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DOSSIER:
**INTEGRACIÓN Y DERECHOS FUNDAMENTALES
EN UN MUNDO GLOBALIZADO**

**INTEGRATION AND FUNDAMENTAL RIGHTS IN
A GLOBALIZED WORLD**

Coordinado por Cristina Hermida del Llano. Jean Monet Chair

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Integration and Fundamental Rights in a Globalized World

Dossier

INTRODUCCIÓN

El presente volumen recoge contribuciones de eminentes juristas del ámbito nacional e internacional, los cuales se acercan al tema de la integración y los derechos fundamentales desde diversas disciplinas (Derecho Constitucional, Derecho Civil, Derecho Internacional y Filosofía del Derecho) en aras de afrontar los retos del siglo XXI en este ámbito al estar instalados en un mundo fuertemente globalizado. Esta obra colectiva es en gran medida resultado de las investigaciones realizadas en el marco de la Cátedra Jean Monnet (“The prohibition of racial discrimination in the European Union”)¹, concedida por la Comisión Europea a Cristina Hermida del Llano en la Universidad Rey Juan Carlos en julio de 2017.

La obra se divide en dos grandes partes. La primera parte se titula „Integración y derechos fundamentales en la Unión Europea” (*Integration and fundamental rights in the European Union*) y la segunda parte aparece bajo el título, no menos sugerente, “Amenazas a los derechos fundamentales en un mundo globalizado” (*Threats to the fundamental rights in a globalized world*).

En la primera parte de la obra se recogen ocho contribuciones en inglés. Esta sección se abre con un estudio del insigne jurista polaco, y por encima de todo buen amigo, desaparecido el 9 de enero de 2018, Prof. Dr. hab. Dr. h. c. mult., Boguslaw Banaszak, quien en sus últimos días de vida ejercía el cargo de Decano de la Facultad de Derecho de la Universidad de Zielona Gora (Polonia) y el de miembro del State Tribunal de Polonia. Su contribución, titulada “*Factor influencing the regulation of human rights in EU and its members States*”, nos invita a reflexionar sobre cómo la regulación constitucional de los derechos y libertades se ha ido gestando en la Unión Europea y en sus diferentes Estados miembros, a partir de conceptos jurídico-naturales muy diversos entre sí, gracias a la influencia de la ideología liberal, del concepto del Estado social regulado por el Derecho e incluso en virtud de la falta de un concepto común de derechos humanos en el inicio de la construcción europea. Como el propio autor resalta, la regulación de los derechos humanos fue deliberadamente omitida en los Tratados Constitutivos de las Comunidad Europea, por tratarse de un asunto que ya regulaban los diversos Estados en sus ordenamientos jurídicos internos (principalmente, en sus Constituciones), y además estaba ya contemplada en el Derecho Internacional Público tanto a nivel universal como regional. El Prof. Banaszak pone de relieve, con gran acierto, que los creadores de la integración europea no quisieron duplicar los sistemas de protección ni tampoco los catálogos de derechos humanos. Es por ello que en la década de los setenta del siglo XX el sistema de los derechos fundamentales estuvo basado en los principios generales del Derecho propuestos por el Tribunal de Justicia de Luxemburgo.

La Carta de Derechos Fundamentales común para toda la Unión Europea fue adoptada el 7 de diciembre de 2000. Fue un acuerdo entre las instituciones sin eficacia jurídica vinculante. El Prof. Banaszak demuestra de forma lúcida y brillante cómo la situación cambiaría a raíz de la ratificación del Tratado de Lisboa puesto que por primera vez la Unión Europea parecía haber tomado en serio el tema de la protección de los derechos del individuo.

La segunda contribución –“*The Charter of Fundamental Rights of the EU and Protocol on the application of the Charter of Fundamental Rights of the EU to Poland and United Kingdom*”– es de Izabela Gawlowicz, Profesora de la Facultad de Derecho y Administración de la Universidad de Zielona Gora en

¹ Reference: 587051-EPP-1-2017-1-ES-EPPJMO-CHAIR.

Polonia. La autora ahonda en el tema de la Carta de Derechos Fundamentales en la Unión Europea, examinando sus ventajas e inconvenientes, además de profundizar en el Protocolo sobre la aplicación de la Carta a Polonia y a Reino Unido, como el propio título de su estudio indica.

Rainer Arnold, Catedrático Emérito de Derecho Constitucional y Jean Monnet Chair de la Universidad de Regensburg en Alemania, se ocupa en su contribución tanto del principio de protección efectiva como de los derechos de las minorías en el Derecho de la Unión Europea (*“The Principle of protection efficiency and minority rights in EU Law”*). El autor se adentra en un tema de gran importancia en el constitucionalismo contemporáneo. Tengamos en cuenta que una variedad de aspectos de la protección del individuo y de los grupos aparecen contemplados a nivel nacional y supranacional así como recogidos en el marco de las Convenciones del Consejo de Europa. El autor sostiene la tesis de que la protección de los derechos de las minorías está íntimamente conectada con la dignidad humana, la cual goza de una gran complejidad normativa. Aquí se nos muestra cómo el principio de eficiencia material y funcional de la protección de los derechos humanos ha de aplicarse también para el caso de las minorías.

Joanna Osiejewicz, Profesora de Derecho de la Unión Europea en la Facultad de Derecho y Administración de la Universidad de Zielona Gora en Polonia, lleva a cabo un estudio sobre la protección supranacional de los derechos de la lengua en el contexto universal y europeo (*“Supranational protection of language rights in universal and european context”*). Teniendo en cuenta que ningún tratado internacional universal está dedicado por completo a los derechos lingüísticos, la autora presenta sus resultados tras el análisis de ciertos tratados universales y regionales que sí contienen disposiciones sobre la protección de los derechos del lenguaje, valorando la efectividad del enfoque legal internacional en esta materia concreta.

El gran jurista polaco Boguslaw Banaszak se ocupa también de otro tema en esta primera parte de la obra, con un trabajo titulado *“Legal opinion on the analysis of the changes to the Act on the Constitutional Tribunal and of the changes in the make-up of the Constitutional Tribunal in the light of the Fundamental values of a democratic State of Law lying at the base of the European Union, in particular article 2 of the Treaty on the European Union”*. Este estudio no puede ser sobre un tema más polémico y actual ya que gira en torno a la disputa por el nombramiento de cinco jueces del Tribunal Constitucional polaco, lo cual se explica a raíz del resultado electoral de las elecciones parlamentarias del 25 de octubre de 2015. Para entender la problemática conviene saber que el *Sejm* ha legislado en repetidas ocasiones sobre la Ley del Tribunal Constitucional (LTC) en Polonia. La LTC fue originariamente aprobada por la 7ª legislatura del *Sejm* (25 de junio de 2015). Esta ley previó la elección, por la legislatura, de los sucesores de aquellos jueces constitucionales cuyos mandatos terminarían en 2015. Así, en su última sesión (8 de octubre de 2015), el *Sejm* eligió a cinco jueces constitucionales (llamados “los jueces de octubre”): tres, para reemplazar a tres jueces cuyos mandatos concluían en noviembre de 2015, y dos, para reemplazar a jueces que terminaban el mandato en diciembre. El TC revisó ambas decisiones legislativas: la LTC y la elección de los cinco jueces de octubre; y concluyó que la 7ª legislatura del *Sejm* debía elegir tres jueces y la entrante (8ª legislatura) debía elegir a los otros dos. Días después de la primera sesión de la 8ª legislatura, el *Sejm*, con la fuerza numérica de la mayoría absoluta de PiS, reformó la LTC (19 noviembre) para invalidar los nombramientos de los cinco jueces que había hecho la previa legislatura (25 de noviembre) y procedió a elegir cinco nuevos jueces (2 de diciembre). Es decir, sobre “los jueces de octubre”, la 8ª legislatura cubrió las dos vacantes que legalmente le correspondían, pero se extralimitó en sus poderes al anular la elección de tres jueces legalmente electos por la 7ª legislatura. Las acciones del *Sejm* fueron revisadas por el TC. La 8ª legislatura respondió (22 de diciembre de 2015) reformando la Ley sobre el Tribunal Constitucional (LTC-bis), pero, nuevamente, en su revisión, el TC encontró que las reformas eran completamente inconstitucionales (9 de marzo de 2016). El gobierno rehusó publicar

la sentencia. Por tercera vez, la 8ª legislatura se puso a trabajar en la LTC; en esta ocasión (22 de julio de 2016), creó una nueva ley (LTC-plus). Lamentablemente, el TC la declaró parcialmente inconstitucional (11 de agosto de 2016). Todo ello provocaría una crisis institucional en Polonia pero además haría saltar la preocupación internacional, sobre todo de la Comisión Europea y del Parlamento Europeo. Como señaló el primer vicepresidente de la Comisión Europea, Frans Timmermans, la crisis constitucional polaca aunque es esencialmente un problema nacional, pone en riesgo los fundamentos de la UE ya que plantea una quiebra del principio de separación de poderes y una erosión de los pilares de la democracia constitucional.

Heribert Franz Koeck, eminente jurista austriaco, Catedrático emérito de Derecho Internacional Público y además representante especial para el este y sureste de Europa de la Universidad Johannes Kepler de Linz en Austria, se ocupa de analizar el sistema de refugiados en el ámbito europeo. Su contribución lleva un título de por sí elocuente: “Desde una migración cuantitativa a una migración cualitativa y el sistema de refugiados” (*“From a quantitative to a qualitative migration and refugee system”*). El autor explica en su estudio cómo el refugiado tiene un derecho a ser protegido en virtud de la Convención de Ginebra y del régimen europeo de Dublín. Sin embargo, el Prof. Koeck se ocupa de resaltar las deficiencias de ambos regímenes al estar basados en la ingenua creencia de que los Estados son capaces de brindar asilo a todos los refugiados. El autor defiende la tesis en su trabajo de que ningún Estado miembro de la Unión Europea puede ser obligado a recibir más refugiados de los que puede realmente integrar. Los “verdaderos” refugiados deberían poder diferenciarse de los refugiados económicos u otras categorías de migrantes que, a su juicio, no merecen la condición de refugiado. Asimismo aboga por la separación de los “verdaderos” refugiados, que sí aceptan los valores europeos, de los que no los comparten y, por consiguiente, no son “auténticos” refugiados. La propuesta del Prof. Koeck es la de animar a la comunidad internacional, concebida como unidad, para que ponga fin a la situación por la que la gente se ve obligada a abandonar su país de origen.

Joanna Osiejewicz, Profesora de Derecho de la Unión Europea en la Facultad de Derecho y Administración de la Universidad de Zielona Gora en Polonia, tiene otra contribución en esta primera parte del libro colectivo. Concretamente, ahora examina el interés de la comunidad internacional en el Derecho Medioambiental de la Unión Europea en su estudio titulado *“The interest of international community in the EU environmental Law”*. A su juicio, los principios del Derecho medioambiental de la Unión Europea no están suficientemente definidos en la legislación primaria de la Unión Europea. Según explica la autora, su significado sustantivo ha sido objeto de numerosas discusiones que evidencian la falta de claridad en esta materia. El propósito de este artículo es mostrar el desarrollo del concepto de los principios en el Derecho Medioambiental en el plano internacional, cuál es su expresión específica en el ámbito de la Unión Europea así como los problemas prácticos que plantea su aplicabilidad. La autora parte de la premisa de que los principios del Derecho Medioambiental son flexibles, deliberadamente imprecisos y gozan de una naturaleza ambigua en aras de una efectiva implementación por parte de la comunidad internacional.

La primera parte del libro la cierra otro artículo del internacionalista de origen austriaco, Heribert Franz Koeck, Prof. Dr. iur. (Viena), M.C.L. (Ann Arbor), Dr. h. c. (Pitești), Dr. h. c. (Alba Iulia), Catedrático de Derecho Internacional Emérito y Representante especial para Europa del Este y del Sureste en Johannes Kepler University Linz, Austria. En este caso el tema que trata el autor es el de la solidaridad en la Unión Europea (*“Solidarity in the European Union”*). El autor parte de que la solidaridad no sólo es un valor legítimo sino además un valor esencial para la comunidad de Estados que persiguen la paz y la seguridad, la libertad y el bienestar para sus ciudadanos. En esta contribución se enfatiza que la solidaridad es una obligación legal y no solo una exigencia política. Sin embargo, en opinión del Prof. Koeck, el alcance que se otorgue a la solidaridad como

valor esencial puede terminar dañando la credibilidad de la Unión Europea por lo que habría que tomarlo en serio.

La segunda parte de la obra colectiva se titula “Amenazas para los derechos fundamentales en un mundo globalizado” (*Threats to the Fundamental Rights in a globalized world*) y consta de diez contribuciones en español e inglés. La primera de ellas corresponde al jurista de origen austriaco Heribert Franz Koeck. Su contribución se titula „*Challenges and dangers that threaten the rights of an intercultural society in a globalized world*“. El autor resalta que la multiculturalidad se caracteriza por la situación de coexistencia de grupos caracterizados por su diferencia cultural, nacional, étnica, religiosa dentro de un mismo territorio sin necesariamente considerarse el contacto entre grupos deseable. De ahí que entre los diferentes grupos pueda llegar a existir una situación de tolerancia pasiva pero no aceptación o estima personal en términos de reciprocidad. Por el contrario, a su juicio, la interculturalidad se caracteriza por la convivencia entre diferentes grupos en un ambiente de tolerancia activa y con la intención de mantener relaciones equitativas entre todos. El autor defiende que, aunque parezca mentira, nos enfrentamos a una situación de regresión en el área de los derechos humanos que amenaza incluso el mínimo de coexistencia pacífica. Ello, por ejemplo, ocurre en los Estados islámicos y más concretamente en los países que se encuentran bajo la influencia del fundamentalismo militante. Por consiguiente, en opinión del autor, no deberíamos ser ingenuos pensando que los migrantes que vienen a nuestros países automáticamente van a compartir nuestros valores. Para el Prof. Koeck una amenaza actual para las sociedades libres es la multiculturalidad y por ello hay que dar pasos solo en la dirección que conduzca al ideal de la interculturalidad.

Mihaela Miruna Tudorascu es actualmente la Decana de la Facultad de Derecho y Ciencias Sociales en la Universidad 1 Decembrie 1918 Alba Iulia de Rumanía. En su contribución se ocupa de los principios de la buena administración y por ello lo titula „*The good administration principles and normativity*“. Según explica la autora, el poder de la Administración Pública encuentra su legitimidad en la observancia del Derecho, el cual reconoce su fuerza discrecional al estar centrado en salvaguardar los intereses públicos, que la Administración Pública ha de salvaguardar. Una buena administración significa para la autora que la legalidad vaya acompañada por principios complementarios capaces de asegurar la transparencia de las tareas de la Administración Pública, lo que significa que las personas cuyos intereses y derechos están en manos de la Administración Pública tengan derecho a participar en el proceso desisorio, lo que a su vez exige que las decisiones estén motivadas y los criterios de actuación se comuniquen siempre a los interesados. La Prof. Tudorascu insiste en que tales principios deben ser establecidos y respetados en el Derecho Administrativo y en la esfera procedimental.

Ioan Ganfalean, Prof. Asociado y Decano saliente de la Facultad de Derecho y de Ciencias Sociales en la Universidad 1 Decembrie 1918 de Alba Iulia, Rumanía contribuye a esta obra colectiva con un texto titulado „*Human Trafficking, a challenge for contemporary society*“. El tráfico de seres humanos es un asunto que concierne a las instituciones internacionales en los últimos años cada vez más a menudo. El tráfico de seres humanos se considera una forma particular de manifestación del crimen organizado por ser, en esencia, tráfico ilícito de personas. Generalmente, las manifestaciones más significantes de tráfico humano son la prostitución organizada, proxenetismo, adopciones ilegales, y comunmente, migración ilegal de personas, que tienen como víctimas en gran medida a mujeres y niños. El Prof. Ganfalean examina en detalle todos estos supuestos dando su particular punto de vista para afrontar esta problemática.

Sheryll D. Cashin, Catedrática de Derecho en Georgetown University Law Center, Washington D.C. en Estados Unidos, se ocupa en su contribución de un tema de su especialidad como jurista: la

justicia racial. Su estudio lo titula *“Place not race: Affirmative action to redress segregation in the United States”*. Sheryll Cashin explica en su estudio los argumentos claves de su libro *Place Not Race* (Beacon Press, 2014). Ella defiende tanto en el libro como en esta contribución que América es un país segregado que no realiza los ideales de igualdad de su fundación como país y de su Constitución. La autora explora cómo la segregación por raza y clase, en escuelas y vecindarios, concentra las oportunidades solo en algunos lugares quedando las desventajas focalizadas en otros, lo que provoca *“opportunity hoarding”*, esto es una oportunidad de acaparamiento de recursos para familias prósperas, educadas en la universidad. La jurista norteamericana concluye que los colegios y las universidades selectivas de Estados Unidos tienen la obligación de contrarrestar estas tendencias sistémicas y de que la acción afirmativa en las admisiones a la Universidad deberían favorecer a los estudiantes de alto rendimiento de entornos desfavorecidos, independientemente de la raza. Ella también aboga por reformas como la de convertir en opcionales los test estandarizados.

Carlos M. Vázquez es Catedrático de Derecho Constitucional en Georgetown University Law Center, Washington D.C, Estados Unidos. Su contribución, directamente relacionada con la anterior realizada por Sheryll Cashin, aborda el tema de las medidas especiales en la Convención para la eliminación de todas las formas de discriminación racial (*Special measures under the Convention for the Elimination of all forms of racial discrimination*). El autor se ocupa de resaltar en su trabajo dos cuestiones interesantes de este texto internacional (ICERD), relacionadas con las denominadas “medidas especiales” (también algunas veces conocidas como “acciones afirmativas”). El primer punto que el autor aclara es que tales medidas, cuando tengan por finalidad asegurar el trato adecuado y paliar las desventajas raciales de los grupos étnicos o raciales, no constituyen discriminación racial bajo la perspectiva de la Convención. En segundo lugar, el autor resalta que la Convención establece que se requiere que los Estados Partes impongan medidas especiales „cuando las circunstancias así lo exijan”. En esta contribución el autor profundiza en el examen que realiza la Convención de la figura de „medidas especiales“, poniendo particular atención en la recomendación general adoptada por el Comité contra la Eliminación de la Discriminación Racial en esta materia.

El prestigioso jurista de origen ucraniano, Y.L.Boshytskyi, Rector de la Universidad de Kiev en Ucrania, Kyiv University of Law of NASU y jurista honorífico de Ucrania, se ocupa en su contribución de los problemas de integración de Ucrania en la Unión Europea. De ahí que lleve por título *“European integration of Ukraine: Problems, Challenges and perspectives”*.

Como el propio autor reconoce, la naturaleza y nivel de cooperación de Ucrania con la Unión Europea dependerá del desarrollo de las transformaciones internas que se produzcan en Ucrania que deben ir encaminadas al cumplimiento de los prerequisites para el desarrollo de una democracia estable y el crecimiento de una economía doméstica. Esto puede despertar gran interés puesto que se ahonda en una cuestión polémica y actual que afecta directamente al entramado normativo e institucional de la Unión Europea en nuestros días.

Cristina Hermida del Llano, es Profesora de Filosofía del Derecho en la Universidad Rey Juan Carlos de Madrid, Jean Monnet Chair y coordinadora de este volumen. En su contribución titulada *“The Refugee Crisis in the European Union”* se ocupa de estudiar las diferentes etapas que ha atravesado la crisis de los refugiados en los últimos años. Este análisis está dividido en tres grandes partes: en primer lugar, se hace un estudio exhaustivo de las medidas adoptadas por la Unión Europea hasta la fecha, incluyendo la política concerniente a España en el ámbito de la crisis de los refugiados; en segundo lugar, se elabora un análisis de los fondos y gestión de la Unión Europea de cara a afrontar la entrada de los refugiados en los diferentes Estados de la Unión Europea; en tercer y último lugar, se asume una perspectiva global sobre los factores endógenos y exógenos que

afectan directamente al desarrollo de las políticas de la Unión Europea cuando se trata de abordar la crisis de los refugiados.

Eugen Chelaru, Decano y Catedrático de Derecho Civil en la Facultad de Derecho y Ciencias Administrativas de la Universidad de Pitesti en Rumanía estudia en su contribución, que ha sido traducida del rumano al español, el tema de la libertad de pensamiento, de conciencia y de religión en la actualidad no sólo a nivel internacional y en el ámbito del Consejo de Europa (Convenio Europeo de Derechos Humanos y Libertades Fundamentales de 1950) sino más concretamente en el ordenamiento jurídico nacional de Rumanía.

Víctor Hugo Ramírez Lavalle es de formación diplomático aunque actualmente ejerce de profesor de varias asignaturas de Derecho en la Universidad Iberoamericana de Puebla (México). Su contribución en español, titulada „*Quo vadis Europa?*” tiene como propósito abordar puntual, más no exhaustivamente, los principales factores que están incidiendo en el marco de la Unión Europea. A juicio del autor, hoy en día resulta sumamente difícil entender la confusa y peligrosa actitud así como proceder europeos ante una serie de acontecimientos y graves problemas que enfrenta: migración (intra y extra fronteras); las posibles consecuencias del “brexit”; el contagio de esta decisión británica en varios países miembros de la UE; la detonación de procesos independentistas o secesionistas; la actual geopolítica europea que incluye la denominada “rusofobia”. A juicio del autor, todas estas situaciones definitivamente pueden aumentar no sólo en forma crítica la crisis en la UE sino, más peligroso aún, no solucionar debidamente las problemáticas señaladas. El Prof. Ramírez Lavalle advierte que Europa puede llegar a convertirse en un foco de tensión, poniendo en peligro la paz y la seguridad internacionales.

La última contribución de esta obra colectiva pertenece a Herbert Schambeck, Presidente emérito del Senado en Austria, Prof. Dr. Dr. h. c. mult. de Derecho Constitucional y de Filosofía del Derecho en la Universidad Johannes Kepler de Linz (Austria). El tema de su estudio, que ha sido traducido del alemán al español, no puede ser más oportuno desde el punto de vista de la política internacional actual: “*Las respuestas del Estado austriaco a los retos que plantean las cuestiones políticas de integración de la actual crisis de los refugiados*”. Según explica el autor, la mayor crisis de refugiados desde el final de la Segunda Guerra Mundial amenaza a Europa y concretamente a Austria hasta límites insospechados no sólo en el ámbito político sino también económico. Tanto la Unión Europea como los Estados miembros se ven obligados a encontrar una solución adecuada para afrontar este problema. A comienzos de 2016 tuvo lugar en Austria una Cumbre de Refugiados (*Refugee Summit*), que reuniría tanto a Estados federales, como a representantes de ciudades y comunidades del país. Austria ha intentado reducir las fuertes corrientes de refugiados y migratorias hacia Austria a través de reglas y procedimientos válidos pero también eficaces. Para el insigne jurista austriaco resulta imprescindible el reparto de refugiados entre todos los Estados miembros de la Unión Europea y por ello resulta obligado volver la mirada a los fundamentos de la subsidiariedad, solidaridad y humanidad.

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FACTOR INFLUENCING THE REGULATION OF HUMAN RIGHTS IN EU AND ITS MEMBERS STATES

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RESUMEN:

La regulación constitucional de los derechos, libertades y deberes de un individuo en cada país no forma un conjunto accidental de normas, sino que está más bien determinada por un concepto particular del estado del individuo en el Estado. Esto no significa necesariamente que deba reflejar dicho concepto y que las constituciones basadas en el mismo concepto deban ser exactamente iguales. A los factores que influyen en las diferencias y similitudes en la regulación de los derechos humanos en la UE y sus Estados miembros pertenecen multitud de conceptos de derechos humanos y libertades en los Estados democráticos europeos (los más importantes son los conceptos jurídico-naturales, el liberalismo, el concepto típico del Estado social regido por la ley) y la falta de un concepto común de derechos humanos en el período inicial de formación de la CEE y la UE.

La actitud hacia los derechos humanos en la UE experimentó una interesante evolución. Su regulación se omitió deliberadamente en los tratados que constituyen las Comunidades Europeas, ya que el tema estaba regulado por una parte por las leyes internas de los Estados miembros (principalmente las constituciones) y por la otra, por el Derecho Internacional Público universal y regional. Los creadores de la integración europea no querían duplicar los estándares de protección y los catálogos de derechos humanos. En los años 70 del siglo pasado, el sistema de derechos fundamentales se basaba en los principios propuestos por el Tribunal Europeo de Justicia.

La Carta de los Derechos Fundamentales común para toda la UE se adoptó el 7 de diciembre de 2000. Era un acuerdo entre instituciones y no era un acto legalmente vinculante. La situación cambió después de la ratificación del Tratado de Lisboa. Gracias a la Carta, la UE por primera vez ha adoptado una actitud compleja con respecto a la protección de los derechos de las personas. Debe subrayarse que las nociones utilizadas en la Carta también se refieren a los términos empleados por las Constituciones de la mayoría de los Estados miembros de la UE, que las ciencias jurídicas conocen bien incluso en los países que no emplean términos apropiados en su legislación (por ejemplo, el de dignidad humana). Sería difícil asumir que la Carta crea nuevos estándares y un concepto de derechos humanos o proporciona una interpretación más o menos uniforme de los derechos individuales tanto dentro del alcance del Derecho Europeo ampliamente concebido (UE y Consejo de Europa) como del Derecho interno de los Estados miembros de la UE.

ABSTRACT:

The Constitutional regulation of rights, freedoms and duties of an individual in every country does not form an accidental set of norms, but is rather determined by a particular concept of the status of the individual in the state. This does not necessarily mean that it must reflect such concept and that constitutions based on the same concept should be exactly alike. To the

factors influencing the differences and similarities in the regulation of human rights in EU and its member states belong: multitude of concepts of human rights and liberties in European democratic states (most important are legal-natural concepts, liberalism, concept typical of social state ruled by law) and the lack of common concept of human rights in the initial period of forming EEC and EU.

Attitude to human rights in the UE underwent an interesting evolution. Their regulation was deliberately omitted in the treaties constituting European Communities as the issue was on the one hand regulated by member states' internal laws (mainly the constitutions) and on the other – by both universal and regional public international law. The creators of European integration did not want to duplicate both the standards of protection and the catalogues of human rights. In the seventies of the last century the system of fundamental rights was based on the principles proposed by the European Tribunal of Justice.

The Charter of Fundamental Rights (CFR) common for the whole EU was adopted on 7 December 2000. It was an agreement between institutions and was by no means a legally binding act. The situation changed after ratification of the Treaty of Lisbon. Thanks to the Charter the EU for the first time has adopted a complex attitude to the issue of the protection of the rights of an individual. It should be underlined that the notions used by the Charter also refer to the terms employed by the constitutions of most EU member states, which legal sciences are well acquainted with even in the countries which do not employ appropriate terms in their legislation (e.g. human dignity). It would be difficult to assume that the Chart creates new standards and one concept of human rights or provides a more or less uniform interpretation of individual rights both within the scope of widely understood European law (EU and Council of Europe) and internal law of EU member states.

PALABRAS CLAVE: *Derechos Humanos, Conceptos de Derechos Humanos y libertades, Unión Europea, Carta de Derechos Fundamentales, Derecho Europeo*

KEYWORDS: *Human Rights; Concepts of Human Rights and Liberties; European Union; Charter of Fundamental Rights; European law*

1. INTRODUCTION

Constitutional regulation of rights, freedoms and duties of an individual in every country does not form an accidental set of norms, but is rather determined by a particular concept of the status of the individual in the state. This does not necessarily mean that it must reflect such concept and that constitutions based on the same concept should be exactly alike. In fact, we must be mindful of the fact that any basic law does not come into existence in a vacuum and often applies institutions or solutions existing in a given country. On the other hand, despite widespread acceptance of one concept by the authors of an organic law, they may find it necessary to admit some

elements typical of another (e.g. Declaration of Rights of Man and Citizen of 1789 connected liberal ideas with elements of the natural-law concept). Moreover, concepts of the status of an individual themselves are not monolithic. They maintain only certain fundamental assumptions, but are subject to modification in respect of other questions and apply different approaches in resolving detailed issues. The result is that some — and sometimes far-reaching — differences can exist between individual countries, even those whose constitutional norms concerning rights, freedoms and duties of an individual have been based on the same concept.

Generally speaking, regulations of individual freedoms and rights in the

constitutions and treaties take into account, both in the catalogue of such rights and freedoms and specific provisions concerning them, norms of international law and customs binding on European countries as well as constitutional standards existing in democratic states and Member-states of EU.

2. CONCEPTS OF HUMAN RIGHTS AND LIBERTIES INFLUENCING INTERNATIONAL, SUPRANATIONAL AND INTERNAL NORMATIVE REGULATIONS

As there is a multitude of concepts of human rights and liberties, it is reasonable to restrict the discussion only to these which in the past substantially influenced or are currently influencing normative regulations concerning individual rights, focusing solely on their most fundamental assumptions and ignoring detailed analyses, presentations of their different versions, etc. After all, every concept may to a greater or lesser degree be modified and adapted to the current social, economic and political premises. This is an issue constituting a separate subject of research, which can not be elaborated here.

a/ Legal-natural concepts

Legal-natural concepts constitute an internally diversified group, which results from the possibility of adopting various assumptions for their existence – philosophical, religious, historical or biological. Leaving aside a detailed discussion, a general thesis may be formulated, proposing that all the natural concepts are characterised by the recognition that people are equal and free by nature and that they are entitled to certain inherent rights. Positive law only declares natural laws which already exist and does not enact them. Its primary task is to restrict the rights in the interest of individuals co-existing in an organised society. It thus acquires a negative

character identified with interference in the sphere of natural rights with an aim of restricting them in exceptional cases. In this view law is secondary in character, while natural rights are primary. This view, focusing on an individual, does not take into consideration the fact that the law and the state are indispensable for the development of an individual and implementation of his or her natural rights. Therefore, some proponents of legal-natural concepts maintain that these do not deny the need to protect inherent rights of an individual by positive law, as exemplified by the following view of H. Waśkiewicz: «positive law plays the same role for natural rights as executory provisions do for a statute».

Legal-natural concepts frequently influence the interpretation of significance of individual rights in international and national scales, which does not necessarily have to result in legal nihilism and negation of the letter of positive law, although undoubtedly one of the functions of natural law – especially from the point of view of American natural law jurisprudence – is countering legal positivism.

It is interesting that after considerable restriction of the role of legal-natural concepts in the 19th century, they enjoyed a considerable revival after World War II.

b/ Liberal concept

19th century constitutional regulations of individual rights emerged under an overwhelming influence of liberalism (e.g. the constitution of Belgium from 1831). They no longer emphasised a legal-natural character of individual rights but interpreted them «as an expression of the will of the state, which is totally independent in their establishing». The state was to be a mere instrument providing social order and internal security, concurrently protecting the society and creating conditions for its development as well as the development of individuals constituting it. The status of an individual in a state and the scope of his or her rights depended on the positive law existing in a

given state or the common law which the state accepted. A rule was adopted that individual rights are guaranteed solely for the citizens of a given state and only in exceptional circumstances for non-citizens. Constitutional provisions provided grounds for normative regulation of civic rights but due to their general character had to be elaborated and specified in statutes, owing to which they could be adapted to the changing social reality as the process of resolving statutes or their amendment is easier than amending the constitution.

The grounds for the liberal catalogue of individual rights were constituted by the notions of personal freedom and freedom of business, protection of property and ownership, religious tolerance and restriction of Church's influence, freedom of assembly and freedom of speech. These freedoms were to protect an individual against interference from the state, while at the same time liberalism perceived the state as a guarantor and protector against anti-liberal tendencies and threats.

The liberal concept perceived an individual as an isolated entity. The concept's basic premise was the idea of a self-regulating, free society, which was more or less directly expressed in the works by G. Hegel, J. Bentham, A. Smith. It assumed that a society consists of equal, free individuals who encounter resistance from other individuals when attempting to implement their needs and interests. Various individual interests work in different directions and therefore it is eventually possible to establish a solution benefiting the whole society. Individuals tend to compromise and are by themselves able to evaluate legal, political and economic problems rationally. Common interests are stronger than what divides people.

The liberal concept perceived individual rights as an expression of division of competences between an individual (a society) and a state, which resulted in juxtaposing a state and a society, a state and an individual.

c/ Concept typical of the so-called social state ruled by law

The purpose of such state, in contrast to the liberal state, is to direct the processes of social development and to ensure impartial distribution of its fruits. In order to achieve its goals, it may apply not only the traditional means (i.e. commands and prohibitions) but also a wide spectrum of other measures designed to direct one's personal conduct (e.g. through taxation or subsidies). The state and society are not treated as mutually opposing forces, although they are not identical with each other. The social state ruled by law is separated from society, which guarantees freedom of the individual, but is also closely connected with it, thereby guaranteeing progress and social justice. This corresponds with the departure from regarding an individual as an isolated subject whose links with society are recognized. On the one hand, this makes it possible to emphasize individual responsibility for deciding the fate of the community and leads to re-evaluation of duties consigned to him/her, which, having received a wider social context, become instruments for implementing new tasks of the state. On the other hand, the state has been obliged to care for the subsistence of an individual and ensure the provision of opportunities for an individual development as guaranteed in the constitution. This leads to a change in the character of individual rights that begin to function as an aim of the state's activities. Formal guarantees do not suffice, and the state is compelled to undertake political, environmental, social and other activities in order to carry out the programme formulated in provisions of the constitution relating to them. Rights and freedoms do not protect only the individual sphere of liberty of the person, but also play some social functions and, therefore, an enjoyment thereof should be socially oriented, i.e. when protecting interests of an individual they also serve the common good.

The concept of human rights and liberties typical of the so-called social state ruled by

law underlines political rights of citizens. They play an important role in the functioning of the democratic state. They not only stimulate democratic modifications of political institutions, but allow the growth of sense of law in society as well. They influence a wider range of realization of other rights and freedoms.

Confirming the significance of social rights, the social state ruled by law treats them in a different way from political or personal rights¹. They do not found any claims by an individual for a particular behaviour on the part of the state or any concrete performance, but are rather an imposition on the state of an obligation to undertake activity for their accomplishment. The social state ruled by law, as compared to the liberal state, reverses the principles concerning the substantial scope of rights, freedoms and duties contained in the constitution. While under the liberal conception they relate, above all, to citizens, and only in exceptional situations — to non-citizens, under the concept of the social state ruled by law, it is assumed that provisions of the constitution specifying the status of an individual are addressed to all persons staying in the territory of a given state, except for the rights, freedoms and duties explicitly reserved for citizens.

3. LACK OF COMMON CONCEPT OF HUMAN RIGHTS IN THE INITIAL PERIOD OF FORMING EEC AND EU

Attitude to human rights in the EEC and subsequently in the UE underwent an interesting evolution. Their regulation was deliberately omitted in the treaties constituting European Communities as the issue was on the one hand regulated by member states' internal laws (mainly the

constitutions) and on the other – by both universal and regional public international law. The creators of European integration did not want to duplicate both the standards of protection and the catalogues of human rights.

Initially the European Tribunal of Justice restrictively interpreted the treaty provisions and rejected the concept of existence of fundamental rights of an individual in the community law. It changed its position in the mid-1970s acknowledging that these rights are part of unwritten community law. The Tribunal began drawing its own catalogue of fundamental rights closely linked with four freedoms rooted in the treaties and vital for uniform European market. The rights were protected solely within the scope essential for the functioning of the community law.

In this situation, when the system of fundamental rights was based on the principles proposed by the Tribunal, the EU lacks legal acts concerned with fundamental rights, which legally bind EU bodies and member states as well as coherent procedures serving the purpose of their protection. The problem could be resolved in two ways – either by implementing a new treaty which would offer complex regulation of fundamental rights within the EU law or by the EU joining the Convention on the Protection of Human Rights and Liberties. Over fifty years of experience in the implementation of the Convention would enable to avoid numerous inconveniences resulting from introducing new legislation.

4. CHARTER OF FUNDAMENTAL RIGHTS

Initially, a third way was adopted. The Charter of Fundamental Rights (CFR) adopted by the European Parliament, Council and Commission at the summit in Nice on 7 December 2000 was an agreement between institutions and was by no means a legally binding act. The situation changed after ratification of the Treaty of Lisbon.

¹ Cf. BANASZAK, B. *Constitutionalisation of Social Human Rights – necessity or luxury?*, *Persona y Derecho* 1-2/2012, pp. 17-20.

Thanks to the Charter the EU for the first time has adopted a complex attitude to the issue of the protection of the rights of an individual. The protection comprises all the categories of rights – apart from personal and political – also widely understood social, cultural and economic rights. In view of para. 5 of the Charter's preamble, the catalogue of protected rights comprises «the rights resulting especially from constitutional traditions and international agreements adopted by all the member states [...] as well as the judicature of the Tribunal of Justice of European Communities and the European Tribunal of Human Rights». A new attitude towards all the rights – including the traditional ones, universally included in the catalogue of protected rights – may be observed, aiming at regulating possibly all contemporary issues resulting from their implementation. This attitude enables not only to account for the threats resulting from the development of civilisation but also to reformulate some of the rights. Thus the Charter comprises new potential in the application of the rights and includes the regulation stimulating changes in their understanding and protection.

Within its subjective scope the Charter aims at protecting not only EU citizens, but also everyone staying in the EU territory, which conforms with the tendency in the EU legislation, which determines that by definition the EEC and the EU legal acts concerned with rights of an individual extend their subjective scope onto everyone present in the area where the EU law is in effect.

Even though the Charter does not recognise *expressis verbis* the implementation of its provisions in the case of legal persons, this «does not denote that in singular cases legal persons could not cite the Charter's provisions if it they are applicable in their situation».²

² *Stanowisko Rady Doradczej do spraw Praw Człowieka przy Ministrze Spraw Zagranicznych*, [w:] *Karta Praw Podstawowych Unii Europejskiej*, Ministerstwo Spraw Zagranicznych Warszawa 2001, p. 62.

The complex character of the Charter is favoured by the manner of regulation of particular rights.

«While some rights and liberties are formulated in such a way that they may be directly implemented, there are numerous ones which offer guidelines as to the policy of community bodies [...]. This method [...], avoiding difficulties resulting from finding a formula enabling implementation of the rights by courts, confirms that all the rights and liberties are binding. This denotes that everyone may demand their implementation, even though not in each case their implementation can be vindicated in legal proceedings».³

Multiplicity of sources concerned with the rights of an individual implies existence of diversified terminology, which, in turn, due to interpretation of concrete notions, is of practical significance for implementation of particular rights on the basis of a normative act applied in a given situation. In the case of international and supranational law, all this is affected by problems resulting from translating legal notions into national languages of the countries where they are implemented.

Realising this, the creators of the Charter did not want it to be yet another element in the kaleidoscope of acts concerned with the rights of an individual. In its very title they aimed at referring to the notion of fundamental rights developed in the judicature of the European Tribunal of Justice from the late 1960s. Simultaneously, striving to ensure the Charter's compatibility with the European Convention on Human Rights, they formulated the principle in art. 53, para 3 of the Charter stating that «Within the scope in which this Charter includes the rights corresponding to the rights guaranteed by the Convention on the Protection of Human Rights and Liberties, their interpretation and scope are congruent with the those conferred by the Convention».

³ *Ibid.*, p. 57

In the legal sciences for some authors the relation between the Charter and European Convention of Human Rights is not clear. The good example is the opinion of Polish scholar A. Bisztyga:

«European Convention for the Protection of Human Rights and Fundamental Freedoms enjoys good opinion of the constitutional act orders European legal space of human rights. The pearl in the Convention crown is European Court of Human Rights, which case-law creates European standards of human rights in contemporary way. Being obligatory, Lisbon Treaty and Charter of Fundamental Rights of European Union change the previous situation. Instrumentarium of the human rights protection in Europe has been enriched. However a number of questions about the relation between Convention and Charter arise and the relation between European Court of Human Rights and Court of Justice of European Union as well as the case-law of both European courts. Are the relations going to be complementary or use confrontation? »⁴.

It should be underlined that the notions used by the Charter also refer to the terms employed by the constitutions of most EU member states, which legal sciences are well acquainted with even in the countries which do not employ appropriate terms in their legislation (e.g. human dignity).

All these measures enable to create not only a complex catalogue of fundamental rights, but also to interpret them in a largely uniform way both in widely understood European law (EU and Council of Europe) and in the EU member states' internal law. According to the Charter, the European Tribunal of Justice has a significant role to play in the process of interpretation of the

Charter's provisions. In this context it is interesting to quote the following stance of the Polish Constitutional Tribunal:

«Interpretation of the EU law by the European Tribunal of Justice should fall within the scope of functions and competences delegated to the Communities by the member states. It should also correlate with the principle of subsidiarity determining the activity of the Community and EU institutions. The interpretation should be also based on the assumption of mutual loyalty between the Community and EU institutions and member states. This assumption obliges the European Tribunal of Justice to support local legal systems, while the member states are obliged to apply the highest standards of respecting community norms [...]. Member states retain the right to evaluate whether EU legislative bodies acted within the delegated competences and whether they exercised their authority in congruence with the principle of subsidiarity while issuing a legal act (legal provision). The principle of priority of the community law is not applicable in the case of the acts (provisions) issued in excess of the above restrictions. »⁵

The Charter does not refer to the category of the rights of an individual already present in international law and internal law of many countries, i.e. their division into rights and liberties and further division into two groups: personal and political as well as economic, social and cultural. This typology frequently caused controversy in the legal doctrine, but it has been universally accepted, which is substantiated by two UNO Human Rights Pacts constituting the basis for the system of protection of human rights adopted by the UN and the presence of European Social Charter together with the European Convention on Human Rights in the regional European system of their protection.

Instead of adopting the already existing typology, the Charter creates six categories corresponding to its first six chapters, which is intended by the Convent elaborating the

⁴ BISZTYGA, A.: *Europejska Konwencja Praw Człowieka a Karta Praw Podstawowych Unii Europejskiej – stan kompatybilności czy konkurencyjności?*, Przegląd Prawa Konstytucyjnego 7/2009, p. 188. Cf. Also LENAERTS, K.: *Fundamental Rights in the European Union*, «European Law Review» No. 25, 2000, p. 579.

⁵ OTK ZU No 5/A/2005, pos. 49.

Charter to provide it with its complex character and enable to extend the protection over new areas exceeding the traditional scope of regulation, universally adopted in international and internal law. The headings of the chapters – groups of rights – are linked with values–ideas⁶ especially important for the EU. In this way «the Chart seems to break with historically formed division and by rejecting the hierarchy of fundamental rights, based on the division mentioned above, [the Chart – B. B.] creates a new concept of fundamental rights».⁷ The concept is not rooted in the traditional science of law. It is not yet fully mature, while the accompanying axiology has not been universally adopted. It emerged under the strong, predominating influence of social democratic thought⁸ and only in a very limited degree does it take into consideration other philosophical trends. Despite that, it lacks coherence, which is substantiated by the need to prepare explanations to the Chart's provisions after it was adopted. On the initiative of the Great Britain the Presidium of the Convent elaborated explanations, which by virtue of para. 7 art. 52 of the Chart serve the purpose of its interpretation and should be taken into consideration by the courts of the EU and member states.

As a result it would be difficult to assume that the Chart creates new standards and one concept of human rights or provides a more or less uniform interpretation of individual rights both within the scope of widely understood European law (EU and Council of Europe) and internal law of EU member states.

The proponents of the Chart, supporting such a wide catalogue of rights guaranteed by

it, perceive it as a virtue and a testimony of a complex character of its regulations. However, they admit that «the Chart's wide catalogue has been designed for future, extended EU competences».⁹ They indicate possible restriction in the scope of rights regulated in the internal law of the member states, which is exemplified by possible opposition of the Union to the introduction of death penalty in the countries tightly co-operating with the USA in combating terrorism.¹⁰

EU seems to lack acceptance of one, universally adopted concept of human rights, which substantially hinders further integration and protection of human rights. As an example I may quote the contentious issue of including the regulation concerning social rights in the Charter of Fundamental Rights. The comparison of the catalogue of constitutional human rights common for all the EU member states shows that its core is formed by traditional (classic) personal liberties and political rights. Social, cultural and economic rights (with the exception of property rights) are to a varying degree present in individual constitutions and in their case no elements common for them all can be determined. This is caused by the controversy in the science of law and among various political movements concerning the need of and extent of constitutional regulation of social rights and the whole social sphere.

Opponents of subjecting social rights to constitutional regulation maintain that since the degree of their implementation always depends on current and constantly changing economic situation, the matter should thus be subject to statutory legislation. In their view the regulation's place in the legal hierarchy should not determine the extent of social effects of state's effort. They also emphasise that social rights have a postulatory character. In their case a state

⁶ Cf. MIK, C.: *Rola Europejskiej Konwencji Praw Członiewka w procesie integracji europejskiej*, in: ks. W. Chrostowski (ed.), *Czynić sprawiedliwość w miłości*, Warszawa 2001, p. 304.

⁷ D. Capitant, *Die Charty...*, p. 13.

⁸ This is the opinion of other scientists analysing the text of the Charter of Fundamental rights – cf. HOGAN, G.: *Der einfluss der Europäischen Grundrechte–Charta auf die irische Verfassung* in: P. J. Tettinger, K. Stern (ed.), *Kölner...*, p. 65.

⁹ E.g. C. Castello and V. Browne – cf. *ibidem*, p. 68.

¹⁰ E.g. C. Castello and V. Browne – cf. *ibidem*, p. 68.

must first elaborate and then implement complete social programmes¹¹. If, apart from the norms of postulatory character, the constitution included social rights enabling an individual to claim benefits from the state, to meet these it might have to take over the control of economy, which would contradict the provisions of property rights and economic freedom¹². In this context it is the essence of the constitution that is important, the role it is to play in the state. This is referred to by W. Martens, who writes: «Where [...] the guarantee of freedom is interpreted as the guarantee of existence, a constitution devoted to the principle of liberty contradicts itself»¹³. From this perspective including social rights in the constitution is prevented by fear of undermining the effectiveness of political rights and civil liberties in a situation where the same catalogue would protect an individual against the state and would simultaneously authorise him or her to demand benefits from it. Because of this «the constitution [...] is transformed from the act which determines the limits of authority into the act which determines the sphere of the authority's obligations. Consequently, this transforms the constitution into a peculiar charter of social life»¹⁴. Additionally, the state is not obliged to guarantee social rights and to provide actual conditions enabling individuals and social groups to benefit from their constitutionally guaranteed rights. This aims at preventing the use of other rights included in the constitution to satisfy social claims.

¹¹ Cf. MÜLLER, J.P.: *Soziale Grundrechte in der Verfassung*?, Basel – Frankfurt am Main 1981, pp. 41-44, 203.

¹² Cf. HORNER, F. *Die sozialen Grundrechte*, Salzburg, München, 1974, p. 225.

¹³ MARTENS, W.; and HÄBERLE, P.: *Grundrechte im Leistungsstaat*, Veröffentlichungen der Vereinigung des Deutschen Staatsrechtslehrer, z. 30, 1972, p. 33.

¹⁴ CIEMNIEWSKI, J. *Konstytucja państwa socjalnego czy konstytucja państwa liberalnego*?, w: *Prawo w okresie przemian ustrojowych w Polsce. Z badań Instytutu Nauk Prawnych PAN*, Warszawa 1995, pp. 68-69.

The viewpoint that social rights should not be included in a constitution has many proponents in the doctrine of constitutional and European law in several developed democracies. It is held that such rights have a programmatic nature and that in this respect the state must implement whole social programmes. Personal and political rights and freedoms require that the state and EU creates adequate institutional guarantees or only refrains from interfering with the legally protected autonomy of the individual. They may be accomplished more easily and quickly, and EU or state activity is in this respect determined to a smaller degree by economic factors.

At this point, it might be said that «even in most advanced democratic systems of government, there have been observed permanent or occasional departures from the proclaimed principles. This mostly relates to social and cultural rights whose extent, and, particularly, level of realisation is very often determined by the stage of the business cycle, depending on place and time. Any instances of international or domestic recession result in trends towards the reduction of social benefits»¹⁵.

Proponents of regulation of social rights in EU law advocate the need of departing from the treatment of fundamental rights and liberties as the means of merely protecting individuals against the interference on the part of the state. The guarantee of civil liberties and political rights thus requires taking into account economic, social and cultural conditions, i.e. introducing social rights into the constitution. According to P. Häberle, in the contemporary state «a complex tool develops, which includes the following elements: guarantee of fundamental rights as widely-understood social rights, as the aim of the constitution, as the subjective entitlement to benefits and as the

¹⁵ ZWIERZCHOWSKI, E. *Wprowadzenie do nauki prawa konstytucyjnego państw demokratycznych* [An introduction to the teaching of constitutional law of democratic states], Katowice 1992, p. 22.

interpretation guidelines for the judiciary»¹⁶. He also notes that «absence of or modest presentation of social matter in the constitution does not prevent the state from the possibility of conducting broad social policy transforming it into a welfare state. Presence of precise and elaborate social matter in the constitution determines this direction. Therefore, from the point of view of the majority of citizens who will benefit from social rights [...] it is desirable that [...] the constitution includes elaborate and precise regulations of the social matter»¹⁷.

For the proponents of social rights in the states lacking constitutional regulation of the matter or where this regulation is limited, the Charter of Fundamental Rights has a great significance for two reasons. Firstly, the Charter includes the statements distinctly indicating the existence of social rights, thanks to which they, interpreted as fundamental, would be indirectly introduced into the legal systems of these states. Secondly, the charter enables to grant a social function to the rights already included in the constitution which are not treated as social. Then «classic fundamental civic rights are mixed with fundamental social rights which may be appealed from as being directly applicable and as subjective constitutional law»¹⁸. Pursuant to these citizens could demand the state to provide certain benefits, both of material character and as means enabling them to take advantage of the regulations created by the state aiming at providing social conditions for their implementation.

Another example is provided by the Chart's regulations concerned with marriage

and family. Art 51, para. 2 of the Chart seems to state in a way excluding any doubts that «the Chart does not extend the scope of implementation of the EU law beyond the Union's competences, it does not introduce new competences or tasks for the UE». On the other hand certain formulations of the Chart's provisions may indicate a different tendency or are devoid of legal significance. An Irish scientist G. Hogan, who analysed them, states: «elementary rights, which the Charter will protect, are *de facto* not designed to be applied by the Union of precisely restricted competences but by a federal state or even a centralised or unitarian state. For example, art. 9 of the Chart states that 'the right to marry and establish a family are guaranteed in accordance with member state statutes regulating the implementation of these rights'. Yet, what is missing – at least now – is any EU competence concerning the right to marry. Therefore a question arises why the right is to be protected at the level of the new European constitution. [...] In other words, in what circumstances could a member state statute concerned with the right to marry contravene art. 9 of the Charter of Fundamental rights? If the answer is that it is impossible, as the right to marry is regulated solely by the member state law, then we return to the basic question, why an attempt has been made to include [in the Charter] the right to marry and establish a family as well as its protection if it is protected at the state level by the constitutions and by art. 12 of the European Convention on Human Rights? The same concerns the majority of rights included in the Charter, such as the provisions concerned with the rights of children, the right for just legal proceedings or the right for the health protection».¹⁹

It should be underlined that EU includes the countries with restrictive regulation concerning divorce (Malta) and the countries which accept homosexual marriage (e.g.

¹⁶ MARTENS, W.; and HÄBERLE, P.: *Grundrechte im Leistungsstaat*, Veröffentlichungen der Vereinigung des Deutschen Staatsrechtslehrer, z. 30, 1972, p. 73.

¹⁷ ZAWADZKA, B.: *Prawa ekonomiczne, socjalne i kulturalne*, Warszawa 1996, p. 94.

¹⁸ MÜLLER, J. P.: *Katalog i zakres obowiazywania praw podstawowych*, w: CZESZEJKO-SOCHACKI Z. (ed.), *Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 r. i Konstytucja Rzeczypospolitej Polskiej z 1997 r.*, Bialystok 2001, p. 78.

¹⁹ HOGAN, G.: *Der Einfluss der Europäischen Grundrechte-Charta auf die irische Verfassung*, pp. 67–68.

Spain, France). At the forum of EU institutions and in many individual member states this dispute about the role of family and marriage has become a dispute about the role of freedom of speech and religion.

People inspired by Christianity or Islam find it difficult to accept a departure from a traditional notion of a family. Therefore, those who view this notion differently frequently attack mainstream Churches and religions in Europe and treat them as hypocrites, which the Catholic Church brings to attention. In his document *The Family and Human Procreation* published in 2011 cardinal A. Lopez Trujillo, the head of the Pontifical Council for the Family, points out at the tendency to «overshadow God» in contemporary culture.

This act of dissociating from the values shaping European culture for two millennia, which is best exemplified by absence of reference to God in the proposed EU constitution, distorts the past. As M. Pera wrote in his book *Deprived of Roots* «People (and nations) who forget about their roots are neither free nor serious».

Criticism of views negating non-traditional values is sometimes treated as reprehensible and punishable hatred. This obviously affects the notion of freedom of speech and forces public authority to undertake inquisition activity – as in the case of the reverend Ake Green. Equalling a critical view, proposing different values, with attack results in suspension of freedom of speech and delegating to the state the power of decision as to what is permitted. R. Descartes said that he may disagree with someone's views but he is ready to sacrifice his life so that the view may be propagated. A. de Tocqueville warned that it is the whole of the citizens of a democratic country and not public authority who have the power of deciding whether someone's views are right or wrong. Once an attempt to restrict this power is made, there will be no end to further restrictions.

It should be remembered in this context that when a new Polish constitution was

resolved in 1997, the text of its preamble caused a heated political and ideological dispute. Eventually a compromise formula was adopted referring to the ten centuries of the history of the state and the nation and indicating a significant role of Christian heritage. It was also emphasised that opening to Europe and the world does not contradict the sense of national identity and attachment to cultural roots.

In this context the following view of the Polish Constitutional Tribunal is worth quoting:

«The interpretation of EU law by the European Court of Justice should not exceed the functions and competences delegated by member states to EU. It should also correlate with the principle of subsidiarity determining the activity of the community-EU institutions. The interpretation should also be based on the assumption of mutual loyalty between the community-EU institutions and the member states. The assumption generates – on the Court's part – the obligation to favour national legal systems, while on the part of member states – the obligation to observe community norms to the highest achievable standards [...] Member states reserve the right to evaluate whether the community (EU) legislative bodies resolving a given act (of law) observed delegated competences and whether they exercised their powers in accordance with the principles of subsidiarity and proportionality. Exceeding this framework results in the fact that the principle of the priority of the community law does not apply to the acts (provisions) resolved in excess of these limitations»²⁰.

The Polish Constitutional Tribunal emphasized that:

«Relative autonomy of legal systems, based on their own internal hierarchical principles, is not tantamount to absence of mutual influence. It also does not eliminate the possibility of collision between the regulations of the community law and the

²⁰ OTK ZU Nr 5/A/2005, poz. 49.

provisions of the Constitution. The latter would take place when there was irrevocable contradiction between a constitutional norm and the norm of the community law, a contradiction which could not be eliminated with the use of interpretation respecting relative autonomy of the European law and the national law. Such a situation cannot be ruled out but it may – due to [...] common character of assumptions and values – appear only exceptionally»²¹.

For the so-called new member states of EU, which include Poland, it is especially important that the disputes concerning values discussed above were, as emphasized by the Ioan Ganfalean, resolved respecting the principles of «solidarity, consensus and in the spirit of compromise»²². The values on which the whole EU legal system is based cannot be imposed on any country by another country, neither can they be imposed on a minority by a majority currently in power within individual states.

It must be remembered that common values and the EU law implementing them stimulate the identification of citizens of EU member states with the Union as a whole. This serves the purpose of increasing their interest in public life and their contribution to influencing the will of their own countries and the Union – e.g. by participating in the elections to the European Parliament. For the purpose of implementing this task it is important that European integration is in its form and content an expression of a broad social consensus, a result of compromise between various social groups and political powers. This multiplicity must form an integrated whole, which in its turn affects its ability to perform economic and political functions of a new entity. The EU law may constitute the basis of the social development of united Europe only when it is accepted by the citizens, when it protects their interests, ensures freedom and the possibility of the

development of an individual, guarantees internal peace by creating mechanisms of solving social conflict, provides the citizens with the possibility of exercising authority not only in their own country but also in EU and supervising not only the national but also European institutions. From this perspective it may be observed that the Union strives to implement these objectives and that the proposals of differentiating the rate of integration within two-speed Europe or unjustified criticism of new EU members wishing to voice their views have become the thing of the past

The Treaty of Lisbon enables us to hope that new decision-making mechanisms will enable to reach a compromise in determining new values influencing the quality and form of integration.

²¹ OTK ZU Nr 5/A/2005, poz . 49.

²² GANFALEAN, I.: *The Implementation of European Law In Romania*, *Annales Universitatis Apulensis*, Series Jurisprudentia 11/2008, p. 123.

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU AND PROTOCOL ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU TO POLAND AND UNITED KINGDOM

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RESUMEN:

La primera parte del texto recuerda el término “fragmentación” en el Derecho Internacional Público como el enlace a la autonomía del sistema legal de la Unión Europea. Sin profundizar en el alcance de la fragmentación y su papel en el Derecho Internacional Público, se analizan tanto el carácter como los pros y contras de la Carta de los Derechos Fundamentales de la UE. En la parte final se presenta la naturaleza y el significado del llamado Protocolo Polaco-Británico a la Carta, así como las posibles consecuencias legales de su adopción.

ABSTRACT:

The first part of the paper analyzes the “fragmentation” in public international law as well as the link between it and the autonomy of European Union legal system. Without going deeper into the considerations of fragmentation and its role in public international law, the character and the pros and cons on the Charter of Fundamental Rights of the EU are discussed. In the final part, the nature and the meaning of the so called Polish-British Protocol to the Charter is presented as well as the possible legal consequences of its adoption.

PALABRAS CLAVE: *Derecho Internacional, Unión Europea, Carta de Derechos Fundamentales,*

KEYWORDS: *International Law, European Union, Charter of Fundamental Rights*

1.- INTRODUCCIÓN

There are some strong evidences, that legal system of the European Union is one of the *self-contained regimes*¹. The phenomenon of

¹ Wider about fragmentation in public international law and *self-contained regimes* see especially No nr 31 of «New York University Journal International Law and Politics» (NYUJILP): Abi-Saab, G.: *Fragmentation or Unification: Some Concluding Remarks*, pp. 919-933; Charney, J. I.: *The Impact on the International Legal System of the Growth of the International Courts and Tribunals*, pp. 697-708; Danilenko, G. M.: *The Economic Court of the Commonwealth of Independent States*, pp. 893-918; Dupuy, P.M.: *The Danger of the Fragmentation Or Unification of the Internal Legal System and the International Court of Justice*, pp. 791-808; Jackson, J.H.: *Fragmentation or Unification Among International Institutions: the World Trade*

Organizations, pp. 823-832; Kingsbury, B.: *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, pp. 679-696; Pinto, M.: *Fragmentation or Unification Among International Institutions: Human Rights Tribunals*, pp. 833-842; Romano, C.P.R.: *The Proliferation of International Judicial Bodies: the Pieces of the Puzzle*, pp. 709-751; Petersmann, E-U.: *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System*, pp. 753-790; Treves, T.: *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, pp. 809-821; Koskenniemi, M.: *Study on the Function and Scope of the Lex Specialis Rule and the Question of «Self-Contained Regimes»*, UN Doc. ILC (LIV)/SG/FIL/CRD.1/Add.1, 2004, Leathley, Ch.: *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has ILC Missed the Opportunity?*, NYUJILP, vol. 40/2007, s. 259-306; Yamamoto, R.: *What are «self-contained regimes» and How Do They Work? Contemporary Features of*

fragmentation of public international law has permeated the ground of the ongoing legal discourse among the representatives of the doctrine of this law for good, contemporary, prompting reflection on the nature and directions of development of this law. Public international law just like any other decentralized legal order is governed by its specificity (mainly no single legislator, no single executive power – no single authority that enforces the compliance with the law, the lack of formal hierarchy legal norms relevant to the domestic law, specific sources and special structure) determined also by the processes of progressive fragmentation.

Growing number of international organizations has its strong impact into forming international law standards. International organizations operate nowadays, often forming specialized legal standards, with judicial bodies acting within their structures, have been permanently etched into contemporary international law, not only as its subjects, but also as active participants creating the international reality.

In other words – “fragmentation of public international law” is the term describing deepening differentiation of the international legal system² (formation of a variety of specialized fields – namely: sections, subsystems), correspondingly –

Enforcement System of International Law with Special reference to International Human Rights Law: <http://www.curri.miyakyo-u.ac.jp/curri-ex/pub/maca/rep99/yamamoto.html> or Simma, B. and Pulkowski, D.: *Of Planets and the Universe: Self-contained Regimes in International Law*, «The European Journal of International Law» (EJIL) Vol. 17, No. 3, pp. 512-516 and others.

² M. Koskenniemi indicates, that the background of fragmentation was already created by Wilfred Jenks, that described conflicts between treaty regimes: M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Fifty-Eight Session, Geneva, 1 May- 9 June and 3 July – 11 August 2006, the text available:

http://www.repositoriocdpd.net:8080/bitstream/handle/123456789/676/Inf_KoskenniemiM_FragmentationInternationalLaw_2006.pdf?sequence=1

fragmentation means creating autonomous normative subsystems in the frame of public international law, called *self-contained regimes*. It simply means, that *self-contained regimes* have been emancipated/distincted from general rules of public international law (although European Union according to the Lisbon Treaty itself is pronounced as international organization, so by some means EU still is and will be any way situated in international public legal order).

Despite the above-mentioned questions, it's justified to start with some general principles governing relations between states, adopted in the frame of United Nations system.

The general principles governing friendly relations between States are set out in one of the most important (however not legally binding) documents - UN General Assembly Resolution 2625. It states that the progressive development and codification of the seven principles listed below would ensure their more effective application in the international society and would promote the realization of the purposes of the United Nations. This resolution sets out the common view in the international community according the content of the following seven principles:

- Peaceful settlement of disputes,
- Prohibition of the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations,
- Non-intervention in matters remained in the domestic jurisdiction of any State, in accordance with the Charter,
- Co-operation between States in accordance with the Charter,
- Equal rights and self-determination of peoples,
- Sovereign equality of States,
- Fulfilment in good faith the obligations assumed by the States in accordance with the UN Charter.

In the consequence of expansion of its scope, contemporary international law has

strengthened compulsory adjudication and some of enforcement mechanisms, but in the meantime it has lost its strong link to state consent. The ground of the inter-state obligations is no longer the specific consent of states and its interpretation, applying and enforcement is no longer up to the states. Correspondingly, the question of the legitimacy of international law is placed somewhere between traditional international obligations based on the state's consent and the more and more autonomous regional international legal systems with their specificity (and discipline) in the name of democratic values and human rights protection. International law takes seriously the commitments underlying constitutional democracy developing kind of constitutionalist model for assessing the legitimacy. The very core of this model there contains four distinct principle, that go as follows: the formal principle of international legality, the jurisdictional principle of subsidiarity, the procedural principle of adequate participation and accountability as well as the substantive principle of achieving outcomes that are not violate of fundamental rights and are reasonable³.

All those things mentioned above (fragmentation processes in international law, general principles of states cooperation, that come from classic international law and that are still in force, distinction of different normative system connected with activity of international organization, specific character of European Union as non-typical organization and specific character of states obligations in the EU legal system) should be consider while examining the normative character of the Charter of Fundamental Rights of the EU and Protocol on the Application of The Charter of Fundamental Rights of the EU to Poland and United Kingdom (the so called British or UK Protocol).

³ See: M. Kumm, *The Legitimacy of International Law: a Constitutionalist Framework of Analysis*, EJIL 2004, vol. 15, issue 5, p.907-931.

1. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU – SOME REMARKS ON IT'S MEANING AND IT'S NATURE

The Charter of Fundamental Rights of the European Union was signed by the Member States in December 2000 during the meeting of the European Council held in Nice, France.

The Charter contains in a single text all together the civil, political, economic, social and social rights which had previously been laid down in a variety of international, European and national sources (mostly in Convention for the Protection of Human Rights and Fundamental Freedoms⁴ from 1950 and the International Covenant on Civil and Political Rights⁵ and International Covenant on Economic, Social and Cultural Rights⁶ – last both from 1966 as well as national constitutions).

The Charter brings together in a single document the following groups of rights:

- Coming from human dignity (e.g. the right to life, respect for private and family life);
- freedoms (e.g. freedom of conscience, religion and beliefs, freedom of expression);
- equality (e.g. respect for cultural, religious and linguistic diversity, the prohibition of discrimination);
- solidarity (e.g. right of collective bargaining and action); citizens' rights (e.g. freedom of movement and residence);
- justice (e.g. presumption of innocence and right of defense).

Between 2000 and 2007 the Charter was not legally binding. A Declaration annexed to the Nice Treaty provided that an

⁴ http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁵ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

⁶ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

Intergovernmental Conference would be held in 2004 to consider, *inter alia*, the legal status of the Charter. It means, that from the very beginning non – binding character of the Charter has been considered as temporary solution. This resulted in the adoption of the Lisbon Treaty and consequently according to its provisions in the giving to the Charter binding legal character. On 1 of December 2009 with the entry into force of the Lisbon Treaty also The Charter entered into force and therefore became an integral part of European Union law. The Charter sets out the fundamental rights which every Union citizen can benefit from.

However, Charter does not create fundamental rights which are of general application in national law – and that's the link to the question of Protocol on the Application of The Charter of Fundamental Rights of the EU to Poland and United Kingdom.

Article 2 EU Treaty states, unequivocally, that «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail». Those values can and should be considered as basic UE principles, because they cause legal consequences. Correspondingly, their violation can be sanctioned, their consideration is one of the requirements to fulfil due to get EU membership as well as the one of the fundamental EU members' obligations and they have the important impact on the UE objectives.

Article 6 of the EU Treaty (as amended by Lisbon treaty) includes the Charter of Fundamental Rights of the EU into the catalogue of primary sources of EU law (correspondingly – into EU normative system), stating, that:

1. *The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adopted on 12 December 2007, which shall have the same legal value as the Treaties.*

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties*

3. *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.

The latter paragraph explicitly provides that the Charter does not introduce any new EU powers or tasks⁷.

⁷ As rightly indicates N. Chronowski, that effect is in compliance with the common concept that fundamental rights norms do not attribute power, but merely limit the exercise of powers. The Union cannot directly influence the formation of the common standards, i.e. it has no legislative competences except of the treaty-based rights. See: N. Chronowski, *Enhancing the Scope of the Charter of Fundamental Rights – Problems of the Limitations and Advantages of Directly Applicable Charter Rights with Regard to the Recent Case Law Developments of the European Court of Justice and National Courts*, Discussion Paper upon the call of the European Commission for contributions to the Assises de la Justice, the text available here: http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/36.hungarianacademyofsciences__preliminary_contribution_assises_cfr_chronowski_en.pdf

The provisions of the Charter are addressed:

- To the institutions of the EU with special regard to the principle of subsidiarity,
- The national authorities in cases they implement EU law (what for instance happens when domestic authorities apply or adopt the national law implementing directives or apply regulations directly).

The Charter and European Convention for the Protection of Human Rights and Fundamental Freedoms play subsidiary roles to each other – when the Charter is not applied, the protection of fundamental rights is guaranteed under the constitutions or constitutional traditions of EU countries and international conventions (like European Convention) they have ratified. The Charter strengthens the protection of fundamental rights by making those rights more visible, more defined and more explicit for citizens. The Charter has its supporters as well as its opponents, that comes along with its advantages and disadvantages. The latter will be briefly show below.

Pros and cons for the Charter:

Pros	Cons
<p>Complex character in objective and subjective aspect:</p> <ul style="list-style-type: none"> - the protection covers all groups of rights: personal, politic, economic, social and cultural, - the Charter’s aim is not only protect EU citizens but to protect all persons within EU and does not exclude legal persons’ protection in some cases. <p>However it’s always possible to claim to</p>	<p>Quite controversial, new typology of fundamental rights. The Charter does not reclaim to the categories of human rights known from the public international or national law. So far the typology covered the distinction for rights and freedoms and the division for personal and political, economic, social and cultural – those typologies have been confirmed in International Covenants (1966), European Social</p>

<p>implement the rights from the Charter, not always it’s admissible to start legal procedure according to it.</p>	<p>Charter (1961) and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).</p> <p>The Charter creates six categories, that answers to the Charter’s division for six main chapters, which titles are connected with ideas/values especially important for EU.</p> <p>That concept is quite new, not based on philosophy of human rights and not universally accepted yet – going further it can encourage the collisions between different systems of laws or creating different interpretations of the same terms within the EU.</p> <p>One can argue, that it does not make any sense to make a special human rights system within the economic – oriented organization.</p>
<p>Harmonization of the terms according to fundamental rights – most of human rights protection systems imply creation variety in terminology, what has the significant</p>	<p>The lack of precision in describing the principles. The Charter makes the division for fundamental rights and principles (that aren’t mentioned in the name of the</p>

<p>impact into practice and application of law and can create some problems, especially having regard to even language and translation aspects. That's why in its article 52 point 3 the Charter recalls the scope and the meaning of the rights of the European Convention. The Charter uses also the definitions and the terms from the most of European constitutions (like: human dignity).</p> <p>All of that lets to create quite homogenous catalogue of the fundamental rights and to unitary understanding of those rights in EU law as much as in domestic law.</p>	<p>Charter), but in the text of the Charter there are not precisely identified principles and the provisions of the Charter do not specify, which declare the rights and which ones - principles.</p> <p>Probably this problem is connected with question of social rights, widely described in the Charter and contested as binding by some states.</p>
<p>Creation autonomic mechanism of human rights protection for EU (before protected only on the basis of ECJ judgments or in the relation «individuals – states» on the basis of provisions of the European Convention). Now the rights are</p>	<p>The Charter thanks to its provisions can stimulate the extension of the competences of EU's institutions/organs, however its Article 53 unequivocally exclude such possibility (there are some contradictions within the Charter itself obviously).</p>

<p>protected in wider scope – because in the relations:</p> <p>Individuals – states,</p> <p>Individuals – EU institutions/organs</p> <p>Legal persons (in some cases) – states and EU institutions/organs</p>	<p>Example – right to marriage and to start the family supposed to be protected in conformity with national laws, but where are the EU competences according to this right?</p> <p>It might be, that the Charter has been done in this shape a bit in advance – for the future expanded EU competences.</p>
<p>New important rights: i.e. right to diplomatic protection (not confirmed yet in any other legal act before and very important to individuals).</p>	<p>The lack of protection measures in the Charter, no procedural guarantees (no control mechanism). It could be good to separate European Convention system from the Charter system (does it exist?).</p>

2.- THE CHARACTERISTIC OF PROTOCOL ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

The UK and Poland sought reassurance, that the Charter would not be directly incorporated into their national law.

Article 1, Protocol No. 30 (which is annexed to the TEU and TFEU) provides that:

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative

provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it [i.e. the Charter] reaffirms.

2. *In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law [...]*

Taking into the consideration those provisions, one must notice, that in Poland the value and legal importance of the Charter has been overshadowed by the so – called British – Polish Protocol, annexed to the Treaty of Lisbon, because the applicability of the Charter in Poland is analyzed through the lens of the disputable content of the Protocol No. 30. The decision of the polish authorities to join the Protocol, negotiated earlier by the British delegation, invoked a high level of uncertainty concerning the Charter's status in Poland.

The Protocol seems to be an *opt-out clause*⁸. Quite poor jurisprudence of the Court of Justice of the EU and Polish courts in that matter has not helped much to clarify the scope of the application of the Charter in Poland. That's why the implementation of the Charter in Poland is quite limited. For the same reason it's too soon to predict the real potential it has and can have in polish legal system. It's sure, that Polish motives (obviously political) to join the Protocol were completely different from those of the UK (here we have: not to create new rights, not to make social rights justiciable). The Declarations No. 61 and No. 62 annexed to the Lisbon Treaty illustrates polish government's reservations as to the Charter - the delicate spheres like: euthanasia, same-sex partnership or even marriages, liberalization of abortion, for which at least part of society is not ready yet in Poland. According to the

Article 51 of the EU Treaty, the Protocol has the same legal value as the treaties. Because of joining the Protocol, the legal status of the Charter is in Poland questionable. According to polish realm, the Protocol is rather invisible in the courtroom and in practice courts do not invoke its provisions. It can confirm some opinions, that the Protocol plays currently mostly political role. Any way final clarification of the whole normative significance of the Protocol by the Court of Justice of the EU is strongly needed.

⁸ What allow states to opt out of otherwise-required commitments (i.e. optional protocols and opt-out clauses) can be called „negotiated options”, see: J. Galbraith, *Treaty Options Towards a Behavioral Understanding of Treaty Design*, VJILA vol. 53, no 2, 2013, p. 313.

THE PRINCIPLE OF PROTECTION EFFICIENCY AND MINORITY RIGHTS IN EU LAW

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RESUMEN:

La protección de las minorías es de gran importancia en el constitucionalismo contemporáneo. En este ámbito aparecen diversos aspectos de la protección individual y grupal a nivel nacional y supranacional, así como en el marco de los Convenios del Consejo de Europa. La protección de los derechos de las minorías que está estrechamente relacionada con la dignidad humana se caracteriza por la complejidad normativa. El principio de eficiencia sustantiva y funcional de la protección de los derechos humanos debe aplicarse también a las minorías.

ABSTRACT:

Minority protection is of great importance in contemporary constitutionalism. A variety of aspects of individual and group protection appear in this field on the national and supranational level as well as in the framework of the Council of Europe Conventions. The protection of minority rights, which is closely connected with human dignity, is characterized by normative complexity. The principle of substantive and functional efficiency of the human rights protection has to be applied also with regard to minorities.

PALABRAS CLAVE: *Minoría, Consejo de Europa, Derechos Humanos*

KEYWORDS: *Minority, Council of Europe, Human Rights*

1.- THE MULTIPLICITY OF FUNDAMENTAL RIGHTS GUARANTEES IN EUROPE AND THE GENERAL PRINCIPLE OF FREEDOM

Europe is characterized by the existence of multiple fundamental and human rights protection systems: the national constitutions, the European Convention of Human Rights, Council of Europe conventions related to specific fields of protection, the EU Fundamental Rights Charter, universal instruments of protection, primary and secondary EU law, ordinary national legislation, etc.¹

This multiplicity of protection at various levels is based on the common idea to protect efficiently the individual, in a substantive and a functional way. This idea is a consequence of the basic principle of freedom of the individual which results from the supreme value of human dignity and, connected with this, from the necessary anthropocentric orientation of the relation between public power and individual.

This basic idea is not only relevant for State power, it is valid also for supranational systems such as the EU which replace, at least in part, the State as the traditional pattern of social organization. It seems quite consequent that the exercise of power on individuals is necessarily linked to the

¹ See ARNOLD, R.: *Fundamental Rights Review in Europe: Substitution or Standard Control?* In: PALERMO, F.; POGGESCHI, G.; RAUTZ, G;

and WOELK, J. (eds.): *Globalization, Technologies and Legal Revolution*, Nomos, pp.189-198.

existence of instruments to protect their freedom against undue and excessive power impact. The concept of *contrat social* points out that the original fact is the individual's freedom which is given up, as far as it is necessary, for the organization of the society what includes the exercise of institutional power. Giving up freedom for a determined finality means to keep up freedom insofar as limitation of freedom is not required by this finality. In other words: freedom exists as a principle, society organization by the establishment of institutions and the exercise of power, that is the expression of the institutional will with binding effect on the individual, are exceptional and require therefore legitimation. Legitimation is given if the institutional will intends to preserve and to promote society in terms of good governance, in conformity with the idea of justice, human dignity and the principle of freedom as such. Limitation of freedom must therefore fully respect the principle of freedom by not exceeding the indispensable degree of limitation, by conserving the «essence» of freedom as expressed particularly in the various fundamental rights provisions and by a strict observance of the supreme value, dignity.

The institutional will is expressed by the exercise of public power, no matter by a State or by a supranational organization disposing of the ability for normative orders. The *contrat social* which is essentially based on the principle of freedom of the individual is a safeguard for this freedom as it is a contract. This means that freedom was given up voluntarily and that the due relation between freedom and institutional finality is the essential contents of the contract. Historically, written safeguards for the observance of this contract have been formulated, fundamental rights in constitutional texts. A later development has been to institutionalize guardians of these rights, therefore guardians of the contract, judges and, in a more advanced phase, constitutional courts.

It results from these preliminary reflections that the exercise of power with binding effect on individuals is confronted with the principle of freedom. Therefore each system which institutionalizes the exercise of power on individuals is based on this principle regardless if it is written or not by the law of this system. It is therefore consequent that judges formulate fundamental rights in systems without a written fundamental rights catalogue, often in form of general principles as it happened in the European Communities system², sometimes by establishing a link to other written catalogues, as in France in 1971³ or in Great Britain in 1998 through the Human Rights Act⁴.

This same idea is applicable to the phenomenon that judges, in particular constitutional judges develop further the written body of fundamental rights in a Constitution by extending their contents or even by formulating new aspects of existing rights. The principle of efficiency of fundamental rights protection leads to an enlargement of the written and formulated rights. This traditional activity does not exceed interpretation in a well understood sense which seeks to apply the basic principle of freedom inherent, as explained above, in all institutionalized power systems with impact on individuals.

² See BERNITZ, U.; and NERGELIUS, J. (eds.): *General Principles of European Community Law*, 2000.

³ DECISION N° 71-44 DC DU 16 JUILLET 1971, REC., P. 29.

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<http://www.legislation.gov.uk/ukpga/1998/42/c contents>.

2. - THE PRINCIPLE OF FUNCTIONAL CONCENTRATION OF RIGHTS

If this fundamental scheme is kept in mind, a collateral phenomenon can be better understood, the phenomenon of the *functional concentration of rights* which means that rights of a certain legal order are interpreted and conceived in the light of the interpretation of rights stemming from a different order. The general principle of freedom has an intrinsic tendency to absorb existing rights concepts even if they belong to a different normative system. This is perhaps one of the reasons of *judicial dialogue* with the effect of adaptation, approximation and so-called cross-fertilization. These phenomena can be justified in the perspective of the existence of the general principle freedom in power-related systems. If this principle is general, the specific formulation is not of primordial importance but is exposed to extensive interpretation, to conceptual harmonization with different legal orders, to further normative development of the contents on major social changes etc.

It is decisive that all these processes serve the realization of the basic principle of freedom, by contributing to the substantive and functional efficiency of the individual's protection. Substantive efficiency in this sense means to cover all present and future, existing and emerging threats to freedom. Functional efficiency is dedicated to uphold the full function of the freedom safeguards, in particular by a due application of proportionality as a highly capable instrument of adequately balancing freedom and public interests as well as by the guarantee of the very essence of fundamental rights⁵.

3. - MINORITY PROTECTION THROUGH THE

⁵ See ARNOLD, R.: *Substanzzielle und funktionelle Effizienz des Grundrechtsschutzes im europäischen Konstitutionalismus, Essays in Honour of Friedhelm Hufen*, C.H. Beck, 2015

FUNDAMENTAL RIGHTS CHARTER OF THE EU - AN EXAMPLE

a) The Complexity of Minority Protection Law

Minority protection is normatively complex: individual and collective rights, programmatic norms, objective constitutional principles, regional and international instruments constitute a functional body which should protect efficiently a minority. Minorities are important social factors in societies which can have the tendency to assimilate with the majority or to maintain their specificities which constitute a group of persons as a minority. Many countries in the world and also some of the member States of the European Union are distinctly of a multi-ethnic character. For peace and justice within the society respect and protection of minorities are indispensable⁶.

b) Normative Differentiation of Minority Protection: the complementary tendencies of individualization as subjective rights and of objectivization as constitutional programs

Minority protection can appear in various normative forms: as individual or collective rights, as objective normative programs with binding or only recommending character, in direct reference to minorities (as article 21 of the Charter or article 2 of the Treaty on the EU) or ethnic groups, a term which seems to be a synonym for minorities (as in article 19 of the Treaty on the Functioning of the EU), or only in indirect reference to them protecting for example the «multiplicity of cultures, religions and languages» (as article 22 of the EU Charter) or even through the classical rights such as nondiscrimination,

⁶ SEE IN GERMAN LANGUAGE KROLL, FRANK-LOTHAR; AND NIEDOBITEK, MATTHIAS (EDS.), *VERTREIBUNG UND MINDERHEITENSCHUTZ IN EUROPA*, 2005 AND IN PARTICULAR THE CONTRIBUTION OF NIEDOBITEK, M.: *MINDERHEITENSCHUTZ IM EUROPÄISCHEN MEHREBENENSYSYSTEM*, IBIDEM, PP. 241 – 278.

freedom of religion, of expression, or of association., etc. It is a frequent phenomenon that the recourse to classic rights functionally substitutes specific minority protection rights. It is not very exceptional that constitutional law combines objective finality or program norms and subjective minority-related individual rights and even more frequently classic individual rights.

c) The definition of minority

Before analyzing the EU Charter on the minority protection issue there should be made a short reference to the term of minority.

In the classic view of *Capotorti* minorities are persons who differ from the rest of the population in a State in basic personal attributes such as ethnic origin, language, religion, cultural tradition etc., are numerically inferior and in a non-dominant position⁷. There must also be fulfilled the subjective element to maintain these characteristics as a group.⁸

The claim of a person to maintain these personal attributes only individually is not a question of minority rights in a strict sense but of invoking individual fundamental rights, in particular personality rights and non-discrimination.

Furthermore, citizenship of such persons is no longer the requirement for being characterized as a minority group enjoying protection under international law⁹.

It shall be noted that there is no consolidated definition neither in national nor in international law. It is evident that national law, constitutional and ordinary law, can establish their own definitions. The

essential is that the individual, without any discrimination for its personal attributes, its dignity, its fundamental rights and the exercise of these rights by the individual or by a group are respected.

EU law does not define the term of minority which it uses in particular in article 21 of the EU Charter and in article 2 of the Treaty on the EU. By article 19 of the Treaty on the Functioning of the EU discrimination is forbidden for reasons of «ethnic origin», a provision which is important for but not exclusively destined to minority protection. Also this term is not precisely defined albeit its meaning is less difficult to understand than that of minority.

It can be stated that each legal order has the right to define autonomously what a minority shall be. However, if it does not define it by itself it seems justified that the notion which has developed internationally shall be applied also within this specific legal order. This results from the fundamental intention of a legal order to harmonize, as far as possible, its internal concepts with those developed in a legal order superior to it as international law is for States as well as for the EU as a subject of international law. This tendency of interpretative approximation seeks to avoid conflicts between the two orders which might result from a divergent interpretation of the same term in each of them. This seems to be a consequence of the binding normative effect of the superior on the inferior order.

This tendency of approximation is an example also for the above-mentioned principle of functional concentration of rights, seen from the perspective of the definition of the rights holder.

d) EU law as an example for normative complexity of the minority rights protection

Minority protection in the European Union is a significant example for the complexity of fundamental rights protection in modern constitutionalism. Analyzing this phenomenon we can speak of various principles: first of all of the principle of

⁷ See CAPOTORTI, Francesco: *Minorities*, in *Encyclopedia of Public International Law*, vol. III, Rudolf Bernhardt (ed.), 1997, pp.410-421, 410-411.

⁸See ARNOLD, Rainer: *Minderheiten*, in: *Staatslexikon. Görres-Gesellschaft* (ed.), 1987, 7th ed., vol. 3, pp. 1160 - 1167

⁹ See UN Declaration of 1992 adopted by General Assembly resolution 47/135 of 18 December 1992, <http://www.un.org/documents/ga/res/47/a47r135.htm>

substantive and functional efficiency which has already been mentioned, secondly of the principle of *subjectivization*, which can be divided into an *individual* and a *collective* dimension, thirdly of the principle of *valorization*, further of the principle of *positive implementation*, and finally of the principle of *functional concentration*.

These principles which are important for the fundamental rights protection in general shall be examined in brief reflections.

The topic refers to European Union law protection of minorities. However, the mentioned principles are transversal principles, constitutional in their nature and applicable for national fundamental rights protection as well as for supranational guarantee systems. To a certain extent they are also of significance for the European Convention of Human and Rights (ECHR) which is a constitutional instrument¹⁰.

The first mentioned basic principle is the *efficiency principle* which is inherent in a constitutional order, as pointed out above. This principle is not only the basis for the fundamental rights protection in a State but also in the supranational order and can conceptually also be transferred to the ECHR.

The guarantee of substantive efficiency in this context means that minorities have to be protected in every respect which is necessary for the existence, the free deployment of the characteristic elements of a minority concentrated on language, culture, religion, etc. Substantive efficiency covers all the aspects which are necessarily linked to a minority. Functional efficiency means that the protection guarantee can only be restricted for legitimate general interests in conformance with proportionality¹¹ and can never be affected in its nucleus, its essence.

¹⁰ CASE OF LOIZIDOU v. TURKEY (PRELIMINARY OBJECTIONS), (Application no. 15318/89), para. 75

¹¹ See ARNOLD, R. *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional*, together with MARTÍNEZ ESTAY, J.I.; and ZUNIGA URBINA, F. in: *Estudios Constitucionales*, Santiago de Chile, 2012, pp. 65-116.

The principle of efficiency aims at reaching the finality of efficient protection and does not precisely predetermine the ways how to reach this scope.

The principle of *subjectivization* expresses the tendency to lay down individual rights of minority protections for the persons belonging to minorities. The modality of their protection can be the protection by subjective individual rights which can directly be invoked by the rights holders. This is the *individual* dimension of this principle which is complemented by the *collective* dimension expressed by the protection of minorities as a collective body, a social entity. An example for the individual dimension is article 21 of the EU Charter or article 19 of the Treaty on the Functioning of the EU, for the collective dimension article 2 of the Treaty on the EU.

The principle of *valorization* is based on the fact that subjective rights, fundamental and human rights, constitute (objective) values. They are part of the ideological basis of the constitutional order, «construction principles» of the constitutional system. Norms of more general content such as article 22 of the EU Charter which indirectly have a protective effect for minorities also belong to this category.

The principle of *positive implementation* is of great importance for the realization of minority rights. This embodies the positive dimension of the protection while the already mentioned rights have the character of defense against intervention into the spheres of freedoms and rights which are important for the minority members.

Positive implementation has various aspects: the realization by ordinary legislation or, at the level of the EU, by secondary law is indispensable for the situation of minorities. National legislation has to be adapted to the requirements of minority protection in the way that violations are excluded. However, beyond this, active protection has to be given to the minorities. In correspondence to their specific needs as language, education, cultural tradition, etc. the legislator has to act.

This implementation duty comprises positive discrimination, which means legislation in order to satisfy the above-mentioned requirements and establish structures of autonomy in particular in cultural matters as well as forms of political participation. It is necessary on the one hand to treat minorities and members of minorities in equal way as the majority in all the matters which concern all the people in a State equally. This is an evident consequence of the basic principle of equality and nondiscrimination. Insofar as specific qualities of a minority are concerned, legislation has to guarantee and to promote them in a particular way.

It has to be underlined that minority protection on the one hand requires nondiscrimination but on the other hand positive promotion for a minority needs. If a minority as a collective body wants to continue its identity, support by the State and the majority population is indispensable. It is needed to admit to the minority members to use their language (at least in private use), to exercise their religion, to adhere to their culture and tradition. For the minority as a collective body public power is obliged not to intervene in a detrimental sense but to foster the existence and development of it. It can be stated that positive implementation of the minority protection is a necessary complement to the individual and collective freedom to adhere to a minority and to carry out minority-related activities. For maintaining the minority character of a group the State has not only to refrain from interfering but also to actively support the group by its legislation and to some extent also financially. It is evident that the margin of appreciation how to fulfil the implementation task is rather large. However, the measures must be efficient and correspond to a satisfactory fulfilment.

The principle of *functional concentration* indicates a tendency to fill up the concept of the own legal order with elements of the parallel concept of a different legal order, especially of international law. In the field of

fundamental and human rights the principle of *protection efficiency* implies also the tendency to concentrate protective elements which can be found in other legal orders within the own concept. These elements can exist in the written text or even more in jurisprudence. As rights are normally formulated in a general way they are widely open for absorbing new aspects for intensifying protection. This process of convergence goes on even regardless the traditional separation of national and international law or the fact that national legal orders are separated one from the other by State sovereignty. The vertical adaptation process from international and even more from supranational to national law is the implicit consequence of the superiority of these legal orders. As the judicial practice in Europe shows the interpretative adaptation of rights to concepts stemming from international law is not hindered for example for Germany by the fact that international treaties such as the European Convention of Human Rights are transformed into German ordinary legislation¹². Nevertheless the Convention is used by the constitutional jurisprudence as an interpretation maxim also for constitutional law¹³. Rule of law is seen as incorporating international law as well, and the constitutional complaint of the individual can invoke violations of German fundamental rights if they are not interpreted in the light of the Strasbourg concepts¹⁴. Also in other countries the interpretation of the own constitutional order concentrates the optimum standards developed in international law or in different legal systems.

This is an ongoing process which mainly characterizes the phenomenon of judicial dialogue.

In the context of minority rights the interpretation of the relevant EU law, in particular of article 21 of the Charter and of

¹² See Art. 59. 2 Grundgesetz (Basic Law)

¹³ BVerfG (Federal Constitutional Court) Görgülü case

2004
http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html para.32-33

¹⁴ BVerfG (note 13), para. 63

article 2 of the EU Treaty, have to be adapted to the substantive precepts of the highly important Council of Europe Conventions, the Framework Convention on protection of national minorities¹⁵ and the European Charter for Regional or Minority Languages¹⁶. Both documents demonstrate the structural variety of guarantees, individual rights with a subjective and collective dimension, programmatic norms, and normative implementation programs. Subjective rights and objective values are combined with implementation duties.

4.- SOME CONCLUSIVE REMARKS

Minority protection is of growing importance around the world. Ethnic diversity in a State has to be duly respected and taken into consideration at a constitutional level. International and supranational Law have developed a variety of guarantees.

In the European Union article 21 of the Fundamental Rights Charter as well as article 2 of the EU Treaty and other provisions protect minority rights. Member States have to conform to the EU standard. Entry into the EU is only possible if minority problems are duly resolved. Minority protection is taken seriously also in external relations of the EU with third countries. Important influence on national and supranational standards is exercised by the two important Council of Europe Conventions, the mentioned Framework Convention and the Charter on regional and minority languages.

Modern European constitutionalism is based on the principle of efficiency of the fundamental rights protection which finds its expression in jurisprudence by the *effet utile* approach of rights interpretation. The finality to protect the individual as well as groups

such as minorities in a substantively and functionally efficient way is basic. The modalities how to fulfil this finality can be different: subjective rights of the individual member of a minority or collective rights of the minority group are a subjective form of protection, binding or recommending programmatic norms conceive cultural, religious, and ethnic diversity as objective values which have to be protected against public power or even private intervention and to be promoted by implementation through ordinary legislation. Furthermore, there is an inter- and transnational adaptation process visible which tends to fill up the own protection concepts with the best elements from other legal orders, a sort of *optimization tendency*.

Minority protection is of particular normative complexity demonstrating aspects of all the dogmatic approaches in the field of fundamental and human rights. As a whole it confirms the thesis of the ultimate finality of the rights protection: its substantive and functional efficiency.

¹⁵ <http://www.coe.int/en/web/minorities/text-of-the-convention>

¹⁶ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007bf44>

SUPRANATIONAL PROTECTION OF LANGUAGE RIGHTS IN UNIVERSAL AND EUROPEAN CONTEXT

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RESUMEN:

Ni un solo tratado internacional universal está dedicado en gran medida a los derechos lingüísticos. Este artículo presenta los resultados del análisis de tratados universales y regionales seleccionados que contienen disposiciones para la protección de los derechos lingüísticos, y tiene como objetivo extraer conclusiones sobre la efectividad del enfoque internacional legal en este tema. El análisis de los actos elegidos del Derecho Internacional y el Derecho Europeo lleva a la conclusión de que los Estados están más bien dispuestos a aceptar los reglamentos de soft law, debido a la falta de preocupación por las consecuencias legales rígidas, y luego ajustarse a los problemas particulares con la ayuda de acuerdos bilaterales sobre una base de reciprocidad.

ABSTRACT:

Not even one universal international treaty is dedicated extensively to linguistic rights. This article presents the results of the analysis of selected universal and regional treaties containing provisions for the protection of language rights, and aims at drawing conclusions about the effectiveness of the legal international approach in this subject matter. The analysis of the chosen acts of international law and European law leads to the conclusion that states are more willing to accept soft law regulations, due to the lack of concern about stiff legal consequences, and then to adjust the particular issues with the help of bilateral agreements on a reciprocal basis.

PALABRAS CLAVE: *Derecho Internacional, Derecho Europeo, Tratado Internacional*

KEYWORDS: *International Law, European Law, International Treaty.*

1.- INTRODUCTION

It is widely accepted and hardly disputed that human dignity is natural, non-transferable, and identical for every human being. The consequence of such an understanding of the essence of this value is the assumption that nationality, race, sex, religion, language or education cannot be a prerequisite for the differentiation with regard to human dignity. This principle is considered to be fundamental to all international and domestic regulations, and it serves as the basis for creating a system of

other individual rights. In this sense, dignity is the source of all values recognized as human rights and freedoms¹.

The protection of linguistic minorities is closely related to their culture. As Fernand de Varennes explained, the importance of language for many minorities is a derivative of the central location of language in their social and cultural identity². Language does

¹ JABŁOŃSKI, M.; and JAROSZ-ŻUKOWSKA, S.: *Prawa człowieka i systemy ich ochrony*. Zarys wykładu, Wrocław 2004, p. 26.

² DE VARENNE, F.; *Language, Minorities and*

not only serve functional communication, but it also expresses the cultural identity of the given user and reflects cultural heritage developed by all its previous users³. In fact, language is one of the fundamental components of human identity. For this reason, the respect for human dignity is closely linked to the respect for a given person's identity and, therefore, the language of the person. This view was expressed in universal legal instruments⁴. International and regional legal instruments also reflect the relationship between the protection of minority languages and preservation of cultural diversity. Because all languages are an expression of collective identity, it is necessary to provide the conditions that are indispensable for their development⁵.

Not even one universal international treaty is dedicated to linguistic rights. Most of international and regional legal instruments in this field refer to the human rights and the cultural importance of languages, and consequently to the linguistic diversity as a general policy. This article presents the results of the analysis of universal and European treaties for the protection of language rights, and aims at drawing conclusions about the effectiveness of the legal international approach in this subject matter.

Human Rights, p.129. See also: A. Connelly, The European Convention on Human Rights and the Protection of Minorities, 2 Irish Journal of European Law 1993, p. 279.

³ MANCINI, S.; and DE WITTE, B.: Language Rights as Cultural Rights: A European Perspective, in: FRANCONI, F.; and SCHEININ, M. (ed.): Cultural Human Rights, Leiden 2008, p. 247.

⁴ Organization for Security and Cooperation in Europe, High Commissioner on National Minorities, The Oslo Recommendations Regarding the Linguistic Rights of National Minorities, 01.02.1998, <http://www.osce.org/hcnm/67531?download=true> (2016-11-25).

⁵ Art. 7 (1) of the Universal Declaration on Linguistic Rights, (June 9, 1996), United Nations Educational, Scientific and Cultural Organization [UNESCO], www.unesco.org/cpp/uk/declarations/linguistic.pdf (2016-10-25).

2.- UNITED NATIONS

The process of referring to the concept of human dignity in international agreements was initiated after the Second World War, when the Preamble to the Charter of the United Nations⁶ of 26 June 1945 declared the need to restore faith in the fundamental human rights, in the dignity and worth of human beings. These formulations were then repeated in Article 1 of the Universal Declaration of Human Rights⁷ of 10 December 1948, stating that all human beings are born free and equal in dignity and rights.

Language rights are protected by the international law from the perspective of protection of national minorities and indigenous peoples⁸. Because minorities are recognized as entities located in a relatively worse situation, it does not suffice to merely tolerate their languages, but it is also necessary to promote them. The minority language is usually different from the language of the majority, and the special protection of minority groups is necessary in order to preserve their cultural identity. For this reason, guarantees of language rights are subject to regulation under conventions relating to the protection of these groups and their members.

Article 27 of the International Covenant on Civil and Political Rights (hereafter: ICCPR)⁹, which contains a positive obligation to support maintenance and revitalization of minority languages, constitutes the universal source of language rights protection. According to this Article, persons belonging to ethnic, religious, and linguistic minorities shall not be denied the

⁶ <http://www.un.org/en/sections/un-charter/un-charter-full-text/> (2016-11-06).

⁷ <http://www.un.org/en/universal-declaration-human-rights/index.html> (2016-11-06).

⁸ On the necessity to protect language rights in international law: MÅLSKÖÖ, L.: *The Language Rights in International Law: Why the Phoenix is Still in the Ashes*, 12 *Florida Journal of International Law* No 12 (2000), p. 441.

⁹ International Covenant on Civil and Political Rights opened for signature at New York on 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407.

right to their own culture, to profess and practice their own religion, and to use their own language together with other members of their group. Article 27 ICCPR is neither a standard program nor the principle devoid of effectiveness, because the states are required to establish national measures necessary for its implementation. Article 27 ICCPR defines only the priority, which is to respect and preserve the specific characteristics of minorities, that is language, culture and religion. Nevertheless, its implementation requires the signatory states to fulfill this obligation¹⁰.

The Human Rights Committee referred to the regulation of Article 27 ICCPR in its general comment No. 23 of 6 April 1994, and noted that it establishes and recognizes the right granted to persons belonging to minorities. The Committee explained therefore that Article 27 ICCPR does not establish a collective right. The Committee also made a distinction between the rights protected under Article 27 ICCPR and the right to self-determination provided in Article 1 ICCPR, in addition to the prohibition of discrimination in accordance with Article 2(1) and Article 26 ICCPR. The Committee also noted that the terms used in Article 27 ICCPR suggest that those protected belong to a given group and share a common culture, religion and/or language, and that the persons to be protected must not be nationals of Contracting States to the ICCPR. Moreover, persons belonging to minorities do not need to be permanent residents to benefit from the protection of Article 27 ICCPR. Even migrant workers and newcomers in the country constitute a minority and have the right not to be deprived of the use of these rights. The Committee concluded that, although Article 27 ICCPR is formulated in a negative way, it requires the adoption of positive measures of protection, not only against the actions of the Contracting State to the ICCPR in the sphere of legislative, administrative or judicial

review, but also against those of other people in this country¹¹. Positive measures may be necessary to protect the identity of minorities and the rights of their members to cultivate and develop their own culture and language and to practice their own religion in the community with other members of the group¹². The Committee did not specify, however, what should be the nature of these measures and left this question to the discretion of the Contracting States to the ICCPR. In a later communication on the importance of Article 27 ICCPR, the Committee replaced the existing wording with the strong commitment of Contracting States to grant protection to ethnic and linguistic minorities.

The implications of the rights of minorities to cultivate their culture and use their language, as contained in Article 27 ICCPR, were developed in the United Nations Declaration on the Rights of persons belonging to national minorities or ethnic or religious (1992)¹³. This document, which is considered an interpretative declaration of Article 27 ICCPR¹⁴, goes beyond the initial approach presented in Article 27 ICCPR. Article 2 of the Declaration states affirmatively that persons belonging to linguistic minorities have the right to enjoy their own culture and use their own language¹⁵.

The International Labour Organization Convention (hereafter: ILO) No. 169 Concerning Indigenous and Tribal Peoples in

¹¹ *ibidem*, item 6.1.

¹² *ibidem*, item 6.2.

¹³ *Lovelace v. Canada*, U.N. Human Rights Committee, Final Views, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) (1981), item 15; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992).

¹⁴ *Ibid.*, Preamble, item 4: «Inspired by the provisions of article 27 of the International R Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious and linguistic minorities».

¹⁵ *Ibid.*, Art. 2(1).

¹⁰ ARZOZ, X.: *The Nature of Language Rights*, Journal on Ethnopolitics and Minority Issues in Europe No 2 (2007), p. 10.

Independent Countries¹⁶, which is placed beyond the protection of minorities and among guarantees being different in nature, is an international instrument for the protection of indigenous peoples containing a list of linguistic rights. The linguistic rights of indigenous peoples do not relate mainly to the protection of commercial interests, but some of them are important for the transmission of information related to trade in a language other than the language of the majority. Article 30(1) of ILO Convention No. 169 states that governments are to adopt measures appropriate to the traditions and cultures of the peoples concerned, to tell them of their rights and obligations, in particular with regard to work, economic opportunities, issues of education and health, social welfare, and their rights under the this Convention¹⁷.

3.- COUNCIL OF EUROPE

UN Human Rights Committee and the European Court of Human Rights belong to two separate legal regimes, which include rights related to linguistic minorities: the competence of the Committee include, among other things, issuing authoritative comments in response to a complaint under the ICCPR, while the European Court of Human Rights is responsible for monitoring compliance by the Member States of the Council of Europe with their obligations under the European Convention on Human Rights (hereafter: ECHR)¹⁸. The ICCPR provides for, on the basis of Article 27

ICCPR, a direct right to the use of minority languages, while the ECHR does not contain a corresponding permission. The claimants under the ECHR cannot raise immediate claim of their language rights, but only a claim alleging infringement of Article 14 ECHR, which prohibits discrimination in the enjoyment of other rights upon the ECHR, with language as one of several bases. In the doctrine, Article 27 ICCPR is considered to be the most widely accepted, legally binding provision on minorities, however the Committee is reluctant to recognize the right to use the minority language in the official circulation¹⁹. The results of investigations on the basis of Article 27 ICCPR do not differ significantly from similar claims directed to the European Court of Human Rights, even though in the latter case, in the absence of a direct language right, only a limited range of Article 14 ECHR establishing the prohibition of discrimination in the enjoyment of other rights provided for in the ECHR can be applied²⁰. The claimant featuring the direct language right of Article 27 ICCPR does not enjoy, however, greater protection of their language than provided by Article 14 ECHR in reference to the prohibition of discrimination and the right to a fair trial, which in turn are not linguistically or culturally specific.

The European Charter for Regional or Minority Languages (hereafter: ECRML)²¹, adopted 1992 within the framework of the Council of Europe, is one of the most important documents at the regional level, containing binding standards for language rights. As the first international legal instrument devoted to the protection of

¹⁶ International Labour Organization (ILO), *Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries*, adopted June 27, 1989, entered into force September 25, 1991, 72 ILO Official Bull. 59; 28 ILM 1382 (1989).

¹⁷ *Ibid.*, Art. 30: «Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention».

¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950 r., ETS No. 005.

¹⁹ WIERUSZEWSKI, R. Artykuł 27: Ochrona mniejszości, in: R. Wieruszewski (ed.), *Międzynarodowy Pakt Praw Obywatelskich (Osobistych) i Politycznych*, Warszawa 2012, p. 692.

²⁰ PAZ, M.: *The Failed Promise of Language Rights: A Critique of the International Language Rights Regime*, Harvard International Law Journal, Vol. 54, No 1 (2013), p. 165

²¹ European Charter for Regional or Minority Languages, done in Strasburgu on 5 November 1992, ETS No. 148.

minority languages, the Charter helped to increase the standards of protection in the areas, in which the universal instruments are incomplete. The Contracting States undertake to introduce a minimum number of measures to promote regional and minority language in various fields. Article 3(1) ECRML provides that each State ratifying the ECRML determines which minority and regional languages should be included within the scope of the Charter. It is worth noting, however, that not all European countries, including the European Union Member States, have signed and ratified the ECRML²². For the purposes of the ECRML, regional and minority languages are languages that are traditionally used within a given territory of a state by citizens of this state that form a group numerically smaller than the rest of the state's population. These languages are to be different from the official language(s) of the state. This notion includes neither dialects of the official language(s) of the state nor languages of migrants (Article 1 ECRML). With regard to regional and minority languages on the territories in which these languages are used, and depending on the situation of each language, the Contracting States must base their policies, legislation, and practice, amongst others, on the following objectives and principles: recognition of regional and minority languages as an expression of cultural wealth; respect for the geographical area of each regional/minority language in order to ensure that the existing or new administrative divisions do not constitute an obstacle for the promotion of this regional or minority language; the need to take resolute actions to promote regional and minority languages in order to protect them; facilitating and encouraging the application of the regional and minority languages in speech and writing, in public and private life (Article 7 ECRML).

The Council of Europe also adopted a general document for the protection of

national minorities, i.e. the Framework Convention for the Protection of National Minorities (hereafter: FCPNM)²³. According to Article 1 FCPNM, the protection of national minorities and the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights and, as such, falls within the scope of international cooperation. The Contracting States undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions, and cultural heritage (Article 5(1) FCPNM). The content and scope of the Convention were assessed by the European Court of Human Rights in *Chapman v. United Kingdom*²⁴. Having examined the specific cultural background of the Roma communities, the Court held that in this case the right to protection and respect for private and family life must mean the right to preserve the cultural identity of minorities through support for conducting private life in harmony with the nomadic tradition²⁵. According to the Court, it can be said that there is an emerging international consensus among the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity, and lifestyle. However, the Court is not persuaded that the consensus is sufficiently concrete for giving clues to behavior or standards which Contracting States consider desirable in a particular situation. The Court pointed out that the FCPNM sets out general principles and objectives, but the signatory countries were unable to agree on the way of their implementation²⁶.

²²http://www.coe.int/pl/web/conventions/full-list/-/conventions/treaty/148/signatures?p_auth=XM DjTPza (2016-10-25).

²³ Framework Convention for the Protection of National Minorities, done in Strasbourg on 1 February 1995, ETS No. 157.

²⁴ *Chapman v. The United Kingdom* (Application no. 27238/95), ruling of European Court of Human Rights of 18 January 2001, ECHR 2001-I.

²⁵ *Ibid.*, item 73.

²⁶ *Ibid.*, item 93-94.

4.- EUROPEAN UNION

In addition to the legal protection of minorities, including cultural diversity, as expressed in the system of protection of human rights of the Council of Europe, relevant provisions relating directly to multiculturalism, include the law of the European Union (hereafter: EU). Regardless of the national policies of the Member States, the EU, bearing in mind the goal of integration and respect for human rights, should be particularly interested in promoting the idea of multiculturalism, as the blending of cultures is essential to the process of integration. Promotion and protection of multiculturalism are particularly important in the context of the rights of persons belonging to national and ethnic minorities²⁷.

According to Article 2 of the Treaty on European Union (hereafter: TEU)²⁸, the EU was founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States. This provision sets thus a new standard in the EU approach to the fundamental rights of its citizens, i.e. the protection of human rights is not only a general principle of the EU primary law, but also the concrete commitment of the EU and its Member States, which together should strive to develop and strengthen the fundamental rights in the European area. Article 2 TEU is assessed as constituting a central category of the normative legal order of the EU, overriding even the general principles of the law and the written laws of the EU²⁹.

Human dignity also received its normative content of the Charter of Fundamental Rights of the European Union (hereafter: ChFR)³⁰, announced officially at the European Council in Nice on December 7, 2000³¹. It strengthens the protection of the fundamental rights of the EU citizens by stating that there must be no discrimination, in particular with regard to ethnic origin, language, religion, and race. According to Article 22 ChFR, the EU respects cultural, religious, and linguistic diversity. Although the content of the TEU and the ChFR do not give rise to any collective rights of minorities, they justify the assumption that legal dilemmas related to the protection of cultural diversity of the Member States should be resolved taking into account not only the international or domestic law, but also the EU law³². On the basis of Article 2 and Article 3 in connection with Article 4(3) TEU, the Member States committed themselves to a joint action in view of the completion of the EU core values: respect for human dignity, human rights, including the rights of persons belonging to minorities.

ChFR does not grant to minorities as groups or communities the right to protect their cultural identity, religious and linguistic diversity. In this sense, it does not give grounds for the construction of collective rights, to which a cultural, religious or linguistic minority would be the subject. The minority rights are protected indirectly through the fundamental rights as guaranteed by the ChFR, which also serve members of communities and minority groups, i.e. the freedom of thought, conscience, and religion (Article 10 ChFR); the right of parents to ensure the education and teaching of their

²⁷The dignity of the human person takes the first place in the axiology of the European Union as a good of fundamental importance, compare: W. Osiatyński, *Prawa człowieka i ich granice*, Kraków 2011, p. 292.

²⁸Treaty on European Union (Consolidated version 2016) - OJ C 202 (2016).

²⁹SOZAŃSKI, J. *Ogólne zasady prawa a wartości Unii Europejskiej (po Traktacie Lizbońskim) – studium prawnoporównawcze*, Toruń 2012, p. 165.

³⁰Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

³¹SADOWSKI, M. *Godność człowieka i dobro wspólne jako fundament wartości europejskich. Propozycje katolickiej nauki społecznej*, in: E. Kozerska, T. Scheffler (ed.) *Aksjologiczne i praktyczne aspekty integracji europejskiej*, Wrocław 2007, pp. 105–107.

³²WRÓBEL, A.: *Karta Praw Podstawowych. Komentarz*, Warszawa, 2013, p. 758.

children in conformity with their religious, philosophical, and pedagogical convictions (Article 14(3) ChFR); the right to apply in writing to the EU institutions in one of the languages of the Treaties (Article 41(4) ChFR); the prohibition of discrimination, in particular with regard to race, color, ethnic or social origin, language, religion or belief, political or any other opinion (Article 21 ChFR). The ChFR repeats in its Article 21(1) the formula used in Article 14 ECHR and sets, amongst other things, the prohibition of discrimination on the grounds of national minority.

In terms of the fundamental rights, including language rights, petitions submitted by EU citizens play an important role. The right to petition is specified in Rule 215 of the Rules of Procedure of the European Parliament³³. The petition may be submitted by any EU citizen and any natural person being resident in a Member State. The Committee on Petitions deals, amongst others, with complaints lodged by non-German parents on discriminatory practices of the German Office for Children, Youth and Family, which in many cases, a priori assumed that in the event of separation or divorce the non-German spouse would not be able to properly care for the education of their children and usually granted the custody of the child to the parent who is German. At the same time, they prevented the non-German parent from speaking with the child in a language other than German, and the meetings always took place in the presence of an official³⁴. The case was subject to a claim submitted to the European Court of Human Rights, which, by the judgment of 8 April 2004, held unanimously that Germany

violated Article 8 ECHR in the field of family life³⁵.

5.- BILATERAL TREATIES

The conclusion of bilateral agreements, including a provision that persons belonging to minorities have, on the basis of the principle of reciprocity, the right to freely use their mother tongue in public and private life, and the right to write their names and surnames in their mother tongue, is conducive to the development and protection of minority rights. Sometimes the content of the agreements introduces the possibility of using by persons belonging to national minorities their mother tongue also in public life, i.e. in relation citizen–public authorities³⁶.

The Treaty between the Republic of Poland and the Federal Republic of Germany on good neighborhood and friendly cooperation, signed in Bonn on 17 June 1991³⁷ may serve as an example. According to Article 20(1-3) of the Treaty, members of the German minority in the Republic of Poland, i.e. persons with the Polish citizenship who are of the German origin or admit to the German language, culture and traditions, as well as those in the Federal Republic of Germany, with the German citizenship, who are of the Polish origin or admit to the Polish language, culture and traditions, have the right, individually or together with other members of their group, to freely express, preserve, and develop their ethnic, cultural, linguistic, and religious identity without any attempt at assimilation against their will. The treaty gives them the right to the full and effective enjoyment of human rights and fundamental freedoms without any discrimination and in full equality before the law. Persons referred to in the Treaty enjoy in particular the right,

³³ Rule 215: Right of petition, Rules of Procedure of the European Parliament, <http://www.europarl.europa.eu/sides/getLastRules.do?language=en&reference=RULE-198> (2016-11-06).

³⁴ JANUSZ, G.: *Prawa Podstawowe a ochrona Mniejszości Narodowych w Unii Europejskiej*, TeKa Komisji Politologii i Stosunków Międzynarodowych O.L. PAN, No 5 (2010), p. 170.

³⁵ *Haase v. Germany* (Application no. 11057/02), ruling of European Court of Human Rights of 8 April 2004, ECHR 2004-III.

³⁶ Compare: MASTERNAK, M. – Kubiak, *Odesłania do prawa międzynarodowego w Konstytucji RP*, Wrocław 2013, pp. 129-134.

³⁷ Polish Journal of Laws No 14 item 56.

individually or together with other members of their group, to freely use their mother tongue in private and public life, to access information in this language, to disseminate and exchange, as well as to use their names and surnames in their mother tongue.

6. - SOFT LAW

Soft law instruments do not establish a formal legal obligation for states. Therefore, they are more likely to contain more far-reaching provisions concerning the protection of language rights than a binding source of law. An example of this type of law is the Universal Declaration of Linguistic Rights³⁸ (hereafter: UDLR) adopted in the framework of the UNESCO World Conference on Language Rights in 1996. Article 1(2) UDLR states that language rights are both individual rights and collective agreements. According to Article 2(3) UDLR, the collective rights of language groups may include the following: the right to learn their own language and culture; the right of access to cultural services; the right to an equitable presence of their language and culture in the communications media; the right to communicate in their own language with government bodies and in socioeconomic relations. The UDLR introduces the concepts of 'linguistic community' and 'linguistic group'. In light of Article 1(1) UDLR, a linguistic community is any human society established historically in a particular territorial space, whether this space is recognized or not, which identifies itself as a people and has developed a common language as a natural means of communication and cultural cohesion among its members. According to Article 1(5) UDLR, a language group is each group of people sharing the same language, which is established in the territorial space of another linguistic community but which, as opposed to the main linguistic community, does not

have historical predecessors. Examples of linguistic groups are immigrants, refugees, deported persons and members of diasporas. This innovative conceptual framework has a potential to help overcome the difficulties associated with the narrowing treatment of minorities with regard to language rights.

7. - CONCLUSION

The analysis of respective acts of the international law and the European law leads to the conclusion that states are more willing to accept soft law regulations on the protection of linguistic rights due to the lack of concern about stiff legal consequences, and then to adjust the particular issues in the bilateral agreements on a reciprocal basis.

The international law protects national minorities in order to preserve their cultural identity and to avoid ethnic conflicts, including language. The overview of the various instruments to protect minority language rights indicates, however, the reluctance of the international community to grant these groups specific, enforceable rights in this area.

Article 27 ICCPR is the most widely accepted legally binding provision on minorities. On the contrary, the ECHR does not contain any direct language right, offering only the prohibition of discrimination in the enjoyment of other rights provided for in the ECHR. Claimants submitting their application on the basis of the direct language right according to Article 27 ICCPR, however, do not enjoy greater protection of their language than when acting on the basis of the right stipulated in Article 14 ECHR that refers to the prohibition of discrimination and the right to a fair trial, which in turn are not linguistically and culturally specific. Also the ChFR, which, however, establishes, amongst others, the prohibition of discrimination on the grounds of national minority, does not provide an effective safeguard mechanism and leaves the problem to be solved particularly, on a bilateral basis.

³⁸ Universal Declaration of Linguistic Rights (1996), <http://www.unesco.org/cpp/uk/declarations/linguistic.pdf>, (2016-10-25).

LEGAL OPINION ON THE ANALYSIS OF THE
CHANGES TO THE ACT ON THE
CONSTITUTIONAL TRIBUNAL AND OF THE
CHANGES IN THE MAKE-UP OF THE
CONSTITUTIONAL TRIBUNAL IN THE LIGHT OF
THE FUNDAMENTAL VALUES OF A DEMOCRATIC
STATE OF LAW LYING AT THE BASE OF THE
EUROPEAN UNION, IN PARTICULAR ARTICLE 2
OF THE TREATY ON THE EUROPEAN UNION

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RESUMEN:

El 25 de junio de 2015 se aprobó una nueva Ley sobre el Tribunal Constitucional. El séjm (primera cámara del Parlamento) del séptimo término fue consciente en mayo de 2015 de que el Presidente había ordenado la elección parlamentaria el 25 de octubre de 2015. En ese momento, las encuestas preelectorales predijeron que la oposición ganaría. Los cambios introducidos por esa ley incluían un modo especial para designar a los jueces del Tribunal Constitucional, cuyo mandato expiró en 2015. Sobre la base de las disposiciones antes mencionadas, el Sejm polaco nombró a 5 jueces del Tribunal Constitucional el 8 de octubre de 2015. En este contexto, la mayoría parlamentaria en ese momento deseaba eliminar el impacto del Sejm recién elegido en la composición del Tribunal Constitucional hasta el final de 2015.

El 25 de octubre de 2015 la oposición anterior ganó las elecciones parlamentarias. El 19 de noviembre de 2015, el Sejm polaco revisó algunas disposiciones de la Ley del Tribunal Constitucional de 25 de junio de 2015. El 25 de noviembre de 2015, se privó de fuerza legal las resoluciones relativas a la elección de jueces de octubre de 2015. El Sejm fue consciente de las dudas con respecto a si los jueces del Tribunal habían sido nombrados correctamente el 8 de octubre de 2015 debido a algunos defectos procesales como, por ejemplo, que habían excedido el plazo de su mandato, se había violado el principio de igualdad ante la ley (límite de edad para los candidatos de los jueces - no más de 67 años); la infracción del llamado bloqueo legislativo (durante el cual no se pueden introducir cambios esenciales en la ley electoral que se apliquen al proceso electoral ordenado antes de que transcurra ese período); el principio de no continuar el trabajo del Parlamento.

De conformidad con el artículo 2 del TUE, las acciones del Sejm elegido el 25 de octubre de 2015 tienen como objetivo garantizar el principio de pluralismo en la definición de la composición del Tribunal Constitucional, privando de efecto a las resoluciones del nombramiento de jueces antes de que se cumpliera su mandato, para impedir que el recién elegido Sejm democráticamente designe jueces para tales cargos y para enfatizar la necesidad de

adherirse a los procedimientos que rigen el proceso de designación de los jueces del Tribunal Constitucional que es tan importante para el proceso democrático.

ABSTRACT:

On June 25th, 2015, a new Act on the Constitutional Tribunal was passed in Poland. The Sejm (first chamber of the Parliament) of the seventh term was aware of the fact that in May 2015 the President ordered a parliamentary election to be held on October 25th, 2015. At the time, the pre-election polls predicted that the opposition would win. The changes introduced by the aforementioned act included a special mode for appointing judges of the Constitutional Tribunal, whose term of office lapsed in 2015. Based on the aforementioned provisions, the Polish Sejm appointed 5 judges of the Constitutional Tribunal on October 8th, 2015. In this context, the parliamentary majority at the time wished to eliminate the impact of the newly elected Sejm on the composition of the Constitutional Tribunal until the end of 2015.

On October 25th, 2015, the previous opposition won the parliamentary election. On November 19th, 2015, the Polish Sejm revised some provisions of the Act on the Constitutional Tribunal dated 25 June 2015. On 25 November 2015, the Polish deprived of legal force the resolutions concerning the election of judges in October 2015. The Eighth Sejm was aware of the doubts as regards whether the judges of the Tribunal were appointed correctly on October 8th, 2015, because of: procedural defects, exceeding the time limit of its term of office by the Sejm that appointed the judges in October 2015; infringing the principle of equality before the law (age limit for candidates of the judges - no more than 67 years); infringement of the so-called legislative blackout (during which no essential changes to the election law may be introduced that apply to the election process ordered before the lapse of such period); the principle of discontinuing the work of the parliament.

In line with Article 2 of TEU the actions of the Sejm elected on October 25th, 2015, were intended to ensure the principle of pluralism in defining the make-up of the Constitutional Tribunal by vacating the resolutions on the legal validity appointment of judges long before the positions of judges expire, to prevent the newly democratically elected Sejm to appoint judges to such positions and to emphasize the necessity to adhere to the procedures governing the appointment process of the judges of the Constitutional Tribunal that is so important for the democratic process.

PALABRAS CLAVE: *Estado Democrático, TUE, Tribunal Constitucional*

KEYWORDS: *Democratic State, TEU, Constitutional Tribunal*

1. - INTRODUCTION

This paper is not intended to offer a comprehensive analysis of the changes to the Act on the Constitutional Tribunal, but the analysis of the norms concerning changes to the make-up of the Tribunal.

In Poland, the justice system is held by common courts, administrative courts and military courts as well as tribunals. Tribunals are courts with specific competences and of

special significance, which were established mainly to protect the Constitution by ruling on the liability for infringing the Constitution by the persons holding the highest state positions (State Tribunal) or to ensure compliance of the lower-level standards with the Constitution (Constitutional Tribunal). The Constitutional Tribunal rules in the matters related to: compliance of acts of law and international agreements with the

Constitution, compliance of acts of law with ratified international agreements, whose ratification required a prior consent in the form of an act of law, compliance of the provisions of law issued by the central state authorities with the Constitution, ratified international agreements and acts of law, compliance of the objectives or activity of political parties with the Constitution and in the matter raised by constitutional complaints.

The judges of the tribunals are appointed by the Polish Sejm by absolute majority of votes. The second chamber of the Parliament, the Senate, does not participate in the appointment process. The Constitution does not specify detailed issues related to appointment of judges of the Constitutional Tribunal, leaving these issues to be regulated by the Sejm in by-laws or in an act of law. The above pertains e.g. to the deadline by which a proposal may be filed regarding submitting a candidate for a judge of the Tribunal in case a term of office of a judge of the Constitutional Tribunal expires and the entities entitled to file such a proposal. The judges begin holding their position after they take an oath before the President of the Republic of Poland. The Constitution grants no public authorities the competences to verify the appointments made by the Polish Sejm, which means that the Polish Sejm has exclusive competence in this respect.

The term of office of a judge of the Constitutional Tribunal is defined in the Constitution and it is individual. Such a long term of office and its individual nature are intended to ensure the pluralism of views of the judges and to enable different compositions of the Sejm to appoint judges of the Constitutional Tribunal.

2. -SCHEDULE

On 25 May 1997 in a referendum Polish citizens approved the Constitution that was passed by the Parliament. It entered into force on 17 October 1997.

This Constitution defined the competences of the Constitutional Tribunal slightly differently than its predecessor and increased the number of judges from 12 to 15. It legitimized the solution that became the standard practice before that date, that is the fact that each term of office of a judge is individual, and extended the term of office from 8 to 9 years. The provisions of the Constitution concerning the Constitutional Tribunal were further elaborated upon in the Act of 1 August 1997/Act on the Constitutional Tribunal.

Increasing the number of judges made it necessary to appoint 3 new judges. As the parliamentary election was to be held on 21 September 1997, the Sejm of the Second Term (1993-1997) decided not to appoint those judges and to leave the appointment to the newly-elected Sejm, despite the fact that formally its term of office ended after the Constitution entered into force – 20 October 1997 (one day before the first session of the newly-elected Sejm). Therefore, we already have a precedent consisting in leaving the appointment of the judges of the Constitutional Tribunal to the Sejm that was elected through general election preceding the beginning of the term of office of the judges of the Constitutional Tribunal, which was intended to ensure the pluralism of views of the judges of the Constitutional Tribunal. The judges were appointed on 6 November 1997.

At the end of December 2006, a person was appointed by the Polish Sejm to be a judge of the Constitutional Tribunal, with respect to whom there were some doubts as to their activity before appointment and as to the lack of the qualifications required of a judge of the Constitutional Tribunal. Taking the oath was postponed by the President due to these doubts. The Polish Sejm failed to resolve them, and as a result, the President took the oath in March 2007. Next, the Tribunal itself commenced a procedure to decide on any disciplinary proceedings

against the subject judge. However, the judge in question resigned earlier from her position as a judge of the Constitutional Tribunal.

Here we have a precedent that consists in recognizing that the President of the Republic of Poland may refrain from taking an oath from a judge if there are doubts as to the appointment of the given person to hold the position of a judge of the Constitutional Tribunal. Over that period, the President undertakes measures to have a relevant authority clarify the doubts.

On 25 June 2015 a new Act on the Constitutional Tribunal was passed at the initiative of the President of the Republic of Poland. The Sejm of the seventh term was aware of the fact in May 2015 that the President ordered a vote (parliamentary election) to be held on 25 October 2015. At the time, the pre-election polls predicted that the opposition would win.

The Head and the Deputy Head of the Constitutional Tribunal, accompanied by some of the judges, took an active part in drawing up the draft of the new Act on the Constitutional Tribunal. The changes introduced by that act included specifying the deadline for the proposal to submit a candidate for a judge and the entities entitled to do so. They also provided for a special mode for appointing judges of the Constitutional Tribunal, whose term of office lapsed in 2015. Based on the aforementioned provisions, the Polish Sejm appointed 5 judges of the Constitutional Tribunal on 8 October 2015. In this context, the parliamentary majority at the time wished to eliminate the impact of the newly elected Sejm on the composition of the Constitutional Tribunal until the end of 2015.

On 25 October 2015 the previous opposition won the parliamentary election, gaining the number of MPs that slightly exceeded the absolute majority in the Sejm. On 11 November 2015 the seventh term of office of the Sejm ended – a day before the first session of the newly elected Sejm of the

eighth term of office. On 6 November 2015 the term of office of 3 judges of the Constitutional Tribunal lapsed. The President of the Republic of Poland refrained from taking the oath from their successors, raising doubts as to whether all 5 judges appointed on 8 October 2015 were appointed correctly (this matter will be further discussed in this paper).

On 19 November 2015 the Polish Sejm revised some provisions of the Act on the Constitutional Tribunal dated 25 June 2015. The revision introduced precise definitions of the term of office of the Head and Deputy Head of the Constitutional Tribunal, whose term of office lapses in 2015. As there were doubts as to whether all 5 judges appointed on 8 October 2015 were appointed correctly, it provided for appointment of new judges to those positions. In the revised Act on the Constitutional Tribunal dated 19 November 2015 aimed at enabling the Polish Sejm to appoint judges of the Constitutional Tribunal in the situation where the appointment made by the Sejm of the seventh term of office on 8 October 2015 turned out to be defective in procedural terms.

On 25 November 2015, the Polish Sejm passed five resolutions that confirmed that the five resolutions passed by the Sejm on 8 October 2015 pertaining to the holders of the positions of the judges of the Constitutional Tribunal are deprived of legal force. Also, the Polish Sejm asked the President of the Republic of Poland to refrain from taking the oath from the persons specified in the resolutions of the Sejm dated 8 October 2015.

On 2 December 2015 the Sejm appointed 5 new persons to hold the positions of the judges of the Constitutional Tribunal based on the standards provided for by the by-laws of the Sejm. On 3 December 2015 the President took the oath of 4 judges for the 4 positions of the judges of the Constitutional Tribunal whose term of office lapsed on that day, and on 9 December 2015 the President

took the oath from the judge that was vacated a day before that day.

On 3 December 2015 the Tribunal considered the request to analyse compliance with the constitution of certain standards of the Act on the Constitutional Tribunal dated 25 June 2015. The request was submitted by the MPs, the majority of which voted for adopting the said Act. Originally, the request was to be considered in full composition of the Tribunal, but as the judges involved in the works on the draft of the said act in the Parliament excused themselves from adjudicating, the panel of 5 judges considered the case. The Tribunal ruled that the provision (Article 137 of the Act on the Constitutional Tribunal dated 25 June 2015 that provided for a special mode of appointing judges of the Tribunal, whose term of office lapses in 2015, is not consistent with the Constitution with respect to 2 judges whose term of office lapses in December 2015. In this respect, the Tribunal confirmed the doubts of the President and the parliamentary majority. The Constitutional Tribunal ruled that the said provision with respect to the 3 judges whose term of office lapses on 6 November 2015 was compliant with the Constitution. While ruling on the constitutionality of Article 137 and while issuing the judgement, the Constitutional Tribunal did not rule on the correctness of appointment of some or all judges made the Sejm of the seventh term of office on 8 October 2015. It only ruled on the compliance of the norm with the Constitution, based on which the appointment was made.

On 9 December 2015 the Tribunal considered the request to analyse the constitutionality of the revised Act on the Constitutional Tribunal dated 19 November 2015 and ruled that some of its norms are inconsistent with the Constitution, including Article 137a that provided that if judges of the Tribunal, whose term of office lapses in 2015, the deadline to file a proposal

submitting the candidate for a judge of the Constitutional Tribunal is 7 days since entering into force of the Act amending the Act on the Constitutional Tribunal. It means that the legislator decided to appoint the judges of the Tribunal for the positions vacated in 2015. Actually, the parliament appointed judges of the Constitutional Tribunal for the positions vacated in 2015 earlier than the said act provided for, taking advantage of the procedure provided for in the Sejm's by-laws.

In both judgements, the Constitutional Tribunal ruled that the statutory norms pertaining to the appointment of the judges of the Constitutional Tribunal are consistent with the Constitution, yet it did not analyse whether the appointment of the judges of the Constitutional Tribunal made on 8 October 2015 was correct. The Constitutional Tribunal is not competent to control such an act of appointment of the Sejm.

Both the judgement of 3 December 2015 and the judgement of 9 December 2015 were issued by a 5-person panel of judges, despite the fact that originally the matters were to be considered by

the Tribunal in its full make-up (at least 9 judges). The legislative and the executive powers expressed their doubts as to whether these judgements were issued correctly.

3.- LEGAL CONTROVERSIES REGARDING THE APPOINTMENT OF THE JUDGES OF THE CONSTITUTIONAL TRIBUNAL OF 8 OCTOBER 2015

The Sejm of the eight term of office was aware of the doubts as regards whether the judges of the Tribunal were appointed correctly on 8 October 2015. The doubts were reported by the opposing MPs in October 2015, by the President of the Republic of Poland, refraining from taking the oath, experts – authors of legal opinions

presented to the Sejm wrote about them. Major reservations of legal nature that undermined the appointment of the judges of the Tribunal of 8 October 2015 are as follows:

1/ Procedural defects

Law studies emphasize the role of following a relevant procedure to make democratic decisions. «As modern democracy is more than just the rule of the majority, and as it also involves respecting various minorities («otherness»), and the conflict of interest is something that cannot be avoided, it is the procedures, negotiations, tenders, joint participation that are the practical way to enable the operation and legitimization of the state and its powers. Democracy requires procedures, as democracy itself is only a way, a method of functioning of the society. Otherwise, it would not be possible to express the interests of the minorities»¹.

Article 19(2) of the Act on the Constitutional Tribunal dated 25 June 2015 reads: «The proposals regarding candidates for the judges of the Tribunal must be filed with the Speaker of the Sejm no later than 3 months before the lapse of the term of office of Tribunal's judge. » In turn, Article 137 provided for an exception from that rule, reading as follows: «the deadline for submitting the proposal mentioned in Article 19(2) as regards the judges whose term of office lapses in 2015, is 30 days since the act enters into force». The Act on the Constitutional Tribunal dated 25 June 2015 entered into force on 30 August 2015. The appointment pertained to the positions of the judges whose term of office lapses in November (3 judges ended their term of office on 6 November 2015) and in December 2015 (one judge ended their term of office on 2 December 2015, the other one – 8 December 2015). The legislator used two

points of reference to determine the deadline for submitting the proposal – the rule, i.e. the day the term of office of a judge of the Tribunal lapses, and the exception – the day the act enters into force.

The statutory regulations differed from the current regulations included in the by-laws of the Sejm. The by-laws, which in reality has the same legal power as an act of law in terms of appointing judges of the Constitutional Tribunal, was not amended. The by-laws provide for only one point of reference – the day the term of office of a judge of the Constitutional Tribunal lapses.

Article 19(1) of the Act of 25 June 2015 on the Constitutional Tribunal reads: «The Sejm Presidium and a group of at least 50 MPs have the right to propose candidates for the judges of the Tribunal». Compared to the wording of the by-laws of the Sejm in Article 30(1), the legislator introduced an important change, replacing the conjunction «albo (or)» with the conjunction «oraz (and)». Additionally, it must be noted that in the previous Act on the Constitutional Tribunal of 1997 Article 5(4) contained a provision that was equivalent to the provision of the by-laws, reading that the Sejm Presidium or a group of at least 50 MPs have the right to propose candidates for the judges of the Tribunal.

Considering the significance of linguistic interpretation of law, it must be emphasized that the amendment of the Act on the Constitutional Tribunal of 25 June 2015 leads to a significant difference in how the entity entitled to propose candidates for the judges of the Constitutional Tribunal is defined. The conjunction «albo» (or) means that both sentences or parts of a sentence are mutually exclusive or mutually exchangeable. The conjunction «oraz» (and) connects two parts of a syntactic phrase and has the meaning equivalent to «i» (and). It means that the legislator provided for that the Sejm Presidium and a group of at least 50 MPs have the right to propose candidates for the

¹ ŁĘTOWSKA, E.: *Bariery naszego myślenia o prawie w perspektywie integracji z Europą, (Barriers of our thinking about the law in the context of the European integration)* Państwo i Prawo 1996, pp. 4-5.

judges of the Tribunal. Article 30(1) of the by-laws of the Sejm it follows that such a right is bestowed upon either the Sejm Presidium or separately upon a group of at least 50 MPs.

Due to the differences in the statutory regulations and the provisions of the by-laws, it must be noted what is the relationship between both acts of law. It is important from the viewpoint of the principle of the parliamentary autonomy that is derived from Article 112 of the Constitution. It means that the norms included in the Sejm's by-laws serve to specify constitutional norms, to define the manner in which they are implemented, or to fill in the gaps in the Constitution. The relationship between them and the statutory regulations is not simple and in no way is a hierarchic one. The by-laws are in no way subordinate to the act.

2/ Exceeding the time limit of its term of office by the Sejm that appointed the judges

The Sejm, while appointing the judges on 8 December 2015, exceeded the time limit of its term of office, thus infringing Article 119 in conjunction with Article 4 of the Constitution. Additionally, pluralism, which is provided for in Article 2 TEU, was also infringed. The appointment of a judge of the Constitutional Tribunal was not made by the composition of the Sejm elected in general election before the lapse of the term of office of the judge of the Constitutional Tribunal. It made it possible to form a pluralist composition of the Constitutional Tribunal and a result – to influence 14 out of the 15 positions of judges in the Constitutional Tribunal – by the same parliamentary majority. Here it is vital to mention the precedent of 1997 discussed in the schedule that the Sejm of the seventh term of office should look up to. The precedent is important, as it is directly related to the entrance of the Constitution into force and to interpreting by the Sejm of the relation

between Article 119 and Article 4 of the Constitution.

3/ Infringing the principle of equality before the law

The essential criteria for appointment of judges of the Constitutional Tribunal on 8 October 2015 was the age criterion specified in Article 18(2) of the Act on the Constitutional Tribunal dated 25 June 2015. The act introduced an age limit for candidates of the judges of the Constitutional Tribunal – they must be no less than 40 years of age and no more than 67 years of age upon the date of appointment. While specifying a bottom age limit is a common practice in democratic states of law with respect to the holders of positions by appointment, specifying the upper age limit might raise doubts as to the compliance of this solution with the Constitution. There are no grounds in the Constitution to apply age as an appointment criterion for the candidates of the judges of the Constitutional Tribunal. Thus, the appointment is made in line with the upper age limit of candidates set at 67 years of age should be recognized as discrimination of the elderly and infringement of Article 32(2) of the Constitution and Article 2 of TEU, which prohibit discrimination in public life for any reason, including age.

It must also be added that while ruling on the compliance of the Act on the Constitutional Tribunal dated 25 June 2015 with the Constitution, the Tribunal did not consider that issue. The Constitutional Tribunal is bound by the contents of the request and that issue was not raised in the request.

4/ Infringement of the so-called legislative blackout

The Constitutional Tribunal emphasized this principle with respect to the parliamentary election and provided for a requirement of the so-called six-month legislative blackout period, during which no essential changes to the election law may be

introduced that apply to the election process ordered before the lapse of such period. This requirement only applies to significant changes² and to such changes that explicitly influence the course of the voting and its results, and that require informing the subjects of the legal norm about its introduction³. The Constitutional Tribunal ruled: «the blackout period with respect to election law in terms of introducing «significant changes» before the date of the election is derived from the case law of the Constitutional Tribunal from the period after 2000, in response to the infringements related to amending the election law just before the election. It was introduced recently, in combination with the soft law of the Council of Europe, to prevent changes to the election law at the last minute and to respect subject rights»⁴.

The position of the Constitutional Tribunal sets out the standard that is more general in nature and applies not only to parliamentary election, but also to appointment and election of other main authorities, including the judges of the Constitutional Tribunal. This position should also be considered by the parliament while adopting the Act on the Constitutional Tribunal dated 25 June 2015. Unfortunately, the Parliament did not do so, and as a result, changes to the deadlines to submit proposals of candidates for the judges of the Tribunal could have a clear impact on the course of voting in the Sejm and its results, as in October 2015 the President of the Republic of Poland ordered a vote – Sejm election, i.e. the body that appoints judges of the Constitutional Tribunal by absolute majority of votes. Any changes in the ratio between the parties and societies for MPs representing the nation could imply proposing other

candidates or creating a new majority, therefore the appointment of other members of the Constitutional Tribunal.

The Sejm, respecting the legislative blackout requirement and appointing the judges of the Constitutional Tribunal on 2 December 2015, based its actions on the binding norms of the Sejm's by-laws, not on the norms amended in the period that directly preceded the appointment of the judges of the Constitutional Tribunal.

4. - THE PRINCIPLE OF DISCONTINUING THE WORK OF THE PREVIOUS PARLIAMENT

The President of the Republic of Poland refrained from taking oath from the persons appointed as judges of the Constitutional Tribunal (contrary to what people say – he did not refuse to take it), while striving to clarify all and any doubts regarding all stages of the appointment of the judges of the Constitutional Tribunal completed up to that point. It seems that he did so based on the constitutional precedent established in 2007, discussed in the schedule. In the meantime, the procedure of appointing the judges of the Constitutional Tribunal was interrupted⁵ due to the principle of discontinuing the work of the previous parliament. The principle of discontinuing the work of the previous parliament is not expressed in any constitutional norm. Despite that, both chambers of the parliament and the Constitutional Tribunal⁶ deemed it as binding. Due to the place of those authorities

² See judgement of 3 November 2006 , K 31/06, OTK-A 2006, No. 10, item 147.

³ Judgement of 28 October 2009, K 3/09, OTK-A 2009, No. 9, item 138.

⁴ *Ibid.*

⁵ More information about it can be found in the opinion by J. Szymanek for BAS http://www.sejm.gov.pl/media8.nsf/files/WBOI-A4LGY2/%24File/69-15A_Szymanek.pdf.

⁶ see e.g. decision of 22 October 1997, K 7/97, OTK-A 1997, No. 3-4, item 49; decision of 14 November 2001, K 10/01, OTK-A 2001, No. 8, item 262; decision of 26 October 2005, K 29/04, OTK-A 2005, No. 9, item 107.

in the state system it seems that amending or suspending the application of that principle is allowed by means of an act or the Sejm's by-laws.

The lapse of the term of office of the Sejm and the Senate, in line with the principle of discontinuation that is commonly accepted in the democratic states, results in the fact that the matters that were the subject of the works of the parliament are no longer considered, which means that «upon the end of the term of office, all matters, requests, submissions with respect to which the parliamentary works had not been completed, are deemed as ultimately resolved in the sense that they were ineffective.»⁷ The newly elected parliament gains the competence to hold its function and cannot continue the interrupted works. The new parliament could initiate the relevant procedures from the beginning, if it recognized that it is reasonable to perform such works.

It must be emphasized that the Constitutional Tribunal ascribes a more extensive significance to the discontinuation principle and does not relate it exclusively to the work of the parliament itself. It extends this principle to the procedures initiated in the course of terms of offices of chambers, their bodies or MPs, even if they are not *strictly* related to parliamentary work, and to the procedures initiated before the lapse of the term of office, it states: «the principle of discontinuation has a direct impact on the procedure before the Constitutional Tribunal conducted at the initiative of the Sejm or the Senate»⁸. This clearly also applies to the procedures before other constitutional authorities, including the President of the Republic of Poland.

This logic is not modified by the judgement of the Constitutional Tribunal

dated 3 December 2015, as the Constitutional Tribunal did not recognize the principle of discontinuation that has constitutional significance as a control criterion. It was not specified in the requests filed with the Constitutional Tribunal, which is understandable, as they pertained to the constitutionality of the statutory norms of the Act on the Constitutional Tribunal dated 25 December 2015. The discontinuation principle was one of the legal basis for undertaking by the Sejm of the eight term of office of the works on revising the Act on the Constitutional Tribunal dated 25 June 2015.

It must be added that Article 21(1) of the Act of 25 June 2015 on the Constitutional Tribunal reads that «the person appointed as a judge of the Tribunal» takes an oath before the President. The legislator uses the phrase «person appointed as a judge of the Tribunal, not «a judge of the Tribunal». In line with the principle of reasonable actions of the legislator that is derived from the principle of a democratic state of law (Article 2 of the Constitution), it must be adopted that certain phrases were used intentionally to achieve the intended results. Should the legislator recognize that the process of appointing judges is finalised after the appointment by the Sejm, it would be reflected in the relevant norm governing the oath. Let us take Article 15(1) of the Act on the Supreme Audit Office, as an example, which reads: «Before commencing their duties, the Head of the Supreme Audit Office takes an oath before the Sejm.» Here, the legislator states that the person appointed by the Sejm already holds the position after the appointment is made and before the oath is taken. The situation is similar in the case of the Commissioner for Human Rights (Article 5 of the Act on the Commissioner for Human Rights). As the legislator did not use a phrase that clearly recognizes a person appointed to be a judge of the Tribunal as a judge of the Constitutional Tribunal, it means that the

⁷ GARLICKI, L.: *Zasada dyskontynuacji prac parlamentarnych, (The principle of discontinuation of parliamentary works)* Studia Iuridica 1995, No. 28, p. 45.

⁸ Judgement of CT of 17 December 2007, Pp 1/07, OTK-A 2007, No. 11, item 165.

appointment process ends upon taking the oath. This reasoning is justified even more so, when the Sejm appoints a judge of the Constitutional Tribunal before the term of office of the predecessor has not lapsed yet. Thus, treating the appointment process of judges of the Constitutional Tribunal as completed after the voting in the Sejm ends would mean that the Constitutional Tribunal would have more judges than the number 15 specified in Article 194 of the Constitution in the period starting on the appointment date and ending on the day that the term of office of the predecessor lapses.

5. Conclusions

In line with Article 2 of TEU, the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. The actions of the Sejm elected on 25 October 2015 are intended to restore these values in the process of appointing the judges of the Constitutional Tribunal. This is to be assured by:

- ensuring the pluralism principle in defining the make-up of the Constitutional Tribunal by depriving the resolutions on the appointment of judges of legal force long before the positions of judges are vacated, to prevent the newly democratically elected Sejm to appoint judges to such positions;

- emphasizing the necessity to adhere to the procedures governing the appointment process of the judges of the Constitutional Tribunal that is so important for the democratic process;

- appointing judges of the Constitutional Tribunal considering the principle of not amending the appointment rules in the period immediately preceding the appointment, which is of immense

significance for the democratic process;

- considering the prohibition of discrimination of the elderly in the access to public positions;

- considering the principle of discontinuation of the works of the previous parliament that is commonly recognized in democratic states.

FROM A QUANTITATIVE TO A QUALITATIVE MIGRATION AND REFUGEE SYSTEM

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RESUMEN:

Toda persona que es refugiada debido al temor fundado de ser perseguida tiene derecho a la protección. Sobre este principio, se basan tanto los regímenes universales de Ginebra como los europeos. Sin embargo, ambos regímenes tienen serias deficiencias. Se basan en el supuesto implícito de que cada Estado puede recibir y otorgar asilo a cualquier refugiado. Este supuesto no está bien fundado. No se puede esperar razonablemente que ningún Estado, y por lo tanto ningún Estado miembro de la Unión Europea, tome más refugiados de los que puede integrar y tome refugiados que no merecen el estatus de refugiado. Los “verdaderos” refugiados deben estar separados de los llamados refugiados económicos u otras categorías de migrantes que no califican para el estatus de refugiado. En segundo lugar, los “verdaderos” refugiados que están dispuestos a aceptar los valores europeos deben separarse de los que no lo hacen. Pero también existe la obligación de la comunidad internacional en su conjunto de poner fin a las situaciones que hacen que las personas huyan.

ABSTRACT:

Everyone who is a refugee due to a well-founded fear of being persecuted has a right to protection. On this principle, both the universal Geneva and the European Dublin regimes are based. However, both regimes have serious deficiencies. They are based on the implicit assumption that every state is able to receive, and to grant asylum to, any refugee. This assumption is not well-founded. No state, and thus no Member State of the European Union, can reasonably be expected to take more refugees than it can integrate and to take refugees who do not deserve refugee status. “True” refugees must be separated from so-called economic refugees or other categories of migrants not qualifying for the refugee status. Second, “true” refugees who are ready to accept European values have to be separated from those who do not. But there is also an obligation of the international community as a whole to put an end to situations which cause people to flee.

PALABRAS CLAVE: *Refugiado, Migración, Unión Europea.*

KEYWORDS: *Refugee, migration, European Union.*

If we talk about refugees, the starting point has to be the Convention relating to the Status of Refugees, also known as the 1951 Refugee Convention, which was approved at a special United Nations conference held in Geneva 1951.¹

The Convention to which presently about 150 states are parties defines who is a refugee, and sets out the rights of individuals who apply for asylum and the responsibilities of nations that grant asylum. The Convention

¹ United Nations General Assembly Resolution 429 (V) of 14 December 1950,

<http://www.unhcr.org/ref-world/docid/3b00f08a27.htm>

also sets out which people do *not* qualify as refugees, such as war criminals.

The Convention implements Article 14 of the 1948 Universal Declaration of Human Rights, which recognizes the right of persons to seek asylum from persecution in other countries. A state may grant refugees rights and benefits in a state in addition to those provided for in the Convention.

The Convention was initially limited to protecting European refugees from before 1 January 1951, the aftermath of World War II, though states could make a declaration that the provisions would apply to refugees from other places.

The Convention was supplemented by the 1967 Protocol,² which removed the time limits and applied to refugees «without any geographic limitation» but left unaffected declarations previously made by parties to the Convention on geographic scope.

Article 1 of the Convention, as amended by the 1967 Protocol, defines a refugee as « [a] person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. »

A refugee's right to be protected against forcible return, or refoulement, is set out in Article 33(1) of the Convention which states: «No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

threatened on account of his race, religion, nationality, membership of a particular social or political opinion. » It is widely accepted that the prohibition of forcible return is part of customary international law. This means that even States that are not party to the 1951 Refugee Convention must respect the principle of non-refoulement.

Asylum is granted to people fleeing persecution or serious harm in their own country and therefore in need of international protection. Asylum is a fundamental right; granting it is an international obligation under the Convention.

1.- REFUGEES AND THE EUROPEAN UNION

Since 1999, the EU has been working to create a Common European Asylum System (CEAS) and improve the current legislative framework.³

The EU, which constitutes an area of open borders and freedom of movement and where countries share the same fundamental values, and its Member States need to have a joint approach to guarantee high standards of protection for refugees. Procedures must at the same time be fair and effective throughout the EU and impervious to abuse. With this in mind, the EU States have committed to establishing a Common European Asylum System.⁴

Asylum must not be a lottery. EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar.

² The Protocol of 1967 is attached to United Nations General Assembly Resolution 2198 (XXI) of 16 December 1967, <http://www.unhcr.org/refworld/docid/3b00f1cc50.htm>

³ See http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm

⁴ See Summary of The Common European Asylum System - with draft procedures directive, Migration Watch UK, <http://www.migrationwatchuk.org/briefing-paper/37>

Asylum flows are not constant, nor are they evenly distributed across the EU. They have, for example, varied from a peak of 425 000 applications for EU-27 States in 2001 down to under 200 000 in 2006. In 2012, there were 335,895, and rocketed in 2014 and 2015.

Under the Dublin Regulation,⁵ an asylum seeker has to apply for asylum in the first EU

⁵ The Dublin regime was originally established by the Dublin Convention, which was signed in 1990, and came into force 1997/1998. Norway and Iceland, concluded agreements with the EC to apply the provisions of the Convention in their territories. The Dublin II Regulation was adopted in 2003, replacing the Dublin Convention in all EU member states. The Dublin III Regulation (No. 604/2013) was approved in June 2013, replacing the Dublin II Regulation, and applies to all member states except Denmark. It came into force on 19 July 2013. It is based on the same principle as the previous two, i.e., that the first Member State where finger prints are stored or an asylum claim is lodged is responsible for a person's asylum claim. One of the principal aims of the Dublin Regulation is to prevent an applicant from submitting applications in multiple Member States. Another aim is to reduce the number of «orbiting» asylum seekers, who are shuttled from member state to member state. The country that the asylum seeker first applies for asylum is responsible for either accepting or rejecting asylum, and the seeker may not restart the process in another jurisdiction. Together with the EURODAC Regulation, which establishes a Europe-wide fingerprinting database for unauthorised entrants to the EU, the Dublin Regulation aims to «determine rapidly the Member State responsible [for an asylum claim] » and provides for the transfer of an asylum seeker to that Member State. Usually, the responsible Member State will be the state through which the asylum seeker first entered the EU. However, since Greece started to wave refugee through without taking their fingerprints, it has become more difficult to establish the country of entry into the EU, especially if refugees, on their way to Austria, Germany or Sweden, have to cross the territory of states not Members of the EU, like Macedonia and Serbia.

country they entered, and, if they cross borders to another country after being fingerprinted, they can be returned to the former.

2.- THE REFUGEE CRISIS FOLLOWING THE WAR IN SYRIA

Yet, the Dublin regime was not set up with a view to a refugee wave as exorbitant as that caused by the civil war in Syria and, in its wake, by those from other world regions Afghanistan, Pakistan, Iraq, the Maghreb and Black Africa. In 2014, the number of asylum applicants in the EU jumped to more than 625.000, twenty per cent of whom were Syrians. Mainly due to the continuing civil war in Syria, more than a million migrants and refugees crossed into Europe in 2015, sparking a crisis as countries struggle to cope with the influx, and creating division in the EU over how best to deal with resettling people. The vast majority arrived by sea but about 34,000 made their way over land via Turkey. Member States of entry mainly were Greece, Italy, Spain, Malta, Cyprus and Bulgaria, but Member States most affected were Germany, Austria and Sweden.

During the 2015 European refugee and migrant crisis, Greece considered herself overstrained by the great number of refugees arriving from Turkey by land and by sea and put them on the track to other Member States without fulfilling its obligations under the Dublin Regulation. Hungary became overburdened by asylum applications to the point that it stopped on 23 June 2015 receiving back its applicants who later crossed the borders to other EU countries and were detained there.

In order to avoid a humanitarian disaster, Germany decided, on 24 August 2015, to suspend the Dublin Regulation as regards Syrian refugees and to process their asylum applications directly itself. On 2 September 2015, the Czech Republic also decided to

defy the Dublin Regulation and to offer Syrian refugees who have already applied for asylum in other EU countries and who reach the country to either have their application processed in the Czech Republic (i.e. get asylum there) or to continue their journey elsewhere.

On the other hand, Member States such as Hungary, Slovakia and Poland officially stated their denial to any possible revision or enlargement of the Dublin Regulation, specifically referring to the eventual introduction of new mandatory or permanent quotas for solidarity measures.

Germany soon found it necessary to institute a kind of border control, and Austria, Slovenia, and Croatia followed suit. When it turned out that Germany, the preferred country of asylum seekers, would not be able to swiftly take all of them and that, therefore, the number of refugees remaining in Austria and seeking asylum there also rose dramatically, the Austrian government decided to limit the number of refugees who would be granted asylum to 37.500 in 2016 (which is half of the number of 2015) and then to reduce it continuously, restricting it for the years 2016 to 2019 to a maximum of 127.500.

The political turn around so dearly needed does not mean that the borders of Europe have to be closed to migrants in general and to refugees in particular. Moral duties as much as human rights embodied both in national, supranational and international law – especially the Geneva Convention relating to the Status of Refugees of 1951, together with the Protocol of 1967, Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted⁶ and the Dublin Regime of the EU, based on

Regulation No. 604/2013⁷ – do not allow for such a measure. At the same time, however, it is clear that no state and no region, Europe not excluded, can do the impossible or what cannot reasonably be expected from it. Even in this case, the fundamental legal principles of *bona fide* and *ad impossibilia nemo tenetur* may be invoked and have to be respected.

3.- DEFICIENCIES OF THE GENEVA AND DUBLIN REGIMES

However, both the Geneva and the Dublin regime – though originally well meant – have serious deficiencies.

First, the Geneva regime is based on the implicit assumption that every state is able to receive, and to grant asylum to, any refugee. The Dublin regime is based on the implicit assumption that every Member State of the European Union is able to grant asylum to any refugee.

This implicit assumption shows that neither the parties to the Geneva Convention nor the European Council have considered a situation where a State could be overburdened with the number of refugees seeking asylum there. Possibly, the idea that refugees could become a burden was then considered politically incorrect and thus was not further dealt with.

Second, both the Geneva and the Dublin regime are based on the implicit assumption that every refugee is deserving asylum. They do not distinguish between persons worthy of asylum and those who are not worthy of it.

⁷ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Official Journal of the European Union L 180/31.

⁶ Official Journal of the European Union L 337/9

The Geneva regime makes the refugee status and the consequent right to asylum dependent only on a person's «well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion». The Geneva regime does not make the right to asylum dependent on whether this person can be expected not itself to engage in acts amounting to persecution for reasons of race, religion, membership of a particular social group or political opinion. It is therefore also based on the implicit presumption that everyone who once has been threatened with, or has actually suffered from, persecution would refrain threatening others with, or subjecting them to such persecution.

The Dublin regime does not distinguish between border states of the European Union and Member States that are not border states. It is based on the implicit presumption that the different forms of transportation by which refugees could enter the European Union – by land, by sea and by air – would result in an equitable, or at least acceptable, distribution of refugees among the Member States.

The implicit assumptions that are at the basis of the Geneva and the Dublin regime are not well-founded. No state, and thus no Member State of the European Union, can reasonably be expected to take more refugees than it can integrate and to take refugees who do not deserve refugee status. Every state, and thus every Member State of the European Union is entitled to invoke the legal principle of *ad impossibilia nemo tenetur* and the legal principle of *bona fides*, according to which there is no obligation to do the impossible or to accept the unbearable. Since these are overriding principles they cannot be ruled out by either treaty or customary international law.

4.- RECOGNITION OF EUROPEAN VALUES A CONDITION FOR ADMISSION

In fact, these principles are recognised by the European Union and its Member States themselves in connection with admission to membership in the Union. Though Article 49 TEU states that «[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union», the Copenhagen criteria established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995 make admission dependent upon the fulfilment of the following criteria: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the ability to cope with competitive pressure and market forces within the EU, and the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the 'acquis'), and adherence to the aims of political, economic and monetary union.

If it is neither immoral nor illegal to make admission of a state to the European Union dependent upon its respect for the values stated in Article 2 TEU, why should it be immoral or illegal to make admission of a person to the European Union dependent upon its respect for the same values? And if it possible to carefully examine whether states aspiring to membership do indeed fulfil the just-mentioned requirements, why should it be impossible to equally carefully examine whether persons seeking admittance to the European Union – whether as «true» refugees or otherwise – do respect the values stated in Article 2 TEU?

Is there a practical need for examining the stance a person takes towards the values stated in Article 2 TEU? At present, there are at least two reasons why such an examination is needed.

5.- DESERVING' VERSUS 'NON-DESERVING' REFUGEES

First, the recent wave of refugees is threatening to over-strain the reception capacity of the Member States of the European Union or at least of some of them. These states have answered, first, with the re-introduction of border controls under exemption clauses of the Schengen regime; second, with the adoption of annual upper-limits for the number of refugees to be accepted.

According to what has been said before, upper-limits cannot be regarded illegal *per se* if they are the only way to keep the number of refugees within the limits of what is possible or reasonable. This applies even if, in this context, all Member States of the European Union would honour the principle of solidarity and take their fair share of refugees; because the European Union as a whole cannot be expected to admit more refugees than is possible and reasonable. The right of the European Union and its Member States to put a ceiling on the number of refugees in order to stay within the possible and reasonable is out of the question. (This does not, of course, prevent a discussion about the number of refugees Europe is able to manage, and therefore about where to install the ceiling.)

If the European Union and/or its Member States cannot take in all those who claim to be refugees, it is only right and just to distinguish between deserving and non-deserving refugees, i.e. those who adhere to the European values and those who do not, and to reserve the annual quota to the former.

But there is a second, even more compelling argument, namely the radicalisation of the Muslim world. Originally, refugees and other migrants coming to Europe were believed to be happy to adopt themselves to the Western way of life. This might have very well been so thirty years ago, and might still continue to do so,

had the Islamic world not begun to radicalise.⁸

Bin Laden, the head of Al-Qaida, was inspired by the Palestinian Sunni scholar Abdullah Azzam who preached a relentless jihad until either all jihadist fighters were dead or the Muslim world empire would have emerged. His theories were first applied by Arab volunteers who fought against the Soviet invasion in Afghanistan; but afterwards served as the basis of terrorist attacks all over the world. In his paper *Join the Caravan*,⁹ Azzam called upon all Muslims to rally in defence of Muslim victims of aggression and to restore Muslim lands from foreign domination. Azzam emphasized the violence of religion, preaching that, «those who believe that Islam can flourish [and] be victorious without Jihad, fighting, and blood are deluded and have no understanding of the nature of this religion.» He was opposed to any kind of compromise, stating «Jihad and the rifle alone: no negotiations, no conferences and no dialogues.» The Islamic State in Syria and the Iraq is rooted in this tradition, as are the terrorists presently threatening the capitals of Europe and the cities of the United States. As early as 1994, a video showed Azzam exhorting his audience to wage *jihad* in America (which Azzam explains «means fighting only, fighting with the sword»); and his cousin, Fayiz Azzam, says «Blood must flow. There must be widows; there must be orphans.»

Successful terrorist attacks like those on the World Trade Centre in 2001 provided Muslims all over the world with a new self-awareness and self-assurance. Even those who were not prepared to join the Jihad often were ready to revive their Muslim religious and cultural customs and

⁸ For the following, see, inter alia: ATWAN, Abdel Bari: *The Secret History of al Qaeda*, Berkeley, CA: University of California Press, 2006; *id.*, *After Bin Laden: Al-Qaeda, The Next Generation*, London/New York: Saqi Books (London)/ New Press (New York), 2012.

⁹

https://archive.org/stream/JoinTheCaravan/JoinTheCaravan_djvu.txt

consequently to reject the Western way of life together with the values which form its basis. It was then that Turkish women in Western Europe started to wear the headscarf, at a time when to do so was still forbidden in Turkey herself, and that forced marriages and honour killings became fashionable in Muslim social strata. And the latter has become the breeding ground for people who are ready to attack non-Muslim people and institutions, be it in the form of terrorism as in Paris, be it in the form of large-scale harassment as in Cologne and other German cities.¹⁰

Our societies, our states and our European Union cannot afford people who pose a threat to our values and way of life. We must prevent them from further infiltrating Europe, even if they come under the guise of refugees. The present situation gives us the chance to do so.

First, «true» refugees must be separated from so-called economic refugees or other categories of migrants not qualifying for the refugee status. Second, «true» refugees who are ready to accept European values have to be separated from those who do not. It is very likely that the number of «true» refugees worthy of European asylum will be much smaller than the number of those who have so far entered Europe in an uncontrolled process, and that Europe will be able to satisfactorily cope with the refugee problem if all European countries cooperate in this matter on the basis of the principle of solidarity.

6.- ADDITIONAL MEASURES REQUIRED

In order to cope with the refugee problem in a satisfactory manner, additional administrative and substantive measures will have to be taken. The European Union needs an efficient border regime that permits to

deal with applications for asylum in reception centres in those Member States which are the first to be confronted with new refugees; and it needs an efficient border control system that prevents illegal entry into the European Union by those who are not eligible under the refugee regime.

In the end, however, dealing with refugees in an orderly manner is not sufficient. The European Union and its Member States partake in the obligation of the international community as a whole to protect civilians in any country and region where their security and human rights are seriously threatened. With regard to refugees, this means that an end must be put to situations which cause people to flee. The fact that the Security Council, because of the political disagreement among its permanent members, so far has failed to put an end to the civil war in Syria demonstrates that much diplomatic effort will still have to be made because this is a task that cannot be accomplished by Europe alone.

¹⁰ See, inter alia: FALK, Avner: *Islamic Terror: Conscious and Unconscious Motives*, Westport, Connecticut, Praeger Security International, 2008.

THE INTEREST OF INTERNATIONAL COMMUNITY IN THE EU ENVIRONMENTAL LAW

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RESUMEN:

Los principios de la legislación ambiental de la UE no están suficientemente definidos en la legislación primaria de la UE. Su significado sustantivo ha sido objeto de una discusión notable, y en su mayoría son incapaces de una definición clara. El objetivo del artículo es mostrar el desarrollo del concepto de los principios de la legislación ambiental a nivel internacional, su expresión específica del tratado a nivel de la UE y los problemas respectivos relacionados con su aplicación. A los efectos de este artículo, se ha planteado la hipótesis de que los principios de la legislación ambiental de la UE son instrumentos flexibles, intencionalmente imprecisamente definidos y que su naturaleza ambigua permite la implementación efectiva del interés de la comunidad internacional.

ABSTRACT:

The principles of the EU environmental law are not sufficiently defined in the primary legislation of the EU. Their substantive meaning has been the subject of notable discussion, mostly concluding that they are incapable of clear definition. The aim of the article is to show the development of the concept of environmental law principles at the international level, their treaty-specific expression at the EU level and the respective problems referring to their application. For the purposes of this article it has been hypothesized that the principles of EU environmental law are flexible, intentionally imprecisely defined instruments and that their ambiguous nature allows for the effective implementation of international community interest.

PALABRAS CLAVE: *Legislación ambiental, Unión Europea, Legislación primaria UE.*

KEYWORDS: *Environmental law, European Union, Primary legislation of EU.*

INTRODUCTION

Legal norms are created under conflicting interests. International law is characterized by the absence of a central legislative apparatus that could authoritatively decide whose interest is more and whose is less important. The universal international law is created decentrally, through the interaction of individual states and it generally does not work against their explicit will. The

interest of the international community that is understood as a community of states would seem to be a logical section of the interests of each of these states. However, despite the fact that the interest of the international community basically lies in the interests of individual states, it is possible that some of them

oppose it in order to obtain their own temporary benefits¹.

As B. Simma observed, the existence of common interests does not derive from scientific abstraction but rather flows from the recognition of concrete problems.² The increasing importance of the protection of community interests transcends interests of particular states. At the normative level, the community interests seem to be reflected in such legal concepts³ as *ius cogens*,⁴ obligations *erga omnes*,⁵ invocation of responsibility by a state other than an injured state,⁶ individual criminal responsibility,⁷ etc.

¹ More to this topic: HERMIDA DEL LLANO, Cristina: *La universalidad racional de los derechos*, [w:] BANASZAK, B.; JABŁOŃSKI, M.; and JAROSZ-ŻUKOWSKA, S.: (red.), *Prawo w służbie państwu i społeczeństwu. Prace dedykowane Profesorowi Kazimierzowi Działosze z okazji osiemdziesiątych urodziny*, Wydawnictwo Uniwersytetu Wrocławskiego 2012, pp. 320–334.

² SIMMA, B.: *From Bilateralism to Community Interest in International Law*, vol. 250, in: *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law 1994, p. 233.

³ TANAKA, Y.: *Protection of Community Interests in International Law*, in: A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, vol. 15 (2011), p. 333.

⁴ United Nations Convention on the Law of Treaties, Signed at Vienna 23 May 1969, Entry into Force: 27 January 1980, Article 53, <http://www.jus.uio.no/lm/un.law.of.treaties.convention.1969/> (2016-07-02).

⁵ *The Barcelona Traction*, ICJ Reports 1970, 3 et seq. (paras 32-34). The Institut de Droit International defines an obligation *erga omnes* as «an obligation under general international law that a state owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all states to take action.»

⁶ Art. 40, 41 and 48 of the *ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts*, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (2016-07-02).

⁷ Rome Statute of the International Criminal Court, document A/CONF.183/9 of 17 July 1998, Preamble, para. 4, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

The interest of the international community is the reason why a special status under international law is provided for specific instruments.

The concept of the environment derives from the international law. The meaning of the term «environment» has not been clarified until the UN considered environmental issues in 1968 when it recommended in a resolution⁸ that the General Assembly should consider convening a UN conference on problems of the human environment.

The aim of the article is to show the development of the concept of environmental law principles at the international level, their treaty-specific expression at the EU level and the respective problems referring to their application. For the purposes of this article it has been hypothesized that the principles of EU environmental law are flexible, intentionally imprecisely defined instruments and that their ambiguous nature allows for their effective implementation of international community interest.

1.- THE DEVELOPMENT OF THE INTERNATIONAL ENVIRONMENTAL LAW

The process of shaping the international environmental law began in the mid-twentieth century with the elaboration of the principles of good neighbourliness, which broke the unlimited powers of the State over the national territory. According to this principle, no state can benefit from its

⁸ 45th session of the Economic and Social Council (ECOSOC), Resolution 1346 (XLV) of 30 July 1968, [http://www.un.org/en/ga/search/view_doc.asp?symbol=e/res/1346\(XLV\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=e/res/1346(XLV)) (2016-07-02).

territory, or allow its use to private parties in such a way that would result in injury to persons or property on the territory of another state. As the source of this rule is regarded the arbitral award *Trail Smelter*⁹. It concerned pollution with sulphur dioxide that was emitted by the Canadian smelter situated near the US border, and caused damage in the territory of the United States. The principle has been adopted to the overall international level with a judgment in the *Corfu Channel*¹⁰. For international law, the effect of this rule was not only to allocate damages suffered in this way within international torts, but also to confirm the possibility to use its classical instruments (diplomatic protection) for possible claims in the event of failure of domestic remedies.

In the second half of the twentieth century, however, this standard proved to be insufficient. At that time there was in fact a systematic environmental degradation involving the pollution of air, seas and oceans, and soil. That was because of the strengthening of economic relations between states, and, as a result, the emergence of new areas of activity of national economies (nuclear energy, chemical fertilizers), industrial and technical development, resulting in an increase in global demand for oil and

coal. This led to new environmental challenges, which exceeded the previous territorial scope, losing its bilateral nature and becoming regional, and subsequently, global problems.

Another problem was the diverse economic development of the world and the related diversified access to modern technologies. States in Africa and Asia wanting to compensate their delay in economic development caught risky solutions, expecting success even at the cost of impairments in the environment that often affected not only their neighbours¹¹. At the same time, in developed states a social awareness in the area of ecology began to grow¹². The public opinion started to expect from their states mitigating damage and taking into account the interests of mankind to preserving nature. In this way, the process of changing paradigms of global politics and redefining a new axiology was introduced.

In these circumstances, international law faced the necessity of change. The exclusivity of territorial governance was in fact on the road to take account of emerging needs in economic development. Facing the new format of cross-border and global (sea water, air) damages, the mechanism of compensation upon traditional international law based on diplomatic

⁹ *Trail smelter case (United States, Canada)*, 16 April 1938 and 11 March 1941, Reports Of International Arbitral Awards, vol. III pp. 1905-1982,

http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf (2016-07-02).

¹⁰ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 25 March 1948, ICJ Reports 1949, p. 249: «as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal fixed what the Court, in other circumstances has described as the true measure of compensation and the reasonable figure of such compensation», <http://www.icj-cij.org/docket/files/1/1569.pdf> (2016-07-02).

¹¹ See for example: OVIASUYI, P. O.; and UWADIAE, J.: *The Dilemma of Niger-Delta Region as Oil Producing States of Nigeria*, *Journal of Peace, Conflict and Development* 16, 2010, p. 110 ff; EJIMS, O. *The impact of Nigerian Petroleum Contracts on Rights of Communities*, *African Journal of International and Comparative Law*, vol. 21/3 (2013), p. 347 ff.

¹² On social participation in environmental protection: CIECHANOWICZ-MCLEAN, J.: *Pravo ochrony i zarządzania środowiskiem*, Warszawa, 2015, pp. 103-105.

protection were no longer sufficient¹³. A prior obligation to exhaust the courts in the state deemed responsible would limit the real possibility of redress. Even then a number of unresolved issues related to the further activities of the polluter and the division of responsibilities between the entity and the state would remain. For damages in areas beyond the sovereignty of a state, mechanism for their disposition, as well as for forcing polluters on appropriate action lacked completely. There was therefore a need to introduce *a priori* - regulations.

In this way began the process of formation of the international environmental law¹⁴. The starting point for its creation was the Declaration of the United Nations Conference on the Human Environment (1972)¹⁵. In its political foundations lies a report of the Secretary-General U Thant (1969) «The Problems of the Human Environment.¹⁶» It was prepared in response to the resolution 2398 (XXIII) of 3 December 1968 in which the General Assembly

decided to convene a United Nations conference on the human environment and requested the Secretary-General to submit a report concerning, inter alia, the nature, scope and progress of work being done in the field of human environment, the main problems arising in this area, and the possible methods of preparing the Conference¹⁷. The author defined the risk of environmental pollution as a threat to the future of mankind and stressed to the need of active participation of the entire international community. The Stockholm Declaration addressed the issue of the environment as a whole. It referred in particular to the condemnation of nuclear weapons tests and the adoption of an action plan on recommendations for further international action and decided to convene a new conference in future. It contains a number of principles intended to have effect on the conduct of states in respect of their activities influencing the environment. Its essence is art. 21, where it is stated that states «the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction».

In 1992 in Rio de Janeiro, there was a subsequent conference on environment and sustainable development that due to its scope was called «The Earth Summit». It continued the achievements of the Stockholm Conference. The main effects of the Rio conference were: the Agenda

¹³ More on the activity of international courts in this area: GAWŁOWICZ, I.: *Some reflections on modern subsidiary law-making processes in public international law with special regard to diplomatic international law*, Dipartimento Jonico in Sistemi Giuridici ed Economici del Mediterraneo: Societa, Ambiente, Culture, 2015, pp. 179–189.

¹⁴ BEYERLIN, U.: *Rio-Konferenz 1992: Begin einer neuen Umweltschutzordnung?* Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 5, 1994, p. 124.

¹⁵ Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972 by the United Nations Conference on the Human Environment at the 21st plenary meeting as the first document in international environmental law to recognize the right to a healthy environment
<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503> (2016-06-25).

¹⁶<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/243/58/IMG/NR024358.pdf?OpenElement> (2016-06-25).

¹⁷ UN General Assembly Resolution 2398(XXIII) of 3 December 1968, *Problems of the human environment*,
<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/243/58/IMG/NR024358.pdf?OpenElement> (2016-06-25).

21¹⁸, the United Nations Framework Convention On Climate Change¹⁹, the Convention on Biological Diversity²⁰, the Statement of Forest Principles²¹ and the Rio Declaration on Environment and Development²². This latter document contains a catalogue of rules of conduct, whereas the key principle is to place the mankind at the centre of sustainable development (No. 1). The process itself must equally take into account the needs of present and future generations (No. 3). Finally, the protection of the environment must be linked permanently to the economic development (No. 4). At the First Preparatory Committee meeting, known as Prepcom1, a level of consensus emerged amongst delegations that all states need to enhance efforts and concrete actions to achieve sustainable development.

Both declarations contain in principle similar rules that are generally accepted by the international community, despite the fact that they use undefined terms. They impose obligations relating to the pollution of the environment on both the developing and the developed countries. The Stockholm Declaration and the Rio

Declaration became effective in international law as a regime mainly because the basis for their negotiations was the so-called «framework approach». It intends to define the scope of the legal obligations in the general document, and then to formulate the details in the protocol. This approach results in a progressive arrangement of liabilities, to the extent acceptable by states and allows them to influence the content of the commitments. Treaties and the practice of states have further developed general principles contained in the Stockholm Declaration. The Rio Declaration emphasized then the obligations of states based on this development. Its acceptance is also partly due to the balance between the policies of the developed and the developing countries. The developing countries recognized it because of its «precautionary principle» and «polluter pays principle». On the other hand, the developed countries agreed to «common but differentiated responsibilities» and the «right to development». The framework approach helped, moreover, in creating soft law. States created the specifics of principles of international environmental law, whereas the resolutions, protocols and treaties adopted on their basis, led to the creation of the legal system consisting of a combination of formal instruments of law and the soft law²³.

The increase in scientific knowledge on the functioning of the environment and on the effects of environmental destruction was of fundamental importance for the development of international environmental law. The

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<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (2016-06-29).

¹⁹ United Nations Framework Convention On Climate Change, FCCC/INFORMAL/84 GE.05-62220 (E) 200705, <https://unfccc.int/resource/docs/convkp/convenng.pdf> (2016-06-29).

²⁰ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, <https://www.cbd.int/convention/text/default.shtml> (2016-06-29).

²¹ A/CONF.151/26 (Vol. III), Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests

²² A/CONF.151/26 (Vol. I), <http://www.un.org/documents/ga/conf151/aco nf15126-1annex1.htm> (2016-06-29).

²³ GUNTRIP, E.: *The Common Heritage of Mankind: an Adequate Regime for Managing the Deep Seabed?*, Melbourne Journal of International Law vol. 4, 2003, p. 26.

activity of the international community resulting in lawsuits against states violating obligations regarding the environmental protection generated jurisprudence, which promoted the development of international environmental law. 1996 the International Court of Justice (ICJ) issued two advisory opinions: «Legality of the Use of Nuclear Weapons in Armed Conflict» and «Legality of the Threat or Use of Nuclear Weapons». In its opinion of 8th June 1996 on Legality of the Threat or Use of Nuclear Weapons in Armed Conflict²⁴, the ICJ stated, «the environment is not an abstraction but represents the living space, the quality of life and the health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. » 1997 the ICJ ruled on the Gabčíkovo-Nagymaros project (Hungary v Slovakia), in an interstate dispute arising from transboundary environmental damage²⁵. The judgment concerned rather the general international law matters, than strictly environmental matters, however, it enlightened on how environmental law could impact on a project's management. In 1977, Hungary and Czechoslovakia concluded a Treaty in Budapest in order to construct a major hydroelectric dam on the river Danube as a joint

investment. The aim of the project was to produce hydroelectricity, improve navigation on the relevant section of the Danube and open it up for trade, as well as to protect the areas along the banks against flooding, to protect the environment and to develop irrigation systems in the area. However, after 1977, the economic, political and environmental positions within both countries changed significantly. In response to domestic pressure, 1989 Hungary abandoned its works at Nagymaros because of serious doubts on the economic viability and the environmental impact of the project. The Court was asked to answer three questions: whether Hungary was entitled to suspend and subsequently abandon its part of the project; whether the then Czechoslovakia was entitled to proceed with a 'provisional solution' involving damming the river at another location and thus arguably causing environmental damage; what were the legal effects of the notification by Hungary in 1992 of the termination of the Treaty. 1997, the Court found that both Hungary and Slovakia breached their legal obligations. Hungary was not entitled to suspend and subsequently abandon the operation on the Project in 1989. Czechoslovakia was not entitled to put the 'provisional solution' as described in the terms of the Special Agreement into operation, from October 1992. The Court called on both states to negotiate in good faith and, unless Parties would have agreed otherwise, Hungary had to compensate Slovakia for the damage sustained by Czechoslovakia on account of the suspension and abandonment of works for which it was responsible. Furthermore, Slovakia had to compensate Hungary for the environmental damage it

²⁴ <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95> (2016-06-29).

²⁵ <http://www.icj-cij.org/docket/index.php?p11/43&p21/43&code1/4hs&case1/492&k1/48d> (2016-06-29). The summary of the judgment: <http://www.icj-cij.org/docket/files/92/7377.pdf> (2016-06-29).

had sustained on account of putting into operation the 'provisional solution' by Czechoslovakia and its maintenance in service by Slovakia.

In this way, gradually developed a system whose foundation is the precautionary principle that was derived the following Principle No. 15 of the Rio Declaration: «In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. » However, the beginning of the XXI century was the period when the states were withdrawing from the process of achieving exorbitant protection standards, because of their significant economic and political costs not only for poor states but also for the existing economic powers. In addition, after 2005, has come the time of a deteriorating economic situation, and, in the end, the financial crisis. Major industrial countries, it is the United States, China, Russia, were not likely to lead to additional braking of economies by binding environmental standards. The intended process of establishing regional provision for universal solutions also failed.

Accepting obligations under international law by state, especially in areas that are regarded as sensitive and detrimental to the sovereignty and national interests, proved to be effective only in extreme situations, forced by other interests²⁶. This was confirmed by

²⁶ BEYERLIN, U.: *Rio-Konferenz 1992: Beginn einer neuen Umweltschutzordnung?* Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1994, nr 1, p. 131.

the adoption of the Kyoto Protocol²⁷. It was to be the first significant step in the international community in the field of climate protection. But already its entry into force was associated with difficulties. An important issue was to meet the high threshold (ratification by the 55% of states that emit 55% of greenhouse gases). As a result of this it came into force in 2005, only when Russia ratified it (2004) counting on the benefits of emissions trading²⁸. The climate summit in Copenhagen in 2009, which was to supplement the Kyoto Protocol with concrete commitments to reduce emissions, ended in failure. After the conference in Durban, Canada withdrew from the Protocol (2011). The European Union failed to reduce emissions significantly, while China and India even increased them. The United States did not join the Protocol²⁹.

The collapse of the process completed in June 2012 in Rio de Janeiro the

²⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Adopted: 11 December 1997 (Kyoto, Japan). Entered into force: 16 February 2005, <http://unfccc.int/resource/docs/convkp/kpeng.pdf> (2016-07-02).

²⁸ SZYM CZYK, J.: *Problemy związane z wprowadzaniem do praktyki Protokołu z Kioto w Polsce oraz w krajach Unii Europejskiej*, Rynek energii, Febr. 2006, p. 2, http://www.cire.pl/pliki/2/protokol_kioto.pdf (2016-06-29).

²⁹ The Treaty had been operating since February 16, 2005 and expired on 31 December 2012. The European Union and Norway, Iceland, Monaco, Switzerland and Liechtenstein affiliated to the European Economic Area committed to extend their obligations under the Treaty by the year 2020. The new Doha amendment to the Kyoto Treaty as proposed by the European Commission on November 6, 2013 has not yet been ratified by the European Union; *Kyoto Protocol: 10 years of the world's first climate change treaty*, Published on 16/02/2015 <http://www.climatechangenews.com/2015/02/16/kyoto-protocol-10-years-of-the-worlds-first-climate-change-treaty/> (2016-07-02).

conference known as Rio + 20³⁰. Its purpose was to review the implementation of the principle of sustainable development and to support its new mechanisms. The impasse, which the process suffered by the Kyoto Protocol, however, failed to terminate. The outcome document entitled «The Future We Want»³¹, although signed by 193 countries, had meagre impact. States confirmed their commitment to sustainable development and stressed the need to strengthen international cooperation in the field of finance, trade, technology transfer, innovation, etc. They emphasized the necessity for cooperation between public and private sector. They did not fall, however, outside the realm of wishful thinking. They referred to the green economy in the context of sustainable development and poverty eradication, which should be a response to the deterioration of the environment and the current economic crisis. For its adoption, however, no mechanism was created.

The international meeting United Nations Framework Convention on Climate Change, at which the 21st Conference of the UNFCCC Parties (COP21) and the 11th Meeting of the Parties to the 1997 Kyoto Protocol (CMP11) took place, was held in Paris from 30 November to 12 December 2015³². Among the key issues, there were: long-term objectives, finance of adaptation to climate change in

developing countries by the developed countries, as well as reviews of the implementation of the obligations. The climate agreement will be legally binding if at least 55% of the states that are members of the Convention, producing a minimum of 55% of global greenhouse gas emissions wishes to become a party to it. It is planned that the regulations should come into force from 2020.

2.- FORMAL ASPECTS OF THE EU ENVIRONMENTAL LAW

The competence of the European Union in the area of environmental protection is shared with the Member States. That means that if the EU fails to take action to protect a given environmental objective, the Member States retain their power to legislate and to decide what they find a reasonable degree of environmental protection. The European Union is competent to pursue any environmental policy in view of achieving the objectives pursued under the first paragraph of Article 191 TFEU³³. These are: (1) preserving, protecting and improving the quality of the environment; (2) protecting human health; (3) prudent and rational utilization of natural resources; and (4) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. The actors are the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions. The term «action» includes not

³⁰ United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, on June 20-22, 2012.

³¹ http://www.un.org/disabilities/documents/rio20_outcome_document_complete.pdf (2016-06-30).

³² http://unfccc.int/meetings/paris_nov_2015/session/9057.php (2016-06-30).

³³ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390.

only the adoption of legislation according to Art. 288 TFEU, the greatest importance of which is attached to the Directive, but also political instruments, such as resolutions and conclusions of the Council, and setting political goals³⁴. Article 192 (1) and (2) TFEU do not specify the criteria for selecting the form of these actions, therefore the EU generally has freedom of choice³⁵.

According to the case law of the Court of Justice of the European Union (CJEU, Court)³⁶, Art. 192 (2) TFEU is an exception to the ordinary legislative procedure of Art. 192 (1) TFEU and must be interpreted strictly. The CJEU found that the respective provision refers to sensitive areas affecting the territorial governance of the Member States. The common feature of these areas is either a lack of EU powers beyond the policy in the field of the environment, or the need to take unanimous decisions in the Council³⁷. In accordance with Art. 192 (2) TFEU, the Council shall act in a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions. However, the Council may make the ordinary legislative procedure applicable to the matters referred to in this paragraph. This procedure of «small footbridge» refers to fiscal measures; measures affecting town and country planning; measures affecting

the quantitative management of water resources (either directly or indirectly affecting the availability of those resources); measures affecting land use (with the exception of waste management); measures affecting significantly the choice of the Member States between different energy sources and the structure of their energy supply.

Some legal problems may be inducted through the two-step procedure of art. 192 (3) TFEU³⁸, according to which the general action programs setting out priority objectives shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, and the measures necessary for the implementation of these programs shall be adopted under the terms of Art. 192 (1) or (2) TFEU as appropriate. In the literature, there is a dispute as to the treatment of this provision: whether it is a procedural provision³⁹, or contains a rule of jurisdiction⁴⁰. It also shows that this provision is only of declaratory importance, aiming to make aware the recipient that for the realization of action programs it is necessary to undertake specific implementation measures on the basis of the relevant standards of competence provided in the treaty, including Article 192 (1) and (2) TFEU⁴¹.

³⁴ FRENZ, W.: *Europäisches Umweltrecht*, C.H. Beck, München 1997, p. 24.

³⁵ EPINEY, A.: *Umweltrecht in der EU*, Cologne et al. 2005, p. 56.

³⁶ CALLIES, Ch. in: Ch. Callies, M. Ruffert (ed.), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta. Kommentar*, Beck Juristischer Verlag, München 2011, Art. 192 AEUV, p. 28.

³⁷ Comp. CJEU C-36/98 (Kingdom of Spain v Council of the European Union), Reports of Cases 2001 I-00779, para. 46 and 49.

³⁸ CALLIES, Ch., in: Ch. Callies, M. Ruffert (ed.), *op. cit.*, Art. 192 AEUV, para. 36.

³⁹ EPINEY, A.: *Umweltrecht...*, *op. cit.*, p. 27.

⁴⁰ BREIER, S.: *Die Organisationsgewalt der Gemeinschaft am Beispiel der Errichtung der Europäischen Umweltagentur*, «Zeitschrift für Umweltrecht» 1995, p. 303.

⁴¹ Por. BREIER, S, dz. cyt., s. 304.; W. Kahl, w: R. Streinz (wyd.), dz. cyt., Art. 174 EGV, nr akap. 38; Ch. Callies, w: Ch. Callies, M. Ruffert (red.), dz. cyt., Art. 192 AEUV, nr akap. 36.

According to Art. 11 TFEU, environmental regulations can also be found in other EU policies, in particular the provisions concerning the internal market, agriculture and transport. The delimitation between environmental policy and other policies should take place with regard to this area, which the respective regulation focuses mostly on.

3.- MATERIAL ASPECTS OF THE EU ENVIRONMENTAL LAW

The primary legislation of the EU does not provide any definition for environment. However, it follows from Articles 191(1) and 192(2) TFEU that environment includes human beings, natural resources, land use, town and country planning, waste and water. The secondary legislation further refined the notion: «human beings, fauna and flora; soil, water, air, climate and the landscape; material assets and the cultural heritage; the interaction between the factors mentioned in the first, second and third indents»⁴².

The Treaty of Amsterdam introduced the concept of sustainable development without defining it⁴³. The concept has customarily focused on striving for balance between economic development goals and environmental protection efforts. More recently, the idea of 'social' development has been added to the equation.⁴⁴ The concept has international

origins since it goes back to the Brundtland Report which an ad hoc World Commission on Environment and Development had made in 1987 for the United Nations and which was entitled *Our Common Future*⁴⁵. In that report, sustainable development was described as a «development, which meets the needs of the present without compromising the ability of future generations to meet their own needs». However, the precise meaning of the notion remains unclear⁴⁶, although, on the contrary, a policy of economic growth, which disregards environmental considerations, will not meet the criterion of sustainable development⁴⁷. There is also some criticism in the doctrine, that the notion is being more and more used as a substitute for positive, favourable development, losing all its environmental content⁴⁸. The concept of sustainable development gives rise to an obligation to balance industrial development and economic progress with the need to protect the environment and resources for current and future generations and is nowadays mostly intended to safeguard present and future generations from the adverse consequences of global warming.

Article 3(3) of the Treaty on the

Law, Cambridge, 2nd edn. Cambridge University Press, 2003, p. 9.^[1]

⁴⁵ Report of the World Commission on Environment and Development, G. A. Res. 42/187, 96th plen. mtg, U.N. Doc. A/RES/42/187 (11 December 1987), also in book form: *Our Common Future*, World Commission on Environment and Development, Oxford Paperbacks, 1987, ISBN 978-0-19-282080-8.^[1]

⁴⁶ KRÄMER, L.: *EC Environmental Law*, Sweet & Maxwell, 2012, p. 9.

⁴⁷ BIRNIE, P.; BOYLE, A.; and REDGWELL, C.: *International Law and the Environment*, Oxford 2009, p. 45.^[1]

⁴⁸ KRÄMER, L.: *EC Environmental Law*, Sweet & Maxwell, 2012, p. 11.

⁴² Article 3 of Council Directive 85/337/EEC^[1] of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. Official Journal L 175, 5.7.1985, p. 40–48.

⁴³ Article 2 of the Treaty of Amsterdam; Articles 2 and 6 TEC; Article 3(3) TFEU and Article 11 TFEU.

⁴⁴SANDS, P.: *Principles of International Environmental*

European Union (TEU)⁴⁹ states that the Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. The notion of sustainable development consists of four main elements:⁵⁰ principle of sustainable use; inter-generational equity; intra-generational equity; principle of integration. The first one refers to the fact that certain limits should be imposed on the exploitation of natural resources, which should be «rational». Principle 8 of the Rio Declaration⁵¹ refers to the need to ‘reduce and eliminate unsustainable patterns of production and consumption’. This principle of sustainable use is reflected in a number of international treaties through the employment of terms such as «sustainable utilization’, ‘wise use’, ‘rational use’, ‘optimum sustainable yield’ and ‘optimum sustainable productivity’⁵². Inter-generational equity refers to the exploitation of natural resources that should be conducted and planned taking into account not only the needs of the present generation but also the future

ones⁵³. The notion of inter-generational equity is intended to strike a balance between successive generations: the current generation should pass the world to the future ones in no worse condition than it was received⁵⁴. The principle of integration, as indicated in Principle 4 of the Rio Declaration⁵⁵ provides for that environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. The purpose of this principle is to ensure the consideration of diverse environmental needs and concerns, e.g. through dissemination of and access to environmental information and conducting environmental impact assessments⁵⁶. The 2002 New Delhi Declaration on the Principles of International Law Related to Sustainable Development⁵⁷ enlisted principles that were considered to be closely connected to sustainable development: the duty of states to ensure sustainable use of natural resources; ^{[[L]]}_{SEP}the principle of equity and the eradication of poverty; ^{[[L]]}_{SEP}the principle of common but differentiated responsibilities; ^{[[L]]}_{SEP}the precautionary approach to human health, natural resources and the ecosystem; ^{[[L]]}_{SEP}the principle of public participation and access to information and justice; ^{[[L]]}_{SEP}the principle of good governance; ^{[[L]]}_{SEP}the

⁴⁹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2010/C 083/01.

⁵⁰ Sands, 253.

⁵¹ A/CONF.151/26 (Vol. I), *op. cit.*

⁵² MAKUCH, K.; and PEREIRA, R.: *Environmental and energy law*, Wiley-Blackwell 2012 p. 39, referring to: the 1982 United Nations Convention on the Law of the Sea; the 1992 Convention on Biological Diversity (CBD); the 1997 Kyoto Protocol and the 1997 Convention on the Non-navigational Uses of International Watercourses. It also appears in soft law instrument such as the World Charter for Nature (1982).

⁵³ *Ibid.*, *op. cit.*, p. 40.

⁵⁴ BOYLE, A.; and FREESTONE, D. : *Introduction*, in: Boyle, A. and Freestone, D. (eds.) *International Law and Sustainable Development: Past Achievements and Future Challenges*, Oxford, Oxford University Press, p. 12.

⁵⁵ A/CONF.151/26 (Vol. I), *op. cit.*

⁵⁶ The principle of integration has been incorporated in the text of international treaties such as the UN Convention to Combat Desertification, UN GA A/AC.241/27, <http://www.unccd.int/Lists/SiteDocumentLibrary/conventionText/conv-eng.pdf> (2016=06-30).

⁵⁷<http://cisdl.org/tribunals/pdf/NewDelhiDeclaration.pdf> (2016-07-02).

principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. All of them are regarded as elements of sustainable development or as falling under one of the four elements analysed above.

Other principles of EU environmental law are regulated in Art. 191 (2) TFEU⁵⁸: the precautionary principle, the preventive principle, the principle of rectification at source and the polluter pays principle.

The precautionary principle advocates that the lack of scientific certainty is not an excuse for inaction against an environmental threat and should not be used as a reason for postponing measures taken against any threats of serious or irreversible environmental damage⁵⁹. It is thus possible to undertake environmental regulatory controls despite the lack of scientific consensus regarding the nature and seriousness of the potential threat to the environment or human health⁶⁰. The precautionary principle has its origins in German administrative law and was first introduced in the late 1970s as *das Vorsorgeprinzip* (the 'precautionary' or 'foresight' principle), even though the precise content of the principle was

unclear⁶¹. In the judgement of *Leatch v. National Parks and Wildlife Service and Shoalhaven City Council*, the court confirmed that it is necessary to prevent serious or irreversible harm to the environment in situations of scientific uncertainty.⁶² Also in the *Pulp Mills* judgment of the ICJ there was stated that the burden of proof lies with the Claimant State, and that the precautionary approach could not be used to reverse the burden of proof in cases where serious risk cannot be established by the Claimant State.⁶³ Moreover, the judgment established a duty on states to undertake environmental impact assessment in transboundary situations⁶⁴.

It is unclear, however, to what extent the content of the prevention principle is independent from that of the precautionary principle that is also mentioned in Art. 191 (2) TFEU. In practice, both principles are used together and there is no definition of either of them in the Treaties⁶⁵. The judgments in cases C-157/96 and C-180/96⁶⁶ are good

⁵⁸Art. 191 (2) TFEU, «Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.»

⁵⁹ Compare: Art. 3 (3) United Nations Framework Convention on Climate Change, FCCC/INFORMAL/84 GE.05-62220 (E) 200705, <https://unfccc.int/resource/docs/convkp/conven.pdf> (2016-06-30).

⁶⁰MAKUCH, K.; and PEREIRA, R.: *Environmental and energy law*, Wiley-Blackwell 2012, p. 8.

⁶¹ KRÄMER, L.: *EC Environmental Law*, Sweet & Maxwell, 2012, p. 12^[17]_{SEP.}

⁶² Director-General of National Parks & Wildlife Service v. Shoalhaven City Council, judgment of the Land and Environment Court of New South Wales, 23 November 1993, NSWLEC 191, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWLEC/1993/191.html?stem=0&synonyms=0&query=~%20leatch> (2016-06-30).

⁶³ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14.

⁶⁴ For a commentary see MERKOURIS, P.: *Case concerning pulp mills on the river Uruguay (Argentina v. Uruguay): of environmental impact assessments and «phantom experts»*, 15 July 2010, <http://www.haguejusticeportal.net/eCache/DEF/11/878.html> (2016-06-30).

⁶⁵KRÄMER, L.: *EC Environmental Law*, Sweet & Maxwell, 2012, p. 25.

⁶⁶ Case C-157/96, R. v Minister of Agriculture, [1998] ECR, 2211, 63–64; Case C-180/96, United Kingdom v Commission, [1998] ECR 2265, 99–100.

examples to underline the fragility of the unity of the two concepts, given the fact that the English version of the judgments refers to the prevention principle only, and does not make distinctions between the two notions, while the Spanish (principios de cautela y de acción preventiva), German (Grundsätze der Vorsorge und Vorbeugung), Danish (forsigtighedsprincippet og princippet om forebyggende indsats) and French (principes de précaution et d'action preventive) use a phrase meaning both: precautionary and prevention principle⁶⁷. The principle of prevention is regarded to require preliminary action against known and expected impacts, while, in connection with the idea of precaution; it states that unexpected consequences must also be avoided.⁶⁸ The meaning of these terms is concretized through their implementation in sectorial environmental regulations. In the field of waste policy, the principle of prevention of waste generation as enshrined in Art. 4 of Directive 2008/98/EC⁶⁹ was further elaborated through the rulings of the Court⁷⁰.

⁶⁷ SOMSSICH, R.; VÁRNAI, J; and BÉRCZI, A.: *Study on Lawmaking in the EU Multilingual Environment*, European Commission Directorate-General for Translation, 1/2010, Luxembourg: Publications Office of the European Union, p. 115.

⁶⁸ BÁNDI, G.; CSAP, O.; KOVÁCS, L.; STÁGEL, B.; and SZILÁGYI, S.: *The environmental jurisprudence of the European Court of Justice*, Budapest, Szent István Társulat, 2008, p. 102.

⁶⁹ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Text with EEA relevance), OJ L 312, 22.11.2008, p. 3–30.

⁷⁰ Joined cases 418/97 and 419/97, *ARCO Chemie Nederland Ltd v Minister van Volksbuisvesting, Ruimtelijke Ordening en Milieubeheer (C-418/97) and Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt and Vereniging Stedelijk Leefmilieu Nijmegen v Directeur van de dienst Milieu en Water van de provincie*

The general idea underlying the principle of rectification at source is that environmental damage should be rectified by targeting its original cause and by requiring preventive action at source. It must be stressed, however, that some of the language versions of the Treaty use a word meaning 'damage' (for example SV, SL, SK, CS, DE, RO, HU, IT) and the other half 'impairment' (for example FR, BG)⁷¹. In the *Wallonia Waste*⁷² judgment, the Court interpreted the Waste Directive utilising the principle that environmental damage should as a priority be rectified at source. Wallonia, a region of Belgium, imposed a ban on the tipping of waste imported from other regions and Member States because it faced an abnormal large-scale inflow of waste from other regions⁷³. The Court decided that the ban was legal as far as general

Gelderland (C- 419/97), European Court Reports 2000 I-04475, para 39; Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 30 November 2004, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*.

Reference for a preliminary ruling: Verwaltungsgericht Koblenz - Germany. Case C-6/03. European Court Reports 2005 I-02753, para 28–30; Judgment of the Court (Third Chamber) of 18 December 2007, *Commission of the European Communities v Italian Republic*. Failure of a Member State to fulfil obligations - Environment - Directives 75/442/EEC and 91/156/EEC - Concept of 'waste' - Excavated earth and rocks intended for re-use.

Case C-194/05, European Court Reports 2007 I-11661, para 33, 20.

⁷¹ SOMSSICH, R.; VÁRNAI, J; and BÉRCZI, A.: *Study on Lawmaking in the EU Multilingual Environment*, European Commission Directorate-General for Translation, 1/2010, Luxembourg: Publications Office of the European Union, p. 117.

⁷² Judgment of the Court of 9 July 1992, *Commission of the European Communities v Kingdom of Belgium*.

Failure to fulfil obligations - Prohibition of tipping waste originating in another Member State. Case C-2/90, European Court Reports 1992 I-04431.

⁷³ *Ibid.*, p. 31.

waste was concerned, but illegal as far as it banned the import of hazardous waste, as it violated the free movement of goods. The Court also indicated that the principle of rectification at source is consistent with the principles of self-sufficiency and proximity set out in the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal⁷⁴, to which the Community was a signatory. There should be stressed, however, that a strict application of this principle is capable of infringing the preventive principle according to which environmental damage should be prevented rather than cured⁷⁵. Undifferentiated applications of this principle in relation to waste management, requiring waste to be disposed of as close to its source as possible could harm efficient, environmentally friendly facilities in favour of arbitrary geographical solutions of an environmental problem. This possible intertwining may undermine environmental protection and demonstrates the contested nature of environmental protection in the EU. In addition to that ambiguity, it is not clearly settled what rectification means⁷⁶.

The polluter-pays principle⁷⁷ was first

defined in 1972 by the OECD⁷⁸. There are four aspects of this principle: promoting efficiency; promoting justice; harmonization of international environmental policies; defining how to allocate costs within a State⁷⁹. The normative scope of the polluter-pays principle has evolved to include also accidental pollution prevention, control and clean-up costs, in what is referred to as extended polluter-pays principle⁸⁰. This principle has been introduced with the Environmental Liability Directive⁸¹. However, problems with its implementation⁸² show that there is no clear definition and a single approach to this principle. There is also an ambiguity from a linguistic point of view, because English, being the source language, uses a noun + verb phrase structure in an adjectival position to denote an abstract notion, which is quite challenging especially for agglutinating languages where it is hard to place such a structure

European Court Reports 2603, 43–44, 51–53; Case C-378/08, Reference for a preliminary ruling by the Tribunale amministrativo regionale della Sicilia [2010] ECR, 0000 20

⁷⁸ Organization of Economic Cooperation and Development (OECD), *Recommendation of the council on guiding principles concerning international economic aspects of environmental policies*. May 1972. Council Document no. C(72)128.

⁷⁹ BUGGE, H.: *The principles of polluter pays in economics and law*, in: EIDE, E. and VAN DER BERGH, R. (eds) «Law and Economics of the Environment», Oslo, 1996, pp. 73–74.

⁸⁰ VENKAT, A.: *'Polluter Pays' Principle: A Policy Principle*, 2012. Available at SSRN: <http://ssrn.com/abstract=2458284> (2016-07-01).

⁸¹ Art. 1 of the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage,

⁸² SOMSSICH, R.; VÁRNAI, J; and BÉRCZI, A.: *Study on Lawmaking in the EU Multilingual Environment*, European Commission Directorate-General for Translation, 1/2010, Luxembourg: Publications Office of the European Union, p. 113.

⁷⁴ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
Basel, 22 March 1989,
<http://archive.basel.int/text/con-e-rev.pdf> (2016-07-01).

⁷⁵ HEYVAERT, V.: *Balancing Trade and Environment in the European Union: Proportionality Substituted?*, Journal of Environmental Law No 13, 2001, p. 405.

⁷⁶ KRÄMER, L.: *EC Environmental Law*, Sweet & Maxwell, 2012, p. 26

⁷⁷ Case C-293/97, *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others* [1999]

into such a position. Solutions in particular languages range, therefore, from a mirror translation (most languages, e.g., SV, MT, LV, BG, etc.), through a form which could be translated back into English as ‘polluter-payer’, that is, two nouns are put into adjectival position (e.g., FR, PT), to the German version which, instead of respecting the original grammatical form, expresses the concept as the ‘principle of causation’ (Verursacherprinzip)⁸³.

4.- CONCLUSIONS

The environmental law principles are not sufficiently defined in the primary legislation of the European Union. Their substantive meaning has been the subject of noticeable discussion, mostly concluding that they are incapable of clear definition⁸⁴. Their application in environmental secondary law and their interpretation by the CJEU contributed to the further clarification of their meaning. Although according to the case-

the law of the CJEU, Art. 192 (2) TFEU must be interpreted restrictively, it must be admitted that, on the formal level, a considerable scope of discretion is accorded to the EU institutions.

It is possible to identify general ideas underlying the EU environmental principles, but defining them with precision as well as their application are not an easy assignment. The environmental protection is of the contested nature: this contest lies at the heart of its definitional complications in relation to environmental principles. Therefore, environmental principles can be regarded as multi-meaning normative statements, representing a political agreement that is reached in the form of words whereas there is no agreement on what the words mean.⁸⁵ In the result, the undefined nature of environmental principles leaves room for manipulation of the ambiguities that they embody, in particular as to their substantive policy nature and relating to the sharing of environmental competence between the EU and the Member States.

In spite of the ambiguities in their content, general concepts and principles of EU environmental law provided a positive contribution to the effectiveness of international community interests by giving rise to academic, social and political debates and establishing enforcement measures with their indeterminate terminology. At the global level, these problems cannot be currently solved better.

⁸³ *Ibid.*, p. 114.

⁸⁴ SCOTFORD, E.: *Mapping the Article 174 (2) EC Case law: a first step to analysing Community Environmental Law principles*, in: ETTY, T.; and SOMSEN, H.: *The Yearbook of European Environmental Law*, Oxford, 2008, p. 3; DE SADELEER, N.: *Environmental principles: From Political Slogans to Legal Rules*, Oxford, 2002, pp. 2, 37–44, 60, 72–79, 92; KRÄMER, L.: *The Genesis of EC Environmental Principles*, in: MACRORY, R. et. al. (eds.): *Principles of European environmental law*, Groningen, 2004, pp. 31–47, 47; KRÄMER, L.: *EC Environmental law*, London 2007, pp. 25–27; LEE, M.: *EU Environmental law: Challenges, change and decision making*, Oxford, 2005, pp. 97–98; SCOTT, J.: *The Precautionary Principle before the European Courts* in: MACRORY, R. et. al. (eds.): *Principles of European environmental law*, Groningen, 2004, pp. 51–72, 54; EPINEY, A.: *Environmental Principles*, in: MACRORY, R. (ed.): *Reflections on 30 Years of EU Environmental Law*, Groningen 2006, pp. 19–39, 30–31.; TRIDIMAS, T.: *The General Principles of EU Law*, Oxford, 2006, pp. 25–35; CALLIES, Ch., in: Ch. Callies, M. Ruffert (ed.), *op. cit.*, Art. 192 AEUV, para. 27.

⁸⁵ HARTLEY, T.: *Five Forms of Uncertainty in European Community Law*, Cambridge Law Journal 55, 1996, p. 273.

SOLIDARITY IN THE EUROPEAN UNION

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RESUMEN:

La Unión Europea se basa en el principio de solidaridad. La solidaridad no solo es legítima, es esencial para una comunidad de Estados que procuran la paz y la seguridad, la libertad y el bienestar de sus pueblos. La solidaridad es una obligación legal, no sólo un recurso político. Exigir la solidaridad de los demás, pero no estar dispuesto a ser solidario es contrario a la idea de justicia y perjudica a la credibilidad de la Unión Europea.

ABSTRACT:

The European Union is based on the principle of solidarity. Solidarity is not only legitimate, it is essential for a community of states which pursue peace and security, freedom and welfare for its peoples. Solidarity is a legal obligation, not only a political expedient. To demand solidarity from others but being unwilling to render solidarity oneself is counter to the idea of justice and does damage to the credibility of the European Union.

PALABRAS CLAVE: *Multiculturalidad, interculturalidad*

KEYWORDS: *Multiculturality, interculturality*

The European Union regards itself a solidary community. The notion of solidarity appears in the constitutional treaties of the EU in various connections.

1. - SOLIDARITY IN PRIMARY EU LAW

As regards the Treaty on European Union, Paragraph 6 of the Preamble TEU states the desire of the Member States «to deepen the solidarity between their peoples while respecting their history, their culture and their traditions».

Article 2 EU states solidarity among the basic values of the Member States' pluralistic society.¹

¹ Art. 2 TEU: «The Union is founded on the values of respect for human dignity, freedom,

According to Article 3 Paragraph 3 Sub-Paragraph 3 « [the Union] shall promote economic, social and territorial cohesion, and solidarity among Member States. » Sub-Paragraph 5 makes solidarity a principle of the Union's foreign policy.² Equally, Article

democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. »

² Article 3 Paragraph 5: «In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular

21 Paragraph 1 provides that the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world, and expressly names in this context the principle of solidarity. In the same context, Article 24 Paragraph 2 bases the Common Foreign and Security Policy «on the development of mutual political solidarity among Member States». Paragraph 3 requires the Member States to «support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.»

In the Treaty on the Functioning of the European Union, solidarity is invoked in the context of the common policy on asylum, immigration and external border control (Article 67 Paragraph 2), to which the Treaty devotes its Article 80 TFEU providing that «the policies of the Union in the field of borders management, asylum and immigration [Articles 77 to 79] shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the member states when such measures are necessary».

Article 122 Paragraph 1 TFEU states: «Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.»

In addition, solidarity is invoked in the context of energy (Article 194 Paragraph 1), and in a special Title of the Treaty, the Solidarity Clause. The basic provision is Article 222 Paragraph 1 which states: «The

Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States».

2.- THE MEANING OF SOLIDARITY

Notwithstanding the fact that solidarity is enshrined in the constitutional treaties, there is a slight tendency to question its meaning, not so much by politicians than by commentators. «The notion of solidarity is frequently invoked in Europe – but it is not completely clear what it really means. More recently, this has become apparent in the Euro crisis. But there are also other European issues which are testing the usual avowals of solidarity.»³

In contrast, there seems to be little agreement on the meaning of solidarity. «Solidarity – is it only a sense of common ground and of conformity or a stance of vouching for each other? Is solidarity thus passively felt or actively rendered?»⁴

However, to what degree is explicit agreement on the meaning of this basic principle necessary to make implementation of the solidarity principle effective? «What part of solidarity requires better definition for all Member States and EU institutions to clearly understand it and agree on its advancement: is it the principle itself; its content; its goals? Is it better to leave some elements of the definition open to the context – both temporal and situational (including aspects such as geography; scope; number of Member States involved) in the

the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.»

³ ECKART, D.: *Stratenschule, Solidarität in Europa: Wie solidarisch soll Europa sein? in: Bundeszentrale für Politische Bildung (ed.), Eurotopics, 2011.*

⁴ *Ibid.*

need for solidarity and extension of it; political etc.)?»⁵

«To some extent this invokes the proverbial chicken and egg: clearly the drafters of the Treaty found it optimal or convenient not to fully define solidarity, even if some suggested and continue to suggest that a definition could theoretically facilitate the achievement of the principle. Or perhaps they rather surmised that defining solidarity too precisely might impede its actual development. As was explained in Chapter 1, amendments to include a definition or exclude certain aspects of solidarity were not adopted.»⁶

«By leaving ‘solidarity and responsibility sharing’ as broad concepts, it [must] concluded [...] that the drafters intended Article 80 to apply to all matters coming under border, asylum and immigration management. Even if the history of the notions are traceable to ‘burden sharing’ in asylum law, and the relevance for border management was explicitly acknowledged, the principles are now seen to be generally applicable. Suggestions for amendments to limit it to more specific matters in the policy area of border management, asylum and migration, were not adopted.»⁷

What is said here with regard to border, asylum and immigration management, applies *mutatis mutandis* to other areas where the question of solidarity comes up. Integration and solidarity are inextricably connected.

«On the European level this notion is since Maastricht particularly supplemented by idealistically phrased common European norms and values, uniting not only its

member states but now also its citizens. Yet solidarity means different things to different people and different governments. Any political, legal and even moral definition of the term can be re-defined and consequently contested by the (political) opponent. As an important factor of European integration it is consequently and implicitly connected to the notion of (European) legitimacy. Yet it is decisively hampered by national considerations and (mental) borders.»⁸

The following questions must be answered: «What is solidarity within the framework of the European Union? How is the notion of European solidarity defined? What are the legal, political, economic and moral limits of European solidarity? How legitimate is European solidarity?»⁹

«In a recent study, the Paris-based think tank Notre Europe proposed two conceptual distinction of European solidarity: one based on reciprocity and another based on enlightened self-interests.¹⁰ These two flavours of Solidarity are either defined by the rationale of a simple transactional arrangement, rooted in a joint insurance policy against the possibility of a specific calamity or by the rationale of self-interest, which leads governments to identify its own national goals in a shared strategy of integration which consequently secures the stability and viability of the common project.¹¹ In other words: European solidarity is either the concept of shared «homework» with equal partners pooling common risks or the diversified support from stronger member states for weaker member states in

⁵ DIRECTORATE GENERAL FOR INTERNAL POLICIES – POLICY DEPARTMENT C: CITIZEN’S RIGHTS AND CONSTITUTIONAL AFFAIRS – CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, *The Implementation of Article 80 TEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration*, Study, 2011, p. 22.

⁶ *Ibid.*, p. 99.

⁷ *Ibid.*, p. 99.

⁸ RASPOTNIK, Andreas; VENTURA, Marine Jacob y VENTURA, Laura: *The issue of solidarity in the European Union*, TEPSA BRIEF, 2012, p. 1.

⁹ *Ibid.*

¹⁰ FERNANDES, S. y RUBIO, E. (2012). *Solidarity within the Eurozone: how much, what for, for how long?* Report by Notre Europe. Retrieved 16 May, 2012 from http://www.notre-europe.eu/uploads/tx_publication/SolidarityEMU_S.Fernandes-E.Rubio_NE_Feb2012.pdf

¹¹ *Ibid.*

order to create or sustain European stability.¹² »¹³

«Yet solidarity is not a one-way approach but has to include commitments of responsibility by the country receiving aid. In that regard Vignon emphasized the intrinsic link between solidarity and responsibility and noted that solidarity only grows stronger with consequent responsibility. »¹⁴

3.- SOLIDARITY AS AN ESSENTIAL OF EUROPEAN CREDIBILITY

The allegedly diffuse meaning of solidarity serves as a pretext to excuse oneself from being solidary. If called upon to show solidarity, those who are reluctant to do so pretend that they do not really know what it is and what obligations it entails. Those who do so – whether politicians or scholars – feel supported by a good part of European citizens for whom solidarity often is a one-way road: demanding solidarity from others but unwilling to render solidarity themselves. Clearly, solidarity may imply sacrifices. «And sacrifice» does not appear in the glossary of European integration.

The reason for this was stated as follows: «The European Union owes its existence to the efforts of political elites who could count on the passive consent of their more or less indifferent populations as long as the peoples could regard the Union as also being in their

¹² *Ibid.*

¹³ RASPOTNIK, Andreas; VENTURA, Marine Jacob y VENTURA, Laura: *The issue of solidarity in the European Union*, TEPESA BRIEF, 2012, p. 1. *et seq.*,

<http://www.tepsa.eu/download/TEPSA%20Policy%20Paper%20The%20issue%20of%20solidarity%20in%20the%20European%20Union.pdf>

¹⁴ *Ibid.*, p. 2, fn. 5; with reference to VIGNON, J: *Solidarity and responsibility in the European Union*, Notre Europe Policy Brief, No. 26, June 2011. Retrieved June 7, 2012 from http://www.notre-europe.eu/uploads/tx_publication/Bref27_JVignon_EN.pdf

economic interests, all things considered. The Union has legitimized itself in the eyes of the citizens primarily through its outcomes and not so much by the fact that it fulfilled the citizens' political will. »¹⁵

«Thus, to the present day, there remains a gulf at the European level between the citizens' opinion and will formation, on the one hand, and the policies actually adopted to solve the pressing problems, on the other. This also explains why conceptions of the European Union and ideas of its future development have remained diffuse among the general population. Informed opinions and articulated positions are, for the most part, the monopoly of professional politicians, economic elites, and scholars with relevant interests; not even public intellectuals who generally participate in debates on burning issues have made this issue their own. »¹⁶

«The concept of European integration seems to fade in the light of the current economic and financial crisis, scrutinised by the European public and some of its academic representatives. Hence, its fundamental elements of discipline, solidarity and legalization start to crumble. Yet it is particularly the moral aspect of solidarity that provides the basis for subsequent political solidarity as outlined above. Although significant progress addressing the (economic) crisis has been made, only history will judge if the specific steps taken have put the European Union back on track. However, opinions differ on re-tracking European integration, bringing face to face the discrepancy between public perception

¹⁵ HABERMAS, JÜRGEN: *Democracy, Solidarity And The European Crisis, in: Social Europe*, 2013. Retrieved from <http://www.socialeurope.eu/2013/05/democracy-solidarity-and-the-european-crisis-2/>, 6 August 2015, Part I.

¹⁶ *Ibid.*, with reference to LACROIX, Justine; and NICOLAIDES, Kalypso: *EUROPEAN STORIES: INTELLECTUAL DEBATES ON EUROPE IN NATIONAL CONTEXTS*, Oxford, Oxford University Press, 2010.

and political and academic 'knowledge', demonstrating that European politics run past its own citizens.»¹⁷

The European «citizen's perception of solidarity is intrinsically linked to the respective national environment they are exposed to, yet being subtly different between different policy agendas. However is the notion of shared European solidarity an exhausted belief undermined by national self-interests throwing mutual European responsibility back and forth? The European Union's currently widespread perceived credibility gap can only be closed if the concept of European solidarity as the national calculation of implementing self-interests can be detached from these considerations and rather become a borderless, truly European concept.»¹⁸

The «lack of solidarity» has been said to be the «major hindrance» for the integration Europe as a «supranational democracy».¹⁹

«What does it mean to show solidarity, and when are we entitled to appeal to solidarity?» On the basis of conceptual analysis, JÜRGEN HABERMAS has undertaken to exonerate appeals to solidarity of accusations of moral stuffiness or misplaced good intentions that the 'realists' want to level against them. Moreover, showing solidarity is a political act and by no means a form of moral selflessness that would be misplaced in political contexts. Solidarity loses the false appearance of being unpolitical once we learn how to distinguish obligations to show solidarity from both moral and legal obligations. 'Solidarity' is not synonymous with 'justice', be it in the moral or the legal sense of the term.»²⁰

¹⁷ *Ibid.*, p. 6.

¹⁸ *Ibid.*, p. 6.

¹⁹ HABERMAS, Jürgen: *Democracy, Solidarity And The European Crisis*, in: *Social Europe*, 7 May 2013. Retrieved from <http://www.socialeurope.eu/2013/05/democracy-solidarity-and-the-european-crisis-2/>, 6 August 2015. Part III.

²⁰ *Ibid.*, Part III.

« [I]t is the trust-founding *Sittlichkeit* of informal social relations that, under the condition of predictable reciprocity, requires that the one individual 'vouches' for the others. Such 'ethical' obligations rooted in ties of an *antecedently existing* community, typically family ties, exhibit three features. They ground exacting or supererogatory claims that go beyond moral or legal obligations. On the other hand, when it comes to the required motivation the claim to solidarity is less exacting than the categorical force of a moral duty; nor does it coincide with the coercive character of law either. *Moral commands* should be obeyed out of respect for the underlying norm itself, without regard to the compliance of other persons, whereas the citizen's *obedience to the law* is conditional on the fact that the sanctioning power of the state ensures general compliance. Fulfilling an *ethical obligation*, by contrast, can neither be enforced nor is it categorically required. *It depends instead on the expectations of reciprocal favours — and on the confidence in this reciprocity over time.* »²¹

«In this respect, unenforceable ethical behaviour also coincides with one's own medium or long-term interests. And it is precisely this aspect that *Sittlichkeit* shares with solidarity. However, the latter cannot rely on pre-political communities such as the family but only on political associations or shared political interests. Conduct based on solidarity presupposes *political* contexts of life, hence contexts that are legally organized and in this sense artificial ones. This explains why the credit of trust presupposed by solidarity is less robust than in the case of ethical conduct because this credit is not secured through the existence of a *quasi-natural* community. What is missing in the case of solidarity is the moment of conventionality in antecedently existing ethical relations.»²²

Jürgen Habermas rejects «by the way» a connection between solidarity and nationalism, because nationalism obscures

²¹ *Ibid.*, Part III.

²² *Ibid.*, Part III.

the difference between political solidarity and pre-political bonds. It appeals without justification to this kind of communitarian bond when it assimilates the civic solidarity of *Staatsbürger* to the «national solidarity» of *Volksgenossen* (tying people of the same descent).²³ Civic solidarity goes beyond this kind of national solidarity and extends to all citizens across national lines, whether they belong to a national majority or a national minority.

Apart from the fact that reasonable expectations have been considered to be the basis of international obligations and thus of legal relevance by Myrus S. MacDougal, the head of the Yale Sociological School of International Law long ago,²⁴ the distinction made by Jürgen Habermas between law, morality, and ethics (*Sittlichkeit*) obscures the fact that norms which originally might have only been moral or ethical ones may have been transformed into legal ones. This is certainly true for solidarity, which in Article 2 TEU appears among the fundamentals of the Union and its Member States and which is applied by the Treaties in various contexts. There is thus no need to engage the special figure of ethics (*Sittlichkeit*) for the purpose of providing a basis for solidarity, a basis which, by the way, is a far-fetched one.

Thus, solidarity is expressed by doing something, to behave in a solidary manner. This happens only on the basis of a feeling of belonging together. Solidarity based on social cohesion (whether common national heritage, membership in a party, in a trade union or in a (sports or country) club must be distinguished from general human solidarity.²⁵

Natural and other catastrophes (e.g. wars or civil wars) cause a general human solidarity

rendered to people with whom we have nothing in common but who are in a much worse situation. However, this kind of solidarity is rendered on a purely voluntary basis and to an extent decided by us individually. Since, as a rule, it is rendered only out of our plenty or abundance, it does not impose a sacrifice on us and can practically be rated as costing nothing. In contrast, solidarity with persons or social groups to whom there exists a certain bond may be more exacting and not limited to just giving alms.²⁶

Thus, « [w]hat lends solidarity [...] a special character is [...] the *offensive character* of pressing or even struggling for discharging the promise which is invested in the legitimacy claim of any political order. This forward-looking character becomes particularly clear when solidarity is required in the course of social and economic modernization, in order to adjust the overstretched capacities of an existing political framework, that is to adjust eroding political institutions to the indirect force of encompassing systemic, mainly economic, interdependencies that are felt as constraints on what should be in the reach of the political control of democratic citizens. »²⁷

«European states assumed their present-day form of welfare states only after the catastrophes of the two world wars. In the course of economic globalization, these states find themselves in turn exposed to the explosive pressure of economic interdependencies that now tacitly permeate national borders. Systemic constraints again shatter the established relations of solidarity and compel us to reconstruct the challenged forms of political integration of the nation state. This time, the uncontrolled systemic contingencies of a form of capitalism driven

²³ *Ibid.*, fn. 15.

²⁴ MYRES, Cf. & MCDOUGAL, S.: *International Law, Power, and Policy: A Contemporary Conception*, in: *Recueil des Cours*, Vol. 82, 1953, pp. 139-259.

²⁵ STRATENSCHULTE, Eckart D.: *Solidarität in Europa: Wie solidarisch soll Europa sein?*, Bundeszentrale für Politische Bildung (ed.), *Eurotopics*, 2011.

²⁶ *Ibid.*

²⁷ HABERMAS, Jürgen: *Democracy, Solidarity And The European Crisis*, in: *Social Europe*, 7 May 2013. Retrieved from <http://www.socialeurope.eu/2013/05/democracy-solidarity-and-the-european-crisis-2/>, 6 August 2015. Part III.

by unrestrained financial markets are transformed into tensions between the member states of the European Monetary Union. If one wants to preserve the Monetary Union, it is no longer enough, given the structural imbalances between the national economies, to provide loans to over-indebted states so that each should improve its competitiveness by its own efforts. What is required is solidarity instead, a cooperative effort *from a shared political perspective* to promote growth and competitiveness in the Eurozone as a whole. »²⁸

«Such an effort would require [economically stronger Member States, i.e.] Germany and several other countries to accept short and medium-term negative redistribution effects in its own longer-term self-interest – a classic example of solidarity, at least based on the conceptual analysis [...] presented. »²⁹

The question for the reach of European solidarity embodies a great challenge that calls for more public discussion and which, in connection with the EURO crisis, should indeed be discussed because this question also involves the future of the European Union. Some say if the readiness for solidarity of the European citizens is overstrained this would carry the danger of also overstraining the European Union, and even the European Integration project as such.³⁰ But it does not make sense to speak of the solidarity of the European citizens as if all European citizens would all be in the same position with regard to this issue. Citizens in those Member States who presently have to rely on the support of other Member States will be in favour of solidarity. If we speak of overstraining the solidarity of European citizens, we think only of citizens in the donor countries. The statement must therefore be rephrased in the following way: if the readiness for solidarity of the European citizens in the better-off Member States is

overstrained this would carry the danger of also overstraining the cohesion of the European Union, and even the danger of overstraining the European Integration project as such.

But such rephrasing of the statement divests it from its seeming neutrality. In its original form, the statement conveys the impression that that the degree of solidarity among the European citizens is a kind of natural resource the scope of which is independent from the citizens' will. But the contrary is true. It is the decision of each of the European citizen whether and to which extent he will act in a solidary manner.

Moreover, to speak of the solidarity of European citizens at large obscures the fact that it is not *the* European citizen whose solidarity is in question, but that of those European citizens who are called upon to accept solidarity as an obligation – whether legal, moral or ethical – towards those who are in a situation that makes them dependent on the solidarity of others. Those who claim that their solidarity is being overstrained either have not understood what is reasonably expected from them or are not willing to live up this obligation. The notion of the European citizen overstrained by the amount of solidarity due is a typical creation of writers from those Member States which are donor countries; those who are in need of solidarity would not use such a phrase, except if criticizing or deploring the lack of solidarity on the part of those whose solidarity is demanded.

The statement under discussion should thus be rephrased to run as follows: «If the reasonable expectations in solidary help held by one part of European citizens (because they are in need) is not fulfilled by the solidarity of the other part of European citizens (who are in a position to render help), the patience of the former will sooner or later be overstrained, and this would carry indeed the danger of also overstraining the European Union, and even the European Integration project as such. »

²⁸ *Ibid.*, Part III.

²⁹ *Ibid.*, Part III.

³⁰ *Ibid.*

Most of the writings on European solidarity in the meaning of solidarity within the European Union obscure rather than elucidate that meaning. Solidarity is a legal obligation, not only a political expedient. If citizens have not understood this fact, or are unwilling to accept it, they must be set right by those who have the means to do so: (academic and other) writers, politicians, and the media. If they should fail to do so, it would be more difficult to live up to the Member States' obligation of solidarity. But such failure would not divest solidarity of its character as a binding obligation under European Union law.

CHALLENGES AND DANGERS THAT THREATEN THE RIGHTS OF AN INTERCULTURAL SOCIETY IN A GLOBALIZED WORLD

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RESUMEN:

La multiculturalidad se caracteriza por la coexistencia de diferentes grupos culturales, nacionales, étnicos y religiosos dentro del mismo territorio sin considerar necesariamente los deseables contactos. Entre los diferentes grupos puede existir tolerancia pasiva, pero no aceptación mutua o estima. En contraste, la interculturalidad se caracteriza por diferentes grupos que viven juntos en una tolerancia activa y la intención de mantener relaciones equitativas entre sí. Pero incluso el primero, y mucho menos el segundo, no está asegurado en la mayoría de los países del mundo. Más bien, hay un retroceso en el área de los derechos humanos que amenaza incluso un mínimo de coexistencia pacífica. Así es en los Estados islámicos y más particularmente en los países bajo la influencia del fundamentalismo militante. Por lo tanto, creer que los inmigrantes que vienen a nuestros países, o al menos a todos los inmigrantes que quieren quedarse aquí, quieren compartir nuestros valores es ingenuo. En la situación actual, no podemos ignorar la amenaza a nuestras sociedades libres invocando erróneamente la multiculturalidad. No podemos permitir que esta amenaza se convierta en realidad porque, de lo contrario, no habrá necesidad de esa interculturalidad a la que todos aspiramos.

ABSTRACT:

Multiculturalism is characterized by different cultural, national, ethnic, religious groups co-existing within the same territory without necessarily considering contacts between them to be desirable. Between the different groups there may exist passive tolerance, but not mutual acceptance or esteem. In contrast, interculturalism is characterised by different groups living together in active tolerance and the intention of maintaining equitable relations among each other. But even the former, let alone the latter, is not secured in a majority of countries worldwide. Rather, there is a retrogression in the area of human rights that threatens even a minimum of peaceful co-existence. Thus is so in Islamic states and more particularly so in countries under the influence of militant fundamentalism. Therefore, to believe that migrants coming to our countries, or at least all immigrants who want to stay here, share our values is naïve. In the present situation, we cannot ignore the threat to our free societies by mistaken invocation of multiculturalism. We cannot allow this threat to become reality because otherwise there will be no need for that interculturalism to which we all aspire.

PALABRAS CLAVE: *Multiculturalidad, interculturalidad*

KEYWORDS: *Multiculturalism, interculturalism*

In today's world, the multicultural society is still the rule and the intercultural society is still the exception.

1.- MULTICULTURALITY

The former is characterized by the fact that different cultures, national, ethnic, religious groups – while all living within the same territory – do not necessarily come into contact with each other or even consider such contact desirable. Between the different groups there may exist passive tolerance, but not mutual acceptance or esteem. Difference is often viewed negatively and forms major justification for discrimination. In consequence, even where there are laws designed to stop discrimination, the law may not be enforced uniformly and its enforcement might even be not welcome. Thus is particularly true for the enforcement of rights which a particular group does not claim for its members and is reluctant to allow them for its own members. Here, culture is the ground for auto-separation. The multicultural society is a society where cultural groups co-exist but living together of people of different cultural groups is not accepted by all groups without interference.

2.- INTERCULTURALITY

Intercultural societies are characterized by the fact that different cultures, national, ethnic, religious groups who all live within the same territory maintain open relations of interaction, exchange and mutual recognition of their own and respective values and ways of life. Between the different groups there exists active tolerance and the intention of maintaining equitable relations among each other where everyone has the same importance. The intercultural society is a society where people of different cultural groups can live together unfettered by their own groups.

3. - MULTICULTURALITY AND FREEDOM

Of course, to say that the multicultural society is still the rule and the intercultural society is still the exception, also is not correct and an over-optimistic exaggeration. The multicultural society which I have depicted and which is characterized by the peaceful co-existence of different cultural groups is by no means the rule. Freedom House, in its Report on Freedom in the World 2013,¹ classified only 90 states or 46 per cent out of 195 as «free states», while 58 states or 30 per cent were classified «free with reservations» and 47 states or 24 per cent were classified «unfree». Since «free» means respect for and protection of human rights and since multiculturalism and interculturalism presupposes a society in which the human rights of members of different cultural groups are respected and protected, in more than half of all countries we cannot speak even of a multicultural society, let alone an intercultural society.

4.- NO REAL GLOBALISATION

As regards multiculturalism and interculturalism, there does not exist, therefore, a globalised world. If we define globalization as being a process of international integration arising from the interchange of world views, products, ideas, and other aspects of culture,² or, more elaborately, as «a process of interaction and integration among the people, companies, and governments of different nations, a process driven by international trade and investment and aided by information technology», a process that «has effects on the environment, on culture, on political systems, on economic development and prosperity, and on human physical [and we

¹ www.freedomhouse.org

² See, in general, ALBROW, Martin; and KING, Elizabeth (eds.), *Globalization, Knowledge and Society*, London 1990.

may add: mental] well-being in societies around the world, »³ then we have to realize that this process has, so far, not been very successful. Rather, in those areas which are most important in the context of the rights of an intercultural society, it has come to a standstill, and even to retrogression.

5.- RETROGRESSION IN THE AREA OF HUMAN RIGHTS

Universal Declaration of Human Rights

This retrogression can be demonstrated by the call into question of a document that – at the time of its adoption – was hailed as milestone of human development: the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948 by a vote of 48 in favour, none against, and eight abstentions.⁴ Six of the abstentions came from communist countries⁵ and were then attributed to the fact that Article 13 provided the right of citizens to leave their countries. All of these countries, after the political turn in Europe of 1989/1991, have themselves – or their successor states have – embraced the freedoms proclaimed in the Universal Declaration.⁶ Of the remaining two abstaining states, South Africa in the meantime has, after the abolishment of apartheid, accepted these freedoms in an integral manner.

Reservations by Saudi Arabia

Saudi Arabia, on the other hand, was a special case at the time. Its abstention was prompted primarily by two of the Declaration's fundamental rights: freedom of religion and freedom of marriage. As regards freedom of religion, Saudi Arabia rejected the right, contained in Article 18,⁷ that everyone has the right «to change his religion or belief». As regards freedom of marriage, Article 16 Paragraph 1 provides that «Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.» Saudi Arabia was opposed to equal marriage rights and, again, to declaring questions of religion irrelevant to the right of marriage.⁸

At the same time, Saudi Arabia's position signalled disagreement between countries of a European tradition of human rights⁹ or of

⁷ Article 18: » Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. »

⁸ Article 16: « (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. »

⁹ Article 6 Paragraph 3 of the Treaty on European Union (TEU) expressly refers to this tradition in stating that « [f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. » Yet, the fact that human rights reflect a «European tradition» does not mean that human rights are only or primarily something for Europeans; it was only in Europe that the idea of human rights was first developed and human rights embodied in positive law. As the term human rights already indicates that these rights are rights of man as a human being; and there is

³ The Levin Institute - The State University of New York, *What is Globalization?* In: *Globalization 101*, New York 2014, <http://www.globalization101.org/what-is-globalization/>

⁴ Honduras and Yemen did not take part in the vote.

⁵ Soviet Union, Ukrainian SSR, Byelorussian SSR, People's Federal Republic of Yugoslavia, People's Republic of Poland, Czechoslovakia

⁶ They are all parties to the ICCPR and, where applicable, also to the ECHR.

countries which – like Turkey at the time – were aspiring to become part of that tradition – or at least of countries which – like the Arab states – were believed to so aspire.

6.- THE ILLUSION OF PROGRESSIVE EUROPEANISATION

Certainly, there still were peoples whose contact with the European tradition had been too sparse for coming to know and to appreciate the values of a modern, democratic and liberal state and of its precondition, the acceptance of the pluralistic society. Yet, at the time and for the following two or three decades, it was widely believed that this was a transitory situation and that all peoples would readily accept the European tradition should they only have had the opportunity to become acquainted with it.

As regards the Muslim world, this expectation was illusory or at least over-optimistic. Muslim societies, when coming into contact with secular ideals, responded in different ways. Some Muslim countries are secular. Azerbaijan became the first secular republic in the Muslim world during its short-lived independence between 1918 and 1920, when it was incorporated into the Soviet Union. And we have already mentioned Turkey that has been governed as a secular state since the reforms of Mustafa Kemal Atatürk. But there were strong pan-Islamic counter-movements like the Muslim brotherhood dating back to the late nineteen twenties in Egypt. And the Iranian Revolution of 1979 replaced the mostly secular regime of the Shah with an Islamic republic led by its religious leaders. And the number of secular States in the Muslim World has been on the decline ever since the second half of the twentieth century.

no essential difference between European and other human beings.

7.- THE MISSED CHANCE FOR SPREADING THE AMERICAN WAY OF LIFE

If we ask ourselves why this has happened and why – what is regarded all-over the world – the American way of life not only has not been embraced in many regions of Asia and Africa but often has come to be rejected outright, this is because of the fact that the United States' claim to serve the world as an uninterested power in the service of freedom, democracy and justice for all peoples too often has been disproven by the facts, especially in the Middle East which must still be regarded the core region of the Islamic world.

The stance taken by the United States towards the Middle-East problem

Probably, the death-knell for American credibility among Muslims have been the events following the Arab-Israeli War or Six-Day War of 1967, the occupation of the so-called West bank and the Gaza strip¹⁰ by Israel, the latter's refusal to withdraw from the occupied territories¹¹ and Israeli settlement policy that was started as early as 1967¹² despite the fact that the Israeli government had received legal advice that establishing such settlements in occupied territory would be illegal under the Fourth Geneva Convention of 1949¹³ and despite

¹⁰ Occupation then also extended to the Sinai Peninsula.

¹¹ Only the Sinai Peninsula was returned to Egypt in xxx following the Peace Treaty of xxx

¹² The first settlement established was Kfar Etzion in the South of the West bank in 1967.

¹³ Israel tries to justify its action by arguing that « [a]lthough Israel has voluntarily taken upon itself the obligation to uphold the humanitarian provisions of the Fourth Geneva Convention, Israel maintains that the Convention (which deals with occupied territories) was not applicable to the disputed territory. As there had been no internationally recognized legal sovereign in either the West Bank or Gaza prior to the 1967 Six Day War, they cannot be considered to have become 'occupied territory' when control passed into the hands of Israel. » Statement by the Israeli Ministry

the fact that the UN General Assembly, the UN Security Council, the International Court of Justice, the International Committee of the Red Cross, and, in particular, the Parties to the Fourth Geneva Convention have all affirmed that the Fourth Geneva Convention was applicable. Ever since the United States has steadfastly supported the Israeli position, in the face of many resolutions of the UN General Assembly adopted almost unanimously,¹⁴ of a number of resolutions of the Security Council¹⁵ and of the Advisory Opinion of the International Court of Justice on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 2004.¹⁶

Can we reproach the Muslims if they judge according to the deeds and not according to the words? Is it not the Christian Bible which states, in Matthew 7, 16-17: «You will know them by their fruits. Grapes are not gathered from thorn bushes nor figs from thistles, are they? So every good tree bears good fruit, but the bad tree bears bad fruit. »?

The Palestinian reaction

As a consequence, the Palestine Liberation Organisation founded in 1964 under the auspices of the 1964 Arab League summit in Cairo with the purpose of creating an independent State of Palestine, took to guerrilla tactics to attack Israel from their bases in the various Arab States bordering on Israel and committed a series of terrorist acts in the nineteen-seventies and early nineteen-eighties. While Israel and the United States

of Foreign Affairs of 1 November 2007 on: «Israel, the Conflict and Peace: Answers to frequently asked questions».

¹⁴ In 2011, Res. 65/16 entitled «Peaceful settlement of the question of Palestine» was adopted by a recorded vote of 165 in favor to 7 against with 4 abstentions.

¹⁵ Cf. resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 1397 (2002) of 12 March 2002, 1515 (2003) of 19 November 2003, 1544 (2004) of 19 May 2004 and 1850 (2008) of 16 December 2008

¹⁶ ICJ Reports 2003/4, 43 ff.

considered the PLO to be a terrorist organisation until the early nineteen-nineties, most of the other states recognized the PLO as the legitimate representatives of the Palestinian people, especially after the United Nations General Assembly had recognized the PLO as the «representative of the Palestinian people»¹⁷ and had granted the PLO observer status in 1974.¹⁸

Yet, the PLO, in its Ten Point Programme approved in 1974, avowed itself to actively pursue the establishment of a democratic state in Palestine. Had the Oslo Accords, reached in 1993 in which Israel recognised the PLO as representative of the Palestinian people and the PLO recognised Israel's right to exist in peace and rejected violence and terrorism, not been boycotted by Israel after the assassination of Prime Minister Yitzhak Rabin by a radical right-wing Orthodox Jew who opposed the signing of the Oslo Accords in 1995, and had the 2000 Camp David Summit between US President Bill Clinton, Israeli Prime Minister Ehud Barak, and Palestinian Authority Chairman Yasser Arafat in 2000 not failed at the very last moment, today's prospect for an intercultural or at least a multi-cultural society on a global scale might be less gloomy.

8.- FROM ARAB TERRORISM TO MUSLIM TERRORISM

Al-Qaeda

Be it as it may: Because of the seemingly fruitless attempts for a peaceful settlement of the conflict between Israel and the Palestinians and the steadfast support of untenable Israeli positions by the United States even in the face of UN resolutions, the terror that originally had been limited to the Middle East and had been directed to the liberation of Palestinian territory now became a more general phenomenon directed to the

¹⁷ By GA Resolution 3210 and GA Resolution 3236.

¹⁸ By GA Resolution 3237.

liberation of all Islamic territories from the dominance of non-Islamic, especially Western countries. It was then that al-Qaeda, going back to Islamist groups fighting the Soviets in Afghanistan but afterwards having evolved into a global militant Islamist and Wahhabist organization led by the Saudi national Osama bin Laden, started its attacks on civilian and military targets in various countries, including bombing of U.S. embassies in 1998, the attacks on New York and Washington of 11 September 2001 and the Bali bombings 2002. The «war on terror» proclaimed by the United States in 2001 and joined by other countries resulting in the war against the Taliban in Afghanistan (2001-2014) and serving as a pretext for the war against Saddam Hussein in Iraq (2003-2011) had little effect in these regions, was not successful in decisively weakening the Taliban and caused the rise of all kinds of terrorist groups most of which were linked to al-Qaeda but often even more ruthless than the latter.

Islamic State

The most recent movement is that of the Islamic State that is presently controlling great part of the Iraq and Syria and which was repudiated even by al-Qaeda for its brutality and notorious intractability. It has its origins in the Iraqi insurgency against American-led coalition forces and their Iraqi allies following the 2003 invasion of Iraq under the pretext of self-defence against an alleged threat constituted by Saddam Hussein's alleged arsenal of weapon of mass-destruction. Because of its original aim to set up an Islamic state in the Sunni-majority regions of Iraq it called itself the Islamic State in Iraq. It availed itself of the opportunity offered by the Syrian civil war to interfere, and re-named the Islamic State of Syria and Iraq. When it decided to claim parts of the countries bordering the Eastern

Mediterranean,¹⁹ it re-named again the Islamic State of Iraq and the Levant. Most recently, with the proclamation of a caliphate,²⁰ the entity was again renamed the Islamic State.

The Islamic State claims religious authority over all Muslims across the world and aspires to bring much of the Muslim-inhabited regions of the world under its political control. For this purpose, it adheres to global jihadist principles. All jihadist groups of the twentieth and twenty-first centuries emerged from the ideology of the Muslim Brotherhood mentioned above. The Caliphate follows an extreme anti-Western interpretation of Islam, promotes religious violence and regards those who do not agree with its interpretations as infidels and apostates. Christians living in the caliphate were first given three options, converting to Islam, paying a religious levy or death. Presently however, all non-Muslims seem to have only one choice left: conversion or death.

Guidelines issued set a strict dress code on how to wear clothes and veils. Women – who are in principle expected to stay at home and not go outside unless necessary – have to wear full-face veils in the public or face severe punishment.

The Islamic State adheres to the strictest form of the Sharia. Punishment considered cruel or unusual by international human rights standards is the rule; thus, stealing is punished by amputation.

9.- ISLAMIC FUNDAMENTALISM VERSUS MULTICULTURALITY

¹⁹ Namely Jordan, Israel, Palestine, Lebanon, Cyprus and a small part of Turkish territory bordering Syria that has been disputed between Turkey and Syria since the dismemberment of the Ottoman Empire.

²⁰ On 29 June 2014. The present leader Abu Bakr al-Baghdadi became caliph under the name of Amir al-Mu'uminim Caliph Ibrahim.

We will all agree that the Islamic State offers no room for interculturality or even multiculturalism. And we cannot turn away and leave these people to themselves, because – as Ernest Hemingway, in his book entitled *For whom the bell tolls?*²¹ has said – «No man is an island; every man is a part of the main. » There is, therefore, an international responsibility for the people living under the rule of the caliphate.

But there is another argument why no-one should ignore what is presently going on in Syria and the Iraq. There is a famous statement, in essence correctly ascribed to Bert Brecht, which starts: «Sometime they'll give a war and nobody will come».²² But it continues: «Then the war will come to you.»²³

10.- THE THREAT TO MODERN PLURALISTIC SOCIETY

The jihadist movement behind the Islamic State has recruited young people from Britain, Continental Europe and the United States for years. These people are indoctrinated in extremist anti-Western ideology, trained in how to make and detonate car bombs and suicide vests and sent home to start new terror cells. What we call Western countries are directly affected by this movement.

²¹ 1940.

²² This line is borrowed from Carl Sandburg and is contained in his collected poems *The People, Yes*, published in 1936.

²³ This line is said to have been inserted by an *anonymus*. At any rate, the following lines are from Brecht himself: «Wer zu Hause bleibt, wenn der Kampf beginnt, und lässt andere kämpfen für seine Sache, der muss sich vorsehen: Denn wer den Kampf nicht geteilt hat, der wird teilen die Niederlage. Nicht einmal Kampf vermeidet, wer den Kampf vermeiden will, denn er wird kämpfen für die Sache des Feindes, wer für seine eigene Sache nicht gekämpft hat.»

Moreover, «Abu Bakr al-Baghdadi, the self-proclaimed leader of the 'Islamic State' stretching across Iraq and Syria, has vowed to lead the conquest of Rome as he called on Muslims to immigrate to his new land to fight under its banner around the globe.»²⁴ In order to be able to do so, he called Muslims «to flock to the 'Islamic State' to gather for a battle against non-believers throughout the world.»²⁵

While it is unlikely that all of the more than two billion Muslims presently living will indeed emigrate from their countries of origin and join the Islamic State, there are many countries to which the Muslim State movement might spread.

11.- ISLAMIC STATES

There are at least six states which have adopted Islam as the ideological foundation of state in their constitution.²⁶ There are at least sixteen additional states which have declared Islam to be the official state religion²⁷. If it is said that in those countries the legal code is largely secular and that only

²⁴ Damien McElroy, Rome will be conquered next, says leader of 'Islamic State', in: *The Telegraph*, 30 August 2014, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10939235/Rome-will-be-conquered-next-says-leader-of-Islamic-State.html>.

²⁵ *Ibid.*: «Those who can immigrate to the Islamic State should immigrate, as immigration to the house of Islam is a duty, » said Abu Bakr al-Baghdadi, speaking as the first Caliph or commander of the Islamic faithful since the dissolution of the Ottoman empire: «Rush O Muslims to your state. It is your state. Syria is not for Syrians and Iraq is not for Iraqis. The land is for the Muslims, all Muslims.»

²⁶ Afghanistan, Iran, Mauritania, Pakistan, Saudi Arabia and Yemen.

²⁷ Algeria, Bangladesh, Egypt, Iraq, Jordan, Kuwait, Libya, Malaysia, Maldives, Morocco, Pakistan, Palestine, Somalia, United Arab Emirates, Brunei Darussalam and Lebanon, the latter with the exception that it also has recognised 18 other religions or denominations (four Muslim, 12 Christian, one Druze, and one Jewish) making it the most religiously diverse country in the Middle East.

personal status matters pertaining to inheritance and marriage are governed by Sharia law, on the one hand this is not correct – as is shown by the example of Pakistan where, e.g. any critical statements about Islam, whether made by Muslims or non-Muslim, are considered blasphemy and punishable by death – and on the other hand this is bad enough because the Sharia does not respect women's equal rights in these areas.

Moreover, governments in those countries increasingly have come under pressure to make Sharia the only law. There are five more states without any constitutional or official announcement regarding status of religion or secularism, but this does not mean that all of them are neutral in religious matters.²⁸ A particularly negative example is set, in this context, by Sudan which only recently sentenced a Christian-raised woman to death for apostasy and for adultery because she married a Christian man. It took much international effort to secure her release and departure.²⁹

12.- COUNTRIES WITH MUSLIM MAJORITY

There are 22 states with an absolute or relative Muslim majority which have declared separation between civil and government

affairs on the one, and religion, on the other hand.³⁰

The case of Egypt

However, the example of Egypt under the majority rule of the Freedom and Justice Party with strong links to the Muslim Brotherhood and the Presidency of its former leader, Mohamed Morsi, demonstrates the fragility of an order that nominally is based on liberal values but which values have little meaning to the simple people. Morsi, who – though democratically elected in 2012 – had ignored minority rights, granted himself unlimited powers including the power to legislate without judicial review of his acts and would have introduced an Islamist-backed constitution probably even approved by referendum which would have disregarded the fundamental freedoms connected with the recognition of religious, cultural and political pluralism had he not been ousted by a military coup supported by opposition leader Mohamed El Baradei (former Director General of the International Atomic Energy Agency, by Ahmed e-Tayeb, the Grand Imam of Al Azhar, and the Coptic Pope Tawadros II in 2013. Since then, the Muslim Brotherhood has again taken to terrorist attacks and other acts of violence.

The case of Turkey

Another example is the gradual development of Turkey from a laical (and perhaps laicist) state to an Islam-oriented state under former Prime Minister and present Turkish President Recep Tayyip Erdoğan, until recently leader of the Justice and Development Party (AKP) with a strong Islamist tradition. When young, Erdoğan was a Member of the Akıncılar Derneği (Society of Spearheads), a militant Turkish-Islamist

²⁸ Indonesia, Sudan, Niger, Djibouti and Sierra Leone.

²⁹ The case of Mariam Yehya Ibrahim Ishag has received world-wide attention. But prosecutions of apostasy, such as Ms. Ishag's, have a long and disturbing history in Sudan, starting with the case of Mahmud Muhammad Taha in 1984. He was the founder of the Republican Brothers movement and was arrested for calling for an end to Sharia law in Sudan and was eventually executed for apostasy on 18 January 1985. See also LEO, Leonard A.Leo; GAER, Felice D.; and LYNCH Tiffany: Sudan's Continuing War on Religious Freedom, in: *World Affairs*, <http://www.worldaffairsjournal.org/article/sudan-s-continuing-war-religious-freedom->

³⁰ Albania, Azerbaijan, Bosnia and Herzegovina, Burkina Faso, Chad, Gambia, Guinea, Kazakhstan, Kosovo, Kyrgyzstan, Mali, Northern Cyprus, Nigeria, Senegal, Palestine, Syria, Tajikistan, Turkmenistan, Turkey and Uzbekistan.

underground organization. In 1998, he was sentenced to ten months of imprisonment for reciting, in December 1997, a poem by Ziya Gökalp, a pan-Turkish activist of the early twentieth century. The verses were regarded an incitement to commit an offense and an incitement to religious or racial hatred. The citation included verses like «The mosques are our barracks, the domes our helmets, the minarets our bayonets and the faithful our soldiers...».

Erdoğan's rule has become increasingly authoritarian in recent years; and his foreign policy is claimed to rest on Neo-Ottomanism, a policy according to which Turkey should maintain and increase its presence in the lands formerly ruled by the Ottoman Empire. In order to play this role, he will try to turn Turkey from a laical into an Islamist State. Moreover, Erdoğan's periodical political appearances in countries with minorities of Turkish origin, descent or roots like Germany and Austria are another aspect of his imperialistic attitude.

13. - COUNTRIES WITH MUSLIM MAJORITY CLASSIFIED «EXTREMELY UNFREE»

According to the standards of the NGO Freedom House, of the 47 countries regarded «unfree» in 2012, nine were to be considered as «extremely unfree. In seven of these nine countries, the majority of the population is constituted by Muslims;³¹ and among them are Saudi Arabia and Sudan.

Saudi Arabia

Saudi Arabia is an absolute monarchy supported by, and promoting, Wahhabism,³²

³¹ The two other countries are North Korea and Eritrea.

³² «For more than two centuries, Wahhabism has been Saudi Arabia's dominant faith. It is an austere form of Islam that insists on a literal interpretation of the Koran. Strict Wahhabis believe that all those who don't practice their

an ultraconservative and fundamentalist form of Islam and of the Salafi Movement that rejects all «Western» influence, is intolerant of even all other forms of Islam and ruthless in its destruction of historic Muslim and non-Muslim buildings and artifacts.³³ Because of its ties to al-Qaeda and to other jihadist movements including the new Islamic State in Iraq and Syria, Wahhabism has been accused of being a source of global terrorism.

Sudan

As regards Sudan, it is a military dictatorship with elements of radical Islamism.³⁴

14.- CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM

It is not possible to regard these outrages as mere excesses of extremists. All Islamic countries reject fundamental human rights in that form that is necessary for a free and democratic state and thereby deny to the individual rights which are inalienable in a pluralistic society. This was clearly brought

form of Islam are heathens and enemies. Critics say that Wahhabism's rigidity has led it to misinterpret and distort Islam, pointing to extremists such as Osama bin Laden and the Taliban. Wahhabism's explosive growth began in the 1970s when Saudi charities started funding Wahhabi schools (madrassas) and mosques from Islamabad to Culver City, California. » See FRONTLINE, Analysis: Wahhabism, <http://www.pbs.org/wgbh/pages/frontline/shows/saudi/analyses/wahhabism.html>

³³ This has led to the systematic destruction of non-Islamic religious sites in Afghanistan by the Taliban or, more recently, in Syria by the «Islamic State» movement, and even to the destruction of early Islamic heritage sites by the authorities in Saudi Arabia or by the radical Islamist militia Ansar Dine in Timbuktu, Mali, during the Tuareg rebellion of 2012.

³⁴ Freedom of religion is proclaimed by the Interim National Constitution of 2005; but at the same time the Constitution enshrines Shari'a as a source of legislation; and the official laws and policies of the Government favor a fundamentalist form of Islam. Consequently, all dissenters, whether Islamic or else, suffer from repression.

out by the member states of the Organisation of the Islamic Conference in its meeting in Egypt in 1990, where they adopted the *Cairo Declaration on Human Rights in Islam*³⁵ which affirms Islamic Sharia as the sole source of human rights and is at odds with the UN's Universal Declaration of Human Rights in areas such as religious freedom, gender equality, sexual orientation and equal political rights.

Inequality inherent in Islamic law

By reaffirming the inequalities inherent in Islamic law and tradition, the Islamic States have shown either their failure to understand or their unwillingness to accept religious, philosophical and political pluralism as the basic date of society.

The incompatibility of Sharia and human rights

A state based on such an understanding of human rights is by its very nature unable to establish the common good – peace, freedom and general well-being for each and all of its citizens (and this is the correct meaning of the common good, because it is that good that is common to everyone) – on the national level and to contribute to the common good of mankind. And groups based on such an understanding of human rights constitute a threat to society, the national as well as the international one.

³⁵ Cairo Declaration on Human Rights in Islam, 5 August 1990, UN General Assembly, Official Records, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993). See BREMS, E. *Islamic Declarations of Human Rights*, in: *Human rights: universality and diversity: Volume 66 of International studies in human rights*. Leiden-Boston (Martinus Nijhoff Publishers), 2001, pp. 241 *et seqs.*; ANVER M. EMON/ ELLIS, Mark; and GLAHN, BENJAMIN: (eds.), *Islamic Law and International Human Rights Law*, Oxford (Oxford University Press), 2012.

15.- MULTI-AND INTERCULTURALITY AND THE NEED TO PROTECT THE VALUES ON WHICH A PLURALISTIC SOCIETY IS BASED

It is therefore imperative for free and democratic states, and especially for the Member States of the European Union, to protect the values proclaimed in Article 2 of the Treaty on European Union (TEU), which states:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Against dangers from inside

The Member States of the European Union regard respect for, and protection of, these values to be so important that Article 7 TEU provides for sanctions against any Member State that should be responsible for a serious and persistent breach by a Member State of the values referred to in Article 2; even a serious risk of such a breach is already a matter for the involvement of Union under Article 7.

Against dangers from outside

The same must apply *mutatis mutandis* to situations where a foreign state, any non-governmental movement or any individual aims at the overthrow of the legal order upholding and protecting these values, whether by force or by other subversive means. Such a state, such a movement, such an individual must be opposed by all means.

Societies which have enjoyed these values for so long a time that they have become a

matter of course that for them it is difficult to imagine that they are not shared by everyone, at least everyone joining them. But to believe that migrants coming to our countries, or at least all immigrants who want to stay here, share our values is wrong. So strong is this our belief that we neglect to find out who of them does and who does not. We put them to all kind of tests: whether they are able to support themselves, whether they sufficiently understand our language, even whether they know a bit of our history and are acquainted with our political system. But knowing our history and being acquainted with our political system is not the same as identifying either with us or with our political system. Of course, at a certain point they might be required to avow themselves to that system and thereby implicitly to the values at the basis of this system. But it is not sufficient to profess something with the mouth if you do not embrace it with your heart.

16.- EXCURSUS. SHOULD TURKEY BECOME A MEMBER STATE OF THE EUROPEAN UNION?

This is the old problem of whether Turkey should or should not become a Member of the European Union.³⁶ Sometimes the question was raised whether an oriental Muslim state were suited to join a Union of Christian-occidental states. I have always opposed this kind of approach. In a Union of pluralistic States the question of whether the majority of a state's population professes the Christian or the Muslim religion cannot be decisive. The basis of the pluralistic society is the common profession of pluralism and of the values inextricably

connected with it. It is these values which must be embraced by a new Member State.

But embracing these values cannot be a formal thing. For quite some time it was believed that it would be sufficient – apart from the country's economic preparedness – if some principles were inserted in the Turkish constitution, if some changes were made in the Turkish laws that would reflect Turkey's adherence to the European values. It is not the letter of the law that counts; it is the disposition of the hearts that is decisive. Turkey will be ripe for accession to the European Union if its people, its society will have been permeated by the values in question. And to have been permeated by these values means to adhere to them not because the law says so but because of the feeling that without these values no decent life is possible. Turkish society has certainly not yet attained such a state. Therefore, Turkey is not ripe for accession; and if it continues on the way led by Erdoğan it will develop in the wrong direction.

17. - THE NECESSARY EXAMINATION OF HEARTS AND MINDS

So what we have to examine is not the formal knowledge of the people who come to us, it is their hearts and their minds. Such an examination of heart and mind is not contrary to human rights; it is the very precondition for preserving them. It is true that only God can look into the heart of man; but for society it suffices to establish, without reasonable doubt, the state of the heart and the mind of a person who wants to live with us. This can be done on the basis of all circumstances drawing on reason and experience.

The present situation in which our free societies face an express threat from jihadists and islamist terrorists, in some future perhaps also from islamist states – be it the present Islamic State or any other – must not be

³⁶ See: Arguments for and against Turkey's EU membership, in: *Debating Europe*, <http://www.debatingeurope.eu/focus/infobox-arguments-for-and-against-turkeys-eu-membership/>

ignored or excused by invoking the principles of interculturality. We cannot allow this threat to become reality because otherwise there will be no need for interculturality anymore.

THE GOOD ADMINISTRATION PRINCIPLES AND NORMATIVITY

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RESUMEN:

El poder de la administración pública encuentra su legitimidad en el cumplimiento de la ley, que reconoce su fuerza discrecional, adecuada a los intereses públicos que la administración pública debe cumplir. Una buena administración significa, en primer lugar, que la legalidad debe ir acompañada de principios complementarios, capaces de garantizar la transparencia de la administración de bienes públicos; en segundo lugar, que las personas cuyos intereses y derechos están en manos de la administración pública deben tener el derecho de participar en la toma de decisiones; en tercer lugar, que las decisiones deben estar motivadas y los criterios de evaluación deben comunicarse a los interesados. Dichos principios deben establecerse y respetarse en el Derecho Administrativo y en sus normas procedimentales.

ABSTRACT:

The power of public administration finds its legitimacy in the observance of the law, which recognizes its discretionary force, suited to the public interests that public administration should fulfill. A good administration means that legality should be accompanied by complementary principles that serve to ensure the transparency of public assets in administration. It also means that persons whose interests and rights are in the hands of public administration should be given the right to participate to decision making, that decisions should be motivated and criteria of assessment should be communicated to those concerned. Such principles must be established and respected in the administrative law and in its procedural standards.

PALABRAS CLAVE: *Administración Pública, Ley, Derecho Administrativo*

KEYWORDS: *Public Administration, Law, Administrative Law*

The power of public administration finds its legitimacy in the observance of the law, which recognizes its discretionary force, suited to the public interests that public administration should fulfill. In contemporary society it is necessary to achieve a new balance between government rules and democratic principles. Public administration should return to its fundamental joints - to serve the interests of

citizens - and not to exacerbate its dominant character¹.

Government activity takes place in a certain order and procedural forms, strictly determined by normative legal. Legal Empowerment of the government steps, is a necessary, but not sufficient for good administration. It is necessary to rely on complementary principles to ensure transparency in public administration, participation in decision making in an

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appropriate manner of persons whose rights and interests are at stake, motivating decisions, listening to the person involved, communication of assessment criteria, etc².

Thus, under the Charta of fundamental human rights contained in Part II of the Treaty establishing a Constitution for Europe, Art. II-101, the right to good administration is, as follows:

1) Everyone has the right to receive, in terms of its problems, an impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies.

This right includes:

a) the right of everyone to be heard, before any individual measure could formally touch that person;

b) the right of everyone to access to personal file, respecting the legitimate interests of confidentiality and professional and business secrecy;

c) the obligations of the administration to motivate the decisions.

2) Everyone has the right to have the damage repaired; damages caused by the Union institutions or agencies of the Union, in the performance of their duties in accordance with the general laws.

3) Every person may write to the Union institutions in one of the languages of the European Constitution and must be answered in the same language.

Good governance is necessary to find the consecration in administrative law and in its implementing procedures. Also in the administrative law we will be able to distinguish between substantive right and a procedural right, although the boundaries between the two categories of rules are not always marked accurately.

Building a healthy legal framework and adequate legal institutions - fundamental issue in a democracy - are not sufficient, unless it is done a correct implementation of law.

In most cases - reveals a study conducted at the end of the twentieth century - in the first instance administrative decision does not end up being appealed, they remain final. Control mechanisms, even when they are easily accessible are little effective to remedy the mistakes and abuses committed in the first instance³.

Thus, for most of the subjects of an administrative measure, the first act or the first decision is final. Therefore, it is fundamental to good governance and to ensure administrative justice for these acts and decisions to be fair, to be legal.

For this reason the existence of legal norms and institutions devoted public to administration tasks, must be accompanied by an indication of concrete forms in which these tasks shall be fulfilled, forms specified by procedural rules.

What is the need for an administrative procedure? First it's effectiveness administrative approach. Situations of public official or of a public institution is facing in their daily existence are numerous and the existence of standard procedures is for increasing efficiency, especially since most of the times, the cases are similar.

Likewise, the absence of pre-established procedures could lead to ad hoc ones, arbitrary fact conducive to the functioning of public administration.

Secondly - given that one of the fundamental principles of a modern public administration is neutrality and impartiality with customers - citizens, the procedures are necessary to ensure equal treatment; non-discrimination of beneficiaries of public administration is guaranteed, to be against administrative arbitrariness.

Thirdly, both politics and civil society must exercise control over public administration. This would be very difficult in a situation where every public institution or each officer would work to their own rules and methods. Administrative procedure in

² *Id.*

³ *Id.*

the literature is defined = as the set of legal rules on specific forms and modalities of the development, adoption, enforcement and administrative control and operations to achieve administrative and technical materials to government structures⁴.

To improve the quality of administrative processes it is necessary, among other things, of a good training and forming of civil servants who can take legal decisions, documented and relevant.

A very important factor is the adoption of deontological rules, professional ethics, to address to the civil servants and to the leaders of public administration at all levels of it. Rules of administrative procedure are to be systematized and concentrated in an Administrative Procedure Code of Romania.

Administrative Procedure Code is the legal document which sets rules to guide them, in a clear prescriptive, on those who take decisions, rules that assures government transparency, listening to the party concerned, motivating decisions, setting mechanisms of administrative or judicial control easily accessible.

One dimension of public administration reform refers to legal normativity application thereof. Two levels of concern related to administrative law and its application:

- On the first level lays the development of a regulatory framework and a system of needed institutions to showcase these rules. We consider that is fundamental in Romanian positive law, to adopt an Administrative Code and a Code of Administrative Procedure.

The legal framework thus determined, it must be continuously adapted to the challenges of the society, according to the deepening of democracy.

- The second level, relates to the implementation of these legal rules in the social life, to their assimilation, a prerequisite

for the functioning of the public administration structures, respecting the principles of good governance.

The transparency of governance process and rationality of the regulatory process are prerequisites for a more rapid assimilation by the body of social law.

Scientific studies realized in the administrative sciences have revealed the precariousness of the training process of the regulatory and managerial abilities to public administration. To this situation contributes the lack of adequate training of government staff in areas of specific knowledge of good administration.

The requirements, in permanent changing that impose administrative tasks can not be satisfied only by highly qualified staffs, who constantly update their knowledge. An enhanced training and development are essential for public entities not to be exceeded by a context of rapid transformation.

So, here comes a word of public service ethics or public official, serving the needs of citizens.

The phrase, DEON comes from the Greek words, which means science-DEONTOS. Initially it was identified with morality⁵, and we find this idea in «Ethical or moral science» - 1834, by English philosopher and jurist Jeremy Bentham. The paper is structured in two parts, dealing with a theory of virtue and the other, the practice of virtue. On this occasion is marking the distinction between ethics, which deals with what it should be and conducts to what «must be respected».⁶

Ethical norms adopted by society, bears political fingerprint unfortunately, but they naturally tend to accede to satisfy public interests of all citizens who normally should be treated equally, regardless of their legal status or religious beliefs. If it had not

⁴ *Id.*

⁵ BENTHAM, Jeremy: *Ethical or moral science*, 1834.

⁶ VOICULESCU, Florea: *Handbook of contemporary pedagogy*, Cluj Napoca, Ed Risoprint, 2005.

followed this path rules and practices had become dogma and in the same time brakes in the civilizing human relationships, always favoring the company's strong protest in unison against which we all are, the dictatorship, corruption, inequality, differential treatment of gender, etc., all democracies required to eliminate the risk of politicizing the civil service, but this is only a wish. There is no society to slice real distinction between political power and an administration that is requiring to run, even if the administration is working and developing trends to have an autonomous power.

In the above idea is natural that public officials in their work to be continually guided by moral and legal rules. Only civil servants acting on these coordinates contribute to ensuring effective implementation of rights and liberties and also to perform properly their functions.

The deontology of public official functions must be understood as something that needs to be done in the exercise of employee and volunteer who is rewarded and which includes without comment, fulfill obligations to the rules of conduct and carry out the duties of a moral profession.⁷

The deontology of public official functionary does not need to ignore the general rules; it must be present in all forms of individual expression.⁸

National civil servant deontology has indicated that they act on behalf of public power; they are tools to you and the authority to act.⁹

In our country, the process of administrative reform is a reality of the post-1990 reform period in this state, when old institutions are no longer viable, and new ones have not got the strength to resist to

negative developments. There were almost natural tares that generated much critical appreciation to public official and public functions. First level is called corruption plague. It operates easily crossing national borders, marking the legal movement of goods, finances, and people, and even penetrating in the legal system.

We can admit that it has been stated many times that the image of a country depends on its administration, so that our task is to take those measures to build an administration that is respected by all citizens because of the way officials behave is formed .

Changes can be achieved through different approaches, based on various operations, such as:

1. Substitution or replacement of structures, institutions, content, etc., outdated, obsolete, in other modern, efficient, etc.

2. Reshuffle - resulting in complete change of management composition, etc;

3. Addition – to the structure, content, etc., other new elements;

4. Restructuring - by promoting other relationships between components, etc., and other functions.

5. Removing those components which are outdated, obsolete, outdated, etc..

6. Strengthening those practices, compartments with yield positive tradition etc.

We must be aware that in most cases there will be bottlenecks and factors of resistance to reform, to implement the above-mentioned operations, because any change causes a reaction, according to natural tendencies, physiological manifested by any body to maintain a certain balance that you do not want to be disturbed.

Here are some of these factors:

A- the respect for a tradition;

B- the lack of resources or their poor management;

C- the lack of sufficient prepare of public officers for reform;

D- one type of managerial illiteracy;

⁷ TUDORAȘCU, Mihaela Miruna: *The deontology of public function*, Seria Didactică, 2010, p. 6.

⁸ COCHINESCU, M.: «*Introduction in public deontology*», Revista Dreptul Nr. 4/1995.

⁹ NEGULESCU, P.: «*Administrative Law Treatise*», Ed. a II-a, București, 1943, p. 52.

E- building management teams on the wrong principles;

F- the little experience in the alternative administrative structures;

G- the absence of clear regulations on staff and administrative structures;

H- inadequate definition of the functions and inadequate salary scales;

I – the fragmentation of the reform process because of the alternation in power of different political parties;

The reform is necessary for the following four main reasons: Economic reasons, low economic growth and reduction of budgetary resources allocated to public administration, private sector need to have a modern, flexible and open to public - private partnership.

Technological reasons, the introduction of information and communication technology in public administration.

Sociological reasons, citizens, as beneficiaries of public services are increasingly demanding and they do not accept that, their needs should be determined exclusively by what the administrations are offering.

Institutional reasons, Romania's integration into EU structures is involving another mode of administration services. Strong hierarchical structure gives way to new types of organizational reforms based on decentralized structures. The reforms can be of different types: sectoral or global, systemic, bottom-up, pressure from the masses to political makers, from top to bottom, of the cabinet, etc.

The doctrine knows two broad categories¹⁰ of sources of public service ethics: written and unwritten sources. In the category of written sources we remind: the Constitution, laws, conduct code for civil servants and government decisions, orders of government, international regulations, which

if ratified by our country become part of domestic law. As unwritten sources we mention the custom, especially regarding the diplomatic officials and the jurisprudence.

THE BASIC PRINCIPLES IN CIVIL SERVANT DEONTOLOGY

We understand by the principles of ethics, those guiding ideas that public servants should be in outright, mandatory basis for all activities that place a person who is a civil servant, ideas which aim to determine and ensure the efficient functioning of operation service or of the institution where the officer is working.

Following principles are known, are considered fundamental in science of ethics of public officers:

1. Equal treatment to all beneficiaries of public services;
2. Defense of the Constitution and respect the rule of law;
3. Defense of the institution prestige they represent.
4. Permanent event on the professional discretion, regarding of all information, in the exercise of its civil servant. They must defend and respect the dignity of public service users, to respect and protect the intimate life, family life or private life.
5. The public officials should express faith and fidelity to the country to which they belong.
6. Public officer in his work shows obedience to his or her supervisor (but not illegal acts).
7. Transparency.
8. Orientation to citizen.
9. Stability in doing the public work.

¹⁰ POPESCU, D.; DRĂGHICI A.: «Deontologia funcționarului public», Pitești, Ed. Paralela 45, 2005, p. 26.

HUMAN TRAFFICKING, A CHALLENGE FOR CONTEMPORARY SOCIETY

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RESUMEN:

La trata de seres humanos: es un tema que concierne al tema de las instituciones internacionales en los últimos años, con mayor frecuencia. La trata de personas se considera una forma particular de manifestación de la delincuencia organizada porque implica, en esencia, el tráfico ilícito de personas. Normalmente, las manifestaciones más significativas de la trata de personas son la prostitución organizada, el proxenetismo, las adopciones ilegales y, en general, la migración ilegal de personas, siendo víctimas de ello mayoritariamente mujeres y niños. Se lleva a cabo un estudio de este problema, por desgracia, plenamente actual.

ABSTRACT:

Trafficking in human beings - is an issue that increasingly concerns the international institutions in recent years. Human trafficking, the illicit trade in people, is considered a particular manifestation of organized crime, which include organized prostitution, pimping, illegal adoptions, and generally, the illegal migration of people. The victims are primarily women and children. Here we provide details and timelines related to these issues.

PALABRAS CLAVE: *Trata de Seres Humanos, mujeres, niños*

KEYWORDS: *Human trafficking, women, children*

In dealing with this, would be to combine internal and international regulations. We refer initially to the Universal Declaration of Human Rights and Article 1 begins with an analysis of: «All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood . » But if we refer to the ancient times to the present, human trafficking has circumvented this provision, no matter what form of dress: the prostitution, the pimping, illegal adoptions or the illegal migration of persons etc.

Human trafficking is considered a particular form of manifestation of organized crime is, in essence, the illicit trade in people.¹

The Palermo Convention of 13 December 2000, gives the definition of human trafficking:

a. «*Trafficking in persons means the recruitment, transportation, transfer, harboring or receipt of persons by threat or use of force or other forms of coercion, of abduction, of fraud, of deception or abuse of power by using a vulnerable situation, the giving or receiving payments or benefits to achieve the consent of a person having control over another person for purposes of exploitation. The operation means*

¹ OLTEI, Iuliana Gabriela: *Human Traffick. Legal Issues.*, Published in: «Review of Panal Law», No. 2/2009.

prostitution or other forms of sexual exploitation, forced labor or services, slavery or similar practices, servitude or the removal of organs. »

b. *«The consent of a victim of intentional exploitation of trafficking for the purposes referred to in paragraph a. is irrelevant if you have used any of the above-mentioned processes»;*

c. *«The recruitment, transportation, transfer, harboring or receipt of child exploitation will be considered trafficking even if they do not involve any of the procedures provided for in paragraph a. »*

On 4 th of December 2002, Romania has ratified the Palermo Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Also, the Romanian law, art. 12 al. 1 of Law no. 678/2001 on preventing and combating trafficking in persons, trafficking in persons as defined in the following way: *«The recruitment, transportation, transfer, harboring or receipt of persons by threat, force or other forms of coercion, of abduction, fraud or deception, abuse of authority or taking advantage of that person inability to defend themselves or to express their will, or by offering, giving or receiving of payments or benefits to achieve the consent of the person who has authority over another person for purposes of exploitation this person».*²

The provisions of art. 13. par. 1 of that law defines child trafficking as *«recruitment, transportation, transfer, harboring or receiving a minor in order to exploit it».*

Unfortunately, there is a very close network of committing such crimes, the citizens who are generally poorer. A predominant orientation is noted on Eastern Europe.

First, as geografică settlement, as well as economic, allows networks that smuggle people to access very easy to manipulate masses of people in Romania, and amazingly it appears many times, that even parents of children trafficked are parties directly

involved in these illicit commercial acts, we might say.

First, as geographical location, economic level as well, allowing trafficking networks are very easy to gain access to manipulate masses of people in Romania, and amazingly it appears many times, that even parents of children trafficked are parties directly involved in these illicit commercial acts, we might say.

The modalities of recruitment are vast. As I stated in the previous paragraph, one of them is even sale of minors by parents, for illegal adoptions, and more and more serious to commit child sex offenses, and not least for the illicit exploitation of minors: begging (to be reach their disfigurement forced to attract the sympathy of others), work hard, etc.

Compared to the major people, when talking about the means of recruitment, we refer to one of the most common, namely, the false promises of work from some knowledge, relatives or friends.

In Romania, trafficking in human beings is regulated for the first time as distinct from crime in Law. 678/2001, as amended, represents a legislative framework in Romania in the transposition of European legislation and international provisions related to trafficking. Another piece of legislation in this area is the Regulation for applying Law no. Adopted by Government Decision No. 678/2001. 299/20035, legislation intended to clarify roles and responsibilities that institutions have received by previous laws. By GEO. 79/2005 and by Law no. 287/2005, last amendment was made to the Law. 678/2001 relating to crime, the causes of impunity and assistance in Romania, foreign persons, victims of trafficking.³

Before appearing special laws, regulations were lacking in the Criminal Code. Thus, the

² *Ibid.*

³ OLTEI, Iuliana Gabriela: *Human Traffick. Legal Issues.*, Published in: «Review of Panal Law», No. 2/2009.

Criminal Code of 1936 provided, along with the crime of pimping in the usual form (art. 436) and severe form (art. 437), the crime of trafficking in women having an international character, such as aggravated and (art. 439). A series of preparatory acts performed for the crime of trafficking in women were punished as attempts (art. 440). Criminal Code of 1968 focused on the provisions of art. 329, all forms of procurement, to facilitate prostitution and trafficking of women, referred to above. The same code in May sanctioned deprivation of liberty, art. 189, slavery, art. 190, subjected to forced or compulsory labor, art. 191. Analyzing these provisions of the Criminal Code in comparison with those of the special law, it appears that before the advent of the latter remained sanctioned a series of illegal activities carried out in order to facilitate trafficking in persons, and on the other hand, ensure effective legal protection against all forms of actions that are likely to achieve trade and exploitation of human beings.⁴

In our approach, we want to relate to an extremely contemporary niche, namely trafficking in children, their rights and freedoms.

Protecting and promoting children's rights has become an international concern, adopting the best documents in this regard. Convention on the Rights of the Child is the human rights treaty with the widest ratification history.⁵

Sexual exploitation and abuse of children and young adults, often for profit only recently been recognized as a social problem and the facts that require urgent action at national and international. First there was the stage of denial or minimizing the phenomenon. During this stage, it was considered, and in some countries still consider yet, exploitation and sexual abuse of

young people as a rare phenomenon and without significant consequences. It took very long until it was recognized that the problem has reached considerable size and that require attention at national and international phenomenon. Minimizing the problem resulted, among other things, poverty reliable statistical data in this area.

«The next stage tended to attribute to sexual exploitation and abuse of children and young adults a fortuity, as degenerate acts committed by few individuals. When these facts came to public attention the first time they were considered pathological cases, offenders are counted as «mentally unbalanced degenerates and monsters». Now, after the media revealed that many cases of young people on sexual abuse were made, it is not easy to believe that those who indulge in such acts or profit from them are people with mental disorders. The third stage was characterized by accusing the victims. Victims of sexual abuse and exploitation were seen as alluring and perversely inclined to such an extent that they have whipped themselves from sexual abuse. Regardless of age, victims have been identified as highly aggressive and provocative and, if it were their whims on them would not have committed any abuse. Finally, in some countries has reached the final stage: the emergence of pressure groups and social movements have organized campaigns against the sexual exploitation of children and young adults. They have contributed greatly to raising awareness and public authorities.»⁶

By way of example, to present a case that was before the High Court of Cassation and Justice of Romania, namely Decision. 593 of 30 January 2004.

The recruitment of a minor in order to exploit it by begging and recruiting an adult,

⁴ *Ibid.*

⁵ RUSU, Marcel Ioan: *Considerations on the protection and promotion of children's rights in EU legislation*, *Annales Universitatis Apulensis*, Nr. 11/2008.

⁶ POPA, Nelu Dorinel: *Sexual exploitation of children*, Published in: «Review of Panal Law» No. 4/2007.

by offering and giving money or benefits to achieve the consent of the person who has authority over it, for the same purpose, the constituent elements of minor traffic offenses and trafficking in persons referred to in art. 13 and art. 12 of Law no. 678/2001.

With criminal sentence no. 585 of October 8, 2003, the Court finds defendants sentenced for crimes GJ and RB and trafficking of minors and trafficking in persons referred to in art. 13 para. (A), (3) and (4) and art. 12 para. (A) and para. (2). from Law no. 678/2001.

The court noted that on 19 May 2002, defendant GJ went to town Năvodari, and inquiring about the existence of children with disabilities, has been referred to juvenile family BM.

Minor, who had a leg disability, the defendant accepted the offer to go abroad to beg, provided it was accompanied by his sister BA.

Defendant convinced the mother of his two sisters, BC, to agree to leave them, giving them money and goods.

In achieving its purpose, the defendant GJ took the minor and her sister and their mother, to the authorities for obtaining passport formalities. RB defendant has paid the fees for passports, which then, the two defendants took from the girls.

On 15 July 2002, defendant RB was detained at the border, trying to pull out of the country the BM and BA.

Constanta Court of Appeals, by Decision No criminal. 354 / P of 7 November 2003, has rejected calls defendants.

Defendants are baseless appeals.

Article 13 of Law no. 678/2001 provides that 'recruitment, transportation, transfer, harboring or receipt of persons aged between 15 and 18, in the purpose of exploitation, is the offense of trafficking in minors».

Article 12. (A) of the Law, referring to victims of major crime makes the existence of trafficking activity prior to recruitment, transportation, transfer, harboring or receipt of persons by threat, violence or other forms

of coercion, abduction, fraud, deception, abuse of authority or taking advantage of that person's inability to defend themselves or to express the will or by offering, giving, accepting or receiving money or other benefits to obtain the consent of the person who has authority over another person for the purpose of exploitation.

Article 2, paragraph (2). b) Law no. 678/2001 provides that service means «keeping in a state of slavery or other similar procedures of deprivation of freedom or servitude» and the letter. e) provides that «the performance of other such activities that violate human rights and fundamental freedoms» is also a form of exploitation by «servitude» within the meaning of the text quoted understood «the action of subjecting».

However, once get abroad, two sisters, lack of identity in a country whose language they did not know, and could maintain only expedients, begging for defendant RB.

Deed of the two defendants has the elements of the crime of human trafficking, while the BA major recruitment person for purposes of exploitation, is done with the consent of persons who have authority over it - parents of the girl - defendants who gave them money and goods promising them both that they send half the money earned from begging for their daughters.

Therefore, those are the constituent elements of the crime of trafficking in minors and human trafficking, which is why the appeals were rejected defendants.⁷

Here is therefore a serious problem with the Romanian society, but also the international experience, and because of high rates that have reached a rooted, secure issue that can be achieved with great difficulty, given the organizational form of criminal networks and the extent that they have.

To highlight the gravity of these facts, we will refer to another example (here), tried to Alba Iulia Court of Appeal⁸:

⁷ <http://www.scj.ro>

⁸ <http://www.jurisprudenta.com>

Trafficking in persons and trafficking in minors. Retraction of the statements given by victims and refinement. Judge's obligation to give reasons for removing data declarations victims during judicial investigations. Acts accused of being recruited three of the injured party a minor error in diverting them to travel abroad on purpose made of the constituent content of trafficking crimes and trafficking in minors under 12, 13 of the Law nr.678 / 2001 on preventing and combating trafficking.

Department for cases involving minors and family - Criminal Decision No. 41 / A / September 6, 2006 By decision of 14 June 2006, no.233 Criminal Court Hunedoara - VVC defendants convicted criminal section of the IRD and the resulting punishment of three years, or 3 years and six months imprisonment for the crime prev. by art. 12 alin.1si 2, 13 paragraph 2, 3 of Law 678/2001 modified and republished with apps. prev.art.74 letter. of 76 points. a, b of the Criminal Code, 33 points. 34 Criminal Code.

To hear this sentence, the Court held that defendants from Hunedoara, taking advantage of the wealth of many poor women from the Jiu Valley, the town of Lupeni, they have recruited in the period 2004 - 2005 under the promise of providing jobs in Italy. The recruitment of young offender dealt with VVC, which supported all costs required to obtain passports for three couples (two major and one minor) and travel expenses. Once in Italy, the three victims were hosted by IRD defendant who then forced them into prostitution, the promise of decent jobs is in fact a lie used to provide confidence to the young.

The Money that the young obtained from this activity have been appropriated by defendants. Judge fund, analyzing documents and materials and the light disappeared. art. 1 para 1 Code of Criminal Procedure, art. 626 Code of criminal procedure and criminal procedure code 63 has concluded that oscillating behavior of the injured party due to pressure on their carers defendants.

Thus, removing insincere statements reasoned, was retained by the judge guilt for the acts of defendants who ordered the prosecution. In terms of enforcement, the court before sentencing and execution determining how to take account of lack of previous criminal conduct of the defendants previously offenses, tangible danger and how to commit crimes by them.

Against sentence appealed instance, in legal terms provided. art. 363 defendants in criminal procedure code. In the grounds of appeal in writing and orally supported the Court of Appeal, the defendants have shown that it is not considered guilty of crimes for which they were convicted.

They showed that these girls helped financially without claiming and obtaining any material advantage in knowing their insistence that they come from needy families. In relation to these reasons, the defendants asked the caller under Available payment. art. 11pct.2 letter, rap. in Article 10 letter. the criminal procedure code. The defendants claimed that callers have the objective side of human trafficking offenses is not made because of the rules of evidence shall not result in threats, abduction, fraud or other form of compulsion on the victims and no exercise of the victim of abuse of minors.

A final court decision critical of the fund was the failure to state reasons regarding the Iron Curtain by the court of substantive evidence in defense proposed by the defendants. In relation to grounds of appeal raised, the defendants-callers have asked to be given evidence before the court of appeal. Examining the reasons of appeal raised by the defendants, in the light of art. 378 from Criminal Procedure Code, the Court of Appeal Alba - Iulia, the decision upheld the appeals nr.41/A/06.09.2006 criminal defendants, and abolished the criminal sentence appealed only in terms of individualization of sentences for the two defendants in the sense that given the greater efficiency from art. 74, 76 to the Criminal Code and under the supervision of

suspended sentences imposed on defendants and proceeding to a new trial in this range.

Answering the grounds of appeal raised the point, Alba-Iulia Court of Appeal held: instance judge had in mind a fact confirmed by the evidence file correctly. The fact that the two defendants - caller the 3 victims were recruited and they have «facilitated» departure to Italy, promising them jobs as waiters and chambermaids witnessed by: statements aggrieved parties who have come to know the two defendants, one from another and knew that they «helped» more girls to go to Italy.

The two defendants are brother's in law, and the defendant sister is staying for several years in Italy, to Naples. In statements during the prosecution they describe, in detail, that the job offer was made by the two defendants callers, they have accompanied them to the competent authorities to obtain passports, they set the date of departure, had «arranged» Who to expect in Italy, where to be accommodated and reached once informed that there were to be prostitutes.

In the course of legal research, civil party presented another series of facts, but the recruitment and transportation of injured parties in Italy by the defendants, where they checked the results from the statements of witnesses who agree with the issues presented by the injured parties; transcribing minutes of phone call. In the context of said probation, the judge instance, correctly held that they are constitutive elements of the crime of trafficking in persons and minors. The evidence showed that the three injured parties (two major and one minor) were recruited under the promise of jobs in Italy, as waiters and chambermaids. It turns out

that the defendants-callers have accompanied the injured parties to obtain documents, they have paid and transported to Italy, they expected that they sent someone you trust who expect to finish, gave assurances that the minor mother to give consent to leave his daughter.

In the context of the aforementioned probation judge properly fund established conditions for the existence of all criminal liability of both defendants for crimes caller withheld because the three injured parties at the time of recruitment had no job, had no income, so for the defendants - the call was easy to put injured parties in a state of addiction to them. Once in Italy, without papers and without money, the injured parties were only required to follow the conduct of traffickers. This is why their call for the payment for the acts of trafficking in persons and minors has proved to be unfounded. Failure to state reasons for criticism by the judge the evidence suggested the Iron Curtain is unfounded. The judge thoroughly analyzed the entire fund probation, expressly and explicitly stated reasons for which the victim recalls are not justified in concluding their Iron Curtain. Court of Appeal in accordance with the dispute, by the Article 52, 72 from Criminal Code giving efficiency criteria of individualization of punishment and taking account of dispute. 86 / 1 of the Criminal Code as amended by Law no. 278/2006 found that application of a suspended sentence and supervised probation set a maximum range provided by the application. The 86 / 2 of the Criminal Code is able to provide preventive and educational role required by article 52 of the Criminal Code.

PLACE, NOT RACE: AFFIRMATIVE ACTION TO REDRESS SEGREGATION IN THE UNITED STATES

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RESUMEN:

En este ensayo, Sheryll Cashin describe los argumentos clave de su libro, *Place Not Race* (Beacon Press, 2014). Ella sostiene que Estados Unidos es un país con segregación que no está a la altura de los ideales de igualdad de su fundación y Constitución. Ella explora la idea de cómo la segregación por raza y clase, en escuelas y vecindarios, concentra la oportunidad en algunos lugares y la desventaja en otros y facilita el “acaparamiento de oportunidades” por parte de familias ricas y con educación universitaria. Ella concluye que los colegios y universidades selectivos de los EE. UU. tienen la obligación de contrarrestar estas tendencias sistémicas y que la acción afirmativa en las admisiones universitarias debería favorecer a los estudiantes de alto rendimiento en entornos desfavorecidos, independientemente de la raza. Ella también apoya reformas como hacer pruebas estandarizadas opcionales.

ABSTRACT:

In this essay, Sheryll Cashin outlines the key arguments of her book, *Place Not Race* (Beacon Press, 2014). She argues that America is a segregated country that is not living up to the equality ideals of its founding and Constitution. She explores how segregation by race and class, in schools and neighborhoods, concentrates opportunity in some places and disadvantage in others and facilitates "opportunity hoarding" by affluent, college educated families. She concludes that selective US colleges and universities have an obligation to counter these systemic trends and that affirmative action in college admissions should favor high achieving students from disadvantaged settings, regardless of race. She also supports reforms like making standardized tests optional.

PALABRAS CLAVE: *Segregación, acaparamiento de oportunidades*

KEYWORDS: *Segregates, opportunity boarding*

I am very honored to speak at this roundtable on Globalization and Human Rights, here at the Universidad Rey Juan Carlos de Madrid. I am going to talk about the role of place and segregation in creating and limiting opportunity in the United States. I hope that this lecture provides useful insights about inter-group relations that are applicable to the European Union. Across the globe, countries face an eternal challenge of humankind: how to create pluralistic societies in which people of all origins have access to opportunity and

no one is excluded because of their race, nationality, ethnicity or economic status.

But before I talk about opportunity and a phenomenon called opportunity hoarding, I would like to begin with my personal story. I graduated from a strong, well-integrated public high school in Huntsville Alabama in 1980, when America and the South in particular were making good on the promise of *Brown v. Board of Education*—the famous case in which the US Supreme Court declared that state-sponsored racial

segregation in public schools was unconstitutional. Between 1968 and 1980, each year schools in the south became more integrated such that by 1980 about 43% of black children attended integrated schools, up from about zero percent when *Brown v. Board* was decided. And gaps in achievement between blacks and whites narrowed greatly during that period.

In 1980, my activist parents were broke but we lived in a sturdy middle class neighborhood and the public schools I had access to, were quite good. They enabled me, a co-valedictorian, to be accepted to Princeton, my dream school, although I decided to attend Vanderbilt on a full scholarship instead. Today a valedictorian from my high school, S.R. Butler, would not likely get much notice from Princeton or any elite institution because Butler and the neighborhood that surrounds it has gone from being integrated and middle class to heavily black and poor.

In a series of cases in the 1990s the Supreme Court signaled to states that segregation in public education is not unconstitutional if it results from segregated housing that the school district itself did not cause. As a result, many school districts stopped pursuing integration and returned to neighborhood school attendance plans that rapidly re-segregated public schools. And in a 2007 decision the Supreme Court barred school districts from considering the race of children in assigning them to schools, even when their goal is school integration. As a result of these cases, African American and Latino children are now more segregated today in US public schools than they have ever been in the last four decades.

Segregation, then, is a fact of American life. Only 42 percent of all Americans now live in a middle class neighborhood, down from 65 percent in 1970. Because of the increasing separation of the affluent and the highly educated from everyone else, place, where one lives, often determines who has access to high-quality elementary and secondary

education and, in turn, selective higher education.

Today only 17 out of about 3000 counties in the United States have a population in which more than half are college educated--counties that selective college recruiters flock to. They include Marin County north of San Francisco; Orange County in North Carolina's research triangle; Boulder County, Colorado; and affluent suburbs bordering Washington DC and New York City. In the vast majority of U.S. counties, however, college graduates are a small minority. College graduates used to be more evenly distributed, but segregation between them and high school graduates has nearly tripled since 1940.

Highly educated people are drawn to metro centers where other people like themselves live, and within the metropolis they gravitate to neighborhoods of their own kind. This is a phenomenon that transcends race. College graduates living in America's most highly educated metro areas are more residentially isolated than African Americans.

This concentration of human capital in some places and not others has consequences for children. Some kids, like mine, grow up in environs chock-full of doctors, lawyers, World Bank economists, prize-winning journalists – the list goes on and the networks are deep. This intellectual density greatly raises expectations and provides a steady flow of shared wisdom about what it takes to get into a great college. As educational elites congregate in their own universes, the standards and networks for entry into the leadership class become more foreign and less obtainable to those who live elsewhere. A dean of a prestigious U.S. law school said of the trend: «Those that are afforded a high-quality selective K-12 public or private education enter elite colleges and become leaders and everybody else gets to watch on television.»

1.- ROLE OF PLACE IN OPPORTUNITY HOARDING

Sociologist Charles Tilley defined opportunity hoarding as in-group sanctioned practices that have the effect of excluding out-groups. Such exclusion does not have to be intentional. But it happens. Sociologist Douglass Massey has overlaid this analysis with geography. Massey argues that where social boundaries conform to geographic ones, the processes of social stratification that come naturally to human beings become much more efficient and effective. In his words: «If out-group members are spatially segregated from in-group members, then the latter are put in good position to use their social power to create institutions and practices that channel resources away from the places where out-group members live. » The same power can be used to «direct resources systematically toward in-group areas. »

In lay terms, place locks in advantages and disadvantages that are reinforced over time. Geographic separation puts affluent, highly educated jurisdictions in direct competition with lower-opportunity places for finite public and private resources. And affluent jurisdictions are winning. No one says out loud that our public policy should be to give affluent schools more and better resources, but that happens as a result of a concentration of motivated parents who know how to advocate for what they want.

2.- SEGREGATION AND K-12 SCHOOL QUALITY

As I summarize in Chapter 2 of my book, *Place, Not Race*, racial segregation persists, though it is declining slowly. African Americans are the most segregated racial or ethnic group, followed by Latinos. Only about 30 percent of African American and Latino children in the US live in a middle class neighborhood. This means that black and brown children typically will attend

schools with less experienced teachers and fewer resources. They may have limited access to grocery stores and amenities like public parks and libraries. Often they will be exposed to violence in their neighborhood.

Meanwhile, economic segregation has spiked since 1970. In fact economic segregation is growing fastest among African Americans and Latinos. As the map illustrates, those persons of color who can escape to higher opportunity do. *Place* or geography, unlike race, reflects the complexity of post-civil rights America. The civil rights movement of the 1960s created the possibility of a black middle class and upper class *but it did not eliminate neighborhoods with concentrated black poverty*, where people with fewer options are stuck. This is the unfinished business of the American civil rights movement. In high poverty black neighborhoods, residents like those watched by the world recently in Ferguson, Missouri, typically endure predatory racial profiling by the police and a racially unfair and fiscally insane war on drugs that leads to costly and counterproductive mass incarceration. Ghetto neighborhoods also contribute to stereotypes about black people that make people with options flee whenever a school or neighborhood becomes identified as black. Finally, segregation of the college educated is growing even faster than economic segregation. Beyond causing opportunity hoarding, rising geographic separation of the affluent and the educated also appears to contribute to rising inequality. A nationwide study by economists at Harvard and Berkeley found that upward mobility for poor children varied greatly across the US, depending on where they lived. Those fortunate to live in cities like Seattle, Salt Lake City and Boston that had a sizeable middle class and enabled poor families to live among them had much higher rates of mobility than poor children in more segregated cities like Atlanta and Charlotte.

This study linking segregation to rising inequality is consistent with research showing

that America has much more of a class system than other developed nations. Contrary to our favored myth of America as the land of opportunity, it is much more likely in America than other advanced economies that a child's life chances depend on the class of her parents. Place seems to be playing a role in this. Income inequality has risen dramatically in the same decades that economic segregation was rising. The ratio of CEO to worker pay has increased 875 percent since 1978. For the super affluent people living in enclaves with no poor or working class people around, it may be easier to make class distinctions because they are not familiar with people who struggle. It may be easier to justify allocating larger shares of corporate revenues to those at the very top of the income scale and to the owners of capital.

Having a leadership class that is truly diverse in origins matters not just for social mobility but also for social cohesion. Elite universities have a critical role to play in creating a fairer, more cohesive society. They should be engines of mobility rather than reifiers of existing stratification.

3.- ROLE OF PLACE IN COLLEGE ADMISSIONS

The pool of disadvantaged high achievers is actually much larger than many imagine. Economists Caroline Hoxby and Christopher Avery have found that each year approximately 25,000 to 35,000 *low-income* high school students break the 90th percentile on the SAT or ACT (standardized college entrance exams) and have a high school grade point average of A- or better. Nearly 6 percent of this cohort is black and 8 percent is Latino. If admissions offices buy only SAT mailing lists, they will miss all high-scoring students that take only the ACT, which is favored by students the South and Midwest, regions that produce the largest portion of the pool of low-income achievers. Midwest

and Mountain states for example produce 21% of disadvantaged achievers while New England produces only 3.5% of them.

Geographic bias continues with outreach. Selective universities tend to visit high schools that are reliable feeders or are located where plenty of high achievers from other schools can also get to a recruitment presentation. The well-travelled route is to areas dense with college-educated parents: urban counties in southern New England, the Mid-Atlantic region, southern Florida or coastal California or large cities like Chicago, Houston, Dallas or Atlanta. Such traditional recruitment patterns explain why selective private schools fall short in their representation of low-income, high-ability students. They focus on the parts of the country with small numbers of such students and neglect areas with a lot more of them. This creates a false perception among selective colleges that the pool of disadvantaged achievers is miniscule, while doing little to increase college-attending behavior of strivers from low opportunity places.

Place influences not just where colleges choose to recruit but also where achievers choose to apply. Ironically high achieving students from low opportunity places get worse advice than their less stellar peers because high school guidance counselors tend to focus on colleges and practices that fit the general population. The end result of conventional practices in college admissions is that low-income achievers of all colors—even high-achieving ones, even valedictorians—are being overlooked by selective campuses because of geography.

4.- PLACE AND AFFIRMATIVE ACTION

In the United States affirmative action programs were developed in the 1960s, initially to make up for a long history of racial discrimination. In higher education, however,

universities have followed the guidance of the Supreme Court, which allows them to take race into consideration in the admissions process in order to achieve a diverse student body that confers educational benefits on everyone. The race of an individual applicant may be considered as a modest «plus factor,» if that person will contribute to the diversity of the student body, regardless of whether the person is disadvantaged.

I argue that what has been missing from affirmative action policies is an acknowledgement of the role of segregation in curtailing access to educational opportunity. Race-based affirmative action is a poor substitute, and possibly a deterrent, to dismantling the opportunity hoarding that now pervades elite college admissions. Race is no longer a definitive marker for who is disadvantaged in American society. Race-based affirmative action primarily benefits the most advantaged applicants of color, often the children of well-educated African immigrants who tend to live in integrated neighborhoods and do not suffer the legacy of American slavery or apartheid. These students and their wealthy black American cousins, like my children, will get into a very good college, even an elite one, if they choose to work very hard and take the most challenging classes available to them. But college-bound students from medium and low opportunity environs, particularly African Americans who disproportionately attend segregated schools, must be superhuman to overcome the structural disadvantages of place. Among those disadvantages are under-resourced schools with less experienced teachers and counselors, and fewer high achieving peers that raise expectations and share knowledge about the college admissions process. Ironically for proponents of affirmative action, a place-based approach, along with reforms like eliminating standardized entrance exams, would be more likely to help the populations that diversity advocates purport to care about.

In addition to helping people who are *actually* disadvantaged, I prefer college diversity strategies that encourage rather than discourage cross-racial alliances. Dr. Martin Luther King, Jr. saw in his increasingly multiracial band of civil rights soldiers an early example of the beloved community he espoused. The movement itself could be an approximation of the spirit of agape love and community that he envisioned for the whole of America. One expression of this love for community was seeing the mutuality in all types of human suffering. As King famously said, «Injustice anywhere is a threat to justice everywhere.» In the end, he did not turn away from the hardest part of community building. In his last book, King wrote, «Our loyalties must transcend our race, our tribe, our class, and our nation.»

There are obvious lessons here for supporters of affirmative action or any form of justice or fairness. Currently most civil rights advocates in the US focus on racial disparities, typically comparing the lives and struggles of blacks and Latinos to that of whites without ever acknowledging that plenty of whites are also harmed by the same structural barriers that most people of color face.

In America, poverty is growing fastest in the suburbs, where the majority of whites live. African Americans and working class whites have a lot more in common than affluent and poor whites do. I argue that we need to begin to harness this mutuality.

As awful and racially disparate as mass incarceration is, incarceration rates for black men have decreased over the past decade while incarceration rates have risen in the same period for white men. A focus solely on black-white disparities, however, masks a common experience of over-incarceration of high school dropouts of all colors.

Working class whites in particular hear in arguments about racial disparities an accusation of racism that turns them off and limits possibilities for strong multiracial alliances that could enact fairer policies that

bring all people along. While race remains highly salient in American society, a civil rights discourse that focuses on common harms and common values is needed to bridge huge gaps of perception between whites and people of color that contribute to toxic, partisan gridlock.

Thus I recommend giving special consideration to any high achiever who lives in a neighborhood or attends a school where 20 percent or more of their peers are poor, regardless of that person's race. I recommend that any high achiever who comes from low family wealth should also benefit from affirmative action. Both of these proposals accurately reflect the legacy of American segregation and are much more viable politically and legally than race. I believe my proposals are much more radical and unifying than trying to hold on to race-based affirmative action, which many states and schools are retreating from.

I also argue that standardized tests should be optional or not used at all; that financial aid should return to being based solely upon need, not so-called merit; that «legacy» preferences for the children of alumni should be scrapped; and that institutions that are serious about diversity should work with partner organizations like the Posse Foundation and Questbridge, which are astute at finding disadvantaged achievers who are prepared to succeed at elite institutions.

Those who have not escaped segregation are being excluded from the most viable route to the middle class – selective higher education - - and need the obstacles they face to be acknowledged and mitigated. These reforms will help marginalized racial and ethnic minorities but also all people with dreams that find themselves living in the wrong places through no fault of their own.

SPECIAL MEASURES UNDER THE CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

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RESUMEN:

El texto de la Convención para la Eliminación de todas las formas de Discriminación Racial (ICERD, por sus siglas en inglés) resalta dos aspectos acerca de las “medidas especiales” (también conocidas como “acción afirmativa”). En primer lugar, deja claro que tales medidas cuando se toman con el fin de asegurar un avance adecuado de los grupos étnicos con desventajas raciales, no constituyen discriminación racial en virtud de la Convención. En segundo lugar, establece que los Estados Partes están obligados a adoptar medidas especiales “cuando las circunstancias lo justifiquen”. Esta contribución examina de cerca el tratamiento de la Convención de las medidas especiales, con especial atención a la recomendación general adoptada por el Comité para la Eliminación de la Discriminación Racial al respecto.

ABSTRACT:

The text of the Convention for the Elimination of All Forms of Racial Discrimination (ICERD) says two things about “special measures” (also sometimes referred to as “affirmative action”). First, it makes clear that such measures, when taken for the purpose of securing adequate advancement of disadvantaged racial or ethnic groups, do not constitute prohibited racial discrimination under the Convention. Second, it establishes that the States Parties are required to adopt special measures “when the circumstances so warrant.” This contribution closely examines the Convention’s treatment of special measures, with particular attention to the General recommendation adopted by the Committee for the Elimination of Racial Discrimination on the subject.

PALABRAS CLAVE: *Discriminación, raza, Estado*

KEYWORDS: *Discrimination, race, State*

My remarks shall focus on the treatment of «special measures» in the Convention for the Elimination of All Forms of Racial Discrimination, as well as in the practice of the Committee for the Elimination of Racial Discrimination. The Committee’s practice is reflected in its Concluding Observations and in its General Recommendation No. 32, titled «The meaning and scope of special measures in the Convention on the Elimination of Racial Discrimination. » In theory, the Committee might also have occasion to

address special measures in Individual Communications against States parties that have opted into this procedure under Article 14 of the Convention. However, to date the Committee has not addressed, in its decisions on individual communications, whether a State’s decision to employ special measures, or its failure to do so, amounts to a breach of the Convention.

Before turning to the Convention’s text, let me address a terminological point. The Convention uses the term «special measures»

to describe a concept that is sometimes referred to by other terms, such as «affirmative action, » «affirmative measures, » or «positive measures. » But the meaning of these terms in certain legal systems can be different from the meaning in the Convention. For example, in the United States, the term «affirmative action» is generally – though not always – used to describe programs that draw distinctions along racial or ethnic grounds in order to benefit disadvantaged groups. As I will discuss later, «special measures» is a broader term that includes these sorts of programs, but also programs that seek to improve the position of disadvantaged groups by other means. Although the committee occasionally uses these other terms, especially «affirmative action, » our preference, for the purpose of clarity, is to stick to the wording of the Convention. There is one term that we definitively reject: the term «positive discrimination. » This phrase, we have said, is a contradiction in terms, since all racial discrimination is prohibited by the Convention and therefore cannot be «positive. » The term «reverse discrimination» is more complicated should be used cautiously, if at all. A measure pursued by a State party could in theory amount to reverse discrimination -- if it fails to satisfy the conditions set forth in the Convention for using special measures. If a measure does satisfy the Convention's conditions, then the measure does not amount to discrimination, and hence is not reverse discrimination.

Let me turn now to the Convention's text. The Convention mentions special measures in two provisions: article 1, section 4, and article 2 section 2. Article 1 defines racial discrimination, which is prohibited by the Convention, and section 4 makes clear that special measures ordinarily do not constitute prohibited racial discrimination. Specifically, Article 1, section 4 provides that «Special measures taken for the sole purpose of securing adequate advancement of certain

racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. »

Article 1, section 4 should be understood as a clarification of the definition of «racial discrimination» in Article 1, section 1. Section 1 defines racial discrimination as «distinction[s], exclusion[s], restriction[s] or preference[s] based on race, colour, descent, or national or ethnic origin. » Since special measures sometimes take the form of «preferences» based on race or ethnicity, they might be thought to be barred by Article 1, section 1. Section 4, however, makes it clear that such preferences are not barred if they are adopted to secure the adequate advancement of groups requiring such protection, and if other conditions are satisfied. One might think that section 4 is an exception to the broad prohibition of racial preferences. The Committee, however, views section 4 as instead a clarification of the meaning of section 1. Section 1 does not prohibit all preferences, but only those preferences «which ha[ve] the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. » The Committee elaborated on this definition in its General Recommendation 14, in which we observed that «differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate. » Article 1, section 4 should be understood to clarify that preferences

adopted for the purpose of securing the advancement of disadvantaged groups serve a legitimate purpose, and, if they meet the other conditions set forth in Article 1, section 4, they do not violate the Convention.

What are the conditions that determine the validity of special measures?

Article 1, section 4 refers to special measures taken for the «sole purpose» of securing the advancement of disadvantaged groups. According to the Committee's General Recommendation 32, the «sole purpose» language «limits the scope of acceptable motivations for special measures within the terms of the Convention.» This raises potentially difficult questions when racial preferences are adopted for multiple purposes. For example, in some countries, racial preferences in university admissions are justified on the ground that it is important for the educational mission to expose students to a diverse range of viewpoints. The achievement of diversity would appear to be a motivation distinct from securing the advancement of disadvantaged groups. One might say that ensuring that the voices of disadvantaged minorities are heard in the university setting does help secure the advancement of these groups, but this is not their «sole purpose.» The theory is that such diversity also helps improve the education of students who are not members of these groups. Do racial preferences adopted for the purpose of achieving diversity run afoul of the limitations of Article 1, section 4, because they are not taken for the «sole purpose» of securing the advancement of disadvantaged groups? The Committee's General Recommendation does not address this point, but its practice does not suggest that special measures are problematic because they serve this additional purpose. This may be an example of the Committee's interpretation of the Convention as a «living instrument.» Measures rarely have a single purpose. A literal approach to the «sole purpose» criterion is therefore unrealistic.

Article 1, section 4 also provides that special measures must be adopted for the purpose of securing «adequate advancement» for disadvantaged groups. What is «adequate advancement»? The General Recommendation indicates that this term refers to «goal directed programs which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination.» These include «persistent or structural disparities and de facto inequalities resulting from» historical circumstances. But there is a danger that the minority communities themselves may not agree that special measures are necessary to secure their advancement. Accordingly, the General Recommendation provides that special measures should be designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities. Special measures should not be imposed on disadvantaged groups against their wishes. (Note also that Recommendation requires consultation with «affected communities,» not just the beneficiaries of the special measures. This presumably means consultation with representatives of races or ethnicities that would not be benefited by the special measure.)

Article 1, section 4 imposes two additional conditions for the validity of special measures: they must be temporary and not lead to the maintenance of separate rights for different racial groups. Specifically, the Convention provides that the validity of special measures is subject to the requirement «that such measures do not . . . lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.» This formulation can be contrasted with Article 2(2) – which I will discuss further below – which provides that special measures «shall in no case entail as a consequence the

maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved. » The formulations are different in a subtle but potentially important way: article 1(4) imposes two separate requirements – the measures must not maintain separate rights for different racial groups and they must be temporary; article 2(2) imposes one requirement – the wording indicates that measures may establish separate rights for different racial groups as long as they are temporary. The General Recommendation does not discuss the difference in language. In discussing article 1(4), the Recommendation interprets it to impose two separate requirements (that the measures not establish separate rights for different racial groups and that they be temporary). In discussing article 2(2), the Recommendation says that the limitations it imposes are «in essence the same» as those imposed by article 1(4). The General Recommendation does go on to say, however, that the obligation not to maintain special rights for different racial groups in «narrowly drawn» insofar as it refers only to «racial» groups, and thus and calls to mind the practice of Apartheid in South Africa.

Regarding the requirement that the special measures are temporary, the General Recommendation makes several points. As noted, the Convention says that the special measures should not be retained after their objectives have been achieved. The General Recommendation notes, however, that «negative human rights consequences» might result from the sudden withdrawal of special measures that have existed for a long time. The Recommendation urges States parties to be sensitive to this possibility. The General Recommendation also interprets article 1(4) as contemplating that special measures come to an end when their objectives have been «sustainably» achieved. The concept of sustainability was drawn from the work of the Committee on Economic Social and Cultural Rights. The General

Recommendation also notes that, in order to determine whether the special measures have served their objective, it is important for States parties to have in place a continuing, system of monitoring their application and results through the collection of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country. »

Finally, and perhaps most importantly, the General Recommendation draws an important distinction between special measures, which must be temporary, and the permanent rights to which certain minorities might be entitled. For example, minorities have the right to enjoy their own culture, profess and practice their own religion and use their own language, and indigenous peoples have the right to use land traditionally occupied by them. Similarly, women have rights to non-identical treatment based on biological differences, such as maternity leave. These permanent rights should be distinguished from special measures, which are to be used only temporarily. The Recommendation also makes clear that these permanent rights recognized by international human rights law are not «special rights» within the meaning of article 1(4).

Let's now move to the second article of the Convention that mentions special measures, article 2, section 2. Whereas article 1(4) tells us that a special measure, when it satisfies the conditions just discussed, is not prohibited, article 2(2) is more affirmative: it tells us that special measures are sometimes required. Article 2(2) provides, in its entirety, as follows:

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the

adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

We have already discussed the second sentence. I will now focus on the first. In brief, article 2(2) provides that states «shall take special measures «when the circumstances so warrant.» As the General Recommendation notes, the article's «use of the verb 'shall'...indicates the mandatory nature of the obligation to take special measures.» The General Recommendation adds that this obligation is not weakened by the phrase «when circumstances so warrant,» which merely indicates the context in which such measures are required – that is, they are required when there is a disparate enjoyment of human rights by persons or groups and an ensuing need to correct such imbalance. The need to take special measures to correct such imbalances is a reflection of the fact that «the principle of equality underpinned by the Convention combines formal equality before the law . . . with substantive or de facto equality in the enjoyment and exercise of human rights as the aim to be achieved.»

What are the special measures that states are required to employ to correct such imbalances? General Recommendation 32 defines «measures» broadly as including «the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments.» Beyond this, the General Recommendation does not give particular

examples of special measures. General Recommendation 25 adopted by Committee for the Elimination of Discrimination Against Women (CEDAW) is more illuminating in this regard. According to CEDAW's General Recommendation, the concept of special measures encompasses a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems.

Although CERD's General Recommendation does not include these examples, CERD's practice is consistent with CEDAW's list of examples of special measures. We have considered each of these types of measures to be a special measure in certain circumstances. Thus, special measures include programs that draw racial distinctions for the purpose of securing advancement of disadvantaged groups, but they also include measures that do not draw such distinctions, but instead make extra efforts to recruit or train members of such groups.

The Report of the 2002 report by the Special Rapporteur of the Subcommittee on the Promotion and Protection of Human Rights of the Commission on Human Rights, entitled «The Concept and Practice of Affirmative Action,» draws similar distinctions among special measures. The report distinguishes between three categories of special measures. First is «affirmative mobilization,» which includes such measures as increased efforts to recruit members from underrepresented minorities. The second category is «affirmative fairness,» which includes measures designed to ensure that selection processes have not unintentionally discriminated against members of disadvantaged minorities. The third category is «affirmative preferences,» which are measures that take the race or ethnicity of

members of disadvantaged group into account in the selection process, for example for employment or university admissions, or in other contexts, such as politics. «Affirmative preferences, » in turn, can take different forms – race can be a tie-breaker, for example, when the qualifications of two applicants are otherwise equal; or race can serve to place the member of a disadvantaged group ahead of a member of another group even though the latter would otherwise be selected. Quotas are a type of affirmative preference. According to the Rapporteur's report, all of these forms of special measures can be justified, depending on the circumstances, but the first two are uncontroversial, and should be used widely, whereas «affirmative preferences» are more delicate and require greater caution.

I should emphasize that this report is not a CERD document and does not purport to be describing CERD practice (although, I should also note that its author has recently been elected a member of CERD). But something like the approach of this report seems implicit in paragraph 16 of CERD General Recommendation 32, which provides as follows:

Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.

In other human rights contexts, the requirement that a measure be «necessary in a democratic society» has been read to impose rather stringent limits. This language, and the reference to «principles of fairness and proportionality, » suggest that special measures falling into the categories of affirmative mobilization and affirmative fairness will be easier to justify and more commonly appropriate than measures falling into the category of «affirmative preferences»

– and even within this last category, some types of measures will require greater justification than others. All of them are valid under appropriate circumstances, and may even be mandatory given the circumstances. But their appropriateness will depend on the particular circumstances in the State party.

Notwithstanding the above, I should note that CERD practice on special measures has primarily been focused on urging States parties to put such measures in place more frequently. Although the Committee's Concluding Observations have at times expressed concern over special measures that have remained in place longer than necessary, or otherwise raise issues under Article 1(4), it is much more common for the Committee to express concern about a State party's failure to take special measures where they seem warranted. And the Committee's Concluding Observations rarely express views about the appropriateness of particular types of special measures as compared to others.

To conclude, let me summarize the nature of States parties' obligations under the Convention: Article 2(2), as the General Recommendation makes clear, means that it is mandatory – not discretionary – for States parties to employ special measures «when circumstances so warrant. » States parties must initially determine whether the circumstances warrant special measures, and this is to be done by assessing whether there is a disparate enjoyment of human rights by persons or groups within the State party on the basis of race, colour, descent, or national or ethnic origin, and an ensuing need to correct such imbalance. This assessment is to be made on the basis of disaggregated data. Once the need for special measures has been determined, the State party must choose among the various types of special measures that might conceivably be employed. This determination must, inevitably, be sensitive to the particular situation of the various racial and ethnic groups in the State party, and must be done in consultation with such

groups and other «affected parties.» As the General Recommendation notes, the Convention must be interpreted in a context-sensitive manner, and «context-sensitive interpretation . . . includes taking into account the particular circumstances of States parties without prejudice to the universal quality of the norms of the Convention.» The Committee recognizes that «[t]he nature of the Convention and the broad scope of the Convention's provisions imply that, while the conscientious application of Convention principles will produce variations in outcome among States parties,» although we have also stressed that «such variations must be fully justifiable in light of the principles of the Convention.» In the end, the selection of special measures inevitably requires sensitive judgments by the State parties, but these judgments are to be exercised within the parameters and in compliance with the requirements of the Convention, as elaborated in General Recommendation 32.

EUROPEAN INTEGRATION OF UKRAINE: PROBLEMS, CHALLENGES AND PERSPECTIVES

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RESUMEN:

Reflexionamos sobre los problemas de la integración de Ucrania en la Unión Europea. La naturaleza y el nivel de la cooperación de Ucrania con la UE ampliada así como la perspectiva de la integración ucraniana dependerá, en primer lugar, de las transformaciones internas en Ucrania, la creación de requisitos previos para el desarrollo democrático estable y el crecimiento de la economía nacional.

ABSTRACT:

We reflect on the problems related to the integration of Ukraine in the European Union. Given the nature and level of Ukraine cooperation with the enlarged EU, the perspective of Ukrainian integration will depend, first of all, on internal transformations in Ukraine and the creation of prerequisites for stable democratic development and growth of the domestic economy.

PALABRAS CLAVE: *Unión Europea, integración, Ucrania*

KEYWORDS: *European Union, integration, Ukraine*

Thesis 1. One of the global development laws is expansion of integration processes, facilitated at the turn of the millennium, having combined with disintegration trends.

International integration processes influence on functioning of both regional international systems, new global order establishment and separate societies and states, their domestic policies, people's everyday life.

The European Union, which is undoubtedly the leader among the outstanding integration organizations of the world, is the main epitomizer of such ideas in Europe. The European Union is the main engine to combine interests of the majority of Europeans, aspiring for security and prosperity, so the choice of Ukraine made in

favor of the European integration, is well-reasoned.

Thesis 2. Since the European communities were created, representatives of different social sciences, mainly lawyers, political analysts, sociologists, economists have been involved into researching a wide range of issues, related to defining the legal essence of the European Union (hereinafter referred to as the EU) and measuring its institutions impact on the state and legal development of European states. Eventually all the research, both theoretical and practical, is aimed at forming the European integration theory to assist states and peoples, aspiring for the EU membership, particularly Ukraine, to better comprehend how their EU membership will influence their sovereignty;

how the EU institutions can be involved into the main state functions realization and how it will affect their realization efficiency; what the EU membership will provide for citizens of Ukraine in terms of ensuring and protecting human rights and freedoms; what practical steps in reforming the power organization and realization, as well as the national legislation development should be taken not only to become an EU membership, but also to jointly with other European states to develop United Europe as the environment of freedom, prosperity, security and justice.

Thesis 3. As Ukraine identifies its strategic target — the EU integration, including the international union membership, — an important task is adjusting the national legislation to the EU law, determining the total national legislation transformation. The EU integration way presupposes human rights and freedoms genuine insurance and content, creation of a law-governed, social and democratic state, which is destined to occupy a decent place in the world community. The process, *inter alia*, stipulates a large scale reform of the Ukrainian legislation on the basis of principles and standards, established at the general European level, based on the modern international law as a result of European regional international organizations activity. These organizations, alongside with the EU, include the Council of Europe and the Organization for Security and Cooperation in Europe.

Thesis 4. The significance of the processes of legal institutions and «European standards» practical usage in different spheres of legal regulation, the topicality of the Ukrainian legislation harmonization with the EU legal norms, in particular, and the European integration in general, determine the necessity of a thorough and complete research of the issues in both practical, applied and general theoretical aspects.

Particularly, integration is considered the highest regionalization stage, based on the

territorial bordering of states, actively developing various social relations. The term of «integration» (from Latin *integratio* – restoration, unification; deriving from *integer* – complete) is interpreted as a process of mutual adjustment, expansion or unification of something separate into the whole. Scientific sources do not provide non-ambiguity in defining the notion of integration and of its essence. Understanding certain drawbacks of the existing integration theory, only scientific sources make it possible to compare national behavior forms and social groups role, define conceptual extents of characterizing and forecasting the integrated values further development. They provide real transformation methods, international systems transition from anarchy to the rational order.

Thesis 5. Undoubtedly, current integration of Ukraine into the European Union is predetermined by entering into force of the Agreement on the Association between Ukraine, on the one part, and the European Union, the European Atomic Energy Community and their member-states, on the other part (the Association Agreement). The Association Agreement is not only a new legislative basis for the cooperation of Ukraine and the EU, but also the embodiment of the declaration of the will of the people of Ukraine to become a part of the European community.

Thesis 6. On the basis of the general rules of interpreting international instruments, the notion of «association» content should be revealed while interpreting the whole of the Agreement standards. However, as the last decades practice proves, applying and interpreting each association agreement is carried out on the basis of the EU *acquis* concerning the association relations with the third states. Thus, the Association Agreement defines peculiar relations of the association and Ukraine, based on the established principles and traditions. As it was Ukraine to insist on «a new improved agreement» to be the association agreement, the EU

legitimately expects the Ukrainian party to completely understand the content of the notion of «association relations» and is ready to follow it. First of all, association agreements are the most advanced type of international instruments, that can be concluded by the EU with the third states, – the states, with which the EU is ready to develop intensive sustained ally relations, grounded on the mutual trust and respect for common values.

Thesis 7. Entering into force of the Association Agreement is a long process, demanding not only Ukraine to take real steps, but also all 28 EU member states. To enter into complete force it is necessary for the Agreement to be ratified by all its parties – the EU, the European Atomic Energy Community, 28 EU member states and Ukraine, and the General Secretariat of the EU Council to be notified about it by all the parties. The Agreement enters into force three months after its last ratification.

The signing of political and economic sections of the Agreement by the parties preceded the ratification process. The ceremony of signing the Agreement provisions on political cooperation, security and fight against terrorism (Preamble, article 1, issue 1 «Common principles», issue 2 «Political dialog and reforms, political association, cooperation and convergence in the sphere of foreign and security policy», issue 7 «Institutional, common and closing provisions»). It was also made a declaration on the summit in the name of Ukraine that the obligations of Ukraine acquired in the frames of the article 8 of the Ratification Agreement of the Rome Statute of the International Criminal Court (1998) will be fulfilled after introducing proper amendments to Ukrainian Constitution. Economic part of the Agreement providing creation of valuable free trade zone and concerning the access to markets, trade in energy carriers, cooperation in the sphere of agriculture, transport, metallurgy, cosmos, scientific research, tourism, business activity,

intellectual property protection, adjudicating procedure and taxation conditions was signed by Ukraine on the 27th June 2014.

Thesis 8. It is worth to realize that the Association Agreement does not define a concrete date of Ukraine's acquisition of EU membership. At the same time, having made the commitments in the frames of the Agreement, Ukraine would realize large-scale transformations in different directions in the process of implementing its provisions into national legislation what would closely approach our state to European standards. In the frames of the Agreement, Ukraine would have the opportunity to demonstrate from the practical point of view its readiness to the membership in EU. And the EU interest in the most rapid integration of Ukraine would depend exceptionally on effectiveness of functioning new mechanism Ukraine-EU.

Thesis 9. The repeated accentuation in the text of the Agreement on importance of ensuring law supremacy by the parties also attracts our attention. And there are essential reasons for that.

Law supremacy in the value aspect is a main instrument of democracy consolidation as long as establishing only electoral democracy itself does not ensure effectiveness and success of state development according to the experience of post-Soviet countries as well. The filling of association relations with real contest in instrumental dimension is realized with the help of organizational and legal mechanisms which are able to function only on the condition of practical implementation of law supremacy.

Thesis 10. Reformation of judicial system with the purpose of ensuring access to justice and effective judicial protection according to European standards was defined as the key task of the Program of Ukrainian Cabinet of Ministers activity approved by the Regulation of the Ukrainian Supreme Soviet № 26-VIII of 11th December 2014, the Coalition Agreement as well as the Strategy of sustainable development «Ukraine 2020»

approved by the Decree of the President № 5 of 12th January 2015.

Thesis 11. For strengthening local and regional government and conducting decentralization, it was approved:

- Law on amendments to the Budget Code of Ukraine (on reform of intergovernmental dealings) » № 79-VIII of 28th December 2014, directed on regulation of budget legal relations concerned with implementing new model for financial provision of local budgets and intergovernmental dealings, decentralizing powers and finances, granting budgetary and financial independence to local budgets, improving treasurer service of budget funds, strengthening responsibility of main budget funds managers, functioning Ukrainian budget system in special period, establishing new mechanism of budget smoothing, simplifying procedure of local guaranties granting and taking loans from international financial organizations.

Thesis 12. The internal factors, like the need in fundamental reforms in this case, will be more important for social consolidation than the idea to join European Union even if these reforms will be directly connected with the movement to EU. That is, through the accent on internal reforms, it is possible not only to overcome the actual split in Ukrainian society but also to increase the support of European vector for development especially in the most critical to EU regions of Ukraine in such an indirect way. It is exactly the reforms that could become the core of social consolidation and increase attractiveness of European perspective.

In conclusion, it is worth to notice that the western frontiers of Ukraine would

become the eastern ones of European Union with the end of current stage of EU expansion. This political situation of new quality would define to a great extent both the nature of contacts with EU and the perspectives for the further development of Ukraine. It is quiet understandable that the ensuring peace and stability around its borders, getting stable, democratic and economically developed states with friendly predictable foreign policy as its neighbors are in the interests of EU. Therefore, it is worth to expect increasing of EU political pressure on Ukraine, and first of all in the field of strengthening democratic institutions, ensuring human rights and mass media freedom, intensifying the fight against organized crime and corruption in power structures. We suppose that the EU movement towards Ukrainian borders against the background of the Common European Security and Defense Policy development would let Ukraine to participate more actively in strengthening security on the continent. It is the sphere of security where Ukraine could make a real contribution in ensuring stability in the zone of EU interests already today – in the area of peacekeeping, liquidation of emergency situation consequences, strategic transportation etc. Generally, the EU approaching to Ukrainian borders strengthens objectively the impact of European community on Ukraine. This process could be holding positive from the political point of view as long as it encourages the implementation of European standards in Ukraine. At the same time, the EU transformation could cause a lot of problems for Ukraine. Undoubtedly, the nature and level of Ukraine cooperation with the enlarged EU, the perspective of Ukrainian integration will depend, first of all, on internal transformations in Ukraine, creation of prerequisites for stable democratic development and growth of domestic economy.

THE REFUGEE CRISIS IN THE EUROPEAN UNION

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RESUMEN:

El objetivo de este artículo es ofrecer una crítica positiva y constructiva partiendo de las deficiencias de la Unión Europea a la hora de abordar la crisis de los refugiados. El análisis se divide en tres partes: 1) Una visión crítica de las medidas anteriores emprendidas por la Unión Europea hasta la fecha, incluida la política española sobre la crisis de los refugiados. 2) Un análisis de los fondos y la gestión de la Unión Europea para abordar la afluencia de refugiados. 3) Una perspectiva global sobre los factores endógenos y exógenos que afectan el desarrollo futuro de las políticas de la Unión Europea sobre este tema.

ABSTRACT:

This article aims to provide a positive, constructive critique of the European Union's shortcomings in addressing the refugee crisis. The analysis is divided into three parts: 1) A critical overview of past measures undertaken by the European Union to date, including Spanish policy concerning the refugee crisis. 2) An analysis of the European Union's funding and management to address the influx of refugees. 3) A global perspective on both the endogenous and exogenous factors that affect the further development of the European Union policies on this issue.

PALABRAS CLAVE: *Refugiados, Unión Europea*

KEYWORDS: *Refugee, European Union*

LA INTRODUCTION

Since 2015, hundreds of thousands of refugees have reached the territory of the European Union, driven from their homes by war, famine, and poverty. The refugee crisis has taken on a dimension much larger than expected, which has led the EU and Member States to improvise measures to both deter more refugees from coming and resettle those refugees granted asylum. The measures undertaken might be short-term, but the legal and philosophical implications are profound. I will try to make a positive and constructive critique of the European Union's handling of the Refugee crisis.

In this article, I will address three topics:

- 1) First, I will give a critical overview of what the European Union has done until now. I will briefly cover Spanish policy on the refugee crisis.
- 2) Second, I will analyze the European Union's economic outlays to address and manage this problem.
- 3) Third, I will consider the main challenges for the EU in the near future.

1. THE CURRENT SITUATION

1.1. WHAT HAS THE EUROPEAN UNION DONE UNTIL NOW?

Even though a migratory crisis cannot be reduced to mere numbers, a proper analysis requires a review of the facts. Let me describe here briefly the main policies that

the European Union has applied since the beginning of the refugee crisis in 2015:

A) Policies to reduce pressure and avoid systemic collapse in peripheral countries.

In 2015 75% of all asylum requests were registered in just 5 countries: Germany, Austria, Hungary, Sweden, and Italy. Faced with an onslaught of refugees, Germany decided to reinstate border controls, which were subsequently also adopted by France, Belgium and Poland. Such measures stand in stark contrast to two decades of free movement within the Schengen area. Other countries like Austria, followed soon by Finland, the Netherlands, Slovakia and the Czech Republic, sent thousands of soldiers to man their borders as the countries stepped up checks.

Going beyond these measures, Hungary built fences on the Serbian and Croatian border and passed laws in 2015 imposing harsh penalties for entering Hungary illegally.¹ A second, 150-kilometer-long fence on the Serbian border equipped with motion and heat sensors and other surveillance tools is planned to be completed by May 1, 2017.

B) Policies to develop safe routes and reduce both deaths at sea and human trafficking.

The years 2015 and 2016 stand out for each setting a new record for the number of persons dead or missing at sea. One of the stated goals of the agreement between Turkey and the EU, signed in March 2016, is to reduce the number of such deaths by interdicting the passage of refugees from the

¹ Some 400,000 migrants passed through Hungary that year before the fences were in place, most on their way to Germany and other destinations in Western Europe.

Near East through the Mediterranean.² Furthermore, the EU is strengthening the role of the European Border and Coast Guard, based on an agreement reached between the Council, Parliament and Commission on June 21st, 2016³, whose stated aim is to help save lives, while still reinforcing the respect of fundamental rights of refugees. The key goal of these measures is to “ensure effective control of our external border and stem illegal flows into the EU”, as proclaimed in a communiqué from the recent EU Summit in Malta.

The new border controls in the Balkan states leave refugees stranded in Greece. As a consequence, the number of new migrants coming to the EU from Turkey has gone down significantly, also thanks to the European Union-Turkey agreement. In exchange for EU largesse, Turkey is urged to take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU.

² In order to stop the human trafficking and to offer an alternative to risking their lives for migrants, the EU and Turkey have decided to put an end to the irregular migration from Turkey to the EU in March 2016. All new irregular migrants crossing from Turkey to the Greek islands as of 20th March 2016 will be returned to Turkey. For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU.

³ This measure had been announced even earlier, in September 2015 within the framework of the European Agenda on Migration, and was supposed to provide support to all Member States, identifying and intervening to address weaknesses in local border controls in advance, and not when it is too late. The agreement has the primary objective to ensure and implement, as a shared responsibility, the European integrated border management at the external borders, manage migration effectively, and ensure a high level of security within the EU, while safeguarding EU-internal free movement and maintaining full respect for fundamental rights.

The EU-Turkey deal has shifted the focus back to the Central Mediterranean route for refugees and asylum seekers from Africa. .

In 2016 alone, 181.000 migrants and refugees reached Europe irregularly with the help of traffickers operating out of war-torn Libya and other countries including Egypt. Many died while making the perilous crossing.

C) Measures to provide refugee with suitable living conditions upon arrival.

Although the EU provided 90 million Euros to Greece to improve the refugee camps and make them suitable for winter conditions, camps are overcrowded, access to water and electricity is limited, and heating was lacking in the winter time. This left refugees feeling unsafe and vulnerable. Just around 15.000 refugees were moved to camps prepared for low temperatures.

As an example, in Moria, (a camp on the island of Lesbos), designed to house 1.500 people, three times that number (4.500 people) are living in overcrowded conditions in thin summer tents. In this camp, 3 men died. When Pope Francis visited the Moria refugee camp, in April 2016, he said “We hope that the world will heed these scenes of tragic and indeed desperate need, and respond in a way worthy of our common humanity (...)”⁴

Many organizations, including the International Rescue Committee, have denounced the situation in the camps, claiming that they do not meet international humanitarian standards. Along with other NGO observers, they have documented long queues for food and water, and a lack of schooling and opportunities for work.

⁴

<http://www.romereports.com/2016/04/18/pope-francis-full-speech-in-moria-refugee-camp-lesbos>

D) Policies to accelerate relocation and mitigate the despair of delay in refugee camps.

The temporary emergency relocation scheme was established in two Council Decisions in September 2015, in which Member States committed to relocate persons in clear need of international protection from Italy and Greece by September 2017.

Since the presentation of its first report in March 2016, the Commission reports on the implementation of the relocation and resettlement schemes on a monthly basis. According to the tenth Report on Relocation and Resettlement,⁵ while progress has been promising on resettlement, Member States need to renew their efforts to deliver on their relocation commitments.

Although there has been a progressive increase in the pace of relocations with 13.546 persons relocated as of February 28th, 2017 (9.610 from Greece and 3.936 from Italy), at the current pace, the total number of persons relocated will fall short of meeting the obligations set for September 2017.

According to the European Commission, up until February 7th 2017, Member States had relocated only 7% of the 160.000 asylum seekers that they promised to accept in their countries from Greece and Italy.

⁵ European Commission. Brussels, 2.3.2017 COM(2017) 202 final Report from the Commission to the European Parliament, the European Council and the Council and the Tenth report on relocation and resettlement. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_tenth_report_on_relocation_and_resettlement_en.pdf

According to the Fifth Progress Report on the EU-Turkey Statement,⁶ following almost a year of implementation of the Agreement, continued efforts are needed from Greece, Turkey and all EU Member States to accelerate the implementation of the Statement and to ensure results.

The data on relocations reveal a lack of responsible engagement in putting this European policy into practice. In the last Report, from March 2nd, 2017, the Commission has called for renewed efforts in implementing solidarity measures under the European Agenda on Migration.⁷

E) Policies to provide the relocated refugees with the same conditions regardless of the host country.

The status and rights given to resettled refugees vary depending on the host country. Resettled refugees arriving in Belgium, the Czech Republic, France, Finland, Ireland, Portugal, Sweden and the UK receive a permanent residence permit.

In contrast, refugees resettled to Denmark, Germany, Iceland, the Netherlands, Norway, Romania and Spain receive a temporary residence permit, and are able to apply for permanent residency after a specified period

⁶ European Union: European Commission, *Fifth Report on the Progress made in the implementation of the EU-Turkey Statement*, 3 March 2017, COM(2017) 204, available at: <http://www.refworld.org/docid/58b98ba54.html> [accessed 11 April 2017]

⁷ EUROPEAN COMMISSION: EUROPEAN AGENDA ON MIGRATION: COMMISSION PRESENTS NEW MEASURES FOR AN EFFICIENT AND CREDIBLE EU RETURN POLICY. BRUSSELS, 2 MARCH 2017. [HTTP://EUROPA.EU/RAPID/PRESS-RELEASE_IP-17-350_EN.HTM](http://europa.eu/rapid/press-release_IP-17-350_en.htm)

of legal residency (the number of years varies by country) and subject to satisfying a number of conditions related to language, civic knowledge, financial independence and good conduct (conditions also vary by country).

All European countries provide a pathway to citizenship for permanent residents, again after varying periods of legal residency and subject to satisfying varying conditions.⁸

F) Investment in integration programs to fight against discrimination and intolerance.

Two approaches to integration exist: the first supports a framework of cosmopolitan generosity that entrusts to the population the mission of “imagining”, both spontaneously and generously, other people, and doing such as a matter of course; the second tries to resolve the problem of human ‘differences’ through constitutional design and radically eliminating the structurally unfavorable position of ‘foreignness’.⁹

From my point of view, these two approaches are not mutually exclusive, but rather form complementary perspectives, both of which are needed to resolve the issue affecting so many persons in Europe.

In my opinion, successful refugee policies of EU Member States, both as members of the whole and separately, depends not only whether demographic problems¹⁰ can be

⁸ <http://www.resettlement.eu/page/resettlement-relocation-or-humanitarian-admission-we-explain-terminology>

⁹ E. Scarry, “La dificultad de imaginar a otras gentes”, in Martha C. Nussbaum, *Los límites del patriotismo. Identidad, pertenencia y ciudadanía mundial*, (Paidós, Barcelona, 1ª ed. 1999, cit. by ed. 2013), 129.

¹⁰ M. Pachocka, “Population Matters? European Integration Process During a Demographic

solved or sustainable economic development can be achieved, but also on whether they can solve the important problems of social cohesion. We should be reminded that “cultural integration” is a key element of the migrant’s life in their new homeland. Such a need is only too often met by indifference by policy makers and the general population, however. We need a paradigm change to counter the “globalization of indifference”.¹¹

Let us review the common basic principles for immigrant integration policy in the European Union, as summarized in a “Handbook on Integration for policy-makers and practitioners” :

- 1) “Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States.
- 2) Integration implies respect for the basic values of the European Union.
- 3) Employment is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society, and to making such contribution visible.
- 4) Basic knowledge of the host society’s language, history, and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration.
- 5) Efforts in education are critical to preparing immigrants and particularly their descendants, to be more successful and more active participants in society.
- 6) Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration.
- 7) Frequent interaction between immigrants and Member State citizens is a fundamental mechanism for integration. Shared forums, inter-cultural dialogue, education about immigrants and immigrants culture, and stimulating living conditions in urban environments enhance the interactions between immigrants and Member States citizens.
- 8) The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.
- 9) The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.
- 10) Mainstreaming integration policies and measures in all relevant policy portfolios and levels of government and public

Change”, in *How Borderless is Europe. Multi-disciplinary approach to European Studies*, István Tarrósy (ed.), (Jean Monnet Centre of Excellence, University of Pécs, Pécs, 2015), 61-72.

¹¹ C. Hermida, “Positive tolerance and solidarity. A paradigm change to counter the ‘globalization of indifference’”, in *Polish Law Review*, Vol. 2(2), 2016.

services is an important consideration in public-policy formation and implementation.

- 11) Developing clear goals, indicators and evaluation mechanisms are necessary to adjust policy, evaluate progress on integration and to make the exchange of information more effective".¹²

The problem herein is that the States do not respond to ethnic diversity in the same way. "For the 'Ethnic' model, belonging to the nation means sharing common descent, language and culture. For the 'Republican' or 'Civic' model it means a willingness to accept political rules and to adopt the national culture. For the 'Multicultural' model it means adherence to political rules, but with the ability to maintain cultural differences and to form ethnic communities and associations. These models should be regarded as "ideal types" because, in practice, elements of all three may be identified in most states".¹³

'Multi-ethnic' and 'multicultural' are not synonymous concepts. As Bodonyi said: "they may overlap each other and may differ, but anyway, both are related to the regulation of individual and collective rights inside a given country. The characteristics and relevance of problems, caused on one hand by historical minorities, and on the other hand by immigrant communities, are very different in different EU countries; partly because of historical reasons, partly because

of actual political and economic reasons".¹⁴ Seeing this variation, it is important to apply new techniques for living together and problem solving. From my point of view, we need to develop a personal attitude and a public norm of tolerance towards other, of friendly and supportive behavior towards immigrants and of a liberal and democratic attitude, based in part on learning from the errors and fatal consequences of nationalism, chauvinism, forced assimilation and ethnic persecution.¹⁵

Also, it is important to have a positive attitude towards minority rights, and towards the freedom to congregate, worship and to speak one's own language. To achieve this goal, we need a broader discourse on identifying the structural factors that underlie discrimination and creating policies to facilitate equality of opportunity and outcome.

We need more of a concept that I have called "positive tolerance", which is more ambitious than mere "negative tolerance". Positive tolerance starts from the precept that tolerance allows us to contrast our ideas with other thoughts, other ways of being and acting and other cultures distinct from our own. This stance maintains that this contrast can enrich our own conceptions of the world. In this manner, the thinking, conduct, or culture that is tolerated, even though different, can help us discover and eliminate "cultural prejudices" and fallacies, and serve to complement and improve our points of view. In effect, it reflects an attitude that is more open, critical and skeptical than that of negative tolerance, even though it is more complex and difficult. I believe that we can accept, without a doubt, that the advantages of positive tolerance, resolutely defended by

¹² *Handbook of Integration for policy-makers and practitioners* (2004 November). http://acidi.gov.pt.s3.amazonaws.com/docs/Publicacoes/Handbook_integration.pdf, 160.

¹³ D. Turton – J. González, *Ethnic Diversity in Europe: Challenges of the Nation State*, University of Deusto, 18. <http://www.deustopublicaciones.es/deusto/pedfs/hnet/hnet03.pdf>

¹⁴ I. Bodonyi, "Immigrants and Minorities. The Contradictions and Barriers of the Cultural Integration", in *How Borderless is Europe. Multi-disciplinary approach to European Studies*, op. cit., 79.

¹⁵ *Ibidem*, 82.

Francisco de Vitoria and other thinkers, outweigh those of negative tolerance for the development of knowledge and a life and culture that is freer and more equal.

In my opinion, solidarity is the other great virtue that is essential to constructing a strong European Union, and, as such, its reach should be global. As Fücks, Steenblock and Pütz said: “We understand European *solidarity* not just in terms of internal operations but also as an aspect of international policy geared to global justice (...) Solidarity has been –and remains– a motor for European integration”.¹⁶

We should not ignore the fact that “European solidarity is a prerequisite for the inner cohesion of the EU, and strength is required to preserve the ‘European way of life’ in a globalized world with its rapidly changing balance of power. Cohesion within the Union and the capacity to engage with the outside world are intimately connected”.¹⁷

It is the responsibility of everyone within the context of today’s democratic Europe to fight for tolerance, respect, and full recognition of all the social, sexual, cultural, national, religious, political particularities that the diversity of free human beings express and do not deeply undermine the values and rules that form the basis of its unity and the conception, as Francisco de Vitoria would have put it, of “common justice”.¹⁸

¹⁶ R. Fücks – R. Steenblock – C. Pütz, “Solidarity and Strength: The Future of the EU”, *Solidarity and Strength. The Future of the European Union*, (Heinrich Böll Stiftung, Publication Series on Europe, Vol. 6, Berlin, 2011), 8.

¹⁷ R. Fücks – C. Pütz, “Preface”, *Solidarity and Strength. The Future of the European Union*, op. cit., 6.

¹⁸ C. Hermida, “La aportación del pensamiento de Vitoria ante el fenómeno de la globalización y la realidad migratoria actual”, *New Perspectives on Francisco de Vitoria. Does International Law lie at the heart of the origin of the modern World?*, José María

1.2. AND SPAIN?

Compared to other Member States, Spain is still far from building a coherent and effective policy to relocate refugees. Spain has admitted just 744 refugees since the beginning of the crisis, making it the sixth country in the European ranking of accepting refugees. This represents just 5% of what the Spanish government promised to admit.

Let me try to put this number into the context of Spanish public opinion and the role Spain plays within European institutions, which gives us grounds for optimism, despite the slow progress.

Spanish society has reacted remarkably to this crisis by pressuring authorities to make the relocation and resettlement process more effective, as well as showing solidarity, concern and empathy through demonstrations, social network activity and by creating NGOs and associations both in Spain and in receiving States such as Greece.

I should like to highlight the work done by the Spanish Committee to Help Refugees (CEAR in Spanish), which has helped the asylum procedures since 1979. Its campaigns to heighten awareness have increased since the beginning of this crisis.

From my point of view, Spanish society’s empathy may be indebted to its history. During the Spanish Civil War (1936-1939), at least 440.000 Spanish refugees lived in camps under very hard living conditions in France. Latin America also played a role in accepting us as refugees: 20.000 in Mexico, and lower numbers in Colombia, in Cuba and in Argentina.

2. THE COST OF A REFUGEE

There are two opposing strategies to manage the refugee crisis. The first is to reinforce the external EU borders to keep refugees out.

Beneyto y Carmen Román Vaca (eds.), (ebook, CEU, Madrid, 2014), 210-238.

The second is to admit refugees and integrate them with good procedural guarantees. Both positions are associated with a cost.

We can compare the real cost of letting refugees come into the European Union, starting from the cost of refugee camps and ending with the cost of relocation in a Member State; on the other side, the total budget invested to stop the massive influx of arrivals into the EU by paying neighboring countries to control the borders more effectively.

The Facility for Refugees in Turkey:

“The Facility for Refugees in Turkey provides for a joint coordination mechanism for actions financed by the EU budget and national contributions made by the Member States, designed to ensure that the needs of refugees and host communities are addressed in a comprehensive and coordinated manner. The resources of the Facility come from the EU budget and from EU Member States over 2016 and 2017, making a total so far of €3 billion over two years”.¹⁹

Funding under the Facility for Refugees in Turkey supports refugees in the country - it is

¹⁹ As showed in the first Annual Report on the Facility published by the Commission on March, 2nd. 3 2017, “of the €3 billion, €2.2 billion has so far been allocated, for both humanitarian and non-humanitarian assistance. Of the €2.2 billion allocated, contracts have been signed for 39 projects worth €1.5 billion. Of this €1.5 billion, €750 million has been disbursed to date. The contracts signed represent half of the €3 billion total for 2016-2017 and are testimony to the swift and efficient implementation of the Facility. The humanitarian actions planned for agreement at the next Steering Committee in March will bring total allocation close to the €3 billion. Vid. Brussels, 2.3.2017 COM(2017) 130 final Communication from the Commission to the European Parliament and the Council. First Annual Report on the Facility for Refugees in Turkey.

funding for refugees and not funding for Turkey. The support seeks to improve conditions for refugees in Turkey as part of the EU's comprehensive approach to addressing the refugee crisis inside and outside the EU”.²⁰

Valletta Action Plan:

On 12 November 2015, the European and African leaders signed the Valletta Action Plan²¹ an agreement to set up an Emergency Trust Fund to help development in African countries as well as to encourage those countries to take back migrants who arrived in Europe. The underlying objective of the Plan is to stabilize the countries and make them able to control their borders, fight against smugglers and build refugee camps in suitable conditions.

Taking into account that the number of refugees who arrived through this route totaled more than 180.000 in 2016, European leaders wanted to stop a renewed massive influx and to instead promote regular migration channels and implement policies for integrating migrants into the EU society. The fund pledged €1.8 billion in aid, with other development assistance of €20 billion every year.

Members of the European Council issued the Malta Declaration, dated February 3rd, 2017, on the external aspects of migration. At this summit, the President of the EU Council Donald Tusk promised the closure of the Central Mediterranean migration route into

²⁰ Vid. March 2nd, 2017, European Commission Report, which asks: What is the state of play as regards the implementation of the Facility for Refugees in Turkey?

²¹ “*Valletta Conference on Migration (Malta, 11–12 November 2015) – Orientation debate*” (PDF). *statewatch.org. Council of the European Union. 30 June 2015*. Retrieved 12 November 2015.

Europe, lending his support to a memorandum of understanding between the Italian and internationally-recognized Libyan government.

This new agreement has been compared to the 2016 EU-Turkey deal, but if the agreement with Turkish President Recep Tayyip Erdogan raised some questions over the respect of the human rights of migrants, in Libya's case continued violations of basic rights are almost certain, making the doubts about implementation of any agreement more than legitimate.

The memorandum does not truly constitute an EU-Libya deal, rather it reflects the EU endorsement of a bilateral memorandum of understanding between Italy and the Presidency Council of Libya headed by Faiez Serraj. The memorandum contains three main elements:

First, it restarts full implementation of the 2008 Friendship Treaty between Italy and Libya, which already included a major chapter (and funding) on migration containment;

Second, it boosts support to the Libyan Navy and Coast Guard in order to rescue as many migrant boats as possible in Libyan territorial waters;

Third, it provides funds to improve health care in the detention centers where migrants are kept once they are rescued by the Libyan Coast Guard.

The memorandum does not mention respect of international conventions (it only refers to International Customary Law), nor does it establish an independent monitoring mechanism.²²

²² Libyan law does not distinguish between migrants and asylum-seekers as Libya is not a party to the Geneva Convention. According to the laws approved under former Libyan leader

Some groups accuse the EU of making Libya seem safe and abandoning humanitarian values. They report bad conditions in refugee camps and continuing dangers faced by migrants. The most troubling report comes from the German embassy in Niger on the systematic abuse of human rights, including executions, in Libyan Camps.²³

The new President of the EU Parliament Antonio Tajani has called for refugee camps in Libya and a billion-dollar "Marshall Plan" for Africa. "Either we are acting now, or millions of Africans are going to Europe in the next 20 years," he warned.²⁴

Emergency funding for Greece:

The European Commission has awarded an additional €3.9 million in emergency funding to Greece under the Internal Security Fund (ISF) to help improve reception conditions for migrants on the Greek islands. This is to further support EU financed actions carried out by the Ministry of Defense to provide catering, accommodation, transportation to the migrants on the islands, and for emergency accommodation solutions, such as temporary accommodation in ships.

With this award, the overall amount of emergency assistance from the Home Affairs Funds made available for Greece since 2015 amounts to €356.8 million. This emergency

Muammar Gaddafi, all individuals arriving without a permit are deemed illegal migrants and jailed.

²³ Conditions for migrants and refugees in Libya are worse than in concentration camps, according to a paper sent to the German foreign ministry by its ambassador in Niger.

Similar evidence of atrocities in Libya has emerged from a court case in Milan brought by the Italian state against a leading smuggler.

²⁴ "German and Austrian leaders call for European Union to close ranks". <http://www.dw.com/en/german-and-austrian-leaders-call-for-european-union-to-close-ranks/a-37733811>

funding comes on top of the €509 million allocated to Greece under the national programs for 2014-2020. In total, the Commission has made available over €1 billion in support for Greece since 2015 to support the country with migration and border management.

We could also add the costs the Member States may face if they continue imposing temporary border controls. In this way, the Commission has estimated that a full re-establishment of border controls within the Schengen area would generate immediate direct costs of between €5 and €18 billion annually.²⁵

The EU has also allocated funding to Member States for the last step in migration, namely relocation. According to the Council Decision 2015/1601, host States would receive 6000 € for each person that they admit in their countries and at the same time, the sending states, Greece, Italy and Hungary, will receive 500 € to cover the expenses of transport for each person who is relocated from them.

3. MAIN CHALLENGES FOR THE NEAR FUTURE

This part will cover some of the main challenges in the near future for finding a global approach to migration.

²⁵ Member States such as Poland, the Netherlands or Germany would face more than €500 million of additional costs for the road transport of traded goods; Spain or the Czech Republic would see their businesses paying more than €200 million in additional costs; border controls would cost the 1.7 million cross-border workers between €1.3 and €5.2 billion in terms of time lost; at least 13 million tourist nights could be lost, with a total cost of €1.2 billion; between €0.6 and €5.8 billion of administrative costs would have to be paid by governments due to the need for increased staff for border controls. Vid. http://europa.eu/rapid/press-release_IP-16-585_en.htm

Geopolitically:

We refer here to both the exogenous and endogenous political factors that may affect European decisions. It would be a mistake for European countries to seek individual answers to current challenges, rather than EU-wide solutions.

We are witnessing a new delineation of the world, as the Germany's foreign minister, Sigmar Gabriel said. Donald Trump and Russia openly attempt to weaken the EU. In fact, Austria's chancellor, Christian Kern, has said recently that the US and Russia were openly trying to destabilize the EU. Both Sigmar Gabriel and Christian Kern called for European Union (EU) members to close ranks in the face of pressures from the new US administration and from Russia.

Another matter of concern is the electoral calendar in several European countries, including the elections in France or Germany, has fuelled populist parties who stoke fears of migrants.

In the case of Germany, Angela Merkel prepares for crucial elections this September 2017. For many voters, Merkel's tenure is associated with the record number of 900.000 refugees that came to Germany in 2015 (another 280.000 arrived in 2016). The chancellor is under pressure to keep the promise she made late last year: "A situation like we had in the late summer of 2015 can, should and must not repeat itself."

This promise was Merkel's answer to the charge levied against her by critics from within her own party and the far-right Alternative for Germany (AfD) that Merkel had "lost control" of the situation.

Political leaders in Germany and beyond have realized that only if the EU can demonstrate to its citizens that it is in control of its external borders, the Schengen passport-free

travel zone, one of the key achievements of European integration, can survive.

Controlling borders is a precondition for sustaining open societies in Europe. The need for control is an assessment widely shared across the political spectrum in Germany.

The idea is for asylum requests to be handled by EU authorities in North Africa. This would allow the EU to return migrants rescued by EU member state authorities in the Mediterranean to North Africa, thereby making illegal crossings less attractive and destroying the traffickers' business.

Cooperation with North African countries will remain the centerpiece of trying to reassert control. Indeed, the need to protect external borders and control migration flows is what unites all EU governments, from Germany to Hungary. What divides them is how they deal with the issue of refugees and migrants - especially of Muslim origin - domestically.

We should not forget that the European solidarity is a prerequisite for the inner cohesion of the EU, and strength is required to preserve the 'European way of life' in a globalized world with its rapidly changing balance of power.

In this context we need to reflect about the Brexit decision in United Kingdom. In my opinion²⁶, if we wish to construct a Europe of solidarity we need to strengthen the ties between the Member States of the European Union and empathize with those who are in a worse situation, lending credibility to the

²⁶ C. Hermida, <<The consequences of the United Kingdom's referendum on leaving the European Union>>, *Aktualne Problemy Referendum*, Edit. by Beata Tokaj, Anna Feja-Paszkiwicz, Bogusław Banaszak, (Krajowe Biuro Wyborcze, Varsovia, 2016), 203-212.

postulates of the Treaty of Lisbon.²⁷ There is no room for half-measures. The European Union has the opportunity now to demonstrate that the treaties that have cost so much effort and compromise and form the backbone of its organizational power, given legal backing, have not been written in sand.

Europe needs to display more solidarity, but also more tolerance. Let us hope that, during Theresa May's leadership, the United Kingdom hews to these two values, in the knowledge that it cannot grow as a country simply based on self-sufficiency. We all need each other, both at the individual and group level. The ideas, conduct, or culture that we tolerate, even if it is different from our own, can help us to discover and eliminate "cultural prejudices". The principal advantage of defending the virtues and solidarity in the European Union is that this provides the basis for achieving a life that is more free and equal.

Legislatively:

The precarious development of Asylum Law within the European Union and the lack of a real strategy to guide the Member States to adopt a common policy, have led to palliative decisions²⁸. For this reason, we need:

²⁷ J.C. Piris, *The Lisbon Treaty. A Legal and Political Analysis*, (Cambridge University Press, 2010, New York, 4th printing 2011).

²⁸ ACNUR (1992): Manual de procedimientos y criterios para determinar la condición de refugiado en virtud de la Convención 1951 y el Protocolo de 1967 sobre el Estatuto de los Refugiados.

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. *Official Journal of the European Union* L 326/13, 13.12.2005.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless

- Laws to guarantee safe routes.
- Common rules of protection of fundamental rights for the beneficiaries of international protection.
- Harmonization in the living conditions for refugees among the Member States.

With such proposals, the Commission expects to simplify the asylum procedures as well as the decision processes and hopes to discourage asylum seekers from secondary movements from one Member State to another and promote the integration perspectives of those with the right to be granted international protection.

The ultimate goal is to achieve a common, efficient, coherent asylum strategy, based on harmonized norms and mutual trust among the Member States of the EU, in accordance with international rights and mechanisms.

Socially:

Citizens are divided: some go to demonstrations to pressure their governments to open their borders and ask for more safe routes to reach European territory, to increase resettlements, guarantee suitable conditions for refugees both in camps and in reception States. Others are reluctant to accept migrants, reacting with fear and intolerance, which has supported the growth of populist parties.

At the beginning of March 2017, Hungarian Prime Minister Viktor Orbán called for “preserving ethnic homogeneity”. Orbán has consistently stoked fears of Muslim

persons as refugees or as persons who otherwise need international protection and the content of the protection granted. *Official Journal of the European Union* L 304 , 30.09.2004, 12–23.

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. *Official Journal of the European Union* L 31, 06.02.2003, 18-25.

immigration, as a source of terrorism and a threat to Europe’s cultural heritage, in order to consolidate his power.

Other governments, such as Poland, have used similar language, which has also been echoed by the right-wing AfD in Germany. The fight between the Orbán-type ethnic nationalists and advocates of an inclusive nationalism is a decisive battlefield for preserving open societies in Europe.

In the eyes of Viktor Orbán, migrants are a “Trojan horse of terrorism,” which put his country under siege. He considers the migrants, many of whom are Muslims, as a threat to Europe’s Christian identity and culture. While Orbán has said often that Hungary will apply its Christian values to take in asylum-seekers, very few achieve protection in Hungary and only around sixteen a day are now allowed to apply for asylum at the border transit zones.

According to a recent report of the Government of Hungary (05-03-2017), “The number of illegal immigrants and asylum seekers in Hungary decreased last year, but we cannot uphold the illusion that the problems will be solved”, said Zsuzsanna Vég, Director General of the Immigration and Asylum Office, at a press conference in Budapest on 7.03.2017²⁹.

²⁹ “29.432 people were registered as asylum seekers and 18.236 as illegal migrants”, Ms. Vég said. “It looks like the European Union may be ‘waking from its Sleeping Beauty dream’ and has begun debating several European refugee systems”, she pointed out, adding that we should not sustain any illusions about the fact that the required legislation will be adopted this year. Acts of terrorism and the crimes committed by immigrants have forced Member States to concentrate more on security and become more cooperative than previously was the case, she explained.

Hungary is still fifth with regard to the number of asylum seekers per 1000 citizens, with a ratio of 2.93, although it was in first place in 2015. Syria, Iraq, Pakistan and Iran continue to be the leading source countries in the EU as a whole, although the number of migrants arriving from Kosovo and Albania fell.

With regard to the situation in Hungary, Ms. Végh told reporters that while in 2015 over 400,000 illegal immigrants arrived in the country and 177,000 people submitted requests for asylum, the trend was reversed in 2016 and there were more asylum seekers than illegal immigrants.

In addition to international developments, the measures introduced by the Hungarian Government, such as the reinforcement of external border security, the amendment of regulations on detaining refugees, or the establishment of the so-called 8-kilometre rule, also played an important part in reducing the numbers of asylum seekers, she highlighted³⁰.

In my opinion, the EU should focus more on the most vulnerable members of society, and on delivering prosperity to all. The situation has become more complicated given a recent decision of the European Court of Justice (7.03.2017) that held that EU member states have the right to deny so-called “humanitarian visas” to asylum seekers.³¹

<http://reliefweb.int/report/hungary/almost-30-thousand-asylum-requests-were-submitted-last-year>

³⁰ In 2016, Hungary accepted 425 asylum-seekers, while registering 29.432 asylum claims. In 2015, 502 asylum-seekers were granted protection. Germany took in 890,000 asylum-seekers in 2015 and 280,000 in 2016.

³¹ The EU court ruled against an Orthodox Christian Syrian family with three children from Aleppo who had applied for a visa at the Belgian embassy in Beirut last October. They planned to

4. CONCLUSIONS

Failure by the Member States of the EU to cooperate leads to a lack of effective measures and makes it difficult to arrive at a common operational asylum strategy. But there is, above all, a clear lack of shared responsibility. In conclusion, there are four goals that we should set:

- 1) EU members need to restore the promise of prosperity as a primary issue and to transform the internal market into a social market economy.
- 2) It is worthwhile to invest in integration programs to fight against discrimination and intolerance. We need a paradigm change to counter the “globalization of indifference”.
- 3) We need what I have called “positive tolerance and solidarity” to construct a strong European Union. Both concepts should have a global reach.
- 4) Increasing cohesion within the Union will enhance the capacity to engage with the outside world.

travel to Belgium and apply for refugee status once there.

One member of the Syrian family claimed to have been abducted, beaten and tortured by an armed group and later released after paying a ransom.

Belgium refused to issue the “humanitarian visa” and claimed the right to refuse entry to the family. The Belgian authorities said that the links of the family to Aleppo were too tenuous and that they were not obliged to grant entry to everyone coming from Syria.

The European Court of Justice ruled in favor of Belgium.

Human rights activists and the European Parliament have pushed for humanitarian visas in order to stop human trafficking and provide a legal route for refugees to come to Europe.

SOBRE LA LIBERTAD DE PENSAMIENTO, DE CONCIENCIA Y DE RELIGIÓN

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RESUMEN:

En esta contribución se plantea el tema de la libertad de pensamiento, de conciencia y de religión en la actualidad no sólo a nivel internacional y en el ámbito del Consejo de Europa (Convenio Europeo de Derechos Humanos y Libertades Fundamentales de 1950) sino más concretamente en el ordenamiento jurídico nacional de Rumanía.

ABSTRACT:

This contribution raises the issue of freedom of thought, conscience and religion today, not only at the international level and within the Council of Europe (European Convention on Human Rights and Fundamental Freedoms of 1950), but more specifically within the national legal framework of Romania.

PALABRAS CLAVE: *librepensamiento, religión, conciencia*

KEYWORDS: *Freedom of thought, religion, conscience*

1. PRELIMINARES

La libertad de pensamiento, de conciencia y de religión constituyen los derechos humanos¹ fundamentales cuya garantía deriva de que son un medio de protección del individuo en relación con la sociedad y además factores que contribuyen

decisivamente a lograr la cohesión social y la construcción de sociedades democráticas.

Si queremos tener una idea clara sobre la importancia de estos derechos basta con echar un vistazo a lo que está sucediendo hoy en Oriente Medio, afectado en buena medida por una intolerancia religiosa, que lleva a la supresión física de las personas que no comparten la creencia de la mayoría de la población. Esta intolerancia se utiliza con fines políticos, enunciando incluso sus defensores la idea programática de extender la dominación de una religión única en todo el mundo.

La historia mundial está llena de manifestaciones de intolerancia religiosa, cuyas formas extremas se encuentran en matar a los que sean de una religión diferente a la religión mayoritaria (recordamos aquí la persecución de los cristianos en el Imperio

¹ En la doctrina del derecho constitucional se ha demostrado como las libertades son verdaderos derechos y que, desde el punto de vista jurídico "el derecho es una libertad y la libertad es un derecho", MURARU, I; y TANASESCU, E.S.: *Derecho constitucional e instituciones políticas*, vol. I, edición XI, Editorial All Beck, Bucarest, 2003, p. 141. Asimismo, en relación con las convenciones internacionales dedicadas a los derechos y libertades se ha demostrado que existe la misma equivalencia derechos-libertades públicas que en el derecho interno, pero esta se denomina de "los derechos humanos", como valores universalmente reconocidos – BIRSAN, C.: *La Convención Europea de derechos humanos. Comentario por artículos*, vol. I. Derechos y libertades, Editorial All Beck, Bucarest, 2005, p. 11.

Romano en los siglos I-III), su expulsión (el ejemplo de los judíos sefardíes expulsados de España en el siglo XV) o las guerras de religión. Sin embargo, también existen formas menos violentas de persecución religiosa, donde aquellos que profesan otra religión diferente de la mayoritaria simplemente son tolerados, aunque se les restringen una serie de derechos. Por eso, textos como el Edicto de la Tolerancia emitido por el emperador romano Galerius el Joven el 30 de abril de 311, por el cual el emperador Constantino el Grande ordenó poner fin a la persecución de los cristianos, siguen estando presentes hasta el día de hoy en la memoria de la humanidad.

En esencia, la libertad de pensamiento, de conciencia y de religión protege tanto el fuero interno de cada persona, así como sus manifestaciones externas, que ponen en evidencia los conceptos sobre la vida y sociedad, y también los conceptos e ideas religiosas. Por lo tanto, la regulación de estos derechos tiene doble una dimensión: interna y externa.

Lo arriba mencionado, en relación con las manifestaciones violentas de intolerancia, pone de relieve la importancia de la libertad de religión a pesar del desarrollo y la continua secularización de la sociedad, por lo que también en nuestro estudio vamos a prestarle especial atención.

A nivel internacional, las primeras declaraciones que se consagraron la libertad de pensamiento, de conciencia y de religión, estaban contenidas en la Declaración Universal de los Derechos Humanos del año 1948 (artículo 18) y el Pacto Internacional O.N.U de Derechos Civiles y Políticos, firmado en 1966 y que entró en vigor el 23 de marzo 1976 (artículo 18).

El Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales, que fue adoptado por el Consejo de Europa el 20 de marzo de 1952,

más conocido como la Convención Europea de Derechos Humanos² también ha regulado la libertad de pensamiento, de conciencia y de religión a través del artículo 9.

Además, en el ámbito interno, los Estados democráticos han regulado de manera similar las mismas libertades en sus Constituciones internas.

2. LA CONVENCIÓN EUROPEA DE DERECHOS HUMANOS

2.1. La regulación y los titulares de la libertad de pensamiento, de conciencia y de religión

Conforme lo establecido en el artículo 9 de la Convención: <<1. Toda persona tiene derecho a la libertad de pensamiento, de conciencia y de religión; este derecho implica la libertad de cambiar de religión o de convicciones, así como la libertad de manifestar su religión o sus convicciones individual o colectivamente, en público o en privado, por medio del culto, la enseñanza, las prácticas y la observancia de los ritos.

La libertad de manifestar su religión o sus convicciones no puede ser objeto de más restricciones que las que, previstas por la ley, constituyen medidas necesarias, en una sociedad democrática, para la seguridad pública, la protección del orden, de la salud o de la moral públicas, o la protección de los derechos o las libertades de los demás>>.

Básicamente, el texto del artículo 9 de la Convención regula una única libertad que tiene tres componentes entre las cuales existe un vínculo indisoluble. Es lo que resulta de la redacción del texto de la Convención, que se refiere a la libertad de pensamiento, de

² A continuación utilizaremos el término "Convención" para designar el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales.

conciencia y de religión utilizando el singular, y no se refiere, por tanto, a la libertad de pensamiento, de conciencia y de religión mediante el uso del plural; pero, tal como veremos a continuación, también resulta avalado por la jurisprudencia del Tribunal Europeo de Derechos Humanos (T.E.D.H.).

La libertad de pensamiento, de conciencia y de religión forma parte de los derechos civiles y políticos, perteneciendo a la primera generación de derechos humanos.³ De la forma en que se regula resulta que cada uno de los aspectos de esta libertad revela tanto un aspecto interno como otro externo⁴.

Desde la perspectiva del aspecto interno, se trata de facultades del individuo que tienen carácter absoluto, dado que siempre y cuando se mantengan en la etapa de conceptos e ideas que no se exteriorizan, no alteran el orden público, independientemente de sus contenidos. Ahora bien, cuando se manifiestan en actos externos, los derechos en cuestión se convierten en hechos sociales y forman parte del ejercicio de su organización estatal⁵, de modo que se vuelve relativo el carácter del derecho⁶.

A pesar de que pertenece al fuero interno, que por definición escapa a cualquier censura estatal, razón por la que es absoluta, la protección de la libertad a tener convicciones y creencias no está desprovista de interés. Por tanto es de interés, al menos porque su

naturaleza consiste en proteger eficazmente la libertad de elección⁷. Ello se ve mejor en el caso de la libertad de pensamiento, que tiene un carácter interno por excelencia y, por lo tanto, absoluto.

El hecho de que el texto del artículo 9, párrafo 9 de la Convención enuncia de forma expresa la religión parece sugerir que tanto la libertad de pensamiento como la libertad de conciencia tienen en consideración este aspecto, pero en realidad las cosas son más complejas, y el propósito de proteger todos estos aspectos van más allá de los intereses individuales. Por lo tanto, el TEDH ha sostenido en repetidas ocasiones que *“la libertad de pensamiento, de conciencia y de religión representa uno de los fundamentos de una sociedad democrática en el marco del Convenio. Consagra la idea del pluralismo –idea ganada difícilmente a lo largo de los siglos- inherente a tal sociedad”*⁸.

Por otro lado, la Convención protege las creencias personales, morales, políticas, filosóficas, religiosas y otras similares, y los que pueden acogerse a esta protección no son sólo los seguidores de las creencias religiosas, sino también los ateos, agnósticos, escépticos o los indiferentes⁹.

Para poder aplicar las disposiciones previstas en la Convención y para disfrutar de su protección, las creencias personales deben tener un cierto grado de fuerza, seriedad, coherencia e importancia¹⁰.

No sólo las personas físicas pueden invocar la violación de la libertad protegida en el artículo 9 de la Convención, sino también algunas personas jurídicas. Por lo tanto, se decidió que una iglesia, en su calidad de

³ Para las clasificaciones que se han sometido a los derechos garantizados por la Convención y para la divulgación de los criterios utilizados, ver *“RENUCCI, J.-Fr.: Tratado de derecho europeo de derechos humanos, Editorial “Hamangiu”, Bucarest, 2009, pp. 80-82*

⁴ Es una distinción, que se hizo por primera vez, por VELU, J.; & ERGEC, R.: *La Convention européenne des droits de l'homme*, Editura Bruylant, 1990, p. 584.

⁵ Ver BIRSAN, C.: *La Convención Europea de Derechos Humanos. Comentario de artículos*, Edición 2ª, Editorial C.H. Beck, Bucarest, 2010, pp. 729-730

⁶ RENUCCI, J.-Fr. opere citato («en la obra citada»), p. 206

⁷ *Ídem*, p. 207

⁸ CEDO, 14 de diciembre de 1989, Serif c/Grecia, Recueil 1999 – IX, &49.

⁹ CEDO, 25 de mayo de 1993, Kokkinakis c/Grecia, Serie A, nr. 260A, & 31; 13 de diciembre de 2001, Eglise métropolitaine de Bessarabie et autres c/Moldavia, Recueil 2001-XII, &114.

¹⁰ CEDO, 25 de febrero de 1982, Campbel y Cosans c/Regatul Unit, Serie A nr. 48 &34.

persona jurídica puede ejercer su derecho definido en el artículo citado.¹¹ Por supuesto, en tales circunstancias, lo que se protege es la apariencia externa de la libertad en cuestión, su manifestación, y no el aspecto interno, intelectual, que es propio sólo de personas físicas¹².

Una condición esencial para alegar la vulneración de la libertad consagrada en el artículo 9 es que la persona de que se trate sea víctima, en virtud del artículo 34 de la Convención, y que respectivamente pueda reclamar que la libertad que alega fue en verdad vulnerada por una autoridad estatal.

En virtud del artículo 9 de la Convención, los Estados tienen tanto obligaciones positivas, como negativas. Efectivamente, la obligación negativa consiste en la prohibición de iniciar cualquier acción u omisión que podría dar lugar a la efectiva restricción de las libertades de que se trata, y las obligaciones positivas hacen referencia a las medidas que deben de tomar los Estados para prevenir cualquier injerencia no autorizada en su ejercicio.

2.2. El contenido de la libertad de pensamiento, de conciencia y de religión

La determinación del contenido de los tres componentes de la libertad garantizada en el artículo 9 presenta diferentes grados de dificultad.

Más difícil resulta aún este proceso en el caso de la libertad de pensamiento que, tal como hemos visto, se refiere a los procesos que se producen en el foro interno de la persona. Lo que se manifiesta hacia el exterior son las injerencias no autorizadas, que, pueden afectar dicha libertad, y precisamente a ellas se refiere la jurisprudencia del TEDH.

¹¹ Comisión, 5 de mayo de 1979, nr. 7865/1977, *Société X c/Suisse*, DR (Décisions et Rapports) nr. 16, p. 85.

¹² En la misma línea, ver BIRSAN, C.: *La Convención Europea de Derechos Humanos*. Comentario de artículos, Edición 2ª, opere citato, p. 733

Por lo tanto, se decidió que la obligación de asegurar que la información y el conocimiento en el plan de estudios se transmita de manera objetiva, crítica y pluralista, con la prohibición de todo adoctrinamiento; ello se desprende de las disposiciones del artículo 2 del Protocolo adicional número 1 (texto que regula el derecho a la educación), como de lo dispuesto en los artículos 8 (sobre el respeto a la privacidad y la familia), artículo 9 y artículo 10 (que protege la libertad de expresión) de la Convención, y, en general, de su espíritu, como instrumento internacional diseñado para proteger y promover los ideales y los valores de una sociedad democrática¹³.

La conciencia es "un producto más elaborado y mejor estructurado que el pensamiento de una persona",¹⁴ razón por la cual también es difícil determinar el contenido de la libertad de conciencia.

La jurisprudencia del TEDH trata en particular la libertad de conciencia en relación con la libertad de religión. Por ejemplo, el Tribunal decidió que la obligación de seguir un curso de educación moral y social impuesta a los niños dentro del plan de estudios no constituye una violación de la libertad de conciencia, puesto que no se trata, en tal situación, de un adoctrinamiento político o religioso.¹⁵ Del mismo modo, el Tribunal ha establecido que la Convención no puede constituir una justificación para invocar la objeción de conciencia y negarse asimismo a efectuar el servicio militar obligatorio o alguna actividad alternativa al

¹³ CEDO, 7 de diciembre de 1976, *Kjeldsen, Busk Masen y Pedersen c/Danamarca*, Serie A nr. 23, &53.

¹⁴ BIRSAN, C.: *Le juge européen, la liberté de pensée et de conscience*, Droit & Justice, 2004, p. 52.

¹⁵ Comisión, 8 de septiembre de 1993, nr. 17187/1990, *Bernard y otros c/Luxemburg*, DR nr. 75, p. 57.

mismo, dado que la Convención no regula este derecho¹⁶.

Siendo la religión un fenómeno social con una considerable antigüedad y bajo múltiples formas de manifestaciones, la determinación del contenido de este tipo de libertad se consigue más fácilmente. Al mismo tiempo, la sensibilidad es mucho mayor en esta materia, lo que determinó la existencia de un mayor número de casos presentados ante el TEDH y por tanto, una extremadamente rica jurisprudencia en esta materia.

Sin embargo, la diversidad de la religión como un fenómeno social que no puede ser confinado a las principales religiones, no permite una definición precisa de la noción de «religión» y «culto», y el TEDH ni siquiera intentó elaborar tales definiciones. Sin embargo, el TEDH dictaminó que la dimensión religiosa del derecho garantizado por el artículo 9 se enumera entre los elementos esenciales para la identificación de aquellos sujetos que tienen cierta fe y una determinada concepción sobre la vida¹⁷.

En este contexto, existe una preocupación legítima sobre las sectas religiosas, sobre todo cuando se trata de niños y personas vulnerables, por lo que aunque, en principio, el TEDH y la Comisión afirmaron que todos los grupos religiosos y sus seguidores disfrutaban de iguales garantías en relación con la Convención, se deben tomar ciertas precauciones para proteger estas categorías¹⁸.

En cuanto a la relación entre la religión y el Estado se prohíbe a este último que obligue a los ciudadanos a tener determinadas creencias y cometer prácticas religiosas, del mismo modo que los ciudadanos no están autorizados a rechazar el cumplimiento de las

obligaciones legales invocando la libertad de religión.

La libertad religiosa estaría en gran parte vacía de contenido si no incluyera la libertad personal de manifestar la religión. Bajo este punto de vista opera el principio de libertad de elección, que es aplicable también en el caso de las otras dos libertades.

Las formas de manifestación a las que se refiere la jurisprudencia del TEDH consisten en la posibilidad de que el sujeto exprese públicamente sus creencias religiosas, a participar en eventos y ritos religiosos, a cometer gestos con significado religioso, a unirse o no a una confesión religiosa, a organizar y participar en las formas de educación religiosa¹⁹.

Sin embargo, las creencias y ceremonias con contenido religioso no están aceptadas unánimemente, habiéndose elaborado incluso hostiles doctrinas al fenómeno religioso, en general. La misma expresión de tales creencias o doctrinas forma parte del contenido de la libertad de pensamiento, de conciencia y de religión, por lo que no puede ser reprimida; a menudo se encuentra bajo la protección del derecho a la libertad de expresión, garantizado por el artículo 10 de la Convención.

No obstante, el TEDH ha admitido que un Estado puede considerar necesario tomar medidas para reprimir algunas formas de comportamiento, incluida la comunicación sobre las informaciones e ideas consideradas incompatibles con el respeto a la libertad de pensamiento, de conciencia y de religión de los demás²⁰.

¹⁶ Comisión, 23 de abril de 1965, A. Grandrath c. RFG, Ann. 1965, p. 507.

¹⁷ CEDO, 25 de mayo de 1993, Kokkinakis c/Grecia, antes citada, &31.

¹⁸ RENUCCI, J.- Fr. *op. cit.*, p. 211.

¹⁹ Ver BÍRSAN, C.: *La Convención Europea de Derechos Humanos*, Comentario de artículos, Edición 2ª, opere citato, pp.746-748 y la jurisprudencia citada por el autor.

²⁰ CEDO, 25 de mayo de 1993, Kokkinakis c/Grecia, precitată, & 48.

El TEDH decidió que la representación provocadora de los actos de culto religioso puede considerarse como una violación del espíritu de tolerancia que debería caracterizar una sociedad democrática y constituye una violación del respeto de los sentimientos religiosos de los creyentes, que están garantizados por las disposiciones del artículo 9 de la Convención²¹. El reciente ataque terrorista cometido en la sede de la revista francesa Charlie Hebdo ha devuelto dramáticamente este asunto a la atención de la opinión pública.

2.3. Las limitaciones a la libertad de pensamiento, de conciencia y de religión

El párrafo 2 del artículo 9 regula las condiciones bajo las cuales los Estados pueden establecer limitaciones a la libertad de pensamiento, de conciencia y de religión. Éstas sólo podrán ser adoptadas por ley y deben constituir las medidas necesarias, en una sociedad democrática, para la seguridad pública, la protección del orden público, la salud o la moral públicas o para la protección de los derechos y libertades de los demás.

Como ya hemos demostrado, tales restricciones solo pueden ser autorizadas en lo que se refiere a la dimensión exterior de la libertad garantizada, y por tanto, no en la interior.

Así, el TEDH dictaminó que los Estados tendrán derecho a comprobar si un movimiento o una asociación que afirma tener fines religiosos, lo que lleva realmente a cabo son o no actividades perjudiciales para la población o para la seguridad pública.

En lo que respecta la regulación del uso de símbolos religiosos en el espacio público, con especial referencia a la prohibición del velo

²¹ CEDO, 20 de septiembre de 1994, Otto Preminger Institut c/Austria, Serie A nr. 295-A, &47.

islámico, se ha demostrado que esto no contraviene lo previsto en el artículo 9 de la Convención y se basa tanto en el principio de laicidad establecido en la Constitución, como en el principio de neutralidad de la escuela.²²

Con referencia al reconocimiento de un culto, y dentro de las condiciones legales, el TEDH dictaminó que la negativa de conceder tal reconocimiento no podrá ser sustituida por el hecho de que se le ha otorgado personalidad jurídica a una institución religiosa y se le permitió contratar a empleados y a comercializar objetos específicos de culto. El hecho de que la ley dispone que sólo los cultos religiosos reconocidos pueden funcionar, determina que la tolerancia mostrada por el Gobierno frente a una determinada iglesia no tiene el significado de un reconocimiento, y la negativa de otorgarle reconocimiento tiene tales consecuencias en lo que respecta el ejercicio de la libertad de religión, de tal manera que no puede considerarse proporcional al objetivo perseguido y tampoco parece ser necesario en una sociedad democrática²³.

3. LA CONSTITUCIÓN DE RUMANÍA

En lo que se refiere a la legislación rumana relativa a la libertad de pensamiento, de conciencia y de religión, son relevantes dos disposiciones constitucionales. Se trata de las contenidas en el artículo 20 y en el artículo 29.

De conformidad con el artículo 20, titulado «Los tratados internacionales de derechos humanos», «(1) *Las disposiciones constitucionales relativas a los derechos y libertades de los ciudadanos*

²² CEDO, 24 de enero de 2006, Köse y otros c/Turcia, dec. nr. 26625/02, no publicada, citada por RENUCCI, J.- Fr. *op. cit.*, p. 224.

²³ CEDO, 13 de diciembre de 2001, Eglise métropolitaine de Bessarabie et autres c/Moldavia, antes citada, & 97.

se interpretarán y aplicarán de conformidad con la Declaración Universal de Derechos Humanos, con los pactos y tratados de los que Rumania es parte.

(2) Si existen incoherencias entre las leyes internas y los pactos y tratados de derechos humanos fundamentales en los que Rumania es parte, prevalecerán las reglamentaciones internacionales, salvo cuando la Constitución o las leyes internas contienen disposiciones más favorables».

La existencia de este texto constitucional es una ilustración del proceso de «la europeización del orden constitucional», que se menciona en la doctrina y que se caracteriza tanto por la implantación de las ideas de la Convención en el contenido de las constituciones de los países de la Unión Europea, como a través del control de las reservas con objeto constitucional, que pueden ser invocadas por éstas²⁴. Lo cierto es que el texto del artículo 20 de la Constitución se refiere a cualquier tratado sobre derechos humanos en el que Rumania sea parte, pero la Convención, como tal tratado, es de lejos la más importante, aunque sólo si tenemos en cuenta el hecho de que es la única que ha creado un mecanismo judicial, apto para sancionar la violación de sus disposiciones.

Las citadas disposiciones constitucionales tienen como consecuencia el hecho de que cualquier autoridad rumana, incluidas las del poder judicial y del Tribunal Constitucional, tendrán que tomar en cuenta las disposiciones de la Convención y los demás tratados cuando deban interpretar y aplicar las disposiciones constitucionales relativas a los derechos y libertades de los ciudadanos, pero también cuando estas operaciones jurídicas se refieran a las leyes ordinarias, que desarrollan las disposiciones constitucionales. En caso de discrepancia entre las disposiciones de la Constitución Rumana y las disposiciones de la

Convención, prevalecerán las previstas en la primera sólo si son más favorables.

A su vez, el artículo 29, titulado «Libertad de conciencia», dispone que: «(1) La libertad de pensamiento y de las opiniones y creencias religiosas no puede ser restringida bajo ninguna circunstancia. Nadie puede ser obligado a adoptar una opinión o a adherirse a una creencia religiosa, contraria a sus convicciones.

(2) Se garantiza la libertad de conciencia, que debe manifestarse en un espíritu de tolerancia y respeto mutuo.

(3) Los cultos religiosos serán libres y se organizarán de conformidad con sus propios estatutos, en las condiciones previstas por la ley.

(4) En las relaciones entre los cultos se prohíbe cualquier forma, medio, actos o acciones de enemistad religiosa.

(5) Los cultos religiosos son autónomos del estado y gozarán de apoyo de este último, incluyendo la facilitación de asistencia religiosa en el ejército, en hospitales, cárceles, hogares y orfanatos.

(6) Los padres o tutores legales tienen derecho a garantizar, de conformidad con sus propias convicciones, la educación de los hijos menores de edad cuya responsabilidad recae sobre ellos».

Así, de lo previsto en el primer párrafo del apartado 1 del artículo 29, resulta que la libertad de conciencia incluye la libertad de pensamiento, de opiniones y creencias religiosas, existiendo una estrecha conexión entre estos tres aspectos.

La doctrina ha definido la libertad de conciencia como «la posibilidad de la persona física de tener y expresar en privado o en público una determinada concepción del mundo, para compartir o no una creencia religiosa, de pertenecer o no a una confesión

²⁴ Ver . RENUCCI, J.- Fr: *op. cit.*, pp. 58-62.

religiosa, para cumplir o no con el ritual requerido por esa fe»²⁵.

La Constitución presta especial atención a la apariencia religiosa de la libertad de conciencia, teniendo en cuenta el hecho de que la religión es un fenómeno social muy extendido y con una alta sensibilidad que proviene de la historia. Así se proclama no sólo la libertad de religión sino también la libertad de culto.

El término de "culto religioso" tiene un doble significado: el de asociación u organización religiosa respectivamente, y aquel de ritual religioso, practicado dentro de tales organizaciones²⁶.

El Estado rumano es un estado laico, de modo que los cultos se establecen de acuerdo con sus propios estatutos, de conformidad con las disposiciones de la ley y son autónomos. Esto no excluye la posibilidad de conceder un apoyo por parte del Estado, que se manifiesta a través de las formas indicadas expresamente por la Constitución (para facilitar la asistencia religiosa en el ejército, en hospitales, cárceles, hogares y orfanatos), pero también a través de otros medios, tales como apoyando la remuneración de personal clerical y no clerical, el apoyo financiero para la construcción de templos de culto y el mantenimiento de los actuales, etc.

No existe una jerarquía de cultos religiosos y las relaciones entre ellos están prohibidas de cualquier forma, medios, actos o acciones de enemistad religiosa.

La libertad de conciencia incluye el derecho de los padres a proporcionar o no a sus hijos

una educación religiosa, que puede llevarse a cabo tanto en el seno de la familia como en la escuela.

En la educación primaria, secundaria, superior de educación secundaria y profesional los planes incluyen la religión como disciplina escolar, que es parte del tronco común. A los estudiantes pertenecientes a las confesiones religiosas reconocidas por el Estado, independientemente de su número, se le garantiza el derecho constitucional a participar en la clase de religión, de conformidad con su propia confesión. (Artículo 18, párrafo 1, de la Ley de educación nacional n° 1/2011).²⁷

La redacción original de la ley establecía que, a petición escrita del alumno mayor de edad, y respectivamente, de los padres o del tutor legal establecido para el menor de edad, el estudiante tenía la posibilidad de no asistir a las clases de religión, en cuyo caso, sin esta disciplina se ponía fin a la situación escolar. La disposición legal en cuestión ha sido declarada inconstitucional, argumentándose que la libertad de conciencia permite a los padres a escoger el tipo de educación para sus hijos, mientras que el Estado asumió de forma autónoma y competente una misión propia para la educación, la correlativa con la de sus padres. Existe una obligación negativa del Estado que se abstenga de interferir en la formación o la adhesión de una creencia o fe religiosa, y, por otro lado, también existe una obligación positiva, en la medida en que una persona se manifiesta en la dirección del estudio o a recibir las enseñanzas de una determinada religión o fe religiosa, para crear el marco legislativo e institucional necesario para el ejercicio de la libertad de conciencia y el derecho a la educación, consagrado también por la Constitución. «Pero, en ningún caso la persona no podrá ser puesta en una posición ab initio para defender o

²⁵ CONSTANTINESCU, M.; IORGOVAN, A.; MURARU, I.; & TĂNĂSESCU, E.S.: *La Constitución de Rumania revisada –comentarios y explicaciones*, Editorial All Beck, Bucarest, 2004, p. 57.

²⁶ Ver IANCU, Gh.: *Derecho constitucional e instituciones políticas*, Bucarest, C.H. Beck, Edición 3ª, 2014, p. 280.

²⁷ Publicado en el Boletín Oficial de Rumania, Parte I, N° 18, de 10 de enero de 2011.

proteger su libertad de conciencia, porque tal enfoque supondría una violación de la obligación negativa del estado, en cuya virtud, no podrá exigir el estudio de la religión.»²⁸.

Como resultado, la ley ha sido modificada en el sentido de que la inscripción del alumno a la frecuencia de las clases de religión se efectuará mediante petición escrita del alumno mayor de edad, y respectivamente, del padre o tutor legal instituido para el alumno menor de edad y la modificación de esta opción deberá hacerse también mediante la petición escrita del alumno mayor de edad, y respectivamente, del padre o tutor legal establecido para el estudiante que es menor de edad.

4. LA RELIGIÓN Y LA LEY

El acto normativo contemplado en la Constitución y que proporciona el marco general para el reconocimiento y funcionamiento de los cultos religiosos es la Ley n° 489/2006 sobre la libertad religiosa y el régimen general de cultos²⁹.

Conforme la ley, la libertad religiosa incluye el derecho de toda persona a tener o adoptar una religión, para manifestar individual o colectivamente, en público o en privado, a través de rituales específicos y prácticas del culto, incluso a través de la educación religiosa, así como la libertad para conservar o cambiar de fe religiosa. La religión del niño que ha alcanzado la edad de 14 años no puede ser cambiada sin su consentimiento y el niño que ha alcanzado la edad de 16 años tendrá el derecho a elegir por sí solo su religión.

Toda persona tiene el derecho a manifestar las creencias religiosas colectivamente, según

sus propias creencias y según lo previsto por la ley, tanto en las estructuras religiosas con personalidad jurídica como en las estructuras sin personalidad jurídica. Las comunidades religiosas eligen libremente la estructura asociacional a través de la cual manifiestan su creencia religiosa: el culto, una asociación religiosa o grupo religioso, según la ley.

La agrupación religiosa es una forma de asociación sin personalidad jurídica de algunas personas físicas que, sin ningún procedimiento preliminar y libremente, adoptan, comparten y practican una creencia religiosa.

La asociación religiosa es una persona jurídica de derecho privado, constituida de conformidad con las condiciones de la presente ley, formada por personas físicas que adoptan, comparten y practican la misma creencia religiosa. La asociación religiosa puede convertirse en culto bajo los términos de la ley.

La calidad de culto reconocido por el Estado será adquirido por la decisión del Gobierno, sobre una propuesta de la Secretaría de Estado para Asuntos Religiosos, por las asociaciones religiosas que, a través de su actividad y el número de sus miembros, ofrece garantías de durabilidad, estabilidad e interés público.

En Rumania hay 18 confesiones religiosas reconocidas, que se presentan en el Anexo.

No existe una jerarquía de las confesiones religiosas según el número de adeptos, pero «el Estado rumano reconoce el importante papel de la Iglesia ortodoxa rumana y de las otras iglesias y confesiones religiosas reconocidas en la historia nacional de Rumania y en la vida de la sociedad rumana.» (párrafo 2 del artículo 7 de la Ley N° 489/2006).

Según los datos proporcionados por el último censo realizado en octubre de 2011, la

²⁸ Tribunal Constitucional, Sentencia n° 669/2014, publicada en el Boletín Oficial de Rumania, Parte I, N° 59, de 23 de enero de 2015.

²⁹ Republicada en el Boletín Oficial de Rumania, Parte I, no. 201 de 21 de marzo de 2014.

población de Rumania era de 20.121.641 personas. De los 8,8 millones de personas que han declarado la religión del censo, en 2011, la mayoría de la gente -más exactamente el 86,5%- han declarado que son creyentes ortodoxos, el 4.6% católicos romanos, 3.2% reformados, 1.9% pentecostales, 0.9% los católicos griegos y 0.2% «sin religión» o ateos.

En Dobrogea también habita una minoría islámica, formada especialmente por turcos y tártaros cuyos antepasados se establecieron aquí durante el Imperio Otomano, que se estima en aproximadamente 6000 personas. El número de los seguidores de la religión islámica está en ligero aumento como resultado de la inmigración procedente de algunos países árabes.

5. LA SITUACIÓN DEL CULTO GRECO-CATÓLICO

La presentación de la situación del culto greco-católico es una ilustración de la manera en que la intolerancia religiosa, manifiesta por razones políticas en determinados períodos históricos, produce efectos -aunque sean mitigados- hasta hoy en día.

Historia

La Iglesia Rumana unida con Roma, más conocido en Rumanía bajo el nombre de la Iglesia Greco-Católica, apareció en Transilvania, a finales del siglo XVI, mediante la elaboración de una parte del clero y de la Iglesia Ortodoxa Rumana. En aquella época, Transilvania fue parte del Imperio Austríaco (Habsburgo).

Mediante el Título expedido en el año 1691 por el Emperador Leopoldo I se han reconocido los derechos a cuatro religiones recibidas (romano-católica, luterana, calvinista y unitaria), así como los privilegios de las tres

naciones que vivían en Transilvania (húngaros, szecklers y sajones). Aunque los rumanos, que constituían la mayoría de la población, eran de religión cristiana ortodoxa, su iglesia únicamente gozaba de la condición de ser tolerada.

En el año 1692 el rey confirmó a los sacerdotes ortodoxos, que apoyaba la Unión con Roma, los mismos derechos con el clero católico romano, y a través del Título del año 1698 se concedió a los rumanos el derecho de poder cambiarse a cualquiera de las 4 religiones receptes (aceptadas).

En estas condiciones el ortodoxo metropolitano Atanasie Anghel convocó, en el año 1697, el Consejo de Alba-Iulia que aceptó cuatro principios obligatorios de unión con Roma: el reconocimiento de la supremacía Papal, la existencia del Purgatorio, comunión con ázimo y Filioque.

En cambio, a los rumanos que estaban unidos se les reconocía el mantenimiento del ritual tradicional, el respeto de las fiestas ortodoxas, la elección apostólica por el Sínodo, la igualdad de derechos del clero y de los creyentes con el clero y los fieles de la Iglesia Católica Romana. Estos derechos fueron confirmados por los diplomas emitidos por el emperador en los años 1699 y 1701.

La Ortodoxia ha mirado esta situación como una disidencia inaceptable y el metropolitano Atanasie Anghel, quien fue reconocido por el Papa como obispo de la iglesia, fue excomulgado por el Metropolitano del país de Rumania.

La Iglesia Greco-Católica ha tenido un papel especialmente importante en el desarrollo de la cultura rumana, de la vida espiritual de los rumanos de Transilvania y se ha involucrado activamente en la lucha por la protección de los derechos de sus nacionales.

Un momento de profundo significado se ha producido el día 1 de diciembre de 1918, cuando el Acto de la Unión de Transilvania con Rumania fue leído frente a la gran Asamblea Nacional en Alba-Iulia, por el obispo griego-católico Iuliu Hossu, asistido por el obispo ortodoxo de Caransebeș, Miron Cristea, patriarca de la Iglesia Ortodoxa Rumana.

Las primeras Constituciones del estado moderno, adoptadas en los años 1866 y 1923 respectivamente, garantizaron la libertad religiosa. La Constitución de 1923 declara la Iglesia Ortodoxa Rumana como «la iglesia dominante del estado» y la Iglesia Greco-católica, ocupando la segunda posición por su ponderación e importancia, fue designada como culto nacional, con prioridad sobre todas las demás religiones.

En consecuencia, la Ley n° 54 de 22 de abril de 1928 para el régimen general de los cultos, mencionaba la preeminencia de la Iglesia Ortodoxa Rumana y de la Iglesia Greco-Católica, en ese orden, mientras que la religión católica romana, la religión de la minoría húngara calvinista reformada, la adoración luterano evangélica de la comunidad sajona, el culto unitario Húngaro, el culto armenio gregoriano, el culto mosaico y la religión musulmana, fueron descritos como cultos históricos. Los otros cultos, como el neo-protestantismo, fueron considerados como asociaciones religiosas.³⁰

El estatuto jurídico de la Iglesia Greco-Católica y sus relaciones con el Estado Rumano han sido aún mejor especificados a través del Concordato entre el Vaticano y Rumania (1929).

A partir del 30 de diciembre de 1942, en plena guerra mundial, el jefe del Estado (título auto conferido por el mariscal Ion Antonescu) emitió un decreto por el cual

todas las «sectas religiosas», respectivamente el neo-protestantismo, que son los cultos que la ley había calificado como «asociaciones religiosas» (bautistas, adventistas, pentecostales, los cristianos después de la proclamación del evangelio, etc.) están prohibidos.

El día 23 de agosto 1944, la dictadura militar de Mariscal Antonescu es derrocada, y se derogan las leyes restrictivas en materia religiosa, por lo que todos los cultos religiosos son reconocidos nuevamente.

El establecimiento del régimen comunista, cambia los datos de la cuestión!

Aunque la Constitución de 1948, garantiza a nivel declarativo, «la libertad de conciencia y la libertad religiosa» y reconoce que «todos los cultos son libres e iguales ante la ley», el nuevo acto normativo que rige la materia -el Decreto n° 177 de 4 de agosto de 1948 del régimen general de las confesiones religiosas- es mucho más restrictivo.

Se introduce por parte del estado la obligación de reconocimiento previo del culto religioso, como condición para su funcionamiento, y aunque ningún culto está oficialmente prohibido, se preparan implícitamente dichas medidas. Importante, en este sentido, son las disposiciones del artículo 36 y del art. 37.

El artículo 36 señala que «la riqueza de los cultos extinguidos o cuyo reconocimiento ha sido retirado, pertenece al imperio de la ley».

A su vez, el art. 37 dispone que: «Si al menos el 10 % del número de creyentes de la comunidad local de culto pasan a otro culto, la comunidad local religiosa del culto abandonado, pierde derecho a una parte de su patrimonio, proporcional al número de creyentes que lo dejaron, y esta parte proporcional se traspasa al patrimonio de la comunidad local del culto que han adoptado los nuevos creyentes.

³⁰ Ver GILLET, Ol.: *La religión y el nacionalismo*, Bucarest, Editorial Compania, 2001, p. 46.

Si quienes abandonan la comunidad local conforman la mayoría, la Iglesia (la casa de oración), al igual que los edificios anexos, pertenecen por derecho a la comunidad local del nuevo culto adoptado, concediéndose la otra riqueza a las dos comunidades locales en la proporción que se indica en el párrafo precedente.

Si los que pasan de un culto religioso a otro, representan al menos el 75% del número de creyentes de la comunidad local del culto abandonado, se traspa a la comunidad local del culto adoptado, con derecho de indemnización a favor de la comunidad local abandonada, proporcional al número de aquellos que permanecen sin contar la iglesia (la casa de oración) y los edificios anexos; dicha indemnización se pagará en un plazo máximo de 3 años desde su establecimiento.»

En realidad serán reconocidas únicamente 14 cultos religiosos. Son asimismo prohibidas, la Iglesia Griego-Católica, acusada de tener una ideología similar a la «anticristiana»³¹, los Testigos de Jehová y algunos cultos como el neo-protestantismo.

La medida coincide con la denuncia del Concordato celebrado por Rumania con el Vaticano, el 17 de julio de 1948, aunque la iglesia católica romana continuo funcionando legalmente. Mediante el Decreto n° el 3 de agosto, 1948, han pasado a ser propiedad del Estado, y sin indemnización, los bienes muebles e inmuebles pertenecientes a iglesias, congregaciones, comunidades o a particulares, que sirvieron para el funcionamiento y mantenimiento de las instituciones de educación general, técnica o profesional.

Por el Decreto n° 358/1948 la riqueza mueble e inmueble perteneciente a la Iglesia Greco-Católica y a cualquier organización que pertenecía a esta, ha pasado a ser propiedad del Estado. Excepción han sido

los lugares de culto, que fueron entregados a la Iglesia Ortodoxa Rumana, a la luz del hecho de que el culto de las parroquias greco-católicas han vuelto al culto ortodoxo rumano, circunstancia que se menciona en el artículo 1 del Decreto. En realidad, el proceso de transición de los creyentes greco-católicos y una parte del clero al culto ortodoxo rumano fue la consecuencia de la prohibición del funcionamiento de la Iglesia Greco-Católica y las presiones ejercidas de las autoridades comunistas. En estas circunstancias, 431 sacerdotes y el 87% de las parroquias han aceptado la transición a la Iglesia Ortodoxa.³² Muchos clérigos greco-católicos que se negaron someterse fueron condenados a prisión, junto con todos los obispos de este culto.

La tarea de hacer efectiva la toma de posesión de riquezas confiscadas ha sido encomendada a una Comisión especial, siendo autorizada a transmitir una parte de ella a la Iglesia Ortodoxa Rumana o a sus diversas partes componentes.

Al mismo tiempo, las granjas y las tierras forestales, que eran propiedad de las confesiones religiosas, fueron nacionalizadas sin distinción alguna y algunos monasterios fueron cerrados.

El restablecimiento de los derechos del culto católico

El decreto a través del cual se confiscaron las riquezas de la Iglesia Greco-Católica ha sido uno de los primeros actos normativos derogadas en diciembre de 1989 por el poder revolucionario de Bucarest, que marcó el retorno a la legalidad de este culto. El 14 de marzo de 1990 el Vaticano nombro a los líderes de las 5 diócesis (eparquías) greco-católicas, y al metropolitano³³, siendo

³² BUCUR, I.-M.: *En la historia de la Iglesia Greco-Católica Rumana (1919-1953)*, Cluj-Napoca, Editorial Acento, 2003, p. 202.

³³ Para la organización de la Iglesia Greco-Católica véase FRENTIU, Cr.: *Discusiones sobre el*

³¹ GILLET, Ol.: *op. cit.*, p. 49.

estos reconocidos por el Estado rumano a través de decreto presidencial.

Sin embargo, el problema de los bienes que pertenecían a la Iglesia Greco-Católica no se solucionó del mismo modo, como tampoco se ha resuelto la cuestión de la restitución de los bienes tomados por el estado comunista y de otras confesiones religiosas, incluyendo la Iglesia Ortodoxa Rumana.

En este sentido, el marco legislativo adoptado y las medidas previstas, ni tienen un carácter unitario, ni proporcionan aun una reparación completa y equitativa.³⁴ Cuestiones especialmente complicadas han surgido con respecto a la restitución de los lugares de culto, solicitada por la Iglesia Greco-Católica, pero que pertenecen a día de hoy a la Iglesia Ortodoxa Rumana, fuertes pasiones animando no sólo al clero, sino también a los practicantes de ambos cultos. Las complicaciones son generados en particular por el hecho de que, si en el año 1948, cuando fue prohibido, el culto greco-católico fue practicado por el 8 % de la población del país,³⁵ para el censo del año 2002, sólo 223.327 personas han declarado su religión greco-católica, lo que significa un 1%, mientras que el 86,8 % de la población,

respectivamente 18.806.428 personas, se declararon de confesión ortodoxa.³⁶

Podemos hablar de tres categorías de medidas adoptadas por las autoridades rumanas hasta el presente en materia de las medidas restauradoras apropiadas para las confesiones religiosas: la restitución de tierra según lo previsto por la ley, previa petición; medidas específicas de restitución de bienes inmuebles; la restitución de los bienes de conformidad con las condiciones de un especial acto normativo, que es el Decreto de Urgencia del Gobierno n° 94/2000 relativa a la restitución de bienes inmuebles que pertenecieron a las confesiones religiosas de Rumania.

La restitución de tierras

Las primeras medidas para la restitución de los terrenos han sido adoptadas con arreglo a la Ley de Tierras n° 18/1991, que ha regulado un procedimiento para restaurar el derecho de propiedad para las personas físicas, y también para los cultos religiosos.

De acuerdo con las disposiciones de esta ley, en su redacción inicial, se les podía devolver a los cultos religiosos, previa petición, una superficie de terreno de 5 hectáreas de tierra cultivable equivalente para cada parroquia o monasterio, pertenecientes a las confesiones religiosas reconocidas por la ley, o hasta 10 hectáreas de tierra agrícola cultivables en el caso de los monasterios.

Mediante la Ley n° 1/2000, estas áreas de tierra fueron aumentadas hasta 100 hectáreas, sin distinguir entre las unidades situadas en la zona rural de aquellas situadas en la zona urbana. Además, según el mismo acto normativo, las unidades de culto se han convertido en beneficiarios de la recuperación del derecho de propiedad sobre

derecho de propiedad de la Iglesia Ortodoxa Rumana sobre los lugares de culto, propiedad de la Iglesia Greco-Católica hasta el año 1948, en *El Derecho* n° 1/2010, pp. 66-67.

³⁴ Para la evolución de la legislación sobre las medidas restauradoras para inmuebles asumidos por el estado y otras personas jurídicas, durante el régimen comunista y los problemas que ello suscita, véase CHELARU, E., *Derecho civil. Los derechos reales principales*, Bucarest, Editorial C. H. Beck, Edición 4, 2013, pp. 148-182 y 222-251.

³⁵ Conforme su propio juicio, en el año 1948 la Iglesia Greco-Católica tenía 1.800.000 creyentes, aproximadamente 2.500 iglesias, una academia teológica, tres seminarios teológicos, así como más monasterios y escuelas confesionales.

³⁶ Según los mismos datos, la Iglesia Católica Romana cuenta con 1.002.000 miembros. Debe señalarse que el último censo de la población data del año 1930.

las tierras de bosques, dentro del límite de 30 hectáreas.

Por último, la Ley n° 247/2005 retiró los límites sobre la superficie, haciendo válida la restauración del derecho de propiedad para toda la zona de la tierra cuyo control había sido asumido por el estado.

Medidas específicas

A través del Decreto Ley N° 126, de 24 de abril de 1990 se dispuso la restitución de los bienes tomados por el Estado a favor de la Iglesia Rumana Unida con Roma (greco-católica) mediante la aplicación del Decreto n° 358/1948, situados en actualidad dentro del patrimonio del estado.

Tal y como se mencionó arriba, no han sido objeto de restitución los terrenos forestales y tierras agrícolas, cuya situación jurídica ha sido regulada posteriormente.

Tampoco han sido restituidos los lugares de culto y las casas parroquiales, cuyo control fue asumido por la Iglesia Ortodoxa Rumana, siendo constituida una Comisión para resolver su situación jurídica, formada por representantes clericales de ambos cultos que iban a tener en cuenta el deseo de los creyentes de las comunidades que poseían tales bienes.

Además se ordenó que en las localidades donde el número de lugares de culto es insuficiente en relación con el número de creyentes, el estado apoyará la construcción de nuevos lugares de culto, para cuyo objetivo pondrá a disposición de los respectivos cultos el terreno aferente si estas no disponen de este terreno y contribuirá con fondos económicos al establecimiento de los recursos financieros necesarios.

Las parcelas de terrenos y edificios restituidos en virtud de este decreto-ley, en número de 80, han sido identificados por Decisión del Gobierno n° 466/1992.

Según el artículo 1 del Decreto de Urgencia del Gobierno n° 13/1998 «Los edificios, junto con la tierra relacionada, contenidos en el anexo que forma parte integrante del presente Decreto de Urgencia, que pertenecieron a las comunidades de los ciudadanos (organizaciones, cultos religiosos) que formaron parte de las minorías nacionales de Rumania e introducidos después del año 1940 en el patrimonio del Estado rumano a través de medidas de restricción, confiscación, nacionalización o maniobras dolosas, serán restituidos a sus titulares o sucesores».

A pesar de la formulación con carácter general del texto de la citada ley, la restitución sólo se llevó a cabo para 17 inmuebles, señalados en el Anexo del Decreto de Urgencia. Entre ellos destaca La Casa Evangélica en el municipio Săcele, del condado Braşov, la sede del Obispado Reformado de Oradea, la sede del Obispado Romano-Católico de Oradea, la Biblioteca «Batthyaneum», el Museo y el Instituto Astrológico del Obispado Romano-Católico de Alba Iulia.

Problemas especiales planteo la restitución del edificio en el que el trabajo de la biblioteca «Batthyaneum», que, además de los libros, tiene en sus colecciones sobre 1200 manuscritos, 600 incunables, 50.000 volúmenes impresos en los siglos XVI-XVIII y 19.000 documentos históricos. Para evitar su cambio de sitio, se firmó un protocolo entre el Ministerio de Cultura y Asuntos Religiosos y el Arzobispado Romano-Católico en virtud del cual la biblioteca continuó con sus actividades.

Y en este caso la restitución ha afectado también inmuebles que pasaron a formar parte de la propiedad del Estado, incluso antes de la instauración del régimen comunista.

Otros 4 inmuebles han sido restaurados en virtud del Decreto de Urgencia del Gobierno n°112/1988.

En algunos casos relativos a bienes inmuebles tomados en posesión por las autoridades comunistas en ausencia de cualquier acto normativo de expropiación, que pueda constituir el título de propiedad del estado, las instancias judiciales ordenaron sus restituciones. Dichas soluciones han sido motivadas dado que el Decreto n° 358/1948, a través del cual se confiscaron las riquezas de la Iglesia Greco-Católica, fue un acto abusivo, contrario a las disposiciones de la Constitución de 1948, que garantizaba la libertad de religión.³⁷

El Tribunal Superior de Casación y Justicia observo que en los litigios con tal objeto son de aplicación las disposiciones del segundo párrafo del artículo 3 del Decreto-Ley n° 126/1990, ley especial que obliga a respetar la voluntad de los creyentes de la comunidad que posee el inmueble.

El Tribunal señaló que “el sintagma «el deseo de los cristianos» en el texto legal mencionado solo puede ser interpretado en el sentido sostenido por la Instancia de Apelación, es decir, que con esta frase el legislador tuvo en cuenta el número de creyentes pertenecientes a los cultos que litigan por un determinado lugar de culto. Desde esta perspectiva constitucional, se puede deducir que desde la entrada en vigor del Decreto-Ley n° 9/1989 a través del cual fue reconocida oficialmente la Iglesia Rumana Unida con Roma (Iglesia Greco-Católica), los creyentes ortodoxos de la parroquia de la B. III (Iglesia dedicada al Santo Gran Mártir Jorge) tuvieron la posibilidad de optar a favor de este culto, mediante la transición del culto ortodoxo al culto greco-católico. Pero, no haciendo uso de tal opción, se presumirá que pertenecen a

la religión ortodoxa, y al mismo tiempo su deseo, por lo que se refiere al lugar de culto en litigio es que este pertenezca al culto ortodoxo.”³⁸

Aunque solo sea por las consideraciones que implica esta decisión se puede ver el grado de delicadeza del problema de la restitución del lugar de culto, debido al cambio de opciones de los creyentes a lo largo del tiempo. Esta es también la razón por la cual el Estado ha financiado la construcción de unos nuevos lugares de culto, que fueron asignados sea al culto greco-católico, sea al culto ortodoxo, según sea el caso, especialmente, en aquellas localidades en las cuales los habitantes pertenecían a ambos cultos, aunque sólo había una iglesia.

6. EL DECRETO DE URGENCIA DEL GOBIERNO N° 94/2000

Este acto normativo regula, con carácter general, la concesión de medidas restauradoras para los inmuebles que pertenecieron a las confesiones religiosas en Rumania y que, de forma abusiva, con o sin título, estuvieron en posesión del Estado rumano, organizaciones cooperativas o de otras personas jurídicas en el período comprendido entre el 6 de marzo de 1945 y 22 de diciembre de 1989.

Constituyen el objeto de esta ley los inmuebles que sean propiedad del estado, de una persona jurídica de derecho público, los que están en manos de un organismo autónomo, de una sociedad o una empresa nacional, de una sociedad comercial o una autoridad de la Administración Pública Central o Local a la que el Estado es

³⁷ Por tales razones ver también FRENȚIU, CR. Loc. cit., p. 73.

³⁸ El Tribunal Superior de Casación y Justicia, Sección I Civil, la ST n° 3350, de 27 de noviembre de 2014, publicada en el sitio web de la Corte.

accionista o asociado con participación mayoritaria en la sociedad.

El decreto define los inmuebles como los edificios existentes en especie, junto con sus terrenos relacionados, situados dentro de las localidades, con cualquiera de los destinos previstos en el momento de apropiarse de manera abusiva y al igual que los terrenos situados en la fecha de la toma abusiva de su propiedad dentro de las localidades, no restituidas hasta la fecha de entrada en vigor de la Ley n° 247/2005, a través de la cual se ha modificado.

Las medidas restauradoras se otorgan independientemente de si la apropiación del inmueble se llevó a cabo con o sin título. La toma de posesión «con título» se entiende como aquella que se hizo con arreglo a la legislación vigente en el momento en que ocurrió. La toma de posesión «sin título» constituye un abuso, incluso en lo referente a la legislación vigente en aquel momento, que consistió sea en la emisión de un acto de autoridad carente de fundamento jurídico, o bien sea a través de la expropiación forzosa del propietario, incluso en ausencia de la más mínima apariencia legal³⁹.

La práctica del Tribunal Superior de Casación y Justicia, relativa a estas nociones, se pronuncia en el sentido de que son adquisiciones de inmuebles sin título válido las realizadas en virtud de los actos normativos que entraron en contradicción con la Constitución por entonces vigente y con los tratados internacionales en los que Rumania era parte.⁴⁰

Al mismo tiempo que la retrocesión de los inmuebles en especie, también se restituyen los bienes muebles, si es que fueron

adquiridos junto con el inmueble en cuestión y si aún existen a la fecha de presentación de la solicitud de restitución.

No constituyen objeto del Decreto en cuestión los inmuebles destinados a un lugar de culto, que deban ser objeto de leyes especiales.

Los beneficiarios de las medidas restauradoras son los cultos religiosos que han sido desposeídos de sus bienes inmuebles durante el periodo del régimen comunista. A fin de obtener dichas medidas, estarán representados por los centros de culto o centros diocesanos. Estos están definidos por la ley como sigue: «Por centro de culto se entiende la institución que, con sede en Rumania, coordinará todas las unidades locales de una confesión religiosa. Por centro diocesano se entiende la institución que tiene jurisdicción sobre un número de unidades locales de culto situados en una zona geográfica específica del país.»

Las medidas restauradoras previstas por el legislador consisten en la restitución de los inmuebles en especie y las medidas restauradoras por equivalencia, que se concederán en los términos previstos por una ley especial⁴¹.

³⁹ Para conocer el significado de las dos nociones ver y CHELARU, E. op cit., pp. 228-229.

⁴⁰ Ver sentencias de la sección civil y de propiedad intelectual n° 421/2004 en el Boletín de la Casación, n° 4/2005, p. 11-12 y no. 741/2005, no. 4/2006, p. 275-276

⁴¹ Se trata de la Ley n° 165/2013 sobre medidas para finalizar el proceso de la restitución en especie o por equivalencia de los inmuebles adquiridos de forma abusiva durante el régimen comunista en Rumania, publicada en el Boletín Oficial de Rumania, Parte I, no. 278 de 17 de mayo de 2013.

ANEXO

LISTA de los cultos reconocidos en Rumania	
Nº	Denominacion del culto
1.	LA IGLESIA ORTODOXA RUMANA
2.	OBISPADO DE LOS SERBIOS ORTODOXOS DE TIMISOARA
3.	LA IGLESIA CATÓLICA ROMANA
4.	LA IGLESIA RUMANA UNIDA CON ROMA, GRECO-CATÓLICA
5.	EL ARZOBISPADO DE LA IGLESIA ARMENIA
6.	LA IGLESIA CRISTIANA RUSA DE RITO ANTIGUO EN RUMANIA
7.	LA IGLESIA REFORMADA DE RUMANIA
8.	LA IGLESIA EVANGÉLICA LA C.A. EN RUMANIA
9.	LA IGLESIA EVANGÉLICA LUTHERANA EN RUMANIA
10.	LA IGLESIA UNITARIA EN TRANSILVANIA
11.	LA UNION DE LAS LAS IGLESIAS CRISTIANAS BAUTISTAS EN RUMANIA
12.	LA IGLESIA CRISTIANA DESPUÉS DEL EVANGELIO EN RUMANÍA – LA UNION DE LAS IGLESIAS CRISTIANAS TRAS EL EVANGELIO EN RUMANIA
13.	LA IGLESIA EVANGÉLICA RUMANA
14.	UNIÓN DE LA IGLESIA PENTECOSTAL APOSTÓLICA DE DIOS EN RUMANIA
15.	LA IGLESIA CRISTIANA ADVENTISTA DEL SÉPTIMO DÍA EN RUMANIA
16.	LA FEDERACIÓN DE COMUNIDADES JUDÍAS DE RUMANIA
17.	EL CULTO MUSULMAN
18.	LA ORGANIZACIÓN RELIGIOSA DE LOS TESTIGOS DE JEHOVÁ.

¿QUO VADIS EUROPA?

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RESUMEN:

El presente ejercicio tiene como propósito abordar puntual, más no exhaustivamente, los principales factores que están incidiendo en el marco de la Unión Europea (UE). Hoy en día resulta sumamente difícil entender la confusa y peligrosa actitud así como el proceder europeo ante la serie de acontecimientos y graves problemas que enfrenta: migración (intra y extra fronteras); las posibles consecuencias del "brexit"; el contagio de esta decisión británica en varios países miembros de la UE; la detonación de procesos independentistas o secesionistas; la actual geopolítica europea que incluye la denominada "rusofobia", situaciones todas que definitivamente incrementaría no sólo en forma crítica la crisis en la UE sino, más peligroso aún, de no solucionar debidamente las problemáticas señaladas, Europa tendería a convertirse en un foco de tensión que podría poner en peligro la paz y la seguridad internacionales.

ABSTRACT:

The purpose of this exercise is to address on a timely basis, but not exhaustively, the main factors that affect the framework of the European Union (EU). Today, it is extremely difficult to understand the Europeans' confusing and dangerous attitude as well as their approach towards the serious events and problems it faces: migration (from within and without); the possible consequences of "Brexit"; the contagion of this British decision in several member countries of the EU; the explosion of independence or secessionist movements; the current European geopolitics that includes the so-called "Russophobia", all situations that would definitely increase not only in a critical way the crisis in the EU but, even more dangerously, if the indicated problems are not properly solved, Europe would tend to become a source of tension that could endanger international peace and security.

PALABRAS CLAVE: *Brexit, Unión Europea, Independentismo*

KEYWORDS: *Brexit, European Union, Independentism*

1. - LA INTRODUCCIÓN

El título del presente ensayo no es fortuito, por el contrario, hoy en día resulta sumamente difícil entender la confusa y peligrosa actitud así como el proceder europeo ante la serie de acontecimientos y graves problemas que enfrenta, tales como la migración (intra y extra fronteras), las posibles consecuencias del «brexit» (salida definitiva de Gran Bretaña de la Unión Europea), y con ello la muy probable adhesión de varios países europeos a esta

posible decisión británica y, asimismo, que detone los procesos independentistas o secesionistas en varios Estados europeos, lo que definitivamente incrementaría –en forma crítica- la crisis en Europa.

Si a estos dos problemas se le agrega que en 2017 se llevarán a cabo elecciones en países clave (Francia, España, Grecia, Portugal e Irlanda) luego entonces las circunstancias nos lleva a pensar que en corto tiempo se podría transformar profundamente la fisonomía «democrática» e integracionista europea.

Si lo citado con anterioridad es preocupante, resulta entonces sumamente peligroso observar la «nueva» geopolítica que se está implantando en dicha zona, distinguiéndose por una creciente militarización impulsada por los Estados Unidos de América (EUA) ante la pasividad –con tonos de vasallaje- europea, teniendo como eje central la incongruente e inexplicable actitud «rusófoba» estadounidense y europea, tanto en lo individual como colectivamente a través de la Organización del Tratado del Atlántico Norte (OTAN), lo que lleva a considerar -con profunda seriedad- que Europa se está convirtiendo en una zona de extrema amenaza que pone en peligro la paz y la seguridad internacionales.

El presente ejercicio tiene como propósito abordar puntual, más no exhaustivamente, cada uno de los factores señalados con anterioridad.

2.- LA INTEGRACIÓN DESINTEGRADA DE EUROPA

Vale la pena recordar que la actual Unión Europea (UE) tiene su fundamento en las tres Comunidades Europeas preexistentes: La Comunidad Europea del Carbón y del Acero (CECA), la Comunidad Europea de la Energía Atómica (Euratom) y Comunidad Económica Europea (CEE), cuyo propósito fundamental fue y es el establecimiento de un mercado común y de un arancel externo similar entre sus miembros fundadores (Bélgica, Francia, Alemania, Italia, Luxemburgo y Holanda). No sería sino hasta noviembre de 1993 cuando entró en vigencia el Tratado de la Unión Europea (Tratado de Maastrich). Al respecto es preciso señalar que de los 28 países que actualmente integran la UE sólo 19 están en la eurozona, y también del total general 19 Estados son miembros de la Organización del Atlántico Norte (OTAN).

Los efectos específicos de éste subinciso, son tendientes a demostrar que la UE nació con visos de desintegración –varios analistas en la actualidad lo denominan «euroescepticismo» o simplemente «eurofobia»- y que Inglaterra siempre ha sido pilar de esta desintegración. En este proceso de integración desintegrada, es necesario hacer notar que Francia se opuso desde un principio al ingreso de Gran Bretaña, país que por si acaso no es signatario del Tratado de Schengen ni tampoco se adhirió a la Unión Monetaria. En otras palabras, los británicos nunca han aceptado el euro como moneda, por lo que el significado real de su participación en la UE siempre ha tenido tintes desintegradores. De la misma manera, los británicos desde siempre han impuesto barreras contra el libre paso de ciudadanos no pertenecientes a la UE y, en la actualidad, impone severas restricciones a la masiva migración de ciudadanos de otras nacionalidades, al contrario de la mayoría de los miembros de la UE.

Otros ejemplos de este proceso desintegracionista serían las actitudes adoptadas por Francia y Holanda países que en sendos referéndum rechazaron la Constitución Europea en 2005, sumándose Irlanda en 2008 y, por si fuera poco, Noruega, sin necesidad de formar parte de la UE, disfruta del Espacio Económico Europeo, lo que le da acceso al mercado único sin verse obligado a seguir las normativas en servicios financieros, agricultura o pesca ni tampoco aplicar la legislación comunitaria. Finalmente, no menos importante es el hecho del retiro de Francia de la OTAN en 1966.

En otro orden de ideas, pero siempre en el marco de la paulatina desintegración europea, deben tomarse en consideración dos elementos que podrían tender a crear un efecto dominó. Uno sería los procesos secesionistas que están emergiendo con fuerza particularmente en Escocia y en Cataluña y en otros Estados europeos pero, asimismo también influirán los procesos

electorales en países tales como Francia, España, Grecia, Portugal e Irlanda, en donde las encuestas primarias dan el triunfo a partidos u organizaciones que van de la extrema derecha (Francia) hasta la izquierda moderada (España) pero con claro apoyo a un secesionismo. En síntesis, el panorama, en este sentido no es nada tranquilizante. Todos estos elementos no hacen sino percibir con más claridad, la desintegración paulatina pero constante de la UE.

3.- EUROPA Y LA GEOPOLÍTICA

Con el propósito de darle mayor peso específico a las percepciones establecidas con anterioridad, sin duda es necesario enfocar puntualmente otro factor de suma importancia como lo son los «juegos estratégicos» (geopolíticos) que se están presentando en el escenario europeo.

Si se toma en cuenta lo señalado en el artículo «Accounting for inertia in geopolitical forecasting», «...la geopolítica, por lo menos desde el sentido que se practica (en Europa), no está determinada en un acercamiento que entienda a las naciones en sus interacciones ni tampoco como un sinónimo en sus relaciones internacionales. Es más, dicha geopolítica es tomada como una disciplina que no busca explicar la intersección entre el lugar y la gente o, más específicamente, entre el lugar y las naciones...». Luego entonces la geopolítica en esa zona geográfica parecería que se practica olvidando las bases esenciales de la geopolítica tradicional como lo serían las geográficas, históricas, políticas, económicas, sus sociedades, lo que llega al extremo de poner en tela de juicio la fiabilidad de su seguridad interna y, por ende, la seguridad regional y global.

Ahondando en la percepción del tema que nos ocupa, si también se toman en cuenta los criterios aparecidos en el artículo de George Friedman «What borders means to Europe», «...Europa sigue siendo un

continente que cuenta con 50 fronteras y sólo algunos países forman parte de la Unión Europea. En este sentido (continúa el autor), cabe recordar que los estadounidenses tienen como objetivo reducir el poder y el significado de esas fronteras que les permita interponer sus intereses nacionales sin preocuparse de la opinión de todos los Estados soberanos, ni menos los de sus respectivas poblaciones.. ».

Lo anterior lleva entonces a reflexionar que, por lo menos en principio, la Europa actual «...enfrenta tres problemas que seguirá teniendo con persistencia en un futuro mediano: a) Las corrientes migratorias provenientes del propio espacio europeo, las «nuevas» corrientes del mundo islámico y, con ello, el arribo de grupos terroristas (sin olvidar las personas y grupos de ciudadanos europeos afines al Estado Islámico); b) Las crisis económicas que distinguen a un gran número de países pertenecientes a la UE (iniciada en Grecia y aún sin haberla solventado con éxito), mismas que atentan contra la integridad política, económica y social de Europa...» y c), todo parecería indicar, según Friedman, «...que Europa en general y los países más poderosos de esa zona en lo particular, han olvidado que su integración sigue descansando el gran valor moral en que se basó su unión, a lo que necesariamente debe aunarse su historia común, valores idiomas y religión, así como una cultura común y, desde luego su autodeterminación (y soberanía) como Estados-Nación...». Desde mi punto de vista, todo lo anterior me lleva a considerar que Europa ha perdido su memoria histórica.

Otra reflexión propia sería que también Europa continúa cediendo ante un «nuevo» sistema geopolítico que está siendo implantado en base a intereses de poderosos grupos políticos internos en cada país; miembros incómodos (Polonia, Lituania, Letonia y Estonia) y, desde luego, en el aspecto global la intervención política, económica (a través de la troika FMI-BM-BIE) y militar estadounidense, siempre

acompañado de su inseparable aliado británico, los que insisten en romper la débil pero necesaria integración europea, con fines e intereses propios.

Por otra parte, desde mi particular opinión, existen factores históricos que están plenamente ligados a este desorden en Europa. El primero de ellos es que desde su percepción los EUA siempre han estado convencidos de haber sido los «libertadores de Europa» en la II Guerra Mundial, así como los «triunfadores» de la Guerra Fría, ante la disolución y casi extinción de la URSS y, de ahí, el principio de su hegemonía mundial pero, nunca se han puesto a razonar tres aspectos fundamentales: a) que históricamente Rusia fue base fundamental para derrotar a los nazis en la zona este europea y, respecto a quien ganó la Guerra Fría, los EUA y sus aliados sólo dejaron mal herida a Rusia pero éste país volvió a ser potencia regional con signos de potencia global; b) la debacle de la URSS tuvo connotaciones negativas y positivas; dentro de éstas resalta el hecho de que si bien 15 de sus ex repúblicas optaron por la separación, también dio lugar a que la URSS se «liberara» del apoyo político, económico y militar hacia esas repúblicas lo que le permitió reenfocar esos apoyos a urgentes programas internos como su maltrecha economía, así como a enfocar su proceder a restablecer su política interna y sus relaciones internacionales que al final, le han dado resultados alentadores a un país que de la noche a la mañana estuvo a punto de desaparecer; c) los países liberados de la influencia soviética fueron atraídos por las «bondades» de la democracia y el libre comercio practicados en Europa pero, la UE no estaba (y sigue sin estar) preparada para asumir tal compromiso; d) este espacio fue aprovechado por la OTAN (léase EUA), organización que en su afán de consolidar su separación del espacio soviético los convirtió en peones para sus intereses particulares con estos estados pero dichos países no han superado su estatus previo a su adhesión a la

UE y, por lo tanto, son considerados países rémoras.

La consecuencias más visibles de esta conjunción amorfa de decisiones euro-estadounidenses no es solo la pérdida de la soberanía europea por la intromisión estadounidense en su política interna y en sus relaciones internacionales sino, asimismo, la pérdida de los valores y la credibilidad europea en el contexto mundial, haciendo notar que desde entonces Europa tuvo que hacerse cargo política y económicamente de ellos, mientras que la OTAN asumió la «responsabilidad» de brindar «cooperación» y «ayuda» militar de un gran número de esos países. Desde mi perspectiva, esta situación solo sigue contribuyendo al proceso de desintegración europea. La pregunta obligada sería: cuáles fueron y son los beneficios reales tanto para los países que se liberaron del yugo soviético y para la UE?. Luego entonces el único beneficiado es y seguirá siendo el país hegemón mundial que, definitivamente, no sufre la pérdidas económicas y comerciales que atraviesa la UE, ni mucho menos las consecuencias que podría ocasionar –como muchos analistas así lo estiman– un conflicto militar que en ocasiones parece inminente en esa zona.

4.- BELICISMO ESTADOUNIDENSE VS INTEGRACIÓN EUROPEA

Ante esta serie de hechos objetivos (históricos y actuales) destacados con anterioridad, es necesario plantear otro argumento señalado en el artículo «Europa, el nuevo patio trasero de Estados Unidos», escrito por la periodista Vicky Peláez en el que hace notar que «...el inexorable proceso de globalización bajo la batuta norteamericana, ha puesto fin a la independencia europea en esta primera década del siglo XXI que estamos viviendo...». En este sentido, la autora dice: «...este proceso en Europa ya se vislumbró

hace más de 50 años. Al final de los años 1940 los estrategas estadounidenses junto con sus aliados británicos decidieron que su hegemonía sería más sólida si se lograba una Unión Europea para evitar desgastar sus recursos financieros, políticos y militares, esto, formando tratados, acuerdos y alianzas con los países individuales de la eurozona. Por supuesto el pretexto oficial era la contención de la Unión Soviética...».

Siempre de acuerdo con la periodista Peláez, «...actualmente Europa es una gran base militar norteamericana. La lectura del 2015 Base Structure Report del Departamento de Defensa estadounidense, que ofrece datos sobre las bases militares que posee Estados Unidos en su territorio y en el extranjero, confirma esta afirmación. Según el documento, actualmente el Pentágono tiene cerca de 300 bases militares en el viejo continente y de ellas la mitad están ubicadas en Alemania...». El artículo también menciona que: «...el principal propósito de la OTAN «era (es) mantener a Rusia afuera, Estados Unidos adentro y Alemania bajo control».

Con el propósito de darle el pragmatismo y objetividad a este ejercicio sin hacer a un lado el «beneficio de la duda» al artículo de la periodista Peláez, a continuación se insertan algunas cifras -de acuerdo a datos del Departamento de Defensa estadounidense al 30/sept/2015- del número de efectivos militares con los que los EUA cuentan en los siguientes países europeos: Alemania 36,691; Italia 11,799; Gran Bretaña 8,920; España 2,503 y Portugal 457. Se debe tomar en consideración que en los efectivos militares estadounidenses se encuentran personal del ejército, la armada, marines y de la fuerza aérea. De la misma manera, no están consideradas ni las bases «clandestinas» (Rumania cuenta entre 3 y 4) ni tampoco las establecidas en otros países europeos «afines» a la política militar estadounidense (principalmente en Polonia, Lituania, Letonia, Estonia y posiblemente Bulgaria).

En este contexto, existe también la necesidad de citar a otros países no europeos que tienen en su territorio un gran número de efectivos militares estadounidenses, como Japón (52,060); Corea del Sur (24,899); Barein (3,419), Turquía (1,581) y Catar (593). Si bien su accionar es alejado de la zona europea, debe tomarse en cuenta que o bien son miembros de la OTAN o acompañan a los EUA en su proceso militarista global, involucrando -directa e indirectamente- a varios países europeos en diferentes conflictos que se suscitan en las respectivas áreas geográficas de los países señalados. Como puede apreciarse, la actitud bélica estadounidense y la «condescendencia» europea, necesariamente tiende a provocar una escisión en su integración ya que un buen número de países europeos no están de acuerdo con «ayudar» o «solucionar» dichos conflictos; no obstante, participa ante las fuertes presiones norteamericanas. En síntesis, los EUA cuentan con más de 52 mil militares en Europa o, en otras palabras, con un tercio de sus fuerzas militares a nivel mundial.

En este tenor, vale asimismo la pena mencionar que en Alemania tienen su base el Estado Mayor del Comando Europeo (EUROCOM), el Comando Africano (AFRICOM), el Cuartel General del Ejército norteamericano en la región y el Cuartel General de la fuerza aérea estadounidense. Es o no ocupación?

5.- SANCIONES EUROPEAS CONTRA RUSIA

La relación entre la UE y Rusia -en lo general- ha estado encaminada hacia la cooperación pero Rusia siempre ha exigido reglas claras, sin posiciones dubitativas y, sobre todo, sin permitir la injerencia europea en su política interna. Las relaciones entre la UE y Rusia cambiaban -y lo seguirán haciendo- en la medida de las posiciones políticas que adoptaron y adoptarán los

diferentes regímenes en ciertos países pero, con los más poderosos (Alemania, Francia e Italia) existe una interdependencia que difícilmente pueda llegar a romperse totalmente.

Cabe asimismo recordar, en este sentido, las etapas «críticas» como la «guerra» (3 días) entre Rusia y Georgia y, últimamente, la posición rusa sobre el golpe de estado en Ucrania (impulsados ambos por los estadounidenses), que dio lugar a la anexión por la parte rusa de Crimea y que provocaron severas sanciones contra los rusos; sanciones que fueron impulsadas por los estadounidenses y su coro de «aliados» (particularmente Gran Bretaña, Polonia, Lituania, Letonia, Estonia), sanciones que por si acaso si bien es cierto que en principio y en la actualidad sigue afectando severamente la economía rusa, en corto tiempo se convirtió en un bumerán contra las economías europeas. Al respecto, históricamente la URSS antes y ahora la Federación de Rusia normalmente ha sido el «chivo expiatorio» estadounidense en Europa.

No está por demás señalar que los estadounidenses han estado aprovechando el ambiente de inseguridad que crearon en la UE y, precisamente en base a esta apreciación, iniciaron una nueva ola de expansión de la OTAN hacia los ex países socialistas de la región que está culminando con el «escudo antimisiles» sin que en realidad Europa se vea amenazada por Rusia. Si en cambio, provocó que los países involucrados en este escudo, como España, Polonia, Rumanía y hasta Bulgaria se hayan convertido en los principales objetivos militares de Rusia, al tiempo de estar orillando a los rusos a formar un eje militar con China, lo que definitivamente ni los EUA ni el mundo en general lo desean. En diferentes oportunidades Rusia ha conminado a los europeos a instaurar un sistema de seguridad colectiva, lo que no conviene a los intereses de los estadounidenses, toda vez que perderían su hegemonía en Europa.

6.- CONCLUSIONES

Como puede apreciarse, son muchos los factores que están incidiendo en el proceso integracionista europeo (o lo que queda de él) y, lamentablemente, desde mi perspectiva, la solución de los mismos no puede atacarse en forma conjunta ya que si bien todos ellos están de alguna manera interrelacionados y afectan directa e indirectamente tanto a países como a la propia UE, cada uno de ellos debe ser tratado de forma independiente. El primer obstáculo a superar es que los 28 miembros deben adoptar por consenso una solución, misma que hasta la fecha no ha sido posible lograrlo en varios temas de su agenda. La situación en el tema de las corrientes migratorias de las personas de zonas de conflicto en oriente medio y África es un claro ejemplo de desunión; inclusive existen críticas en el sentido de que la UE ni estuvo ni está preparada en esta materia.

En cuanto al éxito o fracaso del referéndum en Gran Bretaña de la UE, salga o se quede, el organismo de todos modos quedará debilitado; aún más, el Artículo 50 previsto para tal situación establece que el proceso llevaría más de 2 años pero, mientras, el país separatista seguiría siendo miembro, pero sin beneficiarse de los derechos que disfrutaban el resto. Realmente: a quién perjudicará la salida: a los británicos o a la UE en su conjunto?.

Desde mi punto de vista, no obstante que el escenario es bastante delicado, la UE tiene la oportunidad de reintegrarse si logra reagruparse. En este sentido considero que es el momento idóneo para que los 15 miembros iniciales (ahora sin Gran Bretaña) impongan nuevas reglas del juego a los restantes 13 de tal manera que no sigan siendo rémoras. La sobrevivencia de la UE debe estar por encima de los intereses nacionales compartidos, es decir, una real integración necesita de Estados con economías sólidas, democracia sostenible, certeza jurídica y seguridad social que sólo

una organización potente como la UE puede proporcionar a Estados con estas características. Es un gran riesgo, pero así son las necesidades inmediatas de la UE.

Respecto a la nueva geopolítica, al proceso militarista y a las sanciones contra Rusia, mi opinión es que es un «paquete» que la UE no podrá resolver mientras siga bajo el tutelaje económico, político y militar estadounidense. Lo alarmante es que si bien están haciendo mella las contra sanciones rusas y eso está llevando a un cada vez mayor número de miembros de la UE a distanciarse y hasta pedir (empresas y parlamentos en cada país) el cese de las mismas por estar causando estragos en sus respectivos sectores económicos y comerciales; en lo relativo a la geopolítica, la militarización y la rusofobia, son temas que están alejados de una solución europea. Lamentablemente los europeos han perdido la soberanía en política exterior así como en el uso soberano de sus fuerzas armadas gracias a la OTAN que, cada vez más, acerca a los europeos a un conflicto militar peor a la II Guerra Mundial.

Todo lo anterior tendería a solucionarse si los países europeos más poderosos obligaran a los miembros incómodos, especialmente a Polonia, Lituania, Letonia y Estonia a cumplir con lo establecido en el Tratado de Maastrich y no entrelazarlo con la OTAN. Desde luego que dichos países, apoyados por los estadounidenses, van a denunciar la «nueva» democracia que se les quiere imponer y, en el plano militar, siempre apoyados por los EUA, seguirán argumentando que Rusia tiene intenciones de invadirlos. En bien de la supervivencia de la UE, este tipo de falacias debe de ser detenido de una vez por todas ya que, en caso contrario, puede darse por sentado que la desintegración de la UE será más acelerada.

Como una reflexión final, solo me queda desear que la UE cree las bases para una política a largo plazo en la que necesariamente se inserte un proceso de distensión, igualdad y una real cooperación con intereses globales que beneficie a la

población en general y no a los Estados y empresas. De otra manera ¿Quo Vadis Europa?.

LAS RESPUESTAS DEL ESTADO AUSTRIACO A LOS RETOS QUE PLANTEAN LAS CUESTIONES POLÍTICAS DE INTEGRACIÓN DE LA ACTUAL CRISIS DE LOS REFUGIADOS¹

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RESUMEN:

La mayor crisis de refugiados desde el final de la Segunda Guerra Mundial amenaza a Europa y concretamente a Austria hasta límites insospechados no sólo en el ámbito político sino también económico. Tanto la Unión Europea como los Estados miembros se ven obligados a encontrar una solución adecuada para afrontar este problema. A comienzos de 2016 tuvo lugar en Austria una Cumbre de Refugiados („Refugee Summit“), que reuniría tanto a Estados federales, como a representantes de ciudades y comunidades del país. Austria intenta reducir las fuertes corrientes de refugiados y migratorias hacia Austria a través de reglas y procedimientos que sean tanto válidos como eficaces. Resulta imprescindible el reparto de refugiados entre todos los Estados miembros de la Unión Europea. Ello exige además volver la mirada a los fundamentos de la subsidiariedad, solidaridad y humanidad.

ABSTRACT:

The biggest refugee crisis since the end of the Second World War threatens Europe and specifically Austria, pushing it to beyond its limits not only in the political but also economic context. Both the European Union and the Member States are obliged to find an adequate solution to deal with this problem. At the beginning of 2016 a Refugee Summit took place in Austria, which brought together the provinces as well as representatives of cities and communities from across the country. Austria aimed to reduce the strong migrant and migratory flows to Austria by implementing rules and procedures that are both valid and effective. It is essential that refugees be distributed among all the Member States of the European Union. Doing so also implies revisiting the EU principles of subsidiarity, solidarity and humanity..

PALABRAS CLAVE: *Refugiados, Austria, UE*

KEYWORDS: *Refugee, Austria, EU*

¹ Traducción del artículo del alemán al español realizada por Cristina Hermida del Llano. Jean Monnet Chair y Profesora Titular de Filosofía del Derecho en la Universidad Rey Juan Carlos de Madrid.

Ser responsable requiere dar respuestas. Lo he explicado al final de mi clase magistral en la Universidad Rey Juan Carlos sobre «Migración e integración»; en lo que sigue, quiero incidir, desde una óptica austriaca, en los requerimientos inherentes a la responsabilidad política del momento presente.

En Austria, esta responsabilidad recae especialmente sobre dos departamentos del Gobierno Federal austriaco, a saber el *Ministerio de Europa, Integración y Exteriores*, así como el *Ministerio del Interior*; ambos ministerios están liderados por políticos demócrata-cristianos que han adoptado a principio de este año, dentro del contexto de sus convicciones y en un periodo de tiempo prudencial, unas decisiones que abren nuevos horizontes de cara a la estructura estatal federalista austriaca, que prevé también, además de la Federación y los distintos estados federales, las ciudades y los municipios.

En este contexto remito al congreso del Club del Partido Popular Austriaco, socio de coalición del Gobierno federal austriaco, el pasado 14 y 15 de enero de 2016, así como a la cumbre de asilo del 20 de enero de 2016, que han decidido la manera común de proceder del Estado federal, de las regiones, ciudades y municipios en el momento actual.

I.

Condicionada por las crisis en Oriente Próximo y Oriente Medio, Europa se enfrenta a un aumento enorme del número de refugiados. El último año, mucho más de un millón de personas acudieron en masa a Europa. Dentro de la Unión Europea las cargas de esta crisis de refugiados son distribuidas de forma extremadamente desigual. Alemania, Suecia y Austria llevan la carga principal. En Austria hay actualmente 9,4 solicitantes de asilo por cada 1.000 habitantes, en Suecia incluso 15,22 y en Alemania 5,24.

Mientras que en 2013 todavía unas 17.500 personas demandaron asilo, en 2014 fueron 28.000 y en 2015 unas 90.000, de las cuales

en cada caso, unas 25.000 procedían de Afganistán y Siria y unas 13.500 del Irak. Debe suponerse que la mitad de las personas que en 2015 llegaron a Austria recibirán protección internacional en la misma Austria. Actualmente si no somos capaces de limitarlo, en breve tendremos que contar con 120.000 personas más que irrumpirán en masa en Austria para presentar una solicitud de asilo.

Esta crisis de refugiados, la mayor en Europa desde el fin de la Segunda Guerra Mundial, amenaza superar las capacidades de Europa y Austria; tanto desde un punto de vista socio-político como también financiero. Así políticos de renombre ponen ya en tela de juicio la idea de una Europa sin fronteras que sin embargo se ha transformado en un atributo de la Unión Europea y es esencial para el funcionamiento de un mercado interior común; numerosos estados han vuelto a establecer controles fronterizos para poder controlar la crisis de refugiados.

La superación de esta crisis requiere de una acción a todos los niveles: en el plano internacional, a nivel de la Unión Europea y a nivel nacional. Por lo tanto, hay que resolver los conflictos en los países de origen, apoyar aquellos Estados en las regiones de conflicto, donde ya se han refugiado numerosas personas, con la acogida y el aprovisionamiento de los refugiados, proteger las fronteras exteriores de la Unión Europea con eficacia, establecer puntos de concentración en las fronteras exteriores de la Unión Europea, repartir a los refugiados entre todos los Estados miembro de la Unión Europea y crear un sistema de asilo unificado para la Unión Europea. Finalmente hay que asegurarse que las personas que no tienen derecho a una protección subsidiaria vuelvan a sus países de origen.

Hay que tomar todas estas medidas para resolver la crisis de una forma estable sin que ello suponga una carga excesiva para las ciudadanas y ciudadanos, así como evitando el riesgo de que la sociedad se fracture. Para esto, por una parte, es necesario que

reduzcamos de forma continuada y regulemos con eficacia la oleada de refugiados y la migración a Austria mediante el establecimiento regular de unos límites superiores basados en la capacidad a determinar por una comisión de expertos, la reducción del atractivo de Austria como país de destino, el aumento del número de repatriaciones de personas que no pueden permanecer en Austria y reforzando el procedimiento de asilo.

Por otra parte, la integración de las personas que están llegando a Austria supone uno de los aspectos más importantes en la resolución de la crisis de refugiados actual. Esto es un gran desafío para nuestro país. En términos del principio de subsidiariedad hacen falta medidas a todos los niveles que creen las condiciones sociales para la mejor integración de los refugiados, pero apelando también a su propia responsabilidad.

La integración no constituye una vía de dirección única. Esta tarea sólo la podemos realizar juntos.

II.

Austria tiene que reducir razonablemente y de forma estable la oleada de refugiados y la migración a Austria, así como regularla con eficacia. Este reto sólo se puede superar mediante esfuerzos comunes y en colaboración mutua y mediante un proceder en común del Estado federal, de las regiones, las ciudades y los municipios.

Todas las corporaciones territoriales tienen una responsabilidad especial en la resolución del desafío actual. Sólo de esta manera se puede asegurar la mejor resolución posible y solidaria de la situación actual.

El primer y objetivo más alto es garantizar una inspección de las entradas de forma ordenada. Por eso es necesaria una gestión de fronteras flexible y sin fisuras, adoptando todas las medidas necesarias para proteger las fronteras de la mejor forma posible. Esta gestión de fronteras debe de realizarse de forma coordinada con nuestros países

vecinos, así como con todos los demás estados afectados sin excepción.

Austria seguirá insistiendo con vehemencia en medidas a nivel europeo e internacional que lleven a una reducción de los demandantes de asilo en Austria. Estas incluyen

- Una estrecha colaboración europea en coordinación con Turquía.

- Medidas rápidas para la protección eficaz de la frontera exterior de la Unión Europea, junto con el registro de todas las personas recién llegadas.

- Instalación y establecimiento de puntos de concentración y el establecimiento de un mecanismo de reparto solidario eficiente en función de cuotas de participación proporcionales por parte de todos los estados miembros.

- Repatriación de personas no necesitadas de protección directamente en la frontera exterior de la Unión Europea.

- Cooperación y coordinación reforzada en la protección y el control de las fronteras del espacio *Schengen* con Alemania, Eslovenia, Croacia y todos los demás estados de la ruta de los Balcanes del oeste, o bien con Italia con respecto al enlace norte-sur, especialmente a través (de la autopista) del *Brenner*.

- Negociación de acuerdos de readmisión entre la UE y los estados miembros.

- Realización de una campaña informativa intensa en los países de origen y en los medios sociales para limitar los flujos migratorios ya a nivel local.

III.

Para no pedir a Austria algo por encima de lo exigible, es absolutamente

imprescindible reducir claramente la ola de refugiados hacia Austria. Con este fin, el Gobierno federal, las regiones, ciudades y municipios tienen la intención de admitir un número de refugiados que no supere, a título orientativo, el 1,5 por ciento del total de la población austriaca, todos ellos repartidos a lo largo de un periodo de cuatro años y de forma decreciente, de tal forma que en el año 2016 se trataría de la acogida de 37.500 refugiados, de 35.000 en el año 2017, de 30.000 en el año 2018 y de 25.000 en el año 2019.

Entre el Gobierno federal, las regiones, ciudades y municipios siguen teniendo lugar un intercambio de información amplio, para poder desarrollar las medidas y estrategias correspondientes. Por medio del Ministerio del Interior y en colaboración con el Ministerio del Exterior y el Ministro de Defensa hay que elaborar previsiones regulares sobre la evolución previsible de los flujos migratorios y del número de solicitudes.

Se está ampliando la devolución de solicitantes de asilo a los Estados de origen y terceros Estados seguros y fomentando el regreso voluntario. Con ese fin se está elaborando una estrategia sobre la base de un enfoque gubernamental global.

Dado que otros Estados miembros de la UE no elevan el nivel de sus sistemas de prestación, el Gobierno federal, las regiones, ciudades y municipios reivindican la adopción de las correspondientes medidas nacionales de cara a apoyar un mejor reparto de los flujos migratorios dentro de la Unión Europea, así como para asegurar las capacidades suficientes que permitan atender a aquellos que son realmente perseguidos.

Para eso son necesarias las siguientes medidas a nivel nacional:

1. Procedimientos de asilo más estrictos mediante limitación en el tiempo de estancia y una reunificación familiar más restrictiva.
2. Procedimiento rápido para solicitudes con pocas expectativas,

así como ampliación de la lista de estados de origen seguros.

3. Más prestaciones en especie en vez de prestaciones en metálico en lo que se refiere a las necesidades básicas.

4. La cesión diaria a las regiones, por parte de los Servicios de Prestaciones del Mercado de Trabajo, de aquella información que se requiere para la imposición, en su caso, de las sanciones previstas en el ámbito de las prestaciones mínimas. Las regiones reivindican una ejecución eficiente de las prestaciones mínimas orientadas a las diferentes necesidades, para centrarse más en los deberes de integración (idioma, integración social, valores, además competencias relevantes para el mercado de trabajo).

5. Tomar las medidas pertinentes en relación con los abusos de las prestaciones básicas.

Al mismo tiempo el Estado federal, las regiones, las ciudades y los municipios se declaran a favor de generar las suficientes capacidades dentro de su esfera de competencia respectiva. Está asegurado el correspondiente intercambio de información con los municipios afectados.

La situación de refugiados actual supone un desafío personal enorme para la policía austriaca. Junto a una serie de medidas esta situación provoca en la policía austriaca un perceptible rechazo a la acogida de refugiados.

IV.

El creciente número de personas con derecho de asilo y la integración de refugiados reconocidos supone un desafío creciente para la política de integración, así como para el aseguramiento de la cohesión social y el mantenimiento de la paz social en Austria. La integración es una competencia horizontal que hay que considerar en todos

los ámbitos de la vida. Conforme con el principio de la subsidiariedad hay que tomar medidas a todos los niveles (Estado federal, regiones, ciudades y municipios). De las personas con derecho de asilo es de esperar y también de exigir respeto a nuestra sociedad y escala de valores, la disposición para la cooperación en el proceso de integración y la responsabilidad personal.

Austria tiene que reducir razonablemente y de forma estable así como regular eficazmente el flujo migratorio y la migración a Austria para que podamos ayudar también en el futuro a quienes lo necesitan. La solución depende principalmente de medidas duraderas a nivel europeo e internacional y requiere también al mismo tiempo de una lucha decidida contra los extremismos y el terrorismo en aras de la defensa del propio país.

Todos estos requisitos y medidas muestran que en una época de múltiples crisis que tratan de superarse favoreciendo la pluralidad de las religiones y las diferentes situaciones culturales, sociales y económicas, es importante sentirse comprometido con los valores y la seguridad en la sociedad y el Estado y que, en aquella reciprocidad que parte del orden nuevo de una Europa en proceso de integración, se pueda vislumbrar también la comunidad internacional como una comunidad solidaria donde, además del Estado, se rijan también por principios de subsidiariedad las instituciones religioso-eclesiásticas, sociales y otras iniciativas de particulares solidarias en la misma medida en que lo hacen las instancias políticas por principios de mera humanidad.

Artículos

Miscelánea

REFLEXIONES SOBRE UNA LACRA SOCIAL: LA AGRESIVIDAD INFANTIL

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RESUMEN:

La agresividad infantil es un comportamiento frecuente hoy en día entre los niños y constituye un problema de primer orden en la convivencia social. Establecer su desarrollo en ciclos especiales y temporales es tarea pedagógica ineludible. Para ello se requiere individualizar cuáles son los factores y circunstancias que inciden en su origen, desarrollo y mantenimiento: familia, escuela, espacios de ocio y juego, espectáculos... De su influjo perturbador se deduce la necesidad de erradicar la agresividad infantil y convertir esta tarea en imperativo moral de padres y educadores.

ABSTRACT:

Child aggressiveness is a frequent behavior among children nowadays, and is a major problem in social coexistence. Establishing its development in special and temporary cycles is an unavoidable pedagogical task. Therefore it is necessary to identify the factors and circumstances that affect its origin, development and maintenance: family, school, hobbies, spectacles... Because of its disturbing influence, it is necessary to eradicate child aggressiveness, taking this task as a moral imperative for parents and educators.

PALABRAS CLAVE: *Agresividad, violencia, conducta, familia, escuela, disciplina, victimización, responsabilidad.*

KEYWORDS: *Aggressiveness, violence, behavior, family, school, discipline, victimization, responsibility*

1.- PORQUÉS Y EVOLUCIÓN DE UNA CONDUCTA LAMENTABLE.

Existe un hecho, que preocupa a toda la sociedad y, particularmente, a los especialistas de la conducta humana: la agresividad en el hombre. Tal fenómeno cobra una relevancia especial cuando aparece o tiene sus manifestaciones en la edad infantil. Nos referimos a una lacra social. Esta constituye hoy uno de los problemas más acuciantes que tiene planteados la pedagogía actual. Se multiplican las situaciones en las que se

encuentran implicados niños, que padecen las consecuencias de conductas agresivas y que desborda la familia y la escuela. Se trata de uno de esos problemas sociales endémicos, que permanece enquistado en los cambios y, por consiguiente, presenta serias dificultades para su tratamiento.

Estudios realizados por psicólogos y pedagogos nos muestran que, al menos, un 5% de los chicos presentan desórdenes de conducta relacionados con la agresividad. Tomando como dato comprobado que la conducta agresiva se manifiesta desde edades

muy tempranas y que, además, se caracteriza por su frecuencia y por afectar ampliamente a determinados comportamientos de la persona, nos atrevemos a formular una serie de interrogantes que están en el sentir de muchos: ¿Qué preguntas nos hacemos los adultos al contemplar conductas agresivas? ¿Dónde tiene presumiblemente sus orígenes la agresividad de los niños? ¿Cuáles son los factores que la condicionan o la causan?, ¿Qué consecuencias acarrea para quienes la ejercen o la soportan?, ¿Qué trastornos produce la agresividad en las aulas? ¿Quiénes y cómo deben aportar soluciones a las conductas agresivas? etc...

De partida se precisa anotar que la agresividad guarda una estrecha relación con los procesos y el estadio del desarrollo evolutivo en que se encuentra el individuo. Existen comportamientos agresivos propios de unas circunstancias especiales, de momentos o edades determinadas, de situaciones peculiares que, una vez que las mismas son superadas, desaparecen las actitudes agresivas, o incluso, si persiste el comportamiento agresivo, este sería inapropiado para el nivel evolutivo del niño. Por ejemplo, las rabietas entran dentro de los parámetros de la normalidad hacia los tres años de edad del niño y, por ello, en este momento no deberían preocupar a los padres, pero se convertirían en objeto de estudio y tratamiento si persistiesen y trascendiesen los seis años.

Es difícil fijar con precisión el momento en el que aparece la agresividad en el niño; sin embargo sabemos que éste reacciona desde muy temprano contra toda frustración, restricción o irritación. Las primeras manifestaciones agresivas responden a situaciones azarosas e imprevistas, pero a medida que crece el niño, aquellas se van centrando en objetivos concretos y tienen como finalidad la hostilidad y la venganza.

Un comportamiento frecuente del niño recibe el nombre de “rabieta”. Esta constituye una de las manifestaciones más claras de excitación en los niños. La rabieta tiene por objeto un hecho concreto: la frustración de un deseo, la prohibición de una acción, un capricho negado... Las rabietas están orientadas en cada edad a cumplir unos objetivos diferentes. En los niños menores de un año responden generalmente a la ausencia de cuidados o a la necesidad de ver satisfechas una serie de necesidades. Es un modo de llamar la atención y su finalidad es lograr cuidados. A los dos años, a medida que la personalidad del niño aumenta, las rabietas surgen como consecuencia de un conflicto con la autoridad. El niño se ve obligado en numerosas ocasiones a cumplir órdenes que no siempre coinciden con sus gustos y apetencias, lo cual provoca el choque con superiores o con iguales. Se trata de incrementar el dominio o el poder frente a potenciales rivales o colegas.

A medida que el niño avanza en edad, entre los tres y cuatro años, momento en el que la autoafirmación de la propia identidad se incrementa, las manifestaciones agresivas se recrudecen y constituyen una forma de interacción prácticamente habitual. Los episodios de rabieta adquieren mayor expresión física, ya que suelen ir acompañadas de actuaciones y gestos exagerados como pataletas, lloros desesperados, golpes, agresiones... A partir de los cuatro años, los deseos frustrados focalizan la conducta agresiva. Ésta se produce cuando el niño choca con algún obstáculo que le impide satisfacer sus deseos y tiene un foco concreto: se centra en la persona u objeto que el niño percibe como causante de su frustración.

Es de tener en cuenta que la espontaneidad es el modo más común de comportamiento de los niños, al vivir un mundo liberado de coacciones por la

protección paterna o familiar. En situaciones excesivamente proteccionistas, la autoafirmación se ve acompañada de actitudes egoístas. No hay que perder de vista que los niños al actuar con espontaneidad, remiten sus actos al propio ego, resultándoles difícil comportarse altruistamente, ser generosos, hacer renunciaciones y sacrificarse por los demás. Pasar del espacio familiar polarizado en los intereses particulares al comportamiento socializado exige tiempo y aprendizaje. Hasta tal punto la polarización en el yo predomina en edades tempranas que la interacción social en estas edades se caracteriza por frecuentes brotes de conflictividad y agresividad.

La agresividad entre niños y adolescentes adquiere rasgos diferenciales cuando acontece entre sexos diferentes. Al decir de los expertos, a partir de los dos años, los varones son más agresivos que las mujeres. El varón se muestra más violento y usa la fuerza. Esto se atribuye a que los niños suelen ver con más frecuencia programas con violencia, como guerras, peleas, aventuras de riesgo... La agresividad, por otra parte, se expresa de formas y comportamientos diferentes. Los niños la canalizan generalmente mediante ataques físicos mientras que las niñas la enfocan desde el punto de vista verbal. También la duración de la agresividad es otro de los aspectos que marca distancias entre ambos sexos: frecuentemente perdura más en los varones. Tal vez la explicación a este hecho se encuentre en factores culturales y con los roles que unos y otras asumen. Tradicionalmente se ha sido más condescendiente con la agresividad masculina porque se la consideraba un rasgo ligado a la virilidad, mientras que a la mujer se la ha educado para ejercer la sumisión.

Se suelen describir las peculiaridades de las diferentes fases evolutivas de la agresividad distinguiendo etapas según la edad: de los cuatro a los siete años, el niño la

expresa a base de enfados, celos, la orienta contra los padres o familiares y su finalidad es exteriorizar el conflicto amor-odio que genera la internalización de las normas sociales. La agresividad se vincula a la autoafirmación de sí mismo frente a mandatos, prohibiciones o rechazos. Con frecuencia el objeto se desplaza hacia un hermano o amigo, los juegos toman un cariz agresivo y la convivencia familiar se deteriora. En este momento tendría lugar el paso de la agresividad que aspira vencer a la agresividad hostil en la que subyace el deseo de hacer daño al otro.

Entre los seis y catorce años se abre un mayor abanico en cuanto a las formas de agresión: enfado, disgusto, envidia, fastidio, celos, crítica, empleo de la fuerza, estrategias disuasivas... etc. A medida que la edad avanza, la agresión se reviste de apariencias de racionalidad tendentes a presentar los componentes emocionales bajo argumentaciones justificadoras. Es periodo, por otra parte, en el que el objeto de las agresiones también se amplía de los padres a los hermanos, e incluso al propio sujeto. El fin perseguido es competir, defender la justicia, dominar los sentimientos... Simultáneamente ganan terreno el autocontrol y la racionalidad. El incremento de autoestima a causa de la mayor maduración del "yo" se traduce en mayores diferencias entre sexos a la hora de actuar en enfados, críticas o estrategias de daño y venganza. En la adolescencia asistimos a la configuración de la agresividad que conformará la edad adulta del individuo. El objeto se centra en uno mismo y la finalidad es mantener el equilibrio emocional sobre todo en relación con la autoestima.

Las manifestaciones más exacerbadas de la agresividad se van desvaneciendo a medida que el niño avanza en el proceso de socialización ya que se desarrollan mecanismos de control interno eficaces que ayudan al niño a resolver los conflictos desde

el punto de vista social. La convivencia, los vínculos familiares y las herencias culturales, costumbres o vínculos familiares generan componentes morales en el niño, que remarcan valores como la justicia, la solidaridad, la generosidad, etc. que contrapesan los sentimientos y tendencias agresivos. Ésta es una consecuencia de la asunción e incorporación de reglas aprendidas en su relación con los demás, gracias a las cuales nace en su conciencia la idea de respeto a sus congéneres y la noción de propiedad ajena.

2.- PREDISPOSICIÓN A LA AGRESIVIDAD.

En época en la que la antropología viene acentuando la relevancia del componente somático y biológico de la persona en sus opciones y decisiones parece pertinente preguntarse si se puede hablar de una cierta predisposición a la agresividad en algunas personas, o lo que es lo mismo, ¿existen personalidades agresivas? Simplificando mucho y vista la pregunta así parece que estamos defendiendo un determinismo en este tema. Lo cual se haría eco de posiciones defendidas por los neurocientíficos, que encuentran en nuestro cerebro estructuras estables que fijan de antemano nuestros comportamientos, reduciendo el ancho campo que la tradición asignaba a la libertad.

Lo que sí parece cierto es que hay un determinado grado de estabilidad en la tendencia a expresarse con agresividad en algunas personas, independientemente del lugar y del momento en el que se encuentra el sujeto. Así, encontramos individuos que muestran comportamientos agresivos en algunas situaciones y que manifiestan una clara inclinación a mantener esta conducta y a ser persistentes en sus respuestas. Basta a este propósito presenciar un debate político o asistir a un partido de fútbol. Lo que parecía ocasional e infrecuente se transforma en

costumbre y hábito estable. Lo cual transferido al problema que nos ocupa, la predisposición orgánica a la agresión, lo enunciaríamos así: mostrar manifestaciones agresivas acontece en un momento determinado y de forma casual, o, por el contrario, la agresividad es un ingrediente esencial y estable en la conducta de un individuo. Con otras palabras: ¿una persona, niño o adulto, es agresivo por constitución natural o se torna agresivo porque quiere y cuando quiere? Tener ideas claras al respecto es condición indispensable para un tratamiento adecuado de los episodios agresivos.

Se suele aceptar que si una persona utiliza la agresión como una forma estable y persistente para dar respuesta a situaciones adversas de la vida diaria, tenemos elementos de juicio para decir que estamos ante personalidades agresivas. Esta agresividad puede ofrecer una rica variedad en cuanto a sus formas de expresión. Las investigaciones realizadas con niños han revelado que aquéllos que tienen propensión a la violencia, cuando están activados emocionalmente, no propinan los ataques a los otros de una única manera sino que presentan diversas formas unidas por un denominador común: el deseo de causar dolor al otro. Y así presenciamos peleas, insultos, ridiculizaciones, pegar con la mano, dar patadas, romper enseres ajenos, injuriar, etc.

Desde el punto de vista de la integración social del niño, sea en el reducido espacio familiar sea en el más amplio mundo escolar, la agresividad suele ir ligada a otras conductas antisociales que no tienen nada que ver con la edad o el entorno. Muchas de las personas con propensión a la agresividad presentan conductas antisociales en otros aspectos como el espacio laboral, los eventos deportivos, el ocio, el transporte público, etc., violencia sistemática que también practican en diversos lugares como el hogar, la escuela, la calle, etc.

Otro aspecto importante de la conducta agresiva es su continuidad longitudinal, como han puesto de manifiesto investigadores en diferentes estudios que miden y comparan la agresividad en distintos momentos de la vida de un sujeto. Olweus realizó la primera muestra cuando los individuos con los que trabajó tenían entre 2 y 8 años; repitió la misma con intervalos de tiempo de 6 meses y 21 años. Al final, encontró una relación elevada entre los niveles de agresividad de los sujetos que fueron diagnosticados como agresivos en el primer momento y los reflejados en las mediciones posteriores. De donde se deduce que los niños que han sido agresivos en su infancia tienen una mayor probabilidad de presentar conductas antisociales a lo largo de su vida adulta.

3.- FACTORES ESTIMULANTES DE LA AGRESIVIDAD INFANTIL.

Efectuar un recuento de situaciones y factores que estimulan la agresividad resultaría tarea prolija dados los análisis y el anecdotario de pedagogos, psicólogos y sociólogos que han tratado estos temas. Merece la pena, sin embargo, efectuar un recuento, sin pretensiones de agotar la materia, porque son muchos los factores que contribuyen a que se desarrolle la agresividad en los niños. Tanto más cuanto que estar apercebido de los estimulantes de la agresividad permite encauzar estrategias de erradicación de los mismos y de obviar situaciones de peligro. A continuación haremos desfilar un elenco, a los que se refieren los tratadistas del tema, y que inciden, en nuestra opinión, de una manera más directa en la aparición del hecho agresivo.

3.1.- Factores biológico-somáticos.

Ya hemos hecho alusión a la relevancia que la antropología contemporánea concede al cuerpo y a la biología del organismo humano. Que tal condición incida en las conductas

agresivas parece opinión razonable. Se opina, incluso, que causas biológicas como el periodo del embarazo, el uso del alcohol o de otras drogas inciden en el posterior carácter del niño. Numerosos autores piensan, aportando pruebas, que existen unas predisposiciones biológicas hacia las conductas inadaptadas; para ellos la agresividad brota de manera endógena con leves influencias del ambiente y de los estímulos sociales. De ahí que gran parte de los seres humanos exterioricen comportamientos agresivos lo cual lleva a pensar que se trata de un instinto innato. Tanto más cuanto que el fenómeno de la violencia se encuentra en todas culturas. Lo cual sugiere la sospecha de su origen innato.

Habida cuenta de los trabajos aludidos, podemos concluir que cada individuo desarrolla tempranamente un nivel innato de agresividad y que ésta permanece bastante estable a pesar de las variables de tiempo, situaciones o circunstancias. Este hecho nos induce a pensar que la agresividad está constitucionalmente, aunque en cierto grado, determinada y forma parte de los comportamientos humanos.

3.2.- Factores socio contextuales.

Muy opuesta es la apreciación de quienes acentúan el influjo de factores exógenos. La agresividad estaría condicionada en gran medida por el influjo que ejerce el contexto en el que se mueve el niño. La sociedad constriñe a la persona configurando su conducta, como es bien sabido que establece la sociología de Durkheim. El medio rural o el contexto urbano determinan espacios y tiempos en los que las relaciones de convivencia se concretan en afectos y desafectos.

Las consecuencias de la conducta agresiva no se hacen esperar. Destaca, entre ellas, el rechazo que sufre el agresor por parte del grupo de referencia, especialmente por los adultos y los efectos que revierten

sobre el propio sujeto de conducta inadaptada. Al contraponerse agresores y agredidos se dibuja una espiral que se abre con esta premisa: la conducta agresiva es la consecuencia del rechazo que experimenta un individuo por parte de su grupo social que lo conduce irremisiblemente al aislamiento. Dicho rechazo y aislamiento privan al niño de experiencias elementales de interacción social, imprescindibles para el desarrollo de su carácter.

Son numerosos los autores que han centrado su atención en estudiar estos efectos y han concluido que cuando un niño agresivo es rechazado, crece inevitablemente con la convicción de que el mundo es hostil y está enfrentado a él. Naturalmente, este sentimiento de rechazo y hostilidad le relega a un estatus negativo dentro del grupo al tiempo que le obliga a dar un giro en sus relaciones sociales y a recuperar su autoestima buscando el apoyo y respaldo social de aquéllos con los que se siente compenetrado. De ahí que el entramado de relaciones en los niños desadaptados esté tejido normalmente por niños que comparten sus estatus de rechazo. Es así como se forman grupúsculos desestabilizadores en el seno de un colectivo en el que tienen cabida estas subculturas, dotadas de una red relacional muy jerarquizada y fuertemente cohesionada, que consolidan y perpetúan el círculo de hostilidad.

Los dos factores ya aludidos: los reiterativos fracasos en sus relaciones sociales y la percepción hostil que tienen del mundo que les rodea, nos lleva a sacar una conclusión: la autoestima de los alumnos agresivos es baja.

3.3.- *La familia.*

El contexto o entorno primario y más cercano se concreta en la familia. Se sabe que la vida familiar y la conducta de los padres actúan como caldo de cultivo de la agresividad. Es la etapa de la vida del niño

que deja mayor impronta en el individuo. Abundan los estudios que se han realizado sobre este tema con la intención de perfilar los matices de las relaciones familiares y conocer el alcance de su implicación en la conducta agresiva infantil. El modelo de vida familia deja impronta permanente en sus miembros. En la familia pueden existir desavenencias, discusiones, maltratos, reyertas... Los niños reproducen lo que ven y viven. Las conductas antisociales que se generan en el seno de una familia constituyen el embrión y el entrenamiento de la conducta antisocial que manifiestan los adolescentes en otros ambientes, como ocurre en la escuela. Este proceso se inicia con la imitación de modelos coercitivos en la familia y, posteriormente, pasa a ser la tónica general en las relaciones interpersonales al margen del lugar y de los sujetos que entren en escena.

Partiendo de la base de que la parcela de entorno más próxima y significativa para el niño en los primeros años de su vida y en la que realmente se mueve al principio de ella es la familia, y concretamente sus padres, podemos decir que las conductas agresivas se generan en el núcleo familiar y que los padres enseñan a sus hijos a ser agresivos, aunque sea de un modo inconsciente. No podemos ignorar que los modelos de conducta agresiva que ofrecen los padres y adultos, los refuerzos que brindan a la conducta agresiva de sus hijos a través de actitudes cargadas de violencia, tensiones familiares motivadas por el estrés, la ansiedad, problemas afectivos y emocionales, situaciones precarias desde el punto de vista económico, etc., allanan primero y abonan después el camino del aprendizaje de conductas agresivas e incitan al niño, en múltiples ocasiones, al comportamiento agresivo y a la victimización.

Entre las variables que concurren en el desarrollo de la agresividad infantil en el seno de una familia se encuentran: la carencia de

estructuras que sirvan de marco de referencia y marquen, por una parte, pautas definidas y claras de lo que se espera de cada uno de los miembros de la familia y, por otra, otorguen cohesión al grupo, la incoherencia en el comportamiento de los adultos censurando, aprobando o ignorando un mismo hecho, condicionando su calificación moral exclusivamente al estado anímico del momento, la desunión y la falta de apoyo mutuo de los cónyuges a la hora de dar normas y de valorar comportamientos de los hijos, el empleo de la violencia en la resolución de conflictos de pareja, el aislamiento de la familia, la ausencia de manifestaciones afectuosas, el recurso a los castigos corporales, la falta de control por parte de los padres y la historia familiar caracterizada por conductas antisociales. Estas situaciones familiares ejercen una poderosa influencia en la formación de valores morales, roles y marcan la pauta de las relaciones sociales del niño cuando se incorpore a otros ámbitos de socialización y trate de integrarse en otros contextos como son la escuela, grupos de amigos, etc.

3.4.- *El ámbito escolar.*

El ámbito escolar, donde el niño transcurre una gran parte de su tiempo, deja un poso poderoso en él y es el caldo de cultivo donde se alimentan las conductas antisociales. Los comportamientos agresivos vividos en la familia se repiten en la escuela. Hoy en día proliferan en el aula los episodios denominados *bullying* o *acoso escolar*. Éste se desarrolla siguiendo un proceso que recorre tres estadios: en un primer momento, el niño tiene conductas antisociales, como desobediencias, peleas, algún hurto, mentiras evasivas etc. como consecuencia es excluido del grupo de iguales y acumula rechazos y fracasos. Una vez iniciado este proceso, consumarlo simplemente es cuestión de tiempo pues las probabilidades de acceder a los distintos estadios de la conducta agresiva aumentan considerablemente.

Las conductas antisociales conllevan un deterioro progresivo en dos áreas: por una parte en los problemas de relación entre iguales y, por otra, en las deficiencias escolares. La violencia perturba las actividades pedagógicas, generando desorden e indisciplina y perjudica al correcto funcionamiento de la labor docente, desviando la docencia hacia problemas de indisciplina. El rendimiento escolar se resiente en un clima de violencia. Los individuos que comienzan pronto la práctica de estas conductas, suelen convertirse en agresores crónicos.

Una figura escolar de no escasa incidencia es el apodado “matón de aula”. Su frecuencia y versatilidad perturba la paz y concentración exigibles en la productividad académica. El etiquetado como el “matón” del aula ataca e intimida a los compañeros con premeditación calculada y llevando a cabo acciones coercitivas. Generalmente, el “matón” no necesita la provocación de la víctima, sino que tortura y atormenta a un compañero reiteradamente y lo hace de una manera fría y calculada. Se sirve de este comportamiento para demostrar su fortaleza, su capacidad de dominio, control y su superioridad frente a compañeros que por el esfuerzo, la disciplina o las propias dotes personales tienden a sobresalir y obtienen éxitos y reconocimiento.

La escuela aparece como espacio idóneo para ensayar métodos de corrección de la agresividad. Los docentes son siempre referentes del orden, del trabajo y de la aplicación. Desde el extremo de quienes, restando relevancia al problema, propugnen la tolerancia o el desinterés, hasta quienes ejerzan el celo o la responsabilidad, existen estrategias de prevención de conductas y solución de conflictos: el diálogo con los padres es una de ellas, también la conversación con el niño, o medidas disciplinarias si el caso las requiere. El intercambio informativo verbaliza los

contextos y situaciones del episodio agresivo. Aconsejables son, en todo caso, la creación de espacios de reflexión en los que los docentes adquieran conciencia del problema y de posibles métodos de prevención. Estos programas escolares de control de la violencia se orientan a concienciar a los educadores, a incrementar su responsabilidad y a desarrollar competencias en el fortalecimiento de la disciplina, potenciando valores como el respeto, la tolerancia o la paz.

3.5.- *Los medios de comunicación y espectáculos.*

La presencia frecuente de los medios de comunicación en la vida actual: televisión, cine, Internet,... acuña modales y formas de conducta en todas las edades, y sobre todo, en aquellas más influenciadas como son las de los niños. Se trata de la exposición repetida a la violencia en los medios de comunicación, como han puesto de manifiesto estudios que nos hablan de porcentajes muy elevados de niños que presencian películas violentas. El análisis de la investigación ha llevado a sus autores a establecer una relación directa entre las películas violentas visionadas y el crecimiento significativo del nivel de agresión de los individuos, siempre que exista previamente una predisposición fuerte a la agresión. Esto tiene una explicación basada en los componentes cognitivos, es decir: aquellas personas expuestas a escenas violentas sólo tendrán pensamiento e inclinaciones agresivas si entienden que los protagonistas tratan de herir o matar intencionadamente a otro, y por lo tanto, que hay alguna relación entre las acciones que ven y la agresión.

3.6.- *Factores cognitivos y reflexivos.*

Al ajustarse la agresividad a estadios evolutivos y coincidir en este aspecto con la racionalidad y la capacidad reflexiva del niño o adolescente, algunos autores defienden que los individuos agresivos sólo tienen respuestas agresivas a las situaciones adversas

que se les presentan y afirman que la conducta agresiva, como forma de interactuar con el medio, es el resultado de una inadaptación originada por problemas en la codificación de la información que obstaculiza la elaboración de respuestas alternativas. A pesar de que en nuestros días se ha vinculado estrechamente la razón y la emotividad y se ha exaltado la *inteligencia emocional* a instancia directora de elecciones y decisiones, la tradición filosófica siempre enfatizó el papel orientador de la razón en las conductas. No otra cosa significaba apelar a la aristotélica *prudencia* como guía de las conductas. En tal perspectiva se observa que el niño agresivo es menos reflexivo que los niños bien adaptados. Incluso, los jóvenes agresivos presentan serias dificultades para la reflexión sobre sus actos. Estas deficiencias socio-cognitivas inciden de tal manera en las conductas agresivas que pueden mantenerlas e, incluso, aumentarlas.

3.7.- *El espíritu de la colmena humana.*

La emigración del campo a la ciudad ha traído como consecuencia que una gran parte de la población viva confinada en las grandes urbes actuando de manera anónima y despersonalizada. Estas prisas le restan tiempo para reflexionar y las conductas se ajustan a urgencias inmediatas cargadas de improvisación, prisa y otros componentes irracionales. La vida familiar desplaza sus esfuerzos del ámbito de la educación al ámbito del bienestar, del cuidado de los hijos al trabajo remunerado.

Familias que, en su día, buscaron una honorable salida a una situación de miseria vivida en el medio rural, se han encontrado con un estilo de vida que raya con la esclavitud. Por otra parte, la carestía de la vida de la ciudad les exige realizar más de un trabajo remunerado para poder sobrevivir, que además, obliga a sacrificar los escasos ratos de ocio, de comunicación y de contacto personal. En tal situación los procesos de socialización y la convivencia se deterioran.

La frialdad, la incomunicación y la superficialidad en las relaciones humanas campean en el anonimato urbano. Las sugestivas diversiones que atraen a los adolescentes presentándoles la cara fácil y cómoda de la vida y ocultando la cruda realidad, contribuyen a que cuando los individuos despiertan del sueño que los llevó a la ciudad, sufran una gran frustración que alimenta la agresividad. En la oferta que nos hace la ciudad: tráfico, prisas, escasez de tiempo, aglomeraciones, diversiones, falta de calidad de vida,... se generan los individuos más agresivos y cuando activan su energía agresiva, pueden acabar con todo porque pierden su dominio y su capacidad de interacción con los demás.

A ello contribuyen los hacinamientos de población. Una vivienda saludable no está al alcance de todas las economías. Muchas veces, padres e hijos se han visto obligados a compartir las mismas habitaciones o, incluso, a vivir como realquilados de otra familia. En ambas ocasiones surgen conflictos.

En el primer caso, los hijos presenciarán relaciones paternas con el consiguiente perjuicio para su formación; en el segundo, surgirán discusiones, envidias, enfrentamientos entre las familias y lo único que les unirá será el odio mutuo. Además, los grandes bloques con viviendas de tipo social no disponen de espacios verdes ni de zonas de juegos para los niños. Consecuencia lógica es que éstos viven confinados en sus reducidas casas estrechándose el cerco de sus relaciones a las que puedan mantener exclusivamente con sus hermanos.

Si una vivienda digna no existe, el niño termina eligiendo otra alternativa: la calle. En ella transcurren sus horas libres y ella será su escuela. Allí están expuestos a todos los peligros y ejemplos que le ofrece la ciudad. Escaparán a ella siempre que puedan porque allí encuentran la libertad. A los arrojados a la calle sólo les resta formar grupos con otros niños de su misma condición y constituir las

pandillas de chicos que pululan por los barrios con el deseo de tener nuevas experiencias, sentir nuevas sensaciones y satisfacer sus caprichos. Muchas de estas pandillas usan una indumentaria característica que los distingue de otros grupos semejantes, utilizan pinturas especiales, tatuajes, etc.

3.8.- Rasgos de la personalidad.

Algunos autores han fijado las características de personalidad que suelen estar asociadas a las conductas agresivas de los niños. Rasgos temperamentales que modulan las conductas. Los alumnos agresores tienen una clara inclinación hacia el psicoticismo que se concreta en gusto por burlarse de los demás, ponerles en ridículo, despreocuparse de ellos, e incluso llegan a mostrar crueldad e insensibilidad insólitas ante los problemas ajenos. Su gran extraversión delata un temperamento expansivo e impulsivo que se traduce en el gusto por las relaciones sociales, la huida de la soledad, la tendencia al cambio, al movimiento y a hacer constantemente cosas. Pero al mismo tiempo, su inclinación a la agresividad es su expresión de interacción social, en la que se enfadan con frecuencia y sus sentimientos son muy variables, buscan el riesgo y sus conductas son volubles. Lo anteriormente expuesto pone de relieve que estos niños padecen “trastornos de conducta” que les inducen a participar en todos los conflictos y a tener problemas tanto con sus iguales como con los adultos.

Factores como la progresiva secularización de la cultura, la confusión moral reinante y el trastocar las normas morales contribuyen a que se tambaleen y se cuestionen los valores asociados a la ética, a la religión o a herencias de la tradición de cualquier pueblo. Está expandiéndose una conciencia liberada de normas y matizada por una carencia absoluta del sentimiento de culpabilidad. Si, por casualidad, uno se siente culpable, inmediatamente busca a otro sobre el que recaiga el peso de sus culpas. De esta forma se va perdiendo progresivamente la

dimensión humana y religiosa al mismo tiempo que se fortalecen la ayuda y la colaboración en todos los niveles.

3.9.- *Prisas, agotamiento, estrés.*

El estilo de vida urbano ha generado las formas de vida del “hombre de asfalto”. La consecución de las necesidades superfluas que “se ha creado” el hombre de nuestro siglo exige unos ingresos económicos que sólo se pueden obtener teniendo un pluriempleo. Esta situación produce un agotamiento físico y psíquico en la persona y repercute en sus relaciones familiares e interpersonales que se tornan crispadas, tensas, distantes y que, a veces, cristalizan en un ensimismamiento y una abstracción que desembocan en un individualismo dispuesto a acabar con una relación sana, equilibrada, distendida y afectuosa. Los problemas familiares son suplantados por los laborales y la esposa y los hijos tendrán que prescindir de la compañía y del respaldo personal y moral de su marido y de su padre respectivamente. Los diversos trabajos remunerados que algunas personas se ven obligadas a realizar para ver logradas sus aspiraciones acaban minando sus fuerzas corporales y mentales, algo que se traduce en unas relaciones familiares frías, tensas y cargadas de agresividad. Así, el padre que llega a casa cansado de su jornada laboral, no soporta que los niños jueguen porque le “molestan”, ni entiende que quieran hablar con él y contarle sus vivencias a lo largo del día. Él les manda callar con malas formas, les aparta de su lado limitándose a ver desfilar un elenco de programas insulsos y vacíos de contenido que le ofrece la televisión. Ésta no le incordia, la esposa y los hijos sí, porque reivindican diálogo y afecto. A cambio, dispone de una serie de comodidades, todo un cúmulo de objetos almacenados en un bazar, todo el bienestar material que se puede conseguir en detrimento de una relación familiar sana, sencilla, afable, equilibrada y amorosa.

Algo parecido sucede al padre de familia en sus relaciones con los vecinos con los que ya no se establecerán lazos afables y amistosos sino que se convertirá en una persona huraña, introvertida y asocial. El cansancio prolongado se adueñará de su sistema nervioso y la irritabilidad estará a flor de piel, dispuesta a dispararse con la mínima intervención de los que le rodean.

3.10.- *Fanatismo e histerias colectivas.*

Lo que antaño acompañaba al fervor religioso o la histeria colectiva hoy ha pasado a ser manifestación que acompaña al partido de fútbol, a las concentraciones musicales en torno a un ídolo o a la manifestación política. La agresividad brota aquí en campo abonado por emotividades descontroladas. Una manifestación política o religiosa que defiende con apasionamiento unas ideas, creencias u opiniones está abocada a la intolerancia e intransigencia. En este caso, los individuos, que abogan por una postura concreta con tenacidad, se cierran ante ella y olvidan las formas de pensar de otros grupos. Es lo que llamamos fanatismo. El fanatismo no conoce el diálogo ni la tolerancia, sólo trata de imponerse por la fuerza, haciendo oídos sordos a la multiplicidad de culturas, confesiones e ideologías que constituyen el entramado de la sociedad. Ignora la “sociedad plural” y logra el empobrecimiento de ésta imponiendo dictatorialmente una única ideología. Consecuencia inmediata es el rechazo que esta actitud provoca en los individuos y el desarrollo del germen de agresividad que todo hombre alberga.

Son noticias de prensa cada día episodios de histeria colectiva en la que participan los niños y en los que el frenesí de unos pocos se convierte en actitud de masas. Como consecuencia del fanatismo, la exaltación de los ánimos es muy frecuente y constante, en ocasiones se llega a un delirio que degenera en una perturbación de los comportamientos. Cuando el hombre olvida la razón para dejar conducirse exclusivamente por los prejuicios

y los sentimientos exacerbados, cuando actúa a la ligera sin tener presente la meta que se ha trazado, entonces se desvía del camino que debía seguir y las consecuencias pueden ser catastróficas e imprevisibles.

3.11.- *Sexualización de las relaciones entre humanos.*

Un relevante espacio de las relaciones entre los humanos, el sexo, presenta al día de hoy una mutación alarmante. Lo que en otros tiempos fue cercado de la privacidad honesta o de la gentileza romántica se ha transformado en territorio de relaciones tensas entre los géneros, más abundante en conflictos que en afectos. No hay noticiario que no traiga noticias sobre abusos, reyertas y desencuentros. Y la trágica nómina de muertes por violencia de género. Donde los idealismos eróticos reflejados en la poesía, la pintura, la música y que la vida cotidiana traducían a su manera de múltiples y exquisitas formas, una agresividad rampante puebla de sucias maneras que van de la grosería a la crueldad. El odio triunfa sobre el amor, el rencor sobre el afecto, el vicio sobre la virtud. En tal contexto la agresividad invade también el espacio en el que el niño crece.

La cultura de hoy día está impregnada de sexo. Éste ha pasado a ser un producto más de la economía de mercado y se hace presente en todos los campos. El erotismo es una plaga social que invade la publicidad. El sexo ha entrado a formar parte de los bienes de consumo y los estímulos eróticos han aumentado desmesuradamente y han saturado el mercado, sin lograr saciar a los consumidores. El niño en tales circunstancias aprende y practica a edad inmadura lo que su entorno le muestra en escenarios cotidianos como la calle, la familia, el círculo de amigos, los medios audiovisuales, anegando su maduración erótica en relaciones inadecuadas cuando no perversas. Estos factores son determinantes a la hora de que la situación cristalice en agresividad.

3.12.- *Influjo de la televisión, de los videojuegos, del cine y de los espectáculos:*

A un colectivo tan influenciado y vulnerable como la infancia y adolescencia, los medios de comunicación encuentran terreno maleable a placer. Destinados a la noble tarea de educar, ejercen con frecuencia otro cometido denigrante: coadyuvan a que se enquisten la agresividad y la violencia en las mentes de los niños y de los adolescentes. Las famosas películas del “Oeste” e, incluso, diversas series de dibujos animados que se proyectan para los menores, presentan la muerte, la tortura, los ataques y el crimen de manera que estos hechos entran a formar parte de la vida del niño.

Nosotros comulgamos con otros especialistas que aducen que los modelos ofrecidos en la pantalla suelen producir el efecto de **identificación**. Los niños, en virtud de su plasticidad, tratan de imitar los personajes que admiran porque reúnen una serie de “cualidades” muy valoradas por ellos y por la sociedad de hoy, tales como: la audacia, el valor, la arrogancia, la fuerza del hombre frente a la mujer, la prepotencia y justifican las peleas y el derecho a matar del “bueno”. Los niños necesitan modelos y éstos no son otros que los personajes de las películas con los que se identifican; el segundo paso es imitar sus acciones con lo cual la semilla de la violencia sembrada en las mentes infantiles es cuidadosamente abonada y alimentada con los dibujos animados y las películas que se les ofrecen. El tercer nivel consiste en poner en práctica lo aprendido y asimilado durante horas delante de las pantallas; para eso disponen de sus compañeros y amigos que pueden convertirse en víctimas. Por otro lado, los juguetes de los que hace uso el niño son copias exactas de armas reales, lo cual le permite emular auténticos ataques, escenas bélicas o demostrar su fuerza frente al otro en una pelea. Es así como el niño de hoy vive la “violencia” y siente en su interior el anhelo de cometer actos violentos que, por otra

parte, le permiten tener vivencias y experiencias nuevas.

3.13.- *Juegos infantiles.* Los juegos imitan la vida. Y sus escenas, episodios, acción y utillaje trasladan al mundo infantil mucho de lo que los adultos hacen, generando procesos de imitación, identidad, conflicto. En los juegos el niño se proyecta a sí mismo en ideales, valores, afectos y desafectos. En una palabra: traduce de modo espontáneo su carácter y personalidad. Es de aconsejar que la vitalidad natural que hay en el niño y que éste tiende a expresar en el juego, poniendo a prueba sus fuerzas, se trueque en fuerza acumulada, para dar salida con determinados juegos y juguetes a la agresividad natural que esconde.

Frecuentemente los juegos que utilizan los niños están cargados de violencia y predisponen al niño a considerar la fuerza y la agresión como algo natural. Es instructivo observar el comportamiento de los niños cuando juegan. Generalmente, les divierte el miedo que pasan los otros, si el adversario encuentra obstáculos y también les gusta ridiculizar al compañero, etc. Para ellos, los héroes son los que ejercen el poder, soldados, deportistas, policías, vaqueros.... los protagonistas, en una palabra, que detentan más fuerza y a los que les está permitida una conducta arbitraria. Fortaleza y bondad se homologan. Son los mejores quienes tienen más posibilidades de asustar, torturar y amedrentar a los demás. El niño asimila actitudes que inspiran actos como la ley del más fuerte, la venganza de la víctima, la prepotencia, la fuerza, la soberbia, etc., afloran en su vida adulta y actúan en consecuencia mostrando la violencia consigo mismos y con los demás. A este propósito son de recordar el conjunto de juguetes bélicos que ofrece hoy el mercado y provocan la admiración y entusiasmo infantil. Juguetes que, sin embargo, anulan la creatividad del niño, debido al automatismo

que predomina en ellos, que predisponen a la violencia porque presentan luchas encarnizadas, que afectan al oído por sus colisiones estruendosas y que ofrecen batallas cruentas en las que suele triunfar el más aguerrido, el más decidido, el más agresivo, identificado siempre con el bueno.

A veces la violencia que anida en estos niños la expresan dirigiendo violencia contra los animales. Se trata de conductas desviadas no canalizadas de forma normal, cuando el agresor no encuentra viable dirigir la violencia contra su víctima. El animal de compañía o la mascota de turno asumen el papel de agredido soportando la descarga agresiva del niño irritado. Toda la agresividad contenida: rabietas y frustraciones que no pueden liberar contra los mayores la descargan sobre los indefensos animales y lo hacen con saña sobre todo si están en grupo

4.- AGRESIVIDAD, VIOLENCIA Y DISCIPLINA.

Una convivencia correcta y una conducta pacífica exigen el control de la agresividad. Para ello se precisa en primer lugar percibirla como lacra y problema social. Y conceder la importancia que merece el aprendizaje del dominio de la propia agresividad y la de los congéneres para conseguir tanto en la familia como en la escuela y en la sociedad un buen desarrollo del niño. Se necesita lograr un cierto grado de control sobre las influencias e imposiciones provenientes de los seres que nos rodean con el fin de poder mantener una relativa independencia individual que permita debilitar el gregarismo en las conductas. Este fenómeno, difícil de erradicar en algunos momentos, generalmente se convierte en un obstáculo para alcanzar la propia autonomía y la capacidad de decisión moral.

En un estadio superior al de la agresividad natural hacia los otros y al de la experiencia en la que todos vivimos en conflicto casi permanente con nosotros mismos, se

encuentra la actitud que acompaña a la agresividad: la violencia. Esta consiste en un comportamiento marcado por la pasión y la fuerza, que practica una agresividad gratuita y cruel. Y que hiere y denigra tanto al agresor como a la víctima. La violencia se consume en golpes, insultos, lesiones.... Tanto desde una posición psicológica como social, es preciso dejar bien sentado que, al margen de toda justificación cultural, social o tradicional, hay violencia cuando un sujeto impone su fuerza, poder o estatus contra otro, de forma que le ocasiona directa o indirectamente daños, malos tratos o abusos físicos o psíquicos.

Violencia y agresividad son conceptos distintos, aunque difusos e indefinidos. La agresividad connota comportamientos que remiten al daño moral, físico o psíquico a otra persona. La violencia concreta el acto agresivo en el uso de fuerza física para causar daño y dolor. El conflicto hace referencia a una situación de confrontación de dos o más protagonistas, entre los cuales se abre un antagonismo originado por la colisión de intereses. En algunas ocasiones, los conflictos terminan con una actitud agresiva al no hacer uso adecuado de los instrumentos mediadores. En ese caso estamos ante la violencia que es el uso prepotente y oportunista de poder sobre el contrario, con intención lesiva y sin legitimación alguna. El fenómeno de la violencia se nos presenta difuso e ininteligible, porque lo que intentamos comprender es una agresividad injustificada, un hecho pasional descontrolado.

Si nos ceñimos al ámbito escolar, el fenómeno de la violencia interpersonal deja de ser un hecho aislado para convertirse en un grave problema que incide en la convivencia y afecta a las estructuras sociales vulnerando la actividad educativa. Al tratar de la agresividad le atribuimos una responsabilidad compartida, ya que la confrontación tiene lugar en torno a los

intereses de dos contendientes; por el contrario, la violencia supone el abuso de poder de un sujeto o de un colectivo de sujetos sobre otro que es más débil. Por ello, la violencia implica una asimetría entre las personas involucradas en los hechos agresivos.

Ya hemos aludido antes a la importancia que tiene el aprendizaje del control propio y ajeno ante la agresividad del otro en situaciones de conflicto. Ambas tareas forman parte de un largo y delicado proceso que requiere su interiorización y asimilación. No hay duda de que aprender a dominar la propia agresividad y tener habilidad para que no nos afecte la de los otros, constituye una ardua y compleja tarea. Cuando el adolescente carece de estas habilidades nunca aprendidas, no está en condiciones de entablar relaciones interpersonales fluidas, en las cuales se sirva de los consabidos instrumentos mediadores: la negociación y la palabra.

La rivalidad y la competición que surgen de la confrontación de intereses generan frecuentemente conflictos, especialmente, entre iguales. El conflicto es un proceso natural que se desencadena en el marco de un sistema de relaciones y en el que, generalmente, hay una colisión de intereses. Todo proceso psicológico tiene dos raíces: la biológica y la sociocultural que dan lugar a principios de confrontación con los demás. La raíz social, comunicativa e interactiva, que aporta al hombre su articulación cultural, a través del proceso de socialización, le abre las puertas a un mundo conflictivo, en el que tiene que aprender a llevar las riendas del control y dominio mediante la negociación y la elaboración conjunta y consensuada de normas. La raíz biológica, aboca al ser humano a la confrontación natural. Ni la una, ni la otra justifican la violencia.

Existe una estrecha relación entre los problemas de disciplina y los de violencia

entre iguales. Allí donde exista un caldo de cultivo para elaborar democráticamente unas normas consensuadas y asumidas por todos los integrantes de un grupo, donde el profesorado cumpla su rol socializador y donde los alumnos tengan la posibilidad de participar activamente en la elaboración de las reglas así como de hacer una crítica constructiva de los comportamientos y acontecimientos que se desarrollan en un aula, es fácil que disminuyan los problemas de violencia. Se requiere un clima de aula y de centro distendido, diáfano, coherente con los principios que proclama, acogedor, justo, solidario, respetuoso, abierto a las sugerencias, dispensador de confianza, que preste atención a la diversidad, posibilitando la existencia de relaciones interpersonales fluidas.

Sin embargo, la violencia aparece fortalecida en un clima en el que las reglas son arbitrarias, se elaboran al margen de los alumnos, no son claras, son zafias, incoherentes, no hay distinción entre normas preceptivas y facultativas, no existe frontera entre la libertad individual y el derecho al respeto de los demás, priman los intereses individuales, existe desconfianza, injusticia, hermetismo, autoritarismo, etc.

Siempre ha habido adultos que han ejercido violencia sobre niños y jóvenes pero, generalmente, este hecho se ha soslayado y se ha presentado como una forma eficaz y necesaria de disciplina. Por su parte, el escenario escolar está plagado de situaciones en las que unos niños violentan a otros, bien por su fuerza, bien por su estatus en la clase, ya por su habilidad para hacer determinados trabajos o por la soltura en los juegos; sin embargo, los adultos apenas han concedido importancia a estos hechos. Antes bien se han considerado como “cosas de niños”.

El paso de una disciplina autoritaria a otra participativa y consensuada puede acarrear algún conflicto aislado, pero superado el primer momento, si han

prevalecido el dialogo y la coherencia, las aguas vuelven a su cauce y se vislumbrará un nuevo modelo de convivencia en la que no tendrá cabida la violencia.

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UNA APROXIMACIÓN HISTÓRICA A LA VIOLENCIA EN EL DEPORTE

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RESUMEN:

El deporte se ha convertido en una parte muy importante de la sociedad desde el comienzo del siglo XX. Competiciones como la SuperBowl, el Mundial de Fútbol y los Juegos Olímpicos son eventos seguidos desde todas las partes del planeta, lo que ha originado que el deporte sea una cuestión global que sirva como elemento de unión entre las personas. Pero también el deporte ha creado una corriente violenta que se manifiesta en los estadios, sobre todo a través de los ultras y de los aficionados que a partir de, agresiones, insultos y amenazas a jugadores, árbitros u otros aficionados, desprestigian la propia competición deportiva.

ABSTRACT:

Sport has become a very important part of society since the beginning of the 20th century, competitions such as the SuperBowl, the World Cup and the Olympic Games are events followed from all parts of the planet, which has led the sport to become as a global issue that serves as a link between people. But sport has also created a stream of violence that is observed in the stadiums especially through the hooligans and fans who, from attacks, insults and threats to players, referees or other fans, discredit sports competition itself.

PALABRAS CLAVE: *Violencia, Deporte, Historia, Derecho.*

KEYWORDS: *Violence, Sport, History, Law.*

1.- INTRODUCCIÓN

Durante el transcurso de un evento deportivo son numerosos los aficionados que disfrutan del encuentro, pero también muchos gritan, insultan y amenazan a los jugadores por una acción errónea, al árbitro por no estar de acuerdo en la decisión que ha tomado, o contra otros aficionados por no ser del mismo equipo.

Todas estas acciones son cada vez más recurrentes en el escenario deportivo junto con la violencia física, propiamente dicha. Este tipo de violencia, la más tradicional, se

fundamenta en la producción de lesiones a otro, ya sea por una agresión directa o por el lanzamiento de objetos que ha tenido como actor principal a los aficionados más radicales.

Siendo la vida y la integridad física los bienes jurídicos con mayor protección, esta violencia física es la más trascendental para el legislador. Es por ello que el Estado se encuentra inmerso en la obligación de erradicarla en cualquier competición deportiva, tanto a través de fórmulas jurídicas (sanciones penales y administrativas, disolución de los grupos radicales) como sociales (educación, prevención de la violencia a través de campañas de concienciación).

Violencia y deporte se entienden como elementos confrontados, especialmente en cuanto a los valores perseguidos por éste último. Entre éstos, se concibe el deporte como instrumento beneficioso para la salud; tal y como reconoce la corriente intelectual que promovería por el Movimiento Olímpico, siendo el precursor el Barón de Coubertín.

Son numerosos los escritos en los que se señala al deporte como elemento necesario para el bienestar de la salud. Uno de ellos es el informe de la Unión Europea, en el que se explica la necesidad del ejercicio físico como actividad que promueve un estado de salud óptimo, ya que *“la actividad física, la salud y la calidad de vida están íntimamente conectadas. El cuerpo humano fue diseñado para moverse y necesita, por tanto, actividad física regular para funcionar de manera óptima y evitar la enfermedad”*¹.

A la par podemos afirmar que el deporte se constituyó como un nexo de unión de los cinco continentes, y al mismo tiempo una herramienta que ayuda a la mejora de la salud de los ciudadanos, y las relaciones internacionales. Zagalaz Sánchez se ha referido al Movimiento Olímpico del siguiente modo: *“El principal emblema, la bandera olímpica con los cinco aros, trata la unidad de los cinco continentes, este concepto de unidad de dicha insignia se completa con el lema Citius, Altius, Fortius, triple superlativo: más rápido, más alto, más fuerte, valores tradicionales del deporte. Ideado por el dominico francés Henri Didon en 1891, fue asumido como lema olímpico oficial en el Congreso fundacional del COI en 1894”*².

Por estos rasgos, el deporte es para la sociedad una actividad que debe ser promovida por los Estados, y así aparece

recogido en el artículo 43.3 de nuestra Constitución Española: *“Los poderes públicos fomentarán la educación sanitaria, la educación física y el deporte. Asimismo facilitarán la adecuada utilización del ocio.”* Asimismo, la Ley del Deporte en su preámbulo considera el deporte *“como una de las actividades sociales con mayor arraigo y capacidad de movilización y convocatoria. Además de ser un elemento fundamental del sistema educativo y su práctica es importante en el mantenimiento de la salud y, por tanto, es un factor corrector de desequilibrios sociales que contribuye al desarrollo de la igualdad entre los ciudadanos, crea hábitos favorecedores de la inserción social y, asimismo, su práctica en equipo fomenta la solidaridad.”*³

Así pues, pretendemos determinar cuáles son los elementos violentos que podemos hallar en un evento deportivo, y cuál es la respuesta dada por las instituciones deportivas para evitar que éstos tengan lugar. Ejemplo de ello son los cánticos de carácter xenófobo, racista u homófobo hacia un deportista o un árbitro, como ocurrió en el estadio del equipo de fútbol del Real Zaragoza hacia el jugador del F.C Barcelona Samuel Eto’o durante un partido de fútbol de la Liga en el año 2006.

El objeto de estudio, es la relación de la violencia con el deporte, que ocurriendo de manera sistemática desde el siglo XX. Esto se debe a que en la actualidad el deporte y la actividad física, están en un momento álgido, gracias a los numerosos efectos positivos que tiene para la persona que lo practica. Esta expansión del deporte la analiza de una manera muy acertada Madell al afirmar que *“el hecho de que los participantes y espectadores del deporte moderno se hayan afianzado y progresado, tanto en número como en extensión social, se debe a la empatía ideológica y política existente entre las*

¹ Directrices de Actividad Física de la UE Actuaciones Recomendadas para Apoyar La Actividad Física que Promueve la Salud Grupo de trabajo de la UE “Health & Sport”, Bruselas. 2008.

² ZAGALAZ SANCHÉZ, M^a Luisa. *Valores en el movimiento olímpico*. Materiales para la historia del deporte. 2015. p.71.

³ Ley 10/1990, de 15 de octubre, del Deporte. Preámbulo.

*adaptaciones psicológicas necesarias para la vida moderna y la ideología implícita en el deporte*⁴

2- LA EVOLUCIÓN HISTÓRICA DE LA VIOLENCIA EN EL DEPORTE

Desde la antigüedad el deporte ha sido ha sido tratado como una expresión social y cultural. Rodríguez López ha estudiado esa evolución y llega a la conclusión que “*las formas del deporte han ido evolucionando conforme evolucionaba la sociedad, adaptándose a la sociedad, reflejando esas características y reforzando en sus miembros los principios de la organización social*”⁵. Continúa exponiendo que en la Edad Antigua los Juegos Olímpicos Griegos constituían la columna vertebral de la sociedad a partir del año 776 a.C. hasta el siglo IV d.C.

La importancia del deporte era fundamental para los griegos como explica José Luis Salvador: “*La aspiración común a todos los griegos, es elevarse destacadamente por encima de sus semejantes, se refleja en numerosos puntos de ese bucólico lugar llamado Olimpia. Los espartanos serían los primeros en levantar monumentos conmemorativos de sus triunfos atléticos. Otras ricas polis siguieron el ejemplo construyendo templos de piedra y mármol para custodiar las estatuas de sus atletas vencedores*”⁶

En estos juegos había competiciones de carreras de caballos, lanzamientos de peso y jabalina, tiro con arco, combates con armas...⁷ Estos combates con armas podrían extrapolarse, en la época romana, a los juegos circenses donde los gladiadores luchaban con armas en confrontaciones mortales contra otro competidor. Tanto en Grecia como en Roma, estos deportes con un carácter

predominantemente violento, eran aceptados por la sociedad y servían como instrumento de entretenimiento para el pueblo.

Como ya hemos mencionado anteriormente, el deporte en la antigüedad aunque tuviese un elemento violento, era un signo de grandeza, que en la actualidad ha sido modificado por una cuestión más económica que ha condicionado la práctica deportiva. De Vicente Martínez explica las razones que han llevado al origen actual de una serie de conductas antideportivas: “*En la Antigua Grecia, el deporte fue reconocido como un factor para el desarrollo armónico del cuerpo, como una fuente de salud y como un medio de educación espiritual y moral, tanto para la persona como para la sociedad. Sin embargo, en los tiempo modernos, debido principalmente a la profunda comercialización y al carácter profesional del deportista, el deporte ha adquirido una nueva dimensión que arrastra un aumento de las conductas antideportivas*”⁸.

Diríamos pues que con la llegada de los deportes contemporáneos (fútbol, baloncesto, tenis...) el elemento violento dentro del mismo ha desaparecido, pero que las conductas antideportivas han aumentado. Dentro éstas encontramos algunas que pueden ser violentas y otras que van orientadas a otros fines contrarios a los valores del deporte. (dopaje, amaño de partidos...).

Durán González considera que se ha llegado al punto de suprimir los deportes con un gran elemento violento gracias a los cambios sociales que “*han dejado huella en la estructura psicológica de los individuos, los cuales al verse desposeídos de sus competencias en materia bélica, incluso de defensa personal, no sólo pacifican efectivamente sus comportamientos, sino que desarrollan mecanismos mentales que les facilitan el desempeño de su nuevo rol*”⁹.

⁴ MADELL, Richard. *Historia cultural del deporte*. Bellaterra. 1986. p.273.

⁵ RODRIGUEZ LOPEZ, Juan. *Historia del deporte*. Inde. 2000. p.12.

⁶ SALVADOR, José Luis. *El deporte en occidente, Grecia, Roma, Bizancio*. Cátedra. 2009. p.45

⁷ RODRIGUEZ LOPEZ, Juan. *Historia del deporte*. Inde. 2000. pp. 37-47.

⁸ DE VICENTE MARTÍNEZ, Rosario. *Derecho penal del deporte*. Bosch. 2010. p.89.

⁹ DURÁN GONZÁLEZ, Javier. *El vandalismo en el fútbol. Una reflexión sobre la violencia en la sociedad moderna*. Gymnos. Madrid. 1996 p.26.

Aunque no sea de una forma generalizada, los deportes en la actualidad contienen un menor número de elementos violentos. Como dicen Pelegrín Muñoz y Garcés de los Fayos “*en un encuentro deportivo en cualquiera de sus categorías (escolar, profesional, amateur) hay un elemento violento que aprenden los deportistas para conseguir su objetivo primordial que es ganar, como por ejemplo, dar un empujón, poner la zancadilla o provocar un jugador rival para que sea sancionado, por lo que los jóvenes deportistas están desarrollando un estilo agresivo de comportamiento y de pensamiento para alcanzar metas deportivas*”¹⁰

Debemos hacer una distinción entre los conceptos agresividad y violencia. Por un lado, la agresividad puede entenderse como una herramienta de juego siempre que ésta esté dentro de los límites permitidos por la sociedad; no debemos perseguir ni reprochar un comportamiento agresivo, como puede ser, por ejemplo, emitir un grito en la celebración de una canasta en baloncesto. La violencia (puede ser definida) como los elementos no permitidos en una actividad deportiva, ya sea por parte de los jugadores o de los espectadores que acuden al evento.

Para Jean Marie Domenach la violencia “*se cristaliza en tres aspectos principales: el aspecto psicológico, explosión de fuerza que cuenta con un elemento insensato y con frecuencia mortífero; el aspecto moral, ataque a los bienes y a la libertad de otros; el aspecto político como empleo de la fuerza para conquistar el poder y dirigirlo a fines ilícitos*”¹¹.

Cuando un jugador cae al suelo y se escucha al público celebrarlo, a la vez que falta el respeto a ese jugador con términos despectivos, e incluso llegando a corear al unísono “písalo, písalo”; estaríamos ante una actitud violenta que debe ser intolerable para el resto de la sociedad, por lo que no puede ser aceptada.

Antes de enumerar los acontecimientos históricos relacionados con la violencia en el deporte, debemos diferenciar no sólo los tipos de violencia (física y verbal) sino en qué situación pueden ocurrir, es decir, si se trata de violencia endógena o violencia exógena. La violencia endógena es cualquier acción de carácter violento que surge durante el transcurso de un evento deportivo, dentro del terreno de juego y por parte de los propios deportistas (una patada, un empujón, un puñetazo...). La violencia exógena es la ejercida por los aficionados antes, durante o después de un evento deportivo, ya sea dentro o fuera del estadio (desórdenes públicos, cánticos racistas, lesiones, homicidio...).

Los hechos más relevantes son los relacionados con la violencia exógena. A partir de 1970, la mayoría de incidentes se registran en el fútbol, como consecuencia del alto seguimiento de este deporte por parte de la sociedad. Anteriormente, en el año 1964, fallecieron 328 personas y más de 500 sufrieron heridas en el estadio Nacional de Lima (Perú) durante el transcurso de un encuentro entre la selección nacional de Perú y la Argentina. La tragedia tuvo lugar debido a las cargas policiales contra los aficionados que al tratar de huir se encontraron con las puertas del estadio cerrados y se produjo una avalancha.

No sólo en Latinoamérica acontecen desdichas, como la del Monumental de River Plate en Argentina, en el que una avalancha de aficionados el año 1968 acabó con la vida de 71 personas. En Europa ocurrió la denominada “Tragedia de Heysel” que centraría el foco de la violencia en los estadios de la mano de los aficionados más radicales.

Ocurrió durante el transcurso de la final de la Liga de Campeones entre el Liverpool inglés y la Juventus de Turín italiana, en el estadio de Heysel (Bruselas). Dentro del estadio, antes del comienzo del partido, los aficionados más radicales del Liverpool

¹⁰ PELEGRÍN MUÑOZ, Antonia; GARCÉS DE LOS FAYOS RUIZ, Enrique. *Agresión y violencia en el deporte*. Wanceulen. Sevilla. 2007 p.13.

¹¹ DOMENACH, Jean Marie. *La violencia y sus causas*. Unesco. 1981 p.34.

(conocidos como hooligans) comenzaron a lanzar objetos a los aficionados de la Juventus además de abalanzarse contra ellos con intención de agredirles. Los aficionados de la Juventus intentaron escapar originándose una avalancha que produjo 39 muertos.

Este acontecimiento conmocionó a la sociedad europea e hizo replantearse la seguridad en los estadios de fútbol, aprobándose distintas medidas de seguridad para garantizar la seguridad en los recintos deportivos; aunque nuevamente en 1989 encontramos una avalancha en un estadio inglés, Hillsborough, donde fallecieron 96 personas asfixiadas.

Meses después de la Tragedia de Heysel, se aprobó por parte del Consejo de Europa, el *Convenio Europeo sobre la violencia y los incidentes protagonizados por algunos espectadores durante encuentros deportivos y, en particular, partidos de fútbol*¹².

El Convenio ha sido un instrumento necesario para una mayor prevención y concienciación a nivel europeo del problema de la violencia en el deporte. En palabras de Millán Garrido, *“el Convenio Europeo de 1985, con su posterior desarrollo a través de las recomendaciones del Comité Permanente, ha demostrado, con su implantación normativa en distintos países, una gran efectividad en la prevención, control y represión de los incidentes en los espectáculos deportivos, lo que ha hecho trascender de su ámbito originario —el Consejo de Europa— para pasar a constituir un referente internacional obligado en materia deportiva”*¹³.

El problema de la seguridad en los estadios, no son sólo las avalanchas que hemos mencionado anteriormente, ya que gracias a las distintas normativas internas e internacionales de los países han conseguido

suprimirse casi en su totalidad; sino también las acciones vandálicas que provocan los aficionados más radicales de los equipos como hemos visto.

Para Ferro Veiga las causas principales de la violencia en los estadios deportivos tiene mucho que ver con la falta de preparación del evento y la carga emocional de estos: *“La falta de seguridad y organización del evento; Lugares no aptos donde las hinchadas deben estar separadas y bien individualizadas, mala dirección del evento deportivo por parte del árbitro; Falta de educación y cultura por parte de los jugadores; Sobrecarga emocional tanto por parte de los jugadores como por parte de los espectadores”*¹⁴.

Respecto a la causa que expone Ferro sobre la falta de seguridad, los mecanismos que se llevan a cabo en la actualidad permiten que la violencia en los estadios, por lo menos en España, se reduzca a mínimos históricos, y solo se produzca en momentos en los que las fuerzas y cuerpos de seguridad del Estado no tienen que escoltar a la afición, como pudiera ser la mañana antes del partido.

La mayoría de estos incidentes están originados por los aficionados más radicales y violentos, conocidos en España como “ultras”. Teresa Adán marca el comienzo de estos grupos en España en el año 1982, con motivo de la celebración del Mundial de Fútbol de 1982 y las características que presenta sobre los ultras son las siguientes: *“los grupos ultras tienen una predisposición a la violencia, el enemigo no es solo el aficionado rival o la policía, sino también puede ser un aficionado del mismo equipo que no piense como él, utilizando estructuras organizativas tanto a la organización interna de coreografías o cánticos como a externa en las relaciones con el club”*¹⁵.

Sigue explicando la autora que estos grupos comenzaron al igual que las demás peñas, con la intención de animar a los

¹² BOE-A-1987-18787.

¹³ MILLAN GARRIDO, Antonio. *La violencia deportiva en el ámbito supranacional: el Convenio Europeo de 1985*. en Régimen jurídico de la violencia en el deporte. Coor MILLAN GARRIDO, Antonio. Bosch. 2006. p.110.

¹⁴ FERRO VEIGA, José Manuel. *Deporte: Violencia y fraude*. Formación Alcalá. 2012. p.65.

¹⁵ ADÁN, Teresa. *Ultras. Cultura del fútbol*. Estudios de juventud n° 64/04 pp.87-88.

jugadores, colocando pancartas o vendiendo material para financiarse los viajes; pero comenzaron a encontrarse amparados por grupos radicales, de extrema derecha e izquierda, y se hicieron dueños de las gradas de animación¹⁶.

Para López García la pertenencia de los más jóvenes a los grupos ultras se produce por la necesidad de sentimiento de grupo ya que *“el joven visualiza en el grupo violento deportivo la solución a su agitación. Pero el Ultra encuentra, además, que su pertenencia al grupo le reporta notoriedad, le hace sentirse poderoso e importante y le dota de un arrojo que le permite acometer acciones, que de forma individual, y antes de su pertenencia al grupo, no sería capaz de emprender”*¹⁷

Estos grupos han ido desapareciendo gracias al apoyo de las federaciones y de los clubes, los cuales limitan su actividad dentro de los estadios. Pero la lista de agresiones y homicidios que han dejado estos grupos en la historia de España es considerable.

En el año 1993, falleció un niño de 13 años durante un encuentro entre el C.D. Español y el Cádiz de la primera división española de fútbol, después de que un aficionado lanzase una bengala en el estadio de Sarriá (Barcelona) e impactase contra el pecho del niño provocándole la muerte.

Dos de los sucesos más graves tienen como protagonista al grupo radical del Atlético de Madrid, denominado “Frente Atlético”. En el año 1998 murió apuñalado, en los aledaños del estadio Vicente Calderón, el seguidor de la Real Sociedad Aitor Zabaleta. Por este crimen un ultra del Frente Atlético fue condenado a 17 años de prisión.

En el año 2014 una pelea entre ultras del Deportivo de la Coruña (Riazor Blues) y el

Frente Atlético horas antes del comienzo del partido que enfrentaba a sus equipos, acabó con la muerte de un miembro de los Riazor Blues, al ser lanzado al río Manzanares por integrantes del Frente Atlético.

Unida a la violencia física, resultado del comportamiento de los ultras, en los eventos deportivos también reina la violencia verbal hacia jugadores, cuerpos técnicos y árbitros; como ocurre en numerosas ocasiones con cánticos racistas y xenófobos contra jugadores. En julio de 2018 un equipo de segunda división ruso, el Torpedo Moscow, canceló el traspaso del defensa Erving Botaka-Yoboma, porque sus ultras no querían un jugador de raíces congoleñas en su equipo.

Asimismo, en los primeros meses de este mismo año hemos presenciado actos contrarios a los valores del deporte, sobre todo en países de la Unión Europea donde se respeta la libertad y los derechos fundamentales de los ciudadanos. Los actos a los que nos referimos ocurrieron en Grecia y en Portugal. En el primero de ellos, el Gobierno griego suspendería el campeonato de fútbol después de que el presidente del PAOK Salónica, entrase en el terreno de juego a la conclusión del partido para amenazar al árbitro armado con una pistola. En Portugal, un grupo de ultras violentos del Sporting de Portugal golpearon, durante un entrenamiento, a varios jugadores de su propio equipo por no haber podido clasificarse para la Champions League de la temporada siguiente.

Precisamente, y como hemos dictado, la violencia en el deporte se manifiesta de diversas formas, pero siempre con el distintivo del odio hacia el contrario. Por tanto, ¿por qué se permiten determinadas actitudes, que a la mayoría de los ciudadanos nos parecen incorrectas en los eventos deportivos?

¹⁶ *Ibid* p.90-91.

¹⁷ LÓPEZ GARCÍA, Antonio. *Violencia en el deporte: 'la sanción de las acciones violentas de menores y jóvenes como detonantes de la crisis familiar*. La crisis en las familias, infancia y juventud en el siglo XXI coord. NIETO MORALES Concepción. Dykinson 2015. p.214.

3- LA TOLERANCIA DE LA VIOLENCIA.

Con ocasión de un evento deportivo, encontramos a numerosos aficionados que aplauden una agresión a un rival en un terreno de juego, o que insultan a los rivales y al árbitro, basándose en su libertad individual. Sin embargo debe existir un límite por ser conductas de carácter violento que, cuyo único fin es ofender al contrario.

El comportamiento agresivo y violento de las personas, tiene una relación con los factores sociales. Para Pelegrín Muñoz y Garcés de los Fayos, el comportamiento agresivo surge: “de la acumulación de una serie de variables a lo largo del desarrollo de la persona, que aumenta la probabilidad de desajustes emocionales que pueden dificultar la adaptación a su entorno familiar, escolar y deportivo”¹⁸. Debemos analizar, por tanto, porqué una sociedad donde la violencia se castiga, en los eventos deportivos se permite. Rosell encuentra una permisividad mayor en el deporte y afirma que “fuera de los tiempos de guerra, el deporte es quizá el único escenario en el cual los actos de agresión interpersonal no sólo son tolerados, sino aplaudidos con entusiasmo por un gran segmento de la sociedad”¹⁹.

Cuando hablamos de tolerancia hacia la violencia en el deporte, tratamos tipos violentos que no vulneran el Derecho Positivo, es decir, los Derechos Fundamentales de los ciudadanos. Las instituciones han ido introduciendo leyes para tratar de respetar esos derechos. Por ejemplo, la Ley contra la Violencia, el Racismo, la Xenofobia y la Intolerancia en el Deporte de 2007; aunque en ocasiones sea insuficiente

ya que estos comportamientos se siguen dando en los estadios deportivos.

La permisividad de la violencia por parte de la sociedad es un elemento difícil de reconocer, pues dependiendo del momento puede ser de una manera u otra. Pérez Triviño y Ríos Corbacho afirman que “la violencia no solo está permitida sino que incluso promueve como instrumento para alcanzar el fin deseado, la victoria. En el deporte no es extraño que las crónicas deportivas de los periódicos estén repletas de metáforas bélicas: “conquista” “batalla” “honor”... Los deportistas, pero también los periodistas y la afición experimentan emociones extremas a través de esas expresiones de violencia de espíritu belicoso”²⁰.

El umbral de tolerancia a la violencia es mayor, como explica Cohen, en deportes con un mayor contacto, como es el caso del fútbol o en boxeo; a diferencia de lo que ocurre en deportes como el tenis²¹, donde los aficionados censuran actitudes violentas como romper la raqueta o discutir con el árbitro. Debemos entonces prestar atención al tipo de deporte que es y el contacto físico que surge para saber si el umbral de tolerancia es mayor o menor, aunque no podemos utilizar esta afirmación de Cohen como absolutamente cierto, ya que un deporte donde el contacto no existe como es la pértiga, los aficionados en los Juegos Olímpicos de Río de 2016 silbaron al pertiguista francés Renaud Lavillenie por haber superado al pertiguista brasileño.

Otra cuestión relativa al umbral de tolerancia es el uso de las redes sociales como instrumento de agresión verbal a los deportistas, que chocaría la libertad de

¹⁸ PELEGRÍN MUÑOZ, Antonia; GARCÉS DE LOS FAYOS RUIZ, Enrique. *Agresión y violencia en el deporte*. Wanceulen. Sevilla. 2007 p.132.

¹⁹ GÓMEZ, Ángel *La violencia en el deporte. Un análisis desde la Psicología Social*. Revista de Psicología Social. 2007. p.67 en referencia a RUSELL, G.W. *The social psychology of sport*. Nueva York. Springer Verlag. 1993.

²⁰ PÉREZ TRIVIÑO, José Luis. RÍOS CORBACHO, José Manuel. *La violencia en el fútbol: del análisis psico-social a las respuestas penales*. Iusport. 2014 <https://iusport.com/art/3744/violencia-en>.

²¹ GÓMEZ, Ángel *La violencia en el deporte. Un análisis desde la Psicología Social*. Revista de Psicología Social. 2007. p.67 en referencia a COHEN, R *Agresión y violencia en el deporte*. Lecturas: Educación física y deportes. N°2. Buenos Aires.

expresión con el odio hacia una persona. La deportista canadiense Kim Boutin recibió más de 10.000 mensajes amenazantes en la red social Instagram después de haber chocado durante la carrera involuntariamente con la ídolo surcoreana en la modalidad de patinaje, Choi Min Jeong y conseguir una medalla por delante de esta.

Con esto percibimos que el umbral de tolerancia de la sociedad ante las amenazas y el acoso en redes sociales es mayor que el realizado en un campo propio, donde en los medios de comunicación aparecen numerosas. En el campo del Standard de Lieja (Bélgica) apareció un dibujo con la cabeza cortada del ex jugador de este equipo Steven Defoeur con motivo de la vuelta de este al estadio como jugador visitante defendiendo la camiseta del Anderlecht.

Máximo Pimienta expone que una de las posibles causas de esta violencia en los espectáculos deportivos, *“es la exteriorización por parte de los deportistas de su frustración por el transcurso del encuentro a través de la violencia que puede impactar a sobre los aficionados que están observando el juego”*²².

La condena a esta violencia es cada vez más recurrente, y por ende la tolerancia este tipo de acciones cada vez es menor. Como efecto de las iniciativas de los medios de comunicación, de la sociedad civil, de las instituciones y de los propios deportistas para que el deporte sea un instrumento educativo e integrador para los más jóvenes.

Las instituciones han colaborado para frenar la tolerancia de los actos violentos en el deporte a través de campañas de educación, de concienciación y con instrumentos jurídicos represivos como son el Derecho Penal. Gamero Casado considera que *“el Derecho ha contribuido de manera decisiva a*

*lograr que incluso en los deportes de carácter violento se reduzcan o desaparezcan las lesiones y agresiones entre contrincantes y también los episodios de violencia entre espectadores, y con ello, ha coadyuvado a preservar el extraordinario potencial educativa y socializador de la práctica deportiva”*²³.

Para Ríos Corbacho la inclusión del Derecho Penal en la violencia de los ultras en el deporte *“viene determinado por la violencia que rodea al espectáculo deportivo, normalmente por grupos minoritarios que se amparan en el anonimato y la cohesión, utilizando los encuentros deportivos como pretexto para desplegar los instintos más perversos y violentos del espectador, acarreando daños, lanzando objetos al terreno de juego, e incluso en determinadas situaciones graves, a través de agresiones físicas a las que las sanciones disciplinarias no han podido frenar”*²⁴. En el Código Penal español aparece tipificado en el artículo 558 el delito de desórdenes públicos con motivo de eventos deportivos²⁵ para asegurar la paz pública.

Con la entrada del Derecho (no solo penal, sino también administrativo) y la justificación de suprimir todo tipo de violencia en los eventos deportivos, se empiezan a sancionar los desórdenes públicos desde el orden jurisdiccional penal, pero también otras desde el orden administrativo que ponen en peligro la

²³ GAMERO CASADO, Eduardo. *Violencia en el deporte y violencia en los espectáculos deportivos*. en Régimen jurídico de la violencia en el deporte. Coord MILLAN GARRIDO, Antonio. Bosch. 2006. p.19.

²⁴ RÍOS CORBACHO, José Manuel. *Las sombras del deporte: de la violencia exógena a la incitación al odio*. Revista Inclusiones Vol 3. Nº 2. 2016 p.39.

²⁵ Artículo 558. Serán castigados con la pena de prisión de tres a seis meses o multa de seis a 12 meses, los que perturben gravemente el orden en la audiencia de un tribunal o juzgado, en los actos públicos propios de cualquier autoridad o corporación, en colegio electoral, oficina o establecimiento público, centro docente o con motivo de la celebración de espectáculos deportivos o culturales. En estos casos se podrá imponer también la pena de privación de acudir a los lugares, eventos o espectáculos de la misma naturaleza por un tiempo superior hasta tres años a la pena de prisión impuesta.

²² MAXIMO PIMIENTA, Carlos Alberto. *Torcidas organizadas de fútbol Identidade e identificações, dimensões cotidianas*. en Futbologías: fútbol, identidad y violencia en América Latina. Coord ALABARCES, Pablo. Consejo Latinoamericano de Ciencias Sociales. 2003.

integridad del deporte. Para Bujosa Badell las medidas de carácter administrativo han sido muy convenientes, poniendo como ejemplo *“la colaboración de las federaciones deportivas con la Administración en la prevención de la violencia en el deporte o la promoción de medidas para la realización de controles de alcoholemia en los espectáculos deportivos de alto riesgo o para la efectividad de la prohibición de introducir objetos peligrosos o susceptibles de ser utilizados como armas en las instalaciones deportivas”*²⁶.

4- LA ANTI VIOLENCIA COMO MOVIMIENTO CULTURAL, SOCIAL Y POLÍTICO

Las instituciones deportivas nacionales e internacionales, los Estados, la sociedad civil, los medios de comunicación y los propios deportistas, en numerosas ocasiones, son ejemplo del movimiento contra los actos violentos en el deporte.

Recordemos que los valores del deporte son contrarios a la violencia, por lo que debe perseguirse la destrucción de esta. Para conseguir dicho fin los agentes enumerados anteriormente han puesto en marcha una serie de medidas, entre las que destaca, la aplicación del Derecho Penal en el castigo de los desórdenes públicos con penas de prisión; y del Derecho Administrativo con sanciones pecuniarias. Comenzaremos analizando la labor del Estado español en esta materia, creando una estructura para la prevención de la violencia en el deporte que está dando sus frutos.

El título noveno de la Ley del Deporte de 1990 versa sobre la prevención de la violencia en los espectáculos deportivos, siendo esta parte derogada por la creación de una Ley cuyo objetivo es la lucha violencia, el

racismo, la xenofobia y la intolerancia en el deporte²⁷.

La Ley contra la violencia, el racismo, la xenofobia y la intolerancia en el deporte aprobada en 2007, expone una serie de definiciones en su artículo segundo sobre acciones *“que puedan constituir delitos o faltas tipificadas en las leyes penales”*. Esta serie de definiciones las agrupa en: 1) Actos o conductas violentas o que incitan a la violencia en el deporte; 2) Actos racistas, xenófobos o intolerantes en el deporte; 3) Entidades deportivas; 4) Personas organizadoras de competiciones y espectáculos deportivos; 5) Definición de deportista²⁸.

Hace una primera definición que aporta el artículo sobre *“los actos o conductas violentas o que incitan a la violencia en el deporte”*. En ella nos explica todos los tipos de violencia que puede haber, comenzando por la violencia física: *“la participación activa en altercados, riñas, peleas o desórdenes públicos en los recintos deportivos, en sus alrededores o en los medios de transporte”*. Continúa con la violencia verbal y la exhibición de pancartas, símbolos que inciten al odio, así como los cánticos que influyan de la misma forma.

El apartado segundo del artículo, considera actos racistas en el deporte cualquier declaración emitida por persona física o jurídica, antes²⁹, durante o después de la celebración de una competición deportiva

²⁷ Ley 19/2007, de 11 de julio, contra la violencia, el racismo, la xenofobia y la intolerancia en el deporte.

²⁸ Deportistas: las personas que dispongan de licencia deportiva por aplicación de los correspondientes reglamentos federativos, tanto en condición de jugadoras o competidoras, como de personal técnico o entrenadores, árbitros o jueces deportivos y otras personas titulares de licencias que participen en el desarrollo de la competición deportiva.

²⁹ Es importante señalar que con anterioridad al comienzo del encuentro, la Ley en su artículo 2 apartado 2.d) considera los medios de transporte para ir a la competición como los prolegómenos del encuentro.

²⁶ BUJOSA BADELL, Lorenzo *Deporte y Delito: algunas cuestiones procesales Diario La Ley, Sección Doctrina, 2000, Ref. D-217, tomo 6, Editorial La Ley*

por razón del origen racial, étnico, geográfico o social, así como por la religión, las convicciones, la discapacidad, la edad o la orientación sexual.

Lo más reseñable en esta Ley es la creación de la Comisión Estatal contra la Violencia, el Racismo, la Xenofobia y la Intolerancia en el Deporte. La Comisión contra la Violencia, que aparece en el capítulo cuarto, tiene por objetivo impulsar acciones de prevención contra la actuación violenta en los acontecimientos deportivos; así como el fomento de campañas de concienciación contra cualquier tipo de violencia en el deporte.

En la Ley se citan las funciones principales de Comisión, pero no es hasta 2008 donde se aprueba un Real Decreto para explicar su funcionamiento³⁰. Este Real Decreto está formado por diez artículos en los que se exponen las normas que ha de regir este órgano colegiado (Pleno, Comisión Permanente, Funciones, Naturales, Objetivos...).

Otro aspecto a destacar de la Ley es su régimen sancionador. La cuantía de la infracción está en un arco desde los 150 euros en las infracciones leves a los 650.000 euros, en caso de infracciones muy graves, además de incluir la prohibición de acceso al estadio por un periodo determinado. Las infracciones que pueden acarrear sanción aparecen tipificadas en los artículos 21, 22 y 23 de la presente Ley.

También encontramos el régimen disciplinario, que se diferencia del régimen sancionador en que las personas sancionables sólo podrán ser las que aparecen señaladas en el artículo 32 de la Ley: *“Las personas vinculadas a una federación deportiva mediante una licencia federativa estatal o autonómica habilitada para la*

participación en competiciones estatales así como los clubes, Sociedades Anónimas”.

Para continuar el trabajo comenzado por la Ley de 2007, y así actualizar el texto sobre la prevención de violencia en los estadios que databa de 1993, se aprobó un nuevo Real Decreto en 2010 con el reglamento para la prevención de la violencia en los estadios³¹.

Este Real Decreto incorpora las modificaciones, inclusiones y adaptaciones necesarias para desarrollar la nueva ley y hacer, así, efectivas sus novedosas previsiones, pasando a denominarse ahora, “Reglamento de prevención de la violencia, el racismo, la xenofobia y la intolerancia en el deporte”.

Lo que pretende este Real Decreto es la presentación de un reglamento actualizado como herramientas para la prevención de actos violentos en los estadios, a través de medidas de seguridad; tal y como se recoge en el Capítulo Primero o de las funciones de los responsables y de los Cuerpos y Fuerzas de Seguridad del Estado. Estas medidas se relacionan con el Convenio Europeo sobre la violencia de 1985. Entre ellas, por ejemplo, la lista de medidas que deben adoptar los organizadores o el uso pirotécnico en el estadio.

Cabe destacar dentro el Capítulo Octavo del reglamento “las medidas de apoyo a la convivencia y la integración en el deporte” pues trata, desde el punto de vista de la información, la prevención y la educación, como una posible resolución al conflicto de la violencia. Además, dota de una seguridad jurídica al Observatorio de la Violencia, el Racismo, la Xenofobia y la Intolerancia en el Deporte que como aparece en el Preámbulo del Real Decreto venía funcionando desde 2004.

³⁰ Real Decreto 748/2008, de 9 de mayo, por el que se regula la Comisión Estatal contra la violencia, el racismo, la xenofobia y la intolerancia en el deporte.

³¹ Real Decreto 203/2010, de 26 de febrero, por el que se aprueba el Reglamento de prevención de la violencia, el racismo, la xenofobia y la intolerancia en el deporte.

Asimismo crea una figura muy interesante desde el punto de vista educativo que es el premio al “Juego Limpio”, que se podrá conceder a equipos deportivos, aficionados, deportistas, técnicos, medios de comunicación y patrocinadores.

El premio es un reconocimiento que otorga el Consejo Superior de Deportes a los agentes enumerados anteriormente que han brillado durante la temporada deportiva, por su conducta contra la violencia, el racismo, la xenofobia y la intolerancia y a favor de la paz, la tolerancia y la convivencia en el deporte.

Hemos comprobado como el Estado y el Consejo Superior de Deportes están totalmente implicados en la erradicación de la violencia, pero también las federaciones deportivas y los medios de comunicación, que con la labor de todos trabajan constantemente para evitar conflictos en los estadios.

Un ejemplo de la implicación de los medios de comunicación en la lucha contra la violencia es el proyecto realizado en 2009 por la Agencia de comunicación EFE y el Consejo Superior de Deportes bajo el lema “No juegues contra el Deporte”. Con este proyecto se pretendería concienciar a los ciudadanos de los problemas existentes en el mundo del deporte relacionados con la xenofobia, el racismo y la intolerancia. La forma de transmitir estos mensajes fue través de audios que aparecieron en Radio Televisión Española en el canal de radio, Radio 5, los sábados por la tarde, se emitieron un total de 490 programas hasta 2017.

La FIFA es el órgano mundial del fútbol, y como todas las instituciones, una de sus mayores inquietudes es acabar con la violencia en el fútbol, esto lo materializa en una de las campañas más importantes y con más repercusión mediática denominada “Fair Play”. Este proyecto presenta un decálogo de medidas, aprobado en 2005 por la Comisión de Ética y Deportividad de la FIFA, para

dotar al deporte de unas herramientas educativas que pudiesen erradicar la violencia y las trampas del deporte: “1) *Juega limpio*; 2) *El fútbol por un mundo mejor*; 3) *Denuncia a quienes engañan*; 4) *Ayuda a otros a jugar limpio*; 5) *Rechaza las malas influencias*; 6) *Fomenta el juego limpio*; 7) *Promociona el fútbol*; 8) *Respeto a todos*; 9) *Acata las reglas*; 10) *Juega a ganar, pero acepta la derrota con dignidad*.”

La UEFA como órgano representativo del fútbol europeo también ha llevado a cabo numerosas campañas de concienciación del problema del racismo en el fútbol. La campaña para eliminar el racismo, la discriminación y la intolerancia del fútbol lleva el nombre de “No to racism” y se ha convertido en una prioridad importante para la UEFA en los últimos años, utilizando sus plataformas de alto perfil para enviar un mensaje clave e inequívoco: No al racismo.

Como explica la UEFA en su página web, cada año realizan una jornada de concienciación contra el racismo, además de los anuncios de televisión en los que participan jugadores conocidos para concienciar sobre el problema que en determinadas ocasiones surge en los estadios “*la tercera jornada de la UEFA Champions League y la UEFA Europa League destaca la lucha contra el racismo y toda forma de discriminación en los estadios de fútbol de toda Europa, además de talleres, mesas redondas y torneos de mini fútbol con aficionados, clubes, asociaciones nacionales, grupos étnicos minoritarios y organizaciones juveniles*”³².

Además del proyecto contra el racismo, la UEFA tiene 11 puntos de trabajo concretos llamados “once valores”. El décimo de ellos se refiere a la violencia y vuelve a tratar el tema del racismo, bajo el título “Respeto” y expone que “*El respeto es un principio clave del fútbol. Respeto por el juego, la integridad, la diversidad, la dignidad, la salud de los jugadores, las reglas, el árbitro, los oponentes y los seguidores*.”

³² <https://www.uefa.com/insideuefa/social-responsibility/respect/no-to-racism/index.html> consultada el 21 de septiembre de 2018.

Nuestro mensaje es claro: tolerancia cero contra el racismo, la violencia y el dopaje. El fútbol une a las personas y trasciende las diferencias. El color de la piel es invisible debajo de la camiseta. , para la UEFA, siempre será así. Racismo y cualquier otra forma de discriminación nunca serán tolerados. La UEFA no tolerará la violencia ni en el campo ni en las gradas. El fútbol debe ser un ejemplo".³³La palabra respeto la podemos ver en las equipaciones de los equipos de fútbol en competiciones europeas como parte de la campaña de concienciación.

Todas estas manifestaciones de apoyo a la erradicación de la violencia en los estadios se deben extrapolar a las redes sociales, que como ya hemos comentado anteriormente, es uno de los actuales focos de violencia de la sociedad. Un ejemplo de campaña para prevenir ese odio por redes sociales y que incluye a una gran empresa como es Telefónica, es el proyecto que llevó a cabo junto a la Real Federación Española de Fútbol bajo el lema "#StopViolenciaEnRedes". Además utilizan un eslogan que demuestra que el foco del problema son las propias personas y no solo el ambiente que puede generarse en un terreno de juego *"Tú lo tuiteas, alguien lo hace. En tu mano está parar la violencia en redes"*

La campaña tiene como fin evitar todos esos mensajes que encontramos habitualmente en las redes sociales de amenazas e insultos a deportistas, árbitros o incluso a los narradores del encuentro. Un claro ejemplo es el acoso que sufrió el portero del Liverpool Loris Karius por su actuación en la final de la Champions League de la temporada 2017/2018.

El informe de la compañía Sentís para la Cadena Ser recoge la violencia en el fútbol en las Redes Sociales. El estudio consta de una muestra de 2 millones de mensajes lanzados en redes durante el transcurso de 20 partidos

³³ <https://www.uefa.com/insideuefa/about-uefa/eleven-values/index.html#val10> consultada el 21 de septiembre de 2018.

de fútbol en las temporadas 2016/2017 y 2017/2018. En el podemos comprobar que el 19,6 % de los mensajes relacionados con estos partidos son de contenido violento, es decir más de 387.000 mensajes. Dentro de los mensajes, el 67% de estos corresponden a insultos genéricos, el 12% a insultos relacionados con ánimo de discriminar al deportista, un 10% a asuntos relacionados con el machismo, el 7,7% a la homofobia y por último un 6,5% de los mensajes relacionados con el racismo³⁴.

5- CONCLUSIONES

La violencia en el deporte es un elemento difícil de erradicar. Como hemos visto, esta ha ido evolucionando y convirtiéndose en un problema endémico de la sociedad. Teniendo en la actualidad una mayor presencia la violencia verbal y no la violencia física.

Otro de los grandes problemas es la respuesta por parte de las instituciones para prevenir comportamientos vandálicos en los eventos deportivos, enfocados, anteriormente, hacia la violencia física debido a las numerosas lesiones y homicidios provocados por los grupos violentos de los equipos. Sin embargo, en la actualidad debemos analizar los hechos de violencia verbal como elementos de una gran gravedad y que perturban la integridad moral de las personas.

Debemos alertar que cada vez los ultras, como grupo, son menos numerosos y que el principal problema lo encontramos en los aficionados en sí; por lo se debe estudiar el comportamiento de cualquier aficionado y no sólo el de los ultras.

El análisis de los graves problemas del fútbol y la violencia ha cambiado desde el comienzo del siglo XXI. Por ello la respuesta de las instituciones debe ir enfocada a las

³⁴<http://cadenaser00.epimg.net/descargables/2018/02/12/e07eaa37159af8c1aa8aca0f9cc1666e.pdf?int=masinfo> Consultado el 19 de septiembre de 2018.

directrices que marca la Ley de 2007 para la prevención de la violencia y racismo a través de sanciones para los responsables.

Debemos alertar de un crecimiento del problema de la violencia en las redes sociales: la impunidad de estar detrás de una pantalla, ya sea de móvil o de ordenador, está creando una corriente violenta impune que debe ser perseguida, pues las redes son la forma de comunicación más habitual y no debe ser un lugar de confrontación y enfrentamiento. Para ello debe realizarse un trabajo de concienciación y educación desde las escuelas para prevenir estos posibles problemas.

LA IMPORTANCIA DEL PENSAMIENTO DE RATZINGER EN LA DEFENSA DE LA RAZÓN

Vicente Ramos Centeno

RESUMEN:

La evolución de la Modernidad ha terminado estrechando y empobreciendo la razón. Así, por ejemplo, hoy hasta han desaparecido conceptos como "naturaleza humana" y "Derecho natural". Ratzinger nos pide ampliar "nuestro concepto de razón y de su uso". Él se opone a las concepciones irracionales de Dios y de la religión, de la historia y del fundamento de la convivencia. La "luz divina de la razón", dice, ha de ser órgano de control de la autenticidad de la religión, ha de hacer frente a las concepciones irracionales y nihilistas de la historia que niegan a Dios e insultan al hombre, y también a las concepciones irracionales del fundamento de la convivencia. Para ello, añade, es necesaria una nueva alianza de fe y razón, pero esto implica que el cristianismo no se trivialice a sí mismo.

ABSTRACT:

The evolution of Modernity has ended up narrowing and impoverishing reason. Thus, for example, concepts such as "human nature" and "natural law" have disappeared today. Ratzinger asks us to expand "our concept of reason and its use". He opposes irrational conceptions of God and religion, of history and the foundation of living together. The "divine light of reason," he says, must be the organ of control of the authenticity of religion, must face the irrational and nihilistic conceptions of history that deny God and insult humanity, and also the irrational conceptions of the foundation of living together. For this, he adds, a new alliance of faith and reason is necessary, but this implicates that Christianity does not trivialize itself.

PALABRAS CLAVE: *Modernidad, razón, estrechamiento de la razón, religión, historia, convivencia, alianza fe y razón.*

KEYWORDS: *Modernity, reason, narrowing of reason, religion, history, living together, alliance faith and reason.*

1.- INTRODUCCIÓN

Seguramente nuestros tiempos serán un día caracterizados como los tiempos de la crisis de la razón. O, como ha dicho Ratzinger muchas veces, tiempos de estrechamiento de la razón. La Modernidad que en Lutero significó la ruptura entre razón y fe, en la

ciencia y en la filosofía comenzó con una gran confianza en la razón. Más, poco a poco, con acontecimientos decisivos, como la pérdida por España y la Casa de Austria de la Guerra de los Treinta Años y la hegemonía del norte protestante en el panorama europeo, fueron surgiendo formas de filosofía, como el empirismo, en los que la razón fue cada vez más estrechada y los

Europeos muchas veces llegaron a la conclusión de que la razón no era instrumento válido para saber de lo verdaderamente esencial.

No sólo en Kant buscando poner límites a la razón, y no digamos en Nietzsche y Heidegger, sino en muchas otras filosofías, de todas las tendencias y pelajes, la desconfianza en la razón oscurece el espíritu de los europeos por lo menos desde el siglo XVIII. Bien lo vieron primero Husserl y luego Bloch y los de Frankfurt, que criticaron la reducción de la razón a razón instrumental que no sabe nada de fines. La razón ha estado perdiendo terreno hace ya demasiado tiempo, y esa pérdida constante nos ha llevado a un mundo “sentimentaloides y cutre”, como me decía no hace mucho un hombre sabio y yo mismo ya he recordado alguna vez. Un mundo de una razón tan empobrecida y estrechada que hasta han desaparecido los conceptos de “naturaleza humana” y “Derecho natural”. Véanse las cosas que ahora se escriben sobre la fundamentación de la moral y del derecho.

Esto todo está llevando a leyes inicuas y prácticas aberrantes, algunas de las cuales costaron la horca en Nürenberg, pero que ahora son cada vez más aceptadas en una sociedad de masas mandibles como ovejas, cada vez más conformes con los valores nazis y estalinistas.

Necesitamos reconstruir la razón, “ampliar el concepto de razón y de su uso”, dice muchas veces Ratzinger, volver a reconocer a la razón la capacidad para saber de lo verdaderamente esencial y ejercerla. Y en esta circunstancia el pensamiento de Ratzinger puede sernos de una gran ayuda. Ratzinger es un pensador de nuestro tiempo que ama la razón, que cree en su capacidad para saber de lo verdaderamente esencial, que la considera una “luz divina” que debe servirnos de criterio en todas las cuestiones de la vida.

Ratzinger ha visto muy bien el peligro de una visión irracional de la realidad y de la praxis. Ahora sólo quisiera considerar tres peligros que él ha visto muy bien: el peligro de una visión irracional de Dios y de la religión, el de una visión irracional de la historia y el de una concepción irracional del fundamento de la convivencia.

1.- LA CONCEPCIÓN RACIONAL DEL CRISTIANISMO DE RATZINGER. LAS PATOLOGÍAS DE LA RELIGIÓN Y DE LA RAZÓN

Ratzinger sabe de la fuerza de la religión, de la realidad de la religión en la vida de los hombres y de los pueblos. No cae en esa trivialidad, como es lógico, siendo quien es, de tantos autores modernos y contemporáneos que reducen la religión a superstición o a expresión de situaciones sociales. Pero sabe también de sus peligrosas patologías.

Y esas patologías, considera Ratzinger, no se dan sólo en formas del hinduismo o del islam conocidas por todos, sino que también en el cristianismo se dan cuando se renuncia a la armonía entre fe y razón. La “luz divina de la razón”, dijo en diálogo con Habermas, debe ser “como un órgano de control” de la autenticidad de la religión.

Defiende Ratzinger que el cristianismo, desde el principio, optó por el logos y por la verdad, optó por la razón y defendió que su asunto era la verdad, del mundo, del hombre y de Dios. Por eso anota algo muy interesante: el cristianismo, desde el principio, no dialogó con las religiones, sino con la filosofía. Porque también ésta se ocupaba de la verdad y de la razón. Y es que la salvación, dice este pensador, no está en las religiones mismas (cuántas cosas sin sentido se dicen hoy a este respecto, se me ocurre a mí), sino en la verdad.

La fe cristiana, hasta la ruptura protestante, siempre fue aliada de la razón y la creencia en el Dios cristiano, podríamos añadir, racionaliza el mundo. Nietzsche sabía bien estas cosas, de ahí que su rechazo de Dios y su rechazo de la razón, de la historia de la razón tal como se ha mostrado en la historia de la filosofía occidental, vayan unidos.

El cristianismo, tal como lo concibe Ratzinger, es aliado de la razón y debe ser aliado de la razón. Y además es una religión que tiene una base racional esencial: el cristianismo no es un mito, sino una historia. Su justificación racional es la historia de Cristo, que conocemos realmente.

Pero, si puede haber patologías de la religión, también las hay de la razón. En el tiempo moderno y contemporáneo ha habido muchas formas patológicas de la razón, todas aquellas que la han reducido y estrechado, hacen de la razón mera razón instrumental y privan a la razón del saber de lo bueno y de lo justo, y de estar abierta a las preguntas definitivas, considerando la religión y sus preguntas como mera ilusión supersticiosa. Habermas mismo, en diálogo con Ratzinger, ha admitido el sinsentido contemporáneo de esta mutilación de la razón.

2.- CONTRA LA CONCEPCIÓN IRRACIONAL DE LA HISTORIA

Otra cosa muy importante del pensamiento de Ratzinger es su lucidez para captar cómo la ruina de la razón ha llevado a una concepción irracional de la historia. Y, efectivamente, vivimos en una sociedad en que una concepción cátara, nihilista y resentida de la historia se ha hecho común, y de las cátedras universitarias esta visión ha pasado a los discursos políticos y al sentir de la gente en general. La consecuencia de todo esto es muy clara: la negación de Dios y el insulto del hombre. Lo dice así de explícitamente Ratzinger: “Utilizamos los

horrores de la historia humana, precisamente también de la más reciente, como pretexto concluyente para negar la existencia de un Dios bueno y difamar a su criatura, el hombre” (RATZINGER – BENEDICTO XVI, *Jesús de Nazaret. Primera Parte*, La Esfera de los Libros, Madrid, 2007, pág. 195).

Necesitamos, es razonable pensar con Ratzinger, una concepción nueva de la historia, distinta de la que hoy domina el alma envilecida del hombre contemporáneo, y más fiel a la verdad y a la humanidad. Y yo creo que el pensamiento de nuestro autor puede ser muy importante para la construcción de esta nueva concepción de la historia.

La concepción de la historia de Ratzinger es la del cristianismo. Y como toda concepción sería de la historia, incluida la del mismo Marx, se plantea el problema del fin de la historia, del sentido de la misma. Y el fin de la historia, como es lógica en este teólogo cristiano, es el Reino de Dios. La historia camina hacia el Reino de Dios y ése es su fin.

Pero, ¿qué es el Reino de Dios? Porque en estas cosas ha habido mucha confusión en el mundo contemporáneo. Ratzinger deja muy claro que el Reino de Dios no se identifica con ningún proyecto o programa político. Su lucidez podemos verla bien claramente cuando observamos cómo proyectos políticos que se consideraban el fin de la historia no hace muchas décadas se han vuelto hoy imposibles e indeseables. Pero el Reino de Dios, la soberanía de Dios, que conlleva la salvación del hombre, no se identifica con ningún proyecto político, él juzga todo proyecto político e indica a la historia su dirección.

Es importante meditar esto, porque Ratzinger llama la atención al cristianismo para que no se equivoque, se trivialice y pierda su especificidad. El peligro actual de trivialización del cristianismo es algo sobre lo que han llamado también la atención otros

muchos autores contemporáneos, como Metz y Kolakowski. Pero Ratzinger insiste a los cristianos: Cristo no es un rebelde (no rechaza la Torá) ni un liberal (no es un maestro que quiera suavizar el rigor de la moral) ni un zelote (no es alguien que quiera imponer el Reino de Dios por medio de la violencia). Lo que nos trajo Cristo fue a Dios y lo que predicó fue la llegada del Reino de Dios, la soberanía de Dios.

Todo esto es importante, porque el cristianismo ha sido la mayor fuerza generadora de historia de la historia, y lo que sea el futuro dependerá mucho del futuro del cristianismo y de cómo éste se entienda a sí mismo.

3.- LA IRRACIONALIDAD DEL ATEÍSMO QUE DEJA SIN FUNDAMENTO DE VERDAD LA CONVIVENCIA HUMANA

Considero que otra de las muestras de la irracionalidad de nuestro mundo es lo que suelo llamar “la instalación en la muerte de Dios” del pensamiento contemporáneo, es decir, el poner acriticamente el ateísmo como punto de partida. Pero esto produce efectos perversos, la muerte de Dios aceptada acriticamente ha producido y produce efectos perversos.

Ratzinger habla con mucha claridad de los efectos perversos de nuestra cultura atea en el Tercer Mundo. Es ella la que ha transformado en *Tercer Mundo* al Tercer Mundo. No les hemos llevado a esos pueblos al Dios conocido en Jesucristo, sino que les hemos arrancado su alma sin respetar tampoco lo que pudiera haber de racional y humano en sus tradiciones, de modo que también los hemos convencido a ellos de que lo único importante es el poder y las ganancias.

Podíamos añadir también que la actual persecución mundial del cristianismo, en que nuestro mundo ateo ejerce el papel de aliado objetivo de los asesinos, muestra bien también los efectos perversos de la muerte de Dios.

Comentando la parábola de los viñadores inicuos, nos dice también Ratzinger que, contra lo que pensara Nietzsche, la muerte de Dios no nos ha hecho a nosotros los dueños de la viña. Los dueños son otros, los grandes poderes internacionales. Podríamos decir nosotros que, contra lo que decía Marx, en nuestro mundo ya no se nos proponen flores en la cadena, hoy se nos propone (eso es lo progresista) soportar las cadenas sin rastro de flor alguna.

Este es el mundo sin referencia a Dios que hemos construido. Pero sin esa referencia, dice Ratzinger, se degradan el derecho y la moral. Porque la verdad es que “el principio de la mayoría no basta”, como se vio en el régimen nazi (*Discurso en el Bundestag*, 22 de Septiembre de 2011).

Ratzinger afirma que las ideas de los derechos humanos, de igualdad de todos los hombres, de libertad y dignidad de las personas, son ideas que han ido siempre unidas a la creencia en Dios, en el Dios de Israel que nos trajo Cristo. No se puede prescindir de esta *herencia*, dice Ratzinger, para construir una sociedad humana. Necesitamos *la verdad* que recibimos por herencia. Los resistentes antinazis tenían razón porque heredaron una herencia que provenía de la creencia en Dios.

Ratzinger sabe de sobra que no se puede imponer la fe, pero que tampoco podemos renunciar a esta herencia de verdad si queremos vivir como hombres (Cf. RAMOS CENTENO, *Pensando con Ratzinger*, BAC, Madrid, 2016, pág. 117).

Desde luego, lo que no parece razonable a estas alturas son las tesis de Nietzsche o de nuestro contemporáneo Rorty. Ellos rechazan el concepto de verdad y Rorty, con otros muchos de hoy en día, llega a acusar a los defensores de la verdad de defensores de la dictadura. Pero el hecho es que todas las dictaduras se han basado en la mentira, dice Ratzinger, y que sin verdad el poder es de los fuertes.

En conclusión, yo preguntaría a progresistas y postmodernos: ¿Permitiríamos, porque lo quiere la mayoría y no hay verdad objetiva alguna, un régimen que echara por la borda toda nuestra tradición humanista, un régimen totalitario, un régimen racista, que exterminara a los débiles, que persiguiera a los creyentes, que inculcara ideología en vez de educar y enseñar el conocimiento de la realidad, que legislara la explotación bárbara de los obreros, que considerara que las mujeres tienen menos derechos que los varones? ¿Permitiríamos algo así y lo consideraríamos justo, dado que no hay verdad y la mayoría ha votado un programa semejante? ¿De dónde sabemos que eso no sería justo y que los disidentes serían los que tenían razón?

Otra pregunta haría, en las terribles circunstancias que vivimos en nuestros días: ¿Puede el vacío resistir al fanatismo?

Termino con una advertencia a los cristianos, inspirado en ideas de Ratzinger (y también de otros autores): no trivialicen su mensaje, el vino nuevo no es vino aguada. Quizá les ayude recordar estas ideas de Bloch, un autor no precisamente cristiano, sino judío ateo que se llamaba a sí mismo marxista:

. “El cristianismo es altivez” y “voluntad de no dejarse tratar como ganado”

. “El cristianismo no es sólo un clamor contra la miseria, es un clamor contra

la muerte y el vacío y hace portavoz de ambos al Hijo del Hombre”

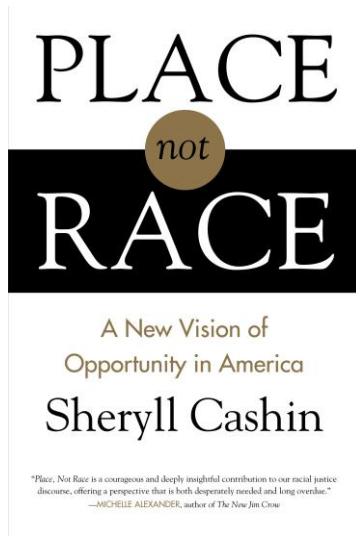
Reseñas

bibliográficas

RESEÑA BIBLIOGRÁFICA

CASHIN, S.: *Place not race. A new visión of opportunity in America*

Boston, Beacon Press, 2014 (176 páginas).



Sheryll Cashin, catedrática de Derecho en Georgetown University Law Center, activista de derechos civiles, publicó en 2014 un nuevo libro con el que contribuye positivamente al discurso de la justicia racial, ofreciendo una perspectiva tan novedosa como atrevida, cargada de sólidos argumentos, que fueron germinando a partir de varios artículos publicados en prestigiosas revistas académicas así como ponencias presentadas en diversos seminarios y congresos.

El contenido de la obra se desarrolla a través de una introducción, cinco capítulos, conclusión y un epílogo muy emotivo y pedagógico, a modo de carta a sus dos hijos, que recomiendo no sea lea sin haber leído antes el capítulo segundo, titulado <<Place Matters>>, puesto que ayuda a entender mejor su contexto familiar y la razón de ser de este

libro. En las primeras líneas de esta obra la autora aclara que el tema central es la justicia. Su hilo conductor es intentar convencer al lector de que es preferible el criterio del lugar frente al de la raza cuando se trata de programas de acción afirmativa por razones, fundamentalmente, pragmáticas puesto que con ello se consigue mayor cohesión y mejores políticas sociales. Lo más importante es que además, según la autora, así se ayudará a los verdaderamente desfavorecidos por la segregación, teniendo en cuenta que los que sufren por vivir en ambientes oprimidos y pobres son merecedores de una especial consideración.

La raza resulta ser todavía importante en la sociedad americana, particularmente, en el sistema de justicia penal. Lo que Sheryll Cashin argumenta es que la raza como criterio es, al final, poco inclusivo. La autora recuerda en la introducción las palabras de Walter Benn Michaels, profesor de la Universidad de Illinois, quien escribió en el *Journal of Blacks in Higher Education*: “Cuando los estudiantes y profesores activistas luchan por la diversidad cultural, ellos en buena parte están tratando de combatir algo más que el color de la piel que los niños ricos tienen”.

Para la autora de libros como *The Agitator's Daughter and The Failures of Integration*, entre otros, el uso de la raza en las acciones afirmativas ha ido disminuyendo como factor para la admisión en las Universidades. Desde que Ward Connerly puso en marcha una movilización política por todo Estados Unidos en contra de la acción afirmativa a mediados de los noventa, el porcentaje de Universidades públicas que consideran el factor étnico o racial para admisiones ha caído del 60 % al 35 %. En la actualidad, únicamente, el 45 % de Universidades privadas siguen considerando explícitamente la raza como factor relevante, siendo éstas en su mayoría escuelas para la élite socio-económica del país. Para Sheryll Cashin este descenso evidente del uso de la raza como factor importante en las acciones afirmativas no hay que interpretarlo de un modo negativo ya que la acción afirmativa está pensada para ayudar a gente que se encuentra en situación de desventaja y ésta viene condicionada más que por la raza por el lugar, el ambiente en el que uno crece y se desarrolla como ser humano. Su propuesta incluye la realización de test opcionales estandarizados, sustituyendo el criterio del mérito basado en objetivos económicos por el criterio de la necesidad, y conseguir reclutar así buenos estudiantes de lugares marginados,

en aras de reforzar la deseada alianza entre razas así como la movilidad social. La autora trata de dar argumentos para demostrar cómo los costes sociales de optar por el criterio de las preferencias raciales son muy superiores a los beneficios marginales que se derivan de esta práctica, si lo comparamos con otras alternativas, como la que sugiere la autora, que consideran el criterio de la raza de una forma neutral.

A lo largo de libro, la autora defiende creo que con argumentos convincentes la tesis de que la raza no, por definición, abarca a todos aquellos que sufren de desventajas estructurales de pertenecer a escuelas o barrios marginados u oprimidos. La raza puede llegar a ser demasiado inclusiva, pecando por exceso, al poder incluir también a gente de piel oscura pero que tienen una situación socio-económica aventajada frente a otros. Como resalta Sheryll Cashin repetidas veces en la obra, uno de los aspectos perversos de la diversidad actual que se persigue en las mejores escuelas y universidades es que redundan en beneficio de los niños de inmigrantes africanos que, en su mayoría, son los mejor formados y educados de todos los grupos de inmigrantes, muy por encima de cualquier otro grupo étnico, incluidos blancos y asiáticos. De hecho, en Harvard destacó en 2012 el alto porcentaje de estudiantes admitidos que procedían de Nigeria y Ghana.

El objetivo para Sheryll Cashin es crear una sociedad donde el desarrollo de la personalidad sea libre y no esté condicionado por las circunstancias o lotería del lugar de nacimiento, algo sobre lo que ya habían insistido, con no pocos sólidos argumentos, pensadores de la talla de John Rawls. No queda así otra salida si queremos construir una sociedad cimentada en el valor de la igualdad de oportunidades para todos que combatir las injusticias de la segregación, como imperativo moral por encima incluso de la búsqueda de la diversidad en sí misma considerada. En definitiva, la propuesta de la autora es comenzar una etapa de reconciliación racial a partir de la reforma de la acción afirmativa. Según explica, en menos de tres décadas la mayoría blanca americana va a ser sustituida por una multirracial, multiétnica, América. Esta transición está creando ya conflictos sociales –un conflicto de valores, cultural y de filosofía política-. Habría que estar preparados frente a las amenazas en el ámbito racial que sobrevienen del fenómeno de la globalización y de los cambios tecnológicos.

Recomendaría de un modo especial al lector las páginas del capítulo cuarto <<Place, Not Race, and Other Radical Reforms>> en las que la autora examina los seis exitosos ingredientes de lo que Tom Parker denominó “el libro de cocina de la diversidad”. La alianza interracial sólo se puede conseguir si se cambia el sistema y se hace un uso neutral de la raza en programas como la acción afirmativa pues lo contrario termina haciendo crecer el resentimiento y divide más que une en un contexto de creciente diversidad.

No cabe duda de que Sheryll Cashin es una abogada apasionada de la integración, tal y como deja patente en una de las frases más bellas de este libro: “Yo creo en el valor de la diversidad y en la idea de que la gente debería estar expuesta <<al otro>>”. Lo que interesa no perder de vista es que la diversidad enriquece y beneficia a toda la sociedad y no sólo al que a priori ha salido beneficiado de un modo directo al recibir un apoyo preferente del sistema. De ahí que se muestre partidaria de lo que ella misma denomina “diversidad práctica” lo que, a su vez, requiere un esfuerzo diario de crear prácticas y estructuras que sean verdaderamente inclusivas y terminen con los prejuicios que muchas veces nos invaden.

El quinto y último capítulo de la obra es claramente reconciliador en términos raciales, como su propio título indica, defendiendo la autora allí lo importante que resulta lograr una alianza multirracial desde el punto de vista teórico y práctico. Sheryl Cashin explica que necesitamos nuevas identidades colectivas que trasciendan las meramente individuales y para ello tenemos que incorporar algunas personas –no todas- que no están en contacto directo con nosotros de una forma natural pero que son valiosas para nuestro

entorno existencial. Es evidente, constata la autora, que el proyecto de construcción de la comunidad multirracial es complicado. Literalmente precisa: “Como un matrimonio requiere trabajo, compromiso, negociación y un grado de consenso que sólo se conseguirá con un esfuerzo intencionado”. Lo que nosotros tenemos ahora –añade con cierta desazón- es un prevalente sentimiento de recelo hacia la raza y el cambio social junto a políticas nacionales enfrentadas a este compromiso.

La autora termina el quinto capítulo dejando un mensaje tan contundente como provocador: “La libertad no es gratis. La democracia real se paga con el sudor del trabajo” y en suma no podemos endiosar o demonizar a nadie en función de su apariencia racial. Sin duda alguna, esta obra de Sheryl Cashin invita a la reflexión teórica pero sobre todo anima a seguir profundizando en una teoría de la justicia que no deja de lado a los débiles o a los que se encuentran en una situación de desventaja por carecer de las mismas oportunidades que los que han tenido la suerte o la fortuna de nacer en un ambiente socio-económico más favorecido. Tenemos que agradecer a la autora africano-americana que nos haya dado las claves en este sugerente libro de cómo abandonar los prejuicios existentes en este tema, tendiendo una mano hacia esa buscada y anhelada alianza interracial superadora de los meros intereses partidistas o individuales egoístas. En definitiva, esta obra merece que se conozca y se lea, no sólo por los juristas sino por el público en general, porque en ella se descubren múltiples mensajes en favor de una sociedad en la que reina la fraternidad interracial, algo a lo que creo que sin duda deberíamos aspirar dentro de este mundo regido por la globalización en el que estamos instalados.

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RESEÑA BIBLIOGRÁFICA

HERMIDA DEL LLANO, C.: *La mutilación genital femenina. El declive de los mitos de legitimación*

Valencia, Tirant lo Blanch, 2017 (231 páginas).



No estamos ante un mero libro. Es mucho más: es una realidad urgente a tener muy en cuenta en este siglo XXI, incorporada a las páginas que finalmente configuran este libro con mayúsculas. Comenzando por el acertado título que enmarca perfectamente todo el contenido del mismo. Título que además es desgranado de forma académica en cada poro del libro. Esta obra tiene gran solidez y rigor académico, al basarse en numerosas fuentes doctrinales, legales y jurisprudenciales.

Cristina Hermida nos introduce en el tema de forma pedagógica. Narra de forma espléndida todo el marco geopolítico donde se enmarca el terrible problema de la mutilación genital femenina. En el libro va aflorando de forma paulatina esta intrincada problemática que se va dando en el ámbito privado y que va agrandando ese círculo primigenio hasta ver la mutilación genital femenina en su amplio campo de acción desde los distintos ámbitos donde se incorpora y se aprueba.

La profesora Cristina Hermida va jalonando todo este proceso y marcando elementos de reflexión muy valiosos con una convicción profunda: el Derecho, la ética, la educación son instrumentos al servicio del respeto por la dignidad de cada ser humano, por lo que las tradiciones culturales atávicas no pueden estar por encima del valor de la vida humana y su bienestar físico y psicológico. Desde todo ello, dedica una parte muy importante al relativismo cultural frente al que hay que permanecer en una actitud de reflexión profunda para no legitimar la mutilación genital femenina atendiendo a argumentos de especificidades culturales. Esta parte del libro me parece nuclear ya que es una invitación a valorar la importancia que tiene el aprehender la realidad desde las claves de que no se puede violar los derechos humanos bajo ningún concepto ya que la propia identidad de los pueblos tiene su dynamis y por tanto, va evolucionando.

Me resulta importante este libro, sobre todo, porque crea una escuela nueva. Escuela que tiene un referente en la propia autora gracias a sus trabajos y trayectoria profesional y vivencial. Defiende sin ningún tipo de duda metódica la dignidad de la persona y su valor. Esta nueva escuela de vida nos pone en el camino de reconocernos parte de este mundo y poder enfocar tanto la mutilación genital femenina como otras cuestiones que van surgiendo en estos momentos como verdaderas personas de nuestro tiempo. Además, es muy interesante el poder tratarlos desde las perspectivas del Derecho, la filosofía, la política (en su sentido ciudadano), la teología...

Esta línea de responsabilidad que nos propone el libro y su autora no la podemos perder. Es constitutivo de suyo. Los derechos de las personas son inviolables e irrenunciables y contra ellos, ninguna razón de Estado, ningún pretexto de bien común puede prevalecer. Sólo de esta forma se funda un orden sobre la verdad. Verdad que está encuadrada también en el derecho positivo sabedor de que la norma constitucional ha de velar por la vida e integridad del ser humano. Esto queda plasmado en el libro de forma

rigurosa examinando sentencia por sentencia, sacando a partir de todo ello, la falsedad en la que se asientan los mitos de legitimación que permiten la aberrante práctica de la mutilación genital femenina.

En el capítulo 3º aborda la autora la mutilación genital femenina desde la perspectiva jurídica española, inspirada en el interculturalismo para trabajar en las diferentes aristas ya sean sancionadoras en el ámbito del Derecho Penal (artículo 149 del código penal) o también en programas de ayuda para la realidad sangrante de estas mujeres. Estas aportaciones están muy bien explicadas en el libro ya que el Derecho es presentado en una perspectiva novísima como trampolín del cambio social, tratando de superar todos los posibles paternalismos.

El capítulo 4º está dedicado al derecho de asilo. Abarca el entramado humano desde la perspectiva de la legislación española y europea, teniendo en cuenta un quinteto nuclear. Éste capítulo invita a pararnos ante conceptos vivenciales como es el de persecución-refugiado-protección internacional-patriarcado y género.

Y para terminar toda esta magistral exposición. Cristina Hermida, nos propone un 5º capítulo, donde expone los retos que tenemos como ciudadanos y como sociedad ante la mutilación genital femenina con preguntas de hondo calado: ¿Qué valor tiene la dignidad de la persona? ¿Se puede hacer objeción de conciencia ante los Derechos Humanos? ¿Qué papel tiene en todo esto el Estado? ¿Cómo planificar una formación y educación pertinente para estos nuevos retos? ¿Cómo empoderarnos en el conocimiento y adhesión a los Derechos Humanos? La profesora Cristina Hermida da luz a todas estas cuestiones dentro del marco del Derecho y de la filosofía del derecho.

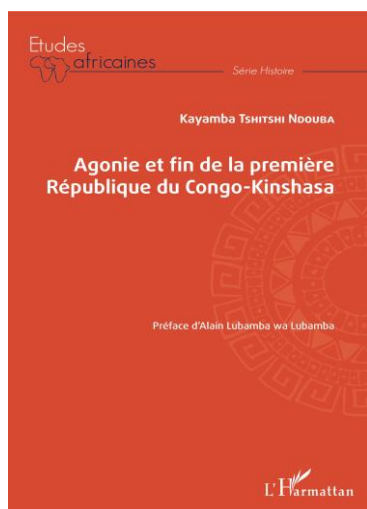
Verdaderamente, este libro abre un nuevo camino ya que es un excelente despertador de conciencias desde el absoluto rigor jurídico y filosófico, para hacer un mundo más habitable y así lo expresa noblemente Cristina Hermida del Llano: “Los iusfilósofos no podemos mantenernos al margen”.

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RESEÑA BIBLIOGRÁFICA

SHITSHI NDOUBA, K.: *Agonie et fin de la première République du Congo-Kinshasa, Préface d'Alain Lubamba wa Lubamba*

París, L'Harmattan, 2016 (292 páginas).



En sus *Lecciones sobre la filosofía de la historia*, Georg Wilhelm Friedrich Hegel, declaró que “Se aconseja a los gobernantes, a los políticos, a los pueblos, que aprendan principalmente a través de la experiencia histórica, desde las lecciones de la historia. Pero lo que la experiencia y la historia enseñan es que los pueblos y los gobiernos nunca han aprendido nada de la historia y nunca han actuado conforme a las máximas de las que podrían haberse inspirado”. Así, Hegel argumentó sobre la idea de que, a pesar de la variabilidad de las circunstancias, algunos de los principios generales de la experiencia histórica del hombre pueden orientar la acción presente. Este filósofo alemán expresó, ya en 1822, el interés y las virtudes pedagógicas del conocimiento de la historia desde el punto de vista de la acción presente y principalmente de la acción

política.

El libro "La agonía y el fin de la primera República de Congo-Kinshasa", del profesor Kayamba Tshitshi Ndouba, examina con notable rigor y conocimiento las secuencias intermitentes de las crisis políticas de la experiencia singular de los años 1960-1965. Este libro revela brillantemente las síntomas visibles del disfuncionamiento de las instituciones y de las relaciones políticas en dos niveles: Entre gobernantes y gobernados, entre el Estado y la sociedad. A partir de estas premisas, el profesor Kayamba Tshitshi señala en su libro los factores constitucionales, las dinámicas institucionales y las estrategias de los actores políticos, individuales y colectivos, que han exacerbado la crisis política de la primera República de la R.D Congo.

La dialéctica y la argumentación desarrolladas en este libro invitan al lector a comprender con claridad los hechos políticos que inevitablemente transforman las crisis políticas en una crisis de régimen. Al mismo tiempo, el autor interpela a los ciudadanos congoleños a interpretar los signos que preceden la caída de los pilares de un régimen político, a partir de la experiencia histórica de la primera República.

De hecho, todo régimen político pretende integrar y ordenar las divergencias de los elementos del orden político. Como sistema de gobierno de una sociedad, un régimen político tiene vocación de persistir en el tiempo, más allá de las vicisitudes y de las turbulencias de la vida política, al instituir mecanismos de regulación y de reabsorción de los conflictos políticos. Entonces, el colapso y el derrumbamiento de un régimen son un hecho histórico significativo en el análisis y la puesta en perspectiva de la evolución de una sociedad, con respecto a las consecuencias que genera sobre el equilibrio del sistema social, económico y cultural.

Ciertamente, a diferencia de los hechos físicos, los hechos históricos no están supeditados a las leyes. Sin embargo, como ha señalado Maxime Tandonnet, el ex asesor de Nicolás Sarkozy, la naturaleza humana no cambia, y los acontecimientos de la misma naturaleza se repiten constantemente en la lógica de una renovación eterna. Es pues a este

nivel que podemos situar la pertinencia y la relevancia de los análisis desarrollados por el profesor Kayamba Tshitshi Ndouba. Esta investigación nos lleva a comprender, teóricamente y en términos de práctica política, las consecuencias del fin del régimen democrático de la primera República en la evolución del actual sistema político congoleño. Y, en extensión, el profesor Kayamba Tshitshi Ndouba invita a reflexionar sobre las analogías y similitudes entre la crisis política de la primera República y la crisis política actual que golpea la República Democrática de Congo. La previsibilidad del desenlace fatídico de una crisis prolongada y mal resuelta es un hecho que debe interpelar la buena consciencia de todo congoleño comprometido con los valores de paz, de justicia, de equidad, del buen gobierno y de la democracia.

Este es el mensaje, que a mi juicio, el profesor Kayamba Tshitshi pretende transmitir a sus conciudadanos y a la clase política. El libro interpela sin reparo a los actores políticos congoleños que aún no han asimilado "el significado de la historia" como una fuente inspiradora de acción política a favor de nuestra herencia común, el Congo.

Muy bien documentado y estructurado, este libro invita no solo a los expertos en el tema sino al público en general a profundizar en el conocimiento de la historia política del Congo en aras de explorar sus victorias y fracasos así como a indagar en las profundidades de la memoria colectiva y en las virtudes de la construcción nacional de la República democrática de Congo.

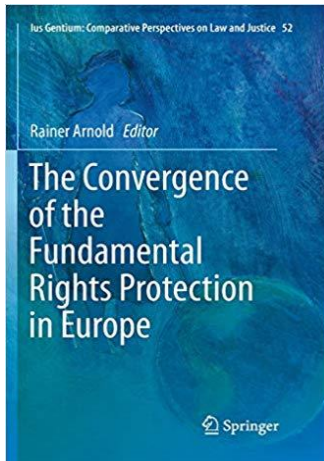
El autor lanza un llamamiento para evitar los errores del pasado e innovar la vida pública congoleña mediante la consolidación y la redefinición de los logros de la independencia ganada con esfuerzo y los valores universales de la democracia y el Estado de Derecho.

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RESEÑA BIBLIOGRÁFICA

ARNOLD, R. (Ed.): *The Convergence of the Fundamental Rights Protection in Europe. Ius Gentium: Comparative Perspectives on Law and Justice.*

Vol. 52, Springer (Springer Science+Business Media Dordrecht), Holanda, 2016 (235 páginas).



Se trata de una obra colectiva en la que reconocidos expertos del ámbito académico internacional y jueces de Tribunales Constitucionales reflexionan sobre la protección de los derechos fundamentales en Europa. El examen lo realizan teniendo en cuenta el nivel de protección que deriva de las Constitucionales nacionales, del Convenio Europeo de Derechos Humanos y de la Carta de Derechos Fundamentales de la Unión Europea para los Estados miembros.

Los trece capítulos que conforman este libro demuestran la interconexión funcional de estos diferentes niveles de protección en aras de lograr una progresiva convergencia. El lector se adentra en un tema clave actualmente en el siglo XXI a través del examen de cuestiones profundas cómo, por ejemplo, si la dignidad humana ha de considerarse el verdadero fundamento de los derechos fundamentales, si la acción positiva es una forma específica de igualdad o en si el concepto de convergencia de derechos fundamentales se sostiene en la realidad.

Resulta particularmente interesante el tema relativo a las formas de recepción directa de un orden legal diferente así como el del proceso de transferencia funcional de principios y conceptos. Desde una múltiple y rica perspectiva, por la diferente especialización jurídica de los autores de esta obra, se pone de relieve lo importante que es la tarea de la interpretación para la armonización de la protección de los derechos fundamentales. Enfoques institucionales tradicionales como es el método de transformación dualista alemán pierden valor funcionalmente en el proceso de armonización a través de la labor del interpretación constitucional.

Nos invitan a la reflexión jurídico-política las páginas de esta obra colectiva, editada por el prestigioso constitucionalista alemán y Jean Monnet Chair, Rainer Arnold, en la que la convergencia de los derechos fundamentales en Europa se examina no solo en sistemas más tradicionales como España o Italia sino en Polonia, Rumanía y Kosovo, entre otros.

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RESEÑA BIBLIOGRÁFICA

PALACIOS BAÑUELOS, L.: *Franco y el franquismo. Vol.III de Las Bases de la España Actual*

Madrid, Ed. Dilex, 2016 (489 páginas).



De los volúmenes que conforman la obra *Las bases de la España actual, Franco y el franquismo*, que es de por sí una monografía, un libro que puede leerse sin más preámbulos, constituye la parte principal de un conjunto. Por dos motivos. El primero, por la larga duración de la dictadura franquista, del franquismo o régimen de Franco, cuatro décadas que sí, que son historia, pero que siguen siendo fundamentales para comprender nuestro presente, por ejemplo la pugna permanente sobre la interpretación del pasado en la clase política y en los medios de comunicación, la no resolución de la organización territorial del Estado y la extensión de la corrupción, con tantos cómplices de la misma. El segundo, porque el autor ofrece un fruto maduro, una obra de síntesis y de interpretación tras

una larga etapa de sedimentación de lo aprendido y explicado en otras obras y en las aulas de varias universidades españolas y francesas.

Conozco a la persona, al historiador y su obra. Al historiador desde la época en que preparaba mi licenciatura en Geografía e Historia en la Universidad Complutense, con una tesina dedicada a Falange durante la guerra civil, y a continuación cuando abordé una tesis doctoral sobre la extrema derecha española; recuerdo que entre las obras que consulté entonces figuraba uno de los primeros libros de Luis Palacios, *Elecciones en Burgos 1931-1936. El Partido Nacionalista Español* (Madrid, Florida, 1980). A la persona desde que en 1998 me incorporé a la Universidad Rey Juan Carlos, precisamente cuando él ponía las primeras piedras del Instituto de Humanidades y del Área de Historia Contemporánea, tarea esta segunda en la que tuve la oportunidad de echarle una mano; después colaboraría con Luis Palacios en varias empresas, entre estas dos monografías, la edición de libros y la organización de congresos dedicados a la España del Tiempo Presente. Todo esto, obviamente, no tiene relación directa con el libro que se presenta, son más bien recuerdos, cuando Luis Palacios ha accedido a la jubilación sin la oportunidad, merecida, de haber sido Emérito en un tiempo histórico en el que el poder se inventa tantos Visitantes, haciéndonos recordar algunas obras literarias y cinematográficas. Pero existe una relación indirecta, pues hay un hilo conductor, y un proceso de maduración, desde sus primeras obras de conjunto hasta esta que ahora presentamos. Y esta es deudora de una obra intermedia, posiblemente la más innovadora del autor, *El franquismo ordinario. Diálogos con*

Payne, Carrillo, Mercedes Sanz-Bachiller, Velarde, Tamames, Divisionarios, Guerrilleros... (Astorga, CSED, 2011). Este libro tenía la virtud de narrar los hechos principales incorporando un análisis de los (diferentes) discursos políticos del régimen y de ofrecer, al tratar los temas, un diálogo con protagonistas de episodios, temas y etapas de la España que transcurre entre 1936 y 1975. Al hacerlo, adelantaba el planteamiento de *Franco y el franquismo*, y el error del título. Antes y ahora las fuentes orales, y los documentos que estas pudieran ofrecer, aportaban testimonios inéditos y complementaban otras fuentes. Ni antes ni ahora el objeto de estudio era tan solo la España franquista, ni el gobierno, ni el sistema, ni el régimen, ni siquiera el franquismo ordinario, lo que “el franquismo inculcó a los españoles, qué formas de ver la vida y de actuar implantó en España de manera que los españoles las aprendimos, vivimos y fueron –y, en cierto sentido, pudieran seguir siendo, incluso inconscientemente- actuantes” (*El franquismo ordinario*, p. 19). En ambos libros están los españoles de varias Españas, las varias familias políticas del franquismo, los franquistas de a pie, los perdedores de la guerra civil, fuera y dentro de España, en ese exilio interior, y los que solo pugnaron por sobrevivir, fuera cual fuera la ideología que pasaba por su lado, pensando en sí mismos y en los suyos, incapaces o reacios a sumarse a cualquier proyecto político.

Luis Palacios conoce bien otros temas importantes para distintos niveles y ramas de nuestra historiografía, las Cajas de Ahorro, la Historia de Córdoba y la Institución Libre de Enseñanza. Sobre esta última dispone de estudios reconocidos como pioneros desde el ámbito académico. Pero es evidente que este historiador forma en las filas de quienes, en la profesión, no renuncian a escribir sobre el tiempo que les ha tocado vivir, un reto, una tentación, una parte del quehacer académico desde que la historiografía apostó por esta ampliación de los quehaceres del profesional de la Historia y, a continuación, los planes de estudio introdujeron asignaturas de Historia del Tiempo Presente, Nuestro Tiempo o Actual. Como decíamos, *Franco y el franquismo* es la obra de un Catedrático con amplia experiencia en docencia e investigación que ha ido sembrando en tres Universidades, una obra de síntesis, de reflexión, llena de matices, a partir de la revisión de la bibliografía disponible y de una reflexión sobre su propia obra.

Como es lógico en una obra de conjunto, el autor trata la política interior, y con esta la ideología y las familias institucionalizadas (Ejército, Iglesia, Partido) y las familias políticas, las relaciones internacionales, la economía, la sociedad, la cultura nacional católica y la cultura nacida en España al margen del régimen, y las cuestiones relativas a los vencidos organizados o no como oposición; y trata en extenso, en varias partes, de la figura del dictador, para que entendamos la naturaleza de su régimen. Por ejemplo, dice Luis Palacios que en la biografía de Franco sobresale su condición de militar. Pero matiza esta afirmación al traer a colación su conversación con Mercedes Sanz Bachiller: Franco fue una persona apegada al poder del mando, incluido el político, uno de los militares más políticos de nuestra historia, y, por supuesto, utilizó el poder militar para hacer política, que era lo que entusiasmaba a Franco.

Precisamente, las partes del libro que me parecen más sugerentes son las referidas al análisis de Franco, el personaje fundamental, claro está, del régimen, pero que no construye solo él, sino, con él, sus diversos servidores a lo largo del tiempo, y también sus opositores,

aunque con una perspectiva muy distinta y mucho menos influyente. También las relativas a la cultura en todas sus formas, al teatro, al cine, la novela y las culturas popular y juvenil. Asimismo, las que muestran la aparición de una España distinta, que no es lo mismo que opuesta, a la España querida y deseada por el franquismo más puro, el de los veinte primeros años del régimen (nacional-sindicalismo y nacional-catolicismo).

Esa España distinta surgió, paulatinamente, durante la segunda fase de la dictadura franquista, a partir del cambio de política económica, para hacer una economía que podríamos denominar extranjera, no autóctona, en tanto que vino a sustituir al nacional-sindicalismo y al nacional-catolicismo de una tacada (dejando restos y adornos) para ser parte de organismos supranacionales, CEE, BM, FMI, y beneficiarse de la coyuntura que ya disfrutaban los países democráticos y capitalistas: crecimiento sostenido basado en intensificación de relaciones económicas, tecnología y bajos precios del petróleo. También nació *de* (al menos *con*): la incorporación a la programación de TVE de series extranjeras que mostraban otras formas de organización política y un distinto modelo de familia, los propios de países muy cercanos, cuyos gobiernos presumían de sociedades libres y más ricas; de nuevos y variados medios de prensa escrita, de propiedad privada; de la multiplicación de las relaciones con el exterior; del despegue del turismo; y de la renovación de la iglesia católica. Todos esos factores, ajenos y distintos a lo que había sido el larguísimo primer franquismo (dos décadas), cambiaron la sociedad, y al hacerlo esta cambió la clase política y la clase funcionarial. No está de más una comparación: la programación de TVE, y también RNE, tuvo unos efectos en los años 60 y 70 parecida a la producida, recientemente y ahora mismo, por los llamados móviles y otros dispositivos tecnológicos, que han cambiado, y siguen cambiando, comportamientos y formas de pensar.

Es este un libro lleno de conocimiento, fruto, como he dicho, de la reflexión y de muchas lecturas de diversas disciplinas, como muestran sus citas de Cela, de Marías, de otros literatos y pensadores, y, por supuesto, de un conocimiento de la historiografía reciente. El lector va pasando, y comprendiendo, las diferentes fases de una muy larga dictadura, hasta sumergirse en el tardofranquismo, en la crisis de sucesión. Una crisis que no solo tuvo que ver con la erosión física y mental del dictador, también con el cambio en el interior de la sociedad española; el cambio social no podía dejar de afectar a la clase política franquista, sobre todo a su parte más joven, y a los políticos y sindicalistas de la oposición, en el interior y el exterior de España. Como se dice en la obra, el asesinato del almirante Carrero Blanco, mano derecha del dictador, vino a agudizar la crisis de sucesión que conduciría al fin del franquismo.

No faltan en el libro, como parte propia de este y como puente al volumen dedicado a la transición política a la democracia, unas páginas dedicadas a reflexionar sobre lo que de ese régimen ha permanecido, durante un tiempo o hasta la actualidad. Este es un tema muy interesante. ¿Fútbol y toros desempeñaron el papel del pan y circo del Imperio Romano? ¿Qué es el fútbol ahora, hay más o menos fútbol en los medios de comunicación, y por qué, y para qué? Entretener, o adormecer... y los móviles... Y los privilegios de una organización privada, la iglesia católica, y los de otra, la banca, mucho más influyente ahora que en época de Franco, y la colonización norteamericana en forma de bases militares. No

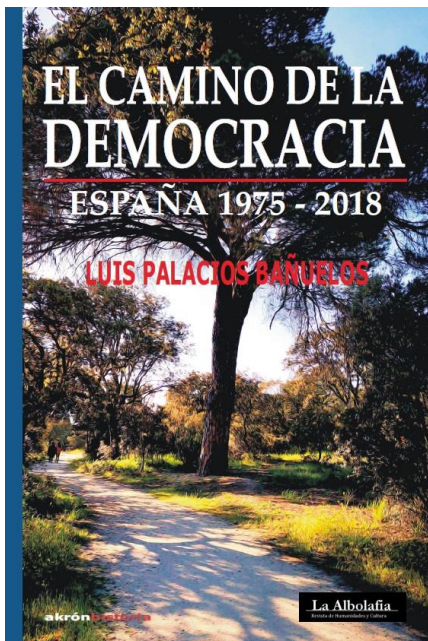
se dice en el libro, pero su contenido, el pasado, si invita a la reflexión y al debate sobre estos mismos temas, en el presente, mirando al futuro.

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RESEÑA BIBLIOGRÁFICA

PALACIOS BAÑUELOS, L.: *El camino de la democracia. España 1975-2018*
 Madrid, Ed. CSED, 2018, (324 páginas).

ISSN: 2386-2491



¿Estamos al final de un ciclo histórico? Esta es la pregunta que un nuevo libro del Catedrático y Director del Instituto de Humanidades de la URJC L. Palacios Bañuelos pretende responder. La respuesta, que el libro da, viene avalada con centenares de páginas del autor, unas ya publicadas en anteriores volúmenes otras de cosecha reciente aun no molida y, en todo caso, pertenecientes a lo que, más que recuerdo del pasado, es vivencia prolongada de un acontecer que, como diría el gran hermeneuta Gadamer, configura y continua influyendo de forma eficaz en la experiencia del presente. Páginas que, más que construir memoria histórica, testimonian eventos acontecidos en la cercanía temporal del historiador que los narra en un relato que se asemeja más a la crónica del cronista contemporáneo que a la memoria del historiador que

recuerda.. Aquella cercanía delata el conocimiento directo que no se nutre de archivos o bibliotecas ni de testimonios ajenos sino de vivencias vividas, término acuñado por Ortega y Gasset en tiempos de hegemonía del *Vitalismo*, y que más que remitir a una mostrenca experiencia de hechos, tal como todo buen positivista defiende, prefiere encontrar en ellas la vida que transmiten y de la que participan.

La figura anglosajona del “observados desinteresado” que describe neutralmente hechos no parece ajustarse en este caso al historiador que, con talante centroeuropeo, se sitúa mas en posiciones hermenéuticas que valoran, recurriendo a la categoría de “ciclo histórico”, un relato que discurre durante cuatro décadas: 1975-2018. El Prof. Palacios plantea el libro, como se dice en la *nota preliminar* con sentido de utilidad, justificando la pregunta inicial ¿estamos ante el final de un ciclo histórico?, “repasando la realidad “con una serie de flashes para buscar las razones de los aciertos y fracasos detectados al repasar los cuarenta años de nuestra historia democrática”. La anécdota, mediante el recurso al concepto de ciclo histórico, queda elevada a categoría”, como diría en su día, si mal no recuerdo, aquel maestro de ensayismo que fue D. Eugenio D’Ors.

El libro lleva por título *Senda a la democracia*, con un senderista que no es otro que la sociedad española y cuyo recorrido viene marcado por el camino que España recorre en ese periodo. Camino cuyos avatares el autor ha narrado en los cinco volúmenes de su obra *Las bases de la España actual* (Ed. Dilex, 2017), del que especialmente el titulado *El reinado democrático de Juan Carlos I* se convierte en fuente principal. Del camino forman parte los hechos y dichos de personajes como los Presidentes de los gobiernos que durante el periodo se suceden: A. Suarez, Calvo Sotelo, Felipe González, J. Ma. Aznar, J.L. Rodríguez Zapatero y M. Rajoy. De entre los personajes destaca la figura del Rey Juan Carlos I. Con los eventos que jalonan la acción de gobierno. Pero el protagonista principal es la sociedad española, con sus deseos y esperanzas, una sociedad diversificada en colectivos, a veces cohesionados en torno a líderes carismáticos como el ejército y la iglesia, y no carente de heridas lacerantes, como el fenómeno terrorista ni de problemas de alta política como la estructura territorial de España, que aún colean. Una sociedad, en todo caso, que se integra en organismo supranacionales como la NATO o en la CEE y que muestra su vitalidad en la cultura, la economía, la política exterior, hasta alcanzar un notable grado de “estado de bienestar”. De esta sociedad, sin embargo, de cuyo organismo viviente el historiador comparte vivencias, también forman parte la crisis que cercenó tantas posibilidades o el soberanismo recalcitrante de algunas regiones.

Si por su utilidad nos preguntamos, cuando tenemos entre las manos un instrumento que resulta útil para algo, como es el caso del libro reseñado, se ha de reconocer que sirve para conocer mejor a España, en un periodo actualmente cuestionado desde perspectivas arbitrarias y que no reflejan las cosas tal como han sido. Es por eso por lo que su autor no pretende sino cumplir el mandato inmanente al ejercicio del intelectual cuando crea saber: servir a la verdad. Actitud que en el día de hoy parece haberse difuminado en tertulias, manifiestos y análisis menos fieles a la objetividad de los hechos que interesados en la captación de adhesiones y benevolencias ideológicas. Por eso para terminar, reconociendo el servicio que presta, agradecemos este nuevo libro a su autor y a la editorial que esmeradamente lo presenta.

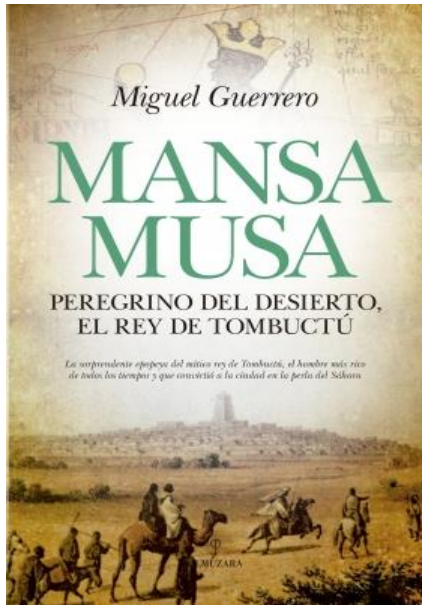
J. Ma. Ga. Gómez-Heras
Catedrático Emérito de la USAL

RESEÑA BIBLIOGRÁFICA

GUERRERO ANTEQUERA, M.: *Mansa Musa. El peregrino del desierto, Rey de Tombuctú*

Almuzara, 2018. (304 páginas)

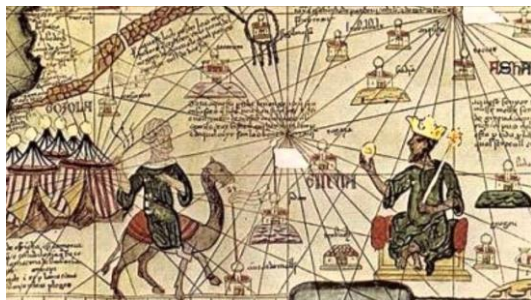
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A mediados de los 80 del pasado siglo hubo un gran interés por Mali al conocerse que en Tombuctú, Gao, Mopti y en las principales ciudades y pueblos de la curva del Níger subsistía una etnia descendiente de los principalmente moriscos venidos de Marruecos al mando del almeriense Yaudar o Jódar, que había sido Bajá de Marrakech y nació en Cuevas de Almanzora (Almería). En 1591 conquistaron el Imperio Songay al servicio del Emperador Ahmed IV AL Dahabí (el Dorado) llamado así por los fabulosos rescates cobrados por los nobles portugueses que cayeron prisioneros en la batalla de Alcazarquivir en 1578 en la que murió el Rey Don Sebastián y que dos años después significó por la muerte del anciano tío y sucesor del Rey portugués que Felipe II se proclamara Rey de Portugal. Sucesivamente fueron enviados contingentes principalmente moriscos unos 23.000 en total que constituían un estado dentro del estado en las afueras de Marrakech y a los que el soberano envió a esta

misión exterior con un doble objetivo aumentar su riqueza aurífera y librarse de unos “incómodos súbditos que llevaban mal el poco interés del emperador por recuperar su mítico Al Ándalus español, ya que de hecho tenía un pacto con Felipe II contra un enemigo común el Imperio turco.

Como estos moriscos fueron sin mujeres, formaron una etnia con mujeres del país, hoy Malí, llamados “Armas”. La razón es que cuando eran atacados por los nativos en la primera expedición la de conquista de 1591 no decían como ahora ¡Alarma! o ¡al arma!. El grito era el del siglo XVI ¡Arma, arma! Nada más escuchar este grito los atacantes recibían el fuego de los arcabuces y espingardas del Ejército de Yaudar y eso asustaba a los caballos y camellos de los atacantes tuareg y Songay. En la principal batalla la de Tondibi cerca del Níger los moriscos adoptaron el orden de combate que tanto éxito les dio en Alcazarquivir y vencieron completamente. Ya aunque hubo algunas importantes escaramuzas en la montaña de Hombori y en los acantilados de Badiangara frente a los dugones. El dominio “Arma dependiendo del sultán de Marrakech saadí y después



independiente con el Baja de Tombuctú, duro dos siglos hasta los Imperios tuareg y fulani o peul de Osman Dan Fodio previos a la colonización. Y pese a ello “los armas” siguieron conservando sus alcaldes en las ciudades y barrios. Un arma Ismael Diadié Haidara Ben Guzmán, fue becado en España en parte gracias al Director de África del MAE Embajador Jorge Dezcallar y se consiguió que los fondos moriscos y judíos “Kati” vinieran a España.

¿Cuál fue la razón por la que Ahmed IV decidió la conquista de este Imperio?. La creencia de que las cupulas y mezquitas doradas de Tomboctu estaban recubiertas de oro. El valor que alcanzaban



los libros donde sabios y dignatarios pagaban en oro los manuscritos. Como confirmarían Ibn Jaldún Ibn Batuta y Ahmed Baba. Otra respuesta nos la da Miguel Guerrero (nombre de un “As” de la aviación en la Guerra Civil) en su fascinante libro. La fabulosa peregrinación de Mansa Musa o el Kankha Musa desde sus capitales imperiales de Niani y Tombuctú en 1324 hasta La Meca y Medina. Al pasar por El Cairo altero los precios del oro dada la

fabulosa cantidad de preciado metal que llevaba. Su caravana la formaban según se dice 60.000 hombres y 15.000 mujeres. Se le ha considerado a Mansa Musa “el hombre más rico de la Historia”. Pero esa fabulosa fortuna era el resultado de muchos años de extracción aurífera en el norte de la actual Ghana conocida como “Costa de oro”. Ello no significaba que a flor de tierra y de fácil extracción hubiera muchas minas de gran riqueza.

La historia que nos relata Miguel Guerrero es fascinante y se lee de un tirón y con el atractivo de que el relato que nos seduce corresponde a la realidad histórica. Mansa Musa Rey de Reyes existió y la prueba es que en el famoso mapa del cartógrafo judío mallorquín Abraham Cresques del siglo XIV, conocido como “Mapa Catalán”, aparece Mansa Musa sentado en su trono alzando en su mano una gran “Pepita” de Oro. Guerrero nos presenta a Mansa como un soberano justo, musulmán moderado, respetuoso y generoso con sus súbditos que no acepta la entrega de mujeres jóvenes como tributo y que no duda en ordenar la ejecución y de uno de sus oficiales y dos nativos por la violación una la mujer que previamente le había sido ofrecida a él, pero que respetó y rechazó el ofrecimiento.



Miguel Guerrero Maestro e Ingeniero Técnico ha trabajado en industria del petróleo en países árabes y en Nigeria y reside en Tánger. Sus transcripciones del árabe son correctas. Conoce perfectamente que los oasis de Tuat y Gurara origen de los tuareg por donde paso Mansa como el Reino de Tremecen, hoy en Argelia pertenecieron históricamente a Marruecos. Los tuareg son de origen judío que se convirtieron al Islam. De los fulani o peul hay una tradición de ser una de las tribus perdidas de Israel en este caso en el Sinaí que atravesó el Sahara y apareció en El Sahel convirtiéndose al Islam. Y una salvedad los “griot” no son cronistas según los etnólogos Levi Strauss y Marcel Mauss son juglares que por tradición oral se ganaban la vida recitando. De hecho el escritor Manuel Villar Raso escuchó en la mítica Plaza de Jema el Fnaa a un “griot” recitar la conquista por el almeriense Yaudar de la curva del Níger y le inspiró una de sus mejores obras. A través de la diestra pluma de Miguel Guerrero conocemos que este alquimista buen gobernante y culto astrónomo que sabía que la Tierra era redonda dos siglos antes de que nuestro Elcano lo confirmara. Mansa Musa realizó un asombroso periplo por tierras fascinantes y lo maravilloso es que esta obra es más que una aventura es la realidad histórica.

NOTA: Las imágenes proceden del mapa realizado por los cartógrafos judíos mallorquines Abraham y Jahuda Cresques en 1375, que sirvieron a los Reyes de Aragón. Probablemente la imagen de Mansa Musa, el Rey de Ghana (o Costa de Oro) sentado en un trono dorado motivó la invasión y conquista del ejército morisco del Sultán Ahmed IV el Dhabí y Al Mansur.

En *Andalucía en el Níger* (Universidad de Granada editado por esta Universidad en 1987) se reproduce la figura de Mansa Musa. En otras partes de este célebre mapa aparecen una caravana con un camello que transporta oro. Se hizo una copia para un Rey francés contemporáneo de Pedro IV de Aragón y se volvió a localizar en 1802 una copia en la Biblioteca Nacional de París. A Mansa Musa se le denomina también Khanka Musa y Ganga Musa. A este mapa se le conoce también por "Mapa Catalán".



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COLABORAN EN ESTE DOSSIER

Rainer Arnold. Doctor en Derecho y Doctor Honoris Causa múltiple, Catedrático de Derecho Público en la Universidad de Regensburg desde 1979. En 1999 consiguió el grado de Jean Monnet Chair de Derecho de la Unión Europea y en 2008 fue nombrado Jean Monnet Chair ad personam „Legal Relations of the EU with Central, Eastern and Southeastern Europe“. Es Académico correspondiente de la Academia de Ciencias de Bolonia, miembro titular de l'Académie internationale de droit comparé y socio del European Law Institute. En 2008 fue nombrado miembro Fernand Braudel del Instituto Universitario Europeo de Florencia en Italia. Ha sido Profesor Visitante en numerosas universidades, entre otras, en la Universidad de Paris I (Panthéon-Sorbonne), de Paris II (Panthéon-Assas), de Estrasburgo, de Toulouse, de Roma La Sapienza y de Bolonia. Ha obtenido la Cruz Honorífica para las Ciencias y las Artes, Primera Clase, (Honorary Cross for Science and Art First Class) de la República de Austria (2018).

Bogusław Banaszak. Fundador y Decano de la Facultad de Derecho de la Universidad de Zielona Gora en Polonia. Falleció el 9 de enero de 2018. Fue distinguido experto en Derecho Constitucional, miembro del Consejo Legislativo la Oficina del Primer Ministro, miembro de la Comisión Europea para la Democracia a través del Derecho (la llamada Comisión de Venecia) y miembro del Tribunal del Estado en Polonia. Además ha sido miembro del Comité de Ciencias Jurídicas de la Academia de Ciencias de Polonia (desde 2011), académico correspondiente de la Real Academia de Ciencias Morales y Políticas (desde 2010) y miembro de la Academia Europea de Ciencias, Artes y Literatura en París (desde 2004). Desde 1992 cooperó con el Senado polaco. También fue miembro del Comité de Codificación de Derecho de Familia del Defensor del Pueblo para los menores de edad desde 2013. El Profesor Banaszak recibió el Doctorado Honoris Causa de la Universidad de Pecs (Hungría-2004), de la Universidad de Alba Julia (Rumania-2008), de la Universidad de Pitesti (Rumania-2010) y de la Universidad de Derecho de Kiev (Ucrania-2011). Son innumerables las distinciones nacionales e internacionales recibidas a lo largo de su vida.

Yuriy L. Boshytskyi. Rector de la Universidad de Kiev -University of Law the National Academy of Sciences of Ukraine- (Ucrania) desde 2007. Profesor Honorífico de Ucrania. Es la máxima autoridad del Centro Internacional de problemas jurídicos de propiedad intelectual bajo el Instituto del Estado y del Derecho en Ucrania. Ha publicado cerca de 250 artículos y numerosos libros sobre sus líneas de investigación que son: derechos de propiedad intelectual, derechos de autor, derechos de propiedad industrial. Es el Secretario de la Asamblea Constitucional de Ucrania. Miembro del Consejo experto para los derechos económico-sociales y humanitarios de las personas discapacitadas en la institución del Defensor del Pueblo en Ucrania. Además es el Presidente de la Unión de Abogados de Ucrania y es Doctor Honoris Causa por la Universidad de Moldavia.

Sheryll Cashin. Catedrática de Derecho, Derechos Civiles y Justicia Social en la Facultad de Derecho de la Universidad de Georgetown en Washington D.C. (Estados Unidos). Actualmente, imparte docencia en Derecho Administrativo, Derecho racial y americano aunque también ha dado clases de Derecho Constitucional, Derecho del Gobierno Local, Pobreza y ha realizado un Seminario sobre Desarrollo urbano. Es autora de numerosos libros: *Loving: Interracial Intimacy in America and the Threat to White* (Beacon, 2017); *Place Not Race* (Beacon, 2014); *The Failures of Integration* (PublicAffairs, 2004). Ha sido galardonada tres veces para el Hurston/Wright Legacy Award for non-fiction (2005, 2009, y 2018). Ha publicado en muchas revistas científicas así como ha publicado artículos en el New York Times, Los Angeles Times, Washington Post, Salon, The Root, etc.

Eugen Chelaru. Catedrático de Derecho en la Universidad de Pitești (Rumanía). Ha ejercido como Decano de la Facultad de Ciencias Económicas y Derecho de esta Universidad desde 2008. Además es PhD coordinador afiliado a la Facultad de Derecho de la Universidad de Craiova. Miembro de la

Academia de Ciencias Jurídicas en Rumanía y miembro del Comité Científico de numerosas revistas.

Ioan Ganfalean. Ha desempeñado durante varios años el puesto de decano en la facultad de derecho de la universidad "1 de diciembre de 1918" de la universidad de alba iulia (rumanía), donde aún mantiene el puesto como profesor de derecho civil. desde 2004 ha ejercido como consejero de la oficina territorial del defensor del pueblo de alba iulia en rumanía. en 2018 fue designado fiscal adjunto en la institución del defensor del pueblo.

Izabela Gawłowicz. Doctora en Derecho, abogada, docente e investigadora. Profesora Ayudante en el Departamento de Derecho Internacional y Europeo, dentro de la Facultad de Derecho y Administración en la Universidad de Zielona Gora (Polonia). Su campos de investigación son los siguientes: Derecho diplomático, Derechos Humanos con especial referencia al derecho de las minorías, la jurisprudencia de los tribunales internacionales y su impacto sobre el desarrollo del Derecho Internacional.

Cristina Hermida del Llano. Doctora en Derecho (1996) y becaria Alexander von Humboldt (Alemania). Ha realizado numerosas estancias investigadoras en calidad de Visiting Researcher en Georgetown University Law Center en Washington D.C. (Estados Unidos). Es Presidenta de la Asociación Española de Hispanismo Filosófico así como Directora de la Revista de pensamiento español e iberoamericano. Académica correspondiente de la Real Academia de Jurisprudencia y Legislación de Madrid. Profesora Titular de Filosofía del Derecho en la Universidad Rey Juan Carlos de Madrid y Jean Monnet Chair desde 2017. Desde el 2013 es Profesora Jean Monnet. Autora de numerosas publicaciones en el ámbito del pensamiento español en el siglo XX y en el ámbito de la filosofía del Derecho y del Derecho de la Unión Europea. Es miembro de la Cátedra de Naciones Unidas de los objetivos de desarrollo sostenible, financiada por la ONU (2016-2019) en la Universidad Rey Juan Carlos de Madrid así como miembro de la Cátedra UNESCO Chair on Culture of Peace and Human Rights (2017-2020) en la Universidad Autónoma de Madrid.

Heribert Franz Koeck. Doctor en Derecho (Viena), M.C.L. (Ann Arbor), Doctor Honoris Causa múltiple, Catedrático Emérito de Derecho Internacional de la Universidad Johannes Kepler Linz (Austria). Ha ostentado el cargo de Decano durante veinte años en la Facultad de Derecho de dicha Universidad. Ha realizado además labores docentes en la Universidad de Viena y en Law University en Bratislava, y actualmente mantiene su docencia en Danube University de Krems. Es autor de numerosos libros y artículos de Derecho Internacional, Derecho Europeo y Filosofía del Derecho.

Joanna Osiejewicz. Doctora en Derecho, habiendo realizado con éxito el Master de Filología Alemana junto a un Máster de Derecho. Tiene el Doctorado en lingüística aplicada al ámbito del Derecho. Ha obtenido el grado postdoctoral en Derecho como Profesora habilitada. Es traductora jurada de alemán en Polonia. Fiscal de la Asociación de Abogados de Varsovia. Miembro del Consejo Minero en el Ministerio de Medioambiente en Polonia.

Víctor Hugo Ramírez Lavalle. Diplomático de carrera (1972-2003). Estuvo adscrito a las Embajadas de México en Bolivia, Ecuador, Guatemala, Costa Rica, Yugoslavia, El Salvador, Paraguay y República Dominicana, así como trabajó en el Consulado General de México en Denver, Colorado, EUA. En la Secretaría de Relaciones Exteriores desempeñó tareas como Jefe de Departamento en la Dirección General para América Latina y el Caribe y como Asesor de la Directora de Organismos y Mecanismos Regionales Americanos. Realizó la Licenciatura y la Maestría en Relaciones Internacionales, con especialidad en Diplomacia y en temas de Seguridad Internacional, respectivamente, en la Atlantic International University de Miami, Florida E.U.A. En el Instituto Matías Romero de la Secretaría de Relaciones Exteriores, realizó la Maestría en Estudios Diplomáticos, cinco Diplomados en distintas áreas de las Relaciones Internacionales así como un curso sobre seguridad internacional y hemisférica.

Herbert Schambeck. Doctor en Derecho (Viena), Doctor Honoris Causa múltiple. Nombrado Gentiluomo di Sua Santità. Ha sido Presidente del Consejo Federal de Austria (Senado de Austria). Actualmente es Catedrático Emérito de Derecho Constitucional y de Filosofía del Derecho en la Universidad Johannes Kepler Linz (Austria). Es miembro de la Academia Pontificia de Ciencias Sociales y de otras muchas Academias de Ciencias Sociales. Miembro de varias asociaciones científicas y además profesor invitado en numerosas universidades del ámbito nacional e internacional. Editor y autor de numerosos libros y artículos en Derecho Público y Filosofía del Derecho. Ha recibido, entre otras distinciones relevantes, la condecoración “Grand Crosses by the Holy See”.

Miruna Tudorascu. Doctora en Derecho y ejerce como Decana de la Facultad de Derecho y Ciencias Sociales de la Facultad de Derecho de la Universidad “1 Decembrie 1918” de Alba Iulia (Rumanía) desde 2016. Con anterioridad, desde 2012-2016 fue Vicedecana de esta Facultad de Derecho, donde además es Profesora Asociada en el Departamento de Ciencias Jurídicas y Administrativas. Sus líneas de investigación son: Derecho Civil, Contratos especiales, Derecho Sucesorio, Teoría General del Derecho y Deontología profesional aplicada al ámbito público. Ha sido miembro de diferentes comisiones académicas, habiendo formado parte de equipos internacionales en diversas acciones europeas. Además ha participado como ponente en numeras conferencias del ámbito nacional e internacional.

Carlos M. Vázquez. Catedrático de Derecho en Georgetown University Law Center en Washington, DC (Estados Unidos). Actualmente codirige el Centro para Estudios legales transnacionales (Center for Transnational Legal Studies) en Londres. Desde 2012 a 2016, ha sido miembro del Comité para la eliminación de la discriminación racial en Naciones Unidas. Desde el 2000-2003 ha sido miembro del Comité Jurídico Inter-Americano de la Organización de los Estados Americanos. Ha formado parte del Comité editor de American Journal of International Law y del Consejo Ejecutivo de la Sociedad Americana de Derecho Internacional (Executive Council of the American Society of International Law).

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Todo el contenido publicado en La Albolafia: Revista de Humanidades y Cultura es sometido a un proceso de revisión realizado por destacados profesionales en todos los campos de las Humanidades y de la Cultura. El Dossier y los artículos de la sección Miscelánea son analizados a través del método de revisión por pares ciegos, con el fin de garantizar su calidad y rigor científico. Las reseñas bibliográficas son sometidas a una revisión simple, siempre por profesionales de igual o mayor rango que el autor.

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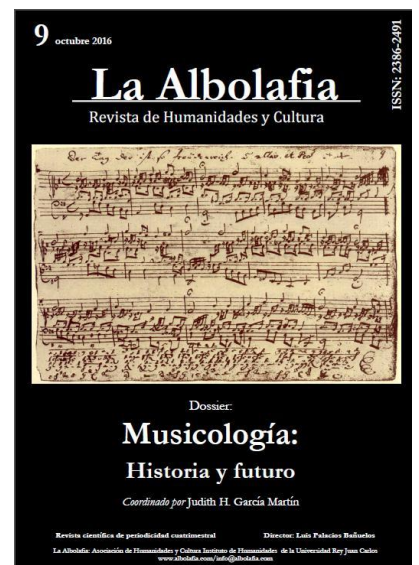
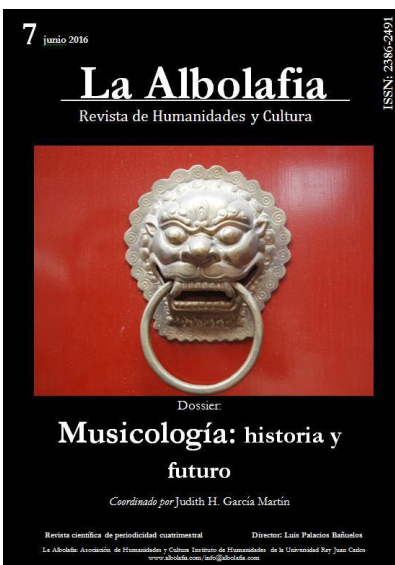
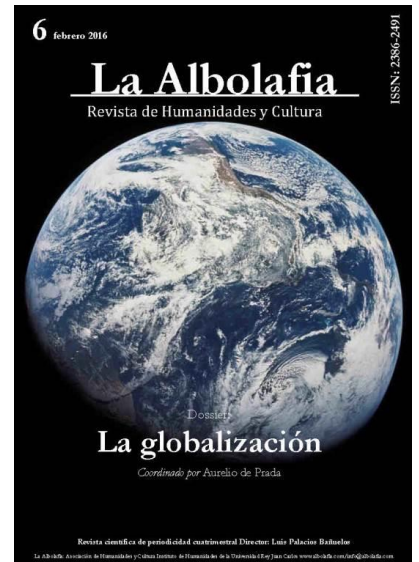
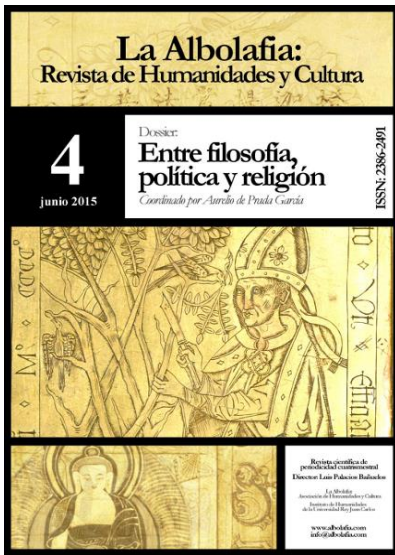
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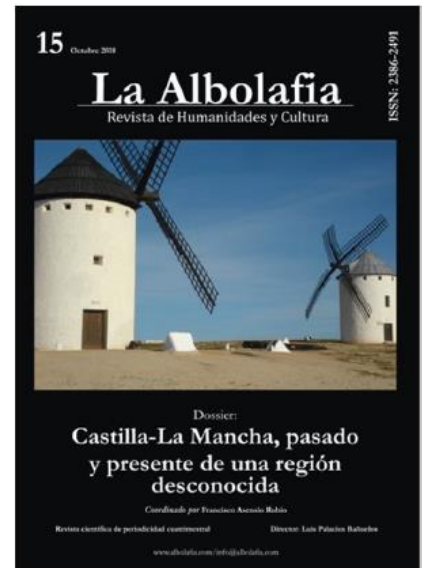
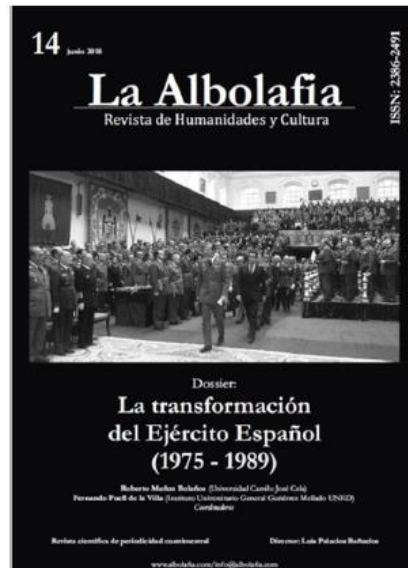
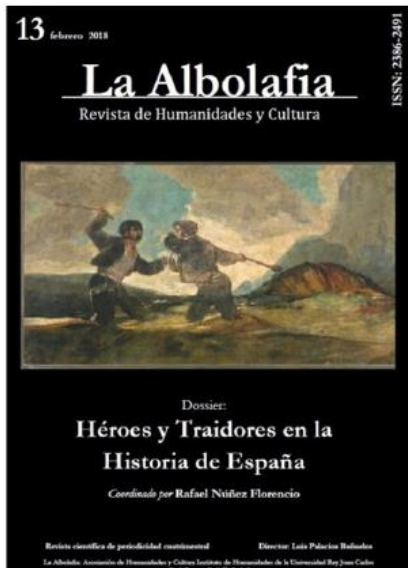
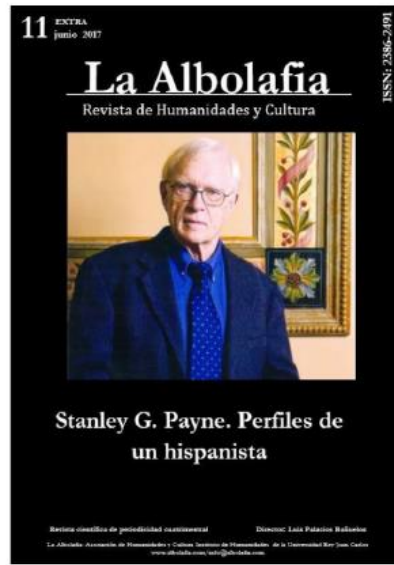
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ANTERIORMENTE PUBLICADOS...





PRÓXIMO NÚMERO

FILOSOFÍA ESPAÑOLA, ¿MITO O REALIDAD? (I)

Coordinadora: Dra. Miriam Ramos Gómez

El próximo número de la revista tratará de responder a la pregunta sugerida por el título: “Filosofía española, ¿mito o realidad?” Constará de tres partes: artículos sobre autores españoles y su relevancia en el pensamiento filosófico; reseñas de obras de reciente edición o de estudios sobre dichos autores; y bibliografías comentadas. A continuación, se indica el sumario de los artículos.

1. Introducción, por Dra. Miriam Ramos Gómez (EUM Fray Luis de León, Centro adscrito a la Universidad Católica de Ávila, Valladolid)
2. "Séneca y el ideal del sabio", por Dra. M^a. A. Fátima Martín Sánchez (Investigadora independiente)
3. “Fecundidad del realismo vitoriano: histórica defensa de los derechos del hombre, de los pueblos y de la comunidad internacional”, por Dra. Lourdes Redondo Redondo (Universidad Católica del Uruguay, Montevideo, Uruguay)
4. “La aportación de Jaime Balmes en la revalorización de la verdad”, por Dra. M^a Carmen Chivite Cebolla (Universidad Católica de Ávila)
5. “El exilio como clave ontológica en María Zambrano: su estancia en Cuba”, por Dra. Juana Sánchez-Gey (Vicepresidente de la Asociación de Hispanismo Filosófico, Universidad Autónoma de Madrid).
6. “Millán-Puelles: una filosofía realista de la idealidad”, por Dr. David Torrijos Castrillejo (Universidad Eclesiástica San Dámaso, Madrid)
7. “Julián Marías: metafísico español”, por Dra. M^a Nieves Gómez Álvarez (Investigadora independiente y escritora)

