those who migrate.

Second, Carens’ argument illuminates the deeply-rooted conflict between the demands of universalism<sup>12</sup> and particularism through the lens of the ethics of migration. His argument for

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<sup>8</sup> Consider the example provided by David Miller in “Border Regime and Human Rights”, p.8: “Your human right to food could at most impose on me an obligation to provide adequate food in the form that is most convenient to me (costs me the least labor to produce, for example), not an obligation to provide food in the form that you happen to prefer”.

<sup>9</sup> (Carens, 1987), Carens’ view of closed borders is rather strong. Other philosophers, e.g. Walzer (1984, p.41) accepts that state have a moral obligations to admit family members of current citizens, refugees and displaced ethnic nationals.

<sup>10</sup> I distinguish between two closed borders theories, (1) strong-Westphalian, and (2) moderate-liberal understanding of sovereignty; and take the (2) as valid. Reading (1) regards cross-border issue as a “private matter”, whilst (2) views states to be increasingly interdependent as they observe common principles, such as international human rights regimes; moreover, view (2) postulates that sovereignty is no longer the ultimate and arbitrary authority, rather the respect to self-determination is fulfilled when domestic principles are anchored in institutions shared with other states. Reading (2) is plausible and incorporated in both moderate closed and porous borders theories, as both theories support the idea that the right to admit migrants within a polity is the prerogative of the republican sovereign in the described sense by (2). Disputes between the two sets of theories regard the rights that would-be migrants ought to have to condition the terms and conditions of sovereign’s decision.

<sup>11</sup> It is estimated that, whereas in 1910 roughly 33 million individuals undertook crossborder movements to settle in countries other than that of their own, by the year 2000 that number had reached 175 million. During the same period (1910–2000), the population of the world is estimated to have grown from 1.6 to 5.3 billion, that is three fold. Migrations, by contrast, increased almost six fold over the course of the same 90 years. United Nations, the Department of Economics and Social Affairs, 2002, report it. (Benhabib, 2004, p.5)

<sup>12</sup> Basic rights and human rights are conditions that enable the exercise of personal autonomy; as a moral being you have a fundamental rights to justification (Forst, 1999). Your freedom can be restricted only through reciprocally and generally justifiable norms, which equally apply to all. (Benhabib, 2004, p.133) In the sphere of morality, generality means universality. Particularity instead refers to those rights of individuals by virtue of their membership to a community. (Benhabib, 2004).

open borders is grounded in the same political tradition that promotes this conventional argument for restricting immigration. Drawing particularly upon Kantian cosmopolitanism and Rawlsian liberalism, Carens' uses core democratic assumptions which shape contemporary political theory on the state and democracy, yet challenges the conventional view about migration that is based on these assumptions.

In criticizing the conventional view that justifies the restriction of immigration, Carens considers Western democracies to be the modern equivalent of feudal privilege—an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, those born in a particular state or to parents who are citizens of a given state are more entitled to the benefits of citizenship than those born elsewhere or born of alien parents. Thus, birthplace and parentage are natural contingencies that are arbitrary and irrelevant from a moral point of view. Carens extends therefore a basic right to freedom of movement from one city to another within the same country or from one social class to another, to one country to another. Being born in an African country in today's society and being impeded by migration regulations to join a wealthier country is the equivalent of being destined, Carens would argue, by guns pointed at migrants at the border, to remain in the same social class. In condemning the closed borders thesis of Michael Walzer, his main communitarian interlocutor, which assumes the political space is the same as the ethical and cultural space, Carens takes a cosmopolitan position, based upon Kantian universalism. Morally, the cosmopolitan tradition is committed to viewing each individual as an equal unit of moral respect and concern, and legally, cosmopolitanism views each individual as a legal person and grants protection of their human rights by virtue of their moral personality, not based on national membership or any other status.

Open border is based on three distinct arguments: necessary to maximise overall utility (utilitarianism, not detailed here), the requirement of distributive justice (liberal egalitarianism) and the requirement to ensure individuals' right to free movement (libertarianism). Carens emphasises the Rawlsian "original position" to justify his argument in favour of freedom of international movement as a basic liberty, even though Rawls explicitly assumes a closed political system in which questions about immigration could not arise. Echoing Rawls, Carens argues people in the original position would choose two principles: the first principle would guarantee equal liberty to all, and the second – the "difference principle" – would permit social and economic inequalities as long as they were to the advantage of the least well off and attached to positions open to all under fair conditions of equal opportunity. According to Carens, these principles are satisfied when individuals are free to pursue the best opportunities wherever they are in the world, regardless of their place of birth. In this respect, Carens' argument is in line with Robert Nozick's (1974) libertarian theory in which the state of nature justifies the creation of a minimal state whose sole task is to protect people within a given territory against violations of their natural rights, including rights to property and to enter in voluntary exchanges. According to this view, the individual should not be impeded in pursuing their life goals and therefore a significant amount of freedom, including freedom to migrate to the land in which life plans are fulfilled, is desirable.

## ii. Closed borders

Carens basic argument is correct in assuming that moral equality cannot stop at the border, however this does not account for why citizenship is arbitrary like ethnicity or race. Although citizenship arises in such a manner that individuals cannot be blamed or credited for it, thus appearing morally *arbitrary*, yet the border is not *irrelevant* insofar as it marks the morally relevant relationship between its citizens. Moral equality does not require political equality insofar as the state exercises power over those living *within* its borders, which it cannot do to others; the justifiability of states' institutions is due to those subject to its authority, thus, far from being morally irrelevant, citizens of a country are those who maintain its political and social institutions (subjects to and authors of them). Thus moral equality and more broadly liberal principles of justice are not inconsistent with immigration constraints of states. (Risse, 2005; 2006) Christopher H. Wellman's argument, one of the most articulated in favour of closed borders – upholding that “legitimate states may choose not to associate with foreigners, including potential immigrants, as they see fit” (Wellman, 2008, p.13) – rests on three main premises: (1) legitimate states have a right to political self-determination, (2) freedom of association is an essential component of political self-determination, and (3) freedom of association allows one not to associate with others.

Premise (1) upholds that e.g. Sweden cannot punish Norwegian drivers who speed on Norwegian highway, because intruding in Norway's domestic affairs constitute a violation of the legitimacy of its state. The legitimacy argument holds against the USA if (hypothetically) it unilaterally decided to annex Canada, and American citizens supported this in a referendum. Legitimacy relies on the doctrine of popular sovereignty, according to which people have a right to rule themselves. Whilst we find the first illustration plausible, we also believe that such a premise is too demanding, e.g. we do not believe that Sweden's legitimacy to self-determination is undermined if constrained by EU laws in domestic affairs, e.g. labelling its import-export goods veraciously, or international human rights laws or other regional and international treaties, applying domestically. Most importantly, Laegaard points out that the annexation example is crucially different from immigration: immigration is an *individual* phenomenon that concerns individuals who take residence within a territory, whereas annexation means a state taking over another's territory, subjecting people and changing its jurisdiction. Annexation is a blatant breach of freedom of association as the annexed people are forcibly incorporated under a new authority, whereas immigration involves individual permission granted. (Laegaard, 2013)

Premises (2) and (3) provide a more robust, yet limited argument for states having a right not to associate with prospective migrants. The freedom of association right is fundamental in liberal societies as enabling citizens' moral autonomy to collectively decide their own political future, thus their political autonomy.

Philip Cole (in Laegaard, 2013) – who challenges those defending the right to control membership by subscribing to liberal values – attributes the freedom of association argument a limited role on the ground that states are not associations such as clubs or marriages. When exercising the right to leave a marriage or a club one does not need to enter a new one to leave

the former, while leaving a state necessarily entails entering another. Thus states are “meta-associations” where autonomous individuals enter all other possible forms of association. Therefore, Wellman’s argument for freedom of association seems too demanding, in that it unjustifiably defends the political self-rule against the background of perspective migrants’ basic needs who flee persecution or severe human rights violation, and lacking minimally decent life. Self-determination can be overridden in favour of granting asylum, as most theorists assume – unlike Wellman – that states have a moral and legal duty to admit refugees that does not undermine self-determination. Or so most of us believe when it comes to weighing reasons for the right to freely associate and other rights (Blake, 2012).

Moreover, according to Laegaard (2013) the associative view is defective in implying that the territorial right of states and the right to freedom of association regard the same entity. States, although they protect individuals’ rights, do not enjoy the moral status of individuals. Thus the state does not enjoy the right to exclude migrants from its territory by virtue of the right of freedom to association. Therefore migrants’ exclusion should be grounded in states’ territorial rights, rather than freedom of association rights. However, those that take this direction face circularity insofar as even if states had such territorial rights, ultimately the people are in control of a state’s action and the state represents people’s interests. Thus the argument for states excluding immigrants does not follow from Wellman’s associative account.

David Miller’s thesis grounds the right to control immigration to the territory of the state in the contingent inference that the ability of the state to perform its functions, such as upholding law, protect human rights, presumes “absolute” control over a territorial jurisdiction, including control to exclude needy foreigners, (Miller, 2007; 2000). Miller’s view is compatible with the assumption (1) that citizens have special duties towards their fellow citizens and therefore special entitlements to rights within a given territory, and that these same concerns are lesser towards foreigners; and (2) protecting migrants from violations of human rights when this occurs, but generally setting one’s own borders and protecting primarily the national interests, may be considered unjust, but not right-violating.

But all other functions, that are powers of sovereignty, are generally compatible with not exercising control over immigration, resulting in being undermined only if massive immigration burdens the state. This is a contingent matter that cannot justify a general right to control immigration for cases where there is no prospect of such consequences as well (Fine, 2010, p.355), requiring therefore an additional argument that justifies the general right to control migration<sup>13</sup>.

### iii. Porous Borders Theory

In terms of democratic theory the major problem with Carens’ argument for open borders identified by Benhabib is that democracies must be accountable to a specific people, hence a democracy actually requires some kind of political closure (Benhabib, 2004, p.219). She

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<sup>13</sup> Fine’s argument, found in Laegaard (2013).

attempts to reconcile the rights of migrants conflicting with the need for democratic sovereignty, and more broadly to reconcile the demands of universalism and particularism. While accepting that the issue of democratic sovereignty has become a contentious theoretical and political issue, Benhabib challenges the view that there is a conflict between democratic sovereignty and international legal norms regarding human rights. She claims that such a view misunderstands not only what sovereignty is, but also how international and transnational norms function in democracies. Such norms, she claims, enhance rather than undermine democratic sovereignty. While accepting that states do have the right to limit who enters their borders, Benhabib argues that these borders should not be open, or closed but “porous”. This is a much more moderate position than that put forward by Carens. Benhabib acknowledges that the migration phenomena have become part of the demos, the decision making, without borders being open. By “porous borders” Benhabib means that the principles and practices of a community incorporate aliens, refugees and asylum seekers, newcomers and immigrants into existing polities.

If we accept that democracy needs borders, and that these are not unilaterally set by a “fixed” group of individuals who constitute a polity, it remains a question how borders should be set in order to also accommodate migrants’ say. How do borders *fluidly* “change” and maintain, at the same time, a stable polity? Can we even address the *right to membership* without first addressing the *right to first entrance*?

This view – although it accommodates in principle both main concerns, on one hand that democracies need some sort of closure and that migration requires accommodation within the demos – is inconclusive in clarifying the right of the contemporary would-be migrant in contrast with the right of the state to unilaterally set its policies, which by default restrict the rights of the would-be migrant. Benhabib’s conclusion is problematic in acknowledging on the one hand that borders are *de facto* porous<sup>14</sup>, but when it comes to explaining normatively the theory of porous borders on the other hand, collapses into closed borders theory, in line with which states unilaterally set up border policies, looking uniquely at their national interest in setting up migration policies, and migrants have no say.

Porous borders’ theory grants a fundamental human right, in line with the Kantian hospitality principle, to sojourn in other territories, not only temporarily, as Kant foresees, but more permanently, including a lifetime. This is because residing for a long time in one place should trigger a right to full membership, unlike the Kantian principle of hospitality that grants a cosmopolitan right<sup>15</sup> to migrants to sojourn in other territories, rather than be a permanent visitor. The republican sovereign may refuse the migrant only if this can be done without leading to her destruction<sup>16</sup>. Thus, asylum seekers and refugees’ claim to admission to a new

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<sup>14</sup> In chapter four and five (Benhabib, 2004) empirical examples are explained, e.g. extensive discussion on EU borders.

<sup>15</sup> The Kantian temporary sojourn right stands on two premises: the capacity of all human beings to associate and the common possession of the surface of the world.

<sup>16</sup> The Kantian concept of temporary sojourn is incorporated in Geneva Convention on the Status of Refugees as the principle of “non-refoulment” (United Nations, 1951), obliging signatory states not to forcibly return refugees and asylum seekers to their countries of origin, if doing so would endanger their life and freedom. (Benhabib, 2004, p.35)

territory is grounded in the right to hospitality, and anchored in the republican cosmopolitan order. Moreover, it is legally incorporated in the international human rights regime<sup>17</sup>, and subsequently accepted by republican states. Benhabib's fundamental human right regards the admission of the asylee and refugee and says little about immigrants whose admission remains "a privilege", in the sense that it is up to the sovereign to grant such "contract of beneficence"<sup>18</sup>. Benhabib's theory focusing on the right to membership of *all* strangers (refugees and immigrants) is inconsistent insofar as she does not explain immigrants' first entrance as she does with the category of refugees. I cannot speak of the rules that apply to me as a PhD student in a given university if I do not first clarify how I got *into* the PhD program of that given university, for rules of the program, such as a leave of absence, or stipend, etc. apply to me.

The Kantian right of hospitality adopted in the porous border theory, however, broadly suggests that denying foreigners the claim to enjoy the land and its resources, when this does not endanger the life and welfare of original inhabitants, would be unjust. If we deny Miller's position (2002), as Benhabib seems to do, we have no grounds to believe that immigration by definition endangers the style of life and cultural values considered essential for decision-making values<sup>19</sup>. Benhabib eschews this view by contrasting the "demos" to the "ethnos". The right of hospitality is situated at the boundaries of the polity, grounding a human right to hospitality, rather than constituting either a virtue of sociability, or a kind of kindness and generosity on the side of states. This suggests hospitality to refugees and immigrants as well, but Benhabib is not clear on this point. The principle of hospitality is legally unambiguous as it distinguishes between refugees to whom admission is granted and immigrants, whose admission instead is conditional on democratic decision-making. Morally, the hospitality principle is ambiguous for distinguishing between migrants and refugees, whereas the latter *deserve* hospitality for escaping war and persecution, the former do not for *simply* escaping poverty. Morally, these categories overlap and the hospitality principle does not account for the distinction it takes: Why does it apply if your life is threatened, but not when your overall life is endangered by poverty (which can deny many liberties)? The human right to life is not distinguished clear-cut from other basic human rights to subsistence, such as capacity to live a

<sup>17</sup> By international human rights regime, Benhabib refers to a set of interrelated and overlapping global and regional regimes that encompass human rights treaties as well as customary international law or international "soft law" (namely, international agreements which are not treaties and are not covered by the Vienna Convention on the Law of Treaties). Examples would include UN treaties bodies under the International Covenant on Economic, Social and Cultural Rights, The Convention of all Forms of Racial Discrimination, The Convention Against Torture and Other Cruel, Unhuman and Degrading Treatment or Punishment, and the Convention on the Right of the Child (Newman, 2003). Other international such structures are the establishment of the European Court of Justice, The European Conventions of Human Rights and Fundamental Freedoms, The European Court of Human Rights and others. These international norms constrain national sovereignty in a number of ways, for example, state sovereignty is subject to international norms which prohibits genocide, ethnocide, mass expulsion, enslavement, rape and forced labor. Concretely in the domain of transnational migration, the International Declaration of Human Rights (UN, 1948) recognises the right of movement across boundaries: a right to emigrate-to leave a country, but not to enter a country. (Benhabib, 2004, pp.7–11)

<sup>18</sup> (Benhabib, 2004, p.38).

<sup>19</sup> Other empirical considerations strictly related to the impact of immigration on national welfare systems are in favor and against immigration (e.g Carens, against Miller claims that immigration augments the overall utility and individual utility of migrants). I consider this discussion to go under the "utilitarian" umbrella that I will not address, as stated in section III, i.



decent life, have adequate wellbeing for oneself and one's family, including clothing, housing, medical assistance, etc. I argue that the Kantian hospitality principle is too restrictive in that immigrants' entry be denied based on not leading to her destruction. A larger scope of the principle ought not to entail with the word "destruction" her life or bodily injured protection only, but take into account other human rights that are grounded in the interest of human beings.

Assuming Benhabib is right in asserting that the tension between universalism and particularism<sup>20</sup> is overcome by renegotiation,<sup>21</sup> I attempt to shed light on what claims immigrants have to new territories in such renegotiation. Can democratic iterations support the project of establishing would-be migrants' admission to new countries in their negotiation with sovereign states? Benhabib accepts that sovereignty is a relational concept, rather than a self-referential one.

"While the paradox that those who are not members of the *demos* will remain affected by its decisions of inclusion and exclusion can never be completely eliminated, its effects can be mitigated through reflexive acts of democratic iteration by the people, who critically examine and alter its own practices of exclusion. We can render the distinction between 'citizens' and 'aliens', 'us' and 'them', fluid and negotiable through democratic iterations. Only then do we move toward a post-metaphysical and post national conception of cosmopolitan sovereignty, which increasingly brings all human beings, by virtue of their humanity alone, under the net of universal rights, while chipping away at the exclusionary privileges of membership" (Benhabib, 2004, p.21).

As a result of this, policies regarding access to citizenship ought not to be viewed as unilateral acts of self-determination, rather as decisions with multilateral consequences that influence other entities in the world community.

The act of renegotiation between the two dimensions, universalism and particularism, occurs by democratic iterations, concept that shows how commitments to context-transcending constitutional and international norms can be mediated with the will of democratic majorities. In Benhabib's words, democratic iterations are complex processes of public argument, deliberations, and learning through which universalist rights claims are contested and contextualised throughout legal and political institutions as well as in public sphere of liberal democracies. Democratic iterations are jurisgenerative as they change established understanding in a polity and establish precedents. Policies regarding access to citizenship

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<sup>20</sup> Universal human rights have a context-transcending appeal, whereas popular and democratic sovereignty must constitute a circumscribed *demos*, which acts to govern itself. Self-governance implies self-constitution. There is thus an irresolvable contradiction between the expansive and inclusionary principles of moral and political universalism, as anchored in universal human rights, and the particularistic and exclusionary conceptions of democratic closure. (Benhabib, 2004)

<sup>21</sup> Examples of such democratic iterations are provided in chapter five, as forms of interpretation of the local, the regional, the global, and the national, including "the scarf affair" in France, the case of a German-Afgani school teacher who was denied to teach with her head covered and the German Constitutional Court that denied the right to vote in local elections to long-term foreign residents in the city of Hamburg. This decision was superseded in 1993 by the Treaty of Maastricht; a democratic iteration that resulted in abolishing of German restrictive citizenship laws. (Benhabib, 2004, pp.21–23)

ought not to be viewed as unilateral acts of self-determination, but rather as decisions with multilateral consequences that influence other entities in a world community. But what are the implications for migrants' degree of say in the decision-making of border policies, which lay the grounds for their access to a new territory and the terms of it? It is still to be clarified in what ways implications of concepts such as "democratic iterations" and "negotiation" answers the research question.

Furthermore, against Rawls ideal world of "closed and complete societies", Benhabib argues that it would be grossly inadequate to consider the "fortune of the liberal people" in the West without considering the "interdependence of capitalism and imperialism" (Benhabib, 2004, p.100). What does taking into account world-historical processes entail with regard to migrants' first entrance? This presupposes a principle of historical interactivity of peoples, which Benhabib does not address explicitly and my intuition is that it is worth exploring. Migrants might have a say on borders policies based on historical interactivity, special relations (e.g. ex-coloniser, ex-colonised), and broadly historical reasons. This line of argument implies that only countries that have not colonised have the right to exclude immigrants and that countries that colonised have a weaker claim to self-determination in the area of immigration. This argument cannot provide normative guidance speaking of the right of the states to constrain or allow immigration to any extent insofar as a general argument, that takes into account, yet remains independent from empirical premises, should be provided to apply at all times. However, in line with Benhabib, I endorse that historical circumstances cannot be left aside in the analysis. Thus I signal the need of clarifying these insufficiently unexplored areas in the porous borders theory to both differentiate it from and defend it against closed borders theory.

The most contentious issue is whether there is a human right to hospitality that applies not only to refugees and asylum seekers, but immigrants as well, on the ground that the categories overlap. Porous borders have the burden of proof of whether there is a right to migrate and would this right what ensure in terms of making others' voice heard in a *demos*. David Miller, the main closed border theory interlocutor finds unproblematic that a country acts in its own national interest (Miller, 2007, pp.163–201; 2012, pp.407–427) when setting border policies that enhance particularistic rights of state's citizens even though they harm or do not offer equal regard and protection to migrants rights. In this sense, border policies cannot be considered a violation of a universal human right, precisely because human rights alone do not encompass under their umbrella a set of more *substantive* rights.<sup>22</sup> The idea is that not *everything* citizens enjoy as a right of citizenship by virtue of their status will translate into a human right. Miller correctly points out that not even a fully philosophically grounded human right<sup>23</sup> can ensure a migrant a say with regard to his admission in a new territory. However, I suggest two strategies in order to address the limitation of human rights:

<sup>22</sup> Miller David. *Borders Regimes and Human Rights*, *Journal of Law and Ethics of Human Rights* (forthcoming). David Miller's conclusion is that such policies might be unjust, but not necessarily right-violating.

<sup>23</sup> Note 20.

- 1) A thicker one: by developing an account of justice<sup>24</sup> concerned primarily with the rights of migrants. This is because justice has a broader domain of application than a simple human right<sup>25</sup> that would be combined with human rights, which by their very nature are universally binding and applicable to the relationship between states and immigrants as well as to other relationships. To accommodate migrants' rights, democracy goes hand in hand with justice.
- 2) A thinner one: by developing an account against Miller's idea upholding that, because there is no such human right to migrate, a given state is only constrained to have a more just migration policy. I doubt that this line of argument can be understood so straightforwardly. In line with Michael Blake's argument (Blake, 2012, pp.748–762) and in line with an account of justice concerned with the rights of migration that I will develop, I shall argue that the rights of migrants to enter ought to be a matter of "negotiation" as the freedom of association right is to be regarded in the context of the direct impact that it has with the antidiscrimination right. In other words it is plausible not to want to associate with x, so for instance to exclude x from your members, but there are instances when x can be a women or homosexual and they might not be discriminated against, for example, on the grounds of her "womanhood". This means therefore that the first freedom is subordinated to the second because the right to freely associate cannot produce discrimination, and therefore, it is a morally prohibited strategy. I will proceed in line with this argument in weighing different claims and trying to evaluate to what extent migrants have a say on border policies and to what extent borders can be unilaterally set, rather than assuming, like Miller, that would-be migrants have none full stop.

## Conclusion

This paper provided an overall outline of the most salient arguments responding to the question of what are the rights of migrants to first entry and the rights of states to unilaterally set border policies (and other policies) affecting the former, in line with the national interest. Its modest goal is to assess that the current literature does not respond the question of what are the claims of migrants to first entry versus claims of states to unilaterally decide on it. This paper justifies the great interest in further evaluating whether (1) there is one and only normative response to what are the claims of migrants (whether such claims are rights, and what kind of rights) independent from empirical considerations; (2) whether the porous theory can provide a middle ground terrain of "negotiation" of the rights of the individual migrant

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<sup>24</sup> I will elaborate on Nancy Fraser's account, addressing the capacity of public sphere and democracy in times in which publics no longer coincides with territorial citizenries, economies are no longer national and states no longer possess the capacity to solve many problems, transnational by nature. She calls it the "misframing" issue, specifically this one of democratic frame-setting, demanding that subject of justice be balanced: "who", "how", "what" counts as a matter of justice be balanced in virtue of reflections on the scales of justice. Fraser's goal is to provide a theory that encompasses and "valorises expanded contestation of previously overlooked harms, such as non-distributive inequities and transborder injustices, while also tracking reduced capacities for overcoming injustice, absent a stable framework in which claims can be equitably vetted and absent legitimate agencies by which they can be efficaciously addressed" (Fraser, 2009, p.8).

<sup>25</sup> See Griffin, 2008.

and the state, as it seems to be promising, including solid reasons for why such negotiation is desirable in the first place; (3) finally, advancing the two strategies mentioned in the last part of the paper itself might provide some solid grounds for assessing new institutional levels, other than domestic, but including domestic migration policies as well, marking new avenues to deal with transnational migration.

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### SECTION III

#### NEW HORIZONS: THE EU AS A GLOBAL POWER

#### GLOBALISATION AND GLOBAL POWER

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**Key Words:** *globalisation, global power, International relation, greatest impact*

#### **Abstract**

*Our planet is nowadays under the power of globalisation. Globalisation is the idea and inspiration of our time, a great debate and a comprehensive admission. The current global trend is related to the economy, politics, culture and society. While the global power is facing daily life, where establishment of economic, technological, political networks receives multiple value if it is viewed in relation to weakening of the historical claims on the state and nation.*

*Sovereignty and cultural identity are some areas where globalisation has the greatest impact; “A single economic system has become ubiquitous”, wrote Henry Kissinger. However, it is already widely accepted in scientific circles that globalisation is a controversial topic. Only variety of interest in the states’ policies remains indisputable. Basic elements of policy on democracy, legitimacy or relation to economy are elaborated today in their essence by the debate, from the west to the east, regarding globalisation. Public communication in the global world is increasingly becoming important. As a key term, omnipresent, globalisation is instrumentalised in service of interests. The debate on globalisation focuses on fundamental issues to the future. World crisis makes obvious, the preparation of politics and leadership on the economic spectrum.*

*In this paper, we will shed light on some dynamic issues in the perspective of the multidimensional of the globalizing processes, dimensions of globalisation and the regionalisation process, in particular. Focus on the subject of globalisation should take into consideration some intellectual contributions of experts on the conflicts and peace at UN, such as Rognar, Muller and personalities of world diplomacy and academic field such as Francis Fukuyama, Samuel Huntington, etc., as well as the works of the specialised institutions in Europe and Balkans.*

*Globalisation is not a new phenomenon. The global economy originates in the nineteenth century. Despite the development taking place in 1930s, the globalizing process was*

*interrupted by the two World Wars and then the Cold War. The term “globalisation” was of recycled only after 1980s, by reflecting the technological development, information and fulfilment of international transactions.*

*The essential feature of globalisation today is re-dimensioned. Nowadays we have cross-border flows of goods, services, people, money, technologies, information, ideas, cultures and crimes which are continuously changing and increasing. These essential defining features of globalisation today are computerisation, miniaturism, digitisation, satellite communications, fibre optic, internet etc. Globalisation has proven that there is not only a single “anchor”, is changeable and has the ability to transcends the historically inherited borders.*

*The erosion of national-state sovereignty seems to have a disconnection from the market economy from the basis of moral rules and modern societies. The worldwide global relations are interrelated by interests which are defined by the economic power which defined the entire complexities of relationships.*

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## THE EU'S NORMATIVE POWER IN DEVELOPMENT POLICY PRACTICED IN DEVELOPING COUNTRIES

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**Key Words:** *normative power Europe, development policy, development aid*

### **Abstract**

*This paper is investigating the Union's normativity within Foreign Development cooperation policies towards developing countries because traditionally the European Union (EU) has used this policy as tool to pursuit its norms. Based on Manners' tripartite method assessed NPE through its principles, actions and impact, we come to the conclusion that European development policy can be understood as a key component of the EU's normative aspiration towards developing countries, but its success in this regard will depend on the way in which it promotes normative objectives in the context of development cooperation. Also, we see that normative impacts or its effectiveness in practising development cooperation activities in developing countries is negligible because of its lack of vertical and horizontal incoherence, and national factors influencing developing countries in importing EU norms.*

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### **Introduction**

On the basis of constructivist approach, more scholars currently start studying on EU international actorness focusing on concepts of "normative, value-driven external policy". The liveliest debate in this rich literature revolves around Normative power Europe (NPE) moved the conceptual understanding of the EU as a power beyond the dichotomy of military power and civilian power (Damro, 2012, p.682). All these works put forward the unique role that the EU has played and could play on the world politics as a promoter of its constitutive principles or ideational factors, which range from multilateralism to sustainable peace, from democracy to human rights and rule of law, and value beyond its own borders. This debate is far from being exhausted and there are in fact widely diverging views to be found concerning the key question of whether in fact the EU is a normative power in world politics. On the one hand, the concept has been severely criticised by scholars who claim that the Union is an interest-driven actor and who like Ramon Pacheco Pardo therefore draws the conclusion that the EU "is *not* a ... normative or ethical power". On the other, it has been promoted by

scholars like Manners who consider that the Union “should be considered a normative power” (Manners, 2002). Besides, empirical researches have presented both positive and negative results about the concept’s accuracy. There definitely seems to be a puzzling lack of consensus both about what the concept entails, and about its accuracy and so far quite inconclusive. Therefore, the arguable question raised here is that whether the EU is able to fit the role as a promoter of universal norms, or even a changer of norms?

This puzzle also motivates more empirical research to investigate whether the concept is indeed a correct description of the EU’s foreign policy (Sjursen, 2006b, p.170 and Bicchi, 2006, p.300). Due to word constraints and to avoid charges of relativism, it is not the aim of this paper to debate the definitions of either normative power or norms inspired by Manners (2002). Instead, it seeks to assess and investigate the concepts as outlined by Manners (2008a; 2009a and 2009b). Using such definitions, this paper will argue that the degree to which the Union exercised normative power varied across the criteria analysed. Within the EU, we have chosen its development policies as the case study of NPE. Some questions will be answered: Why can we apply the concept of normative power to EU’s development policy? What would be its characteristic applied to development policy? What has the EU done and its impacts on developing countries? And does the EU’s power rest the way the EU helps to meet these requirements through co-operation programmes, aid and technical assistance? This paper will be structured as follows. The first section makes an analysis of the self-image of the EU as a normative power. Next, based on Manners’ tripartite framework of principles, actions and impact, the degree of normativity is evaluated within the EU’s development policy. Challenges for the EU’s norm diffusion are mentioned in the last section.

### **The EU’s self-image as Normative Power**

Normative power literature is increasing rapidly in scope of both academic debate and policy discourse, claims a central place in the debate on the EU’s external identity. In a search of the EU’s external identity, scholars argue that “the most important factor shaping the international role of the EU is not what it does or what it says, but what it is” (Manners, 2002, p.252). What the EU is – a particular identity with a normative basis – makes it different from other actors in the international system. This influential formulation has led to a number of scholars agreeing that “we may best conceive of the EU as a ‘normative power Europe’” (Manners, 2002, p.235). This conception of Normative Power Europe (NPEU) has been initiated by Ian Manners (2001) as an alternative interpretation of power to distinguish Europe, and consequently the EU, from a strictly military power like the US. In a seminal article, Manners (2002) suggested that the EU is a distinct type of actor: one whose practice is both norm-driven and defines the “normal” in world politics. Manners argues that “a normative power perspective attempts to understand and judge the ideational aspects of the EU by studying the EU’s principles, actions and impact in world politics” (2009b, p.786).

Norms<sup>1</sup> may very well be an important heritage in EU foreign policy (Manner and Laidi, 2008). In this sense, norms are institutional elements of the Union's construction, or constitutive principles. "Norms" are products of the historical development of the EU, they shape its identity and constrain the Union's action towards its citizens as well as towards the whole world. Saying the EU is built on shared common principles (norms) gives an idea of power that reflects an expressed consensus on principles and that is bounded by the adherence to those same principles. These common principles, or norms, which characterise the EU polity: peace, liberty, democracy, rule of law, human rights, social solidarity, anti-discrimination, sustainable developments and good governance, are central to the EU's normative dimension and are argued to be promoted in the rhetoric, discourse and action of the EU internally and externally. Laidi (2008) extends the EU's norm to the issues of regional governance, such as the creation of supranational institutions. Obviously, the EU has always been an experiment at market integration, so Parker and Rosamond (2013) adds more market cosmopolitan constitutive principles in the precise architecture of the NPE argument including free trade, fair trade, market economy, regulatory capitalism, competition. In addition, NPE rejects any affiliation with colonial/neo-colonial practice, that is, the role of mission civilisatrice for the less developed parts of the world. NPE emphasises the cosmopolitan nature of the EU's principles, particularly by "a commitment to placing universal norms and principles at the centre of its relations with its member states and the world" (Manners, 2006, c.f. Whitman, 2011, p.4). In its totality, rather than emphasizing merely on civilian (economic and legal relations) or material power, NPE emphasises the overall structural power the EU possesses as a result of its relative ambiguity. Thus, it is an inclusive approach about what is or ought to be normative about the EU, in contrast to the essentialism of civilizing Europe (Manners and Diez. 2003, p.73–74). Yet, it is not enough to focus only set of the EU's civic cosmopolitan norms if the NPE approach is understood purely as an analytical description of the nature of EU external action. These norms should be legitimate, coherent and consistent if the EU is to be recognised as "living by example" (Manners, 2008a, p.56). Manners argues that legitimacy of principles is achieved if the EU draws upon the principles that are acknowledged within the United Nations (UN) system to be universally applicable, including in the UN Charter, the UDHR, and the European Convention on Human Rights (ECHR) (Manners, 2009a, p.2–3). Coherence is the extent to which differing principles, and the policies that promote them, are non-contradictory (Manners, 2009a, p.2), whilst consistency means ensuring that the EU does not have double standards in its internal policies and the values it seeks to promote (Manners, 2008a, p.56). Coherence and consistency in the promotion of principles externally is intended to come through the post-Lisbon position of a High Representative (Manners, 2009a, p.3).

Manners also stresses on ideational nature of the EU which highlights the fact that it is not based (solely) on material factors (military or economic power) but that its capacity to exercise influence rests on its ability of modifying others' conceptions of the EU as well as of

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<sup>1</sup> In the discussion on NPE, "norms" are referred to interchangeably as "rules", "principles" and "values", and this makes it difficult to distinguish between the historical-institutional-identitarian, ethical and legislative meanings of the term. In this study, norms are referred to values or rules, principles which are transcendental universal principles of global scope (Manners, 2002).

the international context. This ideational non-material justification focuses on “non-material exemplification found in the contagion of norms” through imitation and representation of the EU which has become a pole of attraction. Even though the EU acquired military capabilities within the framework of the European Security and Defence Policy (ESDP), this does not necessarily undermine its role as a normative power – as long as military means are not prioritised over non-military ones (Manners, 2006a). Manners argues that the promotion of the EU’s principles is most effective through engagement and dialogue, which can be found in regular patterns of communication with third partners, including “through accession procedures, stabilisation and/or association agreements, the European Neighbourhood Policy, African, Caribbean and Pacific relations, and Generalised System of Preferences “Plus” arrangements” (2009a, p.3). However, the EU can have not only “positive” influence through incentive and deliberative measures at its disposal to project its certain norms and values, but also “negative” conditionality involves the *suspension* of aid if the recipient country violates the conditions although according to the original concept of normative power raised by Manners (2002), the negative (sticks) measures would not be preferred. Indeed, I digress from Manner’s criteria by considering coercive actions in pursuit of ethical or normative goals to be valid. Instruments diffusing norms thereby cannot alone define one actor as a normative power.

This image of the EU as normative power is found both in academic and in official discourse (Diez, 2005; Merlingen, 2007 and Pace, 2007). European Union elites frequently refer to EU norms and values and tend to see the EU as a “force for good”. In a speech to the European Parliament, then Commission President, Romano Prodi stated, “Europe needs to project its model of society into the wider world. We are not simply here to defend our own interests...We have forged a model of development and continental integration based on the principles of democracy, freedom and solidarity – and it is a model that works” (Prodi, 2000). European policy-makers have been extremely eager to identify the EU as a power including characteristics contrary to traditional definitions of power. Former High Representative Javier Solana stated that: “The EU has responsibility to work for the ‘global common good’. That is a fitting way of describing the EU’s global role and ambition” (c.f. Aggestam, 2008, p.6). He also argued that “[Ordinary people] want us to be able to support democratic government, to defend human rights and the rule of law” (Larsen, 2002, p.291, quoting Solana, 2000). In addition, article 21 of the Lisbon Treaty illustrates the European Union’s propensity to promote its norms in world politics and is a good exemplification of the concept of Normative Power Europe (NPE). Therefore, senior European policy-makers have been extremely eager to portray the EU as a power that holds features contrary to traditional definitions of power. The discourse of normative power has become an increasingly important practice of European identity construction (Diez, 2005, p.635). Both the treaty and the concept show how academic and official discourses affirm this self-image (Diez, 2005, p.614; Diez and Manners, 2007b, p.174 and Smith, 2009, p.604–605). The normative discourse was prompted by a variety of factors related to the end of the Cold War. It was originated firstly from the Duchene’s idea of civilian power and secondly the cold war ideological competition in European post-communist period. The transformation into EU with its newly important created foreign policy (CFSP) required a new justification which led the EU to construct a normative

discourse about protecting human rights, promoting democracy and spreading prosperity in its neighbourhoods.

According to Zutter (2010), the EU cannot be a normative power purely by virtue of European discourse. If its goals and means are not normative or if it does not produce a normative impact, then this is not consistent with normative power. So, subsequent section of this paper will investigate whether the EU is committed to the principles of the tripartite framework in its external foreign policy, by analysing principles, actions taken by the EU and the impact of such actions in their development policy towards developing country.

## **Normative Power Europe presented in the field of Development policy**

### Development Policy as a case for studying NPE?

Development policy is often used as a synonym for development cooperation. However, this is not the case. As Ashoff (2005, p.13) clarifies, development cooperation constitutes only one level of action within the larger framework of development policy. By development policy, I refer to an officially formulated and adopted public policy that consists of defined objectives (e.g. poverty eradication and sustainable development), and means (e.g. development cooperation, official development assistance and, increasingly, policy coherence for development), as well as actors that use these means for the achievement of the objectives (i.e. donor – recipient). It is obvious that such EU's economic strength provides a huge opportunity to project and wield power in the international system but how does the EU use its economic power and the political leverage flowing from it to the betterment or detriment of the developing South? The traditional approach in this field is limited to focus on EU's development policies through trade or on the EU's relations with specific regions like Africa, Latin America or Asia. So, it is omitted an important dimension of European power and influence through supporting foreign aid and development cooperation (Birchfield, 2011).

While the NPEU concept has often been applied in the study of EU external policy, development policy has often been omitted from consideration. Indeed, the image of the EU as a normative power cannot be limited to an arbitrarily delineated realm of external action (security policy, for instance), but instead should cover all different spheres (Sjursen, 2006, Pace 2007, p. 1043). We assume that it is necessary to make more empirical analysis of development policy with normative perspective because of some following reasons: Firstly, development policy is among the EU's oldest policies. The EU has so far fifty years of development cooperation which has been started with the Treaty of Rome and evolved by the provisions of two Yaounde Conventions (1963–1975), the ad hoc European Development Fund (EDF), Lome Convention, economic assistance PHARE to CEECs, Cotonou Agreement, etc.

Secondly, on a worldwide basis the EU is often seen as an attractive partner, owing to the unique combination of economic dynamism with a genuine social model – and the variety of social models inside the EU is also perceived as an asset, as it points to different possible

arrangements of markets and social policies. Compared to many other actors, the EU has built up a reputation of credibility and sensitivity, owing to its focus on social issues (Vanheukelom, 2012). Hence, the reputation of the EU can be seen as a major asset regarding international dialogue on social issues. It is thus important to capture this momentum by using the opportunity for further progress in order to reach the very ambitious goals set by the EU.

Fourthly, due to the fact that it includes both a bilateral (granting assistance through European Community) and multilateral (embodying the efforts of its 27 Member states) actors in providing financial assistance (Carbone, 2007, p.1), the EU is a unique case and potential donor in international development. So, on the international scene, this characteristic makes Europeans fully cognisant and supportive of the leading role their societies play in development assistance. The European Commission alone is the second largest donor. In 2011, EU's ODA reached to €53 billion in international development cooperation and yet there has been only scant attention paid to this area of EU policy. After the 2001 terrorist attack in the US, the EU committed to boost its volume of aid which was seen as the counterbalance of the US aid programme. Moreover, above financial advantage leads aid apparently to become an important instrument for the EU external policy, in particular, to developing countries, making up the vast majority of its external relations budget. It has a broad range of aid instruments at its disposal that can be adapted to the complexities of institutional and political reform processes in a longer time perspective.

In addition, development policy is also a distinct policy arena because its overall agenda is primarily set at the donor end, while the policy in itself is implemented and its impact felt in another sovereign entity. This constitutes a power relationship of a particular kind between those who intervene to "cultivate development" and those who depend on that intervention. In this respect, the interests setting and motivations to engage in such a policy are particularly complex as it involves different actors at both ends that operate with imbalanced power resources. Consequently, development policy involves a massive number of principles, norms, procedures and practices that are designed to govern the donor-partner relationship on the one hand, and can all be regarded as instruments of power on the other (Stocchetti, 2013, p.42). Obviously, the constitutive principles which define the EU as normative power are included in its development policies. Particularly, from 2001 onwards, it has acquired a higher profile than it had at the end of 1990s because the EU started to accentuate other "softer" types of instruments and mechanisms for promoting social standards in non-member countries such as development aid and technical assistance, corporate social responsibility and the decent work country programme.

Finally, in the pursuit of supporting "fundamental values" the EC can act differently from a-political multilateral donors (such as the World Bank) and also from bilateral donors that are often politically constrained by domestic constituencies and politics. Beyond aid, the EU can combine other dimensions of its external action to create more coherent incentive packages in particular contexts where this can be conducive for reform minded coalitions. Also, as political institution based on norms, we argue that this makes the EU a normative power internally because the member states follow these directions set by the European Commission in their own development policy. While bilateral aid policies of each Member State may still

be conducted by narrowly national interest that are pursued through forms of economic blackmail and political coercion, such concerns less affect collectively the EU. For instance, reports on EU development policies of international organisations like OECD assessing the EU's collective effort at development policies point out that this is an area that warrants greater analysis by scholars interested in exploring various forms of the EU's international "actorness" (Birchfield, 2011). So, on a certain aspect, practising NPE in development policy is a test of the EU's ability to speak with one voice (namely the EU's vertical coherence) and is increasingly a central component of the EU identity in the international scene. What is particularly compelling about the need to more carefully consider the EU as an actor in the field of international development is the opportunity to evaluate both the normative and empirical dimensions of its commitments. The following is to dissect to what extent the European development policy corresponds to the concept of "Normative Power".

### Norms diffused through the EU's development policy

There has been considerable evolution in Europe's approach to development policy since the early days of the Yaoundé Convention. An initial focus on development as economic growth was subsequently transformed into a uniquely European position under Lomé, which sought to deal with the concerns of the Third World directly. Since 1990, the EU's development policy has increasingly moved in a less privileging but more holistic direction, placing an emphasis on conditional and differentiated aid encouraging regionalisation, together with greater overall funding. This changed direction is motivated by the purpose of promoting more holistic normative principles (such as good governance, human rights, democracy and rule of law) reflecting a greater emphasis on the results-orientated consequentialist ethics increasingly witnessed in the Millennium Development Goals (MDGs). The campaign against poverty, and for sustainable development and the consolidation of democracy and respect of human rights, together with the gradual integration of the developing countries into the world economy, became the normative base of the Union's development cooperation, covering all developing countries in the Treaty of Maastricht in 1992. In 2005 the European Commission launched its new Social Agenda for modernising Europe's social model with two key priorities, (i) employment and (ii) fighting poverty and promoting equal opportunities. The principal areas of social policy, monitored through an annual social situation report, are summarised in the following five themes: Poverty and social exclusion; Education and training; Labour market; Health; and Gender equality. The environmental issues and trends in the EU relate mostly to the pressures caused by economic activities, urbanisation, pollution and energy / resources use. The EU Sustainable Development Strategy forms the overarching policy framework, within which the Lisbon Strategy can be seen as the key economic component and the 6th Environmental Action Plan (EAP) constitutes the environmental pillar. One of the key goals of the Lisbon agenda is an eco-efficient economy. Here sustainable use of resources, energy efficiency, decoupling environmental pressures from economic growth, and solving challenges of energy use and climate change are key drivers. So we argue that the EU is a political institution that is based on norms. Furthermore, we argue that this makes the EU a normative power internally because the member states follow these directions set by the

European Commission in their own development policy. Such norms have been reflected in the EU's legal documents of development policy towards developing countries.

The Community policy in the development sphere is complementary to the policies pursued by Member States and should: (1) foster sustainable economic and social development of the developing countries; (2) facilitate their smooth and gradual integration into the world economy; and (3) fight poverty in the developing world (Art 130 of the TEU, Art 177 of TEC). An intensification and reassertion of poverty as the development priority was undoubtedly needed. The EU's eagerness to accelerate specific norms in its relations with developing countries is most prominently expressed in the 2005 European Consensus on Development, the first common European framework in the area of development policy. Here, EU Member States, the Council, the European Parliament and the European Commission agreed to a common EU vision of development declared that Community development policy was grounded on the principle of sustainable, equitable and participatory human and social development. In the Regulations of DCI provided for developing countries, the EU reaffirms that "the Community's development cooperation policy and international action are guided by the Millennium Development Goals (MDGs) [...] and the main development objectives and principles approved by other competent international organisations in the field of development cooperation." (COM 2006: 41<sup>2</sup>). In relation to the goals of the EU's development policy the European Commission states that *"Our mission is to help to reduce and ultimately to eradicate poverty in the developing countries through the promotion of sustainable development, democracy, peace and security"*. (European Commission 2012a). The Lisbon Treaty has not significantly amended development policy (Articles 208 to 210 TFEU), but does, take over the *acquis* of the European Consensus on EU Development Policy, making long-term eradication of poverty the overriding objective of development policy (Article 208(1) TFEU). The principles that are defined as development principles in the former EC Treaty (since foreign policy is not part of the Community pillar) become the EU's external action principles (Article 21(2) TEU). Article 10a-2d in the Reform Treaty reflects the resulting overhaul of the EU's development policy which shows the promotion of "the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty". Following about the MDGs, *"The European Union (EU) joined world leaders at the United Nations Millennium Summit in 2000 with the aim to free fellow men, women and children from the abject and dehumanising condition of extreme poverty"* (European Commission 2012b). Some argue that it is difficult to define if the norms are *universal* or not, but, what is most striking about these concepts underlying the EU's development policy (in addition to succinctness, which is altogether rare for any EU policy) is that two of the four principles indicate the alignment of the EU's values with those of the United Nations and more specifically, the UN Millennium Development Goals, and other competent international organisations in the field of development cooperation.

Promotion of human rights, democracy, the rule of law and good governance are also an integral part of the EU's development policy strategy (Art 177 TEC). It is the ambition of the

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<sup>2</sup> Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 on establishing a financing instrument for development cooperation.



Commission to integrate “*the promotion of democracy and human rights into all of its external policies*” (ibid) through The European Instrument for Democracy and Human Rights (EIDHR) (ibid). In 1998, Council of Ministers issued the June 1998 guidelines for the EU policy towards third countries on the death penalty and started presenting the EU annual report on human rights which would assess human rights in the EU and its actions in international affairs. Interestingly, the EuropeAid Annual Report 2005 illustrates the way in which normative concerns within the European Commission still place human security at the centre of development aid, as Benito Ferrero-Waldner argues, “promoting human security is central to our approach. We must respond to the full range of threats afflicting the most vulnerable in societies across the world – hunger, deadly diseases, environmental degradation and physical insecurity” (European Commission, 2005). The current core of the external dimension of social policy is moving towards to further decent work and labour standards in non-member countries. There is some evidence regarding the conformity of EU Member States with ILO Conventions. EU competencies taking measures to implement labour standards are set out in Chapter 1 of Title XI of the EC Treaty, namely Articles 136 to 145 of TEC. Gender equality is explicitly mentioned as the principle of equal pay for equal work. For instance, Article 141(3) of the TEC said that measures shall be adopted “(...) to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.” The Commission stated that the social provisions of some bilateral agreements “still needs to be fully exploited”. Also, EU aid is tied to institutional reforms and the recipient country’s own long-term development goals and achievements (2004, p. 10-11). Thus, the EU sees ownership by EU partner countries as pivotal for the efficiency and sustainability of its initiatives.

Important development oriented initiatives and policies include the Cotonou Agreement (EU-ACP Partnership Agreement, 2000 and 2005). Indeed, it can be seen these normative principles diffused in the development agreements with Africa. The revision of the fourth Lomé Convention took place in 1994, only two years after the signing of the Maastricht Treaty. Importantly, above objectives were also included in the renewed Lomé IV Convention in 1995. While continuing to acknowledge “the right of each state to determine its own political, social, cultural and economic policy options” (Article 2), Lomé IV further brought the European approach closer to the development mainstream by introducing political provisions on the promotion of human rights, good governance and the rule of law. The Cotonou Agreement reinforced this string of changes, consigning the remaining uniquely European elements of Lomé to history and bringing the EU–ACP relationship closer to the framework of global governance, particularly trade governance under the WTO. This agreement is a clear example of the EU creating stronger ties between political and social improvements and aid. Thus the ACP states are now being disaggregated, with the conclusion of WTO-compatible regional EPAs becoming the norm. Further, in line with the broader development community, poverty reduction has been highlighted as the “central objective” of EU–ACP cooperation (Article 19), with conditionalities (on democracy, human rights, the rule of law and good governance) being linked to the receipt of assistance, establishing what is seen as being a more integrated approach to poverty. At the same time this strategy seeks a discursive mediation of inequalities between Europe and the South. From this perspective it is

arguably the case that EU development policies represent the normative basis and the empirical function of the theoretical concept, the practice of a “Normative Power Europe” is evaluated in the next sub section.

### The EU's actions to spread norms

Arguably, European development aid can be understood as a key component of the EU's normative aspiration towards developing countries (Manners, 2008, p.24f), but its success in this regard will depend on the way in which it promotes normative objectives in the context of development cooperation. There is a pertinent need for pragmatic, sustainable solutions and support in order to meet the high EU ambitions. Similar to trade agreements, under the framework of NPE, development cooperation agreements would hold any such more normatively actions of if they involve deliberative instruments based on dialogue, persuasion and positive conditionality, rather than coercion or solely material motivations.

When referring to the normative orientation of European development policy, one has to stress the importance of political aid conditionality. As Manners' argument “Both procedural and transference diffusion are now facilitated by the conditionality which is required in all EC agreements with third countries” (Manners, 2002, p.244–245). The original agreements with the ACP countries, for example, were largely apolitical up until the introduction of conditionality at Lomé IV in 1995. Since then the EU has built upon these three principle areas and conditionality has become the standard for all aid. This entails the linking of aid to the fulfilment of various political conditions, relating to human rights, democracy and good governance (Elgstrom and Pilegaard, 2009, p.46). So, one of the cornerstones marked the introduction of the so-called conditionality clauses, which implied that human rights, democratic principles and the rule of law were essential elements of EU aid agreements with third countries. Conditionalities can be either negative, which means a threat of penalties in the event of failing to comply, or positive, in which case they resemble incentives. Examples of conditionality include: suspension or redirection of assistance away from governmental channels to civil society; EU membership conditionality; and EU incentive schemes, such as “Governance Facility” for European Neighbourhood (ENP) and “Governance Initiative” for African, Caribbean and Pacific (ACP) countries, etc. The consensual or positive approach is characterised by the consent or at least toleration of the target state's authorities, the absence of coercion, active and positive engagement by the foreign actor, pro-active rather than reactive involvement, and by direct engagement with local individuals and institutions.

The EU can have “positive” influence through incentives at its disposal to project its certain norms and values. For example, the first attempt of strengthening incentive mechanisms is the European Initiative for Democracy and Human Rights (EIDHR), which is a rather flexible instrument to grant aid to groups or individuals within civil society, intergovernmental organisations defending democracy and human rights, without agreement from theoretical government. The EU is also taking direct actions in regards to external states through its aid agreements with third countries. Positive conditionality became the cornerstone in relations with less developed former colonies and neighbouring countries deemed to cooperate or join

the EU, as stated by former commissioner of the EU Christopher Patten: “In all our programs, there is a clear conditionality linked to our assistance (for example, the human rights clauses in the Lomé Convention and in our Partnership and Cooperation Agreements with the NIS, and the Copenhagen Criteria for EU accession, now extended with clarifications to Turkey).” For example, the EU created a framework of structural support and financial motivation for demanded reforms regarding “open market economy”, “consolidated democracy”, “administrative ability” in the framework of ENP. In the period from 1991 to 2004 four main pre-accession instruments (or pre-structural foundations) including PHARE, ISPA, TACIS and SAPARD provided financial support for the economic and political reforms in applicant CEECs having quite low economic development compared to the EU average and short of administrative capacity. In the case of African countries, in 2000 Cotonou Agreement, a wide range of development policy instruments have been developed in order to uphold democratic and human rights principles in its relations with sub-Saharan Africa. Half of the increase is earmarked for Africa (providing at least an additional annual 10 billion EUR by 2010), the continent most in need of additional support in their efforts to reach the MDG’s. The EU currently is Africa’s most important donor of aid with around 60% of all development aid (European Commission, 2005).

President Barroso has publicly stated: to achieve the MDGs, it is necessary “to do more, better and faster”. The European Commission has made and will make proposals to strengthen the level of ambition and to consolidate its world leadership in Development Policy. “As well as more aid, the EU will provide better aid” (European Consensus on Development, 2005). In 2005, the EU 25’s ODA totalled 43 billion EUR but they agreed to continue increasing their ODA budgets beyond the commitments they made at Monterrey (0.39 % of GNI in 2006). At the UN World Summit 2005 Commission President Barroso challenged others to match European Union’s commitments on Development goals such as the firm determination to reach the long-standing target of 0.7% of GNP to official development assistance (ODA) in 2015. Its new interim minimum target for each member state is 0.56% GNI/ODA by 2010 and the UN-recommended level of 0.7 percent by 2015. It means that the EU commit to provide an additional 20 billion euro in ODA per year by 2010 and 45 billion euro more per year by 2015<sup>3</sup>. The average levels of 0.4 per cent GNI for DAC EU donors compare favourably with the OECD average of 0.33 per cent GNI, as well as with the Japanese and US levels below 0.3 per cent GNI. One thing is apparent: the EU member states are incrementally channelling a growing proportion of their total aid programs through the EU up from 13 % in 1990 to 17% of development assistance now transferred from the member states to the EU itself. These pooled resources alone make the EU assistance efforts among the world’s five leading donor programs managing approximately \$6 billion of development aid annually, roughly the same amount of assistance managed by the UN and the Office of Development Assistance (ODA) of the World Bank and the IMF (Lennon, 2001, p.127 and Birchfield, 2011, p.153). Following the introduction of the Financial Perspective for 2007-2013, two main development instruments are the EDF which is used exclusively for activities in ACP countries and the

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<sup>3</sup> Annex to the Communication from the Commission to the Council and the European Parliament Annual report 2006 on the European Community’s Development Policy and the Implementation of External Assistance in 2005 [COM (2006) 326 final].

Development Cooperation Instrument (DCI) which is for activities in Latin America, Asia, the Middle East and South Africa. Environment, food security and investing in people (i.e. health) are involved in these funds. The DCI's budget for 2007–13 is EUR 16.987 billion, and the budget for the 10th EDF (2008–13) is EUR 22.682 billion. The Humanitarian Aid Instrument, the European Democracy and Human Rights Instrument and the Stability Instrument also enable specific Community assistance to be provided to developing countries. Besides, there is away from old patterns towards the agenda of debt relief in framework of EU aid policy. Louis Michel, the EU's development commissioner has requested that "road maps" be drawn up for individual countries to ensure that each EU Member State meets new targets and another Commission official also highlight that even without including debt-relief, overall EU aid grew by 6.1% this past year. This is a significant point given that the recent one-off debt relief to Nigeria and Iraq represents a quarter of the total 48 billion Euros in reported aid.

Another important issue in terms of financial instruments is technical assistance to non-member countries which has shown sustainable results in partner countries, in particular capacity building, training and raising governments', employers' and workers' awareness. This type of instrument varies depending on the content and context. Important examples are the technical assistance that the EU provides to accession countries in terms of assisting the adaptation of their law to European standards. But EU training activities spread to Asia and Latin America as well. One major agency active in this field is the European Training Foundation (ETF). The Commission (2004:10) pointed out that the promotion of social rights is an integral part of its bilateral agreements with South Africa (1999) and ACP (the 2000 Cotonou Agreement), Chile (2002) and that technical assistance will be provided in this regard. Other prominent examples are the assistance provided by the ILO in terms of the decent work country programme, which supports the social dialogue and helps implementing ILO conventions. In addition, technical assistance has also been focused on supporting NGOs.

Under the framework of deliberative activities, *cultural filter* (Manners, 2002) or *shaping the discourse* (Forsberg, 2011, p.1196) is a direct form of normative power in order to adapt its norms and thereby sharing the same point of view. By following the MDGs and signing MDG contracts with third countries (Burkina Faso, Ghana, Mali, Mozambique, Rwanda, Tanzania, Uganda and Zambia), the EU is creating awareness about the importance of a global development policy and by doing so the EU promoted its normative objectives. To these contracts the Commission states that "*The MDG Contract is part of the European Commission's effort to improve the effectiveness and predictability of aid and accelerating progress towards the MDGs*" (ibid). In this case the EU is exercising its normative power in cooperation with the UN. When the EU and the UN propose an agenda and thereby also a discourse, they have the ability to influence other countries in a desired direction. Besides, the EU uses NGO in order to exercise its normative power, namely, by sponsoring the NGO activities, the EU tries to create awareness of social norms that can eventually lead a topic to the top of an international agenda. One of these is that the EU is currently working towards the universal abolishment of the death penalty by creating awareness of the topic.

*Informational diffusion* through strategic communications is exemplified by *Social dialogue and consultation* which are also at the heart of both the EU social model and the EU's bilateral cooperation agreements with developing countries. As a part of the Treaty establishing the European Community (TEC), the European social dialogue is a fundamental element in the European social model. It is encompassed by the discussions, negotiations and joint actions undertaken by the European social partners aiming to promote consensus building and democratic involvement among the main stakeholders in the world of work. In fact, social dialogue and social partners have been present within the EU development policy framework for many years already, starting with the European Consensus for Development (2005), the Council Conclusions on Promoting Decent Work for all (2006), and on Promoting Employment through EU Development Cooperation (2007). The social partners of the EU and non-Member States may exchange experience and best practice, particularly concerning the countries of the Euro-Mediterranean Partnership, the EU Partnership with Latin America, with ACP countries. In that respect, the promotion of using social dialogue in non-member countries is an important topic for technical assistance and capacity building. Involving civil society and interest organisations in social dialogue also makes it possible to take into account that one size does not fit all, since the social standards in a given country are path dependent and national starting conditions have to be considered when defining and developing social standards. The exchange of experience, diplomacy and specific policy learning regarding social policy are important policy instruments that the EU uses as a normative power (Kissack, 2009). EuropeAid and EC Delegations have reinforced their partnership with civil society organisations – both as implementers of EC aid, and as key stakeholders in the dialogue on external assistance, and remained active dialogue with Member States, Partner Countries, European Parliament since 2002. Regular meetings (“quadrilogues”) and seminars have been organised in the EU and in partner countries to supplement ad hoc contacts and promote partnership and dialogue. To increase coordination with other donors, EuropeAid initiated and actively joins the Donor Exchange, Coordination and Information Mechanism, a process to create synergies for civil society development. Dialogue, stimulation and negotiation within the ILO were seen as a better way to promote CLS than via the WTO, in particular taking into account the experiences of the Doha round (DG 2010: 19).

Although, according to Manners (2002), the negative (sticks) measures would not be preferred, the EU also has “negative” conditionality involves the *suspension* of aid if the recipient country violates the conditions. In Cotonou Agreement (Art 9(1) or agreement with Chile (Art 44), human rights, democracy and the rule of law are marked as “essential elements” clause, which implies that their violation can lead to the suspension of development aid (Keukeleire and MacNaughtan, 2008, p.291 and Holland, 2004, p.286). They form part of the political dialogue and developing cooperation between the EU and its partners. This “negative” conditionality also refers to the EU's sanction policy. The EU can impose sanctions in two ways: it can implement sanctions decided by the UN Security Council or impose autonomous sanctions. These sanctions generally entail measures such as arms embargos, or travel bans for officials. The issue of conditionality and references to social issues in development aid agreements is a contested one. The EU has a strong record in taking a comprehensive approach to aid, linking it to trade, development and political reform, while many NGOs

argue that there should be no strings attached to development aid programmes (Huybrechts and Peels, 2008).

Also, it can be said that according to geographic proximity and economic conditions of partners, the EU diffuses norms in different approaches. Developing countries, in particular those in Africa, benefit from European development aid – and this gives the EU, the world's largest donor, a lever to advance social concerns. For emerging economies, in particular in Asia which has a strategic location in global value chains and is highly dynamic in economic terms, the advancement of normative values through the EU's political aid conditionality has proven to be difficult, so the EU launches a dialogue with them as well as their regional organisations (China, ASEAN).

### Is the EU an effective norm-exporter within Development policy?

A normative power by definition promotes its norms by shaping “conceptions of the normal” in world politics, thereby, normative power is expected that third parties adopt or intimate norms (Forsberg, 2009; Manners, 2002 and 2008a). Manners argues that impacts are “normatively sustainable if they lead to socialisation, [partnership] and ownership for the involved parties” (2009b, p.796). Certainly, it can consider aid to be a relevant means to promote the EU's norms in the developing world but the relationship between principles and actions is salient issues when it comes to the empirical assessment of NPE and its ability to shift recipients' behaviours and policies. For development aid, it is not just the amount but the quality of the assistance that matters for producing positive change in economic development. According to Carbone (2007), the quality of aid is as important as its quantity, if not more so. Consequently, the Commission is now better placed to analyse impact and results of external aid. It has, in the last years been strongly committed to improve aid effectiveness by an action plan built on transparent mapping and monitoring of Member States' activities, the Paris Declaration, the execution of the aid effectiveness dimension of the European Consensus on Development and an agenda on Policy Coherence for Development. Especially, the adoption of an ambitious Paris Declaration on Aid Effectiveness in 2005 that any conditions on development assistance should be drawn from the country's own strategy, helping to reinforce commitment to priorities that have already been identified was due, in no small measure, to the strong input provided by the EU.

Yet, as above pointed out, the question of how to measure NPE's impacts or its effectiveness in practising actions in international politics is still controversial. Manners (2008), an advocacy of NPE concept, even thinks that it is difficult to confirm or disprove convincingly the normative practices and consequences of rapidly evolving EU development aid. In order to fill this gap, the Center for Global Development and Foreign Policy has given an assessment tool of Commitment to Development Index (CDI) in order to evaluate the role of financial assistance playing in economic development of developing countries. Regarding quantity and quality of foreign aid, this index ranks the EU Member states as the top countries (like Denmark, Austria, Netherlands) holding high aid quantity and quality in developing countries (CDI 2012). Meanwhile, some scholars think that the EU has had only limited

success in maximizing the impact of member state and EU-level development funding (Holland, 2009, p.30).

We assume that it still need to take an empirical perspectives on the EU's development aid policies into account in order to assess the degree of successfulness in promoting EU's norms. Africa could be a salient example for testing the effectiveness of normative aid power Europe. The Lomé and the ACP relationship prior to 2000 was motivated by the ambition to promote social solidarity and discourse ethics through unconditional and undifferentiated aid and dialogue while being selective in excluding developing societies in the rest of the world. In the post-Cold War world such "paternalistic, neo-colonial attitudes undermined the principle of equality" (Lethinen, 1997 in Bonaglia, et al. 2006, p.172) and were criticised for "the poor results of EU development cooperation" (Arts and Dickson, 2004, p.2). However, practically, it appears to see increasing incapacity of the EU in presenting itself as a normative power in Africa because of its lack of internal coherence (Grauls and Stahl, 2011). Also, the movement from the Lomé Convention's emphasis on privileged partnership to the Cotonou Agreement's focus on conditionality, differentiation and regionalisation has been criticised by Storey, Orbie and others. There are several cases demonstrating the reluctance in the implementation of the EU principles and ideals, due to special relations and interests of a Member State in a specific African country (Olsen, 1998, p.363). More importantly, African leaders themselves have been wondering the EU's normative stand in reference to the policy of conditionality, claiming that it cannot be a substitute for domestic ownership (Grauls and Stahl, 2011). The President of Rwanda, Paul Kagamé, stressed that "actions will only bear fruit when Africa substitutes external conditionality – that is, doing what the donors tell us to do – with internal policy clarity – that is, knowing ourselves what we need to do and articulating this vision clearly to our development partners" (c.f. Michel, 2007). Furthermore, it has also been argued that political conditionality of aid might lead to an asymmetrical power relationship between the donor and the recipient. Arguably, policy conditionality rarely achieves its intended objectives because the third partner worry about its seriously undermining country ownership. Some scholars thus suggest that "well-focused aid selectivity is better than rigid conditionality" (Dijstra, 2002, p.308).

Adoption of norms are to a varying degree depending on the EU's and ambition to each geographical regions (i.e. developing countries in Africa in which the EU is considered as the largest donor or Western Balkan, Mediterranean regions and Asia which are trading partners or competitors now and in the long run of EU) and norms because development cooperation has been implemented through geographic and thematic programmes (COM 2006, p.42)<sup>4</sup>. For instance, this argument is proved by the ratification status of ILO Core labour standard of aid recipient countries. The Arab states and the Asian region in particular exhibit a low ratification rate. 23 out of 33 Asian countries (70 %) have not ratified all conventions and several of them are categorised as the emerging economies, i.e. countries that already are or will become significant economic competitors to the EU such as India, China, Thailand, South Korea, Malaysia, etc. Meanwhile the ratification rate of these conventions by Africa is

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<sup>4</sup> Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 on establishing a financing instrument for development cooperation.

12 out of 53 countries and all countries in the region have ratified at least one convention (DG 2010, p.47). Another successful normative impact is demonstrated by the incentive package for European countries that are candidate for joining the EU involves aid, financial and technical assistance. With an enlargement to Central and Eastern Europe, the EU has conducted over the most successful democracy-promotion program ever practiced by an international actor (Vachudova, 2007). Also, the EU's development policy seems to be useful and coherent for poverty reduction, while there is still a deficit of coordination between the EU and the Member States regarding the question of whether development aid should be used to improve CLS (DG 2010, p.54). Indeed, Orbie and Babarinde (2009) employ the case of promoting labour standard in order to clarify that the direct impact of EU social policies on developing countries is negligible, especially the limited capacity of Community to act in the ILO.

It can be argued that the EU's norm diffusion could be more successful if the third partners have their own needs of norms and strong capacity for localizing and adapting the norms. For example, the desire for norm diffusion by the EU coupled with the desire of Vietnam to foster its own Renovation and poverty reduction strategies has enabled the European Union to affect the domestic policies of Vietnam to an unprecedented degree. Also, Vietnam's popularity is largely explained by the fact that it perceived as a good aid recipient, and it has often been identified as a "best practice" example of how a government can manage external aid and own its development agenda. This ownership and leadership of in managing donors and aid obviously not only contribute to increase the EU's aid effectiveness and value of the EU's financial assistance, but also make the donor-recipient relationship more equal.

### **Challenges for practising normative power in the EU's Development policy**

The first challenge may be come from the prioritisation of strategic interests over norms in determining the EU's development policy, especially an aid allocation. Maizels and Nissanke (1984) found that bilateral aid tended to follow the donor-interests model. Other scholars also referred the dichotomy between the "development orientation" of DG Development and the "more political orientation" of DG External Relations in the context of the aid policy of the European Commission (Carbone, 2007, p.48–49; Holden 2009, p.41, Bates 2010, p.xi. c.f. Harmart, 2013). Decisions on aid allocation for ACP countries were taken by Directorate-General (DG) Development of the European Commission together with the EDF committee. These decisions were based on an "aid allocation model", which reveals the underlying principles of the allocation of money: population, income per capita, demographic dynamics, prevalence of AIDS, human poverty index, the vulnerability of the country and financial, economic and social performance (European Commission, 2007). Meanwhile, DG External Relations conduct aid policy towards the Mediterranean countries, so interests (relating to the issues of oil and trade) have played more important role in providing the financial assistance given by the EU to the region. So, Dearden (2009) concludes that the aid allocation towards non-ACP countries was conducted by political considerations, rather than on development.



The EU's sanctions bring scholars serious doubts about the so-called "rhetoric-behaviour gap" in exercising NPE through development policy (Wood 2009, p.128; Hyde-Price, 2006; Youngs, 2004a and Sjursen, 2006). Firstly, it has been argued that within a post-Cold war context characterised by a renewed, more ideological rhetoric on aid, and although the EU has followed this general trend in the redefinition of aid strategies (Santiso, 2003, p.19), "there was a lack of 'serious' European commitment to accelerate the declared ideals of the first years of the so-called new international system" (Olsen, 1998, p.367). Indeed, the actual commitments of the EU in sub-Saharan Africa to promote the stated values and principles have been strongly criticised (Olsen, 1998, p.345, more generally Santiso, 2003, p.16). Secondly, despite strong rhetorics, EU sanctions have generally been imposed in a rather mild and unequal way. In practice, the EU has only sanctioned very few of the countries which violated the agreed norms, and it remains unclear as to how the EU selected these countries (Brummer, 2009 and Wood, 2009). Furthermore, numerous exemptions to sanctions were applied, bringing in inconsistency in terms of policy enforcement. African leaders regularly complain that EU normative policy is characterised by an unequal relationship between the European "donor" and the African "recipient", leaving no other choice to the latter than to adhere to European norms. To illustrate this, Robert Mugabe was invited by the French President, Jacques Chirac, to attend the 2003 France-Africa Summit despite sanctions imposed by the EU on the government of Zimbabwe, including a travel ban for President Mugabe (c.f. Grauls and Stahl, 2011). More recently, the EU agreed to temporarily lift the travel ban to allow the Zimbabwean president to participate in the EU-Africa summit in December 2007 and, in so doing, accommodated pressures of the African Union, which threatened to boycott the summit (Brummer, 2009, p.201). So, the NPE concept has been accused of being Eurocentric, hiding a new form of cultural imperialism of a "civilising" power which is projecting its own understanding of norms onto the rest of the world (Bicchi, 2006).

Moreover, the now dense multilateral agenda of EU development aid, including the Millennium Development Goals, the Rio and Johannesburg sustainable development goals, the post-11 September security concerns, the Doha development agenda, the Monterrey Consensus and the Paris Declaration on Aid Effectiveness increasingly makes polycentric development policy difficult, if not impossible (Manners, 2007). This has reduced the impacts of norm diffusion through aid policy on developing countries.

Besides, Carbone (2007) and Holland (2009) argue that the very lack of coordination, incoherence lead to duplication, overlap and streamlines the multiple and differing demands made by donors. There are difficulties of national political criteria and donor competition making impasses in aid integration in EU which is accompanied by the EU's poor performance in both quantity and quality of development assistance. As has been argued elsewhere, greater coordination between the national and supranational levels of European development would increase the efficiency and effectiveness of development aid originating from the EU (Bretherton and Vogler, 1999). So, the Europeans have undergone self-critique and concrete reform, by virtue of gradually transferring development policies to the supranational level away from the temptations and perils of pursuing narrow national interests

that may come at the expense of the broader interest of sustainable human development consistent with the values enshrined in the EU's founding treaties. The EU does not act as a single player in the developing countries – but as several donors. For example, in Tanzania there are more than 600 healthcare projects in progress. Some of them were initiated by donations from either the EU or the Member States. There is therefore a need to streamline and coordinate development policies between Member States and the Commission.

As already mentioned, Community aid policy is complementary to that of the Member States. It is therefore not surprising that the European Union and the Member States confront with many challenges in coordinating their development policies both at the overall strategic level as well as on the ground (Alden and Smith, 2005, p.5). It should be stressed, that although the EU's development policy is not free from Member States' influence, the power of Member States in this aspect is not equally distributed as the vertical incoherence. Former colonial powers such as France continue to have unmatched influence within the European development aid system (Olsen, 1998, p.347 and Zanger, 2000, p.308). On the basis of a realist premise, colonial or linguistic ties, donor countries' strategic and political interests, trade interests, and a donor's domestic political economy all play important roles in determining the priorities of aid allocation as far as the choice of recipient countries are concerned (Alesina and Dollar, 2001; Carbone, 2007; Hoeffler and Outram, 2008). Examining the determinants of aid allocation by the European Community, scholars found that the EC's aid allocation is shaped by both the interests of the EC and the needs of the recipient countries (Bowles, 1989; Tsoutsoplides, 1991; Grilli and Riess, 1992; Neumayer, 2003). So, the reality is increasingly that there are differing degrees of commitment to the normative principle of solidarity in development aid appear to have emerged within the EU.

The volume of aid is a controversial issue, which is subject to the size of economic appearance as well as political identity of each member state. First, there is the group of DAC members who have hit the UN target of giving more than 0.7 per cent GNI and do not claim large debt cancellations as aid – Sweden, the Netherlands, Luxembourg and Denmark. There is a second group of DAC members who are above the EU average of 0.4 per cent GNI but some of which appear to claim debt cancellations as aid – Belgium, Austria, France, the UK, Finland and Ireland. Finally, there is a third group of DAC members who are below the EU average of 0.4 per cent GNI, including Germany, Italy and emerging donors Spain, Portugal and Greece, as well as Japan and the US. While the Northern member states stressed that increasing volume of aid was a moral obligation and persistently shamed other for not doing so, the southern ones used their economic difficulties and the need to enhance the quality of aid to divert attention away from their poor performance in quantity of aid (Carbone, 2007, p.69). This makes the Commission hesitating in launching commitments as well as actions in spite of their shares of European Consensus on Development. So, on the reform agenda, the EU tries to promote better coordination between the member states and the EU commission and among the four Directorates-General that deal with development. Although coherence has increased in recent years, there is still room for improvement.

European crisis has resulted in reducing the financial resources for external policy, including the EU's aid budget<sup>5</sup> (Fägersten, 2011; Young, 2011 and Nicoletti, 2013). After three years of consecutive growth in EU official development assistance (ODA), the financial crisis has led to a EUR 500 million decline in development aid between 2010 and 2011<sup>6</sup>. The EU countries have committed themselves to provide 0.7% of GNI for ODA by 2015, but only four countries have reached this target so far. With the ongoing crisis and sharp cutbacks in aid from debt-ridden countries (Greece and Spain in particular), prospect of above overall goal is becoming vague. It is striking that the countries with the sharpest reduction in aid are most affected by the financial crisis: Spain, Greece, France and Belgium. The EUR 500 million was reduced in 2010–2011 corresponds to a fall from 0.44% to 0.42% of EU GNI. In the Democratic Republic of the Congo (DRC), EU financial support for the presidential and parliamentary elections was decreased sharply from EUR 165 million to EUR 45 million. At the same time, in Palestine, a fiscal crisis which in combination with falling donor support and Israeli restrictions threatens to become protracted and to lead to a “totally unmanageable” situation. The Ad Hoc Liaison Committee meeting in March 2012 spelled out that “it is imperative that additional donor funding can be identified and transferred immediately to reverse the crisis before it becomes totally unmanageable” (see Fägersten, 2011). This is clearly a case where declining EU support may exacerbate the situation and where the EU may lose its previous influence in the state-building process. Beside, NGOs have strongly criticised these sharp cuts as disproportionate: “European countries are cutting aid faster than their economies are shrinking”, according to a director of Concord, an umbrella organisation for NGOs working in relief and development (EUobserve, 2012). An Oxfam representative warns that “the sweeping cuts to European development aid are inexcusable. This means the world's poorest people are being made to pay the price of austerity while the bank bailouts continue” (ibid).

## Conclusion

In post-Cold War era, the linkages between the three branches of external relations: trade, the emerging common foreign and security policy, and development policy became more crucial than before (Van Reisen, 2007, p.59). A realm of development policy therefore becomes the interesting cases for practicing the EU's normative power. Within the framework of development policy, the EU has demonstrated significant commitments to the UN MDGs and tried to incorporate these norms in aid and other development cooperation agreements at different level. Clearly, as expressed in the Treaties and EU Consensus on Development, the EU has a self-image of normative power in the fields of development policy. EU development policies towards developing countries represent the normative intention which is evident in

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<sup>5</sup> Although a negative trend in resource allocation has been a common feature of at least the last 2011 and 2012 budgets, the 2013 budget's share for external policies has been particularly affected. The European Parliament's final agreement of 12 December 2012 has eventually accepted the Council's (member states') request for an allocation of €6.4 billion in payments to EU external action, that is to say the 4,8% of the total EU budget, which is a remarkable shrinkage in comparison to the 6,4% of the total budget that heading 4 counted for in 2012 (c.f. Nicoletti, 2013).

<sup>6</sup> European Commission statement 4 April 2012, doc IP/12/348.

the inclusion of normative objectives into legal documents. Although the implementation is still largely analytical and exploratory, increasingly, the EU puts a bigger emphasis on dialogue, stimulation and non-binding mechanism such as development cooperation and corporate social responsibility. It may be said that to a large extent the EU faces the ethical criteria about “being reasonable” and “doing least harm” (Orbie, 2011, p.180) when the EU applies negative conditionality in the development policy. Also, this may raise fears of “parental” or asymmetrical power in aid relationship. These lead to vagueness in judging if the EU can have normative impacts on the partners. Consequently, the EU acts as a normative power, but the impact of this might be insufficient to improve global social policy. Normative impacts depend on the recipient capacity, the shared understanding and interpreting EU’s norms, the EU’s internal coherence.

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## BALANCING AS A DYNAMIC METHOD TO TUNE THE EU INSTITUTIONAL MACHINERY

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**Key Words:** *European Union, institutional balance, European Parliament, institutions, Lisbon Treaty*

### **Abstract**

*In its traditional forms, constitutional balancing has been used in two different meanings, however, balancing in terms of the EU embodies a different process. The European integration can hardly be associated with any pre-existing plan. Meanwhile, the existence of the EU has constantly been associated with numerous dilemmas. Examples of the dilemmas can be described in pairs of opposite extremes, such as technocratic guidance – democracy, or intergovernmentalism – supranationalism.*

*The designers of the EU institutional architecture had to find some kind of equilibrium to counterbalance the extremes, thus balancing has been used in a way which is closer to the checks and balances system, with its postulate of control of one department over another. There is a significant difference between the original “checks and balances” doctrine and the EU counterbalancing system, nevertheless, both have the same idea behind: the distribution of powers should be counterbalanced to avoid abuse. In national legal systems, checks and balances have become a part of the separation of powers concept. In contrast, in the EU the idea of counterbalancing has become an independent dynamic method applied to respond to challenges faced ad hoc. The complexity of the Union system makes difficult tracing this mechanism in details, but the general trend is that every major shift in the decision making rules is counterbalanced in one way or another. However, the changes introduced to respond a challenge may lead to the creation of a disproportion, which becomes a new challenge afterwards, thus demanding a new solution.*

*Balancing between the extremes of “technocratic guidance – democracy” is a practical example. The backroom technocratic-elite style of decision-making raised the issue of the “democracy deficit”. Counterbalancing the deficit, the introduced changes shifted the status of the Commission. Now the decline of its power is viewed as a new challenge, demanding further balancing to ensure an adequate application of the Community method.*

*So, balancing is used as a dynamic method to deal with ad hoc challenges met en route in the process of European integration. Moreover, it is accompanied by a tendency to counterbalance each step in a manner similar to the “checks and balances” concept, although the measures can be installed in various levels or have a non-proportional character.*

\* \* \*

## THE JOURNEY OF “BALKANS” AND “WESTERN BALKANS”, TOWARDS “SOUTHEASTERN EUROPE” AFTER THE COLD WAR

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**Key Words:** *Balkans, Western Balkans, democracy indices, European Union*

### **Abstract**

*The paper makes an analysis of the security dynamics of Western Balkans countries after the Cold War. It argues that the period of conflicts and crises during the period of the dissolution of Yugoslavia, the region was referred mostly as “Balkans”, while this “Balkans” period 1991–2001, was characterised by the domination of the “hard power” mainly by international organisations such as UN and NATO, greatly supported by US, in their endeavour to make the region part of a collective security paradigm that aims at NATO membership.*

*Since 2001, the region is referred mainly as “Western Balkans”, a geopolitical term that indicates a period of the influence of the EU “soft power” to integrate the countries of the region in the European Union. The spectrum of social, political and security challenges of the region is provided in the perspective of the international think tanks such as “Failed States Index”, “Democracy Index” “Freedom in the World”, “Press Freedom Index”, “Economic Freedom Index”, “Transparency International” and Conflict Barometer regarding the issue of the ethnic identity, statehood capacity, political and civilian freedoms, corruption, freedom of the press and the regional conflicts and unfinished processes of state-building as the last obstacles in the way towards regional integration into NATO and EU. This final goals, would transform the reference to the region as “South-eastern Europe”, a term, already in use after Croatia’s EU membership in 2013, which remains the ultimate goal of the Western Balkans in the coming decade.*

\* \* \*

## TEN YEARS AFTER THESSALONIKI

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**Key Words:** *the EU's enlargement policy, the Western Balkans region, European perspective, EU keeps the door open, differentiation, conditionality, own merit*

### **Abstract**

*The paper describes the changes in the EU's enlargement policy towards the Western Balkans region from the Thessaloniki Agenda 2003 on. Ten years after the Thessaloniki agreement, and on the eve of the accession of Croatia I focus on the long delayed journey of the region as well as on the progress that the countries of the Western Balkans have made on the path to European integration in the past decade.*

*“The Thessaloniki agenda for the Western Balkans: Moving towards European Integration” represents the turning point in European Union and South-Eastern European countries relations. The EU reiterates its unequivocal support to the European perspective of the region. Each of these countries – the five countries that signed the Declaration in 2003 have now become seven – is at a different place on the path to EU membership. Since Thessaloniki Summit there have been several changes in the EU's enlargement policy. The process by which one becomes a member has changed and the conditionality became more and more rigorous during the last decade. It is revealed that the EU strengthened the criteria of admission and made the accession process harder after Eastern enlargement and decreased its financial instruments at the same time when the accession of the post-communist countries after the democratic transition came on the agenda. Thessaloniki made a link between the Stabilisation and Association Process and the enlargement, stressing the principles of differentiation based upon “own merits” and possibility to “catch up” with the present candidate countries. Furthermore, it brought the enlargement kind elements into the process, engaging new instruments for the countries of the region. Fortunately the EU problems, mainly the euro crisis has not ended the enlargement process, the accession of the Western Balkans to the European Union is steadily moving ahead, the EU keeps the door open for the aspirants. It is seen by Croatia's accession, as the country became the 28th member of the Union since 1st July 2013 on, as well as the EU opened membership negotiations with Montenegro in 2012. In addition the European Council confirmed Serbia as a candidate country, and the country accession talks are likely to start in January 2014. Therefore my aim is to prove that the Thessaloniki Agenda for Western Balkans was a significant step in relations with the countries of the region and, at the same time, it opened the new perspective for the region countries.*

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## 1. Introduction

The paper describes the changes in the EU's enlargement policy towards the Western Balkans region from the Thessaloniki Agenda 2003 on. Ten years after the Thessaloniki agreement, and on the eve of the accession of Croatia I focus on the long delayed journey of the region as well as on the progress that the countries of the Western Balkans have made on the path to European integration in the past decade.

*"The Thessaloniki agenda for the Western Balkans: Moving towards European Integration"* represents the turning point in European Union and South-Eastern European countries relations. The EU reiterates its unequivocal support to the European perspective of the region. Each of these countries – the five countries that signed the Declaration in 2003 have now become seven – is at a different place on the path to EU membership. Since Thessaloniki Summit there have been several changes in the EU's enlargement policy. The process by which one becomes a member has changed and the conditionality became more and more rigorous during the last decade. It is revealed that the EU strengthened the criteria of admission and made the accession process harder after Eastern enlargement and decreased its financial instruments at the same time when the accession of the post-communist countries after the democratic transition came on the agenda. Thessaloniki made a link between the Stabilisation and Association Process and the enlargement, stressing the principles of differentiation based upon *"own merits"* and possibility to *"catch up"* with the present candidate countries. Furthermore, it brought the enlargement kind elements into the process, engaging new instruments for the countries of the region. Fortunately the EU problems, mainly the euro crisis has not ended the enlargement process, the accession of the Western Balkans to the European Union is steadily moving ahead, the EU keeps the door open for the aspirants. It is seen by Croatia's accession, as the country became the 28th member of the Union since 1st July 2013 on, as well as the EU opened membership negotiations with Montenegro in 2012. In addition the European Council confirmed Serbia as a candidate country, and the country accession talks are likely to start in January 2014. Therefore my aim is to prove that the Thessaloniki Agenda for Western Balkans was a significant step in relations with the countries of the region and, at the same time, it opened the new perspective for the region countries.

## 2. Define the Western Balkans

The starting point should be to define the notion of the Western Balkans that is the most disputed border planning all over Europe. When Romania and Bulgaria was separated from the Balkans in Helsinki in 1999, thus has divided the region on the basis of euro-politics to two parts resulted in the artificial establishment of the Western Balkans sub-region. Under the notion Western Balkans – as a political space of the European enlargement policy – those states are understood that are not members of the Community, but a priority of their foreign policy is the Euro-Atlantic integration, more exactly all former Yugoslav republics but Slovenia plus Albania. Although it is in constant change – at the moment of its establishment it covered 5 states, and today 8 states – it is tackled as a single entity in the EU's enlargement

strategy. This is strengthened by the geopolitical situation of the Western Balkans, as an island in the EU bordered by EU member states from each side. This geographical closeness makes its integration actual and inevitable, since the recent conflicts may be transported to the territory of the Community. Therefore, the EU elaborated a strategy to the whole region consisting of the Royaumont scheme and the Regional Approach, followed by the Stability Pact, and then the Stabilisation and Association Process and Agreement.

On one hand the region is characterised by geographic, historic, political, ethnic, cultural, linguistic, religious and economic heterogeneity. On the other hand from the point of view of the Union the region should be handled as a homogeneous entity because of such common features like all the regional states have to face with the problems of transition to a democracy, market economy and the establishment of a nation state. These are strongly hindered by the growing new-nationalism, organised crime, the lack of relation with the other Western Balkan states and the dependency on great power politics. It has to be added that these common features are not present in the states of the region at the same intensity and depth, having even specific characters. This inner contradiction presupposes the hardships of the integration of the Western Balkans into the EU and this heterogeneity as a reason for the longer and harder process of accession than in case of the Central and Eastern European countries. The differences are reflected in the fact that different states of the Western Balkans are on different levels of integration.

### **3. From the EU Royaumont Process and Regional Approach Initiatives till the Enlargement Strategy**

The Yugoslav crisis revealed that the newly invented Common Foreign and Security Policy (CFSP) in Maastricht Treaty was not “common” and it did not work at all. (Ágh, 2006) In early nineties the EU failed to develop a long-term strategy towards the Western Balkans and used only ad hoc measures and actions.

It was only immediate after the Dayton Peace Agreement of December 1995 when the first EU initiative turned towards the region and introduced the *Royaumont Process* – the agreement was signed in Royaumont – in order to maintain the Dayton commitments, to promote stability and introduce regional projects, to establish good neighbourly relations. The initiative was very much modelled on the already existing Stability Pacts for Central and Eastern Europe and it was based on the civilian preventive diplomacy. It was obviously a pre-condition for the latter to occur in the EU’s policy. Royaumont Initiative was accompanied by the OBNOVA financial assistance programme. (CFSP Annual 1997–1999)

Next year the EU launched the other initiative called *Regional Approach* targeted Albania and the bulk of Yugoslavia’s successor states. It, however, did not include the other Balkan countries as Bulgaria, Romania and Slovenia, all of which had signed Europe Agreements and put forward membership applications. In the initiative the EU did not use the notion Western Balkans yet, but it was the first time when the Community introduced the entire strategy for the countries belonging to the region outlining the borders of the future Western Balkans. The

*Regional Approach* initiative agreed upon by the EU General Affairs Council on 26-27 February 1996 aiming to strengthen “*stability, good-neighbourliness and economic recovery in Southeast Europe*”. Thus the EU named the political and economic conditionality for the development of bilateral relations with the five Western Balkan countries, namely with Albania, Bosnia, Croatia, the Federal Republic of Yugoslavia and Former Yugoslav Republic of Macedonia. The EU introduced the further contractual criteria with these countries such as respecting for democratic principles, human rights, the rule of law, protection of minorities and refugees, market economy reform as well as regional co-operations. (COM, 1997)

These attempts introduced by the EU between 1996 and 1999 had proven to be insufficient, as the Community was strongly involved with its internal reforms (Amsterdam Treaty) and the transition of Central and Eastern European countries so its attention towards the Western Balkans was “*neither consistent, nor unified, nor decisive*”. (Bokova, 2002, p.24)

It was just the Kosovo crisis which brought a turning point in the EU’s Balkan policy which became more coherent and proactive. The Kosovo crisis came to an end by the EU coherent strategy, by Stability Pact in October 1999, aiming at fostering peace, democracy, human rights and economic prosperity, to sum up stability to the region. The main instrument of it became the Stabilisation and Association Process (SAP) which established a strategic framework for the relations of the Western Balkan countries with the EU. The Stability Pact provided prospects for future EU membership for five South-Eastern European non-candidate countries. (EC, 1999)

As the linchpin of the Stability Pact the strategic framework for the relations of the Western Balkan countries with the EU was established called the Stabilisation and Association Process (SAP). In addition a new type of agreement has also been offered – Stabilisation and Association Agreements (SAA) – for Western Balkan countries combining an assistance programme. From 2000 until 2006 the EU’s main instrument was the Community Assistance for Reconstruction, Development, and Stabilisation (CARDS) through which five billion Euros was given to the region for infrastructure, institution building, and matters related to justice and home affairs.

These agreements are much the same as the Europe Agreements introduced for Central and Eastern European Countries, with two main differences. One of them is a requirement on cooperation on Justice and Home Affairs issues (which has been much developed as an EU competence since the Europe Agreements were signed in the 1990s). According to the other one the countries of the region are required to affirm their commitment to regional cooperation. Flexibility is the important element of the SAP as the Western Balkan countries are able to proceed along the path to EU integration at its own pace, without the risk of being held back by regional laggards. This flexibility refers to the acknowledgement the very different circumstances of the countries in the region. (International, 2003)

The SAP on one hand is bilateral issue creating strong links between each country and the EU on the other hand it has a regional character as well while encouraging cooperation between the countries themselves and their neighbours in the entire region. The aims of the Stabilisation and Association Process are the drafting of SAAs, with a view to accession; the

development of the existing economic and financial aid; aid for democratisation, civil society, education, and institutional development; the cooperation in the field of justice and home affairs, maintain the political dialogue; the establishment of a free trade area with the EU. (COM, 1999) In 2007 the CARDS programme was replaced by a single, unified instrument (Instrument for pre-accession assistance – IPA). The EU offered 11.5 billion Euros assistance through the IPA for the period 2007-2013 both candidate and potential candidate countries.

Stabilisation and Association Agreements require the European Parliament's consent, as well as they need to be ratified by the individual Western Balkan countries and all EU Member States. Among the various elements they require respect for democratic principles, human rights and the rule of law. With the exception of Kosovo, whose independence has not been recognised by 5 member states, all Western Balkan countries have already signed Stabilisation and Association Agreements with the EU.

EU relations with the Western Balkan states were strengthened at a summit meeting in Zagreb in 2000 and the Santa Maria de Feira European Council in June 2000. The later first time confirmed that the EU main objective remained the fullest possible integration of the Western Balkans countries through the Stabilisation and Association Process. Furthermore at the Nice Summit in December 2000 the *"clear prospect of accession"* was promised in case of the development of the regional co-operation and conditions fulfilling.

EU's emerging Balkan strategy that reached its peak in 2003 in Thessaloniki Summit in June 2003, when the EU-Western Balkan Forum was held under the Greek Presidency. The Thessaloniki European Council gathered heads of state and governments of the EU member states, the acceding candidate countries as well as the countries of Stabilisation and Association Process. EU made a formal promise to the Western Balkans that future EU membership was a possibility. The Community confirmed *"its unequivocal support to the European perspective"* of the Western Balkan countries. In addition the Thessaloniki Declaration stated that *"Western Balkans countries will become an integral part of the EU, once they meet the established criteria"*. *"The EU reiterates the future of the Balkans is within the European Union"*. (EC, 2003)

The Thessaloniki Declaration highlighted the values shared by both sides such a democracy, rule of law, respect for human rights, market economy, peaceful conflict resolution and regional cooperation. The Summit also adopted the *Thessaloniki Agenda for the Western Balkans: Moving towards European integration*. The Agenda highlighted that the SAP would remain the framework of the EU policy for the region until accession, suitably enriched with elements from the experience of enlargement.

I was underlined that the EU integration progress would depend on the political will and the individual performance of the countries in meeting the Copenhagen criteria and the criteria set by the SAP conditionality. The principle of "own merits" and the opportunity to the "laggard" countries to catch up with the forerunner ones became major elements of the region's integration.

The Thessaloniki Summit introduced some important new instruments in order to strengthen the SAP. In particular, European Partnerships were being drawn for the SAP countries individually in order to support each country's progress through setting out the short- and medium-term priorities these countries need to address. These European Partnerships were based on the Accession Partnership of Central and Eastern European countries during 1990s. Progress on solving tasks named in European Partnerships, as well as satisfactory implementation of the SAAs, should allow the Western Balkans to move up the steps set out by the EU.

The Summit enhanced support for institutional building through twinning programmes' direct transfer of know-how and experience. In addition in Thessaloniki the EU promised promoting the economic development and increase the region's export capacity, as well as the Community gave possibility to take part in some of the EU programmes and agencies.

What Copenhagen European Council in 1993 meant for Central and Eastern European acceding countries, the Thessaloniki Summit 10 years later might mean for Western Balkans countries. One of the most important achievements was the clear European perspective and the principle of differentiation.

After Thessaloniki commitment the commission monitors progress of SAP countries in its Annual Progress Reports and also publishes an annual Enlargement Strategy paper. (Samardžija, 2003)

In spite of the EU commitments toward the region integration, after Thessaloniki the political debate has aroused in the Union resulting in enlargement fatigue and absorption capacity – latter first appeared in official texts in the conclusions of the Copenhagen summit of 1993. All of these factors have had consequences for the credibility of the commitment to offer the prospect of accession which the Union made to the Balkan countries at the 2003 Thessaloniki Summit. Debate around future enlargement reached its peak after the biggest and most significant enlargement round of 2004 and after the rejection of the draft Constitution in May 2005 in the Dutch and French referendums. These internal frictions and lack of confidence reflected in the EU's enlargement policy, voices arose in the EU claiming that a halt in further enlargements was necessary. According to the Michael Emmerson "enlargement fatigue" is a vague political sentiment, which after the period of rest and introducing some institutional changes might be a passing mood and might be no longer fatigued. While "absorption capacity" is also vague which is being used in legal, economic or political meaning. (Emerson, 2006)

In its 2005 Enlargement Strategy paper, the Commission has recognised that a renewed consensus on enlargement was needed. According to the Commission, the renewed consensus should be achieved about absorption capacity by completing of institutional reforms, by respecting of budgetary limits and implementing common policies in order to the proper function of common EU policies. In 2005, the Commission still called for the EU to continue with enlargement but to take into account the Union's absorption capacity. The Commission applied for "*fair but rigorous conditionality*" in the document. The Enlargement Strategy Paper set out the extent of its commitment to the Western Balkans which built upon



Thessaloniki Agenda in 2003. It recognised that *“the journey towards membership has value in itself, even in cases where accession is many years away”*. The process is often difficult, so for the EU it is essential to stay engaged throughout the whole integration process, and committed to the outcome. (COM, 2005)

In January 2006 the Commission supplemented the Enlargement Strategy Paper with a Communication *“The Western Balkans on the Road to the EU: Consolidating Stability and Raising Prosperity”* that listed a range of practical measures and priorities for the Western Balkans. (COM, 2006a) Even the European Parliament in February 2006 adopted a resolution on the Commission’s enlargement strategy paper, which was supported by a large majority of MEPs in March 2006. (EP, 2006)

The renewed Enlargement Strategy in 8 November 2006 defined the term integration capacity. It says that *“The EU’s capacity to integrate new members is determined by two factors: 1. maintaining the momentum to reinforce and deepen European integration by ensuring the EU’s capacity to function; 2. ensuring that candidate countries are ready to take on the obligations of membership when they join by fulfilling the rigorous conditions set (...) It is essential to ensure public support for enlargement. Maintaining rigour in the process and strict conditionality is essential to safeguard this support”*. (COM, 2006b)

The further step in the EU and the region relationship was the *Enlargement Strategy and Main Challenges 2006–2007*, where three principles were introduced such as consolidation of commitments, fair and rigorous conditionality and better communication with the public. These three principles were combined with the EU’s capacity to integrate new members.

Consolidation means that the EU had to admit its responsibility towards the countries with prospects for EU membership and had to keep its word with respect to the existing commitments, as the EU’s credibility would otherwise be questioned. Consolidation reinforces the EU commitment and credibility towards the existing enlargement agenda.

The Commission underlined the high importance of Communication in future enlargement. Through better communication the Commission aimed to achieve a broader acceptance of enlargement and successful fight against enlargement fatigue.

The Enlargement Strategy introduced a new model of the enlargement as setting the standards for the entire region, based on credibility and conditionality.

As José Manuel Durão Barroso, President of the European Commission said in his speech in 2011 *“EU enlargement is about credibility: Credibility from the candidates in respecting all criteria and enforcing the required reforms, but also credibility on the EU’s side in moving forward once the agreed conditions have been met.”* (Barroso, 2011) Ulrich Sedelmeier names two sides of credibility from another point of view. On the one hand *“the candidates have to be certain that they will receive the promised rewards after meeting the EU’s demands”*. On the other hand *“they also have to believe that they will only receive the reward if they indeed fully meet the requirements”* (Sedelmeier, 2006, p.12)

The credibility is reinforced through strict membership criteria and it was less certain when or even if it would receive the ultimate reward of EU accession. (COM, 2006b)

#### 4. Requirements for the Membership

The credibility is reinforced through strict membership criteria and the Thessaloniki Declaration emphasises that the principle of conditionality lies at the heart of the enlargement process. The mechanism of new phase of accession after 2004 is predominantly conditionality, through setting of requirements in order to gain full EU membership. It is revealed that the EU strengthened the criteria of admission and decreased its financial instruments at the same time when the accession of the post-communist countries after the democratic transition came on the agenda. In addition the fact that the EU made the accession process harder after Eastern enlargement, and Western Balkans countries had to face with three generations of the enlargement criteria. (Lőrinczné, 2013)

Before 1993, the simple fact that a country was “European” – not only in geographical, but also in cultural sense – and “state” as well as democratic one, was already the necessary and sufficient requirement for eligibility to membership. Since 1993 the Copenhagen criteria – set out by the European Council in 1993 at a summit in Denmark – have become a fundamental part of the EU’s enlargement policy. The criteria are generally divided into political criteria, economic criteria, and ability to take on the *acquis communautaire* and to establish the administrative and judicial capacity to ensure its effective implementation. Besides the ability to cope with the obligations of membership – the so called “*acquis communautaire*” – and the economic criteria – “*existence of a functioning market economy*”, the highest priority goes to the political requirement of “*stability of institutions guaranteeing democracy, the rule of law, respect for human rights and protection of minorities*”. It was the first time when the EU clearly acknowledged the requirement for potential member states. Besides these three criteria the fourth Copenhagen criterion constituted about the capacity of the Union to absorb new members, while maintaining the momentum of European integration. (EC, 1993)

Madrid European Council of 1995 made clear that admission would entail more than the mere political commitment to accept the integration *acquis*, indeed the candidate countries would have to adjust their administrative structures to guarantee effective implementation of EU rules. Copenhagen and Madrid criteria were introduced for Eastern enlargement but they are the basic requirements for the Western Balkan countries as well.

The second generation of enlargement criteria came into the light in case of the Western Balkans accession. These requirements can be divided into so called pre-pre-accession criteria – namely Regional Approach, Stabilisation and Association Process, Stabilisation and Association Agreements – all of them referring criteria should be fulfilled before accession negotiations start. The last wave of conditions occurs during the accession talks called benchmarks.

In Regional Approach the Council complemented the “Copenhagen Criteria” with additional conditions. The most important of them was “regional cooperation” through which the Western Balkan countries were required to build common structures (for example, a free trade area) and sustain a multilateral political dialogue. Perhaps more controversially condition is the cooperation with the ICTY, founded in The Hague in 1995 as a key condition by the Dayton countries (Croatia, Bosnia, and Serbia-Montenegro).

The Stabilisation and Association Agreements added some new and specific elements of conditionality such as stabilisation, regional cooperation, democratisation, commitment to respect human rights and the right of return for all refugees and displaced persons, the development of civil society and institution-building. (COM, 2005b)

Eventually, the third wave of conditions accompanied Croatia’s accession process starting in 2005, embodied a specific criteria, called “benchmarks”. After experiences with Bulgaria and Romania the European Commission decided to make the negotiation process much stricter with the introduction of benchmarks, instrument used for the first time in case of Croatia. In the European Commission’s own words, benchmarks constitute a *“new tool introduced as a result of lessons learnt from the fifth enlargement, to improve the quality of accession negotiations, by providing incentives for the candidate countries to undertake necessary reforms at an early stage”*. (COM, 2006)

Through this new technical model had not been used in previous enlargements, compliance with criteria was ensured. The Commission conducts a screening before launching the negotiations on a given chapter. The findings of the screening for each chapter are highlighted in a screening report, in which the Commission proposes whether to start negotiations on this chapter or not. If the progress is considered insufficient, the Commission recommends that the Council establishes certain conditions, benchmarks to start or to finish, or both. Negotiating chapters shall not be opened until opening benchmarks had not been achieved and could not be closed until the requirements of the EU had not been met. Opening benchmarks concern *“key preparatory steps for future alignment and the fulfilment of contractual obligations that mirror acquis requirements.”* Whereas closing benchmarks primarily concern *“legislative measures, administrative and judicial bodies, and track-record of implementation of the acquis.”* (COM, 2006, p.10)

Karen Smith names two types of conditionality, positive and negative ones. In case of positive conditionality, on the bases of the candidate country’s progress the EU offers the applicant the chance of carrying on the negotiations, to start a new stage in the accession process. Negative conditionality means that when the EU is unsatisfied with the efforts made by the aspirant the accession process could be halted or slowed down. (Smith, 1998, p.256) The concrete situation has to be mentioned when the European Council postponed the date of the accession talks with Croatia until the requirement of full cooperation with the ICTY had been met. In addition the author mentions that the EU applies for a multilateral conditionality that may be considered more acceptable and legitimate than conditionality applied by a single state.

According to Christian Pippin the specific feature of EU’s conditionality after 2004 is that it had undergone a three-dimensional evolution. The first one is based on the specific features of

SAP, as SAP countries should implement all the SAA conditions before being considered by the EU as membership applicants. This is the so called *pre-pre-accession conditionality*. The second evolutionary dimension of the pre-accession conditionality regards the introduction of the tool of benchmarking. The third stage of conditionality is in the post-accession period's specific safeguard clauses, later being reinforced by the "*cooperation and verification mechanisms in the area of judicial reform and the fight against organised crime and corruption*". (Pippan, 2004, p.227)

## 5. Western Balkan Countries and the European Union

An unambiguous commitment was to be made at the Thessaloniki summit by the EU that the countries of the Western Balkans will be welcomed as EU members once the criteria for membership have been fulfilled. It is a long process and the countries belonging to the region are at different levels. Regarding this fact future members can be categorised into two groups, candidate and potential candidate countries.

Currently, five countries are recognised by the EU as official candidates for membership: Macedonia, Montenegro, Serbia, Iceland, and Turkey and three of them belong to the Western Balkans. These countries have been screened by the Commission and have been found suitable for entering the thirty-five chapter negotiation process, and have been granted candidate status by the member states. Nevertheless, all are at different stages of the accession process.

The remaining Western Balkan states, namely Albania, Bosnia-Herzegovina, and Kosovo are considered potential EU candidates. Potential Candidate States that have submitted an application to join the EU, but either the screening process or the approval of the member states to elevate them to candidate level is still outstanding and it will likely be many years before any of these countries are ready to join the EU. In addition to these two categories, the Western Balkan states were at some point or are still included in the framework of the Stabilisation and Association Process, a preparatory relationship between the EU and the accession states in the run-up to full candidate status.

The Western Balkans states' integration process

Country	SAA opened	SAA signed	SAA enters into force	Application for EU	Candidate status	Opening negotiation	Member-ship
Albania	2003	2006	2009	2009			
BiH	2005	2008					
Croatia	2001	2001	2005	2003	2004	2005	2013
Macedonia	2000	2001	2004	2004	2005		
Kosovo	2013						
Montenegro	2005	2007	2010	2008	2010	2012	
Serbia	2005	2008	2010	2009	2012	2013	

Source: European Commission <http://ec.europa.eu/enlargement/countries>, Lőrinczné Bencze Edit (2013) *Practice and Theory of the Enlargement of the European Union – the Croatian Case*. Aposztróf, Budapest.

The Former Yugoslav Republic of Macedonia (FYROM) was the first to sign the Stabilisation and Association Agreement on 9 April 2001, and was followed by Croatia on 29 October 2001. Both of states started the implementation of the agreements before they came into force. Albania has signed the Stabilisation and Association Agreement only in 2006, Montenegro in 2007, Bosnia and Herzegovina in 2008. On the other hand, except for Bosnia, the cycle of Stabilisation and Association Agreements were completed by the end of 2008.

According to Stefan Lehne, there are several explanations for these differences in the accession process. The author names historical accidents as the first factors. Serbia and Montenegro, as well as Croatia case – which countries could only begin the process after the fall of Milosevic and Tudman are good examples for this. The second issue is the Western Balkan countries different capacity. A third factor is constitutional complexity, the underdeveloped government and unresolved status questions as it could be seen in case of Bosnia Herzegovina. The fourth factor determined by extension of political commitment to the enlargement policy. (Lehne, 2004, pp.119–120)

In this respect, the most successful example of Western Balkan countries is Croatia. The country is the frontrunner for EU accession, as finished its process and joined the EU in 2013. Nevertheless, it was a long delayed journey as Zagreb applied for EU membership in February 2003. The Brussels European Council of 17-18 June 2004 named Croatia as an official candidate for membership and indicated that negotiations could be opened in early 2005. European Council of 16/17 December 2004 decided that 17 March 2005 was to be the date of opening the negotiations with Croatia provided that Croatia demonstrated “full cooperation” with the International Criminal Tribunal for the former Yugoslavia (ICTY). In lack of this the start of accession talks was delayed, and it was opened just in October 2005. In June 2011, the EU concluded accession negotiations with Croatia. The EU and Croatia signed the Treaty of Accession in December 2011. In January 2012, Croatian voters approved the country’s EU accession in a national referendum, with 66% in favour, and the Croatian parliament ratified the accession treaty in March 2012. As all EU member states ratified Croatia’s accession treaty by June 2013, Croatia became the EU’s 28th member state on July 1, 2013.

Although Macedonia was the first country of the region to sign a Stabilisation and Association Agreement in April 2001, which entered into force in April 2004, it obtained its candidate status a bit later, in December, 2005. Despite of the Commission recommendation to open the accession talks in 2009, negotiations have not been opened yet, because of Greece opposition. The dispute over the “name issue” with Greece has obstructed its relations not only with the EU, but also with NATO. In order to help maintain momentum for the EU reform process in Macedonia the European Commission launched a High Level Accession Dialogue with the country in March 2012.

Serbia has been one of the most difficult cases in the EU enlargement process and the country had to face several obstacles. One of them has been solved with the referendum in Montenegro on May 21, 2006, but the main problem, Kosovo is still on agenda. In April 2008 the EU signed Stabilisation and Association Agreement with Serbia entered into force in 2010. The European Commission issued its positive Opinion on Serbia's application for EU membership in October 2011, recommended EU candidate status for the country and the next year recommended the opening of accession negotiations with Serbia. In June 2013, the EU announced it would open accession negotiations with Serbia by January 2014 meanwhile in September 2013 the SAA entered into force. In spite of negotiations began, Serbia would not be ready to join the EU for many years, until Kosovo's status is fully resolved.

Since its smooth divorce from Serbia in 2006, Montenegro has also made significant progress. In 2007 October the Stabilisation and Association Agreement with the EU was signed which entered into force in May 2010. Montenegro applied for membership to the EU in 2008, and the EU granted candidate status to the country. The EU opened accession negotiations with Montenegro in June 2012.

Albania is the only country in the region which was not part of Yugoslavia. The country completed the Stabilisation and Association Agreement in June 2006 which entered into the force three years later In April 2009, when Tirana submitted its formal application for EU membership as well. After two rejections in 2010 and 2011, the Commission offered Albania its tentative approval in 2012, recommended that Albania be granted candidate status. The Commission's 2013 Progress report found that Albania had made good progress on key reforms. On 12 November 2003 the EU and Albania hold the first meeting of the High Level Dialogue on Key Priorities such as ability to tackle corruption and organised crime, its protection of property rights, and its treatment of minorities, especially its Roma community.

Since the end of the war in 1995 for Bosnia and Herzegovina EU integration has remained a distant goal. Bosnia and Herzegovina – along with other Western Balkans countries – was identified as a potential candidate for EU membership during the Thessaloniki European Council summit in June 2003. As the only major step the Stabilisation and Association Agreement has been ratified but has not yet entered into force. Since then there are no concrete moves toward EU membership and the country has not yet applied for EU membership. In its Progress Report in 2013 the Commission concluded that Bosnia and Herzegovina has made very limited progress in addressing the political criteria and little further progress towards a functioning market economy.

Since Kosovo's declaration of independence in February 2008 under U.N. Security Council Resolution 1244, which ended the 1999 conflict between Serbia and Kosovo, the country faces problems of international legitimacy. Kosovo was recognised only by 23 out of 27 EU Member States. Kosovo participates in the Stabilisation and Association Process and as a potential future candidate receives pre-accession financial assistance from the EU. In October 2012, the European Commission issued the feasibility study for a Stabilisation and Association Agreement. After the agreement between Kosovo and Serbia on normalizing

relations in June 2013 EU agreed to begin negotiations on an SAA with Kosovo first round of which took place on 28 October 2013. (COM, 2013)

## 6. Concluding Remarks

Thirteen years have passed since promises for the integration of the Western Balkans at the Zagreb Summit, (2000) and ten years from Thessaloniki summit (2003) since the launch of the European perspective. The Thessaloniki Agenda adopted at that summit set out in considerable detail the EU approach in preparing the countries of the region for EU accession, confirming the stabilisation and association process. On one hand since then lots of progress have been done in the region, the democratic transition of these countries was the permanent issue on the integration agenda. The current EU's priorities are to strengthen the rule of law, judiciary, fundamental rights, justice, freedom, to combat organised crime, corruption and illegal migration.

On the other hand still, the only country, which has become a member state, is Croatia, but according to the forecast not any countries from the Western Balkans could become the member state of the EU before 2020. During the decade the circumstances have changed so much that lots of promise made by the EU was forgotten, or was slow down by the inner and global issues. The enlargement process suffered from several fatigues. Blerim Reka names three basic obstacles, such as enlargement, institutional and financial fatigues. The enlargement fatigue reached its peak after the biggest enlargement round in 2004, and was resolved by absorption/integration capacity of EU. The period between 2004 and 2008 was characterised by the institutional fatigue, while the EU has faced internal problems after the French and Dutch referendum on constitution. This period ended by introduction of Lisbon Treaty. Since 2008 EU faced a third one, a financial fatigue as a result of the world financial crisis. Unfortunately the EU enlargement fatigue is becoming stronger with the current economic crisis. The EU is tired from these three fatigues; and countries from Western Balkans are tired from commitment fatigue. (Blerim, 2011)

The EU enlargement policy towards Western Balkans through Stabilisation and Association Process was not sufficient enough. In this case the first decade (1999–2009) of EU involvement in the Western Balkans, was more a stabilisation one. Comparing with the enlargement round of Central and Eastern European region, where the transformation of the countries was the basic issue, in case of the new enlargement policy applied towards the Western Balkans seems to be more controlling and imposing. This EU control toward aspiring countries from the region, was manifested through observance of the strict fulfilment of obligations emerging from the Stabilisation and Association Agreement. Existing rigid enlargement policy for Western Balkans was a combination of enlargement policy and soft protectorate, where proclaimed Stabilisation and Association Process was more stabilisation approach rather than association one. EU should change its enlargement policy toward Western Balkans, being more flexible and more associative.

Ten years after Copenhagen summit the Union is entering a post-enlargement era. It is obvious that during the next phase of the enlargement the Western Balkans countries are not left on their own, outside of the EU club.

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## **FACILITATING THE PERSECUTION OF RIGHTS IN THE EUROPEAN UNION (NEW TENDENCIES TOWARDS A BETTER ACCESS TO JUSTICE)**

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### **Abstract**

*After the Charter of Fundamental Rights of the European Union has gained the same legal status as the Treaties, the autonomous interpretation of human rights has become increasingly important for the Community legislation and judicature. Furthermore, the economic crisis has signalised: the legal system has to pay much more attention to ensure the rights of the needy while preventing the state budget from unnecessary expense. That is why the question of “access to justice” as the procedural framework for facilitating the persecution of rights has entered into the centre of attention again. The aim of this paper is to demonstrate the recent development tendencies in this field. Firstly, the expanding scope of legal aid will be analysed with special emphasis on environmental cases and immigration issues. Then the evolving common interpretation principles will be introduced which give guidance for the national legislator and courts. Finally, the question will be discussed whether and how alternative dispute resolution methods can contribute to a better, more efficient persecution of rights in the framework of EU law. The analysis is primarily based on the most recent case-law of the Court of Justice of the European Union. Furthermore, the documents of EU institutions will be introduced (with special regard to the Fundamental Rights Agency) complemented with the statements of German, English-, French- and Spanish-language secondary literature.*

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“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

This is the way how Article 47 of the Charter of Fundamental Rights of the European Union (in the following: ChFR) defines the principle of effective judicial protection containing in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.<sup>1</sup>

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<sup>1</sup> Europese Gemeenschap vs. Otis NV and Others, C-199/11, judgment of 6 November 2012. para 48.

After the ChFR has gained the same legal status as the Treaties, the autonomous interpretation of human rights has become increasingly important for the Community legislation and jurisprudence. Furthermore, the economic crisis has signalled: the legal system has to pay much more attention to ensure the rights of the needy while preventing the state budget from exaggerated costs. That is why the question of “access to justice” as the procedural framework for facilitating the persecution of rights has entered into the centre of attention again. The aim of this paper is to demonstrate those recent development tendencies in this field, which improve the chances of access to justice for the broadest possible group of the needy and at the same time contribute to the enhancement of efficiency within the existing legal framework. Thereby three major points will be analysed: the expanding scope of legal aid, the development of common principles of interpretation arising from the case-law of ECJ and the relation of legal aid to alternative dispute resolution methods.

## 1. The expanding scope of legal aid

The first basic phenomenon gaining particular attention in the last few years is the need for an extensive interpretation of the scope of legal aid, especially in two fields: in environment cases and in immigration issues.

### a.) Environment cases

Since 2005 when the Aarhus Convention<sup>2</sup> was ratified by the EU it is an obligation for Community-law to ensure the right to challenge decisions or omissions by public bodies that are suspected of not complying with environmental law. The important role of the public, especially specialised associations in defending the environment has been confirmed by ECJ as well.<sup>3</sup> In the words of Advocate General Eleanor Sharpston: “the fish cannot go to court”.<sup>4</sup>

Nevertheless, the analysis of concrete cases shows several difficulties, especially because of the doubtful *locus standi* of NGOs and private individuals in front of national courts and EU courts as well. The grounds for this phenomenon is that the litigants have to comply with the “protective law theory”, so they have to assure that the legal rule in question is at least designed “to protect also the interests of individual persons rather than the public at large, and the plaintiff must belong to the class of persons to be protected”.<sup>5</sup> It is, however, nearly impossible to found the existence of such an interest in cases related to the protection of the environment. That is why with regard to a certain environmental measure (e.g. measures

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<sup>2</sup> United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25th June 1998, Aarhus.

<sup>3</sup> David Edwards and Lilian Pallikaropoulos v. Environment Agency, C-260/11, judgement of 11th April 2013, para 40.

<sup>4</sup> Janez Potočnik (European Commissioner for Environment): “The fish cannot go to Court” – the environment is a public good that must be supported by a public voice, Speech/12/856 23/11/2012 [online] Available at: <[http://europa.eu/rapid/press-release\\_SPEECH-12-856\\_en.htm#footnote-7](http://europa.eu/rapid/press-release_SPEECH-12-856_en.htm#footnote-7)>

<sup>5</sup> Ebesson, J., 2002. *Access to Justice in Environmental Matters in the EU*. The Hague: Kluwer Law International, p.237.

concerning Natura 2000 territories) “it is possible to determine more or less precisely the number, or even the identity, of the persons to whom a measure applies but this does not imply by no means that that measure must be regarded as being of individual concern”.<sup>6</sup>

The situation is more complex in case of NGOs because in their case not even a direct concern can be identified: the ground for this kind of litigation is a public or quasi-public interest. In case of pieces of EU-legislation this indirect connection of the litigants with the subject of the claim usually results in the entire denial of process capability as a consequence of Article 263 (4) of the Treaty on the Functioning of the European Union.<sup>7</sup>

The circle of cases where the EU legislation offers the possibility of collective litigation *expressis verbis* is quite narrow one. At the time of the EU joining the Aarhus Convention<sup>8</sup>, namely, the EC has made a reservation on the Member States having the primary obligation to fulfil the obligations arising from the Convention until the Community decides “to adopt provisions of Community law covering the implementation of these obligations”. The *actio popularis* provision of Article 9 (3) of the Aarhus Convention has not yet been incorporated into EU law in the framework of other acts either. Consequently, there is, as yet, no EU law obligation to permit an *actio popularis*.

The only requirement is that Member States permit certain members of the “public concerned” to have access to a review procedure to challenge the legality of administrative decisions, acts or omissions. This requirement is reproduced in Article 10a of the Environmental Assessment (EIA) Directive.<sup>9</sup> “The first paragraph of Article 10a requires Member States to grant standing either (a) to bodies which have a sufficient interest, or (b) to those which ‘are maintaining the impairment of a right’.”<sup>10</sup>

Furthermore, Member States are required by EU law to ensure effective judicial protection to “natural or legal persons who are unable, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, to challenge directly Community measures by interpreting and applying national procedural rules in a way that enables those persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act”.<sup>11</sup>

This solution is absolutely in accordance with the competences of the EU being limited in the field of civil procedural law, it assures the possibility to take account of the different tests for

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<sup>6</sup> Markku Sahlstedt and Others vs. Commission of the European Communities, C-362/06, judgement of 23rd April 2009, para 31.

<sup>7</sup> “Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

<sup>8</sup> Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.

<sup>9</sup> Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2003/35/EC.

<sup>10</sup> Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV vs. Bezirksregierung Arnsberg, C-115/09, opinion of AG Sharpston delivered on 16 December 2010, paras 42–44.

<sup>11</sup> Commission vs. Jégo-Quéré & Cie SA, C-263/02, judgement of 1st April 2004, paras 30–35.

standing in the various national legal systems and helps courts to focus on those cases where a significant chance of success can be presumed. However, it might result in a significant restriction of environmental cases to be brought to court, because in lack of provisions motivating litigation (legal aid, representation, reduction of or exemption from procedural charges) even those applicants might reside from litigation whose plea would be well-founded. This argument can be supported by the findings of an expert group set up by the Commission, which analysed the enforcement of the Aarhus Convention in 17 Member States of the EU and has concluded that there was not even one country where the barriers of effective justice would not be significant concerning at least one indicator (individual's stand, stand of NGOs, costs of procedure, efficiency).<sup>12</sup>

The legal uncertainty the stakeholders face concerning litigation in environmental matters has been perceived by the European Commission as well. That is why it has launched a public consultation "on ways to improve access to justice in the field of environment" focusing on three key areas of the problem: a) perceptions of the importance of ensuring effective and efficient access to environmental justice in Member States; b) options for ensuring effective and efficient access to justice in environmental matters; c) elements on which action at EU level is possible.<sup>13</sup>

A solution offered by NGOs themselves is "to give direct effect to the provisions of the Aarhus Convention and make it directly applicable without further subordinate legislation."<sup>14</sup> However, the ECJ has declared in a recent case that the direct effect would be contrary to the principles of EU law.

The provisions of the Aarhus Convention regulating the legal position of individuals are not clear and precise enough, because the criteria under which members of the public are entitled to litigation have to be determined by national law. So "the provision is subject, in its implementation or effects, to the adoption of a subsequent measure".<sup>15</sup>

Probably, the most efficient and clear solution would be to set up the directive on access to justice in environmental measures as foreseen in the decision on the implementation of Aarhus Convention. However, until this is drafted, a recent development in the Community-law could contribute to the extension of rights connected to access to justice. According to the present wording of Article 263(4) TFEU natural or legal persons may initiate proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures". In the *Microban*-case the Court ruled that the concept of a "regulatory act which is of direct concern to [the applicants] and does not entail implementing measures" has to be

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<sup>12</sup> Darpö, J., 2012. *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union*. 11th November 2012. [report] Available at: <[http://ec.europa.eu/environment/aarhus/pdf/2012\\_access\\_justice\\_report.pdf](http://ec.europa.eu/environment/aarhus/pdf/2012_access_justice_report.pdf)>

<sup>13</sup> [online] <[http://ec.europa.eu/environment/consultations/access\\_justice\\_en.htm](http://ec.europa.eu/environment/consultations/access_justice_en.htm)>

<sup>14</sup> How can NGOs support the Access to Justice Directive of the EU?, Justice and Environment, 2012 [pdf] Available at: <[http://www.justiceandenvironment.org/\\_files/file/2012/Access%20to%20Justice%202012\\_toolkit.pdf](http://www.justiceandenvironment.org/_files/file/2012/Access%20to%20Justice%202012_toolkit.pdf)>

<sup>15</sup> *Lesoochranárske zoskupenie VLK vs. Ministerstvo životného prostredia Slovenskej republiky*, C-240/09, judgement of 8th March 2011, para 45.

interpreted as precluding the examination of an individual concern.<sup>16</sup> From this follows that in case of certain regulatory measures, primarily decisions in the field of environmental law, the access to justice rights of both individuals and NGOs has been significantly extended.

#### b.) Immigration issues

Another important issue in the field of access to justice is the question of legal aid for migrants. In this case it is not the deficiencies of legislation that cause major problems, but the practical barriers of enforcement. Concerning migrants enjoying the benefit of free movement rights, the legal framework is quite well-established. First of all, they can benefit from the harmonised rules of legal aid in cross-border legal disputes.<sup>17</sup> This means that all Member States guarantee at least pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings to court as well as legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient.

Secondly, the common rules of jurisdiction in civil and commercial matters<sup>18</sup> offer EU citizens the rights to start proceedings and to be sued at a court which is adequate to ensure them the most efficient persecution/defence of their rights. This principle (known as the antique theory of "*actor sequitur forum rei*") ensures that the defendant can protect his rights effectively, because the process is restricted to the legal venue, he has reasonable access to.<sup>19</sup> Behind it we can also find the opinion, that the plaintiff decides about the whether, how and when of the claiming, so he has important advantages about the process. That is why the defendant's position should not be hindered even by the fact that he has to take part in a process at a place optimal only for the plaintiff.<sup>20</sup> Or, as the ECJ simply concluded: "That jurisdictional rule is a general principle because it makes it easier, in principle, for a defendant to defend himself."<sup>21</sup> Acknowledging that the difference in economic power could significantly influence the possibilities of success in a legal dispute, Article 19 of the Brussels I. Regulation makes it possible for the employee to initiate a procedure against the employer domiciled in a Member State in the courts of the Member State where the employee is domiciled or where the employee habitually carries out his work or where the business which engaged the employee is or was situated. However, the employee may only be sued by the employer only in the courts of the Member State in which the employee is domiciled.

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<sup>16</sup> Microban International Ltd. and Microban (Europe) Ltd vs. European Commission, T-262/10, judgement of 25th October 2011.

<sup>17</sup> Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

<sup>18</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters introducing a recast of Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I. Regulation).

<sup>19</sup> Buchner, B., 1998. *Kläger- und Beklagenschutz im Recht der internationalen Zuständigkeit*. Tübingen: Mohr Siebeck, p.61.

<sup>20</sup> Förschler, P., 2004. *Der Zivilprozess*. Stuttgart: Kohlhammer, p.16.

<sup>21</sup> Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA. C-26/91, judgement of 17th June 1992. point 14.

Although these guarantees seem to be adequate to ensure effective judicial protection, as the Fundamental Rights Agency of the EU (FRA) has concluded the intimidation by employers or mistrust of police and institutions are obstacles hindering the reporting of violations of labour law. In case of illegal migrant workers,<sup>22</sup> this phenomenon is even more characteristic.

According to the FRA “access is usually better guaranteed where labour justice procedures are independent from the immigration enforcement system. This means that the reporting of migrant plaintiffs in an irregular situation to immigration authorities is not mandatory, like in Spain, Ireland, Sweden and France. In practice, access to labour inspections may be possible on a case-by-case basis if the migrant in an irregular situation is supported by a trade union. In such a case, the risk of expulsion would be low”.<sup>23</sup>

An interesting question – arising from the different implementation methods concerning the legal aid directive – is whether legal aid could be applied to illegal migrants as well. For example the Spanish act of 2001 on free legal aid did not restrict its personal scope to people lawfully resident in the country<sup>24</sup>, so even illegal migrants could be entitled to claim the benefits of legal aid. In case of administrative or criminal procedures where the legality of stay is examined and the migrant is threatened by expulsion, this interpretation would be in accordance with the right to defence as interpreted by the European Court of Human Rights (ECtHR) as well.<sup>25</sup>

The question was partially solved by Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, which declared in Article 13 that a) the third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance and b) Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid.

Whether it is a duty of the Member States to extend legal aid to illegal workers in other types of procedure (civil or labour law), must be determined by the European legislator or by the ECJ. In this interpretation, the principles recently developed by the Court in legal aid cases could be supportive.

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<sup>22</sup> Several NGOs have called attention that besides the existing problems of enforcement of rights in immigration issues more attention has to be paid to cases where the denial of access rights is accumulated by a gender-based discrimination. These phenomena, however, are much more related to the scope of equal treatment, and that is why they will be left out of consideration at this place. [pdf] Available at: <<http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/PlatformForInternationalCooperationOnUndocumentedMigrants.pdf>>

<sup>23</sup> European Union Agency for Fundamental Rights, 2011. *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*. Vienna, pp.37–46.

<sup>24</sup> Prado, V. and Pascual, R., 2011. Acceso a la justicia de los más defacorecidos y Unión Europea. *Iuris Tantum Revista Boliviana de Derecho*, Vol. 12, No. 12, Santa Cruz de la Sierra, July 2011.

<sup>25</sup> The right to legal aid has to be ensured in an efficient way, the rights cannot remain theoretical or illusory. Furthermore, the State has a duty to ensure justice by positive actions. Eur. Court H.R., Airey vs. Ireland, No. 6289/73, judgment of 9 October 1979, Series A, No. 32, para 25.

## 2. Establishing common interpretation principles for the national law

As the case-law of access to justice at the ECJ is growing, the court is defining more and more principles which give appropriate guidance to the national courts. At this regard, two tendencies can be perceived: a) the ECJ is extending the scope of some general principles of EU law to access to justice matters and b) is developing new principles according to the special features of this right.

Concerning the basic principles of EU law in access to justice cases, it can be confirmed that both the principle of efficiency and equivalence apply. According to the principle of equivalence the means of access to justice available at the national level for individuals to secure their rights under EU law should not be less favourable than those available for similar actions in national law.<sup>26</sup> This principle finds application primarily in those cases, where the plaintiff cannot rely on any domestic law granting access to the court or he wants to prove its inapplicability. In these cases, namely, the applicant is deriving his right to an effective access to justice immediately from the EU law. So, his procedural position may not be less favourable than of the one who may rely on the national legislation when enforcing his rights.

The duty of the Member States to ensure an efficient access to justice cannot only be derived from the ECJ case law<sup>27</sup> but is a duty – as mentioned above – under the European Convention on Human Rights. In this context the national legislator has to ensure that elements of legal aid, like dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer<sup>28</sup> are granted in a way that does not make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law”.<sup>29</sup>

With regards to the special principles guiding national courts, first of all, it has to be mentioned that according to the recent ECJ case-law, in cases of access to justice national courts have generally wider possibilities and duties of interpretation,<sup>30</sup> because the rights to access to justice and legal aid operate with such terms (like neediness, financial capacities, legitimate aim of the persecution of rights, prohibitively expensive character of the litigation etc.) which cannot and should not be determined at EU level. So, they have to take the specialties, legal traditions and even the standard of living in a particular state into account. This kind of subsumption and appreciation should not be excluded from the competences of national courts.

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<sup>26</sup> Shirley Preston and Othes vs. Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank, C-78/98, judgement of 16th May 2000, para 31.

<sup>27</sup> Principle of efficiency means that the detailed procedural rules governing actions for safeguarding an individual's rights under EU law that they must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law. Rewe-Zentralfinanz eG and Rewe-Zentral AG vs. Landwirtschaftskammer für das Saarland, C- 33/76, judgement of 16th December 1976. para 5; Unibet (London) Ltd and Unibet (International) Ltd vs. Justitiekanslern, C-432/05, judgement of 13th March 2007, para 43.

<sup>28</sup> DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH vs. Bundesrepublik Deutschland, Case C-279/09, judgement of 22nd December 2010. para 59.

<sup>29</sup> Iwona Szyrocka vs. SiGer Technologie GmbH, C-215/11, judgment of 13th December 2012. para 34.

<sup>30</sup> Massam Dzodzi vs. Belgian State, joined cases C-297/88 and C-197/89, judgement of 18th October 1990, para 38.



Finally, as a guidance concerning the interpretation of EU law, the ECJ has recently declared the requirement of a consistent and uniform interpretation of human rights with the European Convention on Human Rights (ECHR) and the practice of the ECtHR.<sup>31</sup> This argument follows from Art. 52 Para 3 ChFR<sup>32</sup>, but ECJ has given considerable guidance to interpret this provision paying attention to several practical scenarios: If the ChFR grants wider protection, it forms the legal basis of the judgment in the human rights cases of ECJ but also in this case the case law of the ECtHR has to be taken into account. Are there any uncertainties concerning the meaning or scope of terms or provisions, they “must be interpreted in its context, in the light of other provisions of EU law, the law of the Member States and the case-law of the European Court of Human Rights.”<sup>33</sup> In cases, falling outside the scope of EU law, national courts have to orientate towards the standards of the ECHR. This way the national legislator, the national courts and even the applicants in concrete cases can be more certain in the probable outcome of the supervision of a legal act in the field of access to justice.

### 3. Legal aid and alternative dispute resolution methods

Finally, the relationship of access to justice rights and alternative dispute resolution methods (ADR) has to be examined. The grounds for this question getting into centre of attention is that ADR methods offer a cheap, simple and efficient method to reach a solution in case of a legal dispute, so their principles are entirely in accordance with the aims of access to justice.

Acknowledging the importance of ADR methods, especially mediation, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters was adopted, which – exactly as the title suggests – rules only on certain aspects of mediation, especially on the confidentiality and the enforceability of the agreements resulting from the meditation.

An interesting feature of the Directive is that it does not harmonise national rules on limitation and prescription periods. Nevertheless, in Recital 24 the legislator encourages Member States to ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails.

Guidance for the structuring of the detailed rules of mediation follows from two Commission Recommendations,<sup>34</sup> which have identified a number of minimum guarantees that ADR schemes should respect including impartiality and effectiveness. These are related to fields

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<sup>31</sup> DEB, C-279/09, para 35.

<sup>32</sup> “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

<sup>33</sup> DEB, C-279/09, para 37.

<sup>34</sup> Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes and 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

(primarily consumer protection) which belong to the centre of attention in the EU. In other sectors or in case of mediation in general, however, there are less concrete instructions. Unfortunately, in a recent case when the ECJ was asked about the compatibility of a compulsory mediation procedure with the requirements of EU law, the question has become hypothetical after the changes of the national law in the meantime, so the Court did not have the possibility to answer the question.<sup>35</sup>

Nevertheless, from the existing case-law of ECJ it seems that the Community judicature does not intend to put more obligations on Member States concerning mediation by the extensive interpretation of the legislation. For example, concerning Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, the Court has declared several times that it “does no more than require Member States to seek to promote mediation in criminal cases for offences which they consider appropriate, and consequently it is for the Member States to define the circle of offences for which mediation should be available.”<sup>36</sup> So the burden of developing a consistent scheme of ADR in accordance with the requirements of access to justice is put primarily on the national legislator.

The fact that judicial interpretation has less significance at this point follows also from the analysis of problem fields by Commissioner Viviane Reding: “The three main shortcomings are gaps in the coverage of ADR schemes, lack of awareness of consumers and businesses and the uneven quality of ADR schemes.”<sup>37</sup> While the second problem can be solved by civil actions and centralised campaigns, in the other two fields, the responsibility of the Member States is much more intense. And at this point not only the necessity for collaboration at the level of EU legislation is especially important, but a common understanding of the obligations following from the right to an efficient access to justice as well.

#### 4. Conclusions

As a basic conclusion it can be declared that access to justice could be improved in two ways, through non-legislative means or through binding EU legislation. As we seen in the case of access to justice in environmental cases, the two methods are able to support or even supplement each other: until a common European framework implementing the Aarhus Convention is created, the case-law of ECJ delimitates the correct interpretation and application of the right to access to justice. This task is fulfilled not only by applying the common principles of EU law (principle of efficiency, principle of equivalence) to access to justice issues, but also by developing special standards applicable in issues of access to justice

<sup>35</sup> *Ciro Di Donna vs. Società imballaggi metallici Salerno srl (SIMSA)*, C-492/11, judgement of 27th June 2013.

<sup>36</sup> *Magatte Gueye, Valentín Salmerón Sánchez*, joined cases C-483/09 and C-1/10, judgement of 15th September 2011, para 72.; *Emil Eredics and Mária Vassné Sági*, C-205/09, judgement of 21st October 2010.

<sup>37</sup> Reding, V., 2011. Ensuring access to justice: Alternative Dispute Resolution. Speech at the Seminar “Finding balanced alternatives: promoting alternative dispute resolution mechanisms in the EU”, Brussels, 19th September 2011. [pdf] Available at: <[http://ec.europa.eu/commission\\_2010-2014/reding/pdf/speeches/alternative\\_dispute\\_resolution\\_en.pdf](http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/alternative_dispute_resolution_en.pdf)>

(wider interpretation possibilities of national courts, interpretation in accordance with the ECHR).

An important test for the application of the latter principle would be to discuss whether the right to an efficient access to justice, especially in connection with non-judiciary rights grants a right for illegal migrants to the services of the judiciary and public administration system. Nevertheless, the partially proactive character of EU legislation should not be left out of consideration either. This can be demonstrated at the example of legal aid for migrant workers, where besides the direct rules of legal aid in cross-border litigation also other, different rules, like those on jurisdiction pay attention to the efficient persecution of rights for people in an economically subordinate situation. The extension of ADR possibilities, primarily in the field of consumer protection would result in a same kind of development.

All these methods together, supported by a permanent civil control can contribute to a better realisation of the access to justice rights on the level of EU law, which is getting more and more important in the EU legislation and judicature.

## MACEDONIA'S PROSPECTS OF JOINING THE EUROPEAN UNION IN THE NEAR FUTURE

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**Key Words:** *Macedonia, European Union, Greece, Bulgaria, integration*

### **Abstract**

*For more than two decades Macedonia's Euro-Atlantic integration is hindered and blocked due to the fact that there is an on-going diplomatic dispute with her southern neighbour, Greece. Skopje and Athens' relations with each other are tense, and neither side has the chance to break the deadlock. The on-going conflict over the Macedonia's constitutional name and the cultural tensions between her and Bulgaria are the main obstacles in front of Macedonia's Euro-Atlantic integration. The essay gives a detailed view on the history of the Greek-Macedonian conflict, its main turning points and the foreign policy shifts in the past two decades. It also dissects thoroughly the main bilateral agreement between the two neighbouring states, the Interim Accord of 1995, which laid down the bases of their relations. It is of great importance to analyse the Accord's main deficiencies in order to understand why its provisions do not support the improvement of the Greek-Macedonian relations. The Republic of Macedonia's aspirations to join the European Union and NATO under its constitutional name have caused controversy in recent years. The main goal of the essay is to analyse Macedonia's political motivations and to answer whether the Balkan state is ready to join the Union or the new nationalistic policy is more important than the Euro-Atlantic integration.*

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### **1. The "name dispute" with Greece**

For more than two decades Macedonia's Euro-Atlantic integration is hindered and blocked due to the fact that there is an ongoing diplomatic dispute with her southern neighbour, Greece. Skopje and Athens' relations with each other are tense, and neither side has the chance to break the deadlock. The so called "name dispute" is incorrect, albeit the fact that one of the cardinal questions concerning the neighbourly relations is the unresolved problem with Macedonia's constitutional name. Macedonia or the Republic of Macedonia name versions are unacceptable for Greece, because her northern province is, very similarly, also called Makedonia. From the beginning of the 1980s Greece's representatives have expressed their fears about the safety of their country's sovereignty and territorial integrity. A not

negligible part of the Greek society and the Greek diaspora have raised their voice against the putative threat coming from the newly established Balkan state.

The dispute is more of a cultural, and based on principles, rather than a true conflict, which concerns the national security of Greece. The new-fangled ideology of the Neomacedonism is extremely nationalistic and populist. The Macedonian nation which was artificially created<sup>1</sup> in the mid-1940s and since then till the fall of the totalitarian regime has been established a new cultural and historical identity of the Macedonian nation. The theory that today's Macedonian people are direct descendants of Alexander the Great's antique Macedonians is offending Greece's national pride. Athens is arguing that the Macedonians of Alexander the Great had Hellenic origin, while today's Macedonians have Slavic roots. In the period of 1991–1993 Macedonia was in a *de facto* international quarantine, because Greece maintained a very powerful and successful diplomatic offence in the international circles in order to block the recognition of its neighbour.

Macedonia, not only was struck with the Greek diplomatic obstacle, but was also haunted by an economic recession. The Macedonian economy was in a decline due to the fact that the old commercial channels were blocked on the north by the economic embargo imposed by the West on Yugoslavia, and on the south by the embargo imposed on Macedonia by Greece. In 1992 Greece's parliamentary party's leaders established the official approach towards Macedonia, which was based on extreme intransigence. The new political dogma indicated that Greece's government would not recognise its neighbour until the name of the state contains the word Macedonia or any of its derivatives.<sup>2</sup>

The so called new Macedonian question evolved into an incomprehensible for the rest of the world feud which jeopardised the already fragile regional stability. In order to prevent the further escalation of the contention in the broader region the United States of America (USA), the European Union (EU), and the United Nations (UN) took diplomatic measures, such as to deploy UNPROFOR forces in 1992,<sup>3</sup> and to set up a mediatory mechanism in order to bring the two bickering states to the negotiating tables. The highly experienced mediators started to manufacture sequentially resolution names for the new state in order to please the Greek demands, thus to pave the way for Skopje for international recognition. For more than two decades the international diplomats, such as Cyrus Vance, David Owen and Matthew Nimetz, came up with highly unusual and awkward names such as: Upper Macedonia, New Macedonia, North Macedonia, Vardar Macedonia, Republic of Macedonia (Skopje), Republic of Macedonia – Skopje, Gornomakedonija, Novomakedonija etc.<sup>4</sup> These grammar constructs of the highest diplomacy brought bittersweet taste in the mouth of most Macedonians, but Greek demanded an even inconceivable “solutions” such as Skopjania or Skopje.

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<sup>1</sup> Dimitrov, B., (n.d.) *The ten lies of the Macedonism*. Sofia: IK Sveti Kliment Ohridski.

<sup>2</sup> Kofos, E., 2005. The Unresolved ‘Difference over the Name’: A Greek Perspective. In: E.Kofos and V. Vlasidis, eds. 2005. *Athens –Skopje: An Uneasy Symbiosis*. Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP), p.141.

<sup>3</sup> Wood, M. C., 1996. *Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties*. Heidelberg: Max Planc Institute for Comparative Public Law and International Law, p.237.

<sup>4</sup> Gligorov, K., 200. The unrealistic dreams of large states. In: J. Pettifer, ed. 2001. *The New Macedonian Question*. London: Palgrave, p.103.

The path was not easy at all, Greece not only objected the name, but also the national flag of Macedonia, which contained the notorious Hellenic symbol of the Vergina-sun (or Vergina-star), and the parts of the Macedonian Constitution. Greece found the preamble, the 3., 68., 74., and the 49. articles of the above mentioned Constitution highly inappropriate and offensive, because they constituted a direct threat to its sovereignty.

The international mediators finally found a way to partially calm down the Greek concerns, by adopting a UN Security Council resolution<sup>5</sup> which submitted a provisional name proposal. Both Athens and Skopje remained sceptical towards the new situation, but after a lengthy debate in their national parliaments the decision makers, led by Macedonia's president Kiro Gligorov and Greece's Prime Minister Konstantinos Mitzotakis accepted the offer. Under the auspice of the United Nations mediators Macedonia finally became a UN-member in April 1993 but under the interim name of "the former Yugoslav Republic of Macedonia", commonly known as its abbreviation, *FYROM*. Although neither Macedonia nor Greece was satisfied with the developments, henceforth the negotiations were started. The resolution constituted that the stakeholders were obliged to negotiate, but were not bind to find a permanent solution to the "Macedonian Question".

The political pressure in Greece was at its peak when the UN-decision was brought to daylight, mass protests disrupted. The Mitzotakis-government eventually lost its majority in the Greek parliament after a bitter quarrel between the prime minister and the then foreign minister, Antonis Samaras, and later on with the party strongman, Milthiades Evert. On the upcoming elections in Greece, autumn of 1993, Andreas Papandreu's PASOK won, and the socialist party shifted the promising negotiations into a standstill cold war which resulted an even more rigorous embargo from Greece towards its northern neighbour. The strict embargo had its own backlash for Athens because the European Union filed a lawsuit at the European Court of Justice (ECJ) against Greece for failing to fulfil its obligation to maintain the free and uninterrupted movement of goods and people between an EU member state and a third country. Eventually the ECJ ruled against the European Commission because the European body could not prove that Greece has breached its obligations, nor the ECJ had the jurisdiction to make a decision in a clearly political question.

Nonetheless the failed lawsuit had its positive results for the ongoing dispute because the opinion of the international diplomacy took Macedonia's side on the integration matter, leaving Greece in a very uncomfortable position. For instance the USA, and a large quantity of the European States recognised Macedonia under its constitutional name and rejected to build up diplomatic relations only recognising the interim *FYROM* name. The economic pressure also mounted on the shoulders of the new Greek government, because the economic embargo was a double-edged weapon. The Greek small and medium enterprises also accumulated significant loses, due to the fact that Macedonia was a leading business partner – regardless of the political opposition, the economic cooperation between the two states, apart from the embargo period, was always flawless.

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<sup>5</sup> Security Council Resolution S/RES/817 (1993). 7 April 1993.

After serious discussions in the Greek parliament the revised version of the 1993 Vance–Owen draft was again in front of the Greek diplomats in the UN. In 1993 the draft proposal was rejected from both sides, because it contained, apart from the settlement of many bilateral questions, such as the economic and commercial relations, a recommendation for the name issue as well. Serious discussions went on between the Greek politicians afterwards, the main question what should the later on adopted Interim Accord contain – whether it should be a so called “big package” which deals with all existing open questions, including the name dispute, or should it be a “small package”. The opinions ranged between the two options, but the internal political dividends decided that the new multifunctional agreement between the two states should be a small “package” which passes the responsibility of making this watershed decision for the latter time.

## 2. The Interim Accord

The Interim Accord was signed on 13th of September 1995, New York, by the “representative of the Party of the First Part and the representative of the Party of Second Part”.<sup>6</sup> The diplomatic wording is exquisite, there is no other international agreement whatsoever where the stakeholder’s name is mentioned in this form. “The Interim Accord contains a Preamble, 23 articles in 6 parts, and a final disposition relating to the language of the text and the registration of the Accord.”<sup>7</sup> The Accord is a multi-purpose bilateral binding agreement between Greece and Macedonia, its goal is to develop the friendly relations and to impose confidence–building measures, to strengthen the human and cultural rights, to clear the way in front of Macedonia towards its integration in international, multilateral and regional institutions. Furthermore it reaffirms the treaty relations between Athens and Skopje, raises new grounds for the economic, commercial, environmental and legal relations.

Greece’s main goal is to ensure that Macedonia has no irredentist intentions, nor to interfere with the internal politics, especially with the minority questions in Greece. On the other hand Greece recognises Macedonia under its provisional, *FYROM* name, lifts the imposed embargo and opens the way for the Balkan state to become a member of international organisation under the provisional name. “[...] however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent of the Party of the Second Part is to be referred to in such organisation or institution differently than in paragraph 2 of the United Nations Security Council resolution 817 (1993)”.<sup>8</sup> This article bears with extreme importance for the future of Macedonia’s Euro–Atlantic integration, as we could see Greece in 2008 has opposed Macedonia’s accession in the North Atlantic Treaty Organisation (NATO) on pretext that her northern neighbour has applied for membership not under its

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<sup>6</sup> Interim Accord between the Hellenic Republic and the FYROM. New York, 13 September 1995, see more: [online] <<http://www.hri.org/docs/fyrom/95-27866.html>> [Accessed on: 25 September 2013].

<sup>7</sup> Zaikos, N., 2005. Interim Accord: Prospects and developments in accordance with international law. In: E. Kofos and V. Vlasidis, eds. 2005. *Athens –Skopje: An Uneasy Symbiosis*. Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP), p.24.

<sup>8</sup> Interim Accord, *ibid.* article 11, paragraph 1.

provisional name. From the legal aspect Greece has the right to object to any Macedonian application if it is not carried out according to the Interim Accord's 11th article.

The Accord managed to settle the conflict of the national flag, according to the 7th article Macedonia is bound to change its national flag which contains the above mentioned Vergina-sun, and replace it with a flag acceptable for both sides. This obligation was later on carried out in a smooth fashion by the Macedonian government, although there were some minor outbursts from non-governmental organisations in the Macedonian diaspora around the world. This article did leave a very important loophole for the future, though. "If either Party believes one or more symbols constituting part of its historic or cultural patrimony is being used by the other Party, it shall bring such alleged use to the attention of the other Party, and the other Party shall take appropriate corrective action or indicate why it does not consider it necessary to do so".<sup>9</sup> As I argued it before, the essence of the Macedonian-Greek conflict has a cultural, historic nature, national principles lay in its focus. Till this very day ceaseless cultural and historic war rages between the two nations, for instance the "Skopje 2014" project provoked the Greek society's anger because its monuments were taken, accordingly to the Greek press, from the national history of the Hellenic nation. In Skopje a towering statue of Alexander the Great, Philipp II, emperor Justinian and many more has raised concerns over the megalomania of the Neomacedonism.

Albeit its deficiencies the Interim Accord reinstated the economic circulation in the region, it established the basic diplomatic relations between the states and gave hopes for the future that there might be a way to untangle this diplomatic Gordian knot.

The Interim Accord's expected effects were non-viable, because the UN-mediators did not took into account the nationalistic populism, which predominantly shapes the image of the Balkan state's policy. After some positive signs from the Greek government, such as the obtainment of memberships in some minor international organisations, the Macedonian foreign policy took a visible and quite inexplicable turn and returned to the old, Neomacedonism-based dogmas. Unlike Greece's expectations the Macedonian government did not changed its view on the Macedonian minority issue in northern Greece, nor its cultural policy. The new foreign minister of Macedonia Ljubomir Frckovski imposed a forceful nationalistic and critical foreign policy towards Greece. Macedonian politicians, except President Gligorov, were frustrated and jittery because the relations with Greece were not as smooth as they would have been expected in the time of the signing of the Interim Accord. This impotency of Macedonia became clearly visible in 1996 when "the Ministry of Foreign Affairs drafted an *aide-mémoire* that was delivered to foreign diplomatic missions and international organisations. Its object was a denunciation of Greece for the way in which it had thus far implemented the Interim Accord".<sup>10</sup>

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<sup>9</sup> Interim Accord, *ibid.* article 7, paragraph 3.

<sup>10</sup> Tziampiris, A. 2005. The name dispute in FYROM after the signing of the Interim Accord. In: E. Kofos and V. Vlasidis, eds. 2005. *Athens-Skopje: An Uneasy Symbiosis*. Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP), p.231.



The main confrontations between Greece and Macedonia stemmed from the Interim Accord's insufficient foresight – for example many problems occurred with the issuing of visas, due to the additional administrative and bureaucratic burden imposed by the Accord. Greek authorities rejected passports which contained the Slavic names of Greek cities and villages. The Macedonian discontent turned into an official battle of words, which only resulted a negative opinion from even the moderate thinking Greeks, who were supportive in the first period after the signing of the Accord.

The official opinion on the name issue constantly changed in the official Macedonian approach depending on the economic situation, the newly elected government's political orientation and the global political events. The period of 1995–1996 was marked by uncompromising intransigence towards finding a solution for name which pleases both sides. This approach was also represented in the early years of the Georgievski-government (1998–2002), which chose a strategy of spacing non-opportunism – the Macedonian government avoided the collision with Athens but maintained active economic cooperation in order to strengthen the domestic economy. Although the relations between Greece and its northern neighbour under the Simitis-Georgievski duo was characterised by initiative thinking the prospects of Macedonia to get closer to the European Union remained shallow. In this period the Macedonian foreign policy adopted a strategy of ignorance, which main goal was to ignore the problem of the name. The events which took place after 1999 gradually transformed the way of thinking in Macedonia concerning the state's future. "Gradual worsening of inter-community relations within *FYROM*, resulting in dissociation of the name issue from matters of state security (2000–2001)".<sup>11</sup>

### 3. Path towards the European Union

The ethnic tension occurred by the events which took place in neighbouring Kosovo took their toll on the Macedonian economy, and reshaped the state's political guidelines. The 1991 Constitution of Macedonia established a homogeneous state-type which treated the Macedonians as higher-class citizens compared to the increasingly growing Albanian minority. The clashes of 2001 were result of this legal and administrative structure of the state. The Ohrid Framework Agreement did lift momentarily the responsibility off the shoulders of the Macedonian government to make the vital administrative reforms in order to change from homogeneous to heterogeneous the structure of the Macedonian state. But on the long-term it would be necessary to expand the rights of the Albanian minority.

"The Ohrid Agreement is a document which established the basic principles of a civil state. Despite the claims of the Macedonian constitutionalists that the interventions in the preamble of the constitution are made in the spirit of the European constitutionalism and the radical separation from the traditional concept of a nation-state, the changes in the Constitution were

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<sup>11</sup> Ibid. p.230.

more in the terminology level, than in terms of principles.”<sup>12</sup> Nonetheless Macedonian nationalism is still noticeably present in the past decade’s Macedonian politics. The dual political system somewhat integrated the Albanian factor by the Badinter principle, but I am sceptical whether the increasing Albanian population would settle for its present status. According to last national census the Albanians made up more than a quarter of the total population of Macedonia, but the rapid population growth among them is likely to result a dual state in its true meaning. Some experts argue that the rapid increase among Albanians in Macedonia resulted that today approximately one third of the population is Albanian. The unrests showed in 2001 that Albanians demand more rights, the question whether the power distribution is fair can turn out of the blue once more in the near future, signs for this process were visible for instance in 2012 and 2013 when Clashes in Skopje and Tetovo between ethnic Albanians and the Slavic population ended in fights and beatings. “On April 12, the day before Easter, near Skopje, on the shore of Lake Smilkovsky, four Slavic Macedonians were killed. Police circulated pictures of the tragedy site clearly depicting an Albanian flag. This was followed by a massive protest in Skopje with anti-Albanian slogans, which resulted in clashes with police.”<sup>13</sup>

The ethnic situation, the external tensions with neighbouring states, the failing economy after the global recession all lead to the idea that Macedonia has no other possibility or alternative to join as soon as possible the European Union. In 2013 Macedonia is lagging behind on this vital task to complete her European integration. The situation for Macedonia has clearly deteriorated, the small Balkan state was the only one which came out of the dissolution of Yugoslavia without any serious war nor blood loss, and still today Slovenia and Croatia are already member states; Serbia and Montenegro are way ahead in the process of joining; and only Bosnia and Kosovo are behind Skopje.

The process of integration towards the European Union was quite promising for Macedonia; Skopje was the first post-Yugoslavia state that signed the Stabilisation and Association Agreement (SAA) on 9 April 2001, which entered into force in April 2004. On 22 March 2004 Macedonia submitted its application for EU membership, and the European Council of December 2005 granted the status of candidate country to her. “In October 2009, the Commission made recommendations to the Council to open negotiations with the country and to move to the second phase of SAA Implementation. These recommendations were reiterated in 2010 and 2011”.<sup>14</sup>

As the European Commission has reiterated every year since 2010 that even though Macedonia continues to sufficiently fulfil the political criteria for membership of the European Union, the Macedonian politicians have to make more efforts to settle down first their conflicts with Greece and Bulgaria. Besides Greece, Bulgaria, under the Borisov-cabinet

<sup>12</sup> Andreevska, E. et al., 2011. Political spirit and the state administration functioning according to the OFA. In: B. Reka, ed. 2011. *Ten years from the Ohrid Framework Agreement. Is Macedonia functioning as a multi-ethnic state?* Tetovo: SEEU.

<sup>13</sup> Lulko, L., 2012. Macedonia: Albanians want more. *Pravda*, 15 April 2012. [online] Available at: <<http://english.pravda.ru/world/europe/15-05-2012/121114-macedonia-0>> [Accessed on 3 October 2013].

<sup>14</sup> European Commission, 2012. *The Former Yugoslav Republic of Macedonia 2012 progress report*. SWD (2012) 332 final, Brussels, 10 October 2012, p.4.

has withdrawn its unconditional support, and sharply changed its tone towards Macedonia, for the alleged usurpation of its national cultural heritage and for the discriminative manner indicated by the Macedonian authorities towards the Bulgarian minority living in the country, although the official census statistics point out that only couple of thousand Macedonian citizens declared themselves to be ethnic Bulgarians.

Despite that since 2005 Greece has not showed further interest to speed up the negotiations with Macedonia, the European Commission has proposed new, alternative ways to help Macedonia's bid to become an EU-member. Such initiative was the High Level Accession Dialogue (HLAD), which was launched by the European Commission in the spring of 2012, after the umpteenth Greek veto. According to the European Commission the purpose of the HLAD was to inject new dynamism and speed up the EU accession reform process, thereby strengthening confidence and boosting the country's European prospects. "Four high-level meetings have been held so far in the framework of the HLAD: in March, May and September 2012 and in April 2013."<sup>15</sup>

The aforementioned prospects were meagre, due to the fact that after the Greek economic crises Athens did not showed any willingness to restart the multilateral negotiations with Macedonia and the UN mediators. The Greek governments from 2008 till this very day fight serious internal instabilities and a diplomatic conflict based on principles of cultural pride seems to be at secondary importance. Some experts believed that after the economic crises Greece might have had bended under the international pressure, but the reality is that neither of the political forces in the international diplomacy wanted to engage in forceful act in order to probate the Macedonian interests. The nationalistic and adamantly stubborn policy by the Gruevski-cabinet towards Greece has estranged even its loyal allies, such as Germany or the USA, so in the time of the crises neither of them wanted to mount additional pressure on Athens to resolve this meaningless to the outside world conflict.

In fact neither the Macedonian, nor the Greek government wanted to get involved in an unrealistic diplomatic struggle, and to give unfounded promises to the domestic public opinion. In Athens it was a matter of prestige not to be defeated on another "battlefield", the cabinets' prestige in this critical period was at historic low and Greek society was determined not to give up on its national principles even in crucial periods such as this. The Macedonian government was in a similar position, due to the fact that its popularity has dropped in 2012. This was explained by the lethargy and the apathy of the Macedonian society towards all the political parties in the country. The overall lethargy is a well-known phenomenon in almost all the ex-Yugoslavian states, but in Macedonia is due to not only the low standard of life but also to the sequential failed attempts by the governments in the past 15 years to join the European Union. Macedonia is lagging behind in the integration process and the society is tired of waiting for the political promises made on this account. The duality of the political system in Macedonia does not allow a political rejuvenation, and the social demand for a new force is also scarce. The state control is overwhelming and constant; there is a well

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<sup>15</sup> Report from the European Commission to the European Parliament and the Council, 2013. *The Former Yugoslav Republic of Macedonia: Implementation of reforms within the Framework of the High Level Accession Dialogue and promotion of good neighbourly relations*. COM(2013) 205 final, Strasbourg, 16 April 2013, p.3.

functioning intimidating apparatus which controls the internal opposition initiatives. In these circumstances it is not surprising that the ruling Internal Macedonian Revolutionary Organisation – Democratic Party for Macedonian National Unity (VMRO-DPMNE) has managed to cling to the power after the 2008 early parliament elections. In 2008 Greece vetoed Macedonia's bid to become a NATO-member, and Gruevski's ruling VMRO-DPMNE had to pull out a fast political manoeuvre in order to preserve its political positions, as a result the weak Social Democratic Union of Macedonia (SDSM) could not regroup and prepare in such a short time and remained in opposition.

The SDSM after 2005 fell into a deep, internal political crisis, the main opposition party to this very day could not stand up to the VMRO-DPMNE, even the leader change in 2013 could not raise the popularity of the party. It was clear that former Prime Minister and then SDSM-president Branko Crvenkovski by 2013 was a spent force in the political landscape, but the final factor which led to the election of Zoran Zaev as the new man in charge was the results of the political battles which started in the autumn of 2012.<sup>16</sup> First the conflicts within the coalition between the VMRO-DPMNE and the Albanian party of the Democratic Union for Integration (DUI) were not handled in the proper manner by the opposition leader, then the political mass clashes which took place on 24th of December 2012. The submission of the law for the Macedonian Defenders in the Parliament and the adoption of the Draft Budget for 2013 have increased the politically tense situation in the country. "The law on the situation of the Macedonian Defenders was disputed by the second governmental party DUI, the leading Albanian party in the Government of the Republic of Macedonia, because this law would regulate only the special rights of the members of the Macedonian police and army forces who were active during the war in the former Yugoslav federation, during the crises in 2001 in Macedonia, and of those Macedonian soldiers who are taking part in the NATO and similar international missions worldwide, but does not include the members of the former UCK".<sup>17</sup>

The opposition clearly obstructed the parliamentary work during the last months of 2012; even the state budget of 2013 was at risk due to the protests of the SDSM MP-s. After the ruling coalition submitted a draft budget plan and the Speaker of the Parliament, Trajko Veljanovski scheduled the plenary session without rescheduling the regular sessions of the Finance and Budget Committee and Legislative Committee on the Amended Draft Budget for 2013, the SDSM argued that this decision is unconstitutional and against the procedures of the Macedonian Assembly. This was followed by mass protests and physical confrontations in the parliamentary hall, which resulted the expulsion of the media and opposition from the parliament.

The next months were marked by a bitter quarrel between the political forces, and the absence of the SDSM from the parliamentary meetings, the government has accused Crvenkovski's party for trying to occupy the power over the state through non-democratic ways. On the other

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<sup>16</sup> Milanov, V., 2013. His playing with him, like a Greek with a Macedonian. *Kitekintő*, 18 April 2013. [online] Available at: <[http://kitekinto.hu/europa/2013/04/18/ugy\\_jatszok\\_vele\\_mint\\_gorog\\_a\\_macedonnal/#.UIF6KIZ3ZPA](http://kitekinto.hu/europa/2013/04/18/ugy_jatszok_vele_mint_gorog_a_macedonnal/#.UIF6KIZ3ZPA)> [Accessed on 6 October 2013].

<sup>17</sup> Czymmek, A. and Pasoski, D. 2013. *Difficult times in Macedonia. Political crises report*. Skopje: Konrad Adenauer Stiftung Country Reports, p.1.

hand the SDSM demanded early parliamentary elections which should be held in the same time with the local, municipal elections in the spring of 2013. Neither of the opposite sides could agree on the resolution to the internal political crises, so the European Union had to mediate between the VMRO-DPMNE and the SDSM in order to preserve the remaining of its diplomatic reputation. Athens and Sofia instantly remarked that not only Macedonia is not ready to join the EU due to its external conflicts, but also the internal situation is jeopardizing its integration as well. In March 2013 an agreement was finally concluded with the two main parties, deciding that they will participate in the elections on March 24, 2013, but after the elections which the ruling party overwhelmingly won, the discussions and the tension remained. The social democrats again urged early elections, and further more to be declared that the VMRO-DMNE was fully responsible for the disorders conducted in December 2012. Eventually neither of the demands of the opposition were granted fully, the mediators acknowledged that the ruling party was partially responsible for the discontent, but the main request for early elections in the autumn of 2013 were rejected. The election system in Macedonia is an evident source of conflict; many unsolved questions may blur the outcome of the next elections, which are going to take place in the spring of 2014 for the new president of Macedonia. For example the regulation of casting of votes coming from Macedonians living abroad is obscure, neither the weight of their voice nor the size of the electoral districts were proportional in 2011, when the first elections took place where votes coming from abroad were permitted.<sup>18</sup>

The political instability has raised concerns in Europe whether Macedonia is ready to start the long-awaited pre-accession talks with Brussels, regardless to the external conflicts. In 2012 the European Commission and European Parliament, which are predominantly for the starting of the opening of the pre-accession chapters, stated that further efforts are needed in areas such as the environment, social policy and employment, as well as the regional policy and coordination of structural instruments. The HLAD 2013 report also stated that “there are continued concerns about self-censorship, poor labour rights of journalists and the public’s access to objective reporting. Moreover, during the local elections in March, observers noted a lack of balance in coverage by the public broadcaster and private stations”.<sup>19</sup> Even though there are deficiencies which need further efforts from the Macedonian government in order to comply to the common European requirements, Macedonia is ready to start the pre-accession talks.

The Bulgarian–Macedonian conflict<sup>20</sup> is much more manageable than the name dispute with Greece, even though the new Bulgarian government led by Plamen Oresharski shares a similar view on the Macedonia question as his predecessor. Bulgaria has raised her voice against the nationalistic cultural policy of Macedonia, but Sofia’s position is way more positive than Athens’. The Greek government has revealed in September 2013 its

<sup>18</sup> Popovska, T. 2013. New election rules for new political quarrels. *Utrinski Vesnik*, 4 October 2013. [online] Available at: <<http://www.utrinski.mk/default.asp?ItemID=84A1D4492DFF654EBA94FCB838089285>> [Accessed on 5 October 2013].

<sup>19</sup> Report from the European Commission to the European Parliament and the Council, *ibid*, p.4.

<sup>20</sup> For further information see: Milanov, V., 2013. The Bulgarian–Macedonian Conflict. In: A. Lőrincz, ed. 2013. *The Balkans Dialogue: Conflict Resolution and EU Accession Politics in the Balkans and Turkey. Conference Proceedings*, pp.77–88.

preconditions for the name issue, which must be realised in order for the Greek support. “We support a mutually acceptable composite name with a geographic determinative prefix that will be for general use – *erga omnes*. It is a final, clear, and functional solution.” – said Evangelos Venizelos, Foreign Minister of Greece.<sup>21</sup>

In the 2013 annual progress report for Macedonia the European is likely to propose once the starting of the pre-accession talks, but it is difficult to imagine that Greece would change her mind on the issue. Not to mention that Athens has thoroughly stressed that Macedonia has to settle its conflicts and just afterwards can begin its accession bid. The settled neighbourly relations are a vital condition for a smooth integration process. Macedonia has operated in the past two years in vain dreams, which were based on 2011 International Court of Justice (ICJ) judgement. The ICJ has ruled that Greece, in accordance with 1995 Interim Accord has no right to object the accession of Macedonia to an international or regional organisation if she applies under its provisional name, *FYROM*. Officially Macedonia has applied under the name of FYROM, but Skopje also breached its own obligations – she has used several Hellenic national symbols and have not imposed corrective steps in order to please Greece.

My final conclusion is that Macedonia is ready to start the pre-accession talks, but it is not possibly until she settle its conflicts with Greece (and Bulgaria). The UN-accession can be a guideline for the Macedonian politicians, because the state today is in a similar position as it was back in 1993 – only a compromise can lead to a success, the nationalistic policy is bound to be retentive.

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<sup>21</sup> Solid stance from Athnes: geographical definition and “*erga omnes*”. *Dnevnik*, 23 September 2013. [online] Available at: <<http://www.dnevnik.mk/default.asp?ItemID=4D8C4F835A1D824590966E670245DDAC>> [Accessed on 1 October 2013].

## SECTION IV

### BEYOND THE EUROPEAN UNION

#### EUROPEAN INTEGRATION PROCESS: YESTERDAY AND TODAY

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**Key Words:** *integration, discrimination, future, process, regionalism*

#### **Abstract**

*This article aims to analyse the integration process. European construction or architectural arise through analysis of European integration process starting from the vision of their fathers up to nowadays.*

*This paper's conclusions come through analyses of the integration process since the community of coal and steel until today. The enlargement process helps in fulfilling the "dream" of the fathers of Europe's building: "A joined and free Europe, as a step forward to European architecture" Since 6 to 28.*

*European architecture today is a world power in economic, trade, and economic policy making it thus the most developed regional group compared to other regional groups. So, the analyses of European integration process will begin with European Community for Coal and Steel which is a supranational organisation, which laid the foundations of a new organisation, starting by a common market of coal and steel.*

*The European construction started as the first phase of the integration process, the concept of coal and steel announced from Robert Schuman on May 9, 1950, will remain in the history as the Schuman Integration Plan. "By creating an economic Europe we will create a political Europe at the same time, whereas the united Europe will not be made immediately, even not through a general construction, but it will be created through concrete achievements which will create a solidarity fact".*

*The European Union today, formed by many member states with different traditions, different languages, but with the same values keeps moving forward based in the expansion and reforms process. Today the states must leave nationalisms, proud, by bringing a new epoch in European regionalism, where important is the individual as a citizen and not the country where he is from.*

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**MODERNISATION, MOBILITY AND ETHNICITY****Sînziana Preda**

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**Key Words:** *migration, Turks, Tatars, socio-economic changes*

**Abstract**

*As some of historic minorities from Romania are obviously shrinking (due to permanent or partial migration, other options of ethnic claiming, negative demographic growth, acculturation), investigating, patrimonialisation of their culture and analysing the means already used for its conservation by its creators is imperative. Starting from the cultural similarities and differences, our proposal is intended to be a study regarding the mobility level in a particular ethnic group (the Turkish and Tatar community in Dobruja region) which is less visible within the minorities of Romania; this is due to its ethnic, confessional and cultural specificity. On the other hand, we wanted to see if the migration routes of its members follow patterns similar to those identified in other ethnic groups. Based on fieldwork we were able to determine some typologies of migration, structured according to historical age, social and economic status, family patterns, and education. Personal motivations also played an important role. Especially the young people of the community oscillate between the heritage that is passed by the older generations, the influence of acculturation and the socio-economic system pressure. Some of them choose permanent emigration and Turkey is a favourite destination, at least for study.*

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## A MULTILEVEL AND MULTIDIMENSIONAL ANALYSIS OF THE RIGHTS AND DUTIES OF THE EUROPEAN CITIZENSHIP

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**Key Words:** *European citizenship, multilevel and multidimensional nature, rights and duties*

### **Abstract**

*A majority of democratically-run systems of governance exhibit the notion of citizenship. This paper will therefore discuss the multi-layered nature of European citizenship, reflecting upon the local, regional, national and European concepts. Painter (1998, p.1) argues “since citizenship cannot be wholly divorced from the identity, care needs to be taken to ensure that any definition of European identity is inclusive and supportive of ethnic and cultural difference”. Both, nationality and citizenship correspond to two distinct kinds of membership, which are closely linked despite their different foundations (Delanty, 2007). Therefore, it is essential to analyse the concept of multi-level citizenship and emphasise the different rights that derive from them, or lack of thereof.*

*European citizenship incorporates formal membership of the EU, whereas national citizenship covers the membership of regional and national communities (Kivisto and Faist, 2007). The nature of multi-level European citizenship becomes one of the major barriers for turning a legal form of European citizenship into a social practice. Different polities may derive from these levels. As Delanty (2007) states, European citizenship concerns the EU polity on both national and transnational levels, while cosmopolitan citizenship does not have a precise relation with a particular polity. Membership in these overlapping communities is often defined by rights, obligations and responsibilities stemming from belonging to the community.*

*The laws in the communities essentially include and protect people, but also tend to exclude the outsiders (Mohanty and Tandon, 2006). Natives, on the other hand, are the ones with identity, status, holding a passport that gives them access to political, social, civil, and economic rights, as well as duties of citizens. Outsiders lack all these entitlements. Therefore, citizenship embraces not only protection, but inequality and discrimination as well. Equality may originate between those who do hold a citizenship and own a passport. However, between those who do own and the ones that do not, inequality and prejudice may arise.*

*Citizenship rights may also have a multi-dimensional character. A common distinction is made between negative and positive rights. Negative rights are often referred to “freedom from” something that constrains one’s liberty, for instance, from fear, hunger, want, or slavery (Bowie and Simon, 2008). The conceptual framework of positive rights, or “freedom*

*to” something implies freedom to speech, political participation, economic activity, social interaction, etc. The European Union has established a wide range of freedoms, including freedom of movement of goods, services, capital and labour. Additionally, the EU Charter of Fundamental Rights distinguishes civil, political, social and economic rights. The entitlements and duties citizens have in interpersonal relations are often recognised as civil rights.*

*Political rights, on the other hand, include individual’s (citizens and companies) rights in their relation to the state. Fundamental social rights are the rights to which a citizen is entitled as a member of a community. Economic rights, moreover, include the rights concerning economic transactions.*

*Occasionally the categories of civil, social, political and economic rights may intersect (Barzel, 2002). For example, the freedom of association is at the same time a civil right to protection from discrimination on grounds such as race, national origin, religion, etc.*

*The conceptual framework of citizenship has eliminated the societal differences by establishing equal rights and duties of all people in the state. On the other hand, citizenship itself has constructed a new form of inequality, which distinguishes between the citizens endowed with rights and non-citizens lacking these entitlements. Moreover, the ability to access such rights may be subject to the socio-economic positions of individuals. These often vary by nation, yet common characteristics of class division are based on ascribed statuses.*

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**FACING “FRENEMY” FIRE:  
THE SOUTH CAUCASUS BETWEEN  
EU AND RUSSIA SECURITY INTERESTS**

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**Key Words:** *European Neighbourhood Policy (ENP), external governance, foreign policy, geopolitics, regional hegemony*

**Abstract**

*Russia’s “Near Abroad” is a contentious region, within which the competitive friction between the European Union (EU) and Russia is a high-stakes political power game and the resurgence of a 19th century “Great Game.” Within the Caucasus, questions presiding over the establishment of zones of influence and political control have assumed a leading position in the on-going debate over the reorganisation of the European “Common Neighbourhood” and the geopolitical positions of the EU and Russia as a whole. Shunning the term “Common Neighbourhood,” Russia has pursued its own agenda in what it refers to as the “regions adjacent to the EU and Russian borders” or the expanse comprised of the former Republics of the USSR. In the last ten years, Russia has not been reticent about its intentions to defend this territory. This paper assesses the European Union (EU) and Russian approaches to the “Common Neighbourhood,” and considers key factors in EU and Russian power projection in the South Caucasus. It examines elements that specifically drive Armenia closer to Russia and the EU’s efforts to balance this through its own external governance. In doing so, it looks at a range of “carrots” and “sticks” that both the EU and Russia, as geopolitical actors, employ to gain traction into this shared space, which has both reified and obscured national borders in the region. A theoretical framework of geopolitical strategies is employed to establish the context in which both the EU and Russia operate with respect to the South Caucasus, and establishes the basis for understanding how both actors respond to one another in their respective attempts to exert their dominance in the region. The argument is made that despite protracted efforts by the EU to establish its influence over the South Caucasus more generally, Russia’s geostrategic posture is better suited to secure a true and concrete zone of influence within the region.*

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## **TURKISH AND TATAR IDENTITY IN DOBRUDJA REGION, ROMANIA**

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**Key Words:** *Turks, Tatars, identity, Dobrudja*

### **Abstract**

*The present study is a primary effort to identify and descript the identitary dynamics of the two most ancient ethnic communities of Romania, the Turks and Tatars. As a context framing, the paper shows the historic and demographic evolution of the Turks and Tatars all throughout the 20th century. Chronologically, the emphasis falls upon the communist period, to better envisage the way in which political, economic and social changes in the era were reflected in the ethnic and religious structures of the Turks and Tatars in Dobrogea and consequently to extend on identitary evolutions after 1990. By adding the archive research to journalistic text analysis and field research (interviews, participative observation) the study traces the memory patterns of the communist period, the types of relations and attitudes created in relation to the regime, together with the evolution of self-image and image of the other (Turk-Tatar), generated by the main identitary landmarks: ethnicity, religion, origins, mother tongue and traditions, inside the socialist society as well as after the fall of the communism.*

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## THE TENDENCY OF CRIMES COMMITTED WITH TOOLS IN HUNGARY

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**Key Words:** *public administration, effectiveness and efficiency, procedure*

### **Abstract**

*Crimes committed with several types of tools are some of the most frequent crimes committed in Hungary as the number of robberies, breaches of domicile and other types of crime committed by armed offenders has been growing rapidly in recent years. This is further exacerbated by the fact that public security has greatly deteriorated and, as a consequence, armed self-defence has become a common practice. In other words, more and more people commit crimes using several types of tools such as knives. A major problem in this connection, however, is the fact that society seems to be unaware of this tendency and it seems to be unclear even for lawyers what the exact meaning of this special institution is.*

*In my presentation, therefore, my aim is threefold: First of all, to introduce briefly the history of the definition of crimes committed with tools; Secondly, to give an overview of these definitions and of the above mentioned crimes; and thirdly, to analyse and interpret them in the light of the latest legislation.*

*I am fully convinced that the present understanding of the definitions of armed crimes as well as their regulation is not fully satisfying. Judicial custom and the relevant statistics should be examined in order to see the tendency of these crimes starting from the earliest regulations to the latest ones (e. g. the new Criminal Codex). By relying on statistical data, I intend to represent the frequency, motivation and punishment of armed crimes in a systematically drawn chart. On the basis of this chart, I will point out the exact reasons why offenders use guns or explosives or the replicas of these, when committing crimes which seem to be very important by regarding the security issues in the European Union.*

*In the concluding part of this presentation, I will demonstrate the development of armed crimes as a special institution of criminal law and while emphasizing the changes in the regulations. I truly believe that pointing out major anomalies in the regulations will serve as great help to criminal lawyers and criminologists in their effort to make regulations that can eventually lead to the decrease of armed crimes.*

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## **I. Introduction**

Crimes committed with several types of tools are some of the most frequent crimes occurring in Hungary as the number of robberies, breaches of domicile and other types of crime committed by armed offenders has been growing rapidly in recent years. This is further exacerbated by the fact that public security has greatly deteriorated and, as a consequence, armed self-defence has become a common practice. In other words, more and more people commit crimes using several types of tools such as knives, sticks and other instruments. A major problem in this connection, however, is the fact that society seems to be unaware of this tendency and it seems to be unclear even for lawyers what the exact meaning of “crimes committed with tools” is.

In my presentation, therefore, my aim is threefold:

First of all, to introduce briefly the history of the definition of crimes committed with tools; Secondly, to give an overview of these definitions and of the above mentioned crimes; and, Finally, to analyse and interpret them in the light of the latest legislation.

I am fully convinced that the present understanding of the definitions of crimes committed with tools as well as their regulation is not fully satisfying. Judicial custom and the relevant statistics should be examined in order to see the tendency of these crimes starting from the earliest regulations to the latest ones (e. g. the new Criminal Codex). By relying on statistical data, I intend to represent the frequency, motivation and punishment of armed crimes in a systematically drawn chart. On the basis of this chart, I will point out the exact reasons why offenders use guns or explosives or the replicas of these, when committing crimes.

In the concluding part of this presentation, I will demonstrate the development of crimes committed with tools as a special institution of criminal law and criminology while emphasizing the changes in the regulations. I truly believe that pointing out major anomalies in the regulations will serve as great help to criminal lawyers and criminologists in their effort to make regulations that can eventually lead to the decrease of crimes committed with tools.

## **II. The History of the Definition of Crimes Committed with Tools**

Before showing the tendency and frequency of crimes committed with tools, I would like to show the development of this term and its history in order to emphasise the fact that without understanding the meaning of the crimes committed with tools, this tendency cannot be properly examined.

### 1. The Middle Ages

The history of armed crimes dates back to the Middle Ages when, in the 11th century, the Hungarian King, László (Ladislaus) I, had created an act in which it was stated that using a

sword when murdering somebody should be punished more strictly.<sup>1</sup> In the 15th century, King Matthias had forbidden the holding of weapons in pubs because of frequent robberies, murders and other crimes.<sup>2</sup> In the 16th century, armed crimes had continued to grow, therefore, King Ferdinand I made the punishment of these crimes even stricter<sup>3</sup>. The first real regulation, however, can be connected to King Rudolf I, who had stated that the contentious parties were forbidden to use weapons during a fight and that they had to keep the laws.<sup>4</sup> The draft of the new criminal codex created by King Joseph II in 1795 had contained even more accurate regulations about this issue, especially about homicide, however with the death of King Joseph II none of these had any real effect on the Hungarian criminal law.<sup>5</sup>

## 2. The effects of the Dualism and the World Wars

In the period of the so-called dualism, legislation had gathered speed and, as a result, the compilation of a Hungarian criminal codex became more and more urgent. As a consequence, the legislature had put together the Csemegi Codex in 1878, which was a modern penal code but contained nothing about crimes committed with tools. It has used the term without a definition thus giving the third power the opportunity to judge cases by making decisions on their own without providing a sufficient definition. The next act about offences passed in 1879 had punished even more types of armed crimes such as armed begging, for example, but still not providing any definition. This resulted in judicial high-handedness, which led to the imprisonment or even execution of many innocent people. It can also be seen that the term “crimes committed with tools” was not only specified for criminal law but also for the law of offences, which means that a wider range of criminal actions could be punished.

Before World War I, there had already been an act which used the term mentioned above in a special way: it used it only for the defence of the officers, moreover, those who had committed a crime using a tool against an officer had been sentenced to life sentence and been given a penalty, in most cases.

During the 20th century, the legislature had increased the number of crimes by defining more types of violation as crime and, as a result, the number of crimes committed with several types of tools had also increased. The first act passed in 1921 declared that those who attempt to overturn the legal order of the state and of the society in order to establish the absolute rule of a particular social class in violent ways and, for this purpose, obtain large quantities of arms, ammunition, and explosives, or any other substance suitable for killing people, should be punished more severely.<sup>6</sup> These types of crimes were even more widespread in 1924, when

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<sup>1</sup> Chapter 8 about Homicide of the Second Book in the Decrees of King Saint Ladislaus.

<sup>2</sup> Act LXVI of 1486 who would like to go to a pub should put his weapon down.

<sup>3</sup> Act of LXVII of 1563 punishment of those who take weapons and other forbidden material to the Turkish.

<sup>4</sup> Act of XXV of 1588 the contentious parties have to fight with the laws not with weapons. The replacement of the fortress at Bajcs, introduction.

<sup>5</sup> Hajdu, L., 1971. *The Draft of the First Hungarian Criminal Codex (1795)*. Budapest: Közgazdasági és Jogi Könyvkiadó, p.329.

<sup>6</sup> Act III of 1921 about the better and more operative defence of the order of state and of society § 1., third sentence.

the legislature started to punish the use of explosives and, moreover, homicide committed with explosives could even be punished with life sentence. Armed crimes were also common among soldiers, which meant that they had to be punished more strictly. That is to say, if a soldier used force against his fellow soldiers, had to be suspended and imprisoned. It must be emphasised, at this point, that this had been the first regulation using the term explosives. Accordingly, I would like to point out that this had also served as a basis for the definitions included in the socialist and the other criminal codices.<sup>7</sup>

Between the two World Wars, the regulation had changed only a little even though new acts had been created on the ground of crimes committed with several types of tools. One of them was created in 1930 and contained regulations about the criminal codex of soldiers. It applied the term, however, did not provide a definition. In addition, one of its rulings stated that martial law should be introduced if the soldier commits a crime against his alderman by using a tool or equipment.<sup>8</sup> It actually proposed martial law for the incident when someone committed a crime against an officer by using a tool dangerous for life.<sup>9</sup> Another ruling of this act had said that a theft should be punished more strictly if it was committed with a tool or with equipment which could be used to bear down personal resistance.<sup>10</sup> It can be seen that the creator of the act had used modern terms but had separated the tools depending on whether they were suitable to murder someone or bear down someone's resistance. It is necessary to emphasise here that both parts have to be included in the contemporary definition of the term so that the judge can confirm that the crime has been committed with a tool.

These acts introduced rules only in connection with the regular criminal law. I am fully convinced that the criminal law applied for soldiers and policemen is also important especially when considering the fact that most of the acts contained rulings about crimes committed with several types of tools. The act created in 1932 contained rulings about the latter and enumerates the cases in which a policeman is allowed to use his weapon. This means that if he uses it in any other cases, he breaks the law. At the same time, there was no regulation in this act about the responsibility and the punishment of the policeman in this case.<sup>11</sup>

After World War II more guns and all kinds of explosives had become available as well as more people could find or buy some of these tools suitable for taking a person's life. As a result, the creator of the law needed to introduce new terms, new acts and apply them for even more crimes or offences.

The 3rd supplementary article of the Csemegi Codex had stated that crime should be punished more strictly if it was committed intentionally and the perpetrator used or threatened with a

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<sup>7</sup> Act XV of 1924 about the crimes committed with the creation, hold and use of explosives and exploders § 1.

<sup>8</sup> Act III of 1930 about the putting into force the Criminal Codex of Soldiers and about completion and modification of the ordinary criminal acts connected to the Criminal Codex of Soldiers § 42. 1.

<sup>9</sup> Act III of 1930 § 45.

<sup>10</sup> Act III of 1930 § 75.

<sup>11</sup> Act XIII of 1932 about the right to use of weapons by the Hungarian Police § 1–3.



weapon.<sup>12</sup> It can be seen that at that time there was no real difference between guns as weapons and tools as weapons as it was only the dangerousness of these tools that mattered.

After World War II, legislation had changed as a result of which the number of acts on criminal assault had decreased. Until 1989 only three acts had been created: the 3rd complementary act of the Csemegi Codex, the socialist Criminal Codex and the modern Criminal Codex. The 3rd supplementary article of the Csemegi Codex did not introduce the definition of crimes committed with tools although it used the term in the summary of offences.

### 3. The socialist Criminal Codex on this issue

The first act that had introduced the definition of crimes committed with tools was the socialist Criminal Codex compiled in 1960. According to this codex, a crime is committed with tools when the offender commits the crime by holding a tool which can be used to prevent or overcome the resistance of someone and can cause death.<sup>13</sup>

This applies to many types of crime including robbery, breach of domicile, plunder, etc.

When examining this definition it has to be stated that it is a completely modern definition including every part of the contemporary regulation.

However, the problem with this regulation was that it was inaccurate and insufficient especially because it did not specify which tools are suitable for taking a person's life. If not properly defined, anything can be regarded as a deathly tool.

### 4. The Criminal Codex of 1978

In the next 20 years after 1960, a new Criminal Codex had been created in 1978 which had also used the same terms as the socialist Criminal Codex, so there had been no changes made in the term. Accordingly, it had still stated that a crime is committed with a tool whenever it is committed by holding a tool to prevent or overcome someone's resistance and can cause death.<sup>14</sup>

However, the range of crimes which are committed by using tools had been extended and as a result, nearly 16 types of crimes qualify as that.

This Codex had been in effect for 25 years, which meant that the judicial practice relying on it was highly comprehensive: the judges mostly interpreted the differences between the use, the holding and the commitment of tools, as well as between the definition of tools suitable for causing someone's death and prevent or overcome someone's resistance.

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<sup>12</sup> Act XLVIII of 1948 about the termination and supplement of anomalies in the criminal codices § 15.

<sup>13</sup> Act V of 1961 § 115. third section, second sentence.

<sup>14</sup> Act IV of 1978 about the Criminal Codex of Hungary § 137. 4. b).

In one such case, the Curia of Hungary had declared that the alleged intent for homicide cannot be deduced from the type of perpetration and from the levelling of the weapon suitable for taking human life. In this particular case, the defendant was carrying a sharpened sickle and as he was in an increased emotional state because of the troubled relationship with the victim, he hit the victim's neck with the sickle. The sickle, in this respect, was a tool qualifying as a human-lethal means. This cannot be, however, applied for the crime of murder as an aggravating circumstance.<sup>15</sup>

The Curia of Hungary had made an interesting decision about the subjective dangerousness of tools when it had to decide whether a plastic helmet could be considered as a tool which can be used to prevent or overcome someone's resistance and can cause death. The Court came up with an interesting solution: a plastic helmet cannot be considered as a human-lethal means.<sup>16</sup> In my opinion, the use of a "general" term, however, is extremely problematic because it does not include all the cases. A plastic helmet can easily be used to prevent or overcome someone's resistance and be a lethal weapon.

### 5. The new Criminal Codex

Since July 1st 2013, Hungary has had a new Criminal Codex created in 2012, which has changed nothing about the term, however, extended the range of crimes and eliminated the difference between the dangerousness of armed crimes and crimes committed with tools. Analysing the "new" definition it can be seen that it is just as comprehensive as it was earlier but, on the other hand, it is still inaccurate.

### **III. Statistics – Changes between 2009 and 2013**

In 2009, 3 years before the new Criminal Codex was made, the Hungarian police cooperating with Hungarian prosecutors started to collect statistical data on crimes committed with tools. At this point, I would like to present some rather interesting findings.

Firstly, considering registered crimes, we can see that the tendency of crimes committed with tools is considerably increasing. Since 2009 the number of registered crimes committed with tools has increased by nearly 315 %, which is rather surprising as a new and stricter criminal policy of the government has already been in effect.

The age group of the offenders has also changed: the use of several types of tools among under-age people has become more common and has been increasing slowly by nearly 50 %, which raises the question why it is more common for this age group to use several types of tools? I think the reason is that these tools can be found everywhere, nearly anything can be used a weapon, for instance, a knife, a stick or even a plastic helmet. Among young adults the tendency has also been increasing by nearly 80 %, while with people between 25 and 59, the

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<sup>15</sup> BH1976. 247. decision of the Hungarian Supreme Court.

<sup>16</sup> BH1977. 261. decision of the Hungarian Supreme Court.

results are almost the same except that the size of the increase is by 200%. The most surprising fact is that among people over 60, where the greatest increase can be seen, however, the number of offenders is still low.

As far as the gender of the offenders is concerned, a great difference can be found: only 9 % of the offenders are female, the rest are male. This number, however, changes in the different age groups, which is an important fact as the population has been growing old. The number of crimes committed with tools grows until the age of 60, over which the number of offenders starts to decrease. The causes derive from the fact that aggressiveness and the frequency of committing crimes decreases with age.

In this overview of the types of crimes, changing tendencies can be seen: Firstly, the number of crimes committed against a person is increasing greatly; secondly, the number of crimes committed against the polity, the judicature and the purity of public life shows a very little increase, more likely to stagnate with a little increase. The number of crimes committed against public order shows a steep rise, from 144 cases in 2010 it has risen to 653 case in 2012 which is a really astonishing, however, frightening result. In contrast with this, the number of crimes committed against wealth showed a small decrease, which means that offenders who commit crimes against wealth use guns or explosives or replicas of these instead of using other deathly tools.

The three most common armed crimes are robbery, which is more than 2/3 of all crimes committed with tools, breach of peace and lynch law. I think it is not surprising that robbery is in the first place given the growing poverty in our country, however, the absence of kidnap is surprising as it is also a violent crime in which the offender uses weapons.

Another interesting question relating to this problem is that of the tools used during the crime. According to the definitions mentioned above, there are a wide range of tools and equipment that can be used during the crimes. The most common tools used during the crimes are the gas- and alarm pistols, at the same time, the number of crimes committed with these types of pistols is decreasing after a steep rise due to the strict gun policy of Hungary. The second common tool is the knife, which is a cheap, easy and light tool and, as a result, shows a great 60% increase nowadays. Another type of hitting tools is the maul the use of which shows a decrease after a 200 % increase. However, there are some rather interesting findings in the statistics regarding the tools or the equipment used for the crimes: sticks are not really common but their number is increasing whereas the use of belts is negligible.

#### **IV. Statistics – What Society Knows about Crimes Committed with Tools**

Earlier in this paper I have introduced the history and the definitions of crimes committed with tools and discussed the frequency of them by presenting the age and gender groups of offenders, the crimes and the tools used as weapons.

At this point, I would also like to present some other facts and statistics about crimes committed with tools but not from the point of view of the prosecutors or of the police, but

from that of society. I intend to expound on whether people in general know what these definitions mean and how they regard these crimes. To be able to show this, I have created a questionnaire in 2012 which includes the age, gender, residence and qualification as well as the knowledge about this type of crimes.

Of those included in the questionnaire, 21 % of the men were able to make a distinction between armed crimes and crimes committed with tools which is quite surprising as 42% of the women knew the difference. Moreover, only 15 % of the males think that more crimes are committed with weapons or explosives or their imitations than using other tools and 17% of the females think about it in the same way.

Familiarity with the meaning of crimes committed with tools in the different age groups is varying as only 1 % of people under 18 know what crimes committed with tools mean and none of the people above 65 do. However, between 18 and 65, the number of those who could tell the meaning and difference is decreasing, between 18 and 25, 25 % of the people answered correctly, whereas only 22 % of people between 25 and 40 years of age did, and, most surprisingly, only 9 % of people between 40 and 65 knew the correct answer.

Another factor I have considered in the questionnaire is the place of residence of the people questioned: 15 % of those who know the meaning live in the capital, 60 % in a county capital, 21 % in a town and only 3 % live in a village. The answer to the question why people who live in larger places know the meaning and the differences can be found in an obvious circumstance: the bigger the place, the more crimes are committed.

Another aspect of crimes committed in relation to society is qualification. In view of the results of the questionnaire, I can state that the higher one's education is, the higher the possibility of knowing the meaning and the difference in question.

## **V. Summary**

Considering the definitions of and the statistical data on armed crimes discussed above, I am fully convinced that understanding these factors of crimes committed with tools can help the legislature and the judges to make a new and more comprehensive regulation on armed crimes.

In my opinion, the latest definition of crimes committed with tools is not more complex than the earlier ones. At the same time, I think that it should be even more inclusive. In other words, the definition should be made more accurate and include the types of tools regarded as tools for committing crime; holding a tool which can be used to prevent or overcome someone's resistance and can cause death; equipment as well as guns and weapons which are already listed in the act; finally, guns and ammunition such as gas pistols and rook-rifles. An appropriate definition will make an expanded regulation possible.

The judicial custom has been helping legislation by widening the scope of crimes committed with tools when included crimes committed with tools despite the fact that there is no

unanimous decision on whether they should be regarded as these special equipment. The small number of criminal cases tried by the Supreme Court of Hungary indicates that changes in the regulation can take a lot of time, probably decades.

By relying on the statistics, I have intended to represent the frequency, motivation and punishment of crimes committed with tools in a systematically drawn chart. The findings in the chart made with the help of the Hungarian Police and the General Prosecutor's Office, show that the frequency of armed crimes is decreasing. There are several reasons for this decrease, such as, for instance, the strictness of the Hungarian firearm act or the high price of guns and ammunition. As permits for hunting guns or sports guns, or holding a gun for self-defence are hard to obtain, it is equally hard to buy a firearm nowadays.

By demonstrating the development of the definitions of crimes committed with tools as a special institution of criminal law and criminology and by analysing some important factors in connection with armed crimes, I have intended to emphasise the necessity for profound changes in the regulations. Although the new Criminal Codex contains up-to-date regulations of crimes committed with guns, supplementing it on the basis of the latest results of crime statistics would make it not only a more complete but also a more effective tool of jurisdiction.

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PROSPECTS FOR THE EUROPEAN UNION:  
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