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**SUMMARY**

# The legal nature of the franchise agreement (comparative-legal analysis)

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***Abstract:*** *The article analyses the scientific approaches to understanding the legal nature of the franchise agreement, focuses on clarifying its subject, form and content with reference to the experience of legal regulation of franchising relations in Ukraine and abroad (using individual countries of common and civil law as an example). Comparative analysis of the franchise agreement with related agreements are carried out, namely such as: a concession agreement, a license agreement, a joint activity agreement, an agency and investment agreement, and the characteristic features of the agreement are identified.*

***Keywords:*** *Franchising, Franchise agreement, Franchiser, Franchisee, Franchising relations.*

## INTRODUCTION

As of today in the world there is a trend of cooperation between legal entities and individuals of different countries, the result of which often becomes the conclusion of various civil and economic agreements, such as purchase and sale, supply, concession, joint activities, agency services, investment, license agreements and the like. Such interest in cooperation is primarily associated with the internationalization of inter-economic relations, the active development of business partnerships, the existing migration processes, and the opening of one's own business. However, such cooperation may also entail risks of problems for participants in these relations, which primarily concern the following issues: a) the emergence of the need for continuous monitoring of the current state of the market for supply and demand; b) the search for effective ways to carry out activities in an aggressive competitive environment; c) the establishment of a production system, supply, separation of itself from competitors by creating its own "brand". Such circumstances significantly affect the results of conduct business and in many cases force owners to terminate or even liquidate. A practical solution to this problem can serve as a franchise agreement, which virtually eliminates all of the above obstacles to the implementation of effective business activities.

The study of the legal nature of the franchise agreement was devoted to works as foreign: Zh. Deltei, F. Kotler, Zh. Lamben, M. Mandelson, Morné Cronje, V. Rudashevskyi, and national scholars: A Tsyrat., E. Krivonos, O. Bezukha, A. Deringera, I. Koval, O. Kondratieva, L. Kondratenko, S. Stefanovskyi, M. Gudyma, Y. Sydorov and others. Despite a sufficiently large number of scientific works, in today's legal science (both in Ukraine and abroad) there is no single consistent approach to understanding the legal nature of the franchise agreement, and there are no progressive unifications (both at the international and national levels) regarding the legal regulation of the investigated contractual structure, which ultimately negatively affect on arise, change and termination of legal relations in this field.

The purpose of the article is to analyse existing doctrinal and legislative approaches to understanding the legal nature of the franchise agreement; researching the subject and form of the specified agreement by analysing of foreign and domestic experience and criteria for distinguishing the franchise agreement from related agreements.

**STATEMENT OF THE BASIC MATERIAL**

Modern legal science has a large number of definitions of franchising. Thus, I.A. Blank defines franchising as the sale of a license for a technology or trademark of a company that has a high image in the market, provided that the buyer (the franchisor) complies with the quality standards of the products and services specified by the seller (the franchisee) in the process of its implementation.[1] A.S. Tsesliv, Stephen Spinella under franchising understand the form of organization and conduct of business, according to which one of the entrepreneurs (the franchisor) develops a business process model and sells the rights to conduct business in accordance with this model to another entrepreneur (franchisee).[2] I. Kylimnyk, in turn, understands franchising as a long-term cooperation of two or more partners, which are combined with the purpose of sharing the trademark, the technology, know-how and other objects of intellectual property rights.[3] B. Putinskyi understands franchising as a system of contractual relations of large manufacturers with small organizations in which the responsibilities for the sale of goods are carried out on the basis of a license of the company's name or trademark of the parent company, as well as compliance with production technology and strategies of commodity marketing.[4,5]

Analysing these definitions, it can be argued that in general they are focused on the activities of the franchisee in the implementation of certain goods or services, or on the franchisor's control over the franchisee's compliance with all the schemes of activity given to it, depends on the kind of franchising that is the basis of the definition, namely: trade or business format franchising. This approach, namely: the preference for consumers' expectations and interests in the context of the relationship between the franchisor and the franchisee is characteristic of the doctrines of European states, in contrast to the scientific doctrine of researchers of the United States of America (hereinafter referred to as the USA), where attention is focused on controlling one side over another.[6]

In the context of the proposed scientific discussion, it is interesting precisely the approach proposed in scientific works by researchers from the USA, which distinguish three approaches to establishing the essence of franchising relationships that not always mediated by concluding a franchise agreement. The first approach is contractual, according to which the franchise agreement is considered as a logical element of understanding franchisor-franchise relations, and it is noted that such an approach reflects the content, clarity and fairness of these relations; however other researchers argue that such an approach does not justify itself with practical point of view, since contractual norms are inherent in any contractual relationship, and therefore do not reflect the specifics of such relations. Moreover, these relations cannot be fully regulated by the agreement; therefore, their further regulation is carried out thanks to such sources as legal custom, legal doctrine, judicial practice and the like.[7] In our opinion, the reasoning of the latter group of scientists is more justified, since such an approach is only a formal one, leaving an essential characterization of these relations without attention.

The second approach is called behavioral or processual. According to its content, relations between the parties arise on the main adjustment of the three processes: initiative – find counterparty;

[1] I.A. Blank Glossary-reference book of financial manager // I. A. Blank. – K .: "Nika-Center", 1998.- p. 480.
[2] A. S. Tsesliv Commercial concession and related agreements: a comparative aspect / A. S. Tsesliv // Business Inform. – 2013. – No. 6. – p. 351-355.
[3] V. Evdokymova Franchising and commercial concession agreement// Patents and licenses, 1998.- № 1. – p. 23
[4] A. A. Eremin. Monograph: Franchising and commercial concession agreement: theory and practice of application.
[5] Dobrin, S., & Chochia, A. (2016). The concepts of trademark exhaustion and parallel imports: a comparative analysis between the EU and the USA. Baltic Journal of European Studies, 6(2), 28-57.
[6] An international model for vicarious liability in franchising, Robert W. Emerson 2015. [Electronic resource]. – Access mode: http://www.alsb.org/wp-content/uploads/2016/01/NP-2015-An-Intl-Model-for-Vicar-Liab-Emerson.pdf.
[7] O. V. Velychko Legal nature of franchising // Ukrainian law, 2002.

implementation – exchange of information between the parties; review – provides an assessment of the activities of the parties. According to this approach, factors such as interaction, completeness and sufficiency of the information exchanged, ways of resolving conflicts, participation of the parties in decision-making, the use of useful strategies and the competence of the parties can influence on successful cooperation of the parties.

The third approach is relational, which, in our opinion, does not differ significantly from the previous one. In this approach, franchising relationships should be based on the following components: concentration of attention, solidarity, restraint, integrity, flexibility and mutual benefit.[8] We consider that none of analysed approaches is perfect, because they reflect only the formal aspect of the relationship or its abstract elements, which require clarification and detailization in order to uniform understanding.

Investigating the legal nature of the franchise agreement, it can be stated on the whole that this contractual approach is quite widespread practically all over the world, but, unfortunately, there are no known unifications of this sphere at present, which makes it difficult to regulate these relations. It has to be focus on that despite the diversity of the legal regulation of the study area, it is possible to single out some general approaches to understanding the nature of this agreement in the national legislative practices of the states of the world:

- First, the main element of franchising relationships is the right of the franchisee to offer, sell or distribute the goods and services of the franchisor. The essence of such a relationship is that the franchisee carries out activities using the reputation of the franchisor. The independence of the franchisee is of great importance, that is, employees, contractors or/ franchisor agents that offer, sell, distribute goods or services, cannot be considered a franchisee, since the relationship between the franchisor and such persons arises on the basis of other agreements, for example, an employment agreement or a distribution agreement. However, in this case they don`t independently carry out their activities, separately from the activities of the franchisor.
- Secondly, the parties to the franchising relations are dependent on each other: the franchisor depends on the effectiveness of the franchisee, the franchisee, in turn, depends on the experience and assistance of the franchisor. In addition, the parties have a common interest – the sale of goods and / or services for profit[9].
- Thirdly, the existence of an organic connection with the trademark and other objects of intellectual property. This means that there must be a connection between the activity of the franchisee and the trademark of the franchisor. The indicator of compliance with this condition can be the real use of the franchisee's trademark, its investment in business, advertising company expenses and payment for the use of the trademark.
- Fourthly, a paid basis in the form of franchising fees which are paid in exchange for the right to become a party to the franchise agreement. Traditionally, such meetings are called royalties, that is, payment for the use of a registered mark for goods and services or a trademark.[10] Royalties are paid in advance or by making current payments. It should be noted that in some states, franchising collections include initial payments for investment, fees based on a percentage of gross or net, etc., and therefore, in order to protect the interests of the

[8] Patrick J. Kaufmann, Rajiv P. Dant Franchising: Contemporary Issues and Research, Volume 4, Number 1/2 1995.

[9] Min Aung The Relationship between Franchisee and Franchisor: a qualitive approach study of fast food franchising in Yangon. [Electronic resource]. – Access mode: http://utcc2.utcc.ac.th/utccijbe/_uploads/InProcess/201606/The%20Relationship%20between%20Franchisee%20and%20Franchisor.pdf

[10] Concerning the concept of "royalties", the Ministry of Justice of Ukraine; Letter, Extract dated May 05, 2011 No. 289-0-2-11-81 [Electronic resource]. – Access mode: http://zakon2.rada.gov.ua/laws/show/v0289323-11].

parties, it is necessary to clearly indicate how the amount of royalties will be calculated, and if this is a certain percentage, then from what it will be charged. After all, in court practice, there are cases when a court refused to the franchisor in a lawsuit to recover these sums because of the impossibility of determining the amount of royalties.[11]

- Fifth, the availability of a marketing plan is not mandatory, but today it is quite common in contractual practice. Such plan is drawn up by the franchisor, which should be brought to the attention of the franchisee, and includes prices, production technology, products that are used and the like. The more restrictions imposed on the franchisee, the more successful the franchisor's plan is.[12]
- Sixth, the presence of penalties. In our opinion, fixation of penalties in agreements provides certain guarantees to the franchisor, for example, for violation of the order or technology of production of certain products and in the presence of consumer complaints about the franchisee's activity, the franchisor bears subsidiary responsibility, and in the presence of complaints to the franchisee as to the manufacturer of products – the franchisor responds together with the franchisee in solidarity.[13]

The question of determining the subject of the agreement under study remains controversial, which is primarily due to the lack of a unified approach to its interpretation in the national doctrinal practices of states. For example, M.M. Agarkov points out that the subject of the agreement is a certain thing, in respect of which the agreement is concluded.[14] O. V. Poltavskyi, in turn, under the subject of the agreement understands the actions that must be performed under the agreement. Another scientist interprets the concept of "subject of the agreement" more broadly and includes in it both the thing about which the agreement is concluded, and the actions that must be performed under the agreement. In our opinion, the subject of the franchise agreement can be defined as the transfer franchising by franchisor to franchisee – a complex of rights to intellectual property objects, over which the parties entered into the agreement. To such objects should be attributed:

A). Means of individualization (identification) of participants of civil turnover, goods, works and services – the brand name of the rightholder, a trademark;

B). Products of intellectual activity – invention, industrial designs, know-how;

C). Objects of copyright as the results of intellectual activity – databases for personal computers, design of premises and the like.[15]

Investigating the legal nature of the franchise agreement, it is worth paying attention to the form of this agreement. So, in Article 1118 of the Civil Code of Ukraine states that the commercial concession agreement (we believe that it is a franchise agreement) should be concluded in written form, non-observance of which entails the recognition of the deal as invalid. That is, contractual relations between the parties arise from the moment of execution of this agreement in written form. In our opinion, if such a position of the domestic legislator is not in doubt, then the provisions of the national legislation on the abolition of the state registration requirement in this category of agreements require detailed analysis, because there are countries where the need for state registration of franchise agreements are established by law. For example, in China, the franchisor must register

[11] Elena Sulima, At the negotiating table: what to look for during conclusion a franchise agreement? // Lawyer and law, analytical publication, No. 35 http search.ligazakon.ua/l_doc2.nsf/link1/EA010776.html

[12] Babette Marzheuser-Wood, Bran Baggott Franchise Law in the United States, 2015.

[13] Victor Moroz, License agreement and commercial concession: advantages and disadvantages// Lawyer and law, analytical publication, No. 35.

[14] M.M. Gudyma On the issue of the concept of the subject of a civil agreement // Scientific Bulletin of Uzhgorod National University, 2013.

[15] V.V. Bessarabova. The agreement of a complex entrepreneurial license as the basis for the functioning of a franchising system. [Electronic resource]. – Access mode: http://www.bseu.by/russian/scientific/herald/2003/3/030316.pdf;

the franchise agreement within 15 days from the date of its signing.[16] The duty to register is also established in the legislation of the Republic of Lithuania.[17]

In our opinion, the above approach is more expedient than that implemented by the domestic legislator by abolishing the requirement of state registration of franchise agreements, since entering information into the register on transfer of property rights to intellectual property objects provides additional guarantees to the parties in case of disputes, competition other franchisees and the like. However, the provisions on the state registration of the franchise agreement have generally discretionary nature, and in our opinion, the imperative should concern, the registration of provisions on disclosure of information about the franchise.

Delimitation of the franchise agreement from other related agreements is important in the context of this study. In our opinion, the franchise agreement should be separated from the following agreements:

1. ***The franchise agreement and the commercial concession agreement.*** As already noted, the franchise agreement provides for the relationship of custody, control, assistance and interaction between the franchisor and the franchisee. The franchisor provides the franchisee with a certain set of rights for the implementation of the relevant activity, and the franchisee, in turn, undertakes to invest in such activities. As a result, as a rule, a new business entity of a similar profile is created that operates using a brand name, trademark or other intellectual property objects, the franchisor's strategy and under its control, but is managed by the franchisee. By the commercial concession, it is usually applied in trade relations. The rightholder grants the other party the right to sell goods; the latter does not receive the right to use intellectual property objects, to carry out production activities. That is, in the franchising relationship, the volume of transferred rights to the other party is much larger.[18] If You analyze the legislation of Ukraine, then Article 1115 of the Civil Code of Ukraine states that under the commercial concession agreement one party (the rightholder) undertakes to provide to the other party (user) for payment the right to use, in accordance with its requirements, a complex appropriate to this party of rights with the purpose of manufacturing and (or) selling a certain type of commodity and (or) the provision of services.[19] From the above it is clear that in this article we are talking about the franchise agreement, since by its content the party can be given the right to manufacture goods, contradicts the content of the commercial concession.

2. ***The franchise agreement and the license agreement.*** The franchise agreement is considered to a certain extent as copying a particular business model that is regulated and controlled through such an act. In turn, the license agreement is based on the sale or provision of a specific product or service (for example, retail outlets that have a license to sell Apple products). The difference between these agreements is also that the franchisor provides support for the manufacture of the whole franchisee's business, and under the license agreement, support is usually associated with a particular product or service, and not with all the activities of the licensee.[20] It should also be noted that, unlike the franchise agreement, which can be only on a paid-for basis, the license agreement can be both paid and unpaid. In a license agreement, a party may be a natural person or legal entity, and under the franchise agreement, only a legal entity acts as a party. In addition, these

[16] Regulations on Administering Commercial Franchises, art.8 http://www.fdi.gov.cn/1800000121_39_3485_0_7.html February 6, 2007

[17] p. 2 art. 6.767 Civil Code of the Republic of Lithuania, dated July 18, 2000, Law No. VIII-1864 (Last amended on April 12, 2011, No XI-1312) http://www.wipo.int/wipolex/en/text.jsp?file_id=202088#LinkTarget_7318].

[18] V.S. Dmytryshyn The commercial concession agreement and franchise agreements. The Correlation of Concepts and Legal Nature / / The Scientific Journal «Chronicles of the Kyiv University of Law 2010/3.

19 The Civil Code of Ukraine dated January 16, 2003 No. 435-IV [Electronic resource]. – Access mode: http://zakon5.rada.gov.ua/laws/show/435-15.

[20] Morné Cronje The difference between a franchising and a licensing agreement, 2015 [Electronic resource]. – Access mode: https://blog.fnb.co.za/2015/10/the-difference-between-a-franchising-agreement-and-a-licensing-agreement.

agreements are distinguished by the duration of the relations that they regulate. Thus, franchising relations are characterized by long-term, while the license agreement is determined with the termination of the exclusive right. The question of responsibility of the parties also is solved in different ways in these agreements. Under the license agreement, when obtaining a license, the licensee is responsible for its activities and possible negative consequences. In turn, the franchisor bears subsidiary responsibility in the presence of complaints about the activities of the franchisee, and jointly – if the consumer challenges the activity of the franchisee as a manufacturer.

3. ***The franchise agreement and the joint activity agreement.*** Individual researchers (V. Rudavshevskyi and others) consider the franchise agreement as a kind of a simple partnership agreement (the joint activity agreement). In support of their position, they note that both agreements provide for the establishment of partnerships, building trust, coordination of management.[21] Others (and we sign on to this point of view) consider that this approach is rather questionable, given that, firstly, the parties to the franchise agreement pursue different aims; secondly, the parties to the joint activity agreement may be both legal entities and natural persons; thirdly, the common property is created in the joint activity agreement, and the parties do not act as a creditor and debtor in such relations, but have more or less the same status.[22]

4. ***The franchise agreement and the agency agreement.*** In accordance with Article 297 of the Commercial Code of Ukraine under the agency agreement, one party (the commercial agent) undertakes to provide services to the other party (the entity represented by the agent) in concluding agreements or to facilitate their conclusion (provision of actual services) on behalf of this entity and at its expense, the person who represents the agent must pay a certain amount of money for the services provided. In our opinion, the situation related to the conclusion of the franchise agreement is somewhat different: the franchisee pays the royalties for using the brand of the franchisor.

5. ***The franchise agreement and the investment agreement.*** In scientific works, the investment agreement is usually understood as the agreement that mediates investment activity, which is considered as a set of practical actions for the implementation of investments. All kinds of property and intellectual values can be attributed to investments that are invested in objects of entrepreneurial activity, resulting in a profit or social effect is achieved.[23]As already noted under the franchising agreement, the franchisor transfers franchisee its intellectual property rights, which the franchisee uses to produce its business with the purpose of profit. In our opinion, the investment agreement is the general name of agreements that provide for the investment of funds, for example, agreement of purchase and sale of securities, joint activity agreement and others.[24] However, such actions may be mediated by concluding the franchise agreement.

Thus, the legal nature of the franchise agreement is disclosed through clarification of the subject matter of this agreement, its content, and the correlation of this agreement with other related agreements through recourse to national doctrinal and legislative practices. In general, we can state that at present time there is no established approach to understanding the legal nature of the franchise agreement in national legal doctrines and laws of the states of the world, there has been no progressive unification of this sphere both at the international and national levels, which complicates the potential opportunities for franchise participants (especially if they have a foreign element) to

[21] V. D. Rudashevskyi Investments and franchising / V. D. Rudashevskyi, M. A. Furshchyk // Investments in Russia. – 1997. No. 9/10. – p. 39-43.

[22] Ya. O. Sydorov, L. I. Shekhovtsova Comparative legal characteristic of the commercial concession agreement (franchising) and related agreements // Scientific Bulletin of the Zaporizhzhya National University No. 4, 2010.

[23] I.V. Kurafieieva.Value of the investment agreement with the agreement for participation in shared construction of housing / I.V. Kurafieieva // Forum of rights. – 2010. – No. 1. – p. 194–200 [Electronic resource]. – Access mode: http://www.nbuv.gov.ua/ejournals/FP/2010-1/10kivubg.pdf.

[24] O. Chaban. Classification of agreements, which mediate the implementation of investments // Enterprise, economy and law – 7/15 [Electronic resource]. – Access mode: http://pgp-journal.kiev.ua/archive/v7/4.pdf.

effectively refer to this category of agreements for the purpose of their conclusion and further proper execution.

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6. Dobrin, S., & Chochia, A. (2016). The concepts of trademark exhaustion and parallel imports: a comparative analysis between the EU and the USA. Baltic Journal of European Studies, 6(2), 28-57.
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12. Morné Cronje The difference between a franchising and a licensing agreement, 2015 [Electronic resource]. – Access mode: https://blog.fnb.co.za/2015/10/the-difference-between-a-franchising-agreement-and-a-licensing-agreement.
13. O. Chaban. Classification of agreements, which mediate the implementation of investments // Enterprise, economy and law – 7/15 [Electronic resource]. – Access mode: http://pgp-journal.kiev.ua/archive/v7/4.pdf.
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15. p. 2 art. 6.767 of Civil Code of the Republic of Lithuania, of July 18, 2000, Law No. VIII-1864 (Last amended on April 12, 2011, No XI-1312) [Electronic resource]. – Access mode: http://www.wipo.int/wipolex/en/text.jsp?file_id=202088#LinkTarget_7318].
16. Patrick J. Kaufmann, Rajiv P. Dant Franchising: Contemporary Issues and Research, Volume 4, Number 1/2 1995 [Electronic resource]. – Access mode: https://goo.gl/1vutxR.
17. Regulations on Administering Commercial Franchises, art.8 [Electronic resource]. – Access mode: http://www.fdi.gov.cn/1800000121_39_3485_0_7.html February 6, 2007.
18. The Civil Code of Ukraine dated January 16, 2003 No. 435-IV [Electronic resource]. – Access mode: http://zakon5.rada.gov.ua/laws/show/435-15.
19. V. Evdokymova. Franchising and commercial concession agreement// Patents and licenses, 1998.- № 1. – p. 23

20. V. D Rudashevskyi. Investments and franchising / V. D. Rudashevskyi, M. A. Furshchyk // Investments in Russia. – 1997. No. 9/10. – p. 39-43.
21. V.S. Dmytryshyn. The commercial concession agreement and franchise agreements. The Correlation of Concepts and Legal Nature / / The Scientific Journal «Chronicles of the Kyiv University of Law 2010/3.
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23. Victor Moroz, License agreement and commercial concession: advantages and disadvantages // Lawyer and law, analytical publication, No. 35.
24. Ya. O. Sydorov, L. I. Shekhovtsova. Comparative legal characteristic of the commercial concession agreement (franchising) and related agreements // Scientific Bulletin of the Zaporizhzhya National University No. 4, 2010.

# Brexit and the future of the European Union

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***Abstract:*** *The United Kingdom leaving the European Union has been a long and rather complicated process. This article intends to analyse the process, with closer look at the main events since the referendum on leaving the EU and predicts possible impact of Brexit on the future the EU and the UK itself.*

***Keywords:*** *Article 50, Brexit, European Union, United Kingdom.*

This paper critically examines the issue of Brexit and the potential impact on the EU and the United Kingdom themselves. Brexit is the name given to the United Kingdom European Union membership referendum which occurred on 23rd of June 2016 which sparked a lot of debate from two sides named leave and remain[1]. It ended in a simple majority result of 51.9% being in favour leaving the EU with the remaining 48.1% wanting to remain in the EU. The referendum legally was actually non-binding and only advisory but government at the time promised to follow through on whatever the result was and initiated the act of invoking article 50 of the Treaty on European Union, which began the United Kingdom's withdrawal from the EU by 30th of March 2019 after negotiating the Brexit terms.

The problem with this outcome is that it has caused a lot of uncertainty over the future for both the EU and the United Kingdom and whether that this result was a good thing to follow through on. The problems, as advocated by many critics lies within the boundaries and rules previously created and have been set in stone since the UK originally joined into the EU in 1973 and have been expanded upon ever since. These problems stem from the economical and legal relationship between the EU and the UK as the UK originally joined to be a part of the single market which itself has a lot of strict rules that all member states have to follow before being allowed to enter it, though when they entered back when it was just the European Economic Community the EU had begun to expand and tried to bring all the member states into one community that fall into and follow the same rules and regulations which led to EU creating legal rules that would bind to member states when put into power. This aspect of the EU the United Kingdom particularly disliked[2] as they felt it was an act of giving up their own sovereignty over their own land and letting the EU dictate what they can and can't do.

The negotiating between the EU and the UK can go multiple different routes on how this could end like for example the UK could follow the route of Norway[3], but the two main options are at the moment a soft Brexit or a hard Brexit[4]. The hard Brexit is what the leave voters want but the Government still want some sort of access to certain areas of the EU like the single market. The EU however are not going to make it easy for the UK to stay in the single market without also wanting

[1] "Brexit: the pros and cons of leaving the EU" The week, May 22, 2018, accessed November 22 2018, https://www.theweek.co.uk/brexit-0

[2] "Margaret Thatcher on the European Union (National Press Club, Washington DC, 1995)", filmed 1995, Youtube Video, 2:28, posted by "Steven Woolfe MEP", April 9, 2018

[3] Traub Florian and M.Dennis Gillian. 'Brexit—What Could Happen to My IP Rights?' (2017) Vol 29, Intellectual Property & Technology Law Journal, pg 20, pg 1

[4] George Alexandra. 'RESTRUCTURING INTELLECTUAL PROPERTY JURISDICTION POSTBREXIT: STRATEGIC CONSIDERATIONS FOR THE EUROPEAN UNION AND BRITAIN' (2017) Vol 43, Brooklyn Journal of International Law 43 Brook. J. Int'l L., pg 131, pg10 – 11

something in return, for example keeping the freedom of movement which the UK do not want to keep due to fearing the lack of proper border controls will lead to an increasing problem with immigrants and terrorist fears due to lack of proper screening[5] of those coming in. Depending on the outcome of the Brexit negotiations, there will be consequences for both sides with differing levels of impacts for either side.

On an economical aspect, already the Brexit vote has shown damage to the UK economy[6] as the pound which was already weakened by the previous 2008 recession and was on a road to recovery, dropped once again but to new all-time lows[7]. This is happening whilst the UK is still inside the EU and abides by the same rules and regulations as usual until they finally leave. The EU at the moment haven't really been affected but for them it seems to be more about the long term implications as right now the UK is still in the EU so they will still benefit from the fact that the UK have the 2nd highest economy[8] out of all the member states and that they will still benefit from their contribution to the EU budget. Now whilst this is happening at the moment, in the future this could completely turn around when the UK does leave the EU but it comes down to what kind of deal the UK can strike. As previously mentioned there are multiple different routes the UK could take in leaving the EU which include multiple ways of a hard and soft Brexit[9]. Neither the UK and the EU are going to make it easy as the UK are going to try gain every advantage of the EU whilst trying to drop all the disadvantages like paying into the EU budget, but the EU will also being trying everything to make it as a hard as possible for the UK to gain a deal without having severe restrictions laid onto them as the EU right now are not willing to give up freedom of movement just so they can avoid having low skilled immigrants coming into the country but then they can have access freely to the singles market[10]. If we treat the UK as if it were outside the EU already, they are the EU's largest single export market in goods[11]. So if we think about the Post-Brexit scenario and whatever the negotiation deal maybe, the EU seem to benefit either way as the UK may still continue to import from the EU a lot of their goods from these members states despite the deal in place as they could be certain brands that the UK citizens like, for example BMW, Mercedes, Audi etc or it could be due to the fact that even with the increase in customs due to no free movment of trade, the deal may still be better than offered elsewhere, though that is yet to be seen as the UK are trying to use Brexit as a way of attracting other countries in creating trade deals with them and the US being one of the first[12].

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[5] Jessica Elgot and Jamie Grierson, "May says EU immigrants will lose priority status after Brexit", The Guardian, October 2, 2018, accessed on November 22, 2018, https://www.theguardian.com/uk-news/2018/oct/02/eu-citizens-lose-priority-under-post-brexit-immigration-plans

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Too show how much the EU influences the UK on the legal level, I have picked one area of law which is Intellectual Property as that is a very important part of law, not just for the UK and the EU but even on an international level and how Brexit has large implications on that stage on just this one area. The UK and the EU values Intellectual property as an essential part of law for the success of the Internal Market of the EU, which is why a Directive was adopted on the enforcement of Intellectual property rights[13]. This Directive recognises the importance of intellectual property rights in promoting innovation and creativity and in developing employment and improving competitiveness, it does this by seeking to strike a balance between providing inventors and creators with the opportunity to realise a legitimate profit and encouraging the widest dissemination of works, ideas and new know-how whilst not hampering freedom of expression, freedom of information and the protection of personal data on the internet. The scope of the directive is wide in that it applies to all intellectual property rights covered by EU provisions in the field. In addition to the legislation regarding the issue at hand, the EU has shown a remarkable and ever-growing amount of case law on IP issues that has gone a long way in implementing the law.

Intellectual property law has long been set up on an international stage, which makes it not surprising that the UK's membership of the EU has had a great influence on copyrights, patents, trademarks and the like.

Three issues mark the impact of the EU on Intellectual property law:

The drive towards greater harmonisation of the laws of individual Member States

The move to community-wide intellectual property rights

The impact of the TFEU[14] on the use and abuse of intellectual property rights

Harmonisation deals with Intellectual property rights implemented in each Member States are alike, meaning that the internal market of the EU is reinforced and trade between Member States is facilitated. Harmonisation of national laws in the field of Intellectual Property has been happening for some time and hasn't been restricted to the EU countries, patent law was affected through the harmonisation process as the European Patent Convention was implemented and didn't just affect the UK. UK patent law was changed on 1 June 1978 as a result of this convention and Patents Act 1977 came into force. EU directives are instrumental in changing domestic law protecting registered designs, copyright law and rights in performances. An example of this is the right of artists to a royalty on the resale of their works was introduced into the UK in 2006[15] as a result of a Directive[16]. Significant changes to trademark law were made by a European Directive[17] also as they attempted to achieve a limited harmonisation of trademark law throughout the EU, this formed the basis of Trade Marks Act 1994 which replaced the outdated Trade Marks Act 1938. Since then trademark law has been integrated into a community-wide rights system. An example of case law of this would be

Community-wide rights deals with Intellectual property rights being recognised and given effect throughout the EU.As mentioned before trademark law is now in a Community-wide system, a Community patent differs from this as a Community patent system is a unitary system, granting patents will take effect throughout the whole of the EU. In the UK, the Patents Act 1977 already has in place the necessary mechanism for recognising Community patents[18]. Progress has been made towards this in respect of patent law as a proposal for a Community Patent Convention was first established in 1975[19]. Right now in its current state, it's a European Patent Convention which permits

[13] Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights
[14] Treaty on the functioning of the European Union
[15] The Artist's Resale Right Regulations 2006
[16] Directive 2001/84/EC of the European Parliament and of the Council
[17] Directive 89/104/EEC
[18] Patents Act 1977 s 130(7)
[19] Community Patent Convention (76/76/EEC)

the application for a bundle of patents but only covers a specified number of Member States including the UK. This route to obtaining patent protection throughout Europe (though not just limited to the countries of the EU) has grown in importance for the EU.

However Britain has signalled its intent to ratify its agreement for the UPC to be put in place in London despite triggering Article 50. Even after Brexit, this would make the process of dealing with patent disputes concerning European patents can be easier as instead of being litigated separately in the domestic courts of each Member State, it can be heard as a single case before the UPC. It is just uncertain whether the UK will remain a member of the UPC post-Brexit as it will be up to the UK Government[20]. However the UK could standardize its legislation with the international IP legal framework where it is less strict unlike the EU with the likes of WIPO (World Intellectual Property Organisation) which the UK is already a part of.

The impact of the TFEU in Intellectual property rights is to do with the use of Articles 34, 35 and 36 which help promote free movement of goods, Article 101 which prohibits restrictive trade practices and Article 102 which is designed to prevent the abuse of a dominant market position.

Articles 34, 35 and 36 deal with the notion of freedom of movement of goods between the Member States which contains grounds which includes protection of intellectual property rights as they fall within the definition of industrial and commercial property[21] as it was established in Musikvertrieb Membran and K-tel International v GEMA[22]. The case concerned if copyright was also included within the definition of industrial property, as patents, trademarks and rights in designs were already included. The Court explored the issue of about whether royalties from sound recordings and that if the work was distributed to another Member State, it should benefit from equality in the royalties paid for any distribution of those sound recordings in the German market as the owner of the copyright has legitimate interest in receiving and retaining the benefit of his intellectual or artistic effort regardless of the degree to which his work is distributed and consequently it is maintained that he should not lose the right to claim royalties equal to those paid in the country in which the recorded work is marketed. The ruling[23] in this case should be interpreted in a way that it prevents discrimination of copyright owners from obtaining royalties when their work is put onto another Member States market. The implementation of this ruling show how the EU tries to prevent discriminatory actions being taken place by member states and that they try and make sure that freedom of movement of goods isn't taken advantage upon.

This leads into the principle of exhaustion of rights which means that the holder of intellectual property rights cannot use his rights to prevent the commercialisation of goods that have been placed on the market within the EU by him or with his consent. Exhaustion of rights does not harm rules on ownership, nor does it harm the existence of those rights as it merely controls the exercise of those rights where such exercise conflicts with the freedom of movement of goods. This principle is not absolute however, it will not apply under certain circumstances like if for example the commercialisation involved repackaging the goods or altering them in an unacceptable way which would harm the holder of the intellectual property rights. This is where EU Directives play a part to provide rules on exhaustion of rights, for example Directive 2008/95/EC deals with exhaustion of rights relating to trademarks[24].

[20] George Alexandra. 'RESTRUCTURING INTELLECTUAL PROPERTY JURISDICTION POSTBREXIT: STRATEGIC CONSIDERATIONS FOR THE EUROPEAN UNION AND BRITAIN' (2017) Vol 43, Brooklyn Journal of International Law 43 Brook. J. Int'l L., pg 131, pg28 – 30

[21] Article 36 TFEU

[22] 55/80 and 57/80 Musikvertrieb Membran and K-tel International v GEMA [1981] ECR 147

[23] Ratio from 55/80 and 57/80 Musikvertrieb Membran and K-tel International v GEMA [1981] ECR 147

[24] Article 7 of Directive 2008/95/EC

The EU has put a lot of effort in promoting the full harmonisation of copyright and even showing that decisions of cases in other Member States can have an effect in the UK. The main cases in this area being the Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im-und Export Verwaltungsgesellschaft mbH case[25], where German copyright law[26] didn't allow non-German nationals to rely on the provisions which prohibited the distribution of unauthorised recordings of performances given outside Germany. Phil Collins and Cliff Richard argued that this German law was breaching Article 7 of the EEC Treaty[27] (now Article 18 TFEU) in an action relating to the distribution of bootleg recordings of their performances given in the USA and the UK. It was taken to the European Court of Justice (now the Court of Justice of the European Union) for a ruling under Article 234 of the EC Treaty (now Article 267 TFEU), where it was confirmed that copyright fell within the scope of Article 12 and the principle of non-discrimination applied to those rights. The ruling[28] for this case should interpreted in a way that it stops discriminating authors and performers from other member states and allow them to prohibit marketing of their performance without their consent in other member states when the performance was given outside the performers national territory. The implementation of this ruling shows how the EU does not stand for discriminatory actions by Member States.

Even though there has not yet been a full harmonisation of copyright law throughout the EU, they still fell within the Treaty's provisions because of their effect on trade in goods and services within the EU.

Too conclude, the Brexit scenario is going to be a complicated road for both the UK and the EU as both have their own set of goals that they both want to achieve but only one can achieve their goals whilst crippling the other. Another thing that is going to be complicated is when it comes to all the laws that have been put into place through the EU, as already discussed earlier the law on IP itself has been altered massively through the EU which may now see years of work thrown away if a proper Brexit deal is not agreed. Though a strange thing that the UK seems to have done is that they have agreed to join a Community Patent Convention called the Unified Patents Court[29] that the EU have been making steps to create as Britain has signalled its intent to ratify its agreement for the UPC to be put in place in London despite triggering Article 50. Even after Brexit, this would make the process of dealing with patent disputes concerning European patents can be easier as instead of being litigated separately in the domestic courts of each Member State, it can be heard as a single case before the UPC. It is just uncertain whether the UK will remain a member of the UPC post-Brexit as it will be up to the UK Government[30]. However the UK could standardize its legislation with the international IP legal framework where it is less strict unlike the EU with the likes of WIPO (World Intellectual Property Organisation) which the UK is already a part of but then why would they agree to join the UPC in the first place?

[25] C-92/92 Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im-und Export Verwaltungsgesellschaft mbH
[26] German Copyright Act 1965, ss 96(1) and 125(1)
[27] European Economic Community Treaty
[28] Ratio from C-92/92 Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im-und Export Verwaltungsgesellschaft mbH
[29] Cook Trevor. '"BREXIT" and Intellectual Property Protection in the UK and the EU' (2016) Vol21, Journal of Intellectual Property Rights, pg 355, pg 1
[30] George Alexandra. 'RESTRUCTURING INTELLECTUAL PROPERTY JURISDICTION POSTBREXIT: STRATEGIC CONSIDERATIONS FOR THE EUROPEAN UNION AND BRITAIN' (2017) Vol 43, Brooklyn Journal of International Law 43 Brook. J. Int'l L., pg 131, pg28 – 30

When it comes down it there would a lot of legislation that will have to be removed if it is a hard-Brexit[31], which means that the UK Parliament will have a lot of work to do even after the deal even though yes they could join the WPO which would help when it comes to IP law but when it comes to the human rights aspect for example, this was given through the EU as the UK never really law on peoples human rights except for the Magna Carta which is centuries old and is likely to be completely outdated in this day and age.

We can already see this in the economic front as the UK want to rid of the freedom of movement to restrict access of immigrants but then keep in the single market but the EU won't allow that as they clearly do not benefit equally from such a deal. At the same time though this could be a political tactic deployed by the EU to show other Eurosceptics across the member states that maybe thinking about leaving or trying to renegotiate the terms of their EU membership that if the UK are having a hard time to leave, that other countries may think otherwise in trying to attempt their own 'Brexit'. Though at the moment the UK seem to have agreed a draft agreement[32] with the EU that the current Prime Minister Theresa May is happy with, though if it actually comes into action in time for the actual leave date of 29th of March 2019, we shall see as the EU parliament have to accept this plan and the members of Parliament all have to agree to it before it can be ratified which at the moment most of them are against this current plan as they don't see it as the Brexit that was promised and more of a in-between soft and hard Brexit which doesn't really benefit the UK at all.

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# Spain and Portugal join the European Communities: A long and problematic process

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***Abstract**: Spain and Portugal's aspirations for its incorporation into the European Communities gained momentum with the arrival of democracy for both countries and, for that purpose, the Government of President Adolfo Suárez requested, on July 26, 1977, officially joining the EEC (today Union European). This Spanish and Portuguese aspiration was satisfied eight years later -on June 12, 1985- with the signing of the Accession Treaty in Madrid and the effective integration into the Economic Community on January 1, 1986. Since then, the path of Spain and Portugal has come marked by important advances that have resulted in the well-being of their society as a whole.*

***Keywords:** Spain, Portugal, European Union, Enlargement*

## INTRODUCTION

Both countries are located in the South West of Europe and had historically an important relationship with Europe since the prehistoric times, and became important powers during the time of the great discovers of America, the circumnavigation of Africa and the relations between Europe and Asia. The creation of the Spanish and Portuguese Empires, located in different continents meant the beginning of European influence in the world affairs. Also this Empires were important in Europe, as the Spanish Empire was united with the German Empire and had possessions all over the Mediterranean, Italy, Benelux and France. This relation was important in cultural matters, as the University of Salamanca and its important school that had a great influence in the European culture, plus world writers as Cervantes and its novel book Don Quixote, painters as Velazquez, and other important cultural personalities. But the European importance of both countries decreased step by step as their Empires declined, becoming in political terms minor powers in Europe and somehow isolating from the rest of the continent. Nevertheless they still were important in Europe in cultural terms, and were involving in all the European cultural movements. Both countries looked inwards increasingly separating themselves from the centre of Europe, but their cultural elites were still strongly link with Europe, with outstanding figures as Picasso, Dali or Ortega Gasset[1]. The political elites were also link with Europe, and Europe was taken as an example of modernity, as an example to reform these countries and increase their level of development. The XX century meant the creation of dictatorships in Spain and Portugal under the powers of Francisco Franco Bahamonte and Antonio de Oliveira Salazar and its exclusion from the democratic states of West Europe being even more isolated from the European states as they were seen as the last fascist regimes of the continent. But the Cold War and the possibility of communist regimes in both countries made USA support somehow these countries and incorporate them in the Western area, even when the political ties with other European partners were weak[2].

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## PREVIOUS RELATIONS WITH THE EUROPEAN INTEGRATION

Portugal was interested having relations with other European states in order to integrate in the international arena and secure the domestic situation with international support, but it could not join the European Communities because of its political system[3]. On the other hand, its economy was linked with United Kingdom, a traditional ally, so the relations with this country were more important. As the British proposed a new European organization based on economics without any political implication, the Portuguese government involved the country in the negotiations[4], and Portugal became a founder member of the European Free Trade Association. When United Kingdom, Ireland and Denmark left the organization for joining the European Communities, the rest of the member states of the EFTA signed bilateral free trade agreements with the EEC during 1970s. Then the relation of Portugal and the EEC was based in these economic agreements. It could not go further until Portugal was a democratic state[5].

The case of Spain is more complicated, because its economic ties with the members of the EFTA were not so strong, it did not apply for membership, so the country was somehow isolated from Europe, because its political relations with the member states of the EEC were generally bad. After the Spanish civil war, many intellectuals left the country becoming a strong opposition abroad to the Spanish regime, especially in Europe, and some of them became important in the development of the European integration, as Salvador de Madariaga , founder of the Colleague of Europe, the best institution of European Integration learning. Other important personalities, more than 100[6], were present in the European meeting of Munich in 1962 representing Spain, without any official representation from Spain. The final conclusions of this European Congress included a reference to the Spanish government pointing out the necessity of the country to become a democracy in order to integrate in Europe[7]. Franco rejected these proposals and the relations between Spain and the EEC became even more problematic. Nevertheless, there were economic relations between both areas, and half of Spanish exports had the EEC as its destination. A preferential agreement was signed in 1970, and established a preferential system with the objective of eliminating the barriers to the commercial exchanges between Spain and the Community[8].

Spain and Portugal became democratic after the death of Franco in 1975 and the collapse of the Portuguese regime in 1974. Soon afterwards both applied for membership in the European Communities. There was identification in both countries of Europe and freedom, and the accession became an obsession in order to secure the new democracies. The negotiations started soon but the way was long and full of obstacles and the enlargement finally became a reality in 1986, after almost 8 years of negotiations.

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## THE NEGOTIATIONS

The EEC Communities linked both countries in the enlargement process, so the accession was limited to an agreement with Spain and Portugal. In the case of Portugal, there were no major problems, because of its small size and previous economic ties with the Communities, but the case of Spain was much more complicated because of its magnitude. The negotiations were conducted by different chapters, mainly agriculture, industry, and fishery.

Agriculture was a delicate issue because it was the main Spanish economic activity, and it could distort the already problematic CAP inside the Communities and at the same time compete with the French production. The CAP was by far the policy of the European Communities with a biggest share in the European Budget, and the inclusion of an important country in terms of agriculture could have meant a huge increase in the global expenditure to keep the level of payments received by all the European farmers. So it was important to reform the sector in Spain before the accession to adapt it to the European necessities. On the other hand, the French farmers of the South of the country, focus on Mediterranean production, were afraid of Spanish cheap production and its consequences in terms of market share[9]. The Spanish could produce cheaper, with better quality and because of its weather condition the harvest was ready before than in France, reaching the market before its French competitors. And logically there was an important unrest between French farmers. They even blocked the borders between France and Spain preventing the Spanish agricultural production to reach the European Market. Violence was common, trucks burnt and destroyed, physical attacks commonly spread, and the French police did not stop it. This problem lasted for many years, even with Spain already inside the European Communities, and the High Court of Justice of the EU banned these actions and blamed them on the French state because of the inactivity of its police. Nevertheless, after log discussions the problem was solved with the inclusion of Stand Still clauses and the gradual access of the Spanish products to the European market[10].

Industry was a problem because the regime of Franco had promoted a big industrial sector in Spain, being an important country in this field, but the industry was obsolete and was mainly supported by state subsidies, something against the European legislation. It was clear that the Spanish could not compete with other member states in a free market and its industry should be partially dismantled, but the problem was the timing. Spain wanted to join fast the Communities in order to get financial support from the European Communities for reforming its industrial sector[11], but the member states thought that the cost will be too high. The negotiations were hard, and finally an agreement was reached and Spain undertook the reform prior the accession with some European support complemented with national financing. The EEC was paying before the enlargement to save money after the accession. The Spanish government used the requirements of reform of the EEC in this field to justify the needed reform in the eyes of its citizens and avoid a social conflict[12].

This was a constant in many other fields of the Spanish society, anxious of joining the European Communities. The state needed to reform many fields of the Spanish economy, essential reforms that should have been undertake anyway, but were presented to the citizens as a petition of the EEC. As there was a high support for the enlargement among the Spanish citizens the social protest were minimal under the circumstances of the reform, with many State companies closed and high unemployment. The reforms were basic for the Spanish economic competitiveness and were accepted as a minor price for joining the European Communities. This situation expanded to other fields, as social or political, as an example, the legalization of the Spanish Communist party, the long

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term enemy of Spain during 40 years of a pseudo fascist regime, was partly presented as a necessity to be a fully democratic country in order to join the European Communities[13].

Fishery was another important field in the negotiations because of the size of the Spanish fleet, the biggest of Europe, and one of the most important of the world. The situation of fishing was difficult after increasing the national sovereignty waters all over the world in the 1960s. The Spanish fleet traditionally fished in international areas that suddenly became national, with the consequent restrictions and conflicts. Accepting Spain in the European Communities also meant accepting the Spanish fleet in the Communitarian waters[14]. There were other problems, as environment, because the fishing technics of the Spanish were considered too aggressive for the sea environment[15]. And market reasons, because the preparation and competiveness of the Spanish fleet was higher than the European fleet. The Spanish fish market counted for more than half of the communitarian market, more than half of the fish ate in West Europe was consumed in Spain. So, other European states were interested in the Spanish market as a source for developing their own fishing industry. Also, as it was a communitarian policy, the EEC should represent the interest of its member states all over the world, and the Spanish fleet was spread around the globe[16].

The main problems were between Spain and France, and Spain and United Kingdom. The first conflict was link with the sovereignty of the waters of the Bay of Biscay, where the Spanish did not respect the national waters of France and the French naval forces had problems to reinforce its position. Even there were some sad events when the French shot Spanish fishing boats from a Helicopter, and some sailors died[17].

UK wanted to keep outside of its waters the Spanish fleet to protect its national industry, already in a problematic situation after losing the fishing grounds of the North Sea, before international and then under the sovereignty of Iceland.

Finally, again, Stand Still clauses were accepted restricting the free access of the Spanish fleet to the communitarian waters for long periods of time, but, it was ineffective because once inside of the Community, once inside of the Common Market, the Spanish companies just established themselves in, for example, British soil, using the freedoms of the market to create British companies with Spanish boats, Spanish sailors and selling their caches in Spain, avoiding the Stand Still clauses and getting free access to the communitarian waters[18].

## CONCLUSIONS

The Treaty of the enlargement was finally signed and it was the most complicate Treaty of enlargement in the History of the European integration because of its high number of clauses provisions and exceptions. But it meant the incorporation of Spain and Portugal to the Communities. The benefits for Spain and Portugal were numerous, as political support to their new democracies against any internal attempt to reverse the situation, as it happened in Spain with the military coup

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lead by Tejero, the modernization of the economic and social structures of both countries, and economic benefits from the European policies. Spain and Portugal have been net receivers of European funds until nowadays. In 2011 there was difference between the Spanish payments to the EU and the money obtained by Spain from the European Union of around 2000 million euro. Most of the funds reached these countries via the CAP and the Structural Funds, heirs of the Mediterranean Fund created by the lobby of Papandreou[19]. Another important industry of both countries, the tourism, was highly benefited by the enlargement. The numbers of tourist grew year after year because of the membership of the European Communities, with all the legal and social securities it includes as being part of the same politic and economic block. Just Spain during 2010 received 52, 6 millions of international tourists, mostly from the European Union[20].

On the other hand, the European Communities obtained benefits from the enlargement, as free access to the Spanish and Portuguese markets when the European companies were more competitive than the Iberians, with the consequent economic benefits, plus more international influence because of the Iberian international connections, especially with America[21]. The enlargement also reinvigorated the European dream, because both states were, and still are big supporters of the European integration and always back new Treaties, new policies and deeper integration in the European building process.

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# International Organizations: a Challenge or a Solution for the World Politics?

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***Abstract:*** *During the Millenium speech commencement, the former secretary general of the United Nations Kofi Annan, highlighted the importance of the international organizations. He showed that all the challenges of the 21th century cannot be solved without these organizations. The first International Organization (IO) appeared during the 19th century. As the Central Commission for Navigation on the Rhine (1815) or the International Telecommunication Union (1865), most of them was created to deal with specific issues. Then, in order to manage disputes between sovereign states, the Permanent Court of Arbitration was established in 1902. The 19th century assisted to the emergence of many international organizations, symbol of cooperation between countries.*

***Keywords:*** *International Organizations, world peace, cooperation, integration.*

## INTRODUCTION

International organizations are defined by the International Law commission as "*organization established by a treaty or other instrument governed by international law and possessing its own international legal personality*"". These organizations are composed by international members or scope. They refer to two main types : they can be Intergovernmental Organization (IGO), so composed by sovereign states who cooperate in some fields (such as the United Nations, the World Bank...), or International Non-Governmental Organization (INGO), which are independent from governments and usually non-profit organizations such as "Medecin sans Frontières". These organizations can be permanent or temporary, regional or broader.

International organizations are generally perceived as the solution for world politics, defined as the international governance. Indeed, they answer to the pragmatic approach saying that each global problem or international issue should be managed and solved by an international response. Therefore, an international organization can also be considered as "*a body that promotes voluntary cooperation and coordination between or among its members*" (McCormick, 1999, p10). International organizations are, in other words, forums of discuss which gather sovereign countries, who agreed to solve commonly international problems[1].

However, the effectiveness of some of these numerous IO is questioned. There is still lots of conflicts all around the world and many issues cannot be solved by the international organizations. As en example, the FAO underlined it by showing in its 2017 report that hunger in the world increased by 50 million people between 2006 and 2016. In other words, IO lost popular support and lack of legitimacy; moreover, they are highly limited by the states behaviour which perceived these forums as tools to become more influential.

Therefore, we can wonder if the international organizations are still considered as the solution for the world politics or if they constitute challenges?

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The effectiveness of international organizations as a solution to solve global problems is questioned[2]. However, it is unquestionable to argue that this cooperation represents one of the best solution to gather world's actors, to establish communication and, therefore, to try to find common answers. Nevertheless, these answers can be counterproductive if it is not taking at the right level.

## GLOBAL PROBLEMS SOLVED BY GLOBAL COOPERATION, INTERNATIONAL ORGANIZATIONS AS A SOLUTION FOR THE GLOBAL POLITICS

The International organizations are seen as the only way to maintain peace in this globalized world. Indeed, they create an international order and, they are supranational forums where the self-interest of states is supposedly erased to find a common solution.

The international cooperation is considered as the solution for a peaceful and stabilized world. Indeed, based on the reflection of the enlightenment philosophers such as the liberalists Grotius, Kant and Locke, cooperation between sovereign states through international organizations is considered as a way to escape from the state of anarchy described by the realists. Indeed, by sharing common values and concerns, states cooperate to achieve common objectives and interests.[3] More concretely, the Mercosur free trade area was created with the goal of overcoming *"the rivalries between the Southern cone of South American states*".[4] Through the establishment of Mercosur in 1991, some South American states developed economic and political relationship to avoid conflicts by focusing on what is gathering them, on their economic partnership. In other words, cooperation represents a way to ensure peace.[5] By the way, this interdependency was highly supported by the President Woodrow Wilson, underlining in its 14-points that cooperation at all the levels is the only way to avoid conflicts. He said that free trade and open agreements between states are required to avoid mistrust and wars.

The United Nations is one of the biggest examples of international cooperation which led to the creation of international rules. The committed states have "*to maintain international peace and security*", based on this principle, the members of the Security Council can decide sanctions. Indeed, according to the article 41 of the Charter of the United Nations, the "*Security Council can take action to maintain or restore international peace and security*" if the principles of the UN Charter are not respected. Moreover, this international organization is creating a legal framework through the resolutions decided into the Security Council by its 5 permanent members. The latter is, for example, responsible of the peacekeeping operations to ensure the creation of the conditions for a sustainable peace. Recently, the Security Council mandated the operation "United Nations missions for justice support in Haiti", ensuring the deployment of troops in Haïti to end the rebellion and to accompany the establishment of a sustainable peace. Therefore, through international organizations, the states have decided the establishment of an international order.

Additionally, international organizations are forums of discuss and proposals, which gather states for negotiations.

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Thanks to international organizations, technical cooperation can be created between their members and other actors, ensuring the provision of intellectual and material sources. It is, by the way, one of the commitments written in the United Nation Charter *"The Purposes of the United Nations are: (…) To be a centre for harmonizing the actions of nations in the attainment of these common ends*." (Charter of the United Nations, Article 1). As an example, the European Union and the United Nations have established a platform in order to intensify cooperation and coordination for an effective resolution of the shared issues. It ensures a better coherence for some missions mainly for police and military actions, for the best effectiveness.[6] These forums of discuss are therefore necessary to ensure the coherence of different missions and the establishment of coordinate actions over police and military missions for example.

International organizations can be perceived as solutions to overcome the states toward a global approach, probably more suitable for the international/globalized issues.

Indeed, due to the process of globalization, a high level of interdependency and strong international ties between differents actors have been created. This interdependency is pushing the states to coordinate more their actions with the other actors, in order to propose a coherent approach on some global issues: it ensures "*collective responses*" based on "*mutual accountability*".[7] F.Cameron qualifies this cooperation as an "*effective multilateralism*".

The international organizations are actors of the international scene. They are, often, the only solution to solve global problems. Therefore, states must try to find global responses rather than protect first their national interests in a short term view, strategy more suitable to manage one common issue. As Gallarotti mentioned, "*to be effective, several actions must be taken together, in the right order".* As an example, the World Bank is composed by 189 member countries, which have developed this partnership in order to fight poverty and underdevelopment. It ensures loans for poorest countries and work for the reconstruction and the development of developing countries. Another example can be provided with the framework realized by the United Nations in order to find common solutions to the climate change, and reinforce the commitment of the actors in this way. The Paris Agreement represents the futuristic guide to avoid environmental disasters and show the willingness of some states to protect the well-being of the humanity through a collective commitment in the ecologic field (see. The Paris Agreement, United Nations Framework on Climate Change). These examples underlined that international organizations, through the cooperation between its members, can take some responsibilities that single states cannot assume alone.

Since the Treaty of Westphalia in 1648, the principle of non-inference in the sovereign state has been reinforced. Indeed, states are sovereign in their borders and over their population, they benefit from the principle of unconditional state sovereignty. Therefore, in general, interferences are not allowed into sovereign states by the international law.

However, the Non-Governmental Organizations (NGO), part of what we call international organizations, are interesting instruments which can overcome the state's sovereignty. Indeed, NGOs overcome this principle since they have conditioned the principle of non-interference to the international human law.[8] As an example, in developing countries, the NGOs can intervene urgently in case of major natural disaster (example of Haïti in 2010). Therefore, if one population is under threat and if the state cannot protect it, NGOs can intervene[9].

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Moreover, the United Nations created the measure of last resort "Principle of Responsibility to protect" or "RtoP" during the 2005 World Summit. This principle is based on the assumption that sovereign states must protect their populations from mass atrocity crimes and human rights violations. This principle expands this responsibility to international organizations, civil society and the private sector. However, the intervention must be justified by some criteria such as the just cause or the last resort.[10] International organizations can intervene, under criteria, beyond the sovereignty of states ensuring a humanized approach of the world.

Required to maintain peace between international actors and to solve global problems, the international organizations gained importance in this globalized world. Indeed, as Hurd (2012) wrote, "*as interdependence increases, the importance of international organizations increases with it*". However, they are not the solution to the all-world politics and can become the core challenges of the 21st century.

## INTERNATIONAL ORGANIZATIONS, THE SOURCE OF NEW CHALLENGES

International organizations are, obviously, not the perfect solution to drive world politics. Indeed, they can be very ineffective because of the prominence of states and be the source of new problems.

International intergovernmental organizations are based on cooperation. Therefore, all the members need to agree on the decisions.

In other words, international organizations are, obviously, not independent from states. They can be considered as a ring to show their state's power and influence over the world. It ensures the domination of some powerful actors and their ideologies.

Because international organizations are the sum of these sovereign states mainly, they are often ineffective and reflect the self-interests of the states. First of all, trying to find a common solution supported by all the member states is a hard task. Also, as Mearsheimer said, IO have limited power toward powerful states because they represent the distribution of power in the world. Therefore, they represent a way for states to take advantages from others thanks to alliances mainly. This idea is well illustrated by the example of NATO: this regional and military organization was created to ensure the balance of power regarding USSR[11]. Therefore, in this competitive and anarchic world, these IO can bring peace by maintaining the balance of power.[12] Therefore, according to Chuck Hagel, "*Alliances and IO should be understood as opportunities for leadership and a means to expand our influence not as constraints on our power*". Indeed, as the realist mentioned, IGOs are mainly ways to create alliances and to serve the national interests of each countries. In other words, "*Great powers usually benefit from the existing order and have an interest in maintaining it"*.

In other words, by creating alliances, the most powerful state can influence the decisions of the rest, and therefore, ensuring its prominence by driving indirectly the world politics.

Moreover, even if some decisions are taken, the states remain sovereign. Indeed, it means that they are not obliged to apply some decisions taken by one international organization. Therefore, when sanctions are decided, states can do not apply them or withdraw from the organization. In other words, the enforcement and the respect of the international law does not exist quite often, mainly when the sanctions are decided against a powerful country such as Russia or the USA. As an

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example, by this military intervention in Crimea, Russia broke the international principle of inviolability of frontiers. Therefore, some international sanctions were imposed to Russia during the Crimean crisis. However, Russia decided to impose counter-sanctions against other countries such as the USA and continued the annexation of this Ukrainian region. Another example is the sanctions decided against North Korea to push the Kim regime to denuclearize the peninsula[13]. However, these sanctions damaged considerably the economy and therefore the people, rather than creating a pressure toward denuclearization. Accordingly, international sanctions are often ineffective if the states do not want to respect the international law. These examples highlight that sovereign states are the most powerful actor of the international relations as supported by the realist viewpoint. Therefore, the international relations are obviously anarchic and the international law is not relevant because it is created by states to serve their own national objective of security and power.[14]

International organizations are not the solution to each global problem. Indeed, sometimes, by trying to solve one problem thanks to cooperation, other problems can appear.

IO can deteriorate some situations they wanted firstly to solve. In other words, IO can become counterproductive and create new challenges. It is mainly the case of the economic and financial organizations, often more suitable for strong economies. Indeed, when states in financial difficulties ask help from the International Monetary Funds (IMF), the latter can offer loans conditioned to the implementation of economic policies such as the reduction of government borrowing or some structural adjustments as the privatisation or deregulation of the national market. However, by following this economic model, the IMF imposes unadapt policies to weak economies. As an example, the IMF loaned $40 billion to stabilize the currencies of some Asian countries during the Asian crisis in 1997. The counterparty was the implementation of a series of "structural adjustment package" (SAP) which were supposed to reduce the government spending and deficit by increasing the interest rates and suppress lots of jobs (South Korea had to destroy 50% of the jobs in the bank sector according to Naomi Klein). In other words, the exigencies of the IMF destroyed a part of the state's incomes and increased the financial instability with the withdrawal of investors[15]. These unadapt policies deteriorated the economic crisis and its consequences.

Additionally, the success of the International organizations encouraged the creation of many of them. Numerous organizations were created and some, specialized in the same fields. This situation can become counterproductive if they lack cooperation and coordination.[16] The absence of a proper coordination can create a competition between them, and therefore the fall of the actions decided.

To avoid this problem, the IO are supposed to cooperate as mentioned for example in the article 1 of the Charter of the UN. Actions must be harmonized, coordinated to provide "*appropriate arrangements for effective cooperation with other intergovernmental organisations (...)"* as mentioned in the article 5 of the agreement establishing the World Trade Organization. Nevertheless, even if some International organizations have established a strong cooperation, each of them has its own rules, objectives and different members. The lack of common standards can create negative or counterproductive effects instead of solving one issue.

Therefore, it is necessary to measure the implication of each International organization in some issues. Their intervention can create new problems or reinforce others. International organizations

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must coordinate their efforts in order to ensure effectiveness and avoid negative effects of unadapt interventions. In other words, Gallarotti advises to take into consideration the "*optimal scope and level of multilateral management*" for the best effectiveness.

International organizations are often perceived as the more suitable solution to global problems. Therefore, states can be discouraged to intervene in their own countries in order to solve national issues. Indeed, IO can be considered as substitutes for national answer to problems, some states can, therefore, wait for the intervention of the IO and do not try to solve the situation with long-term solutions. Thus, IO should try to reduce this dependency and encourage states to assume their responsibilities over its territory and its population as much as it can. Also, the state is in general supposed to take decisions more adapted to its country to solve some issues. However, sometimes, IO "*causes or exacerbates problems by offering solutions that have unpredictable and destabilizing effects*". As an example, the military intervention in Libya in 2011 caused lots of damages such as the fostering of violence, the failure of the state and the strengthening of terrorist groups in the region.[17] The intervention deteriorated the already complicated solutions. In other words, Peter Single recommended applying at the global level the principle of subsidiarity applied in the European Union. This principle was as well recommended by the FAO in 1996, supporting that "*each nation must adopt a strategy consistent with its resources and capacities to achieve its individual goals and, at the same time, cooperate regionally and internationally in order to organize collective solutions to global issues of food security*". This principle of subsidiarity reminded by the FAO, ensure a suitable form of government for the world, by guaranteeing that each decision will be taken as close as possible at an adapted level.

Finally, the lack of accountability is one of the disadvantages of IO. The latter, considered as the solution for global issues in the 1990s, received popular support or a passive acceptance of their interventions. However, regarding some failures in the resolution some global problems a social contestation over IO is rising. It is based on the perception that people have of the IO: this perception depends on the well management of the cross border issue and of the contribution given to the IO. The people seems to look for a biggest space for public debate such as underlined during the World Social Forum showed[18] Indeed, some IO suffer from a democratic deficit.

## CONCLUSION

Finally, the debate was focus on the relevance of the international organizations, if they are considered as a solution for the world politics, or more as a challenge.

International organizations are perceived as best the solution to answer the challenges of this globalized and interdependent world. Indeed, IO are composing by sovereign states or independent members which agreed to solve some globalized problems based on cooperation. Indeed, by having more common answers and interests states are more willing to take common decisions. These international organizations understood as intergovernmental organizations or NGOs are necessary in this globalized world to humanize some situations by correcting the problems caused by geopolitical strategies or economic liberalism. However, as mentioned, IO are often not effective enough and can be the source of new challenges. Quite often, challenges appear because the states

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who composed those organizations try to take advantages from the situation they have to solve or, because the level of decision is not suitable enough to the situation.

In other words, as Hurd (2012) said, the IO are the solution for global politics and, at the same time, the cause of new problems.

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# How has the introduction of the GDPR improved the data protection rights of the Finnish citizens?

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***Abstract:*** *This paper is written to better understand how Finland implemented the General Data Protection Regulation (GDPR in short) into law and how it has affected the citizens of Finland. By summarising the old laws and the GDPR we get a better understanding of the importance the GDPR brings and what problems it could solve in the future.*
*Data protection and privacy has become a bigger issue and importance because of the growth of data collection. That is why Finland fully incorporated the EU's new data protection regulation into the body of law and by repealing the Personal Data Act, Finland's old data protection law. The GDPR has brought a wide range of new protection and privacy standards for the Finnish citizens such as the right to forget and the right to know how ones information is being used.*

***Keywords:*** *GDPR, Data Protection, Privacy, Finland, Law*

## INTRODUCTION

Privacy is a human right that is regarded as important and vital for the wellbeing of people. But we usually take our right to privacy for granted and just assume that it is automatically kept private from others. The average adult spends about 5.9 hours of time per day on social media and the internet overall in a study conducted 2018.[1] This means that for every Instagram page or Facebook link that a person browses there are hundred pieces of information stored in the form of cookies, which other websites and companies use to know a person's habits.[2] The introduction of stricter data protection laws was enforced in the EU in the form of the General Data Protection Regulations or GDPR for short and will function as a corner stone for future laws.[3] Data is so valuable nowadays that there is a need for further regulations and updated versions of most laws concerning data. How has Finland changed their privacy laws and what new rights does the GDPR bring to the citizens?

## 1. DEFINITIONS

### 1.1. Data protection

Defining data protection is difficult because there are so many aspects that are involved in its making. Nevertheless, according to the European Union's legislation personal data is any information relating to an identified or identifiable natural person.[4] One way of defining data protection is "the condition of not having undocumented personal information about oneself known by others"[5] which dictates that information that is private to oneself shouldn't be documented and thus should have a label of privacy over it. A more modern definition for data protection could be

[1] Meeker, Mary, *Internet Trends 2018: Digital media usage*, Kleiner Perkins, 2018, P.11
[2] Amitai, Etzioni, *Privacy in a cyber age: Policy and practice*, Palgrave, Macmillan, 2015, P.77
[3] Colin, Tankard, *Network Security: What GDPR means for businesses*, Elsevier Ltd, 2016, P. 5 – 8
[4] *Ibidem*, P.9
[5] W. A. Parent, *A new definition of privacy for the law*, Volume 2 Issue 3, 1983, P. 305

"legal rules that aim to protect the rights, freedoms and interests of individuals, whose personal data are collected, stored, processed, disseminated, destroyed"[6].

Privacy is the fundamental right that your information is being protected from unlawful sources and it can seem obvious that everyone should have the right to have a private life. But this can be very hard to control because of the many factors that are the making of privacy.

### 1.2. Data subjects and Collectors

Data subjects are persons with "any information relating to an identified or identifiable natural person"[7]. This means that anyone who uses the internet or sends messages leave data which they are the data subject of.

A controller according to the General Data Protection Regulation "means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data"[8]. Collectors can be anyone from websites to governments and their purpose is to gather the data the data subjects provide.

## 2. GOVERNING LAWS OF DATA PROTECTION IN FINLAND

Finland has a couple of laws that regulate data protection such as the constitution, acts and now the GDPR. What are the laws? The main principle of privacy in Finland is written in the Finnish constitution "chapter 2 section 10"[9]. According to section 10 "The right to privacy" everyone has the right of privacy in their home, life and honour. It even states that data protection is more detailed in another act which was the "Personal Data Act"[10] but now is replaced by the GDPR[11]. The General Data Protection Regulations will be further addressed in the next chapter.

### 2.1. Personal Data Act (repealed)

The Personal Data Act in Finnish law was established 1999 and focused on the rights and privacy of Finland's citizens. It was the governing law for data protection in Finland until 1.1.2019 when the act was repealed and the GDPR took over its place as the main law for data protection in Finnish law. The acts objective was to ensure a quality of protection of data, protection of a private life and other basic rights that includes privacy. With quality of data means that anyone who gets access or acquires data must have it quality checked that it is indeed accurate data. Protection of private life was kept in control with chapter 3 of the act prohibiting any processing of sensitive data such as ethnicity, criminal acts, state of health, sexual relation and much more. Some parts of sensitive data could still be published anonymously for research.

The act on the other hand did not protect data that was published or otherwise made public. The Personal Data Act did not either have any special rights of allowing information to be controlled or removed from websites because it only had authority in the Republic of Finland.[12]

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[6] Maria, Tzanou, *The fundamental right to data protection: Normative value in the context of counter terrorism surveillance*, Bloomsbury, 2017, P. 13

[7] Regulation (EU) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016/679, Article: 4

[8] *Ibidem*, Article: 4

[9] *The Constitution of Finland*, 11.6.1999 / 731

[10] *Personal Data Act*, 1999 / 523

[11] Tomi. Mikkonen, *Perceptions of controllers on EU data protection reform: A Finnish perspective*, 2014, Abstract

[12] *Personal Data Act*, 1999 / 523

### 2.2. Other minor acts about data protection in Finland

The other acts about data protection that supported the Personal Data Act and follows the GDPR are the Act on the Protection of Privacy in Working Life, Information Society Code, and the Act on the Protection of Privacy in Electronic Communications.

The Act of the Protection of Privacy in Working Life's purpose is to ensure that employers take the right measures to secure the data and information of their employees and customers. Information that can be private and thus protected can be for example the emails of the employees which according to the law needs a law-enforced reason for employers to get data about the employees from electronic messages. [13]

The Information Society Code's objective is to ensure the quality and reach of communication services across Finland, to ensures that the communications systems in Finland are confidential and data protected. This doesn't only affect Finnish companies but also larger communications platforms that provide services to Finland. [14]

The Act on the Protection of Privacy in Electronic Communications objective is to have all electronic communications data and privacy sufficiently protected.[15]

## 3. THE EUROPEAN UNION'S DATA PROTECTION LAW

### 3.1. What is the GDPR?

The General Data Protection Regulation or GDPR for short is the EU regulation for processing data, free movement of data and privacy. It was introduced in May of 2016 and brought into effect may of 2018.[16] All data that is gathered from European Union citizens have to be according to the GDPR and the persons data who is being collected has to be aware of it.[17] Addition to being aware of collection all citizens of the European Union must have the possibility of control of their data and have rights that allow them to edit their own data.[18] There are still some restriction to this scope such as any data outside of EU law is not protected by the GDPR such as criminal activity. [19]

The GDPR was introduced seemingly in a good time when big data collectors such as google are making headlines with debatable unethical data collection.[20] You could say that the GDPR has brought the concept of consent to the web and thus making it more user friendly in a corporate world.

### 3.2. How data privacy has evolved in the EU

Before the GDPR there was hardly any regulation in the EU on how websites on the internet should try to protect and defend users from data miners.[21] Data privacy was enacted and brought up with Article 8 of the European Union charter of fundamental rights. But there wasn't really any hard

[13] *Act on the Protection of Privacy in Working Life*, 2004 / 759
[14] *Information Society Code*, 2014 / 917
[15] *Act on the Protection of Privacy in Electronic Communications*, 2004 / 516 – 2011 / 365
[16] Regulation (EU) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016/679, Article: 4
[17] *Ibidem*, Article: 13
[18] *Ibidem*, Article: 16
[19] *Ibidem*, Article: 23
[20] URL: https://www.independent.co.uk/news/world/americas/google-location-data-privacy-android-sundar-pichai-a8490636.html Accessed: 20.4.2019
[21] Maria, Tzanou, *The fundamental right to data protection: Normative value in the context of counter terrorism surveillance*, Bloomsbury, 2017, P. 1

enforcing of keeping user's information secure.[22] This has created great deal of hardship in cases where data privacy wasn't recognised properly because of the lack of laws.[23] The GDPR which became enforceable in 2018 made a way for all citizens of the EU and EEA to in principle have moderate control over data.[24] This brought the possibility to control remove or revoke one owns data.[25]

### 3.3. The rights of the data subjects

With the GDPR there came a lot of new rights and obligation for the citizens of the European Union such as the knowledge of collection of information. Thus, making it easier to choose who can access data the user inputs on the web. The following are some rights that the GDPR secures:

The right to know where the information is used. This right gives the citizens of EU the possibility to see what information websites for example uses, who is collecting it and for what purpose.[26]

The right to rectification or in other words have uncompleted data corrected. This allows anyone to either correct or complete data that anyone has collected on data subjects.[27]

An important right that has caught the eye of many is the right to erasure or "the right to be forgotten" as many calls it. It allows any EU citizen to have their data removed from any data bank or website. It is crucial for the development of a free and protected internet and society to have the possibility to remove unwanted and unimportant information from the internet.[28]

The right of restricting of processing gives the users the right to restrict any data gathered from processing that data. This can be useful in cases where a collector of data may have used data unlawfully and thus the data subject can restrict it from further usage.[29]

Right to data portability is the right to get the data in a foreseeably usable format and to be able to export data from one data source to another.[30]

Right to object of processing or handling of a data subjects' information. Anyone has the right to at any time object if they see that the data is handled improperly.[31]

### 3.4. Obligations of the collectors

Collectors of data are now obliged to follow all the rules and obligations that the GDPR sets for them or face consequences such as big sanctions.[32] Some obligations that collectors must follow are notifying the user in cases where data is being erased or restricted from the user and full transparency of what data they have already collected.

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[22] *Ibidem*

[23] Kerikmäe, T., Müürsepp, P., Särav, S., & Chochia, A. (2017). Ethical lawyer or moral computer–historical and contemporary discourse on incredulity between the human and a machine. *Вісник Національної академії правових наук України, (2),* 27-42.

[24] Jan, Philipp, Albrecht, *EDPL: How the GDPR will change the world*, 2016, P.287

[25] Regulation (EU) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016/679, Chapter: 3

[26] *Ibidem*, Article: 13

[27] *Ibidem*, Article: 16

[28] *Ibidem*, Article: 17

[29] *Ibidem*, Article: 18

[30] *Ibidem*, Article: 20

[31] *Ibidem*, Article: 21

[32] Jan, Philipp, Albrecht, *EDPL: How the GDPR will change the world?*, 2016, P. 287

In case of a breach in a collector's security and data subject's privacy the company or collector has 72 hours to notify the data subjects of the breach before charges can be pressed and sanctions given.[33]

## 4. DIFFERENCES BETWEEN FINNISH LAWS AND THE GDPR

The GDPR brought a new perspective to what of all individuals data is being stored and how we as EU citizens can improve our knowledge on how to control it. New information of how everyone can improve privacy is important and interesting to follow its development in all nations. Now because of the GDPR the citizens of Finland have a much broader protection of all information. Before the GDPR Finland used the Personal Data Act which had very well thought rights such as keeping an equal level of protection even outside Finnish borders. But with the introduction of the GDPR this law wasn't needed because the whole European Union must have the same level of protection for all data. The main reason for its repeal was the fact that it was quite old and did not cover the new technologies and messaging services that have been invented and thus had to be used in quite broad terms.

The biggest and newest difference are the new rights and specifically the right to be forgotten. Before the GDPR there was nothing written in the Personal Data Act about a method in Finland on how to assure that your information has been deleted from a website or data source. But now thanks to the GDPR you have it written in law and all companies that function inside of the European Union must follow these regulations.

The Finnish laws regulated the quality and data that could be collected. But there was not really any sanction for collectors that used their data subjects information without their knowledge or consent. The GDPR solved this problem by introducing strict rules to collectors on what they can do with the data they acquire. Transparency of data is a concept that is very important in a democracy. It is crucial to have information available to all citizens about the states involvement in different subjects, which is why transparency in a state is helpful so that everyone understand what is going on. The citizens must also have transparency on what is happening with their own data which is why the GDPR offers full responsibility to the collectors to keep the data protected and safe.[34] The Finnish regulations do offer through the Information society code[35] a way to ensure a quality of data collected and that they follow certain rules. But not nearly as closely as the General Data Protection Regulation does.

## 5. CASE: COLLECTING AND DISTRIBUTING OF PERSONAL- AND TAX INFORMATION

In the case Satakunnan Markkinapörssi Oy and Satamedia Oy there was collection of tax information and personal information of about 1 million citizens in Finland.[36] The reason for the case being controversial was that Satakunnan Markkinapörssi Oy and Satamedia Oy used means of text messages for people to find out others tax information. This goes against violation of the Finnish

[33] Regulation (EU) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016/679, Article: 33

[34] Michelle. Goddard, *The EU General Data Protection Regulation: European regulation that has a global impact*, 2017, Core Privacy Principles

[35] *Information Society Code*, 2014 / 917

[36] *Helsingin hallinto-oikeues*, KHO: 05/0839/2 29.9.2005

constitution chapter 2 section 10, and the old data protection law the Personal Data Act 2 §. The dispute was covered in Finland at first and went through many courts before going to the supreme court and even the Court of Justice of the European Union. The problem was the interpretation of data protection and privacy laws. Finland did not have a clear enough data act in the dispute of sending personal information through text messages and tax information being publicised by a corporation.

If the case would be tried under the General Data protection Regulations today it would probably had taken another turn because of a more direct and modern regulation. Satakunnan Markkinapörssi Oy and Satamedia Oy should have according to the GDPR firstly asked consent for the collection of this data that they had acquired and were going to use for personal gain. It could plausibly even be the only needed requirement for the court. Secondly according to the GDPR the usage of a data subjects' information must be disclosed to them. In this case it should have been disclosed to all data subjects about the tax information and personal information being distributed through the text messages.

Speculations aside, the problem with the case is that there was not sufficient enough regulation on what some one can do with the data they collect. It is so easy to just ignore any data that is on yourself in the world before some one uses it in a way that you do not agree with.

## 6. OPINIONS

The General Data Protection Regulation is a welcoming new breath of air towards an old system that was not developed for the future but seems hastily put together for the time. To determine what counts as personal data and to determine who and how it is protected is what the GDPR brought to the citizens of Finland. Even though the other Finnish data protection laws are in effect and are there to support the GDPR and keep some separate standards outside of the personal data department. Should Finland be concerned that Finland doesn't have their own personal data act? The data regulation brought by the EU is a lot more working in a wide range. Privacy is a big subject in the world today and many citizens of the European union up to 69% are worried that the data that is gathered on them is used for other purposes than disclosed of, in a survey done in 2017[37]. This is a big concern indeed but the GDPR that was is in effect since 2018 is here to eliminate that concern by making harder regulation on data collectors.

The possibility of withholding or not allowing data to different collectors could still be a variable that we have to figure out. Possibilities of the effects it has are quite broad and there are a lot that must be considering. Examples could be not enough data for surveys or research to be made, but it looks like a farfetched possibility now.

As mentioned before in case, Everyone should become more aware of the data that is on them online or anywhere really. No one cares about data that they just don't know exist, but when that data comes forward its usually really unsettling. The case talked about that information of over 1 million Finnish citizens were used against their will and without them knowingly selling that information as a service.[38]

[37] Vasilik. D, Konstantinos. A, Michalis. P, Haralambos. M, *A Metamodel for GDPR-based Privacy Level Agreements*, 2017, P. 1

[38] *Helsingin hallinto-oikeues*, KHO: 05/0839/2 29.9.2005

### 6.1. Introduction of data protection laws a possible gateway for even stricter laws

To take as an example the citizens of Finland. With the introduction of the GDPR they can have control of the data that they produce whilst online, texting and writing. Will this new possibility of data control bring a need for more control over what can be done with personal data or looser restrictions for collectors of data on what can be collected? At the moment data should be collected only for "specific, explicit and legitimate purposes"[39] furthermore it should be accurate. But how does a individual know that this is being enforced and how can anyone check up on this? Some stricter features that could be a modern way of regulating data protection could be a way for collectors to show all the time what data that is being collected and the data subjects having full control of what can be submitted and what not. Even though the GDPR is in full action there are surely some that still don't follow it as they should. The future will surely hold methods for easily viewing all data traffic and information collected and a possibility for citizens to have full control.

## SUMMARY

Broadly translated we can conclude how data protection in Finland has improved the rights of the citizens by allowing new rights and regulation to come in act. The conclusion would at first glance seem quite simple but it is not. The Finnish citizens had quite well written laws on data protection and security. But the General Data Protection Regulation just upgraded all the necessary regulation to a much more modern and data subject friendly standpoint. The GDPR with its improvements in individual control of a data subjects own data such as the right to be forgotten or the right to know what happens to ones data is very crucial in shaping a democracy with enough privacy. Even private matters that are collected has more regulations on it now more than ever. The difference between privacy and data protection is that privacy is the right for a private life whilst data protection is the right to have your own data protected, erased and controlled.[40] The old Finnish data law was quite similar but the GDPR is so much more modern for a technologically advanced future.

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# The Legality of Active Euthanasia in Relation to Human Rights and Legal Approaches to Active Euthanasia in Different States

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***Abstract:*** *This paper has its focus on the relation between active euthanasia (AE) and human rights. Additionally, it researches the differences between the approaches of different states on the justification of AE. The two most significant sources, which are interpreted in this paper, are the European Convention on Human Rights (ECHR) and the two cases of the European Court of Human Rights (ECtHR).*

*The paper attempts to provide solutions to an issue regarding the relation between AE and human rights as the ECHR values the life of a human very high but, however, does not directly prohibit AE. Furthermore, the paper observes whether justification for AE could be deduced from other human rights.*

*The conclusion that might be drawn from this study is that there may be some human rights, which could potentially provide the justification for AE. However, as there exists also rights, which may be considered as opposite to the justification, it might be stated that deriving the justification for AE from human rights would be difficult as well as time-consuming.*

***Keywords:*** *Active euthanasia, human rights, justification, sources*

## INTRODUCTION

The legality of AE has been and is a multidimensional as well as a controversial topic that has led to debates and discussions among different states and citizens.[1] In addition, the relation between the legality of AE and human rights is an issue that has as well been much discussed, and AE has received both support and opposition. To refer to the human rights perspective, there is no specific right to euthanasia, such as a right to die, codified in the ECHR. On the contrary, the ECHR includes Article 2 that guarantees an individual's right to life. In addition, there are differences between states' juridical approaches to AE within the European Union, and thus the laws of different states on euthanasia may vary from one another. For example, where few states in the European Union, such as the Netherlands and Belgium have legalized AE, Finland has decided to illegalize it like most of the other states of the European Union.[2]

There are some variable definitions for active euthanasia. However, in general, AE occurs when a physician intentionally causes the death of a patient by giving some lethal substances to a patient upon his or her request that must be based on certain conditions.[3]

In this research, I will focus on the relation between the legality of AE and human rights perspective, and hence a considerable part of the research is based on the two significant cases that are related to euthanasia, Pretty v. the United Kingdom (the UK) and Haas v. Switzerland in which

[1] Bamgbose, O. Euthanasia: Another Face of Murder. *International Journal of Offender Therapy and Comparative Criminology*. Vol. 48. No.1. 2004, p 111. Accessible: https://doi.org/10.1177/0306624X03256662

[2] Korkee, E. *Eutanasia sallittu vain neljässä maassa – Kuolinapu jakaa lääkäreiden mielipiteitä Suomessa.* Aamulehti. 2016. Accessible: https://www.aamulehti.fi/kotimaa/eutanasia-sallittu-vain-neljassa-maassa-kuolinapu-jakaa-laakareiden-mielipiteita-suomessa-23983200

[3] *Lääkärin Etiikka. Elämän Loppu*. Eds. Samuli Saarni, Mervi Kattelus, Vuokko Nummi. Vol.7. Helsinki: Suomen Lääkäriliitto, 2013, p. 159

human rights perceptive is strongly involved as the different Articles of ECHR are interpreted. I will also compare legal approaches to AE in the Netherlands, Belgium and Finland in order to give a concrete example of the different approaches to AE occurring at the moment. To further specify, my research is based on the following questions. Could active euthanasia get justification from the human rights perspective by deriving the justification from other human rights that already exist in the treaties, for example, in the European Convention on Human Rights as there is no direct right that prohibits or allows AE exiting? How do the legal approaches to AE differ in the Netherlands, Belgium, and Finland?

## 1. THE RELATION BETWEEN LEGALITY OF ACTIVE EUTHANASIA AND HUMAN RIGHTS

As written above, the relation between AE and human rights can be considered as a complex topic, for instance, as there is no direct mention or a right that directly prohibits or allows AE in the ECHR. However, the research will focus on the possibility to approach the ECHR, in a way that justification for AE would be derived from other human rights that are already acknowledged and existed, such as a right to life, a prohibition of torture, a right to respect for private and family life and a prohibition of discrimination, which are all codified in the ECHR in the Section 1 as Articles 2, 3, 8 and 14. The ECtHR has applied those aforementioned rights in relation to euthanasia and assisted suicide in its earlier case law and, the two significant cases by ECtHR are Pretty v. UK and Haas v. Switzerland.[4] In addition to the ECtHR, the United Nations Human Rights Committee (UNHRC) has also taken a position on euthanasia. Additionally, when pondering the legality of active euthanasia in relation to human dignity, human self-determination might be involved, which usually can be referred to people's right to decide on their own lives.[5]

### *1.1. Pretty v. the UK – Right to life, prohibition of discrimination, right to respect for private and family life, prohibition of torture*

The case of Pretty v. the UK is significant in relation to euthanasia even though the case was mainly about assisted suicide.[6] The decision of the ECtHR can be considered to be based on common law jurisdiction.[7] Mrs. Pretty, the applicant, was suffering from terminal motor neuron disease and eventually, she died in 2002.[8] Before her death, the disease had paralyzed her from her neck down, and hence the applicant asked for the Director of Public Prosecutions (DDP) to let her husband, who agreed with the applicant, to assist her to commit suicide without the husband being subjected to criminal liability, as the applicant herself wasn't physically able to commit suicide without any external help.[9] DDP refused on the request, and the applicant appealed for DDP's decision but the Divisional Court and later the House of Lords refused the applicant's application.[10] Thus, the case

[4] Rietiker, D. From Prevention to Facilitation-Suicide in the Jurisprudence of the ECtHR in the light of the Recent Haas v. Switzerland Judgment. *Harvard Human Rights Journal*. Vol. 25. 2012, p 86.
[5] Leenen H. J. J. Dying with Dignity: Developments in the Field of Euthanasia in the Netherlands. *Medicine and Law*. Vol. 8. 1989, p 517. Accessible: https://heinonline.org/HOL/P?h=hein.journals/mlv8&i=527
[6] Cherkassky, L. *Text, Cases and Materials on Medical Law*. Pearson Education Limited, 2015, p 730.
[7] Nugent, J. Walking into the Sea of Legal Fiction: An Examination of the European Court of Human Rights, Pretty v. United Kingdom and the Universal Right to Die. *Journal of Transnational Law & Policy* Vol. 13. No. 1. 2003, p 185
[8] Millns, S. Death, Dignity and Discrimination: The Case of Pretty v. United Kingdom 3. No.10. *German Law Journal*. Cambridge University Press. 2002. Accessible: https://pdfs.semanticscholar.org/3fdb/7e651bfa7b823459629052eb4188ac54806e.pdf
[9] Pretty v. the United Kingdom, para. 10. no. 2346/02. ECHR 2002
[10] *Ibid.*, para. 11-14

was brought to the ECHR by the applicant who argued that the DDP with its decision had violated her certain human rights.

**1.1.1. Pretty v. the UK – Article 2 – Right to life**

The applicant argued that a right to life, guaranteed by Article 2 of ECHR, protects not only an individual's right to life but an individual's decision on choosing whether to live or die and that a right to die could be derived from Article 2, and consequently Article 2 does oblige a state to guarantee an individual's right to die as well as a right to life.[11] On the contrary, the UK's Government, the respondent, argued that Article 2 may establish positive obligations for a state, and hence to safeguard an individual's life.[12] The applicant argued that her right to life was violated by DDP. According to the ECtHR's statement regarding the argument of the applicant, some of the Articles of the ECHR may include the opposite to the right, but that does not apply to Article 2, and hence a right to die could not be derived from the right to life.[13] In addition, the ECtHR confirmed the respondent's position on Article 2 and held that Article 2 also obliges a state to safeguard and secure an individual's life even from an individual himself.[14]

**1.1.2. Pretty v. the UK – Article 3 and Article 14 – Prohibition of torture and prohibition of discrimination**

According to the applicant, the illness was causing her such terrible suffering that was considered as derogatory treatment under the prohibition of torture, and even though, the state was not directly responsible from such treatment, it still had a positive obligation to safeguard individuals from such treatment.[15] On contrary to the applicant's argument, the respondent argued that Article 3 was not to be applied in the case as the prohibition of torture was mainly contained of negative obligations, not positive. Positive obligations were found only in three situations that, however, were not met in the case.[16] The ECHR has stated that the prohibition of torture is one of the most fundamental and essential rights of the ECHR and considered as one of the core values of democratic societies. Additionally, the state's positive obligations to protect individuals from inhuman or degrading treatment are to be found in the previous legal praxis of ECtHR.[17] The ECtHR's case law has as well defined the "treatment" to mean more specifically "ill-treatment" and specified when the treatment of an individual may be covered by Article 3.[18] For example, ECtHR has stated the following in its previous case law: "Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading and also fall within the prohibition of Article 3."[19] However, ECtHR held that in the case of Pretty v. the UK, the state has provided adequate treatment for the applicant and has not caused any "ill-treatment" for her, nor cannot the positive obligation be found to arise from Article 3 and, hence Article 3 has not been breached.[20]

Additionally, the applicant invoked to the prohibition of discrimination, Article 14, by arguing that she was treated in the same way as those who were capable of committing suicide, and hence

[11] *Ibid.*, para. 35
[12] *Ibid.*, para. 36
[13] *Ibid.*, para. 39, 40
[14] *Ibid.*, para. 38
[15] *Ibid.*, para. 44
[16] *Ibid.*, para. 47
[17] *Ibid.*, para. 51
[18] *Ibid.*, para. 52
[19] *Ibid.*, para. 52
[20] *Ibid.*, para. 56

was exposed to discrimination.[21] The respondent, however, argued that Article 14 was not to be applied, as the situation of the applicant was different than the situation of those who were capable of committing suicide without any external help. ECtHR stated that the state could be committed to discrimination in a situation where people in different positions are treated differently and, in a situation, where people in the same position are treated in a similar way and held that Articles 8 and 14 were engaged together as well.[22] Thus, it held that there occurred no violation of Article 14.[23]

**1.1.3. Pretty v. the UK – Article 8 – Right to respect for private and family life**

The applicant argued that based on a right to respect for private and family life, he has a right to decide on the time and the ways of his death, and a state cannot restrict the right by limiting an individual's right to die with the assistance of another individual.[24] The respondent stated that a state has a right to limit the actions of a person that may violate her even if Article 8 does contain a right to die.[25] ECtHR has not directly denied that the prohibition of dying with assistance would violate an individual's right to respect for private and family life. However, it held that no violation has occurred in that specific case.[26]

***1.2. Haas v. Switzerland – Article 8 – Right to respect for private and family life***

The case of Haas v. Switzerland can be considered as a significant case in relation to euthanasia and the interpretation of Article 8 of the ECHR. Haas, the applicant, was a national of Switzerland and suffered from bipolar affective disorder and he was no longer able to live a life that would be considered as valuable, and thus he tried to commit suicide for a couple of times but failed. Eventually, he asked for several physicians to prescribe him a fatal amount of lethal medicine, called sodium pentobarbital, but his attempt was no successful. The applicant asked for different state authorities to grant him a permit of exception, but no authority granted such a permit.[27] Authorities stated, that Article 8 doesn't impose a positive obligation for a state to offer euthanasia the conditions that guarantee painless and definite death.[28] Hence, the applicant appealed to the Federal Court who rejected the applicant's appeals based on the rationale of the authorities. Swiss penal code, Article 115, permits assisted suicide only for unselfish reasons.[29]

The applicant argued that the respondent had violated Article 8 by disallowing the applicant to decide on how and when he wants to die by not providing lethal sodium pentobarbital for him, and stated that taking the sodium pentobarbital was the only way to guarantee dignified, quick and painless suicide.[30] The respondent argued that even though Article 8 could be considered to confer a right for an individual to decide on how and when he wants to die, a violation could be justified on the grounds of Article 2. The ECtHR held that the respondent had not violated Article 8 even though

[21] *Ibid.*, para. 85
[22] *Ibid.*, para. 89
[23] *Ibid.*, para. 90
[24] *Ibid.*, para. 58
[25] *Ibid.*, para. 60
[26] *Ibid.*, para. 78
[27] Harmon, S.H. and Sethi, N. Preserving life and facilitating death: What role for government after Haas v. Switzerland. *European Journal of Health Journal*. Vol. 18. No. 4. 2011, p 356. Accessible: https://heinonline.org/HOL/P?h=hein.journals/eurjhlb18&i=365
[28] Haas v. Switzerland, para. 10, no. 31322/07. ECHR 2011.
[29] Gamondi, C., Pott, M. and Payne, S. Families' experiences with patients who died after assisted suicide: a retrospective interview study in southern Switzerland. *Annals of oncology*. Vol. 24. No. 6. 2013, p 1640. Accessible: https://academic.oup.com/annonc/article/24/6/1639/180484
[30] Haas v. Switzerland, para. 33, no. 31322/07. ECHR 2011.

Article 8 could grant a right for an individual to decide on their deaths and lives and it also referred to the case of Pretty v. the UK by stating that Article 2 doesn't have an opposite right – a right to die.[31] Eventually, the reasoning for the decision was based on Article 2 which was prioritized high as it guarantees a right to life.

### *1.3. Arguments about the human rights in relation to AE based on the cases*

It can be argued that the applications and meanings of Articles 2 and 8, a right to life and a right to respect for private and family life, have received the most significant importance and observations in relation to AE. In the cases of Pretty v. the United Kingdom and Haas v. Switzerland, neither of the applicants reached the desired decision by the ECtHR as it held in both cases that the respondents had not acted against the applicants' rights, and thus there occurred no violations of the applicants' rights. However, especially the case of Pretty v. the UK can be considered as a significant precedent on euthanasia as it provides great arguments and interpretations of certain human rights in relation to euthanasia.

#### 1.3.1. Arguments that can be stated based on the case of Pretty v. the UK

In the case of Pretty v. the UK, for example, Articles 2, 3, 8 and 14 were analyzed and taken into account by the parties and the ECtHR. As said above, the main emphasis can be seen to be placed on Articles 2 and 8 and their reciprocal relation, and hence they will get the greatest attention and observation in this chapter. However, firstly, Articles 3 and 14 in relation to AE are taken into consideration.

In general, the purpose of Article 3, that is considered as one of the most fundamental for individuals, in relation to AE in a situation where an individual is suffering from a terminal disease that causes horrible pain, could be thought of as quite simple – Article 3 should protect an individual from such a situation. However, the ruling of the ECtHR in the case of Pretty v. the UK, has shown that the relation between euthanasia or assisted suicide and Article 3 is not that simple nor straightforward, and it can be argued and stated that Article 3 cannot directly or automatically grant an acceptance or justification for active euthanasia either. In addition, it must be noticed that the ECHR and its Articles should be interpreted as a whole and not to give too much emphasis on one specific right by ignoring others. Based on the decision of the ECtHR considering Article 14, the right to euthanasia cannot probably be directly or automatically derived from the prohibition of discrimination even in a situation where individuals in different positions are not treated differently.

The main emphasis is on Articles 2 and 8. In the case, the ECtHR verified that even though some of the rights can have an opposite right in the ECHR, but Article 2 is not such a right that could have the opposite meaning – a right to die. The issue that might arise from the interpretation is that how some rights can be granted the opposite right and others cannot be granted such a right. Such an interpretation could, in general, be considered as questionable as it in a way puts some rights in an unequal position depending on if an opposite right is to be granted. However, when analyzing the position of ECtHR on euthanasia, the right on active euthanasia cannot be derived from Article 2 as it cannot be considered as a right that has the opposite right to its original meaning as well. The deviant position on justification on euthanasia is presented by Article 8 and its interpretation on AE. According to the interpretation of the ECtHR, Article 8 can be considered to grant a right to an individual to decide how and when he or she wants to die and face death. However, in the case, the ECtHR held that there occurred no breach of Article 8 as other rights of the ECHR must be taken

[31] *Ibid*., para. 50,61

into account and one right cannot be too much emphasized. However, the ruling and the decision show that it can be possible to derive justification on AE from Article 8 of ECHR.

**1.3.2. Arguments that can be made based on the case of Haas v. Switzerland**

The case of Haas v. Switzerland was mainly focused on Articles 2 and 8. Even though the decision of the ECtHR was not favorable to the applicant, the interpretation of Article 8 could be considered as compliant and approbative in relation to AE as Article 8 was applied to grant a right for an individual to decide on his or her death and life. This interpretation of the ECtHR shows that there might occur a possibility to deduce justification on active euthanasia from one of the human rights that is acknowledged in the ECHR, a right to respect for private and family life, even though the other human rights, such as a right to life, must be also taken into account when analyzing the possibility of justification for AE in relation to human rights. The case of Haas v. Switzerland in some way confirmed that generally Articles and rights of human rights treaties, such as Articles and rights of the ECHR, are to be applied together as a whole. However, in this case, the ECtHR can be considered to have verified the position of Article 2 by, a right to life, by valuing it very high as it could be considered to give priority to Article in question over Article 8. Based on the decision of the ECtHR, it can be stated that euthanasia and the possible deaths of individuals are taken seriously and approached carefully and thoughtfully from different perspectives.

***1.4. The United Nations Human Rights Committee on Euthanasia***

As stated above UNHRC has also taken a position on euthanasia. To specify the aforementioned statement, UNHRC has interpreted an individual's right to life, which is guaranteed by the International Covenant on Civil and Political Rights (ICCPR), in its draft called General Comment No. 36. Based on the draft, UNHRC can in some way be considered to support legalizing euthanasia and assisted suicide as the draft provides the following: "States parties [may allow] [should not prevent] medical professionals to provide medical treatment or the medical means in order to facilitate the termination of life of [catastrophically] afflicted adults, such as the mortally wounded or terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity."[32]

However, it should be noticed that the interpretation of the UNHRC concerns the ICCPR and not the ECHR. Nonetheless, as it can be seen the ICCPR also guarantees some and certain human rights, such as a right to life. The approach and the interpretation of UNHRC can be considered in some parts to refer to the acceptance of performing euthanasia or at least its approach can be seen as referring to the neutral position on euthanasia. In addition, the statement can as well be considered to provide juridical protection for states to legalize and allow performing active euthanasia, and at least for those states that have already legalized it, such as the Netherlands and Belgium. The position and approach of the UNHRC towards euthanasia expresses that the justification for euthanasia may be deduced from other human rights. The UNHRC also mentions dying with dignity, that is usually taken into account and included into discussions on euthanasia.

[32] Human Rights Committee. 10/2018. General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life. Para. 10. Accessible: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf

## 2. LEGAL APPROACHES TO ACTIVE EUTHANASIA IN THE NETHERLANDS, BELGIUM AND FINLAND

As said above, the legal approaches and laws on euthanasia and to specify, on AE, in Netherlands and Belgium are seemingly different than in Finland, as both the Netherlands and Belgium have legalized active euthanasia not only for adults but for minors as well, and Finland itself has made euthanasia illegal for everyone. Thus, there occurs a variation between states' legal approaches and laws.

### *2.1. Current legal situations in the states aforementioned*

The Netherlands enacted a law on euthanasia, Termination of Life on Request and Assisted Suicide Act, that came into force on 1st of April 2002.[33] It permits performing euthanasia by a physician under specific conditions and due care, such as a voluntary and frequent request by a patient and a mortal illness that causes unbearable pain, and if such conditions are not obeyed by a physician, he or she might be prosecuted under Dutch Penal Code.[34] In addition, a child who has reached the age of 12 can require euthanasia based on her or his will under strict circumstances.[35] Belgium as well has legalized AE under certain circumstances, and hence the law on legalizing euthanasia came into effect on the 23rd of September 2002, permitting euthanasia and verifying that it is not criminalized when a physician obeys perquisites and the conditions based on the law.[36] In 2014, Belgium removed the age limit of euthanasia and legalized euthanasia for the children suffering from terminal illnesses under strict conditions.[37] On contrary to the laws of the Netherlands and Belgium, Finland has no law on euthanasia. However, AE is illegal in Finland on the grounds of the Criminal Act and Act on the Status and Rights of Patients, and hence ending a patient's life by a physician or another assistant is considered as killing or homicide and is strictly punishable.[38] Euthanasia cannot legally be performed for adults or minors. Yet, euthanasia has been debated topic also in Finland. In 2016, the citizens' initiative on euthanasia got over 60 000 supporters and proceeded to the Parliament. Eventually, the Parliament voted for the rejection.[39]

### *2.2. Arguments on the differences occurring in the Netherlands, Belgium and Finland*

Based on the laws of the Netherlands, Belgium and Finland, euthanasia and active euthanasia can be treated very differently between different states within the EU. As it is written above, where the laws of the Netherlands and Belgium permit performing AE by a physician, the legislation of Finland considers performing the treatment as a criminal act, and thus punishes those who commit it. However, the progress of the initiative to the Parliament has shown that there is also a genuine

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[33] Buruma, Y. Dutch tolerance: On drugs, prostitution, and euthanasia. *Crime and Justice*. Vol. 35. No. 1. 2007, p 99

[34] Janssen A. The New Regulation of Voluntary Euthanasia and Medically Assisted Suicide in the Netherlands. *International Journal of Law, Policy and the Family*. Vol. 16. No. 2. 2002, p 260. Accessible: https://heinonline.org/HOL/P?h=hein.journals/intlpf16&i=268

[35] Bovens L. Child euthanasia: should we just not talk about it? *Journal of Medical Ethics*. BMJ. Vol. 41. No. 8. 2015, p 634. Accessible: https://www.jstor.org/stable/44014168

[36] Burkhardt S., La Harpe R., Harding T-W., Sobel J. Euthanasia and Assisted Suicide: Comparison of legal aspects in Switzerland and other countries. *Med. Sci. Law*. Vol. 46. No. 4. 2006, pp. 290-291. Accessible: https://heinonline.org/HOL/P?h=hein.journals/mdsclw46&i=287

[37] Bovens L., *supra nota* 35, p. 631

[38] *Lääkärin Etiikka. Elämän Loppu.* (2013), *supra nota* 3, p. 160

[39] Vartiainen, N. (2018) Eduskunta äänesti eutanasian sallimisen kumoon. Helsingin Sanomat. 3.5.2018. Accessible: https://www.hs.fi/politiikka/art-2000005665880.html

willingness among some citizens of Finland to legalize euthanasia, and hence to make changes to the current legislation that prohibits euthanasia. It can be observed that the mindsets on legalizing euthanasia between different states can be very similar even though the laws might deviate considerably from each other. Juridical approaches towards AE are hence completely different when comparing the Netherlands and Belgium to Finland. However, the treatment, even though it's legalized in the Netherlands and Belgium, is not performed lightly or easily, yet it is thoroughly considered as there are the possibility and risk of prosecution under the law. In addition, in the Netherlands and Belgium euthanasia is allowed to perform also to minors, which seemingly places minors to an equivalent position with adults. This decision can be considered to emphasize a mindset that despite the individual's young age and minority if a minor is suffering from a terminal illness that causes unbearable pain he or she has an equal right and possibility to euthanasia under the laws of the Netherlands and Belgium. Therefore, it can be argued that in some states AE is also a right that is not dependent on an individual's age.

## CONCLUSION

As I have already emphasized earlier in this research, the situation with active euthanasia and its legalization in relation to human rights is not unequivocal, and it truly has been, and is a controversial topic, on which people and states' have taken a different and varied approaches as some people and states are for it and others against it. In addition, the position of the ECHR does not really clarify the situation as the ECHR does not include a clear prohibition or justification for active euthanasia, nor does it directly provide a right to death, contrary to a right to life that is guaranteed by Article 2.

The two cases of Pretty v. the United Kingdom and Haas v. Switzerland have both included significant legal argumentation on assisted suicide and euthanasia as well as clarified and strengthened the position of the ECtHR. Thus, they may be considered as two of the most important cases on assisted suicide and euthanasia. The question of whether active euthanasia could receive justification from human rights perspective by deriving the justification from other human rights that already exist in the treaties, for example, form the rights of the ECHR, can be researched by analyzing the abovementioned cases. Based on the decisions and arguments of ECtHR, the justification on active euthanasia cannot be directly or easily deduced from the other human rights and Articles, such as from Articles 2, 3, 8 and 14. The Article 2, a right to life, can be considered as the most significant obstacle to the justification for euthanasia as ECtHR has prioritized and valued it considerably high as it guarantees and secures an individual's life. However, based on the statements of ECtHR, the Article 8, that guarantees a right to respect for private and family life, can be considered as granting a right for an individual to decide on his death as well. Thus, it is basically possible to derive the justification on active euthanasia from Article 8. However, as the rights of ECHR form a whole and must be analyzed together, in general, the justification on AE by deriving it equally from other human rights above, can be considered as difficult and improbable. Additionally, despite that some institutions, referring to the UNHRC, have taken an approving position on euthanasia, the issue of euthanasia remains complex and not straightforward as stated earlier.

As said earlier, active euthanasia is treated totally different in NL and Belgium than in Finland, as the latter has illegalized and criminalized euthanasia by law. However, even though euthanasia is legal for adults and minors in the first two countries mentioned above, there is a possibility for a physician to be prosecuted under the law if he acts against the conditions that are determined by the

law. Thus, it can be concluded that even though active euthanasia is legal in a few countries, it is never performed on light grounds and it requires compliance with the law.

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# EU Legislation Effects on Women's Rights and Equal Treatment and Opportunities in the Workplace

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***Abstract:*** *This research investigates the effects of EU legislation in the labor market concerning equality between men and women. Studies imply that the female participation in the labor market has significantly increased but there's still recognized indirect gender-based discrimination. Parental leave legislation, policies and segregation in the labor market is discussed. Data concerning gender pay gap differences is analyzed in addition to labor market policy effect on employment of women. Case law and ECJ rulings are introduced to provide evidence that there is indirect discrimination towards women in the labor market. EU has taken actions towards more equal pay between genders in form of legislation, since there are several factors contributing gender pay gap it's not possible to close it via legislation. The structure of the labor market, the general mindset of the people and the economy is structurally modeled to work certain way. Women tend to work in lower income fields than men. Overall, the effect of EU legislation is positive, and it's what secures women's rights in case of indirect discrimination.*

***Keywords:*** *equality, discrimination, gender, pay, employment*

## INTRODUCTION

This paper analyses the effects of EU legislation on women participation in a workplace and also its effects on the more equal work environment. The main question is, if the legislation, for instance, on equal opportunities have improved women's rights in the workplace. Studies and data imply that the female participation in the labor market has increased but there still is indirect gender-based discrimination towards women in the workplace.[1] The gender pay gap between male and female workers is different in different EU countries and that is mainly because of segregation in the labor market, how work is valued and work-life balance. The aforementioned are the reasons for the gender pay gap which are one of the factors resulting in inequality between male and female workers in the labor market.[2]

European Union works towards closing the gender pay gap and promotes equal economic independence for both sexes.[3] The gender pay gap is the difference in average gross earnings between male and female workers. The main factors that contribute to the gender pay gap are aforementioned, segregation in the labor market, how work is valued and work-life balance. Therefore, high gender pay gap indicates that the labor market is segregated, and lower gender pay gap indicates that there's less segregation in the job market.[4] One of the European Union founding

[1] Jan Dirk Vlasblom, Joop J. Schippers. "*Increases in female labour force participation in Europe: similarities and differences",* European Journal of Population, 2004, p.389. Accessible: https://link.springer.com/article/10.1007%2Fs10680-004-5302-0

[2] Causes of unequal pay between men and women, European Commission – European Commission. Accessible: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/causes-unequal-pay-between-men-and-women_en

[3] Gender equality, European Commission – European Commission. Accessible: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality_en

[4] Causes of unequal pay between men and women, European Commission – European Commission. Accessible:

principles, equal pay for equal work, prohibits to pay women less than men for the same work.[5] However, there remains indirect discrimination towards women in organizational hierarchies and some positions.[6] Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the equal opportunities and equal treatment of men and women in matters of employment and occupation show the efforts European Union has made towards equal pay between male and female workers.

The directive implies that the equal treatment of men and women cannot be confined to the prohibition of discrimination based on the fact that a person is one of other sex.[7] Female participation in the labor market has increased in Europe, however, the segregation of female and male labor remains to be one of the main reasons for the gender pay gap. [8] Eurostat data shows that the gender pay gap is higher on the private sector in some EU countries than it is in the public sector which may be due to the fact that there are collective pay agreements protecting the employees.[9] The policy agenda of EU has been moved up by equal opportunities, the downside of this is the fact that then the approach to equal opportunities is formed by the agenda of European employment strategy. The process of working towards more equal opportunities is more about changing the whole structure of the labor market than focusing on isolated defects.[10] However, segregation in the labor market does not directly indicate inequality although it's one of the main causes for the gender pay gap. Women tend to generally pursue lower income work than men do.[11]

## 1. FACTORS THAT CONTRIBUTE THE GENDER PAY GAP AND LEGISLATION SECURING EQUALITY

One of the European Union founding principles, equal pay for equal work, regulates that it's not allowed to pay women less for the same work than man and vice versa. There are also several directives supporting, for instance, equal treatment and opportunity of men and women in matters of employment and occupation.[12] There is still an existing gender pay gap in the EU member states and the main factors that contribute this are segregation in the labor market, how work is valued and

https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/causes-unequal-pay-between-men-and-women_en

[5] Dobrin, S., & Chochia, A. (2016). The concepts of trademark exhaustion and parallel imports: a comparative analysis between the EU and the USA. *Baltic Journal of European Studies*, *6*(2), 28-57.

[6] Mark Smith. "*Analysis Note: The Gender Pay Gap in the EU – What policy responses?",* 2010, p.3-4 Accessible: http://www.eif.gov.cy/mlsi/dl/genderequality.nsf/All/F592B6E5C824A8A6C22579A700296E29/$file/the_gender_pay_gap_in_the_eu_egge_2010.pdf

[7] EUR-Lex – 32006L0054 – EN – EUR-Lex, Eur-lex.europa.eu. Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1553349084039&uri=CELEX:32006L0054

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[9] Gender pay gap statistics – Statistics Explained, ec.europa.eu. Accessible: https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics#Gender_pay_gap_higher_in_the_private_sector

[10] Jill Rubery. "*Gender mainstreaming and gender equality in the EU: the impact of the EU employment strategy.",* 2002, p.516. Accessible: http://www.eif.gov.cy/mlsi/dl/genderequality.nsf/0/9E015C850578EF53C2257A750029B512/$file/Rubery.pdf

[11] European equality law network. Key EU directives in gender equality and non-discrimination. Accessible: https://www.equalitylaw.eu/legal-developments/16-law/76-key-eu-directives-in-gender-equality-and-non-discrimination

[12] Mark Smith. "*Analysis Note: The Gender Pay Gap in the EU – What policy responses?",* 2010, p.3-4 Accessible: http://www.eif.gov.cy/mlsi/dl/genderequality.nsf/All/F592B6E5C824A8A6C22579A700296E29/$file/the_gender_pay_gap_in_the_eu_egge_2010.pdf

work-life balance.[13] There are also structural inequalities in the labor market favoring men in higher positions.[14] Besides the legislation securing women the same pay for the same work than men, there are cases of indirect discrimination and the whole structure of the current labor market is not supporting full equality in matters of the gender pay gap. However, segregation which is one of the main causes for the gender pay gap does not always indicate inequality. Inequality shows in some selection processes, in organizational hierarchies, in case law and it also has its roots in people's mindsets.[15]

### 1.1. Parental leave and legislation

Women experience more career interruptions than men. For instance, parental leave which women tend to take more often is a case of career interruption.[16] This explains why the gender pay gap is lower among younger people since they haven't yet experienced these interruptions.[17] As an example in Sweden there are policies that aim to facilitate the combination of work and family for both mothers and fathers, still there is knowledge of the impact of long parental leave can leave in woman's career. Circumstances of long parental leave give women the opportunity to keep the job they held before the parental leave. This may lead to different treatment when coming back to the job. These long parental leaves support the idea that the man is the main breadwinner in the house, which results in supporting larger gender pay gap and the model that men make the money and women stay home taking care of the children.[18] Revised Framework Agreement between European social partners on parental leave – Council Directive 2010/18/EU implements on parental leave. Its key points are that workers are entitled to parental leave on the birth or adoption of a child, it applies equally to all workers, men and women and the parental leave must be granted for at least a period of 4 months as an individual right of both parents. It specifies the return to work and non-discrimination. According to the directive, workers must be protected against less favorable treatment or dismissal on the grounds of an application for, or the taking of, parental leave.[19] The Parental Leave Directive does not inflict any obligations to pay during parental leaves and it leaves

[13] Causes of unequal pay between men and women, European Commission – European Commission. Accessible: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/causes-unequal-pay-between-men-and-women_en

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[15] Francesca Bettio, Alina Verashchagina. "*Gender segregation in the labour market: root causes, implications and policy responses in the EU*.", 2008, p.36. Accessible: https://core.ac.uk/download/pdf/60417738.pdf

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[18] Marie ***Evertsson*** and Ann-Zofie ***Duvander***. "*Parental Leave-Possibility or Trap? Does Family Leave Length Effect Swedish Women's Labour Opportunities?",* 2010, p.435-436. Accessible: https://s3.amazonaws.com/academia.edu.documents/45394043/Parental_LeavePossibility_or_Trap_Does_F20160505-2665-1olcy1l.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1555239056&Signature=Mcwa5ejAm%2sOn%2Fp5tE%3D&response-content-disposition=inline%3B%20filename%3DParental_Leave_Possibility_or_Trap_Does.pdfBsZellBrZG

[19] EUR-Lex. Summary of: Parental Leave. Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:em0031

this for the member states to define.[20] European Commission has made a proposal for a directive for the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. This proposal addresses women's under-representation in employment and support women's career progression, it builds on existing rights and policies. Objectives of this directive are to improve access to work-life balance arrangements and to increase take-up of family-related leaves and flexible working arrangements by men.[21]

### 1.2. Segregation in the labor market

One of the main causes of the gender pay gap is segregation, meaning men and women generally work in different jobs. The segregation in the labor market is relatively high EU wide. Four especially high segregation countries are Estonia, Finland, Slovakia and Latvia and four low-segregation countries are Greece, Romania, Malta, and Italy.[22] Significant increases in female participation in the may raise the levels of segregation on a more or less temporary basis.[23] Women tend to pursue lower income jobs generally. However, there are several case studies that show women's skills underestimation. One example is a case (Ferreira 2008) where female and male waiters were interviewed for a survey in Portugal and justified women's lower pay because women are more 'sensitive', and men are able to cope better with 'physical effort'.[24] Undervaluation and discrimination are aspects of existing wage inequality. This does not indicate that segregation in the labor market always leads to inequality.[25] When it comes to European labor market policies most of the policy action is focused on skill-training. 10 EU member states have reported that they have implemented governmental training programmes devoted to counter segregation. These member states are Austria, Belgium, Finland, France, Germany, Greece, Norway, Portugal, Sweden, and the UK. Training has been often one of the only ways of providing women with so-called 'male', usually technical, skills without questioning men's occupational choices.[26]

### 1.3. Gender pay gap differences in private and public sector

According to Eurostat data, the gender pay gap is significantly higher in the private sector than it is in the public sector. This may be due to, for instance, collective pay agreements that are supporting employees. There are also large differences between member states considering this matter of subject. The unadjusted gender pay gap by economic control by percentage in 2017 was in Romania in the private sector 7,0% and in the public sector 5,4%. Comparing these numbers to Finland where the percentage was in the private sector 16,2% and in the public sector 18,3%, it's clear that the differences between these two countries are significant. Overall, as an unadjusted indicator, the GDP gives a view of the differences between women and men concerning earnings, this measures a lot of wider concept than the concept of the European Union principle, equal pay for

[20] EUR-Lex. Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. Accessible:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0253

[21] *Ibidem.*

[22] Dutt, P., Ferraro, S., Chochia, A., & Muljar, R. (2018). Using patent development, Education policy and research and development Expenditure policy to understand differences between countries: the case of Estonia and Finland. *Baltic Journal of European Studies, 8*(1), 123-153.

[23] Francesca Bettio, Alina Verashchagina. "*Gender segregation in the labour market: root causes, implications and policy responses in the EU*.", 2008, p.19-22. Accessible: https://core.ac.uk/download/pdf/60417738.pdf

[24] *Ibidem*. P.34.

[25] *Ibidem*. P.36.

[26] *Ibidem*. P.48.

equal work. Higher gender pay gap indicates wider segregation in the job market. [27] Therefore, when the pay gap is generally higher in the private sector it implies that the labor market is more segregated in the private sector than it is in the public sector. This data is from the year 2017 that is after the implementation of the directive on equal opportunities and equal treatment of men and women in matters of employment and occupation.

### 1.4. Directive on equal opportunities and equal treatment of men and women in the matters of employment and occupation

The objective of the Directive 2006/54/EC on is to ensure equal opportunities and equal treatment of women and men in the matters of employment and occupation. The prohibition of direct and indirect discrimination, harassment and sexual harassment in pay are required by this directive.[28] The Directive 2006/54/EC is an important aspect of the gender equality law in the European Union. European Commission intends to submit a new directive that is based on Article 13 of the directive on equal opportunities and equal treatment in matters of employment. This would extend the principle of equal treatment of men and women beyond employment law.[29]

### 1.5. Labor market policy effect on employment of women

European Union has released in 1997 its "European Employment Strategy". This is a set of policies which objective is to increase the individual employability and also emphasize the aim of obtaining equal opportunity for women and men.[30] The effects of policies like skill-training programs, monitoring and sanctions, job search assistance and employment subsidies are larger for women than for men, particularly shown in areas that have low female labor force participation. According to a survey on active labor market policy effects for women in Europe seems that skill training programs are more effective on women and job search assistance is more effective for men. Overall, active labor market policies have a positive effect on employment for women.[31]

## 2. CASE LAW AND EQUAL OPPORTUNITIES AND TREATMENT

There are cases of indirect discrimination based on gender in the Union and there are also European Court of Justice (ECJ) rulings on the grounds of one of the main principles of the European Union, equal pay for equal for men and women. Case law shows how the legislation finds its way in individual situations. Circumstances that deal with indirect discrimination must be handled case by case and the solutions can be found from the legislation. Current EU legislation aim is to secure

[27] Gender pay gap statistics – Statistics Explained, ec.europa.eu. Accessible: https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics#Gender_pay_gap_higher_in_the_private_sector
[28] European equality law network. Key EU directives in gender equality and non-discrimination. Accessible: https://www.equalitylaw.eu/legal-developments/16-law/76-key-eu-directives-in-gender-equality-and-non-discrimination
[29] Dagmar Schiek. "*A New Framework on Equal Treatment of Persons in EC Law*." 2002 p.291. Accessible: https://s3.amazonaws.com/academia.edu.documents/38022186/schiek_elj_2002.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1555495952&Signature=Eu2Y3eMiVR4YKP%2F0mtbU6Ck1%2BBE%3D&response-content-disposition=inline%3B%20filename%3DA_New_Framework_on_Equal_Treatment_of_Pe.pdf
[30] Active labor market policy effects for women in Europe: A survey. P.2. Accessible: https://www.econstor.eu/bitstream/10419/78669/1/525034781.pdf
[31] *Ibidem.* P.14.

equality in the matters of employment and occupation.[32] Therefore, the more that there appear cases of inequality in the ECJ, the more there will be rulings and precedents concerning the subject. These rulings and precedents will also have an effect on future cases that concerns indirect discrimination towards women.

### *2.1. Case Kenny and others v Minister for justice, Equality Law Reform and others and indirect discrimination*

Case Kenny and others c Minister for Justice, Equality and Law Reform and others is an example of an indirect discrimination case in Ireland. Ms. Kenny and 13 other female civil servants were employed to perform clerical duties for the Irish Police force. The claimants claimed indirect discrimination against them in the form of salaries. Their claim was that they were engaged in work equivalent to the work of a group of police officers also assigned to do the same duties but were paid a higher rate. The Irish Labor court found that there was indirect discrimination in question but also stated that the difference in pay was objectively justified. The claimants appealed to the High Court in Ireland, which referred questions to the European Court of Justice (ECJ).[33] In light of ECJ rulings, in this case, it's for the employer to establish objective justification for the difference in pay. In the case where the indirect discrimination aspect has been established, the justification in the difference in pay must relate to the comparators who have been recognized by the national court in establishing the pay difference.[34] In light of this case, the unequal treatment of male and female workers can be objectively justified in certain situations even when indirect discrimination has been recognized. The directive on equal opportunities and equal treatment between men and women in matters of employment prohibits direct and indirect discrimination,[35] but in these circumstances, the ECJ has set in its ruling aforementioned limits to in which situations indirect discrimination can be objectively justified when established.

### *2.2. European Court of Justice (ECJ) rulings*

As a way to enacting the principle of equal treatment, individual law enforcement has proven to be a slow way.[36] One of the main principles of the European Union is the aforementioned principle of equal pay for equal work for male and female workers. Therefore, all the member states have to ensure that this principle is applied in their legislative systems. Description of equal pay without discrimination based on sex is that pay for work at time rates is the same for the same job and that pay for the same work at piece rated shall be calculated on the basis of the same unit of measurement.[37] The article 141 of the EC Treaty ensures equal pay for work of equal value and

[32] Gender equality, European Commission – European Commission. Accessible: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality_en

[33] Personnel Today. Kenny and others v Minister for Justice, Equality and Law Reform and others. 2013. Accessible: https://www.personneltoday.com/hr/case-of-the-week-kenny-and-others-v-minister-for-justice-equality-and-law-reform-and-others/

[34] *Ibidem.*

[35] EUR-Lex – 32006L0054 – EN – EUR-Lex, Eur-lex.europa.eu. Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1553349084039&uri=CELEX:32006L0054

[36] Dagmar Schiek. "*A New Framework on Equal Treatment of Persons in EC Law*." 2002 p.299. Accessible: https://s3.amazonaws.com/academia.edu.documents/38022186/schiek_elj_2002.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1555495952&Signature=Eu2Y3eMiVR4YKP%2F0mtbU6Ck1%2BBE%3D&response-content-disposition=inline%3B%20filename%3DA_New_Framework_on_Equal_Treatment_of_Pe.pdf

[37] Heide Ineborg. "*Supranational action against sex discrimination: equal pay and equal treatment in the European Union.*" 2001, p.477. Accessible: http://cite.gov.pt/pt/destaques/complementosDestqs2/Women_gender_and_work_2001.pdf#page=478

applies not only to regular wages but also to "any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his (or her) employment from his (or her) employer."[38] The rulings of ECJ will also lead the way for the future cases that concern indirect discrimination, especially towards women.

## CONCLUSION

As a conclusion, according to the aforementioned research, the European Union has taken several actions towards more equal pay between men and female workers in the form of legislation, directives, etc. Since there are various factors that contribute the gender pay gap, the legislation is not able to fully close it, it does secure certain rights, but it doesn't change the structure of the labor market in short-term. The labor market, as well as the general mindset of the people and the economy, is structurally modeled to work a certain way. Therefore, the gender pay gap has its roots in deep and it can't be changed via legislation, at least not on a short-term basis. One of the main factors contributing to the gender pay gap is segregation in the labor market between male and female workers, meaning that women and men generally work in different jobs. However, segregation does not always imply inequality in the labor market. Lower income jobs are more likely to be occupied by female workers and higher income jobs occupied by male workers. Obviously, this is a statistical generalization. According to the aforementioned research, women are more likely to be stigmatized, for instance, being more sensitive than men and men are more likely to be stigmatized as the breadwinner of the household, the money maker. This is a difficult matter of subject since the legislation doesn't give a direct answer to it. The existing legislation may prohibit direct and indirect discrimination, but it does not ensure full equality between male and female workers. Since the last few decades, female participation in the labor market has increased and this may be, at least partly, due to EU legislation supporting equality, the directive on equal treatment and opportunities in matters of employment, equal pay for equal work, etc. Since there are more equal opportunities for both sexes, it encourages female participation in the labor market in terms of where it has been lacking. The legislation prohibits direct and indirect discrimination in terms of employment and occupation, however, there are cases like Kenny and others v Minister of Justice and, Equality Law Reform and others where indirect discrimination can be objectively justified even when recognized in some cases. When individual legislation has proven to be a slow way to enact the principle of equal treatment it still does have an effect. Overall, the effect of EU legislation on women's rights and equality in the workplace is positive. Today women's equal rights with men have better security than before and there is legislation where to turn to in case of, for instance, indirect discrimination, and there is the possibility to try and correct the injustice via existing legislation in any of the member states. However, since the gender pay cap consists on aspects like labor market segregation that does not always indicate inequality between men and women in matters of employment, it's not necessarily something that is even possible to fully close via legislation.

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[38] *Ibidem.* P.480.

2. Francesca Bettio, Alina Verashchagina. "*Gender segregation in the labour market: root causes, implications and policy responses in the EU*.", 2008, p.19-48. Accessible: https://core.ac.uk/download/pdf/60417738.pdf
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18. Jan Dirk Vlasblom, Joop J. Schippers. "*Increases in female labour force participation in Europe: similarities and differences",* European Journal of Population, 2004, p.389. Accessible: https://link.springer.com/content/pdf/10.1007/s10680-004-5302-0.pdf

# Right to Self Determination in Globalization Era

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**Abstract:** *Conflicts are not modern. Through the quandary of first and second world wars, states embraced norms to mitigate reoccurrence of conflict intra and interstate. From the Montevideo convention on rights and duties of states 1933, Westphalia treaty 1648, to the universal declaration of human right 1948. While these global norms grant states legitimacy more so acknowledge its sovereignty, it inter alia grants protection of right and choices of indigenous people in determining how and who governs them "right to self-determination". However, there is a prevalence of human right abuses, reinforced by conflict created by these norms. While the state strives to protect their sovereignty, indigenous people clamor for the protection of their right to self-determination. Through appraising the Catalonian and the Biafran secessionist struggle this paper acknowledges state sovereignty. However, argues that rights to self-determination of indigenous people should take precedence over sovereignty.*

**Keywords:** Globalisation, Human Rights, Self-determination, Sovereignty.

## INTRODUCTION

Globalization is impacting not only on our daily lives but also on relationships between states, non-state actors and redefining boundaries. This has weakened understanding of emerging intricate relationships that exist. Realizable wars and conflicts of new dimensions are widespread globally. While scholars, governments, and organizations implement their views to enhance a sustainable solution, the conflicts still exist and expand with time.

Historically there are global norms on human right (universal declaration of human right 1948) on wars (Hague convention of 1899 and 1902), on recognition of state (Montevideo convention on rights and duties of states 1933 and the Westphalia treaty 1648) remarkably the united nation treaty of 1966 which grants indigenous people right to self-determination is seen to be a trigger to this modern global upheaval.

Decades ago the universal right to self-determination of 1966 was a passport to the creation of new states these new states were guaranteed sovereignty from the offshoot of the Westphalia treaty. Visibly today is the conflict between the right to self-determination of indigenous people and the sovereign right of states to protect their territorial integrity.[1] This conflict is because of no clear roadmap for the enforcement of this global right.

This research will unravel if right to self-determination is a trigger to the contemporary conflict and determine how to create a balance between the right to self-determination and sovereignty. A comparative analysis of the Biafra secessionist movement in Nigeria and the Catalonia call for independence in Spain will be visited to draw a design for implementation of this global right to end the contemporary feud.[2]

[1] Hoffmann, T. & Chochia, A. (2018). The Institution of Citizenship and Practices of Passportization in Russia's European Neighborhood Policies. In: A. Makarychev, T. Hoffmann (Ed.). Russia and the EU Spaces of Interaction (223−237). Routledge, Taylor&Francis Group.

[2] Ramiro Troitino, D.; Chochia, A.; Kerikmäe, T. (2017). Critics of the Catalan Independence Process and Catalan Political Nationalism. In: W. Strickland (Ed.). European Union: Political, Economic and Social Issues (77−98). New York: Nova Science Publishers.

The rising nature of conflict anchored on minorities right to self-determination raises more concern on the path to sustainable peace thus this research will attempt to revisit past researches on the right to self-determination

This research will seek answers to:

Is the Right to self-determination in United Nation Treaty Article 1 Vol 999 International Covenant on Civil and Political Rights a death trap in post-colonial Era?

How will the right to self-determination and sovereignty of states coexist?

## OVERVIEW ON THE RIGHT TO SELF DETERMINATION

States since inception, worked towards global peace notably ensuring treaties that guides the action of states in the international system among these treaties are the Montevideo Convention on the Rights and Duties of States,[3] Enacted on 26th December 1933 and came to force a year after. The Hague Conventions of 1899 and 1907[4], the Westphalia treaty of 1648 notable for granting states sovereignty and the International Covenant on Civil and Political Rights.[5] Whereas these treaties played a key role in regulating the conduct of states across national frontiers, it could be seen that vagueness the International Covenant on Civil and Political Rights on the right to self-determination[6] has triggered a global human right violation by states anchoring on principle of sovereignty and protection of territorial integrity.[7]

The right to self-determination is an international principle that grants all indigenous people the right and freedom to self-governance. As captured by article 1 of united nation treaty vol 999 "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"[8] while the right to self determination was instrumental in the colonial era in granting independence to every indigenous people from their colonial masters, in the post-colonial era, the right to self-determination has become a death trap as it gives room for anarchy sprouting from states use of force to suppress the movement which they perceive an internal threat to their sovereignty. Illustrative Evidence is seen in The Nigerian civil war of 1967-1970 between the Nigerian state and secessionist indigenous people of Biafra, the failed Catalonia referendum in Spain, secessionist plight by the Kurdish people in Iraq and the anglophone secessionist crisis in Cameroun.

Amidst these views, the reality of the vagueness of this international law on right to self-determination in post-colonial Era and its concomitant effects are visible in the use of brute force to quell every secessionist movement not minding the statutory right of the indigenous people.

The rising nature of conflict anchored on minorities right to self-determination raises more concern on the path to sustainable peace previous research's holds Divergent views on the right to self-determination, sovereignty, secession and human right catastrophes arising therein, more so correlation between these factors are not new to the academic polity, questions on the possibility of emergence of new states on the global principle of self-determination is argued to be left on the desecration of the sovereign entities as the existing laws are not for creation of new state but for

[3] U.I.O, The Faculty of Law, Convention on Rights and Duties of States, Dec 26, 1933, Art. l,

[4] Médecins Sans Frontières, The Hague Conventions of 1899 and 1907(Médecins Sans Frontières, The Hague Conventions of 1899 and 1907.

[5] United Nation Treaty Vol 999 No. 14668, International Covenant on Civil and Political Rights. 19 December 1966

[6] ibid

[7] Chochia, A., & Popjanevski, J. (2016). Change of Power and Its Influence on Country's Europeanization Process. Case Study: Georgia. In *Political and Legal Perspectives of the EU Eastern Partnership Policy* (pp. 197-210). Springer, Cham.

[8] United Nation Treaty Article 1 vol 999 International Covenant on Civil and Political Rights. 19 December 1966

recognition of sovereign states[9] more theories posit that international laws pick on the notion of sovereignty and territorial integrity as against the creation of new states[10] For Carsten Stahn sovereignty is a known yardstick for recognition of states and could be earned sovereignty, conditional and constrained sovereignty this concludes that such rights could be granted on the desecration of the leviathan who may perhaps refuse to grant such supposedly gesture as seen in Catalonian and Spain uprising[11] Malcolm posited that sovereignty cannot guarantee recognition without stability as evident in the case of Democratic Republic of Congo and a sister secessionist group. In a fight for recognition by the united nation, the former was accepted and the later was rejected for lack of stability in its acclaimed polity[12]

## DEFINITION OF RIGHT TO SELF DETERMINATION

Conflict arising from this universal right of self-determination and need for sustainable solutions put the legal statute into many scholarly types of research, Erica-Irene held that right to self-determination could be well understood by distinguishing between the internal and external rights to self-determination she sees external right to be evident in states liberating itself from alien rule. Such liberation from their colonial masters is external self-determination. And the internal right to self-determination as the power of this sovereign to decide their system of government and who governs them[13] , Susanna Mancini, perceives right to self-determination as fundamental freedom of people to make economic, political and religious decisions for their good.in furtherance, she sees self-determination as a principle that combines both nationalist and democratic tenants[14] amidst these views as captured by article 1 of united nation treaty vol 999 "All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development"[15] the numerous views have a center point which sees the right to self-determination as to the right of colonies and non-colonies to determine their own way of life.

## BIAFRA SECESSIONIST MOVEMENT IN NIGERIA

### Who are the Biafran people?

The Biafran people are indigenous people from the eastern states of Nigeria, these states include Abia, Imo Ebonyi, Enugu, Anambra, Rivers, Akwa Ibom, And Calabar. Though most of these states are now grouped under south-south, historically it is believed the conflict started after the amalgamation of the northern and southern protectorate which lead to the formation of Nigeria. Historians have blamed the conflict on the amalgamation which had in its consideration the economic benefits from the union and not the diversity in cultural and religious ideology more so variant languages the Biafrans are known for their exceptional trading skills and their egalitarian culture, such as the findings of the colonial masters had failed severally to annex the region unlike

[9] Tamás Lattmann International Law Reflection 2017/12/EN 29 October 2017
[10] Jure Vidmar, Review of Developments in German, European and International Jurisprudence, Vol. 16 No. 03 P.351
[11] Carsten Stahn, The Law and Practice of International Territorial Administration, P.756
[12] Malcolm N. Shaw, International Law, sixth Edition P.205
[13] Erica-Irene A. Some consideration on the right of indigenous people to self-determination, P.4
[14] Susanna Mancini, Rethinking the boundaries of democratic secession: Liberalism, nationalism, and the right of minorities to self-determination, 11 September 2008, P.3
[15] ibid

their counterparts who had a central authority through which the areas were easily acquired. The eastern Nigerians are predominantly Christians, with a little over 10 percent atheist and Muslims

**Chronicles Of 1967-1970**

The Ibo as one of the minority group before the independence of the Nigerian state in 1960 detest the union of the northern and southern protectorate by Sir Lord Lugard, after the Nigerian independence in 1960 the ethnic politics of governance and the marginalization of this minority groups ensued leading to the first Nigerian civil war with alarming casualties described as genocide. Three million Ibos were massacred by the Nigerian elite forces and foreign soldiers who were invited by the government. The thoughts of what led to the civil war have met varying view. Greene was of the view that the marginalization took many dimensions there laws meant only for the poor, censuses that were not census, elections that were not elections, recounting the speech made by the secessionist leader that Biafra people did not secede from Nigeria, rather were pushed out from it as a result of organizational and legal standings which enhance and reinforced marginalization of the Biafran populace[16]

**The Secession Movement Post 1970**

The massacre of 1967 to 1970 did nothing to the determination of this indigenous person who convincingly referred to the united nation right to self-determination as a base for their call for independence. From the top of the genocide in 1970 to date there has been countless demonstrations by this people which at all times meets the brute force of the government resulting to alarming casualties and no liability by the side of the government who stands on the right of protecting its sovereignty and territorial integrity the aba and Onitsha massacre stands out in the analogy of the use of force against unarmed civilians in the grounds of protecting territorial integrity. After the death of the Biafran leader, 2015 saw the reemergence of the call for self-determination. A new leader trained in the United Kingdom preached the nonviolent method of demonstration as pathway to secession, such peaceful unarmed protesters were not only arrested and charged for treason, many were killed during the protest reacting to this further raises questions as to the legality of secession on the legal ground of the universal right to self determination and the methodology for its pursuance. Till date the struggle for the right of self-determination of the indigenous people of Biafra persists so is the government brutal response to the movement on the grounds of sovereignty and right to protect such.

## THE CATALONIANS IN SPAIN

Historically Catalonia was adjudged autonomous prior to the early eighteenth century, having its territorial integrity, rulers, Institutions, and laws this was captured in its union agreement with Aragon in 1137.[17] The death of Martí l'Humà in 1410 saw the emergence of Fernando de Antequera to the throne as there was no heir from Martí l'Humà. Not long after Fernando took the throne there was a pact leading to the joint administration of Castile governed by queen Isabel and Fernando of Aragon in 1479 though these nations were governed by a single sovereign entity, there were no major institutional changes arising from this pact.

Shortly ensued an occurrence that changed the status of the Catalonian nation. by 1621 Philip IV appoints duke of Olivares as chief minister in a bid to create a strong absolute state this was

[16] Kirk- Geene, The Genesis of The Nigerian Civil War And The Theory Of Fear, Uppsala 1975, P.4
[17] Montserrat Guibernau, Prospects for an Independent Catalonia, Volume 27, Issue 1, pp 5–9.

recorded in history as the revolt of the reapers and the first nationalist revolution in Europe.[18] Not long after ensued a war of succession where the Catalonians choose the Austrian against Philip V. the treaty of Utrecht was in favors of Philip IV and lead to his emergence as the king of Spain. the emergence of Philip V brought changes to the governance structure of Catalonia. Barcelona surrender after its defeat by the Franco Spanish people and by the order of Philip V the Catalan political institutions was dissolved, and their language changed to Spanish.

**Post 2000.2004 Era and Catalonia Struggle**

The Catalonian nationalism grew from strength to strength as many models of nationalist movements and struggle ideologies emerged. movements like the conservative nationalism by Jaume Balmes, the Catholic nationalist movement by Josep Torees, the Catalan Marxist struggle by Anreu Nin. Thought the Catalonian struggle for independence has been a life it took the trajectory of seeking for more autonomy, Montserrat highlighted several factors that triggered and re-energized the contemporary call for not just more autonomy but independence these factors ranges from Jose Maria neglect for the Catalonian call for more autonomy, the questions on the statue of autonomy and the limitations set by the Spanish state that leads to accumulation of 8% deficit to the Catalonian GDP[19]opinion poll held on 11th September 2013 shows 52% of Catalonians would vote for a sovereign Catalonian state as against 24.1% who will vote against the referendum, the Spanish state stopped the referendum on the ground that the Spanish constitution does not and will not recognize the Catalonian as a sovereign state, but a single Spanish nation within Spain. it states that the 2006 statue aims to eliminate certain constitutional grounds which made Catalonia an integral part of Spain. Such acts that confer the Catalonia state the authority to create its own taxes are unconstitutional as it is repugnant to the Spanish laws which are adjudged supreme.

## CONFLICTS OF NORMS

The right to self-determination as a universal principle that guarantees indigenous people the right to determine who governs them is widely seen as a trigger to abuse and death from the Catalonian of Spain to the Biafran in Nigeria, states are obligated to protect their territorial integrity as such uses state mechanism to quash secessionist movements. One could question the rights and wrongs of the parties to this conflict, could be state be held liable for protecting the territorial integrity using the state machine which they are obligated to do? Or could the indigenous people who pray to secede from their original state on the ground of the right to self-determination? These norms have been reinterpreted to suit states hegemony ignoring the indigenous peoples' rights such interpretations that support states hegemony was portrayed in the response of the united states in the wakes of the use of force on the Catalonians quest for secession. Though the methodology of implementing the right to self-determination is still left vague, the Montevideo convention enumerated criteria which are essential for state recognition Catalonian posses these characteristics, yet the United States response contradicts the Montevideo convention[20] having refused to recognize Catalonian independence on the right to self-determination but see it as an integral part of the sovereign Spanish territory.

Harmonizing Right to Self-Determination and State Sovereignty

[18] Chochia, A. & Ramiro Troitino, D. (2012). Future Enlargements of the EU and limits of the organization. L'Europe unie/United Europe, 6, 2–26.
[19] Ibid P.9
[20] ibid

Many states suffer the pains of these conflicting norms, the two cases explored in this article stand out and represent others. They share similar patterns and anchored on the universal right of Self-determination. A path to peace could be far from practicable without analyzing the conflict of norms to ensure a path through which this right be exercised. It is pertinent that answers to certain questions are required. Do these questions include what is a democracy? And does democracy play any role in the conflict of these norms, lastly what should be prioritized over the other, right to self-determination or the sovereignty of states? The definition of democracy is synonymous to that of the right to self-determination. Democracy is seen as a system of government characterized by periodic elections, right to franchise, life freedom of speech, etc. Thus democracy guarantees the freedom of speech as such to a large extent forms a legal ground for the expression of the right to self-determination. Sadly, as evident in these countries where these fundamental rights are denied are all democratic nations. The defense of states on the anchor to the sovereignty clause is to be analyzed in cautiousness to the meaning of sovereignty a state is adjudged sovereign when it possesses three essential elements, which are people, location (geographical area) and a government. It is pertinent to note that among all the components of a state the people are the most important as there could be no state or sovereignty without the people. The people also in this context forms the government and the laws, in a question on the what should be the priority of the state, it should be remembered that among the attribute of a state the people are the most important and should enjoy such rights associated with their importance. The right to self-determination could be a threat to the existence of states without a certain clause to regulate the creation of new states. However, the states should not be protected on the altar of sacrificing the peoples right as it goes against the pact in the foundation of the states. Amidst these conflicts a sustainable peace could be realized by redefining the contextual meaning of indigenous people, could indigenous people mean a group of people? all marginalized people in a state? Indigenous people should be defined on the ground of certain shared value system. As seen ailing democracy aids the contemporary hikes on the call for secessions, globally there is ailing political system characterized by corruption and incapacity of the mechanism of the state, such inefficiency bread marginalization and the call for secession.

## CONCLUSION

Right to Self-determination from the Catalonian and the Biafran secessionist struggle is seen as an anchor for the pursuance of such rights. However, the states on its own have maintained their obligation for the protection of the territorial integrity as such used the state mechanism at "all cost" in response to such secessionist struggle. Amidst the theories that explain these intricate relationships between the right to self-determination and sovereignty, these theories align with the state on its obligation to protect its territory and others see the right to self-determination as a political statement left for states to interpret. This research recognizes both rights as two democratic principles, which should be followed in a systematic way as both could coexist without being a threat to the existence of each other. This could be realized by redefining the term indigenous people or people as it is captured in the right to self-determination, giving priority to people as it forms the most essential element in the state. Institutional reforms that guarantee the absence of marginalization and corruption should be encouraged. Right to self-determination should not be addressed as a political statement without a clear interpretation in the post-colonial era. A state without the people cannot be called a state and democracy without the people is no democracy suffix to say respecting the will of the people is true democracy without which a state is stateless.

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# Migration Policy in Russia and its „Domino Effect" Towards Migrants

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***Abstract:*** *Since the collapse of the Soviet Union, migration policy has always been an all-important issue for Russian authorities. It is one of the major migrant-receiving countries in the world and according to some assessments, international migrants constitute up to 25 per cent of total workforce in the country. After becoming an independent state, the authorities quickly realized that the Soviet-style immigration laws had to undergo huge changes in order to regulate the incoming massive migration effectively. This article presents a general overview of Russian immigration law at different stages of its development. It also elaborates on how toughening migration policy has produced reverse effect by creating more illegal migrants in the country, in addition to resulting in "domino effect" towards migrants.*

***Keywords:*** *migration policy, Russia, domino effect, Central Asian migrants, FMS*

## INTRODUCTION

Russia, after the United States of America, Saudi Arabia and Germany, is the fourth largest host country of international migrants in the world with over 11 million migrants residing in the country in 2017.[1] Majority of them come from the former Soviet countries, especially from Central Asia.[2] Generally, the nationals of those countries can come to Russia under the visa-free regime. However, once they arrive, they are subject to draconian immigration laws and regulations which usually compel many of them to stay and work illegally.[3] According to statistics from 2015, about three million foreign citizens residing in Russia had already violated the legal terms of their residence. [4]

If the USSR would still exist, majority of the migrants in Russia today would not be regarded as international migrants and their conduct would also be regulated by ordinary Russian internal legislation. Moreover, the collapse of the Soviet Union has changed the statuses of people by turning former citizens of one country into foreign citizens in relation to each other. In turn, it resulted in changing attitudes among those people and created completely new ways of viewing migration. All these proccesses took place simultaneously with other huge transformations in the post-Soviet area: transition from planned economy to Western-style market economy and from a multinational and multicultural country to building nation-states. Under the circumstances, a number of questions arose

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Available at: https://xn--b1aew.xn--p1ai/Deljatelnost/statistics/migracionnaya/item/15851053/ ; Chochia, A., & Popjanevski, J. (2016). Change of Power and Its Influence on Country's Europeanization Process. Case Study: Georgia. In *Political and Legal Perspectives of the EU Eastern Partnership Policy* (pp. 197-210). Springer, Cham.
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[Accessed 25 March 2019].

in the post-Soviet Russia about the regulation of vast inevitable mobility processes and whether this mobility is beneficial and desirable or negative and even dangerous. The answers to those questions — which have been constantly changing over time — led to another set of equally complicated questions: what institutions and rules should control and regulate the process and its actors.

An ongoing debate on this issue has always been accompanied by constant changes in the migration policies of Russia. Meanwhile, available research on migration in Russia suggest that the policies are highly inconsistent, cynical and dependent on conflicts between various lobbysts i.e. liberals, nationalists and neo-imperialists.[56] They also point out the existence of strong ideological division on this subject.[7] Undoubtedly, all of these factors inevitably lead to controversial and frequent changes, which derserve sound research not only from a domestic perspective, but in a comparative context as well.[8] In the first section of this research paper, I aim to give a brief description of changes and developments in Russia's migration policy, namely early stages of its development and the concept of "compatriot" developed during that stage. Further, I will present my analysis on the main directions and results of the recent changes in the immigration laws. In the second section, I will suggest that high number of illegal migrants in Russia largely has to do with the "domino effect" of its immigration laws where breaking one law makes it inevitable to break another which finally pushes a migrant out of an inner circle of legality without any right of return. I will use a case study derived from my daily conversations with Uzbek migrants when I was in Uzbekistan in May 2018. At the end of the second section, I will try to present my analysis on what factors resulted in "domino effect" and possible solutions to this issue. The last section of this research paper will summarize all the important points before coming to a logical conclusion.

## 1. DEVELOPMENTS IN RUSSIA'S MIGRATION POLICY

After the collapse of the Soviet Union, a newly independent Russia became a destination for millions of international migrants. With its very little experience in managing large-scale migration processes, Russia had to quickly set up its policies and institutions to regulate the situation. Soon, it became obvious that its Soviet-style immigration laws needed to be updated and had to undergo huge transformations.

### 1.1. Refugees and Issues of Displacement

The early 1990s was marked by a massive resettlements of Russian-speaking migrants who were previously living in other Soviet republics. It was largely due to various upheavels and political reforms taking place in those republics including civil war in Tajikistan, armed conflicts in Moldova and Caucasus, and laws that gave the status of official state language to languages other than Russian. It resulted in huge flows of refugees and displaced people from various ethnic groups.

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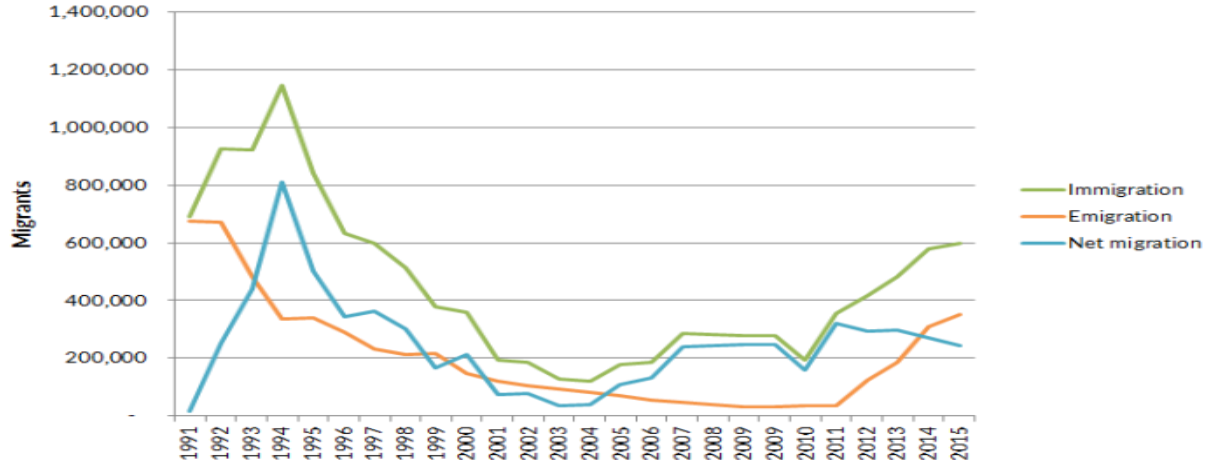
**Figure 1.** Migration flows to and from Russia, 1991-2015




*Note:* Immigration figures refer to inflows of migrants who stay in Russia longer than one year.
*Source:* Federal State Statistics Service (Rosstat), "International Migration," updated April 19, 2019, available online (in Russian).

Therefore, unsurpisingly, the first migration legislation in the post-Soviet Russia was devoted to the issue of refugees and displaced people.[9] This legislation explained the difference between refugees and displaced people. According to it, foreign citizens arriving in Russia were defined as refugees and Russian citizens who obtained their citizenship outside of Russia were defined as forcibly displaced people. In this sense, this period of immigration policies in Russia is considered to be the most liberal from the political point of view as it mainly aimed to regulate the influx of unprecedented number of migrants — majority of whom were ethnic Russians — to resettle in their "homeland".[10]

#### *1.1.1. "Compatriots"*

Later in 1995, Russian government adopted a 'Declaration on Support for Russian Diaspora and on Patronage for Russian Compatriots' according to which anyone coming from former USSR, Russia and their direct descendants thereof, who do not hold a Russian citizenship but want to maintain ties and stay loyal to the Russian Federation are defined as "compatriots". Further, in 1999, the newly adopted "Act on the Russian Federation's State Policy toward Compatriots Abroad" strengthened the concept.[11] Generally, the concept of "compatriot" was very broad and *de facto* included anyone who lived in the post-Soviet area. Subsequently, all policies concering the "compatriots" were built around the idea of supporting them abroad and even more importantly, assisting those who wanted to move back to Russia permanently. Moreover, simplified procedures for getting Russian citizenship were in place for them.

### 1.2. The Toughening of the Russia's Migration Laws

The next milestone in the development of Russia's migration policies dates back to 2000s. Given the threats of both internal and international terrorism, Russian authorities decided to reorient

[9] Zakon 'O bezhentsakh', No. 4528-I and Zakon 'O vynuzhdennykh pereselentsakh', No. 4530–1.
[10] Meilus, L. 2013. „Challenges in Migration Policy in Post-Soviet Russia." (Illinois Wesleyan University.) 17.
[11] On details of this act in the context of Russian foreign policies see Hoffmann, T. & Chochia, A. (2018). The Institution of Citizenship and Practices of Passportization in Russia's European Neighborhood Policies. In: A. Makarychev, T. Hoffmann (Ed.). Russia and the EU Spaces of Interaction (223−237). Routledge, Taylor&Francis Group.

the existing migration policies and turn it into a fight against the illegal migration.[12] The authorities started seeing illegal migrants as one of the main sources of instability inside the country and ultimately, as a threat to the national security.[13] One of the first steps on this way was "drawing a clear line between "ours" and "aliens" and between "preferred" and "non-preferred"". For this reason, "Federal Law on Legal Status of Foreign Citizens in the Russian Federation" was adopted in 2002. Along some other changes, this law also laid out certain cultural requirements for compatriots and migrants who wanted to become Russian citizens. Initially, as mentioned above, the concept of "compatriot" included anyone who was a citizen of the USSR and their direct descendants. Therefore, it was open for anyone from the post-Soviet area regardless their national, ethnic and cultural origin. However, it gradually became a word to describe someone with plan's to move to Russia.[14] According to the new law adopted in 2002, all migrant workers who entered the territory of Russian Federation were classified as "temporary staying foreigners" and had a right to stay in Russia for 90 days. They were also obliged to register at the City Department of Interior of Russian Federation within 3 days of their arrival to Russia. For that to be done, migrants needed either a written agreement with the perspective employer or a rental contract with a landlord and a migrant. In order to change their status from "temporary staying foreigner" to "temporary staying resident", migrants had to find a job and get proper work pemit within those 90 days.

However, in reality, for migrant workers, it was extremely hard to register within three days of their arrival due to the following reason: neither employers nor landords are willing to make a formal written contract with migrants. The paramount motive behind it is to evade the taxes.[15] Since majority of landlords do not provide leasing contracts easily, migrants have no other choice than working without proper documents. In turn, it makes them extremely vulnerable to violations of their rights by employers and the police.

So, due to those legal restrictions, many migrants turned to shadow economy. In this way, the number of illegal migrants in Russia grew dramatically since the introduction of the aforementioned draconian laws and regulations. It also initiated a growth in corruption related to the immigration industry.[16] As a result, in 2007, Russian authorities were compelled to introduce some changes to previously existing laws. Due to those amendments, the 90-day period was extended to 180 days and 3-day deadline for registering was also extended to 7 days. Apart from that, there were several positive changes concerning the procedures of getting work permits. For example, based on the new amendments, migrants could apply for the work permit in any Federal Migration Service (hereafter: FMS) offices without being dependent on one particular employer. It meant more freedom to choose and to change their workplace.

However, what looked *de jure* good, was *de facto* hard to implement. Moreover, the compulsory medical exam that had to be done within 30 days cost about 500 USD which is extremely expensive for migrants. The amendments to the law also made it compulsory for migrants to take language test which was another huge obstacle on their way to legality. Above all, FMS failed to fully cooperate with other agencies when it comes to implementing new reforms. Therefore, this stage of development in Russia's migration laws were called by some academicians as "liberal-restrictive" due to its double standard approach.[17]

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[12] Latsis, O. 2002. „Time for deportation again?" The Russian Journal .

[13] Igushev, A. 2003. „Tajikistan: Countering poverty, trying to stay in good terms with Russian and West." CACI Analyst.

[14] Heleniak, T. 2001. 'Migration and restructuring in post-Soviet Russia'. Kd. 4,

[15] Schaible, D. 2003. „Life in Russia's 'Closed City: Moscow's movement restrictions and the rule of law." New York University Law Review 76: 344-373.

[16] Meilus, L. 2013. „Challenges in Migration Policy in Post-Soviet Russia." (Illinois Wesleyan University.) 17.

[17] Tipaldou, S., & Uba, K. ,. 2014. The Russian Radical Right Movement and Immigration Policy: Do They Just Make Noise or Have an Impact as Well? Kd. 7. 66 kd.

### *1.2.1. Reforms of 2014-2015*

As the massive migration flow continued throughout the following years, there was a need to revise previously existing immigration laws and to introduce further developments to it. Those developments came in 2014 and 2015. They had several important aspects and were aimed at solving particular tasks which I will describe in the next paragraphs.

Although the new concept *de jure* talked about attracting more migrant workers to Russia, the first amendments *de facto* had more restrictive nature rather than encouraging. The implementation of a three-month stay rule can be a salient example in this regard. According to it, a migrant coming from a country that has established visa-free regime with Russia can stay for three month with six month period. Previously, there was no six month limitation and therefore, many migrants used to cross and re-enter the nearest border (e.g. Kazakhstan, Ukranian borders) and in this way, prolong their stay. With the new rule, Russian authorities removed this option for migrants. So, migrants had to either leave Russia in three month and return only after staying at least three month in their own home countries, or acquire proper documents. The latter option had its own nuances and obstacles.

Apart from the aforementioned change, there were some other significant changes in other aspects of immigration legislation. Previously, in order to work legally in Russia, migrants were obliged to get quota permits and work patents. Starting from 2015, a single patent system was introduced which was supposed to simplify the process of getting proper documents to work in the country. One should note that it was only for those countries that have visa-free regime with Russia and citizens of countries that do not fall under that category were still obliged to acquire permits and work patents. Except for simplifying the process, this development was also meant to solve the issue of social security of migrants by making it compulsory to get a health insurance.

Further and even more importantly, the new laws drew a line between those who were only invited to stay temporarily, and those who were encouraged to stay permanently and acquire Russian citizenship. For example, native Russian speakers, businessmen and experts in particular fileds had a chance to get a residence permit and Russian citizenship easier than other ordinary migrant workers. The latter category was required to renew their patent after a year of their stay and leave Russia after 2 years.

The fourth significant amendment to the immigration laws had to do with the integration of migrants into the Russian society and culture. According to the new law, one of the requirements for acquiring residence permit and patent was passing an exam in Russian language, history and legal system. One more interesting thing to note about this legislation is that there was an examination fee to be paid by migrants. This law entered into force from 2015 and still stays active.

### **1.2.2. Entry Bars**

Since 2012, in order to regulate the vast migration process, Russian authorities introduced a practice of issuing entry bars to migrants who have violated the immigration laws. Initially, it used to be issued only to those migrants who had not left Russia within the thirty-day period after the expiry of their residence permit. However, it has experienced a serious shift in 2013-2014. According to the new law, entry bar is issued to any migrant who commits two or more administrative offences (i.e. crossing the road in wrong places, speeding or parking tickets) within a three-year period.[18] Unlike many other laws, this one works retroactively and therefore, a migrant can get an entry bar not only for two or more administrative offences committed after this law was passed, but rather any three-year period of migrant's residence in Russia. Although the law does not imply it explicitly,

[18] Russian Federation. 1996. „THE LAW ON THE RULES OF ENTRY AND EXIT FROM THE TERRITORY OF RUSSIAN FEDERATION, Art. 27, § 2.1."

courts have *de facto* interpreted it accordingly.[19] Issuing an entry bar makes a migrant effectively deportable and leaves no possibility to regularize his/her stay in Russia. As a result, the number of deportations increased significantly over the following years. According to the official statistics from FMS, 645, 000 migrants were deported in 2014 compared to 73, 000 in 2013. It is important to note that not all migrants who get an entry bar are deported by the authorities. In many cases, they are given a certain period of time to leave Russia on their own.

## 2. IMMIGRATION LAWS AND THEIR EFFECTS

Since 2000s, the migration policies of Russia towards migrant workers, especially from Central Asia, have become more and more restrictive and repressive. Although the laws do not imply it explicitly, it can be seen in the real life experiences of many migrants. Frequently changing rules and other inconsistencies in the law and in the institutions that regulate migration have led to the phenomenon of "domino effect" of immigration laws. In other words, it is a kind of a chain reaction which migrants can activate by commiting a single offence and it does not matter how small it is. It is enough to cause the "domino effect".

### 2.1. A case study

Anvar is thirty-two years old migrant worker from Uzbekistan[20]. He had arrived in Moscow several years ago to find a work in some construction site because it was a job for which he had received special training when he was in Uzbekistan. He found a job in a small contruction site and he liked it. He also was advancing well in his career. Of course, as with everyone else, there were temporary delays in payments, but Anvar understood very well that it is a general condition for all migrants in Russia and therefore, accepted it. Moreover, he managed to bring his wife and his child to Russia, so they were all living together. In short, he was happy with his job and his life.

He was one day stopped in the metro by the police. During the check, the police officers asked for his passport and residence registration card. Having checked the documents, the officers accused Anvar of having fake registration. Subsequently, the officers kept him at a police station overnight. In next the morning, they took him to one of the district courts with the accusations of having a fake registration documents. Alongside him, the officers also took eighteen more migrants with the same accusations.

The court immediately accepted the charges brought by the police and found Anvar and other migrants guilty of violating administrative and immigration laws. It resulted in ordering a usual triple sentence: a five-year entry which had to be issued immediately by the FMS, expulsion order and a fine (5000 rubles). With various construction projects under way, his wife and a child living with him in Moscow, leaving Russia seemed impossible.

Moreover, Anvar was quite certain that his immigration documents were legit because they were given to him by his employer. Therefore, he hired an immigration lawyer. The lawyer recommended Anvar to go to the local FMS office and ask them to check the status of his registration from their database. It is important to note that the police does not have an access to the FMS database because of the division in their responsibilites and therefore, they are supposed to send an official request to FMS every time when they suspect someone of having false immigration papers.

[19] Kubal, Agnieszka. 2016. „Entry Bar as Surreptitious Deportation?" Journal of the American Bar Foundation (Law&Society Inquiry) 2 (2): 13.

[20] In order to keep the confidentiality of a migrant whom I talked to in Uzbekistan, I changed his name and some of his personal data. However, important facts of the case are unchanged.

However, as in the case of Anvar, the police often do not follow those procedures and file a case directly to the court.

Having waited in the long queue at the FMS office, Anvar was informed that his registration was on their database. The FMS officer issued a printout from their database certifying the validity of his registration. Based on this evidence, Anvar's lawyer filed an appeal with the Moscow City Court.

In turn, the court having received the evidences rejected the earlier decision of the District Court.

Justice seems to be served. However, what were the real effects of the decision made by the Moscow City Court which was supposed to bring Anvar back into legality?

As mentioned above, Anvar was issued a triple sentence and one of them was issuing the five-year entry bar immediately by the FMS. So, the decision of the Moscow City Court was supposed to remove the entry bar. It was necessary for him in order to renew his patent. However, there was yet a bigger problem. Anvar's registration was soon going to expire and renewing it required the removal of his entry bar. The problem was that the formal long processing time of the Moscow City Court and equally, long processing time of FMS would make it impossible for him to renew the registration. Without registration, it is also impossible to renew his working patent which would push him back into illegality.

His lawyer advised Anvar to make a request at the FMS so that they would remove his entry bar as soon as possible and let him legitimise his stay in Russia. Subsequently, he filled an application at the FMS and attached the reference from the Moscow City Court. The FMS confirmed that it takes one month for FMS to remove his entry bar from the database. However, his registration expiry date was closer than that.

Did he win the case after all? After all, Anvar and his family were compelled to leave the Russian Federation and wait for the court and the FMS to process and lift his entry bar. In other words, despite the acquittal of the Moscow City Court, he had to leave.

### 2.2. "Domino effect": the reasons and the ways to eradicate them

Anvar's case represents many other cases and similar situations that migrants experience in Russia in their every day life. Breaking one law — or simply being accused— leads to breaking another law which, finally, pushes a migrant out of the inner circle of legality while offering very little or no chance to return. As Anvar told me: "If you do not fulfil one condition, pay the taxes on working patent a few days later, or FMS officer puts your name or your date of birth incorrectly, then the process starts. One thing leads to another and it continues until you find yourself in the court. After that, illegality becomes your only and only option."

I would argue that the more repressive the immigration laws are in Russia, the more illegal migrants will be produced as a result. The above presented data has shown that over the years, Russia's immigration policies has been getting tougher against the migrants and it was producing reverse effect: the number of illegal migrants has been increasing since then. Moreover, from my point of view, slight decreases in the number of migrants in the country have largely to do with the economic decline in Russia since 2014 due to the sanctions imposed by EU and USA. Therefore, the belief that the newly adopted policies have been effective might be questionable.

Taken into account the complexity of the migration process in Russia, it is impossible to offer any "quick fixes". However, there seems to be several ways how the overall situation could be improved. Above all, there is a need to revise the proportionality of the sanctions being imposed on migrants compared to the scale of an offence commited. For example, issuing an entry bar and expulsion of a migrant (who might have family ties in Russia) because of administrative offences seems to be against the principle of proportionality. Apart from that, taking into consideration the

financial situation of migrants and the capacity and the willingness of state agencies to implement the new laws is important step towards establishing better immigration legislation.

## CONCLUSION

The aim of this paper was to analyze the development of migration policies in post-Soviet Russia and to examine the phenomenon of "domino effect" of its current immigration laws in relation to migrant workers, especially from Central Asia. As observed above, the migration policies in the country had more liberal character in its earlier stages. Its immigration laws were solely aimed at regularizing the vast migration process and accomodating millions of people fleeing to the country. Moreover, it was far less selective in terms of ethnicity and culture when deciding how to treat migrants. However, starting from 2000s, due to both external and internal factors, Russia started toughening its migration laws and treating particular type of migrants differently. Over time, it created a division between "preferred" and "non-preferred" migrants. The concept of "compatriot" – – which initially was implemented as a very broad concept and included *de facto* everyone in the post-Soviet space — lost its initial significance and thus, its value.

Reforms in 2014-2015 which *de jure* were supposed to make migrants' lives easier produced reverse effects due to its impracticality and failure of legislating authorities to consider the everyday realities of migrants' lives and working style of its state agencies. Moreover, the practice of issuing entry bars, especially after the amendments to the legislation in 2014, started producing even more illegal migrants and ultimately, led to the above mentioned "domino effect". Due to the improportionate sanctions, many migrants turned to shadow economy. In this respect, when making new amendments and revising the existing immigration policies as a whole, Russian authorities need to take these factors and results into consideration. There is a high need for further research into the lives of migrants in order to examine real "rules of the game" that migrants live by rather than formal legislation that do not usually operate as it is supposed to.

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# Flexicurity in termination the Employment Contract – the Comparison Between Estonia and Vietnam[1]

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***Abstract:*** *This article compares the regulation on terminating the employment contract at the initiative of the employer between the Estonian Employment Contract Act and the Vietnamese Labour Code. The comparison is done in the theory of flexicurity to give some recommendations for reforming these regulations of the Vietnamese Labour Code.*

***Keywords****: Flexicurity, temination the employment contract, labour law, Vietnam, Estonia.*

## INTRODUCTION

The concept of flexicurity entered the academic and political discourse in the late 1990s. The most widely followed definition paints it as a policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of labour markets, work organization and labour relations on the one hand, and to enhance security – employment and social security – notably for weaker groups in and outside the labour market, on the other hand[1]. A combination of the flexibility of the labour market and the security of employees is also evident in policy discourse at European Union level, in particular in Commission's Green paper from 1997[2]. Flexicurity policy in Europe is aimed at solving social and economic problems as the development of the labour market enters the period of "erosion of the standard employment relationship" and the rise of "flexible employment" and the decline of indefinite full-time job and the long – term employment relation[3]. Some studies at that time show that, flexicurity policy will help support the competitiveness of firms, increase quality and productivity at work and facilitate the adaptation of firms and workers to economic change[4]. The flexicurity concept was also being implemented by the International Labour Organization (ILO) in the Middle East and developing countries, including Vietnam. These studies indicated that the harmonious combination of security and flexibility in promulgating labour relations in market economies is an appropriate policy to create economic development and decent work.[5]

In the framework of flexicurity, it is important to establish transparent rules on the termination employment contract at the initiative of the employer. The regulation of the termination of an employment contract at the request of the employer shows how flexible labour relations are. Estonia is also a European country that applies this policy to labour market reforms and labour laws since 2008. The basis for the draft act was the concept of flexicurity and therefore the Act aimed to increase flexibility and security in employment relations[6]. The new Employment Contracts Act of Estonian

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[1] Wilthagen and Tros, 2008, p. 169; Klammer, 2004.
[2] Per Kongshoj Madsen, 2006, p.3.
[3] ILO/Denmark/Molisa Project in Vietnam, Balancing security and flexicurity in emerging countries, 2009, p.37
[4] Ton Wilthagen and Frank Tros, 2008; Kazutoshi Chatani (2008)
[5] Maria Sabrina De Gobbi, 2007; Paul Vandenberg, 2008.
[6] Praxis Centar, Analysis of Labour Contract Act, *https://centar.ee/uus/wp-content/uploads/2013/03/Analysis-on-Labour-Contract-Act.pdf*; Estonian Employment Contracts Act: Cornerstone in Applying the Flexicurity in Estonia?

has been ratified in 2008 and effected from 01/01/2009 (EECA)[7] focuses on balancing the interests of the parties to employment contracts and attempts to make the rules more flexible. Estonia is considered as a successful country in fulfilling the flexicurity policy in Europe, especially on voluntary job mobility[8].

The first Labour Code of Vietnam was issued on June 23, 1994, takes effect from January 1, 1995, has passed four additional amendments in 2002, 2006, 2007 and 2012 (VLC). The application process of the Labour Code has appeared many shortcomings, limited from practical implementation. Comments on the draft Labour Code 2012, It is said that the provisions of this Code were strangling the labour market[9]. Through summarizing the implementation, many businesses, workers, user representatives, and trade unions have reflected many difficulties and shortcomings including the content of labour contracts. Currently, the Draft Law on Amendment and Supplementation to the VLC is being published publicly on the National Assembly website to get people's opinions (Draft).

In this article, the author will make a comparison of the rules of termination of the employment contract at the initiative of the employer in the concept of flexicurity between EEAC 2008 and VLC 2012. To point out the advantage and disadvantages of each and give some recommends for complete there rules of VLC 2012. Termination of the employment contract at the initiative of the employer is the case where the employer unilaterally terminates the labour contract without agreement of the employee. To protect the security of work for employees, EECA 2008 and VLC 2012 both regulate the ground and the procedure that the employer has to comply with.

## 1. THE GROUNDS OF CANCELLATION

Regulations on the grounds of cancellation show how easy/flexible that the employer could cancel legally employment contracts. In order to protect employees' works, Article 4 Convention Number 158 of the International Labour Organization (ILO) stipulates that, an employment contract must not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking, establishment, or service. Countries have regulated grounds and procedures for terminating contracts. The strict of these regulations show how flexible the employer is.

*EECA*

Fulfilling the concept of flexicurity, EEAC makes significant changes concerning the rules on the grounds for termination of an employment contract on the initiative of the employer. Instead of exact grounds[10], EEAC provides general reasons and guidelines for termination. The employers could decide which reasons are suitable for their enterprises. According to EEAC, the employer can cancel the employment contract only extraordinarily and due to an influential reason connected with the employee or the economic situation.

- *The grounds due to reasons from employees*

[7] The old EAC (1992) regulated the grounds and procedure for termination of employment contracts in great detail. That kind of rigid regulation on termination was not purposeful.

[8] Muffels, R. J. A., & Wilthagen, A. C. J. M., 2013.

[9] Lawyer Truong Quang Duc, Comments on the draft Labor Code 2012, http://luatsuquangthai.vn/bo-luat-bop-nghet-thi-truong-lao-dong-367-a3id. Many provisions remarked in this writing were regulated in Vietnamese Labor law code 2012.

[10] The old EAC (1992) provided ten specific grounds for terminating contracts, For each of the grounds for dismissal, the employer had an obligation to prove that there was a reason provided by law for the dismissal; otherwise, the dismissal was unlawful.

Section 1 Article 88 EECA provides a possibility for the employer to cancel the employment contract due to the reasonable excuse caused by the employee. The law lists examples of probable cancellation causes: (i) For a long time been unable to perform his or her duties due to his or her state of health which does not allow for the continuance of the employment relationship (decrease incapacity for work due to a state of health). A decrease in capacity for work due to state of health is presumed if the employee's state of health does not allow for the performance of duties over four months' (The employee has not been able to fulfil their work tasks due to the health condition for a long time); (ii) For a long time been unable to perform his or her duties due to his or her insufficient work skills, non- suitability for the position or inadaptability, which does not allow for the continuance of the employment relationship (decrease in capacity for work) (The employee cannot cope with work tasks due to insufficient knowledge or skills); (iii) In spite of a warning, disregarded the employer's reasonable instructions or breached his or her duties; (iv) In spite of the employer's warning been at work in a state of intoxication; (v) Committed a theft, fraud or another act bringing about the loss of the employer's trust in the employee; (vi) Brought about a third party's distrust in the employer; (vii) Wrongfully and to a significant extent damaged the employer's property or caused a threat of such damage; and (viii) Violated the obligation of maintaining confidentiality or restriction of trade. The employer can cancel the employment contract within a reasonable period after they learned or must have learned about the circumstances[11].

- *The grounds due to economic reasons*

Economic reasons are cases where due to objective reasons, employers must change their organizational structure or new technology or other objective reasons leading to labour redundancy. In this case, the employee lost his job completely without their fault.

According to EECA, an employer may extraordinarily cancel an employment contract if the continuance of the employment relationship on the agreed conditions becomes impossible due to: a decrease in the work volume or reorganization of work or other cessation of work; cessation of the activities of the employer; bankruptcy[12].

Before cancellation of an employment contract due to lay-off, an employer shall where possible, offer other work to the employee. Such obligations do not apply in the case of the employer's bankruptcy and when the employer ends its' activity. The employer shall, where necessary, organize the employee's in-service training or change the employee's working conditions, unless the changes cause disproportionately high costs for the employer[13].

Besides, the employer must follow the equal treatment principle during redundancy. This means that the employer may keep better-working employees employed. At the same time, the employer may not reduce employees based on their gender, age, nationality, sexual orientation or other circumstances not related to work. During redundancy, the employees' representative and employee raising a child under the age of 3 get preferential treatment. For instance, if the employer must make some employees redundant and has determined employees who will be let go, the employee raising a child under the age of 3 must be kept at work and another employee chose[14].

Employees' representative and a parent of a child under the age of 3 can only be made redundant if one position (employing this person) will be made redundant and there are no other people to let go from the same position instead. For instance, when the only accountant of the company will be let go as the company shall procure accountancy service from outside the company in the future[15].

[11] Section 4 Article 88 EAC 2008
[12] Section 1 Article 89 EEAC 2008
[13] Section 3 Article 89 EECA 2008
[14] subsection 1, 2 Section 1, Section 2 Article 88 EECA
[15] Section 4,5 Article 89 EEAC 2008

*VLC*

According to VLC, the grounds that the employer may cancel employment contract are stipulated at four articles with different procedures of cancellation: (i) Cases where employers shall may unilaterally terminate labour contracts which has two groups of grounds: reason arising from the employee and force majeure reasons (Article 38); (ii) Obligations of employers in cases of changes in structure, technology or due to economic reasons (Article 44); (iii) Obligations of employers in cases of merger, consolidation, division, or separation of enterprises and cooperatives (Article 45); Dismissed (Article 126). Although they are regulated in different articles with different names, they can be divided into two groups: the grounds due to reasons arising from employees and the ground due to economic reasons.

- *The grounds due to reasons from employees*

The grounds due to reasons from employees that the employer may cancel employment contract are stipulated at two articles:

*The first group* is regulated in Section 1 Article 38 VLC with the right to unilaterally terminate the employment contract of the employer. The employer shall have the right to unilaterally terminate the employment contract in the following cases: (i) The employee repeatedly fails to perform his/her work in accordance with the terms of the employment contract; (ii) An employee is sick or has an accident and remains unable to work after having received treatment for a period of twelve consecutive months in the case of an indefinite term employment contract, for six consecutive months in the case of an definite employment contract, or more than half the duration of the contract in the case of an employment contract for seasonal work or a specific task of less than 12 months. Upon recovery, the employee shall be considered for reinstatement or continue to work for the employer (The employee has not been able to fulfil their work tasks due to the health condition for a long time); (iii) The employee does not present him/herself at the workplace until the period of 15 days from the expiry of the suspension period of the employment contract as stipulated in Article 32 VLC.

In those cases, the employer could cancelation the employment contract after doing prior notice to the employee, which are regulated in Section 2, Article 38 VLC.

*Second group* is stipulated at Article 126 VLC with the right of the employer to dismiss employees as the a disciplinary measure, includes: (i) The employee commits an act of theft, embezzlement, gambling, intentionally causing injury, using illicit drug inside the workplace, disclosing technological or business secrets or infringing the intellectual property rights of the employer, or commits acts which are seriously detrimental or posing seriously detrimental threat to the assets or interests of the employer; (ii) The employee who is subject to the disciplinary measure of deferment of wage increase recidivates while the disciplinary measure is not yet repealed; or where an employee was demoted as a labour discipline and recidivates. Recidivism means an employee recommits the same breach of labour disciplinary regulations while the disciplinary measure has not been repealed in accordance with Article 127 of this Code; (iii) the employee has been absent from work for 05 accumulated days in 01 month or 20 accumulated days in 01 year without a proper reason. Proper reasons include natural calamities or fires; the employee or his/her family member suffers from illness with a certification by a competent health care institution; and other reasons as stipulated in the internal work regulations.

Employers have to comply with the principles and procedures for settling violations of labour disciplinary regulations which are regulated by law[16]: The employer must demonstrate the culpability of the employee; There must be the participation of the representative organization of the

[16] Article 123 VLC 2012,

worker's collective at the grassroots level; The employee must be physically present and is entitled to self-defence or to have a lawyer or other persons to assist in his/her defence; if the employee is under 18 years of age, his/her father, mother or a legal representative must be present; and any settlement of violations of labour disciplinary regulations must be documented.

- *The grounds due to economic reasons*

According to VLC, the economic reasons that the employer has the right to lay-of employees are regulated in more detail, concludes: (i) Changes of organizational structure, re-organization of employments: (i) Changes of products, product structure; (ii) Changes of technology process, machinery, business manufacturing equipment, associated with production, business activities of the employer[17]; (ii) Economic reasons: Economic crisis or recession; or Implementation of the governmental policy on restructuring the economy or implementation of international commitments[18]; (iii) In cases of merger, consolidation, division, or separation of enterprises and cooperatives[19]; (iv) In cases of force majeure: in the event of a natural calamity, fire, hostilities, epidemics, relocation or narrowing of the production and business sites, at the request of competent state agencies and the employer has exhausted all possibilities, and is forced to scale down production and reduce the workforce[20].

Except for the cases of force majeure, VLC also requires the employer to offer and/or re-train employees for continued employment[21].

*Comments:*

*Firstly*, in regulations of the grounds due to reasons arising from employees, EECA provides the employer the right to cancel the employment contract easier than VLC does:

- EECA provides an employer the right to cancel the employment contract in the cases that are not allowed by VLC: (i) In spite of a warning, disregarded the employer's reasonable instructions or breached his or her duties; and (ii) In spite of the employer's warning been at work in a state of intoxication;

- For serious violations of employees, EECA allows employers to unilaterally terminate labour contracts just with prior notice. Meanwhile, VLC regulates that, the employer can only terminate the labour contract by disciplining with the dismissal penalty in a very strict procedure. These grounds are: Committed a theft, fraud or another act bringing about the loss of the employer's trust in the employee; Brought about a third party's distrust in the employer; Wrongfully and to a significant extent damaged the employer's property or caused a threat of such damage; Violated the obligation of maintaining confidentiality or restriction of trade[22].

*Secondly, the grounds due to economic reasons stipulated in EECA are the same in VLC but the conditions to lay-off employees in EECA are stricter than those in VLC.* Many grounds regulated in VLC are just specified examples for the case of re-organizing of works, which are regulated in both EECA and VLC. EECA prohibits discrimination and treatment and limits the number of cases not allowed to quit, while VLC does not. So EECA is more reasonable than VLC in the meaning of security of employees. In reality, the employer could easy to create the grounds for redundancy (such as the grounds of reorganizing of employment, restructuring of activity). The equal treatment principle of EECA prevents the arbitrariness of the employer and protects week employees in the

[17] Section 1 Article 44 VLC 2012, Article 13 Degree 05/2015/NĐ-CP
[18] section 2 Article 44 VLC 2012, Article 13 Degree 05/2015/NĐ-CP
[19] Article 45 VLC 2012
[20] subsection a Section 1 Article 38 VLC
[21] Article 44,45,46 VLC
[22] These grounds are for employers to cancel the employment contract according to section 1 Article 88 EECA, and for employers dismiss employees as a disciplinary method according to Article 126 VLC.

case of redundancy. VLC does not such restrict regulations so the employer often applies these measures to cancel the employment contract.

*Thirdly, the obligation of employers to arrange other jobs for the employees is regulated in EECA is more reasonable than that in VLC*. EECA requires the employer to offer a new job for the employee in any case possible, not depend on the reasons lead to cancellation. VLC only requires the employer to do this obligation in the case of redundancy[23]. The employer has no obligation to offer anther job for employees in case of employees cannot cope with work tasks due to objective reasons (health status or personal capacity[24]). In this field, EECA considers to the social responsibility of the employer to protect security for the employee better than VLC. The obligation of employers to offer another job for employees is a method to guarantee the security of work for employees. According to EECA, this obligation of the employer is set up in cases where an employer cannot guarantee the job according to the contract without employees' fault, or employees cannot cope with work tasks due to objective reasons. This regulation is base on both sociality and contract aspects. For cases where the employee does not undertake the work due to objective reasons such as health status or personal capacity, the employer offers the other appropriate job (if any). These regulations reach to the social responsibility of employers. In the case of redundancy, employers cannot provide work to the employee on agreed conditions because of economic reasons, arranging another job for the employee is considered to implement the obligations in the contract law.

## 2. PROCEDURE ON CANCELATION

- **Terms for advance notice of cancellation**

Advance notice of cancelation has the purpose to give the employee the chance to find a new job and to reduce the expenses of the unemployment insurance fund. The longer the period of advance notice, the more security for employees and the less flexible for employers.

*EECA*

According to EECA, an employer shall give an employee advance notice of extraordinary cancellation if the employee's employment relationship with the employer has lasted:

- Less than one year of employment – no less than 15 calendar days;
- One to five years of employment – no less than 30 calendar days;
- Five to ten years of employment – no less than 60 calendar days;
- Ten and more years of employment – no less than 90 calendar days.

On the basis specified in subsection 1 Article 88 EECA (contract is terminated due to the employee's actions) an employer may cancel an employment contract without adhering to the term for advance notice if, considering all circumstances and mutual interests, it cannot be reasonably demanded that the performance of the contract be continued until the expiry of the agreed term or term for advance notice.

*VLC*

VLC requires the employer to give the prior notice only in the case of unilateral termination of the employment contract specified at Article 38 VLC. The period of advance notice does not depend on the length of employment at the employer's company but depends on the types of labour

[23] Article 44,45,46 VLC

[24] Stipulated at subsection a, b Section 1 Article 38 VLC

contracts. When unilaterally terminating an employment contract in cases provided at section 1 Article 38 VLC, an employer shall give notice to the employee as follows[25]:

- At least 45 days in the case of an indefinite term employment contract;
- At least 30 days in the case of a definite term employment contract;
- At least 03 working days in the case of an employment contract for seasonal work or a specific task of fewer than 12 months' duration and in the case the employee has not been able to fulfil their work tasks due to the health condition for a long time.

*Comments*

To give the employee the chance to find a new job, the terms of advance notice in EECA 2008 is more reasonable. The employer should do the prior notice in the entire termination contract at the initiative of the employer. This obligation is only omitted in the case of impossible or not be necessary. These regulations in VLC are not reasonable and do not meet the purpose of gaining a security job for employees. According to VLC, employers do not have the obligation to do advance notice in the case of redundancy and dismissal. VLC has no exception on the case initiative termination employment contract, which is regulated in Section 1 Article 38. Another while, In case of force majeure, the employers also should do the prior notice to employees. In the case of an employment contract for seasonal work or a specific task of fewer than 12 months' duration and in the case the employee has not been able to fulfil their work tasks due to the health condition for a long time, the period of prior notice of 3 working days is too short to find a new job.

• The obligation of employers to grant time off:

Obligation of the employer to grant time off is regulated in EECA but not be in VLC. Article 99 EECA stipulates: "*If an employer cancels an employment contract extraordinarily, the employer shall grant the employee within the period of advance notice time off to a reasonable extent to find new employment"*.

The obligation of the employer to grant time off is a good regulation for granting the security of work for the employee. To get a new job as soon as terminating the employment, the employee needs to do some procedure such as: finding information, applying employment fill, take part in a recruitment procedure.

## 3. ALLOWANCE/ COMPENSATION

Allowance/ compensation that the employer must pay to the employee in the case of termination contract has a role as granting the security of income for the employee. Vietnam and Estonia both have implemented the unemployment insurance scheme. The employer and employees have to contribute monthly to the unemployment fund. Employees will receive unemployment benefits in most cases of unemployment because of the terminating labour contract. In these cases, employers have no obligation to pay an allowance to employees because they had contributed to the unemployment fund for this purpose. Granting the amount and the range of unemployment benefits is considered as a method to fulfil the flexicurity policy.

*EECA*

EECA requires the employer to compensate employees just in case of redundant[26]. The amount of money for compensation depends on the type of employment contract:

[25] Section 2 Article 38 VLC 2012

[26] In this case, an employee also has the right to receive a benefit upon lay-offs under the conditions and according to the procedure prescribed in the Unemployment Insurance Act of Estonia.

"- Upon cancellation of an employment contract due to lay-off, an employer shall pay an employee compensation to the extent of one month's average wages of the employee.

– Upon cancellation of an employment contract entered into for a specified term for economic reasons, except for reason of bankruptcy, an employer shall pay an employee compensation to the extent that corresponds to the wages that the employee would have been entitled to until the expiry of the contract term. No compensation shall be paid if the employment contract is cancelled due to force majeure.

- If an employer gives advance notice of cancellation later than provided by law or a collective agreement, the employee has the right to receive compensation to the extent to which he or she would have been entitled to upon adhering to the term for advance notice."[27]

*VLC*

In Vietnam, the unemployment insurance regime is implemented from January 1, 2009. Employees are obliged to participate in unemployment insurance when working under indefinite labour contracts and definite labour contracts with a term of from full 3 months[28].

In case an employment contract is terminated at the initiative of the employer, which are regulated in Section 1 Article 38 VLC, the employer is responsible for paying severance allowance to the employee who has worked regularly for a period of at least a full 12 months. Half of the monthly wage is payable for each year of work[29]. Where the employment contract is terminated because of economic reasons which are regulated at Article 44, 45 VLC, and the employee has worked regularly for the employer for at least 12 months, the employer shall pay a job-loss allowance to the employee. The job-loss allowance shall be one-month wage for each year of employment, and shall not be lower than 2 months' wage[30]. The qualified period of work for the calculation of severance allowance and job-loss allowance shall be the total period during which the employee actually worked for the employer minus the period in which the employee participated in the unemployment insurance scheme in accordance with the Law on Social Insurance, and the period for which the employee has been already paid severance allowance by the employer[31]. The reference wage for the calculation of severance allowance and job-loss allowance shall be the average of the wages, which are stated in the employment contract valid for 06 months preceding the termination of the employment contract[32].

*Comments*

- In cases where the employer unilaterally terminates, the labor contract basing on the grounds due to the reasons from the employee, EECA and VLC both do not require the employer to subsidize or compensate employees. The employer-paid unemployment insurance premiums for employees during the time of employment. So in these cases, employees only receive unemployment benefits if they meet the conditions prescribed by the law on unemployment insurance.

- In cases where the employer unilaterally terminates the labour contract basing on the grounds due to financial reasons, EECA requires the employer to subsidize or compensate employees while VLC does not. Besides the unemployment insurance allowance, EECA provides the obligation of the employer to pay compensation of one average salary month to the employee. If the employment contract is a fix-term one, this amount of compensation equal to the salary for the rest time of the contract. In these cases, the employer cannot guarantee employment for employees

[27] Article 100 EECA
[28] Article 43 Vietnamese employment law 2013
[29] Section 1 Article 48 VLC
[30] Section 1 Article 49 VLC
[31] Section 2 Article 48, Section 2 Article 49 VLC
[32] Section 3 Article 48, Section 3 Article 49 VLC

according to the signed contract without the employee's fault. Therefore the employer has to compensate employees. This regulation will make the employer considers carefully in redundancy. According to VLC, the employer does not have the obligation to pay any allowance or compensation to the employee when terminating the employment contract due to financial reasons[33]. This provision of VLC is not reasonable to base on the contracting aspect as explaining above. It also conflicts with the nature of job-loss allowance according to VLC. The job-loss allowance is paid to employees who have lost their jobs without their faults, so the amount of job-less allowance is twice of the amount of severance allowance. Job-Less allowance includes two parts: half is the severance allowance and half is compensation that the employer has to pay to the employees because of not guaranteeing work for the employee under the employment contract. In the case of employees take part in the unemployment insurance regime, the employer has contributed the amount of money to the unemployment insurance fund so in ordinary they do not have to obligation to pay severance allowance to the employee in ordinary termination of employment contracts. But it is not fair if employers have no obligation to pay any allowance/compensation to employees in the case of extraordinary termination employment contract base on economic reasons. The obligation to compensate employees in this case also limits the employer applying economic reasons to lay – off employees.

## 4. CONSEQUENCES OF ILEGAL TERMINATION OF LABOR CONTRACT AT INITIATIVE OF EMPLOYERS

*EECA*

Article 104 EECA stipulates that voidness of cancellation happens in these cases: (1) Cancellation of an employment contract without a legal basis or in conflict with the law; (2) Cancellation of the employment contract of a pregnant employee or an employee who has the right to pregnancy and maternity leave. Violation the terms of advance notification is not void[34].

An action with the court or an application with a labour dispute committee for the establishment of the voidness of cancellation shall be filed within 30 calendar days as of the receipt of the declaration of cancellation. If an action or application is not filed within the term or if the term for filing the action or application is not restored, the cancellation is valid from the start and the contract has expired on the date specified in the declaration of cancellation[35].

Within 30 calendar days as of the receipt of a declaration of cancellation an employee may file an action with the court or an application with a labour dispute committee to challenge the cancellation in force due to a conflict with the principle of good faith, unless the employer cancelled the contract due to a breach of the employment contract by the employee. In the case a court or labour dispute committee establishes that cancellation of an employment contract is void, the court or labour dispute committee shall, at the request of the employer or the employee, terminate the employment contract as of the time when it would have expired in the case of validity of the cancellation. the court or labour dispute committee shall not terminate the employment contract if the employee is pregnant or has the right to pregnancy or maternity leave or has been elected as the employees' representative unless it is reasonably not possible considering mutual interests[36].

[33] the employer only pays job loss allowance for the period that the employee does not participate in unemployment insurance regime.

[34] Where the employer fails to comply with the provisions on advance notice, the employee shall be paid a compensation equivalent to his/her wage for the number of days during which the notice is not given (Section 4 Article 100 EEAC)

[35] Article 105 EECA

[36] Article 106,107 EEAC

Upon the unlawful cancellation of an employment contract, if the employment relationship continues, an employee has the right to demand compensation for damage, in particular wages not received. The part obtained by way of different use of the employee's labour force may be deducted from the compensation. In case of termination of the employment relationship in court or labour dispute committee, an employer shall pay employee compensation in the amount of three months' average wages of the employee. If the court or labour dispute committee terminates an employment contract with an employee who is pregnant, who has the right to pregnancy and maternity leave or who has been elected as the employees' representative, the employer shall pay the employee compensation in the amount of six months' average wages of the employee. In these case, the court or labour dispute committee may change the amount of the compensation, considering the circumstances of the cancellation of the employment contract and the interests of both parties[37].

*VLC*

According to Article 41 VLC, the unilateral termination of an employment contract is illegal in cases that are inconsistent with Article 37, 38, 39 VLC. That means the cancellation is void if the employer violates the regulations on grounds of termination, advance notice or in cases the right of the employer to unilaterally terminate an employment contract is limited. Comparing with EECA, VLC regulates stricter in the grounds of illegal termination employment contracts. Violating the advance notice terms is void according to VLC, but it is not void according to EECA 2008. That leads to the result that violating advance notice term is treated as violating grounds of termination or prohibit cases of termination.

The legal consequences of illegal termination of labour contracts of employers under VLC are also stricter than those of EECA. Article 42 VLC stipulated that, in cases of illegal unilateral termination of employment contracts, employers have these obligations:

- The employer shall pay the wage, social insurance and health insurance for the period during which the employee was not allowed to work, and additionally at least 2 months of wage as stipulated in the employment contract;

- The employer shall reinstate the employee in accordance with the original employment contract: where the employee does not wish to return to work, the employer shall pay the severance allowance; where the employer does not wish to reinstate the employee, and the employee agrees, two parties shall negotiate additional compensation which shall be at least equal to two months' wage as stipulated in the employment contract, in order to terminate the employment contract; where there is no longer a vacancy for the position or work as agreed in the employment contract and the employee still wishes to continue working, two parties shall negotiate to amend and supplement the employment contract.

- Where the employer fails to comply with the provisions on advance notice, the employee shall be paid a compensation equivalent to his/her wage for the number of days during which the notice is not given.

*Comments:*

*- VLC is very stricter than EECA in requiring the employer to reinstate work for the employee*. The regulation on reinstating the employee is one aspect of flexicurity in gaining security for employees and decreeing flexible for employers. According to ECA, in case of wrongful termination of an employment contract, it is possible to terminate the employment contract by a decision of the court, if at least one of the parties intends to do so. This means that even in the case of wrongful dismissal, an employee will lose his or her job. However, the employee has an opportunity to obtain compensation from the employer, the amount of compensation will be determined by the court.

[37] Article 108,109 EECA

Being opposite to EECA, VLC requires the employer to reinstate the job for the employee in all cases of illegal termination of labour contract at the initiative of the employer.

- *The legal consequence in case the employer violates the prior notice term is too strict according to VLC.* For example, in case the employee "repeatedly fails to perform his/her work in accordance with the terms of the employment contract"[38], the employer has cancelled employment contract with him/her without advance notice or notify with a period less than that are regulated by law. This case is the illegal termination of labour contracts according to Article 41 VLC. The employer has to reinstate the employee, pay the wage, social insurance, and health insurance for the period during which the employee was not allowed to work, and additionally at least a 2-month wage as stipulated in the employment contract. Besides, the employer has to pay compensation equivalent to his/her wage for the number of days during which the notice is not given. Meanwhile, according to EECA, in the above case, the employer has only the obligation to pay to the employee's wage for the number of days during which the notice is not given.

- *The amount of compensation in case the unfix-term labour contract according to VLC is so strict comparing with that in EECA.* In the case of an indefinite term labour contract, the employer must compensate wages during the working days from the date of termination of the illegal labour contract. The time limit to bring an individual labour dispute to the Court is 01 year from the date of detection of the act, which a party claims that their lawful rights or interests are infringed upon[39]. The employee who is cancelled illegal labour contract will look for another job and get unemployment insurance allowance (in the time of unemployment). They will file a lawsuit after nearly 1 year and it is taken at least 6 months for trial. In this case, the employer must compensate for the salary during the days of not working under the contract is about 18 salary months, plus at least 2 months by law. Meanwhile, he/she still received unemployment benefits or salaries in other companies during that time.

## 5. SOME RECOMMENDATIONS FOR VLC

- ***Re-divide the grounds of cancelation***

In general, there are two kinds of the grounds that the employer shall may cancel labour contracts: first kind is arising from the employee (violating contracts, disciplinary or inadequate health, ability to perform work under contract); the second kind comes from the objective reasons that the employer cannot guarantee the work for the employee (force majeure reasons or measures to develop production and business, increase labour productivity resulting in employers having to narrow their production and business leading to labour redundancy). In the first kind of the grounds the failure to perform the contract is due to reasons arising from the employee, not entirely due to the fault of the employer. In the second kind of the grounds the reasons lead to the job-loss is not entirely due to the employee's fault. The division base on the employee's fault above will have fair treatment in the cancelation procedures and the responsibility of the employer when terminating the contract. Obviously, in the second kind of grounds, employers must be more responsible than the first one. The Draft remains the regulation of the grounds of cancelation as present VLC. The Authors of this article recommends that new VLC need to re-divide the grounds of cancelation into two kinds as that in EECA. Specifically:

- Moving the grounds that the employer has the right to dismiss the employee from Article 126 VLC to Section 1 Article 38 VLC. These are serious disciplinary violations of employees but

[38] a ground that the employer may cancel the employment contract stipulated at subsection a section 1 Article 38 VLC
[39] Article 202 VLC

the employer has to fulfil a much stricter procedure to cancelation employment contract than other cases, which are regulated at Article 38.

- Moving the grounds that the employer has the right to unilateral employment contract at subsection d Section 1 Article 38 (force majeure) to Article 44 as an economic reason.

• *Adding the cases that the employer has an obligation to re-train and/or offer another job for the employee.*

The obligation of the employer to re-train and/or offer another job for the employee is a method to gain the security of work for the employee. This obligation should be regulated in case the employer cannot provide work for the employee according to the employment contract because of objective reasons, except the case impossible or unreasonable. In order to guarantee work for employees, VLC should provide two more case that the employer has to retrain and/or offer another job for employee like EECA: in case of employees cannot cope with work tasks due to objective reasons (health status or personal capacity[40]).

• *Amending the term of advance notice*

*Firstly, VLC should require employers to give advance notice in cases they unilateral terminate the labour contract unless it is not possible to do not unnecessary.* The authors of this article agree with the Draft that regulates the obligation of the employer to give advance notice in case of redundancy (Article 42, 43 Draft). Besides, the employer also should give advance notice in the case of dismissal regulated in Article 126 VLC. Besides, VLC should point out the cases that the employer has no obligation to give prior notice, for example: The employee commits an act of theft, embezzlement, disclosing technological or business secrets or infringing the intellectual property rights of the employer, in the case of force Majeure that the employer could not give the advance notice.

*Secondly, VLC needs to gain the period of advance notice to at least 15 days.* The period of 3 working days stipulated in section 2 Article 38 VLC is too short to find a new job.

• ***Addition the term of grant time off***

The term of grant time off regulated in EECA is a very improvement one that VLC should be adding in the cancelling labour contract procedure. Within the period of advance notice time, the employee must have the right to be off for taking part in a new recruitment procedure.

• *Renewing compensation/allowance regulations*:

*Firstly*, for cases where employees lose their jobs completely without their fault except the reasons for force majeure, the employee needs to be paid the amount of money as a compensation for being terminated the labour contract. In the cases of redundancy which are regulated at Article 44,45 VLC (Article 41,42 Draft), the employer must have to pay compensation to the employee. This regulation will affect the employer in considering the case of redundancy. Especially for the type of labour contract that defines the time limit to be regulated in the direction of compensation for the remaining time of the contract. This provision will limit the signing of the type of labour contract to determine the actual duration, which means to ensure the stability of work for employees in the market.

*Secondly, VLC should release the obligation to re-employ the employee in case the employer cancels the labour contract base on the legal ground but violates the advance notice.* The obligation to re-employ the employee in all cases of illegal cancellation the labour contracts is too strict to the

[40] The cases that the employer has the right to cancel employment contract which is stipulated at subsection a, b Section 1 Article 38 VLC

employer in the concept of flexicurity. Actually, in the case of violating the regulation of advance notice, the employer has the right to cancel the employment contract at the end of the advance notice period. Because the employer canceled the employment contract before the notice period expires, the contract is violated until the time of termination of the contract. therefore, employers only need to compensate for wages during the unannounced days.

## CONCLUSION

In general, EECA gives the employer much more flexible in cancelling labour contracts and also gives more security of work or/and income for the employee in comparing with VLC. In estimating the balance between the flexible of the employer and the security of the employee in the situation of Vietnam, the authors of this article give some recommendations to reform VLC on the regulation of cancelation of the employment contract at the initiative of the employer.

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# Le fait religieux, l'islam et la radicalisation

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## QU'EST CE QUE LE FAIT RELIGIEUX? UN FAIT TOTAL D'UN GENRE PARTICULIER

L'expression « fait religieux » s'est imposée depuis quelques années dans le vocabulaire scientifique, scolaire et public. Le fait religieux, quoi qu'en pense de ses origines et de son contenu, est un aspect important de la vie des sociétés contemporaines qui contribue à les spécifier ; il a tenu et tient encore une grande place dans l'histoire des sociétés et a entretenu des rapports nombreux et divers, avec les autres composantes de la vie collective ( R. Rémond, 1995). Il participe pleinement de l'histoire de l'humanité. Bergson (1859-1941) n'hésite d'ailleurs pas à qualifier l'homme « d'animal religieux », véritable « machine à fabriquer des dieux » (Delimeau, 2000). L'homme étant apparu sur terre il y a environ trois millions d'années, on dénote déjà chez ces hommes, une ritualisation de la mort, une transcendance d'une entité supérieure, d'un au-delà avec la mort, avec lesquels ils cherchent à se relier. C'est entre 95 000 et 35 000 av. J.-C. que les hommes ont voulu donner une sépulture à leurs morts, attitude les différenciant ainsi de l'animalité. Chaque religion[1] est dans les faits, un « système religieux » ( Thual, 2003) qui renvoie à la fois « à un corpus de croyances et à des formes sociologiques et administratives se manifestant par une expression collective du culte elle-même articulée sur les structures politiques ».Ce système religieux soude tous ceux qui y adhèrent en une « communauté morale » ( Durkheim) qui se réfère, et transmet génération après génération, un discours, une « mémoire collective »(Julliard, 1996) puisque l'acception du verbe polysémique latin *religere* (duquel émane également le vocable religion) signifie remémorer, se souvenir, se recueillir des restes. Avoir foi en une religion, c'est subséquemment adhérer à un dogme, pratiquer et transmettre valeurs et croyances.

Etudier une religion revient in fine, à analyser des « représentations (croyances, mythes, dogmes), une organisation (mosquées, églises, confréries, sectes) et des rites (Dumortier, 2002).

## CE FAIT A TROIS CARACTERISTIQUES :

1-Il se constate et s'impose à tous. Il y a depuis mille ans des cathédrales dans les villes françaises, des œuvres d'art sacré dans les musées, des fêtes au calendrier religieux, du gospel à la radio. Pouvons-nous boucher les oreilles et fermer les yeux devant le monde tel qu'il est ? Pouvons-nous refuser d'écrire sur nos agendas sous prétexte que le calendrier prend pour l'année zéro la date (contestée) de la naissance de Jésus ?

2-Un fait ne préjuge ni de sa nature, ni du statut moral ou épistémologique à lui accorder. Ces interrogations se révèleront du débat philosophique, elles doivent être formulées, prendre acte n'est pas prendre parti.

[1] La religion vient du verbe latin *religare :* elle relie les croyants entre eux, elle soude la communauté des fidèles et relie cette communauté à l'objet de la croyance.

3-Un fait est englobant. Il ne privilégie aucune religion particulière comme plus vraie ou plus recommandable que les autres. Il est vrai que les programmes d'Histoire donnent une place importante au siècle des Lumières (XVIIIème) et ne négligent pas les religions qui sont parties prenantes sur un strict pied d'égalité. Le fait est observable, neutre et pluraliste.

Ces trois propriétés disent déjà ce qu'un enseignement du « fait religieux » peut signifier pour l'école républicaine dans un pays (où la laïcité privilège unique sur le continent européen) revêt la dignité d'un principe constitutionnel. La séparation des églises et de l'Etat ne signifie pas, comme aux USA, rendre les églises libres de toute emprise étatique, mais rendre l'Etat libre de toute emprise ecclésiastique.

Faire entrer l'histoire du fait religieux dans l'enseignement, c'est apporter un éclairage circonstancié sur ses incidences sur l'aventure humaine puisqu'il est un élément essentiel des civilisations. Les croyances et les pratiques religieuses sont bien des faits de civilisations, l'exercice a donc un caractère laïc. Il s'agit de transmettre une culture et non de dispenser un enseignement religieux.

## DE LA DIFFICULTE DE QUANTIFIER LE FAIT RELIGIEUX

Le fait religieux se prête à la description, à l'explication, à l'interprétation mais fort mal à la quantification (Dumortier, 2002). En effet, le dénombrement des fidèles est un enjeu de pouvoir protéiforme : la possibilité pour une minorité 'affirmer un état de fait et de dénoncer les brimades et les vexations dont elle est victime (chrétiens du Soudan, musulmans en Chine, Karens en Birmanie) ou au contraire pour une majorité d'atténuer l'influence ou la domination dont elle profite dans la réalité.

En outre comment définir un fidèle ? Un baptisé est il nécessairement un chrétien ? Peut-on légitimement considérer comme fidèle une personne ayant cessé toute pratique ? De fait les chiffres sont toujours sujets à discussion, ou, à tout le moins, à l'interrogation.

## LA RELIGION SOURCE DE CONFLICTUALITE ?

La faillite actuelle de l'idéologie marxiste[2] athée et ses variantes a autorisé la réapparition du fait religieux dans des Etats où il était officiellement interdit. Ainsi renaissent au grand jour l'Eglise orthodoxe en Russie, l'islam en Asie centrale (ex- républiques soviétiques du Kazakhstan, de l'Ouzbékistan, de Kirghizie, de Turkménistan, du Tadjikistan de l'Azerbaïdjan) ; le luthérianisme en Estonie et Lettonie, le bouddhisme au Cambodge. Seul la Corée du Nord, la Chine et Cuba affichent un athéisme contredit par bien des réalités (venue du pape à Cuba). Mais cette résurrection s'accompagne, à l'échelle mondiale, d'un regain de conflictualité. Non pas que les religions, dans leur essence, sont porteuses d'intolérance, toutefois, force est de constater l'accumulation d'affrontements qui culminent médiatiquement avec les attentats du 11 septembre 2001.

Ainsi depuis 1990, plusieurs pays ont connu diverses guerres civiles ou conflits régionaux comportant un élément religieux ou idéologique : l'ex-Yougoslavie, l'Irak, le Sri Lanka, l'Algérie, Israël, l'Arménie, la Birmanie, le Timor-Oriental, la Tchétchénie, le Tibet, les Philippines, la Syrie,

[2] Francis Fukuyama annonçait dans sa formule le « choc des civilisations », la « fin de l'histoire » : la victoire du « monde libre » dans la guerre froide devait assurer le monopole de la démocratie du marché, horizon désormais unique et indépassable.

la Lybie. Ces conflits régionaux mettent aux prises des acteurs marqués religieusement, que cette connotation soit consciente et affichée ou qu'elle leur soit attachée inconsciemment.[3]

L'après- Seconde Guerre mondiale et la volonté affirmée de mettre à l'index la guerre, suivie de la guerre froide[4] ont donné l'illusion d'un monde sans guerre. Or depuis 1945 à 1989, 160 conflits ont éclaté à la surface de la planète causant la mort de 40 millions de personnes (Boniface, 2001), conflits localisés[5] occultés par l'affrontement des deux superpuissances.

## ISLAM ET SOCIETE

Ce qui retiendra notre attention ici, ce n'est pas l'intimité de la conscience personnelle, le contenu de la foi musulmane mais le facteur religieux en tant qu'il déborde de la vie privée comme phénomène social. Il le fait de plus d'une façon et pour diverses raisons. D'abord l'adhésion à la religion musulmane a naturellement des effets sur le comportement des musulmans en société : elle est de nature à modifier leur attitude, à infléchir leur vote à peser sur leurs opinions politiques ou sociales. Deuxième religion de France, l'islam reste la religion des autres par excellence. Elle est l'une des plus méconnues des religions de ce pays. Elle rime souvent avec intégrisme, terrorisme, exploitation de la femme et fanatisme.

De plus le fait religieux comporte ordinairement une dimension sociale puisqu'il il se vit dans une communauté. La foi est enseignée, reçue, vécue dans une mosquée, église, synagogue, elle s'exprime dans un culte célébré publiquement le vendredi. La religion suscite ainsi l'existence d'une communauté musulmane (confessionnelle par nature)) à l'intérieur de la société française globale et cette dernière ne peut plus ignorer la présence musulmane et se désintéresser de la présence musulmane dans le pays. Il faut donc aller aux explications théorique pour mieux cerner ce retour du religieux particulièrement chez les jeunes et non pas les explications journalistiques. Mais également les instances religieuses musulmanes ne peuvent plus ignorer que leurs fidèles appartiennent aussi à une nation et son par conséquent les citoyens de cet Etat. Il y aura donc inéluctablement, intimes ou espacés, implicites ou codifiés, bons ou mauvais des rapports entre l'Islam organisé et les pouvoirs publics français.

Mais cet aspect des rapports Religion/ Etat qui est généralement le plus visible et le plus connu, s'il retient l'attention en priorité, est loin d'être le seul et l'unique ou s'articulent les deux institutions. Il n'est que sommet d'une pyramide de relations multiples et qui intéressent bien d'autres secteurs de la réalité tel que ; l culture, les mentalités, l'immigration, les classes sociale, la mouvance djihadiste. Ce n'est donc pas seulement la présence des étrangers sur le sol français qui évoque le fait religieux, c'est toute l'histoire de la France. D'autre part, les rapports avec l'islam ont subi d'importantes évolutions surtout lorsque les autorités françaises que le mythe du retour est ébranlé et que ces immigrés s'y enracinent pas leurs enfants.

Mais qui a dans ce pays a intérêt à traduire en termes exclusivement religieux, des problèmes qui sont politiques, sociaux économiques et identitaires et qi prennent éventuellement des formes religieuses parce qu'ils ne peuvent plus prendre des formes politiques.

Si le fait religieux a cessé en beaucoup de société, (tel n'est pas le cas dans les sociétés musulmanes où la référence à l'islam est l'expression du sentiment national) d'être l'expression commune, si le pluralisme des croyances est devenu le droit et le fait, si les liens entre religion et politique se sont distendus, le fait religieux n'a pas disparu. Loin de là, il montre même une étonnante

[3] Ainsi au Kosovo, les Kosovars musulmans ont été aux prises avec les troupes de la République fédérale de Yougoslavie cependant que les forces d'interposition de l'ONU (la KFOR) étaient avant tout composées de Chrétiens.
[4] Où la paix impossible rendait malgré tout la guerre improbable.
[5] Où l'élément religieux n'est en rien négligeable

persistance dans les pays qui ont tenté de l'étouffer (Union soviétique ou les pays socialistes), il montre une capacité de durer et de résister qui n'autorise pas à le traiter comme une simple survivance voué à s'étioler à bref délai.

## QUAND L'ORIENT INSPIRAIT L'OCCIDENT: SAVOIRS, ECHANGES ET REPRESENTATIONS

L'Europe, au cours de son histoire, était en permanence en contact avec de grandes civilisations au passé millénaire. Celles de l'Orient en particulier sont caractérisées par l'enracinement religieux de leurs populations, et témoignent de structures sociales, culturelles et économiques particulières. Après des siècles de relations plus ou moins tendues, le choc sans précédent avec l'Occident à partir du XIXème siècle ne manque pas de faire évoluer en profondeur ces rapports. Or, du VIIème au XVème siècle, l'islam a été effectivement présent en Occident même. Pour des historiens comme Claude Liauzu,[6] il fallait occulter cette longue page de l'histoire pour construire une hostilité envers l'Orient et les Arabes. Mais après avoir été longtemps oublié et /ou occulté, l'apport de la civilisation arabo-musulmane est à nouveau un sujet d'intérêt, et ce travail d'objectivation est maintenant entrepris par de nombreux historiens.

Lorsqu'on parle d' « héritage occulté », il faut savoir qui assume l'héritage et qui l'occulte, qui le reconnaît et qui le rejette. Le public connaît peu la philosophie et la science arabe et juive du Moyen-âge alors que la présence de l'Islam en Occident, qu'on peut appeler Islam « occidental » débute dès 719 avec la conquête de la Septimanie. L'influence de la civilisation arabo-musulmane sur la culture européenne est l'objet à présent d'une sorte de reconnaissance posthume et un objet de recherche de réflexions.

Penchons-nous donc sur ces relations et les représentations réciproques, les préjugés et les peurs qui ont jalonné ces échanges.

## L'ESPRIT DES LUMIERES ET L'ISLAM

Que sont les Lumières? C'est une expression relativement récente dans la langue française, elle date de quelques décennies à peine et s'oppose à l'obscurantisme religieux. On peut la traduire en allemand par *Aufklärung* qui veut dire éclairement, en italien par *illuminismo* et en anglais par *enlightenment* qui veut dire illumination.

Les Lumières sont un mouvement intellectuel du XVIIIème siècle qui entend faire triompher la raison, l'esprit critique, dans l'évolution de la pensée et de la réflexion.

Les philosophes adoptent deux positions concernant la religion musulmane. Hostiles à toutes les religions, ils le sont également à l'islam. Mais comme il s'agit d'une religion concurrente du christianisme, ils font preuve à son égard de bienveillance. Si les philosophes critiquent des dogmes chrétiens comme celui de la Trinité, ils apprécient le caractère rationnel de l'islam où Jésus est considéré comme un homme et non comme un Dieu.

De même, les philosophes s'opposent au monachisme et reprochant aux moines d'être absents dans la lutte contre l'absolutisme intellectuel et politique, allant s'isoler pour prier au lieu de s'intégrer aux forces vives du royaume.

[6] LIAUZU (Claude), *Empire du mal contre Grand satan. Treize siècles de cultures de guerre entre l'Islam et l'Occident*, Paris, Armand Colin, 2005, p.6

Autre point séduisant pour les philosophes des Lumières: l'absence d'une hiérarchie religieuse en islam. En effet, un fidèle peut s'adresser, prier et demander le pardon directement au Seigneur.

Dans l'empire ottoman, qui s'étendait des confins algéro-marocains jusqu'à l'Asie, les religions vivaient au contraire en harmonie, du moins sans accrocs apparents.[7]Les juifset les chrétiens, appelés "*dhimmis*", bien que considérés comme inférieurs sont convenablement traités. Ils pouvaient conserver leur croyance moyennant le paiement d'un tribut appelé « *jezia* ». Il faut rappeler qu'après 1492 (date de la prise de Grenade en Espagne), de nombreux juifs ont préféré se réfugier dans les provinces turques et en Afrique du Nord où ils étaient correctement accueillis. Appelés "gens du livre", leur statut est jugé avantageux comparé à celui des juifs établis en Europe chrétienne.

Tout cela n'était pas sans émerveiller les philosophes qui se plaignaient à la même époque de l'intolérance religieuse sévissant en Europe.

La pièce de théâtre écrite[8] par Voltaire, « L'imposteur ou *Mahomet »*, est cependant ambiguë. Il y critique subtilement l'islam. Dédié au pape, cet ouvrage a profondément horrifié les musulmans. La grande idée ayant séduit les philosophes dans l'islam est celle de l'égalité. Or, les musulmans sont égaux comme les dents d'un peigne. Dans la religion musulmane, la soumission existe, mais seulement envers Dieu et la foi qui trouve son aboutissement dans la législation islamique. Le christianisme, à la différence de l'islam n'entretient pas l'idée d'un espoir terrestre ; aussi dans les sociétés chrétiennes, on ne peut pas espérer modifier les conditions sociales en s'appuyant sur la religion. Il ne faut pas oublier que le roi est monarque de droit divin, comme en témoignent la cérémonie du sacre et le pouvoir miraculeux du roi. Toute tentative de mise en cause ou toute rébellion contre cet état des choses est impie et sévèrement condamné par l'Eglise, alliée du souverain. En terre d'islam, en revanche on peut toujours évoquer "l'infidélité aux principes de Dieu", l'éloignement des préceptes du Prophète pour galvaniser les fidèles et réclamer une correction des conditions présentes. Une correction qui ne peut se faire et ne doit se faire que dans les limites imposées par le Coran.

Pour les *Oulemas,* les théologiens, la société nouvelle ou ancienne n'a qu'une référence absolue, celle existant à l'époque de Mohamed (le guide), exposant ainsi que la société musulmane à ses débuts, fut marquée par l'égalité de traitement entre l'esclave et le seigneur d'une tribu.

Les philosophes savaient que l'islam prêchait l'harmonie sociale, et cette idée d'améliorer socialement les conditions de vie n'était pas pour leur déplaire. Mais ces *Oulemas* ont bâti une référence théologique, à savoir reconstruire une société idéale, celle de l'époque de Mohamed, alors que les penseurs des Lumières posaient comme préalable la destruction de l'ordre religieux, avec cependant une exception envers l'islam.

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[7] Pour plus d'information sur ce sujet, veuillez consulter les nombreux articles rédigés par l'historien et président de l'Académie tunisienne des Sciences, de Lettres et des Arts, Hichem Djait notamment ses livres *L'Europe et l'Islam*, aux éditions le Seuil, Paris, 1978, et *Connaissance de l'Islam* ; La Découverte, Paris, 1994.
Ce que l'on appelle modernisation passe concrètement par des pensées, réflexions, actions, réformes qui transforment rythme et mode de vie en ville surtout mais également dans certains villages (dits coloniaux) et parfois jusqu'à la campagne. Dans un premier temps, la diffusion culturelle avant et sous le Protectorat (1881) est plus urbaine que rurale, touche davantage les hommes que les femmes mais elle imbibe graduellement la société tunisienne. La création d'associations et d'équipes sportives, l'enthousiasme scolaire qui en suit, l'introduction du cinéma à Tunis dès 1896, l'apparition d'une école de peinture en 1930, la naissance du ciné-club en 1946 sont autant d'initiatives culturelles qui touchent une minorité de Tunisiens, considérés après 1956 comme des pionniers et des relayeurs culturels et civilisationnels. Cette attraction française joue également sur la vie familiale comme elle agit sur la sensibilité des Tunisiens et jusque dans leur vie privée.

[8] Rédigée en 1736 et jouée à Lille et à Paris en 141 et 1742.

## L'ORIENTALISME FRANÇAIS

En 1664, la Compagnie des Indes orientales, créée par Colbert pour le commerce de la soierie, du thé et des épices, favorise les échanges commerciaux et artistiques. Dès ce moment, l'Orient prend peu à peu sa place dans le décor de la vie française (tapisseries la mauresque, faïence imitant les arabesques). Au XVIIIème siècle, les liens diplomatiques entre la France et certains pays d'Orient se resserrent, différentes réceptions de délégations étrangères ont lieu. Ainsi Ali Bey décide d'envoyer, après l'avènement au trône de France de Louis XVI, un ambassadeur à Versailles pour une visite de haute courtoisie.

Désormais, tout ce qui vient de Turquie, de Chine, de Perse (en bref d'Orient) est à la mode. La traduction par Antoine Galland des *Mille et Une nuits* (1704), *et Les Lettres persanes* (1721) de Montesquieu renforcent cet attrait. L'image que l'Orient véhicule au XVIIème et au XVIIIème est celle d'un monde magique et mystérieux.

L'orientalisme, terme inventé au début du XIXème siècle désigne aussi bien l'intérêt scientifique pour l'Orient que la fascination exercée par cette terre sur l'Occident et qui s'est exprimée dans un courant littéraire et artistique. C'est Bonaparte en 1798, qui ouvre les portes d'un Orient non plus de fantaisie mais vécu, exploité par le romantisme avec ses couleurs propres et ses mœurs. L'orientalisme se construit à l'occasion de l'expédition d'Égypte, de la colonisation ainsi que par la fascination exercée par l'empire ottoman devenu « l'homme malade de l'Europe ». Et c'est grâce à une élite d'intellectuels et d'artistes qui représentent les paysages de la Méditerranée orientale, les monuments et les populations, que la curiosité des Occidentaux pour l'Orient se trouve aiguisée. Des peintres (Delacroix, Benjamin Constant), des écrivains et des poètes (Flaubert, Victor Hugo et Byron) voyagent dans tous les pays du sud de la Méditerranée et alimentent cet intérêt à travers gravures, *peintures, récits viatiques et descriptions exotiques. Victor Hugo écrit: « L'Orient est devenu une préoccupation générale*[9]». En 1842, l'historien Edgar Quinet nomme l'Orientalisme « une renaissance orientale [10]». D'après lui, cette renaissance vise à retrouver les sources communes de l'Orient et de l'Occident et constitue une source d'inspiration. Les écrivains (Lamartine, Nerval), les peintres (Gabriel Decamps qui visite la Grèce et la Turquie en 1828, Adrien D'Auzat qui voyage dans le Proche Orient en 1830, Delacroix au Maroc en 1832) témoignent d'un Orient éternel, immobile, mystérieux, exotique et érotique qui contraste avec l'univers de la société industrielle européenne. L'orientalisme français est lié aux valeurs du romantisme littéraire et dans le même temps, vise à retrouver les sources communes à l'Orient et à l'Occident[11].

Ces impressions, ces sentiments et ces stéréotypes (le harem, le désert, le sable…) nourrissent abondamment la littérature et l'art du XIXème siècle. L'Orient représente cet « ailleurs » dont l'espace et la culture sont perçus, soit comme un monde exotique et mystérieux, soit comme un monde barbare. Ainsi l'empire ottoman constitua pour les Occidentaux le seuil entre le monde civilisé et l'Orient barbare. Cette rencontre avec l'Orient forme aussi une culture regardante de l'autre, dans laquelle l'observateur mesure les écarts à la norme occidentale. Dans cette rencontre, l'Orient reste une figure silencieuse mais nécessaire à l'Occidental pour entretenir sa propre identité.

Dans la seconde moitié du XIXème siècle, l'extension du tourisme, du commerce et l'expansion coloniale aidant, l'Orientalisme est une source d'inspiration active en Europe, et sa vogue aboutit, par exemple, au Salon des peintres orientalistes français en 1895, dont le but est de mieux faire connaitre les pays et les cultures d'Orient. Les Orientalistes pensent que leur civilisation a son origine au Proche Orient. On remarque que, pour beaucoup de pays colonisés par la France

[9] Préface de *Les Orientales,* Paris, Charles Gosselin, 1829.
[10] *Le Génie des religions,* Paris, Charmentier, 1842.
[11] BEJI (Linda), *L'orientalisme français et la littérature tunisienne francophone : relations et influences.* Thèse de doctorat soutenue en juin 2009, université Paris IV, pp. 9-10.

comme la Tunisie, leur reconnaissance au monde moderne a pour origine l'Occident. Un dialogue de civilisations s'opère, accepté souvent par les deux civilisations. Au fur et à mesure du développement des outils de communication (photos, cinéma, publicité) et du tourisme, l'Orient se banalise et le mouvement orientaliste, tel qu'il était à l'origine, s'arrête.

Cette lassitude s'installe à une époque (1855) où s'impose la sensibilité ethnographique, c'est-à-dire un intérêt pour l'indigène, sa culture, son identité et non plus son environnement.

## QUAND LES COMBATTANTS DE LA FOI ETAIENT LES AMIS DE L'OCCIDENT !

Lors de l'invasion soviétique de l'Afghanistan en 1979 sur demande du président de l'époque, le pro soviétique Nejib , les djihadistes étaient considérés amis de l'Occident, des « combattants de la foi » dans le Djihad. A cette époque, la religion musulmane n'était perçue comme un facteur de régression du mois qu'elle s'accorde aux intérêts stratégiques de l'Occident. Et peu importe que la quasi-totalité de ces combattants afghans héroïsés soient des musulmans traditionnalistes, intégristes même**.**

Bien que la référence absolue de leur combat est islamiste rétrograde, dans laquelle la femme renvoyée à sa place traditionnelle, est totalement absente, un récit médiatique quasi unique va durant de longues années, exalter les Moudjahidines, en présentant leur révolte comme une chouannerie sympathique attachée à sa foi. Et puisque la priorité géopolitique est que ce pays devienne pour l'URSS ce que le Vietnam a été pour les Américains, il s'agissait de populariser le combat contre « l'empire du mal ». Alors on applaudissait les exploits militaires de ces « combattants de la foi » contre l'armée rouge. En voilà quelques exemples :

-Brzezinsky, Conseiller à la Sécurité nationale (1977-1981) du président américain J. Carter (1977-198I) : « *Cette terre là bas est la vôtre. Vous y retournerez un jour ce que votre combat va triompher. Vous retrouverez alors vos maisons et vos mosquées. Votre cause est juste. Dieu est à vos côtés* » le 3 février 1980 quelques jours après l'intervention de l'URSS en Afghanistan, s'adressant aux Moudjahidines réfugiés au Pakistan.

-Jean –François Le Mounier écrivait dans *Le Point* le 3 mars 1980 que « *Allah Akbar, les russes dehors . Le vendredi 22 février, ils entendaient manifester drapeau vert de l'islam en tête contre la présence de l'armée soviétique, jugée insupportable* »

-Marek Hatler, écrivain et intellectuel français déclare au journal *Le Monde* le 30 juin 1980 : « *Le comité Droits de l'Homme a décidé d'aider la résistance afghane à construire une radio sur son territoire : Radio Kaboul Libre* ».

-*Le Figaro Magazine* du 13 septembre 1980 *: « Ce qui meurt à Kaboul sous la botte soviétique, c'est une société d'hommes nobles et libres »*

-B. H. Levy philosophe, intellectuel médiatique et ami du Commandant Messaoud[12], déclare dans le journal de 20h de TF1 le 29 décembre 1981 : « *il faut accepter de penser que comme tous les résistants du monde entier les afghans ne peuvent vaincre que s'ils ont des armes…L'Occident doit les aider…je crois qu'aujourd'hui, ils n'ont de chance de triompher que si nous acceptions de nous ingérer dans les affaires intérieur afghanes* ».

-*Le Monde*, 19 décembre 1984 : « *Des Français qui travaillent avec les résistants afghans, c'est cela l »amitié franco-afghane… un ami qui aide son ami* »

Quelques années plus tard, leurs cousins idéologiques en Algérie (GIA, Groupe islamique armé), puis les Talibans en Afghanistan, El Quaida et l'organisation de l'Etat islamique (OEI) ont

[12] Chef des Moudjahidines 1953-2001. Assassiné probablement par Al Quaïda.

été dépeints sous les traits de « fanatiques », « fous de Dieu », et de « barbares ». Il n'en est pas moins vrai que l'Afghanistan a servi de creuset et d'incubateur à leurs successeurs. Le jordanien Abou Moussab Al Zarkaoui, considéré comme le père de l'OEI, a débarqué en Afghanistan de 193 à 1993.

Ben Laden, fondateur d'Al Qaida a été dépêché par les services secrets saoudiens au Pakistan (Peshawar) afin d'apporter un soutien militaire et financier aux Moudjahidines.

L'Algérien Mokar belmoktar respnsable d'AQMI a combattu lui aussi dans les rangs des Moudjahidines afghans, il est ensuite revenu en Algérie pendant la guerre civile et a combattu avec la GIA avant de rejoindre Al Quaida. Ceux là et bien d'autres étaient favorablement accueillis par les Américains et les Européens tant qu'ils servaient leurs desseins stratégiques. Puis ils se sont retournés eux, la presse européenne et américaine après la période de séduction, changea complètement de discours, on commence alors à évoquer leur férocité et à parler de leur extrémisme religieux.

## RELIGION ET VIOLENCE

Partout le fanatisme religieux ruine le « Vivre Ensemble », mine la vie des pays et sabote la laïcité. Ce raz de marrée de nostalgie religieuse, qui brouille les cartes et bouscule les démocraties, n'est pas si surprenant que cela. Les énormes mutations technologiques économiques et géopolitiques que nous vivons depuis plusieurs années portent en elles autant de menaces que de promesses. Mais malheureusement, elles nous précipitent collectivement dans une incertitude, une instabilité, un avenir difficile à maîtriser (Roy, 2008). Dans ces périodes, la tentation est grande de tenter et recréer rêveusement un monde auréolé de tous les vertus, une nostalgie de l'islam pur et conquérant, son « âge d'or ».

Dans une rupture générationnelle, ces candidats à la mort) en cherchent à retourner contre leurs parents une « prétendue » vérité islamique que ces derniers auraient trahie et pas su transmettre (Roy, 2012). Des parents qi ne comprennent pas du tout la radicalisation[13] de leurs enfants. Car à l'aube de la deuxième décennie du XXIème siècle, l'odeur de souffre et d'encens ; les appels aux meurtres des *koffars* (athées) menacent nos vis. Partout le temps est couvert, couvert de voile, de barbes, de sang, d'interprétations fallacieuses du coran et de l'islam. Des questions à la quelle nous avons tenté d'y répondre : Quand est ce que tout a commencé ? Quelle année, quel jour et en quelle saison les lumières se sont éteintes ? Pourquoi les jeunes empruntent-ils le registre de la radicalisation islamique ? Comment faire pour désamorcer la bombe sur laquelle nous sommes assis[14] ? Comment ces jeunes se sont imposés alors qu'ils étaient faibles ? Cette radicalisation a entrainé un conflit entre et a ouvert un débat de fond dans l'interprétation des causes du djihadisme chez ces jeunes. Deux conceptions vont s'affronter : celle de Gilles Kepel qui met en avant la radicalisation de l'islam rendue visible par la montée du salafisme, exprimée dans la formule « *radicalisation de l'islam* » et Olivier Roy qui considère la radicalisation djihadiste n'est pas la conséquence mécanique de la radicalisation de l'islam. La plupart des terroristes sont des jeunes issus de la seconde génération de l'immigration, radicalisés récemment et sans itinéraire religieux de longue date ils ne deviennent pas djihadistes à l'issue d'un parcours de radicalisation religieuse. Quand ces jeunes se radicalisent, ils empruntent le répertoire religieux comme les jeunes des années 1970 avaient empruntés l'action armée révolutionnaire. Pour ce dernier c'est une révolte nihiliste générationnelle, il l'a exprimé dans la formule « *Islamisation de la radicalité* » Il ne s'agit pas pour nous de trancher ici la question mais

[13] Tout cela fini par construire une espace de religion du Djihadisme qui devient relativement autonome par rapport aux préceptes de l'islam.

[14] Est le titre de notre article paru dans le *Huffington Post* en 2015 et distribué aux doctorants le mardi 19 février 2019.

de comprendre pourquoi Daech attire ces jeunes et comment lutter contre cette radicalisation qui met en danger le « Vivre Ensemble » ?

Depuis le 11 septembre 2001, on ne parle que de la poussée islamiste et de la radicalisation de l'islam. En même temps une querelle est engagée pour l'hégémonie sur l'islamologie en France et la recherche sur la radicalisation. La compétition est assez rude, il faut avoir à l'esprit aussi les enjeux financiers et le pouvoir qui s'y jouent.[15]Ce qui a retenu notre attention ici, ce n'est pas l'intimité de la conscience personnelle, le contenu de la foi musulmane, mais le facteur religieux en tant qu'il a débordé la vie privée comme phénomène social car cette adhésion (à l'islam) comme croyance religieuse a naturellement des effets sur le comportement des fidèles en société. Certains jeunes issus de l'immigration sont attirés par la révolution que porte Daech et par le changement profond de leur vie qu'elle peut leur procurer. Ces jeunes radicalisés se sentent investis d'une mission morale même s'ils viennent d'un milieu délinquant et même s''il existe une multiplication de motivations et une multitude de profils. L'Etat islamique recrute aussi facilement, c'est qu'il propose à ses candidats, de vivre ensemble un récit en groupe auquel on peut croire, qui donne sens à leur vie, dans des groupes d'individus prêts à se sacrifier les uns pour les autres, pour des étrangers unis par l'idée de l'islam. Les humains ne veulent pas vivre sans grand récit et sans mythe, les inscrire dans un récit historique pour prolonger la flamme religieuse comme au début d l'apparition de l'islam , c'est la narration (Logier , 2016), vécu par ces gens comme positif et non nihiliste même s'il se traduit par des crimes intolérables de notre point de vue. Pour eux, le fait de se faire tuer ne répond pas à une volonté de mourir mais de vivre « au-delà ». C'est ce qu'a bien compris ce groupe terroriste. Ils perçoivent leur vie actuelle comme dénuée de sens et dont ils veulent sortir, ces recrus pensent qu'ils sont en train de sauver le monde même si c'est une vision apocalyptique, puisqu'il faut d'abord le détruire. Dans cette approche la violence constitue un rite de passage vers la libération de soi et de l'humanité (Atran, 2016). Parler de « psychopathes » ou de « fous » empêche la compréhension du phénomène. Comment explique-t-on alors le fait de trouver des sympathisants de Daech dans une centaine de pays hommes et femmes de tous âges, avec des positions sociales diverses ? Des jeunes marginalisés en France, des universitaires en Angleterre, des professionnels en Afrique, des étudiants en Tunisie. Il faut revoir sur le lien relationnel et social du groupe car beaucoup ont rejoint Daech avec leurs amis, tenter de réparer l'ascenseur social qui est en panne depuis plusieurs années, intégrer les mémoires de l'immigration dans le récit national afin qu'ils ne sentent plus périphériques à la nation. Surtout avec l'essoufflement de l'utopie islamique d'une civilisation tournée uniquement (avec rigueur) sur le religieux et l'apparition depuis des années d'un nouvel islam tissé de compromis pragmatique avec l'Occident et nourri au libéralisme économique. C'est l'émergence d'une nouvelle classe bourgeoise cosmopolite qui est demandeuse de religion plus mondaine, plus individualiste, plus adaptée à la société française (un islam de France disaient certains) et surtout tournée vers l'économie du marché et le profit alliant Coran et management.

## POURQUOI DAECH ATTIRE ? POURQUOI DES GENS NORMAUX SONT ATTIRES PAR CETTE ORGANISATION ?

Des jeunes et des personnes très diverses sont séduits par Daech parce qu'ils sont à la recherche d'un récit qui donne sens à leur vie. Daech cherche a élaboré un projet idéologique fondé sur la

[15] Les derniers attentats ont amené gouvernement et Fondations à débloquer des sommes colossales pour les recherches sur le radicalisme.

négation de l'individu et des libertés individuelles[16]. En effet, chacun, est défini uniquement par son appartenance à la communauté musulmane, et tous les musulmans doivent adhérer à ce projet. La communauté musulmane doit être constamment engagée dans une lutte dont l'objectif est fixé par le projet idéologique de Daech. Il cherche ainsi à créer un homme nouveau, il est un soldat d'Allah, il lutte et meurt pour affermir les principes de l'islam.

Daech a bien compris que les discours sur la République et les institutions démocratiques et républicaines, ne mobilise plus, il est bien au contraire source de contestation. Elle va alors développer un marketing qui s'adresse à l'affect, aux émotions, aux tripes et sentiments. Elle va chercher à inscrire ces jeunes dans un récit historico-religieux glorieux, devenant ainsi la « meilleure » organisation sur le marché de la radicalisation. Dans son approche, la violence constitue un passage obligatoire vers une libération personnelle et même une libération de l'humanité. Elle réussit à leur « vendre » l'idée apocalyptique qu'ils sont en train de sauver le monde puisqu'il faut le détruire en premier.

Là où Daech est fort, c'est qu'(il investit du temps pour écouter chaque personne qu'elle recrute, en même temps, elle trouve les moyens de marier des frustrations intimes avec son grand récit, cette histoire d'un monde qu'on construit L'objectif est de provoquer une adhésion totale en allant chercher les ressorts intimes du candidat plutôt qu'un développement de généralités sur l'islam et le coran.

Pour attirer les jeunes dans son giron, le mouvement terroriste Daech propose à ces jeunes ce qu'il y a de « meilleur » ses dernières années sur le la marché de la contestation sociétale radicale, appuyée par une visibilité médiatique concoctée avec un récit narratif et des aventures alléchantes. Ces jeunes vont pouvoir ainsi marquer la rupture générationnelle avec leurs parents, ils vont retourner contre ces derniers une « prétendue » vérité islamique qu'ils auraient trahie et pas su transmettre (Roy, 2016).

Mais on peut s'interroger sur la vie religieuse de ces jeunes qui empruntent le registre de la radicalisation islamique ? Parmi eux, il y a des jeunes stupides certes, quelques psychopathes également, mais aussi des gens brillants, instruits et intelligents.

Ces jeunes ne sont pas pratiquants de longue date, ils croient au paradis (si non, ils ne se feront pas exploser) et à la mort. Ils se dispensent des obligations rituelles religieuses parce qu'ils se font exploser et que dans leur conception, vis-à-vis de ce genre de sacrifice, Dieu sera plus tolérants sur l'absence de pratiques religieuses telles que les prières, le ramadan et autres obligations religieuses. Ce qu'ils cherchent, c'est cette rédemption finale qui les dispense d'être un bon et vrai pratiquant. La plus part d'entre eux, même s'ils viennent de milieux délinquants voire criminels, se sentent investis sincèrement d'une mission morale.

Ils affichent clairement leur volonté d'établir un califat, mais ils n'évoquent pas de la société islamique qui se construirait sous le califat. Ils ne parlent jamais de ce que serait la vie dans une société islamique. Ils n'annoncent pas non plus le futur mais seulement la fin des temps, car vivre ne les intéressent plus. Ces jeunes n'attendent rien du futur, c'est véritablement « no future » et que la mort peut être la solution à ce questionnement de mal de vivre. Ce sentiment est nihiliste, qui ne croit plus à la vie, il est celui qui meurt dans la pureté de son acte.

On sous estime la capacité d'attraction de Daech, l'utopie qu'elle propose et même les valeurs que porte cette organisation terroriste. Pour Scott Atram anthropologue français, parler des psychopathes ou de nihilistes empêche la compréhension du phénomène. Comment explique-t-on que cette organisation a des sympathisants dans nombreux pays, home et femmes de tout âge et de catégorie sociale : des jeunes diplômés et marginalisés en Tunisie, des universitaires en France, des

[16] Cette situation nous renvoie à « la banalité du mal » développée par Hannah Arendt au sujet du procès d'Eichmann. Selon elle, l'inconsistance tragique de l'accusé, son incapacité à penser et à juger par lui-même le rend un personnage robotisée n'ayant fait qu'obéir, « dé substantialisé ».

salariés en Algérie et en Angleterre. Ils sont attirés par la révolution que propose Daech. Et par le changement de leur vie qu'elle peut procurer, ils conçoivent leur vie actuelle comme inutile sans sens de laquelle il faut s'en sortir (Liogier, 2016).

## LA MORT EST LEUR DESTINATION

La mort est au cœur du projet des jeunes radicalisés. Leur révolte mortifière se marie parfaitement bien avec le discours apocalypthique de l'organisation terroriste Daech. Alors que le salafisme propose une séparation et pose des problèmes de séparatisme sociétal (Homme/femme, pratiquant/non pratiquant, musulmans/autres…). Et même si certains fondamentalistes salafistes ont fleurté avec certains thèmes de Daech, voire ils les mettent en avant de Daech et portent une grande responsabilité dans le départ de nombreux jeunes faire le Djihad, les salafistes, leur mort n'est pas nécessaire à leur action.

La biographie des djihadistes qui sont passés à l'action dans les mois qui suivent leur reconversion mais qui n'ont pas de pratiques réelles de l'islam. La mort est au centre de leur projet djihadiste, elle est leur « destin ».

## LES CHANTIERS DE L'ISLAM DE FRANCE[17]

Comment l'islam doit se réformer en profondeur pour être compatible avec la laïcité ?

Voilà à mon sens quelques pises de réflexion afin de faire émerger un « islam des Lumières »[18] en France :

- Décréter la guerre sainte dépassée et inutile et refuser toute forme d'intégrisme[19]. Dans le coran, il ya autant de versets qui prônent la paix que la guerre. Les muftis doivent privilégient les premières : l'ascèse intérieure. Substituer au Jihad, la bataille contre soi, l'approfondissement de la foi, l'amour de l'Autre, en l'absence de clergé en islam il revient par conséquent aux intellectuels musulmans de le faire

-Réévaluer le statut de la femme. Polygamie, répudiation… aspects les plus visibles de l'infériorité juridique de la femme. Comme toujours les fondamentalistes s'appuient sur les textes. Ils les extrapolent exemple : frappez la de 100 coups (Sourate de la Lumière), ce statut est caduc.

-Affirmer la prééminence de l'individu sur la communauté. Pour interpréter les textes, les musulmans doivent se libérer de l'idéologie de la communauté très forte dans cette religion. Puisque l'islam prétend transcender des identités nationales. La *Oumma* n'est pas au dessus de la critique humaine.

Existence des Etats avec des histoires et des cultures différentes et de l'autre côté, l'Homme croyant ou pas, libre de s'exprimer.

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[17] Un Islam en France est un islam qui doit respecter le statut de la femme, les valeurs de la République, la laïcité, l'égalité Homme/femme, in fine il doit séparer le ciel et la terre. Un islam en France est un islam importé d'autres pays (Arabie Saoudite, Afghanistan, Algérie…) qui veulent l'appliquer intégralement sans tenir compte de l'histoire et des spécificités de la société française.

[18] L'expression est de l'anthropologue Malek Chebel.

[19] Le terme même d'*intégrisme* a historiquement une origine chrétienne[19]. En 1890, c'est le nom du parti politique espagnol crée par ses prometteurs en vue de la mise en pratique du syllabus, publié par les autorités pontificales, en 1864. Ce texte s'oppose de la façon la plus totale à tout modernisme et préconise une conception fixiste des pensées et des comportements aux différents plans politiques, idéologiques et religieux. Il s'agit en fait, de faire en sorte que rien ne change en quelque domaine que ce soit, toute modernité risquant de remettre en cause l'intégrité des principes éternels de l'Eglise.

-Rappeler le primat de la politique sur le religieux. L'islam régit la sphère céleste et les affaires terrestres, le domaine privé et l'espace public. Il faut cantonner les imams à la mosquée c'est à cette condition que l'islam pourra se séculariser.

Un islam rénové n'est nullement une menace pour la laïcité, il faut faire valoir un islam des Lumières ( Chebel, 2009).

-Favoriser une nouvelle interprétation des textes : Après le questionnement de l'innovation Depuis près de mille ans, l'interprétation s'est figée sur des percepts qui datent du Moyen Age. Or le coran doit être replacé dans son contexte historique nouveau, il ne nous parle plus de la même manière.

## POUR CONCLURE

### Le retour du spirituel pour éviter les guerres de religion ?

Après deux siècles de reflux, la mer du spirituel remonte. Pour le meilleur et pour le pire. Le pire de pulsions obscurantistes dont les religions n'ont pas réussi à se débarrasser ; intolérance et superstitions, de la femme à l'homme. Et une radicalité de tous les intégrismes ou s'exprime le désarroi d'agonie d'un système saisi par la terreur de ses voir inexorablement mourir. Mais le spirituel revient également pour le meilleur. Parfois même du côté de la religion, lorsqu'elle en s'érige pas en maitre de vérité. De plus en plus des héritiers de l'islam, du christianisme, du judaïsme, vont puiser à ces sources des perles d'inspiration. On ne va plus vers les textes pour obéir mais pour méditer, trouver son chemin de vie personnel. On relit la Bible, le Coran, la Bhagavad-Gita, pour y sentir le mystère de l'univers et de notre condition humaine. Chacun tente de s'ouvrir aussi aux grands textes des autres et la nouvelle quête de sens fait exploser tous les cadres. Elle déborde les murs et les frontières du religieux qui n'a plus le monopole de rien. Le chercheur de sagesse est aujourd'hui un nomade spirituel, un explorateur, un omnivore qui cherche partout de la nourriture pour son âme, partout une expérience initiatique, y compris dans les domaines les plus profanes de sa vie : ses amours, ses réseaux, ses engagements, son travail, de la simplicité, de la beauté, de l'intensité, de la qualité plutôt que la quantité. Cette soif est spirituelle, car elle vient s'étancher aux mille et une sources de l'existence où jaillit quelque chose qui peut nous faire grandir en humanité. N'est ce pas là l'aurore d'une spiritualité enfin partageable entre nous tous, athées, agnostiques et croyants de toutes confessions ? Voyez à quel point les générations qui arrivent sont mues par cette immense espérance d'une « respiritualisation » du monde. Leurs ainées sécularisées se battaient pour une société qui soit la plus juste. A ce combat pour le progrès politique, ces nouvelles générations veulent ajouter le progrès d'être et conscience. Elles perçoivent que les deux sont inséparables, que la transformation personnelle sera demain la condition- l'énergie- de la transformation sociale. Elle refuse le monde d'hier, qui ne donnait plus gère e droit de cité au spirituel. Qui mesurait la valeur d'une vie en termes e réussite matérielle, de plaisirs sensibles. En rupture avec ce modèle, notre jeunesse veut éprouver la joie bien exaltante de se sentir vivante. De sentir couler en soi la sève des grands liens nourriciers qui dilatent l'esprit et le cœur jusqu'à l'infini (fraternité, communion avec la nature, avec son âme….), cette sublime source lumineuse décrite par toutes les traditions de sagesse d'Orient et d'Occident. La vie spirituelle qui émerge ne tend plus vers un au-delà, elle veut se nourrir ici et maintenant, dans tout geste, tout acte, tout engagement, la vie spirituelle cherche à devenir la vie tout court, tel est l'événement de ce début du XXIème siècle (A. Bidar, 2016).

# La localisation des activites en Europe : Les cles de la reussite

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***Résumé :*** *L'économie régionale et territoriale s'est intéressée depuis plusieurs décennies à la présence de certaines zones d'activités économique et à leurs impacts sur la croissance économique et sur le développement régional. Ces multiples contributions mettent en évidence le succès de certaines zones d'activités économiques qui demeurent toutefois dissemblables. L'objet de cet article s'efforce dans un premier temps de dresser une typologie des principales zones d'activités économiques avant dans un deuxième temps d'en analyser leurs caractéristiques. Dans cette optique, nous mettrons en exergue la Silicon Valley qui demeure aujourd'hui encore une référence au niveau international avant de nous intéresser à deux exemples emblématiques en Europe : l'exemple des districts industriels italiens et l'exemple de Kalundborg au Danemark.*

***Mots clés :*** *zones d'activités économiques, systèmes productifs locaux, districts industriels, écologie industriel.*

***Abstract:*** *The regional and territorial economy focused for several decades the presence of certain areas of economic activities and their impacts on economic growth and regional development. These many contributions highlight the success of certain areas of economic activities which remain however dissimilar. The purpose of this article strives at first to draw up a typology of the main areas of economics activities before in a second time to analyze their features. With this in mind, we'll highlight Silicon Valley which today remains a reference at the international level before we look at two emblematic examples in Europe: The example of Italian Industrial Districts and example of Kalundborg in Denmark.*

***Keywords:*** *economic activity, local productive systems, industrial districts, industrial ecology areas.*

L'économie régionale et territoriale s'est intéressée depuis plusieurs décennies à la présence de certaines zones d'activités économique et à leurs impacts sur la croissance économique et sur le développement régional, on peut citer sans être exhaustif les travaux de Benko et Lipietz (1992), de Pecqueur (2000), de Baudelle, Guy et Mérenne-Schoumaker (2011) et d'Olszak (2016), ces derniers portant sur la ville de Loos en Gohelle située dans la région des Hauts de France. Ces multiples contributions mettent en évidence le succès de certaines zones d'activités économiques. Toutefois, il nous faut souligner que chacune de ces zones disposent de spécificités au niveau de leur organisation interne et qu'un cluster ne peut être comparé à un système productif local (SPL), lui-même différent d'un district industriel ou d'un pôle de compétitivité. Il convient dans un premier temps de dresser une typologie des principales zones d'activités économiques avant d'en analyser leurs caractéristiques de manière plus spécifique.

## 1. UNE TYPOLOGIE DES PRINCIPALES ZONES D'ACTIVITES ECONOMIQUES

Comme nous venons de le mentionner, de nombreux travaux scientifiques se sont penchés sur les caractéristiques des différentes zones d'activités, l'un d'entre eux a retenu toute notre attention, celui de Perrat (2006) car il présente dans un tableau de synthèse les différentes formes territoriales

d'organisation industrielle que l'on peut retrouver en Europe et ailleurs en prenant soin de distinguer :

- Les caractéristiques des dynamiques ;
- La relation à l'espace ;
- Les acteurs et la gouvernance de ces zones d'activités.

Le tableau 1 nous donne un aperçu très détaillé de chacune de ces formes.

**Tableau : Les différentes formes territoriales d'organisation industrielle**

| | **Caractéristiques des dynamiques** | **Relation à l'espace** | **Acteurs et gouvernance** |
|---|---|---|---|
| **Districts industriels (DI)** | Présence d'activités industrielles semblables et complémentaires amenant à la réalisation de produits finis spécifiques. La flexibilité constatée dans la réponse aux tendances du marché stimule la productivité et la compétitivité | Le système est lié à un territoire précis et bien défini. On peut souligner une prédominance du développement endogène qui se matérialise par un plus ou moins grand dynamisme des entreprises en présence sur ce même territoire. | Ce sont essentiellement des PME que l'on retrouve au sein de cette zone. Concernant la gouvernance, on est en présence d'un système auto-organisé qui mélange à la fois, la coopération entre firmes et la concurrence entre elles, le fait qu'elle soit de taille équivalente favorise ces deux attitudes. La coopération peut être favorisée par le fait que l'on note l'existence d'une certaine identité culturelle forte entre les entreprises (le sentiment d'appartenir à un même territoire en même temps que l'origine le plus souvent local des chefs d'entreprise renforce cet effet). |
| **Systèmes productifs locaux (SPL)** | A l'instar du District Industriel, on retrouve les mêmes activités industrielles semblables mais avec des types de production qui dans le cas présent peuvent être plus divers : produits finis, composantes, ensembles complexes, etc … | Ce système est lié également à un territoire précis et bien défini et l'on note également une prédominance du développement endogène lié également au dynamisme des entreprises locales. | De manière quasi-identique aux districts industriels, on retrouve un système qui est fortement auto-organisé mais avec cette fois-ci des entreprises qui peuvent être de taille différentes et appartenir à des secteurs différents comme l'industrie et les services. La gouvernance pour sa part repose principalement sur le |

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|---|---|---|---|
| | | | secteur privé mais avec des modes d'organisation plus informelles que pour les districts. Un autre élément à souligner également repose sur le fait que le secteur public peut être sollicité pour améliorer le fonctionnement du système. |
| **Technopôles/technopole** | Une technopôle implique de nourrir des synergies entre des entreprises, des centres de recherche et des organismes de formation, dans le but d'ouvrir en permanence de nouveaux champs de développement de produits, de procédés et de marchés. | Si l'on prend une définition restrictive de la technopole, on retrouve une zone géographique peu étendue et un site particulier.<br>A l'inverse si l'on se place dans une approche extensive de la technopole[20], l'implantation des activités peut couvrir une agglomération beaucoup plus étendue.<br>Concernant le développement d'une telle zone, celui-ci peut être endogène à l'instar des organisations territoriales précédentes mais il peut le cas échéant avoir un caractère exogène, avec des éléments extérieurs dynamisant la croissance de la zone. | Dans le cas d'une technopôle ou d'une technopole, les acteurs en présence sont de différents types : grandes firmes, PME, TPE, laboratoire de recherche, centres techniques, grandes écoles, centre de formations, etc. La plus ou moins grande coopération entre ces acteurs dépend en grande partie des décisions volontaristes des acteurs publics (Etat et collectivités locales).<br>La gouvernance d'une technopole est d'abord publique, mais une entrée plus ou moins forte du secteur privé peut en modifier la dynamique. |

[20] On définit habituellement une technopôle comme une zone d'activités qui rassemble des entreprises de fabrication ou de services dans le secteur des hautes technologies. Elles sont situées la plupart du temps dans la périphérie de grandes villes, dans un cadre plutôt agréable et en lien avec les structures de recherche. Dans le même temps, on définit une technopole comme un territoire de grande envergure, en l'occurrence une vielle entière orientée vers les hautes technologies, qui développe une politique d'accueil des cadres, chercheurs et techniciens en leur assurant un cadre de vie de bon niveau.

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|---|---|---|---|
| **Pôles de compétitivité** | Le gouvernement français définit un pôle de compétitivité comme un partenariat entre des entreprises, des centres de formation et des centres publics et privées de recherche organisé autour d'un marché et du champ technologique qui lui est lié. Le but recherché est de faire franchir ponctuellement des étapes significatives en termes d'innovation ou de productivité | Le regroupement de cette multitude d'acteurs doit se faire dans une espace géographique donnée bien que cette espace peut être beaucoup plus étendu que les trois espaces précédents, une coopération entre plusieurs régions peut être recherchée par ailleurs.<br>Le mode de développement est résolument exogène et tiré par le marché. | A l'instar des technopoles, c'est une politique publique, volontariste et sélective qui porte sur un nombre limité de projets disposant d'une masse critique et d'une visibilité internationale. Dans le cas présent, ce sont des grandes firmes nationales et étrangères qui doivent être les pilotes de ces projets et de leur gouvernance. |
| **Clusters** | Si l'on se réfère à la terminologie anglaise, il s'agit d'un conglomérat d'éléments, par exemple un ensemble de firmes et accessoirement d'autres acteurs (recherche, formation, services) dont le degré d'interaction n'est pas bien défini mais dont on attend une certaine osmose. | Concernant la zone géographique pertinente, elle peut varier considérablement, soit un espace clairement défini soit au contraire un réseau d'entreprises entretenant entre elles des liens étroits. Dans le cas présent, le mode de développement est résolument exogène et tiré par le marché. | Au niveau de la gouvernance, ce sont des acteurs privés qui sont en charge de la coordination des activités au sein du cluster. On peut avoir parfois le secteur public qui peut s'insérer dans son fonctionnement en développant son aspect organisationnel et financier. |

La typologie des formes territoriales d'organisation industrielle laisse apparaître des situations assez différentes avec une multitude de clivage entre d'une part, les zones d'activités plutôt spécialisées comme les districts et les SPL d'un côté et les autres formes d'organisation de l'autre. Un autre élément de différenciation intervient également entre des zones d'activités clairement identifiées en terme de positionnement géographique, c'est le cas une fois encore des districts, des SPL et des technopoles par rapport aux pôles de compétitivité et autres clusters qui pour leur part peuvent s'étendre sur une large zone. Ensuite , on peut faire la distinction entre les zones d'activités qui vont entrainer une dynamique interne que l'on peut qualifier de développement « endogène » voire « autoentretenue » c'est le cas essentiellement des districts et des SPL et des zones d'activités qui se développent en fonction de l'évolution du marché comme les pôle de compétitivité et les

clusters. Pour finir, il nous faut souligner une dernière distinction liée à la prédominance du secteur privé dans la gouvernance de la zone par rapport à celle du secteur public. Dans le premier cas, on retrouve les districts, les SPL et les clusters, dans le deuxième cas, les technopoles et les pôles de compétitivité.

## 2. LES REUSSITES DE CERTAINES ZONES D'ACTIVITES ECONOMIQUES

Après avoir dressé une typologie des organisations industrielles territoriales, il nous semble intéressant de nous attarder sur certaines expériences que l'on peut qualifier de réussites et qui ont été menées aux Etats-Unis et en Europe et qui correspondent en grande partie aux cinq cas de figure qui ont été énoncés précédemment. Ainsi, nous examinerons successivement le cas de la Silicon Valley comme étant particulièrement illustratif du concept de technopole, de cluster et de pôle de compétitivité. Nous mettrons ensuite en valeur le District Industriel en nous appuyant sur l'expérience italienne et pour finir, nous examinerons le cas de Kalundborg au Danemark comme étant représentatif d'un SPL.

### 2.1. La Silicon Valley

Le territoire de la Silicon Valley a donné lieu à de nombreux travaux concernant son développement et son succès aujourd'hui mondialement reconnus, on peut citer plus particulièrement les contributions de Saxenian (2000), de Rosental (2012). Pour l'occasion, nous nous appuierons sur le document de synthèse paru en 2013 et réalisé par l'AUCAME (Agence d'Urbanisme de Caen-Métropole) et qui fait ressortir les points importants de cette zone en même temps qu'il insiste sur les conditions nécessaires pour la transposer avec succès.

La Silicon Valley située dans la région de Santa Clara à côté de la ville de San José représente le symbole de la domination américaine dans le secteur des hautes technologies (informatiques, télécommunications, nano et bio-technologies). Le développement de la Silicon Valley est étroitement lié à la montée en puissance de l'Université de Stanford, aujourd'hui considérée avec Harvard et le MIT comme l'une des meilleures universités au monde. Au sein de cette université, un professeur que l'on qualifie aujourd'hui de visionnaire, Fred TERMANN agacé de voir ces étudiants partir sur la côte Est[21] pour trouver un travail bien rémunéré avait eu l'idée de développer les relations entre les entreprises et les universités. Ces relations ont eu comme effet et c'est encore vrai aujourd'hui de créer une sorte de « dynamique croisée », les inventeurs des entreprises donnent des cours au sein des universités comme Stanford et Berkeley et les étudiants les plus brillants et ingénieux sont stimulés pour créer des sociétés. On oublie trop souvent que des entreprises comme HEWLETT-PACKARD et plus récemment APPLE sont le fruit de l'imagination de jeunes étudiants à l'instar de Steve Jobs dans le cas d'APPLE.

Les différents chercheurs qui ont analysé ce que l'on appelle aujourd'hui le « modèle de la Silicon Valley » mettent en avant un certain nombre de points forts permettant d'expliquer cette réussite territoriale.

Le premier élément que l'on retrouve ici relève principalement des comportements particuliers des habitants de la zone, ces derniers auraient une mentalité particulière qui se décline en fonction d'un certain nombre de facteurs :

[21] Il nous faut souligner qu'avant la seconde guerre mondiale, l'essentiel de l'activité économique des USA était concentré sur la côte Est, la Californie faisait figure de parent pauvre pour l'occasion, la tendance s'est inversée à partir du début des années 1960.

- *la reconnaissance d'un droit à l'échec ;*

La prise de risque lorsque l'on choisit de créer est reconnu comme fondamentale mais une première expérience peut parfois échouer, alors qu'en Europe l'échec s'accompagne plus difficilement de l'octroi d'une seconde chance, dans la Silicon Valley, cela apparaît comme faisant partie des règles du jeu.

- *le décloisonnement entre les milieux professionnels ;*

Au sein de la Silicon Valley et plus particulièrement à Stanford, les enseignants sont souvent eux-mêmes des chefs d'entreprise !

- *l'existence d'une solidarité transversale ;*

Les liens peuvent être très forts entre les salariés d'entreprises potentiellement concurrentes, la côté identitaire est très fort chez les habitants de la Silicon Valley.

- *l'importance des réseaux ;*

Ici plus que nulle part ailleurs, les réseaux sociaux permettent la diffusion de l'information ce qui permet de mieux se faire connaître et de favoriser les rencontres entre les porteurs de projets et des financeurs.

- *la capacité d'adaptation ;*

Le dynamisme de la Silicon Valley se traduit également sur plusieurs décennies par une modification substantielle des industries dominantes, le territoire s'adapte fortement à l'évolution des secteurs d'activités et l'on voit poindre à chaque décennie de nouvelles entreprises dans les secteurs porteurs.

- *L'existence d'un risque permanent ;*

La croissance économique au sein de la Silicon Valley qui repose essentiellement sur l'innovation connaît elle aussi un certain nombre de revers qui se traduit parfois par des fermetures d'usine, le modèle social n'est pas forcément celui auquel on aimerait voir se généraliser en Europe mais le modèle économique reste encore le point fort.

Si sa mentalité un peu particulière est l'une des conditions de la réussite de la Silicon Valley, un certain nombre de facteurs disparates pourraient s'appliquer à d'autres zones territoriales en Europe durant les 10 ou 20 prochaines années, AUCAME en liste un certain nombre :

- disposer d'un homme providentiel, visionnaire et qui crée des liens transversaux au sein d'un territoire ;
- avoir une géographie et une géologie favorables avec une histoire commune qui développe un esprit de pionnier facile à acquérir par les nouveaux-venus ;
- avoir un goût prononcé pour l'indépendance et l'esprit d'entreprise ;

- disposer au sein du territoire d'une université créatrice de synergies entre le monde académique et les chefs d'entreprise ;
- s'appuyer sur l'Etat comme élément de ressource en stimulant la recherche sur les secteurs porteurs ;
- se positionner dans les secteurs de pointe ;
- accepter la diversité, le droit à l'échec, favoriser le goût du risque et l'échange d'informations ;
- disposer d'un réseau de financeurs recherchant à la fois la rentabilité et la capacité à innover des porteurs de projets ;
- avoir des grandes entreprises favorisant la création de petites entités innovantes ;
- développer les relations entre les entreprises.

Même si le modèle de la Silicon Valley apparaît bien spécifique, les facteurs de réussite énoncés ci-dessus pourraient peut-être faire l'objet d'une transposition à des territoires en résilience. Les Districts Industriels italiens constituent une autre forme de réussite d'une zone territoriale.

### 2.2. Les Districts Industriels italiens

A l'instar de la Silicon Valley, l'expérience des Districts Industriels italiens ont donné lieu également à un certain nombre de travaux à la fois empiriques et académiques s'appuyant à l'origine sur les travaux de Marshall (1900) en économie industrielle. On peut citer sans être exhaustif, les contributions des auteurs italiens comme Brusco (1989), Beccatini (1990) et Bagnasco (1991), et en France, Benko et Lipietz (1992).

Pour bien comprendre l'intérêt du concept de District Industriel, il faut partir du postulat de Marshall qui considère que le marché ne fonctionne pas uniquement sur le principe de la concurrence mais peut s'enrichir d'éléments comme la coopération et la solidarité. Courault (2000) nous indique les fondements de ce qui a fait le succès des expériences initiées principalement dans le Nord de l'Italie. Ce dernier considère d'abord que le développement des Districts Industriels en Italie résulte de la volonté des PME du Nord et du Centre de l'Italie de s'organiser en réseaux locaux de donneurs d'ordres et de sous-traitants à la fin des années 60 et au début des années 70 lorsque le fonctionnement taylorien des grandes entreprises commençait à être remis en cause. Ce rejet en partie du modèle incita les industriels à confier une part de leur production aux ouvriers qualifiés et aux techniciens de leurs ateliers pour qu'ils créent à leur tour leur propre entreprise. Cette externalisation massive des taches incita les créateurs d'entreprises précédemment ouvriers ou techniciens à s'appuyer sur l'ensemble des ressources localement disponibles. Dans ces conditions, un grand nombre de PME et de TPE, concurrentes sur le marché mais par ailleurs complémentaires au niveau de la spécialisation productive ont émergé créant de fait les conditions favorables à l'expansion des Districts en s'appuyant sur la main d'œuvre disponible, nombreuse dans la région.

Toujours selon Courault, le développement et le succès des districts s'explique aussi pour plusieurs raisons :

- l'appartenance des salariés à des familles élargies et à des communautés villageoises comme on peut les retrouver massivement en Italie semblerait de nature à renforcer les liens entre les personnes ;
- l'appartenance sociale et territoriale en même temps que le rapprochement professionnel développe des solidarités d'autant plus fortes qu'elles sont stimulées par le mouvement syndical ;
- la proximité géographique des entreprises favorise les échanges rapides et permanents d'informations, essentiels aux relations marchandes et à la coopération ;

- les districts se sont consacrés à la production de biens de consommation dont la croissance rapide au cours des années 60 et 70 a été propice à leur développement ;
- la réussite du modèle s'appuie également sur les nombreuses aides et appuis multiples émanant des autorités locales, politiques, professionnelles et financières. La structure administrative de l'Italie reposant sur le poids important de ces instances à contribuer à rendre le système plus harmonieux et plus efficace.

La combinaison de ces multiples éléments nous permet de mieux comprendre la réussite de ces expériences d'aménagement territoriale des zones d'activités, toutefois, un dernier élément revêt également une grande importance : l'existence de deux réseaux distincts mais étroitement imbriqués maximisant l'efficacité de l'organisation productive, dans chaque district italien, on retrouve à chaque fois :

- un réseau économique dense, constitué d'entreprises qui appartiennent au même secteur d'activité et qui s'efforcent en se spécialisant de rechercher des avantages comparatifs. Tout cela se double par ailleurs au sein de chaque entreprise d'un mimétisme au regard des stratégies les plus performantes de leurs concurrentes ;
- un réseau social qui se compose de travailleurs qui s'efforcent de satisfaire les besoins du moment et qui sont capables de modifier leur position sur le marché local du travail, soit en changeant d'entreprises, soit en créant leur propre entreprise.

Le modèle du District Industriel serait-il transposable à d'autres régions européennes ? Il suppose à la fois des relations étroites entre certaines entreprises d'une part et une forte mobilité des travailleurs d'autre part. Si les conditions peuvent ne pas être réunies dans un futur proche pour certaines zones, il conviendrait de mettre en place le cas échéant, les conditions susceptibles d'y parvenir à moyen terme.

Une dernière expérience d'aménagement territorial d'une zone d'activités mérite d'être soulignée, celle reposant sur l'écologie industrielle et territoriale matérialisée par ce que l'on appelle aujourd'hui la symbiose de Kalundborg et qui s'apparente en fait à un SPL.

### 2.3. L'écologie industrielle appliquée à une zone : l'exemple de Kalundborg

L'écologie industrielle et territoriale a fait l'objet de nombreux articles et contributions scientifiques, on peut citer notamment Engberg (1993), Erkman (1998) et Sterr et Ott (2004). Erkman estime pour sa part qu'une société fondée sur l'écologie industrielle implique de passer d'un système industriel actuel qu'il considère comme juvénile à un système industriel qu'il nomme « mature », seul capable à l'instar des écosystèmes de permettre le bouclage des flux de matières et d'énergie, les quatre éléments permettant de parvenir à un écosystème sont les suivants :

- valoriser les déchets comme des ressources ;
- boucler les cycles de matière et minimiser les émissions dissipatives ;
- dématérialiser les produits et les activités économiques ;
- décarboniser l'énergie.

Si Erkman et les auteurs précités se sont attardés tout particulièrement sur l'exemple de Kalundborg en considérant ce qu'ils appellent la « symbiose » comme un produit des « forces du marché », un auteur a une tout autre vision mais qui nous paraît particulièrement intéressante. En

effet, Buclet (2011) dans ce qui constitue aujourd'hui l'un des ouvrages de référence sur l'écologie industrielle et territoriale met en lumière un certain nombre de faits donnant à la zone de Kalundborg, un caractère spécifique sur lequel il convient de se pencher un peu plus.

On ne peut comprendre l'expérience de Kalundborg, si l'on ne fait référence à la politique environnemental du Danemark dans lequel se situe cette zone. Le Danemark se caractérise en fait par la mise en place de réglementations environnementales contraignantes pour les entreprises qui doivent périodiquement rendre compte aux autorités locales de leurs efforts pour réduire les pollutions, ce qui a conduit ces mêmes autorités à rechercher par tous les moyens une coopération avec les entreprises dans le but à la fois de les sensibiliser et de les aider le cas échéant à trouver les solutions optimales. Cet aspect des choses est l'un des éléments fondamental pour comprendre la dynamique qui s'est mise en place à Kalundborg. En effet, c'est la volonté de la municipalité de réduire la pollution thermique du fjord, ainsi qu'un problème général de disponibilité d'eau, qui a conduit la centrale thermique à récupérer pour son propre usage l'eau de refroidissement de la raffinerie de pétrole. Par ailleurs, la régulation sur les eaux polluées a également incité la raffinerie à investir elle-même dans des infrastructures de traitement de l'eau usée afin de pourvoir la centrale thermique en eau suffisamment propre par rapport à ses besoins. Dans le même temps, la municipalité de Kalundborg a investi au milieu des années 70, dans un réseau de chaleur afin d'exploiter l'excès de chaleur provenant de la centrale thermique. Elle a également exigé que l'ensemble des résidents se connecte à ce réseau de chaleur afin d'en assurer la rentabilité. Les synergies entre les acteurs locaux se sont ainsi multipliées depuis plusieurs décennies, l'ensemble de ces synergies apparaît rentable économiquement en raison du poids de la réglementation environnementale et des contraintes fixées par la municipalité, sans ces contraintes, on peut estimer que ces synergies ne seraient pas rentables par ailleurs.

D'autres éléments ont également été mis en avant pour expliquer le succès avéré de Kalundborg. Ainsi, on peut citer la confiance qui existe entre les entreprises et qui les poussent à dévoiler une partie de leurs procédés de production leur permettant une compréhension mutuelle des échanges envisageables. Cette confiance se matérialise alors par une multitude de contacts rendus d'autant plus faciles que la zone de Kalundborg est aisément délimitée d'un point de vue géographique en même temps qu'elle demeure modeste en terme de population présente. Si l'on rajoute à cela le fait que les entreprises présentes sur le secteur ne sont pas concurrentes mais plutôt complémentaires, on comprend pourquoi ce que l'on nomme l'éco-park de Kalundborg apparaît efficace pour l'occasion.

Un tel modèle est-il transposable dans d'autres zones en Europe et notamment à l'échelle d'une commune ? Si l'on met en avant le fait que la législation environnementale puisse être encore plus contraignante à l'avenir afin de respecter les accords internationaux qui ont été signés à Paris en Décembre 2015, si l'on considère que certaines collectivités territoriales puissent en faire un cheval de bataille au niveau de leur politique de développement durable alors on peut penser qu'une telle expérience puisse être appliquée dans toute l'Europe. La condition nécessaire implique toutefois de disposer sur une zone géographique clairement délimitée d'industries distinctes capables de développer des synergies entre elles.

## CONCLUSION

Les formes de localisation des activités au sein d'une zone géographique apparaissent multiples à l'échelle planétaire mais l'on peut considérer que toutes contribuent au développement local en créant des emplois et en spécialisant une zone d'activités dans certains secteurs spécifiques. Les trois exemples que sont respectivement la Silicon Valley, les Districts Industriels et la zone de

Kalundborg bien que très différentes de par leurs caractéristiques mettent en lumière un certain nombre de points communs :

- l'importance des réseaux à la fois au niveau des individus et des entreprises ;
- l'importance de bien choisir la localisation des activités pour ensuite les développer ;
- l'importance plus ou moins forte des politiques publiques d'aménagement du territoire.

Pour finir, rien ne s'oppose à ce que ces expériences réussies d'aménagement ne puissent pas se décliner sur d'autres territoires européens.

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# The Present Challenges of Canadian Economic Diplomacy and the Feminization of poverty with its Impact on Equality of Opportunity for Education in North America

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***Abstract:*** *Historically, the economic diplomacy was managed by men and many women were discriminated against if they tried to get a job in an area traditionally male-dominiated. Nowadays in Canada more women have the chance to get a job in areas, like business or economic diplomacy, previously dominated by men. Having many women living in poor conditions, gave birth, in 1978, to the term "feminization of poverty". This paper gives a short description of economic diplomacy and evaluates some strategies used in Canada to include more women in the global promotion of trade. The paper also describes what the "feminization of poverty" is and presents its impact on equality of opportunity for education based on gender, race, ethnicity or social status. The paper also evaluates the cycle of poverty and the discrimination that women, especially from different minorities, have had to face in North America concerning their rights for education. The paper also shows how women have had to deal with oppression concerning education and job opportunities and evaluates how this situation has changed in Canada. The interest of this research is to evaluate the conditions that created the lack of political tools to efficiently address the "feminization of poverty" in Canada, giving the example of many young female graduates who cannot find a job in their field. The last part of the paper briefly describes the feminist movement, its approaches and the historical legacy of the "feminization of teaching" in Nova Scotia.*

***Key words****: economic diplomacy, feminization of poverty, feminization of teaching, Canadian Trade Commissioner Service (TCS).*

## 1. ECONOMIC DIPLOMACY- GENERAL CHARACTERISTICS

According to Bayne and Woolcock (2007) economic diplomacy "is mainly concerned with what governments do" but also represents the interests of the countries at the global level, being in the same time deeply involved "into domestic decisions -making"(p. 3).

Canadian economic diplomacy is promoted at the global level. One way of fostering Canadian economic diplomacy is The Trade Commissioner Service (TCS) with its motto "*Take your business to the world!"* Canadian trade commissioners work in 160 cities around the world, providing information about trade missions and events, Canada's trade agreements, and supporting international businesses that are interested to invest in Canada and Canadian businesses that are willing to invest in other countries. One initiative created to include more women in the international business is Business Women in International Trade (BWIT) that provides women with assistance and advice concerning the achievement of success in the international markets. Women also can receive information about how to adapt their firm when investing in another country, how to connect with colleagues and customers in the host country, how to set appropriate objectives, how to find different business development events (https://www.tradecommissioner.gc.ca/trade_ commissioners-delegues_commerciaux index.aspx?lang=eng).

From 2016, all these events helped several women in Canada to be more confident and to apply for different international opportunities, that can help them to develop new business connections around the world. Many women from Canadian minorities have few opportunities to

access funds and develop connections. The inequalities in Canadian society mainly affect Native, Black, and immigrant women.

## 2. THE "FEMINIZATION OF POVERTY" AND ITS CHALLENGES FOR EQUALITY OF OPPORTUNITY IN CANADIAN EDUCATION

Historically the position of women in society has had many interpretations and continues to affect the way in which women are treated. In 1978 for the first time the concept of "feminization of poverty" was defined by the number of women living on the edge of poverty. This concept is related to how traditional societies see women as being made especially for domestic activities and as being inferior to their husbands.

Taking Canadian society as an example, even if the modern approach gives more rights to women, there are social inequalities in Canadian society and gender issues continue to represent an area for research and reflection. Canadian society and the Canadian government have had different approaches on how to help women escape poverty. Although women are in general discriminated against regarding educational and employment opportunities, ethnic and "color" differences add extra layers of discrimination for First Nations, black and immigrant women. The problem for First Nations, black and immigrant women who live in higher levels of poverty levels does not seem to be recognized by many official policies and has affected the development of Canadian society.

Concerning social inequality, the focus on inequality in Canada has been based on ethnic origin, especially for First Nations. From its inception in 1845, the Canadian educational system has been seen as being open to all social classes. Later, radical theorists blamed the failure of students from lower social classes on capitalism.

Wotherspoon (2014) presented several types of gender inequality, showing different examples of the evidence of racial and ethnic inequality in Canada and presented arguments why First Nations are the most disadvantaged people in Canada. In this sense the author shows the stratification of Canadian society based on inequalities of "gender, race and ethnicity, class, region, age" (p.241). The author presents other research that shows how women in Canadian society earn lower incomes and how they face discrimination at work and at home. The examples given regarding gender inequality differ at different levels of education. For example, at the elementary and secondary level of education there is not a visible gender differentiation, but "women's participation rate have remained somewhat lower in graduate studies" (p. 250). The problem presented here is the process of gender segmentation inserted directly or indirectly into educational programs. The problem of classroom practices with different gender expectations creates a distinct way in which female and male students choose courses for their studies or future jobs. At the post-secondary level, women have increased their overall educational participation by "growing proportions of women in nearly every field of study" (p. 251). But the central focus of the women's increased university participation remains in fields that are traditionally dominated by women, like education, arts, languages, nursing and social work as opposed to male-dominated fields like IT, engineering or applied sciences.

Wotherspoon also described how different educational approaches and experiences of male and female students contribute to the creation of a *social reproduction* beyond what they are studying in at school. The example given is the gap in income between women and man in the labor market. Another discrimination that women face because of gender segregation in education is the time they have to dedicate for the traditional role they are expected to take for doing domestic work or being forced to interrupt their career or education because of pregnancy.

Concerning women's income in Canada, Drolet (2011) argues that after the 1980s women's wages have increased more than men's, showing that younger women have better choices for studies

and work. This is important, especially for young "white" Canadian women, but there are still many First Nations or immigrant women living at the edges of poverty. For instance, Wotherspoon shows that in Canada a large number of federal, provincial or municipal policies discriminate against access to services based on "race, gender and other social characteristics" (p.246). The problem is that compared with other Canadians, persons of Aboriginal ancestry have lower rates of pursuing education or completing post-secondary studies (p.206). An important step made by First Nations is based on *reasonable accommodation* which requires that Canadian legal systems meet the needs of a minority if their needs do not impede others. An example of this is the case of Sandra Lovelace Nicholas who fought for the rights of First Nations women. She married outside her reserve and when she divorced her husband and returned to her reserve she was not recognized as having same rights as before she left her reserve. Sandra Lovelace Nicholas petitioned the United Nations Human Rights Commission that the Canadian government was not respecting the right for equal protection before the law for both men and women in Canada. This compelled the government to change the Indian Act in 1985, helping over 16,000 Fist Nations women to have their rights respected. The significance of this case is that it represents an important step concerning the elimination of gender discrimination in Canadian law and challenged traditional gender hierarchy in the Maliseet First Nations group in which she was born (Sandra Lovelace v. Canada, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977).

## 3. THE CYCLE OF POVERTY, CULTURAL CAPITAL AND WOMEN DISCRIMINATION IN CANADIAN EDUCATION

To describe the differences in students achievements at school, sociologist Pierre Bourdieu created the term of "cultural capital". In 1979 Bourdieu described three forms of "cultural capital" as being *embodied*, *objectified* and *institutionalized* (p.3). Embodied cultural capital includes the accumulation of personal characteristics such as language, accent, the impact of family, cultural attributes and the economic advantages that the members of different families can have. The objectified form of cultural capital is a product of historical projection transferred from one generation to another by its material forms, like written lines, paintings or monuments (p.5). In its institutionalized form, cultural capital refers to school credentials and qualifications that give the values of a group when compared with another group and that finally are connected with the "economic capital" that can guarantee the future monetary value of the investment in any institutionalized form of cultural capital (pp.5-6). Therefore, the discrimination between different students and their achievements is based on the chances they have in the family to find better schools based on passing the selection and evaluation processes that can be disadvantageous for various ethnic groups who have been historically marginalized such as First Nations people.

In analyzing equality of opportunity in Canadian education, Young (1990) presents the contradictions of an open Canadian society. The author shows two points of view concerning inequalities in Canadian society. The side that accepts the inequalities argues that the inequalities are necessary because they provide motivation for people to receive a reward in gaining economic benefits later. However, the opposing view assumes that is better to eliminate the inequalities because they are against justice and humanity and produce future bad elements for society such as increasing criminality. These two points of view have created theories of stratification that try to explain or justify inequalities within Canadian society.

When arguing why "talent wastage" should be avoided, Young claims that this can negatively affect all citizens because it is impossible to benefit from the "effective utilization of the talent of the largest amount of people" without taking into consideration social stratification or occupational

structure (p.162). The key factor identified in the stratification of society is education. The factors associated by Young with the type and length of education a child can receive are "class, region, race and ethnicity, religion and gender" (p.162). A child from a rich family is more likely to receive future advantages compared with its peers from a poor background because the rich parents transfer their material and educational benefits to their children.

Concerning poverty in Canada, based on the National Council of Welfare research results of 1988, in the mid-1980s Canadians most likely to live in poverty were mostly female, First Nations, single parents, from rural areas and poorly educated (p.78). With so many females living in poverty, the "feminization of poverty" started to expand in Canadian society. For example, when a mother lives in poverty, this situation affects her children because a child born poor is more likely to get sick and not be able to study in as comfortable conditions as a child from a higher social class. Another factor is the importance of role-models that children see in their family. A child that is born to a family with enough resources can be taught to learn important skills. For example, that child can have piano lessons and therefore be able to understand classical music later. However, a child forced to help its mother with domestic work likely sees from a young age, from not having its needs met, a motivation for a better life or a motivation to leave the family and experience life on the streets. Schools provide children in Canada equality of opportunity to follow and exploit their talents. The important aspect here is in which measure can schools and the investment in education help to challenge social inequalities and give opportunities to more children a dream for a better life.

Porter (1979) presents the differences between equality of condition and equality of opportunity. Concerning equality of condition everything with value for the society, like "material resources, health, personal development, leisure should be distributed among all the members of society in relatively the same amounts regardless of the social position which one occupies" (p.244). Equality of opportunity is presented by Porter as being connected with the unequal distribution of resources that can be openly accessed by each individual without any discrimination concerning religion, family status, ethnicity or gender.

The Canadian policies of the 1960s naively created more programs and schools to include more poor students from poorer rural areas with the hope all students would have the chance to achieve the highest results in their schooling. The results showed that not all students had the ability to finish their studies or to succeed. At the same time, the occupation of the students' parents influenced the results of their children at school. Additionally, there was still gender discrimination because more male than female students could benefit from the educational system to enter into the higher classes of society.

During the 1960s and 1970s Canada increased its expenditure on education with the hope to increase equality of opportunity. The problem was that the increase in expenditure failed to increase equality of educational opportunity. With more governmental expenditure used for public education an inflation of credentials arose that led to a requirement for more qualifications for the same jobs that could be done with less credentials. In this sense, Young argues that "after increasingly longer periods spent in schools, the credential that a student receives at the end is that which will give entrance to the occupational structure" (p.167) and this corresponds to the social status of their parents. Young considers that early social reformers were "more honest or realistic in their goals for education" because they concentrated on integrating the learners into society by "giving them attitudes, knowledge and motivation to be good citizens" (p.167).

Young considers that the best way to bring a change and to improve the opportunity of education in Canada is to focus on cultural factors rather than material factors that were previously the priority of education providers and politicians.

Women are still more vulnerable to live in poverty because they are forced into different types of education than males based on the expectations of the market and domestic responsibilities.

Schools can change curricula and adapt them to the needs of society but by working isolated the educational system cannot function properly. A recent documentary called *Generation Jobless: Canada's Youth are Unemployed and in Debt* shows the problems that the young generation faces after leaving university. The majority of graduates presented in the documentary are females that are forced to work as servers in restaurants and are not able to find a job in the field they graduated from. A solution to this problem is presented by the University of Regina which calls for more collaboration with the labor market to make sure that graduates get a job in their chosen field of studies. This program has helped over 90 percent of graduates find a job in their field of studies. Another example presented by this documentary shows the collaboration between the Ministry of Education in Switzerland and the labor market with students being able to work and study from high school. The problem presented in the documentary is that Canada does not have a national Ministry of Education. By allowing each province to take separate decisions and not having a national survey of the number of graduates in different sectors and their future opportunities in the labor market, it is difficult to create such opportunities for Canadian youth.

The cycle of poverty is similar to the business cycle with a wave structure that increases, arrives at a maximum and decreases. However, the difference here is that the cycle of poverty never arrives at a minimum point that can be totally controlled by the modern political approach.

When describing the fight of feminists for equal education for girls and women, Gaskell (1993) presents different feminist positions from the past and the present such as: "eliminate the difference gender makes"; "value the difference women make" and "learn to respect and work across difference" (pp.146-147). The key points in Gaskell's conclusions refer to the many aspects of education addressed by the women's movement in demanding equal representation for female students and teachers, the need to reshape institutions and to reorganize standards of excellence and government policies (p.158).

The impact of gender on professionalism is presented by Perry (2003) who analyzed the number of female teachers in Nova Scotia between 1870 and 1960. The author evaluated how the employment of many less-qualified female teachers led to female teachers in Nova Scotia between 1870 and 1960 to have the lowest Canadian salaries.

In Nova Scotia in 1870 the majority of common-school teachers were women because they received less education than men who could apply for better jobs. This created a misconception about the "feminization of teaching" which places women in a position to accept any payment for their work. Furthermore, at that time school teaching in Nova Scotia was not seen as a career, but as how Perry shows "it was a temporary job for both men and women" (p.333). The option of teaching was always available and the interest of the government was to always have a surplus of teachers. The problem between 1855 and 1950 was that teaching required "no training at all until 1930" and "only brief periods of compulsory training, often less than a year as late as the 1950s" (p.338). This challenged the profession of teaching and its role in the province's development during the interwar period and World War II. This situation created a legacy of the "feminization of teaching" in the province because later female teachers were affected by the legacy of low salaries.

## CONCLUSIONS

The gender segregation at the political and business peaks gave women few chances to advance at the same step with their men colleagues in areas like economic diplomacy. Nowadays Canadian society is inclusive, trying to develop more programs that help women to succeed in different businesses that promote economic diplomacy around the world. The Business Women in

International Trade is just one successful example of new opportunities that women can take when deciding to invest in other countries.

Gender discrimination in Canada and throughout the world has not helped the plight of women living in poverty. The cycle of poverty is difficult to escape because of the inefficiency of policies supposed to help people stuck in this cycle. Recent generations also have significant numbers of females unable to find a full-time job.

Increasing the expenditure in education without connecting it to the market's needs is a waste of time and resources. Canada needs a Ministry of Education to create overriding national policies focusing on opportunities for education and gender inclusion regardless of the constitution complications this would entail. Canada also needs to allocate cultural values in the process of education and address the situation of the increasing number of victims of the "feminization of poverty".

The employment of large numbers of female teachers without qualification led to the concept of the "feminization of teaching" in Nova Scotia and created difficulties for later female teachers in negotiating for better salaries. The impact of the "feminization of poverty" for educational opportunities strongly shows that females in Canada need to be treated on an equal basis as their males classmates or colleagues and that without eliminating discrimination there will be a continuous cycle of poverty.

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# Review

**MIHAELA DACIANA (NATEA) BOLOȘ, TRADEMARKS AND GEOGRAPHICAL INDICATIONS IN THE INTERNATIONAL RELATIONS SYSTEM** (in Romanian *"MĂRCILE ȘI INDICAȚIILE GEOGRAFICE ÎN SISTEMUL RELAȚIILOR INTERNAȚIONALE")*, Universul Juridic, Bucharest, 2013 (ISBN 978-606-673-044-0)

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The international relations literature is mainly focused on the political shifts of the international relations system concerning states and international organizations behavior. The political decisions, their impact, how they shape and reshape the international system according to the will of the main political actors are covered by many scholars, from different angles. However, these decisions are only a part of a bigger picture that is being developed internationally, which can be found in all economic or societal areas. In this context, following the international process of decision-making, adopting laws and building standards represent a key aspect in understanding the different layers that interact and interfere in the global system.

In her book, "Trademarks and Geographical Indications in the International Relations System", the author Mihaela Natea, PhD, Senior Lecturer at the University of Medicine, Pharmacy, Science and Technology of Târgu Mures, Romania, Head of History and Political Science Department, presents the development of the international system in a particular area: intellectual property. The book analyses the behavior of the international actors such as states, the building of an international system of laws and international organizations, the economic focus of companies around the world in this field. The approach is done form different angles international relations, European studies, law, economy, which offers a unique view over the subject.

From the European studies perspective the book underlines the building of the IP system in the UE, the process of harmonization of law and practices for member states and candidate states. Also an important aspect is the reflection of the EU IP system in the world, the European states position in international negotiations with the World Intellectual Property Organization and World Trade Organization. A particular attention is given to the geographical indication system, with the Lisbon Treaty, the difference between geographical indication and appellation of origin, and the international legal battles in front of the WTO Arbitration Court for the allegation of non-tariff barriers in international trade in the case of appellation of origin. There is an international battle of systems and interests with high economic value for all parties.

Also concerning geographical indications, the author points several cases concerning state interest in the delimitation of a certain region such as in the case of Tokay or use of name such as "Macedonia" the region and the republic.

Overall the book offers a rare insight of international relations in a field studied mainly from a legal or economic point of view, adding a valuable research to the academic literature.

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