

THE CHALLENGES OF MODERN
DEMOCRACY AND EUROPEAN
INTEGRATION

Vol 1

European Integration and Democracy Series

Series Editors:

FILIP KŘEPELKA, Masaryk University, Brno, Czech Republic

ELŻBIETA KUŹELEWSKA, University of Białystok, Poland

ERICH SCHWEIGHOFER, University of Vienna, Austria

RYSZARD SKARZYŃSKI, University of Białystok, Poland

KONSTANTY A. WOJTASZCZYK, University of Warsaw, Poland

THE CHALLENGES OF MODERN DEMOCRACY AND EUROPEAN INTEGRATION

Vol 1

Edited by
Elżbieta Kuźelewska and Dariusz Kloza

Warszawa–Białystok 2012

Editors

Elżbieta Kuzelewska
Centre for Direct
Democracy Studies (CDDS)
University of Białystok
Mickiewicza 1
15-213 Białystok
Poland
ekuzelewska@gmail.com

Dariusz Kloza
Research Group on Law, Science,
Technology & Society
Vrije Universiteit Brussel
Pleinlaan 2
1050 Brussels
Belgium
dariusz.kloza@vub.ac.be

Review

WAWRZYNIEC K. KONARSKI, Jagiellonian University in Krakow, Poland

Cover design

BARBARA KUROPIEJSKA-PRZYBYSZEWSKA

Cover illustration

Europa and the Bull, Museo di Tarquinia, Italy (image in public domain)

Layout

OFI

© Copyright for the content by the University of Białystok, 2012

© Copyright for the layout by Oficyna Wydawnicza ASPRA-JR, Warszawa 2012

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.



Oficyna Wydawnicza ASPRA-JR
03-982 Warszawa, ul. Dedala 8/44
tel. 0-602-247-367. tel./fax 870-03-60
e-mail: oficyna@aspra.pl
www.aspra.pl

ISBN 978-83-7545-324-9

Foreword

by Włodzimierz Cimoszewicz

Europe, with few exceptions, is a continent of democracy. This is a huge achievement of Europeans, enabling them to enjoy political rights and liberties. The dynamics of changes of the contemporary world in economy, in the proportions of political influence, in technology and in social life pose new challenges. The ability to adjust to the new reality, to maintain or increase competitiveness as well as to think and plan globally and long-term will be decisive factors bringing success or failure.

Will European democracy meet these needs? Do the quality of political systems and actions in EU Member States measure up to the challenges of a current situation? Rejecting the Treaty establishing a Constitution for Europe due to the reasons not related to its content is definitely pessimistic. Adopting the Treaty of Lisbon, however, is an optimistic signal. Current financial and economic problems in several EU Member States are a sign of significantly more severe future upheavals, resulting from the appearance of the world's new economic giants. The increase in xenophobic attitudes and growing populism is a reaction to disturbing the life comfort. It considerably affects the political world. Will we be able to realize, in these circumstances and with a full respect of democratic principles, that there is a need for a stronger community or, on the contrary, that the community will be weakened by nationalisms? How will it influence the EU image, its international position and attractiveness? Will the states not being the EU members still be interested in the accession? These are only few of the questions – the future of the EU and all Europe will depend on the answers. We need to think and talk about it.

Dr Włodzimierz Cimoszewicz

Senator since 2007

Prime Minister of Poland 1996–1997

Minister for Foreign Affairs of Poland 2001–2005

Speaker of the Lower Chamber of the Parliament 2005

Translated by Katarzyna Orzechowska

Contents

Foreword by Włodzimierz Cimoszewicz	5
Preface	13
List of Abbreviations	15

PART ONE – DEMOCRACY IN THE EU

1 The Nature of the European Union: a Border Perspective.	19
<i>Cristina Stănculescu</i>	
1.1 The Study of the EU's Nature	20
1.2 The Borders and the Empire Models.	22
1.3 The EU External Border: a Technical Barrier?	23
1.4 A Social Barrier?	26
1.5 An Economic Barrier?	28
1.6 A Demarcation Barrier?	30
1.7 EU, a neo-westphalian empire.	31
Bibliography	32
2 From Apathy to Protest: How the EU's Legitimacy is Fading	37
<i>Paul Brzesina</i>	
2.1 Introduction: Input and Output Discrepancies.	37
2.2 The Democratic Deficit and Legitimacy Crisis	39
2.3 The European Parliament – A Parliament without Powers?	41
2.4 Electing the European Parliament – Only Second Order Elections?	44
2.5 The Constitutional Crisis and European Referenda	47
2.6 The Economic and Euro Crises	50
2.7 The Challenges Ahead.	54
Sources	57
3 The Principle of Democracy in Modern ECJ Case-Law.	63
<i>Andreas Orator and Stefanie Saghy</i>	
3.1 Introduction	63
3.2 The Codification of the Democratic Principle in the Treaties	64

3.3	Early Case-Law: Defending the European Parliament's Prerogatives	66
3.3.1	Consultation as Essential Formality	66
3.3.2	Locus Standi	68
3.3.3	Choice of Legal Basis	69
3.4	Modern Approaches to the Democratic Principle	72
3.4.1	Transparency as a Democratic Prerequisite	72
3.4.2	Participatory Democracy	76
3.4.3	Democratic Accountability of Administration	79
3.5	Conclusion	82
4	Supremacy of EU Law and the Accession of the European Union to the ECHR.	85
	<i>Ozan Turhan and Margerite Helena Zoetewij-Turhan</i>	
4.1	Introduction	85
4.2	Fundamental Rights in the EU Until the 2009 Lisbon Treaty	86
4.2.1	Member States' conflicting duties under EU law and the ECHR	87
4.3	Accession of the EU to the ECHR: Why, and Why Now?	89
4.3.1	Supremacy of EU law and the position of Member States' Constitutional Courts	89
4.3.2	Other reasons for the EU to accede to the ECHR	91
4.4	Towards Accession: Concerns and Accession Negotiations	92
4.5	Draft Agreement on Accession of the EU to the ECHR	94
4.5.1	EU competences and accession to the ECHR	95
4.5.2	Representation of the EU in bodies of the Council of Europe	97
4.5.3	Internal review by the ECJ	98
4.6	Conclusion	100
5	Between Legitimacy and Efficiency. Recent Developments of Language Regime in the European Union	101
	<i>Filip Křepelka</i>	
5.1	Grounds for Research of Language Regime in Study of Democracy in the European Union	101
5.2	Multilingual Reality of Europe	101
5.3	Official Multilingualism of the European Union	103
5.4	Political, Economic and Legal Aspects of Multilingualism in the European Union	106

5.5	Increasing Number of Official Languages of the European Union due to Enlargements	108
5.6	Troubles with Increased Number of Languages.	109
5.7	Privileged use of English and Other Selected Languages in the European Union	111
5.8	Opposition against Attempts to Reduce and to Categorize Official Languages	112
5.9	Evaluation of Recent Tendencies in Language Regime of the European Union	113
5.10	Conclusions	116
6	Islamic finance: Challenge to the European Market and Constitution?	117
	<i>Bernhard Kitous</i>	
6.1	Background	118
6.2	Constitutions, “Choices Among Options” Which Structure our World	120
6.2.1	Laicity and Europe.	121
6.2.2	The Subjective Dimension of Societies and Peoples	121
6.3	Adaptation, Wherever Action Interests Meet the Actual Needs of People.	123
6.3.1	How Christendom Matured on the Question of usury	123
6.3.2	How Islam is Structuring its Claims Against “Financial Sins”.	126
6.3.3	Moreover, Islamic Finance is Adapting to Globalization	127
6.4	Risk, a Word Which Makes Islamic Finance an Interesting Challenge.	129
6.4.1	Hope and Disappointment Pertaining to the Moral Success of Islamic Finance	130
6.4.2	Islamic Scholars Diverge as to the Proper Meaning of “Islamic Finance”.	133
6.4.3	Beck’s RisikoGesellschaft and Risk-Analysis	133
6.5	Limits Whereby Economic Life is Under Religious Constraints.	136
6.5.1	In Conclusion: Islamic Finance Launches Three Challenges to European Democracy	137

7 Common Voice of the European Court of Human Rights and the European Court of Justice on Treatment of Aliens	139
<i>Matylda Pogorzelska</i>	
7.1 Introduction	139
7.2 The Road to the N. S. and M.E. Judgment	142
7.2.1 Extraterritorial Jurisdiction	142
7.2.2 The Roots: Soering	143
7.2.3 Conditions of Applicability of Article 3 in the Strasburg Case-law	144
7.3 Expulsion From One to Another EU Member State. The ECtHR Approach	146
7.3.1 Obligation to Consider the ECHR While Applying the Dublin Convention – T.I. v the UK	146
7.3.2 A warning – K.R.S. v. the UK	147
7.3.3 Lost of Patience – M.S.S. v Belgium and Greece	149
7.4 Expulsion From one to Another EU Member State. Approach of the ECJ	151
7.5 Conclusions	153

PART TWO – THE EU AND ITS PARTNERS

8 Turkish Problems with Democracy in the Context of the EU Membership Question	157
<i>Adam Szymański</i>	
8.1 Setting the Scene	158
8.2 Democracy and Human Rights in Turkey – Current Situation.	160
8.2.1 Democracy and Rule of Law	161
8.2.2 Human rights	164
8.3 Key Issues in Democratisation Process after 2011 Parliamentary Elections	167
8.4 Conclusion – Major Future Challenges of Consolidation of Democracy in Turkey	172
9 The Political Reconstruction of the Western Balkans. Challenges for the European Union.	177
<i>Marko Babić and Jacek Wojnicki</i>	
9.1 Western Balkans Countries and Meanders of European Integration	177
9.2 European Integration as a Divisive Factor at the Political Scene	185
9.3 Perspectives for Fast Integration – the Case of Croatia	186
9.4 Problems with the Burden of the Past	187

9.5	The Case of Serbia	189
9.6	The Case of Montenegro	192
9.7	The Case of Macedonia	192
9.8	The Case of Bosnia and Herzegovina	193
9.9	Conclusions	194
	Bibliography	196
10	Strategic Landscape of the Transatlantic Partnership.	197
	<i>Elżbieta Kuźelewska</i>	
10.1	Introduction.	197
10.2	The Base and the Strength of Transatlantic Relations	198
	10.2.1 Common Values	198
	10.2.2 Economic Ties	200
	10.2.3 NATO as a Special Link Between Europe and the US.	200
10.3	Cooling of the transatlantic relations	203
	10.3.1 Transatlantic Partnership and the War on Terrorism	203
	10.3.2 Unilateralism vs. Multilateralism	207
	10.3.3 Differences in Approach to the Use of Military Force in International Relations	210
	10.3.4 European and American Attitudes Towards the International Law	211
	10.3.5 Is the EU ‘Jealous’ of American Hegemony?.	212
10.4	Cooperation Alternatives for the US and the EU	214
	10.4.1 The US–China Relations: Any Competition?.	214
	10.4.2 Any Serious Cooperation Alternatives for the EU?	215
10.5	Conclusions	217
11	Eurasian Economic Union.	
	An Eastern Competitor for the European Union?.	221
	<i>Adam R. Bartnicki</i>	
11.1	Integration Projects on the CIS Territories.	222
	11.1.1 Commonwealth of Independent States	222
	11.1.2 Other Regional Organizations	227
11.2	Determinants of a EAEU Agreement – Economic Co-operation.	229
11.3	Determinants of Agreement – History and Culture.	231
11.4	Determinants of Agreement – an alliance of Authoritarianisms?	232
11.5	From Common Economic Space to the Eurasian Economic Union.	238

11.6	Interests of the Partners of the Agreement.	240
11.6.1	Russia	240
11.6.2	Kazakhstan	242
11.6.3	Belarus	243
11.7	Conclusions and Forecasts	245
11.7.1	The Eurasian Union As the USSR II?.	245
11.7.1	Chances for Integration Within the Eurasian Economic Union.	247
11.7.2	The Eurasian Union as a Competitor for the European Union	248

Preface

L'Europe ne se fera pas en un jour ni sans heurts. Rien de durable ne s'accomplit dans la facilité. Pourtant déjà elle est en marche.

Robert Schuman¹

The labyrinths of the European Union are full of promises and disappointments. To enter, an informed guide is required.

Jacques Delors²

This book is the very first creation of the Centre for Direct Democracy Studies (CDDS) at the Faculty of Law of the University of Białystok. The Centre was established in 2011 to foster and institutionalise research on direct democracy in Central and Eastern Europe.

Among its goals, the Centre aims to launch a series of peer-reviewed publications on democracy and European integration. For the first book in the planned series the Centre called for papers on the challenges of modern democracy and European integration. More than a dozen scholars from across Europe have kindly accepted its invitation.

This volume is divided into two parts. The first part looks at the nature of the principles on which the European Union (EU) is founded. Cristina Stănculescu examines in the first chapter the characteristics of the EU through the lens of its external borders and their functions, in particular whether the role of these borders is to exclude or rather to allow contact and exchange. In chapter 2, Paul Brzesina analyses the reasons for the decreased support of European integration in the Member States and discusses why citizens' protests would become an answer to the legitimacy crisis in the EU. Andreas Orator and Stefanie Saghy look in chapter 3 at the use and evolving understanding of the democratic principle in the recent case law of the Court of Justice of the European Union. In chapter 4, Margerite and Ozan Turhan consider questions the EU needs to deal with before its accession to the European Convention

¹ R. Schuman, *Pour L'Europe*, Éditions Nagel, Paris 1963, p. 14.

² J. Delors, *Foreword to: P. de Schoutheete, The Case for Europe. Unity, Diversity and Democracy in the European Union*, Lynne Rienner, London 2000, p. ix.

on Human Rights and analyse what such an accession might mean for the principle of the supremacy of the EU law. Filip Křepelka looks in the fifth chapter at the linguistic regime of the EU, its recent developments and the quest to reconcile the European multilingual reality with efficiency. In chapter 6, Bernhard Kitous discusses the concept and rules of Islamic finance – the notion which triggers growing interest in Europe due to increased economic exchange with the Muslim world and which, at the same time, raises the question of its prospects within European democracies. In chapter 7, Matylda Pogorzelska explores one of the recent judgments of the Court of Justice of the EU concerning asylum seekers in the EU in which the Luxembourg Court, by a reference to the case law of the European Court of Human Rights, found that an asylum seeker may not be transferred to a Member State where she risks inhuman treatment, as *de facto* not all Member States offer equally high standard of protection.

The second part explores the relations between the EU and its neighbours and partners from a democratic perspective. First two chapters here look at the candidate countries. In chapter 8, Adam Szymański investigates the democratisation process in Turkey from the viewpoint of its relations with the EU in 2010–2011. Marko Babić and Jacek Wojnicki give in the ninth chapter a thorough analysis of integration efforts and problems of the former Yugoslav countries on their way to the EU as well as of the EU readiness for future enlargement toward the Western Balkans. In chapter 10, Elżbieta Kuźelewska studies the reasons why transatlantic relations, built on common values and interests, have loosened since late 1990s. In the final chapter, Adam Bartnicki thoroughly evaluates integration processes in the post-Soviet democracies, in particular in the proposed Eurasian Economic Union.

The editors would like to express their gratitude to all authors that contributed to this collection of papers for their fresh look on a number of issues essential to European integration. Special thanks go to the Faculty of Law of the University of Białystok for its intellectual and financial support.

In respect of the diversity of nationalities, disciplines and perspectives represented in this book, the editors and the publisher have left the choice concerning the use of reference systems to the authors of the contributions.

The editors welcome any comments and suggestions at ekuzelewska@gmail.com and dariusz.kloza@interia.pl, respectively.

Elżbieta Kuźelewska
Dariusz Kloza

Białystok–Brussels, February 2012

List of Abbreviations

AKP	Justice and Development Party (Turkish: Adalet ve Kalkınma Partisi)
BDP	Peace and Democracy Party (Turkish: Barış ve Demokrasi Partisi)
CFMZ	Common Free Market Zone (Russian: Единое экономическое пространство)
CIS	Commonwealth of Independent States (Russian: Содружество Независимых Государств)
CFSP	Common Foreign and Security Policy
CHP	Republican People's Party (Turkish: Cumhuriyet Halk Partisi)
CJTF	Combined Joint Task Force
CSTO	Collective Security Treaty Organization (Russian: Организация Договора о Коллективной Безопасности)
DTP	Democratic Society Party (Turkish: Demokratik Toplum Partisi)
EAEU	Eurasian Economic Union
ECHR	European Convention on Human Rights
ECJ	European Court of Justice, <i>officially</i> : Court of Justice of the European Union
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EDSP	European Defence and Security Policy
EEC	European Economic Community
EP	European Parliament
EU	European Union
EurAsEC	Eurasian Economic Community (Russian: Евразийское Экономическое Сообщество)
GC	General Court

GUAM	[Georgia, Ukraine, Azerbaijan, Moldova] Organization for Democracy and Economic Development (Russian: Организация за демократию и экономическое развитие)
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia, <i>officially</i> : International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
ILO	International Labour Organisation
IMF	International Monetary Fund
MD	Missile Defence
MEP	Member of the European Parliament
MHP	National Action Party (Turkish: Milliyetçi Hareket Partisi)
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NTA	New Transatlantic Agenda
OPEC	Organisation of Petroleum Exporting Countries
RBKCU	Customs Union of Belarus, Kazakhstan and Russia (Russian: Таможенный союз России, Белоруссии и Казахстана)
SCO	Shanghai Cooperation Organization (Russian: Шанхайская Организация Сотрудничества)
SFRY	Socialist Federal Republic of Yugoslavia
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US	United States of America
USRB	Union State of Russia and Belarus (Russian: Союзное государство России и Белоруссии)
USSR	Union of Soviet Socialist Republics (Russian: Союз Советских Социалистических Республик)
WMD	Weapon of Mass Destruction

Part One

Democracy in the EU

The Nature of the European Union: a Border Perspective

CRISTINA STĂNCULESCU*

Starting with the early 1990s, much of the discussion around the EU, both in European public spheres and among EU scholars, has focused around the so-called “democratic deficit”. This notion is based on the idea that “decisions in the EU are in some ways insufficiently representative of, or accountable to, the nations and people of Europe” (Dimitri Chryssochoou, 2007:360). The development of this notion was influenced by the end of the “permissive consensus” that characterized for long the European integration process. Indeed, as Lisabeth Hooghe and Gary Marks emphasised it, 1991 marked the end of this consensus, since then the EU being rather characterized by a “constraining dissensus”, as its decision making process entered the “contentious world of party competition, elections and referendum” (Lisabeth Hooghe and Gary Marks, 2008:5–7). The politicisation of the European integration when societies were making decisions about joining, enlarging or deepening the regime (Lisabeth Hooghe and Gary Marks, 2008:20) made scholars widely agree that the EU suffers from a serious democratic deficit (Max Haller, 2009:223). Yet the literature developed two different perspectives on what the democratic deficit is. The first one considers it to be an institutional problem: the European integration has increased the executive power and decreased the national parliamentary control, the European Parliament (EP) is still too weak, there are no true European elections, the EU is too distant from the voters and it adopts policies that are not supported by a majority of citizens (Andreas Follesdal and Simon Hix, 2005:4–6). The second one stresses the absence of a European demos and the importance of the emergence of a European civic identity (Dimitri Chryssochoou, 2007:364), clearly looking at the EU through national eyes. Nevertheless, some scholars challenged the orthodoxy

* Centre d'étude de la vie politique (CEVIPOL), Université Libre de Bruxelles, Lecturer Assistant and Researcher, Cristina.stanculescu@ulb.ac.be.

of the democratic deficit either by claiming that the EU is a regulatory state (Giandomenico Majone, 1994; 1998; 2010), either by examining the EU as an extension of the liberal-intergovernmental theory (Andrew Moravcsik, 2003). From these perspectives there is no reason to criticize the EU for its weak democratic dynamics, as it should not be democratic in the usual (national) meaning of the term (Andreas Follesdal and Simon Hix, 2005:7–10). Thus some argue that the EU democratic deficit is a myth (Andrew Moravcsik, 2003).

However, this on-going debate on the existence of a democratic deficit in the EU seems to be much more a debate on the EU nature than one on the democratic dynamics of its political system. As Decker underlines it, the use of this notion can conceal “a wide variety of views on the desired future shape of the EU” (Frank Decker, 2002:256), as well as it can be influenced by different conceptions of its present shape. This is why, if the rest of this book is examining the democratic dynamics in the EU, the current paper is addressing the question of the “nature of the beast” (Donald Puchala, 1972).

The analysis of this issue shall be made through the perspective of the border, as “borders are central to understanding political life” (Malcom Anderson, 1996:1). According to Anderson, frontiers are both institutions and processes. As institutions, borders are established by political decisions and regulated by legal texts, delimiting the sovereignty of a modern state. As processes, frontiers are instruments of state policy and markers of identity, being constantly reconstituted by the “human beings who are regulated, influenced and limited by them” (Malcom Anderson, 1996:3). This is why “borders are inseparable from the entities which they enclose” (Malcom Anderson, 1996:11). Therefore, in this chapter the nature of the EU shall be examined through the lens of the European external borders.

1.1 The Study of the EU’s Nature

In 1987, just after the signature of the Single European Act, Jacques Delors, at that time the President of the European Commission, qualified the EU as an unidentified political object. 24 years later, despite scholars’ interest for the nature of the EU and the development of significant literature on this subject, the name that could be given to it remains highly debatable and debated. The EU has been seen as a complex system (Robert Geyer, 2003), “post-national, unsovereign, polycentric, non-co-terminous, neo-medieval arrangement” (Philip Schmitter, 1996:26), “union of states” (Christopher

Brewin, 1987), federal system (Friedrich von Krosigk, 1970; Daniel Kelemen, 2003; Thomas Christin and al., 2005), multi-level governance system (Tanja Aalberts, 2004; Tanja Borzel, 2010), inter-state consociation (Olivier Costa and Paul Margette, 2003), confederal consociation (Dimitri Chrysochoou, 1997), confederation (Alexander Warleigh, 1998), model of internationalisation and deep regionalism (Brigid Laffan, 1997), distinctive regional international society (Thomas Diez and al.) and, of course, the list could go on. Two perspectives have been used by the scholars to capture the essence of the European construction: internal and external. The first one focuses on the division of competences between the national and the European level, but also on the decision making process at the European level. The external one examines the EU as an international relations actor and compares it to others forms of regional integration.

However, only few scholars (Stefano Bartolini, 2005; Jan Zielonka, 2006) have analyzed the nature of the EU through its frontiers despite the fact that borders and maps are “not merely the representations of the limits of state authority, but also one of the most powerful international signifiers of the state” (Katy Hayward, 2006) and one of the main indicators of the shape of any political community. In his well-known book *Restructuring Europe*, Bartolini examines the European integration process as one of “territorial and functional boundaries transcendence, redefinition and shift, and change that fundamentally alters the nature of the European states” (Stefano Bartolini, 2005:xii). Nevertheless, Bartolini focuses mainly on the internal boundaries of the EU, dealing only marginally with the external ones.

On the other hand, Zielonka uses borders as one of his main criteria for defining the EU as an empire. Zielonka opposes two models of empires: 1) the neo-westphalian, characterized by centralization, coercion, military and political control, 2) and the neo-medieval empire, which is polycentric and based on economic and bureaucratic control (Jan Zielonka, 2006:14). If external borders in the neo-westphalian model are clear, sharp, hard and fixed, in the neo-medieval model they are fuzzy, creating soft-border zones in flux (Jan Zielonka, 2006:12–14). According to the Zielonka, the EU fits the second type of empire, the neo-medieval, especially after the 2004 and 2007 enlargements. It should be noticed that contrary to the largest part of the literature on the nature of the EU, the Polish author takes into account the shape and the dynamics of the external European borders. Yet, when Zielonka examines the EU borders, he focuses primarily on the enlargement policy. But the EU external borders are not regulated only by this policy. They are also closely related to the immigration policy, the Schengen area or FRONTEX.

1.2 The Borders and the Empire Models

In this context, the aim of this paper is to test Zielonka's hypothesis that the EU is a neo-medieval empire, by examining more closely the shape of its external borders. The application of his classification (between neo-westphalian and neo-medieval empire) to the frontiers indicates two kinds of ideal types of borders: of inclusion and of exclusion. In the case of borders of inclusion, openness to the "other" is expected to be found in the different politics, as well as a certain difficulty to define the insiders and the outsiders. Inversely, the borders of exclusion are supposed to create a sharp delimitation between those inside and those outside.

In this paper, in order to test Zielonka's model, the degree of openness and permeability of a border shall be examined in the perspective of the functions it performs in the international environment (Moraczewska, 2008:44). If a border plays the role of a social, economic, technical and symbolic barrier, then the degree of openness is low. In this case we can talk about a border of exclusion. But, if the border allows social and economic contact, and exchange and the difference between insiders and outsiders is blurred, then it is a border of inclusion. The aim of the analysis is to examine if the role played by the external border of the EU is to exclude through demarcation strategies and social, economic and technical barrier building or rather to allow contact and exchange. In this way, it can be seen if the EU's external border functions as in the case of a neo-medieval empire or of a neo-westphalian one.

The objects of the analysis are the policies of the EU that deal with frontiers, like immigration policy, Schengen or external border management. In the examination of each of these policies, the focus will be on the way the border is seen, framed or imagined. It will be asked if the role of the borders for the EU decision makers, as seen through the different policies, is to "divide" their citizens from the non-EU ones. Or, as they have a temporary character, borders are rather some seen as spaces of exchange?

Let us examine these questions in the light of the functions the EU borders play, according to different EU border regulating policies. As it has already been mentioned, Anna Moraczewska identified four kinds of functions that a border can fulfil: technical, economic, social and symbolic barrier. The technical aspect of functioning of a border refers to the technological and infrastructural system put in place at the crossing points or all along the border. The economic function "involves the laws concerning the flow of goods and the processes of economic integration", while the social one refers to the regulation of the people crossing the border (Moraczewska, 2008:45). The

demarcation of a border takes place also when there is a symbolic difference created by the existence of that barrier between insiders and outsiders.

In the following, EU policies will be examined through the lens of the functions they fulfil. The first one is the technical function.

1.3 The EU External Border: a Technical Barrier?

In the past ten years, following the establishment of the Schengen zone, the importance of the technological devices used at the borders has been in a constant growth. As Moraczewska explained, by the middle of 2007, all along the eastern border of the EU have been placed “a monitoring system, movement sensors, IT systems, *skytruck* aircraft equipped with radiolocation systems, scanners detecting pollution, devices to scan goods and systems that verify identity on the basis of the iris or papillary ridges” (Anna Moraczewska, 2008:44).

The southern border of the EU has known a similar process of securitization. This is true for example for Spain and its two enclaves in North Africa, Melilla and Ceuta. The initial fences that delimited the territory of the two cities from the rest of Marocco, build at the middle of the 1990s, have been reinforced a decade later. Under the pressure put on this enclaves “by the thousands of immigrants coming mostly from the South of the Sahel that attempted to cross the fences in October 2005” and then in 2006, the Spanish authorities decided to enlarge the original fences and to erect a third one (Jaume Castan Pinos, 19). For Castan Pinos, the reinforcement of the Spanish borders was encouraged by the EU, who partially financed the fences (75 per cent of the total costs for Ceuta and two thirds of the total costs for Melilla) (Jaume Castan Pinos, 1–21). The construction of fences at the border is planed also by the Greek authorities that manage another southern EU border. The decision was taken as, in the last years, 90 per cent of the migrants who illegally enter the EU use Turkey’s border with Greece (Eric L’Helgoualc’h, 2011 and Elinda Labropoulou, 4 January 2011).

Different terms have been used to describe the technological closure that takes place at the EU’s external borders: “the new wall of shame”, “the golden curtain”, “the European wall”, “fortress Europe”, “cyber-fortress Europe” (Jaume Castan Pinos, 1, Guild and al., 1). The possible use of pilotless drones capable “of monitoring vessels at sea for longer periods then the current equipment” made even some speak of a militarization of the EU borders as such devices were designed for war (Eric L’Helgoualc’h, 2011:197).

At the same time, a process of externalization of the EU external border started to take place. One of the most criticised signs of it is the cooperation

between the EU and Kadafi's Libya. In February 2009, the EU announced the reinforcement of border control in Libya would be sustained by a package of 20 million euro, training and equipment for border management coming from the EU. But of course this is not the only example, other North African countries, like Marocco, "have also been receiving funds from the MEDA programme (European Neighbourhood Partnership Instrument) since 2007" (Hein de Hass, 2008:1309).

The institution that embodies EU efforts to reinforce the securitization of its external border is the European Agency for the Management of External Border (Frontex), established in 2004. Andrew Neal showed that if in 2001 the European decision-makers discussed the need of setting-up a European agency for border management in the context of their security concerns following the 9/11, in 2003 when the decision to establish the agency would be taken other reasons have been put forward (Andrew Neal, 2009). The main one was the fact that the agency is a logical extension of the integration process and of the free movement of persons inside the EU (Andrew Neal, 2009:350). The European Commission explains in its proposal for establishing a European agency for management of the external borders that it should be placed in the larger context of EU objective to create an integrated border management at its external borders that "will ensure a high and uniform level and control and surveillance" (COM(2003) 687). Frontex itself justifies its establishment by "an evolutionary process, bringing together nationally focused systems underlying the sovereignty of each state to create a common operational model for cooperation at the external borders" (Frontex's website). Frontex's birth act, a Council's regulation of October 2004, underlines that the creation of the agency is an "important step" towards the promotion of solidarity between Member States needed for an "effective control and surveillance of external borders" (EC 2007/2004).

And if in dealing with this "matter of the utmost importance" (EC 2007/2004), the European decision-makers financed the agency with 6.2 million euro in the first year, in 2010 the budget of Frontex was 15 times larger (almost 90 million euro, according to Frontex's website). Moreover, in September 2011, in the context of the uprising in the Arab countries, the Council and the EP co-decided that Frontex's budget will be reinforced in order for the agency to be able to buy and loan equipment and staff needed for its missions, without depending on Member States capacity and will. Agency's budget increase is a proof of the growing attention the European institutions and the Members States give to the securitization and control of the EU external borders in a common European framework.

Another proof of the same trend can be found in the arguments put forward by the European institutions for the creation of a European Border Surveillance System (EUROSUR). The setting up of EUROSUR is intended to “increase security of the EU” by preventing cross-border crime and the number of illegal immigrants “who manage to enter the EU undetected” and to improve the search and rescue capacity of the EU at its borders (COM(2008) 68). A proposal for establishing EUROSUR has been forwarded by the European Commission to European Parliament and the Council in December 2011. Once set up, the system is supposed to provide the common technical framework required by a 24 hours communication between Member States and Frontex, and especially to develop programmes that could improve the performance of surveillance tools and sensors (COM(2011) 873). Therefore, it can be noticed that a particular attention is given by the European institutions to the technological aspects of the European external border management.

The same attention can be noticed from the creation, in 2007, of the External Borders Fund meant to financially sustain national projects that are meant to improve surveillance infrastructures, surveillance equipment, personnel and practices used at the EU external borders (EC 574/2007). So, the Member States use European money to develop the functioning of their European external borders. The establishment of national coordination centres that will centralize information from the border and will communicate with the other national centres and with Frontex will be, for instance, financed by this External Borders Fund. The importance of the securitization can be seen also from the existence of systems like the Visa Information one (VIS; 2004/512/EC) that allows communication and exchange between a central information system on visas and each Member States, or the development of SIS II (Schengen Information System). SIS II that will replace, obviously, SIS I, will be a “large-scale information system containing alerts on persons and objects that want to enter the European Union” (SIS II; EC 1987/2006). It shall be used by borderguards, customs officers and Member States authorities that issue visas.

Of course, these developments were put in place in the Schengen framework and not all the Member States of the EU are part of the Schengen. To be more precise, 22 are and 5 are not. Nevertheless two of them, the UK and Ireland, do apply some of the Schengen legislation and measures, like the SIS. And the other three countries expressed their will of joining Schengen, but for the moment are considered to be unprepared. Meanwhile, their implementation of the Schengen *acquis* is being constantly evaluated.

Therefore, a European technical barrier exists. During the last 10 years, this barrier has become more and more concrete. Frontex, VIS, the future

SIS II and EUROSUR indicate the will of Member States and of the EU to deal with the European external borders in an integrated way, at the European level. And by doing that, they are making the external borders a part of a very tangible reality.

1.4 A Social Barrier?

The notion of social barrier refers to the case of borders to their function of controlling and limiting mobility for those that are considered as outsiders. At the level of the EU, this matter can be examined through the lens of the immigration policy and – more precisely – of the regulations, communications and strategies issued by the European institutions in this area. The aim is to see if they are constructing a non-European “other” to whom they are regulating access to the EU territory.

At the end of the 1990s, the Tampere Council marked the beginning of a period of growing attention at the European level for the migration phenomenon and its impact on the EU. Following this Council, that triggered a European strategy for the fight against the cross-border crime and illegal immigration, the European Commission lunched in 2000 a broad debate on immigration and asylum through a number of its communications, meant to “harmonise and co-ordinate national legislations on immigration rules and procedures” (Euractiv, 23 November 2000).

Ever since, the number of European regulations in this area never ceased to grow. At the beginning of 2000s, a common list of countries whose nationals need visa for entering Schengen area was drawn up by the European institutions (EC 539/2001). Afterwards, harmonisation has taken place in what concerns rules for entering the Schengen countries for pupils or young people involved in volunteering actions or for those taking part at sporting events. In 2003, a single status for non-EU nationals’ long-term residents was elaborated (EC 2003/109), as well as a uniform format for the EU resident permits (EC 1030/2002). Few steps have been made also towards the creation of a coherent European framework for integration of non-EU citizens (COM(2005) 389), especially through exchange of best practices and European Commission’s reports. The traffic of people living close to the EU external borders has also been regulated at the European level, by the setting up of a permit of local border traffic (EC 1931/2006).

In 2008, the Council announced the signature of a European Pact on Immigration and Asylum. This Pact, which is a political rather than a binding legal document, shows nevertheless that it is the will of the Member States to

“move towards a tougher policy on immigration” (New York Times, 7 July 2008). The European commissioner in charge of justice, freedom and security at that time, Jacques Barrot, explained that “we can’t leave immigration in complete disorder: [...] it is necessary to have a Europe with rules of the game” (Euractiv, 18 September 2008). Among the five main “commitments” of the Pact on Immigration and Asylum, three are particularly interesting for the subject of this article: “to make border controls more effective”, “to control illegal immigration by ensuring that illegal immigrants return to their countries of origin or a country of transit”; “to organise legal immigration to take account of the priorities, needs [...] of each Member State” (13440/08). These objectives point out the intention of the European elites to pursue the process of defining at the level of the EU the answers to the questions: “Who can enter our territory?”, “Who can stay on our territory?”, “How do we deal with immigration?”, “How can it be controlled?”, to name just a few of the issues that the European leaders deal through the legal instruments related to the immigration policy.

The responses given to these interrogations can be found in directives like those that have already been mentioned, but also in those that followed the signature of the Pact, like the EU Blue Card one, that deals with the conditions of entry and residence on the EU territory of highly qualified non-EU nationals (2009/50/EC). The Directive on European Blue Card is EU main policy initiative in the global competition for qualified foreign labour. In 2005, the European Commission has issued a Policy Plan on Legal Migration (COM(2005) 669) which announced four directives regulating the entry and residence of few selected categories of economic immigrants, for whom common needs and interest of the Member States exists (COM(2005) 669): the highly skilled workers, the seasonal workers, the intra-corporate transferees and remunerated trainees. The EU Blue Card Directive was one of the four that were planned by the Commission’s Plan. For Castles, the 2005 document shows that Europe is giving a common answer to the question already enounced, namely “who can stay on our territory” and that the response is “the highly qualified, while less-skilled workers are admitted only in limited numbers through temporary and seasonal labour programs” (Stephan Castles, 2006:760). Meanwhile, the European Commission proposed also a directive on seasonal workers, that creates common rules for their entry and residence in the EU and that specifies their rights “while staying in Europe” (Euractiv, 14 July 2010). The corollary of defining who the EU Member States want it is defining who they do not want. And the response is, of course, the illegal immigrants. It is in this context that the strengthening of Frontex, the creation of EUROSUR and all other

technical system discussed in the previous section, can be fully understood, as they are means of limiting the illegal immigration at the external borders of the EU. It is in this perspective that the Return Directive can be also placed, as it focuses on the elaboration of common standards and procedures “to be applied in Member States for returning illegally staying third-country nationals” (2008/115/EC).

Thus, the directives, communications and plans that were elaborated in the framework of the European institutions regarding immigration, show that a social barrier is being constructed at the European level. The barrier makes the difference between the inside and the outside, between the EU citizens and the non-EU nationals. Of course, there is nothing new in regulating immigration. This kind of regulation existed before in the laws of the Member States and still exists. Nevertheless, what is new is that this work is being done at the European level and especially that now the opposition between French national – non-French national, German national – non-German national or Polish national – non-Polish national, is being progressively replaced by the opposition European citizen – non-European national. Sure, the European citizenship is a consequence of the citizenship of one of the Member States and not its replacement. But, as it can be noticed, the directives and strategies elaborated in the framework of the immigration policy are constructing a non-European “other” and legal barriers to its entry to the EU territory.

1.5 An Economic Barrier?

In order to see if the EU has build since its existence an economic barrier to separate it from its neighbours and – more largely – from the rest of the world, this section will focus on the common custom regime of the EU, as it is under this shape that this kind of frontiers are constructed (Anna Moraczewska, 2008:48–49).

The legal framework for common external custom regime exists since the Treaty of Rome, which set the basis of the European Economic Community. The creation of an internal market would not have been possible without the decision of the Member States to present “a united front to the world in respect of international trade” (Nugent, 2005:407). This is why the Treaty, following the Spaak report (Brussels report, 1956), stipulated that “in order to establish a common market” the elimination of custom duties between Member States should be made together with the “establishment of common custom tariff and of a common commercial policy towards third countries” (TFEU, Arts 2–3).

The next step is made in 1968, on 1st July, when the six countries at the origins of the European construction are actually introducing a common custom tariff for third countries and are erasing custom tariffs between themselves (Bino Olivi and Alessandro Giacone, 2007:98). The functioning of common external custom regime has afterwards benefited from the growing integration of the internal market. The Single European Act and the Maastricht Treaty created one European market and set the basis of the monetary union. Therefore, the EU exceeded the shape of a custom union to become an integrated single market with one monetary policy.

Following this development of the economic integration at the Union's level, nowadays the Commission has exclusive competence in matters related to the customs union (TFEU, Art 3). That means that the EU Member States do not interfere with this competence and that the European Commission has the power to issue decisions in this area.

The European legislation related to the customs union has set up a Common Customs Tariff that applies to the import of goods from non-EU countries to the territory of the EU, and of a Combined Nomenclature, which centralizes the tariff and statistical data of the customs union. It has also created and developed a Community Customs Code that is meant to comply the rules that are applicable to the trade between the non-EU countries and the EU Member States (import and export) (EC 450/2008). Moreover, the EU is responsible for the conclusion of international agreement related to the custom union in the framework of international organisation or directly with specific countries.

Therefore, the EU has constructed in the last 50 years an economic barrier for the third countries. It has a common external tariff, it has developed a common legislation that regulates imports of goods to its territory and negotiates in a unitary way custom agreements with third countries. Sure, different kind of tariffs and even status exists for different third countries: there are non-preferential and preferential origins, but also the custom union. This third status is given to three countries: Turkey, Andorra and San Marino. It refers to the fact that goods can be moved freely between the EU and the respective country. This could lead to the conclusion that there are different economic frontiers created by the EU. Yet, the customs unions just mentioned are not complete. For instance, the custom union with Turkey does not cover agricultural or coal and steel products. And it cannot be considered that this preferential system offered, for instance, to San Marino, makes the EU look like an empire, as Italy had before the establishment of the custom union the same kind of agreement with this country, and was not considered to be an empire. Thus, EU looks for the third-countries like having constructed

a custom union that regulates the trade between them and the Member States of the Union and that can be qualified as an economic barrier, in the sense that Moraczewska used it.

1.6 A Demarcation Barrier?

The demarcation function that borders play refers to their symbolic content (Anna Moraczewska, 2008:59–60). Therefore, for this analysis the question is if the EU institutions and Member States have encouraged the use of symbols of the EU at its external borders in order to see if national symbols has been accompanied or maybe even replaced by European ones.

And in order to answer this question, let us imagine a trip of a non-EU national needing a visa to one of the countries of the Union. The first step that our traveller needs to make is to request a visa from the embassy of the country where he wants to go. The visa will not be just given just for that country, but for all the countries of the Schengen area. It has to be noticed that if his destination country does not have an embassy in his country, then he can address himself to an embassy of other Schengen state. The application form our traveller fills up is unique for all Schengen states and the EU twelve stars flag can be found on it. Moreover, a few EU countries that are not in the Schengen area use the same application form (like Romania or Bulgaria). Our traveller will receive the answer to his application only if he passes the verification of the EU centralized Visa Information System, at which are participating also countries like the UK or Ireland, that are not members of the Schengen area. Once he receives a positive answer, the non-EU national can take a flight and enter the “European territory of the Schengen states” (Application for Schengen Visa form). At the airport, when he passes the security checks, he has to go in the line for the non-EU citizens. And if he travels by car he notices that the road sign marking the entry into an EU Member State is the same for all the EU countries: blue, with the 12 stars and the name of the country written in the middle. The non-EU traveller perceives thus the EU external border on his application form, in the reply he gets, in his passport, at the airport etc. For him, the external border is a fact. This is why this frontier plays the role of demarcating the EU citizens from the others. The fulfilment of this function by the European external borders is confirmed by the establishment of institutions and centralized systems meant to manage the external borders and control the access into the EU territory, like FRONTEX, EUROSUR, VIS, SIS, etc. Their existence has a symbolic aspect that reinforces their demarcation role. Moreover, as it has been noticed in the case of candidate countries or partial

integrated countries into the Schengen system, this demarcation function does not stop at Schengen borders, but rather at the EU borders.

1.7 EU, a neo-westphalian empire

According to the official EU documents, its external borders have a great importance for the European integration process for at least two reasons: they offer a “high level of security” to the European citizens and they allow “a better management of migrations” (TEU, Art 67; European Council, 1999: 22). The raising awareness for the EU external borders is closely connected to the internal market building and to the introduction of the free movement of persons, particularly through the Schengen agreement implemented from 1995. The set-up of a *de facto* internal market as well as of free movement area between some of the EU Member States made the external borders become in just a few years a common concern.

Nowadays, like it has been showed in this paper, the EU external borders are designed to fulfil all the four functions Moraczewska identified as characterizing rather exclusion borders than open ones. These borders are technical, social, economic and symbolic barriers between the EU citizens and the non-EU ones. Moreover, the European institutions are constantly announcing new measures in this area, meant to improve the management of these borders and in this way to better protect the EU citizens. Therefore, at a close examination of the design of EU external borders, the hypothesis that the EU is looking like a neo-medieval empire is contradicted. Through the lens of the functions the EU external borders are meant to fulfil, the EU reassembles more with a forming neo-westphalian empire than with the neo-medieval one.

Bibliography

- Tanja Aalberts, “The Future of Sovereignty in Multilevel Governance Europe – A Constructivist Reading”, *Journal of Common Market Studies*, 42-1, 2004, pp. 23–46.
- Malcom Anderson, *Territory and State Formation in the Modern World*, Cambridge, Polity Press, 1996.
- Stefano Bartolini, *Restructuring Europe. Centre Formation, System Building, and Political Structuring between the Nation State and the European Union*, Oxford, 2005.
- Tanja Börzel, “European Governance: Negotiation and Competition in the Shadow of Hierarchy”, *Journal of Common Market Studies*, 48–2, 2010, pp. 191–219.
- Christopher Brewin, “The European Community: a Union of States without unity of government”, *Journal of Common Market Studies*, 26–1, 1987, pp. 1–23.
- Stephan Castles, “Guestworkers in Europe: A Resurrection?”, *International Migration Review*, 40–4, 2006, pp. 741–766.
- Thomas Christin, Simon Hug and Tobias Schulz, “Federalism in the European Union: the view from below (if there is such a thing)”, *Journal of European Public Policy*, 12–3, 2005, pp. 488–508.
- Dimitris Chrysochoou, “Democracy and the European Polity”, in Michelle Cini, *European Union Politics*, New York, Oxford University Press, 2007, pp. 259–374.
- Dimitris Chrysochoou, “New challenges to the Study of European Integration: Implications for Theory-Building”, *Journal of Common Market Studies*, 35–4, 1997, pp. 521–542.
- Olivier Costa and Paul Magnette, “The European Union as a consociation? A methodological assessment”, *West European Politics*, 26–3, 2003, pp. 1–18.
- Frank Decker, “Governance beyond the nation-state. Reflections on the democratic deficit of the European Union”, *Journal of European Public Policy*, 9–2, 2002, pp. 256–272.
- Thomas Diez, Ian Manners and Richard Whitman, “The Changing Nature of International Institutions in Europe: the Challenge of the European Union”, *Journal of European Integration*, 33–2, 2011, pp. 117–138.
- Andreas Follesdal and Simon Hix, “Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik”, *European Governance Papers*, C-05-02, 2005, pp. 1–27.
- Robert Geyer, “European Integration, the Problem of Complexity and the Revision of Theory”, *Journal of Common Market Studies*, 41–1, 2003, pp. 15–35.
- Elsbeth Guild, Sergio Carrera and Florian Geyer, “The Commission’s New Border Package. Does it take us one step closer to a “cyber-fortress Europe?””, *CEPS Policy brief*, n°154, March 2008.
- Hein de Haas, “The Myth of Invasion: the inconvenient realities of African migration to Europe”, *Third World Quarterly*, 29–7, pp. 1305–1322.

- Katy Hayward, "National territory in European space: Reconfiguring the island of Ireland", *European Journal of Political Research*, 45, pp. 897–920.
- Lisabeth Hooghe and Gary Marks, "A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus", *British Journal of Political Science*, 39, 2008, pp. 1–29.
- Max Haller, "Is the European Union legitimate? To what extent?", *International Social Science Journal*, 60, 2009, pp. 196–223.
- Daniel Keleman, "The Structure and Dynamics of EU Federalism", *Comparative Political Studies*, 36-1/2, 2003, pp. 184–208.
- Brigid Laffan, "The European Union: A Distinctive Model of Internationalisation", *European Integration on-line Papers*, 18-1, 1997, pp. 1–17.
- Eric L'Helgoualc'h, *Panique aux frontières. Enquête sur cette Europe qui se ferme*, Paris, Max Milo, 2011.
- Giandomenico Majone, "The Rise of the Regulatory State in Europe", *West European Politics*, 17-3, 1994, pp. 78–102.
- Giandomenico Majone, "Europe's "Democratic Deficit": The Question of Standards", *European Law Journal*, 4-1, pp. 5–28.
- Giandomenico Majone, "Transaction-cost efficiency and the democratic deficit", *Journal of European Public Policy*, 17-2, 2010, pp. 150–175.
- Anna Moraczewska, "Recent Transformations of the Functions of the Border Between Poland and Ukraine", in Wojciech and Andrzej Podraza, *Polish-Ukrainian Border's Significance for the Region and Europe*, Lublin, 2008, pp. 44–73.
- Andrew Moravcsik, "Le mythe du déficit démocratique européen", *Raisons politiques*, 10, 2003, pp. 87–105.
- Andrew Neal, "Securization and Risk at the EU Border: The Origins of FRONTEX", *Journal of Common Market Studies*, 47-2, 2009, pp. 333–356.
- Neil Nugent, *The Government and Politics of the European Union*, Palgrave, 2003.
- Bino Olivi and Alessandro Giacone, *L'Europe difficile. La construction européenne*, Gallimard, 2007.
- Jaume Castan Pinos, "Building Fortress Europe? Schengen and the Cases of Ceuta and Meilla", *CIBR's Working Papers Series in Border Studies*, WP 18.
- Donald Puchala, "Of Blind Men, Elephants and International Integration", *Journal of Common Market Studies*, 10-3, 1972, pp. 267–84.
- Philip Schmitter, "Some Alternative for the European Polity and Their Implications for the European Public Policy" in Yves Meny and Jean-Louis Quermonne, *Adjusting to Europe: the Impact of the European Union on National Institutions and Policies*, London, Routledge, 1996, pp. 25–40.
- Friedrich von Krosigk, "A Reconsideration of the Federalism in the Scope of the Present Discussion on European Integration", *Journal of Common Market Studies*, 9-3, 1970, pp. 197–223.
- Alexander Warleigh, "Better the Devil You Know? Synthetic and Confederal Understandings of European Unification", *West European Politics*, 21-3, 1998, pp. 1–18.

Jan Zielonka, *Europe as Empire. The Nature of the Enlarged European Union*, Oxford, 2006.

Newspapers articles

Katrin Bennhold and Caroline Brothers, “EU pact on immigration emphasizes enforcement”, *New York Times*, 7 July 2008, <http://www.nytimes.com/2008/07/07/world/europe/07iht-union.4.14302428.html?scp=2&sq=pact%20on%20immigration%20and%20asylum&st=cse>.

David Cronin, “Military Technology to Track Down Migrants”, *Inter Press Service*, 25 February 2010, <http://ipsnews.net/news.asp?idnews=50459>.

Euractiv, “Commission wants co-ordinated immigration policy”, 23 November 2000, <http://www.euractiv.com/migrations/commission-wants-ordinated-immigration-policy/article-115696>.

Euractiv, “The European Pact on Immigration and Asylum”, 18 September 2008, <http://www.euractiv.com/socialeurope/european-pact-immigration-asylum/article-175489>.

Euractiv, “EU to ease restrictions on seasonal workers”, 14 July 2010, <http://www.euractiv.com/socialeurope/eu-ease-restrictions-seasonal-workers-news-496294>.

Elinda Labropoulou, “Concern over proposed Greek border fence”, *CNN*, 4 January 2011, <http://edition.cnn.com/2011/WORLD/europe/01/04/greece.border.fence/index.html>.

Official EU Documents

Report of the Heads of Delegation to the Ministers of Foreign Affairs (Brussels Report), 21 avril 1956, <http://www.unizar.es/euroconstitucion/library/historic%20documents/Rome/preparation/Spaak%20report%20fr.pdf>.

Presidency of the European Council, *Presidency Conclusions. Tampere European Council 15 and 16 October 1999*, 1999, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm.

Council Regulation of listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, (EC) 539/2001, 15 March 2001.

Council Regulation of laying down a uniform format for residence permits for third-country nationals, (EC) 1030/2002, 13 June 2002.

Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, COM (2003) 687.

Council Directive concerning the status of third-country nationals who are long-term residents, 2003/109/EC, 25 November 2003.

Council Decision of 8 June 2004 establishing the Visa Information System (VIS), 2004/512/EC, 8 June 2004.

Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, (EC) 2007/2004, 26 October 2004.

- Communication from the Commission a Common Agenda for Integration – Framework for the Integration of Third-Country Nationals in the European Union, COM(2005) 389.
- Communication de la commission programme d’action relatif à l’immigration légale, COM(2005) 669, 21 December 2005.
- Regulation of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, EC 1931/2006, 2006.
- Regulation of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II), EC 1987/2006, 2006.
- Decision of the European Parliament and of the Council of establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme “Solidarity and Management of Migration Flows”, 574/2007/EC, 23 May 2007.
- Communication From The Commission examining the creation of a European Border Surveillance System (EUROSUR), COM(2008) 68, 13 February 2008.
- Regulation of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code, EC 450/2008.
- European Council, European Pact on Immigration and Asylum, 13440/08, <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>.
- Directive of The European Parliament And Of The Council of on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008/115/EC, 16 December 2008.
- Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 2009/50/EC, 25 May 2009.
- Treaty on the European Union.
- Treaty on the Functioning of the European Union.
- Proposal for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (Eurosir), COM(2011) 873.
- Application for Schengen Visa form, <http://www.diplomatie.gouv.fr/en/IMG/pdf/visagb.pdf>.

Chapter 2

From Apathy to Protest: How the EU's Legitimacy is Fading

PAUL BRZESINA*

2.1 Introduction: Input and Output Discrepancies

Over half a century ago, the initiatives that were taken and which resulted eventually in what became to be known as the European Union (EU), were truly elitist ones. The EU was deliberately created by a small elite “from above” and not “from below” because the politicians and not the people led the movement of closer European integration. Over the years, a bureaucracy was created that affects nearly every aspect of our lives today.¹ It is this development, the top down and not bottom up approach, that reveals the fundamental understanding inherent in European politics and especially in its institutions. This is what constitutes its “congenital defect”.

But what was created was only possible because it was tolerated by the people who longed for nothing more than just peace between themselves and their neighbours. Peace in Europe is taken for granted nowadays but wealth is not. This is where European solidarity and consequently popular support for the European Union may face its limits.

At the core of this chapter is the claim that the support for European integration by the people of its member states is asymptotically approaching zero and that it is on the verge of turning into open protest. Over the past

* Paul Brzesina holds a MLitt in International Security Studies from the University of St Andrews, UK, and a BA in History and Political Science from the University of Düsseldorf, Germany. He has gained work experience at the German Embassy in Copenhagen and the State Chancellery of the Land North Rhine-Westphalia and is currently working at Blohm + Voss Naval, a company of ThyssenKrupp Marine Systems, and is responsible for corporate development and communication. He is also a freelance researcher of the Centre for Direct Democracy Studies (CDDS) at the University of Białystok. For comments and remarks, you can contact him via ptb6@alumni.st-andrews.ac.uk.

¹ See Haller (2008), pp. 31–58.

decades we were able to observe a down-falling curve. European integration at the cost of weakening the strength of the traditional nation state was tolerated – arguably even supported – immediately after the war but with every election for the European Parliament (EP) tolerance and support faded away and apathy rose. The events accompanying the Constitutional Treaty and the Treaty of Lisbon, as well as the global financial and economic crisis show another rock bottom for European integration: Protest. The change from apathy to protest (and to some extent the rise of nationalism) is in my view the severest threat for democracies and the European Union. It is the direct result of the rising discrepancies between input and output legitimacy on the European level. One example shall help to underline my point:

On the 6 June 1988 Jacques Delors's held a speech in front of the EP in which he predicted that “[i]n ten years 80 per cent of economic legislation, maybe even fiscal and social, will have common origin” (meaning from the EU). Since then the “80 per cent myths” has circulated in the German yellow press as well as within academic and political circles.² Nevertheless, a calculation by the administration of the German parliament, the Bundestag, figured out that on average 31.5 per cent of the laws passed in Germany derive in one form or another from initiatives taken by the EU. Regardless of missing distinctions between directives and regulations, the depth of integration varies considerably from one policy field to another. That means for instance that 67 per cent of laws from the Ministry of Environment and 52 per cent from the Ministry of Agriculture, 33 per cent from the Ministry of Finances and 38 per cent from the Ministry of Economics have an European impulse.³

These numbers speak of course only for Germany and generalisations for other EU Member States are only partially feasible but the significant impact of the EU on the life of the citizens of the EU Member States – let it be a quarter, a third, half or even three quarter of legislation – cannot be neglected. What they reveal is the diminishing influence of the people of the EU Member States on the one hand and on the other the increase of legislation from the EU that has to be implemented on the national scale. In short, this is what is often commonly described as the gap between input and output legitimacy and in academic circles rather called consequentialist and procedural legitimacy which leads to a democratic or legitimacy deficit.⁴

² Quote taken from *Frankfurter Allgemeine Zeitung*, 14.05.2011, “Neue Statistik: EU macht weniger Gesetze als angenommen” (New statistic: EU makes less laws than assumed). See also König & Mäder (2009), pp. 1–5.

³ See above.

⁴ See for instance Rittberger (2003), pp. 206–208, Bowmann (2006), pp. 191–192, and Hurrelmann & Debardeleben (2009), pp. 232–235.

In order to put my claim that protest will become the answer to the faltering legitimacy of the EU forward, this chapter proceeds as follows: I will start by elaborating on the democratic deficit where I will point out the different aspects of the whole debate. Secondly, I will turn to one of the core elements of criticism within that debate, the European Parliament, which is the only directly elected institution of the European Union. Thereby I will analyse the powers of the EU which might be one explanation for weak voter turnouts. The next part will focus on popular support and I start by taking into account voter opinion polls and surveys in order to explain why the support seems so low. Afterwards, I will take another dimension of popular activity into account which became visible during the referenda about the Constitutional Treaty and then I will give an outlook based on the current developments of protest in the EU Member States. Last, I will summarise my arguments and conclude that if the weak popular basis of the EU is not strengthened, the developments during the financial and economical crisis will aggravate. The trend of diminishing support and apathetic attitude will turn into protest which leaves enough space for right wing populist parties to fill a vacuum. Should their power increase significantly, the entire project of European integration will be put in jeopardy.

2.2 The Democratic Deficit and Legitimacy Crisis

The democratic deficit or legitimacy deficit of the European Union is a topic that has generated much attention in political and academic circles. The simplified version that I have presented is only one part of a wider debate. Goodhart for instance identifies four broad types of the democratic deficit that “emerge from the vast and diverse literature on this subject”. These are “institutional, performance, secondary, and structural deficits”.⁵ The first type focuses on the lack of efficiency and accountability of the European Union’s institutions, in particular on the strong legislative role of the European Commission and the rather weak European Parliament. Performance deficits focus on output deficits which refer to policies that undermine the welfare state whereas secondary deficits are preoccupied with “deficits that occur within the EU’s Member States when governmental competences get transferred to the European level (...)”.⁶ Last, structural deficits refer to the lack of a European public sphere and the discrepancies between European and national polities.⁶ Even though this view is very differentiated, it is based on the presupposition

⁵ Goodhart (2007), p. 568.

⁶ See Goodhart (2007), pp. 568–569.

that there is one democratic deficit but this does not need to be an universally shared opinion. Observing the entire debate one reaches quickly the conclusion, as Ehin does, that all it is about is the nature of the European Union and the question of the indicator for democracy and legitimacy.⁷ So, how should legitimacy be judged then?

One could of course start by departing from the most common denominator, well known to all students of political science, which is often seen in Abraham Lincoln's famous quote, "Democracy is the government of the people, by the people, and for the people". Even this approach bears some problems because when looking for instance at the representation of the citizens in the European Parliament one quickly realises that "[t]he EU thus is not undemocratic by mistake but deliberately violates one of the constituting principles of democracy".⁸ It seems that normative standards for legitimacy are much harder to define than one would assume.

As I have highlighted earlier, the difference of the impact of the EU on some policy areas would make it even possible to judge each policy area by different standards of legitimacy in relation to its impact. This thought came also to Lord and Magnette who conclude that several principles of legitimacy co-exist. They summarise them in "four vectors", "indirect, parliamentary, technocratic, and procedural", each in combination with input and output legitimacy. These principles are in reality able to reinforce or weaken themselves as well as to be traded of against each other.⁹ Nevertheless, their approach has one fundamental shortcoming, they omit the role of the people or at least their *perception* of legitimacy. This view is not unproblematic because legitimacy is subjectively perceived and it is for this reason why in the worst case authoritarian regimes can even be perceived as "just". Therefore, the question lies between two poles: subjective perception on the one side and normative universal standards people believe in on the other. Similar to Lord's and Magnette's ideas, Ehin does a smart move that bypasses the entire academic debate by simply creating a bridge between the normative and empirical referent objects for judgement by looking at polls from the Eurobarometer and by trying to answer "whether the European citizens expect the EU to conform to the liberal-democratic criteria of legitimacy or not" and as he proves, they do.¹⁰ I will get back to this aspect in due time because one important question has to be kept in mind beforehand.

⁷ See Ehin (2008), p. 620 & 623.

⁸ Neyer (2010), p. 905. This approach is partially employed by Hurrelmann & Debardeleben (2009), pp. 233–238.

⁹ See Lord & Magnette (2004), pp. 188–192 & 199.

¹⁰ Ehin (2008), pp. 621–623 & 630–635.

If we now gradually shift our focus from the academic and in many ways theoretical sphere to the level of the common citizens of the EU Member States, another new question has to be asked: What are the channels through which the citizens of the European Union provide input legitimacy? Or in other words where can democratic participation and direct representation be found?

There are in fact only three kinds of input: There is the intergovernmental level where citizens elect national governments which in turn are represented in the Council of Ministers. On the transnational level there exists arguably a “civil society” that can directly affect the policy making process of the European Commission but as Hurrelmann freely admits, “[i]t is best defined as supplementary to the other channels, as its procedures lack their formality and bindingness”.¹¹ Therefore, one has to admit that there is only one institution in the EU that enjoys direct input legitimacy: The European Parliament. Even its members consider themselves to be “the voice of the people of Europe”¹² and Rittberger describes the European Union “as the only system of international governance” that “contains a powerful representative institution”¹³ but is that really the case? Goodhart is not the only one who highlights the institutional legitimacy deficit. Other like Follesdal and Hix claim also that the powers of the EP have not been increased to the same extend as the powers of the Commission which is the institution that determines most policies.¹⁴ On the contrary, the Commission has gained power at their expense.

Since the EP is the only directly elected institution, the voice of the people, one should also look at the strength of this voice in order to derive conclusions about the popular support for the EP and the EU in general.

2.3 The European Parliament – A Parliament Without Powers?

A lot has been written about parliaments and representation and again the question that remains is by which standards has the European Parliament to be judged? By the standards of national parliaments? Some, like Neyer for instance, are very sceptical about this because in their view “the major task of the European Parliament is not to represent the people of Europe [...]” but “[...] to critically accompany the working of the Commission and the

¹¹ Hurrelmann & Debardeleben (2009), pp. 230–232.

¹² See for instance the homepage of Jim Higgins, MEP, North West Constituency, United Kingdom.

¹³ Rittberger (2003), p. 203.

¹⁴ See Follesdal and Hix (2005), p. 5.

Council [...]” and “[...] to guard against any legal activity which cannot be justified publicly or which does not meet the expectations of the citizens of the European Member States”.¹⁵ However, since the people’s expectations are in line with national standards, why should they not be used to judge?

Next, the institutional nature of the EP is far from the nature of national parliaments as the electoral system, “[t]he absence of a ‘European Element’ in national and European elections [...]”, the violation of the principle of equal representation, and the lack of European parties demonstrate.¹⁶ This leads us to another aspect, if these standards are not as far developed as national ones, maybe the EP’s powers are?

It is certainly right to conclude that with every treaty revision the European Parliament has been empowered more. The reason for this is quite peculiar: Every kind of treaty revision was a result of the widening gap between input and output legitimacy and only because this gap and the increasing democratic deficit was also perceived by the political elites, they realised that they had to find a way to tackle it. In other words, the democratic deficit is the driving force behind the empowerment of the European Parliament.¹⁷ The most recent treaty revision in form of the Constitutional Treaty would have had a similar effect and even the Treaty of Lisbon, which is in the words of Giscard d’Estaing “[...] the same as the rejected constitution – only the format has been changed to avoid referendums” led eventually to similar outcomes.¹⁸ If it is true that the EP will be significantly empowered by these treaties, would we be still able to talk about a democratic deficit? Let us therefore look at the prospective supervisory, budgetary and legislative powers of the EP as they were laid down in the Constitutional Treaty and how they are envisaged in the Treaty of Lisbon.¹⁹

One of the most important facts is the statement that the EP “shall, jointly with the Council, exercise legislative and budgetary functions”. This is

¹⁵ Neyer (2010), p. 913. With reference to the following article: Auel, K. (2007), Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs, *European Law Journal*, 2007, Vol. 13, No 4, pp. 487–504.

¹⁶ See Follesdal and Hix (2005), p. 6 & 19. For the electoral procedures see in particular Farell & Scully (2005).

¹⁷ See Rittberger (2003), pp. 220–221.

¹⁸ Euobserver: “Lisbon Treaty Made to Avoid Referendum, says Giscard”, by Helena Spongenberg, 29.10.2007. Even eurosceptic groups like Open Europe claim that both treaties are widely identical. See Open Europe (2008), p. 5.

¹⁹ A comparison of both treaties is a very wearisome endeavour because the Constitutional Treaty, or rather the “Treaty establishing a Constitution for Europe” (TCE), was supposed to be a new treaty summing up all the previous treaties in one. In contrast, the Treaty of Lisbon introduces only amendments to the “Treaty of the European Union” and the “Treaty establishing the European Community”, which is known as the “Treaty on the Functioning of the European Union” (TFEU).

done by replacing or in fact relabelling the co-decision procedure “ordinary legislative procedure”.²⁰ Already these provisions make the EP an equal legislator to the Council of Ministers²¹ and in addition to this, the competences of the EP as they were laid down in the Treaty of Nice rise from 43 to 82 in the Constitutional Treaty.²² But there are still 26 cases of exceptions where a “special legislative procedure” has to be adopted.²³

When looking at the budgetary procedure, the Constitutional Treaty and the Lisbon Treaty are nearly identical but there is one important distinction that envisages two essential changes. In both the co-decision procedure, too, applies to the entire budget and the distinction between compulsory and non-compulsory expenditure is made obsolete. The major amendment applying to the budgetary procedure is that “the Treaty of Lisbon gives the final word to the European Parliament for all categories of expenditure (...)”.²⁴ Prior to the Constitutional Treaty the EP “had only review over expenditures and compulsory expenditure was decided upon by the Council alone”.²⁵ Even though this looks like another form of empowerment – and it certainly is – one should keep in mind that in the past the European Parliament was able to force its will upon the European Commission in terms of non-compulsory expenditure.²⁶

A prime example of supervisory powers that is often mentioned is the election of the President of the Commission but it can be argued that the EP does not elect in the real sense but rather ratifies.²⁷ Concerning the whole Commission, the EP has given itself the “vote of confidence” which has gained more and more weight over time so that since 1985 each Commission

²⁰ See TCE Art. I-20 (1) and Art. III-396.

²¹ See Europa, A Constitutions for Europe, The Union's Institutions, The European Parliament, 19.06.2011.

²² See European Parliament (2004), “Europa wagt mehr Demokratie” (Europe Dares more Democracy), Special Issue, p. 2.

²³ See Löffler (2004).

²⁴ See TCE Articles I-53 to I-57 and for the latter Articles III-402 to III-415 (TCE Art. III-403 equals TFEU Art. 270 A). Concerning the Lisbon Treaty see Centre for European Policy Studies (CEPS), Royal Institute for International Relations (EGMONT), and the European Policy Centre (EPC) (2007), p. 10.

²⁵ Pinelli (2004), p. 84.

²⁶ See TCE Art. I-55 and Corbett (2007). Art. II-404 describes the procedure applying to the budget which is similar to the legislative procedure where the Conciliation Committee is enacted to find a common position between the EP and the Council. If a common position is not reached within 21 days “a new draft budget shall be submitted by the Commission” Art. III-404 (8).

²⁷ See TCE Art. I-20 and Art. I-27, Pinelli (2004), p. 92 and CEPS, EGMONT and EPC (2007), pp. 11–14. Referring to TFEU Art. 193, Art. 201 and in the TEU Articles 9 D (8) and 9 A (1).

waits until it is confirmed by the EP. Nevertheless, this is nothing more than a consultative role but as Corbett argues “no individual would wish to take office should Parliament reject his or her candidacy”.²⁸ The most powerful instrument of control, however, is the motion of censure on the Commission which can lead to its resignation and this actually happened in May 2005. A motion of censure was voted against José Manuel Barroso, the Commission President, only shortly before the referenda took place but he stayed in office without any serious problems.²⁹

As can be seen, the European Parliament and European democracy has been strengthened by the last treaty revisions and it seems like a considerable effort was taken to counterbalance the Commission by giving more power to the EP. However, the lack of an initiative right for the EP, the exclusion from several policy fields, and the fact that the EP still does not really elect the Commission show that the EU has not yet arrived at the final stage, wherever that will be.³⁰ Now that I have proven that the EP is a powerful institution and that the elite has recognised that something had to be done in order not to alienate the people and in order to close the gap between input and output legitimacy, the question that remains to be answered is, does the European Parliament enjoy any legitimacy?

2.4 Electing the European Parliament – Only Second Order Elections?

What is indeed very surprising is the fact that even despite considerable empowerment of the European Parliament, the voter turnout in the EU Member States has steadily declined. The overall average for each election underlines that trend: Whereas the turnout for the first election in 1979 was 61.99 per cent, it dropped to 43 per cent in 2009. An all time low that demonstrates apathy at its best. Even the number of the eight new EU Member States after the eastern enlargement was embarrassingly low with only 31 per cent, for the two Mediterranean countries with 77 per cent very high, and for Romania and Bulgaria with only 29 per cent and 33 per cent quite low as well.³¹ On average, the voter turnout for election for the European Parliament is 30 per cent lower than in national ones which demonstrates a very high “voter fatigue”.³² How can this be explained? Indeed, the EP has been lacking some powers but these

²⁸ Corbett and others (2007), pp. 266–267 & pp. 271–273.

²⁹ See TCE Art. III–340 and Dinan (2006) pp. 73–74.

³⁰ See also Hurrelmann & Debardeleben (2009), pp. 231.

³¹ European Parliament, Turnout at the European Elections (1979–2009).

³² Franklin & Hobolt (2010), p. 2 & p. 6.

have been significantly increased over the years but maybe there are others factors that have to be taken into account?

For instance electoral systems. The provisions that were laid down for uniform procedures are quite vague and line out standards that still allow enough space for national preferences, individual threshold, proportionality, and constituencies.³³ Taking into account the other aspects of the democratic deficit, like the lack of an European public sphere, another argument is not far away that leads to the conventional wisdom that the elections of the EP are “second-order national contests” that often serve as referenda on the performance of the national government. This is an observation that has been made for all EP elections.³⁴ So, how do electoral campaigns look like in the EU Member States and what are the factors that determine voting behaviour?

The easiest way to shed some light upon this would be simply to ask the voters and that has been done by the team of Eurobarometer who conducted extensive research on European elections. A survey from 2007 reveals that the people who were questioned had generally speaking a good understanding of the competences of the EP in the area of enlargement (68 per cent right answers), its budgetary competences (60 per cent) and also how the MEPs are elected (48 per cent)³⁵ but when asked to judge themselves on their knowledge, most people were very critical of themselves. On a scale from one to ten (one meaning knowing nothing, ten knowing a great deal), the average for all countries concerning the role of the EP in the EU is for various questions only 3.7. It might be explained by the fact that 73 per cent feel fairly badly or very badly informed about the EP.³⁶

So far, these questions were rather empirical ones and the time has come to turn to normative ones. When asked which institutions should have the greatest decision-making power, 47 per cent think it should be the European Parliament and only nine per cent that it should be the Commission. More interesting is the comparison between the actual perceived knowledge of the power of the EP and the power it should have. Then, the EP should have four per cent more power, rising to 47 per cent and the Commission six per cent less, only eight per cent. But, mind you, for both aspects, nearly a quarter state

³³ See European Parliament (2009), Electoral Procedures, and Council of the European Union, Council Decision of 25th June and 23rd December 2002 (2002/772/EC/ Euratom) as well as Farrel & Scully (2005), p. 770.

³⁴ Davidson-Schmich (2009), pp. 1–4 & pp. 9–10.

³⁵ See Eurobarometer (March 2008), The European Parliament, Special Eurobarometer 288, p. 8.

³⁶ See above, pp. 23–24.

that they do not know.³⁷ As I have shown, the EP's power has been steadily increased. Of the people asked, 45 per cent think that the EP's powers has been strengthened, eight per cent that it has been weakened, and 26 per cent that it stayed the same.³⁸

However, when taking into account their own judgement about their knowledge of the EP, most people claim that they do not know very much about the EP and it is not surprising that for 35 per cent there is nothing in particular they appreciate about the EP whereas 33 per cent simply state that they do not know. The opposite questions causes similar results. The last result that is relevant for us is the fact that 55 per cent think that the EP is not well known, which is in order of the rankings of the attributes associated with the EP, after democratic, the second one.³⁹ What do these results actually reveal? A significant number believes that the EP is not only the most powerful institution and one that has been empowered over the years but also that it should be the one with most powers but that argument does not hold up to reality. Furthermore, they admit that they do not know much about the EP. Is this maybe the reason for low voter turnouts? No interest in EP elections?

Results from a pre-electoral survey in September 2008 suggest so, too. They found out that only 16 per cent knew one year in advance when the elections were going to take place. 75 per cent, however, said that they did not know.⁴⁰ Asked about their interest in these elections, 46 per cent said that they were "very or somewhat interested" whereas 51 per cent said that they were "somewhat or very disinterested". The same percentage of disinterest is reached when asked about the interest in the next EP elections but there 46 per cent claim that they are interested.⁴¹

Concerning the prospective turnout, 30 per cent said that they will definitely not vote in contrast to 14 per cent who said they would. What is even more interesting is the reason why they would not vote and the main reasons were that their vote would not change anything (68 per cent), the lack of knowledge of the EP, and no interest in the elections, (60 and 59 per cent respectively), the belief that the "EP does not sufficiently deal with the problems which concern the people" (57 per cent). "No interest in European affairs" is only mentioned by 45 per cent and what I have guessed earlier, that EP elections are second order elections is underlined by the fact that there is only one per cent

³⁷ See above, pp. 35–36.

³⁸ See above, p. 39.

³⁹ See above, pp. 49–51.

⁴⁰ See Eurobarometer (September 2008), The European Parliament, Special Eurobarometer 299, p. 6.

⁴¹ See above, pp. 9–11.

difference between the answers relating to the importance of European and national elections.⁴² In line with that is also the finding that for most people the themes that mattered most, were the ones that referred to the daily life of the people which were at the time mainly economic issues, growth and unemployment.⁴³ After the elections took place, 28 per cent mentioned the “lack of trust in/ dissatisfaction with politics generally” as the main reason for abstaining, followed by 17 per cent for each “not interested in politics as such” and “vote has no consequences/ vote does not change anything” which makes clear that of the most important reasons none has anything to do with European affairs in particular.⁴⁴

These results reveal a lot about electoral behaviour and public support for the European Parliament and interest in European politics. First of all, they do not indicate at all that the turnout is so low because in comparison to other institutions, the EP is quite weak.⁴⁵ In fact, they reveal the opposite, that “[...] despite increasing powers of the EP, these elections have been met with public indifference and apathy” and that “the nature of EP elections” are the main reason for the lack of interest.⁴⁶ What counts most for the people are national affairs and not European ones and this does also reveal that the discrepancy between input and output legitimacy has never been really solved. The EU started as an elite project and it seems to remain one that despite its increasing impact on the people's daily life hardly triggered any interest in European affairs.

2.5 The Constitutional Crisis and European Referenda

Instead of being seen as second order elections with low turnouts, the referenda on the Constitutional Treaty demonstrate exactly the opposite. Neither indifference, apathy or a fatigue syndrome can be detected, instead high turnout. Let us look at these peculiar events.

On the 29 May 2005 the referendum on the Constitutional Treaty was held in France. With a voter turnout of over 69 per cent of which 54 per cent voted “no”, the claim that European affairs create little interest must be re-evaluated. Not only are the reasons for the high turnout of interest but also the

⁴² See above, pp. 17–21.

⁴³ See above, pp. 30–31.

⁴⁴ See Eurobarometer (November 2009), Post-Electoral Survey 2009, Special Eurobarometer 320, p. 27.

⁴⁵ See Davidson-Schmich & Davidson-Schmich (2009), pp. 4–5.

⁴⁶ Franklin & Hobolt (2010), p. 17.

main factors that determine electoral behaviour. A post-referendum survey by Eurobarometer reveals that 31 per cent of the no-voters were concerned that the constitution might have negative impact on employment in France and that unemployment was too high anyway (26 per cent). The constitution was also, from an economic point of view, considered to be too liberal (19 per cent) and the third reason with 18 per cent was the opposition to the French president, the national government or some parties. A key element for 32 per cent of the voters for taking part in these elections was on the one hand their overall opinion concerning the European Union and on the other to the same extent the economic and social situation in France and only 18 per cent said that it was the constitution itself that determined their turnout.⁴⁷

Similar developments took place in the Netherlands where with a turnout rate of over 62 per cent 62 voted against and 38 per cent in favour of the constitution.⁴⁸ This was unexpected because a turnout rate of only 30 per cent was predicted. Here again the high turnout suggests strong interest in European politics or would it be misleading to assume that? The actual reasons for the no vote was first of all the “lack of information” (32 per cent), secondly, the “loss of national sovereignty” (19 per cent), and then with 14 and 13 per cent respectively opposition to the national government and certain political parties and the costs of the European Union for the Netherlands.⁴⁹ What is also interesting in contrast to the findings concerning the elections for the European Parliament where European topics play only a minor role is that the financial share of the Netherlands on the EU played with 31 per cent the key role in these elections, followed with 21 per cent by the economic situation in the Netherlands and with 18 per cent by the opinion on the European Constitution.⁵⁰

The parallels in both countries, France as well as the Netherlands are striking but as these surveys reveal, the protest did not directly aim at the European Union in France where national politics played the more dominant roles whereas in the Netherlands they did. Nevertheless, both times the constitution was rejected. Is the support for the EU already cracking?

After both rejections of the Constitutional Treaty the political elite tried to act wisely. The President of the European Council and the Heads of States decided to enter a “period of reflection” in which they wanted to consult each

⁴⁷ See Eurobarometer (June 2005), Post-Referendum Survey in France, Flash Eurobarometer 171, pp. 18–20 & p. 31.

⁴⁸ See Eurobarometer (June 2005), Post-Referendum Survey in The Netherlands, Flash Eurobarometer 172, pp. 3–4.

⁴⁹ See above, p. 16 & p. 29.

⁵⁰ See above, p. 19.

other on the next steps but also to continue ratification.⁵¹ It was soon realised that ratification would cause severe problems but the constitution should be preserved as far as possible and eventually the Treaty of Lisbon evolved which obviously tried its best to avoid the term “constitution” which has provoked many EU Member States to call for a referendum by assuming that every “European Constitution” will make National Constitutions obsolete or at least violate them.⁵² The Treaty of Lisbon was agreed on the 13 December 2007 in Lisbon which was signed there by the European leaders.⁵³

However, having tried to avoid referenda there were still countries where these had to be held and Ireland was one of them. During a first referendum on the 12 June 2008 the new treaty was rejected only to be agreed on in a second referendum in October 2009. The turnout in Ireland was with 53 per cent between the average of the latest EP election and the high turnouts in France and the Netherlands.⁵⁴ The reasons for this turnout were first of all the lack of knowledge concerning the Lisbon Treaty (52 per cent), its low priority because the Irish were “too busy” to vote (45 per cent), the campaign that had “turned them off” (34 per cent) and no interest in politics (31 per cent). No interest in European affairs had gained 24 per cent.⁵⁵ Concerning the campaign 69 per cent said that the no campaign was “more convincing”, an opinion that is also shared by 15 per cent of the yes voters.⁵⁶

In 2009 the abstention rate had significantly declined, from 47 per cent to 41 and the benefits that were now perceived by the Treaty of Lisbon increased from nine per cent to 38 and the lack of information played only a minor role (four per cent) but instead “to protect Irish sovereignty” (17 per cent) and “the lack of trust in politicians” rose from twelve per cent to 17 and six to 10 per cent.⁵⁷ Also this time the percentage of voters who found the “yes” campaign more convincing rose from 15 to 67 per cent whereas the ones that were convinced by the “no” campaign declined from 67 to 18 per cent. However, the reasons why most Irish citizens voted yes were truly inspired by national concerns: 32 per cent saw the Treaty of Lisbon “in the best interest of Ireland” and 23 per cent

⁵¹ Luxembourg Presidency of the Council of the European Union, “Jean-Claude Juncker states that there will be a Period for Reflection and Discussion but the Process to ratify the Constitutional Treaty will continue with no Renegotiation”, Press Release, 17.06.2005.

⁵² See Schulte (2007), pp. 129–130.

⁵³ See Euractiv, “European Leaders Sign New EU Treaty In Lisbon”, 14.12.2007.

⁵⁴ See Eurobarometer (July 2008), Post-referendum Survey in Ireland, Flash Eurobarometer 245, p. 6.

⁵⁵ See above, p. 8.

⁵⁶ See above, p. 13.

⁵⁷ See Eurobarometer (August 2009), Lisbon Treaty Referendum Survey Ireland 2009, Flash Eurobarometer 284, p. 5.

thought that “it will help the Irish economy” and 19 per cent that “Ireland gets a lot of benefit from the EU”.⁵⁸ A decisive factor for the yes-voter were probably also the Irish guarantees that were included in the second referendum.⁵⁹

As I have initially claimed, the declining participation in elections is partially a result of the declining interest in the EU. However, a declining voter turnout does not necessarily mean that people become more dissatisfied, it can even mean the opposite because the more you are satisfied the less urge is there to change something.⁶⁰ This can also be applied to referenda in general, especially, when compared to the elections of the European Parliament. Whereas the elections of the European Parliament indicate voting fatigue, arguably European lethargy because the perceived impact seems comparably low, the referenda that took place demonstrate how national themes in a European context can be utilised to mobilise the electorate because they are perceived as an instrument of imminent change. Today mass mobilisation seems to take another form and to go even further.

2.6 The Economic and Euro Crises

With the “credit crunch” and the global economic recession around 2007 a turning point in the history of popular support for the European Union emerged that was strongly characterised by protest. It is of course true that protest has always existed and that many countries have different traditions and cultures of protests. Nevertheless, the beginning of the subprime mortgage crisis that led to a financial and economic crisis which was followed at least in Europe by the debt or so called Euro crisis, triggered mass protests in many EU Member States.

Countries like Greece, Ireland, Portugal, Spain, and even Italy, have accumulated enormous debts which, in the worst case, could result in their bankruptcy, at least in theory so far.⁶¹ This situation has put so much pressure on the national governments that all of them initiated in one form or another latest in 2010 national austerity programmes. Generally speaking, all citizens are affected by these measures directly, because for instance their salaries are lowered, or indirectly, because some services like social benefits will not be available to the same extend as they were in the past anymore.

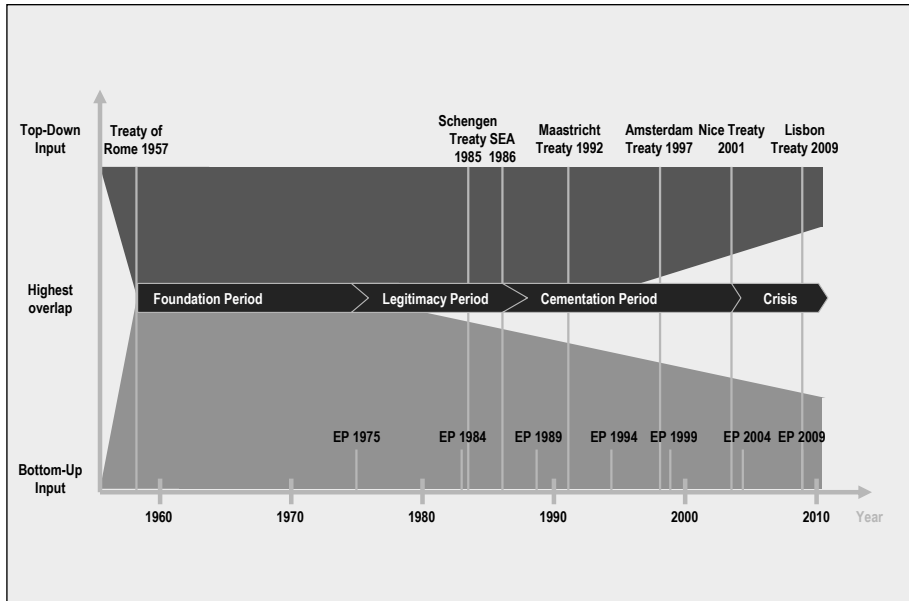
⁵⁸ See above, pp. 6–7.

⁵⁹ See Referendum Commission, *Lisbon Treaty 2009, Developments since 2008*.

⁶⁰ See Merkel (2010), p. 3. He refers to an OECD survey where the countries with the lowest voter turnout over the last 20 years (Switzerland, United Kingdom, and the United States) showed a high subjective satisfaction with the democratic system they live in.

⁶¹ See Deutsche Welle, “Europe’s next Bankruptcy Candidates?”, 28 April 2010.

Figure 1. Input-Output Correlation



In the United Kingdom students demonstrated collectively against higher tuition fees all over November 2010.⁶² Even stronger protest has occurred in Spain where also students, in particular young graduates, belong with 46 per cent unemployment to the group that is suffering most under the crisis and the country itself has with 21 per cent unemployment the highest percentage in the European Union.⁶³ The government's intention in France to rise the retirement age by two years which is part of a wider programme mobilised thousands of people⁶⁴ and in Italy, the third strongest economic power in the European Union, public sector cuts and numerous scandals have led to direct protest against the Prime Minister Silvio Berlusconi.⁶⁵ Also in Portugal, a country that belongs to the most severely affected countries by the crisis, as a reaction to announced cuts, labour protests begun in November 2010 and resulted in a wave of protests all over March 2011. These were the "largest national demonstrations in decades".⁶⁶

⁶² See BBC, "Violence at Tory HQ Overshadows Student Fees Protest", 10 November 2010.

⁶³ See CNN, "Thousands protest economic Crisis, high Unemployment in Spain", 18 May 2011 and see BBC "EU Austerity drive Country by Country", 11 November 2011.

⁶⁴ See BBC, "France hit by new Wave of Strikes over Pension Reforms", 19 October 2010.

⁶⁵ See CNN, "Italy Protesters Rally against Berlusconi", 5 November 2011.

⁶⁶ See CNN, "Portuguese Workers walk out to protest Austerity Measures", 24 November 2010 and Guardian, "Portugal needs its sleeping King now more than ever", 25 March 2011.

Further, pan-European actions were taken on the 29 September 2010, the European Day of Action, when thousands of people in Belgium, Greece, and Poland, to name few, were united against the austerity measures of their national governments.⁶⁷ But the country where probably most protests took place, is the one with the most severest problems, the one, that is on the verge of bankruptcy: Greece. In protests following the government's announcement to cut public expenditure three people died and an entire movement seems to have evolved.⁶⁸

Another movement that has emerged on an even larger scale beyond the borders of Europe, is the occupancy movement. The enormous efforts that had to be taken by national governments to bring the global financial system back into balance after the first crisis have not been forgotten and the ones who were responsible for that downturn, (Investment) Bankers, are still causing discontent. With the occupy movement that begun on the 17 September 2011 in New York in front of Wall Street, a global movement, not only in the industrialised and developed world, against economic and social inequality emerged that one months after it started has spread over 900 cities.⁶⁹ How far this movement will go, remains to be seen.

The similarities between the European cases mentioned above are striking. One group of these countries has even received the label "PIGS", standing for Portugal, Ireland, Greece, and Spain, sometimes even spelled with two "I" to include Italy as well. What these have in common is that they belong to the so called Eurozone, the countries with the single European currency, the Euro, and that they all are threatened in one way or another by bankruptcy. Even outside the Eurozone, other countries like the UK, Latvia, Romania, and Hungary are facing severe financial challenges, too.⁷⁰

Looking at the crisis there are at least two levels, one is affecting the ordinary citizens of the EU Member States who are confronted with austerity measures by their governments which they can barely comprehend. The other level is taking place among the European leaders who fear a chain reaction if one state is permitted to go insolvency. While angry protesters were marching through the streets shouting, "Hands off our rights! IMF and

⁶⁷ See Guardian, "European Day of Protests and Strikes: Live Updates", 29 September 2010 and Der Spiegel, "Streiks und Proteste in EU Ländern: Wutlauf gegen das Sparen" (Strikes and Protests in EU Countries: A March of Anger against Cuts), 29 September 2010.

⁶⁸ See BBC "Three dead as Greece protest turns violent", 5 May 2010 and BBC, "Greece protest against Austerity Package turns violent", 28 June 2011.

⁶⁹ See Guardian, "Occupy Movement: From local Action to a global Howl of Protest", 18 October 2011.

⁷⁰ See Deutsche Welle, "Europe's next Bankruptcy Candidates?", 28 April 2010.

EU Commission out!”⁷¹ European leaders called in emergency summits to deal with this crisis for over a year now, first to establish the European Financial Stability Facility in May 2010 that aims at preventing states from going bankrupt and then in October 2011 to write off 50 per cent of Greece's debts.⁷² Now, nearly one year after the European financial umbrella was created, views changed, solidarity is fading and nothing underlines this changing point more, than the fact that bankruptcy and exclusion from the Eurozone are no more off-topic.⁷³

Surprisingly, here the opinions of the political elite and the ordinary citizens seem to correlate. The heads of states of the EU Member States try desperately to secure the Eurozone at all costs necessary but they are to the same extent no more willing to pay for one of their members in peril as are the citizens in the countries that are not affected by the crisis.

In the opinion of the citizens, the EU has constantly gained, from spring 2009 onwards until fall 2010, when the last survey was conducted. Since then faith in the EU's conflict management skills declined. What the survey also reveals is that the EU enjoys more trust than national governments.⁷⁴ However, despite the lack of contemporary opinion polls, the protests that are currently taking place speak a language on their own and they can serve as an indicator for the declining support but for whom?

Political consequences are and were very likely and they reveal a development that in combination with the legitimacy crisis, poses a fundamental threat to the European (solidarity) Union. In many national elections that took place, right wing national parties gained significant votes. Here are first indicators for the rise of populism, nationalism, and euroscepticisms. As mentioned, some transnational movements have emerged but most protests are directed at national governments and that means that the people who are filling the streets are *not* united in protest.

The elections on the 15 March 2011 in Finland were won by Timo Soini's right wing party “True Finns”⁷⁵ and in the Netherlands Geert Wilders' Freedom Party doubled its seats in the last parliamentary election in September 2010 is now the third strongest party.⁷⁶ In Scandinavia, namely Denmark, Pia

⁷¹ See BBC, “Greece Police Tear Gas anti-austerity Protesters”, 1 May 2010.

⁷² See for instance Guardian, “Debt crisis: EU Leaders announce €70bn Plan to protect Euro”, 8 May 2010 and “EU Summit: Crisis rumbles on as EU Leaders produce half-finished Deal”, 26 October 2011.

⁷³ See Guardian, “Bankruptcy threat to Greece as Euro Ministers delay vital €8bn”, 26 September 2011.

⁷⁴ See Eurobarometer (January 2011), Economic Governance in the European Union, Standard Eurobarometer 74, p. 10.

⁷⁵ See BBC, “True Finns' Nationalism Colours Finland Election”, 15 April 2011.

⁷⁶ See BBC, “Surge for Dutch anti-Islam Freedom Party”, 10 June 2010.

Kjærsgaard's Danish National Party became with 13.8 per cent in 2007 also the third strongest party.⁷⁷ In France, Jean-Marie Le Pen's (and his daughter's) "Front National" gained a considerable number of votes in the first round of during the local elections in March 2011.⁷⁸

In some countries where regular elections were not foreseen in the near future but where the crisis had also a strong impact, the national leaders resigned after they were confronted with protest. Their successors are less characterised by ideological nationalist ideas than they are seen as crisis copers.⁷⁹ So what prospects does the European Union have?

2.7 The Challenges Ahead

European integration has been an evolutionary process whose driving force were the political elites. The development of the European Parliament, from the Common Assembly, a consultative institution in 1952 to a true Parliament with its first direct elections in 1979 through which the citizens of the EU Member States were enabled to provide direct input, can be considered a significant achievement for the EU. However, the question that has to be asked in the 21st century is whether parliamentary elections are sufficient nowadays?

The European Parliament, its co-institutions and the political elites undertook various measures to counterbalance the democratic deficit but even though they have demonstrated big efforts, the legitimacy deficits still persisted because of the structural weaknesses within the institutional triangle. In the perception of the citizens the European Parliament should be (rather should have been) at least an equal co-legislator to the Council if not a stronger actor. That is something that has only been achieved recently, over 30 years after the first European election.

In retrospective, public awareness of the European Parliament was highest when elections were approaching and the European Parliament seems to be and to have been very sensitive to the degree of its awareness⁸⁰ but this could not change the fact that most voters did not even know one year in advance that EP elections were upcoming.

⁷⁷ See BBC, "Danish Centre-Right wins Election", 14 November 2007.

⁷⁸ See Guardian, "French Local Elections leave Sarkozy Party in Disarray: Far-right Front National Party makes historic Gains in first Round of Elections due to Popularity of Leader Marine Le Pen", 29 March 2011.

⁷⁹ See for instance Guardian, "Portugal in Crisis after Prime Minister resigns over Austerity Measures", 23 March 2011, "Silvio Berlusconi resigns as Italian prime minister", 13 November 2011 or "Lucas Papademos appointed Greek Prime Minister", 10 November 2011.

⁸⁰ See Shephard, Mark (1997), p. 438.

So far, I have largely omitted the EP's own awareness raising campaigns and measures and it would certainly be interesting to evaluate their impact even though based on the voter turnout, the answers seem quite obvious. Some measures, for instance the postcards that addressed daily issues of the citizens of the EU Member States⁸¹ or the increased use of social media in order to mobilise the younger electorate⁸² seemed very promising but they still could not impede dissatisfaction or at least disinterest.

Since its foundation, fading support or even diminishing tolerance for the European entity that would one day become the European Union can be observed. It is therefore possible to argue that the overlap between input and output legitimacy must have been very strong at the beginning, as the schematic graph tries to visualise, and drifted apart continuously. In the period when the legitimacy deficit occurred and the cementation period where the EU tried to overhaul itself for the years to come, the real threat to the process of European integration emerged. Here a gradual shift from apathy to protest can be observed and it is this divide that is slowly replacing the support that the European Union has enjoyed for several decades with national chauvinism. This gap started with the declining voter turnout for the European Parliament and became wider during the financial, economic, and debt crises. On the one hand international developments, exogenous factors, can be blamed for this but on the other, some of these developments were the inherent congenial defects of the European Union that contributed to the diminishing support base of the EU. With growing lack of support the progress that was made in Europe is suddenly put into jeopardy by the anachronistic idea of nationalism when the world is too interconnected and interdependent to allow states to make their own way regardless of others. This is why there is no alternative to the European Union, especially in times like these.

The crisis we are facing today reveals also that democracies as we know them do not seem to work sufficiently enough. They do not give citizens enough space for direct participation, neither on a national level where they feel impotent when they are confronted with severe austerity measures nor on the European level. When dynamics are triggered that need quick decisions, political systems that work in time intervals are not flexible enough to give a quick answer from below. Our electoral systems on both levels do not provide enough input in times when decisions are made that affect the people nearly immediately. The European Union and the elites have finally

⁸¹ See Association of Local Democracy Agencies (ALDA) (2009), p. 5.

⁸² See Press Release, European Parliament creates Profiles on Online Social Media to raise Awareness of the European Elections, 2009 Elections, 27 April 2009.

recognised this. One of the features of the Treaty of Lisbon for instance is the “European Citizens’ Initiative”. An initiative has to be supported by at least one million citizens from seven EU Member States and fulfil certain formal criteria in order to be directly forwarded to the European Commission which has a considerable short period (three months) to look at it and to conclude measures and actions it believes to be appropriate.⁸³ This instrument reflects the lessons learned from the past because it counterbalances the strong EU legislative influence on the EU Member States by allowing its citizens to articulate their own initiatives and with the empowerment of the European Parliament, another pillar for direct input legitimacy. The European Union seems to get slowly on track and the protests in the streets – if dealt with adequately – may accelerate the steps on the road towards direct democracy.

⁸³ See Europa, “Commission welcomes Agreement on European Citizens’ Initiative”, Press Release, 15 December 2010, and also TFEU Art. 24 (1) and ECI Regulation 211/2011.

Sources

BBC:

- “Danish Centre-Right wins Election: Denmark’s Centre-Right Government of Prime Minister Anders Fogh Rasmussen has won a snap Election, securing a third consecutive term in Office”, 14 November 2007, available at: <http://news.bbc.co.uk/2/hi/europe/7091941.stm> (20.05.2011).
- “Greece Police Tear Gas anti-austerity Protesters”, 1 May 2010, available at: <http://news.bbc.co.uk/2/hi/8655711.stm> (14.11.2011).
- “Three dead as Greece protest turns violent”, 5 May 2010, available at: <http://news.bbc.co.uk/2/hi/8661385.stm> (14.11.2011).
- “Surge for Dutch anti-Islam Freedom Party: A Dutch anti-Islam Party has more than doubled its Seats in Parliament in a national Vote, though it is unclear if it will take Part in a Coalition”, 10 June 2010, available at: <http://www.bbc.co.uk/news/10271153> (20.05.2011).
- “France hit by new Wave of Strikes over Pension Reforms, 19 October 2010, available at: <http://www.bbc.co.uk/news/world-europe-11570828> (20.05.2011).
- “Violence at Tory HQ overshadows student fees protest”, 10 November 2010, available at: <http://www.bbc.co.uk/news/education-11726822>; <http://www.bbc.co.uk/news/education-11726822> (14.11.2011).
- “True Finns’ Nationalism Colours Finland Election”, 15 April 2011, available at: <http://www.bbc.co.uk/news/world-europe-13091920> (20.05.2011).
- “Greece protest against Austerity Package turns violent”, 28 June 2011, available at: <http://www.bbc.co.uk/news/world-europe-13935400> (14.11.2011).
- “EU Austerity drive Country by Country”, 11 November 2011, available at: <http://www.bbc.co.uk/news/10162176> (14.11.2011).

CNN:

- “Thousands protest economic Crisis, high Unemployment in Spain”, 18 May 2011, available at: <http://edition.cnn.com/2011/WORLD/europe/05/18/spain.protests/index.html> (14.11.2011).
- “Italy Protesters Rally against Berlusconi”, 5 November 2011, available at: http://articles.cnn.com/2011-11-05/world/world_europe_italy-protest_1_berlusconi-confidence-votes-italy-s-president-giorgio-napolitano?_s=PM:EUROPE (14.11.2011).
- “Portuguese Workers walk out to protest Austerity Measures”, 24 November 2010, available at: http://articles.cnn.com/2010-11-24/world/europe.austerity.protests_1_austerity-measures-portugal-unions?_s=PM:WORLD (14.11.2011).
- Council of the European Union, Council Decision of 25th June and 23rd December 2002, Amending the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage, Annexed to Decision 76/787/ECSC/ EEC/ Euratom (2002/772/ EC/ Euratom), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:283:0001:0004:EN:PDF> (29.05.2011).

Der Spiegel:

“Police Debacle in Heiligendamm: G-8 Protesters Block Roads to Summit”, by Charles Hawley, 6 June 2007, available at: <http://www.spiegel.de/international/germany/0,1518,487113,00.html> (20.05.2011).

“Streiks und Proteste in EU Ländern: Wutlauf gegen das Sparen” (Strikes and Protests in EU Countries: A March of Anger against Cuts), 29 September 2010, available at: <http://www.spiegel.de/politik/ausland/0,1518,720312,00.html> (20.05.2011).

Deutsche Welle, “Europe’s next Bankruptcy Candidates?”, 28 April 2010, available at: <http://www.dw-world.de/dw/article/0,,5515912,00.html> (14.11.2011).

Euobserver, “Lisbon Treaty Made to Avoid Referendum, Says Giscard”, by Helena Spongenberg, 29.10.2007, available at: <http://euobserver.com/?aid=25052> (29.05.2011).

Euractiv, “European leaders sign new EU treaty in Lisbon”, 14.12.2007, available at: <http://www.euractiv.com/en/future-eu/european-leaders-sign-new-eu-treaty-lisbon/article-169112> (24.06.2011).

Europa, Gateway to the European Union:

EUR-Lex: Access to European Law, “Treaty Establishing a Constitution for Europe” (TEC), available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SO M:en:HTML> (29.05.2011).

A Constitutions for Europe, The Union’s Institutions, The European Parliament, 19.06.2011., available at: http://europa.eu/scadplus/constitution/parliament_en.htm#PROCEDURES (29.03.2011).

“Commission welcomes Agreement on European Citizens’ Initiative”, Press Release, 15 December 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1720&format=HTML&aged=0&language=EN&guiLanguage=en> (16.01.2012).

European Parliament:

Electoral Procedures, Fact Sheets on the European Union, by Wilhelm Lehmann, December 2009, available at: http://www.europarl.europa.eu/parliament/expert/displayFtu.do?id=74&ftuId=FTU_1.3.4.html (12.06.2011).

“Europa wagt mehr Demokratie”, Media Service, Special Issue, December 2004, available at: http://europa.frithjof-schmidt.de/fileadmin/user_upload/frithjof-schmidt/themen/2005/Medienservice-Dezember2004.pdf (20.05.2011).

Press Release, European Parliament creates Profiles on Online Social Media to raise Awareness of the European Elections, 2009 Elections, 27 April 2009, available at: <http://www.europarl.europa.eu/sides/getDoc.do?language=nl&type=IM-PRESS&reference=20090427IPR54478> (16.01.2012).

Turnout at the European Elections (1979–2009), available at: http://www.europarl.europa.eu/parliament/archive/elections2009/en/turnout_en_txt.html (12.06.2011).

Eurobarometer, Opinion Polls and Surveys, available at: http://ec.europa.eu/public_opinion/index_en.htm (13.06.2011).

- The European Constitution: Post-Referendum Survey in France, Flash Eurobarometer 171, June 2005.
- The European Constitution: Post-Referendum Survey in The Netherlands, Flash Eurobarometer 172, June 2005.
- Post-Referendum Survey in Ireland, Analytical Report, Flash Eurobarometer 245, July 2008.
- Lisbon Treaty Referendum Survey Ireland 2009, Analytical Report, Eurobarometer 265, August 2009.
- Lisbon Treaty Referendum Survey Ireland 2009, Key Results, Flash Eurobarometer 265, September 2009.
- Lisbon Treaty Post-Referendum Survey Ireland 2009, Analytical Report, Flash Eurobarometer 284, October 2009.
- Economic Governance in the European Union, Standard Eurobarometer 74, January 2011.
- Eurobarometer, Public Opinion and the European Parliament, available at: http://ec.europa.eu/public_opinion/topics/ep_en.htm (13.06.2011).
- The European Parliament, Special Eurobarometer 288, March 2008.
- The 2009 European Elections, Special Eurobarometer 299, September 2008.
- Post-Electoral Survey 2009, Special Eurobarometer 320, November 2009.
- Frankfurter Allgemeine Zeitung, "Neue Statistik: EU macht weniger Gesetze als angenommen" (New statistic: EU makes less laws than assumed), available at: <http://www.faz.net/s/Rub0E9EEF84AC1E4A389A8DC6C23161FE44/Doc~EC E53A3E51DAD46E3AAFC3E6424FC109C~ATpl~Ecommon~Scontent.html> (14.05.2011).
- Guardian:*
- "Debt Crisis: EU Leaders announce €70bn Plan to protect Euro", 8 May 2010, available at: <http://www.guardian.co.uk/business/2010/may/08/debt-crisis-merkel-sarkozy-euro-protection-plan> (14.11.2011).
- "Portugal in Crisis after Prime Minister resigns over Austerity Measures", 23 March 2011, available at: <http://www.guardian.co.uk/business/2011/mar/23/portugal-government-collapses-eu-bailout-looms> (14.11.2011).
- "Portugal needs its sleeping King now more than ever", 25 March 2011, available at: <http://www.guardian.co.uk/commentisfree/2011/mar/25/portugal-king-jose-socrates-golden-age> (14.11.2011).
- "French Local Elections leave Sarkozy Party in Disarray: Far-right Front National Party makes historic Gains in first Round of Elections due to Popularity of Leader Marine Le Pen", 29 March 2011, available at: <http://www.guardian.co.uk/world/2011/mar/21/french-local-elections-sarkozy-pen> (20.05.2011).
- "Bankruptcy threat to Greece as Euro Ministers delay vital €8bn", 26 September 2011, available at: <http://www.guardian.co.uk/business/2011/sep/26/debt-crisis-euro> (14.11.2011).

- “European Day of Protests and Strikes: Live Updates”, 29 September 2010, available at: <http://www.guardian.co.uk/world/2010/sep/29/european-protests-strikes-budget-cuts> (20.05.2011).
- “Occupy Movement: From local Action to a global Howl of Protest”, 18 October 2011, available at: <http://www.guardian.co.uk/world/2011/oct/17/occupy-movement-global-protest> (14.11.2011).
- “EU Summit: Crisis rumbles on as EU Leaders produce half-finished Deal”, 26 October 2011, available at: <http://www.guardian.co.uk/world/2011/oct/26/eu-summit-eurozone-crisis-leaders> (14.11.2011).
- “Silvio Berlusconi resigns as Italian prime minister”, 13 November 2011, available at: <http://www.guardian.co.uk/world/gallery/2011/nov/13/silvio-berlusconi-resigns-italy-in-pictures> (14.11.2011).
- “Lucas Papademos appointed Greek Prime Minister”, 10 November 2011, available at: <http://www.guardian.co.uk/business/video/2011/nov/10/lucas-papademos-greek-prime-minister-video> (14.11.2011).

Other:

- Jim Higgins, MEP, North West Constituency, United Kingdom, available at: <http://www.jimhiggins.ie/ep/about-the-eu/european-parliament> (20.05.2011).
- Luxembourg Presidency of the Council of the European Union, “Jean-Claude Juncker states that there will be a Period for Reflection and Discussion but the Process to ratify the Constitutional Treaty will continue with no Renegotiation”, Press Release, 17.06.2005, available at: <http://www.eu2005.lu/en/actualites/communiqués/2005/06/16jclj-ratif/index.html> (20.04.2011).
- Referendum Commission, Lisbon Treaty 2009, Developments since 2008, available at: http://www.lisbontreaty2009.ie/lisbon_treaty_developments.html (08.01.2012).
- The Economist, “A German Railway Row: Green Shooters – Protests over Stuttgart Station may infect National Politics”, 16 September 2010, from the Print Edition, available at: <http://www.economist.com/node/17046673> (20.05.2011).

Secondary Literature:

- Association of Local Democracy Agencies (ALDA) (2009), Raising Awareness on European Elections: Actions for European Active Citizenship, 7 January 2010, available at: http://www.alda-europe.eu/newSite/public/publications/31-publication_EU_elections.pdf (12.01.2012).
- Bowman, Jonathan (2006), The European Union Democratic Deficit: Federalists, Skeptics, and Revisionists, *European Journal of Political Theory*, 2006, No 5, pp. 191–212.
- Centre for European Policy Studies (CEPS), Royal Institute for International Relations (EGMONT), and the European Policy Centre (EPC) (2007): “The Treaty of Lisbon: Implementing the Institutional Innovations”, November 2007, available at: http://www.egmontinstitute.be/SD/Joint_Study_complet.pdf (24.04.2011).

- Corbett, Richard, Jacobs, Francis, Shackleton, Michael (2007), "The European Parliament", John Harper Publishing, London 2007.
- Davidson-Schmich, Louise K. & Davidson-Schmich, Michael (2009), The Content of European Parliament Election Campaigns: A Framework for Analysis and Evidence from Germany in 2004, Conference Paper for the 9th European Union Studies Association, 31th March – 2nd April 2005, available at: <http://aei.pitt.edu/3076/> (20.04.2011).
- Dinan, Desmond (2006), Governance and Institutional Developments: In the Shadow of the Constitutional Treaty, *Journal of Common Market Studies*, Vol. 44, Issue 1, pp. 63–80.
- Ehin, Piret (2008), Competing Models of EU Legitimacy: The Test of Popular Expectations, *Journal of Common Market Studies*, 2008, Vol. 46, No 3, pp. 619–640.
- Farrel, David & Scully, Roger (2005), Electing the European Parliament: How Uniform are 'Uniform' Electoral Systems?, *Journal of Common Market Studies*, 2005, Vol. 43, No 5, pp. 969–984.
- Follesdal, Andreas & Hix, Simon (2005), Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik, *European Governance Papers*, No C-05-02, available at: <http://www.connex-network.org/eurogov/pdf/egp-connex-C-05-02.pdf> (03.02.2011).
- Franklin, Mark & Hobolt, Sara (2010), The Legacy of Lethargy: How Elections to the European Parliament Depress Turnout, *Electoral Studies*, 2010, Vol. 30, No 1, pp. 67–76, an earlier draft available at: http://www.eui.eu/Personal/Franklin/Franklin&Hobolt_ES.pdf (18.05.2011).
- Goodhart, Michael (2007), Europe's Democratic Deficits Through a Looking Glass: The European Union as a Challenge for Democracy, *Perspectives on Politics*, 2007, Vol. 5, No 3, pp. 567–584.
- Haller, Max (2008), *European Integration as an Elite Process – The Failure of a Dream?* New York, Routledge 2008.
- Hurrelmann, Achim, & Debardeleben, Joan (2009), Democratic Dilemmas in EU Multilevel Governance: Untangling the Gordian Knot, *European Political Science Review*, 2009, Vol. 1, No 2, pp. 229–247.
- König, Thomas & Mäder, Lars (2009), The Myth of 80% and the Impact of Europeanisation on German Legislation, Mannheim Centre for European Social Research, Working Paper, Nr. 118, 2009, pp. 1–14.
- Lord, Christopher & Magnette, Paul (2004), E Pluribus Unum? Creative Disagreement about Legitimacy in the EU, *Journal of Common Market Studies*, 2004, Vol. 42, No 1, pp. 183–202.
- Löffler, Klaus (2004), Endlich Schluss mit dem Stückwerk: In der Verfassung werden die Kompetenzen des Parlaments ausgebaut", article has been available at: http://www.europa-waehlt.de/verfassung/wissenswertes/beitrag_dr_klaus_loeffler.html (24.02.2008).
- Merkel, Wolfgang (2010), Die Herausforderungen der Demokratie zu Beginn des 21.

- Jahrhunderts, Keynote Presentation during „Österreich 2020“, 03.03.2010, available at: http://www.oe2020.at/media/file/8_Keynote_von_Prof._Dr._Wolfgang_Merkel_Die_Herausforderungen_der_Demokratie_zu_Beginn_des_21._Jahrhunderts.pdf (20.04.2011).
- Neyer, Jürgen (2010), Justice, Not Semocracy: Legitimacy in the European Union, *Journal of Common Market Studies*, 2010, Vol. 48, No 4, pp. 903–921.
- Open Europe (2008), “A Guide to the Constitutional Treaty”, February 2008, available at: <http://www.openeurope.org.uk/research/guide.pdf> (24.06.2011).
- Pinelli, Cesare (2004), Essays: The Powers of the European Parliament in the New Constitutional Treaty, *The International Spectator*, Vol. 39, No 3, pp. 84–96.
- Rittberger, Berthold (2003), The Creation and Empowerment of the European Parliament, *Journal of Common Market Studies*, 2003, Vol. 41, No. 2, pp. 203–225.
- Schulte, Bernd (2007), Quo vadis Europäische Verfassung? Historischer Rückblick, aktuelle Konturen aus rechts- und politikwissenschaftlicher Sicht, *Perspektiven. Einführung: Aspekte der aktuellen Lage, Sozialer Fortschritt*, 2007, Vol. 56, No 5, pp. 129–130.
- Shephard, Mark (1997), The European Parliament: Laying the Foundations for Awareness and Support, *Parliamentary Affairs*, 1997, Vol. 50, No. 3, pp. 438–452.

Chapter 3

The Principle of Democracy in Modern ECJ Case-Law

ANDREAS ORATOR* AND STEFANIE SAGHY**

3.1 Introduction

The case-law of the European Court of Justice (ECJ) and its General Court (GC) on the democratic principle exemplifies a European institution's attempt to come to terms with the challenges of modern democracy in general and its realization in a supranational entity in particular. Despite the fact that the Court's references to the democratic principle have been infrequent, we aim at tracing its use, its evolving understanding and, thereby, analysing the Courts' viewpoint in and, possibly, contribution to, the rich debate on democracy in the EU. While several national courts such as the German *Bundesverfassungsgericht* have time and again engaged in this debate, which has been widely echoed in academic literature,¹ this article shall be focused on the jurisprudence of the European courts on the democratic principle.

By that we understand a legal principle, either stemming inherently from the Member States' democratic organization or stipulated expressly in Art 2 TFEU as a value, on which the Union is founded, which is specific

* Dr.iur. (Vienna), LL.M. (NYU), diplômé (Sciences-Po); Lecturer, Institute of European and International Law, WU University of Economics and Business, andreas.orator@wu.ac.at.

** Mag.iur. (Vienna); Institute for European, International and Comparative Law, University of Vienna, stefanie.saghy@univie.ac.at.

¹ For national courts' contribution, see eg the German *Bundesverfassungsgericht*'s *Maas-tricht* decision of 12 October 1993, BVerfGE 89, 155 and its more recent Lisbon decision of 30 June 2009, BVerfGE 123, 267, esp paras 276–297; for literature, instead of all, J. Weiler, *Der Staat 'über alles'*. *Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts*, Harvard Jean Monnet Working Papers, No 7/95; Daniel Halberstam/Christoph Möllers, *The German Constitutional Court says "Ja zu Deutschland"*, *German Law Journal* 2009, 1241. Furthermore, see the European Court of Human Rights (ECtHR), which places the European Parliament at the heart of an "effective political democracy", ECtHR 18 February 1999, 24833/94 (Matthews).

to the Union legal order, yet closely related to the notion of democracy in EU Member States.² After a brief discussion of its foundation in the Treaties (3.2), we turn to the earlier case-law in which the Court generally referred to democracy in order to strengthen the prerogatives of the European Parliament in the Community's overall institutional balance (3.3). Only later the Court started to look into complementary and alternative views on democracy beyond parliamentary representation (3.4). Here, three situations in which the ECJ and the GC considered with regard to consequences of the democratic principle on the Union legal order shall in turn be assessed.³

3.2 The Codification of the Democratic Principle in the Treaties

Until the 1980s, the democratic principle did not play a discernible role in ECJ jurisprudence, nonetheless since the notion of democracy could not be found in the Treaties. However, the ECJ's referring to the democratic principle with regard to the participation of the European Parliament in the legislative process since the early 1980s predates its codification in the Treaties. The first, yet modest, textual basis for the principle of democracy within the EU was only introduced with the Treaty of Maastricht in 1992. In its preamble, the Member States wished to "enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them".⁴ Art F(1) TEU (Maastricht) stipulated that the Union "shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy". The subsequent Treaty of Amsterdam⁵ further developed that provision; the newly amended Art 6(1) TEU (Amsterdam) explicitly stated that not only the Member States, but also the "Union is founded on the principles [...] of democracy".⁶

² See *infra* 3.2.

³ While it cannot be denied that the democratic principle is also entailed in issues of, *inter alia*, delegation of non-legislative and implementing powers pursuant to Art 290 and 291 TFEU, in this article we will focus almost exclusively on case-law in which the ECJ directly referred to the democratic principle.

⁴ Treaty of European Union, 1992 OJ, C 191/1, TEU (Maastricht).

⁵ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 1997 OJ, C 340/1, TEU (Amsterdam).

⁶ Art 6(1) TEU (Amsterdam): "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

The Treaty of Lisbon⁷ marks an important step in the codification of the democratic principle.⁸ Based as a fundamental “value”, on which the Union is founded according to Art 2 TEU (Lisbon), it is outlined in more detail in “provisions on democratic principles” in title II of the TEU (Art 9–12). Pursuant to Art 10(1) TEU, the “functioning of the Union shall be founded on representative democracy”. Art 10(2) TEU explicitly recognizes the dual basis of democratic legitimation, constituted on the one hand by a directly elected European Parliament, and on the other hand by the Council (and European Council), whose members are accountable to their national parliaments. Representative democracy pursuant to Art 10(3) and (4) also entails the Union citizens’ right to participation “in the democratic life of the Union”, the obligation of transparency and closeness to citizens, as well as a distinctive role of political parties at European level. The special role of national parliaments, in particular, in the legislative process is emphasized in Art 12 TEU.⁹ Moreover, the Treaty of Lisbon mentions several elements of participatory democracy.¹⁰ This includes, firstly, the obligation of the institutions to provide citizens and also “representative associations” with the possibility to express and exchange their views publicly (Art 11(1) TEU) and to “maintain an open, transparent and regular dialogue with representative associations and civil society” (Art 11(2) TEU). Secondly, participation shall be carried out in “broad consultations with parties concerned” (Art 11(3) TEU). Finally, this includes the citizens’ initiative, an instrument of direct democracy (Art 11(4) TEU).¹¹

While these rules on democratic principles highlight essential aspects of the understanding of the Union’s notion of democracy, it goes without saying that the notion of democracy remains a highly contested one in European law, not least due to the existence of manifold concepts of democracy and respective democratic standards in the Member States and the issue of transferability of those standards to a non-state level. Consequently, the respective academic

⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 OJ, C 306/1 (hereinafter Treaty of Lisbon). The ultimately rejected Treaty establishing a Constitution for Europe (CT), 2004 OJ, C 310/1, which constitutes the basis of the Treaty of Lisbon, had included a title VI, solely dealing with the “Democratic life of the Union”.

⁸ No change of Art 6(1) TEU took place with the Treaty of Nice, 2002 OJ, C 325/33.

⁹ It should be borne in mind that while Art 2 and 9–12 TEU constitute the normative basis of the EU democratic principles, they should be seen in light of several other Treaty provisions, incl. *inter alia*, Art 223–234 TFEU, 2008 OJ, C 115/47, Art 290 and 291 on delegated rulemaking and delegation of implementing acts, or the role of national parliaments in the supervision of Europol and Eurojust in Art 12 TEU.

¹⁰ In the preceding provision of Art I–47 CT, “the principle of participatory democracy” was explicitly mentioned in the heading.

¹¹ See also Art 24 TFEU and the Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative, based on that article.

literature is legion.¹² Suffice it to say that the debate on democracy in the EU seems to be wider entailing not only forms of traditional input-oriented representative democracy “by the people”, but also alternative channels of legitimacy through transparency, deliberation and participation in order to foster output-driven legitimacy “for the people”.¹³

3.3 Early Case-Law: Defending the European Parliament’s Prerogatives

3.3.1 Consultation as essential formality

Even before it was laid down explicitly in Art 6(1) TEU (Amsterdam) the ECJ recognized the “fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary” of the European Parliament.¹⁴ Thus, in the 1980s the Court started using the democracy principle as a legal principle.¹⁵ In what has become known as the *Isoglucose* case-law, the democratic principle has been interpreted primarily in order to support the status of the European Parliament vis-à-vis the Council in the legislative process. Consequently, “[d]ue consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an es[s]ential formality disregard of which means that the measure concerned is void”.¹⁶

As legal background to the cases *Roquette Frères (Isoglucose I)*¹⁷ and *Maizena (Isoglucose II)*¹⁸ served the Council’s intention to amend Regulation No 1111/77 laying down common provisions for isoglucose, parts of which had been

¹² Instead of all, see Anne Peters, *Elemente einer Theorie der Verfassung Europas*, 2000; Anne Peters, *European Democracy after the 2003 Convention*, *Common Market Law Review* 2004, 37; Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, *Common Market Law Review* 1993, 17; Giandomenico Majone, *Europe’s “Democracy Deficit”: The Question of Standards*, *European Law Journal* 1998, 313; Andrew Moravcsik, *The European Constitutional Compromise and the neo-functionalist legacy*, *Journal of European Public Policy* 2005, 349; also see Armin von Bogdandy, *Europäische Prinzipienlehre*, in Armin von Bogdandy (ed), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge* 2003, 149.

¹³ See Fritz Scharpf, *Governing in Europe. Effective and democratic?* 1999; also see the discussion of new forms of democracy in the context of European agencies in Stefan Griller/Andreas Orator, *Everything under control? The “way forward” for European agencies in the footsteps of the Meroni doctrine*, *European Law Review* 2010, 3.

¹⁴ See case 138/79, *SA Roquette Frères v Council (Isoglucose I)*, [1980] ECR 3333, para 33.

¹⁵ Armin von Bogdandy, *Founding Principles* in Armin von Bogdandy/Jürgen Bast (ed), *Principles of European Constitutional Law*, 2010, 11 (47).

¹⁶ See supra note 14, *Isoglucose I*, para 33.

¹⁷ See supra note 14, *Isoglucose I*, para 33.

¹⁸ See also case 139/79, *Maizena GmbH v Council (Isoglucose II)*, [1980] ECR 3393, para 34.

previously declared invalid by the ECJ.¹⁹ The Council consulted the European Parliament on the Commission's new proposal in April 1979 and asked it, due to the urgency for new rules, to opine on it within several weeks.²⁰ For several reasons, the Parliament had not given its formal opinion until June; by then, the Council adopted the proposal nonetheless and the Regulation entered into force on 1 July 1979. Despite the fact that the European Parliament had been asked for, but never expressed its opinion, the Council had even included in the preamble to the new regulation "a statement to the effect that the Parliament ha[d] been consulted". By not having properly consulted Parliament, the Council had disregarded an "essential procedural requirement" of Art 263(2) TFEU.

The Court's intention clearly was to safeguard the consultation powers of the Parliament through enabling adequate judicial review. In the *Buyl* case, this became evident when the Court repeated the function of the consultation powers of the Parliament as a means to "effectively [...] participate in the [...] legislative process";²¹ while this was a direct quote from the *Isoglucose* cases, the Court refrained from referring to the democracy principle. Therefore, it is not surprising, but noteworthy that the Court does not necessarily distinguish between the principles of democracy and institutional balance. In the *Isoglucose* cases the Court already outlined the close nexus of the two; the power of the European Parliament is attributed by the Treaties to play a certain role in the legislative process "represents an essential factor in the institutional balance".²²

Furthermore, this reasoning was also applied to cases in which the Parliament "must be freshly consulted whenever the text finally adopted, as a whole, differs in essence from the text on which the Parliament has already been consulted, except in cases in which the amendments substantially correspond to the wishes of the Parliament itself".²³ That also entails the right to be consulted again in case the Council adopts an implementing directive, which changes the content of a basic directive requiring consultation.²⁴ Advocate General

¹⁹ Joined cases 103/77 and 145/77 *Royal Scholten-Honig (Holdings) Limited v Intervention Board for Agricultural Produce*, [1978] ECR 2037.

²⁰ See supra note 18, para 7: By letter of 19 March 1979 the Council consulted the European Parliament and "would welcome it if the European Parliament could give an opinion on the proposal at its April session".

²¹ Case 817/79, *Roger Buyl v Commission*, [1982] ECR 00245, para 16.

²² See supra note 14, *Isoglucose I*, para 33. On the nexus of institutional balance and the democratic principle, see Andreas Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen*, University of Vienna 2011 (doctoral thesis), 159 et seq.

²³ Case C-392/95, *European Parliament v Council*, [1997] ECR I-03213, para 14; cf also case C-388/92, *European Parliament v Council*, [1994] ECR I-02067, para 10 and case C-280/93, *Germany v Council*, [1994] ECR I-04973, para 38.

²⁴ Case C-303/94, *European Parliament v Council*, [1996] ECR I-02943. In case the Parliament is not consulted, it is granted the right to an action for annulment.

(AG) Mancini draws on the *Isoglucose* case-law and even calls the power of consultation “the heart of the system of checks and balances upon which the Community constitutional order is based”.²⁵ Thus, the democratic principle in these early cases, which have become standing case-law,²⁶ is rather seen as an emanation of the Parliament’s position provided for by the Treaties in the institutional balance which needs to be safeguarded by adequate judicial review rather than as a legal principle in its own right.

3.3.2 Locus Standi

Closely related to this case-law is the Court’s interpretation of the Parliament’s locus standi which in the Treaties was not on equal footing with the Council and the Commission. In 1982 the Parliament had filed an action for failure to act in the field of transport policy against the Council. Despite the fact that ex-Art 175 of the Treaty establishing the European Economic Community (TEEC) only accorded locus standi to the Member States and “the other institutions”, the Court recognized that the Parliament could not be excluded from exercising this right “without adversely affecting its status as an institution under the Treaty”.²⁷ In the *Comitology 1988* case, the ECJ went further in recognizing the principal possibility of the European Parliament to file an action for annulment.²⁸ Nevertheless, the Court denied the Parliament admissibility due to the lack of direct and individual concern.²⁹

The decisive turnaround came in the *Chernobyl I* case, in which the Court finally accepted the Parliament’s locus standi for an action for annulment. Institutional balance demanded “that each of the institutions must exercise

²⁵ Opinion of AG Mancini in the case 20/85, *Mario Roviello v Landesversicherungsanstalt Schwaben*, [1988] ECR 2832, para 8.

²⁶ Opinion of AG Darmon in the case C-388/92, *European Parliament v Council*, [1994] ECR I-2069, para 16; case C-65/93, *European Parliament v Council*, [1996] ECR I-00643, para 15; opinion of AG Léger in the case C-417/93, *European Parliament v Council*, [1995] ECR I-01185, para 23; case C-104/97 P, *Atlanta AG and Others v Commission and Council*, [1999] ECR I-06983, para 71; case C-21/94, *European Parliament v Council*, [1995] ECR I-1827, para 17; opinion of AG Fennelly in the case C-392/95, *European Parliament v Council*, [1997] ECR I-03213, para 17; case C-408/95, *Eurotunnel SA and Others v SeaFrance*, [1997] ECR I-06315, para 45 and opinion of AG Colomer in the case C-168/98, *Grand Duchy of Luxembourg v European Parliament and Council*, [2000] ECR I-09131, para 59.

²⁷ Case 13/83, *European Parliament v Council*, [1985] ECR 01513, para 16.

²⁸ Already in the landmark *Les Verts* case, the Court went further by also accepting an action for annulment against measures adopted by the Parliament, even though the Treaty only stated in Art 173 TEC that the ECJ “shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission”. See case 294/83, *Parti écologiste “Les Verts” v European Parliament*, [1986] ECR 1339.

²⁹ Case 302/87, *European Parliament v Council (Comitology 1988)*, [1988] ECR 05615.

its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur”.³⁰ Despite a missing express treaty basis for the Parliament to bring an action for annulment, the safeguard of the Parliament’s prerogatives required a respective legal remedy.³¹

Despite the fact that the democratic principle was never explicitly mentioned, the Court’s reasoning revolved around the same rationale of safeguarding the Parliament’s prerogatives in the system of institutional balance which expresses the fundamental democratic principle of the Community at that time. The “concern for maximum respect for democratic principles” is featured in that case-law, as AG Geelhoed confirms.³² Interestingly, he also deduces from this case-law the requirement of judicial deference as to measures adopted under the co-decision procedure: The ECJ “should be especially slow to annul on substantive grounds the legislative policy decisions of a directly and democratically elected body representing the Community’s citizens”.³³ His argument coincides with the overall rationale of the Court’s earlier jurisprudence on the democratic principle, be it through the *Chernobyl* or the *Isoglucose* case-law, and which, as to *locus standi*, was reflected by the newly codified Art 173(3) TEC (Maastricht) which grants Parliament the right to an action for annulment “for the purpose of protecting their prerogatives”.³⁴

3.3.3 Choice of Legal Basis

A third strand of earlier ECJ case-law on the democratic principle occurred within the context of choice of the appropriate legal basis. In the *Titandioxide* case, the Court argued that if exceptionally more than one legal basis for a Community measure were proposed, the democratic principle would require recourse to that legal basis which involved the most intensive form of participation of the European Parliament, ie recourse to the cooperation instead of the consultation procedure.³⁵ AG Tesauro had outlined the importance of the rationale of the changes brought about by the Single European Act, including “renewed integration through greater recourse to faster decision-

³⁰ Case C-70/88, *European Parliament v Council (Chernobyl I)*, [1990] ECR I-2041, para 22.

³¹ See *supra* note 30, *Chernobyl I*, para 25.

³² Case C-244/03, *French Republic v European Parliament and Council*, [2005] ECR I-04021, para 92.

³³ See *supra* note 32, para 92.

³⁴ See *supra* note 29, case C-302/87, para 25.

³⁵ Case C-300/89, *European Commission v Council (Titandioxide)*, [1991] ECR I-2867, esp paras 18–21.

making procedures and the enhancement of democratic guarantees through more effective involvement of the Parliament in the legislative process”.³⁶ The strengthened participation of the European Parliament was interpreted as an expression of the democratic principle, which therefore also required recourse to the most intensive form of parliamentary participation; in other words, “in dubio pro democratia”.³⁷ Interestingly, while the Court in *Titandioxide* still considered different majority requirements (eg unanimity and qualified majority) to be incompatible for recourse to a cumulative legal basis, the ECJ later modified its approach and accepted even such a case for an (exceptional) cumulative legal basis.³⁸

This approach was continued with the introduction of a third way of Parliament involvement in Community legislation in the Maastricht Treaty; the new co-decision procedure constituted – in the words of AG Kokott – an “important contribution to the democratic legitimacy of Community legislation”.³⁹ The choice of the appropriate decision-making process at the same time becomes an important aspect of the institutional balance.⁴⁰ The *Titandioxide* case-law allows for a cumulation of legal bases only if the same or compatible procedures are laid down by them.⁴¹ In that case, “it is consistent with the principle of transparency [...] and the principle of democracy [...], if, of two legal bases which are equally possible and equally affected but not compatible with each other, in case of doubt the one is chosen with which the Parliament’s rights of participation are greater”.⁴²

So while in the *Titandioxide* case the Council majority requirements of the envisaged legal bases were not compatible, which led the Court to assume that only the legal basis with the stronger parliamentary participation could be used, in a case on development cooperation the ECJ accepted a joint legal basis, since both provisions required the same qualified majority in the Council.⁴³ In this context, the Court reiterated: “[T]he importance of the Parliament’s role in the Community legislative process should be noted. As the Court has already stated, participation by the Parliament in that process is a reflection, at the Community level, of the fundamental democratic principle that the

³⁶ See opinion of AG Tesauro in the case C-300/89, (*Titandioxide*), para 13.

³⁷ Alexander Somek, *Individualism. An Essay on the Authority of the European Union*, 2008, 111.

³⁸ Case C-166/07, *European Parliament v Council*, [2009] ECR I-07135, para 69.

³⁹ Opinion of AG Kokott in the case C-178/03, *European Commission v Parliament and Council*, [2005] ECR I-00111, para 60.

⁴⁰ Kokott, *ibidem*, para 60.

⁴¹ Kokott, *ibidem*, para 58, esp in fn 53.

⁴² Kokott, *ibidem*, para 64.

⁴³ Case C-155/07, *European Parliament v Council*, [2008] ECR I-08103, para 76.

people should participate in the exercise of power through the intermediary of a representative assembly”.⁴⁴

This “*in dubio pro democratia*” approach still saw the democratic principle as a sole function of the prerogatives of the European Parliament. The Court did not consider that the democratic principle especially in the EU “can take a number of different forms”, as AG Poiares Maduro underlines in a later case involving the issue of appropriate legal basis.⁴⁵ While he is reluctant to call into question that case-law, Maduro raises “serious doubts as to the merits of that preference for decision-making procedures which maximize the participation of the Parliament”.⁴⁶ In an extensive footnote, Maduro sketches the mainly dual source for democratic legitimacy in the Union: “At Community level, democratic legitimacy is derived from two main sources: either the Council, in which the will of the peoples of Europe is expressed through the positions adopted by their respective governments, under the control of their national parliaments; or the European Parliament, the directly representative European institution, and the Commission, which is directly accountable to it”.⁴⁷

Maduro’s exposition is a cautious attempt to frame the issue of the European democratic principle outside the rationale of preserving or enhancing the Parliament’s prerogatives: “Directly democratic representativeness is undeniably a relevant gauge of European democracy, but it is not the only one. In particular, European democracy also entails achieving a delicate balance between the national and European dimensions of democracy, without either one necessarily prevailing over the other. This is why the European Parliament does not have the same power as national parliaments in the legislative process and, although an argument could be made for stronger powers for the European Parliament, it is for the peoples of Europe to make that decision through treaty amendment. The balance between the powers conferred on the European Parliament and the other institutions as expressed in the different legislative procedures has evolved over time and reflects the balance which

⁴⁴ See *supra* note 43, C-155/07, para 78.

⁴⁵ Opinion of AG Poiares Maduro in the case C-411/06, *Commission v European Parliament and Council*, [2009] ECR I-07585, fn 5.

⁴⁶ See *ibidem*, para 6.

⁴⁷ See *supra* note 45, fn 5. Other AGs have also already drawn on this dual basis for supranational democracy. In the context of horizontal effect of directives the argument had been raised that such an effect would be “increased where national parliaments are by-passed when directives are implemented”, see opinion of AG Lenz in the case C-91/92, *Faccini Dori v Recreb srl*, [1994] ECR I-3328, para 68. Lenz dismisses the argument by referring, in particular, to the second strand of legitimacy provided by the European Parliament, whose legislative rights “have gradually been increased by the Single European Act and the Maastricht Treaty”, para 69. Also, Member States remain responsible for implementation, para 71.

the peoples of Europe have wanted between national and European means of giving legitimacy to the exercise of power at European level”.⁴⁸ Obviously, this view is irreconcilable with the “in dubio pro democratia” case-law, which Maduro would then regard as “tantamount to altering the institutional and democratic balance laid down by the Treaty”.⁴⁹ That having said, he does not, paradoxically enough, call into question the case-law on cumulative legal bases. Given the explicit provision of the dual legitimacy basis of the Union in Art 10(2) TEU by the Treaty of Lisbon, it remains, however, to be seen if the Court will one day take up these considerations.

3.4 Modern Approaches to the Democratic Principle

3.4.1 Transparency as a Democratic Prerequisite

It has been said that “[p]ublic access to Council and Commission documents is one of the sine qua non of the democratic legitimacy of the European Union”.⁵⁰ After the principle of transparency and access to information had been enshrined in the Maastricht Treaty, AG Tesauro, confirmed by the GC, broadened the understanding of this principle by calling it a right for everybody to have access to documents.⁵¹ Since then, the ECJ has been actively referring to the democratic principle of the EU to develop a broad, now even fundamental right to access to documents.

The development of the right to public access to documents began in 1996 with the ECJ’s decision *Netherlands v. Council*.⁵² The Netherlands claimed that access to documents is a fundamental right and challenged the Code of Conduct concerning public access and the Council Decision 93/731/EC.⁵³ Supported by the European Parliament, it argued that the subjective right to access to documents could not be established by purely internal rules and further explained that the rules governing a fundamental right had to be accompanied by the necessary safeguarding measures.⁵⁴ The ECJ dismissed the case concerning the Code of Conduct, arguing that the subject

⁴⁸ See supra note 45, fn 5.

⁴⁹ See supra note 45, fn 5.

⁵⁰ Inger Österdahl, Transparency, *Common Market Law Review* 1999, 1059; Anne Peters, European Democracy after the 2003 Convention, *Common Market Law Review* 2004, 37 (67).

⁵¹ Opinion of AG Tesauro in the case C-58/94, *Netherlands v Council*, [1996] ECR I-2169, para 19.

⁵² Case C-58/94, *Netherlands v Council*, [1996] ECR I-2169.

⁵³ Council Decision 93/731, 1993 OJ, L 340/43.

⁵⁴ See supra note 52, para 31.

of a claim for nullity could only be a legally effective act and ruled against the Netherlands concerning the Council Decision 93/731/EC. AG Tesouro argued in his opinion that the right to access to documents was the expression of the democratic principle and it therefore followed that any exception had to be interpreted very narrowly and with great prudence.⁵⁵ Even though the ECJ denied the claim, it did approve that there was a “[...] trend, which discloses a progressive affirmation of individuals’ right of access to documents held by public authorities [...]”.⁵⁶ Moreover, by also referring to Declaration No 17 on the right of access to information, “which links this right with the democratic nature of the institutions”,⁵⁷ the Court connects transparency with the democratic principle. This link between transparency and democracy established in this decision was seminal for its future case-law.⁵⁸

It was further developed in the *Swedish Journalists’ Union* case.⁵⁹ Fighting the decision of the Council to restrict the access to 18 requested documents, the Swedish Journalists’ Union brought an action for annulment before the GC. The GC affirmed the claim and also explicitly stated that everybody might request access to any unpublished Council or Commission document, as the purpose of the right to access to documents was to strengthen the democratic character of the institutions and the trust of the public in the administration. Therefore, any person who was refused access to the documents had, by virtue of that very fact, established an interest in the annulment of the decision.⁶⁰

The decision *Sweden and M. Turco v. Council*⁶¹ marks the next big step in the evolution of the right to access to documents. Both appellants were fighting a decision of the GC that confirmed the denial of the Council to grant access to information for legal opinions. AG Poiares Maduro opined to annul the GC judgment on the grounds of a misinterpretation of the Transparency Regulation 1049/2001.⁶² The Court followed Maduro’s opinion and annulled the decision. In this case, the Court outlines the importance of transparency

⁵⁵ Opinion of AG Tesouro in the case C-58/94. Also see Bo Vesterdorf, *Transparency: Not Just a Vogue Word*, *Fordham International Law Journal* 1998, 902 (916).

⁵⁶ See supra note 52, para 36.

⁵⁷ See supra note 52, para 35.

⁵⁸ See cases: case T-174/95, *Svenska Journalistförbundet v Council*, [1998] ECR II-2289; case T-309/97, *The Bavarian Lager Company Ltd v Commission*, [1999] ECR II-03217; case T-14/98, *Heidi Hautala v Council*, [1999] ECR II-02489; case T-191/99, *Petrie and others v Commission*, [2001] ECR II-3677; case C-64/05P, *Kingdom of Sweden v Commission*, [2007] ECR I-11389.

⁵⁹ See supra note 58.

⁶⁰ Österdahl, supra note 50, at 1077.

⁶¹ Joined cases C-39/05P and C-52/05P, *Kingdom of Sweden and Maurizio Turco v Council*, [2008] ECR I-04723 and *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2008, 507.

⁶² Opinion of AG Poiares Maduro in the case C-39/05P and C-52/05P, supra note 61, para 58.

for democratic decision-making when the Council acts as legislator. It clearly flows from the intention of the Transparency Regulation that “where the Council is acting in its legislative capacity [...] wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information, which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights”.⁶³ This groundbreaking judgment highlights the most evident relationship between the democratic principle and the right to access to documents and finally explains how one may understand the often-mentioned nexus of transparency and democracy.⁶⁴

However, there might be the paradox involved that this nexus might at the same time foster and endanger democratic principles, as AG Maduro explains in his opinion for the *Sweden v. Commission* case.⁶⁵ One might challenge the nexus on the basis that it constituted the expression of the “general feeling of suspicion” against the government and the system of representative democracy.⁶⁶ Maduro considers the democratic danger implied in this nexus: “There is, moreover, a risk that transparency will not be used in the same manner by all citizens and that it will serve to promote privileged access to the political system for certain interest groups”.⁶⁷ Despite this risk of institutional capture he acknowledges that the “link with the principle of democracy, on which the Union is founded, has been emphasised from the beginning”,⁶⁸ confirming the case-law on the nexus of democracy and transparency which aims “at giving the public the widest possible access to documents [, which] guarantees ‘greater legitimacy and is more effective and more accountable to the citizen in a democratic system’, because it allows citizens ‘to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions’”.⁶⁹ In Maduro’s view, access to documents becomes

⁶³ See supra note 60, para 46.

⁶⁴ See also joined cases C-514/07P, C-528/07P and C-532/07P, *Kingdom of Sweden v Association de la presse internationale ASBL (API) and Commission, Association de la presse internationale ASBL (API) v Commission and Commission v Association de la presse internationale ASBL (API)*, [2010] ECR I-00000, para 68 and case T-233/09, *Access Info Europe v Council*, [2011] ECR II-00000, para 57.

⁶⁵ Opinion of AG Maduro in the case C-64/05P, *Kingdom of Sweden v Commission*, [2007] ECR I-11389.

⁶⁶ See *ibidem*, para 41.

⁶⁷ See *ibidem*, para 41.

⁶⁸ See *ibidem*, para 41.

⁶⁹ See *ibidem*, para 41.

a fundamental right inseparably connected with the principle of democracy and openness.⁷⁰

The possible tension among the principles of transparency, democracy and data protection are discussed in an opinion of AG Sharpston.⁷¹ By referring to *Hautala v. Council*⁷² she argues that the purpose of the transparency principle is to give citizens the widest possible access to information and thereby strengthening the democratic nature of the Community institutions.⁷³ The “open” notion of transparency requires that “[...] some degree of interference with the rights to privacy and to the protection of personal data in order to promote transparency of the democratic process is ‘necessary in a democratic society’ because it corresponds to a pressing social need”.⁷⁴ Consequently, the strong connection between transparency and democracy justifies even a (proportionate) intervention in the right to data protection and the right to privacy.⁷⁵

Finally, in a very recent decision the GC was confronted with the partial refusal of access to documents in an ongoing legislative process of the Council’s Working Party on Information. In *Access Info Europe v. Council* the GC reaffirmed that exceptions from access pursuant to Art 4 of the Transparency Regulation needed to be interpreted narrowly.⁷⁶ That interpretation stemmed, again, from the nexus of transparency and democracy: “Giving the public the widest possible right of access entails, therefore, that the public must have a right to full disclosure of the requested documents, the only means of limiting that right being the strict application of the exceptions [...]. In those circumstances, openness makes it possible for citizens to participate more closely in the decision-making process and for the administration to enjoy greater legitimacy and to be more effective and more accountable to the citizen in a democratic system”.⁷⁷ The GC left no doubt as to the importance of transparency and the right to access to documents when stating that it strengthens democracy within the EU and constitutes a precondition for the citizens to effectively exercise their democratic rights.⁷⁸

⁷⁰ See *id.*, para 42.

⁷¹ Opinion of AG Sharpston in the case C-92/09 and 93/09, *Volker and Markus Schecke GbR and Hartmut Eifert v Land Hessen*, [2010] ECR I-00000.

⁷² Case C-353/99P, *Council v Heidi Hautala*, [2001] ECR I-9565.

⁷³ See *supra* note 71, para 66.

⁷⁴ See *supra* note 71, para 94.

⁷⁵ See case C-92/09 and 93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, [2010] ECR I-00000.

⁷⁶ See case C-64/05P, *Sweden v Commission*, [2007] ECR I-11389, para 66.

⁷⁷ See case T-233/09, *Access Info Europe v Council*, [2011] ECR II-00000, para 56. Cf. also pending case C-280/11P.

⁷⁸ See *ibidem*, para 57.

Compared to other jurisprudential aspects of the democratic principle, the case-law on access to documents seems much further advanced; this might not only be explained by the separate Treaty and implementing provisions on transparency, but also by the fact that access to documents as an individual right might be more effectively invoked in ECJ and GC proceedings than the “abstract” principle of democracy. As the appeal of the Council with the large support of Member States in the *Access Info Europe v. Council* case shows,⁷⁹ it remains a controversial subject and most likely a favourite jurisprudential “playground” to touch upon the democratic principle.

3.4.2 Participatory Democracy

In sharp contrast to the frequent case-law on transparency, the GC only on a single occasion explicitly elaborated on participatory aspects of the democratic principle. The GC, too, has repeatedly recognized that the Union is founded on the principle of democracy,⁸⁰ and – in line with the above-mentioned ECJ’s classical approach to the democratic principle⁸¹ – stated that generally “the democratic legitimacy of measures adopted by the Council [...] derives from the European Parliament’s participation [...]”.⁸² However, in a case in which no participation by the Parliament was provided for, the GC had to assess the respective implications of the democratic principle.

Articles 3 and 4 of the Agreement on social policy foresee the possibility to conclude agreements between management and labour and implement them on European level, if jointly requested, by a Council decision on a proposal from the Commission.⁸³ That was the case when the Council adopted Directive 96/34/EC on the framework agreement on parental leave concluded by the *Union des Confédérations de l’Industrie et des Employeurs d’Europe (UNICE)*, the *Centre Européen de l’Entreprise Publique (CEEP)* and the *Confédération Européenne des Syndicats (ETUC)*, which was the first legislative act adopted pursuant to the Agreement.⁸⁴ The *Union Européenne de l’Artisanat et des*

⁷⁹ See EU Observer, 30 June 2011, EU states appeal court ruling on transparency, <http://euobserver.com/9/32576> (accessed 05/07/2011).

⁸⁰ Case T-135/96, UEAPME v Council and Commission, [1998] ECR II-2335, para 89.

⁸¹ See supra under 3.3.

⁸² See supra note 80, para 88. See also joined cases T-222/99, T-327/99, T-329/99, Jean Claude Martinez and Others v European Parliament, [2001] ECR I-2823, para 200.

⁸³ Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, 1992 OJ, C 191/91 (hereinafter ‘the Agreement’), annexed to Protocol (No 14) on social policy, 1992 OJ, C 191/90, annexed to the TEU (Maastricht). It had later been introduced into the Treaty of Amsterdam.

⁸⁴ 1996 OJ, L 145/4.

Petites et Moyennes Entreprises (UEAPME), another association representing the interests of small and medium-sized undertakings which was not granted signatory status of the framework agreement, brought an action for annulment of the Directive.

In the present case, the European Parliament was not accorded any role in the legislative process. Thus, the GC argued, the principle of democracy required “that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level”.⁸⁵ It follows from the democratic principle that the two involved Community institutions have “to verify that the signatories to the agreement are truly representative”.⁸⁶

In other words, the GC seems to accept certain situations in which traditional channels of democratic input are underdeveloped, because special interests are at stake, as long as these are adequately compensated by mechanisms, which sufficiently ensure representative stakeholders. Therefore, the representativity of the included social partners and its verification by the Council and the Commission are considered key to assess the democratic nature of the measure. To that end, the GC requires an overall sufficient degree of representativity, which shall be assessed by having regard to the content of the agreement. Non-signatory representatives, which were consulted by the Commission, “whose particular representation – again in relation to the content of the agreement – is necessary” for overall representativity, are subsequently considered as being directly and individually concerned by that measure and therefore granted standing for an action for annulment.⁸⁷ In that case, the GC concluded that the three signatory parties constituted overall sufficiency of representativity in particular by regarding the representation of small and medium sized undertakings, which was the constituency of the excluded *UEAPME*. Consequently, the GC did not find that *UEAPME* was individually concerned by the Directive and declared the action inadmissible.⁸⁸

While the widely discussed GC’s judgment brings an interesting turn to the assessment of the democratic principle in the EU, it seems to raise more issues than it actually settles.⁸⁹ Firstly, the question arises if the role of EC

⁸⁵ See supra note 80, para 89.

⁸⁶ See supra note 80, para 89.

⁸⁷ See supra note 80, para 90.

⁸⁸ See supra note 80, para 111.

⁸⁹ For a positive comment see Joanne Scott/David M. Trubek, *Mind the Gap: Law and*

institutions in this particular legislative process is actually strong enough to meet democratic standards. While they might eventually reject or approve the measures, they are prohibited to amend them.⁹⁰ Secondly, the criteria of “sufficient cumulative representativity” remain unclear.⁹¹ Under what assumptions may an association as *UEAPME*, which has been qualified as equally representative to the signatories and recognized by the Commission, be excluded from the negotiating parties?⁹² Moreover, even if *UNICE*, *CEEP*, and *ETUC* were considered the most representative of all organizations, it is far from clear why agreements of these parties, who arguably do not represent a majority of employees and workers in the EC, should be considered sufficiently representative.⁹³

Despite this criticism it cannot be denied that participatory approaches to democracy are now explicitly acknowledged by Art 11 TEU. The exact relationship of participatory elements within representative democracy, on which according to Art 10 TEU the functioning of the EU is based, however, remains unclear. Ultimately, participation of representative associations here may not “replace Parliament and other institutions and processes of pluralist democratic government, but simply side-steps them in reaching the fundamental policy choices of the polity”.⁹⁴ Despite the “openness” of the GC in assessing novel forms of democracy in the *UEAPME* case,⁹⁵ it also should be borne in mind that the GC’s approach has not been resumed elsewhere. On the contrary, it might be plausibly argued that it remains exceptional even within the GC’s case-law: When a group of traders “affected” by legislation required adequate consultation in the legislative process, the GC replied that “the consultation of representatives of the various groups participating in the economic and social life takes place in

New Approaches to Governance in the European Union, *European Law Journal* 2002, 1 (9–12). Also see Edith Franssen/Antoine Jacobs, *The Question of Representativity in the European Social Dialogue*, *Common Market Law Review* 1998, 1295; Lamy Betten, *The Democratic Deficit of Participatory Democracy in Community Social Legislation*, *European Law Review* 1998, 20.

⁹⁰ Stefania Ninatti, *How Do Our Judges Conceive of Democracy? The Democratic Nature of the Community Decision-Making Process under Scrutiny of the European Court of Justice*, *Jean Monnet Working Paper* 10/03, 30.

⁹¹ Ninatti, *ibidem*, 32.

⁹² Ninatti, *ibidem*, 33.

⁹³ Betten, *supra* note 89, 33.

⁹⁴ Joseph Weiler/Ulrich Haltern/Franz Mayer, *European Democracy and its Critique* in Jack Hayward, *The Crisis of Representation in Europe*, 1995, 32. Also see the general discussion of different models of social representation and legitimacy of participation in Paul Craig, *EU Administrative Law*, 2006, 245–260.

⁹⁵ See *supra* note 89, Scott/Trubek, 9–12.

the Community legislative process only in the form of consultation of the Economic and Social Committee”.⁹⁶

3.4.3 Democratic Accountability of Administration

As it has become evident from the above case-law on transparency, the Courts have started to apply the democracy principle not only in the field of legislative powers and its respective institutions, but also to executive powers and administrative authorities. In particular, the GC recognized that the democratic principle required that all exercise of public authority must generally be democratically legitimated. Thus, a committee of experts may not exercise powers which amount to public authority and consequently, the Commission, whom the experts are advising, may disregard their conclusions precisely “on grounds of principle relating to the political responsibilities and democratic legitimacy of the Commission”. The “scientific legitimacy”, which the experts’ committee enjoys, “is not a sufficient basis for the exercise of public authority”.⁹⁷

Furthermore, in a recent case the ECJ examined possible tensions between the requirement of “completely independent” administrative bodies and the democratic principle in the context of data protection law.⁹⁸ The Court starts by recalling “that the principle of democracy forms part of the European Community law and was expressly enshrined in [the Treaties] as one of the foundations” of the EU. In that *Data Protection Authorities (DPA)* case, the Commission had initiated an infringement procedure against Germany for incorrectly transposing Art 28(1) of the Data Protection Directive,⁹⁹ which stipulated that DPAs “shall act with complete independence in exercising the functions entrusted to them”.

Germany claimed that “the principle of democracy [...] preclude[d] a broad interpretation of that requirement of independence [...] and require[d] that the administration be subject to the instructions of the government which is accountable to its parliament. Thus, the legality of interventions concerning the rights of citizens and undertakings should be subject to the scrutiny of the competent minister. Since the [DPAs] have certain powers of intervention

⁹⁶ Case T-521/93, *Atlanta AG and Others v Council and Commission*, [1996] ECR II-01707, para 68. Cf also *Ninatti*, supra note 90, 34–35.

⁹⁷ Case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-03305, paras 200–201.

⁹⁸ Case C-518/07, *Commission v Germany*, [2010] ECR I-1885.

⁹⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995, L 281/31).

with regard to citizens and entities outside the public sector [...], a heightened scrutiny of the legality of their activities by means of instruments for monitoring legality or substance is absolutely necessary”.¹⁰⁰ In view of the fact that this case on its face dealt with data protection only, it is remarkable that the Court engaged in that argument at all.¹⁰¹

The Court started by reiterating that the EU principle of democracy “form[ed] part of European Community law and was expressly enshrined in [the Treaties] as one of the foundations” of the EU, had to “be taken into consideration when interpreting acts of secondary law”.¹⁰² As opposed to the German view, it does not necessarily require hierarchically organized administration subject to governmental instructions: “That principle does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government. The existence and conditions of operation of such authorities are, in the Member States, regulated by the law or even, in certain States, by the Constitution and those authorities are required to comply with the law subject to the review of the competent courts. Such independent administrative authorities, as exist moreover in the German judicial system, often have regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law subject to the review of the competent courts”.¹⁰³ While pursuant to the democratic principle “the absence of any parliamentary influence over those authorities is inconceivable”, accountability of such independent bodies might be ensured through parliamentary or governmental appointment of its management, legislative confinement of its powers, and adequate reporting obligations to the parliament. Consequently, “conferring a status independent of the general administration on the [DPAs] responsible for the protection of individuals with regard to the processing of personal data outside the public sector does not in itself deprive those authorities of their democratic legitimacy”.¹⁰⁴

Here, the Court for the first time engages in the contemporary debate on how to organize independent administrative bodies in conformity with the requirements flowing directly from the EU principle of democracy.¹⁰⁵

¹⁰⁰ See supra note 98, C-518/07, paras 39–40.

¹⁰¹ Gerhard Kunnert, EuGH: Zur Auslegung der Anforderung der “völligen Unabhängigkeit” der nationalen “Kontrollstellen” (“Datenschutzbehörden”), *jusIT* 2010, 74.

¹⁰² See supra note 98, C-518/07, para 41.

¹⁰³ See supra note 98, C-518/07, para 42.

¹⁰⁴ See supra note 98, C-518/07, paras 44–46.

¹⁰⁵ However, the Court already in its earlier case law has commented on the issue in the related, yet slightly different context of institutional balance and effective judicial protection, see eg case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, [1958] ECR English special edition 00133 and case 98/80, *Giuseppe Romano v INAMI*, [1981] ECR 1241.

However, the Court's findings seem to originate primarily from the motivation to counter the German objection than to deliberately explicate a general theory of democratic accountability of administration under the EU principle of democracy. One should not forget that the German submission was primarily intended to justify its national model of DPAs, which resulted in a rather simplified presentation of a democracy principle which unconditionally required a corresponding right of instruction of a competent minister, who is directly accountable to Parliament. As the German Bundesverfassungsgericht has outlined in its *Lippeverband* decision, even the German constitution allowed for the "openness" of the democratic principle enabling the search for possible (complementary) novel sources of legitimacy.¹⁰⁶ The ECJ's primary motivation might therefore help to explain its short explications on how to establish a sufficient level of democratic accountability short of the "classical" model of hierarchical administration entailing governmental instructions. Its main components are personal legitimation through the appointment of the DPA's management by Parliament or the government and substantive legitimation through parliamentary and legislative reservation as well as parliamentary reporting duties and judicial review by courts.

Nevertheless, the ECJ's position in the *DPA* case has drawn considerable criticism;¹⁰⁷ a general line of critique relates to the erosion of institutional autonomy of the Member States.¹⁰⁸ Also, the Court seems to understand the DPAs closer to judicial bodies whose undisputed independence is democratically legitimized through the courts' strict binding on precisely determined norms. In the case of DPAs, it is questionable that DPAs which apply data protection norms, arguably comprising many open-ended

¹⁰⁶ *Lippeverband* decision of the BVerfG, 5 December 2002, BVerfGE 107, 59. Consequently, see also the generally more positive comments in Alexander Roßnagel, *Verurteilung Deutschlands zur Neuorganisation seiner Datenschützer*, *EuZW* 2010, 296; Thomas Petri/Marie-Theres Tinnfeld, *Völlige Unabhängigkeit der Datenschutzkontrolle*, *MultiMedia und Recht (MMR)* 2010, 352; Astrid Epiney, *Zu den Anforderungen an die Unabhängigkeit der Kontrollstellen im Bereich des Datenschutzes*, *Aktuelle juristische Praxis (AJP/PJA)* 2010, 659. Interestingly, Epiney even argues that since the directive itself, from which the obligation to "complete independence" stems, was adopted by a democratically legitimated EU legislature the democratic principle would not be infringed, cf Epiney, *ibidem*, 661.

¹⁰⁷ For German literature, see Hans Peter Bull, *Die völlig unabhängige Aufsichtsbehörde*, *Europäische Zeitschrift für Wirtschaftsrecht* 2010, 488; Hans-Hermann Schild, *Die völlige Unabhängigkeit der Aufsichtsbehörden aus europarechtlicher Sicht*, *Datenschutz und Datensicherheit (DuD)* 2010, 549; Eike Michael Frenzel, *„Völlige Unabhängigkeit“ im demokratischen Rechtsstaat*, *Die Öffentliche Verwaltung (DöV)*, 2010, 925.

¹⁰⁸ Frenzel, *supra* note 107, 930. Cf also recital 47 of Directive 2008/6/EC: "This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States [...]".

provisions and considerable room for discretion, are comparable.¹⁰⁹ Finally, if the Court tends to accept an (exceptional) modification of “ordinary” democratic standards due to the particularity of data protection law, which requires quasi-judicial institutions, it seems hard to imagine why such an exception might not also be valid in other cases. The ECJ even seems to suggest that for “regulatory functions” and “tasks which must be free from political influence” respective bodies might be likewise required to dispose of “complete independence”. It is both questionable if data protection justifies this exception,¹¹⁰ and the Court does not provide a real justification for the exceptionality of data protection law.¹¹¹

The Court’s view on the exigencies of the democratic principle on the organization of (independent) administration raises many questions, not least as to its scope. It remains to be seen if the *DPA* case really signifies a departure from traditional lines of legally thinking the democratic principle, or rather has to be read in the limited context of a secondary law obligation to create special DPAs.

3.5 Conclusion

The European Courts have come a long way from its first reference to the democratic principle in *Roquette Frères* to the *DPA* case. Starting to apply the then still unwritten democratic principle to preserve and enhance the prerogatives of the European Parliament in the context of institutional balance, the ECJ and its GC over the years have had opportunity to put some flesh on the bones of the legal notion of democracy in the context of transparency, participation and democratic accountability of administration. Today, the democratic principle is a core element of the European Union and the ECJ at occasions has shown that it does not shy away to refer to it. However, the case-law remains limited in number and scope. Obviously, this case-law has to be seen against the backdrop of a very limited number of express provisions on democracy. With the insertion of a title II TEU by the Treaty of Lisbon, it will be interesting to see if and how the European Courts will hearken back to the new provisions on democracy.

¹⁰⁹ Bull, supra note 107, 489. As to the aspect of delegating discretionary powers to independent bodies see Meroni I, supra note 105.

¹¹⁰ Indra Spiecker genannt Döhmann, Anmerkung zu EuGH Rs C-518/07, *Juristen Zeitung (JZ)* 2010, 787 (789–790).

¹¹¹ See Bull, supra note 107, 489, 494. Furthermore, AG Mazák rightly criticized that the Commission did not prove, but merely assumed the negative influences on independence, see also Bull, supra note 107, 491.

For the time being, the case-law on transparency remains the most obvious reference of the European Courts to the democratic principle, as the *Access Info Europe* case shows. As has been outlined above, this is probably due to the fact that access to documents as an individual right might be more effectively invoked in ECJ and GC proceedings than the “abstract” principle of democracy in general.¹¹² However, with the changes of the Lisbon Treaty in Art 10(2) TEU and the explicit recognition of the role of national parliaments in Art 12 TEU, we submit that given the previous reactions of the Courts to newly introduced or amended aspects of the democratic principle in the Treaties, they might take a more active role in recognizing the dual, ie both national and Union, character of EU democracy.¹¹³ Even before its codification in Art 10(2) TEU, it was generally acknowledged that democratic legitimacy of the Union stems from two sources, ie directly from the European Parliament which is elected by EU citizens, and indirectly from the Council (and the European Council), which consists of national governments held accountable to their national parliaments. For different reasons, the AGs Maduro and Lenz have already drawn on this dual basis for supranational democracy.¹¹⁴ We submit that it is not implausible to suggest that the Courts might be less reluctant to refer to such arguments. For the time being, however, the Court has been rather inclined to equate the level of democratic participation with a respective involvement of the European Parliament, ie the Union strand only.

Finally, it remains to be seen if and how the Courts might relate to the provisions of Art 11 TEU on participatory democratic elements. If the ECJ’s consideration in the *DPA* case were not limited to special field of data protection, it might be considered as a first step towards a more “open” approach to assessing the adequate level of democratic legitimacy. So far, the Courts have not commented on the much debated forms of informal interest representation during the legislative process; with the formal introduction of associative elements of the democratic principle, the limits and possibilities of the meaning of, *inter alia*, an “open, transparent and regular dialogue with representative associations and civil society” according to Art 11(2) TEU might come under the Courts’ scrutiny. The adopted legislation on the European citizens’ initiative might serve as yet another basis for actions to stimulate statements from the European Courts on the scope of Art 11 TEU.

¹¹² The currently debated recast of the Transparency Regulation might add to this, see eg Council Doc 18436/2011 of 11 January 2012.

¹¹³ Cf also Armin von Bogdandy, *Founding Principles* in Armin von Bogdandy/Jürgen Bast (ed), *Principles of European Constitutional Law*, 52–53.

¹¹⁴ See supra note 47.

It goes without saying that if and how a European Court might engage into democratic arguments is impossible to predict; nevertheless, the introduction of the provisions on the democratic principle in the Treaty of Lisbon make such a move more likely. We submit that such jurisprudential input would prove to be constructive to refueling the European democratic debate.

Supremacy of EU Law and the Accession of the European Union to the ECHR

OZAN TURHAN* AND MARGERITE HELENA ZOETEWIJ-TURHAN**

4.1 Introduction

Though the ECSC, EEC and EURATOM Treaties that lie at the basis of the present European Union (EU) did not contain a reference to the protection of fundamental rights, thanks to a purposive interpretation of these Treaties by the European Court of Justice (ECJ) it has become clear that the EU is bound by fundamental rights, an interpretation that has since been codified in the amended versions of these Treaties by which the protection of fundamental rights is given a formal legal basis in EU law. Whereas fundamental rights were at first merely recognized as *general principles of EU Law* with the Maastricht Treaty of 1991, with the signing of the Lisbon Treaty in 2007 the status of fundamental rights was raised to *one of the foundations of the Union*, while the Charter of Fundamental Rights and Freedoms was given the same legal value as the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), and thus part of the constitution of the EU. The final step firmly rooting the protection of fundamental rights in the EU legal system would be the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), for which Article 6(2) TEU as well as Article 59(2) of the ECHR as amended by Protocol 14 to the ECHR provide. However, this accession will take some doing as it is not clear what exactly the full legal implications of the accession will be.

The aim of this article is to give an overview of the questions the EU will need to deal with before accession can be realized and will also discuss what the

* Asst. prof. dr. Yeditepe University, Faculty of Law, Istanbul, Turkey, e-mail: ozan.turhan@yeditepe.edu.tr.

** Asst. prof. dr. Yeditepe University, Faculty of Law, Istanbul, Turkey, e-mail: margerite.turhan@yeditepe.edu.tr.

accession may mean for the acceptability of the supremacy of EU law for Member States that were until recently reluctant to accept this other principle of EU law.

4.2 Fundamental Rights in the EU Until the 2009 Lisbon Treaty

As the scope of the three original Treaties was mainly limited to economic integration of the Member States, it was not foreseeable that a provision out of these Treaties or secondary legislation based on the Treaties could conflict with fundamental rights. Consequently, the three Treaties did not mention fundamental rights nor did they authorize the ECJ to take them into account when deciding on the validity or correct interpretation of EU law. For these reasons, the ECJ initially repeatedly held that it could not be held responsible for the protection of fundamental rights, in case EU law possibly infringed them. In its 1959 ruling in ‘Stork’ for instance, the Court found that since it was only competent to apply *Community* law, it was not empowered to examine the compatibility of Community law with a *Member State’s* constitutional law.¹ With the famous rulings of ‘Van Gend en Loos’ and ‘Costa ENEL’,² establishing the supremacy of EU law over conflicting national law, the door to examining EU law on the basis of national law of one of the Member States seemed firmly closed and double locked.

It was only in the 1970s that the importance of human rights was acknowledged by the ECJ. Even though the Court in its ruling in ‘Internationale Handelsgesellschaft’ reiterated the principle of supremacy of EU law over all national law of the Member States, it found that respect for fundamental rights forms an integral part of the *general principles of EU law*, for the protection of which the Court and the EU as a whole is responsible.³ This ruling gave the green light for a rapid development of EU fundamental rights, without there being a basis in the Treaty. For this reason, the Court based itself on the shared values of the Member States’ national constitutions and even recognized a large number of international human rights treaties as sources of fundamental rights in EU law. Not only did the Court make reference to the ECHR,⁴ but also to the ICCPR, the European Social Charter, and several

¹ Case 1/58, *Stork v. High Authority* [1959] ECR 17, under 3A.

² Cases 26/62, *Van Gend en Loos v. Neerlandse Administratie der Belastingen* [1963] ECR 1 and 6/64, *Costa v. ENEL* [1964] ECR 585.

³ Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratstelle fuer Getreide und Futtermittel* [1970] ECR 1125.

⁴ Case 36/75, *Rutili v. Ministre de l’Intérieur* [1975] ECR 1219.

other international treaties.⁵ In recent case law however the ECJ refers to the fundamental rights as protected by the ECHR as being the very foundation of the Community legal order, from which the Member States are not allowed to deviate and which cannot be put aside even by the Charter of the United Nations or by any other binding international treaty.⁶ The Court continued however with reasoning that these fundamental rights were a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.⁷

Therefore, despite the fact that the ECJ has thus consistently given more and more consideration to the ECHR and the case law of the ECtHR,⁸ and regardless of the fact that all Member States of the European Union were already party to the ECHR, because of the fact that until recently the EU could not even accede to the Convention even if it would have wanted to for reasons of both the ECJ⁹ and the Convention itself not allowing for the accession, the EU and its institutions have rightly never regarded the Convention as directly binding.

4.2.1 Member States' conflicting duties under EU law and the ECHR

The same cannot be said for the Member States of the EU. All 27 of them are Members of the Council of Europe and signatories to the ECHR, some of them even before they became Member States of the EU. This brings us to the question of what the position of these Member States will be in case the obligations stemming from the membership in these two different international organizations conflict. That this is not just a theoretical question can be shown by the judgments of the ECJ and the ECtHR in the case of *Bosphorus*. The facts of this case were as follows: a Turkish company called *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* leased aircrafts from the Yugoslav National Airlines. On a maintenance stop in Ireland, one of the aircrafts was seized by the Irish authorities pursuant to EU Regulation 990/93,¹⁰ implementing a decision of the United Nations Security

⁵ Case C-249/96, *Grant v. South West Trains Ltd* [1998] ECR I-621; Case C-60/92, *Otto BV v. Postbank NV* [1993] ECR I-5683; Case 374/87, *Orkem v. Commission* [1989] ECR 3283.

⁶ Joined Cases C-402/05 P and 415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

⁷ *Idem*, para 316.

⁸ *Ahmed and Butler, The European Union and Human Rights: An International Law Perspective*, EJIL, Vol. 17, no. 4, p. 775.

⁹ Opinion 2/94, ECR [1996] I-1759, in which the ECJ found that the EC lacked competence to accede.

¹⁰ Council Regulation 990/93, Concerning Trade Between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), 1993 O.J. (L 102) 14 (EEC).

Council containing sanctions against the governments of Serbia and Montenegro.¹¹ As Regulations have direct effect in the national legal orders of the Member States, Ireland was bound by EU law to confiscate the airplane. Bosphorus however was of the opinion that the seizure was an infringement of *EU law*, entailing a violation of his fundamental right of freedom to pursue a business as protected by Article 1 of the 1st Protocol to the ECHR. As shown above, the ECHR and its Protocols were at the time of this case recognized by the ECJ as sources of fundamental rights that were regarded as general principles of EU law. The Turkish company therefore contested the measure, and thereby the interpretation of the Regulation by the Irish authorities, before an Irish court. The court referred the case to the ECJ for a preliminary ruling, as it was not competent to decide on the validity of the Regulation itself. The ECJ decided however that though the Regulation may have violated Bosphorus' right to property, this interference was, according to the ECJ's own case law on property rights, not disproportionate.¹² The Irish court could, as a result, dismiss Bosphorus' claim. Not satisfied with this outcome, Bosphorus took the case to the ECtHR.

The ECtHR, after having established that the matter fell within the jurisdiction of Ireland – irrespective of the fact that the domestic law was directly based on EU law – found that compliance with legal obligations flowing from EU membership was critical for the proper functioning of a supranational organization such as the EU, and could hence be regarded as a legitimate interest under Article 1 of the 1st Protocol, justifying the limitation to the right to enjoy property. The ECtHR continued its deliberations by saying that though membership to such a supranational organization does not absolve the signatories to the ECHR completely from their responsibilities under the Convention, since EU law provides for a protection of human rights to a level that is 'comparable' to the level provided for by the ECHR, Member States of the EU are discharged from their responsibility under the Convention when acting in compliance with EU law.¹³ Member States are only fully responsible under the Convention for acts that fall outside the legal obligations towards the EU, and in case convincing evidence could be provided that the protection of fundamental rights provided by the EU is 'manifestly deficient'.

According to the ruling of the ECtHR in *Bosphorus*, therefore, actions of the Member States of the EU will not be scrutinized by the ECtHR, if these actions are the direct result of a complete transfer of competences by the Member State to the EU, and as long as the protection of fundamental rights

¹¹ UN S.C. Resolution 820, U.N. Doc S/RES/820, 17 April 1993.

¹² Case C-84/95, *Bosphorus* [1996] ECR I-3953.

¹³ ECtHR, application no. 45036/98, *Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, para 155.

under EU law is comparable to the level of protection provided for by the ECHR. With the Lisbon Treaty, the number of areas of competence in which the EU acts as a supranational organization has grown considerably, which means that the ECtHR does not have jurisdiction over most of the actions of the EU Member States, despite the fact that they are signatories to the Convention. Since it is hard to imagine that, after the Charter of Fundamental Rights of the European Union has become binding with the coming into force of the Lisbon Treaty, the level of protection of fundamental rights in the EU will diminish, and even more difficult to imagine that the ECtHR would decide that there are ‘manifest deficiencies’ in the protection of fundamental rights by the ECJ, it is therefore unlikely that Member States will ever end up finding themselves in a situation in which fulfillment of their obligations under EU law would result in a condemnation of their actions by the ECtHR.

4.3 Accession of the EU to the ECHR: Why, and Why Now?

From the above we could therefore conclude that there is no reason for the EU to sign the ECHR. Neither the EU as organization, nor its institutions, nor the Member States when executing EU law will fall under the jurisdiction of the ECtHR. It is not to be expected that a conflict of competences or obligations will come into existence, either. With what reason then was the new Article on the EU’s accession to the ECHR inserted into the TEU?

4.3.1 Supremacy of EU law and the position of Member States’ Constitutional Courts

As long as the EU is not bound to an (external) code of fundamental rights, some Member States will continue to be reluctant to accept the above mentioned principle of supremacy of EU law. The most well-known example of such a Member State is Germany. The preliminary ruling of the ECJ in ‘Internationale Handelsgesellschaft’ as previously discussed was sent back to the German court the case had originally been laid before. This court referred the case to the German Constitutional Court in order to have the litigious EU legislation declared unconstitutional. Though the Constitutional Court refused to do so in this particular case, it did reserve the right to perform a constitutional review of EC acts, as long as the EU integration process had not progressed so far that EU law also included a catalogue of rights equal to the catalogue of fundamental rights contained in the German constitution. This ruling of the

Constitutional Court of 1974 is known as the first Solange judgment.¹⁴ In its 1986 second Solange ruling the same Constitutional Court, considering the fact that since ‘Solange I’ the ECJ had accepted shared constitutional fundamental rights of the Member States as well as international human rights treaties such as the ECHR as ‘guiding principles of EU law’, found that it could no longer receive review references from national courts with regard to EU law – however again *as long as* the fundamental rights accepted as ‘guiding principles of EU law’ would also be effectively protected within the EU.¹⁵ Thus, whereas the principle of supremacy of EU law was regarded by the ECJ as essential for the establishment of the common market, according to the German Constitutional Court the principle of supremacy could not be maintained where there was no judicially enforceable charter of fundamental rights in the EU.¹⁶

Though in practice this stance of the German Constitutional Court has not lead to any problems of unsolvable nature,¹⁷ the fact remains that the Constitutional Court has never left this standpoint. On the contrary, in its 1993 Maastricht ruling the Court retained that it was ultimately the Federal Parliament, chosen by the German people, that conferred legitimacy on public acts in Germany, including EU legal acts. Even the insertion of Declaration 17 to the Lisbon Treaty, explicitly recognizing the supremacy (or ‘primacy’) of EU law over the national law of the Member States, and though in itself not a binding instrument still explicitly endorsed by all the Member States as an integral part of the Lisbon Treaty,¹⁸ has not changed the position of the German Constitutional Court. On 30 June 2009 it ruled in the case of *Gauweiler v. Treaty of Lisbon* that this Declaration did not constitute a recognition of an absolute primacy of application of Union Law, but merely a confirmation of the legal position as it already was before the signing of the Lisbon Treaty.¹⁹

The German Constitutional Court does not stand alone in its rejection of the EU’s autonomous claims on supremacy of its legal order. Also the Constitutional Courts of Italy,²⁰ Denmark,²¹ Spain²² and Poland²³ have rejected the primacy of

¹⁴ German Federal Constitutional Court, *Solange I*, [1974] 2 CMLR 540.

¹⁵ German Federal Constitutional Court, *Solange II*, [1987] 3 CMLR 225.

¹⁶ Stone Sweet and Brunell, *Constructing a Supranational Constitution*, in Stone Sweet, *The Judicial Construction of Europe*, p. 88.

¹⁷ Chalmers, Davies and Monti, *European Union Law*, 2nd Ed, p. 205.

¹⁸ *Idem*, p. 188.

¹⁹ German Constitutional Court, 2 BvE 2/80, *Gauweiler v. Treaty of Lisbon*, under 331.

²⁰ Frontini, Italian Constitutional Court, 27 December 1973, *Frontini v. Ministero delle Finanze*, [1974] 2 CMLR 372.

²¹ *Carlsen v. Rasmussen*, Danish Supreme Court judgment of 6 April 1998, [1999] 3 CMLR 854.

²² Constitutional Tribunal of Spain, judgment 64/1991 of 22 March 1991, confirmed in judgment 58/2004 of 19 April 2004 and repeated in Opinion 1/2004 of 13 December 2004 by the same court.

²³ Constitutional Tribunal of Poland, judgment of May 11th, 2005, K 18/04.

EU law over their national constitutions. As shown above, Declaration 17 to the Lisbon Treaty does only at first sight solve the problem of the conflicting claims of several of the Member States' Constitutional Courts and the EU with regard to supremacy. Accession to the ECHR may however offer the long awaited solution, in that such an accession would bind the EU also externally to a charter of fundamental rights, the observance whereof is also monitored by an external judicial instance. As it was exactly the lack of certainty with regard to the judicial enforceability of a charter of fundamental rights that triggered the German Constitutional Court to reject the supremacy claim of EU law, accession of the EU to the ECHR would, by filling this gap, deprive the Constitutional Court of every basis it had for its two Solange rulings. As things stand at the moment, however, one cannot but feel sympathy towards the argumentation of the German Constitutional Court in Solange I and II.

4.3.2 Other reasons for the EU to accede to the ECHR

Now the EU has become a major actor in the international arena, and one that takes pride in being a champion of fundamental rights, it appears strange that such an advocate of fundamental rights is not party to any international human rights treaty. Accession to the ECHR would certainly increase the credibility of the EU in regard to issues of (international) fundamental rights. Next to that, by submitting itself to the external control of the European Court of Human Rights (ECtHR) and agreeing to become subject to the values it expects others to respect, the EU will show that it has nothing to fear. Furthermore, accession to the ECHR would result in a consolidation of the fundamental rights applicable in the EU, thus enhancing the legal certainty of the European citizen. Finally, on the EU's accession to the ECHR the ugly 'rivalry' between the two advocates of fundamental rights in Europe would come to an end.

These arguments lead the Intergovernmental Conference (IGC), in which the representatives of national Parliaments, Heads of State or Government of the Member States and representatives of the European Parliament and the Commission come together, to decide to introduce Article I-9(2) into the Treaty establishing a Constitution for Europe, providing for the accession of the EU to the ECHR. After this Treaty was voted down in referenda held in France and the Netherlands in the early summer of 2005, the exact same provision founds its way into Article 6(2) of the Treaty on European Union, which came into force on 1 December 2009.

4.4 Towards Accession: Concerns and Accession Negotiations

After a legal basis for the EU's accession to the ECHR thus being created, the procedure for the accession needed to be officially set in motion. Therefore, in March 2010, the European Commission proposed a Recommendation for a Council Decision that would authorize the Commission to negotiate with the Council of Europe on behalf of the European Union the terms on which this accession would take place.²⁴ In this proposal, the Commission only expressed concerns that do not go beyond those, listed in Protocol 8 to the Treaty of Lisbon, relating to Article 6(2) TEU. The Commission, as 'keeper of the Treaty', is perturbed that accession to the ECHR could affect the EU's powers as laid down in the Treaties, and especially that it could affect the exclusive role of the ECJ in interpreting and applying EU law after the ECHR becoming an integral part of primary EU law. In the same proposal, the Commission indicated that it is necessary that procedures were addressed to either the institutions of the European Union or to its Member States, as the case may be.

Similar concerns were communicated by the ECJ in their Discussion Document on certain aspects of the accession of the EU to the ECHR.²⁵ The Court underlined the importance of the Union negotiator making sure that the ECJ will be given the opportunity to internally review acts of the Union which are susceptible to being the subject of applications to the ECtHR prior to external review by the Convention institutions. According to the principle of subsidiarity governing the functioning of the control mechanisms of the ECHR, it is for the States, signatory to the ECHR, to guarantee that the rights enshrined in the ECHR are observed at national level. Therefore, individuals normally first have to exhaust the domestic remedies according to Article 35(1) ECHR. The ECJ urges the EU negotiator to make sure that this provision will also be made applicable to actions against the (institutions of the) EU. This is especially important in cases in which the ECtHR would be asked to rule on the compatibility of an EU act with the Convention, which, in case the ECJ will not be given the chance to rule on this matter definitively, will endanger the supremacy of the ECJ as sole and last instance interpreter of EU law and

²⁴ Commission Recommendation for a Council Decision Authorizing the Commission to Negotiate the Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, SEC(2010)305.

²⁵ Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010, http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf.

thereby jeopardize the uniform application of EU law. These concerns were also communicated by the ECJ to the ECtHR, during a meeting between delegations of the two courts in which the judges discussed the accession of the EU to the Convention on 17 January 2011. In a Joint Declaration, the Presidents of the two courts agreed that it would be necessary to ensure that in all cases the ECJ would have an opportunity for internal review of acts of EU institutions and acts of Member State authorities in implementing EU law. Whereas the Presidents do not foresee any problems concerning this possibility with regard to the review of acts of EU institutions, because of the condition relating to exhaustion of domestic remedies, with regard to the review of acts of Member States implementing EU law the situation is different. In the latter case applicants will refer the matter to a national court of the Member State concerned; this national court will then decide, according to Article 267 TFEU, whether or not to refer the case to the ECJ for a preliminary ruling. In cases where the court is not obliged to refer the case to the ECJ, parties to the conflict may suggest the court to make such a reference, however the court cannot be forced to do so. This means that according to Article 35(1) ECHR, the preliminary reference procedure of Article 267 TFEU cannot be considered as a legal remedy that needs to be exhausted by the parties, before making an application to the ECtHR. A party may thus bring a matter to the ECtHR without the ECJ having had the opportunity to give a ruling on the case. The Presidents of the ECtHR and the ECJ agree that a procedure needs to be put in place to prevent this from happening.

The European Parliament, in its Draft Report on the institutional aspects of the accession of the EU to the ECHR,²⁶ subscribed to all of the above mentioned concerns, yet adding another matter that deserved attention, namely that of the representation of the EU in those bodies of the Council of Europe that exercise functions related to the execution of the ECHR, such as the Parliamentary Assembly responsible for the appointment of Judges to the ECtHR, and the Committee of Ministers responsible for the supervision of the implementation of judgments of the ECtHR.

The Justice and Home Affairs Council of Ministers published in July 2010 a first draft of the text of the Council Decision authorizing the Commission to negotiate. Only part of this draft has been made public in September 2010, as the decision contains a detailed mandate to the Commission that is not meant to be known to the other negotiation partner, the Council of Europe.²⁷

²⁶ European Parliament Committee on Constitutional Affairs, Draft Report on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2.2.2010, PR\803011EN.doc.

²⁷ DG H 2B, 10817/10 EXT 2.

The contentious character of the decision is also clear from the long time it needed to be adopted and enter into force, as it was only just before summer that the official negotiations between the Commission, as representative of the EU, and the Steering Committee for Human Rights of the Council of Europe could begin.²⁸ In eight long meetings held over summer, the parties were able to draw up a Draft Agreement on the Accession of the EU to the ECHR, that would, on its being adopted and coming into force, make certain adjustments to the system of the Convention to accommodate the accession of the EU.²⁹

The negotiators had the difficult task to reconcile the sometimes opposite interest of the ECHR and the EU with each other. The mandate of the Commission, as limited by the Council decision authorizing it to negotiate as well as by the TEU and Protocol 8 to the Treaty of Lisbon, does not allow it to consent to any agreement that will affect the competences of the EU or the power of its institutions, nor to anything that may affect the situation of Member States in relation to the ECHR. It also has to take into account the considerations of the other institutions of the EU, as listed above. Therefore, the Commission would have to try to mould the Accession Agreement to accommodate the characteristics of EU law as much as possible. The Council of Europe, on the other hand, would prefer the EU to accede the Convention on equal footing with the other High Contracting Parties to the ECHR, making only those amendments to the Convention that are strictly necessary to accommodate the accession of an international organization instead of the States that are already signatory to the ECHR. This problem can be circumvented, as has indeed already be done, by inserting a provision into the Convention, stipulating that the Status of the EU as Party to the Convention shall be further defined in the Accession Agreement; the actual amendments to be made to the Convention can thus be kept limited.

4.5 Draft Agreement on Accession of the EU to the ECHR

The Draft Agreement on the accession of the EU to the ECHR was made public on 19 July 2011. For the Agreement to come into force, thus realizing the accession of the EU to the ECHR, not only the 47 parties to the Convention will have to ratify the Agreement, but according to Article 218(6)(a)(ii) and (8) TFEU the Council will have to adopt, with unanimity, a Decision concluding

²⁸ NB: the 14 members of the Steering Committee that were participating in the active negotiations were chosen on the basis of their expertise, 7 of them coming from Member States of the EU, 7 of them from non-EU Member States.

²⁹ CDDH-UE (2011)16fin.

the Agreement after having obtained consent of the European Parliament. After that, each individual EU Member State will have to ratify the Agreement according to their respective constitutional requirements. The actual accession, from the publication of the Draft Agreement onwards, may thus turn out to be a time-consuming process, even more so in case a Member State, before ratifying the Agreement, requests the ECJ for an opinion as to whether the agreement is compatible with the TEU and TFEU Treaties, as provided for by Article 218(11) TFEU. How big is the chance of such a process resulting in the need for renegotiation, or in other words, is there reason to think the Draft Agreement is not compatible with the Treaties?

4.5.1 EU competences and accession to the ECHR

The concern that the EU's accession might affect its competences or the powers of its institutions – which would be contrary to Article 6(2) TEU and Article 2 of Protocol 8 to the Treaty of Lisbon – is addressed by Article 1(2)c of the Draft Agreement, which provides that accession to the ECHR and the Protocols thereto shall impose on the EU only obligations with regard to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf, and furthermore that nothing in the Convention or the Protocols shall require the EU to perform an act or adopt a measure for which it has no competence under EU law. EU competences are governed by the principle of conferral, enshrined in Article 5(1) and (2) TEU, providing that the Union shall act only within the limits of the competences conferred upon it by the Member States in the TEU and TFEU Treaties. This would mean that the EU would not have competence if one of the Articles of the two Treaties does not explicitly authorize the EU to take action in a certain policy area. This is however an illusion, as Article 352 TFEU enables the Union to take action if regarded as necessary, even where the Treaties have not explicitly provided the necessary powers. The safeguard embedded in this Article stipulates that action is only allowed when it is necessary to attain one of the objectives of the Treaties and as long as it fits within the framework of the policies defined by the Treaties. Because of this safeguard, the ECJ was of the opinion that, since none of the provisions in the TEU and TFEU Treaties confers on the EU institutions any general power to enact rules on human rights or to conclude international conventions in this field, the EU lacked competence to accede to the ECHR in its Opinion 2/94.³⁰ The Court found that the Article should not be abused as a substitute to the much harder procedure for an amendment

³⁰ Opinion 2/94, Accession by the Community to the ECHR [1996] ECR I-1759.

to the Treaties.³¹ However, since the Court has given this Opinion much has changed, especially after the coming into force of the Lisbon Treaty. The respect for human rights is mentioned in one of the first Articles of the TEU as one of the values on which the Union is founded, and in a further Article the protection of human rights is listed as a task of the European Union. The content of Article 6 TEU has already been discussed before. We can thus say that the protection of human rights is now one of the objectives of the Treaty, and that the framework of policies, as defined by the Treaty, also encapsulates the protection of human rights. The conclusion must thus be that the EU has been conferred power to enact rules on human rights, for which reason the Council may use Article 352 TFEU as a legal basis to perform acts or adopt a measure if signatories to the ECHR and/or its Protocols so require. Article 1(2)c of the Draft Agreement in its present form, having regard to Article 352 TFEU, does therefore not provide the EU with a guarantee that it will not be obliged to adopt measures in the field of the protection of human rights if the Convention or its Protocols call for the adaptation of such measures. Such an obligation would not affect the competences of the EU, but would affect the autonomy of the EU law system.³²

Yet with the EU more and more developing into a player on the international scene however, such a trend is only to be expected. With the EU being a Member of the World Trade Organization (WTO) since 1995, and an (enhanced) observer status at the United Nations (UN), the EU has already become bound by international law of various sources. With the Lisbon Treaty, the EU has also committed itself explicitly to the strict observance and the development of international law, including the principles of the UN Charter.³³ A loss of autonomy as a consequence of accession to the ECHR is therefore not something new; this conclusion does not, however, put an end to the discussion on the desirability of the EU binding itself to a document on the protection of human rights. This discussion will not even end with the EU institutions choosing for accession, if and whenever that may happen. It is eventually up to the EU Member States having to ratify the Accession Agreement to decide whether the international organization they have founded should be held accountable according to the same rules on human rights as the Member States themselves are, or whether this international organization should be regarded as ‘above the law’.

³¹ Konstadinidis, *Division of powers in European Union law: the delimitation of internal competence between the EU and the member states*, p. 208.

³² Lock, Tobias, *Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order*, *Common Market Law Review*, Vol. 48, 2011.

³³ Article 3(5) TEU.

4.5.2 Representation of the EU in bodies of the Council of Europe

Article 6 and 7 of the Draft Agreement stipulate the ways in which the EU will be represented in the bodies of the Council of Europe when these bodies take decisions regarding the functioning of the ECHR. With regard to the election of the judges of the ECtHR, Article 6 provides that a number of delegates of the European Parliament, equivalent to the highest number of representatives to which any State is entitled according to the Statute of the Council of Europe. This number of representatives, to which presently Italy, France, Germany, the United Kingdom and Russia are entitled, is 18 out of a total of 636 MPs.³⁴ Every signatory to the ECHR is entitled to deliver a list of three candidates, out of which the Parliamentary Assembly elects the one to become judge in the ECtHR.

Article 7 of the Draft Agreement provides the EU with the right to participate in the Council of Europe's Committee of Ministers, with the right to vote, in the function of the Committee as supervisor of the execution of judgments of the ECtHR or of the terms of friendly settlement, and when the Committee takes decisions about the adoption and amendment of certain legal instruments. In principle the EU will be able to participate and vote on the same footing as the other signatories to the ECHR. However, since the EU and its Member States after EU accession will count for 28 of the 48 signatories to the ECHR, the Council of Europe needed to be assured that the votes of the EU and its Member States together will not prejudice the effective exercise of the Committee's functions. Therefore, the Rules of the Committee of Ministers of the Council of Europe will be changed, in a way to ensure that in cases the EU was respondent or co-respondent, it will not be able to 'block' the two-third majority of the votes of the Committee members that is necessary for a decision to refer a case of non-execution of a prior judgment of the ECtHR to the Court. According to the new rule, if such a decision appears to be supported by a majority of the representatives of non-EU representatives in the Committee of Ministers, the decision can be adopted without a formal vote.

Though from the point of view of the Council of Europe it is understandable that it would like to see such a voting system introduced, this measure goes further than is absolutely necessary to ascertain that the Committee will be able to supervise the execution of ECtHR judgments. While it is understandable that the EU will not be able to cast a vote when the decision needs to be taken whether or not to refer a case to the ECtHR in order not to influence the votes of the EU Member States, the Member

³⁴ Article 26, Statute of the Council of Europe.

States may find it at least patronizing that the Council of Europe does not think them capable of voting independently for the referral of a case to the ECtHR where the EU has failed to execute a judgment of that Court. It is only because of the wish of these Member States that the EU may – or even must – accede to the ECHR due to the introduction of Article 6(2) TEU. By advocating such an accession, the EU Member States express their wish to see EU acts and activities scrutinized by the ECtHR. It would be inconsistent if the same Member States would not vote for, or at least consent, to the actual implementation of ECtHR judgments by the EU, in cases the EU acted as respondent or co-respondent. The introduction of new voting rules, as provided for by Article 7 of the Accession Agreement, is therefore not subsidiary nor proportionate, and the supervision procedure of the Committee of Ministers may in extreme cases even provide an opportunity for abuse by the non-EU signatories of the ECHR.

4.5.3 Internal review by the ECJ

As already explained above, only when a Member State has, by implementing EU law, allegedly violated a claimant's fundamental rights as protected by the ECHR does the possibility that when a local court of a Member State refuses to make a request for a preliminary ruling to the ECJ, a claimant would be able to bring its case directly before the ECtHR without the ECJ having had the possibility to look at the case, as local remedies will have been exhausted according to Article 35(1) ECHR. This would leave the ECJ offside, and creates the danger that the ECHR will have to rule on the compatibility of EU law with the ECHR, which jeopardizes the monopoly of the ECJ to decide on the validity and interpretation of EU law and imperils the uniformity of EU law.

According to Article 3 of the Draft Accession Agreement, Article 36 of the ECHR will therefore be amended, in order to allow the EU to become a co-respondent to proceedings in respect of an alleged violation of the ECHR by one of the Member States of the EU, where that violation could have been avoided only by disregarding an obligation under EU law. If the ECJ has not yet assessed the compatibility of the EU law in question with the ECHR – by way of preliminary ruling – then the ECJ shall be given 'sufficient time' to make such an assessment, which will then be communicated to the ECtHR, without prejudice to the powers of that Court.³⁵ It is especially the last part

³⁵ Comment on Article 3(6) of the Draft legal instruments on the accession of the European Union to the European Convention on Human Rights of 19 July 2011, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents/CDDH-UE_2011_16_final_en.pdf.

of the provision that raises questions as to the effect of the involvement of the ECJ on the ruling of the ECtHR. In the Comments on relevant provisions of the Agreement, annexed to the Draft, the significance of the provision is clarified as meaning that the assessment of the ECJ will not bind the Court. This is not a problem in case the ECJ would declare that the EU act in question, based on which the Member State took an action that allegedly violated the fundamental rights of the claimant, is not compatible with EU law and therefore void according to Article 263 TFEU. The ECtHR can then no longer rule on the compatibility of the litigious EU act with the ECHR, as the act must be regarded as having never existed. It can merely rule on the compatibility of the Member State's action with the ECHR, but this will no longer endanger the position of the ECJ as having the monopoly to decide on the validity of EU law.

In case however the ECJ would, on assessment of the litigious piece of EU law as co-respondent, not find fault with the EU act and leave it intact, the ECtHR should take a decision on the merits of the case. Though the ECtHR has to take the ECJ's assessment into account, it is not bound by the assessment of the ECJ when taking a decision on the merits of the case. It is therefore not unthinkable that a situation will arise in which the ECtHR rules that a certain EU act is incompatible with the ECHR, which will affect the autonomy of the EU legal system in an unprecedented way. In order to prevent this from happening, it is therefore most likely that the ECJ will take full account of the ECtHR's case law when making an assessment of EU law in the procedure as foreseen by Article 3 of the Draft Agreement, even more than it is already doing at the moment. The result will be an ECJ that is much more meticulous in its assessments of potential violations of fundamental rights by the EU. This is, next to in itself being a very desirable development, the only guarantee for the maintenance of the principle of autonomy of the EU law order, as there is no such guarantee to be found in the Draft Agreement. However, insertion of such a guarantee would make external review of the EU acts by the ECtHR impossible, which would render the EU's accession to the ECHR superfluous. It seems that the EU will have to make a choice between two evils: it is either no accession, or the end of the absolute autonomy of the EU law order. Even if Council and Parliament would agree to accession, based on the present Draft Agreement, it remains to be seen in how far the ECJ – if indeed asked for an opinion – is willing or sees itself able to consent to giving up its position of monopolist as provided for by the TFEU.

4.6 Conclusion

The last word on the accession of the EU to the ECHR has definitively not been said yet. The sensitivity of the subject, mainly due to the consequences of such an accession for the supremacy of EU law and the position of the ECJ, which at present is the highest authority with regard to the interpretation and validity of EU law (including EU fundamental rights), and due to the questions regarding the rights of the EU as party to the ECHR especially regarding the appointment of judges and the use of votes. Nevertheless, the EU's accession to the ECHR is in the opinion of authors not only a necessity because of the wording of Article 6(2) TEU but even more so because of the signal such an accession sends out. It is the signal of an international organization that is not afraid to submit itself to the standards of an international treaty on human rights, as for the sake of its citizens it is happy to comply with these standards, which it in many cases it already meets. The EU, as international organization, is according to Article 3 TEU created in order to serve its citizens with higher material and immaterial standards of living, an objective that should be reached with the joint efforts of all institutions of the EU. If the citizens of the EU are best served with a partial renunciation of the supreme position of the ECJ, eventful as that maybe, then this should be regarded as a high but reasonable price to be paid for the greater good. The EU's efforts to protect its prerogatives in the ongoing negotiations between the EU and the Council of Europe on the position of the EU on accession to the ECHR, indispensable and praiseworthy as they are, should not lead to an unnecessary delay in laying the coping stone in the building of the protection of fundamental rights in the EU.

Between Legitimacy and Efficiency. Recent Developments of Language Regime in the European Union

FILIP KŘEPELKA*

5.1 Grounds for Research of Language Regime in Study of Democracy in the European Union

Democracy on both European and national level is reflected by most authors in this collection. Persisting borders between European countries are observed by most remaining authors.

Democracy is based on continuous exchange of opinions on political issues among individuals belonging to particular community. It is realized in a particular human language. Individuals speak, listen, write and read.

Language barriers belong to the most visible borders among European countries. An attention to use of languages in the EU is an important component of this reflection.¹

5.2 Multilingual Reality of Europe

Answer on the question for number of European languages² differs. Foremost, it depends on definition of Europe. Europe as geographic

* Masarykova Univerzita, Brno, the Czech Republic, Filip.Krepelka@law.muni.cz.

¹ Among monographs and collections of papers addressing legal and political aspects of multilingualism of the European Union, Müller F., Burr I. (eds.), *Rechtssprache Europas. Reflexion der Praxis von Sprache und Mehrsprachigkeit im supranationalen Recht*, Duncker & Humblot, Berlin, 2004 and Arzoz X. (eds.), *Respecting Linguistic Diversity in the European Union*, John Benjamins Publishing Company, Amsterdam 2008.

² European languages shall not be confused with Indo-European languages. Several European languages belong to other families. Many Indo-European languages are spoken in Asia. Nevertheless, majority of European languages indeed belongs to this language family with the highest number of speakers worldwide.

subcontinent of Eurasia is distinguished mainly for culture and political reasons. Its eastern borders are drawn variably on maps. Especially inclusion or exclusion of Caucasus region would have significant impact.

Furthermore, we need to decide which types of languages shall be counted. European languages can be divided into several groups according to their role. There are national languages, languages of autochthonous minorities and languages of immigrants. Classical languages, sign languages, constructed languages and auxiliary languages are not considered here.

The first group consists of official languages of European countries. These languages can be sorted according to the number of their speakers and their international significance into bigger and smaller ones.³ The second group consists of languages of autochthonous minorities and minor nations. Their importance differs due to number of speakers, their enthusiasm, history, politics and economy. These languages enjoy now protection and support. The third group consists of languages brought by immigrants from Asia, Africa and other European countries. The speakers of several of them – Arabic, Turkish and Hindi/Urdu – outnumber the speakers of small national languages. The languages are used widely in private life. Its public recognition, however, remains limited.

European countries are mostly based on linguistically defined nations. There are few exceptions – Belgium, Switzerland and Spain – and few countries, where several languages are used simultaneously – Luxemburg and Ireland. There are also countries with significant linguistic minorities – Slovakia, Romania or Finland. Both types of countries encounter internal tensions if coexistence of languages is not appropriately addressed. Achieving and maintaining balance among national and minority languages is burdensome and expensive.

History of several European countries is marked with disputes between privileged and oppressed languages. Language contributed to formation of several countries. Germany and Italy were unified thanks to their linguistic unity. Other countries were established after political emancipation of language-based nations. State borders were drawn and redrawn in accordance with language of population. Remaining minorities and rapid change of language

³ For example *Weber G.*, *Top Languages – the World's most Influential Languages*, *Language Monthly*, 3: 12–18, 1997, actualized and republished in 2008 (<http://www.andaman.org/BOOK/reprints/weber/rep-weber.htm>) considers besides the number of primary speakers the number of secondary speakers, economic power of countries using the language, number of major areas of human activity in which the language is important, number and population of countries using the language and socio-literary prestige of the language. English, French, Spanish, Portuguese, German and Russian belong to global top ten. Their importance, however, relies heavily on their use in other continents.

hierarchy caused often instability: Germans in interwar Czechoslovakia can be mentioned as an example.

Numerous languages are endangered due to long lasting political, economic, social and cultural trends. There are extinct or moribund languages. Nevertheless, there are also examples of language revival. Several European minority languages were suppressed or neglected for long periods of time. Nowadays, their remaining speakers strive for recognition and development of these languages. Individualization and focus on human rights in environment enjoying long lasting peace and prosperity explains this revival.

People speaking various languages use often one language for their communication (*lingua franca*).⁴ Several languages served for the purpose in European history. Greek, Latin, French, Italian, German and Russian were used by elites of people speaking different languages. Finally, another European language has become the first global *lingua franca* according to many observers. English is now used in communication of most elites and professionals who need it.

Europeans have, however, little knowledge of foreign languages. Enhanced education in last decades has limited success. It seems difficult for many people to learn already one foreign language on level sufficient for real debate and understanding. Few European countries have population with knowledge of foreign languages generally perceived satisfactory.⁵

5.3 Official Multilingualism of the European Union

Twenty three official languages of the EU are Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish and Swedish. Majority of twenty seven member states have brought their language to the European Communities and

⁴ „The original *lingua franca* was a mixed language composed mostly (80%) of Italian with a broad vocabulary drawn from Turkish, French, Spanish, Greek and Arabic. It was in use throughout the eastern Mediterranean as the language of commerce and diplomacy in and around the Renaissance era” („Lingua franca“ in Wikipedia).

⁵ Eurobarometer 243 „Europeans and their Languages“, http://ec.europa.eu/public_opinion/archives/ebs/ebs:243_en.pdf (2006) is based on survey of self-estimated knowledge. Many Europeans claim knowledge of foreign languages. For example, 28% Czechs claim German, 24% English and 20% Russian. Reality is less sufficient. Vast majority of students and even most teachers at my university cannot use German in their studies and profession. The EU decided to survey real knowledge. Therefore, European Indicator of Language Competence is established (COM(2005) 356 final).

later to the EU. Solely four member states share their official language(s) with others. Mentioned usual cause for establishment of a European country is thus confirmed.

All mentioned languages are now the authentic languages of founding treaties of the EU⁶ similarly as the languages for publication of regulations, directives, decisions, judgments and other acts of institutions of the EU.⁷

These languages are often no original languages of particular documents if related member state acceded later. Nevertheless, translations of original versions are authenticated. Their equal status with original versions results from principle of formal language equality in the EU.⁸

Similarly, languages of legislative, administrative and judicial proceedings of general importance are above listed languages. Nevertheless, proceedings related to particular member states, proceedings initiated by their courts and proceedings affecting individuals are realized in their own language.⁹ Individuals are entitled to communicate with institutions of the EU in an official language of their choice.¹⁰

Internal working languages in the institutions of the EU are English, French and German. Officials and other employees use them for internal communication and for communication with experts from member states. Selection of the languages was spontaneous. The languages are taught as foreign languages in European schools. The EU, however, recognizes their role only in limited extent.¹¹ These three languages are working languages *de facto*.¹²

English has gradually achieved the first position. Meetings of experts representing member states are often held without translation to other

⁶ See Article 55 of the TEU as amended with the Treaty of Lisbon. The formulation is, however, inaccurate. All mentioned languages are not original languages of the Treaty agreed in Maastricht in 1992.

⁷ See Articles 1 and 4 of the Regulation 1/58 determining the languages to be used in the European Economic Community as amended with acts of accession of new member states and subsequent regulations.

⁸ See words „being equally authentic“ in Article 55 of the TEU.

⁹ See Article 29–31 of the Rules of Procedure of the Court of Justice – consolidated version (2010/C 177/01) for judicial proceedings. Judgments are thus authentic solely in one language (Article 31). They are, however, systematically translated in other official languages for publication in the European Court Reports. Similar arrangements are set for administrative proceedings.

¹⁰ See Article 41 paragraph 4 of the Charter of Fundamental Rights of the European Union.

¹¹ I suggest see this recognition in recruitment policy of institutions of the EU. Knowledge of English, French and/or German is generally expected and routinely tested.

¹² It shall be noted that according to Article 1 of the Regulation 1/58, all official languages are working languages of the institutions of the (European) Union. Adjective “working” has thus twofold meaning.

languages. Nevertheless, French retains its privileges. It is original official language of the European Communities.¹³ Principal institutions are located in French-speaking cities. It is also the language of deliberation of judges in the Court of Justice, whose judgments are drafted in it. On the other hand, German is gradually vanishing, albeit accession of central European countries has increased population with its knowledge.¹⁴

Official multilingualism requires extensive translation and interpretation services. There are departments and units for it in all principal institutions. Freelance translators and interpreters are engaged in addition if necessary. Language policy of the EU achieved political prominence. European Commission now has members charged with language agendas and directorates-general.¹⁵

Mentioned services in the institutions of the EU form undoubtedly the largest translation and interpretation service in the world. There are various data on expenditures. Many people criticize it as expensive. Certainly, there are flagrant examples of unnecessary translation and interpretation. Overall figures are, however, not surprisingly high, shocking and unacceptable.¹⁶

The expenditures shall be considered necessary in general. The law enjoys direct effect in the member states and primacy over inconsistent laws of the member states.¹⁷ Europeans do not know any foreign language to learn their rights and duties. Multilingualism is thus necessary for legitimacy of the EU and its law which is already compromised for other reasons.

Described language regime contrasts with regimes of other international organizations. They have few official languages sufficient for internal operations and communication with diplomats and experts. Powerful founding countries often require use of their languages. English, French, Russian and Chinese are thus official languages of the United Nations. Other UN official languages are languages shared by numerous countries as Spanish and Arabic.¹⁸

¹³ English became official language of the European Communities with accession of the UK and of Ireland in 1973. French was originally the exclusive language of the European Community for Coal and Steel.

¹⁴ The Finnish presidency of the Council (2000) discontinued use of German as working language despite protests of Germany and Austria.

¹⁵ The commissioner for multilingualism was Romanian *L. Orbán* added to the *Barroso I* Commission. In the *Barroso II* Commission, multilingualism was joined with education, culture and youth. There are the Directorate-General for Interpretation and the Directorate-General for Translation.

¹⁶ The European Parliament presents expenditures for translation in 2006 for 800 million euro and for interpretation in 2005 for 190 million euro (<http://www.euparliament.eu/european-multilingualism>). One billion per year are two euro for every citizen of the EU.

¹⁷ As required by the Court of Justice in landmark judgments 26–62 *van Gend en Loos* and 6–64 *Costa v. ENEL* mentioned in every textbook and discussed in all courses of law of the EU, recently confirmed in Declaration no. 17 accompanying the Treaty of Lisbon.

¹⁸ The Charter of the United Nations was agreed in five languages (Article 111). Official

Nevertheless, communication with population usually requires use of languages known to particular individuals. The European Court for Human Rights handles cases and renders judgments in English and French which are official languages of the Council of Europe. Nevertheless, it accepts complaints in all official languages of the member states.¹⁹

5.4 Political, Economic and Legal Aspects of Multilingualism in the European Union

Political, economic, social and legal integration of the member states of the EU, their people and economies is determined with limited linguistic integration.

European elections do not deserve their adjective. Voter participation is low. These elections lack pan-European themes. European political groups are mere associations of representatives of political parties existing in the member states. Missing shared language for debates shall be blamed for it. Similarly, the European Parliament is not integrated psychologically also due to use of interpreters. There is also no direct political background of the European Commission as whole. Its members are selected from senior national politicians by the member states and do not face real political scrutiny in the EU also due to lack of language necessary for it.²⁰

I think that nonexistence of European nation (*demos*)²¹ hinders transformation of the EU into a federally organized state. Such nation does not exist due to lack of shared language (or at most few languages and widespread knowledge of them, if there are other ties, as in Switzerland). Linguistically distinct ethnic nations can form single political nation if there is a language of interethnic communication. Multilingual India uses Hindi and English for this purpose.²² The

languages were not specified. These languages gradually become official languages of principal institutions of the United Nations. Arabic was promoted additionally. Internal working languages are English and French.

¹⁹ Articles 34 and 57 of the Rules of the Court.

²⁰ Detailed analysis in *Hanschmann F.*, Sprachliche Homogenität und europäische Demokratie. Zum Zusammenhang von Sprache, Öffentlichkeit und Demokratie. pp. 63–110, in *Müller F., Burr I.(eds.)*, see above.

²¹ There is considerable debate about level of social and political integration of Europeans sufficient for federalization of the EU among political scientists and legal scholars. For optimism see Weiler J. H. H., *The State „über alles“ – Demos, Telos and the German Maastricht Decision*, for overview of existing opinions see Kaina V., Karolewski I. P., *EU Governance and European Identity*, “Living Reviews in European Governance” 2009, vol. 4, no. 2, <http://www.livingreviews.org/lreg-2009-2>.

²² See Article 343 of the Constitution of India. The Eight Schedule to the Constitution lists 22 languages. Hindi and English are official languages of the Union (federal government). However, no language is „national language“.

EU has so far no such language. Opposite meaning of adjective „national“ in the EU and in the United States of America symbolizes it. Language situation in the US is different. Immigrants often continue to use their languages. Nevertheless, English is undisputedly the national language of this country for two centuries, albeit Spanish becomes gradually the second language.

Multilingualism in the EU has consequences for its economic integration. On the one hand, most goods are traded continentally or even globally, because language barriers can be passed with translation of accompanying labels and documentation. Similarly, capital crosses easily linguistic borders. Big businesses operate internationally. Tourists travel often without any knowledge of foreign languages, because they do not need to know and can rely on basic knowledge of English in hotels, airports, museums etc. On the other hand, language barriers can be traced as an important obstacle to movement of most workers. Many services are traded in linguistically defined markets. Enterprises respect borders of member states in their internal structure, which mostly coincides with language borders also for language reasons. Books, newspapers and journals are marketed at linguistically defined markets, foreign authors are translated and most movies are dubbed.

The EU recognizes the multilingualism on its internal market.²³ The member states can and even shall require use of their national languages for information about goods and services. Sufficient knowledge of languages can be required from migrant workers.

Multilingualism hinders concentration of administrative and judicial enforcement of law of the EU. Establishment of agencies and courts of the EU is expensive. In most cases, application of its law by authorities of member states is optimal solution.

The EU has introduced various measures for cooperation and coordination among agencies and courts of the member states. Efforts to reduce necessary translations are visible. Codes, signs and other non-verbal expressions are established, and forms are preferred.²⁴

Translations cannot be perfect. Vocabulary equivalents are often not absolute equivalents. Despite all checks, mistakes cannot be totally avoided. Furthermore, translation of legal texts is undermined with close relation

²³ For detailed analysis see Bansch V., *Sprachvorgaben im Binnenmarktrecht – Sprachenvielfalt und Grundfreiheiten*, Nomos Verlagsgesellschaft, Baden Baden 2005.

²⁴ Driving licenses issued by the member states of the EU in accordance with the Directive 2006/126/EC on driving licenses. Name and other specification of license holders are indicated with harmonized numerals. Medical restrictions and vehicle adaptations are indicated with harmonized codes. Model driving license is depicted.

between words and concepts of particular national laws. Translation of supranational law of the European Union is thus particularly challenging.

Laws are expressed in more than one language if people are not capable to understand them in one language. These laws, however, shall be applied uniformly. Other language versions shall be considered. The Court of Justice thus repeatedly calls for comparison of language versions of legal texts of the EU.²⁵ Observers claim difficulties with comparing high number of language versions and suggest recognition of consideration of reduced number of versions.²⁶

5.5 Increasing Number of Official Languages of the European Union Due to Enlargements

The number of official languages of the EU has doubled in the last decade. Most new member states have brought their languages. Even Malta and Ireland, where English is widely used, insist on inclusion of their national languages. This number of languages increases sharper than population of the EU. Only Polish could be labeled as medium size language.

Perspective candidates Croatia and Iceland would add new official languages. Possible accession of Turkey, of other Balkan countries and of former Soviet Union republics would repeat it. Few languages of these countries can be labeled as bigger ones: Turkish, perhaps Ukrainian. In relation to it, the EU can hardly resolve disputes related to several Balkan languages.²⁷

In addition to it, inclusion of co-official languages of Spain – Basque, Catalan and Galician – in the list of official languages of the EU is required. Other member states reject it. However, individuals have been allowed to communicate with institutions of the EU in these languages and its most

²⁵ See, for example, judgment 283/81 *Srl CILFIT and Lanificio di Gavardo v. Ministero di Sanita* of 6 October 1982, paragraph “To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions”.

²⁶ Schübel-Pfister I., *Sprache und Gemeinschaftsrecht – Die Auslegung der mehrsprachig verbindlichen Rechtstexte durch den Europäischen Gerichtshof*, Duncker & Humblot, Berlin 2003. Official multilingualism of the European Union shall be retained. Nevertheless, the Author proposes recognition of three internal working languages and comparison of legal documents in other language versions with these working languages.

²⁷ Bulgarian politicians and journalists assert than Macedonian is identical with Bulgarian. Macedonia claims its linguistic independence. Similarly, Serbian, Croatian and Bosnian are perceived now independent due to political divide. On the other hand, Moldavian is considered identical with Romanian also in Moldova.

important legal and political texts are translated. Similar steps have been adopted for Welsh.²⁸

Doubling of official languages in the last decade required enlargement of units for translation and interpretation in institutions of the EU. New language departments were established. The number of translators and interpreters has significantly increased.

5.6 Troubles with Increased Number of Languages

The number of official languages seems to achieve critical threshold after the enlargements in the last decade.

Firstly, the Special Edition of the Official Journal in most new official languages of the EU required by the Treaty of Accession²⁹ was not published in time.³⁰ The delay is uneasy to explain. Certainly, the amount of legal texts (*acquis communautaire*) was bigger than during previous accessions to the European Communities and to the EU. Perhaps, both candidate countries and institutions of the EU underestimated the task.

Consequences of delayed publication were ascertained in landmark judgment *Skoma-Lux*.³¹ The Court of Justice allowed individuals to oppose application of law of the EU by authorities of the Czech Republic if not published officially in Czech. New member states and the European Commission tried to downgrade importance of such publication with publication of available translations in Internet. However, the Court of Justice claimed that prescribed mode of publication is requirement derived from the principle of legal

²⁸ According to plethora of decisions, agreements and proclamations, the Council, the European Commission and the European Parliament and other bodies communicate with individuals in these languages after request of Spain which, however, solely transmitted pressure of related autonomous regions. Spain contributes to coverage of expenditures. Recognition of British minority languages was similar.

²⁹ Article 58 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (2003).

³⁰ All 217 volumes of the Czech Special Edition of the Official Journal were not available until December 2005. Most volumes were published within the first six months of membership according to an unpublished letter of the director of the Publication Office of the EU requested by the *Nejvyšší správní soud* (Supreme Administrative Court) in framework of assistance to reference for preliminary ruling mentioned in the next footnote.

³¹ See judgment C-161/06 *Skoma-Lux s.r.o. v. Celní ředitelství v Olomouci* on reference for preliminary ruling by the *Krajský soud v Ostravě* (the Regional Court in Ostrava) of 11 December 2007.

certainty.³² Nevertheless, the judgment is reluctant to address consequences of the delay in other situations. Early application of law of the EU in new member states would be threatened. Final decisions are thus not put in doubts with the judgment.³³

Similar objections were raised in several other new member states. However, their number was low. Features of law of the EU and of its application explain it. Directives are to be transposed with national laws. Many standards are thus applicable indirectly. Few regulations impose duties and restrictions on larger groups of individuals. People can resort to working translations. Requirements are also described in professional literature and summarized for general public in newspapers and in television. Lawyers and experts who focus on standards of the EU are capable to understand them in foreign language versions available in Internet. And contrary to proclamations, law of the EU has not been applied instantly and entirely in new member states.

Until now, the EU has published few elder judgments of the Court of Justice in new official languages. Even many landmark judgments analyzed in textbooks are not available.³⁴

Another symptom that critical number of official languages was achieved is diminishing ability to compare “all” language versions. The Court of Justice ceased to call for it already before the accession and did it in few cases.³⁵ I have found no such total comparison since the last two accessions. The Court of Justice includes rarely new language versions in comparison.³⁶

It is unrealistic to expect such comparison from courts of the member states. Contrary to the Court of Justice, they are not composed of judges and other employees from all member states capable to consult all versions. National courts would hardly engage linguists for this task.

³² See paragraphs 36–38 of the judgment.

³³ See paragraphs 70–72 of the judgment.

³⁴ The Court of Justice selected 948 judgments, opinions and orders of the Court of Justice and the Court of First Instance. 136 judgments are published in all nine languages brought in 2004.

³⁵ For example, judgment C-375/97 *General Motors Corporation v. Yplon SA* of 14 September 1999, paragraphs 20–22. All eleven language versions of formulation „has a reputation“ in relation to registered trademarks were discussed.

³⁶ See, for example, judgment C-340/08 *M and others v. Her Majesty's Treasury* of 29 April 2010, paragraphs 38 and following. Hungarian, Dutch, Swedish, Finnish, French, Spanish, Portuguese, Romanian, Italian, German and English versions are considered and results categorized in several groups. Why were not any Slavic versions considered?

5.7 Privileged use of English and Other Selected Languages in the European Union

Sharp increase of official languages fosters tendencies to use one or few languages as languages of communication in the EU. Above mentioned working languages are used frequently for publication of preparatory works and for communication. Most documents of legal and political importance are drafted in English, French and German.³⁷

Translation services were reorganized. Direct translation from and into all official languages is now impossible due to high number of language combinations. Therefore, six relay (pivot) languages (Italian, Spanish, and Polish added to working languages) are used for translation.³⁸ Translators and interpreters are expected to know these languages. Knowledge of English is expected generally.

There are, however, few attempts to reduce the number of official languages to plurilingualism (six, five, three or two languages), or even to (English) monolingualism. The only exceptions are administration of single trade marks³⁹ and the proposed regime of single patent.

Unified patenting in the EU is expected to increase inventions and thus contribute to economic growth in Europe. Required translation of patent documentation and registration by the member states are blamed for high cost for patenting.

The European Commission proposes to involve the European Patent Office⁴⁰ for administration of single patent.⁴¹ Language regime of this authority for joint evaluation of patent applications shall be followed.⁴² Entire patent documentation will thus be in English, French or German. Patent claims which summarize restrictions shall be translated into two other

³⁷ According to brochure of *the Directorate General for Translation*, Translating for a multilingual community, 2009, pp. 8–9 (http://ec.europa.eu/dgs/translation/publications/brochures/index_en.htm) 72,5% texts are drafted in English.

³⁸ Use of relay languages is not expected in any legal document of the EU. Information about it can be found in various overviews and summaries in Internet. Polish is partially omitted.

³⁹ According to article 115 of the Council Regulation 40/94 on the Community Trade Mark, there are five official languages of the Office for Harmonization in the Internal Market. The application for a trade mark can be submitted in every official language. Nevertheless, correspondence of the Office will be in language selected from the five.

⁴⁰ The principal institution of the European Patent Organization (37 member states in 2011) established with the Convention on the Grant of European Patents of 5th October 1973 (the European Patent Convention).

⁴¹ Proposal of the Commission for a Council Regulation on the Community Patent of the 1st August 2000 [COM(2000) 412 final 2000/0177 (CNS)].

⁴² Proposal for a Council Regulation (EU) on the Translation Arrangements for the European Union patent adopted by the European Commission on 30th June 2010 (COM(2010) 350 final, 2010/0198 (CNS)). The document does not list any languages, it refers to the European Patent Convention.

languages.⁴³ The documentation of most patents would thus be available in English, the rest in German and French. Translation of patent documentation in other official languages of the EU is not expected.

Several European countries have already showed with the London Agreement amending the European Patent Convention preparedness to allow patenting without description of patented invention in their languages, if available in English. Nevertheless, they usually continue to require translation of so-called patent claims which summarize the scope of its patent protection.⁴⁴

Proposed regime, however, does not suppress other use of other official languages. Claims for damages shall be postponed until entire patent documentation is translated and then notified to infringers.⁴⁵ Translation of patent applications of inventors belonging to the member states with suppressed languages shall be subsidized.⁴⁶ Quality machine translation of patent documentation developed in project financed by the European Union shall be available for free.⁴⁷

5.8 Opposition Against Attempts to Reduce and to Categorize Official Languages

The Lisbon Treaty enables introduction of single titles of industrial property. Nevertheless, special provision requires unanimous decision of the Council on related language regime.⁴⁸ Italy and Spain vetoed in autumn 2010 proposed cessation of use of their languages which follow the three *de facto* working languages in the unofficial ranking of their importance. Poland showed preparedness to veto alternative five languages regime satisfying the two countries. Later, Italy and Poland became more willing to accept the proposal. Behavior of several other Member States is confusing. They have supported the single patent, because representatives of their industries showed preference for cheaper patenting. Nevertheless, doubts about suppression of their national languages can be heard also in these countries.

Representatives of large enterprises and small and medium sized enterprises show preference for English-only regime of single patent. Knowledge of

⁴³ See Article 14 of the European Patent Convention.

⁴⁴ See Agreement on the application of Article 65 of the European Patent Convention and declarations of its contracting parties.

⁴⁵ See recital 4 of the proposal of the Regulation on the Translation Arrangements and Article 44(3) of the Proposal for a Council Regulation on the Community Patent.

⁴⁶ See recital 5 of the proposal of the Regulation.

⁴⁷ See recital 6 of the proposal of the Regulation. Nevertheless, the translations shall not have any legal effect. The EU finances development of this machine translation of patent documentation, see Patent Language Translations Online (<http://www.pluto-patenttranslation.eu>).

⁴⁸ Article 118 paragraphs 1 and 2 of the TFEU.

English among professionals is expected. Nevertheless, it was clear that France and Germany would reject it. Do these countries thus behave otherwise than Italy and Spain criticized for lack of cooperation?

Certainly, particular interests of attorneys, patent brokers and translators in countries using suppressed languages cannot be overlooked.

Many people are convinced that all legal restrictions shall furthermore be expressed in their respective national language. Patents are temporary restrictions of production of invented product or use of invented technology. Constitutionality of proposed cessation of use of other official languages of the EU can be challenged before national courts. It echoed even in opinion of the advocate general on proposed reorganization of judiciary for application of legislation on the single patent.⁴⁹

Majority of member states support enhanced cooperation in single patent.⁵⁰ The Commission continues to propose restrictive regime.⁵¹ I suggest emulation of regime established with the London Agreement. Translation of patent claims in most other official languages and other documentation in English would be surely cheaper than decentralized patenting.

5.9 Evaluation of Recent Tendencies in Language Regime of the European Union

I suggest not generalize willingness and preparedness of member states using medium and small national languages to renounce them. Other categorization of official languages has not been proposed by the European Commission. Multilingualism is anchored in founding treaties and widely recognized as principle of its legal, political and economic integration.⁵²

⁴⁹ Advocate General *J. Kokott* claimed in her leaked opinion incompatibility with the principle of multilingualism. The Court of Justice, however, in its opinion 1/09 of 8 March 2011 focused on other grounds of incompatibility of proposed draft agreement establishing patent judiciary within the European Patent Organization and ignored language issues.

⁵⁰ Twelve member states requested for enhanced cooperation in December 2010. The Commission authorized it, other member states joined it, the European Parliament voted in favor and the Council approved it with decision 2011/167/EU. Language regime of future single patent is not addressed.

⁵¹ Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (COM(2011) 215 final, SEC(2011) 482, 483).

⁵² The principle of multilingualism can be seen in language regime of the EU described in this paper, albeit rarely listed together with other principles of law of the EU. I have mentioned the principle of language equality while citing Article 55 of the TEU. Nevertheless, reality of the EU is different. Working languages, and English in particular, are preferred in many situations described above.

The Council decides unanimously about all changes of the language regime of the EU.⁵³ The member states can thus veto any suppression of their languages. The European Parliament is not expected to be consulted even after significant enlargements of its competences in the last two decades. Perhaps, provocative speeches of populist parliamentarians are feared.

Patents form specific type of legal restrictions. They are addressed to limited number of engineers, scientists and physicians. These experts understand English, because information about the newest achievements of science and technology is available in this language. This explains preference of many representatives of big industries and even small and medium sized enterprises for single patent without documentation in their national language.

In addition to it, patents play another role which is largely ignored by lawyers. Inventors inform thus general public about results of their activities in exchange for temporary monopoly. Enterprises and other research and development institutions can thus avoid unnecessary spending. Documentation of patents is thus huge literature in science and technology.

English has already become language of communication among researchers and university teachers in many fields of science, medicine and technology. “Publish, or perish” means “Publish in English”.⁵⁴ Even economists, political scientists or sociologists are expected to present their findings to foreign scholars in English. Solely jurists, historians and other researchers of national issues continue to publish their principal works in their languages.

Proposed language regime of single patent of the EU can be compared with situation in civil aviation. According to standards of the International Civil Aviation Organization, pilots of planes on international flights are expected to communicate either in their own language or in English at request of air traffic controllers. Taking into account contemporary air transport in many parts of the world, knowledge of English language is necessary. Pilots are expected to pass professional language examinations.⁵⁵

⁵³ See Article 342 of the TFEU.

⁵⁴ If science citation index (SCI) and impact factor (IF) are exorbitantly considered for evaluation of results of research institutions and researchers. See *Dong P., Loh M., Mondry A., The Impact Factor Revisited, Biomedical Digital Libraries 2005, 2:7* (<http://www.bio-diglib.com/content/2/1/7>) „The SCI covers less than one fourth of peer-reviewed journals worldwide, and exhibits a preference for English language journals. Non-English journals have relatively low IFs due to the limited coverage of such journals by the SCI database. Calculation of the IF for non-English journals in their native countries or regions may be a useful way to complement the data in the SCI database.”

⁵⁵ Recent standards require use of relevant national language or English between pilots and air traffic controllers on the other hand. Interpretation is excluded. English is thus necessary in most international flights. It shall be noted that phraseology is standardized. For summary of language regime of communication in civil aviation, see The Frequently Asked Questions – Lan-

Tendency to use English as an exclusive language of international communication within the EU result from widespread education of English at secondary schools and its wide use at universities. Many people claim English shall be taught as compulsory subject. Learning of other languages is labeled as unnecessary.⁵⁶

Proposed language regime of single patent is certainly a challenge for member states with medium and small national languages. The first large set of restrictions shall be applicable without being expressed in national languages. These countries, however, largely concede hierarchy of languages in global and European community. If allowed to express their opinion, they ask for “English only” regime of the single patent for practical reasons.

The disputed language regime of single patent reveals also the recent trends in use of European languages in international communication. English pushes off other big languages. Proposed use of French and German in language regime of single patent follows regime of the European Patent Office established in the past. Italian and Spanish are below the line. Nevertheless, French and German face similar eclipse in other situations.

Tendency to use English as an exclusive language of international communication is cherished by those who find easier to communicate in one foreign language. Exclusive use of English in international communication is welcomed tacitly by the UK and the US and other anglophone countries, because it contributes to international success of their businesses and increases global cultural power.

The tendency is criticized by people capable to use several foreign languages. Their knowledge and use makes international communication precise and richer. In addition to it, knowledge of particular foreign language allows better insight in national community. Dominance of English in international communication is objected by France⁵⁷ and regretted in Germany, Spain and Italy. These countries support education of their languages abroad and push for use of their languages in various spheres of European politics, economy, society and culture.

Close relation exists between languages and laws. Anglo-American system (common law) differs significantly from continental system (civil law) in most

guage Proficiency Requirements for License Holders with citations of relevant standards (<http://www.icao.int/icao/en/trivia/peltrgFAQ.htm>).

⁵⁶ *Národní ekonomická rada vlády* (advisory body of the cabinet for economics) proposed mandatory English and showed little interest for education of other languages. Spared resources should be used for education of mathematics and economic skills. The recommendation, however, does not comply with Barcelona European Council conclusions of 15–16 March 2002 which call for teaching at least two foreign languages from a very early age.

⁵⁷ See, among others, *Resolution sur la diversité linguistique dans l'Union européenne* of *l'Assemblée nationale de la République Française* of 6 January 2004, English http://www.aiic.net/ViewPage.cfm?article_id=1115&plg=1&slg=1.

member states of the European Union. English is not the best language for legal debate in Europe. Legal scholars from mainland Europe find hardly adequate English words for the description of their national laws.⁵⁸

I am convinced that it is hard to study in depth national laws without knowledge of official language of the country concerned. Little information is available in English or in other understandable languages. Furthermore, widespread resort to English reduces available information about international and supranational law. In my eyes, the most precise and detailed reflection of law of the EU is written in German.⁵⁹

This dominance of English is increasing. German and French texts were not discussed as an alternative for this collection. Collections addressing issues related to integration in the EU and to its law included texts in these languages because basic knowledge of them was expected.

5.10 Conclusions

The EU faces now the most serious economic crisis in its history. It is hard to forecast development of language regime in the EU when the balancing of language regime becomes obsolete. Nevertheless, I expect that three mentioned tendencies will compete. Firstly, English will further strengthen its role of *lingua franca* in functioning of the EU thank to its widespread use by experts worldwide, albeit the United Kingdom does not have Euro and does not participate in projects for its stabilization. Secondly, all Member States will insist on publication of all legal documents of general importance in their languages. Furthermore, the European Union will respect use of minority languages. I think that patenting forms an unimportant exception from the principle of multilingualism. By the way, the project of single patent is overshadowed with debt and Euro crisis and concessions of several Member States can result from their situation. Thirdly, large Member States of the EU – foremost France and Germany – will continue to insist on better position of their languages. The language regime will thus remain a compromise between efficiency and legitimacy.

⁵⁸ Czech „zákon“ is equivalent to German „Gesetz“ or French „loi“. Translation in English is „law“, „act“, or „statute“. I prefer the third word. Nevertheless, widespread use of other terms cannot be ignored.

⁵⁹ Let us find English commentary of founding treaties which is comparably voluminous to *Grabitz, Hilf, Nettesheim, Das Recht der Europäischen Union*, published in numerous editions by the German publishing house C. H. Beck.

Chapter 6

Islamic Finance: Challenge to the European Market and Constitution?

BERNHARD KITOUS*

Public choice is an important concept in policies and politics today, as it stands at the precise articulation “between predictive science and moral philosophy” which is of concern – according to Nobel laureate Buchanan¹ – when one considers the issues of religion and economics in society. The 1789 Declaration of human and citizen’s rights (“*Article 1 – All humans are born and remain free and equal in rights, social distinctions between them might be grounded only on a common utility*”) is challenged when forms of “distinction” based upon religion are proposed within the civil society’s arena.

What is today the actual nature and what are the prospects of Islamic finance within European democracies? When it comes to monetary policies, investments and economics at large, what degree of cooperation and openness would be achievable within the EU and outside the EU?

We know that the EU is actively involved in cooperating with regions of the world where Islam is the main religion. Indeed, Allah has provided oil and gas-rich lands to a good number of countries politically and religiously placed under the Shariah influence, at the same time when the European population includes active Muslim minorities. In Britain, Germany and France alone, 5 to 10% of people are Muslims; over the EU as a whole they may represent 17 to 22 million people. Some of them then require the application of Shariah to the management of their money choices and issues, indeed a quite ancient claim since it originated in relation with the 1973 first oil shock when Kuwait Emirate led the price-making rebellion against the

* PhD, Ecole des Hautes études en sciences sociales, EHESS-Cemi, Paris, e-mail: kitousber@aol.com.

¹ J. Buchanan, “The domain of subjective economics: between predictive science and moral philosophy”, in *Method, process and Austrian economics, Essays in honor of L. Von Mises*, edited by Israel M. Kirzner, Lexington Books, 1982.

“big five sisters” (Western oil corporations). According to a Paris-Europlace report,² the question of promoting Islamic finance is a minor one, “a few rubbings” to be done on lawmakers in order to promote a light adaptation of French and European law to accommodate Shariah’s principles. This attitude means considering the major prohibitions of interest and risk to be taken as “modest” adaptations to the European economic system. By advocating such notion of a “slight change”, are we actually giving a fair account of the realities at stake?

Buchanan theory of “public choice” helps to structure an answer to this question. Public choice means we pay interest to How, Who, When, Where, Why decision-making on major public issues is made. According to Buchanan, these questions all relate to constitutions and to existing constitutional frames, top leaders and power relationships.

Public choice needs due consideration both to constitutional interests and to operational action interests. Constitutions will be our first focus; then we further look at practical ways used to adapt and interpret strict religious regulations so they answer actual needs. Then we follow suit with considerations on the very notion of risk, so prevalent in finance, a word which the Arabic tradition keeps on the edge of suspicion. Finally we conclude on religious limits which would ultimately constrain freedom in a civil society, contrasting European democracies with Shariah-led political regimes. The term “Shariah” refers to the Constitutional embodiment of Koran and the Prophet’s sayings (Hadiths) and traditions as the main source of Law in a given nation-state.

6.1 Background

Before we develop these questions, it is appropriate to present the object at stake, namely some texts which, in the Koran, are suggesting finance needs religious control. This is not for theological sake, but for practical purposes; it may be checked against various official Korans from Shia’ and Sunni’ sources and interpretations:³

Those who charge usury are in the same position as those controlled by the devil’s influence. This is because they claim that usury is the same as

² Paris-Europlace, “Enjeux et opportunités du développement de la finance islamique pour la place de Paris: dix propositions pour collecter 100 milliards d’euros”, E. Jouini & O. Pastré, Paris, November 2008.

³ Sources: Wikipedia’s Koran article and “Le Coran”, translated from the Arabic to French by Jean Grosjean, English adaptation with no pretense whatsoever at being an orthodox translation. The text is quoted as a basis for thinking, not as an end by itself. It should not be considered official nor religiously approved in any way.

commerce. However, God permits commerce, and prohibits usury. Thus, whoever heeds this commandment from his Lord, and refrains from usury, he may keep his past earnings, and his judgment rests with God. As for those who persist in usury, they incur Hell, wherein they abide forever (Al-Baqarah 2:275)

God condemns usury, and blesses charities. God dislikes every disbeliever, guilty. Lo! those who believe and do good works and establish worship and pay the poor-due, their reward is with their Lord and there shall no fear come upon them neither shall they grieve. O you who believe, you shall observe God and refrain from all kinds of usury, if you are believers. If you do not, then expect a war from God and His messenger. But if you repent, you may keep your capitals, without inflicting injustice, or incurring injustice. If the debtor is unable to pay, wait for a better time. If you give up the loan as a charity, it would be better for you, if you only knew. (Al-Baqarah 2:276–280)

O you who believe, you shall not take usury, compounded over and over. Observe God, that you may succeed. (Al-’Imran 3:130)

And for practicing usury, which was forbidden, and for consuming the people’s money illicitly. We have prepared for the disbelievers among them painful retribution. (Al-Nisa 4:161)

The usury that is practiced to increase some people’s wealth, does not gain anything at God. But if people give to charity, seeking God’s pleasure, these are the ones who receive their reward many fold. (Ar-Rum 30:39)

From the above sura extracts, one may observe that the main words insist at contrasting what is good (‘hallal’) and what is evil (‘haram’), which may be summarized within Table 1 contrasting Allah’s allowed versus forbidden operations.

Table 1 Hallal way versus Haram way in business, finance and money matters

GOD ALLOWS...	GOD FORBIDS...
Charity	Usury
God’s pleasure	Compounding over and over
Rewards for Repentance	Consuming the People’s money
Patience to debt remittance	Wealth increase based upon exploitation
Paying the poor-due and curing grievances	Punishes those incurring Hell, staying there forever
Believers will receive good	Disbelievers might expect a war from God
God permits Commerce	God prohibits Usury

The major point here is to practice what Allah says is “good for all”; obviously from the poetry of the literal text, there cannot be a clear-cut consensus between readers as to the concrete meanings and measures to be taken. But Islamic finance offers today a general framework to promote and encourage a different

way at practicing the economics of daily life. According to the Hong-Kong Legislative Council Secretariat,⁴ Islamic finance refers to the financial activities that are consistent with the principles of Islamic law, known as Shariah. Shariah is based on the text of Quran (considered by Muslims as the revealed word of God) and the Sunnah (the sayings and practices of Prophet Muhammad). Thus the notion of Islamic finance encompasses both a moral order based upon Allah's requirements, and ways to set up money and economic exchanges. From a Western European perspective Islamic finance is defined most simply as encompassing all the ways and consequences of its religious references upon money and business practices. Vernimmen defines it as: "the whole set of finance, law and tax systems, methods, tools and techniques which enable to manage money, investments and funds according to Shariah's requirements".⁵

6.2 Constitutions, "Choices Among Options" Which Structure Our World

In their "rational choice and moral order", Vanberg and Buchanan⁶ discuss the confusion we usually make between constitutional interests and action (operational) interests. Typically here Islamic finance is presented by its advocates as a practical religious approach to finance which would be fully compatible with standard operational European regulations, while the question of its consistency is not even raised by commentators. It is true that some operational interests of Islamic finance have their rationale: gathering the money and encouraging the presence of Islamic investors in Europe, facilitating contractual relationships with oil and gas producing countries, creating bridges with OPEC member states, inducing mutual trust with the Muslim communities. This sounds very interesting except for the explicit dimension of the Muslim doctrine which puts religious within the sphere of money and economics, through major prohibitions which are presented as "principles". For instance, Masmoudi & Belabed⁷ assume Islamic finance would bring a "solid source of financing looking for new growth to Western economies", based upon four obligations: ban on interest (riba prohibition);

⁴ Hong-Kong Legislative Council Secretariat, Report FSI-19, 2009–2010.

⁵ P. Vernimmen, P. Quiry & Y. LeFur, Lettre Vernimmen, Octobre 2006 and www.vernimmen.net, Lexique de finance vi – La Shariah comporte le droit islamique que chaque musulman se doit de respecter.

⁶ V. Vanberg & J.M. Buchanan, "Rational choice and moral order", *Analyse and critic* 10 (1988), 138–160.

⁷ F. Masmoudi & T. Belabed, *Islamic Finance in the face of financial turmoil: opportunities and challenges*, CAPMENA Note, March 2010, 6 pp. F. Masmoudi is a senior analyst at Qatari Islamic Bank, while T. Belabed is senior financial comptroller at AXA private equity.

ban of uncertainty in transactions (prohibition of gharar); obligation made to base any transaction on a real asset; obligation for borrower and creditor to associate in order to share the risks and rewards of any transaction.

6.2.1 Laicity and Europe

Most European countries have developed for more than a century now the notion that the religious convictions of citizens are intimate and do not interfere with any discrimination (be it positive or negative) in the public sphere. Religions are institutions which struggle for survival in the political arena, but most of Europe's democracies have managed to keep some clear-cut separation – from Spain to Finland and from Britain to Poland – between what might be called the citizen's private realm of religious practice, and the public sphere of economics which is somewhat "equal and neutral" to religious affiliations. To the extent European democracies reflect this consensus on the private realm of religions, one could observe, from an economic viewpoint, that the four liberties of circulation (for goods, services, people and finance) are at the root of a "free market system". There exists an implicit agenda in Europe which excludes any form of a theocracy and enables people of any creed (or agnostic) to hold a place and trade on (civil) markets freed from religious affiliations. Providers of credit (bankers and investors alike) as well as clients asking for money and credit (individuals and firms) meet outside religious references. In the EU, there are no clerics (such are Shariah-board members in Islamic finance) engaged into controlling people's credits.

The way the EU system operates makes it possible (a) – for religions as such to be considered institutions among others which comply with State regulations and are non discriminative; and (b) – for all sources of credit, including insurance companies and the banking system up to the European Central Bank, to obey an open policy managing all individual citizens as well as corporations and banks to be considered actors participating as savers, lenders, business investors and borrowers alike, without any advantage or drawback from their identity (national, religious, ethnic, etc.)

6.2.2 The Subjective Dimension of Societies and Peoples

Even in operational tactics of diplomacy and rational agreement on money and energy issues Buchanan points the subjective choices made alike by actors in politics and economics. He digs deeper into what he calls "constitutional interests" embedded in such huge bodies of cults and culture called "civilizations". Regarding Islam, one should never forget that

the “Ummah” or global Muslim community is central as a strategic concept taking precedence over any other considerations when it comes to converting other peoples and extending the realm of Islam as governance model on earth. This is well described as a subjective normative approach to politics which balances the rational objective market economics.

The reason why constitutional interests are to be considered with attention when dealing with Islamic finance relates to two essential aspects of the area of economics. Buchanan wrote: “Any discussion of the methodology of subjective economics must at once confront an elementary fact along with a necessary hypothesis. The fact is that, in any science of human behavior, the observer is himself among the observed. He hypothesis is that the human beings *choose*. Without this hypothesis the activity of the observer becomes meaningless exercise”.

Islam is a religion which generates even more than a moral order or a full civilization (the word “civil” brings in the notion of civil life of individuals within a society) which bears its own choices and priorities. Vanberg and Buchanan evoke “trust-rules and solidarity-rules” induced by any moral order within a given society. When considering financial decision-making the intervening appeal to Shariah is neither an insignificant nor an innocuous process: it is very well indeed a process which belongs to a constitution for society. The question of Islamic finance therefore implies that of a moral order be in place, the nature and rules of which are largely at variance with the very European moral order itself. Here it is fair to remind that the reference to religion (especially Christianity) was excluded from the project of a European constitution while reference was made to “shared values” such as humanism and openness of the European cultures. Rational choice and moral order are intertwined within what may be called after Buchanan the “subjective economics” dimension of civil society. Therefore the European constitutional and institutional aspects are not to be ousted from the question of Islamic finance (and reciprocally). As Knight says:⁸

And the main, most serious problem of social order and progress is the problem of having the rules obeyed, or preventing cheating. As far as I can see, there is no intellectual solution of that problem. No social machinery of ‘sanctions’ will keep the game from breaking up in a quarrel or a fight (the game of being a society can rarely just dissolve!) unless the participants have an irrational preference to having it go on, even when they seem individually to get the worst of it. Or else the society must be maintained by force, from without – for a dictator is not a member of the society he rules – and then it is questionable whether it can be called a society in the moral sense.

⁸ F. Knight, “Intellectual confusion in morals and economics”, quoted as a dedication in: *The limits of Liberty*, Collective works of J. Buchanan, vol.7, Liberty Fund, Indianapolis, 2000 (1st publication University of Chicago, 1975).

Islamic finance cannot escape questioning its own constitutional impact, because Islam bears a moral order resting on principles which differ from the political economy of Europe. If Knight is right, there is an “irrational” component in constitutions which makes people hold together in a set of bonds for “common good” even if this limits their own liberty: the irrational dimension of Islam is not similar to the irrational dimension of the EU constitution; it will not be easily transferable to Europeans. Of course we must acknowledge that there existed in Spain between 10th and 15th centuries a series of Islamic conquests against Christian kings as well as fights between Muslims themselves (Almoravid versus Umeyyad dynasties). There also existed some forms of cooperation and tolerance between Caliphs, Jewish leaders and Christian princes, including the Cid. This legacy is interesting although it has two drawbacks: it is more than 5 centuries old; it includes lots of conflicts which prove the relative impossibility to mingle Islam with other religious “irrationalities”. Building a bridge over centuries and differences is not self-evident nor immediately possible; it would require a careful analysis of times of obfuscation as well as times of cooperation. Therefore opening up European business to Islamic finance all of a sudden nowadays would be a political breach which cannot be made outside careful considerations of its consequences within the constitutions of EU Member states, as well as into the EU constitutional setting itself.

6.3 Adaptation, Wherever Action Interests Meet the Actual Needs of People

When confusing constitutional interests and action (operational) interests, argue Vanberg and Buchanan, we neglect to take care actively of the viability of our society: “a viable social order requires that the two kinds of interests somehow be brought into congruence”. The quest for congruence between constitutions and actions includes by all means the search for “go-between” and/or “go-around” measures when facing religious prohibitions.

6.3.1 How Christendom Matured on the Question of usury

Roman Catholic Church and its prohibition of usury between 1000 to 1600 offer historical steps⁹ which helped overcome the confusion between usury and reasonable interest rates. The Church’s prohibition was based upon the Old Testament (Exodus 22:25; Leviticus 25:36–37; Deuteronomy 23:19) and

⁹ It is a pity to summarize such important periods in so few words, so we suggest the interested reader should refer to the magisterial works of Marjorie Grice-Hutchinson, *The School of Salamanca*, Clarendon Press, Oxford, 1952 as an introduction.

the New Testament (Jesus chasing down business people from the Temple). The essential message – still actual – was alike *Thou shalt not prefer money to fellow human and/or to God*.

It is noticeable that, due to the needs of princes and populations, the Catholic Church tolerated several types of adaptation to reality, all of them enabling interest rates:¹⁰

¹⁰ Thomas Aquinas's 1262 "De Emptione and Venditione ad tempus" which answers the question of a Firenze trader, Jacques de Viterbe; with talent Aquinas insists on the prohibition of usury (human exploitation); he signals his horror to the thought that, by the only effect of time, money could produce money siblings; but Aquinas also recognizes that the lender may receive some marginal advantages for having been patient and risking his own richness.

The *Salamanca School* was born in Spain during the times (1530–1630) where affluent wealth and gold came from America, raising questions similar to ours today on the "common good", "price changes", "human development", etc. Salamanca produced several fundamental principles among which two have consequences on both democracy and finance: (1) – "jus gentium" – the rights of people – assessed the natural law rights applicable both inside one given people (such as the Spanish) and between several peoples (such as the Spanish and German); this principle led the Salamanca school to set up the first basis of recognition for the rights of Indian Natives; (2) – in 1560 Salamanca took advantage of the notion of "lucrum cessans" (= profits given up) which was discovered by Cardinal Hostiensis three centuries before as the reason for paying some reasonable interest to the lender; being akin to our modern "opportunity cost", *lucrum cessans* gave a sound basis for accepting interest rates as a notion different from "exploitive usury"; it seems that Bernardino di Sienna developed it too.

The last encyclical on interest rate titled *Vix Pervenit* ("It came with trouble") by Pope Benedict XIV, was promulgated on November 1, 1745. While its Articles 1 and 2 re-assess the prohibition of usury and interest, its Article 3 lays ground for "certain contracts" entitling the lender to some additional rights to a fair compensation.

(Article 1) – The nature of the sin called usury has its proper place and origin in a loan contract. This financial contract between consenting parties demands, by its very nature, that one returns to another only as much as he has received. The sin rests on the fact that sometimes the creditor desires more than he has given. Therefore he contends some gain is owed him beyond that which he loaned, but any gain which exceeds the amount he gave is illicit and usurious.

(Article 2) – One cannot condone the sin of usury by arguing that the gain is not great or excessive, but rather moderate or small; neither can it be condoned by arguing that the borrower is rich; nor even by arguing that the money borrowed is not left idle, but is spent usefully, either to increase one's fortune, to purchase new estates, or to engage in business transactions. The law governing loans consists necessarily in the equality of what is given and returned; once the equality has been established, whoever demands more than that violates the terms of the loan. Therefore if one receives interest, he must make restitution according to the commutative bond of justice; its function in human contracts is to assure equality for each one. This law is to be observed in a holy manner. If not observed exactly, reparation must be made.

(Article 3) – By these remarks, however, we do not deny that at times together with the loan contract certain other titles—which are not at all intrinsic to the contract—may run parallel with it. From these other titles, entirely just and legitimate reasons arise to demand something over and above the amount due on the contract. Nor is it denied that it is very often possible for someone, by means of contracts differing entirely from

- (1) by accepting the Lombards' lending tables and their exchanging "money for money", the Church did a first step towards economics, according to the great historian de Roover;¹¹
- (2) through the reflections of Thomas Aquinas and Bernardino of Sienna, the singling out human exploitation (strictly forbidden) from "just compensation to the lender" led the Church to accept debt and money trade. This change came along centuries of trials and errors from both within the Church and from outside;
- (3) some bankers invented a mechanism of money exchange named "trinum" contract involving three partners among which a non-Catholic enabling the transfer of funds with interest (without incurring the wrath of the authorities).

Max Weber's study of the relationships between the protestant ethos and capitalism¹² is an inspiring landmark for any research dealing with the interconnections between finance and religions. Weber emphasized the role of the protestant system of beliefs as a trigger to develop an ethos of economy into which the consciousness of both the divine grace and the human (pre)destiny would dictate a permanent attitude of investment and sound works. Indeed, Calvin sourced from the original texts such as Genesis, Exodus and Deuteronomy, much of his emphasis on the attitude towards thrift, prayer and work, which was congenial to puritanism and the birth of a form of ethical capitalism. According to Calvin, taking an interest on money lending is admissible if and only if its rate provides for a reasonable return to the time value of money and to the risk taken by the lender. This reasonable rate radically differs from a usury rate, and it is not *homo homini lupus* to the extent it results from an arm length's agreement in due form,

loans, to spend and invest money legitimately either to provide oneself with an annual income or to engage in legitimate trade and business. From these types of contracts honest gain may be made.

¹¹ R. de Roover, "Le contrat de change depuis la fin du treizième siècle jusqu'au début du dix-septième", *Revue belge de philologie et d'histoire*. Tome 25 fasc. 1-2, 1946. pp. 111-128.

¹² In 1904 & 1905, Max Weber wrote essays on the interplay of religion and capitalism, dealing especially with how Luther and Calvin have influenced in different ways the practice of business by the Christian followers in four different denominations (Calvinism, Pietism, Methodism, Baptism). These essays have been assembled within Weber's *Die protestantische Ethik und der Geist des Kapitalismus* of which we use the 1958 Scribner's edition, translated by Talcott Parsons. Since Weber assesses in detail the role of beliefs such as individual predestination, faith in the divine presence in human works, divine grace and business success, which are also to be found in diverging forms within the religions born from Muhammad and subsumed under the name of Islam ('submission'), we assume a similar approach could be useful today, *mutatis mutandis*. But the complexity of Islam dictates prudence, as this chapter shows.

contracted between the borrower and the lender. The notion of reasonableness of interest rates is at the root of present-day rules and regulations preventing usury rates in democracies, such as the U.S. In France, for instance, the usury rate is regulated by an annual state decree, which prohibits any rate which would be superior to a maximum level (approximately 20% per year). Following the 2010 financial crisis, the Parliament decided to adapt the definition of usury so as to prohibit the excesses of short-term consumer's credit leading families to bankruptcy through mechanisms such as revolving credit automatically doubling the rate at each period (computerized mad-credit system).

6.3.2 How Islam is Structuring its Claims Against "Financial Sins"

Prohibition is not a new word in political economy, and resistance to prohibition may pass through go-around or alleviating mechanisms. Islamic finance is indeed a complex set of methods which might be summarized into the Don'ts and the Do's.

1 – The Don'ts : according to Islam, one must prohibit ('batil'), "any way of acquiring wealth that violates the rights" (a) of God; (b) of Contracting Parties and (c) of Third Parties. Wealth creation based on exploitation are ruled out and declared illegal by Allah's Law, including *riba*, *gharar*, and gambling. Iqbal writes:¹³

"*Riba* literally means increase, addition, expansion or growth. In the Shari'ah, however, the term *riba* refers to anything (big or small), pecuniary or non-pecuniary, in excess of the principal in a loan that must be paid by the borrower to the lender along with the principal as a condition of the loan or for an extension in its maturity. In this sense, *riba* has the same meaning and import as the contemporary concept of interest in accordance with the consensus of all the fuqaha (jurists)."

Gharar refers to act and conditions in contracts, the full implications of which are not clearly known to the parties. In economic parlance it is very close to "the risks of asymmetric information".

Gambling amounts to transfer of wealth without any value added; it is ascertain to a trick of the devil.

2 – The Do's: according to Iqbal, Islamic contracts can be broadly classified into two categories: on the one hand, charity ('tabarruat') with its strong role

¹³ Dr. Munawar Iqbal, Chief of Research (Islamic Banking and Finance) IRTI, Islamic Development Bank *Financial Engineering and Evaluation of New Instruments*, DLC Lecture, Dubai, November, 2004.

in Islam in relation with the religious tax ('zakat'); on the other hand, trade and exchange ('muawadat') is of direct concern here. "Muslims are free to determine the conditions of their contracts unless they change something forbidden as permissible or something permissible as forbidden". Main guidelines for financial design include agreements with balanced compensation (dollar for dollar flows); mutual benefit (strict value equivalence); non "exploitative" time value of money (time is not supposed to change the values of things).

3 – Islamic finance encompasses moral prohibition of all activities which may disrupt the natural order of things, such as: bribery, smuggling, money laundering, creating pollution, obstructing common passage ways and other negative externalities. Table 2 reflects the moral intention of Islamic finance by assembling some of its 'solutions'.

Table 2 Typical instances of Islamic finance

Title of major principle	Example of applicative notion
No pain no gain (Al- Kharaju Bil-Daman)	Reality-check (no virtual trade)
Sharing answers to human needs (Istihsan)	Risk-sharing (no profit for one alone)
Doctrine of Necessity (Dharoorah)	Sub-contracting (division of labour)
Doctrine of Permissivity (Ibaha)	Interpreting locally what is haram / hallal

6.3.3 Moreover, Islamic finance is adapting to globalization

In spite of Shariah's relative rigidity and the "closure" of Koran's interpretation (Ijtihad) since a millennium, the "needs approach" allows for some adaptation of Islamic finance by creation of a multitude of tools invented here and there. Iqbal gives the example of bay' salam: "in Islam, it is not allowed to sell anything, which is not in one's possession. But in case of salam, the Prophet peace be upon him¹⁴ allowed such sale because of "need" of the people, but laid down the clear rules to protect the interests of both parties". Another case of adaptation is the design of Islamic banking "on the basis of *al-mudarib udarib* principle, which provides that a *mudarib* (agent) may himself appoint another agent to actually run the business. The principle of *al-mudarib udarib* essentially allows for sub-contracting. Another is the practice of *murabahah*, through which the bank buys merchandize upon the promise of another party to purchase it from the bank at a higher price". In both cases "the original contractee may arrange to fulfil the obligations under the contract through third parties". From an Islamic point of view, the multiplication of third parties is a sound process which is not questionable since it is supposed to bring in "more responsibility".

¹⁴ The Prophet, peace be upon him! Where "pbuh" is an expression of respect and grace.

In case of trade and business (*muamalat*), the general responsibility is that of “*ibaha*”, i.e. everything is permitted unless prohibited by Allah. Iqbal writes: “We call this the Doctrine of Original Permissibility as it is enforced by Fiqh (the general body of Islamic law and practices)”. Both permissions and prohibitions are important, and the Shariah provides all guidelines to be observed to differentiate between what is *Hallal* (saint) and what is *Haram* (evil). The interpretation of these guidelines in every place and age is done only when allowed through the process of *ijtihad*. When *Ijtihad* is made possible, it is under the responsibility of local Islamic authorities. Due to the diversity in the practices of Islam, *Ijtihad* results in opposite solutions to similar issues: a religious authority in Saudi Arabia may prohibit some form of Islamic finance which is allowed in Dubai. Dissent between diverging “solutions” and the superimposition of contradictory rules is to be accounted for under the notion of extended responsibility (each one religious authority is accountable for what it permits) which resembles subsidiarity.

Moreover some Islamic leaders, like the Agha Khan, supreme head *khalifa* of the Nizarites, uses Western finance and runs the Agha Khan Foundation in Switzerland and the U.S., including interest rates management. To the extent the Agha Khan is able to articulate his intention to help the poor populations of the Himalayas with spiritual and material duties of the Koran, the local Fiqh finds him a holy Muslim, the more so as being a relative to the Prophet peace be upon him. Principle of responsibility includes the search for reasonable techniques to be held accountable the world over. Among those techniques, *Murabaha* and *Hawala* present a challenge for regulation.

Murabaha, or a form of credit sale through an intermediary with a mark-up, has some potential to help consumer credit in Europe, while its functioning is quite akin the actual formulas offered by conventional “factors” to Western consumers; it might be regulated through usual banking channels; its only drawback might be its increased costs to the consumer (hidden usury when compared to conventional consumer lending).

Hawala designates an immediate currency transfer through a telephone call from, say, a *kantor* (an exchange office) in Warsaw and a *hawaladar* in Istanbul, both acting on behalf of a Turkish client wishing to transfer his savings in zlotys available in Poland into Turkish liras to be given to his sister in Turkey. This particularly elusive non-written contract is practiced everyday in Europe, even if it is not legally allowed. Through swap exchanges between *kantors* (exchange agents) which operate their own clearing-houses without any visible flow of funds, two people or more may exchange instantaneous

funds from a network of *kantors* operating *de concert*. Although highly commandable by the Shariah, Hawala is also unfortunately one of the main sources for financing terrorist activities.¹⁵

Adaptation answers action interests but it rests upon a principle of responsibility which is not self-evident when one considers the grey area below Islamic finance: dissent between mollahs, disparities of treatment, social hierarchy, etc. The variety of practices and the outrageous usage of “authorities” often bypass Allah’s commandment.

6.4 Risk, a Word Which Makes Islamic Finance an Interesting Challenge

In a fascinating article, the Saudi Arabian banker Al Suwailem provides us with the most accomplished reflection on the typical traits of a Shariah approach to finance.¹⁶ Al Suwailem is an educated scholar who quotes March and Bernstein, two figures of contemporary management theory in the U.S. He establishes a distinction between “uncontrollable risk or chance” (which the believer must avoid) and “controllable responsive risk” (which the believer must accept and which he may eventually affect through wisdom) “Whenever risk taking is praised for promoting growth and economic development, it is responsive risk, not chance. The reason is that such risk creates incentives for entrepreneurial efforts and value-adding work”. There is a component of moral choice between acceptable “risk for good” and unacceptable “gambling blindly”, and this brings in the question of acceptable causes versus unacceptable causes. It is “only when risk stimulates productive efforts and value-adding activities that it becomes desirable”. So there exists a judgmental dimension of risk, and the believer must exercise his judgment before agreeing to a certain constructive (responsive) risk.

Not only the intention but the attitudes are also significant in order to act in the direction of goodness: trust rules (especially between Allah and men), and solidarity principles (between men in the name of Allah) should be taken into consideration when risk-managing. Indeed Al Suwailem presents a set of arguments reminding Thomas Aquinas’ advice on proper conditions to be observed in decision-making and risk-taking:

¹⁵ Reuters on May 13th 2010 quoted a declaration by Fayçal Shahzad, the Times Square Christmas bomber in New York (2009), according to which his act had been duly supported by Hawala funds qualified by him as being “Hallal”.

¹⁶ Sami Ibrahim Al-Suwailem, “Decision under uncertainty: an Islamic perspective”, Al-Rajhi Banking and Investment Corporation, Riyadh, Saudi Arabia, November 2000, Sha’ban 1421, 14p.

- the act of choice must pay attention to the due process, not the expected results which may prove to be not reachable;
- uncertainty is a gift sent by Allah to the humans, so that men reflect with their given intelligence at the best way to live and respect their fellow humans;
- the intention of an act is the main criterion which matters in the perspective of faith to Allah;
- whether an action (to solve any problem-matter) succeeds or not is in the hands of providence, once man did all he could to solve the problem at hand;
- the greatest role of man is to adjust to risks, and/or to adjust risks to his own condition; at any human rate, efforts should be made to reduce risks whenever we are confronted to them.

Recognizing that uncertainty is intrinsic to all human activities, Al Suwailem specifies that

in Islamic culture, uncertainty is strongly linked to causes. Once we face an uncertain decision problem, we usually think that one shall perform the cause and leave the final result to the will of Allah, the almighty. This inherent behavior is well established in Islamic principles, with the saying of the Prophet, peace be upon him, regarding the Arabian's camel 'Tie it and entrust' which is frequently cited... The cause, tying the camel, addresses controllable risk, while entrust (twakkul) addresses uncontrollable risk (left to Allah the Almighty). Here we argue that causality represents an important landmark in the Islamic approach of decision under uncertainty.

This gives the flavour of a moral attitude towards risk and it leads Al Suwailem to criticize Western financiers who are unable to differentiate proper uncertainty and improper gambling, because they are deprived of a sound basis for decision-making under risk and uncertainty. Is it really so?

6.4.1 Hope and Disappointment Pertaining to the Moral Success of Islamic Finance

In 2004, Iqbal promoted *Financial engineering* as “the design, development, and the implementation of innovative financial instruments and processes, and the formulation of creative solutions to problems in finance”. Recognizing that finance in the Muslim tradition was pretty limited, Iqbal suggested that, while financial markets become more sophisticated and competitive,

a much broader scope for financial engineering exists in developing new contracts. These contracts could be hybrids of old contracts or may be

entirely new. The scope for financial engineering, and for that matter for innovations in other fields, is quite wide. It is important that the task is given over to those experts who know the needs and niceties of the trade.

When the Western crisis started in 2007, Islamic finance was supposed to balance against a vector for hope. The 2009 report “Islamic finance and banking system: a potential alternative in the aftermath of the current global financial crisis” by the Organization of the Islamic Conference¹⁷ provided another hope:

Indeed a number of experts and officials of Islamic banks and financial institutions around the world have confirmed that Islamic banks have not been much affected by the global economic and financial crisis, and that any effect would be limited due to the nature of Islamic banking – it does not deal in debt trading and detaches itself from market speculation that takes place in economies of the West... Accordingly, given that the current crisis has clearly shown up the weaknesses of the conventional banking and finance system, the resilience of the Islamic institutions to the current financial turmoil has led many analysts, especially in the developing countries, to come to the conclusion that Islamic finance and banking system could provide the solution to the weaknesses of the conventional financial system and could be a feasible alternative. In this regard, Islamic finance is expected to spread increasingly at the international level, and its number of customers is also expected to grow as people search for an alternative banking system.

Irresistibly led to find solutions to the moral collapse of the Western banking system, some Europeans, including the then Minister of the Economy, Industry and Employment, Christine Lagarde, and Prime Minister François Fillion visited the Emirates praising Islamic finance and banking.

But from 2009 on, Islamic finance appeared as fragile as its Western counterparts, with the catastrophic downturn of Dubai World (2010), the largest conglomerate in the Emirates comprising DP World (ports), Nakheel (real estate) and MGM Resorts (US casinos). Later in 2011 Dubai Holding itself went bankrupt. Junk bond debts emitted by the Dubai state corporations lost an estimated 120 billion dollars overnight, leading the IMF to encourage an immediate bail-out by its neighbour, Emirate Abu Dhabi. As an observer said:¹⁸ “In spite of its launching of the tallest skyscraper on Earth (Burj, 828 meters), Dubai City-State is on the verge of total collapsing”. Speaking of

¹⁷ Organization of the Islamic Conference, SESRIC report on the global financial crisis, October 2009, Statistical, economic and social research, and training center for the Islamic Countries, monthly report #2.

¹⁸ Dubai prêt à privatiser les joyaux de l’Emirat, Xavier HAREL, La Tribune, 7/12/2010, p. 9.

Abu Dhabi itself, who could now affirm that Islamic banking is a non-profit, no-interest, no-riba business?

There exists a lack of consistency between the intended morality of Islamic finance and its will to overtake Western conventional finance, for instance, the thrust of Iqbal's argument (2004) in favour of an Islamic version of Western finance was to copy-paste and evaluate new derivatives:

Financial needs of both individuals and businesses have changed. Engineers in modern finance have designed several new ways such as mortgages, options, derivatives, hedging, insurance pension plans, credit cards etc., to meet those needs. We must examine what needs are being fulfilled by these instruments. If the needs are genuine (Islamically speaking), then we must either adapt them for our purposes or invent Islamic alternatives for them.

The inconsistency between technical choices and profit expectations in areas such as the Real Estate,¹⁹ or the Financial Optimization of Guarantees²⁰ implies risks and uncertainty reaching the same levels in Islamic and in Western operators, leading them to conflicts of interests. For instance the conflict between the ADIA (Abu Dhabi Investment Authority) and the U.S Citygroup bank ("Citi") lasts since November 2007 when the latter sold to the former a \$7,5 billion stake in its equity, promising to bring a return of 11% per year.²¹ No profit ensued, losses were made, the expected support by Abu Dhabi vanished and transformed into a world-wide conflict involving Citi against ADIA.

This shows that the realities of Islamic finance are not so different from conventional Western finance: it is fragile and sensitive to profit, and its brilliant declarations of conformity to Shariah are not the expected safeguard against risks. Therefore we may apply to its practice and principles what Wicksell (quoted by Buchanan in his 1986 Nobel lecture), once said on

[advisers of change] who should cease proffering policy advice as if they were employed by a benevolent despot, and they should look to the structure within which political decisions are made... [they] could dare to challenge the still-dominant orthodoxy in [Islamic finance]... [and work] to postulate some model of the State and of politics, before proceeding to analyse the effects of alternative policy measures. [They should] look at

¹⁹ Herbert Smith, *Finance islamique et Immobilier*, Le Club Pierre, 17 december 2008, Paris, with Cheikh Mohamed Bachir Ould Sass, member of the first French speaking Shariah Board.

²⁰ JF. Adelle & P. Crocq, *Optimisation des suretés*, Jeantet-associé, Université de Paris II, Campus 2010.

²¹ Financial Times, 17th december 2009, "*Abu Dhabi's allegations: Citigroup's insular focus has a price: bank faces \$4 billion claim for damages*", p. 18.

the ‘constitution of economic polity’ to examine the rules, the constraints within which political agents act.

6.4.2 Islamic Scholars Diverge as to the Proper Meaning of “Islamic Finance”

There is no general agreement among Islamic clerics on the desirability and suitability of Islamic finance, which belongs to what is called “Ijtihad” (interpretation) – a process supposedly closed since the tenth century. Indeed, some question the acceptability of the very notion of Islamic finance compatible with Shariah itself. For instance there is no universal consensus on financial tools like Sukuks (Islamic bonds) as shown by Sheik Taki Usmani²² who opposes their development. There are even Doctors in Shariah who do not trust any connection between the Koran and Islamic finance, such as Sheik Iman Hossein²³ who names it “an satanic creation of Westernized PhDs in deception”. Even Iqbal, Chief of Research at Islamic Development Bank²⁴ vows for a radical control of each Islamic product to conform with Koran’s “O Ye who believe! Eat not up your property among yourselves unduly. Let it be trade amongst you by mutual agreement”. This points to the existence of conflicts of interpretation within the Ummah itself, creating risks of instability.

6.4.3 Beck’s RisikoGesellschaft and Risk-analysis

Ulrich Beck’s strong emphasis on Risikogesellschaft (the society of risk)²⁵ brings in the delicate issues of how any given ideal (be it religious or ideological) may develop into a nightmare when its stubborn application leads to unforeseen consequences. What are the risks implied by Islamic finance, is it possible to identify some of them today beyond the religious realm itself? In other words, “homo religious” is not sufficient to understand Islam. If one wants to understand what is at stake with Islamic finance, one needs to explore

²² Taki Usmani is the director of the Pakistan Research Institute on Islamic Finance, and he chairs the World Shariah Council of the AAOIFI (Accounting & Auditing organization for Islamic Financial Institutions) located in Bahrein. Sheik Usmani declared in 2008 that the sukuks bonds launched in Frankfurt by German landers were not Shariah compatible since they incorporated hidden ways to bypass the prohibition of Riba and Gharar.

²³ Imran Hossein’s preaches against Islamic Finance are found on YouTube under titles like “Islamic banks: sinful deceptive”, “Is Islamic finance actually Islamic?”, etc.

²⁴ Munawar Iqbal, *Financial Engineering and Evaluation of New Instruments*, DLC Lecture, Dubai, November, 2004.

²⁵ Ulrich Beck, *Risk Society: Towards a New Modernity*, SAGE, San Francisco, 1992.

seriously the various dimensions of politics and risks. Table 3 presents the P-R-E-S-T model to proceed onto first-hand considerations on the five dimensions of risks which Islamic finance might generate: Political risks; Religious risks; Economic risks; Social risks; and Technological risks. This is more of a tool for possible future scenarios with strengths, weaknesses, and risks for Europe. It does not pretend to be any ultimate analysis; it offers a systemic approach to challenges Europe would meet in this area.

Table 3 RisikoGesellschaft: Political/Religious/Economical/Societal/Technological

Dimension	Strengths	Weaknesses	Risks
Political	Turkey, OPEC & Emirates support Muslims communities in Europe: Some European governments co-operate	Loss of trust in Islamic governance; turmoil in the Middle-East send a threatening message	Insiders' influence and political conflicts with nationalist parties such as Front National
Religious	Religious faiths flourish and interesting debates ponder the integrists approach. New centers similar to Middle-Age Andalusia stimulate the interbreeding of believers	Islamic finance is used as a vehicle of power by clerical authorities in Europe. Financial flows may hide behind the curtains of Mosques	Costs plus external interferences with rival "schools" create religious conflicts and instability within Europe
Economic	Possibilities of financial exchanges with the Middle-East economies play a stabilizing role for the Euro-system	Speculations on the Euro currency led by petro-dollars problems lead to a major downturn in Europe	When it comes to national interests the EU divides itself: Irak (2003) & Libya (2011). Each country plays it for itself.
Societal	Islam argues on the moral side (no alcohol, no games) and it is joined up by Puritans such as the British leagues. More and more Islamic shops open up.	Ghettos segregate Muslim populations out of the mainstream. Streets are claimed territories (fights?)	European democracies are not able to hold their moral values. The so-called soft consensus hides a moral vacuums
Techno-logical	Tools and techniques of Islamic finance become standardized & secure; credit unions enter mainstream	Opacity of the contracts noconsistent application + Shariah-boards behave secret arbitrary groups	Financial losses due to Islamic finance may create problems with Shariah countries abroad

Beck's RisikoGesellschaft helps formulate a series of contrasting hypotheses:

- May Islamic finance be trusted on pure laity grounds, without calling for a religious creed? To give but an exemple, is France with its historical compromise (separating religions from the state in 1905) able to properly assign Islam room in its "republican historical compromise?"
- Hypothesis One: the incoming of Islam would (if managed properly) integrate the republican consensus and the tracks of tolerance shown by other forms of religion religions (Christian, Jewish, Buddhist and masonic free-thinking) within the private realm of individuals keeping their faith within the circle of privacy.
- However, given the Islamic claim for a universal Ummah as the "only true global community of believers", would it be a dominant force constraining national governments of EU Member States to abide by the Shariah (in a situation where the EU would be weakened).
- Hypothesis Two: the nature of Islam's claims render them insoluble within the historical compromise of the laicity, both in the French Republic and in the EU, to the extent that religious zeal creates confrontation with other populations and undermines the laicity model – and therefore presents a threat to republican ideals.

Under both hypothesis – in any case where some Islamic form of finance would be authorized – one would need to consider controlling this 'branch' of finance as well as other branches, never letting it proclaim itself more stable, better moral, or safer than conventional finance. This would not be for "religious prejudice" but for reasons of political rationality, articulating financial claims with some regulation of interest rates, some efficient risk-management, and some control put over speculation and hidden money flows. One would also need to ensure that costly credit with Shariah boards will not distort the conditions of life for European citizens, nor would they encourage discrimination between Muslims and non-Muslims. Recruiting and paying religious staff in banks, imposing religious files, and putting constraints on customers may also be a problem which would require solutions ahead. Lastly, we may anticipate that criminal activities in relation to the financing of terrorism in the European Schengen area might be part to the Islamic finance issue and this alone may deserve full attention.

6.5 Limits Whereby Economic Life is Under Religious Constraints

In this introduction to the *Limits of Liberty*, Buchanan explains why any society needs a constitution,²⁶ and how it can be implemented by clearly distinguishing between “the rules of the game” and “the game by itself”. Here with Islamic finance we find an area of concern where arguments are presented to the moral humanistic value of such a finance. During 1990–2008 it was said that such a moralistic finance would escape capitalist types of crises. Unfortunately, reality shows that Middle Eastern banks and finance, whether Islamic or not, suffer from the same disease as western banks and financial markets.²⁷ Buchanan sub-title “Between Anarchy and Leviathan” may be interpreted in terms of utopia (absolute freedom to choose whatever finance one likes) and dangers (of a dictator imposing Islamic finance to all).

Two German authors well illustrate the necessary debate between utopia and its inherent (huge) risks:

- Ernst Bloch’s principle of hope²⁸ raises the question of utopian change; how and why is it possible to set the stage for some Islamic finance as the next projection for an ideal system which would ‘repair’ financial damages on Western markets;
- Hans Jonas’ principle of responsibility²⁹ calls for due diligence to attend the heavy risks resulting from Islamic finance and leads us to ask: is it possible to get some guarantee of comparability, consistency and accountability when it comes to jump into a variety of controversial practices promoted by Islamic financiers?

As advocated in Plato’s Republic, no human society could exist void of some utopia, some common shared values, associated to beliefs and creeds. But that this strong desire belongs to the sphere of ideology and it requires both constitutional trade-offs and operational interests to converge. Even if the figures reached by Islamic finance look impressive, quantity should not drive away quality: it is said that Islamic finance will reach globally 2,800 billion dollars by 2014, increasing 20% a year due to the oil and gas industry revenues and the growing Muslim population worldwide. This trend explains the pressure in favor of a new “Shariah” format for financial operations which

²⁶ James Buchanan, *The Limits of Liberty*, Liberty Fund, Indianapolis, 2000 (1st publishing University of Chicago, 1975).

²⁷ Nicolas Parasie, “Banks struggle in the Middle-Eats”, Wall Street Journal, 30th June 2011.

²⁸ Ernst Bloch, *Le principe Espérance*, Gallimard, Paris 1982.

²⁹ Hans Jonas, *Le principe responsabilité*, Collection Champs, Flammarion, Paris 1998.

would be discriminating from the *status quo* finance on the basis of Muslim affiliation. Buchanan's "precepts for living together in a society of mutual consent" cannot be left to religions, since history shows how conflictual religious ideologies may become over time.

Buchanan writes:

Men must use their own intelligence in imposing order on chaos, intelligence not in scientific problem-solving but in the more difficult sense of maintaining agreement among themselves. Anarchy (a strong ideology) is ideal for ideal men; (but)³⁰ passionate men (like believers) must be reasonable.

We start from here, from where we are, and not from some idealized world peopled by beings with a different history and with utopian institutions. Some appreciation of the status quo is essential before discussion can begin about prospects for improvement. Might existing institutions conceptually have emerged from contractual behavior of men? May we explain the set of rights that exist on basically contractual grounds? How and why are these rights maintained? The relationship between individual rights and the presumed distribution of natural talents must be significant for social stability. Social order, as such, implies something that resembles social contract, or quasi-contract, but it is essential that we respect the categorical distinction between the constitutional contract that delineates rights and the post-constitutional contract that involves exchanges in these rights.

Men want freedom from constraints, while at the same time they recognize the necessity of order. This paradox of being governed becomes more intense as the politicized share in life increases, as the state takes on more power over personal affairs. The state serves a double role, that of enforcing constitutional order and that of providing "public goods". (Therefore)... I emphasize the necessity of distinguishing two stages of social interaction, one which involves the selection of rules and one which involves action within these rules as selected.

To our understanding, Islamic finance is several things at once, and these 'things' should be distinguished and addressed differently if one wants to understand that it is both a constitutional claim, an operational set of tolls, and a huge political pressure to make religion the main basis of civil law.

6.5.1 In Conclusion: Islamic Finance Launches Three Challenges to European Democracy

Depending on which consideration is adopted, Islamic finance needs to be approached from three perspectives, each of them challenging one level of democracy:

³⁰ The words between parentheses consists in our own (BK) comments of Buchanan's original expression.

- (1.) Islamic finance as a branch of finance concerned with the aim of constituting a perfectly economic society, a sort of utopia or money eschatology for mankind, including a moral dimension of social salvation, i.e a claim for Constitution.
- (2.) Islamic finance as a set of tools and financial instruments which offer financial operations which do not use the time-value of money nor interest rates. This corresponds to Buchanan's "action part" with a legal challenge to ownership and trust in business activities.
- (3.) Islamic finance as a global alternative "project" to Westernized societies, encompassing (a) – global warming: Islamic finance as the solution for a better respect for the universe as being Allah's creation and will. The "green" colour – both ecological and religious – then becomes an argument for mutual support with ecologist groups; (b) – global economic crisis: Islamic finance stands as "the ethical solution" for a non-profit-making and no-speculation society; the vision of another new world where the free market would be banished as 'Haram' (evil); (c) – global governance: Islamic finance as the basis for a 'Hallal' (good) regime based upon the Islamic Declaration of Human Rights, itself in touch with the Koran and the Ummah ('Muslim human brotherhood').

It is too early to say whether Islamic finance would force Europe into constitutional change or not – but it surely represents a difficult challenge and a probable issue of contention not only for finance but also for European democracy and republican secularity in the years to come.

Common Voice of the European Court of Human Rights and the European Court of Justice on Treatment of Aliens

MATYLDA POGORZELSKA*

7.1 Introduction

How we treat more vulnerable individuals defines our humanity. There is no doubt that aliens are at a worse position than nationals. First and foremost, they are *aliens*, namely people who do not belong here.

The European Convention on Human Rights¹ is by all means the most successful human rights treaty. In 1995 the European Court of Human Rights referred to the Convention as a “constitutional instrument of European public order (*ordre public*)”.² The protection offered by the Convention is not illusory. Indeed, the Convention aims at protection of fundamental rights of individuals and not interests of the contracting parties. It does not give rise to bilateral or reciprocal legal relation between states, but protects common interests.³ Furthermore, the Convention protects individuals irrespective of their nationality.⁴ It should be remembered that the Convention would not be

* LLM University of Westminster, PhD University of Bialystok, mpogorzelska@hotmail.com.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome, 4 September 1950. Currently (March 2012) the Convention is binding on 47 European States.

² *Loizidou v. Turkey* (preliminary objections), (case 15318/89), ECtHR judgement of 23 March 1995, para. 75.

³ A. Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, *European Journal of International Law* 2003, vol. 14, at 532–533.

⁴ There are very few provisions of the Conventions which explicitly refer to foreigners. Article 16 sets an exception to the principle that everyone enjoys all the rights guaranteed by the Convention. It states that no provision of the following Articles: 10 (freedom of expression), 11 (freedom of assembly and association) and 14 (prohibition of discrimination) should

successful without efficient enforcement machinery. Over time, the ECtHR for all practical purposes has become Europe's constitutional court in matters of civil and political rights.⁵

However, in Europe there are two legal systems operating in the field of human rights – the Convention system and the EU system with its Charter of Fundamental Rights. Recently, especially after the Treaty of Lisbon came into force, those two systems are getting closer, also in respect of treatment of aliens.⁶ Additionally, Protocol 14 to the ECHR amended the Convention by allowing the EU accession to the ECHR (cf. Article 59(2)).⁷ Nevertheless already more than a decade ago Schermers explicitly described two European Courts – the ECJ and the ECtHR – as two chambers of the European supreme court which aim at protecting European public order.⁸

These two Courts adhere to separate legal systems in the field of expulsion of aliens. Within the EU, Member States have a well-established system under the Dublin II Regulation⁹ for transferring responsibility for asylum claims to other EU Member States. The Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining asylum applications and does not necessarily focus on human rights of aliens. Within the ECHR there has been developed a system where possible violations of the aliens' human rights are primarily taken into consideration. Under the

be interpreted as “preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.” Also Article 5(1)(f) concerns aliens and it allows for “the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.” Additionally, Article 3 of the Protocol 4 to the Convention prohibits expulsion of nationals, and then *a contrario* allows for expulsion of aliens, if it is not collective, which is prohibited by Article 4 of the Protocol 4. Moreover, paragraph 2 of Article 3 of the Protocol 4 provides for a right to enter the territory of the state of nationality, hence again *a contrario*, refusal to admit aliens is lawful.

⁵ T. Buergenthal, *The Evolving International Human Rights System*, American Journal of International Law 2006, Vol. 100, at 793.

⁶ For the detailed discussion see: Morano-Foadi Sonia and Andreadakis Stelios, *The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and the ECtHR Jurisprudence*, EJIL, 2011, Vol. 22 no. 4, at 1071–1088.

⁷ On schedule of works regarding the EU accession to the ECHR see the Council of Europe website: <http://www.coe.int/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention>.

⁸ H.G. Schermers, *A European Supreme Court*, [in:] P. Mahoney, F. Matscher, H. Petzold, L. Wildhaber (eds.), *Protection des droits de l'homme: la perspective européenne, Protecting Human Rights: The European Perspective; Mélanges à la mémoire de/Studies in memory of Rolv Ryssdal*, Carl Heymanns Verlag KG, 2000, at 1271–1284.

⁹ Council Regulation (EC) No 343/2003 of 18 Feb. 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50.

Dublin II Regulation, Member States almost automatically transfer asylum seekers to those Member States where individuals in question entered the EU. While under the ECHR, Member States have to first assess the situation in the receiving State and only then make a decision about transfer. However recent jurisprudence of the ECJ sheds new light on the issue of automatic application of the Dublin II Regulation.

On 21 December 2011 the ECJ delivered its judgement in joined cases regarding rights of asylum seekers.¹⁰ In the *N.S. and M.E* case the ECJ confirmed the protection of absolute rights of aliens and found that Member States were under an obligation to conduct a test of conformity with the fundamental rights. Accordingly, an asylum seeker may not be transferred to a Member State where he risks being subjected to inhuman treatment. The judgment further concludes that EU law does not permit a conclusive presumption that Member States observe the fundamental rights conferred on asylum seekers.

The judgement is significant for several reasons. It expressly refers to the jurisprudence of the ECtHR and its long established principles. Additionally, it elaborates on conditions of reception of asylum seekers in Greece, and confirms the findings of the ECtHR that not all the EU Member States could be automatically regarded as “safe countries”.¹¹ It should be noted that Greece’s position is very specific as almost most migrants come to the EU via Greece.¹²

This paper will analyse the leading decisions of the ECtHR regarding immigration cases and application of the EU law in such cases and demonstrate how the ECJ reflected the Strasbourg rulings. The adoption of similar approach constitutes a nexus between these two courts in protecting human rights in Europe and offers a more effective protection of the rights of the aliens.

¹⁰ Judgment of the ECJ (Grand Chamber) of 21 December 2011 in the case of *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*. References for a preliminary ruling: Court of Appeal (England & Wales) (Civil Division) – United Kingdom and High Court of Ireland; hereinafter: *N. S. and M.E* case.

¹¹ For the detailed clarification of the ‘safe countries’ concept see *inter alia*: K. Hailbronner, *The Concept of ‘Safe Country’ and Expeditious Asylum Procedures: A Western European Perspective*, IJRL 1993, vol. 5, s. 31–65 and M. John-Hopkins, *The Emperor’s New Safe Country Concepts: A UK Perspective on Sacrificing Fairness on the Altar of Efficiency*, IJRL 2009, Vol. 21 (2), at 218–255.

¹² It is estimated that around 60 to 80% of illegal migrants come to Europe via Greece, see for example: Frontex Reports, *FRAN Quarterly, Issue 1, January–March 2011*, available at: http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q1_2011.pdf; *FRAN Quarterly, Issue 2, April–June 2011*, available at: http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q2_2011.pdf; *FRAN Quarterly, Issue 3, July–September 2011*, available at: http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q3_2011.pdf.

The first chapter will focus on the Strasbourg principles regarding removal of aliens. The next part will analyse leading cases regarding transfer of aliens between EU Member States. Subsequently, the author will present the recent ECJ approach regarding the issue. The discussed cases lead to the conclusion that while applying the EU asylum law fundamental rights must be primarily taken into consideration.

7.2 The Road to the N.S. and M.E. Judgment

7.2.1 Extraterritorial Jurisdiction

Under the ECHR, with regard to asylum seekers, it is a well-established principle that a sending state is responsible for possible wrongs that might materialize in a receiving state. Relying on Article 1 of the ECHR, the ECtHR established that the state's responsibility extends also to actual or potential actions performed outside its territory if a sending state knows or should have known about the real risk of violation of the Convention.¹³

According to Article 1, the Convention obliges State Parties to ensure that *everyone within their jurisdiction* benefits from the Convention. It should be noted that the Convention does not use a term "territory" but "jurisdiction", which has a wider meaning. The Court elaborated on that issue in the judgment *Loizidou v. Turkey*, and explained that "the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties". The Court held that State Parties might also be responsible for actions outside their territory when they exercise effective control of that area.¹⁴ Most recently, in the case regarding actions of British soldiers in Iraq in respect to Iraqi citizens, the Court confirmed the principle of "effective control" either over a territory or over a person.¹⁵ It seems then that this principle should be applied when establishing whether any action falls under a jurisdiction of a given Contracting State. Actions of state agents performed outside the state's territory give rise to "a real extraterritorial responsibility" (*une vraie responsabilité extra-territoriale*) as opposed to "a pseudo-extraterritorial responsibility" (*une fausse responsabilité extra-territoriale*)¹⁶ which arises

¹³ See *inter alia* *Soering v. the United Kingdom*, (case 14038/88), judgement of 7 July 1989, para. 88.

¹⁴ *Loizidou v. Turkey*, *supra*, para. 62.

¹⁵ *Al-Skeini and others v. the United Kingdom*, (case 55721/07), Grand Chamber judgement of 7 July 2011, para. 130–142.

¹⁶ J.-P. Costa, *L'Etat, le territoire et la Convention européenne des droits de l'homme*, [in:] M.G. Kohen (eds), *Promoting Justice, Human Rights and Conflict Resolution through International Law / La promotion de la justice, des droits de l'homme et du règlement des conflits par*

from expulsion cases. Accordingly, in cases when state agents exercise their power outside the state's territory, "a real" extraterritorial application of the Convention comes into play. In cases when states send individuals outside their territory, "a pseudo-extraterritorial" application might come into play.

7.2.2 The Roots: Soering

The principle of responsibility for future violations which might happen in third countries was developed and applied for the first time in 1989 in *Soering v. the United Kingdom*. The applicant was to be extradited to the US where he was accused of two homicides. In the US, the applicant would face a risk of being sentenced to the capital punishment and exposed to the so-called "death row phenomenon". Mr Soering argued that by sending him to the US, the UK would violate his rights as guaranteed by Article 3 of the Convention (prohibition of torture and degrading and inhuman treatment and punishment). The British Government contested this manner of interpretation of Article 3 and argued that it would interfere with international treaty rights and lead to a conflict with norms of international judicial process as it would involve adjudication on the internal affairs of foreign States, not Parties to the Convention. Alternatively, the UK Government proposed to limit the application of Article 3 in extradition cases to those occasions in which the ill-treatment abroad would be certain, imminent and serious.¹⁷ The Court however relied on Article 1 and concluded that contracting states were also obliged to protect individuals from wrong which might materialize outside their jurisdiction. Knowingly surrender a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture, would not be compatible with the founding values of the Convention.¹⁸ The so-called *Soering principle*, reflecting the *non-refoulement* principle,¹⁹ was in 1991 applied in the case *Cruz Varas v. Sweden*²⁰ concerning expulsion to Chile, although the Court did not find the actual violations of the Convention in that case. Subsequently the Court repeatedly referred to that principle in extradition and expulsion cases.

le droit international, Liber Amicorum Lucius Caflisch, Martinus Nijhoff Publishers, Leiden, 2007, at. 190–193.

¹⁷ *Soering v. the United Kingdom*, supra, para. 83.

¹⁸ Supra, para. 88.

¹⁹ *Non-refoulement* is a principle of international law that precludes states from returning a person to a place where he or she might be tortured or face persecution, for details see *inter alia*: A. Duffy, *Expulsion to face Torture? Non-refoulement in International Law*, IJRL 2008, vol. 20, 373–390.

²⁰ *Cruz Varas v. Sweden*, (case 15576/89), judgement of 7 June 1990. para. 69–70.

7.2.3 Conditions of Applicability of Article 3 in the Strasbourg Case-law

Over the years, the Court developed number of principles which are to be applied in migration cases. These principles touch upon what types of danger could trigger Article 3 protection, whether these dangers attain a minimum level of severity, who is responsible for these dangers and, finally, the absolute character of the prohibition of torture.

As a principle, states have the right to control the entry, residence and expulsion of aliens; however, in exceptional cases, expulsion by a Contracting State may give rise to an issue under Article 3. In order to trigger the protection offered by Article 3, the applicant must adduce evidence that there is a risk of treatment contrary to the provisions of this Article. The assessment of that risk inevitably includes the assessment of a situation in a receiving country.²¹ The submissions presented by the applicant must be credible and consistent. As a principle, the Court takes seriously the factual analysis provided by the domestic authorities; however it might also perform its own analysis. In a case of a former official of the Democratic Republic of the Congo seeking asylum in Finland, the Court established facts after having examined witnesses and documents and found, contrary to domestic findings, that the applicant's story was credible.²² When assessing a situation in a given third country, the Court considers reports of international non-governmental organizations like Amnesty International or Human Rights Watch and governmental sources, like US State Department.²³ The Court respects also findings of the UN High Commissioner for Refugees.²⁴

When an applicant claims membership in a systematically persecuted group, the protection offered by Article 3 applies when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and of his or her membership in the group concerned.

²¹ *Abdolkhani and Karimnia v. Turkey*, (case 30471/08), judgement of 22 September 2009, para. 72–73.

²² *N. v. Finland*, (case 38885/02), judgement of 26 July 2005, para. 167.

²³ See among many others: *Chahal v. the United Kingdom*, (case 22414/93), Grand Chamber judgement of 25 October 1996, para. 99–100; *Müslim v. Turkey*, (case 53566/99), judgement of 26 April 2005, para. 67; *Said v. the Netherlands*, (case 2345/02), judgement of 5 July 2005, para. 54; and *Al-Moayad v. Germany* (case 35865/03), decision of 20 February 2007, para. 65–66.

²⁴ See among Others: *Ismoilov and Others v. Russia*, (case 2947/06), judgement of 24 April 2008, para. 125; *Z.N.S. v. Turkey*, (case 21896/08), judgement of 9 January 2010; in the case of *Charahili v. Turkey*, (case 46605/07), judgement of 13 April 2010, the Court emphasized that the High Commissioner contrary to domestic authorities had heard the applicant and established that removal to Tunisia would be dangerous.

In such situation the applicant does not need to refer to any individual circumstances. Otherwise the protection offered by Article 3 would be illusory.²⁵ Accordingly, for example, as many sources confirmed that convicted terrorists are tortured in Tunisia and the applicant was one of them, he was not required to demonstrate any distinguishing features.²⁶ In 2010 the Court held that deportation of a divorced woman to Afghanistan would be contrary to Article 3 owing to a particularly difficult situation of single women in Afghanistan.²⁷ It should be still remembered, however, that just mere reference to the unstable situation in a receiving country is not enough to trigger the protection of Article 3.²⁸

Having established the existence of the real risk of treatment allegedly contrary to Article 3, the Court examines whether the said treatment attains a minimum level of severity. This assessment is relative. It depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.²⁹ According to the case-law, for example, the practice of female genital mutilation falls within the scope of Article 3 and individuals susceptible to this practice should not be deported.³⁰ The minimum level of severity was also attained in a case where a woman accused of adultery was to be deported to Iran as it was very probable that she would be stoned to death.³¹

As rights guaranteed by Article 3 are absolute, the existence of the obligation not to expel does not depend on whether the risk stems from factors which involve the responsibility of the authorities of the receiving country. Article 3 is also applicable in situations where the danger emanates from persons who are not public officials and the state is not willing or not able to provide protection and/or redress. This principle was developed in the *H.L.R. v. France*³² judgement concerning deportation of a drug trafficker who

²⁵ *Salah Sheekh v. the Netherlands*, (case 1948/04), judgement of 11 January 2007, para. 139–149.

²⁶ *Saadi v. Italy*, (case 37201/06), Grand Chamber judgement of 28 February 2008, para. 132.

²⁷ *N. v. Sweden*, (case 23505/09), judgement of 20 July 2010, para. 53.

²⁸ See for example: *Vilvarajah and Others v. the United Kingdom*, (cases 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87), judgement of 30 October 1991, para. 111.

²⁹ *Saddi v. Italy*, supra, para. 134–136.

³⁰ See *Abraham Lunguli v. Sweden*, (case 33692/02), decision of 1 July 2003; the citizen of Tanzania came to Sweden at the age of 15 and was hiding there because her father was in favour of the ritual female circumcision, subsequently was about to be deported back to Tanzania; however after the admissible decision has been adopted, the case was struck out of the list because the applicant was allowed to stay in Sweden. See also *Izevbekhai and Others v. Ireland*, (case 43408/08), decision of 17 May 2011, para. 73.

³¹ *Jabari v. Turkey*, (case 40035/98), judgement of 11 July 2000.

³² *H.L.R. v. France*, (case 24573/94), judgement of 29 April 1997.

collaborated with police to Colombia. The applicant alleged that he would be persecuted not by the State but by the drug cartels.

The Court has repeatedly reiterated that Article 3 has an absolute character and States cannot derogate from obligation stemming from it.³³ Therefore the applicant's behaviour, even the most disturbing, cannot be used as a justification of deportation to torture. While examining the *Chahal v. the United Kingdom* (1996) the Court stated the principle that the risk of ill-treatment could not be weighed against the reasons (including the protection of national security) put forward by the respondent state to justify expulsion.³⁴ In 2008 the Grand Chamber of the ECtHR confirmed this principle in the *Saadi v. Italy*, concerning deportation of a convicted terrorist to Tunisia.

7.3 Expulsion From One to Another EU Member State. The ECtHR Approach

The Strasbourg Court on many occasions dealt with cases regarding automatic application of the EU asylum law, in particular automatic removal to the country of entry to the EU territory. The leading cases, which will be further analysed, reflect the ECtHR's approach that Member States must not rely solely on the EU law without assessing compatibility with the ECHR.

7.3.1 Obligation to Consider the ECHR While Applying the Dublin Convention – *T.I. v. the UK*

It was generally accepted that members of the Council of Europe, which include all the EU Member States, were safe countries and aliens faced no risk of ill-treatment in those countries.³⁵ However, as appears from the *T.I. v. the United Kingdom* (2000), EU state removing aliens to another EU state still has an obligation to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Article 3 of the Convention. States cannot rely automatically on arrangements made in the Dublin Convention³⁶ concerning the attribution of responsibility between European countries for deciding asylum claims.³⁷ The case *T.I. v. the United Kingdom* concerned the

³³ See *inter alia Saadi v. Italy*, supra, para. 127.

³⁴ *Chahal v. the United Kingdom*, supra, para. 79–80.

³⁵ See Protocol (No 24) on asylum for nationals of Member States of the European Union (OJ 2010 C 83, p. 305) annexed to the Treaties.

³⁶ The Dublin Convention was in 2003 replaced by the Dublin II Regulation – Council Regulation (EC) No 343/2003 of 18 Feb. 2003 establishing ..., supra.

³⁷ *T. I. v. the United Kingdom*, (case 43844/98) decision of 7 March 2000.

Sri Lanka's citizen of Tamil origin who, pursuant to the provisions of the Dublin Convention, was about to be expelled from the UK to Germany. He complained that it was very likely that Germany would further expel him to Sri Lanka where he would face a risk of persecution. However, the Court found that the UK fulfilled its obligation to examine the risk of further expulsion and the applicant could be transferred to Germany.

The issue of automatic application of the Dublin II Regulation was revisited in 2008, when the question of returning asylum seekers to EU countries, especially Greece was discussed. On 15 April 2008 the UN High Commissioner for Refugees published the report in which it advised the EU Member States to refrain from returning asylum seekers to Greece under the Dublin II Regulation. It also recommended that they make use of the so-called "sovereignty clause" embodied in Article 3(2) of the Dublin II Regulation and examine asylum applications themselves.³⁸ According to the report, the quality of refugee status determination proceedings and the reception conditions in Greece were unsatisfactory.³⁹ In 2008 the ECtHR received numerous applications concerning possible return of applicants to Greece. Between May and September 2008 the President of the Fourth Section alone applied Rule 39 of the Rules of Court⁴⁰ in eighty of such cases.

7.3.2 A Warning – *K.R.S. v. the UK*

In the decision in the case of Iranian citizen who was about to be returned from the UK to Greece, *K.R.S. v. the UK*,⁴¹ the Court reiterated the principle that the sending state was under an obligation to examine the situation in the receiving country and ensure that the applicant would not be further expelled to a place where he might face persecution. However the

³⁸ Article 3(2) of the Dublin (II) Regulation provides that "By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant".

³⁹ *UNHCR position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"*, report of 15 April 2008, <http://www.unhcr.org/refworld/docid/4805bde42.html>.

⁴⁰ "Rule 39 (Interim measures) 1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it".

⁴¹ *K.R.S. v. the United Kingdom*, (case 32733/08) decision of 2 December 2008.

Court established that at the material time Greece did not remove people to Iran (or Afghanistan, Iraq, Somalia or Sudan). The Court also addressed the issue of conditions of reception. It referred to the report published by the Committee for the Prevention of Torture after its visit to Greece.⁴² It appeared that facilities in the centres for asylum-seekers required some urgent repair works and, moreover, that the detainees should be allocated a bed, provided with a clean mattress and clean bedding and products for personal hygiene. The allegations of ill-treatment of aliens were repeated in other reports of non-governmental organizations and also in the Amnesty International statement.⁴³ Nevertheless, the ECtHR expressed its belief that Greece would abide by its obligations to adhere to minimum standards in asylum procedures and to provide minimum standards for the reception of asylum seekers as provided by the Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status⁴⁴ and the Council Directive laying down minimum standards for the reception of asylum seekers.⁴⁵ The Court recalled also that Greece, as a Contracting State, had undertaken to abide by its Convention obligations and to secure to everyone within their jurisdiction the rights and freedoms defined therein, including those guaranteed by Article 3.⁴⁶

Although this particular case was declared inadmissible, it sent a very clear message to Greece and also to other Contracting States. It was obvious that the Court realized that the plight of asylum seekers in Greece was adverse but it decided to give this state a chance to tackle the problem. However, in 2009 the cases regarding the return to Greece pursuant to Dublin II Regulation were again communicated to relevant governments.⁴⁷ The Court wanted to know

⁴² Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 27 February 2007, available at the CPT website: <http://www.cpt.coe.int/documents/grc/2008-03-inf-eng.pdf>.

⁴³ See the Amnesty International Report of 27 February 2008 "Greece: No place for an asylum-seeker" available at: <http://www.amnesty.org/en/library/asset/EUR25/002/2008/en/ad3411e5-e5ee-11dc-a281-c950ca3e72a9/eur250022008eng.html> and the report "A gamble with the right to asylum in Europe-Greek asylum policy and the Dublin 2 Regulation" of the Norwegian Organisation for Asylum Seekers, the Norwegian Helsinki Committee and Greek Helsinki Monitor published on 9 April 2008, available at: <http://www.noas.no/?p=news&id=1413>.

⁴⁴ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005.

⁴⁵ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6.2.2003.

⁴⁶ *K.R.S. v. the United Kingdom*, supra.

⁴⁷ See *inter alia*: *Awdesh v. Belgium*, (case 12922/09), communicated on 28 May 2009, the applicant, a refugee from Iraq came to Belgium via Greece. According to the Dublin II Regulation, Greece was responsible for examining his asylum application and he was about to be ex-

whether the applicants would be further expelled to places where their rights would be violated and whether their rights in Greece would be respected.

7.3.3 Lost of Patience – *M.S.S. v Belgium and Greece*

Eventually, in January 2011, in the *M.S.S. v. Belgium and Greece*⁴⁸ judgement the Grand Chamber found that both states, Belgium and Greece, violated Article 3 in respect of the applicant. The application was lodged by an Afghan national, who arrived in Belgium via Greece. He applied for asylum in Belgium. However, pursuant to Article 10(1) of the Dublin II Regulation, he was ordered to leave Belgium for Greece as it was Greece who was responsible for examining his asylum application. The applicant requested the Court to apply interim measures according to Rule 39 of the Rules of the Court (interim measures) in order to suspend his expulsion to Greece. The Court refused to apply Rule 39 in respect of Belgium and possible removal to Greece but informed the Greek Government that its decision was based on its confidence that Greece would honour its obligations under the Convention and comply with the relevant EU legislation on asylum. However the Court applied Rule 39 in respect of Greece and possible removal to Afghanistan. The asylum proceedings in Greece were set in motion. Initially the applicant was detained; upon his release, he was not provided with any accommodation or any other assistance. Apparently, for several months he lived in the street with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court referred to numerous international reports that described appalling conditions⁴⁹ faced by asylum seekers in Greece. It appears that persons, who were not detained, slept on the streets. Those who were detained were subjected to degrading and inhuman conditions. Moreover, there existed a real risk of *refoulement*.

The Court admitted that Greece faced considerable difficulties in coping with the increasing influx of migrants and asylum seekers. However, the argument of the Greek Government that these difficult circumstances should

pelled to Greece. On 12 January 2010 the Case was struck out of the list of cases since Belgium accepted responsibility to examine the applicant's Case. Cases *M.S.S. v. Belgium and Greece*, (30696/09) and *Ahmed Ali v. the Netherlands and Greece*, (26494/09) were communicated on 30 July 2009; refugees from Afghanistan and Somalia respectively complained against being sent back to Greece.

⁴⁸ *M.S.S. v. Belgium and Greece*, (case 30696/09), Grand Chamber judgement of 21 January 2011.

⁴⁹ The judgements lists 23 international organizations' reports, *inter alia* of Amnesty International, Human Rights Watch and UNHCR, see para. 160–195 of the *M.S.S. v. Belgium and Greece* judgement.

be taken into account when examining the applicant's complaints under Article 3 was found to be unacceptable. The Court held that the applicant was the victim of humiliating treatment showing lack of respect for his dignity.⁵⁰

The applicant also complained that by sending him to Greece under the Dublin II Regulation the Belgian authorities had failed in their obligations under Articles 2 and 3. When assessing the responsibility, the Court referred to the *Bosphorus* judgement⁵¹ and reiterated that states were free to transfer their sovereign powers to an international organisation. Nevertheless the states remain responsible under the Convention for all actions and omissions of their bodies.⁵² The Court held that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. Moreover, by transferring the applicant to Greece, Belgian authorities exposed him to degrading conditions of detention and degrading living conditions. Therefore the transfer to Greece constituted violation of Article 3.⁵³

The judgement was significant for several reasons. It should be noted that it was adopted by a great majority; sixteen out of seventeen judges were convinced that Greece, which is both a Member State of the Council of Europe and of the EU and which was considered a safe country, violated its obligations. Hence the clear message is that the situation has to change. Moreover the Court sent a very clear message to other EU States – there is a positive obligation to protect individuals from violations happening elsewhere and states must not apply the EU law automatically. Obviously the judges were aware that the Dublin II Regulation lacked adequate provisions for burden-sharing amongst EU Member States and that it was very convenient for the EU Member States to apply that regulation and get rid of the problem of examining numerous asylum applications and afterwards deal with refugees. Obviously, the judges were also aware of the difficult situation of Greece, as Judge Rozakis pointed out in his concurring opinion, 88% of the immigrants entered EU by crossing the Greek borders. However all of that did not justify the conditions of reception of aliens.

What is also very important, the Court did not practically deal with the question of *refoulement* to Afghanistan but only with question of conditions and lack of efficient proceedings in Greece. This seems to be a new approach. In 2000, in the *T.I.* case, the Court mainly examine whether there existed a risk of indirect *refoulement* from Germany to Sri Lanka. In 2008, in the *K.R.S.* case,

⁵⁰ *M.S.S. v. Belgium and Greece*, supra, para. 263.

⁵¹ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, (case 45036/98), Grand Chamber judgement of 30 June 2005.

⁵² *M.S.S. v. Belgium and Greece*, supra, para. 338.

⁵³ Supra, para. 358–368.

the Court examined both issues – the question of possible *refoulement* to Iran but a considerably significant part of the decision was devoted to the conduct of asylum proceedings in Greece and reception conditions. In 2011, in the *M.S.S.* judgement, the Court practically set aside the question of possible *refoulement* to Afghanistan but elaborated on appalling living conditions of asylum-seekers in Greece and major shortcomings in the asylum applications proceedings.

7.4 Expulsion From One to Another EU Member State. Approach of the ECJ

In view of the above, it is clear that the ECtHR strengthens its position and finds the automatic application of the UE refugee law unacceptable. In December 2011, this approach was also shared by the ECJ in *N.S. and M.E.* Two joined cases concerned the interpretation of the Dublin II Regulation and the fundamental rights of the EU with regard to the standards for the reception of asylum-seekers in Member States. The judgement is significant as for the first time the ECJ held that while applying the Dublin II Regulation, Member States must take account of the asylum seeker's human rights and in certain circumstances there is a duty not to return asylum seekers to the country of their first entry into the EU.

One of the appellants came to the UK having travelled via Greece. Apparently he was arrested in Greece and then expelled from Greece to Turkey; subsequently he travelled to the UK, where he lodged an asylum application. He was informed that he was eligible to transfer to Greece. The appellant applied for a judicial review and the Court of Appeal (England & Wales) referred the case to ECJ pointing out that:

- (1) asylum proceedings in Greece were said to have serious shortcomings;
- (2) the proportion of asylum applications which were granted was understood to be extremely low;
- (3) judicial remedies were stated to be inadequate and very difficult to access;
- (4) the conditions for reception of asylum seekers were considered to be inadequate.

In the reference for a preliminary judgement, the English court asked in essence, whether, while acting in accordance with the Dublin II Regulation, Member States have the duty to observe fundamental rights of the asylum seekers as provided by the EU legislation and the ECHR. Further, the court asked if, in cases where transfer to the responsible state would expose the

asylum seeker to a risk of violation of his fundamental rights, Member States are obliged to examine the asylum application themselves, pursuant to Article 3(2) of the Dublin II Regulation (the sovereignty clause).

The Irish case concerned five appellants originating from Afghanistan, Iran and Algeria. Each of them travelled via Greece and was arrested there for illegal entry. Then they travelled to Ireland, where they claimed asylum. They resisted returning to Greece. The referring court asked essentially if, in case where a Member State finds out that the fundamental rights of the asylum seeker would be violated in a state responsible for examining of the asylum application, the transferring Member State is obliged to examine the asylum application itself.⁵⁴

The Advocate General elaborated on the overloaded asylum system in Greece and mentioned the ECtHR's decisions in the *K.R.S.* and *M.S.S.* cases. In her opinion, Member States must consider the Charter of Fundamental Rights, and the Charter's protection is no less than the protection granted by the ECHR.⁵⁵

The ECJ expressly referred to the *M.S.S.* judgement and its findings that there existed in Greece a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers. After having examined the circumstances of both cases and relevant material, the ECJ held that the Member States may not transfer an asylum seeker to the Member State responsible within the meaning of Dublin II Regulation where they are aware that there existed a real risk of inhuman or degrading treatment resulting from systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State.⁵⁶ Consequently, an application of the Dublin II Regulation "on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply this Regulation in a manner consistent with fundamental rights".⁵⁷ It follows then that in circumstances where in the state normally responsible for examination of an asylum application, such as Greece, the reception conditions are inhuman, other Member States, such as the UK and Ireland, should make use of the "sovereignty clause" and examine the asylum application themselves.

The judgement provoked some mixed feelings. Some commentators worry that it might destroy the European asylum system and its so far smooth

⁵⁴ *N. S. v Secretary of State for the Home Department...*, supra, para. 44, 54.

⁵⁵ Opinion of Advocate General Trstenjak delivered on 22 September 2011. *N. S. v Secretary of State for the Home Department*, supra.

⁵⁶ *N. S. v Secretary of State for the Home Department...*, supra, para. 89, 94.

⁵⁷ Supra, para. 99.

operation. The judgement was perceived by the UK press as a restriction of the country's rights to send aliens to a first entry state.⁵⁸ Murphy wrote that the very high proportion of asylum seekers that enter the EU through Greece means that a finding against that Member State alone is enough to cause something of a crisis in this field of EU law. However the same author notes that the *N.S and M.E.* judgement is very significant from the human rights point of view.⁵⁹

7.5 Conclusions

Two conclusions can be drawn from those judgements. First, automatic application of the EU law is not acceptable and safety and human treatment of concerned individuals must be ensured. It is clear that Member States cannot evade their responsibilities only by reference to some EU legislation, like the Dublin II Regulation. Their primary duty is to ensure that individuals falling within their jurisdiction would not be subjected to inhuman or degrading treatment. As a matter of fact, not all EU Member States offer equally high standard of protection for asylum seekers and both courts require taking this into consideration. It seems that in the past some Member States did not want to acknowledge this and sent asylum seekers back to the country of the first entry relying on the Dublin II Regulation. Obviously that practice imposed a burden on these countries and this burden proved to be intolerable in the case of Greece. The findings of the ECJ are very significant, as they might contribute to shifting the burden of examining asylum application from Greece to other Member States and as a consequence to ensure that all asylum seekers in Europe are treated in accordance with the human rights requirements.

Second, those decisions of both courts constitute by all means a major step towards converging the case law of the ECJ with the ECtHR approach on fundamental rights. It is evident that the ECJ judges were influenced by findings of the ECtHR in the *M.S.S.* case. The ECJ explicitly referred to the *M.S.S.* judgement and accepted its conclusion.⁶⁰ As pointed out by Morano-Foadi and Andreadakis, those two Courts have long been seeking to do so. According to those authors, the new developments introduced by the Lisbon

⁵⁸ See for example: The Guardian, Home Office loses legal battle over asylum seekers, <http://www.guardian.co.uk/world/2011/dec/21/home-office-loses-asylum-seekers-battle> and BBC, *EU court warns UK and Irish over asylum transfers*, <http://www.bbc.co.uk/news/world-europe-16285573>.

⁵⁹ Cian Murphy, *The ECJ on Asylum, Greece & the UK Protocol on the EU Charter*, Human Rights in Ireland blog, <http://www.humanrights.ie/index.php/2011/12/28/nsjudgment/>. For further discussion see also: http://www.europeanfoundation.org/my_weblog/2012/01/the-uk-needs-a-complete-opt-out-from-the-charter-of-fundamental-rights.html.

⁶⁰ *N. S. v Secretary of State for the Home Department...*, supra, para. 88–122.

Treaty, i.e. the legally binding nature of the Charter of Fundamental Rights and the future EU's accession to the ECHR, will significantly re-adjust the relationship and the balance of powers between the two European courts and lead towards a greater harmonization of the human rights standards.⁶¹

It seems that the *N.S. and M.E.* judgement proves that this objective is possible to achieve in practice. Beyond any doubt that decision strengthens the protection afforded to asylum-seekers in Europe and allows for believing that each case would be dully examined on a national level and the risk of *refoulement* would be minimized.

It should be noted that the EU law provides enough instruments for protections of asylum seekers' human rights. The Dublin II Regulation itself contains the "sovereignty clause" which allows Member States to examine the application and not to send an asylum seeker back to the country of first entrance where his rights might be violated. Both European Courts clearly point out that the Member States need to make use of that possibility.

Both judgements – *M.S.S.* (ECtHR) and *N.S. and M.E.* (ECJ) reiterate that reception conditions for asylum seekers and asylum proceedings must comply with human rights standards as set in the ECHR and the Charter of Fundamental Rights and remind States that their primary duty is to protect individuals from violations of their fundamental rights as opposed to expediting proceedings and getting rid of the problem by means of quickly removing asylum seekers outside their jurisdiction. Both these judgements are a good reason for celebration for human rights.

⁶¹ Morano-Foadi Sonia and Andreadakis Stelios, *supra*, at 1086–1087.

Part Two

The EU and its Partners

Chapter 8

Turkish Problems with Democracy in the Context of the EU Membership Question

ADAM SZYMAŃSKI*

After World War II Turkey went through difficult, i.e. not free from setbacks and temporary reversals of democratisation, transition from the authoritarian regime existing during the interwar period to the system based on the functioning of important democratic institutions, free, regular elections and multiparty system. However, this was only the first stage of the democratisation process. Its result can be described as the electoral or procedural democracy.¹ The challenge for Turkey is the democratic consolidation, which for the purpose of this article means a long process that leads to the establishment of effective democratic regime with consensus among all significant political actors that the democratic regime is the most right for their society (in other words it is “the only game in town”).²

The Turkish democracy has not been consolidated yet. However, this state made a big progress on the way to the democratic consolidation, especially in the last decade. The crucial factor contributing to this progress was the EU membership prospect. It was a strong incentive for this candidate country to conduct difficult reforms in order to respect democratic rules and human rights.

The aim of this article is to analyse the issue of the democratisation process in Turkey in the context of its relations with the EU in 2010–2011. After presenting some necessary background it is important to define the

* PhD, researcher and lecturer, Institute of Political Science, University of Warsaw; ad_szym@poczta.onet.pl

¹ G. O’Donnell, *Transitions, Continuities, and Paradoxes*, in: S. Mainwaring, G. O’Donnell, J.S. Valenzuela (eds.), *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective*, Notre Dame 1992, p. 18.

² A.R. Usul, *Democracy in Turkey. The Impact of EU political conditionality*, London, New York 2011, p. 13.

main problems Turkey has while fulfilling the Copenhagen political criteria. The author would like then to answer the question what should be done after the parliamentary elections in June 2011 to solve at least some of these problems. He argues that further reforms are possible. However, the solution to the main problems will take time due to their systemic and ideological origin.

8.1 Setting the Scene

The Republic of Turkey was acknowledged as an official candidate for accession on 10–11 December 1999 at the European Council's Helsinki summit.³ The climate which had developed in 1998–1999 gave rise to a positive consideration of the “Turkish case.” The leaders of the largest political parties in Turkey began speaking with a single voice about the EU. In many EU countries, the Social Democrats came to power. This also applied to Germany, which began to support Turkey's EU aspirations. In August 1999, a series of earthquakes took place in Turkey. Greece spontaneously rushed to help, which improved the strained Greek-Turkish relations (a month later, Turks aided Greeks).

The EU membership prospect became for Turkey a strong incentive to conduct reforms. In 2001–2004, Turkey carried out numerous legal reforms to fulfil the Copenhagen political criteria. Many provisions of the constitution were amended⁴ and thorough changes were introduced in major laws as part of eight reform packages. Some of these revisions broke certain taboos prevailing in Turkey. Specifically, the right to study the Kurdish language at private courses and to broadcast radio and television programmes in this language (subject to certain limitations) was guaranteed, and the death penalty was finally abolished.⁵

These reforms contributed to a decision by the European Council's Brussels summit in December 2004 to open accession negotiations with the Republic of

³ Presidency Conclusions, Helsinki European Council 10 and 11 December 1999, www.consilium.europa.eu.

⁴ All references to the Turkish constitution in this article come from: Türkiye Cumhuriyeti Anayasası, Kanun no. 2709, 7.11.1982, www.tbmm.gov.tr/anayasa/anayasa_2011.pdf.

⁵ For more on political reforms in Turkey in 2001–2004, see, for instance: S. Aydın, E.F. Keyman, *European Integration and the Transformation of Turkish Democracy*, “EU-Turkey Working Paper”, No. 2, August 2004, http://shop.ceps.be/BookDetail.php?item_id=1144; S. Yazıcı, *The Impact of the EU on the Liberalization and Democratization Process in Turkey*, in: R.T. Griffiths, D. Özdemir, *Turkey and the EU Enlargement. Processes of Incorporation*, Istanbul 2004, pp. 91–102; K. Ulusoy, *Turkey's Reform Effort Reconsidered, 1987–2004*, EUI Working Papers, RSCAS 2005, nr 28, www.iue.it/RSCAS/WP-Texts/05_28.pdf; E. Özbudun, *Democratisation Reforms in Turkey, 1993–2004*, “Turkish Studies” 2007, no. 2, pp. 179–196; S. Yazıcı, *Demokratikleşme Sürecinde Türkiye*, Istanbul 2009.

Turkey on 3 October 2005. This represented the implementation of the conclusions of the 12–13 December 2002 European Council in Copenhagen. It decided that the European Council would determine at its December 2004 summit whether or not Turkey had already fulfilled the Copenhagen criteria and whether accession negotiations with this country could be commenced “without delay”.⁶ Before the launch of negotiations Turkey was expected to sign a protocol expanding the customs union between the EU and Turkey to include ten new EU Member States. Moreover, a set of six new laws, including a criminal code and a code of criminal procedure, were to come into force in Turkey. The country met both conditions and started its accession negotiations in October 2005.

However, the pace of the accession negotiations remained slow. After more than six years of negotiations, at the end of 2011 only 13 negotiation chapters were opened and only one was provisionally closed (out of 33 chapters that can be negotiated). The same referred to the democratisation process in Turkey and fulfilment of the Copenhagen political criteria. Although continued, the reforms in the country slowed down after 2005. In 2006, a part of the ninth reform package was adopted, including regulations prohibiting the military courts – with some exceptions – from prosecuting civilians in peacetime, and regulations establishing the right of appeal against military court judgements following a ruling by the European Court of Human Rights (ECtHR). In the following years, Article 301 of the Criminal Code – under which the denigration of *Turkishness*, the Turkish state and government institutions, was a punishable offence – was finally modified.⁷ In another change, a law on foundations, important from the perspective of religious minority rights, was adopted, and a Kurdish public television channel (TRT 6) was established. Moreover, a seven-year harmonisation programme revealed by the government in April 2007 was being carried out, albeit slowly.⁸ The main achievement of the Justice and Development Party’s (AKP) government in the 2007–2011 election period seemed to be the adoption of the constitutional package approved by a referendum on 12 September 2010. The amendments to 26 constitution articles have an effect of limiting the competences of military courts, restructured the Constitutional Court, widened the composition of the High Council of Judges and Prosecutors, making it more representative of the judiciary as a whole,

⁶ Presidency Conclusions. Copenhagen European Council, 12 and 13 December 2002, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/73774.pdf; Brussels European Council, 16/17 December 2004, Presidency Conclusions, www.consilium.europa.eu.

⁷ Türk Ceza Kanununda Değişiklik Yapılmasına Dair Kanun, Kanun no. 5759, 30.04.2008, www.tbmm.gov.tr/kanunlar/k5759.html.

⁸ For more, see: A. Kıvanç, *Hani verdiği sözler, AB yasaların nerde?*, “Radikal”, 11 April 2008.

established the institution of Ombudsman, improved the protection of the rights of women and children and broadened the trade union rights.⁹

The main reasons for the slow pace of reforms in 2006–2011 period were both external and internal. Turkey was losing the incentive to conduct reforms, receiving the negative signals from some EU countries (including the main players: France and Germany), which by words and deeds (blockade of negotiating chapters) implied that Turkey should not be an EU Member State. Moreover, AKP's disappointment, among others, due to some negative rulings of the ECtHR on the headscarf issue, played a certain role in this context. The period of 2007–2008 was the time of political struggle between Kemalists and Muslim-conservative circles. It led to the destabilization of the state connected with the election of the president of Turkey, constitutional changes (2007) and the AKP closure case (2008).¹⁰

The parliamentary elections took place in Turkey on 12 June 2011. Their results indicated that AKP would still govern alone. It received 49.9 per cent of votes (326 mandates). The opposition parties are as in 2007–2011 election period: Republican People's Party (CHP) – 25.9 per cent, 135 mandates, National Action Party (MHP) – 13 per cent, 53 mandates and independent deputies supported by pro-Kurdish Peace and Democracy Party (BDP) – 6.6 per cent, 36 mandates.¹¹ The subsequent AKP government was established, facing the old problems within the democratisation process.

8.2 Democracy and Human Rights in Turkey – Current Situation

The main problems Turkey has with fulfilment of the Copenhagen political criteria can be divided into these in democracy and rule of law field as well as human rights area. This chapter is an outline of the current problems according to the reports of the EU institutions: the European Commission (report from November 2010) and the European Parliament (March 2011).¹² The report of

⁹ For more on amendments to the constitution, see: S. Yazıcı, *Turkey's Constitutional Amendments: Between the Status Quo and Limited Democratic Reforms*, "Insight Turkey" 2010, no. 2, pp. 1–10; W. Chislett, *Turkey's 'Yes' Vote in the Referendum on Constitutional Reform: One More Step Towards Joining the EU*, ARI, 15 September 2010; *6 Milyon oy farkla evet*, "Milliyet", 13 September 2010.

¹⁰ For more, see: W. Hale, E. Özbudun, *Islamism, Democracy and Liberalism in Turkey. The case of the AKP*, London, New York 2010, pp. 55–79.

¹¹ Data: *Menderes'in rekorunu kirdi*, "Milliyet", 13 June 2011.

¹² Commission Staff Working Document, Turkey's 2010 Progress Report, Brussels 10 November 2010, http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/tr_rapport_2010_en.pdf; European Parliament resolution of 9 March 2011 on Turkey's 2010 progress report, P7_TA(2011)0090, Strasbourg, 9 March 2011, www.europarl.europa.eu.

the first institution has more impact on the pre-accession process of Turkey from the formal point of view, but the resolution of the European Parliament has a huge political significance, influencing both the EU Member States and candidate countries.

8.2.1 Democracy and Rule of Law

The main problems within the democracy and rule of law area include: the civil-military relations, the judiciary system, division of power, the functioning of political parties as well as corruption. Most of them are issues with no progress or limited progress also in the previous years.¹³ Reforms are conducted in these cases, but they are insufficient. What is even more important in the Turkish case is that their implementation leaves a lot to be desired (also as far as human rights are concerned).¹⁴

The civil-military relations have not reached democratic standards yet. On the one hand the civilian supervision of security forces (connected with so called civilianization process) is insufficient. There is a progress concerning the functioning of the National Security Council (a civilian can hold a post of the Secretary General and the number of civilians has increased) and the military courts (they cannot prosecute civilians, their competences are limited to cases concerning the military services and duties, the decisions of the Supreme Military Council are opened to judicial review); military officials are not any more members of such civilian bodies as the Council of Higher Education or Radio and Television Supreme Council – mainly thanks to 2001 and 2010 constitutional amendments and seventh reform package from 30 July 2003.¹⁵ However, for instance the civilian control over the educational system as well as parliamentary overview over the defence budget and procurement projects remains limited. The same refers to the role of the Ministry of Defence in the decision making process concerning the military issues.¹⁶ On the other hand, the army still exercises serious political influence, thanks to the broad definition

¹³ In 1998–2006 civil-military relations, judiciary system and corruption belonged to the most problematic issues. For more, see: E. Faucompret, J. Konigs, *Turkish Accession to the EU. Satisfying the Copenhagen Criteria*, London, New York 2008, pp. 152–161.

¹⁴ This is the conclusion from the work on the human rights in Turkey – for more, see: Z.E. Kabasakal Arat, *Conclusion: Turkey's Prospects and Broader Implications*, in: Z.E. Kabasakal Arat (ed.), *Human Rights in Turkey*, Philadelphia 2007, pp. 275–279.

¹⁵ W. Hale, E. Özbudun, *Islamism, Democracy and Liberalism in Turkey...*, op.cit., pp. 61–62.

¹⁶ E.F. Keyman, S.A. Düzgüt, *Europeanization, Democratisation and Human Rights in Turkey*, in: E. LaGro, K.E. Jorgensen (eds.), *Turkey and the European Union. Prospects for a Difficult Encounter*, Basingstoke 2007, pp. 76–77.

of security, being its field of competence, in the Turkish law.¹⁷ This concerns both domestic and foreign policy of the government as well as judiciary actions. However, the army has stopped being untouchable, which is clearly confirmed by the investigation of the alleged criminal nationalistic network *Ergenekon* and the probe into several other coup plans (including *Balyoz*).¹⁸

The reforms were conducted also within the judiciary system – the area of great importance for the EU especially after some lessons from the 2007 enlargement round. The legal changes embraced e.g. the abolition of state security courts, application of the European Convention on Human Rights (ECHR), recruitment of new judges, training on the EU and Human Rights law and new financial resources for the Ministry of Justice.¹⁹ As it was mentioned before, the last constitutional package approved by a referendum on 12 September 2010 apart from limiting the competences of military courts provided for the restructuring the Constitutional Court and widening the composition of the High Council of Judges and Prosecutors to make it more representative of the judiciary as a whole as well as for the establishing the special juvenile courts.²⁰ However, there are still the same old problems with the judiciary system. Apart from the fact that judges are overloaded and underqualified and courts work slowly there are problems with the impartiality of the judiciary and the judicial independence. Judges, especially from old generations, are influenced by the ideology of Kemalism, mainly by the principles of nationalism and secularism. This has an impact on the interpretation of certain laws and judge's decisions, sometimes being contradictory and inconsistent.²¹

The deficits concerning the independence of the courts are connected with the influence of the army on the judiciary system as well as with the link between the latter and the executive power. Even after 2010 constitutional package the Minister of Justice still chairs the High Council of Judges and Prosecutors, having impact on the appointments, transfers and promotions of judges. This calls into question the principle of division of power. Because of this phenomenon there are concerns in Turkey and abroad about the fair trials of persons prosecuted within lawsuits concerning *Ergenekon* or *Balyoz*.²²

¹⁷ The definition of security includes both external and internal security and embraces even such areas as energy or environmental protection.

¹⁸ M. Özcan, F.Y. Elmas, M. Kutlay, C. Mutuş, *Bundan Sonrası: Senaryo Analizleriyle Türkiye-AB İlişkileri*, Ankara 2010, pp. 130–133.

¹⁹ E. Faucompret, J. Konigs, *Turkish Accession to the EU...*, op.cit., pp. 157–159.

²⁰ S. Yazıcı, *Turkey's Constitutional Amendments...*, op.cit., pp. 1–10.

²¹ For more, see: V. Coşkun, *Turkey's Illiberal Judiciary: Cases and Decisions*, "Insight Turkey" 2010, no. 4, pp. 22–30.

²² E. Faucompret, J. Konigs, *Turkish Accession to the EU...*, op.cit., p. 158.

The next problem is the issue of closure of certain types of political parties in Turkey. Since the beginning of the Republic of Turkey about 86 parties – first of all Islamic, Kurdish and far left oriented parties – have been closed down. According to the European Commission for Democracy by Law (so called Venice Commission), which is the advisory authority of the Council of Europe and the ECtHR in the constitutional matters, a prohibition of a party activity or its closing may be recognized as reasonable when the party uses violence as a political measure or as a measure to abandon rights and freedoms guaranteed by the constitution, or in order to destroy the democratic constitutional order. The Commission also emphasizes that the prohibition of activity or closing the party is a final, exceptional preventive measure. In Turkey following the prosecutor's application the Constitutional Court very often makes decisions to dissolve parties, basing them on laws contradictory to the standards of the Venice Commission and Article 11 of ECHR. These laws include very long Article 68 and 69 of the Turkish constitution as well as many provisions of the political parties law, adopted after the military coup in 1980.²³ Interpreted broadly, they give many reasons for closing down a party, including the cases when they are based on cultural, religious or language differences or offend the memory and person of Atatürk. The closure cases from last few years are: the unsuccessful attempt to shut down the governing AKP in 2008, proving that its actions are against the principle of secularism and the closure of Kurdish Democratic Society Party (DTP) in December 2009 due to “focusing on terrorist activities”.²⁴ The constitutional reform in 2010 included initially the changes with the aim to make the closure of political parties in Turkey more difficult. However, this amendment was removed from the package at the end.

Some progress was achieved by Turkey as far as the fight against corruption is concerned. It signed several international conventions on the battle against the corruption as well as set up several parliamentary committees of inquiry and the special bodies at the government level. The development of a comprehensive anti-corruption Strategy and Action Plan is also noticeable in Turkey. However, the phenomenon of corruption – another issue extremely important for the EU and its enlargement policy – still remains one of the most difficult problems on the Turkish way to the EU. According to Transparency International, Turkey is on the 61st place together with Cuba with 4.4 point.²⁵

²³ For more, see: Siyasi Partiler Kanunu, Kanun no. 2820, 22.04.1983, <http://mevzuat.basbakanlik.gov.tr>.

²⁴ M. Özcan, F.Y. Elmas, M. Kutlay, C. Mutuş, *Bundan Sonrası...*, op.cit., pp. 115–120.

²⁵ Transparency International's Annual Report 2009, www.transparency.org/publications/annual_report.

8.2.2 Human Rights

Turkey faces also many challenges in human rights and minority rights area. The main problems here are: first of all the Kurdish issue and the question of the freedom of expression as well as religious freedom, women's rights and trade union rights. Again, most of them are issues showing no progress or limited progress also in the previous years.²⁶ The Kurdish question is a multidimensional issue. When it comes to the human rights dimension, the problem is still a lack of sufficient respect for cultural and political rights for Kurds who are the Turkish citizens living in Turkey. As far as the cultural issues are concerned some important reforms mentioned before were conducted in the recent decade, including courses of Kurdish at private schools and gradual introduction of use of the Kurdish language to the media.²⁷ In 2010, 14 radio stations and TV channels were given permission to broadcast in Kurdish and Arabic. The Kurdish language is allowed to be used in literature; some universities have opened the Kurdish language departments. However, the implementation of the reforms is sometimes difficult. Moreover, some problems still exist, for instance Kurds want to have the Kurdish language courses in public schools (they cannot afford the private ones). There are difficulties with access to services for people speaking solely Kurdish. In practice the use of Kurdish is limited in different cultural performances and newspapers. The use of political rights by Kurds is limited as well. Although there were some legal changes in 2010 regarding the use of the Kurdish language during election campaigns, its use in the political life is still restricted. The most important problem is a ten per cent electoral threshold which forces the Kurdish politicians to participate in elections as independent candidates to be in the parliament at all. "The democratic opening", including also another dimension of the Kurdish problem – first of all socio-economic and PKK dimension, announced by the Turkish government in 2009 has brought no practical results so far.²⁸

A very serious problem is the lack of respect for freedom of expression in Turkey. It has always been an issue underlined by the EU reports. The Turkish law, especially the Criminal Code and Anti-Terror Law, contains so called "gummy paragraphs" which can be interpreted broadly by prosecutors and judges. In the past this led to the situation when many intellectuals, journalists or writers, who very often touch upon the sensitive issues as

²⁶ E. Faucompret, J. Konigs, *Turkish Accession to the EU...*, op.cit., pp. 161–169.

²⁷ B. Oran, *Türkiye'de Azınlıklar. Kavramlar, Teori, Lozan, İç Mevzuat, İçtihat, Uygulama*, İstanbul 2006, pp. 118–129.

²⁸ For more, see e.g.: L. Köker, *A Key to the 'Democratic Opening': Rethinking the Citizenship, Ethnicity and Turkish Nation-State*, "Insight Turkey" 2010, no. 2, pp. 49–69 (also other articles from this volume).

the Kurdish or Armenian issue,²⁹ were prosecuted and sentenced because of violation of some laws, e.g. the mentioned Article 301 of the Turkish Criminal Code. This article was amended in 2008 (there is now a provision about *the Turkish nation*, not *Turkishness*) and some taboos are broken, but Article 301 is still used to violate the freedom of expression as well as other similar articles of the Criminal Code concerning e.g. offences against “state security” or “constitutional order”. In 2010–2011 an important problem appeared in Turkey. As many as 4,091 investigations were initiated in this period against journalists for “breaches of the confidentiality of investigations” or “attempts to influence a fair trial” (Articles 285 and 288 of the Turkish Criminal Code), following their reporting on the already mentioned *Ergenekon* case.³⁰

Moreover, there are some deep concerns in Turkey and abroad concerning the attitude of the government towards the media that are critical of the governing party – the examples in recent years are lawsuits against the authors of cartoons in newspapers showing the Prime Minister Recep Tayyip Erdoğan or financial penalties against media concerns as Doğan Media Group in 2009.³¹ Another current problem is the Internet censorship. Some websites are blocked as YouTube, after publication of videos which allegedly violated the law on crimes against Atatürk.

The violation of rights of religious communities – both non-Muslim and Muslim minorities (first of all Alevi) was one of the main problems for Turkey, very often raised by the EU and the Members States. Only three non-Muslim communities (Greek Orthodox, Jewish and Armenian) were recognized as minorities in Turkey by the 1923 Treaty of Lausanne. However, both they and other religious communities face a huge number of problems to use their rights – many of them connected with the lack of legal personality of the communities. Their rights to own, acquire and sell property, deliver religious services, train clergy, open schools as well as build and renovate the places of worship remain limited. The other deficits concerns the obligatory religion and ethics classes, being in practice the lessons about Sunni Islam, the lack of permission to use

²⁹ The Armenian issue refers to the historical dispute between Turkey and Armenia about the interpretation of actions of the Ottoman Empire towards Armenians, especially during 1915–1917 period. Armenia (and many other states) calls these actions a genocide. The official position of Turkey is its denying. Turks (e.g. intellectuals) who did not share this official point of view faced very often criminal charges.

³⁰ Quotations (not official translation) from: Türk Ceza Kanunu, Kanun no. 5237, 26.09.2004, www.tbmm.gov.tr/kanunlar/k5237.html; examples in the paragraph from: Commission Staff Working Document, Turkey’s 2010 Progress Report, op.cit., pp. 20–21.

³¹ About the freedom of press in Turkey see: D. Çatalbaş, *Freedom of Press and Broadcasting*, in: Z.E. Kabasakal Arat (ed.), *Human Rights in Turkey*, op.cit., pp. 19–34.

some official titles by community leaders (as Ecumenical Patriarch in case of Orthodox church) and, again in practice, discrimination by applying for positions in state institutions. There are cases of attacks on priests and persons from non-Muslim communities. The situation improved after the adoption of the mentioned Law on Foundations of February 2008, especially when it comes to the property issues.³² Some old churches are allowed to deliver special religious services (as at the Armenian Holy Cross church on the Akhdamar Island in Lake Van in September 2010). More than ten members of the Greek Orthodox clergy were granted the Turkish citizenship – the legal obligation in Turkey. The government issued in 2010 a circular including e.g. protecting non-Muslims cemeteries or launching immediate legal proceedings against publications inciting hatred and animosity against non-Muslim communities. However, many problems mentioned have not been solved yet.³³

The protection of women's rights and gender equality have improved, especially in the area of the spouses equality after the adoption of a new Civil Code in 2001 and some amendments to the Criminal Code.³⁴ The institutional framework in this field was created at the level of parliament and government as well as at the police level. However, again the practice remains different from the legal provisions. The main challenges are still gender equality and combating violence against women. Women have still problems on the labour market because of such issues as lack of sufficient child-care services in Turkey as well as difficulties in access to secondary and further education. The representation of women in the top positions in the public administration and trade unions as well as in politics remains low. Domestic violence, forced marriages and so called honour killings are still noticeable in Turkey.³⁵

The 2010 constitutional amendments improved the respect for trade unions' rights. Civil servants and other public employees obtain the right to collective bargaining. Moreover, the ban on certain types of strikes was lifted. However, still some legal provisions are not in line with EU law and ILO conventions. There is also a problem of consensus between the government and social partners which makes it difficult to adopt new laws in this field.³⁶

All these problems of Turkey with respect for democracy rules and human rights prove that although the democratic institutions and mechanism work

³² For more, see: Vakıflar Kanunu, Kanun no. 5737, 20.02.2008, <http://mevzuat.basbakanlik.gov.tr>.

³³ E.F. Keyman, S.A. Düzgüt, *Europeanization, Democratization and Human Rights...*, op.cit., pp. 80–81.

³⁴ For more, see: Türk Medeni Kanunu, Kanun no. 4712, 22.11.2001, www.tbmm.gov.tr/kanunlar/k4721.html.

³⁵ Commission Staff Working Document, Turkey's 2010 Progress Report, op.cit., pp. 25–26.

³⁶ *Ibid.*, p. 29.

properly in this state, the Turkish democracy is not consolidated yet.³⁷ These problems are the reason why Freedom House survey classifies Turkey in 2011 as “a partly free” state, i.e. a country “in which there is limited respect for political rights and civil liberties. Partly free states frequently suffer from the environment of corruption, weak rule of law, ethnic and religious strife, and a political landscape in which a single party enjoys dominance despite a certain degree of pluralism”.³⁸ As far as political rights and civil liberties are concerned Turkey received three points twice (“1” represents the most free and “7” the least free rating). This state is among 60 states with the same status (including also such countries as Burundi, Kyrgyzstan or Venezuela). According to the same survey 87 countries are “free” and 47 “not free”.³⁹

8.3 Key Issues in Democratisation Process After 2011 Parliamentary Elections⁴⁰

Both Turkey and the EU share the same opinion that further democratisation reforms of the new AKP government will be crucial for the whole pre-accession process. This is a key issue to change the current situation in the accession negotiations, outlined at the beginning of the article. This seems to be the only way to come out from the existing vicious circle. The EU and Member States require reforms from Turkey, but they do not give enough incentives to the Turkish government, sending first of all negative signals that actually they do not want this candidate state to be a part of the EU. This dampens the Turkish enthusiasm for further reforms. The way out is just to continue reforms in Turkey without looking at the EU matters for the sake of the Turkish citizens who support the democratisation process. Then it would be easier to change something at the EU level because the atmosphere for the accession talks would be better and supporters of the Turkish accession would receive a powerful tool in the political debate about the prospect of

³⁷ Diagnosis presented also by Prof. Ergun Özbudun, top Turkish constitutionalist from Bilkent University in Ankara, for more, see: E. Özbudun, *Contemporary Turkish Politics. Challenges to Democratic Consolidation*, London 2000.

³⁸ The survey embraces 194 countries and 14 related and disputed territories; see: *Freedom of the World 2011: The Authoritarian Challenge to Democracy*, Freedom House, www.freedom-house.org/report/freedom-world/freedom-world-2011, p. 3.

³⁹ *Ibid.*, p. 9 and 16.

⁴⁰ It must be underlined that experts writing on the key issues for Turkey after the elections present the same diagnosis as the author of this article. Cf. e.g. E. Alessandri, *Democratization and Europeanization in Turkey after the September 12 Referendum*, “Insight Turkey” 2010, no. 4, pp. 22–30.

the EU membership of Turkey. It would also be possible to improve the work of the EU conditionality.⁴¹

Obviously, the 2010 constitutional package was only the first step in the right direction. Apart from its proper implementation, the top priority for the new AKP government should be the adoption of the new constitution to replace the old act adopted right after the military coup in 1980. As McLaren put it, “the process of writing a constitution (...) is likely to be amongst the chief factors explaining whether democratic consolidation occurs or not”.⁴² It must be underlined though that what is important is both the method of preparing this legal act and, of course, its content.

The new constitution should be the result of consensus reached by all main political and social forces in Turkey – unlike the constitutional package approved in September 2010. The previous AKP government tried to prepare the new, “civilian” constitution (as it was promised in the election manifesto)⁴³ and worked on its draft. However, it was not possible to find any common ground for cooperation between the government and opposition due to the lack of political stability caused by the never ending confrontation between the Kemalist elites and religious-conservative circles. This reflected a deep polarization among the elites, but also within the Turkish society, which is also the main challenge nowadays, after the parliamentary elections.

Some kind of consensus between the major political and social forces naturally cannot be excluded. AKP did not get 330 mandates which would enable this party to prepare the constitution they want and send it to referendum. The new AKP government must cooperate with the opposition then to prepare the highest legal act, which was very clearly declared by Erdoğan in his speech on 12 June 2011.⁴⁴ It is in its interest to do it (as in case of majority of parties in opposition) to prove at home and abroad that the opinions appearing before the elections about the danger of creating some kind of authoritarian regime in Turkey (based among others on the dominance of one party with clear majority in the parliament over other minority political parties) were not

⁴¹ EU conditionality – an important principle and mechanism introduced to many EU policies. Within the EU enlargement policy it means that any progress in the accession process depends on a country’s progress in making reforms and fulfilment of membership conditions. For more about the working of the EU conditionality in the Turkish case, see: A.R. Usul, *Democracy in Turkey...*, op.cit., p. 72 ff.

⁴² L.M. McLaren, *Constructing Democracy in Southern Europe. A comparative analysis of Italy, Spain and Turkey*, London, New York 2008, p. 261.

⁴³ *Güven ve İstikrar İçinde Durmak Yok Yola Devam*, Haziran 2007, www.akparti.org.tr.

⁴⁴ He emphasized that the door is open for everybody, including a leader of CHP, Kemal Kılıçdaroğlu. For more, see: *Kemal Bey’in kapısını çalacağız*, “Milliyet”, 12 June 2011.

justified.⁴⁵ Besides, there are high expectations not only in the EU, but also in Turkey concerning the adoption of the new constitution. There is some kind of pressure to find consensus between the main political and social forces in Turkey to prepare it. That is why major political parties declared during the election campaign the readiness to cooperate on the new constitution, emphasizing its importance.

However, the question is if the history will not repeat itself (taking into account the recent election period). The political polarization is strong. All main political parties have their own visions of the new constitution as well as their red lines what should not be included in this legal act. For instance, how to find the common ground for cooperation between MHP and BDP on the question of the autonomy in the South-eastern part of Turkey or between AKP and more social-democratic CHP on the introduction of a presidential system in Turkey which, according to Kılıçdaroğlu's party – a strong supporter of the strengthening of the parliamentary system – would be a regime far removed from democratic standards.⁴⁶

Because of these differences during a TV debate in the election campaign in May 2011 professor Özbudun, asked by well-known journalist Mustafa Akyol, predicted that chances for adopting the new constitution were fifty-fifty. Because of this there are also opinions in Turkey that instead of the new constitution, the old one would be amended again.⁴⁷ Step-by-step reforms are likely. These were announced after the referendum on the constitutional package in September 2010 by a special government group that monitors reforms designed to bring the country in line with EU standards.⁴⁸ However, they would not solve the democratisation problems in Turkey due to the philosophy of the current constitution, putting the strong state in the first place.

The consensus between parties – needed for adoption of the new constitution – was difficult to achieve at the beginning of the new election period not only

⁴⁵ This kind of opinion was presented among others by “The Economist” whose article triggered off harsh reactions in Turkey, at the same time receiving support from AKP adversaries. For more, see: *One for the opposition*, “The Economist”, 4–10 June 2011, pp. 16–17.

⁴⁶ *Bahçeli: Hakaretiler için özür dilemeliler*, “Milliyet”, 15 June 2011; G. Bozkurt, *BDP braces for charter bargaining*, “Hurriyet Daily News”, 13 June 2011, www.hurriyetdailynews.com/n.php?n=bdp-braces-for-charter-bargaining-2011-06-13; *Turkey Debates Merits of US-Style Presidential System*, “Hurriyet Daily News”, 14 September 2010, www.hurriyetdailynews.com/n.php?n=turkey-debates-8216presidential-system8217-2010-09-14.

⁴⁷ This kind of opinion was presented e.g. by a scholar Bekir Cinar during the conference “From the Bosphorus to Brussels: Crafting a Future for Turkey”, Warsaw, 15 June 2011.

⁴⁸ F. Özerkan, *Turkey Braces for Political Reforms, Speedier EU Talks After Sept 12 Vote*, “Hurriyet Daily News”, 19 September 2010, www.hurriyetdailynews.com/n.php?n=turkey-braces-for-political-reforms-to-speed-up-eu-talks-after-sept.-12-vote-2010-09-19.

due to the different opinions on certain matters. Because of imprisonment of eight deputies (five from BDP, two from CHP and one from MHP), the oath during the first meeting of the new parliament was boycotted by the CHP and BDP representatives.⁴⁹ Without the attendance in the parliament it was certainly impossible to reach consensus between parties and agree on the draft of the new constitution. After some time CHP and BDP politicians took the oath but this event confirmed that the political struggle between the parties would make reaching the consensus a very difficult task.

When it comes to the content of the constitution, the most important question is how much liberal it will be. There is a need to create such a constitution that will prioritize the citizen, not the state as it was in the case of the 1980 constitution. The constitutional provisions must guarantee full respect for human rights and allow their limitations only in a few, clearly defined cases. These cases must be formulated in such a way that there is no place for broad interpretation (like e.g. in the case of Article 68 and 69 of the Turkish Constitution). This requires avoidance of the aforementioned “gummy paragraphs”.

Although all parties emphasized in the 2011 election campaign that further democratisation is a top priority issue for them, there is a question if democracy they have in mind is this liberal democracy which will be reflected in the liberal constitution. It seems that CHP, rebuilding its social-democratic profile under the new leadership, is closer than other parties to the liberal model of democracy and constitution (in the election manifesto there is a talk about *özgürlükçü demokrasi*, i.e. “democracy which promotes freedom”), seeing even such issues as wearing headscarves by female students as one of citizen rights. However, the question is what AKP understands as *ileri demokrasi* – “the progressive democracy” – in its election program. The aforementioned attitude of AKP towards the press freedom and the words of Erdoğan in this context during the 2011 election campaign that the freedom has its limits as well as conservative approach to the life style and moral issues raise doubts if the democracy in the new constitution will not appear to be democracy *à la* AKP.⁵⁰

A very difficult question will certainly be whether the first articles from the current constitution, which contain the main constitutional principles

⁴⁹ S. Küçükkoşum, *Parliament takes oath, lacks 170 deputies*, “Hurriyet Daily News”, 28 June 2011, www.hurriyetdailynews.com/n.php?n=parliament-takes-oath-lacks-170-deputies-2011-06-28

⁵⁰ Y. Tekin, *Seçim Beyannamelerinde Yeni Anayasa ve Demokratikleşme*, “Stratejik Düşünce”, no. 19, Haziran 2011, pp. 15–19; K. Kılıçdaroğlu, *Türkiye’de sözüm var*, Ankara 2011, pp. 1–35.

and cannot be changed, will remain intact in the new constitution. As far as democracy and rule of law are concerned, there is a consensus that these principles must stay. However, the other question is whether to include the principles of Kemalism (first of all nationalism and secularism), at least in the form they exist now in the constitution. This puts us back to the question of the liberal profile of the new constitution. Only the cancellation of the principle of the “indivisible unity of the homeland and the nation”, connected with the Turkish nationalism (*milliyetçilik*), in the text of the new constitution or at least its limited use and proper interpretation, can help solve such democratic problems as the Kurdish issue or lack of respect for religious minorities rights. However, MHP will oppose this step. Moreover, the nationalistic circles within AKP and CHP will make all efforts in the mentioned direction even more difficult. In the literature there is already a talk about the Post Kemalist period.⁵¹ However, the Kemalist elites are still there and they will not give up their stance based on the dogmatic interpretation of the principles of Kemalism (especially nationalism and secularism).

Of course, apart from the new constitution, other laws must be changed as well. It seems to be especially important to modify the election law and reduce a ten per cent threshold in order to make the parliament and the party system more representative. This is also important as it regards the promotion of more consensual behaviour on the part of party elites.⁵² This amendment as well as other changes can be made within “the democratic opening” which has not materialized yet. It is connected first of all with the Kurdish problem that seems to be the main challenge for the democratisation of Turkey, embracing all other democracy and human rights deficits in this state. There is a need for the preparation and effective implementation of the project which will be complex, including the solutions of all dimensions to the Kurdish problem – political, social and economic as well as PKK issue. There has been a talk about such a project for a long time, however, so far the words have not been transformed into deeds.

The “democratic opening” in the democratisation context means giving the Kurdish community the status of the Turkish citizens with full rights. Kurds are a decisive political force in local elections in South-eastern Turkey. However, 12–15 million community must have their representatives in the Turkish parliament who can candidate not as independent candidates, but as members of the Kurdish party which can act as any other party – because of

⁵¹ See e.g.: I. Dağı, *Turkey between Democracy and Militarism. Post Kemalist Perspectives*, Ankara 2008.

⁵² L.M. McLaren, *Constructing Democracy...*, op.cit., p. 263.

this the high threshold must be reduced. The functioning of the party which represents the Kurdish interests cannot meet with restrictions. This of course requires a change of proper provisions in the constitution as well as in law on political parties which do not allow establishment of a party on ethnic basis (a connection with nationalism is, again, noticeable).

Ethnic interests cannot be excluded from the legitimate decision-making processes, because then their actions can take place on the streets (as it was many times in the past) and radicalize the PKK position. It can be harmful for the Turkish state – its stability and democratisation process. And here appears the current case of BDP. This party, which almost doubled the number of deputies in comparison to the result achieved by DTP in the 2007 elections, can turn a balance by attempting to reach some kind of consensus on the new constitution and the “democratic opening”.⁵³ However, both BDP and other main parties must meet some conditions which are connected with each other. BDP should define its policy clearly and assure the government and the opposition that they want to use the peaceful means and do not support the violence of PKK. The government, state institutions and other opposition parties must accept in practice the right of Kurdish politicians to take part fully in the political life of Turkey.

It will be difficult because on “both sides” there are a lot of quite radical politicians who are reluctant to take flexible positions on the Kurdish issues. The situation right after the 2011 elections also shows the relevance of the problem of the political exclusion of Kurds. Since the Supreme Election Board quashed the deputyship of one of BDP deputies Hatip Dicle on 21 June 2011 for spreading “terrorist propaganda” and immediately awarded the seat to one of the AKP deputy, BDP decided to boycott the new parliament and organise meetings in Diyarbakır every week instead.⁵⁴

8.4 Conclusion – Major Future Challenges of Consolidation of Democracy in Turkey

The consolidation of the Turkish democracy, indispensable for the progress in the EU accession negotiations, will be very difficult. It does not mean that the fulfilment of the political Copenhagen criteria by this state is not possible and the undertakings within the democratisation process after the 2011 elections will not succeed. The goal of the democratic consolidation

⁵³ S. Çevikcan, *Uzlaşmanın anahtarı*, “Milliyet”, 13 June 2010.

⁵⁴ *BDP to hold group meetings in Diyarbakır each week*, “Hurriyet Daily News”, 28 June 2011, www.hurriyetdailynews.com/n.php?n=bdp-to-hold-group-meetings-in-diyarbakir-each-week-2011-06-28.

of Turkey can be achieved, although only under some conditions and in long term perspective.

The EU does not notice sometimes that current reforms, changes of laws, etc. will not lead alone to the consolidation of the Turkish democracy. The condition for it is to define the main reasons behind the democratic deficits and to try to change the premises of their existence. Since these reasons are both systemic and ideological, Turkey has a long way to the consolidation of its democracy. Consequently, Turkey's accession to the EU is also a long-term project.

One group of reasons is connected with the model of state in Turkey. The state was very strong in the times of the Ottoman Empire. This tradition survived the change of the regime and the establishment of the republic. The state was the highest value to protect by the state's civilian and military elites (whose majority also survived the collapse of the Empire) in the era of the First Republic and afterwards – this is one factor explaining the position of the military in the political system of Turkey. This was reflected in the aforementioned ideology of the state – Kemalism – developed at the end of Atatürk's reforms and transformed later to some kind of “civil religion”. The main principles, being at the same time the major constitutional rules (with exceptions until today) included etatism, nationalism and secularism.⁵⁵ They created the determinants for functioning of the centralized state in unity with one nation (which was reflected in the concept of citizenship based on the French model) and with state institutions that controlled the religious issues, which were completely excluded from the public sphere. The protection of the state was more important than its citizens and their rights which could be restricted when the interest of the state required it. The paradox was that to the principles of Kemalism and the constitutional order belonged (and of course still belongs now) republicanism that is connected with the sovereignty of the nation. The superior position of the state was reflected in the Turkish constitutions, including the current one.⁵⁶

This leads still nowadays to the deficits concerning the respect for democratic principles and human rights. The Kurdish issue is the best example to present the picture. Kurds have problems with their recognition as a minority and with execution of their rights, because as the citizens of Republic of Turkey they

⁵⁵ For more, see e.g.: Z.E. Karal, *The Principles of Kemalism*, in: A. Kazancigil, E. Özbudun (eds.), *Atatürk: Founder of a Modern State*, London 1997, pp. 11–35; S. Kili, *The Atatürk Revolution. A Paradigm of Modernization*, Istanbul 2008, pp. 193–258; A. Szymański, *Między islamem i kemalizmem. Problem demokracji w Turcji (Between Islam and Kemalism. Problem of Democracy in Turkey)*, Warsaw 2008, pp. 56–72.

⁵⁶ A very good book about the traditional strong position of the Turkish state was written by Tim Jacoby. See: T. Jacoby, *Social Power and the Turkish State*, London, New York 2005.

are actually Turks, not Kurds. The situation is changing slowly nowadays, but there is still a need to redefine the concept of the Turkish citizenship in the new constitution.⁵⁷ The talks on the citizenship also took place in the last election campaign. Another question is how to meet the expectations of Kurds concerning the autonomy in South-eastern Turkey when there is a centralized state without the real self-government and the local administration being a part of central public administration and controlled by the “centre”.⁵⁸ This is another issue which should be taken into consideration in the work on the new constitution.

The second group of reasons constituting challenges on the way to the consolidation of democracy in Turkey is connected with the Turkish society and its model. As far as the latter issue is concerned, the problem is connected with the principles mentioned above, especially the Turkish nationalism and the principle of “indivisible unity of the state and the nation”. In Turkey there is a huge number of different ethnic and religious groups. Already in the 1980s some of them, e.g. Kurds or Alevis began to express their different identities more clearly. Although the Turkish politicians and citizens recognize nowadays the fact that there are also other communities in Turkey than ethnic Turks and Sunni Muslims at the same time, the ideology still influences the lack of recognition of the pluralistic model of society, first of all in political terms. The idea of pluralism should be reflected in the new constitution as well as propagated in debates and work of civil society organizations in Turkey.

There is another very important issue concerning both the Turkish elites and common citizens. Although the democratic system with relatively free elections and multiparty system has existed in Turkey since the 1950s, there are still some deficits regarding the advanced democratic culture within the Turkish society. The ideological aspects play again a key role in this context, in addition to some phenomena having a lot to do with the political history of Turkey after World War II.

When it comes to the political elites in Turkey, it seems that they are still not so sure about the significance of the democratic system which is crucial to the consolidation of democracy.⁵⁹ There is still some influence of ideology, first of all the dogmatic approach to the Turkish nationalism, on the behaviour of politicians. It concerns not only Kemalists whose role is diminishing, but

⁵⁷ For more, see e.g.: M. Yeğen, *Citizenship and Ethnicity in Turkey*, “Middle Eastern Studies” 2004, no. 6, pp. 51–66.

⁵⁸ A. Güney, A.A. Çelenk, *Europeanization and the dilemma of decentralization: centre-local relations in Turkey*, “Journal of Balkan and Near Eastern Studies” 2010, no. 3, pp. 241–257.

⁵⁹ Cf. M. Chmaj, W. Sokół (eds.), *Polityka-ustrój-idea. Leksykon politologiczny (Politics-System-Ideas. Political Science Dictionary)*, Lublin 1999, pp. 295–296.

to varying degrees the representatives of all major parties, apart from the Kurdish one (Kurds have their own type of nationalism which does not help the democratisation process at all). Their devotion to nationalism and in some cases secularism weakens their flexibility in political debates, especially when there is a talk about the Kurdish problem. This issue, together with the lack of consensual culture within the political elites in Turkey, does make the consolidation of the Turkish democracy difficult.

Another issue can be described as the “authoritarian inclinations” of many Turkish politicians. The reason can be relatively short periods of time with the authoritarian rules after World War II. There were three military interventions in 1960, 1971 and 1980 (apart from “virtual” coup in 1997), but the army came back to barracks quickly, apart from 1980.⁶⁰ As mentioned before, these authoritarian inclinations are noticeable nowadays. There is a tendency to consolidate the power within one party – AKP and strengthen the executive power which is reflected in the idea of introduction of the presidential system in Turkey.

As far as the Turkish society is concerned the nationalistic ideology, instilled already in the primary school, influences the attitudes of the Turkish common citizens as well. Although they support the democratic system, there are some issues which show the deficit of the democratic culture within the Turkish society. In April 2011 MetroPOLL carried out a survey concerning the democracy issues in Turkey. The question of the support for reduction of ten per cent election threshold was answered as follows: 48.5 per cent of people were for the same threshold, 17.2 per cent – for its reduction and 22.9 per cent – for its full abolishment. Moreover, 43.7 per cent of respondents treated the establishment of the political party on the ethnic basis as something normal, but 50.5 per cent of the Turkish citizens had the opposite opinion.⁶¹ These examples prove the deficits of the democratic culture in the Turkish society connected with the way of thinking and mentality of Turks, shaped by nationalism.

The things to be done to improve the democratic culture of the Turkish society are the processes that can last for many years. There is no simple measure to be taken to solve the problem. There must be a replacement of the state elites in Turkey. It is not certain if so called Post Kemalists will bring a new quality to the Turkish democracy. Nevertheless, the new generations of people in state institutions (administration, the judiciary, etc.) can be more

⁶⁰ L.M. McLaren, *Constructing Democracy...*, op.cit., p. 260.

⁶¹ Data: *Demokrasi Araştırması*, MetroPOLL, Nisan 2011, www.metropoll.com.tr/report/demokrasi-arastirmasi-nisan-2011-2, p. 27 and 30.

sensitive to such issues as human rights or democratic values. There is also a need to change the educational system in Turkey in a way to strengthen the citizen education.

Eventually, it must be underlined that single improvements in the aforementioned areas are not enough. Only the change of the model of state and society together can positively affect the democratisation in Turkey and at the same time the EU pre-accession process. The European Commission's officials must be aware of that while they assess the Turkish candidacy.

The Political Reconstruction of the Western Balkans. Challenges for the European Union

MARKO BABIĆ* AND JACEK WOJNICKI**

With the collapse of Yugoslavia, the Western Balkans region entered turbulent times. Seven countries¹ that had emerged as a result of the collapse had to determine their priorities. After decades under communist rule and years of armed conflict, integration with the European Union seemed to be the only obvious solution. It has also been a synonym for the processes of transformation and modernization of the countries. This papers' aim is to examine integration efforts and problems faced by the post-Yugoslav countries in the context of the processes of their transformation and modernization as well as European Union readiness to face challenges related to these problems.

9.1 Western Balkans Countries and Meanders of European Integration

A spectre is haunting the West – the spectre of the Balkans. At the beginning of the twentieth century, Europe has added to its dictionary of pejorative terms – the Balkans – a term that turned out to be very long-lived. Terms derived from

* PhD, European Studies Chair, University of Warsaw, e-mail: mbabic@uw.edu.pl.

** Assoc. Professor, Aleksander Gieysztor Academy of Humanities in Pultusk, e-mail: jacekwojnicky@poczta.onet.pl.

¹ Albania, Kosovo, Serbia, Former Yugoslav Republic of Macedonia, Montenegro, Bosnia and Herzegovina and Croatia. See: “Western Balkans: Enhancing the European Perspective”. Communication from the Commission to the European Parliament and the Council. 2008-03-05. At: http://ec.europa.eu/enlargement/pdf/balkans_communication/western_balkans_communication_050308_en.pdf. Today Western Balkans is more of a political than geographic definition for the region of Southeast Europe that is not in the European Union. Therefore, Slovenia – the richest part of former Yugoslavia and the country which was successful in preserving a functioning state throughout its transition, allowing state-building and democracy-building to reinforce one another (contrary to all former Yugoslav countries) – is considered to be situated in Central Europe.

it such as “Balkanization”, “Balkanism” were used by politicians, academics, conservative intellectuals as a tool to fight political opponents. For example, “Balkanization” has not only meant the fragmentation of large and powerful political units into smaller and weak ones, but also has been synonymous of return to tribal, backward, primitive and barbaric.² In other words, if in today’s world, we find any concepts and ideas that have hardly changed since its inception, it certainly is the term “Balkans” that belongs to this category. The word does not only describe this geographical area in Europe. This is the word in which at least one characteristic has remained unchanged to this day – antagonism. The history of the former Yugoslavia wars of the 1990s seems to confirm the above mentioned statement.

But history remembers the Balkans from some other times. In the 1970s and 1980s, the Socialist Federal Republic of Yugoslavia (SFRY) was the “star” of Eastern Europe having its history of collaboration with the then EEC. For example, on March 17th, 1970 the first trade agreement between the European Economic Community and the SFRY was signed (with duration of three years). In 1973 the second trade agreement was signed between the European Economic Community and the SFRY (with a duration of five years). In 1983 the cooperation agreement between the European Economic Community and the SFRY, after ratification by all 12 members of the EEC and SFRY, took effect. In 1987, an additional protocol was signed on trade as well as the second financial protocol between the EEC and SFRY for the period between 1987–1991. Finally, on July 4th, 1990, SFRY was incorporated into the scheme of restructuring in Central and Eastern Europe – PHARE being de facto a mean of “assisting the applicant country of Central and Eastern Europe in their preparations for joining the European Union”.³

The sad irony remains that this cooperation began even in times when other communist bloc countries (today being full members of the European Union) continued to build utopian “socialist prosperity” under Soviet control. Yugoslavs then felt that they were “a part of Europe”, a decade earlier than the other countries of Central and Eastern Europe announced their “return to Europe”. Was it then hard to imagine Yugoslavia as a single country and as a full member of the European Union supporting other countries of the region in their aspirations for accession to the European Union? Instead, a bloody conflict in the early 1990s tears apart the state of the southern Slavs.

² M. Todorova, *Imagining the Balkans*, Oxford University Press, New York 1997.

³ About PHARE program at: http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/phare/index_en.htm.

Today, more than twenty years after the fall of the Berlin Wall and eight years after the accession of the countries of Central and Eastern Europe into the European Union, the Western Balkans region remains Europe's periphery. This region's starting position in the postwar period was particularly perplexed. Besides inherited structural problems and system limitations, countries of the region also experienced the ravages of war and some of them – like Serbia – even a foreign military intervention. So, not only reconstruction was needed but a crucial transformation of this grand European region consisting of a large number of small states. Specifically, the complete transformation of societies and institutions, institutional relations and social behavior of whole societies formed during the last half century was needed. For nearly a decade of the nineties the European Union – a major economic and political partner of the region, have not had any articulated common foreign and security policy towards the Western Balkans.⁴ The regional priority was given to the Central European countries due to the fact that they shared common and direct border with the European Union as well as to the Baltic states as a strategic point in the context of relations with the Russian Federation.⁵ Additionally, huge differences in the starting positions of individual groups of countries have existed at the time. For example, while some countries in Central and Eastern Europe such as Poland, Hungary, Czech Republic, Slovenia have made significant progress in the development of market economy and effective resolution of their transformation problems, others (excluding the Baltic Sea countries) remained at an alarmingly low level of development. It was, therefore, difficult to see a single common European Union policy towards this part of Europe. The solution was found – a group approach by regions.

The NATO's military intervention in Serbia in 1999 substantially changed the existing constellation of relations in Europe and also changed priorities. The European Union's relations with the countries of Central Europe and Baltic Sea region were clearly specified and defined. Countries of the two regions joined the path of rapid integration into European structures, and even faster with NATO. Simultaneously with the process of "absorption" of the Central European countries (but also through this process), a common foreign and security policy of the European Union slowly began to appear. Nevertheless, the Western Balkans have been and still remain the biggest challenge for the European Union. In 1999 European Union launched the Stabilisation and Association Process for Albania, Bosnia and Herzegovina, Croatia,

⁴ See: J. Minić, *Program obnove i razvoja jugoistočne Evrope*, in: B. Alendar (red.), *Jugoistočna Evropa 2000. Pogled iz Srbije*, Stubovi Kulture, Beograd 1999.

⁵ See: Д. Петровић, *Нови Устав и савремена Србија*, Институт за Политичке Студије, Београд 2007.

Macedonia, Serbia and Montenegro,⁶ which a year later were considered potential candidates for EU membership.⁷ The European perspectives of this region were confirmed at the Thessaloniki Summit in 2003. The summit presented a plan based on the actions and measures of pre-accession process and launched an in-depth cooperation within the political forum the EU – Western Balkans. The Thessaloniki Agenda also provided for the conclusion of the European Partnerships, similar in principle to the Europe Agreements, signed by the countries of Central and Eastern Europe.⁸ On the other hand, in 2005 the European Commission presented a roadmap for the Western Balkans, which sets out the stages of their integration with the EU – from the police and military missions, through the possible presence of an EU representative, to the issues of the Stabilisation and Association Agreement, ending on the full membership.⁹

When we say the political reconstruction of the Western Balkans, we mean the process of integrating these countries into the European Union. There is no single serious political party in the region, which would not advocate for the fastest possible accession to EU structures. It is important to notice – that in this context – the entire region is finally united around a common goal – EU membership.

Pursuit of this objective is likely to facilitate understanding, that by striving for political stability and economic prosperity of the Western Balkan nations, they can rediscover countless cultural ties linking them to each other. Existing differences that so often in history resulted in antagonism, might in the future help to understand that the nations of the region are a unique part of the whole, which can function well in a relatively harmonious cooperation within the European Union.

Unfortunately, there is also a danger which all of the post-communist countries aspiring to membership had to face. The way in which media in the Western Balkans (at least the Serbo-Croatian language speaking area) present “Europe” has been rather similar to the one that had existed in Poland before the accession to the EU.¹⁰ In public discourse as well as rhetorics of all relevant

⁶ „Operational Conclusions” of May 26th, 1999.

⁷ Santa Maria de Feira European Council held on June 19/20, 2000 confirmed: “all the countries concerned are potential candidates for EU membership”. See: http://ec.europa.eu/enlargement/press_corner/key-documents/sap_en.htm.

⁸ “The Thessaloniki Summit Declaration”, June 16th, 2003. See: http://ec.europa.eu/enlargement/press_corner/key-documents/sap_en.htm.

⁹ Enlargement process, Reports 2005 at: http://ec.europa.eu/enlargement/archives/key_documents/reports_2005_en.htm#strategy.

¹⁰ M. Babić, *Kontrowersje europejskie a Polska w Unii Europejskiej*, in: B. Jagusiak, (red.), *Polityczno-gospodarczy rozwój Polski w strukturach Unii Europejskiej*, Wydawnictwo Wojskowej Akademii Technicznej, Warszawa 2007.

political parties, the word “Europe” and “European” occupy a high position. But the power that emanates from the concept of “Europe” might provide legitimacy for various other political purposes. It is paradoxical that the “Europe”, whose spirit rose from the process of breaking with the mythological consciousness, from the liberated potential of doubt, remains still, it seems, in the realms of dogmatic thinking and serves political purposes. “Myth” of Europe, just like any other political cult, covers stereotypes, emotional fulfillment, highlighting the functional pairs (such as we/they, patriots/traitors, reformers/legalists etc.) “Europe” has, in teleological manner, been presented as the final destination of the nation’s own history where all hopes will be met, all doubts dispelled. “Europe” as a pseudo-utopia opens the space for various manipulations of people’s frustration, hopes, natural aspirations to a better life – in a few words – “the kingdom of peace, justice and freedom”. The ultimate goal of the accession to the European Union (the “Europe”) remains the overriding criterion for the interpretation and standardization of social life. The syntagm “European standards” remains in itself a sufficient argument (arousing no doubts), and the directives from Brussels, are taken a priori as the personification of the living spirit of democracy.¹¹

Zdzisław Krasnodebski when describing Poland and Poles, seems to be writing about the nations of the Western Balkans: “(...) soon real economic and political processes will undermine a naive utopia of Europe – a utopia of absolute openness and universal harmony. These changes in their (aspiring countries as well as new member states – M.B.) foreign policy will make them (...) realize their true peripheral position, (...), but one can hope that this awareness will strengthen the desire to break away from the periphery not through a false sense of imitation, but by consolidation of its own political and cultural sovereignty”.¹²

Unfortunately, the problem of mythologizing of Europe and the problem of peripherality remain inherent feature of all post-communist countries in their aspirations for membership. Instead of gradually resolving issues, according to the scale of priorities, ranging from those of fundamental importance, namely: the state-territorial consolidation (in the case of Serbia still unfinished), the introduction of economic reforms and, finally, deeply thought-out projects of any supranational integration, countries in the region want to resolve them all simultaneously. This further complicates the picture of the current situation.

On the other hand, the European Union after enlargement of the years 2004–2007 seems to have lost enthusiasm for further enlargement. The

¹¹ M. Babić, *Kontrowersje europejskie a Polska w Unii Europejskiej...*, op.cit., pp. 106–108.

¹² Z. Krasnodebski, *Demokracja peryferii*, Wydawnictwo „słowo/obraz terytoria”, Gdańsk 2003, pp. 302.

feeling of “creating” History, a sense of moral obligation which accompanied the Community with accession of the just recent dictatorships such as Spain, Portugal and Greece in the 1980s, or the former communist states such as Poland, Hungary or Czech Republic – seem to “lose the battle” with the technical aspects of the accession process. Today, the Union clearly slows down the process of accession of further members. The European Union does not treat the Western Balkans in its totality and will not accept it as totality, but rather based on individual performance of each country of the region. This paradoxically contributes to the deepening gap between EU members (Slovenia and Greece), candidate countries (Croatia, Macedonia) and potential candidate countries (Bosnia and Herzegovina, Montenegro and Serbia). For example, a recent loud dispute between Croatia and Slovenia, in which Slovenia successfully blocked the European aspirations of Croatia. A similar problem existed between Greece and Macedonia.¹³

However, it seems that for many years the EU visa policy towards the Western Balkan countries has been the main barrier between Member States and candidate countries on the one hand, and potential candidate countries on the other. The problem was so serious (and for some countries still is) that the following should be asked: is this all about border protection or rather the protection of identity?

Before 2004 the discourse on further EU enlargement that was taking place between the political elite and public opinion clearly reflected the contrast between public promises and facts. The EU official position clearly supported enlargement of the Union (including the Western Balkan countries). Perception of the Western Balkans integration consisted of various elements of political and security issues. Namely, the regional dimension of security was clearly highlighted as being of European strategic interest. After the enlargement of 2004, the “absorption capacity” appears to be exhausted – public opinion in most EU countries does not want further enlargement. It shows an obvious dissatisfaction with recent enlargement and presents a barrier for any that might follow. This in turn raises suspicions among citizens and politicians of the Western Balkan countries that they risk the future of the region as an enclave located in the lap of the EU. It is clear that such a perspective does not strengthen the trend of stability, both in terms of political and economic issues. Neither does it eliminate real risks and dangers from which the Union itself seeks protection.

What dangers to the European Union can be relevant today? Direct military threat ended with the end of the Cold War. This state of affairs in turn led to

¹³ It is about Greece dispute with Macedonia regarding the historical name of the latter.

a revised concept of security in Europe. Once the internal security threats (terrorism, illegal migration, organized crime, human trafficking and drugs) changed into the new external threats, it might be dangerous to identify them with the Western Balkans. The fact is that the era of globalization “opened the door” to the EU – both for legal and illegal migrants. This is not surprising as the European Union is one of the world’s biggest economies. However, migration with multiplicity of its forms represents something more than just socio-economic and political problem.

Today migration is a security problem for the EU. Therefore there was a very restrictive visa policy with harsh consequences for citizens of the candidate countries. It seems that this was not solely an issue of struggling against human trafficking or drugs in the EU, but also struggling for identity through social and political cohesion of its societies. In this context, a purely political debate about migration among the EU members has grown to the level of discussion on national security and borders. The EU wants to create and support a “WE” identity, which differs from the “OTHER” identity. This leads straight to: “WE” against “THEM”. EU citizens potentially may see their “WE” threatened by migration from the Western Balkan countries as they fear from “balkanization” of European identity.¹⁴ This gives opportunity to the populist right-wing extremist parties such as Jörg Haider’s “Freedom Party” in Austria which presented its anti-immigration policies “in order to reduce the risk of loss of national identity”.

A good example of a discriminatory visa policy in the EU is the Schengen agreement.¹⁵ “Schengen’s” visa policy is somewhat paradoxical in itself – offering at the same time the freedom and restriction of movement. With this policy EU gives the freedom of movement within the Schengen area, however, surrounded by a tight border, forms at the same time a very hard to access “fortress”. This acquired by EU mentality of “fortress”, means that for example, Bosnia and Herzegovina¹⁶ has been located on the Schengen’s “black list” and

¹⁴ A group of researchers presented interesting results of their studies on problems of migration in the relations Western Balkans – European Union, at an international scientific conference “Migrations, Crises and Recent Conflicts in the Balkans” held in Belgrade on October 27–29, 2005. This conference was organized by the international association of demographers “Demobalk”; See: A. Parent (eds.), *Migrations, Crises and Recent Conflicts In The Balkans*, University Press of Thessaly, Volos 2006.

¹⁵ The borderless zone created by the Schengen Agreements, the Schengen Area, currently consists of 26 European countries, covering a population of over 400 million people and an area of 4,312,099 square kilometers. At: http://ec.europa.eu/home-affairs/policies/borders/borders_schengen_en.htm.

¹⁶ Citizens of Bosnia-Herzegovina and Albania were exempted from EU visa requirements in December 2010.

forced to accept the consequences of such a mentality in order to get closer to the “desired” Europe. What does this acceptance mean?

It means accepting to wait in long queues in front of closed consulates and embassies, feeling of rejection, humiliation for those who wanted to legally cross the EU border, economic and political frustrations which undermine democratic governments,¹⁷ and finally, the growing number of those who change their citizenship to become eligible for a Schengen visa (for example, Bosnian Croats receive citizenship of the Republic of Croatia). On the other hand it means radicalization of pauperized societies and increase of human trafficking dealings (as the cases of Kosovo, Macedonia and Bosnia and Herzegovina show). A critically unresolved situation remains in Kosovo which is the only part of the Western Balkans, still completely outside of the process of visa liberalisation due to a lack of agreement among EU member states about Kosovo’s independence. Out of 27 EU member states, five do not recognise Kosovo’s independence.¹⁸

There are some NGO initiatives opposing these tendencies. For example, the “Citizen’s Pact for Southeastern Europe” openly advocates for the abolition of visas for citizens of Western Balkan countries arguing that “without communication there is no reform. Without reforms, there is no democracy. Without democracy there is no stability. There is no civil society without the active participation of citizens”.¹⁹

So what steps can be taken today? The EU confirms its responsibility for the region in fostering maintaining political stability development and assistance to individual countries in transition with adapting to hard pre-accession process. It emphasizes that integration is a process that requires hard work and difficult decisions in order to meet the criteria and standards required by the EU. But it seems these requirements are seen by the European Union as serving the purpose of “journey” than the end goal of accession (at least from a technical point of view).

This brings a danger of changing approach to integration. It can result in changing public sentiment and discouraging the required great social effort of

¹⁷ “75% percent of young Serbs have never been abroad. This is a disaster” – explained Olja Homa in 2005, president of the Citizens Pact for Southeast Europe. “Currently only four countries in Europe accept the citizens of Serbia without a visa: Bosnia and Herzegovina, Macedonia, Croatia and Albania; only 32 countries worldwide. Young Serbs feel that Europe does not want them. In this way, is as anti-European climate used by nationalist politicians. If so many Serbs have never visited any European Union country, the EU should not be surprised of anti-European attitude in Serbia”. At: <http://www.citizenspact.org>. However, on December 19, 2009 the EU decided to waive visa requirements for citizens of Serbia, Montenegro and Macedonia.

¹⁸ Spain, Slovakia, Romania, Greece, Cyprus.

¹⁹ “Abolish visas” at: www.citizenpact.org.

the Balkan societies. This can be done easily by putting high demands (which usually require great sacrifice) expected to be met in short time. The problem is serious, and could be a downturn for the further policy of openness towards the countries which are at different stages on the road to EU membership.

The real responsibility lies in a peculiar policy of isolationism of the EU, which applies to the states and societies of the Western Balkans. If indeed the EU wishes to extend its borders and include the Western Balkan countries it must resolve the question of “absorption capacity” in their own structures and offer a new, more persuasive policy towards the region. The key is political will in the European Union itself. The current global economic crisis and recent crisis in Greece may persuade some Member States that the more “profitable” solution would be abandonment of further assistance to this region rather than the continuation of a difficult and costly process of adapting the region to EU standards. This would mean postponing the accession of the Western Balkans in the unspecified future. So, are we dealing with the “Europeization” of the Balkans or rather the “Balkanization” of the European Union? It seems to have a status quo – harmful to both parties.

9.2 European Integration as a Divisive Factor at the Political Scene

European integration is an important part of political conflict in the Balkans countries. Officially, most governments and major political parties proclaimed the need for integration with the institutions of the European Union. However, as noted by the columnist of Serbian weekly “Vreme”: “Tadić (Serbian president since 2004) does not have the courage to tell people the truth. Surrounded with specialists in PR, using pro-European slogans, he and his Democratic Party has won three consecutive elections. A few days ago (October 2010) he announced that Serbia will be EU member in 2015. It’s ridiculous”²⁰ – this Serbian journalist concludes.

Similar trends can be found in other Balkan countries – Croatia, Macedonia or Montenegro. For example, Milo Djukanović’s Democratic Party of Socialists of Montenegro (DPS), has ran for parliament in the coalition with the Social Democrats as the “Democratic List for European Montenegro”.²¹ Taking into consideration EU institution’s concerns regarding struggling with the scourge of corruption rate in the Balkan countries, two facts from 2010

²⁰ M. Żyła, *Serbia świętuje 10 lat demokracji. Ciężkostrawne dzieci rewolucji*, „Tygodnik Powszechny” 2010, No. 42, pp. 36.

²¹ K. Krysienieł, J. Wojnicki, *Partie i systemy partyjne państw byłej Jugosławii*, Warszawa –Pułtusk 2009, pp. 122.

should be noticed: Ivo Sanader arrest and Milo Djukanović's withdrawal from political life.

Former Croatian Prime Minister (2003–2009), Ivo Sanader, was arrested on a highway near Salzburg in Austria, on charges of corruption.²² Former Defense Minister Berislav Ročević – was sentenced to five months in prison, while in September 2010 the former head of the customs service and Ivo Sanader's close friend – Mladen Barišić – was arrested. All of them were members of the ruling conservative Croatian Democratic Community. As Croatian political analyst Davor Gjenero claims: "Ivo Sanader's arrest is certainly good news from the perspective of accession talks, but even more importantly for the future of our democracy, transparency in public life and the question of funding political parties".²³

On December 21st, 2010 longstanding head of the Government of the Republic of Montenegro Milo Djukanović announced withdrawal from politics. His supporters pointed out his contribution in achieving independent Montenegrin statehood in 2006. His opponents reminded of accusations issued by Italian prosecutors concerning his involvement in mass-scale smuggling cigarettes to EU countries.²⁴ Milo Djukanović officially gave his reason for resignation: "I have been in power for 20 years. I step down as appropriate circumstances arose", he declared in December 2010. Djukanović's resignation should be considered in the context of obtaining by Montenegro an official EU candidate status in December 2010.²⁵

9.3 Perspectives for Fast Integration – the Case of Croatia

On November 9th, 2010, the European Commission presented its annual report on the state of preparations for accession of the Balkan states: the process of internal reforms is still too slow, the level of corruption in politics and business is still too high. However, it seems that the report was mainly influenced by the global economic crisis and the growing reluctance for future EU enlargement.²⁶

The main objective of the Croatian Jadranka Kosor government (in power from July 2009 to December 2011) was to complete negotiations before

²² K. Zuchowicz, *Premier uciekał, został złapany*, „Rzeczpospolita”, No. 289, 11–12.12.2010.

²³ B. Niedziński, *Przez korupcję opóźnia się wejście Chorwacji do UE*, „Dziennik Gazeta Prawna”, 13.12.2010.

²⁴ *Djukanović po 20 latach żegna się z władzą*, „Dziennik Gazeta Prawna”, 22.12.2010.

²⁵ *Premier Czarnogóry rezygnuje po latach*, „Gazeta Wyborcza”, 22.12.2010.

²⁶ M. Szpała, *Balkany Zachodnie – impas w procesie rozszerzenia*, „BEST OSW Tygodnik”, No. 43, 29.11.2010.

scheduled for November 2011 elections²⁷ to the parliament. In the meantime, the government should have also held a referendum on accession. The Croatian Democratic Community (HDZ) (ruling since 2003) assumed that the success of negotiation can help to increase popularity for the party and ensure victory in future elections. But, due to dramatically low support, the party has decided not to take any controversial but rather crucial socio-economic decision. The government also feared that the economic crisis in the EU member states may cause lowering support for EU integration among the Croatian public. The difficult situation of the Jadranka Kosor government was caused by two key reasons – difficult socio-economic situation in Croatia and serious allegations of corruption directed at some of the leaders of HDZ.

In early 2011 the government popularity was at 24%. The ruling party failure is being used by center-left opposition led by the Social Democratic Party (rise in popularity to about 46%) and president Ivo Josipović. They advocate a quick accession of Croatia to the EU, so the next parliamentary elections (and possible change of power) would not cause significant changes in the foreign policy of the country. Unfortunately, recent surveys of public opinion show a decline in acceptance of European integration – in February 2011, 49% of Croats supported membership in the EU, while against was approximately 40%.²⁸

Nevertheless, on December 9th, 2011 the Jadranka Kosor Government signed accession agreements with the European Union. Almost simultaneously (December 4th, 2011) parliament election results brought severe political defeat for the ruling conservative party (HDZ) as it became embroiled in a series of corruption scandals including some with involvement of former prime minister and several ministers. The election result was a major success of center-left and pro-European coalition led by Zoran Milanović. Furthermore, a referendum on European Union accession was held on January 22nd, 2012 where 66% of voters backed the membership (with about 33% against).²⁹

9.4 Problems with the Burden of the Past

Unresolved issues of the past such as war crimes have been the key elements in bilateral activities of both the Croatian and Serbian governments. In July 2008 former Bosnia Serbs leader Radovan Karadžić was arrested. It is interesting that Serbian authorities announced the arrest of Karadžić just a day

²⁷ In fact, taken place on December 4th, 2011.

²⁸ M. Szpala, *Chorwacja: negocjacje akcesyjne z UE w cieniu wyborów parlamentarnych*, „BEST OSW Tygodnik”, 8.02.2011.

²⁹ “Croatia’s EU Referendum: Voters back membership”, BBC News Europe, January 22nd, 2012 at: <http://www.bbc.co.uk/news/world-europe-16670298>.

before the Serbian Minister of Foreign Affairs met with the EU authorities in Brussels. The Serbian government hoped to improve relations with the EU institutions and boost its bid to join the European Union.³⁰ However, it is worth noting that Karadžić has not only assumed his own defense, but also requested the International Criminal Tribunal to petition information from the United States and Sweden, which he alleges will prove he was promised judiciary immunity. He continues to insist that American top authorities had promised him he would not have to face any legal ramifications if he were to retire from public life after peace had been restored to Bosnia.

In May 2011 the same International Criminal Tribunal for Former Yugoslavia (ICTY) pronounced top Croatian military officials Ante Gotovina and Mladen Markač guilty of war crimes and evictions of more than 200,000 Croatian Serbs in Operation Storm. In Croatia, the particularly painful point of the sentences was the fact that Gotovina and Markač, together with late president Franjo Tuđman and top military leaders, were members of the so-called “joint criminal enterprise” whose goal was the permanent removal of Serbs from Krajina. “Serbs must disappear,” Tuđman told his top brass.³¹ Even Croatian Prime Minister Jadranka Kosor protested claiming that Operation Storm is officially considered a legitimate and unblemished victory over Croatian Serbs in Krajina in 1995. Nevertheless, sentencing of two former generals ignited protests across Croatia. Thousands of angry people protested in the streets of Zagreb and other major cities, claiming injustice had been done to heroes of the homeland war for independence that ended 16 years ago.³²

In March 2010 the Serbian National Assembly released a declaration about the massacre in Srebrenica. This text of the declaration, which Serbia’s government hopes will make it easier for the country to join the European Union, says: “The Parliament of Serbia strongly condemns the crime committed against the Bosnian Muslim population of Srebrenica in July 1995”.³³ There were 127 votes in favor of the declaration in the 250-member parliament; only 173 lawmakers were present for the poll. The declaration had been introduced by the pro-European government of President Boris Tadić (“Koalicija za evropsku Srbiju” – Coalition for European Serbia) but his coalition watered down important parts of the declaration in order to make its passage possible. The word “genocide,” for example, was removed in order to get the post communist Socialists Party on board. Nationalistic Serbian Radical Party and

³⁰ D. Ćosić, *Cud w Belgradzie*, „Wprost” 2008, No. 31.

³¹ Balkans: Anger Over Sentencing Could Lead to Calm, *Inter Press Service*, Monday, April 18, 2011 (posted by Global Issues).

³² Ibid.

³³ *Two Apologies, No Trial Over Srebrenica*, “New York Times”, March 31, 2010.

Serbian Progressive Party voted against the declaration. 21 MP abstained from the poll – mostly from Vojislav Koštunica's nationalistic DSS (Demokratska Stranka Srbije – Democratic Party of Serbia).³⁴

On October 6th, 2010 the Chief Prosecutor at the International Criminal Tribunal for the former Yugoslavia addressed Dutch lawmakers in The Hague over Serbia's co-operation with the Tribunal. In his speech before the European Affairs Committee of the Dutch parliament, Serge Brammertz reiterated his message that the arrest of the two remaining fugitives remains the highest priority of the Prosecutor. Brammertz stated that Serbia has the political will to arrest Ratko Mladić and Goran Hadžić, however, there remain operational obstacles, as the fugitives continue to have "support networks" in Serbia.

After this address, on October 13th, 2010 Parliament of the Netherlands obliged the Dutch government to block Serbia's accession request to the Council of the European Union. It is interesting that the Dutch authorities have been blocking for several years the accession process of Serbia. This attitude has been interpreted as a "syndrome of Srebrenica" – where lightly armed Dutch peacekeepers failed to prevent the slaughter of Bosnian Muslims at Srebrenica in 1995. Commentators agree that Mladić's arrest will prevent further Dutch blocking the accession of Serbia and avoid the current political stalemate.³⁵

President Tadić stated in his address to the nation that the adoption of this declaration is a "historic event" and a "great day" for Serbia. At the same time he referred to the absence of the word genocide in the text of the declaration. He declared that the declaration had no intention to use legal terminology, but only condemnation of the events of July 1995.³⁶

9.5 The Case of Serbia

Serbia applied for membership of the EU on December 22nd, 2009 and finally gained the Commission's status of candidate country in March 2012. In February 2010, the Interim Agreement entered into force and ratification in national parliaments of the Stabilisation and Accession Agreement (SAA) began in June 2010.

On October 25th, 2010, the General Affairs Council forwarded Serbia's application to the Commission; its opinion was due to be communicated in the second part of 2011. The European Union Commissioner for enlargement

³⁴ Ł. Reszczyński, *Belgrad rozlicza historię*, „Przegląd” 2010, No. 18.

³⁵ A. Godlewski, *Wydać rzeźnika*, „Wprost” 2011, No. 22.

³⁶ Ibid.

Stefan Fuele gave Serbian Prime Minister Mirko Cvetković a questionnaire upon which Brussels will decide whether Serbia qualified to get a candidate status for EU membership. Fuele handed Cvetkovic 2,483 questions, divided in 33 chapters, and depending on the answers the European Commission should decide whether Serbia carried out the needed reforms and qualified for candidate status.

An important aspect in the process of integration with the European institutions is reconciliation between post-Yugoslav nations, especially between Muslim-Bosniaks, Serbs and Croats, who fought against each other in bloody civil wars in the nineties. In November 2010, Serbian President Boris Tadić arrived to Vukovar to meet his Croatian counterpart – Ivo Josipović. The two leaders visited a memorial for the victims killed in the 1991 war. President Tadić solemnly declared: “I came here to apologize and express their grief. By recognizing the crimes we create the conditions for forgiveness and peace among nations. And by this we open a new chapter for future generations,”³⁷ he said. On the other hand, Josipović expressed belief that this event will help boost the efforts in establishing good neighborly relations, underscoring that a different policy, one of peace and friendship, proves possible.³⁸ At the same time, Croatian politicians pointed out that Croatia will not withdraw the indictment against Serbia at the International Court of Justice in The Hague. The indictment accuses Serbia of aggression on Croatia in June 1991. President Tadić’s speech made greater impact in Serbia. Politicians of the government coalition and the opposition Liberal Democratic Party agreed with his words of reconciliation. Opposition radical parties accused Tadić of state treason, humiliation of Serbia and the attack on the memory of the Serbian war victims.³⁹

Serbian political scene divided on pro-European and nationalistic anti-European political parties favored the Mirko Cvetković’s government in presenting itself as the only major pro-European force. However, recent changes at the right side of the political spectrum dominated by the Serbian Progressive Party (SNS) have complicated the situation. The Progressive Party formed as a group of breakaway MPs in parliament from the Serbian Radical Party (SRS) led by a moderate nationalist Tomislav Nikolić, after he was expelled for trying to make the SRS more moderate in regards to European integration.

Worsening socio-economic situation in Serbia helped Nikolić’s party to become the most popular political party in Serbia in 2010 (according to the polls,

³⁷ A. Cholewa, *Serbia przeprosza, bałkańskie pojednanie*, „Tygodnik Powszechny” 2010, No. 46, pp. 33.

³⁸ B92, Tanjug, November 4, 2010.

³⁹ A. Cholewa, *Serbia przeprosza, bałkańskie pojednanie...*, op.cit.

the party popularity goes up to 34%). Obviously SNS has taken advantage of popularity of the idea of European integration in Serbian society⁴⁰ along with moderate nationalistic trends. There are two aspects of this success. Rather than using slogans about defending the national interest, the party highlights the socio-economic aspects in Serbia and blames the Cvetković's government for worsening economic situation. Statements regarding the situation in Kosovo became mild – obviously SNS does not wish to antagonize the Albanians. During his visits to Brussels Nikolić tried to change the image of himself and his party. He declared its commitment to the idea of European integration and cooperation.⁴¹

It seems that the government in Belgrade achieved a success on its way to obtain a candidate status for the EU on May 26th, 2011 by arresting general Ratko Mladić – Bosnian Serb forces leader accused of committing war crimes during wars in the nineties. The arrest of General Mladić, was announced in a special television appearance of the Serbian President Boris Tadić. He has decided to transfer Mladić to the International Criminal Court in The Hague. At the same time, what is interesting, an impending report by ICTY prosecutor Serge Brammertz to the UN Security Council was to castigate Serbia for a lack of cooperation with the Hague, and in particular for a “comprehensively failing strategy” regarding the arrest of Mladić.⁴² Nevertheless, opinion of a Serbian political scientist – Darko Trifunović – seems to be accurate: “it is good news that Mladić has been arrested, but his extradition to The Hague will not affect the stability in the region as long as The Hague is hesitant to prosecute war criminals from other sides of the conflict. Not only Serbs committed atrocities”⁴³ – he says.

Somewhat surprising was the decision of the European Council from December 8th, 2011 to postpone granting the status of the candidate to Serbia. In Spring 2012 the European Council was convinced that Serbia has achieved progress in the implementation of agreements reached with the Kosovo Government in Priština including integrated border management, overall regional cooperation and is actively cooperating in enabling EULEX and KFOR to perform their mandates.⁴⁴

⁴⁰ For example, In 2008 75% of Serbs declared support for accession with the EU.

⁴¹ M. Szpala, *Serbia: prounijny konsensus mimo kryzysu*, „BEST OSW Tygodnik”, No. 10, 16.03.2011.

⁴² *Aresztowanie Mladicia przybliża Serbię do UE*, „BEST OSW Tygodnik”, No. 19, 1.06.2011.

⁴³ K. Zuchowicz, *Ratko Mladić schwytany po 16 latach*, „Rzeczpospolita” 2011, No. 122, A12.

⁴⁴ M. Szpala, *Decyzja RE w sprawie polityki rozszerzenia*, „BEST OSW Tygodnik”, nr 40, 14.12.2011.

9.6 The Case of Montenegro

Montenegro is another candidate country for the European Union. Consecutive governments declared willingness to join the EU as quickly as possible. It is worth noting that the issue of EU negotiations delays with Serbia (due to no results in arresting Ratko Mladić) were one of the reasons for Montenegro to leave the Union with Serbia in May 2006.

The European Council on 9th December, 2011 decided to postpone the official opening of accession negotiations with Montenegro.⁴⁵ When it comes to determining the date for the beginning of Montenegro's accession talks, the date would be June 2012, when the Council will review the country's progress in implementing reforms, with a special focus on the rule of law, respect for fundamental rights and suppression of corruption and organized crime. The European Council also took the unprecedented decision that the European Commission initiates the process of analytical examination of the *acquis communautaire* with Montenegro although, it should be noted, that the screening process so far has always preceded the official start of negotiations with a candidate country.

9.7 The Case of Macedonia

Macedonia was the only (until 2006) former Yugoslav republic established in a peaceful manner during the Yugoslav civil wars in the 1990s. Therefore it has been treated as a certain candidate for the EU. However, the complex ethnic mosaic in 2001 caused the outbreak of civil war which ended in summer 2001 thanks to European military forces and European politicians. Macedonia submitted its membership application on March 22nd, 2004. The European Council officially granted the country candidate status on December 17th, 2005 after a review and a positive recommendation of the candidacy by the European Commission. A landmark date in the relations between the EU and Macedonia was October 14th, 2009, when the European Commission recommended start of the accession negotiations for full-fledged membership of Macedonia.⁴⁶ Among current obstacles to full membership is the ongoing dispute with Greece over the country's name, which is also the reason why it is officially addressed by the European Union with the provisional appellation "Former Yugoslav Republic of Macedonia", rather than its constitutional name, "Republic of Macedonia". Greece, being a EU member state of long standing, has veto power against new accessions, and has repeatedly stated that it will block Macedonian accession unless the naming issue

⁴⁵ Consilium – Rada Unii Europejskiej at: <http://ue.eu.int/policies/enlargement/montenegro?lang=pl>.

⁴⁶ P. Olszewski, *Macedonia. Historia i współczesność*, Radom 2010, pp. 165.

is resolved beforehand. The dispute is crucial because, as surveys indicate, as many as 80% of Macedonians would not resign from the name of the state in exchange for admission to the EU and NATO.⁴⁷ Finally, on December 5th, 2011 the International Courte of Justice (ICJ) announced a verdict stating the Greece was in the wrong when it vetoed Macedonia's bid for NATO membership at the 2008 summit in Bucharest.⁴⁸ It seems that after this "name issue" has been resolved, Macedonia can speed up the process of NATO and EU integrations.

9.8 The Case of Bosnia and Herzegovina

The most complicated situation remains in Bosnia and Herzegovina, a country established by the Dayton Peace Agreement in November 1995. The major obstacle is the unwillingness of three nations, Muslim-Bosniaks, Bosnian Serbs and Bosnian Croats to live in one state. Serb separatist tendencies intensified in the spring of 2008 when the international community agreed for separation of Kosovo inhabited by Albanians from the Republic of Serbia.⁴⁹ Based on the principle of precedent change of borders of a former Yugoslav republic (first such case since the disintegration of the Yugoslav federation in June 1991) the authorities of Republika Srpska call for a referendum on secession from Bosnia and Herzegovina.

The European Union is in political terms much more engaged in Bosnia and Herzegovina than in any other country of the region. The country has frequently been called a "European Protectorate".⁵⁰ Between 1991 and 2007 the EU institutions and individual Member States have invested in stabilizing the situation in Bosnia and Herzegovina more than 2,5 billion euro, using various assistance programs: ECHO, PHARE, Obnova, CARDS (transformed into IPA after 2007). In addition, since the beginning of 2005 the European Union launched its first military mission (EUFOR "Althea") replacing stationing for 10 years NATO forces.⁵¹

⁴⁷ K. Zuchowicz, *Spór o antycznego króla*, „Rzeczpospolita” 2011, No. 139.

⁴⁸ ICJ claimed that Greece violated Article 11 of the 1995 Interim Accord. This Accord stipulated that Greece will not block Macedonia's membership in international organizations if done under the UN provisional designation "the former Yugoslav Republic of Macedonia". ICJ rejected Greece's claim that Macedonia allegedly breached the accord prior to the Bucharest summit in 2008.

⁴⁹ J. Wilczak, *Teraz Bośnia?*, „Polityka” 2008, nr 11, pp. 50–53; A. Cholewa, *Bośnia tonie*, „Tygodnik Powszechny”, 11.03.2009.

⁵⁰ See: M. Gniazdowski (ed.), *Europejski protektorat? Bośnia i Hercegowina w perspektywie środkowoeuropejskiej*, Warszawa 2008.

⁵¹ B. Górka-Winter, *Unia Europejska a Bośnia i Hercegowina – w kierunku nowego modelu partnerstwa*, [w:] M. Gniazdowski, *Europejski protektorat....*, op.cit., pp. 163.

Nevertheless, Bosnia and Herzegovina in political and social terms still remains unstable country. For example, the 2010 general elections were followed by 15-months long political deadlock in order for ethnic political leaders to reach agreement on the formation of a new government. As a result of a political compromise on February 10th, 2012, new government of Bosnia and Herzegovina was formed under the Chairmanship of a Bosnian Croat – Vjekoslav Bevanda. The government consists of 10 members – 4 Bosnian Muslims, 3 Bosnian Croats and 3 Bosnian Serbs.⁵² This government priorities are struggle with 43% unemployment rate (one of the highest in the Western Balkans region), preparation of a provisional budget for 2012 and continuing work on reforms that would bring Bosnia and Herzegovina closer to membership of NATO and the European Union.⁵³ In early February 2012 the parliament in Sarajevo adopted two crucial laws in order to fulfill its international obligations (first of all European Union accession requirements) – the State Aid Law forming, inter alia, a single state-level body to coordinate EU funded development programs and Census Law,⁵⁴ allowing the first census in the country since 1991. These events are expected to speed up the process of the country integrations with the European Union.⁵⁵

9.9 Conclusions

Twenty years after the collapse of the Yugoslav Federation, political and economic modernization processes vary among various post-Yugoslav republics. Yet, the issue of European integration is an important aspect contributing to the modernization plans for the countries of the region. Criteria established in Copenhagen in 1993 for the new EU members present a clear road map: a democratic system, market economy development, ethnic minorities rights and fair relationships with neighbors.

Croatia has already met entry requirements, furthering the quest for it to become the 28th European Union state. It will join in on July 1st, 2013 providing the bloc's 27 nations agree to that timetable. The situation looks

⁵² Zob. M. Szpala, *Bośnia i Hercegowina: skonfliktowane elity pod presją kryzysu*, „BEST(OSW)”, nr 7, 15.02.2012.

⁵³ Zob. M. Szpala, *Bośnia i Hercegowina: stan finansów wymusił kompromis w sprawie rzqdu*, „BEST(OSW)”, nr 1, 4.01.2012.

⁵⁴ Some (mostly Bosnian Muslims) feared a census that questioned peoples' ethnicity would cement the effects of wartime ethnic cleansing. But, faced with 80% citizens wanting to join the European Union, Bosnian Muslim politicians dropped objections to a census – a key requirement for candidate countries.

⁵⁵ Along with Kosovo, Bosnia and Herzegovina is the only country of the region which has not yet submitted an application for European Union membership.

much worse in Macedonia, Montenegro and Serbia due to an unstable socio-political circumstances, ethnic conflicts and the lack of progress in undertaking domestic reforms (such as efforts put to combat corruption and reform their judiciary). However, the worst situation is in Bosnia and Herzegovina as it is a country with a chronic political and institutional paralysis and as such is not an efficient and stable state.

Decision of the European Council of December 2011 to postpone a decision on granting the candidate status to Serbia as well as on starting accession talks with Montenegro shall be interpreted as a dissatisfaction of the European institutions with internal changes in these countries (although in the case of Serbia the recognition of independence Kosovo remains a major burden). EU expresses concerns about the advancement of economic reforms and inefficient judicial system. Very close relations between politics, business and organized crime have been and remain to be a fundamental threat to political modernization of the post-Yugoslav countries and their societies. However, the perspectives of integration with the European Union for other countries of the region (although extended in time) provides an opportunity for the political reconstruction of the Western Balkans region along the Copenhagen criteria. That will allow this region to authentically become a part of the united Europe.

Bibliography

- Bilski R., *Łuny nad Tetovem*, Warszawa 2002.
- Parant A. (ed.), *Migrations, Crises and Recent Conflicts In the Balkans*, University Press of Thessally, Volos 2006.
- Cholewa A., *Bośnia tonie*, „Tygodnik Powszechny”, 11.03.2009.
- Cholewa A., *Porażona duma*, „Tygodnik Powszechny”, nr 20, 15.05.2011.
- Cholewa A., *Serbia przeprasza, bałkańskie pojednanie*, „Tygodnik Powszechny” 2010, nr 46.
- Ćosić D., *Cud w Belgradzie*, „Wprost” 2008, nr 31.
- Gniazdowski M. (ed.), *Europejski protektorat? Bośnia i Hercegowina w perspektywie środkowoeuropejskiej*, Warszawa 2008.
- A. Godlewski, *Wydać rzeźnika*, „Wprost” 2011, nr 22.
- Jagusiak B. (ed.), *Polityczno-gospodarczy rozwój Polski w strukturach Unii Europejskiej*, Wydawnictwo Wojskowej Akademii Technicznej, Warszawa 2007.
- Kamiński J., *Trzecie wcielenie Karadźicia*, „Dziennik Gazeta Prawna” 2009, nr 213.
- Krasnodębski Z., *Demokracja peryferii*, Wydawnictwo „słowo/obraz terytoria”, Gdańsk 2003.
- Krysieniel K., Wojnicki J., *Partie i systemy partyjne państw byłej Jugosławii*, Warszawa–Pułtusk 2009.
- Niedziński B., *Przez korupcję opóźnia się wejście Chorwacji do UE*, „Dziennik Gazeta Prawna”, 13.12.2010.
- Olszewski P., *Macedonia. Historia i współczesność*, Radom 2010.
- Reszczyński Ł., *Belgrad rozlicza historię*, „Przegląd” 2010, nr 18.
- Петровић Д., *Нови Устав и савремена Србија*, Институт за Политичке Студије, Београд 2007.
- Todorova M., *Imagining the Balkans*, Oxford University Press, New York 1997.
- Wilczak J., *Teraz Bośnia?*, „Polityka” 2008, nr 11.
- Zuchowicz K., *Premier uciekał, został złapany*, „Rzeczpospolita”, nr 289, 11–12.12.2010.
- Zuchowicz K., *Ratko Mladić schwytyany po 16 latach*, „Rzeczpospolita” 2011, nr 122.
- Zuchowicz K., *Spór o antycznego króla*, „Rzeczpospolita” 2011, nr 139.
- Żornaczuk T., *Bałkański pociąg do Unii*, „Polityka” 2011, nr 28.
- Żyła M., *Serbia świętuje 10 lat demokracji. Ciężkostrawne dzieci rewolucji*, „Tygodnik Powszechny” 2010, nr 42.
- <http://www.seio.sr.gov.yu>.
- <http://europa.eu/rapid/pressReleasesAction>.
- <http://ec.europa.eu/enlargement>.
- <http://www.citizenspact.org>.

Chapter 10

Strategic Landscape of the Transatlantic Partnership

ELŻBIETA KUŹELEWSKA*

10.1 Introduction

Needless to say, the course and results of World War II created new political situation in Europe. On the one hand, weakened and politically unstable Europe was threatened by communism and the Soviet Union, on the other it was offered help from the US. Both Western Europe and the US shared the same values, being the part of the same Western civilization and being the allies in the War against fascism and communism. After World War II, it was the US that was strengthened whereas Europe was economically ruined. During the War the idea of Atlantic community was born as a strategic basis for the whole Western world (“free world”). Initially Western Europe made an attempt to organize for security, the result of which was the Treaty of Brussels (1948). However, France and the UK requested the US to create an alliance pact that would also involve the US in providing security and defense for Western Europe. As a response to this offer, the North Atlantic Treaty was signed on 4th April 1949, providing mutual defense on both sides of North Atlantic. During the Post-Cold War era Europe still remains a strategic area for the US security, and alliance relations with Europe still seem to be a pillar of Washington’s European policy.

The North Atlantic alliance, formed after World War II, was a response to the expected attack of the USSR. The end of Cold War removed an important element of North Atlantic Alliance – the war with communism. It created the need to develop a new formula of mutual relations. The Conflict in Iraq demonstrated that an attempt to build single European foreign policy based on the opposition to the US could result in an unnecessary division of Europe and concurrent worsening of transatlantic relations.

* PhD, researcher and lecturer, Centre for Direct Democracy Studies, Faculty of Law, University of Białystok, ekuzelewska@gmail.com.

Although the end of the Cold War brought about many structural changes in the international system, it did not change the fundamentals of the transatlantic relationship. The United States and Europe still face many common security threats. The transatlantic relationship will continue to be strong, and it will continue to be cooperative.

The aim of the paper is to present the basis of cooling of transatlantic relations and re-defining the roles of the US and NATO (being an institutional basis for the US presence in Europe). Cooperation between the states on both sides of the Atlantic has faced difficult moments, even crises, over the years. First of all, I would like to indicate the common values connecting Western Europe and the US and underlying transatlantic cooperation. Then I would like to present the factors that contributed to the weakening of transatlantic ties. Thirdly, I am going to analyze briefly the US hegemony and strengthening the Sino-American cooperation.

10.2 The Base and the Strength of Transatlantic Relations

10.2.1 Common Values

The end of Cold War strengthened the American administration in belief that it was Europe that could be a partner for the US in a new distribution of forces on a global scale and that Europe would have to take bigger responsibilities having declared that role. On both sides of the Atlantic there was an unquestionable conviction that both the character of transatlantic community and the intensity of ties between the US and their European allies are determined not only by the same values being shared but also by the convergence of long-term political, economic and security interests. A significant factor was the awareness of the fact that it was the cooperation that allowed both partners to achieve their shared essential goals. Both American and European societies strongly support the idea of transatlantic partnership.

Clinton administration supported the process of European integration recognizing the importance for the US of creating a homogenous domestic market, introducing euro and accession of Central and Eastern Europe states to the EU. The integration would mean establishing a zone of stability, security and prosperity in both the US and Europe. In 1990s, the process of forming the EU Common Foreign and Security Policy (CFSP) as well as the NATO operation in former Yugoslavia largely influenced transatlantic relations. The latter pointed to the EU Member States' military weakness, inducing them to make a decision to build up the EU autonomous military

capabilities in order to undertake military operations in a situation when NATO fails to undertake them. Formally, Clinton administration declared support for strengthening military capabilities of European states to take action in crisis situations, being in favor of these capacities controlled by NATO or being its part.

Signing the New Transatlantic Agenda (NTA) by NATO and the EU in December 1995¹ was a significant fact for tightening transatlantic partnership. NTA confirmed the EU's subjectivity in economy, foreign affairs, security and defense areas. The emphasis was put on a common strategic vision of European security as well as indivisibility of transatlantic security with NATO connecting North America and Europe. The willingness to create transatlantic market was declared and numerous initiatives aiming at increasing social support for transatlantic partnership were endorsed.² Developing bilateral relations on different levels and in various areas contributed to tightening the cooperation. Regular meeting agenda, including UE–US summits with the US President, the President of the European Commission and the head of the EU presidency, was extended by regular talks with American Secretary of State and EU troika, including EU Commissioner for Foreign Affairs, High Representative of the Common Foreign and Security Policy and the Minister of Foreign Affairs of the Member State holding of the Presidency of the Council of Ministers. Other essential initiatives determining frames of extended transatlantic cooperation were: Transatlantic Economic Partnership³ (1998), which replaced the idea of New Transatlantic Marketplace,⁴ and the Bonn Declaration of 1999,⁵ setting out developing future mutual relations.⁶

¹ European Union. Delegation of the European Commission to the USA, *New Transatlantic Agenda*, 3 December 1995, <http://www.eurunion.org/partner/agenda.htm> (12.01.2012).

² See more: S. Serfaty (ed.), *Visions of the Atlantic Alliance: the United States, the European Union, and NATO*, Significant Issues Series 2005, vol. 27(8), p. 144 ff; Transatlantic Policy Network, *Completing the Transatlantic Market*, February 2007, <http://www.tponline.org/TPN%20transatlantic%20market%20paper%20FINAL.pdf> (12.01.2012).

³ Transatlantic Economic Partnership 1998, http://eeas.europa.eu/us/docs/trans_econ_partner_11_98_en.pdf (02.01.2012).

⁴ European Union. Delegation of the European Commission to the USA, *The New Transatlantic Marketplace*, 11 March 1999, <http://www.eurunion.org/partner/ntm/contents.htm> (02.01.2012).

⁵ United States Mission to the European Union, *Transatlantic Relations*, 21 June 1999, <http://useu.usmission.gov/bonn-summit-99.html> (02.01.2012).

⁶ A. Jarczewska-Romaniuk, *Unia Europejska a idea transatlantycka – Partnerstwo Transatlantyckie u progu nowego wieku*, [in:] E. Halizak, S. Parzymies (eds.), *Unia Europejska – nowy typ wspólnoty międzynarodowej*, Warszawa 2002, p. 279.

10.2.2 Economic Ties

The initiatives realized within NTA accelerated the process of market integration on both sides of the Atlantic. The following issues were considered to be the most important: standardization of regulations and procedures, better access to both markets in various fields, and gradual elimination of the trade barriers. Integration of both markets contributes to increasing their competitiveness on a global scale. The US and the EU economies, which hold the 50% share of world GDP, are the biggest trade partners for each other. Products using the latest technologies account for one-fifth of their export. Extensive and dynamic common economic relations join both the EU and the US. The EU and American markets are strongly connected due to direct investments. An important factor is a bilateral trade exchange and investment flow – they remain high and relatively stable. In 2009, the EU accounted for 23% of the US merchandise trade in goods and services. The importance of the EU is even greater on the foreign direct investment side, where European companies accounted for \$1.5 trillion, or 63%, of total foreign direct investment in the US and the US companies accounted for \$1.7 trillion, or about 50%, of total foreign investment in Europe in 2009.⁷

10.2.3 NATO as a Special Link Between Europe and the US

There are no doubts that NATO links Europe and the US in a special way. At the turn of the 20th and 21st centuries, NATO had to face the challenge to re-evaluate its role. Contemporary task of NATO is to re-define the scope of its operations in geographic and subject-matter terms and the need for its further extension. There are two different concepts among its members. According to the US and the UK, NATO ought to maintain global character, defying the new threats even if they occur in the territories being distant from the US. This concept is a prevailing one, since NATO is involved in Afghanistan, Iraq, Sudan and Libya. France is in favor of NATO being responsible for the security on Atlantic and in the neighboring territories.

First, the extent of undertaken missions should be narrowed, the EU should be responsible for civilian actions, and actions far from Euro-Atlantic territories would not be the main objective of NATO. Due to French consistent efforts to level the division of spheres of influence within NATO, the French Fifth Republic is often regarded as enfant terrible of NATO.⁸ Paris wants to

⁷ R.J. Ahearn, *U.S.–EU Trade and Economic Relations – Key Policy Issues for the 112th Congress*, http://transatlantic.sais-jhu.edu/transatlantic-topics/Articles/economy/U.S._EU_Trade_and_Economic_Relations_CRS.pdf (20.10.2011).

⁸ E. Posel-Częścik, *Sojusz Północnoatlantycki w polityce zagranicznej Francji*, „Biuletyn” PISM 16.04.2004, no. 15 (203), p. 1101.

be a partner equivalent to the US, although it is neither a military power, nor a serious player on an international arena. France has been a leader in efforts to develop an independent European force in a form of the so-called European Rapid Reaction Force. French efforts to organize an armed force for Europe, however, cannot be interpreted as a counterbalance to NATO or the US. The Rapid Reaction Force is too small to serve as a counter to the US military power and French officials have stated repeatedly that NATO will remain primary defense organization of Europe.⁹

Second, the US supports the idea of NATO enlargement, so the scope of transatlantic community is extended with new countries being included into the organization. The US championed the expansion of NATO to include Poland, the Czech Republic and Hungary in 1999, not considering the fact that Russian officials complained at that time about what they perceived to be an American attempt to extend influence into the previously Russian sphere.¹⁰ Washington also did not take into consideration possible protests of the allies, especially the UK, France and Germany.¹¹ The question that European allies asked was whether NATO enlargement was a good idea and whether it should have become the US policy?¹² One of the reasons for enlargement was the Clinton's administration belief that NATO needed a new lease on life to remain viable. The viability of NATO, in turn, was important because the alliance did not only help to maintain the position of America as a European power, but it also preserved hegemony of America in Europe.¹³ Consequently, in 2004 seven countries of Central and Eastern Europe were admitted to NATO: Lithuania, Latvia, Estonia, Bulgaria, Slovakia, Slovenia and Romania. Albania and Croatia joined NATO in 2008.

Third, the increase in number of NATO members means both strengthening its role as a guarantor of stabilization in Europe and contribution to strengthening American leadership in NATO and the US influence in Southern and Eastern Europe. The growth of NATO members' territory is also an important factor to be mentioned. Having accepted three former Soviet republics, NATO did

⁹ D. Lemke, *Great Powers in the Post-Cold War World: A Power Transition Perspective*, [in:] T.V. Paul, J.J. Wirtz, M. Fortmann (eds.), *Balance of Power. Theory and Practice in the 21st Century*, Stanford University Press 2004, p. 60.

¹⁰ See more: S. Plekhanov, *NATO Enlargement as an Issue in Russian Politics*, [in:] Ch.-P. David, J. Lévesque, *The Future of NATO. Enlargement, Russia, and European Security*, Quebec 1999, pp. 168–185.

¹¹ D. Lemke, *op.cit.*, p. 60.

¹² R.L. Kugler, *Will Enlargement Succeed?*, [in:] Ch.-P. David, J. Lévesque, *The Future of NATO. Enlargement, Russia, and European Security*, Quebec 1999, p. 51.

¹³ R.J. Art, *Europe Hedges its Security Bets*, [in:] T.V. Paul, J.J. Wirtz, M. Fortmann (eds.), *Balance of Power. Theory and Practice in the 21st Century*, Stanford University Press 2004, p. 193.

something that seemed to be impossible earlier – it entered the territory of the former Soviet Union.¹⁴ NATO membership for Croatia and Slovenia, i.e. the republics of former Yugoslavia, meant both overcoming the divisions in Europe and Europe becoming reunited.

Undoubtedly, NATO is the premier organization supporting the security *status quo* in the world. The expansion of NATO to new members in the Eastern Europe has strongly reinforced the transformation of their societies from communist states to democratic market economies of the satisfied coalition.¹⁵

Fourth, if mutual relations among partners of NATO are observed deeply, it needs to be noted that there is a clear discrepancy between European and American interests and also an attempt to reduce American dominance by European allies. The American ability to form a situation in transatlantic system proved to be weakened by the failure of Bush's actions during NATO summit in Bucharest in April 2008. America did not succeed in welcoming Georgia and Ukraine into the Membership Action Plan. Merkel and Sarkozy, fearing the reaction of Moscow, effectively blocked Bush's plans.¹⁶

To sum up, nowadays it seems that NATO is no longer the centerpiece of the transatlantic security relationship, and it is becoming less and less important for the US – European relations. NATO is gradually withering away.¹⁷ The form of transatlantic security relationship is changing. The core of the new transatlantic security network consists of bilateral relations between the US and the leading European powers: France, Germany and the UK.

NATO now plays a secondary role, and it has to compete with other institutions. After the September 11, the US went first to the United Nations – not NATO – to gather support for retaliatory action. Yet that was also for a case in Afghanistan. Most recently, the NATO operation in Libya exposed its problems: only eight members taking part in air missions, weapons deficit and defense budget cuts.¹⁸ However, it is important to note that despite the crisis and cuts in costs, European response in Libya was more effective than in the Balkans in the 1990s. France and the UK proved to be global powers in spite of the fact that their military potential did not match their political aspirations.

¹⁴ J. Kiwerska, *USA – UE. Stan i perspektywy relacji transatlantyckich*, „Rocznik Integracji Europejskiej” 2010, no. 4, p. 80; D. Lemke, op.cit., p. 69.

¹⁵ D. Lemke, op.cit., p. 69.

¹⁶ J. Kiwerska, op.cit., p. 73.

¹⁷ Ch. de Jonge Oudraat, *The New Transatlantic Security Network*, American Institute for Contemporary German Studies 2002, <http://transatlantic.sais-jhu.edu/publications/articles/Chantal.pdf> (20.10.2011).

¹⁸ T. Bielecki, *Europa zdala test w Libii*, „Gazeta Wyborcza” 27.10.2011, p. 9.

10.3 Cooling of the Transatlantic Relations

In late 1990s the processes of weakening the transatlantic relations became evident. Reasons thereof can be found on both sides. On the European side, it was mainly the integration process, introducing common currency, accession of new Member States to the EU, forming the CFSC and the ESDP, being critically perceived by Washington.¹⁹ The EU aiming at playing more independent part in international relations, including transatlantic ones, strengthened integration processes. A significant factor then was the competition among the EU Member States that concerned the influence on EU international politics.²⁰

10.3.1 Transatlantic Partnership and the War on Terrorism

The so-called war against terrorism influenced transatlantic relations significantly. States on both sides of the Atlantic became closer after September 11.²¹ The sense of solidarity and the readiness to help dominated in Europe whereas America was aware that it needed wide international cooperation in their fight against terrorism. Allies, invoking Article 5 of the Washington Treaty, offered support to the US immediately after the attack: Secretary-General George Robertson invoked the Mutual Defense Clause of the NATO²² founding treaty for the first time, declaring that a NATO member had been attacked, and that it was the task of all member countries to help. At the beginning, in the flush of enthusiasm, many Europeans believed that the US now realized that its response to terror could only be multilateral.²³

¹⁹ D. Milczarek, *Stosunki transatlantyckie w sferze polityki zagranicznej i bezpieczeństwa: kontynuacja czy przełom? Polski punkt widzenia*, „Studia Europejskie” 2008, no. 2, p. 34.

²⁰ K. Larres, *EU Trilateralism: Germany, France, Britain, and the Failed Attempt to Turn the EU into a Serious Global Player*, <http://www.aicgs.org/analysis/c/20yearsunity/larres.aspx> (20.10.2011).

²¹ Al-Qaeda wanted to compel the United States to remove its military presence from the Persian Gulf (and, in particular, from Saudi Arabia), and force Washington to alter its stance on the Israeli-Palestinian conflict. Al-Qaeda's leaders also hoped that the September 11 attacks would provoke a U.S. overreaction, and thereby trigger an upsurge of popular discontent in the Islamic world that would lead to the overthrow of the Saudi monarchy and other pro-American regimes in the Middle East, and their replacement by fundamentalist Islamic governments, F. Layne, *The War on Terrorism and the Balance of Power: The Paradoxes of American Hegemony*, [in:] T.V. Paul, J.J. Wirtz, M. Fortmann (eds.), *Balance of Power: Theory and Practice in the 21st Century*, Stanford University Press 2004, p. 107.

²² B. James, *Citing Mutual Defense Clause, Allies Say Attack Was Directed at All: NATO Commits to Supporting the U.S.*, “New York Times” 14 September 2001, http://www.nytimes.com/2001/09/14/news/14iht-t4_22.html (02.01.2012); RTE News, *NATO invokes mutual defence clause*, 2 October 2001, <http://www.rte.ie/news/2001/1002/natoreax.html> (02.01.2012).

²³ J.S. Dryzek, *Deliberative Global Politics. Discourse and Democracy in a Divided World*, Cambridge 2006, p. 131.

The EU also provided an extensive and unconditional support to the US. However, Europeans were surprised by the attitude of the American government: it was interested neither in forming anti-terrorism coalition under the auspices of the UN, nor in setting the campaign in a formula of NATO action. Washington resolved to coalition, based on bilateral relations with a state, the help of which was needed at a particular time.²⁴ *Le Monde*, which on September 12 published an editorial “We are all Americans”, would five months later lead with the headline “Has the United States gone crazy?”²⁵ President Chirac and his Foreign Minister, Vedrigne, represented Europe’s fears by describing the US as a “hyperpower”.²⁶

In the first stage of the anti-terrorism campaign, NATO share was not impressive. In December 2001 and in early 2002 the US signed an agreement with EUROPOL, tightening the cooperation to fight organized crime and terrorism.²⁷ The EU was generally perceived by the US as the major ally in the fight against terrorism. In September 2002 the High Representative for the Common Foreign and Security Policy (CFSP) Solana, Commissioner for External Relations Patten, Belgian Minister of Foreign Affairs Michel (Belgium held then the EU presidency) met the American Secretary of State Powell and the American National Security Advisor Rice in Washington.²⁸ After 9/11, the US government sharpened its policy towards the states supporting terrorism or trying to get access to Weapons of Mass Destruction (WMD). The result of this policy was launching military operation in Afghanistan by the US, their NATO allies and the several EU states in 2002.

However, initially Europeans did not take a military cooperation with the US during the operation in Afghanistan. In October 2001, just after Washington started the military operation against al-Qaeda, the EU General Affairs Council issued a statement giving a full support for the US actions, being a consequence of persistent unwillingness of Taliban to give Osama bin Laden residing in Afghanistan over to Americans.²⁹ Yet transatlantic

²⁴ J. Stachura, *Meandry europejskiej polityki USA*, „Studia Europejskie” 2004, no. 3, p. 37.

²⁵ Ch. de Jonge Oudraat, op.cit.

²⁶ F. Layne, op.cit., p. 119.

²⁷ Supplemental Agreement Between the Europol Police Office and the United States of America on the Exchange of Personal Data and Related Information, https://www.europol.europa.eu/sites/default/files/flags/supplemental_agreement_between_europol_and_the_usa_on_exchange_of_personal_data_and_related_information.pdf (02.01.2012).

²⁸ See more: D. Eggert, *Przewartościowania w stosunkach transatlantyckich w dziedzinie bezpieczeństwa w czasie prezydentury George’a W. Busha*, „Stosunki Międzynarodowe – International Relations” 2004, no. 3–4, pp. 117–118.

²⁹ Council of the EU, 2416th Council meeting – General Affairs – Brussels, 11 March 2002, 6596/02 (Presse 48), http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/69769.pdf (02.01.2012).

solidarity significantly weakened at the beginning of 2002, when in his State of the Union Address, President Bush singled out terrorist organizations and Iran, Iraq and North Korea as their terrorist allies, constituting an “axis of evil”. Countries of Western Europe became worried by the willingness of Washington administration to take action in order to get rid of regimes in the “axis of evil”, especially by the preparations to intervention in Iraq.³⁰ The reason to link three “rogue states” was WMD/I, particularly the quest for, or possession of, a nuclear capability, accompanied by anti-US, anti-Western tendencies.³¹

The attack on Iraq in 2003 was an element of American “war on terrorism”. The direct reason for the attack was Iraqi failure to respect the UN resolution concerning the control over Iraqi installations that might have been used to produce WMD.³² American attack on Iraq was chimed with statements from US Defense Secretary Rumsfeld, urging a doctrine “pre-emptive” action,³³ reflected in the US National Security Doctrine.³⁴ The UK joined the US in the invasion in Iraq. It needs to be mentioned that since the end of the Cold War, Britain has been a steadfast American ally, British forces fought alongside American in Iraq (twice), Yugoslavia and Afghanistan. Britain has not removed itself from NATO, has not undertaken any extensive military buildups, has not formed or even discussed counterbalancing alliances to offset American hegemony, and has not adopted any policies that might be interpreted as either balancing or buck-passing.³⁵

Troops from Poland, Australia, Denmark, Spain, Italy and Hungary supported American invasion in Iraq. France and Germany, Belgium and Luxemburg did not approve of military action there. It was believed that what American administration wanted to achieve was not disarmament of Iraq but settling pro-American regime there. The UN Security Council provided a mandate for the American military occupation as late as in 2004. The American motivation was a conviction that the regime change in Iraq would weaken Palestinian radicalism. The lack of support from the new Iraqi government (favorable to the US) towards radical Palestinian groups, such as Hamas or Jihad, would have weakened their influence in the struggle for Palestinian independence against Israel, which would have finally strengthened Israeli security. The concept of exporting

³⁰ J. Stachura, op.cit., p. 38.

³¹ J. Gow, *Defending the West*, Cambridge 2005, p. 65.

³² See more: World Socialist Web Site, *Weapons of mass destruction in Iraq: Bush's "big lie" and the crisis of American imperialism*, 21 June 2003, <http://www.wsws.org/articles/2003/jun2003/wmd-j21.shtml> (02.01.2012).

³³ See more; <http://www.au.af.mil/au/awc/awcgate/army-usawc/westphal.pdf> (02.01.2012)

³⁴ J. Gow, op.cit., p. 3.

³⁵ D. Lemke, op.cit., pp. 59–60.

democracy to Iraq, intended to be successful, was supposed to cause political changes in other Arab countries (e.g. Syria) and the democratic reconstruction of the Middle East. This concept was not entirely realized and there are numerous indications that the situation in Iraq would be far from stable.³⁶

The least controversial cooperation concerning war against terrorism seems to be mission in Afghanistan. In 2001 the UN Security Council issued Resolution 1386 authorizing the establishment of an International Security Assistance Force for Afghanistan (ISAF). However, at the initial stage of the mission in 2001–02 it was only the UK which contributed substantially to military response in Afghanistan. Other European countries confined to cooperation between European secret services, sending limited number of troops or, in case of Germany, logistic teams and teams halting the proliferation of chemical weapons.³⁷ European allies did not respond enthusiastically to the Bush administration's appeals convincing them to increase their military contingents in Afghanistan. According to America, Afghanistan clearly proved European unwillingness to support and be involved in American efforts. President Obama announced a new strategy for Afghanistan in March 2009. It was welcomed by the European allies.³⁸ However, there was no positive response to his appeal to send additional troops to the Hindu Kush.³⁹ Now there are over 60,000 NATO soldiers taking part in the mission in Afghanistan (including 29,000 American and 2,000 Polish troops).

In spite of the close cooperation in the war against the Taliban (EU police mission EUPOL was launched in Afghanistan in 2007), the situation in Afghanistan is not stable. What is more, there are more and more opinions that the war was lost.⁴⁰ In Afghanistan the Taliban are still a strong group, and the events in Pakistan in 2007–08⁴¹ might be evidence of strong fundamental Muslim influences in this region. Islamists oppose Pakistani authorities openly, criticize their pro-American politics and express the demand for stopping cooperation with the West and establishing the Islamic law in the country.

³⁶ See: U.S. Department of State, *U.S. Ambassador to Iraq Christopher R. Hill On the Current Situation In Iraq*, 18 June 2009, <http://www.state.gov/p/nea/rls/rm/2009/125138.htm> (02.01.2012).

³⁷ D. Eggert, op.cit., pp. 119–120.

³⁸ V. Morelli, P. Belkin, *NATO in Afghanistan: A Test of the Transatlantic Alliance*, <http://fpc.state.gov/documents/organization/124771.pdf> (02.01.2012).

³⁹ J. Kiwerska, op.cit., p. 79.

⁴⁰ Compare: K. Volker, *Afghanistan war: Is the US in it to win it?*, <http://www.csmonitor.com/Commentary/Opinion/2010/0928/Afghanistan-war-Is-the-US-in-it-to-win-it> (20.10.2011).

⁴¹ In 2007 state of emergence was declared by the President Musharraf, in 2008 general election took place.

10.3.2 Unilateralism vs. Multilateralism

On the American side, there was an increasing tendency to conduct unilateral actions.⁴² Among others, America aspired to have a free hand to perform actions on an international scale, unlike other states, not to be obliged to accept commitments resulting from multilateral agreements, and to approach international organizations distrustfully unless the US has a position of the leader. Americans have always tended to divide the world in a Manichean way, into the good and the evil, preferring to take firm actions based on force and pressure rather than on persuasion. They have never hesitated to use military force.⁴³ European states, however, put special emphasis on solving difficult international problems through multilateral treaties, which they regard as the basis for an international order and cooperation.

Second, different US and EU attitudes are not only the consequence of their disproportional potential. European states, being much weaker than the US in terms of their military potential, have a more unfavorable attitude towards using force. America and Europe are different due to different historic tradition and experience, e.g. constructing European integration by compromises and a consensus method. Bush administration accused Europe of unwillingness to share responsibility for an international order, not being ready to accept strategic military challenges and ignoring dangers posed by WMD and their transfer to terrorists or to “rouge countries”. Americans emphasize that Europeans owe their sense of security to the protection that is provided by the US military potential.⁴⁴

Undoubtedly, both the disintegration of the Eastern block and the victory in Persian Gulf War (1991) meant the triumph of American unipolarity⁴⁵ which was not easily accepted by the EU Member States, particularly France. There are numerous examples of American unilateral activities. The US withdrew its acceptance of the ICJ in 1995 after a ruling on the US policy in Nicaragua.⁴⁶ Despite intense pressure from Europe, Canada and many NGOs, the US refused to adhere to the landmine agreement because of the concerns of its army about the effects of a ban on a safety of American soldiers. The US alone rejected a verification protocol to the Biological and Toxin Weapons Convention. The US blocked agreement on

⁴² Dorota Eggert comprehensively presents Bush’s drifting apart from Clinton’s multilateralism towards unilateralism, D. Eggert, op.cit., p. 115.

⁴³ D. Milczarek, op.cit., p. 37.

⁴⁴ J. Stachura, op.cit., p. 35.

⁴⁵ Ch. Krauthammer, *Unipolar moment?*, „Foreign Affairs” 1990/91, no.1, p. 32 ff.

⁴⁶ See: A.L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, <http://www.ejil.org/pdfs/15/4/379.pdf> (02.02.2012).

a Small Arms Treaty by refusing to regulate civilian ownership of military weapons and to restrict arms supply to rebel movements. The US opposed the Draft Optional Protocol to the Convention Against Torture which would have allowed international inspection of the US prisons (including the one at the Guantanamo Bay).⁴⁷ European states were unfavorable to American decision to withdraw from the Kyoto Protocol on greenhouse gas reduction announced at the end of March 2001. The increasing dislike for American persistence made other issues of disagreement significant, such as attitude towards death penalty or function of religion in public life.

Operation in Afghanistan in 2002 could have made Americans realize the short-sightedness of unilateral politics and Washington be keen on cooperation with the European allies. However, the US focused on its right to exercise its own foreign policy, according to American interests – with no multilateral cooperation. European partners regarded this decision as ignoring both international law and American allies' opinion, leading, as a result, to arguments and divisions weakening transatlantic solidarity. European states became cautious towards American unilateral policy.

American unilateralism was present in Bush's announcement to build Ballistic Missile Defense, although European states and Russia opposed it. Missile Defense (MD) aimed at the US protection against ballistic missiles from Iraq, Iran, North Korea and lately Libya – countries being then referred to as the "axis of evil". The EU feared that the increased sense of security on the other side of the Atlantic, being the result of MD, could cause a new wave of isolationist tendencies in the US. It could mean smaller American involvement into defense in Europe and a weaker sense of security among European members of NATO. Events of September 11 and the subsequent presidential elections in the US made MD issue less relevant.

American military operation in Iraq in March 2003 became an accelerating factor for serious dissonance. American war against Iraq (violating the resolution of the UN Security Council and ignoring the opinion of most of the EU Member States) challenged the transatlantic partnership and weakened the CFSP cohesion. The response of Bush administration to September 11 attacks was to intensify the hypersecuritization and unilateralism already under way as a result of a unipolarity. Bush declared a war rather than a police action.⁴⁸ A direct reason for the American attack was a violation by Bagdad of the UN resolution concerning monitoring Iraqi installations ready to produce WMD.

⁴⁷ B. Buzan, *The United States and the Great Powers. World Politics in the Twenty-First Century*, Cambridge 2004, pp. 168–169.

⁴⁸ B. Buzan, *Ibidem*, p. 174.

In practice, this operation was a part of an ambitious plan to reconstruct the geostrategy in the “Broad” Middle East in order to strengthen the states being friendly to the US to oppose its enemies and to support the ideas of democracy and freedom. Gaining allies’ support for the operation in Iraq was a test for Washington leadership and NATO cohesion. Part of allies, including France, Germany and Belgium, started a dispute with the White House, considering the threat from Bagdad regime to the world peace. The differences were related to the issue if the threat was so serious that it needed an immediate American intervention, even without the support of the UN Security Council. The states with critical attitude towards American plans, worried that the intervention would cause destabilization of the region, more dangerous than the *status quo*. Public opinion worldwide, including Western Europe, opposed the war in Iraq. The UK,⁴⁹ Spain, Portugal, Denmark and “new” NATO and the EU Member States, including Poland, supported the policy of Bush administration. As a result, troops from the UK, Poland, Australia, Denmark, Spain, Italy and Hungary were involved in the Iraq War.

Difficult relations with the allies inclined the Bush administration to act in a selective way and prefer relations with the states having more favorable attitude towards American postulates, as well as win the differences between particular partners at the expense of the relations with the EU or the European partners of NATO being treated as a whole. This attitude resulted in the increased American “caution” towards European integration and temporary weakening of the EU as a US partner. Rumsfeld, then US Secretary of Defense, on 23rd January 2003 in his statement divided Europe into “Old Europe”, not accepting American leadership, and “New Europe”, being pro-American and supporting American policy. According to Washington, the “Old Europe” (France and Germany) refused to co-operate. The “New Europe”, as a counterbalance to France and Germany, would have been formed by the UK, Spain, Poland and new NATO members, which in January 2003 signed the Letter of Eight,⁵⁰ strongly supporting American plans in Iraq.

The problem of support for the operation in Iraq became a test for Bush’s policy towards Europe, leadership capacity of the White House, NATO cohesion and European allies’ willingness to act out of territories of member states.⁵¹ It

⁴⁹ Tony Blair insisted that the emerging campaign against Al-Qaueda was not a “war”, and that attention had to be paid to the root causes of terrorism, J. Howorth, J.T.S. Keeler, *The EU, NATO and the Quest for European Autonomy*, [in:] J. Howorth, J.T.S. Keeler (eds.), *Defending Europe. The EU, NATO and the Quest for European Autonomy*, Palgrave Macmillan 2003, p. 13.

⁵⁰ EurActiv, *Does ‘gang of eight’ letter sound the death bell for CFSP?*, <http://www.euractiv.com/security/gang-letter-sound-death-bell-cfsp/article-111961> (02.01.2012).

⁵¹ J. Stachura, *op.cit.*, p. 38.

should be emphasized that both sides aspired to appease the dissonances and they were quite successful in the attempt.

10.3.3 Differences in Approach to the Use of Military Force in International Relations

Other reasons for dissonance between the US and Europe apply to different opinions concerning using military force in international relations. The vision that prevails in the EU is that of co-operative security and group security whereas Bush administration opted for military measures to maintain security. A different American attitude certainly results from strengthening of US military power in the post-Cold War era. The US military spending accounts for over 40 per cent of the world military expenditure. At the beginning of the 21st century, the Pentagon budget was equal to military budgets in 15 countries of the highest defense expenditure. As Cooper says: „The most striking features of the world today is US military dominance. And the contrast between US military capabilities and Europe grows wider all the time”.⁵² Yost, however, appears to be more careful while explaining this matter:

„it is difficult to make comparison between US and European military capabilities for at least three reasons. First, (...) different capabilities can be used to achieve similar results; similar capabilities can be used in different ways to achieve distinct results and so on. Second, even in a simple comparison of similar capabilities (for instance, air-refueling aircraft) basic problems in counting rules arise, quite aside from the quality of the aircraft and the readiness and proficiency of the personnel (...). The third factor complicating a US-European capabilities-gap assessment also involves complex political judgments: the possibility of EU access to common NATO assets and even, in some circumstances, US national assets under the auspices of Alliance-approved CJTFs”.⁵³

The central fact of geopolitics today is the US military power. As I mentioned, America accounts for more than 40 per cent of all military expenditure in the world and a much higher proportion of a military capabilities. There is no conventional force in the world that could fight and all-out war against the US and win.⁵⁴

The US military power reinforced numerous American politicians' activities aimed at perceiving the US to be “a world policeman” or an imperial

⁵² R. Cooper, *The Breaking of Nations. Order and Chaos in the Twenty-first Century*, London 2004, p. 156.

⁵³ D.S. Yost, *The U.S. – European Capabilities Gap and the Prospects for ESDP*, [in:] J. Ho-worth, J.T.S. Keeler (eds.), *Defending Europe. The EU, NATO and the Quest for European Au-tonomy*, Palgrave Macmillan 2003, pp. 81–83.

⁵⁴ R. Cooper, op.cit., p. 45.

power. The asymmetry between the US and its NATO allies in their military expenditure was distinct. The asymmetry in satellite reconnaissance, air force and the capabilities of Quick Reaction Force was a significant factor in the conflict in the Balkans, Iraq and Afghanistan. European aspirations of parity with the US, however, are limited to the economic sphere – there is no chance that Europe could gain such a position militarily in the next decade. The EU Member States show no sign of investing in the military research and development needed to eliminate their security dependence on the US even during two or three decades.⁵⁵ During American involvement in conflicts in Iraq and Afghanistan, European partners were convinced that the US diminished the role of NATO. NATO appeared to be less and less suitable for the US since it became a constraining factor for its military activity. This approach of the American government during the operation in Afghanistan was affected by the conflict in Kosovo in 1999, when American politicians were critical of a slow process of military decision-making, being the consequence of the necessity to consult the decisions with the biggest NATO members. Europeans realized that they needed the US military power, especially the headquarters and planning capabilities of NATO. They also realized that Washington's military intervention was a „near miss” and that the US might not be willing to intervene in the next European crisis.⁵⁶ During the first stage of the operation in Afghanistan, NATO was not sufficiently taken into consideration.

10.3.4 European and American Attitudes Towards the International Law

The dissonance between the US and Europe also results from a different approach to abiding by international law. The US is quite flexible concerning international law principles, particularly these constraining its actions. World public opinion regarded as scandalous US refusal to ratify the ICC Statute.⁵⁷ The EU also criticized the White House severely for insisting that foreigners suspected of Al-Quaeda affiliation who had been captured during the American Anti-Terrorism Action in Afghanistan were not granted the POW (Prisoner-Of-War) status under the Geneva Convention.⁵⁸

⁵⁵ M.R. Brawley, *The Political Economy of Balance of Power Theory*, [in:] T.V. Paul, J.J. Wirtz, M. Fortmann (eds.), *Balance of Power. Theory and Practice in the 21st Century*, Stanford University Press 2004, p. 96.

⁵⁶ R.J. Art, op.cit., p. 196.

⁵⁷ S. Bieleń, op.cit., p. 324.

⁵⁸ J. Stachura, op.cit., p. 36.

During the Bush administration, the concept of preventive strike dominated. It was a meaningful example of the US unilaterally granting itself the role of a superior arbitrator while solving international conflicts. The concept of preventive strike might be dangerous, as military force could be used not only in case of a real threat from a certain state but also against the state presumed as violating international norms. (It would be a recourse in international law advancement.) The concept of preventive strike was applied by the US in Iraq. (No materials to produce the WMD were finally found in Baghdad.) What was at stake in the conflict on how to solve the Iraqi problem was not Iraq itself but the bases of international order. While opposing American politics, France, Germany and Russia did not call into question the US leadership but opposed violating the principles being beneficial for the whole international community. The dispute over Iraq was the dispute over the character of American leadership in the 21st century – based on the power of ideas and economy or the military power. As Art says “Kosovo War and the second Gulf War demonstrated two faces of the US unilateralism: an overwhelmingly powerful but potentially stand aloof United States, and overwhelmingly and highly interventionist United States. Neither unilateralist face pleased the Europeans”.⁵⁹

10.3.5 Is the EU “Jealous” of American Hegemony?

This question is humorous as the concept of jealousy does not exist either in the politics or in international relations. That means the EU is not “jealous” of American hegemony. However, if we put the question of competition between the EU and the US resulting from American hegemony, the answer is not so simple. It seems that the EU cooperates rather than competes with the US (economy and military cooperation; the EU has ceded to the US military power). However, some single European states (especially France and Germany) have taken feeble attempts to the political rivalry within the US (e.g. Iraq War). It does not change the fact that “synergy” of transatlantic relationship dominates. The EU is aware of its ability as well as the US power.

America is not an imperial power in the classical sense, i.e. seeking territory abroad. America is hegemonic – it does aim to control foreign policy. The hegemony is a part of bargain in which America provides protection and allies offer bases and support. From the American point of view, countries can choose either to be allies or to be irrelevant, in which case they can be left alone.⁶⁰

⁵⁹ R.J. Art, *op.cit.*, p. 200.

⁶⁰ R. Cooper, *op.cit.*, p. 48.

American hegemony, clearly formed at the beginning of the 21st century, was a result of using American power actively. Washington hegemony was perceived in a positive way as long as it was used to maintain an existing international order. However, when the US began to impose its own model of the international order, American hegemony started to be regarded as a threat of abusing an unlimited mandate in order to use force in international relations.⁶¹ The US is the only power with a global strategy – in some sense it is the only power with an independent strategy at all. Every other country defines its strategy in relation to the US.⁶²

Despite the significant dissonance and cooling of transatlantic relations, neither the US, nor its European allies wanted them to result in a serious and a permanent crisis. They moved towards resolving the deadlock and minimizing the consequences of the dissonance. The US remained the most important strategic partner for the EU, and the Bush's National Security Strategy had a huge impact on forming the foreign and security policy of the EU. In 2000s, the American failures in the Middle East urged the White House to co-operate with the allies. Another factor conducive to a better atmosphere around transatlantic relations was a more conciliatory leadership style adopted by Bush.

The Obama administration is expected to deepen transatlantic cooperation. On such matters as human rights promotion, promotion of democratic values, fight against terrorism, stopping the WMD proliferation, resuming the Middle East peace process, which appear to be the most critical problems related to international politics and global security, the states on both sides of the Atlantic take a concurrent stand. The American administration assigns a great importance to tightening the cooperation with the European allies as well as coordinating politics towards Russia, Iran, the Middle East and towards global problems (trade liberalization, climate change, etc.) In 2009, a better atmosphere in relations between Washington and Moscow caused certain anxiety in European countries and made transatlantic relations more complicated. America accused Europe of not being able to form a common vision and strategy in relations with Russia. The EU took up a discussion neither on Russian president Medvedev's proposal for the new security strategy nor energetic security. There were three obvious and unavoidable differences: interests, standpoints and opinions concerning various matters relating to the US, the EU or its particular member states. These differences appear to be unavoidable.⁶³ Both parties are aware of common interests and

⁶¹ S. Bieleń, *op.cit.*, p. 394.

⁶² R. Cooper, *op.cit.*, p. 45.

⁶³ J. Kiwerska, *op.cit.*, p. 82.

hope to achieve a kind of mutual flexibility, particularly in issues of secondary importance.

A noticeable spirit of *détente* in transatlantic relations began during the Russian-Georgian War (August 2008). Both Americans and Europeans strongly opposed Russian hegemonic politics. Both sides of the partnership condemned Russia for its actions, although the official statements varied in tone.⁶⁴

10.4 Cooperation Alternatives for the US and the EU

10.4.1 The US–China Relations: Any Competition?

For some years after September 11, relations between the US and China appeared to be on a steadily rising course. As Washington turned its attention to the urgent dangers of terrorism and proliferation, it seemed less inclined to see China as a strategic competitor (actual or potential).⁶⁵

When Obama entered the White House, all the talk was of a potential G-2, i.e. Sino-US leadership,⁶⁶ instead of already well-established G-20. Some people predicted comeback to bipolar balance of power with one new player. Obama's economist Summers said there was "no question the relationship between the US and China will prove of larger historical importance than either the Cold War or anything that happens with the Islamic world".⁶⁷ In 2009 Hilary Clinton chose China for her first official visit as the Secretary of State. Upholding human rights was no longer a priority for Washington, but cooperation on trade and climate change. However, as Shambaugh says: "differing political values and systems will continue to be a barrier; volatile nationalism in China remains a wildcard; economic protectionism embodied in low renminbi and competition is not going to disappear; mutual strategic interests in Asia only partially converge and China's military modernization will continue to alter the regional balance of power".⁶⁸

⁶⁴ See more: D. Milczarek, op.cit, pp. 44–45.

⁶⁵ A.L. Friedberg, *The Future of U.S.–China Relations. Is Conflict Inevitable?*, "International Security" Fall 2005, vol. 30 (2), p. 7.

⁶⁶ K. Rafferty, *Chilling U.S.–China Relations*, "The Japan Times", 23 November 2011, <http://www.japantimes.co.jp/text/ea20111123a2.html> (20.12.2011).

⁶⁷ M. Strachan, *Larry Summers: 'No Question' U.S.–China Relations More Important Than The Cold War*, "The Huffington Post", 18 March 2011, http://www.huffingtonpost.com/2011/03/18/larry-summers-china-recovery_n_837657.html (20.12.2011).

⁶⁸ D. Shambaugh, *US–Chinese Relations Take a New Direction? – Part I*, YaleGlobal Online, 24 January 2011, <http://yaleglobal.yale.edu/content/us-chinese-relations-new-direction-part-i> (20.12.2011).

Chinese economy is the second strongest in the world. The power of China is systematically rising. Beijing and Washington have to seriously co-operate to address not only global economic challenges and nuclear proliferation concerns related to Iran and North Korea, but also such issues as security in Afghanistan and Pakistan.

US–China economic ties have expanded robustly over the past three decades. Total US–China trade rose from \$2 billion in 1979 to \$457 billion in 2010. China is currently the second–largest US trading partner, its third–largest export market, and its biggest source of import.⁶⁹ The rapid pace of economic integration between China and the US (benefiting both sides) has made the trade relationship increasingly complex.

As Friedberg says, in foreign affairs most Americans are liberals. Regarding the future of the US–China relations, liberal optimists believe in three causal mechanisms: economic independence, international institutions, and democratization.⁷⁰ Since the mid-1990s the presumed links between trade, growth, democracy and peace have been features of the official US rhetoric regarding the relations with China. American realists note that, first of all, the power of China is rising. Secondly, throughout history, rising powers have tended to be troublemakers. Most American realists would be content to conclude that China, like all previous potential hegemon (e.g. Hitler’s Germany, USSR), will be strongly inclined to become a real hegemon⁷¹ and, in result, threaten the US position.

Obviously, it is easy to find some argumentations of discord in the American–Chinese relations. For the US, it’s Chinese reluctance to condemn a series of North Korean provocations or its expansive claims to disputed territory in the South China Sea, among others. For China, points of friction included US arms sales to Taiwan, Obama’s meeting with Dalai Lama, US joint military exercises with South Korea in the Yellow Sea.⁷² Europe should not fear that China will take its place in relations with the US. China remains and will remain more a competitor than an ally of the US.

10.4.2 Any Serious Cooperation Alternatives for the EU?

What alliances should be strengthened (or even created) by the EU and with whom? As a general observation, the position of Europe in international

⁶⁹ W.M. Morrison, *China–U.S. Trade Issues*, CRS Report RL33536, <http://www.fas.org/sgp/crs/row/RL33536.pdf> (20.12.2011).

⁷⁰ See more: A.L. Friedberg, *op.cit.*, pp. 12–16.

⁷¹ *Ibidem*, p. 20.

⁷² S.V. Lawrence, T. Lum, *U.S.–China Relations: Policy Issues*, CRS Report R41108, <http://www.fas.org/sgp/crs/row/R41108.pdf> (20.12.2011).

relations is steadily weakening. The role of Europe as a hegemonic power has passed forever. However, Europe must take action to remain among the most powerful states, because of its strong economic position and for its own safety. Alliance with the US (especially within the NATO) is particularly important for Europe and under no circumstances shall it be lessened. However, given the fact that the US continues to be a hegemon jealously guarding its strong position, Washington is looking for other alliances (not only from Europe) because it also has its own upheld interests in other parts of the world.

Should Europe look for other reliable allies? First of all, we ought to answer if common interests of the EU–US still exist? It seems that conflicts of interests dominate in the EU–US relations currently. Only a few European states (such as UK) share the common interests with the US. There is a clear division within the EU. Germany will try to rebuild its power in international relations, like France. Rebuilding the US influence in Europe is rather doubtful; in fact the US presence in Europe is now unnecessary. We are dealing with slow but systematic withdrawal of the US from Europe. American presence was necessary until the end of the 1980s. It lost its *raison d'être* as a result of geopolitical changes. Instead, Europe is doomed to the alliance with the US. Reintegration of American power is likely over next several years. The US has enormous potential to maintain its hegemony (the charismatic leader can help). Predicting the emergence of China as a hegemon is rather exaggerated. China is struggling with its own problems, especially demographic ones.

In spite of many differences between Europe and the US (and geopolitical changes) transatlantic alliance will remain strong. Actually, Europe has no other alternative. Europe will not create alliance with China,⁷³ because – unlike the US – it treats human rights very seriously. Besides, China would not be interested in such alliance, because it would not find the recipient. China could create alliances with single, powerful European states (like Germany, France, Italy), but not with the EU itself.

Theoretically, Europe could turn to the alliance with emerging powers – Brazil⁷⁴ (having quite similar culture to European one) and India.⁷⁵ However, it is an unrealistic project, at least for the next decade or even two. Brazil is so far interested in realizing its own interests in South America and actually does not go beyond this area. India, in turn, continues to struggle with a serious

⁷³ See more: J. Meng, *EU–China Relations: Problems and Promises*, <http://aei.pitt.edu/9060/1/MenEUChinaLong08edi.pdf> (12.01.2012).

⁷⁴ See more: S.F. Chrystenses, *Argentina and Brasil's Relations to the EU*, http://vbn.aau.dk/files/35942861/Steen_Fryba_Christensen.pdf (12.01.2012).

⁷⁵ G. Grevi, A. de Vasconcelos, *Partnership for effective multilateralism: EU relations with Brasil, China, India and Russia*, Paris 2008.

conflict with Pakistan and all its energy is consumed by this conflict. For now, India has neither time, nor aim of opening to the world.

10.5 Conclusions

First of all, considering the fact that the EU will not be able to react effectively beyond the territory enclosed by its borders for a long time, it seems that strengthening its defense capacities as a part of the transatlantic alliance and remaining the US ally will be the most appropriate solution for Europe.

Second, global problems force both Europe and the US to maintain their further cooperation since their long-range goals are shared and since the US – so far – remains the only credible partner for the EU. Moreover, an important factor is that the EU, thanks to CFSP, is the only real organization, besides NATO and the UN, that can effectively engage in conflict management operations on its own. Should security challenges arise but the US decline to participate on its own, or participate through NATO, or where NATO engagement might be less acceptable to local actors, the EU could play a useful role.⁷⁶

The EU is aware of its economic advantage, as its Member States are becoming an equivalent the US partner due to their gross domestic product. In terms of its economic interests, the EU is searching for ways to develop its capacity to compete with the US. This strategy means amassing enough economic power to move out from under the shadow of the US, or at least become a capable partner.⁷⁷ The US, on the other hand, believes that its assistance is of a symbolic and political rather than of an operational character due to its enormous military advantage over the allies. That is why America acted independently in its operations in Afghanistan and Iraq.⁷⁸

However, the reason for concern could be the US drifting apart from its European origins (meant as cultural and civilization origins) to the regions being the source of immigrant inflow – Latin America and Southeast Asia. America is predicted to take an interest in Europe to a smaller and smaller extent. How long will the values that Europe and America share survive?

The US is interested in a closer cooperation with China (perhaps even at the expense of Europe). The US and China share economic issues. Americans realize that without rejuvenating its economy, the US cannot remain a global leader.

⁷⁶ www.globeurope.com/standpoint/hillary-s-offer (20.10.2011).

⁷⁷ M.R. Brawley, *op.cit.*, p. 96.

⁷⁸ S. Bieleń, *op.cit.*, p. 403.

Currently, Europe is trying to cope with economic crisis and stabilize the euro. America is trying to get out of its own economic crisis. To conclude, transatlantic partnership is still holding a key importance for global scale activities. Neither the EU nor the US is powerful enough to achieve their goals on their own. Both European and US power are diminishing in the third or fourth decade of the 21st century – these are India and especially China that will be exercising their growing power as well as other serious actors appearing on a global stage. Faced with a rising China, the Obama administration emphasized that it “welcomes a strong, prosperous and successful China that plays a greater role in world affairs”.⁷⁹ It seems that only by tightening mutual relations on both sides of the Atlantic and by developing the real partnership, the Western World could be united in order to defend and achieve its shared interests and values.

The problem is more complex, however, as it applies to the essence of the values. In a socio-cultural sphere, persisting religious beliefs and ideas seems to be one of the most spectacular attitudes in America whereas European societies are becoming more and more secular. Despite the differences, it is commonly believed that consensus and tightening the cooperation in transatlantic relations are necessary to let the Western World develop and survive in the new globalized and polycentric world. In April 2010 US Secretary of State Hillary Clinton expressed the American point of view: „We do not see the EU as a competitor of NATO, but we see a strong Europe as an essential partner with NATO and with the United States”.⁸⁰ Meanwhile, American Treasury Secretary Geithner has made clear that only if China makes progress on US priorities (such as the reduction of trade and investment barriers, protection of intellectual property rights and currency revaluation), will the US make progress on Chinese priorities, like export of high-tech products and market economy status.⁸¹ Europe should remember about the dream of a robust US–China partnership to lead the world. For the US good relations with China seem to be very important. If tensions between the two Pacific powers worsen, the whole Eastern Eurasia could become divided in a new cold war. On the other hand, a deepening US–China partnership could bring increased possibilities for economic growth and the successful management of pressing global problems, such as terrorism and the proliferation of mass destruction weapon.

The EU should take care of strong transatlantic partnership. Such a partnership is not just political or military but also economic and include the

⁷⁹ S.V. Lawrence, T. Lum, *op.cit.*

⁸⁰ <http://www.globeurope.com/standpoint/hillary-s-offer> (20.10.2011).

⁸¹ E.C. Economy, *Reality in U.S.–China Relations*, Council on Foreign Relations 14 January 2011, <http://www.cfr.org/china/reality-us-china-relations/p23803> (20.12.2011).

realm of nation building in all its aspects. This is a natural partnership, given the fact that the transatlantic nations are all democracies, all dispose of much of the economic product of the world, and all have an interest and concern in what happens in so-called developing world.

Eurasian Economic Union. An Eastern Competitor for the European Union?

ADAM R. BARTNICKI*

On 18th November 2011, the presidents of Russia, Belarus and Kazakhstan – Dmitry Medvedev, Alaksandr Lukashenka and Nursultan Nazarbayev – signed an agreement in Moscow, the aim of which was to establish the Eurasian Economic Union within three years. This agreement, although being mainly intentional one, is another step to deepen the co-operation of these states beyond the Commonwealth of Independent States (CIS). It ought to provoke a question if an organization being potentially competitive to the European Union is being formed in the Eastern frontier of the European Union. In the context of an attempt to establish “the Eastern Union”, i.e. an organization similar to the EU project, it is worth considering whether the Eurasian Economic Union is a peculiar CIS II – an ineffective and inactive organization in a longer perspective or whether it is a real chance for political and economic CIS integration, following the EU example. In order to answer these two questions one needs to follow the motives by which the Moscow agreement was driven, its core and the aims its signatories wish to achieve.

While making an attempt to answer the questions presented above, I will analyze the following: Other integration projects on post-Soviet territories; Factors enabling integration of Belarus, Russia and Kazakhstan within the Eurasian Economic Union – mainly economic, historical, socio-cultural issues and, a significant problem, the actual lack of democracy in the countries being discussed (authoritarianism); Customs Union of Belarus, Kazakhstan and Russia, coming into existence on January 1, 2012 and its governing body, the Eurasian Economic Commission, the aim of which is to prepare Belarus, Russia and Kazakhstan for further integration. In this paper I will also discuss particular partners’ interests – it will allow better

* PhD, Faculty of Law, University of Białystok, e-mail: adambartnicki@me.com.

understanding of their decision. Finally, I will present the conclusions responding to the problems mentioned in the introduction and the forecasts concerning both the Eurasian Union and its possible relations with the European Union.

11.1 Integration Projects on the CIS territories

On 8th December 1991 the leaders of the Russian, Ukrainian and Byelorussian republics declared by an unanimous, although not entirely legal formula, the Soviet Union being dissolved. Legal and formal obstacles were circumvented by invoking the Treaty of 1922, as the Soviet Union was dissolved by the same states that had established it. The Belavezha Accords signed in Viskuli was, in fact, an illegal coup aiming to remove ties of Soviet government, structures and state apparatus. They allowed the post-Soviet states to gain a complete independence and their leaders to enjoy political freedom. In this perspective, the agreement proved to be successful.

11.1.1 Commonwealth of Independent States

On the same day when the USSR was dissolved, the agreement on the creation of the Commonwealth of Independent States (CIS) was signed. This agreement was perceived in a different way by its leaders. Yeltsin counted on reconstructing the Union in a new formula, under Russian leadership. For Ukraine, the CIS was a way to separate from Russia in a peaceful manner.¹ Belarus and Kazakhstan feared breaking ties between the states suddenly. On 21 December 1991 the leaders of eight Soviet Republics – Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Tajikistan, and Uzbekistan signed the Declaration of CIS in Alma-Ata² and joined the CIS (Georgia joined two years later, in December 1993).³ The purpose of signatories of the Declaration was to maintain the commonwealth elements

¹ There were elements of potential crisis at the very beginnings of the Commonwealth. Post-Soviet states' borders were determined according to the layout of the Socialist Republics – it allowed avoiding numerous potential conflicts but it did not prevent appearing such in future, considering the fact that only USSR republics were members of the agreement. It degraded other units of the former Soviet Union – districts and autonomous regions. So far they enjoyed certain quasi-sovereignty, now they became only parts of the states – this is where the conflicts occurred. Moreover, millions of citizens were found out of their new countries.

² Since 10th December Astana has been a capital of Kazakhstan.

³ In 1991–1993 the civil war swept across Georgia. Eduard Shevardnadze, supported by Russia, won the conflict. The price to be paid for the support was joining the CIS (1993) and dependence on Moscow. In 2008 Georgia left the Commonwealth.

of the collapsing USSR, including mainly socio-economic, transportation and military sphere.⁴ An important issue was re-defining the post-Soviet space and establishing mutual relations among the CIS states. It was decided to open the internal borders, co-ordinate foreign policy, make the rights and freedoms of the CIS citizens equal according to European standards, increase the co-operation concerning culture, art, sport, etc. The signatories reached an agreement concerning securing interests of soldiers and their families evacuated from the states of former USSR.

Since its very beginnings the Commonwealth has been an inefficient and artificial entity. At first, it seemed that the republics would take advantage of their established mutual relations that would contribute to their tight economic, and even political, integration. These relations, however, were not as strong as they seemed to be and they soon began being dissolved, especially when facing the conflict of interests and developing Russia's weakness.⁵ Weak integration ties resulted, to a large extent, from the experience of the past. Economic ties in former Soviet republics appeared to be only the CIS founders' wishful thinking. Trade exchange in the USSR functioned according to specific rules of a system based on the central party control. At the end of the 1980s this system of republics' economic co-operation began deteriorating gradually to be finally destroyed at the beginning of the 1990s, when the elements of free market economy appeared. The reasons for this situation were of a complex nature. The main factor was different time and pace when market reforms were introduced. Some CIS states (Uzbekistan, Georgia, Turkmenistan, Ukraine) did not intend to tighten their economic relations with Russia, transferring their political and social dominant contacts towards the states not being affiliated with CIS. This situation resulted in reducing the economic co-operation. For example, in 1991 total trade exchange among CIS states reached 60% to be reduced to 30% in 1999. During the same period a sharp decrease in Russian trade with CIS states was observed. In 2010 Russia's trade exchange with CIS states made up 15% Russian exports and 14% Russian imports (see Chart 2). There was a particularly dramatic drop in trade exchange between the Russian Federation and CIS states in 1998–1999 (during the financial crisis in Russia).

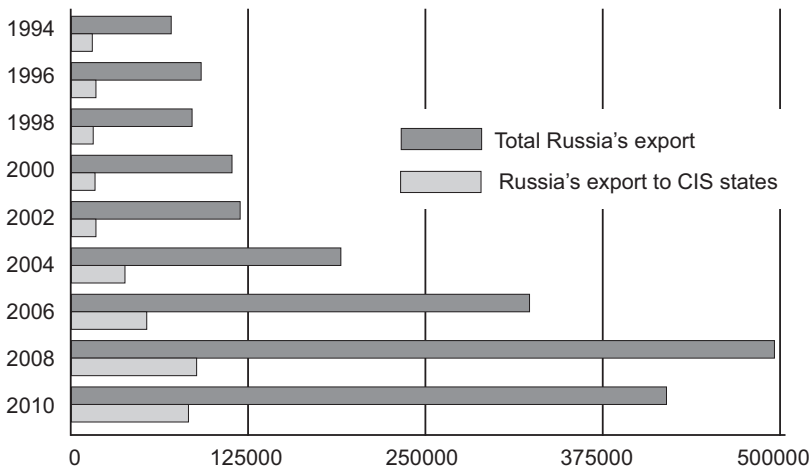
⁴ И. Иванов, *Новая Российская дипломатия*, Москва 2002, p. 104.

⁵ Economic community, on the model of the EEC also appeared impossible to be established due to the fact the CIS lacked the members willing to donate rather than to benefit. During its first stage it did not refer to Russia which was ready to pay for its political leadership. When its financial reserves finished, stagnation swept across the Commonwealth.

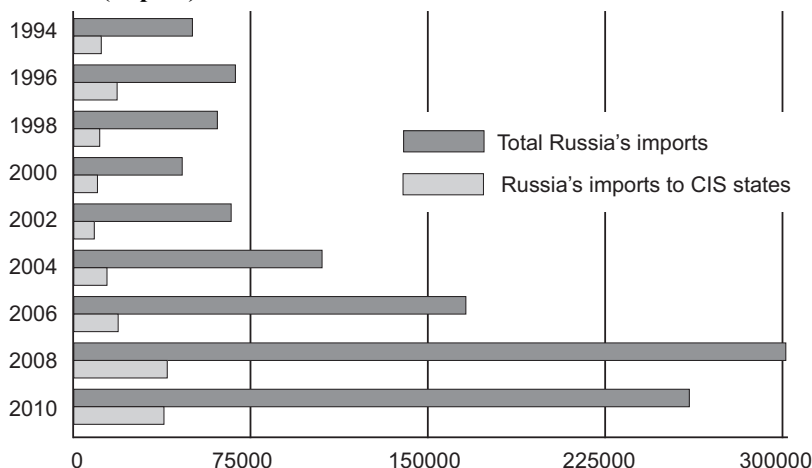
Table 1 Russia's share in a total CIS states' trade exchange in 1991–2000

State	Export		Change in %	State	Import		Change in %
	1991	2000			1991	2000	
Moldova	42,2	42,9	1,6	Belarus	54,3	64,7	19,1
Belarus	57,6	49,9	-13,4	Kazakhstan	57,0	48,0	-14,2
Tajikistan	44,7	34,1	-24,0	Ukraine	61,7	42,8	-30,7
Uzbekistan	52,2	23,1	-56,4	Kirgistan	49,5	25,3	-48,8
Ukraine	57,1	24,1	-58,0	Azerbaijan	45,5	25,3	-55,5
Kazakhstan	55,1	20,3	-63,2	Turkmenistan	33,9	13,6	-60,5
Georgia	58,3	20,7	-64,5	Moldova	41,9	14,8	-64,6
Armenia	63,3	15,0	-76,3	Armenia	44,9	14,9	-66,8
Turkmenistan	48,4	7,5	-84,5	Uzbekistan	43,6	19,4	-68,6
Kirgistan	45,9	11,0	-89,0	Georgia	55,5	14,8	-73,3
Azerbaijan	53,0	4,1	-92,3	Tajikistan	41,7	4,5	-89,3

From: Ю. Шишков, *Россия и СНГ: неудавшийся брак по расчету*, „Pro et Contra” 2001, no. 1–2, vol. 6.

Chart 1 Dynamics of Russian trade with CIS states in 1994–2010 in billions of US dollars (export)

From: http://www.cbr.ru/statistics/credit_statistics/print.asp?file=trade.htm (21.09.2012).

Chart 2 Dynamics of Russian trade with CIS states in 1994–2010 in billions of US dollars (import)

From: http://www.cbr.ru/statistics/credit_statistics/print.asp?file=trade.htm (21.09.2012).

Table 2 Dynamics of Russian trade with CIS states in 1994–2010 in billions of US dollars

	Total Russia's export	Export to CIS states	Total Russia's import	Import to CIS states
1994	67379	15715	50452	13997
1995	82419	16973	62603	18344
1996	89685	18566	68092	20819
1997	86895	19076	71983	18588
1998	74444	15793	58015	14302
1999	75551	29158	39537	10379
2000	105033	14250	44862	13428
2001	101884	15270	53764	13041
2002	107301	16375	60966	12151
2003	13592	21357	76070	15077
2004	183207	30203	97382	19891
2005	243799	33548	125433	21900
2006	303550	43382	164281	24045
2007	354400	53834	223485	31789
2008	471603	71148	291861	38953
2009	303388	48118	191803	24076
2010	400419	62617	248738	35168

From: http://www.cbr.ru/statistics/credit_statistics/print.asp?file=trade.htm (21.09.2012).

Significant CIS problems were also revealed in a political sphere. They mainly concerned different ways of CIS perception as well as defining its global position. Several states (Turkmenistan, Uzbekistan, Ukraine) found it difficult to accept Russia's leading role in the Commonwealth. In the early stage of CIS existence its members did not establish diplomatic relations with the majority of the states in the world nor did they have their diplomatic corps. That is the reason why their foreign policy had to be based on the co-operation with Moscow and its assistance. It started to be changed gradually when CIS states decided to have their own independent foreign policy, sometimes opposing Kremlin concepts. At the same time, the tendencies in their foreign policy were changed. Ukraine inclined more clearly towards the EU,⁶ Asian republics towards Turkey or Iran. Regional conflicts posed another threat to CIS.⁷ In spite of initial declarations, there were economic conflicts occurring in CIS. What is more, Russia and other stronger states still wanted to subordinate weaker republics to their interests.

Integration problems within the Commonwealth of Independent States and its obvious weakness do not deny positive features of bringing this organization into existence. There are no doubts that it protected the post-Soviet territories from the chaos that might have resulted from the USSR dissolution. It was important as there were huge supplies of military weapons (including WMD) remaining in particular republics, which could have been used in numerous religious and ethnic conflicts spreading across the post-Soviet republics, particularly in the south of the former Soviet Union. The Commonwealth of Independent States also meant the attempts (more or less successful ones) to form the common market and spread the achievements of liberal democracy. The Russian Federation, despite its dreams of power, has never been able to dominate the CIS. What is even worse in case of a dominant state, it has not been able to create integration mechanisms or concepts. It did not succeed in reconstructing the post-Soviet military and economic space. All members of the Commonwealth of Independent States gradually realized that it could not become consolidated until Russian issues were not ordered.⁸ At the beginning of

⁶ The President of Ukraine, Leonid Kuchma, declared in 1996 that Ukraine had chosen integration with the West. Compare: D. Deska, *Pod sztandarem niepodległości*, „Rzeczpospolita” 24.08.1996.

⁷ For example: between Tajikistan and Uzbekistan (the access to water); between Uzbekistan and Kazakhstan (dominance in Central Asia); War between Armenia and Azerbaijan (Nagorno-Karabakh 1991–1994); Separatistic conflict in Transnistria (Moldova); Separatistic conflicts in the territories of Georgia (Abkhazia, Adjara, South Ossetia); The Georgia-Russia War 2008; Russia's energetic pressure (Ukraine, Belarus, Georgia).

⁸ И. Кривохижа, *Россия в новой структуре международных отношений (Наброски к концепции национальной безопасности)*, „Polis” 1995, no 3, p. 22.

the 21st century there occurred clear symptoms of CIS decay. It began existing as a merely formal body.⁹ It gradually disintegrated into several economic blocs¹⁰ not willing to integrate with one another. There were also fewer and fewer political benefits resulting from functioning of CIS. Russia became less interested in maintaining this creation, existing only in theory, realizing that contemporary politics and economy required more than a simple attempt to reactivate the USSR which, similarly to the CIS, proved to be both inefficient and ineffective.

11.1.2 Other Regional Organizations

Despite the crisis the Commonwealth of Independent States was not liquidated. Yet, other multilateral organizations were created, gradually leading to the EEU (the Eurasian Economic Union) formation. On 2nd April 1996 Russia and Belarus signed the Commonwealth announcing their union. On 8th December 1999 they signed a treaty on a two-state union, and on 26th January 2000 the Union State of Russia and Belarus was established.¹¹ Russia and Belarus intended to create a single economic area with certain features of a union state, where a single market, economic, defense and foreign policy were intended to be joining elements. The Union State intended to have a common parliament and a union cabinet.¹² These goals, however, have not been achieved. Belarus found Putin's proposal for the "ultimate unification" of both countries, put forth in August 2002, offensive – Belarus was to form a part of Russia.¹³

In October 2000 the Eurasian Economic Community was created¹⁴ (Russia, Belarus, Kazakhstan, Kyrgyzstan and Tajikistan), the aim of which was creating a single economic area and – in a further perspective – introducing single currency. In September 2003 Belarus, Kazakhstan, Russia and Ukraine signed an Agreement on Formation of CES (Common Economic Space). The documents were not adopted by Ukraine that ceased to be the part of the project in 2005.

In May 2006 GUAM Organization for Democracy and Economic Development¹⁵ was established as an organization alternative to the agreements

⁹ А.М. Салмин, *Россия, Европа и новый мировой порядок*, „Polis” 1999, no 2, p. 11.

¹⁰ Ю. Шишков, *Россия и СНГ: неудавшийся брак по расчету*, „Pro et Contra” 2001, no 1–2, vol. 6, p. 104.

¹¹ Texts of agreements: <http://www.soyuz.by/ru/?guid=10046>.

¹² Договор о создании Союзного государства, <http://www.soyuz.by/ru/?guid=10447>.

¹³ S. Popowski, *Drugiego ZSRR nie będzie*, „Rzeczpospolita” 14.06.2002.

¹⁴ Official organization's website: <http://www.evrazes.com/>.

¹⁵ Co-operation within GUAM has continued since 1994 r. Organisation's website: <http://guam-organization.org/node/449>.

State	CIS	CSTO	USRB	GUAM	EurAsEC	CU	RBKCU	SCO
Russia	+	+	+		+	+	+	+
Belarus	+	+	+		+	+	+	
Kazakhstan	+	+			+	+	+	+
Azerbaijan	+			+				
Moldova	+			+	O			
Armenia	+	+			O			
Tajikistan	+	+			+			+
Turkmenistan	+							
Uzbekistan	+	+						+
Kyrgyzstan	+	+			+	+		+
Ukraine	+			+	O			
Georgia				+				
China								+

Key: CIS – Commonwealth of Independent States
 CSTO – Collective Security Treaty Organization
 USRB – Union State of Russia and Belarus
 GUAM – GUAM Collective Security Treaty Organization
 EurAsEC – Eurasian Economic Community
 CU – Customs Union
 RBKCU – Customs Union of Belarus, Kazakhstan and Russia
 SCO – Shanghai Cooperation Organization
 O – observer

initiated by Russia on CIS territories. It was established by the states (Georgia, Ukraine, Azerbaijan and Moldova) being disconcerted by Moscow hegemony in their region.

In August 2006 Russia, Belarus and Kazakhstan began forming the customs union (it was confirmed by the agreement of October 2007). Two years later in June 2009 – President Vladimir Putin announced the intensification of this plan – indeed, on 27th November 2009 several documents were signed (civil code coming into force was rescheduled from 1st January 2010 to 1st July 2010). On 5th July 2010 Russia, Belarus and Kazakhstan signed a declaration that the Customs Code had come into force (forming the Customs Union).¹⁶ On 9th December 2010 Russian President Dmitry Medvedev, Belarusian President Alaksandr Lukashenka and the President of Kazakhstan Nursultan Nazarbayev signed seventeen major agreements on formation of the Single Economic Space from 1st January 2012. Single Economic Space formed macroeconomic policy framework, free capital flow on financial markets and common regulations of

¹⁶ The Civil Code: <http://www.tsouz.ru/Docs/kodeks/Pages/default.aspx>.

the major elements of monetary policy.¹⁷ On 3rd October 2011 Vladimir Putin, in the article in the *Izvestia*, presented his vision of a new organization – the Eurasian Economic Union (over the next two days presidents of Belarus and Kazakhstan published the articles supporting this project). It was then when the way to deepen integration was opened.

What is interesting, on 18th October a similar agreement within the Commonwealth of Independent States was signed – on the establishment of a free trade zone, aiming to help eliminate many barriers in trade.¹⁸ On 18th December, at the meeting of the Eurasian Economic Community (EurAsEC), Dmitry Medvedev declared that establishing Common Economic Zone would not clash with EurAsEC activities. The president declared that the Common Economic Space welcomed new members – especially those from the Commonwealth of Independent States and the Eurasian Economic Union. The ways of integration, i.e. creating an appropriate “road map” referring to actual economic situation in a particular state and a current situation in the world economy, would be discussed with each country.¹⁹ Russia does not eventually intend to abolish the CIS project, similarly to its intentions to preserve EurAsEC, regarding them as a certain stopover on the way to the Eurasian Economic Union. These both structures, with the Collective Security Treaty Organization (CSTO),²⁰ the Customs Union and the Single Economic Space, are likely to be included into the Eurasian Union.

11.2 Determinants of the EAEU Agreement – Economic Co-operation

From the economic point of view, achieving a deep level of integration assumed by Eurasian Economic Union (EAEU) is not a realistic objective, considering substantial differences of legal solutions, different levels of economic development, certain discrepancies of interests among Russia, Belarus and Kazakhstan as well as a growth scale and dynamics of the project participants’ relations with other partners (particularly Kazakhstan and China). One needs to

¹⁷ More on the subject in the further part of the analysis.

¹⁸ I. Wiśniewska, *Podpisanie umowy o strefie wolnego handlu w ramach WNP*, „Tydzień na Wschodzie”, no 34(194) 10/2011.

¹⁹ И. Крылов, *От Евразийского экономического сообщества – к Евразийскому союзу*, „Народная Газета”, 22.12.2011.

²⁰ Collective Security Treaty Organization established on 7th October 2002 on the basis of the Tashkent Treaty by Russia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan and Armenia. In February 2009 Collective Rapid Reaction Force was established. According to: World Factbook CIA 2011.

realize that the economies of the countries attempting integration within EAEU are rather backward and the countries are relatively poor. It seems obvious that the “Eastern Union” being formed resembles the community of poverty rather than prosperity. In 2010 GDP *per capita* in Russia, Kazakhstan and Belarus was: USD 15,900; USD 12,700; USD 13,600 respectively. This amount for the whole European Union is USD 32,700.²¹ Nevertheless, EAEU partners have already formed the Customs Union, operating efficiently, their economies are related to one another to a large extent and a deeper co-operation might bring numerous potential benefits.²² A significant determinant of an agreement of the Common Economic Space and the EAEU in a further perspective is the economic co-operation between the previous partners. However, its significance is different for particular states. The most important partner in economy for Belarus is Russia whereas Kazakhstan is of minor importance. Economic relations between Kazakhstan and Russia are placed on a relatively high level, which is still far from potential capacities and the needs being declared. Both Kazakhstan and Belarus are important economic partners for Russia – the most important ones (apart from Ukraine) in the Commonwealth of Independent States.²³ In 2008 Russian exports to Kazakhstan made up 2.7% and imports 3.2% of total Russian trade. Their mutual exchange amounted to USD 19,731 billion. In 2009 it decreased to USD 12,800 billion to drop finally to USD 7,921 billion in 2010. Moscow is a far more important partner for Astana. In 2008 Russian trade to Kazakhstan made up 15% exports and 37% imports. In 2009²⁴ 8.2% and 31.2% respectively.²⁵

Trade exchange between Belarus and Kazakhstan is not big. In 2008 exports and imports of Belarus reached USD 365.2 million and USD 171.8 million respectively, in 2009 USD 313.4 million and USD 74.9 million, in 2010 USD 463.5 million and USD 403.7 million. Major export products from Belarus to Kazakhstan are machinery and equipment, dairy products, motor vehicles and sugar whereas its imports include gas (77.4%),²⁶ non-ferrous metals (13.1%) and aluminium (3.7%).²⁷

²¹ According to: World Factbook CIA 2011.

²² A. Wierzbowska-Miazga, *Kolejny etap integracji na obszarze postradzieckim*, „Tydzień na Wschodzie” nr 37(197) 23.11.2011.

²³ In 2008 the exchange with Ukraine made 36% total Russia’s turnover with CIS states, approximately 32% with Belarus, approximately 20% with Kazakhstan 20%.

²⁴ Presented 2009 data ought to be examined considering the fact it was a crisis year for Russia and CIS members.

²⁵ Data according to Russian Customs Service. <http://www.customs.ru/>.

²⁶ Data concerning the percentage share of particular products importation in total Kazakhstan’s imports.

²⁷ Data according to the Belarusian Embassy in Astana: www.kazakhstan.belembassy.org/

Russia plays a significant role in the economy of Belarus. In 2009 mutual trade turnover amounted to USD 23.4 billion. In 2010 the turnover increased by 18.9% and amounted to USD 27.9 billion, including Russian exports to Belarus – USD 18.1 billion (increase by 8%), imports – USD 9.8 billion (increase by 46.1%). The increase in the turnover in 2010 was partly caused by rising prices of the products imported from Russia. Belarusian deficit in the mutual turnover in 2010 amounted to USD 8.2421 billion. Russia made up 46.4% Belarusian turnover in 2010 (exports – 38.9%, imports – 51.8%). Belarus made up 4.5% Russian turnover (sixth position) – exports – 4.6%, imports – 4.3%. Among CIS states, Belarus achieved the second position in the turnover with Russia (the first position was achieved by Ukraine). In a total Russian turnover with CIS states Belarus made up 30.5% in 2010. In 2010 Russian exports to Belarus included mainly fuels and energy which made up 57.3% total exports; metals and metal products made up 13.3%; chemicals made up 9% total exports. In Russian imports from Belarus in 2010 machines, equipment and motor vehicles had the leading position. For instance, there were 2.8 times more trucks and 1.6 times more tractors purchased from Belarus. Food and grocery products reached 27.4% total imports, compared to 25.9% in 2009.²⁸

11.3 Determinants of the Agreement – History and Culture

An important determinant of a deeper integration between Russia, Belarus and Kazakhstan is their common past, going back to the Tsarist period. The territory of present-day Belarus was included into the Russian Empire in 1795, after the Third Partition of Poland. Russia conquered and incorporated Kazakhstan in 1873, but it had remained under Russian domination since the middle of the 18th century. Neither Kazakhstan nor Belarus were quasi-sovereign or, at least, autonomous structures within the Russian Empire. They only gained a certain degree of “independence” in the USSR – as Soviet Republics – in 1919 the Byelorussian Soviet Socialist Republic, and in 1936 the Kazakh Soviet Socialist Republic were established. Both republics, together with the Russian Federative Social Republic and the Ukrainian Soviet Socialist Republic, contributed significantly to the final USSR dissolution, although the Kazakh leader, Nursultan Nazarbayev did not attend the meeting on 8th December in Viskuli,

rus/relations/trade/ (11.01.2012).

²⁸ С. Молева, А. Сотников, *Высокая нота товарооборота*, „Союз. Беларусь-Россия”, no 521 (37).

being held²⁹ by Mikhail Gorbachev. This shared past as a part of the Russian Empire and, then, as a part of the USSR made Russia, Belarus and Kazakhstan unite into an almost homogenous entity. Transportation infrastructure, raw materials distribution system, ties of co-operation in economy as well as stable close political relations among these countries – these factors make a renewed integration inevitable. Russia, Belarus and Kazakhstan are close to one another in a cultural dimension resulting from the common past mentioned above and Russian minority residing in Belarus and Kazakhstan – approximately 12% and 25% respectively. Not only is Russian an official language in Belarus (with Belarusian as the other one), it is also a mother tongue for over 60% population. In Kazakhstan Russian is also an official language.³⁰ Majority of city residents use Russian as a basic language in everyday life. Both Belarusian and Kazakh societies are permeated by Russian mass culture, as – thanks to linguistic unity – they have a free and direct access to it.

11.4 Determinants of the Agreement – an Alliance of Authoritarianisms?

The republics that constructed their statehood on the USSR ruins in vast majority accepted a model of presidentially delegated authority (apart from the Baltic States). It was undoubtedly affected by their communist past. It was culturally more acceptable and welcome to accept the strong personal president's power that could be identified with the position of the General Secretary of the Communist Party than a collective parliamentary authority. Transferring ideological and cultural characteristics of the General Secretary to the President meant a social sense of a power and state continuum and guaranteed introducing necessary reforms. Presidency appeared both as a weapon against the former regime and an element providing political stabilization and a modernization.³¹

Presidential system (authoritarianism) was believed to guarantee rejecting certain “anarcho-democracy” that spread across the post-Soviet territories after the USSR dissolution. State leaders had certain trumps in their hands: in the post-communist world being destroyed they were still the guarantors of state stabilization and consolidation, being a point of reference and support. During the initial stage they were genuinely and widely accepted. Occurring

²⁹ Gorbachev made Nazarbayev meet him when he learned about the meeting.

³⁰ Kazakh language is a state language. Art. 7 Kazakhstan's Constitution of 1995 r. The text of the Constitution: http://www.akorda.kz/ru/official_documents/the_constitution/the_constitution.

³¹ В. Кувалдин, *Перелом*, „Известия” 3.07.1991.

authoritarianism did not seem to be an independent form of a political regime but merely active supplementation of a democratic system, being the condition of its better effectiveness. As early as the beginning of the 1990s, most post-Soviet states witnessed personal presidential power appearing, superior to the parliament and not being the object of parliamentary control, merging private property and authority as well as clearly expressed willingness to reconstruct nomenklatura interests and privileges. Communist formula of the state and the power returned in many aspects – it seemed to be necessary, even being only the imitation of prototype. The word “president” was only the semantics for a lot of people since it seemed to be nothing more than another word meaning “the general secretary” or, earlier, “the Tzar”.

Authoritarian tendencies appeared in Russia, Belarus and Kazakhstan in the early 1990s. In March 1994 a new Constitution, which made Belarus a presidential democracy, was adopted. The first presidential election in the independent Belarus took place in 1994 and resulted in an unexpected victory of a deputy Alexander Lukashenka, who gradually introduced authoritarian rule in Belarus. In 1996 he signed a new Constitution which expanded Lukashenka’s power. On 17th October 2004 a referendum on allowing President Lukashenka to stand in further elections was held in Belarus, alongside parliamentary elections. The citizens were to answer the following:

”Do you permit the first President of the Republic of Belarus Lukashenka to participate as a candidate for Presidency of the Republic of Belarus during the President elections and do you adopt the Part I of Article 81 of the Constitution of the Republic of Belarus in the following wording: President is elected for the term of 5 years directly by the people of the Republic of Belarus by means of the universal, free, equal and direct suffrage under the voting by secret ballot?”.

Officially, the turnout during the referendum reached 90.28%.³² As many as 79.42% voters voted yes. President’s attitude towards these results was enthusiastic, declaring that he had not expected such a strong support and such a vast turnout.³³ The amended Constitution eliminated the term limits for the presidency. Referendum results allowed Lukashenka to participate as a candidate for presidency. On 19th March 2006, he claimed another five-year term as president, practically an office held for life. In 2010 elections,

³² Independent survey conducted by Gallup Institute proved, however, that only 48.1% voters supported changes in the Constitution. See: <http://belaruselections.info/archive/2004/sociology/0039320/>.

³³ M. Czerwiński, *Białoruś a systemy polityczne innych krajów WNP. Cechy uniwersalne i swoiste*, [in:] *Przeobrażenia systemowe w państwach Europy Środkowej i Wschodniej. Stan aktualny i perspektywy*, eds. Z. Trejnis, B. Jodełka, Wydawnictwo Akademii Podlaskiej, Siedlce 2004, p. 34.

according to official data, Lukashenka gained 79.67% support and claimed victory in his fourth term as president. Anti-Lukashenka violent protests in 2006 and 2010 did not weaken his power.

President Lukashenka, who is seen as “Europe’s last dictator”, is the reason for the international isolation of Minsk, having a negative influence on the social moods in Belarus. Low efficiency of state administration and the lack of decision-making procedures contribute to corruption and nepotism. Democratic opposition is unable to function under the regime, as it is exposed to persecution. Increasing social stratification is another serious problem, particularly differences between city and country residents as well as these concerning citizens working for the regime and these staying beyond its structures.

Similar situation occurs in Kazakhstan. On 1st December 1991 Nursultan Nazarbayev won the presidential election, being so far the Chairman of the Supreme Soviet (head of state).³⁴ At the very beginning of the term, he announced that Kazakhstan was a democratic republic. In February 1995 he called a referendum concerning extending his term until 1st December 2000. An August 1995 referendum adopted a new Constitution, amended in 1998, extending president’s term to seven years.³⁵ The presidential election was held in Kazakhstan on 10 January 1999.³⁶ Incumbent president Nursultan Nazarbayev won the election with over 80% of the vote. In the presidential election of 2005 almost 100% voters supported his candidacy and in the parliamentary election of 2007 Nazarbayev’s party gained 98 seats in parliament. On 14th January 2011 the Parliament univocally adopted constitutional amendments opening the way for a referendum on an extension of the Kazakh. President’s term of office until 2020. However, they were later rejected by the Constitutional Council (CC) of Kazakhstan as unconstitutional. In April 2011 Nazarbayev was re-elected, receiving 95.5% support. Kazakhstan is an example of an authoritarian regime that can rule in an effective and positive way. Nazarbayev is a popular leader with a genuine social support. Kazakhstan, as the only post-Soviet Central Asian republic, enjoys the position of a regional leader. However, the bigger support for the president one can observe the more obvious is the fact that neither Kazakh opposition nor Kazakh democracy do exist.

The process of liberal and democratic changes was also stopped in the Russian Federation. In June 1991 Russian President – Boris Yeltsin – was

³⁴ Nazarbayev was the Prime Minister of the Kazakh SSR since 1984, and since April 1990 – its President.

³⁵ Закон Республики Казахстан о внесении изменений и дополнений в Конституцию Республики Казахстан от 07.10.1998 N 284-1.

³⁶ Rachat Alijew, Kazakhstan’s minister of foreign affairs, postulated introducing a monarchy, where Nazarbayev would be given *khan* title.

a democratically elected president. In 1992–1993 the conflict between the president and the parliamentary opposition continued, concerning the form and character of a political and economic system in the state. On 23rd September 1993 Boris Yeltsin issued a decree dissolving the Congress of People's Deputies of Russia which was not accepted by the opposition. On 4th October the Parliament building was taken by Yeltsin's military forces, the result of which was broken opposition resistance. On 12th December 1993 the constitutional referendum and the parliamentary election in Russia took place. Majority of voters (58.4%) approved the Constitution which is still in force in Russia. Russia is a democratic, federative, law-based state with a republican form of government, consisting of 89 federal subjects. The legislative power is wielded by the State Duma, the lower house of the Parliament, and the Federation Council, the upper house. Executive power consists of the President and prime minister, but the president is the dominant figure. In 1994–1998 there occurred such negative phenomena as a growing economic chaos, deterioration of democratic processes, appearing "oligarchism"³⁷ and the First Chechen War. In August 1998 Russia was hit by the financial crisis which moved the state close to the brink of political and economic disaster. It resulted in opposition parties, gathered around Yevgeny Primakov, being more vocal and active. In spring 1999 the Parliament attempted the impeachment procedure³⁸ (unsuccessful) against Yeltsin.

On 17th August 1999 Vladimir Putin was confirmed Prime Minister. On 31st December 1999 Boris Yeltsin unexpectedly resigned during the address on Russian television. He declared to have done it in order to allow Russia to enter the new century with new people in power.

Yeltsin transferred all his entitlements to the Prime Minister, including nuclear launch codes. Anti-democratic tendencies that had been growing for a decade of Yeltsin's rule, increased sharply after his resignation. Russia was becoming a more and more undemocratic and uncivil state and the political regime gained more and more control over all aspects of political life. Vladimir Putin won the presidential election of 2000 and 2004, and his protégé, Dmitry Medvedev, was the winner of the election in 2008. The president, enjoying strong social support (60–70%), started the process of the concentration of power in his hands by subordinating power departments, restricting regional autonomy, taking nearly entire control over mass media, replacing political elites and changing the law in order to eliminate opposition from political

³⁷ Russian „oligarchism” is to be defined as establishing huge industrial – financial – media conglomerates tightly connected by politics, influencing the decision-making process in domestic and foreign state's policy.

³⁸ Yeltsin was accused of: signing Belavezha Accords, initiating bloody events of 1993, triggering off the war in Chechnya, weakening state's defense, Russian nation's depletion.

life (electoral regulations to the State Duma were changed). According to the Freedom House Institute, in 2004 Russia ceased to be a democratic state.³⁹

It is Boris Yeltsin to be blamed for Russia's turning back from the way towards democratic reforms. It might be regarded as surprising as he had come to power as a democrat or, at least, as a politician supported by democratic groups, fighting for freedom and destruction of the totalitarian USSR. However, Russian citizens did not remember their president's great accomplishments – establishing sovereign Russia, preserving comparative peace on post-Soviet territories, laying the foundations for private property, establishing good – sometimes even friendly – relations with the West and China and the fact he had given Russia an impulse for changes and development. Instead, he was perceived to have been a leader who had contributed to the state crisis, collapse of the global empire, “dishonest privatization”, poverty, political anarchy, war in Chechnya, corruption, nepotism, and state oligarchization. Pluralism and parliamentary democracy became imprinted in Russian minds as most insulting phrases. The Russians were deprived of optimism and enthusiasm for reforms, market and democracy in the 1990s. They were made to deal with their own material concerns – great emotions they had experienced in 1990–1993 were entirely wasted.

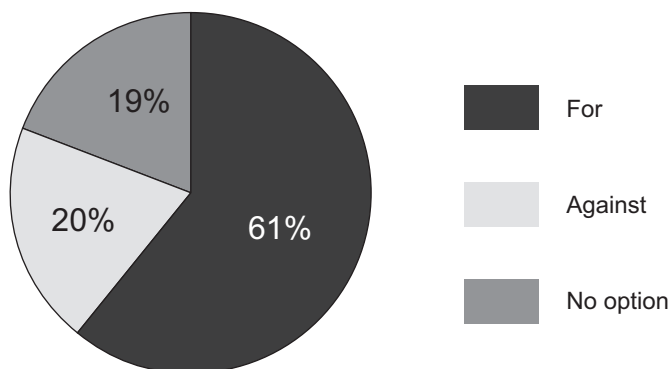
Vladimir Putin's Russia became the state of oppressive and corrupted bureaucracy, aiming to control all social activities, unable to compromise and understand other attitudes, rejecting any criticism, distrustful of competition – the state where democracy was limited to semi-free ability to elect the government.

At the very beginning of 2012, however, the regimes in Russia, Belarus and Kazakhstan have to face the threat of potential social unrest which might challenge the previously exercised political solutions. In December 2010, anti-Lukashenka demonstrations took place in Belarus. On 16th December 2011 in Kazakhstan, in the 20th anniversary of winning the independence, mass riots took place in the Kazakh city of Zhanaozen. They resulted in several dozen deaths of protesters. The situation was stabilized thanks to the mobilization of the institutions of force, the introduction of a state of emergency in the Zhanaozen area and certain conciliatory measures taken by the government. In Russia, major cities witnessed huge demonstrations against rigged results of elections to the State Duma in December 2011. Social movements in the countries mentioned above are still too weak to challenge the regime leadership yet they are more and more problematic for the leaders. In this situation, deepening integration of Kazakhstan, Belarus and Russia seems to be an opportunistic alliance to a large extent, calculated to gain new possibilities and measures in order to keep present *status quo*.

³⁹ <http://www.freedomhouse.org/template.cfm?page=22&year=2004>, (20.01.2010).

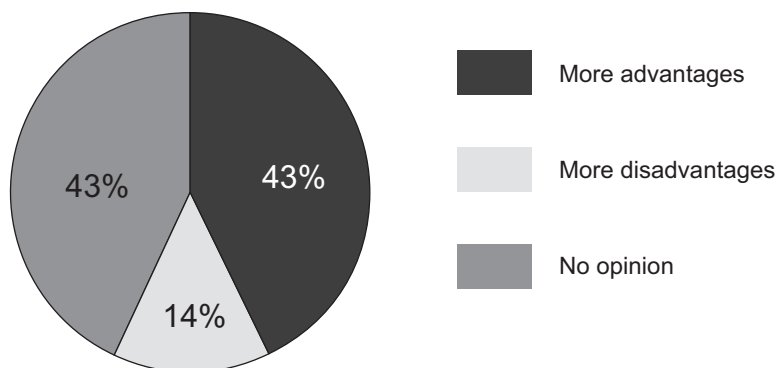
It is difficult to declare explicitly to which extent the EAEU creation is supported by the societies to whom the matter is relevant. Gaining credible data concerning this subject in undemocratic countries is not an easy task. The whole ratification procedure is dominated by the groups related to the regimes being in power. Available public opinion surveys published by the Public Opinion Foundation in Russia on 30th November 2011 proved that the Russians strongly supported the integration.⁴⁰

Chart 3 “Are you for or against integration policy of the republics of the former USSR?”



From: <http://fom.ru/globe/10267> (10.01.2012).

Chart 4 Will Common Economic Space bring more advantages or disadvantages to Russia?



From: <http://fom.ru/globe/10267> (10.01.2012).

⁴⁰ Фонд „Общественное мнение”, Слияние и возвращение, <http://fom.ru/globe/10267> (12.01.2011).

11.5 From Common Economic Space to the Eurasian Economic Union

On 18th November 2011 three documents, the aim of which was to deepen integration of Belarus, Russia and Kazakhstan, were signed in Moscow:

- Declaration of Eurasian Economic Integration announcing the establishment of the Eurasian Economic Union in 2015;
- Agreement on establishment of the Eurasian Economic Commission, starting an organ coordinating integration of the three states;
- Eurasian Economic Commission Regulations.⁴¹

Proclaiming the Eurasian Economic Commission by the presidents is supposed to be another step on the way towards integration of Russia, Belarus and Kazakhstan.

Legal basis for the Common Economic Policy is based on 17 agreements of 9th December 2010, related to all major aspects of economic life in the states being integrated. The agreements anticipate the comprehensive economic integration of Belarus, Kazakhstan and Russia. Its aim is to unify most legal and technical regulations, monetary policy, public support to economy, the access to natural monopoly services.⁴² The CES Agreement reads, *inter alia*

1. The development of a common economic policy, including:
 - macroeconomic policy assumptions, including the determination (based on the model of the EU's Maastricht criteria) of maximum permissible levels of inflation, public debt, budget deficit and interest rates;
 - regulations for selected natural monopolies, but excluding the markets for gas, electricity, heat, pharmacological, petroleum & alcoholic products, and nuclear energy, among others;
 - regulations of competition, as the parties withdrew from a plan to gradually limit state participation in specific spheres of the economy, in favor of a declared intention to reduce the number of enterprises with state participation to 10% in the year 2015;
 - principles of state subsidization of industry and agriculture;
 - regulations for trade in services and for investment policy (although the parties decided that these issues will mostly be regulated by the national law of each country);
 - regulations for protecting intellectual property.
2. Freedom of movement for capital, and a common monetary policy (although the introduction of a single currency is not yet anticipated);

⁴¹ A. Wierzbowska-Miazga, *op.cit.*, p. 3. The texts of documents: http://www.tsouz.ru/Docs/IntAgrmnts/Pages/Perechen_MDTs.aspx.

⁴² A. Jaroszewicz, K. Kłysiński, I. Wiśniewska, *Wspólna Przestrzeń Gospodarcza: kolejny etap integracji wokół Rosji*, "Tydzień na Wschodzie", nr 41(159) 15.12.2010, p. 3.

3. Energy, transport and communications, including the organization, management, operation and development of a common market for oil and petroleum products, as well as access to services and the development of prices and tariffs in electrical energy, the transport of gas, and railway transport;

4. Freedom of movement for the work force, including tackling illegal migration from third countries and determining the legal status of migrant workers and their family members (the parties decided that these issues will mostly be regulated by the national law of each country).⁴³

The Eurasian Economic Commission started operating on 1st January 2012⁴⁴ with the aim to co-ordinate economic union establishment by 2015. According to the Agreement, the Commission will be responsible for customs control procedures (as before, within the Customs Union) as well as macroeconomic issues, competition, energy and, even, monetary policy. The EEC will also deal with public procurement rules and problems related to labor migration. It will gradually take over the economic competencies of the states being its members. The Eurasian Economic Commission consists of a council and a panel, the council comprising one deputy prime minister from each of the member countries and the panel comprising three representatives from each country. The panel is an executive entity, responsible for customs, subsidization of industry and agriculture, fitosanitary regulations. This division follows the EU governing structure – the Council and the European Commission. Panel members are granted the status of federal ministers. Their powers are comparable to these of the EU commissioners. The commission consists of a number of departments responsible for the subordinate departments and advisory bodies. The Head of the Council is Viktor Khristenko, the former Russian Minister of Industry and Trade. Members of the Commission are appointed for 4 years.

The Commission is a supranational governing body, independent of particular governments.

The Commission staff will consist of 800 officials from Russia, Belarus and Kazakhstan. Its lower rank staff will be composed of 84% Russian officials, 10% Kazakhstani, and 6% Belarusians.⁴⁵ The headquarters of the commission will be in Moscow, although the Kazakhstani try to force Astana. The Court of the Eurasian Economic Community (EurAsEC) started its work in Minsk on January 1st 2012. Its aim is to settle the disputes among the community members as well as the companies and entrepreneurs from Russia, Belarus and Kazakhstan.

⁴³ CES agreement according to: Aneks, *Ibidem*, pp. 3–4.

⁴⁴ Договор о Евразийской экономической комиссии от 18 ноября 2011 года. The text of the document: http://www.tsouz.ru/Docs/IntAgrmnts/Pages/Perechen_MDTs.aspx.

⁴⁵ А. Новикова, *Евразийские комиссары получают статус федеральных министров*, „Известия” 17.11.2011.

The Eurasian Economic Union is a project to construct a new union state of a single political center, single economic, military, customs and cultural policy and common currency. The ultimate aim of the agreement “is to achieve the next upper level of integration – towards the Eurasian Union”.⁴⁶

The new “Eastern Union” is practically to resemble the European Union or, according to its opponents, the USSR II. Free movement for capital, services and people will be introduced on the territories of the Eurasian Union (now such free movement is only possible in the Union State of Russia and Belarus) as well as single visa and migration policy (on the model of Schengen Agreement) and abolishing employment restrictions for workers coming from countries other than Russia, being members of the union. There are plans for new supranational entities:

- The Council of the republic leaders and heads of governments of the Eurasian Union states – the supreme political structure;
- The Parliament – the supreme advisory body
- The Foreign Affairs Ministers Council – coordinating foreign policy;
- The International Executive Committee – standing executive and supervising entity;
- The Information Office of the Executive Committee of the Eurasian Union;
- The Council of Education, Culture and Science – creating coherent policy in these areas.

Is there a chance for the project to arise? In order to answer this question, one needs to follow the interests and goals by which particular partners are guided.

11.6 Interests of the Partners of the Agreement

11.6.1 Russia

While analyzing the reasons for the Eurasian Economic Union agreement it needs to be pointed out that Moscow took advantage of its announcement in autumn 2011, several days before the parliamentary elections in Russia,⁴⁷ for the purpose of a successful election campaign. Russian political regime applied the marketing technique similar to that used by Boris Yeltsin before the presidential election in June 1996. On 29th March 1996 Russia, Belarus, Kazakhstan and Kyrgyzstan signed the agreement of “deepening the integration in economic and humanitarian areas”, establishing a close

⁴⁶ В. Путин, *Новый интеграционный проект для Евразии – будущее, которое рождается сегодня*, „Известия” 03.10.2011.

⁴⁷ And several months before the presidential election (March 2012).

alliance within the Commonwealth of Independent States.⁴⁸ On 2nd April 1996 a bilateral agreement between Russia and Belarus was signed that anticipated a tight alliance in December 1999. On 26th April 1996 the Presidents of Russia, China, Kazakhstan, Kyrgyzstan and Tajikistan signed the Agreement of military confidence-building measures in trans-border areas, which formed the basis for the Shanghai Cooperation Organization. Similar event took place before the parliamentary election in Russia in December 1999 and the presidential election in March 2000. Then, the process of integration between Russia and Belarus accelerated dramatically: on 8th December 1999 Belarus and Russia signed a treaty on a two-state union, and on 26th January 2000 the Union State of Russia and Belarus was established.

Before the parliamentary election in December 2011 and the presidential election in 2012, “double” regime of Putin-Medvedev duo decided to demonstrate the dynamic pace of integration in post-Soviet area in order to attract the votes of those nostalgic for the Soviet era. Vladimir Putin’s spokesman Dmitry Peskov declared that the Eurasian Union project would be one of the priorities of the future president’s term. According to Putin, establishing the Eurasian Union is an ambitious assignment to achieve a new upper level of integration and construct a new “huge supranational union that might become one of the political poles in the contemporary world”, being on a par with “other key actors and regional structures, such as the European Union, the United States of America, China and the Asia/Pacific Economic Community”. The Eurasian Union is expected to be an effective link between Europe and a dynamic Asia/ Pacific area.⁴⁹ Psychological aspect of announcing a new stage of integration on CIS territory the day before the 20th anniversary of the USSR dissolution (December 1991) was also a significant factor, considering both building Russia’s image abroad (particularly as the “near abroad” region)⁵⁰ and in its inner dimension – as a proof of government’s effectiveness. The purpose of the declared integration progress was to contrast the EU political and economic crisis. Russia wished to demonstrate that it was still “an attracting center” for CIS members, capable of undertaking the key initiatives in a post-Soviet area. Russia was keen to demonstrate that it was still an independent actor on the world stage, being able to build its own regional formation, considering integration processes in the East Asia (proclaiming the Eurasian Economic Union took place the day before

⁴⁸ In April 1998 the decision of Tajikistan joining the union of four states was taken. Tajikistan was believed to be the major Russia’s ally in Central Asia.

⁴⁹ В. Путин, *Новый интеграционный проект для Евразии – будущее, которое рождается сегодня*, „Известия” 03.10.2011.

⁵⁰ „Near abroad” phrase is used in Russia to refer to former USSR states, perceived to be a natural Russia’s zone of influence.

the East Asia Summit (EAS) – a forum of the states from the East Asia region – Russia and the US were included into EAS in 2011).⁵¹ Russia regards tightening the co-operation in the Commonwealth of Independent States as a mainly political project. It is Kremlin's response to integration processes occurring in the world (e.g. free trade zone promoted for Eastern Europe countries by the EU or for the states of Central Asia by China). The establishment of the Eurasian Economic Union is expected to counteract other states' political and economic expansion in the areas under Russia's control. In the future relations with the EU Moscow might, causing its neighbors to be more dependent, appear as a representative of the whole bloc of states – it might strengthen its position in relations with the Brussels. That is why it is very important for Russia to convince other countries of the region of the advisability of its integration model, particularly Ukraine (not being interested in the project). It would dramatically increase new structure's potential and, as a consequence, its importance.

Signing the agreement is vital for Russia's image. Moscow's aim is to demonstrate that there still exists political and economic unity in post-Soviet area 20 years after the USSR dissolution and it is Russia that is a dominant actor. Russian vision of "Great Europe" means deepening integration with Belarus and Kazakhstan, with Russia's role as a leader, and creating an integrated economic space including the European Union, Russia and its neighbors.

Finally, the new integration project is expected to tighten already existing economic and political ties in the Commonwealth of Independent States, following Russian strategy of reconstructing its economic (as well as political) power in the region – certain USSR II. By establishing the Eurasian Economic Union Russia strives to expand its outlets – integration defined by Moscow increases competitiveness of Russian goods in neighboring markets, particularly cars, machinery and equipment, and to control the distribution of raw materials from the region. However, certain asymmetry needs to be noticed – for Russia it will mean the access to 25-million-market whereas 240-million-Russian market will be open to Kazakhstan and Belarus.

11.6.2 Kazakhstan

Kazakhstan similarly perceives the Common Economic Space or the Eurasian Economic Union in political categories. Astana realizes it is too weak to ignore the co-operation with Russia (being the biggest supplier of goods to Kazakhstan) and to resist increasing Chinese competition independently. For Kazakhstan, deeper economic integration with Russia is the way to defend itself against

⁵¹ A. Wierzbowska-Miazga, *op.cit.*, p. 3.

political and economic Chinese expansion and to find a certain balance with a co-operation with Moscow. It was only several years ago when Kazakhstan began being open towards China, also within the Shanghai Cooperation Organization, treating co-operation with China as an alternative to Russian dominance. Today, Kazakhstan's policy towards both its huge neighbors is more balanced. In this context CES/EAEU is treated as an instrument to both canalize co-operation with China and transform it in the manner expected by Kazakhstan (stopping cheap Chinese produce flooding Kazakhstan). Moreover, the Common Economic Space and opening Russian borders mean a chance to increase foreign investment for Astana. It expects to become the production center for the whole region thanks to Special Economic Zone being formed in Khorgos.⁵² Russia is believed to support Kazakhstan's efforts to join the World Trade Organization in future.⁵³ Owing to EAEU membership it could confirm its major status in relations with Moscow.

It also needs to be mentioned that on 15th January 2012 the parliamentary election took place in Kazakhstan and the regime being in power made use of EAEU integration project in its election campaign.⁵⁴

11.6.3 Belarus

President Alaksandr Lukashenka, when accepting Belarusian participation in the economic union, demonstrates that despite stalled relations with the West, he is not totally isolated on the world stage. Lukashenka makes use of EAEU in order to prove that he is capable of achieving good relations with Russia – his major political and economic partner, even during the deep crisis in Belarus. Taking integration initiative might mean Russian credit support, necessary for the crisis-ridden Belarusian economy. Belarus expects Russia to lower gas prices in 2012 and to maintain the system of preferences concerning the access to Russian outlets for Belarus. In a broader European dimension, Lukashenka might have tried to persuade the Brussels to put aside human right problems and democracy issues in Belarus and to start the co-operation with him in order not to let the country disappear from Europe as an independent political entity.⁵⁵

However, signing the documents initiating EAEU is merely the way to postpone the confrontation with Moscow to Belarus. Doing so, Belarusian

⁵² A. Jarosiewicz, K. Kłyński, I. Wiśniewska, op.cit., pp. 4–5.

⁵³ Russia is still not a WTO member, although it has completed the negotiations on the terms and conditions for its membership.

⁵⁴ Nazarbayev's ruling party gained over 80% votes. According to OSCE, the election did not meet democratic criteria.

⁵⁵ A. Pisalnik, P. Skwieciński, *Bliżej nowego ZSRR*, „Rzeczpospolita” 25.11.2011.

government avoids the risk of a total reduction of energetic or economic subsidies. Belarus, by joining this structure, will maintain reduced prices for raw materials – including duty-free supply of Russian petroleum (it could mean USD 2 billion petroleum subsidies from Russia annually). An access to Russian outlets is another factor of a great importance, as it allows a big part of Belarusian industry to operate (90% food produce and approximately 70% machinery products are sold to Russia). Another advantage for Minsk resulting from the Common Economic Space is free movement for goods and services – it could increase investment advantage of Belarus. In addition, Belarusian authorities assume that adopting Russian legal regulations compatible with WTO requirements will help Belarus join this organization.⁵⁶

Lukashenka hopes to avoid the economic collapse by signing the agreement. Minsk lost control over its debt increase – in 2001 Belarusian Ruble (BYR) was the currency losing value with the biggest pace. At the end of the year the US dollar was 187% more expensive than at its beginning. Belarus could suffer economic breakdown without increased Russian economic subsidies or Russia's direct credit support. Joining EAEU means receiving substantial financial measures for Lukashenka in order to maintain system's stability. On 4th July 2011 EAEU granted Belarus USD 3 billion stabilizing credit from the Anti-Crisis Fund of the Eurasian Economic Community; in September 2011 it received another USD 1 billion directly from Russia.

In November 2011 Russia and Belarus signed the gas deal. For Belarus it is an economic lifeline, preventing the country from a final economic crash; Russia, in return, became free to penetrate profitable and strategic elements of Belarusian economy, for which it had been striving for years. Minsk's main benefit was, first and foremost, a reduced gas price.⁵⁷ In 2011 Belarus paid Gazprom USD 244 per 1000 cubic meters. According to the agreement being in force previously, this price would have to rise to achieve the level of USD 350 within three years (gas price for the EU countries). Now, Minsk will pay USD 165 in the first quarter 2012 and the price of Russian gas for Belarus is expected to remain unchanged for the whole year, while in 2014 Belarus will start paying the same gas price as Russian consumers. Minsk savings will reach USD 2 billion, at least, as a result of this deal, which is referred to as a certain "integration discount". Belarus will also be granted a credit from Russia to construct a nuclear power plant that is to be built by 2018. In return, Russia will take control over Beltransgaz.⁵⁸ It means that in future, even if

⁵⁶ A. Jarosiewicz, K. Kłyński, I. Wiśniewska, *op.cit.*, p. 5.

⁵⁷ А. Ходасевич, Лукашенко ждет дешевого газа, „Независимая газета” 21.11.2011.

⁵⁸ Beltransgaz is a state-owned natural gas infrastructure and transportation company of Belarus operating natural gas distribution by Belarus.

Kremlin-Minsk relations deteriorate, Belarus will not remain any control over Russian gas transit to the West, not even being able, in the case of full blockade of gas supplies from Russia, to pump the gas illegally. As a consequence, the agreement signed in Moscow means accelerating the process of making Belarus politically and economically dependent on Russia. Russia wants Belarus to be left under its total influence, creating the instruments of control over particular areas of the state (from politics, security and defense issues to economy).⁵⁹

In a further perspective, CES/EAEU agreements make Belarusian dependence on Russia stronger and they weaken Minsk's ability to establish better relations with the West. It proves Russia's status as a key political and economic partner for Belarus.

11.7 Conclusions and Forecasts

11.7.1 The Eurasian Union as the USSR II?

Russian politicians admit that the lack of supranational institutions was a significant problem in the Commonwealth of Independent States.⁶⁰ New Eurasian Union is expected not to follow this mistake as well as to avoid the EU's mistake of admitting too many countries to this organization (according to Moscow). Thus, certain states from the outer edge of the Commonwealth of Independent States, such as Mongolia, will be automatically excluded from this structure, which is to function as a certain "club" of former Soviet republics. The states being interested in their membership in the organization are Kyrgyzstan, Tajikistan, Abkhazia and Armenia.⁶¹ Kyrgyzstan and Tajikistan will enjoy some preferences in their access to Common Economic Space. All the states aspiring for the integration are poor, closely connected with Moscow and dependent of Russia. Their participation in Common Economic Space will certainly not increase its potential, only rising the number of entities being dependent on Moscow. In "the Eastern Union" there is not and there will not be any single state that will match Russia in its capacities and influence – today Russia's economic potential makes up 65–70% total CIS potential.⁶² Only Ukraine could balance Russian influence; however,

⁵⁹ K. Kłysiński, *Alaksandr Łukaszenka godzi się na przelomowe ustępowstwa wobec Rosji*, „Tydzień na Wschodzie”, no 38(198), 11/2011, p. 3.

⁶⁰ О. Тропкина, *Евгений Примаков назвал условия для успеха Евразийского союза*, „Известия” 24.11.2011.

⁶¹ Moldova is often referred to as a potential CES member. С. Гамова, *Таможенный союз может стать проблемой для СНГ*, „Независимая газета” 20.12.2011.

⁶² Р. Гринберг, *Не вижу никакой альтернативы щедрости России при создании*

it would only be possible with Western support. Ukrainian membership in Common Economic Space could also challenge Ukraine's pro-Western aspirations, weakening its bargain position towards Moscow. Members of Common Economic Space are "dwarfs" when compared to Russia – that is why it seems difficult to refer to a possible union of equal partners, it is rather a new system of the Russian Federation dominance being constructed on the CIS territories. These are Russian interests that are the most important ones while creating "Eastern Union". For Putin, who regarded the USSR collapse as the major geopolitical disaster of the century, the concept of the Eurasian Union is a key slogan of the presidential campaign, presenting the wide perspective of future integration is a sign of a certain visionariness of the Prime Minister. Putin's concept of "Big Europe" might be its further manifestation, i.e. EU-Russia (EAEU) free trade agreement. Total failure of the integration would mean squeezing Russia out of the area of its political and economic influence by China, the European Union or the US, that is why Moscow is determined to force the EAEU project. Possible success or failure of CES/EAEU is dependent on surrounding states or economic blocs. Both China and the European Union (perhaps the Shanghai Cooperation Organization) might constitute strong political and economic competition for the EAEU.

In Russia there is no soft power attractive enough to draw its neighbors. Kremlin is able neither to modernize the economy nor provide non-authoritarian, stable and efficient rule. It lacks capital sufficient for investment or economic assistance. Following this perspective, it needs to be asserted that all visions of the USSR II appearing in political journalism are groundless. As Dmitry Trenin, a foreign affairs analyst, remarked – Russia does not maintain such strong imperial dynamics as it did in the past and it is not willing to pay its neighbors' bills. On the other hand, young CIS members do not want to give away a big part of their sovereignty to the old dictator.⁶³ When asked about the potential USSR reactivation, Putin himself declared that trying to reactivate or copy solutions of the past would be a naïve attitude.⁶⁴

Евразийского Союза, „Известия” 24.11.2011.

⁶³ Д. Тренин, *Интеграция России в постимперию*, „День” 08.11.2011.

⁶⁴ В. Путин, *Новый интеграционный проект для Евразии – будущее, которое рождается сегодня*, „Известия” 03.10.2011.

11.7.1 Chances for Integration within the Eurasian Economic Union

Achieving the expected level of EAEU integration allowing the establishment of a genuinely operating organization does not seem to be realistic, considering discrepant interests of the partners. This thesis could be proved by the recent past. Only two months after signing the documents establishing CES, Kazakhstan reached an agreement of an increase in uranium supply, which meets 40 percent of China's uranium needs, with China. In 2007 China, Uzbekistan, Turkmenistan and Kazakhstan signed an agreement on the gas pipeline construction and raw materials transportation through Central Asia to China. In December 2009 a gas pipeline Semantepe–Shanghai was opened. On 6th September 2011 construction works on another branch of gas pipeline started in Turkestan and Western Kazakhstan. The Kazakhstan-China Gas Pipeline will be 1475 km long with a designed annual gas transmission capacity of 10 billion cubic meters. According to Sauat Mynbajev, the minister of power industry in Kazakhstan, the pipeline is expected to become operational by the end of 2013. It can be suspected that Chinese scenario for Central Asia is similar to one applied in Africa: developmental assistance in return for raw materials and influence. When the negotiations started in 2007, Russia occupied nearly monopolistic position on power industry markets in Kazakhstan and Turkmenistan. Gazprom was in control of majority of the pipelines and raw materials used in power industry. Completing this investment will mean a total breakdown for Russian influence in this region. Russia was also excluded from another Kazakhstan's project – an oil pipeline running through Azerbaijan, Georgia, to Romania and other EU countries.⁶⁵ Moreover, there are considerable conflicts of interests among the integrating partners, concerning numerous important issues (food/agricultural products; industrial manufacture subsidization by low energy prices; labor force access to labor market or Russian capital expansion in Belarusian power industry sector). Therefore, Russia, Kazakhstan and Belarus are rather unlikely to meet their expected targets entirely (i.e. free movement for goods, services, capital and workforce by 2015). Neither of the parties is ready to divest of a real control over their economies. As a consequence, other unilateral decisions of CSE states protecting their own markets are to be expected (Russian embargo on seed importation, Kazakhstan's ban on oil products exports or oil export duties in Belarus).

⁶⁵ P. Grynczel, *Nazarbajew wczoraj, dziś i jutro*, „Moje Opinie” 18.04.2011. http://www.mojeopinie.pl/nazarbajew_wczoraj_dzis_i_jutro,3,1302611945 (03.01.2012).

Considering this perspective, Common Economic Space might create new conflict areas, particularly in Russia-Belarus relations.⁶⁶

The agreement on establishing of the Eurasian Economic Union by 2015 is of a general character. It is vital to negotiate the details and administrative acts to the agreements. Future relations between the Eurasian Economic Union and the Collective Security Treaty Organization or the Commonwealth of Independent States are not clear.

The task does not appear to be an easy one. The European Union, although it has been co-operating with the NATO for decades, still has not worked out an effective *modus vivendi* with this organization. The Eurasian Union is likely to face similar difficulties.⁶⁷

Although the integration cannot be anticipated following the pace and scope declared by CES members, it can be expected that the determination and interests (particularly these of Russia) manifest future implementation of a part of them, facilitating goods and services movement among the partners. The integration within the Common Economic Space/the Eurasian Economic Union will mean adjusting economic law in the states of the region to Russian economic law to a large extent, which will reduce Belarusian and Kazakh abilities to be involved in any integration projects without Russia (e.g. starting Belarusian negotiations with the EU on the establishment of free trade zone). It needs to be added that the Eurasian Economic Union is to be established on the basis of the states already connected by economic and political ties; the states that have already established an effectively operating customs union. It increases the project's chances to be realized, at least partly. It could be maintained that CES/EAEU is a natural process of integration of the countries being politically, culturally, economically and historically close to one another. It follows integration processes going on in the contemporary world. Russia wants to act as an initiating subject in these processes, being one of the poles of global politics and economy.

11.7.2 The Eurasian Union as a Competitor for the European Union

Is the Common European Space/the Eurasian Economic Union posing a real threat for the European Union? It might seem that the idea of constructing the Eurasian Union might have been dead since its beginnings, as the dictators

⁶⁶ A. Jarosiewicz, K. Kłyński, I. Wiśniewska, op.cit., p. 5.

⁶⁷ R. Weitz, *Global Insights: Dim Prospects for Putin's Eurasian Union*, „World Politics Review”, <http://www.worldpoliticsreview.com/articles/10301/global-insights-dim-prospects-for-putins-eurasian-union> (10.01.2012).

being in power in Russia, Kazakhstan and Belarus are not capable of achieving the community level in their governing perspective. In this context, it is difficult to establish an organization emulating the EU's nature in a real, not only declaratory, way. The Common Economic Space might both mean the beginning and the end of the integration – an organization that could remind us of the Commonwealth of Independent States in its stage of decline, rather than of the European Union. It also seems that the Eastern project will only be a declaration without any political and legal consequences. The Eurasian Economic Union is not really capable of competing with the European Union's potential in economic terms. The only threat does not refer to EAEU's economic competition but Moscow's potential monopolization of power industry raw materials from the Commonwealth of Independent States and, by doing so, increasing Russian political pressure on the EU and taking Ukraine and Belarus away from Western influence. It might stop the border of democracy and free market in Poland and Baltic Republics, deepening the divisions in Europe. It is a serious geopolitical threat that the European Union seems not to be aware of, being preoccupied with the economic crisis. Belarus, Ukraine and Moldova could appear close to the EU influence, becoming eventually its members, provided that the Brussels policy is more active. Although Brussels has abandoned its plans to attach post-Soviet European states to the EU, it still can offer them considerable economic incentives in order to support closer relations and co-operation with the European Union, also in form of Eastern Partnership.

Summing up, it seems that the EAEU project is unlikely to be realized as an organization similar to the EU. The reason is the fear of Moscow's hegemony and, as a consequence, dependence on Russia. When the EU was established, it comprised the states being able to balance their potentials and influence whereas the EAEU consists of the countries unable to counterbalance Russia. Russian, Belarusian and Kazakh leaders are unlikely to accept deep integration depriving them of a real power for the benefit of the integration institutions. In this case, the stagnation of the institution (similar to the CIS decline), rather than deeper integration (certain Eastern EU), is a more probable perspective. The Eurasian Economic Union seems unlikely to compete with the EU in economic perspective, as its economic, technological and manufacturing potential – compared to the EU – is rather faint. It is China rather than the EU that might be a real competition for the Eurasian Union.