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La société tunisienne au XIX^{ème} siècle : organisation, pouvoirs et autorité pendant la colonisation française (1880-1883)

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Abstract: *Tunisian society in the 19th century: organization, powers and authority during French colonization (1880-1883). This article aims to analyse authority in traditional Tunisian society of the 19th century. A society marked by tribal ties and the influence of religious leaders. Authority takes many forms; it varies constantly, and obeys outside influences. The community bond and the religious fact are inseparable segments in the life of the tribes. In this classless society, the power has difficulty in imposing its authority, hence the arrangements and concessions of the central power in order to calm the most turbulent tribes.*

Keywords: *Contact, civilization, Islam, modernity, reform, ideas, culture, Tunisia, France, Enlightenment, Influence, Tradition*

Résumé: *Cet article se propose d'analyser l'autorité dans la société traditionnelle tunisienne du XIX^{ème} siècle. Une société marquée par les liens tribaux et l'influence des chefs religieux. L'autorité prend plusieurs formes, elle varie en permanence, et obéit à des influences extérieures. Le lien communautaire et le fait religieux sont des segments inséparables dans la vie des tribus. Dans cette société sans classe le pouvoir a du mal à imposer son autorité, d'où des arrangements, des concessions du pouvoir central afin de calmer les tribus les plus turbulentes.*

Mots clefs: *Contact, civilisation, Islam, modernité, réforme, idées, culture, Tunisie, France, Lumières, Influence, Tradition*

INTRODUCTION

Ce papier propose une lecture de l'autorité et les différentes formes de pouvoir en termes d'échanges, d'influences et de rapports de forces multiples avant et pendant la colonisation de la Tunisie en 1881.

Il s'agit de montrer l'importance du fait communautaire tribal dont segments agnatiques et individus sont inséparables mais aussi ses fonctions : justifier la possession du sol qui fonde la solidarité des membres du lignage qui n'est pas exempt de conflits. Il est également question des rapports des hommes à la terre et les rapports de ces formations sociales tunisiennes avec le pouvoir central dans une période antérieures à la colonisation française. Ces derniers sont explicites et se rapportent aux temps historiques à un niveau plus large les relations qu'entretienne le pouvoir central avec les gens du plat-pays. Cette société féodale va subir des mutations sous l'ordre colonial.

L'autorité et le pouvoir ne sont pas décelables en un lieu unique (Bey, ministres, ministères), mais se définissent au contraire par leur ubiquité. C'est une sorte de flux qui traverse et connecte la société tunisienne, ses dirigeants, ses éléments et son environnement. L'autorité ne peut donc être associée seulement à un ensemble de dispositifs légaux (cheiks, Caïds, police, gendarmerie, armée, chefs tribaux...) qui ont pour but de soumettre les habitants aux normes édictées par le pouvoir beylical, elle n'est pas unifiée par le haut mais s'exerce dans différents domaines politique, philosophique, intellectuel.

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Cette autorité varie en permanence avec d'incessantes modifications dans les rapports de force dont ne saurait rendre compte l'analyse traditionnelle des institutions de la régence de Tunis. Elle s'inscrit également dans un double conditionnement et obéit également à une logique et influence extérieures qui permettent de situer une société à une période donnée. Mais cette autorité coloniale est indissociable de l'état dans lequel se trouve le pays, et que tout point de l'exercice de l'autorité dans une société est également un lieu d'apprentissage, de formation, d'imitation mais également de résistance. Toute instruction/culture permet et d'assurer et prolonger l'exercice de l'autorité de la France sur le pays.²

Il est question d'explorer aussi les formes de domination, ses modes d'expression (chefs religieux, lois, administration...) et du changement dans les rapports d'autorité notamment dans le domaine politique et de déterminer de façon précise, les frontières dans ce domaine.

En fait le pouvoir ici sera pris comme une donnée, on se préoccupera de savoir comment ceux qui le déterminent cherchent à exercer leur autorité d'une part, à la renforcer et à la conserver d'autre part. Les structures du pouvoir dans système « traditionnel » d'une part et sa transition en un système dit « moderne », les problèmes que posent les moyens et les conditions d'exercice de l'autorité, le problème du nationalisme tunisien et le souci de la vie sociale sous l'occupation seront évoqués. Dans la mesure où la Tunisie se réfère aux conceptions traditionnelles du pouvoir, celles-ci se sont développées en fonction des influences directe et indirecte (Françaises) et par l'intermédiaire des contacts, des idées et des comportements acquis par l'élite tunisienne.

Pour rédiger cet article, nous avons exploité des archives inédites, tant tunisiennes que françaises: les archives nationales tunisiennes (ANT) en arabe, localisées à Tunis, les archives de l'Observatoire National du Sport (ONS) à Tunis, les archives et les écrits de l'Institut de l'histoire du mouvement national à la Manouba (Tunis). S'ajoute une documentation personnelle, des notes et dossiers trouvés dans les archives tunisiennes du premier ministère dont la richesse est considérable. En France nous avons pu consulter les archives diplomatiques de la Courneuve, les archives du service historique de la Défense (SHD) à Vincennes, les archives de l'Assemblée nationale à Paris ainsi que les archives privées de la Société Marseillaise de Crédit (SMC). Nous utiliserons en outre les résultats des passionnants travaux- entre autres- d'historiens tunisiens³ qui ont abordé dans leurs études récentes les relations entre les deux pays et la pénétration intellectuelle des Lumières dans la Régence de Tunis. Pour l'orthographe des noms, nous nous sommes tenus à l'usage, en écartant (sauf exception) des transcriptions « savantes », toujours rebutantes pour le lecteur. Depuis l'indépendance de la Tunisie, plusieurs villes ont changé de nom. Nous nous sommes efforcés d'en tenir compte, au moins pour les noms propres⁴.

² L'image de l'Occident (autorité morale) chez les intellectuels tunisiens aux XIXème-XXème siècles, de la dynamique française et des carences locales, des défis, des mentalités et des cultures ainsi que les relations tuniso-françaises au miroir de ces élites à la même période.² Les moyens utilisés par ces intellectuels pour traduire le pouvoir de fascination exercé sur eux par la culture européenne et plus principalement française sont très variés : les récits des voyages d'abord, mais aussi les rapports, les ouvrages et les correspondances. Ces éléments leur permettent d'émettre des opinions sur l'Autre, de manifester leurs sentiments envers Autrui. Ils nous font ressentir également quelle perception ils ont des formes, des rapports, du dynamisme des éveilleurs et le pouvoir des idées (lors de leur mise en œuvre) sur une société traditionnelle comme la régence de Tunis au XIXème siècle.

³ Il s'agit d'Adel Ben Youssef sur la Franc-maçonnerie en Tunisie, Brahim Belgacem sur l'enseignement de l'arabe dans la Régence, de feu Ahmed Jday (décédé en 2012) sur les relations franco-tunisiennes, Hafnaoui Amairia sur l'élite tunisienne, sur Khairredine et les Jeunes Tunisiens et des écrits de l'historienne Annie Rey-Goldzeiguer sur la *Nahda* et la thèse de Moncef Chebbi « L'image de l'Occident chez les intellectuels tunisiens au XIXème siècle ».

⁴ On écrit : le bey Hamouda, ou le bey Sadok, différemment de Hussein Bey, Hamouda Bey et Mohamed Bey.

POUVOIRS, RELIGIONS DANS LA SOCIÉTÉ TUNISIENNE PRECOLONIALE

Au XIX^{ème} siècle, la société tunisienne, qui s'appuyait encore au XVIII^{ème} et XIX^{ème} siècles sur un passé illustre, s'est trouvée tout à coup démunie face à une civilisation européenne qui la dépassait dans tous les domaines. La volonté réformatrice est née de la rupture qui s'est établie alors avec cet état d'esprit devenu inadapté au fil du temps, et du désir de combler un retard patent, attitude relevant d'une volonté évidente de réaffirmer sa position face à l'Occident. En même temps le processus d'acculturation qui l'accompagne réveille chez les élites tunisiennes des sentiments ambivalents qui ne sont pas nouveaux: d'un côté, une admiration pour l'Occident, ses idéaux, sa civilisation et de l'autre une répulsion envers cette civilisation, qui impose inéluctablement sa culture, sa langue, et avec, ses valeurs, en même temps que la domination qu'elle exerce s'accroît. La présence française effective en Tunisie donnera une ampleur sans précédent à ce phénomène.

Cette situation s'inscrit néanmoins dans une logique qui dépasse le cadre strict de cette période: les rapports Orient/Occident ont toujours été passionnels et complexes, et les relations entre les deux mondes souvent conflictuelles, fortement teintées d'ignorance mutuelle et affectées par des préjugés et des malentendus hérités du passé. Dans les liens qui s'établissent entre les deux cultures, on échappe aussi à une relation de dominé à dominant, comme si on avait besoin de l'autre, à n'importe quel prix, pour revendiquer une existence propre. L'écrivaine franco-tunisienne Hélé Beji l'affirme lorsqu'elle écrit : « *Toujours l'Orient et l'Occident se sont côtoyés avec des sentiments réciproques de convoitise et de jalousie, complices malgré leurs dissemblances, dans le secret vivace de se vaincre l'un à l'autre*⁵ ». C'est dans le regard de l'Autre, de celui que l'on considère comme son rival, que l'on vit, que l'on se construit. C'est en cela que cette étude nous semble avantageuse puisqu'elle met en relief les contacts entre deux cultures qui s'opposent dans une fascination réciproque, et aide à comprendre qu'elle fut l'influence intellectuelle et philosophique française dans la Régence de Tunis.

Dans ce contexte politique, l'horizon des intellectuels tunisiens s'ouvre vers l'Europe et se peuple progressivement d'idées, d'objets et de pratiques qui suscitent l'admiration, l'étonnement et quelques fois la crainte⁶. Au moment où l'Occident opère sa révolution industrielle et bouleverse ses structures, affirme sa puissance et son dynamisme, le monde musulman, y compris la Régence de Tunis, lui, semble se fermer à la modernité et se replier sur ses traditions. Alors s'accroît le fossé et l'inégalité de développement qui s'ensuit. C'est ainsi qu'apparaît le mouvement la *Nahda* comme ressourcement, résurgence, réveil, renaissance. Cette conscience réformatrice s'explique par des phénomènes externes. Il y a d'abord la Révolution française et son message de liberté, et aussi l'expédition de Bonaparte en Égypte qui amène dans ce monde en ébullition un cortège de nouveautés: des nouveautés en matière d'administration, l'idée de recourir à des assemblées représentatives faisant appel aux *oulemas* en particulier, et l'utilisation de quelque chose curieusement nouveau, alors que nous sommes déjà en 1798, l'imprimerie⁷. Dans cette conjoncture inattendue, certains chefs religieux restent enfermés dans le rapport antagonique séculaire entre l'islam et le christianisme, et refusent de « lever les yeux » sur ce que la nouvelle civilisation de l'Occident apporte à l'humanité entière. Leur attitude s'en démarque officiellement; ces théologiens

⁵ In Revue *Esprit*, n° 1, janvier 1997, p.108

⁶ SAIDI (Hédi), *Rencontre des civilisations : chronique des opportunités gachées*, in *Transnationalités et développement: rôles de l'interculturel* sous la direction d'Altay Manço et Claudio Bolsman, publication de l'Institut de Recherche, Formation et Action sur les Migrations, Liège, pp. 199-215, L'Harmattan, 2010.

⁷ Qui dit imprimerie dit communication, dit journaux. Cette espèce de bombe à retardement déposée par Bonaparte, c'est Mohamed Ali qui l'utilise. C'est lui qui est le point de départ du mouvement de rénovation qui a gagné le monde musulman.

ont cherché à trouver dans la redécouverte des sources de la foi et de la culture islamique le ressort nécessaire au renouveau du monde musulman.

UNE REGENCE VASSALE MAIS NON SUJETTE, AUTONOME MAIS NON INDEPENDANTE⁸.

La domination musulmane ottomane fut la plus longue (près de trois siècles), faisant de Tunis comme d'Alger des provinces ottomanes. Cette suzeraineté⁹ à la Porte¹⁰ est, du point de vue politique et diplomatique, une chimère. À Alger, le bey est élu par le *diwan* un conseil supérieur comprenant des officiers et des hauts fonctionnaires. A Tunis, le bey est choisi dans la famille husseinite. Le sultan n'intervient donc pas dans la nomination des souverains, sinon pour leur accorder le firman¹¹ d'investiture quand il reçoit la nouvelle de leur avènement, et des firmans annuels de confirmation. Point de tribut que Tunis et Alger verseraient à la Porte, pas d'agent du sultan dans les deux capitales, ni de représentants des deux Régences à Constantinople. Simplement, des agents recruteurs lèvent des troupes à Istanbul, à Smyrne, en Anatolie, mais ils ne sont en rien des consuls des deux Régences.

Du point de vue diplomatique, les deux souverains peuvent signer des traités librement avec les puissances chrétiennes. Et quand, en 1799, la Porte intervient pour que les relations avec la France soient rompues, Alger n'obéit qu'avec réticence. Cependant, la vassalité des deux Régences n'est pas totalement vide de sens. Elle s'exprime par l'envoi de missions officielles, de cadeaux, de secours militaires (La Porte demande des troupes en 1795 contre la Tripolitaine, en 1810 contre la Crète, puis pour réduire les Grecs moyennant des cadeaux diplomatiques et substantiels)¹². D'autre part, le sultan est considéré comme le successeur du prophète, et cela fait de lui le suprême recours. Les monnaies frappées à Tunis portent son sceau et la *khotba*, la prière du vendredi est prononcée en son nom. À Alger, le mufti du culte hanéfite, nommé par Istanbul, est le chef de l'islam algérien. En cas de demande extérieure, c'est vers la Sublime Porte que l'on se tourne. La dernière lettre du dey d'Alger est un pressant appel à l'aide militaire d'Istanbul, et les tribus tunisiennes résistant à l'occupation française mettront leurs derniers espoirs dans l'arrivée des renforts turcs. Ces manifestations d'allégeance comptent cependant bien moins que l'intégration à un ensemble musulman dont la capitale est la Mecque¹³. C'est aussi le berceau de l'islam et le lieu d'origine revendiqué par plus d'une tribu. On remarque la fureur partagée, et plus encore, de la signification psychologique de ces échanges: le flot des milliers de pèlerins, citadins ou paysans, qui partent chaque année du Maghreb, la floraison des relations de voyages (*rihlas*), les contacts culturels auxquels le pèlerinage donne lieu. Rencontre d'intellectuels de tous les pays du monde musulman, le pèlerinage vers les Lieux saints est bien, pensons-nous, « un congrès mondial de la pensée islamique ». En même temps, le Caire, étape de pèlerinage, tient lieu de capitale intellectuelle de l'islam¹⁴. Au Caire, les pèlerins maghrébins s'emploient à rechercher des manuscrits rares pour les rapporter dans leur pays. Plus généralement, les meilleurs lettrés y complètent leur formation. À al-Azhar, le *riwaq* des Maghrébins est important et le plus vivant, voire le plus turbulent (en 1787, avec les étudiants syriens, ils se soulèvent contre le *cheikh*, le gardant prisonnier, occupent la mosquée et obligent les commerçants à fermer leurs boutiques.) Autre fait révélateur : c'est au Caire que les

⁸ Nous empruntons cette expression à l'historien tunisien Moncef Chebbi.

⁹ Archives diplomatiques de la Courneuve, Correspondance politique et consulaire, 05.09.1851. Il faut distendre au maximum les liens avec l'empire ottoman « cette funeste suzeraineté qui ne peut qu'accentuer « le fanatisme religieux ».

¹⁰ Siège du gouvernement à Istanbul.

¹¹ Mot persan, qui veut dire décret royal émis par le sultan ottoman.

¹² Sources de profits appréciables pour les beys.

¹³ Celle-ci est d'abord une direction de l'espace, vers laquelle on se tourne à chacune des prières quotidiennes

¹⁴ Par exemple, le savant Muhammed al-Fâsi al-Tâûdi qui, passant au Caire pour le pèlerinage en 1767-1768 et 1768-1769, y donne des cours, à l'université d'al-Azhar.

fondateurs des confréries des *Rahmaâniya* et des *Tidjaniya* étudient, leurs ordres correspondant à ceux des *Halwatiya* et des *Hafnawiya* au Caire. Une intense circulation d'hommes et d'idées relie donc les Maghrébins aux musulmans du Proche-Orient. C'est la solidarité à l'intérieur de ce cadre (celui de l'islam) qui est vécue le plus généralement et le plus profondément par les musulmans d'Afrique du Nord. Eux-mêmes en Orient sont nommés indistinctement « Maghrébins ». Mais la lecture par exemple, de la chronique tunisienne de *maqdish*, un seul vocable désigne les habitants de la Régence: les musulmans. Au-delà des diversités d'origine géographique s'exprime ainsi le sentiment d'appartenance à la vaste communauté des croyants. Ceci n'empêche pas ces pays musulmans d'avoir des relations avec d'autres pays comme ceux de l'Europe.

LE POUVOIR DANS UNE SOCIÉTÉ SANS CLASSE

A l'intérieur des tribus; les groupes ne se scindent en classes superposées, mais s'individualisent les uns par rapport aux autres selon le système généalogique tout à fait mythiques (le non de la tribu; fils de...). D'après l'historien Mohamed Hedi Cherif¹⁵, les groupes s'allient ou s'opposent entre eux selon des affinités ou des antinomies dictées par une vieille histoire mal élucidée mais nullement d'après un quelconque déterminisme biologique.

L'organisation familiale de la société n'exclut pas des inégalités¹⁶. La première, entre les tribus qui participent à l'exercice du pouvoir et celles qui ne font que le subir. La Tunisie connaît ces tribus privilégiées dites du makhzen (*makhzen* en Algérie, *guiche* au Maroc) qui en échange de l'appui militaire prêté au souverain, sont dotées de terre et jouissent d'immunités fiscales.

D'autre part, des tribus ont, par leur origine supposée, une certaine prééminence sur le commun des fidèles. Soit qu'elles descendent directement du prophète (*chorfa*) ou des premiers conquérants arabes, soit qu'elles aient simplement un ancêtre marabout, les unes et les autres bénéficient d'un charisme qui les distingue du reste de la société tunisienne. Du reste, la structure familiale elle-même peut, dans son fonctionnement, faire apparaître des familles privilégiées exerçant une domination sur l'ensemble de la tribu. Le principe est électif dans son principe. Mais s'il est détenu par la même famille pendant plusieurs générations, la démocratie ne laisse-t-elle pas alors la place à une structure bien moins égalitaire qu'au début? Enfin les agents du pouvoir, gouverneurs ou caïds ont toutes les prérogatives du monarque à l'échelle locale. Ne peuvent-ils pas, à leur tour, par leur domination et leur indépendance à l'égard du souverain, se muer en seigneurs semblables à ceux de l'Occident médiéval ?

Dans la Régence de Tunis, ne s'est jamais mise en place la division tripartite de la société européenne, brillamment expliquée par Georges Duby, entre les hommes qui prient, ceux qui combattent et ceux qui travaillent: *oratores* (ceux qui prient), *bellatores* (ceux qui combattent), *laboratores* (ceux qui travaillent). Tout musulman est, potentiellement, un soldat de la guerre sainte et tout homme valide peut porter les armes. Non pas dans l'armée régulière du souverain, mais dans sa propre tribu, pour la défendre. Les tribus du makhzen bénéficient d'exemptions fiscales, mais elles n'ont pas d'autre moyen d'existence que le travail de la terre qui leur est concédé. Et en dehors des expéditions de recouvrement d'impôts, leurs membres sont des producteurs, tout comme ceux des tribus ordinaires¹⁷.

Dans les territoires des tribus, les relations sociales sont beaucoup plus archaïques, les solidarités tribales jouent énormément, elles ne sont altérées que rarement, lorsque certaines personnalités connaissent subitement une ascension due singulièrement à leur position avantageuse

¹⁵ *Revue des mondes musulmans et de la Méditerranée*, année 1982/33, pp 67-87.

¹⁶ VALENSI (Lucette), *Fellahs tunisiens : l'économie rurale et la vie des campagnes aux XVIII^e et XIX^e siècles*, Paris, La Haye, Mouton, 1977, p.22.

¹⁷ Nous trouvons les mêmes phénomènes en Algérie et au Maroc.

en tant qu'agent e l'autorité. Il est y admis que les groupes peuvent se faire les auxiliaires de l'Etat contre d'autres communautés rivales, ou plus rarement, se confédèrent entre eux pour s'opposer à la tyrannie beylicale ou aux menaces de l' Occident chrétien.

Quant aux familles qui, par leur origine ou autrement, ont un caractère aristocratique, elles ne jouissent pas nécessairement d'une fortune démesurée, et l'instabilité de leur pouvoir, les querelles entre branches opposées d'une même famille, contrarient le processus de différenciation sociale. Laissons parler l'historien tunisien Hedi Timoumi¹⁸ sur les différents types d'aristocratie en Tunisie du XIXème « *On commettrait une grande erreur en tirant de ce qui précède la conséquence que tous les chorfa ou marabout occupent une position élevée dans la société arabe, on en voit au contraire journellement occupés à tous les métiers. Mais, si tous les membres de ces classes ne jouissent pas d'une part égale de considération et d'influence, on peut affirmer au moins que la puissance et l'autorité ne se trouvent que chez elles* ». Aussi bien, la question est de savoir si l'autorité sur les hommes s'accompagne d'un contrôle sur les terres; si, sur le plan économique, les collectivités rurales sont subordonnées à ces groupes ou individus réputés supérieurs.

La société tunisienne¹⁹ révèle en premier lieu l'absence de perception de la profondeur du temps. L'histoire commence avec le fondateur de la tribu. Hors du lignage, il n'y a d'histoire que si le groupe est impliqué. Au-delà, la réalité est floue et comme étrangère. L'histoire s'identifie avec la généalogie et par conséquent elle commence avec les Arabes et l'Islam. Qu'il ait pu exister des Puniques, des Romains, des Vandales ou des Espagnols ne peut même être supposé. Autre trait d'une pensée pré- scientifique: le fabuleux et le réel ne sont pas distingués. Les miracles accomplis par les saints de la tribu sont incorporés à son histoire, le naturel cohabitait avec le surnaturel. La légende d'origine elle-même n'a, cela va de soi, aucun fondement historique, les tribus résultant de la coagulation d'éléments divers, beaucoup plus que de la fécondité des ancêtres reconnus. Cette image pourtant, est loin de n'être qu'une représentation mentale, une légende à l'usage des enfants, une production folklorique. Elle dessine en effet les plans des clivages qui partagent la société. En outre, les relations à l'intérieur d'un lignage, ou entre les groupes, peuvent être conventionnelles: elles n'en déterminent pas moins les alliances (matrimoniales, ou politiques) et les conflits. Chez ces tribus, le mythe d'origine définit le champ des solidarités du groupe, c'est aussi une première traduction d'une solidarité entre nomades et villageois. Ainsi les limites géographiques du réseau d'alliances de la tribu sont marquées par une fiction.

Chez les uns et les autres, la base de l'organisation sociale est la tribu, définie par les liens de consanguinité. L'endogamie est la règle générale et, à moins d'être parents des autres membres du groupe, on ne peut camper dans les *douars* qui composent la tribu. Le *douar* réunit la famille, comprenons la famille agnatique rassemblant le chef de famille (le *cheikh*), ses enfants, ses proches, ses serviteurs. Du point de vue politique ou administratif, c'est l'assemblée des chefs de *douars* (la *djemââ*) qui, au niveau de la fraction ou à celui de la tribu, prend les mesures concernant la vie du groupe, veille à ses intérêts. D'un commun accord, les membres de cette assemblée désignent l'homme le plus influent qui deviendra leur chef. Ainsi, des chefs issus de la collectivité, des décisions librement débattues entre les chefs des différentes familles, une étroite solidarité des membres de la tribu: en somme une organisation qui n'est pas moins « démocratique » que celle connue dans les pays occidentaux, là, c'est dans l'espace plus vaste de la tribu que la vie s'organise. Dans telle ou telle circonstance, l'adhésion à un *soff* (groupe tribal), qu'on avait crue oubliée, s'exprime de nouveau. Car cette forme sociale existe, elle aussi, dans l'ensemble du Maghreb et sa

¹⁸ Entretien à Tunis, le 20 août 2012. Traduit par nos soins.

¹⁹ VIGNON (Louis) écrivait « *Les habitants du pays sont comme de l'autre côté de la frontière des Arabes et des berbères, deux traits seulement les différencient de leurs voisins : ils sont moins belliqueux et d'habitude plus sédentaire* », *La France dans l' Afrique du Nord*, Paris, Librairie Guillemin et Cie, 1887, p.134.

vigueur, sa résistance au temps, ne sauraient être sous-estimées. On peut le vérifier lorsque en 1729-1740, une guerre civile oppose le bey Hussein ben Ali et son neveu Ali Pacha.

Le pays se divise en deux camps et, en suivant la chronique de Mohamed Seghir ben Youssef, on peut ranger les différentes tribus dans les camps opposés. Un siècle et demi passe, et la révolte de 1864 embrase tout le pays. Révolte fiscale quasi générale contre le gouvernement central, elle se désagrège rapidement: les premières tribus qui se soumettent appartiennent au *soff* husseinite, les autres, selon la même ligne de partage qu'au XVIII^e siècle, sont du *soff* adverse.

DE LA SOCIÉTÉ PARCELLAIRE À LA COMMUNAUTÉ MUSULMANE

Unité sociale et politique, la tribu (ou une de ses subdivisions) est aussi unité économique. Elle a également une relative autonomie administrative : les impôts, notamment, sont répartis entre les groupes : à chacun d'eux revient la tâche d'établir l'assiette et d'assurer la perception des redevances, la solidarité fiscale garantissant à l'État ses revenus. Du point de vue juridique, de même, tous les conflits doivent pouvoir trouver solution à l'intérieur de la tribu ou le village, devant le conseil ou devant le juge issu de la communauté. Quand ses intérêts moraux et matériels sont en jeu, la collectivité se fait justice elle-même, y compris par la guerre contre un autre groupe. Mais en cas de besoin, le recours au souverain est possible et la fonction de justicier suprême est scrupuleusement remplie par le bey de Tunis. Justice sommaire, puisque le jugement est rendu aussitôt sans que jamais une « instruction » ait précédé le procès et que l'exécution de la sentence est immédiate, mais justice directe, les parties se portant devant le monarque sans la médiation d'un avocat²⁰.

Ainsi, quoique la société soit construite sur le modèle familial, l'appartenance à une entité politique définie ou à une aire culturelle plus vaste, celle de l'Islam, corrige le schéma général et empêche de voir dans la société tunisienne un tissu de cellules totalement closes, rigides et étanches comme l'écrit l'historienne Lucette Valensi²¹. C'est dans la pratique religieuse que s'observe le mieux cette dualité entre le repli sur soi et l'intégration à un ensemble plus vaste. En règle générale, la vie religieuse s'organise dans un espace social restreint. Une mosquée, au moins, dans chaque village, une tente qui en tient lieu dans les douars, l'une et l'autre servant aussi d'école pour les enfants, symbolisent l'adhésion à l'Islam et permettent de s'acquitter de ses devoirs religieux. Mais la mosquée a pour complément indissoluble le marabout, (le saint local). Celui-ci, souvent membre du lignage et parfois fondateur, est la transposition sur le plan religieux de la structure sociale déjà citée. En réalité, chaque tribu reconnaît plusieurs marabouts dont les tombeaux sont dispersés sur son territoire et font l'objet d'un culte plus ou moins fervent.

Leur diligence agraire est certaine. Le marabout est le protecteur des moissons (les réserves de grains sont souvent entreposées auprès du tombeau), il éloigne les voleurs et sert parfois de refuge, que le souverain lui-même craindrait de violer. Très fréquemment, la légende du saint exprime cette fonction agraire, soit que ses miracles aient permis au groupe de faire face à l'impôt, soit qu'il ait fait jaillir l'eau fécondante dans des terres stériles, soit qu'il offre des pluies pour l'agriculture. Mais plus encore, le marabout a une fonction sociale, de conservation de la cohésion du groupe. Son culte,

²⁰ L'arbitrage familial, le cadre local, peuvent donc cesser de fonctionner, notamment quand les parties en cause n'appartiennent pas à la même communauté: il existe une autre dichotomie : entre le droit coutumier et la loi coranique. Elle est ressentie au sud de la Tunisie où l'individu peut opposer l'une à l'autre. Du droit coutumier - *l'orf* - relèvent les problèmes de la vie quotidienne (distribution de l'eau, aide aux récoltes) de la répression des délits et, d'une manière générale, l'ensemble des questions qui concernent toute la tribu ou la communauté villageoise, tandis que les problèmes de statut personnel relèvent du droit religieux. Dans la pratique, la distinction n'est pas toujours possible, et l'autorité du *cadi* peut être opposée aux prescriptions de la *djemmaa*. Cette interférence du droit coranique avec la coutume apparaît surtout dans les tribus du centre et du sud.

²¹ VALENSI (L), *Le Maghreb (1790-1830) avant la prise d'Alger*. Tunis, Cérès, 2004, p.48.

en effet, donne lieu à des manifestations collectives; pèlerinage annuel avant ou après la période des grands travaux agricoles, fêtes votives (*Ouada*) où le repas partagé est l'affirmation de la solidarité entre les membres du groupe ou de l'alliance entre les lignages différents. Enfin, le marabout résout la contradiction entre une religion adaptée aux besoins locaux et l'œcoumène musulman²².

La sociologie religieuse maghrébine présente une autre forme, toute différente : les confréries. Celles-ci, au contraire des marabouts, débordent les frontières de la tribu ou du village et de leurs alliés. Elles rassemblent des adeptes de toutes provenances géographiques. Elles sont, comme l'a fait observer Jacques Berque, un moyen pour l'individu de s'affranchir du cadre familial naturel, et d'en choisir un autre.²³ L'adhésion à une confrérie procède d'une démarche individuelle. Cette forme religieuse, d'une grande vitalité à la fin du XVIII^e siècle et au début du XIX^e siècle, plus que le culte des marabouts, intègre l'islam rural à l'ensemble de la communauté musulmane. Elle n'y réussit que partiellement: l'islam, ici, n'a pas fait disparaître des rites agraires qui ne lui doivent rien. Citons ces cérémonies de l'*achoura*, que célèbrent aussi les Berbères du Haut Atlas. Celle-ci est étrangère à l'islam orthodoxe.

Le Maghreb connaît bien d'autres situations et les régions berbérophones sont les meilleurs moyens de conservation des religions pré-islamiques. À la veille du Protectorat signé en 1881²⁴, la réalité du pouvoir n'était pas entre les mains du bey, mais entre celles de son premier ministre. Ce dernier avait la haute main sur les affaires étrangères et les finances de la Régence. Pour l'administration générale du pays, il était assisté d'un ministre de l'intérieur appelé « vizir de plume » et de conseillers, chefs de diverses sections. Un ministre de la guerre et un « vizir du sabre » perpétuaient une tradition militaire attachée à la dynastie husseinite.

Après un siècle de transmission héréditaire du pouvoir, la dynastie husseinite était forte de traditions d'indépendance qui donnaient aux beys l'autorité de princes souverains de la Régence.

LA TUNISIE, UNE MULTITUDE DE DOMINATIONS

La Tunisie se démarque de ses voisins par sa géographie d'abord : elle est ouverte sur la mer et n'a pas de hautes montagnes qui la protègent de l'extérieur. Elle est donc accessible sur tous les fronts, d'où son fort potentiel commercial mais aussi les fréquentes conquêtes dont elle a été victime. De tout temps, ce pays a connu l'Étranger, a été influencé par l'Autre, c'est-à-dire par des hommes et de femmes provenant d'autres cultures.

Cette position géographique privilégiée la rend largement ouverte sur les courants d'échanges culturels, politiques, et économiques ayant parcouru la Méditerranée depuis l'Antiquité. Plus que celui de tout autre pays, le destin historique de la Tunisie fut déterminé par sa situation géographique. D'où un legs patrimonial, génétique, linguistique, politique, anthropologique et historique pour cette contrée plurimillénaire aux multiples appartenances.²⁵ De siècle en siècle, ce pays allait changer de maître : l'empire carthaginois (-800/-146), l'empire romain (-146/430), l'empire vandale (430 /533) et l'empire byzantin (533/700), les Arabes et les Turcs (1574), et plus près de nous l'arrivée des Français (1881). Ainsi s'explique l'histoire de la Tunisie si troublée parfois qu'il devient difficile de

²² VALENSI(L), *Ibidem*, p. 53.

²³ BOUZAR (Wadi), *Jacques Berque et son « autre »*, in *Confluences Méditerranée*, n°41, printemps 2002, 194 pages, p. 34.

²⁴ Traité conclu entre le gouvernement de la république française représenté par le général Bréart et le gouvernement de son Altesse le bey. Bréart avait vécu entre 1826 et 1913, il fut envoyé en Tunisie à la tête d'une brigade, porteur d'un projet de traité préparé à l'avance par le consul général de France, Théodore Roustan, qu'il devait imposer au bey. Il attaqua la ville de Tunis le 8 mai 1881. Ali Mahjoubi, *L'établissement du Protectorat français en Tunisie*, Tunis, Publication de l'université de Tunis, 1982, p.37.

²⁵ AISSA (Lotfi), *Etre tunisien. Opinions croisées*, Tunis, édition Nirvana, 2014, p. 41.

reconstituer la trame des événements historiques du pays.²⁶ Cette situation géographique avantageuse (ouverture sur deux façades maritimes) rend la Régence perméable aux influences extérieures en particulier celles de la France. Celles-ci se traduisent par une pénétration philosophique (les idées des Lumières) et politico-constitutionnel (la Déclaration des Droits de l'Homme) et une diffusion des systèmes juridiques qui les accompagnent, via la langue française entraînant l'avènement dans la Régence, d'une « monarchie constitutionnelle ». Mais la modernisation à la française ne s'arrête pas là : le bey Mohamed Sadok (1813-1882) proclame sur les conseils du consul général de France, Léon Roches (1809-1900), le 10 septembre 1857, le Pacte fondamental qui constituait en Tunisie une ébauche de droit public moderne,²⁷ là où il n'y avait eu auparavant que le bon plaisir du prince. Quatre ans plus tard, après une entrevue à Alger avec Napoléon III en 1860, il promulguait la Constitution de 1861 (la première dans le monde arabo-musulman) qui tendait à substituer un régime constitutionnel à une « beylicalisation absolue » de la Régence.²⁸ Malgré l'affirmation d'une personnalité politique de plus en plus indépendante à l'égard de la Sublime Porte, la Régence de Tunis, courtisée par les puissances occidentales, est au milieu du XIX^e siècle, partie intégrante d'un ensemble très vaste .

Après l'occupation de l'Algérie en 1830, la France devient une voisine immédiate (*jar* selon l'expression d'Ibn Abi Dhi'af dans son ouvrage *Ithaf Ahl Azzaman*) de Tunis et les relations entre la Tunisie et la France se resserrent par la force des choses. Dès lors que son domaine territorial s'étend désormais à l'Afrique, le « souci de sa sécurité » lui donne une sorte de droit de regard et d'intervention dans les affaires de la Régence limitrophe. Aussi dès la prise d'Alger, l'exclusion de toute influence prépondérante exercée en Tunisie par un autre pays devient-elle un des principes fondamentaux de la politique française.

LE TRANSFERT DE L'AUTORITE DANS LE TEXTE DU BARDO (12 MAI 1881)

Le 7 mai 1881, l'ordre est donc donné de marcher sur Tunis car on redoute l'envoi de troupes venant de Constantinople.

Ces ordres parviennent le 8 mai à neuf heures du matin au général Bréart qui part à trois heures du matin. Le soir du 10 mai, il recevait le télégramme chiffré suivant : « Le général Bréart est désigné comme plénipotentiaire pour proposer au bey la conclusion d'un traité dont le texte, en dix articles, est joint à la dépêche. Le général Bréart doit, à cet effet, après avoir campé à deux kilomètres du Bardo (résidence du bey), s'y transporter, de concert avec M. Roustan et avec une escorte convenable. Si le bey demande un délai pour répondre, ce délai doit être fixé dans des limites précises et courtes ; en outre, pendant ce temps, le général Bréart prendra les dispositions nécessaires pour que le bey ne puisse s'échapper. En cas d'un refus absolu de signer le projet de traité, le bey sera gardé prisonnier dans le Bardo, avec les égards, d'ailleurs, qui sont dus à son rang, et le général

²⁶ Traité centenaire du 30 août 1685 entre la Tunisie et la France. Ce traité fut conclu au cours d'une crise sanglante de guerre civile qui éclata entre Ali Bey et son frère Mohamed bey et dura de 1675 à 1685. Sous les ordres du maréchal d'Estrées, le gouvernement français envoya une flotte comprenant huit vaisseaux, cinq galiotes portant 5000 bombes et six autres bâtiments, pour exiger la réparation des dommages causés au commerce français par les corsaires de la régence, et ce au mépris des traités consentis par les deux parties contractantes. Ils devaient également essayer d'obtenir le retour à la France de la concession du Cap Nègre, dont les Anglais venaient de s'emparer et de renouveler le traité de paix et de commerce de l'année 1672. François Petit de la Croix se chargea alors de traduire les clauses de ce traité. *Cahiers des archives, Traités et accords conclus entre la Tunisie et les puissances occidentales (1626-1955)*, les Archives Nationales de Tunisie (ANT), Tunis, 2011, page. 23

²⁷ Ce n'était en fait que l'application à la Tunisie du *Hatti Cherif* ottoman de Gulhâné, promulgué par le sultan en 1839.

²⁸ Il faut mentionner que la première constitution dans l'histoire de la Tunisie fut celle de Carthage. Le philosophe grec Aristote considère dans ce témoignage de première main, que la constitution de Carthage était l'une des meilleurs, voire la meilleure de toutes.

Bréart se réfèrera immédiatement au ministre ». ²⁹ Accompagné de tout son état major, de la plupart des officiers supérieurs de sa colonne et, escorté de deux escadrons de chasseurs d'Afrique le général Bréart entre sous une pluie battante au palais beylical du Bardo pour soumettre au bey le traité du protectorat rédigé et expédié de Paris. Il accorde cinq heures au bey pour en délibérer avec ses conseillers et ministres en lui notifiant que la réponse doit être soit l'acceptation ? soit le refus définitif. Il plaçait la Régence sous Protectorat français, bien que le mot lui-même ne figure pas dans le texte. ³⁰ La plupart des juristes admettent en effet que formellement la Tunisie n'a pas aliéné, en 1881, sa souveraineté interne. Le traité du Bardo est un acte de droit international passé entre deux Etats, la France et la Tunisie.

L'article premier du traité du Bardo stipule que toutes les conventions antérieures entre la France et la régence étaient confirmées et renouvelées. Dans son article 2, il proclame en effet que « S.A le bey de Tunis consent à ce que l'autorité militaire française fasse occuper les points qu'elle jugera nécessaires pour le rétablissement de l'ordre et la sécurité de la frontière et du littoral ». Mais le même article précise ensuite : « cette occupation cessera lorsque les autorités militaires françaises et tunisiennes auront reconnu, d'un commun accord que l'administration locale est en état de garantir le maintien de l'ordre ». La France s'engageait à défendre son Altesse contre les dangers qui menaceraient son pouvoir, ou compromettraient la paix des ses Etats (Art3). La France se portait garante de l'application des conventions liant les autres pays à la Régence de Tunis (Art 4). Le ministre résident représente désormais le gouvernement français, il veille à l'application du traité ; il est également l'intermédiaire des autres pays européens (afin de prévenir leurs intrigues) dans leurs rapports avec le bey. (Art 5). Les agents diplomatiques français et consulaires français sont à partir de la signature du traité chargés de la protection des intérêts des Tunisiens se trouvant à l'étranger. Le bey doit s'engager à ne pas signer de traités internationaux sans en avoir informé au préalable avec le gouvernement français (Art 6). Suivent ensuite la contribution de guerre, la prohibition, la contrebande des armes et de la poudre ainsi que la mise en place d'une commission pour réorganiser la finance de la régence (Art 7, 8 et 9). ³¹

Conformément à la Constitution française, le traité, soumis à l'approbation parlementaire, était déposé le 13 mai sur le bureau du Sénat et, le 14 sur celui de la chambre des députés. Il est accueilli dans les deux enceintes par de vifs applaudissements et est approuvé le 23 mai par la Chambre sur un rapport de M. Antonin Proust, et le 27 mai au Sénat sur le rapport de M. de Rémusat. Après la signature du traité, la Turquie multiplia dans la Tripolitaine les manifestations pour créer de troubles à la frontière, l'Angleterre a eu une mauvaise humeur mais de courte durée et l'Italie se montra très vexée et de ce fait, une crise ministérielle s'est produite. En remettant le texte ratifié par le Président de la République, et par la même occasion la copie de la commission qui l'accrédite auprès d'elle comme Ministre-Résident de la République français en vertu de l'article 5 de ce traité, Roustan déclare pour rassurer un bey très inquiet : « (...) Votre Altesse connaît mon respect et mon dévouement pour sa personne et mon zèle pour les intérêts de son pays. Je continuerai à m'inspirer des mêmes sentiments dans l'exercice de mes nouvelles fonctions (...) je vous prie de me conserver la même bienveillance qu'elle (son Altesse) a daigné me témoigner jusqu'ici » ³²

²⁹ PAVY (Auguste), *Histoire de la Tunisie*, p364

³⁰ Les textes établissant le protectorat français sur la régence de Tunis étaient pour l'essentiel assez voisins de ceux qui devaient trente ans plus tard instituer le protectorat sur le Maroc

³¹ Par le décret du 9 juin 1881, complétant le traité du Bardo, le bey s'est borné « à conférer au Ministre –Résident de France à Tunis le rôle d'intermédiaire officiel et unique dans les rapports avec « les puissances amies ». Il s'agit d'une « simple » délégation de pouvoir, et que le bey n'a pas renoncé à la faculté d'entretenir une armée même si celle-ci a un rôle symbolique.

³² Archives Nationales de Tunisie (ANT), Tunis, Série historique, Carton 215, dossier Protectorat mai 1881, Pièce 182

LA FRANCE EN TUNISIE: POUVOIR, EXCLUSION ET DOMINATION

Le régime du protectorat est le système de colonisation le mieux adapté à la III^{ème} République. Dans un régime parlementaire où le pouvoir législatif peut à tout moment retirer sa confiance au gouvernement et provoquer une crise ministérielle, le protectorat, en soustrayant la régence au contrôle parlementaire, limite les effets d'une instabilité politique chronique. Il est assurément permis de se demander si le gouvernement de la République n'a pas, dans la perspective d'une politique d'expansion coloniale, favorisé un système de colonisation qui lui permet de s'abriter derrière la souveraineté fictive, laissée pour la circonstance au bey local, et d'échapper ainsi à la censure parlementaire. Le système du protectorat permet, en effet, au gouvernement de procéder à l'organisation d'un territoire colonisé sans être paralysé par le contrôle tatillon des Chambres. De plus, la situation démographique de la France, caractérisée par un faible accroissement naturel, cadrerait mieux avec le régime du protectorat qui ne nécessitait pas une colonisation de peuplement.

Le terme de « Protectorat » est bien choisi, il implique l'idée de réciprocité d'obligations. Il faut l'envisager contre la perte des droits du protecteur en cas de manquement. Au cas où le pays signataire du protectorat n'est pas dans le strict droit des colonies, il l'est cependant en plusieurs sens (différents) puisque le pouvoir y est partagé. A notre avis, un pays protégé, comme le fut la Tunisie, n'est qu'un « pseudo-Etat » ou un Etat « mi-souverain » qui ne détient le pouvoir exécutif et législatif qu'en principe, en fiction. Et même s'il a ces pouvoirs, il ne les a pas seul. Si les décrets tunisiens sont pris au nom du bey, ils sont élaborés, proposés et contrôlés par le pouvoir français en place. Il y a donc association et collaboration dans le protectorat entre les deux pouvoirs, le pouvoir indigène tunisien et le pouvoir français. Il y a toujours, dans ces cas, domination : une domination certes très peu perçue parfois, mais toujours déclarée.

Pour l'historien René Rémond « *Le protectorat comporte la reconnaissance partielle d'une singularité qui empêche de le confondre avec le métropole. Il ya des degrés dans la dépendance, et le protectorat connaît une dépendance atténuée. Dans le régime du protectorat, pratiqué par la France, la fiction d'un Etat subsiste. S'appliquant généralement aux pays qui constituaient des unités politiques ayant eu des relations internationales. Le protectorat tient compte de ce passé, respecte l'unité politique.* »³³

En apparence donc, la Régence³⁴ continuait à être dirigée par un prince souverain (le bey) mais le traité du protectorat restreignait considérablement son pouvoir.

Les textes établissant le protectorat français sur la régence étaient pour l'essentiel assez voisins de ceux qui devaient, trente années plus tard, instituer le protectorat français sur le Maroc. La plupart de juristes admettent en effet que, formellement, la Tunisie n'a pas aliéné, en 1881, sa souveraineté interne.

Le traité du Bardo, signé le 12 mai 1881, tout comme plus tard le traité de Fès pour le Maroc,³⁵ est un acte de droit international, passé entre deux Etats. Dans son article 2, il proclame en effet que : « S.A. le bey de Tunis consent à ce que l'autorité militaire française fasse occuper les points qu'elle jugera nécessaires pour le rétablissement de l'ordre et la sécurité de la frontière et du littoral ». Mais le même article précise ensuite que : « Cette occupation cessera lorsque les autorités militaires

³³ REMOND (René), *Le XIX^{ème} siècle (1815-1914)*, éditions du Seuil, Paris, 1974, pp 213-214.

³⁴ Archives Diplomatiques du Quai d'Orsay (Paris). Le budget des recettes de la Tunisie qui était de 17.980.000 piastres en 1881-1882 (la valeur de la piastre oscillait entre 0.60 F et 0.65 F, au mois de mai 1883 Paul Cambon l'estimait à 0.6076 F), passait à 23.753.330 en 1883-1884, à 30.860.885 en 1884-1885, à 34.200.276 en 1885-1886. A.E Tunis. Vol 67 bis et Vol 76 - Rapport au Président de la République sur la situation de la Tunisie. (1881-1890) pp 131 à 133 et pp 136 à 145.

³⁵ Pour le Maroc les textes de 1912 ne prévoient pas le délai au terme duquel les droits protecteurs expireront ou se transformeront, le traité du Bardo est plus explicite.

françaises et les Tunisiens auront reconnu d'un commun accord que l'administration locale est en état de garantir le maintien de l'ordre. » Certes, des limitations sévères sont imposées à la souveraineté tunisienne, mais même en ce qui concerne les rapports entre la régence et les Etats étrangers, le bey n'abdique pas sa souveraineté internationale.

Par le décret du 9 juin 1881, complétant le traité du Bardo, le bey s'est borné à conférer au ministre résident général de France à Tunis le rôle d'intermédiaire officiel et unique dans les rapports avec les puissances amies.

Il s'agit d'une simple délégation de pouvoirs, le bey n'a pas davantage renoncé à la faculté d'entretenir une armée même si celle-ci a un rôle symbolique.

La convention de la Marsa, conclue le 8 juin 1883, donne à la puissance protectrice le droit de promulguer les réformes. Il suffit de citer l'article premier qui disait : « *afin de faciliter au gouvernement français l'accomplissement de son protectorat, S.A le bey de Tunis s'engage à procéder aux réformes administratives, judiciaires et financières que le gouvernement français jugera utiles* ». Cet article aurait pu servir de prétexte aux autorités françaises pour substituer à un régime de protectorat un régime d'administration directe. Cette deuxième convention contenait le mot « protectorat » et autorisait le gouvernement français à mettre son veto à tout acte émanant du bey susceptible de nuire à la bonne administration de la Régence. Pour de nombreux juristes, les conventions de 1881 et 1883 étaient, du point de vue juridique, des formules assez souples pour pouvoir fonder ultérieurement un régime d'autonomie interne.

C'est un projet en dix articles, prévoyant l'occupation d'un certain nombre de points stratégiques dans la Régence. En cas de refus du bey, une démonstration navale dans les eaux tunisiennes appuyée par l'intervention d'une force militaire sur la frontière, devait amener ce dernier à composer et à céder. Les prétextes pour une intervention militaire ne manquaient pas. En effet, le gouvernement français pouvait ouvrir le dossier des Kroumirs (montagnards berbérophones du nord-est du pays) qui avaient, en 1878, pillé un navire français sur les côtes non loin de Tabarka et qui avaient, depuis lors, été la cause de bon nombre d'incidents frontaliers. Le bey se révélait incapable d'inquiéter ces montagnards et les promesses d'indemnités aux familles des rescapés étaient restées sans suite, donnant un prétexte à la France pour intervenir. Les institutions tunisiennes étaient alors en pleine décadence, et la banqueroute financière du régime avait déjà été à l'origine d'une mise sous tutelle exercée conjointement par la France, l'Angleterre et l'Italie.

Le projet avait été soumis au président Mac Mahon qui l'avait approuvé. Mais les ministres sont hésitants à cause des risques encourus. Gambetta, dont les sympathies pour l'Italie sont connues, avait jugé inopportun tout projet d'intervention dans la Régence, voulant éviter une rupture avec l'Italie, et souhaitant ne pas laisser Mac Mahon en retirer le prestige, dans le contexte d'hostilité latente prévalant depuis la crise du 16 mai.

« *L'affaire de Tunis* » connaissait donc un temps d'arrêt, et l'on ne s'intéressait au plan international qu'à la question de la rectification des frontières grecques que la France avait soulevée au congrès de Berlin. Cette question monopolisa l'attention du gouvernement français jusqu'au début de l'année 1881. « L'affaire Sancy » vint réveiller la question tunisienne au début de 1879, mais l'ultimatum de Waddington³⁶ n'était pas appliqué puisque le bey avait souscrit aux exigences françaises. Avec le ministre Freycinet,³⁷ la question de Tunis fut relancée pour la troisième fois, après que l'Italie ait affirmé ses vues sur la Régence, avec notamment l'achat de la ligne Tunis-la

³⁶ William Henry Waddington (1826-1894), homme politique et archéologue français d'origine britannique. Il fut ministre de l'instruction publique (1873 et 1877) et des affaires étrangères (1877-1879) puis président du Conseil (février- décembre 1879). Dictionnaire encyclopédique de la langue française. p. 1639.

³⁷ Ministre du 27 décembre 1879 au 23 septembre 1880.

Goulette par la Société Rubbatino. Alerté par le baron de Courcel,³⁸ Charles de Freycinet, président du Conseil et ministre des Affaires étrangères (du 28 décembre 1879 au 23 septembre 1880), avait fini par se décider à l'action et incite Roustan, en mai 1880, à reprendre avec le bey les discussions au sujet du projet de protectorat, rédigé par Waddington³⁹ à la fin de 1878.

Le bey s'opposa à toute négociation. Charles de Freycinet n'osa pas s'engager plus avant. En effet, il fallait ajouter à l'attitude de l'Italie⁴⁰ le résultat des élections anglaises d'avril 1880 amenant au pouvoir à Londres le cabinet Gladstone qui semblait moins bien disposé envers la France que celui de Disraeli. Charles de Freycinet, et par la suite Jules Ferry, pensaient que le nouveau cabinet allait rendre incertaine l'exécution de la promesse donnée en 1878 par Salisbury. Aussi, avec l'arrivée de Jules Ferry au pouvoir, en septembre 1880, la politique gouvernementale continuait à se caractériser par les mêmes hésitations. Le ministre des Affaires étrangères d'alors, Barthélémy Saint Hilaire, ne s'intéressait qu'à sa position d'arbitre européen entre l'Empire ottoman et la Grèce pour résoudre le problème des frontières qui opposait ces deux pays. Bismarck, ironisant à propos de ses voisins, disait en janvier 1881, que « *les Français jettent aux moineaux grecs la poudre qu'ils devraient réserver pour le pigeon tunisien* ».

Cependant, influencé par Roustan et le directeur des affaires politiques de son ministère, Barthélémy Saint Hilaire posa la question devant le conseil des ministres en janvier 1881. Il espérait influencer ses collègues pour régler la question de Tunis avant les élections législatives prévues en fin d'année. Mais le conseil s'opposa à toute intervention immédiate. « *Une expédition à Tunis, dans une année d'élection, avait dit Jules Ferry,... mon cher Saint-Hilaire, vous n'y pensez pas?* » Les élections approchaient, et personne ne pensait que la France serait en mesure d'entreprendre une action militaire. Le gouvernement était contre ; au Parlement, les monarchistes prônaient le « recueillement », la gauche républicaine de Georges Clemenceau y est opposée parce que les aventures colonialistes détournent l'attention des provinces perdues d'Alsace et de Lorraine. Les positions s'inverseront en trois ou quatre générations.

Cependant, la situation allait changer au cours du mois de mars de la même année. Le gouvernement décida en effet de recourir à l'intervention militaire. C'est à l'action du baron de Courcel que revint la responsabilité de ce revirement de la politique française en Tunisie.⁴¹

Directeur des affaires politiques au ministère des Affaires étrangères, bonapartiste et certainement influencé par la politique de Talleyrand dont il était un admirateur, de Courcel croyait à la nécessité d'occuper la Régence de Tunis. Mis au courant de l'opinion du bey et des grands États européens sur l'affaire de Tunis par une correspondance particulière avec Roustan ainsi qu'avec les ambassadeurs à Berlin, Rome et Londres, il avait jugé, dès le Congrès de Berlin, que la prise de Tunis était possible, et n'entraînerait pas de crise internationale.

³⁸ Alphonse Chodron de Courcel. Né à Paris le 30 juillet 1835 et mort le 17 juin 1919. Diplomate et homme politique français, ambassadeur de la France auprès de l'empire allemand (1881-1886) et représentant de la France à la conférence africaine de Berlin (1884-1885). Sénateur de Seine et Oise, ambassadeur à Londres 1894-1898.

³⁹ William Henry Waddington (né le 11 décembre 1826 et décédé le 13 janvier 1894). Homme politique et archéologue français. Député en 1871, sénateur de l'Aisne 1876-1894. Président du Conseil du 4 février au 28 décembre 1879. Ministre des affaires étrangères de 1877 à 1879, représentant français au congrès de Berlin (1878).

⁴⁰ Pour contrecarrer l'action française, le consul Licurgo Maccio (Consul d'Italie à Tunis de 1878 à 1881) avait subventionné un journal imprimé en arabe « *Le Mostakel* » (« L'indépendant ») et distribué la plupart de ses exemplaires gratuitement. Ce journal, qui continuera à paraître jusqu'en avril 1881, était vivement critiqué par la presse française.

⁴¹ Le Baron de Courcel écrivait à Roustan, le 4 novembre 1880, sur l'influence française à propos de l'Enfida « *Je ne crois pas que nous puissions accepter un échec sur l'affaire de l'Enfida. Vous suivez à cet égard la voie qui vous paraît la plus convenable, mais que le contrat soit arabe ou français l'essentiel est qu'il tienne bon. Je n'ose vous dire encore que nous prendrons les grands moyens parce que notre situation intérieure ne nous le permet pas mais vous serez soutenu...* »

Malgré leurs divergences d'opinions, de Courcel rencontra Gambetta au mois de mars, lui exposa ses idées et obtint son assentiment sur la nécessité d'une action énergique à Tunis. Le revirement de Gambetta, dont l'autorité était toujours décisive bien que qu'il ne fût pas au gouvernement, fut déterminant dans l'orientation de la politique tunisienne et dès la fin du mois de mars. « *Gambetta décidé, Jules Ferry se décida à son tour* ». Il semble que le Président de la République, qui pensait en juillet 1880 que l'affaire de Tunis « *ne valait pas un cigare à deux sous* », ait changé d'avis puisqu'il approuvait, en 1882, le protectorat au cours d'une conversation avec le sénateur Labiche, rapportée par le député Bernard Lavergne : « *Vous avez tort de dire que nous n'aurions pas dû aller en Tunisie. Si nous ne l'avions pas fait, les Italiens s'en seraient emparés et c'était un danger.*⁴² »

C'est dans ce contexte de changement d'opinion chez les hommes politiques les plus influents que se situe l'expédition militaire de la régence de Tunis, et la signature du traité de Bardo le 12 mai 1881. Le procès du journal « l'Intransigeant » s'ouvrit en décembre 1881 dans ce contexte. En effet, Rochefort avait publié en septembre un article sur les affaires tunisiennes, accusant Roustan et Gambetta de diverses malversations financières. À la surprise générale, Rochefort fut acquitté. Gambetta, pour exprimer sa confiance dans les agents du gouvernement, maintint Roustan dans son poste. Ce procès fut la dernière phase du développement de l'affaire tunisienne en 1881. Avec ce procès, la loi sur la liberté de la presse, promulguée au mois de juillet de la même année, recevait sa première application. L'année 1881 fut ainsi non seulement une année d'élections, celle de la libération de la presse mais aussi l'année où la Troisième République entreprit sa première expédition militaire à l'étranger⁴³. En collaboration avec le gouvernement beylical, Paul Cambon⁴⁴ mit en place les institutions du protectorat dont le but était de « gouverner le pays de haut en bas. » L'autorité du protectorat, dès son installation, fit preuve d'une grande complaisance à l'égard des chefs de l'administration locale qu'elle voulait à tout prix s'attacher pour restaurer son influence dans la régence. Certains caïds, accusés de corruption et de prévarication, furent destitués, mais le véritable mobile de ces destitutions était leur hostilité aux autorités françaises. Les nouveaux caïds complaisants, nommés sous le contrôle du Protectorat, ne manquaient pas de tirer avantage de la confiance et de la protection du corps d'armées dont ils jouissaient pour en tirer les plus grands avantages, notamment en s'enrichissant au détriment de leurs administrés.

L'ADMINISTRATION⁴⁵ TUNISIENNE MAILLON DU POUVOIR FRANÇAIS

En apparence, la Régence continuait à être dirigée par un prince souverain (le bey était autrefois un dignitaire de l'Empire Ottoman mais n'a jamais été un dignitaire religieux en Islam. Le

⁴² SAIDI (Hedi), *Rapports colons colonisés en Tunisie. L'exemple de Dar Elbey 1880-1919*, éditions Farjallah, Sousse, p 19.

⁴³ Le 8 novembre 1881, Clemenceau disait à la tribune de la Chambre à propos de cette affaire : « Je n'aperçois dans toutes les entreprises que des banques qui sont à Paris, qui veulent faire des affaires et gagner de l'argent à la bourse; Ces affaires là peuvent intéresser des particuliers mais elles n'intéressent pas l'intérêt national... ». Cité par B. Lavergne, *Les deux présidences de Jules Grévy 1879-1887*, p.95.

⁴⁴ A son arrivée, P. Cambon écrivit à propos des finances tunisiennes : « *On pourrait surveiller et améliorer la perception des impôts actuels et les modifier progressivement de façon à n'imposer au budget français que des charges minimales.* » A.E Tunis, Vol 167 bis, Cambon à Freycinet, Tunis, 22 avril 1882.

⁴⁵ Il est difficile de traiter l'histoire de l'administration dans les colonies sans accorder aux interprètes et aux traducteurs l'intérêt qu'ils méritent, par ce que cette administration ne pouvait se passer de ces « intermédiaires ». Bien qu'il occupait une position inférieure par rapport aux autres fonctionnaires, l'interprète a participé d'une manière très directe à la mise en place des institutions françaises. Rien ne fonctionnait sans l'assistance d'un traducteur ou d'un interprète dans un pays multilingue. Pour plus d'approfondissement voir l'excellent article de Heng Guirat, *Le fonds de l'actuel tribunal d'appel de Tunis : une source pour l'écriture de l'histoire de l'administration ?* In *Les Archives de l'administration et du personnel de l'Etat en Tunisie à l'époque moderne et contemporaine*, Tunis, 2009, pp. 3-16.

principal dignitaire religieux de la Tunisie était le bach-mufti cheick el Islam), mais deux actes du traité de Ksar Saïd et la convention signée à la Marsa, restreignaient considérablement ses pouvoirs.

LE CONFLIT IDEOLOGIQUE: LE CLASH

Le bey avait deux ministres : le « premier ministre » qui dirigeait les caïds ou administrateurs territoriaux et le « ministre de la plume » (*Bach katib*), mais les véritables ministres étaient les ministres français : le ministre des affaires étrangères qui n'était autre que le Résident général, le ministre de la guerre qui était le Général commandant le corps d'occupation, puis les chefs des grands services publics, de l'enseignement, lesquels étaient appelés à siéger dans les conseils du gouvernement et préparaient chaque année le budget. Le Résident général présidait les conseils des ministres en collaboration avec un secrétaire d'ambassade français qui occupait l'important poste de secrétaire général du gouvernement beylical.

Ailleurs, dans le reste de la Régence, des caïds sont nommés (sortes de préfets résidents) et assistés d'un ou de plusieurs *Kahia* chargés de l'administration locale.

À leurs côtés, dans une situation d'observateurs étaient les « contrôleurs civils », vice-consuls de France, qui exerçaient auprès des autorités tunisiennes les mêmes fonctions de direction et de conseil que celles du Résident général auprès du bey.

Ils étaient au nombre de 14, installés à Tunis, Mateur, Bizerte, Bejà, Sfax, Kairouan, Le Kef, Nabeul, Souk, El Arbaâ, La Goulette, Sousse, Djerba et Tozeur, et représentaient le corps des fonctionnaires français en Tunisie. Ces contrôleurs ne devaient pas administrer directement, mais leur rôle n'en était pas moins considérable car ils avaient pour charge de visiter des tribus, recevoir les habitants et contrôler l'application des lois. C'était là l'une des réformes que le système de protectorat s'était empressé de réaliser.

Enfin, nous pouvons citer l'institution de municipalités, la réduction des effectifs de l'armée beylicale, la réorganisation de l'enseignement, la création d'une justice française, l'institution de l'état-civil et la suppression des capitalisations qui mettaient la France en position particulière et privilégiée en Tunisie. Ces capitulations permettaient de placer les étrangers⁴⁶ vivant en pays musulman sous la juridiction de leurs consuls qui étaient seuls qualifiés à pouvoir les juger, les condamner et exécuter les jugements prononcés.

Au premier août 1884, tous les tribunaux consulaires étrangers étaient fermés en Tunisie et les juridictions françaises étendirent leur compétence à toutes les affaires concernant la population européenne. Certains colons, appuyés en France par des hommes politiques et notamment par la députation algérienne, avaient demandé la déposition du bey,⁴⁷ l'annexion pure et simple de la Tunisie. Il faut noter que chaque jour, l'administration française étendait sa mainmise sur le pays, même si les décrets du bey étaient toujours datés de l'année de l'hégire et précédés des formules rituelles musulmanes. Une ère nouvelle commençait, celle de la soumission et de l'exploitation. Il ne faut pas, d'après ce qui était dit, conclure que s'il n'y avait pas eu *l'affaire de l'Enfida*, la Société Marseillaise, la vente de Khaireddine, la colonisation n'aurait jamais vu le jour.⁴⁸

⁴⁶ Ils font un effort gigantesque pour informer, motiver et encourager l'immigration vers les pays neufs et popularisent très bien l'image du soldat laboureur, du missionnaire et du colon courageux, venus apporter la grande civilisation aux barbares d'Outre-mer. Paul LEROY BEAULIEU : De la colonisation chez les peuples modernes. Alcan Éditeur - Paris 1874-autres éditions 1882.1886-1891-1901-1908-

⁴⁷ Archives Diplomatiques du Quai d'Orsay (Paris). Le Quai d'Orsay prescrit à Cambon à la fin de février 1883 de ne pas soumettre à la signature du bey le décret sur le budget qui peut entraîner des difficultés internationales (A.E. Tunis, Vol 72, Challemeil. La cour à Cambon, Paris, 24 Fev. 1883.

⁴⁸ Nous pensons en revanche que l'achat de ce vaste domaine (le plus vaste de la Tunisie) était l'une des plus importantes raisons.

Car, au fond, les raisons fondamentales étaient les transformations économiques et sociales qu'avait connues l'Europe dans les années 1870 et qui avaient entraîné le système capitaliste dans une nouvelle phase. À partir de 1870, l'Europe connaît une dépression économique, la compétition est de plus en plus acharnée et exige surtout l'ouverture de nouveaux marchés pour les marchandises et les capitaux !

*L'expansion coloniale est un système politique et économique(...) à trois ordres d'idées, à des idées économiques, à des idées de civilisation la plus haute portée et à des ordres politique et patriotique*⁴⁹, selon la formule de Jules Ferry.⁵⁰

Vers 1880, 66 % du commerce mondial est entre les mains des Européens, qui commence à imposer une division internationale du travail. Aux pays neufs, elle achète des produits bruts agricoles ou miniers à des prix qu'elle détermine, en contrepartie elle leur fournit des objets manufacturés. L'Europe exporte aussi ses capitaux, et à partir du milieu du XIX^e siècle, elle est devenue le banquier du monde. Si la situation financière de la Régence était fort encourageante pour les investisseurs européens et français⁵¹, la Tunisie par contre ne représentait pas un marché important capable de résoudre le problème de la surproduction dans ces pays capitalistes industrialisés. La population tunisienne ne dépassait pas le million et le niveau de vie était tellement bas que les marchandises françaises et européennes ne représentaient aucune nécessité pour les habitants nomades et semi-nomades vivant en économie de subsistance. De plus, il manquait à la Régence des moyens de communication (routes, chemins de fer, ports) capables d'assurer l'écoulement de ces marchandises.

Cette infrastructure délabrée avait suscité l'intérêt des investisseurs de capitaux français, elle était source de profit et de gain. Les capitalistes financiers français avaient toujours d'autres sources de gain, non moins considérables, tels que l'achat des terres des grands propriétaires qui voulaient s'en débarrasser.⁵²

LES CONTROLEURS CIVILS, BATISSEURS DU PROTECTORAT

On peut ici analyser les rapports et les relations qu'un contrôleur civil membre de l'élite, nome et entretient avec les milieux tunisien et français en Tunisie. Qu'est ce qu'un contrôleur civil ⁵³? Que peut-il apporter et refuser au cours de sa carrière ?

À côtés des caïds, dans une situation d'observateurs, ils exercent auprès des autorités tunisiennes les mêmes fonctions de direction et de conseil. Ce sont des fonctionnaires locaux, des acteurs de premier plan aussi bien dans l'histoire de la Tunisie contemporaine et les piliers de ce colonialisme de type nouveau inventé par la Troisième République.

⁴⁹ FERRY (Jules), *Les fondements de la politique coloniale*, discours à l'Assemblée nationale, le 28 juillet 1885

⁵⁰ Homme politique français (1832-1893). Député, maire de Paris, ministre, il est considéré comme un des pères fondateurs de l'identité républicaine en France.

⁵¹ Archives Diplomatiques de la Courneuve. Cambon écrivait à Ferry le 8 décembre 1884 : « L'établissement en Tunisie d'un régime foncier permettant à la colonisation de se développer à l'aise dans les vastes et fertiles campagnes qui ouvre le protectorat français sur la Régence » A.E, Tunis, vol 85, Cambon à Ferry.

⁵² Le domaine de l'Enfida en est le meilleur exemple. Le retard engendré par l'administration française à autoriser ces capitaux français privés à s'installer en Tunisie s'expliquait par la politique intérieure française et les ennuis rencontrés en Algérie (morts, dégâts matériels). L'opinion publique était incapable de supporter car elle était obsédée par la question de l'Alsace et de la Lorraine.

⁵³ Voir à ce sujet MOUILLEAU (Elisabeth), *Les contrôleurs civils en Tunisie (1881-1956)*, thèse d'histoire soutenue en 1998 à l'université de Paris 3, 1882 pages.

Ils sont au nombre de 14⁵⁴, installés à Tunis, Mateur, Bizerte, Bejà, Sfax, Kairouan, Le Kef, Nabeul, Souk, El Arbaâ, La Goulette, Sousse, Djerba et Tozeur, et représentent le corps des fonctionnaires français en Tunisie. Ces contrôleurs ne doivent pas administrer directement, mais leur rôle n'en est pas moins considérable car ils ont pour charge de visiter des tribus, recevoir les habitants et contrôler l'application des lois. Leur rôle louvoie ainsi entre deux comportements.

La période de la fondation 1884-1897: une phase « démilitarisée »

Le contrôleur civil est en théorie un administrateur qui n'administre pas ce qui laisse à la fonction, à ses débuts un champ d'exercice large parce que mal défini. Le système confère au contrôleur civil un pouvoir si étendu qu'il échappe à toute taxinomie juridique. Il dépend des faits, des hommes et non des idéologies. Durant cette période, les contours de cette fonction nouvelle se préciseront progressivement. Cette période est imprégnée par le souci de créer des rapports nouveaux avec les chefs indigènes et d'imposer une tutelle respectueuse aux populations. Ici, le contrôleur civil est le fonctionnaire républicain pris dans l'engrenage du système protecteur.

1897-1938: le temps de la stabilisation

C'est également le temps de la colonisation officielle dans un climat d'efflorescence du fait colonial et du développement du nationalisme tunisien. À peine la fonction de contrôleur civil stabilisée, elle est remise en cause et tout le système qui va avec. La crise des années trente, la radicalisation progressive du mouvement national sous l'impulsion d'une génération nouvelle ont bousculé l'« intelligent équilibre ». Les contrôleurs se soucient de maintenir l'ordre dans la Régence, seule une minorité d'entre eux demeure encore soucieuse d'établir des rapports courtois avec les indigènes. Pendant cette période, il est le fonctionnaire colonial qui met sans état d'âme son expérience du métier et son savoir répressif au service de la colonisation.

LES PREPONDERANTS⁵⁵ UN GROUPE AUTORITAIRE OPPOSE AUX NATIONALISTES TUNISIENS⁵⁶

Le collectif des Prépondérants apparaît essentiellement comme l'expression du pouvoir agricole en Tunisie. Il faut entendre par là les colons de la première vague, ceux qui ont été les premiers à s'installer en Tunisie et qui ont pu ainsi disposer des capitaux nécessaires et de l'appui technique pour mettre en valeur les terres. Ce collectif est un simple aboutissement de la colonisation française.⁵⁷

Le fondateur de ce groupe d'intérêt, Victor de Carnières directeur du journal *La Tunisie Française*,⁵⁸ (appelé "*le seigneur de Soliman*"), est un grand propriétaire au Cap Bon où l'on

⁵⁴ Parmi eux Pierre BARDI, Contrôleur civil à Tunis en 1922 et René STABLO, contrôleur civil de Djerba de 1936 à 1941.

⁵⁵ Il faut dire que le terme Prépondérants est quelque peu anachronique, car il faut attendre 1907 pour qu'il soit introduit dans le vocabulaire politique. Récupéré par les réformistes tunisiens, il désigne tous les privilèges dont peuvent profiter les colons français, les Prépondérants étant ceux qui sont les plus attachés à conserver leurs privilèges.

⁵⁶ *La Tunisie Française*, 22 septembre 1894

⁵⁷ Par le moyen de l'immatriculation d'une part et de l'achat de terres à des prix dérisoires au profit de grandes sociétés (comme la "Société Marseillaise de Crédit" ou la "Société Cléricale de l'Union foncière de Tunisie") et des grands capitalistes, le domaine agricole colonial progresse rapidement au nord du pays. Un décret promulgué en 1886 vient ouvrir les terres *habous*, qui sont en principe inaliénables, à la colonisation. Enfin, en 1890 on crée la Direction de l'Agriculture qui donnera en 1896 la Direction Générale de l'Agriculture, du Commerce et de la Colonisation dans le but de confisquer des terres appartenant soit aux tribus soit à l'administration des *habous* privés

⁵⁸ Fils d'un haut magistrat, celui-ci, né en 1849, et après des études juridiques qui devaient le préparer à la carrière d'avocat, finit par se découvrir une vocation d'agriculteur. Il arrive en 1883 en Tunisie où il s'installe comme colon à

produit du vignoble, où l'on entretient des pépinières d'arbres fruitiers et où l'on vend des arbres forestiers et des arbres et plantes en pot. Il en est de même de ses collaborateurs : Léon Moncelon est propriétaire à Bizerte, Jean-Baptiste Aquaviva est membre de la Chambre d'Agriculture de la circonscription du Kef, G. Aubé est président du syndicat des viticulteurs. D'autres membres du groupement qui participent à la vie du journal, quoique anonymes parce qu'ils signent leurs articles par un X, un double X ou un triple X., paraissent aussi être bien expérimentés en matière d'agriculture. Ces colons agriculteurs, qui sont déjà en 1892, résidents en Tunisie depuis dix à douze ans, se considèrent comme les défenseurs attitrés des intérêts français dans le Protectorat et voient d'un mauvais œil la prolifération des fonctionnaires vers la fin des années 1890. Ils aspirent à un engagement toujours plus grand du gouvernement français dans la colonisation des terres et l'implantation des colons et constatent, non sans désarroi, l'indifférence du gouvernement du protectorat à leur égard. En effet, de Carnières écrit en 1899 : „On demeure confondu lorsqu'on se rappelle l'état des esprits en 1894, époque de l'arrivée à Tunis du Résident général (René Millet), la situation prospère de la Tunisie, son avenir heureux, tranquille, et que l'on constate en quel désarroi cinq années de folle administration ont précipité la régence”.

Il faut dire, quand même, que l'émergence du groupement des Prépondérants est un peu l'expression des premières angoisses de la colonie française dans son ensemble vis-à-vis de la situation démographique en Tunisie dans les années 1890. Cette situation se caractérise par la faiblesse du nombre des colons français par rapport au nombre de ressortissants européens.⁵⁹

De 1881 à 1890, le nombre des Français progresse peu, l'immigration française étant liée presque seulement aux besoins de l'administration. À partir de 1890, avec la création de la Direction Générale de l'Agriculture, l'immigration française devient un programme de gouvernement. Certes, le nombre des Français se multiplie par cinq entre 1891 et 1911, mais il ne représente encore que la moitié du nombre des Italiens. La présence italienne constitue pour les Français un véritable danger, car cette communauté constitue une colonie bien structurée avec ses commerçants, ses industriels, ses agriculteurs, ses avocats, ses hôpitaux, ses écoles, ses journaux, ses sociétés de toutes sortes, ses agents consulaires installés dans plusieurs ports du pays : La Goulette, Monastir, Gabès, Mahdia, Jerba, etc. et au-delà une capacité inégalable d'intégration.

Investissant d'abord, et dès l'institution du protectorat, le système politico-administratif, cette colonisation conserve, certes, la vieille hiérarchie tunisienne d'administration directe, qui est constituée du premier ministre, des *caïds* (représentants locaux de cette autorité), des *cheïkhs* (agents de liaison entre les administrés et l'autorité) ; mais elle la double d'une hiérarchie nouvelle qui est dirigée par le Résident général et qui est composée, d'une part de techniciens français faisant de l'administration directe, et d'un système français de contrôle, avec notamment les contrôleurs civils. Parallèlement à cette action de conquête de l'administration, d'importantes superficies cultivables sont acquises par la colonisation dès les premières années du protectorat.

Le groupement des Prépondérants s'attribue un double rôle. Il se présente d'abord comme le défenseur de la civilisation contre la barbarie, il se donne aussi l'image du vrai gardien des valeurs républicaines. La première mission découle d'un constat que font les Prépondérants : « Tous les peuples depuis les primitifs jusqu'aux plus civilisés de nos jours se divisent en deux catégories: ceux

Soliman (à une trentaine de kilomètres de Tunis). Il fonde le journal *L'Annexion* qui devient après quelques mois *La Tunisie Française* et réussit à se faire élire le digne représentant des colons agriculteurs, puisque dès 1894 il est nommé secrétaire général puis une année après vice-président de la Chambre d'Agriculture. À partir de 1896 il devient délégué à la Conférence Consultative. Sa liberté de langage et sa plume facile lui permettent d'occuper une importante place dans la scène politique tunisienne. Ses positions font de lui le porte-parole de la droite nationaliste en Tunisie, surtout après l'éclipse du groupement du journal *La Kasbah* de Paul Jacquinot d'Oisy qui était encore plus à droite.

⁵⁹ EL ANNABI (Hassan), *L'« Autre » à travers le journal La Tunisie française, Cahier de la Méditerranée*, 66/203, pp.322-323

chez lesquels la religion domine et règle tout et ceux qui, laissant à l'homme sa liberté de conscience, ont établi un recueil de lois civiles qui se sont modifiées et transformées avec le progrès de la science, ont constitué les codes de la Raison, indépendants des dogmes de la croyance et facilité ainsi l'éclosion de pensées nouvelles et le développement du progrès en laissant dans sa tour d'ivoire s'épanouir les scrupules de la conscience. Les premiers, parmi lesquels se trouvent presque tous les peuples extra-européens et les musulmans entre autres, constituent une race encore primitive, réfractaire à notre civilisation, fanatique par essence de par le développement exclusif donné aux dogmes religieux ». ⁶⁰

Alors à la question : quelle doit être l'attitude des Français à l'égard des indigènes ? « La réponse se trouve dans l'étiquette même de notre gouvernement. Protectorat équivaut à tutelle. Or, le tuteur administre les biens du pupille en bon père de famille sous sa responsabilité et sans prendre l'avis de l'intéressé. Ce qui revient à dire que la nation protectrice doit gouverner la nation protégée au mieux de leurs intérêts communs, qu'elle est tenue d'être juste et même bienveillante vis-à-vis d'elle et de la faire participer peu à peu aux progrès de la civilisation par des réformes opérées avec prudence et sagesse ». ⁶¹

Ainsi, pour les Prépondérants, civiliser ne veut pas dire assimiler, du moins pas immédiatement, et ils n'hésitent pas à taxer d'arabophilie toute mesure dans le sens de l'assimilation prise par le gouvernement du Protectorat en faveur des autochtones.

La position des Prépondérants se radicalise à partir de 1895, après que des délits sont commis par des Tunisiens à l'encontre de Français, notamment à Béja. De Carnières y voit tout de suite un changement dangereux dans la mentalité des habitants, qu'il n'hésite pas d'ailleurs à lier à l'attitude par trop conciliante et pas suffisamment ferme des autorités du protectorat à leur égard. Si l'attitude du groupement à l'égard des Tunisiens musulmans est commandée par la théorie de l'inégalité des races, celle qu'il affiche vis-à-vis des Juifs ⁶² de Tunisie relève en apparence du principe de l'égalité des sujets du bey dont les Prépondérants se font maintenant les grands défenseurs.

« Nous sommes résolu », *dit de Carnières*, « à combattre de toutes nos forces la tendance qu'ont les Juifs en Tunisie à s'isoler au milieu de la population indigène et de former, grâce à des institutions spéciales, une sorte d'Etat dans l'Etat ». « Et tout d'abord », *poursuit-il*, « nous demandons au gouvernement de ne plus faire de distinction entre les sujets tunisiens et de supprimer tous les privilèges qui créent aux Israélites une situation de faveur par rapport aux Musulmans. Il faut en finir avec les protections consulaires qui, moyennant quelques francs par an, donnent aux Juifs des droits sans leur créer de devoirs. Il faut exiger des enfants d'Israël les mêmes impôts que payent les autres sujets beylicaux : il faut les soumettre comme les Arabes au service militaire. Il faut enfin expulser de la Régence cette Alliance Israélite Universelle qui vient, en pleine colonie française, façonner une partie importante de la population aux idées des ennemis de la France ». ⁶³

Ainsi, cachant mal son antisémitisme ce groupement constate avec amertume que Tunis est devenue "*la nouvelle Jérusalem*" des Juifs, car ces derniers y sont choyés, cajolés et protégés. Or, pour les Prépondérants cette situation est dangereuse pour les intérêts français, car, disent-ils : "cette race singulière a conservé dans tous les temps et chez tous les peuples au milieu desquels elle a vécu et qu'elle a exploités, une homogénéité, une persistance de vues, un désir ardent de parvenir à la richesse et au pouvoir; tels que, partout, à la longue, elle a amené la réaction, la révolte, les mesures d'exception enfin qui, seules, en Espagne, en France, en Russie, dans les pays barbaresques, ont pu arrêter son expansion, et, pour un temps, mettre un terme à son envahissement".

⁶⁰ *La Tunisie Française*, 3 juillet 1897

⁶¹ *La Tunisie Française*, 8 juin 1895

⁶² *La Tunisie Française*, 26 juin 1897

⁶³ *La Tunisie Française*, 15 juin 1895

Le groupement du journal *La Tunisie Française* a la même appréhension à l'égard des Italiens vivant en Tunisie, quoique les raisons sont différentes. Ils affichent volontiers un nationalisme exacerbé lorsqu'ils évoquent les privilèges dont disposent les Italiens de Tunisie. "Ces Italiens sont vraiment nés coiffés!", s'exclame *La Tunisie Française*, « non seulement ils ont des consuls, des agents diplomatiques, des fonctionnaires de toutes sortes qui s'occupent d'eux, mais, ils trouvent encore, en Tunisie, dans l'administration française, des protecteurs et des clients »⁶⁴. Ces privilèges créent en faveur des Italiens une situation comparable à celle dont jouissent les Juifs. Mais, pour les Prépondérants la question italienne est autrement plus importante parce qu'elle pose un problème de souveraineté pour le gouvernement beylical. Un problème qui tire ses origines dans la signature du traité franco-italien du 25 janvier 1884.

LES PREPONDERANTS ET L'APPRENTISSAGE DU FRANÇAIS PAR LES INDIGENES

Les Prépondérants ont, les premiers, compris le danger de l'apprentissage de la langue française par les Tunisiens. Pour eux, « l'agitation » signalée dans le monde musulman, était « en grande partie, le résultat de l'instruction ». C'est pour cela qu'ils lancèrent dès 1889 une farouche campagne visant à limiter voire à supprimer l'enseignement du français aux indigènes. Ils considéraient que l'apprentissage de la langue et de la culture françaises qui ouvraient l'accès à la lecture d'ouvrages et de journaux, faisaient « brusquement surgir dans leurs âmes [celles des Tunisiens] des idées de liberté et d'égalité auxquelles ils ne sont prédisposés ni par l'éducation de la famille, ni par les traditions du milieu ambiant et qui, éclatant tout à coup dans leurs cerveaux mal préparés à les recevoir, se traduisent par un redoublement d'orgueil et des aspirations à un idéal vague dont leurs pères n'avaient jamais éprouvé le besoin. » Cette cabale lancée par les Prépondérants eut rapidement des effets.⁶⁵ L'administration coloniale qui était, au début des années 1880 animée par la volonté de diffusion de la langue française dans une logique assimilationniste, changea progressivement de politique. Ainsi, comme l'affirma Charles André Julien : « Alors que la France s'attachait à répandre sa langue de par le monde, elle s'employait à en limiter l'usage en Tunisie ». A travers leur journal, les Prépondérants se présentent à l'opinion coloniale et métropolitaine comme le rempart de la civilisation face à la barbarie, les garants de l'Etat de droit et les champions de la défense des intérêts coloniaux français en Tunisie. Cette image qu'ils se donnent d'eux-mêmes a son corollaire dans les représentations qu'ils portent sur l'autre.

CONCLUSION

La société tunisienne précoloniale est une société tribale sans classe. Les manifestations communautaires sont nombreuses et différentes d'une région à l'autre, certaines sont, cependant communes à toutes les tribus, telles que la présence des groupes communautaires, des Cheiks et des notables, une sorte d'exigence vitale pour celles-ci. Le pouvoir à l'échelle de chaque communauté s'acquiert d'abord sur place aux prix d'une lutte intense menée contre les notables rivaux, vient ensuite la confirmation par la suite par le pouvoir central. L'appartenance à une famille privilégiée et puissante économiquement, ayant réussi à acquérir une suprématie soutenue par un prestige religieux ou la caution d'un marabout, est un atout efficace pour procurer les pouvoirs.

⁶⁴ *La Tunisie Française*, 26 juin 1897

⁶⁵ ESSID (Myriem), *Les Jeunes Tunisiens, pionniers du mouvement national?* Mémoire de Master2: Langues, Cultures et Patrimoines, sous la Direction du Professeur Mansour SAYAH, Toulouse, Université Jean Jaurès, p.60

Les liens à l'intérieur de ses groupes sont basés sur la solidarité qui n'exclut pas une certaine violence. A ce niveau et comme nous l'avons montré auparavant, on peut parler de société segmentaire avec beaucoup de caractéristiques⁶⁶. Les razzias, que ce soit un moyen d'existence ou une tradition guerrière, celle-ci semble un fait habituel qui plonge souvent les territoires tribaux, autrement dit une partie du pays dans une atmosphère de guerre civile permanente et e détérioration des conditions de vie.

L'histoire confirme l'analyse que Pierre Bourdieu proposait pour l'Algérie, elle autorise à élargir ses conclusions à la Tunisie et au Maroc. Il n'en y a pas de motif pour dissocier arabophones et berbérophones, nomades et sédentaires, tribus maraboutiques ou non. La même structure est commune aux uns et aux autres: structure familiale, agnatique et patrilinéaire. Il faut cependant rectifier ce schéma. Des formes politiques ou religieuses indépendantes du cadre familial se superposent à lui. La plus ou moins grande force de ces superstructures, l'existence de survivances pré- islamiques, déterminent des contrastes certains dans la société des trois pays. En règle générale, on doit reconnaître aux berbérophones une vive originalité. Ils ont conservé de la culture pré-islamique un grand nombre de caractères : avant tout, la langue, mais un droit coutumier, une pratique religieuse extérieure à l'Islam.

Tous ces éléments contribuent à faire obstacle à l'intégration aussi de la société. Au Maghreb, la Tunisie étant la plus totalement arabisée, la plus profondément islamisée, la moins morcelée du point de vue géographique, offrait sans doute plus d'homogénéité que l'Algérie et le Maroc et par conséquent plus de possibilités d'échanges voire de changement.

La colonisation imposée à la régence est un acte d'autorité dans le principal objectif est de mettre le pays sous la domination française.

Dans ce régime de protectorat pratiqué par la France, la fiction d'un Etat subsiste. S'appliquant généralement aux pays qui constituaient des unités politiques ayant eu des relations internationales, le protectorat tient compte de ce passé en même tend elle cherche a étendre son autorité sur tous les domaines. Le régime protectoral instauré en Tunisie est un véritable désaveu de la constitution tunisienne. Tous les droits de l'homme, les droits du citoyen élaborés par cette constitution y sont bafoués. Le Tunisien n'avait pas les droits à la citoyenneté. En lieu et place de l'égalité, le protectorat a instauré une société à double vitesse, séparant la communauté tunisienne de la communauté française. Les lois appliquées aux Européens étaient généralement différentes des lois appliquées aux Tunisiens. Les deux communautés n'étaient pas soumises de façon égale au fisc. Les Tunisiens payaient plus d'impôts. Bien plus, cette discrimination existe aussi au niveau de l'affectation du budget. Environ 90% du budget provenait de ce qu'on appelait la population indigène. L'essentiel des dépenses était consacré au paiement des fonctionnaires coloniaux et à la construction d'une infrastructure correspondant aux besoins de la colonisation. De même en ce qui concerne le travail, si la France a aboli le régime de la corvée, elle le maintient sous le nom de « travail forcé ». Rémunérations et salaires sont bien inférieurs à leur niveau dans la métropole, d'autres formes d'autorités imposées aux Tunisiens, en Tunisie.

L'inégalité n'est pas seulement politique⁶⁷ et économique, elle s'étend au statut des personnes, à leurs droits civils et sociaux. Le régime colonial en Tunisie applique deux lois, deux droits. Pour les Tunisiens, l'administration coloniale applique un statut notablement inférieur à celui des Français de Tunisie et sont soumis à un régime administratif plus rigoureux. Ils ne peuvent pas se prévaloir

⁶⁶ HENIA(Abdelhamid), *L'exercice du pouvoir ans et sur les communautés locales en Tunisie aux XVIIIè et XIXè siècles*, MERFM, 115, 2003 ; pp. 581-583, p583.

⁶⁷ Parler d'inégalité politique est en vérité un euphémisme puisqu'elle implique qu'il y ait deux partenaires alors qu'on ne reconnaît pas à la Tunisie d'existence politique, qu'elle est considérée comme un simple laboratoire d'action et de décision politique, n'ayant donc aucune part aux décisions la concernant, qui sont prises en dehors d'elle et en son nom.

des libertés reconnues par la loi française. C'est le cas du droit syndical, pourtant reconnu en France depuis 1884 mais toléré en Tunisie seulement après la Seconde Guerre mondiale. Ce qui est licite en France est en Tunisie tenu pour un délit justiciable des tribunaux, poursuivi et sanctionné sévèrement par des amendes et/ou d'emprisonnement.

De plus, quelques uns des principes que la France tient depuis le XVIIIème, siècle des Lumières, pour élément constitutif de son identité et de sa construction, ne sont pas respectés, comme par exemple le principe de la séparation des pouvoirs cher à Montesquieu.

Les écrits proposés dans ce travail ne notifient pas une vérité absolue, et ne brandissent pas un prêt à penser, mais tentent de nourrir l'information et de fournir des pistes de réflexion. L'interdépendance de plus en plus accentuée des sociétés entraîne des brassages sans précédents de produits, d'idées, d'hommes enrichit les métissages. Les replis et les universalismes univoques sont totalement dépassés. Aujourd'hui le communautarisme, l'enfermement et le rejet de l'Autre menacent la société tunisienne traditionnellement tolérante et ouverte. Alors que ce pays est appelé à participer à l'évolution du monde méditerranéen et à animer le dialogue Nord/Sud, un repli identitaire et un fanatisme religieux (qui sont totalement étrangers à la culture et la société tunisiennes) menacent la Tunisie. Nous devons prévoir une création d'un monde nouveau à la hauteur des exigences de la mondialisation pour aider les hommes à mieux vivre et à mieux comprendre l'Autre. L'histoire culturelle a toute sa place pour comprendre les savoirs de l'« Autre ».

Nous ne prétendons pas avoir épuisé ce sujet mais pensons avoir ouvert les portes à des chercheurs qui pourraient traiter les points non débattus dans le travail.

Notre souhait le plus cher serait de voir poursuivre les pistes évoquées dans cette étude.

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Defining the environmental crime – Why is the global legal and political action urgently needed

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Abstract: *Preservation and protection of environment appears as one of the largest challenges of our time. It necessitates urgent but also comprehensive, planetary action. One of the key issues is to define a scope of future international instrument as well as its definition. This requires global political action, which will then eventually translate into a coordinated legal action and finally articulate itself in viable international treaty.*

Institutional collaboration among stakeholders and agencies needs to be improved as much as the currently existing approaches need to be harmonized. Only an improved institutional framework between agencies and stakeholders that protects environment could enhance and accelerate cooperation to the levels equal to an environmental and climate change challenge. The very creation of such framework could also contribute to the harmonization of monitoring and reporting systems. It will also lead to more coordinated, more effective and properly financed policy instruments as well as more efficient legal enforcement on supranational, national and sub-national level.

Keywords: *Treaty making, environmental challenge, inter-agency coordination, legal definition, political will*

INTRODUCTION

Environmental crime is a complex subject matter, which coupled with a non-existing internationally enforceable definition is calling for an urgent consideration. The variety of wrongdoings against our environment, committed transnationally and on a daily basis is happening with an accelerating severity and frequency. This makes it even more challenging to combat these types of criminal activities and mitigate the damages caused by it, which impact future generations. Committing crimes against the environment endangers sustainable livelihoods, ecosystems, natural resources, that cannot be reproduced or renewed, as much as it harms general health, social equilibrium and revenue streams of governments. Hence, lack of common definition is coupled with a lack of understanding, financial resources and knowledge on the subject matter. Therefore, it is of utmost urgency to start paving the way to combat these types of crimes by transnationally brokered global instrument.

The complexity of the matter manifests in the wide range of criminal activities that are associated with committing environmental crimes, such as money laundering, waste trafficking and hazardous waste dumping, wildlife species smuggling, weapons, drugs – all of that transcends domestic borders. These types of crimes often take place in organized form and are facilitated by other crimes, or by a lack of comprehensive legal frameworks. One of the major facilitators is corruption, which is favoured by high tax burden, excessive market regulations, bureaucracy and high public spending. In addition, there is only a formalistic legal approach in most of the countries to condemn these types of offences.

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Another neuralgic point of combating these types of crimes is the under-resourced incentives in contrast with the criminal environment, which is associated with the availability of significant financial resources. Controlling public resources and influencing public administration strengthening the position of organized crime networks.

To leave the often-used common understanding behind and come to an agreement on the internationally accepted definition. That necessitates an extensive work on the instrument, upon which the UN Member States are able to enhance their respective law enforcement cooperation and close the gap in understanding and acting. Without a definition, the fight against these types of crimes will always be impeded by the allocation of financial resources and political prioritization accompanied with lack of enforcement.

The following pages provide an overview of the main characteristics of environmental crime, its interlinkages to organized crime and the currently existing supporting legislation on international and European level with the objective of identifying barriers, remaining gaps and potential solutions that can pave the way forward. In addition, it analyses international legislations, agreements and legally binding documents, which have already touched upon some parts of the potential definition on environmental crime, or created a definition, that can be a base for starting negotiations on.

Building on the identified successful approaches, author's writing is aiming to facilitate efforts toward a commonly agreed, internationally recognized definition on environmental crime. Besides, it assesses and maps existing legislations and supports actors in their compliance efforts towards the future comprehensive universal instrument/s.

MAIN CHARACTERISTICS OF ENVIRONMENTAL CRIME

From a start, let us feature the main characteristics of wrongdoings related to the environment. They are:

- transnational – no geographical constrains
- wide array of crimes are associated with it, such as trafficking and overfishing (overhunting) of protected species; illegal logging; dumping of hazardous waste; smuggle wild life, weapons, drugs and people across continents
- interlinked with other criminal offences such as passport fraud, identity theft, corruption, money laundering and murder
- it jeopardizes wildlife, population, ecosystems, sustainable livelihoods, revenue streams to the governments it endangers the preservation of the environment and has major implications on the health and safety of the citizens
- it is aggravated through their additional cost and impact to future generations
- a number of circumstances strengthen the link between corruption and environmental crimes, such as tax burden, excessive regulation of legal markets, bureaucracy and high public spending
- organized crime networks are key actors in environmental crimes, because of their control of public resources and their influence on the public administration (locally, regionally and nationally)
- considerable degree of moral acceptance coupled with a low sense of statehood - vulnerabilities in control of authorization system
- criminal systems are complex and essential condition of a normal functioning democracy
- link between environmental crimes and corruption is facilitated by a legal approach is formalistic = focused on legislation that would punish environmental crimes, regardless of the actual damage caused, on the ground of abstract danger

- *lack of common definition* - no internationally recognized definition on environmental crime
- only an often used common understanding
 - *international legal mechanisms* are need to be established and enforced at national level to implement international environmental law
 - illegal activities pose a challenge on law enforcement and implementation (including MEAs)
 - *lack of understanding and approaches between and among States* – a relatively new category to combat transnational crimes - internationally coordinated efforts and a law enforcement cooperation are needed
 - *lack of funding to fight crime knowledge gap between environmental crimes and corruption*
 - actors that are combating environmental crimes are usually *under-resourced in contrast with the criminal environment (which have the financial means)*
 - *significant availability of money* by committing these crimes at the expense of the environment
 - best source of criminal intelligence is from INTERPOL

ORGANIZED CRIME

- environmental crimes are also linked to other types of organized crimes



Interlinkages of environmental crimes with organized crimes

- raising level of awareness of the linkages between environmental crime and organized crime
- wildlife trafficking, transnational trafficking in waste and illegal logging most of all
- ***remaining ambivalence in the definition of concepts***
 - organized crime
 - environmental crime
 - organized environmental crime

–*lack of clear definitions makes it difficult to accurately identify organized environmental crime* within the overall crime statistics, which



has an effect on the awareness of organized environmental crime amongst policy makers and enforcement institutions



impacts the allocation of financial resources and prioritization in the political agenda

–neither the United Nations Convention against Transnational Organized Crime nor the Council Framework Decision 2008/841/JHA (on the fight against organized crime) **does not address environmental crime explicitly**

–the European Union has obligations for companies and their management and supervisory bodies taking into account the Corporate Social Responsibility (CSR): **“accountable, transparent and responsible business behaviour and sustainable growth”²**

–the promotion of these measures can indirectly improve transparency and action to fight environmental crime

–Directive 2014/95/EU creates a binding disclosure requirements among others related to the environment for companies with at least 500 employees, such as

- “environmental protection
- social responsibility and treatment of employees
- respect for human rights
- anti-corruption and bribery
- diversity on company boards (in terms of age, gender, educational and professional background)”³⁴

DEFINITION OF ORGANIZED CRIME

1. UN Convention against Transnational Organized Crime defines an “organized criminal group as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”⁵

2. U.S. Federal Bureau of Investigation (FBI) defines an organized criminal group as “any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened

² European Parliament: Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups; http://www.europarl.europa.eu/doceo/document/A-7-2014-0006_EN.html; (accessed on 08. 10. 2019)

³ European Commission: EFFACE (2016): The EU’s strengths and weaknesses in tackling environmental crime https://efface.eu/sites/default/files/publications/EFFACE_policy_brief_16.pdf; (accessed on 17. 10. 2019)

⁴ European Commission: Non-financial reporting; https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en; (accessed on 16.09.2019)

⁵ United Nations Convention Against Transnational Organized Crime And The Protocols Thereto (2014): United Nations Convention Against Transnational Organized Crime Page 5; https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf (accessed on 14.07.2019)

*violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region or the country as a whole”*⁶

3. European Union has three sorts of approaches to address the issue:

- Civil law criminalizing participation in a criminal association
- Common law based on conspiracy to commit crime
- Scandinavian approach, based on criminal law content and rejects the “criminal organization” element

4. *Illegal disposal of hazardous waste is the only one* of the most widely recognized forms of environmental crimes

5. *UN Minamata Convention*: is the link with the EU policy on mercury, banning all exports of mercury and preventing the uses of mercury where it may enter the environment. The Convention signed and to be ratified by all Member States and the EU⁷

6. *European Parliament*: adopted a resolution on a joint action to prevent and combat mafia type organized crimes, and urged the creation of a European wide approach on combatting illegal waste trafficking, including related organized crime groups⁸

TRAFFICKING AND ILLEGAL DUMPING OF HAZARDOUS WASTE

–illegal not only refers to dumping of waste but also to its transportation, or management of landfills in violation of international or domestic legal provisions

–in addition to being a serious threat it *causes social and economic instability*

–*it is coupled with low risk of prosecution – and the lack of harsh sentences made it a business opportunity for criminal networks*

–*involvement of organized crime organizations working in a well-organized network*, which enables disposing or dumping hazardous waste illegally⁹

–to cut costs and maximize profit, a growing number of legal enterprises participate in trafficking or illegally dumping their waste through facilitators – *because gaming the system costs less than obeying the rules*

–rising production of hazardous waste (especially electrical and electronic waste) it is a *transboundary movement*

–major producing and importing countries are affected by the global threat – even though all exports, illegal trade and dumping of hazardous waste are banned

–countries have *different approach to hazardous waste* for example China and India accept it in order to recycle and recover raw materials; African countries on the other hand are looking material (second hand) usable after repair

⁶ “Organized Crime and Terrorism.” Film Piracy, Organized Crime, and Terrorism, by Gregory F. Treverton et al., RAND Corporation, 2009, pp. 11–26. JSTOR, www.jstor.org/stable/10.7249/mg742mpa.8. ; (accessed on 28.10.2019)

⁷ The UN Environment: Minamata Convention on Mercury (2013); <http://www.mercuryconvention.org/Convention/History/INC5/tabid/3439/language/en-US/Default.aspx> (accessed on 11.09.2019)

⁸ European Parliament (2013): European Parliament resolution of 23 October 2013 on organized crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report) (2013/2107(INI)); <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0307+0+DOC+PDF+V0/EN> (accessed on 19.07.2019)

⁹ EUROPOL (2013) : Threat Assessment 2013 Environmental Crime in the EU, <https://www.europol.europa.eu/publications-documents/threat-assessment-2013-environmental-crime-in-eu> (accessed on 22.08.2019)

–*illicit waste trafficking* is a significant threat for destination countries because of the untreated hazardous waste dumping or manual disassembling with no regard to health and safety issues

–illegal waste management is an increasing threat for producing countries as well because of its link with

- fraud
- tax evasion
- money laundering
- control of legitimate companies in the waste management sector

–*examining the link between criminal activities and illegal trade of e-waste is problematic* given the remaining not specified grey areas of extension

–waste trafficking is facilitated by the corruption of public officials in charge of permits, also associated with law enforcement and customs as well as politicians, who can easily avoid bureaucratic hurdles related to permit granting procedure

–increase in the volume of illegal trade between the European Union and the most affected destination countries in Africa and Asia

–*distortion of market and fair competition rules* → firms that offer safe disposal of waste cannot compete with criminals therefore they are forced to lower their prices and the quality of their services in order to stay competitive.

EU LEVEL

– EU has a competence to harmonize the environmental criminal law as a part of its environmental obligation

– *missing link between organized crime more broadly – including the absence of an express link between environmental criminal law and anti – money laundering law, in addition lack of clarity in the relationship between criminal and non-criminal (administrative) law in the field of environment*

– *no specific EU – level sanctions to address environmental crimes* - sanctions depend on the Member States and their appropriate toolbox of instruments – criminal, administrative and civil law – complementary sanctions can be applied but not in ever MSs

– voluntary associations of professionals working on environmental crimes with the purpose of sharing information and best practices

– a significant amount of environmental crimes cannot be investigated by law enforcement institutions *due to the limited awareness, complexity of establishing causality of environmental crime and the lack of financial resources*

– Member States are not obligated to report on ongoing investigation or enforcement process to EUROPOL and EUROJUST, therefore opportunities missed for the cross- border cooperation

– creation of environmental democracy by engaging directly or indirectly in environmental justice

– in order to reach vulnerable parts of society, the role of local communities, NGOs and civil societies is crucial

– **Aarhus Convention** establishes rules on access to justice and environmental matters for individuals and environmental NGOs¹⁰

–public participation in environmental decision making is prevented, because rights of individuals and communities are not well understood

–victim`s lack of awareness about their rights

–certain crimes are not provable only after a longer period of time

–quantification of damage is not forthright – especially concerning health or loss of livelihood

–it hard to bring action against crimes committed by subsidiaries or subcontractors because they often face obstacles before the EU Court

–the European Union is a member of the multilateral environmental agreements and developed expertise in its instruments, tools, networks, NGOs and enforcement agencies that operate and are involved in both EU and transnational cases

–EU enforcement networks and agencies are :

• **European Network for Prosecutors and IMPEL** - national and transnational level

• European Union provides funding for the **International Consortium on Combating Wildlife Crime (ICCWC)**

Finally, the existing UN Convention of Corruption covers only a public sector segment of it. Regrettably enough, this instrument does not cover private sector at all. As professor Bajrektarevic defined it: “corruption is seemingly victimless trade-off between influence and gain”.¹¹ That means that it stretches from private to public sector easily.

INTERNATIONAL LEVEL

UN ODC

–UNODC, established in 1997, is a network that coordinates actions and encourages cooperation among international agencies and NGOs in the fight against illicit drugs and international crime. It has a mandate to assist Member States in their fight against transnational crimes and offers advice to State parties in order to raise awareness of the importance of environmental crime and organized crime on different ways they can be combatted¹²

–State parties have difficulties dealing with organized environmental crime due to the ***lack of legal and criminal policy tradition in the field*** – the intervention of international institutions is becoming more relevant

–However, it is still unclear how organized environmental crime should be addressed, as a specific criminal offence or just an aggravated circumstance of other related environmental crimes.

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¹⁰ European Commission: The Aarhus Convention; <https://ec.europa.eu/environment/aarhus/index.htm> (accessed on 15.10.2019)

¹¹ Bajrektarevic, A. (2011), *The JHA Diplomacy: The Palermo Convention – Towards the Universal Criminal Justice*, Addleton Academic Publishers, NY – 3(1)2011 GHIR

¹² The United Nation Office on Drugs and Crime (UNODC): About UNODC, <https://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop> (accessed on 22.08.2019)

¹³ European Commission: EFFACE Brussels (2015): Organized Crime and Environmental Crime International Legal Instruments (summary); https://efface.eu/sites/default/files/EFFACE_Organised%20Crime%20and%20Environmental%20Crime_International%20Level.pdf (accessed on 29.09.2019)

Financial Action Task Force (FATF)

FATF included organized crime in its list of designated categories of offences. FATF is an intergovernmental body, which provides insights on how to best address environmental crime and identify possible ways how investigation and prosecution of such crimes may be assisted. FATF has 35 member states and two regional organizations (European Commission and the Gulf Cooperation Council) with the objective of developing and promoting policies to combat the financing of terrorism measures and anti-money laundering, handle high-risk, non-cooperative jurisdictions, and respond to new threats as identified by the UN Security Council and the G20.¹⁴

Green Customs Initiative

The initiative was launched in 2004 to enhance the capacity of customs and other relevant border control officers. The partnership that comprises international organizations, monitors and facilitates legal trade activities and aims to investigate and prevent illegal trade in environmentally-sensitive products, considering trade related conventions and multilateral environmental agreements.¹⁵

The initiative has the following partners:

- Basel Convention (Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal);
- OzonAction;
- Cartagena Protocol (Cartagena Protocol on Biosafety (Secretariat of the Convention on Biological Diversity));
- Rotterdam Convention (Prior Informed Consent (PIC)
- Procedure for Certain Hazardous Chemicals and pesticides in International Trade);
- CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora);
- Stockholm Convention (Stockholm Convention on Persistent Organic Pollutants (POPs));
- INTERPOL;
- UNEP (United Nations Environmental Programme);
- Minamata Convention (Minamata Convention on Mercury)
- UNODC (United Nations Office on Drug and Crime);
- OPCW (Organization for the Prohibition for Chemical Weapons);
- WCOOMD (World Customs Organization)

SUPPORTING LEGISLATIONS, AGREEMENTS

UN Transnational Environmental Crime - Division of Environmental Law and Conventions (DELIC)

• Montevideo Program IV - UNEP/GC/25/INF/15

The Montevideo Program is aiming to increase linkages between environmental law and other areas, most of all the three pillars of UN (peace and security, human rights and development). It assists the international community to highlight gaps and challenges, and provides a comprehensive framework for the development of legal principles and obligations in the field of the environment.

¹⁴ FATF (2019): Mandate <https://www.fatf-gafi.org/media/fatf/content/images/FATF-Ministerial-Declaration-Mandate.pdf> (accessed on 28.08.2019)

¹⁵ UN Environment (2019): The Green Customs Initiative; <https://www.greencustoms.org/> (accessed on 30.09.2019)

These are *the illegal trade in wildlife, environmental crime, marine litter and micro plastics, and lead in paint and batteries, amongst others*.¹⁶

(a) “Assist States:

i) *To improve progressively their environmental standards at the global, or regional or sub regional level;*

ii) *To promote coherence between environmental law and other laws, both at domestic and international levels, to ensure that they are mutually supportive and complementary and that the environmental protection is an integral part of sustainable development;*

iii) *To study the ways in which developing countries have integrated environmental policy into their governmental processes and advise Governments as appropriate;*

iv) *To promote the ecosystem approach as a means of ensuring coherent implementation of international agreements, including through capacity-building activities;*

(b) *Conduct studies on the legal aspects of, obstacles to and opportunities for consolidating and rationalizing the implementation of multilateral environmental agreements, so as to avoid duplication of their work and functions;*

(c) *Upon request of negotiating States, provide an analysis of linkages between agreements under negotiation and the existing agreements;*

(d) *Conduct studies to assist relevant conferences of the parties to multilateral environmental agreements to take action to improve ways of harmonizing and otherwise rationalizing the reporting obligations in multilateral environmental agreements;*

(e) *Enhance cooperation and coordination among the secretariats and conferences of the parties to relevant multilateral environmental agreements in order to have more coordinated activities and procedures;*

(f) *Promote synergies in the implementation of related multilateral environmental agreements at the national and regional levels”*.¹⁷

• **DELIC Capacity Building Programmes for the Judiciary**

• **Directive 2008/99/EC =Environmental Crime Directive**

• **Ship-Source Pollution Directive**

• **International Convention for Prevention and Pollution from Ships (MARPOL)**

Convention

• **Directive 2004/35/EC on environmental liability** – polluter pays principle was introduced

• **Directive on Market Abuse - Directive 2014/57/EU** - requires Member States to ensure that certain offences are punishable with a defined maximum term of imprisonment; it also obligates Member States to adopt rules on the liability of legal persons

• **Article 83(1) TFEU and Article 83(2) TFEU:**

○ **Article 83(1) TFEU** lists ten crimes (so-called Euro Crimes) which are deemed to have sufficient cross-border impact that the *EU can set minimum rules* in their regard. These are: terrorism; trafficking in human beings; sexual exploitation of women and children; illicit drug trafficking; illicit arms trafficking; money laundering; corruption; counterfeiting of means of payment; computer crime and organized crime. Environmental crime is not on the list, however the article goes on to state that “*on the basis of developments in crime*”

¹⁶ UN Environment (2019): The Montevideo IV Programme; <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-2> (accessed on 01.11.2019)

¹⁷ UNEP (2010): Fourth Programme for the Development and Periodic Review of Environmental Law <https://wedocs.unep.org/bitstream/handle/20.500.11822/25474/MontevideoIV.pdf?sequence=1&isAllowed=y> (accessed on 24.09.2019)

○ *Under Article 83(2) TFEU the introduction of minimum rules on the definition of criminal offences and sanctions is possible* if they are essential for ensuring the effectiveness of a harmonized EU policy or its enforcement

- **Directive 2014/95/EU** that introduces mandatory disclosure requirements related to, among others, the environment for companies with at least 500 employees

- **Timber Regulation (Regulation 2010/955/EU)**– to alleviate potential damage in the third countries which are source countries¹⁸

- **UN Minamata Convention:** banning all exports of mercury and preventing the uses of mercury where it may enter the environment. It was signed and to be ratified by all Member States and the EU¹⁹

SUPPORTING LEGAL DEFINITIONS

Organized Crime Convention (Palermo Convention)

–only indirectly refers to organized environmental crime as one of those serious crimes that could be covered by the convention

–the convention provides a legal framework for sanction serious crimes as well as the legal tools to criminalize as offences those activities related to environmental crime. It enables to investigate and to bring to justice those criminals involved in different roles in criminal groups and criminal organizations

–States can cooperate on a wide range of offences related to transnational organized crime:

1. “Serious crime: conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty” enables the CoP to identify new forms and dimensions of transnational organized crime, with a view to facilitating a more uniform approach at the use of the Convention for the purposes of international cooperation.

The Convention does not define organized crime but envisages a working and open definition of serious crime in Article 2.b just using as a reference the minimum penalty of 4 years imprisonment

(b) “Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty

When determining the scope of application of the Convention, Article 3 b) specifies that serious crime is also “where the offence is transnational in nature and involves an organized criminal group

2. Criminal Groups and Criminal Organizations: *Article 2.a of the Organized Crime Convention defines organized criminal group but not criminal organizations. “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”. – it does not incorporate the modus operandi criteria – such as use of violence, hierarchy and adaptation to the environment*

These definitions are open and focused on:

–the number of participants –at least three persons;

¹⁸ Regulation (EU) No 995/2010 of the European Parliament and of the Council <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R0995> (accessed on 31.09.2019)

¹⁹ Minamata Convention On Mercury (2017):

<http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP1%20version/Minamata-Convention-booklet-eng-full.pdf> (accessed on 20.10.2019)

- the duration – a flexible requirement of existing for a period of time;
- the aim: to commit offences for the purpose of financial or other material benefits;
- the type of crime they commit, serious crime as defined by the Convention

3. Criminalization of participation in a criminal organized group: Article 5 of the Convention requires States Parties to foresee the introduction into their criminal law systems of a number of offences relating to participation in an organized criminal group that must be a common minimum standard for all States parties, without prejudice to the differences among their common law or continental law systems and the possibility of adopting stricter provisions.

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

- a. Criminal activities of the organized criminal group
- b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

4. Confiscation, Seizure and Disposal of Proceeds of Organized Crime and the International Cooperation for Confiscation: Article 12 and 13 deal with confiscation and seizure calling on State Parties to adopt legislation to enable them to carry out confiscation of both proceeds from crime and all instrumentalities used during the commission of the offences. Article 12 focuses on domestic measures and Article 13 with international cooperation agreements.

5. Legal persons and organized crime: Article 10 of the Convention requires States to adopt measures to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences defined in the Convention. Paragraph 2 states that, “subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative” leaving the States Parties the possibility of choosing among these three possible liability regimes considering their legal systems and the prevalence of the principle “societas delinquere non potest”. However, States Parties must “ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-sanctions, including monetary sanctions.”

6. Extradition: The Organized Crime Convention establishes a supple legal framework for extradition in its Article 16 that relies on the domestic law of State Parties for most of the conditions, procedures and requirements. However, in a limited number of areas the UN Convention establishes some principles and conditions to be respected by State Parties: the dual criminality principle, rules

on provisional arrest, extradition of nationals for fiscal offences and the obligation to consult with the requesting State before refusing extradition.”²⁰

Definitions on hazardous waste

• **Basel Convention** defines ‘hazardous’ waste on the basis of the pollutants it contains such as lead, mercury, cadmium, chromium, arsenics, etc. Together with the definition of hazardous waste, international provisions stress the international ban to import any sort of hazardous waste to African states parties to the Bamako Convention, from any state not part of it.

• **Bamako Convention** uses a similar language to that of the Basel convention, but has a stronger reference to the prohibition of all imports of hazardous waste; it does not except on certain types of hazardous waste (like those for radioactive materials) made by the Basel convention.

GAPS, BARRIERS AND POTENTIAL SOLUTIONS

wide range of crimes associated with it	emphasis should be put on the prevention of environmental crimes in the linked legislations;
transnational	efforts should be harmonized; improvement of institutional collaboration between different agencies and stakeholders involved in environmental protection
lack of internationally recognized definition - only an often used common understanding	create an internationally recognized definition, which addresses environmental crime explicitly
lack of understandings and approaches between and among States – how to combat crimes	existing environmental standards should be systematized
knowledge gap between environmental crimes and corruption	establishment of gap bridging mechanisms; information systems that provide valuable information on companies and can serve as monitoring tools for law enforcement agencies
link between environmental crimes and corruption is to be favoured by a number of circumstances; high tax burden, excessive regulation of legal markets (bureaucracy and high public spending)	simplification of market regulations and increased transparency
link between environmental crimes and corruption is facilitated by a legal approach is formalistic	initiating discussion on starting to create a concrete legal approach
organized crime networks are key actors in environmental crimes – control of public resources by influencing the public	transparency of public permit and access granting systems, one stop shops

²⁰ United Nations Convention Against Transnational Organized Crime And The Protocols Thereto (2014): United Nations Convention Against Transnational Organized Crime; https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf (accessed on 15.07.2019)

administration (on a local, regional, national level)	
rising production of hazardous waste – especially electrical and electronic waste	positive incentives (e.g. providing for recycling facilities and creating markets for recycled (strategic) materials)
low risk of prosecution, light sentences and guarantee of high profits – lack of harsh sentences	more dissuasive penalties
increasing number of legal enterprises decide to traffic or illegally dump their waste through brokers and facilitators - gaming the system costs less than playing by the rules (obeying the rules)	create a system where rules are worth to follow; decrease the price of waste incineration/disposal
undetermined grey areas of extension makes it difficult to assess the link between criminal activities and illegal trade of e-waste	further investigation of related crimes, offences
environmental crime is interlinked with the exploitation of disadvantaged communities, human rights abuses, violence, conflict, money laundering, corruption	improvement of institutional collaboration between different agencies and stakeholders involved in environmental protection
distortion of market and of the rules of fair competition by criminal networks	creation of enforceable competition rules

THE WAY FORWARD

As the identified gaps and barriers demonstrate, despite all of the strides taken towards an internationally enforceable definition on environmental crime, much still needed to be done. Institutional collaboration among stakeholders and agencies needs to be improved as well as the currently existing approaches need to be harmonized. This however cannot be carried out without proper financial support of these gap-filling mechanisms that create a unified voice.

Coming to an agreement on the internationally recognized definition on environmental crime will yield further benefits. Not just because these types of crimes will be addressed explicitly, but more emphasis will be put on preventing them from happening with a proper set of comprehensive universal financial and legal instruments. An improved institutional framework between agencies and stakeholders that protects environment could cooperate on an extended basis, working towards combatting these types of crimes. The very creation of such framework could also contribute to the harmonization of monitoring and reporting systems, not just on the European level but globally. It will also lead to more coordinated, more effective and properly financed policy instruments as well as more efficient enforcement and harsher sentences for perpetrators.

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The Fight against Organized Crime within the European Union

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“GEORGE EMIL PALADE” UMFST OF TÂRGU-MUREȘ

Abstract: *The European Union has unequivocally and decisively engaged in the fight against organized crime since the adoption of the Treaty of Amsterdam and the resolution of the European Council meeting in Amsterdam on 16 and 17 June 1997, setting up the first action plan against organized crime. Previously, Council resolutions of 23 November 1995 on the protection of witnesses in the fight against international organized crime and of 20 December 1996¹ on individuals who cooperate with the judicial process in the fight against international organized crime were adopted. Further, in 1998 a document on criminalization was adopted in order to suppress the different forms of participation in a criminal organization: namely, Action commune 98/733/JAI of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union - JO de l' Union europeenne no. 351, 29/12/1998.*

Keywords: *Organized Crime, European Union, law, integration, cooperation*

1. BACKGROUND

The European Union has unequivocally and decisively engaged in the fight against organized crime since the adoption of the Treaty of Amsterdam and the resolution of the European Council meeting in Amsterdam on 16 and 17 June 1997, setting up the first action plan against organized crime². Previously, Council resolutions of 23 November 1995 on the protection of witnesses in the fight against international organized crime and of 20 December 1996³ on individuals who cooperate with the judicial process in the fight against international organized crime were adopted. Further, in 1998 a document on criminalization was adopted in order to suppress the different forms of participation in a criminal organization: namely, *Action commune 98/733/JAI of 21 December 1998* on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union - *JO de l' Union europeenne nr. 351 du 29/12/1998*.

In the view of the foreign doctrine⁴, the concept of a criminal organization is difficult to define and, also, can only be criminalized in a delicate way, especially since the related criminal rules connected with the French pattern of wrongdoers or with the “conspiracy” of British law are not very compatible. The approximation of the two legislative systems in this field has only reached an opinion placed between two methods of criminalization, one inspired by the French law and the other by the Anglo-Saxon one.

A few years later, the European Commission deemed it necessary to provide the Union with a more ambitious and clearer text, which could no longer be interpreted differently, in order to truly harmonize criminal laws and to sanction the phenomenon⁵.

¹ G. Antoniu, *Normative Activity of the European Union II*, *Revista de drept penal (Criminal Law Journal)*, no. 2, 2007, p. 36;

² J. P. Labode, *Etat de droit et crime organize, Les apportes de la Convention des Nations unies contre la criminalite transnationale organisee*, Dalloz publishing house, 2005, p. 77;

³ G. Antoniu, *Normative Activity of the European Union II*, *Revista de drept penal (Criminal Law Journal)*, no. 2, 2007, p. 36;

⁴ D. Fontanaud, *Criminalite organisee, Revue Internationale de Droit Penal, Le Droit Penal de l'Union Europeenne, 77 annee, nouvelle serie*, 2006, Eres publishing house, pp. 193-199;

⁵ G. Antoniu, *Normative Criminal Activity of the European Union 3*, *Revista de drept penal*, no. 3, 2007, p. 9; G. Antoniu, *Normative Criminal Activity of the European Union 3*, *Revista de drept penal*, no. 1, 2007, p. 25;

In this regard, a Communication (not made public) of 29 March 2004 on actions taken in the fight against terrorism and other severe forms of crime, the Commission highlighted that the anti-organized crime mechanism within the European Union had to be renewed⁶. The development of a Framework Decision aimed to renew the joint action started since 1998 was announced. This is part of a “reform” consisting of replacing the original text with a Framework Decision representing the appropriate instrument for the approximation of criminal legislations within the Union following the Treaty of Amsterdam. As a result, it was agreed to take into account the United Nations Convention against Transnational Organized Crime⁷, also called the Palermo Convention, which constitutes the international framework⁸, and was approved by the European Community on 21 May 2004.

This international legal act supports the business community by balancing opportunities on the international market, “*level the player field*”, a phrase used in the US after adopting the “*Foreign Corrupt Practices Act*” in 1977, which describes the frustration of Americans on their European partners who could still legally offer bribes abroad in order to obtain economic benefits and to mask certain illicit operations⁹.

2. CRIMINALIZATION

Action commune of 1998, still in force, defines the criminal organization as “a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities”.

The legislations of most European Union countries also punish participation in a minimal structure and stability association which aims to commit crimes of a certain severity. In this regard and for illustrative purposes I have shown above the incompatibility between French and English law¹⁰.

The text also contains an original element regarding the obligation to incriminate the deed, giving the Member States the option to choose one of the two types of conduct described above as punishable.

Paragraph 1 of Article 2 was republished:

“To assist the fight against criminal organisations, each Member State shall undertake (...) to ensure that one or both of the types of conduct described below are punishable by effective, proportionate and dissuasive criminal penalties:

⁶ D. Fontanaud, *Criminalite organisée, Revue Internationale de Droit Penal, Le Droit Penal de l'Union Europeenne*, 77 année, nouvelle serie, 2006, Eres publishing house, p. 198;

⁷ P. Dungan, *Reflections on the Organized Crime, Revista de drept penal*, no. 4, 2006, p. 56; C. Sambrook, *The UN Convention against Corruption. A Step forward from the OECD Convention: Pluses and Minuses from a Comparative Perspective*, Romanian Journal of International Law, no. 2, 2006, p. 68; Y. Dandurand, *Strategies and practical measures to strengthen the capacity of prosecutors services in dealing with transnational organized crime, terrorism and corruption*, Crime, Law and Social Change, no. 47, 2007, pp. 234-236;

⁸ N. Queloz, *Les actions internationales de lutte contre la criminalite organisée : le cas de l'Europe*, Revue de science criminelle, 1997, p. 765;

⁹ J. Lelieur, M. Pieth, Recueil Dalloz 2008, *Dix ans d'application de la convention OCDE contre la corruption transnationale*, Chroniques, p. 1086;

¹⁰ B. de Lamy, *La loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité. Crime organisé*, Recueil Dalloz, 2004, Chroniques, p. 1910;

a.) (a) conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in:

- the organisation's criminal activities falling within Article 1, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the Member State concerned, even where the offences concerned are not actually committed,

- the organisation's other activities in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities (...);

(b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences falling within Article 1, even if that person does not take part in the actual execution of the activity."

The first condition is to actively participate the organization's criminal activities or activities of another nature. It is an objective notion regarding the indictable offence of criminal association within the meaning of French law. This participation is materialized at least in the deeds preliminary to committing a crime.

The second perspective consists of repressing an agreement on a criminal activity and does not require material participation in a crime, or at least in a preliminary deed. It is a much more subjective notion, where the crime is characterized by an "agreement", a "plot" to commit crimes.

It gives Member States the possibility to simultaneously criminalize both aspects in their national legislations.

Among other things, the difficulty of legislative harmonization lies in the fact that, no matter the criminalization option ascertained and no matter the possible divergences pertaining to the criminalization method, the Member States will not come to an agreement regarding a general principle of cooperation due to the shortcomings limited by the requirement of double criminality. The provision on mandating European affairs, among other things, confirmed this waiver by the Member States to use the existence of double criminality for the crimes of participation in a criminal organization.

The proposal for the Framework Decision on the fight against organized crime, adopted by the Commission on 19 January 2005, reiterates the definition of a "criminal organization" in the *Action commune*, only borrowing one element from the United Nations Convention against Transnational Organized Crime. Therefore, it is specified that the objective of the organization is to obtain a financial advantage or another material advantage, confirming that this concept of organized crime must be synonymous with the notion of illegal "profit", obtained by criminal means.

The idea that the criminalization of participating in an organized criminal group implies that the aim is to commit a "serious crime" is preserved. The criterion here, similarly to the one ruled by *Action commune*, is that of an offense punishable by deprivation of liberty or a detention order of a maximum of at least 4 years or longer. Certain forms of participation that were not expressly provided for by the *Action commune* are criminalized in a specific way. The text provides for the sanction of any person who, with intent, actively takes part in the organization's criminal activities or other activities, by providing information or material means or to recruit new participants, in the further knowledge that his participation will contribute to the achievement of the organization's criminal activities

3. PENALTIES

Only Art. 2 of *Action commune* provides sanctions that are "effective" and "proportionate".

On the other hand, as a textual complementing, *Art. 3* of the proposal for the Framework Decision is very innovative and directly concerns the national laws. Imprisonment term intervals are prescribed depending on the different degrees of involvement in the illicit activities of the criminal organization.

For the crime of running and organizing a criminal organization, the maximum imprisonment sentence should not be less than 10 years. For other offenses, the maximum imprisonment sentence may not be less than 5 years.

In addition, the proposal for the Framework Decision provides for aggravating the punishment for a certain number of crimes committed within a criminal organization. Here we are talking about a kind of aggravating circumstance consisting of taking into account the punishment for committing serious crimes, the particular injuriousness of individuals who are members in criminal organizations, namely, a “mafia” type association or an (organized) street gang.

Finally, *Art. 4* of the proposal for a Framework Decision allows applying mitigating circumstances where the offender waives his illicit activities and provides certain useful information to the administrative or judicial authorities.

4. THE LEGAL PERSONS

Article 3 of the Action commune provides that each Member State shall ensure that legal persons may be held criminally, being liable for offences which are committed by that legal person, in accordance with procedures to be laid down in national law. The sanctioning must have the specificity imposed by the subject of the crime which is that legal person. Virtually this does not fall within the scope of the actual criminal liability of the legal persons, but of a liability that may be criminal, civil or administrative, in view of the nature of the crime committed¹¹.

This liability of the legal person does not exclude the criminal liability of the natural persons who are perpetrators of or accomplices to these crimes.

The sanctions on legal persons must be “effective” and “proportionate”. The text emphasizes that the nature of the sanction can be material or economic.

Further, *Art. 5* of the proposal for the Framework Decision of 19 January 2005 provides a principle of liability of legal persons for the offences committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person. The term “liability” must be interpreted in a manner that covers both criminal and civil liability, as well as any other liability¹².

The second paragraph states, *inter alia*, that a legal person may be held liable even if the lack of supervision or control by a person with competence in exercising control has made it possible to commit crimes. The third paragraph states the possibility of cumulating both the liability of the natural person and of the legal person, but the sanction and/or punishment ruled for each will be different.

Art. 6 of the proposal deals with penalties and sanctions for legal persons. These sanctions must be effective, proportionate and dissuasive; to include criminal or non-criminal fines at least. Other penalties commonly applicable to legal persons are also included.

¹¹ G. Antoniu, *Criminal Activity of the European Union*, *Revista de drept penal*, no. 3, 2007, p. 11;

¹² B. de Lamy, *La loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité. Crime organisé*, Recueil Dalloz, 2004, *Chroniques*, p. 1910; J. Lelieur, M. Pieth, Recueil Dalloz 2008, *Dix ans d'application de la convention OCDE contre la corruption transnationale*, *Chroniques*, p. 1086;

5. TERRITORIAL JURISDICTION

Art. 4 of the Action commune provides that each Member State shall ensure that the crimes of participating in a criminal organization which take place in its territory are subject to that State's jurisdiction regardless if the entire illicit activity takes place on the State's territory or only a part thereof.

The proposal for the Framework Decision includes an *Art. 7*, entitled "Jurisdiction and coordination of prosecution". This is a new article in relation to Joint Action 98/733/JHA. Without regulating all issues on jurisdiction, the text provides, as a rule, that each Member State shall ensure that its jurisdiction covers at least the cases in which an offence was committed in whole or in part within its territory, wherever the criminal organisation is based or pursues its criminal activities.

When the offence falls within the jurisdiction of more than one Member State, the Member States concerned shall cooperate and consult each other for coordinating their actions and deciding which of them will prosecute the offenders.

6. INITIATION OF CRIMINAL PROCEEDINGS

Art. 8 of the proposal for the Framework Decision is dedicated to the protection and assistance of the victims, a principle according to which the investigations into, or prosecution of, the offence of participating in a criminal organization are not dependent on a report or accusation made by a person subjected to the offence, namely, the prior complaint of the victim is not a prerequisite. In such cases of organized crime, in most situations, the victims are often afraid of reprisals from the "mafia" organizations on themselves or on their families, which is why they are reluctant to file a complaint and notify the authorities. It is known that the perpetration of criminal offences is often preceded by pressure on the victims, adopting a passive conduct that will ensure the success of the criminal offences and their non-denunciation.

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The European Arrest Warrant before the Romanian Judicial Authorities

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Abstract: *The European Arrest Warrant is one of the major instruments of international cooperation in criminal matters for maintaining and developing an area of freedom, security and justice in the European Union, based on trust between Member States through mutual recognition of court judgments, establishing, as shown before, the “cornerstone” of judicial cooperation between these states.*

Keywords: *European Arrest Warrant, integration process, domestic legislation, law*

1. OVERVIEW

In response to these Romania’s European integration process, in order to harmonize the domestic legislation, inter alia, Title III of Law no. 302/2004 on international judicial cooperation¹, amended and supplemented by Law no. 224/2006², established the legal institution of European Arrest Warrant, with the aim of replacing cumbersome extradition procedures, different from one country to the other; of shortening the inherent delays in these procedures, and introducing a new simplified system for the surrender of sentenced or suspected persons, for the purposes of execution or prosecution of criminal sentences.

The enshrinement of these institutions into the domestic criminal law is an embodiment of the provisions of 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, a Framework Decision recognizing the European Arrest Warrant as the first concrete measure in the field of criminal law implementing the principle of mutual recognition of judicial decisions – this recognition being the “cornerstone” of judicial cooperation between the Member States of the European Union³.

In turn, the Framework Decision is an important achievement of the long-term goal of creating a European area of security, freedom and justice based on the cooperation between the Member States of the European Union.

Thus, as far back as the Treaty of Amsterdam it was stipulated that the European Union must maintain and develop an area of freedom, security and justice, where freedom presupposes the existence of a common judicial area, the European citizens being able to seek justice in any member state same as in their own country. Moreover, this desideratum aims at eliminating the possibility for criminals to exploit the differences between the criminal justice systems of other states, requiring judgments to be recognized and enforced abroad without the formalities provided by the ‘classical’ conventions on international legal aid.

At the Tampere European Council of 15-16 October 1999, it was stated that mutual recognition of judgments is the cornerstone of judicial cooperation between the Member States of the European Union.

The 2002/584/JHA Council Framework Decision of 13 June 2002 materialized the decision taken in Tampere, aiming to replace the formal extradition procedure between the Member States of

¹ Published in the Official Gazette no. 302 of 1 May 2019

² Published in the Official Gazette no. 534 of 21 June 2006

³ http://www.just.ro/rtrv_mc.php?param=cji_penal_instrumente

the European Union in the case of persons avoiding the execution of a custodial sentence or prosecution with a simplified surrender procedure based on a European Arrest Warrant.

According to Article 1 of the above-mentioned Framework Decision, **the European Arrest Warrant is defined** as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or a detention order.

In the light of this definition in the Framework Decision, the European Arrest Warrant should not be confused with the pre-trial detention order in the national law, as the European Arrest Warrant is a judicial decision, which is always based on a pre-trial detention or conviction warrant issued under the domestic law. Moreover, a European Arrest Warrant is only issued when a pre-trial detention or conviction warrant cannot be executed by a Member State of the European Union as the person in question is avoiding arrest by being in the territory of another Member State.

After the entry into force of the provisions of the Law's Title III entitled "Provisions on cooperation with the European Union Member States in the implementation of 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States", in relation to the European Union Member States these provisions have replaced the extradition provisions, unless the Member State in whose territory the person sought is has made statements for non-enforcement of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States of the European Union for deeds committed before a certain date (the Romanian State has not made any statement in this regard).

2. THE ROMANIAN JUDICIAL AUTHORITIES WITH ISSUING AND EXECUTING COMPETENCE AND THE CONTENT OF THE WARRANT

According to Art. 84 paragraph 1 of the national law, the European Arrest Warrant is a **judicial decision** issued by the competent judicial authority of a Member State of the European Union for the surrender of requested persons to another Member State for the purposes of conducting a criminal prosecution or executing a custodial sentence or a detention order.

The competent Romanian authorities are:

- The issuing judicial authorities, namely the competent legal courts which have previously issued the pre-trial detention warrant in the course of the criminal prosecution or during trial or the courts enforcing final judgments of conviction;

- The judicial authorities for the execution of the European Arrest Warrant, which are the courts of appeal;

- The Romanian central authority, the Ministry of Justice, with the role of support, assistance and consultancy in carrying out the procedures (Art. 86 paragraph 3 of the Law).

The content of a European Arrest Warrant does not differ much from that of ordinary arrest warrants; it is included in Art. 87 and in Annex no. 1 to Law no. 302/2004, namely:

- The identity and nationality of the requested person;
- The name, address, telephone and fax numbers and email address of the issuing judicial authority;

- Evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 81 and 85 of the Law;

- The nature and legal classification of the offense, particularly in respect of Article 97;

- A description of the circumstances in which the offense was committed, including the time, place and degree of participation in the offense by the requested person;

- The penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offense under the law of the issuing Member State;

- If possible, other consequences of the offense.

The European Arrest Warrant sent to the competent authority of another Member State must be translated into the official language or official languages of the executing Member State or into one or more other official languages of the Institutions of the European Communities, as accepted by that State. According to the declaration submitted to the General Secretariat of the European Union Council, the arrest warrants sent for execution to the Romanian authorities must be translated into Romanian or into English or French.

3. THE PROCEDURES FOR ISSUING AND EXECUTING A EUROPEAN ARREST WARRANT

3.1. The active procedure (when the Romanian State is the issuer)

The law regulates **two situations** where the Romanian judicial authorities can issue a European Arrest Warrant, ex officio or at the request of the prosecutor (Art. 89):

a) In order to carry out the criminal pre-trial procedure or the trial, if the deed is punished by the Romanian criminal legislation with a custodial sentence of at least two years;

b) In order to enforce the sentence, if the imposed punishment is longer than one year.

c) In order to enforce the measure of deprivation of liberty, the punishment duration is of 6 months or longer

If the whereabouts of the requested person are known, the pre-trial detention warrant issued by the competent Romanian judicial authority may be sent directly to the executing judicial authority.

The issuing judicial authority may request entering the particulars of the person concerned into the Schengen Information System (SIS) through the National Alert Information System. For this purpose, the provisions of Art. 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the abolition of checks at the common borders apply.

The alert entered into the Schengen Information System is equivalent to a European Arrest Warrant if accompanied by the information set out in the Annex. Thus, on a transitional basis, until the time when the Schengen Information System will be able to transmit all the information mentioned in the Annex, the alert is equivalent to a European Arrest Warrant pending the sending of the original document.

The Romanian judicial authorities may transmit the European Arrest Warrant by any secure transmission means leaving a written record, provided that the executing judicial authority can verify its authenticity.

If the Romanian issuing judicial authority does not know the executing judicial authority, the necessary investigation will be carried out, including through the contact points of the European Judicial Network or through the Specialized Directorate of the Ministry of Justice, for obtaining the required information from the executing Member State (Art. 90).

In cases with the element of urgency, when a European Arrest Warrant for criminal prosecution or trial has been issued, the Romanian issuing judicial authority may request a temporary surrender of the person sought to Romania for hearing purposes from the executing judicial authority of the state where the sought person was caught before they rule on the final surrender, or may request to authorize taking that person's statement in the territory of the executing state.

Also, if the presence of the person sought before the Romanian judicial authorities is required for hearing and the foreign executing judicial authority ordered the suspension of the surrender pending the end of an ongoing trial or until the execution of the sentence imposed in the executing state for an offense different from the one in the European Arrest Warrant, the issuing Romanian

judicial authority will be able to request a temporary surrender of the person for hearing or trial, and will return the person after the hearing until the grounds for suspension cease.

In connection with the active procedure for issuing the European Arrest Warrant by the competent Romanian legal courts, the **doctrine** justly expressed the opinion that the provisions of Law no. 302/2004 are deficient, in the sense that although the legal definition provides that the European Arrest Warrant is a judicial decision, therefore a court decision, no express procedural provisions were provided on how to issue the warrant, which would require a trial in an appropriate procedural framework and the ruling of a judgment, thus ensuring the dual function required for any court decision – of a processual measure, to order the issuance of the warrant, and of a procedural measure, to fulfil the provision of the processual measure, of requesting the arrest and surrender of the requested person. Therefore, by only filling out the annexed standard form of the European Arrest Warrant, the requirements of the European Arrest Warrant as defined are not fulfilled – the definition being given both by the Council Framework Decision and by the domestic legislation⁴.

Another significant shortcoming was found in terms of the active procedure, namely that no deadline was set for the European Arrest Warrant to be issued by the competent courts.

In relation to the above criticisms, it is concluded that a **legislative intervention** for the amendment of Law no. 302/2004 is necessary, aiming at closing the gaps identified for ensuring an effective implementation in practice of the European Arrest Warrant when it is issued by the Romanian authorities.

3.2. The passive procedure (when the Romanian State is the executing state)

Issues concerning the substantive conditions for the execution of the European Arrest Warrant.

As a principle, a European Arrest Warrant can solely be executed if the offense for which it was issued is criminalized by the legislation of both the issuing state and the Romanian State (**the condition of double criminality**).

The condition of double criminality **is not required** and the surrender will be granted by the Romanian State when the arrest warrant is issued for selected serious offenses (a number of 32) sanctioned with imprisonment or a custodial measure for a period of at least 3 years in the issuing state. The offenses to which the condition of double criminality does not apply are listed in Art. 97 paragraph 1 of Law no. 302/2004, as subsequently amended and supplemented (for example: membership in organized crime groups, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, ammunition and explosives, corruption, fraud, money laundering, counterfeiting, illicit trafficking in human organs and tissues, etc.)

When a Romanian judicial authority (prosecutor's office or legal court) receives a European Arrest Warrant but has no jurisdiction in resolving it, sends the warrant to the competent executing judicial authority, namely the competent court of appeal, at the same time informing the issuing judicial authority in this regard.

The Romanian executing judicial authority verifies in advance whether the European Arrest Warrant is accompanied by translations; if the warrant is not translated, the Romanian executing judicial authority may communicate this fact to the issuing judicial authority, in order to get the translation submitted as soon as possible, or, if possible, may order the translation to be carried out, the proceedings being suspended until receipt of the translation.

⁴ I. C. Morar, *The Concept of a European Arrest Warrant in the Romanian Criminal Legislation*, in "Curierul judiciar" no. 7-8/2006.

At the same time, the Romanian executing judicial authorities send all the European Arrest Warrants received by them for execution to the Ministry of Justice, as the central authority in the field.

The execution of a European Arrest Warrant by the Romanian executing judicial authorities **may be subject to the following conditions:**

a) If the European Arrest Warrant has been issued for the purposes of execution of a custodial sentence imposed by a judicial decision rendered in absentia or if the person concerned has not been legally summoned, the issuing judicial authority shall provide sufficient assurance to guarantee that the person concerned will be entitled to a retrial in the issuing Member State in his/her presence;

b) Where the offense on which the European Arrest Warrant is based is punished by a custodial life sentence or lifetime detention order, the legal provisions of the issuing Member State must provide for the possibility of asking for a review of the sentence or of the punishment imposed or to apply for parole after having served at least twenty years of the sentence or of the custodial sentence imposed, or measures of clemency.

As an additional guarantee granted to Romanian citizens, paragraph 2 of Art. 98 states that they may be surrendered on the basis of a European Arrest Warrant issued for the purpose of criminal prosecution or trial provided that, in the event of a custodial sentence, the person surrendered will be transferred to Romania for execution of the sentence.

The Romanian judicial authority **will** (mandatorily) **refuse** the execution of the European Arrest Warrant when:

- The person sought has already been tried for the same offenses by a Member State other than the issuing State or, in the case of a conviction, the sentence has been executed or is currently being enforced or the enforcement has been time-barred, or the punishment has been pardoned or the offense was amnestied, or another cause that intervened prevents the execution of the sentencing state under the legal provisions;

- The offense on which the European Arrest Warrant is based is subject to amnesty in Romania, if the Romanian authorities have, according to the Romanian law, the competence to prosecute that offense;

- The person who is the subject of the European Arrest Warrant is not criminally liable due to age, in accordance with the Romanian criminal law (Art. 99 paragraph 1 letter c).

The Romanian executing judicial authority **may** (optionally) **refuse** the execution of the European Arrest Warrant in the following cases provided by Art. 99 paragraph 2 of Law no. 302/2004, of which we present the most important situations:

- Where the person who is the subject of the European Arrest Warrant is being criminally prosecuted in Romania for the same act as that on which the European Arrest Warrant is based;

- Where the European Arrest Warrant has been issued for the purpose of executing a prison sentence or a custodial sentence if the requested person is a Romanian citizen or lives in Romania and has a continuous legal residence in Romania for a period of at least 5 years and declares that it refuses to execute the sentence or custodial sentence in the issuing Member State;

- Where a final judgment has been passed upon the person who is the subject of the European Arrest Warrant in a third non-EU state, in respect of the same acts, provided that, in the event of a conviction, the sanction has been executed or is undergoing execution or execution is statute-barred or the offense to have been amnestied or the punishment to have been pardoned according to the law of the sentencing state;

- Where the European Arrest Warrant refers to offenses, which, according to Romanian legislation, are committed on the Romanian territory;

- Where the European Arrest Warrant includes offenses that were committed outside the territory of the issuing state and the Romanian law does not allow the prosecution of those offenses when they were committed outside of the Romanian territory;
- Where, according to the Romanian legislation, the liability for the offenses on which the European Arrest Warrant or the execution of the imposed sentence are based have been statute-barred, if the acts would have been within the competence of the Romanian authorities;
- Where a Romanian judicial authority has either decided to discontinue the criminal prosecution or to close the case for the offense on which the European Arrest Warrant is based or for which it has been issued, or has ruled a final decision against the requested person for the same acts, which prevents future proceedings;
- Where the convicted person has not been personally present at the trial.

4. DIFFERENCES BETWEEN THE EUROPEAN ARREST WARRANT AND THE EXTRADITION PROCEDURE

The most important element of the novelty in the European Arrest Warrant compared to the extradition procedure is the **elimination of the administrative phase**.

Thus, according to the legal instruments of extradition, this procedure involves two phases: an administrative one and a judicial one. In the administrative phase, central authorities have an essential role to play, especially in the case of active extradition, where the central authority of the requesting state, at the proposal of the competent judicial authority, formulates and transmits, directly or diplomatically, the extradition request; but also in the case of passive extradition, where the central authority of the requesting state examines the extradition requests received under the formal point of view of international regularity and either notifies the competent judicial authority or, if the formal requirements are not met, returns the extradition request stating the reasons.

Given the objective of removing or limiting the formalities, which are likely to make the extradition procedure extremely difficult, the new surrender system based on a European Arrest Warrant eliminates the administrative phase; the cooperation on the surrender of persons who are avoiding prosecution, trial or the execution of sentences almost completely takes place between the competent judicial authorities of the Member States, the central authorities being able to assist the competent judicial authorities or to act as transmitting authorities.

Therefore, if for the extradition procedure the final decision on whether or not to surrender the requested person is also a political one, with the European Arrest Warrant the entire proceedings take place between the issuing and the executing judicial authority, the issuing decision or, as the case may be, the execution decision exclusively belonging to the legal courts.

A significant difference between the European Arrest Warrant system and the extradition procedure concerns the **offense circumstances**, the new system establishing a number of 32 categories of serious offenses as exceptions from the double criminality rule, in which cases surrender can be granted without verifying this status of double criminality.

An equally important difference concerns the duration of the proceedings, as the European Arrest Warrant system regulates a **time limit** for the execution and surrender procedure as opposed to extradition, where no such limit is provided for.

In the European Arrest Warrant system, the competent judicial authority to which such a warrant was referred is required to resolve and to execute the warrant as a matter of urgency, which also involves the arrest of the requested person during the proceedings before the executing judicial authority. On the other hand, the measure of provisional arrest in order to extradite the requested person is not mandatory and if this measure has been taken, it expires after 40 days if the extradition

documents are not received within this time frame. These provisions represent the main cause of the extradition procedure inefficiency.

The European Arrest Warrant, as regulated by the 2002/584/JHA Council Framework Decision of 13 June 2002 and the domestic criminal law by Law no. 302/2004, ensures the necessary balance between effectiveness and strict guarantees for complying with the procedural rights of the requested person.

Finally, according to the system established by the European Arrest Warrant, the Member States of the European Union can no longer refuse to surrender their own citizens, as this system is based on the principle that every citizen of the European Union must be held accountable for his acts before the courts of the entire Union. However, when surrendering the requested person for prosecution or trial, it is possible for a Member State (and for the Romanian State) to request that the person be returned for the execution of the sentence, with the purpose of a better social reintegration.

In conclusion, the European Arrest Warrant is one of the major instruments of international cooperation in criminal matters for maintaining and developing an area of freedom, security and justice in the European Union, based on trust between Member States through mutual recognition of court judgments, establishing, as shown before, the “cornerstone” of judicial cooperation between these states.

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European integration as a historical desideratum of the elites in the Central and Eastern European states

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Abstract: *In the late 1980s - early 1990s, the European continent was marked by the collapse of the Soviet Union and by the fall of the totalitarian communist regimes in the USSR's satellite states. The end of the communist era was emblematic for the history of the European continent and represented the beginning of a new page in contemporary history. The times were new for the peoples who chose to be liberated from totalitarianism, or were awakened to the inevitable context of the paradigm shift. This article aims at presenting an overall analysis of the effects generated by the paradigm shift and the role of elites in managing and administering the change processes that took place in the countries that once belonged to the Eastern Bloc through a comparative analysis of two groups of states.*

Keywords: *Transition to a market economy; Central and Eastern European states; European integration process; Europeanisation; political elites; privatization.*

1. INTRODUCTION

The critical mass of the communist states dissolved in the circumstances in which, on one hand, starting 1989, the states of Central and Eastern Europe declared their sovereignty and independence, on the other hand, in December 1991, the Soviet Union as state structure ended its existence once the Communist Party of the Union of Soviet Socialist Republics was banned.

The unimaginable swift collapse of the regimes based on the Marxist-Leninist ideology and, with few exceptions, on the model of the planned economy, propelled the aspiring democracies into a new socioeconomic reality, the so-called “transition to a market economy”. Practically, for some of the countries that very same transition through democratic reforms has not been yet finalized. However, understanding and treating the transition period exclusively from its economic perspective would not offer the big picture of the reality. The transition to a market economy from communism to capitalism implied as well a transition to democratic political systems, to the allocation of the scarce resources in society.

This article presents an analysis of the situation, causes and effects of the transition to the market economy and to democracy - a phenomenon that brought along significant changes in the social welfare. The paper highlights the main differences in the process of Europeanisation between two groups of countries that were once part of the Eastern Bloc. The first group is made up of the so-called former communist satellite states of the Soviet Union, in particular, the Central and Eastern European countries that managed to join the European Union. The second group concentrates the former Soviet states that are aspiring to become fully-fledged member states of the European Union. In the case of the latter example, the time distance needed to reach the level of convergence required for obtaining the EU candidate status is so far uncertain.

The European integration process of the Eastern European states materialized in different ways from country to country, as a political and social phenomenon following the collapse of the communism in those countries. One cannot overlook the numerous parallels and similarities across the European course of the Central and South Eastern European states. Along with the fall of the

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communism and the beginning of socio-political and legal framework changes, the realities that started emerging in the former satellite states of the Eastern Bloc, as compared to the former Soviet states, were clearly different. These new realities were created and promoted by the political elites of the Central European countries' emerging democracies. As it was the case of the majority post-Soviet states in Europe, the European integration process during the transition period was delayed. The belated start of the European integration process in these countries could be, most likely, explained by the continuously exercised influence of the political and economic elite belonging to the epicentre of the former Soviet empire - Moscow.

We find that, while the narrative of the Central and South Eastern European countries was guided by the "the return to Europe" ideology, that in fact became a desideratum of the political elites of that period, some of the post-Soviet countries, that were forcefully transformed during the totalitarian regime into multi-ethnic countries, are still struggling to determine their national identity. A worthy hypothesis for discussions is that the unequivocal factor of national identities has played a key role in accurately setting up the foreign policy directions that would have been later on coherently promoted by the ruling elites of those states. Perhaps this could partially explain the time gap between the accession of the Central and South-Eastern European countries to the European Union as opposed to the three Eastern European state that managed to sign only 10 years later Association Agreements with the European Union, yet without any clear perspective of joining the EU club.

This paper aims to address and outline the historical role of elites in the Central and Eastern European states during the times known as the transition to a market economy. The structure of the paper comprises 5 sections, including the introduction. The second section illustrates the characteristics of the *nomenklatura* and those of the elites of the transition to a market economy period of the CEE region. Section three examines how the governing elites of the CEE states have shaped the relations with the EU and argues that the policies adopted by the elites had a positive impact on the economic development of the new capitalist states. The fourth section of the paper states the role of the elites in the post-Soviet Eastern states in the period of transition to a market economy, while dwelling on the impact of the geopolitical struggle upon the European integration process of those countries. Section five sums up the conclusions based on the ideas and arguments laid out in the preceding sections.

2. FROM NOMENKLATURA TO ELITES OF THE TRANSITION TO A MARKET ECONOMY

In the view of providing a comprehensive explanation of the "elite" concept and of the categories into which the elites are split, we will present definitions and explanations of the notion as found in the literature review. According to C. Sigmirean, in theory, a general custom of the "elite" concept involves reporting the majority of individuals, i.e. the mass of the population, to the status of superiority held by a particular individual or group of individuals.² The scholarly literature identifies three notorious personalities, in particular Gaetano Mosca (1858-1941), Vilfredo Pareto (1848-1923) and Roberto Michels (1876-1936) as "true theorists of elites", who using the notions of elites, or leaders, reached the idea that "a society without social classes cannot exist". In general terms, those theorists have concluded, similar ideas according to which elites, or a small group of leaders, position themselves above society and rule the world.³

Therefore, this paper uses the definitions of the new theories of elites proposed by J. Higley, M. Burton and G. L. Field, by contrasting the classification of political regimes according to the

² Sigmirean, Cornel, „Istoria elitelor. Perspective istoriografice”, în vol. Statutul istoriei și al istoricilor în contemporaneitate, coordonatori: Gabriel Moişa, Sorin Şipoş, Igor Şarov, Oradea, Editura Universităţii din Oradea, 2014, pp.111-126.

³ Sigmirean, C., *op.cit.*, p. 2

approach proposed by Higley and Burton, and the distinctive elements and characteristics referred to by the authors.

In theory, there are a number of categories of political elites that, according to G. Tibil, include “all those who hold positions of political power in society”. Likewise, among the expressions that convey the same or very close meaning are considered to be those of “political class” or “governmental elites”. We note that, in the absence of a political class with party-based historical background and without relevant governing traditions of an autonomous state administration, the ruling elite that were formed right after the collapse of the totalitarian communist regime in Romania can be integrated into the category of political elites in the sense used by G. Tibil (1995). Similarly, “political class” or “governmental elites” concepts that the author refers to are used interchangeably in this paper.⁴

An argument that supports the thesis regarding the decisive role played by political elites during the transformation processes of the 1990s is the stability of the ruling elites and the authenticity of the desideratum and policies adopted in order to carry out the reforms required while pursuing societal changes and supporting successful transitions to market economies. In these specific times, the quality of the political elites, as well as their intentions towards the governing process and reforms of the administrative systems and of the economies, proves to be critical. In the first years following the collapse of the communist regime, the elites that managed to assert themselves and ascend to the governments of the Central and Eastern European states were to decision-makers that have instituted the priorities and directions to be followed in the course of the transition period. Likewise, under the leadership of those same elites, the distribution of resources and goods in society was performed and the rules of the free market were set. The adoption and implementation of the rules and regulations proved to be a difficult process, in which the economic principles and practices had to be reset and adapted, domestic markets had to be opened to foreign investments; the processes of privatization of state-owned enterprises and the distribution of resources among citizens had to be undertaken, public domains and properties, private domains and private properties were to be defined.

A major factor in understanding the evolution of the situation in the Central and Eastern European region lies in comprehending the national peculiarity and characteristics that have played an important role by contributing to the socioeconomic and political transformations along with the change of state leadership after the fall of totalitarian regimes. The answers to a series of questions that are addressed in this article are aimed at revealing the extent to which the transformation of the elites contributed to the societal change in the former communist states and whether, in fact, the replacement of the old governmental elites with the new elites was the key factor that led to development and to a swifter transition to a market economy in certain Central and Eastern European states, such as Poland, the Czech Republic, Slovakia, as opposed to Romania or Bulgaria.

The leadership structure in the communist regime is an important factor of analysis. According to D. Lane and C. Ross, the development, consolidation and complexity of government bureaucracy were characterized by the autonomy of elites who were not subject of the autocratic control of the party. Authors such as Higley argue, “Democratic transitions and the breakdown can best be understood through changes in the internal relations of national elites.” However, the phenomenon of the transformation of political elites as an agent of the transition to state socialism is briefly studied and limited in the literature.⁵

⁴ Tibil, George, „Conflictul elitelor și instabilitatea politică în evoluția modernă și contemporană a României”, în *Revista Polis*, 4/1995, p. 6.

⁵ Lane, David and Ross, Cameron, *The Transition from Communism to Capitalism, Ruling Elites from Gorbachev to Yeltsin*, St.Martin's Press, New York, 1st ed., 1999, p. 6

It is important to identify and delimit the defining characteristics and parameters of the category of individuals who formed the *Soviet political elite*. We take the definition of the authors D. Lane and C. Ross (1999) according to which the Soviet political elite was formed by people “who had the opportunity to constantly exercise political power over national decisions.” The Soviet political elite consisted of members of the leading political bodies of the Communist Party of the USSR - Politburo and the Secretariat of the Central Committee, the Council of Ministers of the USSR, the Supreme Soviet of the USSR and the Congress of Deputies.⁶

Regarding the power structure of the Soviet political elite before 1989, only two of the political constituencies can be considered major components: the Council of Ministers and the Communist Party of the Soviet Union. Until the “culmination year”, the Soviet Union was governed by “authorities” that were incapable of aggregating the multitude of interests. As it was the case of the basic constituent of the Western civil society, the voluntary organizations, were mainly lacking autonomous authority and were subject to constant supervision and control by party and government agencies. The structure of the Soviet elite proved to a “closed” one, given that autonomous groups outside the state were either not allowed to establish their rights, or were denied access to political power.⁷

K. H. Goetz and H. Wollmann argue that the characteristics of the central apparatus during the communist regime in the Eastern Bloc states strictly limited its political-governmental role and were against effective political coordination within the executive.⁸

As in the case of the Soviet states, state administrative officials had an obligation to demonstrate political loyalty and devotion to the Communist Party, which was essentially the communist political elite. In practice, the Communist Party implemented the requirements through the *nomenklatura* system, which ensured the party’s control over appointments to state positions.⁹

The characteristics of the communist governmental elite did not completely dissolve with the fall of the communist regime. Although the political elite had been replaced in some post-communist states partly by elections, in other countries through a radical move, as in the case in Romania, bureaucratic practices and communist-type institutional thinking were preserved in the mentality of civil servants left in the system, thereby it had perpetuated in the mindset of the emerging post-communist elite.

Perkin in his work explains how the contemporary professional elite that governs modern societies, influences the evolution of humanity, attributing to this modern elite the harmful consequences at a global level. According to the author, “all power is power for exploitation and destruction as well as for creation and distributive justice”. The author argues that “the collapse of communism in the Soviet Union and Eastern Europe,” is rather due to “shortsighted selfishness of their respective professional elites” than because of ideological beliefs.¹⁰ Moreover, the author states that unlike the mass of people who lived at “Spartan levels of consumption”, the *nomenklatura* indulged themselves “into an orgy of corruption”. The phenomenon of corruption practiced by the communist *nomenklatura* resulted in a deep crisis of political legitimacy that could no longer be fixed by Gorbachev. Despite the reforms, the leaders who succeeded Gorbachev were unable to fight corruption. Succinctly, Perkin concludes that the greed shown by the elites proves to be “self-destructive” and leads to the overthrow of those who practice it.¹¹

⁶ Ibidem.

⁷ Lane, David and Ross, Cameron, *op.cit.*, pp. 7-8.

⁸ Goetz, Klaus H., & Wollmann, Hellmut, “A four-country comparison”, *Journal of European Public Policy*, 8:6 December, 2001, pp. 864-887, p. 867.

⁹ Ibidem.

¹⁰ Perkin, Harold, *The Third Revolution: Professional elites in the modern world*, Routledge, London, 1996, p. 2.

¹¹ Perkin, Harold, *op. cit.*, p. 41.

The 1989 revolution marked the end of the nomenklatura, but not necessarily the end of the further enrichment and even the ruling, in one form or another, of the former Soviet and communist political elites.

Towards the end of the Soviet era, asset control had become a veritable space of conflict between government elites, administrative incumbents, and new classes of trained entrepreneurs made up of people coming from middle and lower leadership positions, alternative economies and professionals who were succeeding the old elites. The first category aimed at maintaining power by using administrative controls or by appropriating ownership of state property.¹²

In the times of *perestroika*, it would have been unimaginable for Gorbachev that the nomenklatura would be fiercely devoted to the “struggle” for enrichment by privatizing as many assets as possible and taking control of important state property. It was probably obvious that influential and authoritarian representatives of this social category had access to the necessary information and had knowledge about state assets and the processes of obtaining control over the respective assets, as opposed to the population mass.

It is well known that the Soviet period manifested itself internationally through the isolation of elites in socio-political values characteristic of authoritarianism, the effects being imprinted in the political culture of emerging elites in practice during the transition period of former Soviet countries. Because within the Communist Party of the USSR an internal culture of party democracy that would promote constructive debates and transparent political competition was not practiced, this specificity was reflected in the process of recruiting and forming government elites in the years following the collapse of communism in post-Soviet states.¹³

A tangent idea regarding the isolation of elites, also due to limited mobility, is revealed by C. Sigmirean. The author states that in the communist regime, elites originated from groups that were “frustrated, marginalized, renegaded on national grounds, or by reconversion of old elites, especially at the sectoral level” as the mobility of top communist elites was more restricted compared to the level of elites’ mobility in democratic states.

Likewise, in the Central and Eastern Europe states that were part of the former Eastern Bloc, the Communist Party during those four decades of governance managed to penetrate all the institutions of these countries. The specific legacy from the times of the communist regime, which remained deeply imbued in the system of governance of the Central and Eastern European states, was the main cause of the challenges they faced in the process of the separation of institutional spheres in the state. K. Engelbrekt argues that the Communist Party was present practically everywhere in society, apart from small social cells such as “families and circles of close friends, dissident groups and certain religious congregations such as senior civil servants in the economic sector, in the judiciary, in academia, and even in the arts, were usually members of the Communist Party, or at least tolerated by it.”¹⁴

Similarly, Higley and Dogan argue that the totalitarian regime paved the way for a rapid “movement” of public office holders despite the fact that replacement of the elites is usually an incremental process, and an example of this is shown by the changes that occurred in the regimes of the post-communist Central and Eastern European states. Analysing the events from the perspective of democratization and of the shaping of the new elites in post-communist countries, it is certain that throughout the regional context, the logic of politics has undergone essential transformations. As a result of the fall of the communist regimes, political power ceased to be monopolized by the central

¹² Lane, David and Ross, Cameron, *op. cit.*, p. 19.

¹³ Gherasimov, Cristina, “Political Elite Renewal in Georgia, Moldova and Ukraine,” Research Paper Russia and Eurasia Programme, London, Chatham House, May 2019, p. 3.

¹⁴ Engelbrekt, Kjell, “The Impact of Enlargement on Institutional Integrity in Central and Eastern Europe”, *Perspectives on European Politics and Society*, 10:2, 2009, p. 174.

committees, thus giving green light to political competition, in fact an inconceivable phenomenon in times of the past regime. Elections allowed for the parliamentary seats to be divided “more or less free”, a fact disputed by many political parties and electoral lists.¹⁵

3. THE ELITES OF THE CENTRAL AND EASTERN EUROPEAN STATES IN THE PERIOD OF TRANSITION TO A MARKET ECONOMY

The beginning of the transition from totalitarianism to a market economy, democratic governance and the rule of law in the former communist states of Central and Eastern Europe, for the European Union represented the start of structural reforms and the gradual guidance of these neighbouring states towards convergence with its policies, norms and rules and recommendations. European integration involves going through these complex processes of governmental elites to reform vertically and horizontally, according to certain models recommended by the EU to the Central and Eastern European states and to the CIS states.

The scholarly literature on Europeanization answers a series of questions and hypotheses related to how and why European integration affects the governance of the Central and Eastern Europe states. In Western Europe, European integration has led to limited convergence of the existing models. In the case of these EU member states, the organizing models of the political systems are quite diverse. Some authors state that the EU encourages candidate states in the accession process to converge with certain institutional models to a greater extent than the current member states had converged.¹⁶ The convergence of the administrative structures begins with the accession negotiations and is sought to be part of the Europeanization process.

The changes taking place in post-communist states through Europeanization are analysed in the scholarly literature mainly from the point of view of the EU's impact on the member states. Research in the field of Europeanization of post-communist states involves their institutionalization through the development of formal and informal rules, procedures, rules and practices, but also various ways of interaction established in the member state and the EU.¹⁷ The impact and influence of the EU on the candidate countries is exercised by support for the principle of conditionality under the Treaty on European Union, Article 49, which provides that “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.” The principles stated in Article 2 are “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”.¹⁸

However, at the beginning of the transition period, the European Union's cooperation mechanisms with its member states was, on a case-by-case basis, relatively limited. Therefore, in the absence of implementation mechanisms at the desired level, politicians and business leaders sometimes develop symbiotic relationships to the detriment of markets and public finances.¹⁹

As in the case of the former Soviet states, the privatization process played a major role in the economic transformation of the CEE post-communist countries of the former Eastern Bloc. Since the distribution of state resources and the need to ensure the conditions of fair competition are a pillar

¹⁵ Semenova, E., Edinger, M., and Best, H., *Parliamentary Elites in Central and Eastern Europe Recruitment and representation*, Routledge, Oxon, 2014, p. 2.

¹⁶ Grabbe, Heather, “How does Europeanization affect CEE governance? Conditionality, diffusion and diversity”, 8/6, 2001, p. 1014.

¹⁷ Elbasani, Arolda, “EU Administrative Conditionality and Domestic Downloading”, KFG Working Paper 2, 2009, p. 6.

¹⁸ Consolidated version of the Treaty on European Union, Article 49 (ex Article 49 TEU), Official Journal of the European Union, C 202/43.

¹⁹ Engelbrekt, K., *op. cit.*, p. 175.

of the development of the rule of law. The process of privatization in the first years of the transition to a market economy provided opportunities for abuse, the process itself lacking in transparency.

This argument is also analysed by authors who claim that “privatization has reduced over time opportunities for massive abuses of power through illicit transfer of state property to private property, a common practice in the early 1990s, at the same time privatization has been very important in wasting these possibilities.”²⁰

Through a comparison between Central and Eastern European states after the fall of the regime, we distinguish several factors that influenced the course of economic transformation: (1) non-transparent privatization of state assets by the *nomenklatura* and their duration; (2) the separation of the former communist party from state structures. After the fall of the regime in Hungary and Poland, the former communist party was separated from access to state structures much earlier than in Bulgaria and Romania. However, in Hungary acts of privatization by the *nomenklatura* have manifested themselves widely, unlike in Poland where the councils of the Solidarity trade union have exercised the power of blocking arbitrarily privatization attempts in most of the cases.²¹ At the same time, in Bulgaria as opposed to Romania, the separation of the former communist party from the state institutions did not materialize immediately. The main difference lies in the fact that the representatives of the reformed former Communist Party managed to lead the central government until the beginning of 1992, including the Bulgarian municipalities for another five years. Having long access to power, strategically positioned the emerging elites of the nomenclature to exercise selective privatization of state assets and equally to appropriate the important documentation in the possession of the Communist Party and of the state.²²

An essential factor was the separation of the legal framework from politics. In particular, the differentiation was caused by the real level of separation of powers in the state, especially of the executive and of the judiciary. For example, experience shows that in Bulgaria and Romania, countries where the communist party gradually disintegrated, the establishment of subsequent judicial autonomy turned into a struggle.²³ The process of EU enlargement for Bulgaria and Romania via the transposition of the *acquis* into the national legislation during the pre-accession period had a limited impact on justice, while major transformations of this system were part of the preconditions for accession.

We believe that the differences in the distribution of the public goods, subsequently provided a differentiated basis for the governing elites that was crucial for ensuring economic development during and after the transition to a market economy. This led to the catalyzation of the social progress and to a comparatively enhanced social welfare. Therefore, the discrepancies in the level of economic development can be observed after almost 30 years, given that all these states are now members of the EU and have access to European Structural and Investment Funds. Despite this, the chances of reducing the economic and social disparities and gaps between the levels of regional development in countries like Bulgaria and Romania compared to Poland, the Czech Republic or Slovakia are still limited, although not without potential. Undoubtedly, the implementation by the ruling elites of the right strategies for the development of critical infrastructure and economic growth through consistent enforcement of the EU competition policy rules and ensuring optimal conditions for the absorption of EU structural funds would greatly facilitate economic and social convergence between the Central and Eastern European states.

²⁰ Ibidem.

²¹ Engelbrekt, K., *op. cit.*, p. 175.

²² Ibidem.

²³ Chonkov, B. Y. & Schmitz, F. N. (2002) Public private partnerships in Bulgarien, *Osteuropa Recht*, 48(3), pp. 229–230.

4. THE ELITES OF THE POST-SOVIET STATES IN THE PERIOD OF TRANSITION TO A MARKET ECONOMY

The tumultuous times full of insecurities, as well as the lack of stability of the geopolitical direction that characterized Georgia, R. Moldova and Ukraine, created the needed conditions to maintain the reminiscence of local Soviet era elites in power, be it as part of the political and legislative elite through democratic mechanisms, or among the economic elite that would be in fact leading from shadows a part of the political elite during perestroika and immediately after the fall of communism through the privatization of state owed assets. As the Old Guard elites were part of the former local nomenklatura, the likelihood and chances that they might have succeeded in transferring state owed economic assets into their own property way below the market prices, meanwhile preserving their places in the new administrative structures, or acceding to leadership positions in the public and economic spheres, was undoubtedly higher to the chances of the emerging national elites who were not part of the same social class during the Soviet period.

The European aspirations of the transforming societies in the Eastern European states, in particular R. Moldova, Ukraine and Georgia, have been declared and demonstrated by the political elite through concrete actions over the past 15 years, to the detriment of the continuation of the communist-type government policies of the political and legislative elite that has perished since the beginning of the transition period and that was responsible for delaying the process of European integration.

The societies of the three states went through transformations as a result of the revolutions that replaced the political elite and reoriented the external direction. Among the most relevant social movements that have triggered important changes are the Ukrainian Revolution in Ukraine (2004), the Rose Revolution in Georgia, the Revolution of April 7, 2009 in the Republic of Moldova and the Euromaidan (2013-2014) in Ukraine. These historic events have brought in power new pro-European political parties, dethroning pro-Russian or quasi-communist parties. The citizens massively supported political elites represented by these generations. The societies of these countries and their Western partners were convinced that the new political elites would accelerate democratization and Europeanization and would adopt European core values and principles.²⁴ In the case of Euromaidan, the name itself suggests that the key reason of the outbreak of the revolution was determined by geopolitical factors. The culmination of street protests in the Ukrainian capital in November 2013 was due to the sudden refusal of the Kiev governmental elite to initial the Ukraine-EU Association Agreement at the Eastern Partnership Summit taking place in Vilnius, Lithuania.

The riots and mass demonstrations that took place in Ukraine, Georgia and the Republic of Moldova, some peaceful and others with human casualties, were based on the frustrations accumulated over more than a decade by different social classes of those societies. The low living standard of life in these states, the perpetual financial insecurity caused by fragile economies often lacking competition rules and regulations, low quality or even non-existent social systems, corrupt public services, and growing distrust towards the political elite that came to power during the transition period of 1990-2000, were the major factors that contributed to the accumulation of frustrations. Declaratively, the political elite was geopolitically oriented towards the East, while in practice, it seemed to be more interested in maintaining power and achieving its own economic interests than honouring electoral promises.

One aspect brought to the study of transitions in the former Soviet states of Central and Eastern Europe is democratic legitimacy. Gligorov and Landesmann argue that the main feature of successful transitions in Central and Eastern European countries was their legitimacy, which was ensured by

²⁴ Gherasimov, C., *op. cit.*, p. 3.

reliance on democratic procedures, according to the principle of “democracy first, transition later”. By comparison with less successful transitions, the elites avoided democratic decision-making and opted for authoritarian solutions.²⁵ The “Maidan revolution” and the elections that followed, as a whole, were a first step towards the democratization of Ukraine by delegitimizing the oligarchic system. Thus, the legitimacy of the strategic decisions initially taken by the new elite implied redirecting state’s foreign policy towards strengthening the relations with the EU and for starting major administrative reforms. The authors argue that Ukraine launched “the beginning of the process that has been followed by other more successful countries in transition.”²⁶ Certainly, these transformations of Ukrainian society would influence and encourage future new generations of elites in the neighbouring states, such as the Republic of Moldova, to dare launching real transformational processes aimed at reforming the system, including through popular uprisings, in their own societies.

5. CONCLUSIONS

Through the comparative analysis of the situation in the Eastern European states that were part of the Soviet Union, with the Central and Eastern European countries that were once USSR’s satellite states, we find that the European path of the first group of states began relatively late. In the light of the proposed hypotheses and of the arguments presented, we find that a successful transition from communism to capitalism in a democratic system is reliable and possible only if the imminent processes resulting from the change of the form of government, namely when the transformation of institutional, administrative and judicial systems are designed and governed by a “healthy”, stable and consequent political elite. Therefore, the decisions of the governmental elite should be consistent and should correspond to the authentic principles and values of democracy and rule of law, while pursuing the national interest without managing and promoting hidden political or personal agenda through governance.

The societies of Georgia, the Republic of Moldova and Ukraine have practically expressed the will of reorienting themselves towards European democratic values through several historical revolutions that have radically changed the geopolitical direction and led to the replacement, repeatedly in the case of Ukraine, of the governmental elite.

The long delay in the process of Europeanization and European integration of Georgia, the Republic of Moldova and Ukraine, unlike Romania and Bulgaria is explained by the fact that in the case of the first group of countries, the leadership of the political elites was formed of the representatives of the former communist party, while the second group of countries went through swift, or even radical regime changes.

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²⁵ Gligorov, Vladimir, & Landesmann, Michael, The Ukrainian Crisis: Security Issues and Political-Economic Challenges, The Vienna Institute for International Economic Studies, 01 June 2015, <https://wiiw.ac.at/the-ukrainiancrisis-security-issues-a>, accessed on 22/04/2020.

²⁶ Ibidem.

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Transnistria in the Light of Classic Criteria for Statehood

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Abstract: *The question of the statehood of Transnistria is a part of a more complex phenomenon of the existence of the de facto regimes. As we all know, there are some „classic” criteria in order to become a state and be a part of the international community. This article intends to offer a specific vision on the elements of statehood in the case of the Transnistrian region of the Republic of Moldova. It focuses, in particular, on the state power and population, but refers also to some new elements like the level of democracy and respect of the human rights.*

Keywords: *Statehood, Transnistria, State power, Population, Democracy.*

INTRODUCTION

States began to take shape in the way we know it today due to an event that took place in the seventeenth century, namely the Peace of Westphalia of 1648. However, the process of delimitation of the territory under a certain ruler and people that identified themselves as a community started much earlier, so at that time, it was rather a question of recognition of that communities within bounders.

The universal principle, existing at all times which was formalized as an official instrument in the nineteenth and twentieth centuries in relation to existence of a state consists of its recognition by other states and their willingness to have bilateral, or, where is the case, multilateral relations with that state. In present times, as a rule, in order to be recognized as a state, an entity must meet the requirements of the international community in accordance with public international law.

The classical conditions for existing as a state are laid down in international customary law, which has been codified in Article 1 of the Montevideo Convention of 1933 on Rights and Obligation of States. Thus, in order to become a subject of international law (member of the international community), an entity (state) must have: **a) permanent population, b) delimited territory, c) state power (government), d) capacity to enter into international relations with other states.** However, given the considerable evolution of international relations and the events that followed after 1933, especially the World War II, the Cold war, the disintegration of the USSR and Yugoslavia, the international community developed additional standards in order to obtain the status of a "state".

DE FACTO STATUTE OF TRANSNISTRIA

In what follows, I will analyse the *de facto* statute of Transnistria and will present my vision on the reasons and arguments why it should not be considered a state. According to the scholars¹ and experts opinions², *de facto* regimes are those regimes that have emerged, as a rule, as a result of the

¹ Daron Tan, *Filling the lacuna: de facto regimes and effective power in international human rights law*, in New York University Journal of International Law and Politics, vol. 51 2018- 2019, p.441.

² Christopher J. Boergen, *Thawing a frozen conflict: legal aspects of the separatist crisis in Moldova*, St. John's University School of law, 2006.

illegal use of (armed) force. Due to the way of their apparition, states do not recognize such regimes as equivalent to a state, thus lacking the capacity to operate internationally.

De facto regimes are characterized by the fact that they possess authority and control as a matter of fact, without legal cover, whereas it operate within the territory of a State which already has a legitimate and recognized government. A rebel military force can "establish itself so well in a region within the territory of a State, even if it does not overthrow the legitimate government, that it can be recognized as a *de facto* government of that region over which it exercises effective control."³ According to some scholars, the *de facto* post-soviet regimes (Nagorno-Karabakh, Abkhazia, South Ossetia and Transnistria) meet the 3 classical conditions for becoming a state and claim to meet the fourth, namely the ability to enter into international relations with other countries.⁴

STATE POWER

"State power" (government) can be described as the most important criteria for the existence of statehood, as all others are dependent on it.⁵ Moreover, it is not enough for a state power (a government) to exist as an authority, but it must exercise full control over the territory, while at the same time having the capacity to act independently from other states⁶. In this regard, the case of Finland between 1917 and 1918 should be cited as an example, when its sovereignty was not recognized until the government had full control over the territory without the need for the presence of foreign armed forces in order to secure this control. Another example is the "Manchukuo" case, when after Japan's occupation of the Manchuria region and the attempt to create an internationally recognized state, it was hit by the resolution of the League of Nations Assembly.

In the case of Transnistria, the illegal presence of foreign military troops (of the Russian Federation) on its territory, since 1994⁷ and implicitly, on the territory of the Republic of Moldova is a notorious fact. Although there have been numerous attempts by the Republic of Moldova to request the withdrawal of these troops, which have materialized in international agreements concluded with the Russian Federation⁸ (but not ratified by the Russian Federation or simply not fulfilled) or commitments⁹ and adoption of different resolutions¹⁰ of the international organizations, this has not happened so far.

³ Robert Jennings, Arthur Watts, Oppenheim's International Law, 9th ed, 1992, para.49, p.162.

⁴ Dov Lynch, *Engaging Eurasia's separatist states: unresolved conflicts and de facto states*, Washington, DC, United States Institute of Peace Press, 2004, p.16

⁵ James Crawford, *The creation of states in international law*, Oxford University Press, Oxford, 2006, p.56.

⁶ Anthony Aust, *Handbook of international law*, Cambridge University Press, Cambridge, 2005, p. 136-137.

⁷ On July 29, 1994, the Republic of Moldova adopted a new Constitution, which provided for the neutrality of the state and the prohibition of stationing troops belonging to other states on its territory.

⁸ By way of example, the first agreement concluded in this regard was the Agreement between the Republic of Moldova and the Russian Federation on the legal status, manner and terms of withdrawal of military formations of the Russian Federation, that were temporarily stationed on the territory of the Republic of Moldova. Article 2 of this Agreement provided for the withdrawal by the Russian side of its military formations within three years from the date of entry into force of the Agreement, the withdrawal to be carried out simultaneously with the political settlement of the Transnistria conflict and the establishment of a special status of the „ Transnistrian region of the Republic of Moldova”. Not ratified by the authorities of the Russian Federation, this Agreement never entered into force.

⁹ See the Declaration of the Heads of State and Government of the OSCE at the Istanbul Summit of 19 November 1999, which called for a "rapid, proper and complete withdrawal of Russian troops from the Republic of Moldova" and welcomed the commitment undertaken by the Russian Federation to complete by the end of 2002 the withdrawal of the armed forces from the territory of the Republic of Moldova ", available at <https://www.osce.org/mc/39569?download=true>.

¹⁰ UN General Assembly Resolution A / Res / 72/282 of 26 June 2018 on the complete and unconditional withdrawal of foreign military forces from the territory of the Republic of Moldova, available at <https://undocs.org/en/A/RES/72/282>.

According to the National Defence Strategy of the Republic of Moldova¹¹, "in the eastern region of the Republic of Moldova there is a significant military potential of separatist armed forces, supported multilaterally from outside. At the same time, in the eastern region, there are military formations of the Russian Federation, illegally stationed on the territory of the Republic of Moldova, contrary to the country's Constitution. The separatist and foreign forces, illegally stationed in the eastern region, have a considerable operational capacity, being able to constitute an intervention force at any time, which would allow the regime on the left bank of the Dniester and the Russian Federation to promote its strategic objectives". According to the National Security Strategy of the Republic of Moldova, the foreign military presence (AN. of the armed forces of the Russian Federation) has no legal basis, contradicts the provisions of the Constitution of the Republic of Moldova, commitments and international principles in the field of arms control and political and military relations between states. It is this military presence of a foreign state that is a key factor that supports and fuels the continuation of this "frozen conflict", along with the economic factor.¹²

With regard to the economic factor, it should be noted that since 1992, the Russian Federation has consistently subsidized the Transnistrian economy through direct financial assistance, relatively generous pensions for holders of Russian passports and the supply of electricity and gas at low prices and on credit¹³. According to the Constitutional Court of the Republic of Moldova¹⁴, The Russian Federation has direct relations with the Transnistria in the field of gas export and Transnistria receives electricity directly from the Russian Federation. Moreover, the largest company in Transnistria, the metallurgical plant in Rabnita, was bought by a Russian company, and certain goods produced in Transnistria are presented as having their origin in the Russian Federation. Given its major economic influence in Transnistria, however, the Russian Federation is not interested in creating a prosperous economy that can exist autonomously. As the efficiency of the Transnistria economy depends on the Russian Federation, this instrument is used to control this area at the political level and to deepen the gap between Chisinau and Tiraspol¹⁵.

POPULATION

Due to the semi-closed and "unrecognized" nature of the de facto Transnistrian regime, it is not possible to operate with official information regarding the population, so I have selected data from various sources in order to obtain statistics as accurate as possible. According to the so-called „Ministry of Foreign Affairs” of Transnistria¹⁶, the population of the area is 555 thousand people, of which 31.9% Moldovan, 30.4% Russians and 28.8% Ukrainians. However, it seems that these data are outdated, as according to other sources, also of Transnistria origin, at the time of the 2015 census, 475 thousand people lived in Transnistria¹⁷¹⁸. The latest statistical data are available on the official website of the so-called „Ministry of Economy” of Transnistria, according to which on January 1,

¹¹ approved by Parliament Decision No.134 of 19.07.2018

¹² See also the position of the German Federal Foreign Office, available at <https://www.auswaertiges-amt.de/en/aussenpolitik/laenderinformationen/moldau-node/transnistria-conflict/2139010>.

¹³ Rebecca Chamberlain-Creanga, John O'Loughlin, Gerard Toal, *Divided Space, Divided Attitudes? Comparing the Republics of Moldova and Pridnestrovie (Transnistria) Using Simultaneous Survey*, Eurasian Geography and Economic, Vol. 54, no. 2, 6 august 2013, p.4.

¹⁴ Decision no. 14 of 2 May 2017 on the interpretation of Article 11 of the Constitution.

¹⁵ Kamil Całus, *An aided economy. The characteristics of the Transnistrian economic model*, Centre for European Studies, no. 108, Warsaw, 14 May 2013, p.1.

¹⁶ http://mfa-pmr.org/ru/republic_main

¹⁷ <https://point.md/ru/novosti/obschestvo/nazvana-chislennost-naseleniia-pridnestrovia>

¹⁸ <https://regnum.ru/news/society/2237171.html>

2019, the population of Transnistria consists of 465.1 thousand people¹⁹. A simple analysis shows that there is a considerable decrease in the number of inhabitants in Transnistria that can be observed by comparison with statistics of 1989, when there was a population of 680 thousand people.²⁰

Returning to the classical conditions of statehood, regarding the existence of a permanent population, there is no need of a certain number of population. In principle, the mere existence of the inhabitants on a delimited territory may be sufficient to meet this criterion, but there may still be a need to prove the "real" association of people with this territory.²¹ In this regard, the status of persons living within an entity could be defined through the legal framework.

The so-called existing regulatory framework in Transnistria²² offers the possibility to obtain the „citizenship” in extremely simple and favourable conditions. First of all, the Transnistrian regime allows multiple citizenship. In order to obtain the “citizenship” of Transnistria through “naturalization” it is enough to live on its territory for at least 1 year, with the possibility to be outside the territory for a period of 3 months. In fact, there are a number of situations in which it is not even necessary to meet the above criteria, so that if a person has outstanding achievements in science, technology or culture, he can obtain citizenship immediately, if provided it is of interest to Transnistria. At the same time, Transnistrian „citizenship” can be granted without respecting the 1-year term, on the basis of marriage with a person who has Transnistrian citizenship; on the basis of graduation from Transnistrian educational institutions and employment; on the basis of carrying out entrepreneurial activities for at least 6 months in Transnistria, etc. By comparison, no country in Southwest Europe has such a permissive legal framework²³. Among the 17 states subject to analysis, only in Armenia and Poland the minimum term of stay within the territory of the State is 3 years, in case of other states it starts with 5 years onwards²⁴, whereas in 11 states there is a condition to renounce to the dual citizenship. Also, only in Croatia and Hungary does the citizenship of a spouse serve as an obligation of the state to grant citizenship, in other cases there are a number of additional conditions and the granting of citizenship is at the discretion of the state.

In these conditions, it is necessary to analyse to which extent the population of the area is considered "associated" with the Transnistrian *de facto* regime. In the light of the above, given the conditions under which people can become "citizens" of the Transnistrian regime, it is not clear how their attachment to the regime manifests itself and whether there is a close connection which is inherent in the relationship state-citizen. Given the fact that granting of citizenship of the Tiraspol regime is not conditioned at least by the criterion of knowing a language spoken on its territory, the nature of the so-called "citizenship" should be considered equivocal and perhaps even contested. Moreover, compared to the normative framework of the states in the region, this citizenship of the *de facto* regime cannot be equalled or assimilated, by virtue of the conditions of obtaining, to the institution of “citizenship” as it is provided in the legislation of these states.

Another issue is whether the "citizenship" of Transnistria is sufficient to be considered as a basis for the existence of the population (as a classic criteria) in the context that a majority of residents

¹⁹ <http://mer.gospmr.org/gosudarstvennaya-sluzhba-statistiki/informacziya/ezhegodnik-gosudarstvennoj-sluzhby-statistiki/statisticheskij-ezhegodnik-20191.html>

²⁰ Vladimir Fomenko, *Profilul Migrațional Extins al Transnistriei*, statistical report conducted under the auspices of the International Organization for Migration, Chișinău, 2017

²¹ Malcolm Evans, *International Law*, second edition, Oxford University Press, 2006, p. 232.

²² <http://mfa-pmr.org/ru/ymB>.

²³ Costica Dumbrava, *Citizenship in Central and Eastern Europe*, Comparative Report, Global Citizenship Observatory (GLOBALCIT) Robert Schuman Centre for Advanced Studies, April 2017, available at https://cadmus.eui.eu/bitstream/handle/1814/46112/RSCAS_GLOBALCIT_Comp_2017_02.pdf?sequence=1&isAllowed=y.

²⁴ Countries analysed Armenia, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Republic of Moldova, Poland, Romania, Russia, Slovakia, Slovenia, and Ukraine.

have another citizenship. As I have shown above, there is no "Transnistrian" people, the inhabitants of the region being in proportions of almost 1/3 divided into Moldovan, Russians and Ukrainians. According to some sources, at the level of 2008, around 160,000 inhabitants of Transnistria had the citizenship of the Republic of Moldova, which at that time constituted 35% of the population with the right to vote. Also, 90% of the population of Transnistria had a different citizenship than that offered by the "Transnistrian passport"²⁵. At the same time, according to data provided by the *de facto* leader of Tiraspol²⁶, in 2019, on the territory of Transnistria lived about 80,000 thousand citizens of Ukraine, 200,000 citizens of the Republic of Moldova and 220,000 citizens of the Russian Federation. Even if the information presented cannot be considered as official, and its authenticity can be disputed, this does not prevent me from advancing the idea that the majority of the population of Transnistria enjoys the citizenship of another state. Especially that, pursuant to the Office for Reintegration that used data presented by the Public Services Agency, on August 31, 2019, in the Transnistrian region were documented 332 861 people holders of identity documents of the Republic of Moldova, which according to estimates is between 71% and 95% of the total population on the left bank of the Dniester and in the Municipality of Bender²⁷.

Even if we assume that the *de facto* authorities of Tiraspol would operate with correct data, without using a simple mathematical calculation by which the collected figures would constitute almost entirely the population of Transnistria, these figures are more than representative in finding that there is no "Transnistrian" people and no real "Transnistrian" citizenship. In this regard, it is important to note that these data symbolically reflects the ethnic structure of the population in the Transnistrian region. Therefore, regardless of the sources of information, in the context that almost all of the inhabitants of Transnistria are citizens of other states, what kind of "indigenous" population can be spoken of? In principle, the fact that people have another citizenship is very easy to understand, or Transnistrian "citizenship" is only recognized by other breakaway states and does not offer any benefits of traveling abroad.

OTHER CRITERION

International practice, from the beginning of the twentieth century, but especially after the World War II, has shown that the legal element and the classical conditions for assessing the state character is not enough, the international community developing some „additional" criteria, mostly of a political nature. In fact, there have been situations in which the political aspects had a greater value, but these can be included in the category of exceptions. The idea that must be kept in mind is that social and human relations have developed in the way that the international community will not recognize the entities that claim to be states, in which there are constant and serious human rights violations and anti-democratic regimes are installed forced, using the armed forces and the intervention of other states²⁸. There is sufficient practice to show that a state entity created as a result of the illegal use of force cannot *per se* meet all the criteria of a state, so it cannot become a state either.²⁹ In the following, I will briefly present a vision on the establishment of the Transnistrian

²⁵ Renars Danelsons, *Moldova, Minorities and the International Community*, Advanced Social and Political Research Institute, University of Latvia, 2008, p.13.

²⁶ <http://president.gospmr.org/press-sluzhba/novosti/press.html>.

²⁷ <https://gov.md/ro/content/comentariu-cu-privire-la-unele-declaratii-ale-liderului-transnistrean-vadim-krasnoselski>

²⁸ In this regard, see UN Security Council Resolution no. 541 on the Republic of Northern Cyprus; The behaviour of the states regarding the situation in East Timor in the period 1975-1999, manifested by the non-recognition of the sovereignty character of Indonesia over the region.

²⁹ Jure Vidmar, *Democracy and state creation in international law*. PhD Thesis, University of Nottingham, 2009, p.82

regime through the armed forces, the state of democracy and respect for human rights in the Transnistrian region.

As already mentioned above, the armed forces of a foreign state - Russian Federation, are currently stationed illegally on the Transnistrian territory of the Republic of Moldova. The origin of this stationing will not be analysed, as this territory was part of the Soviet Union, which presupposes the legality of the appearance of these forces and stationing until the declaration of independence of the Republic of Moldova. The role of the Russian army can be divided into two phases: assistance during the 1992 war and current activities, including the maintenance of arms depots in Transnistria. Russia's 14th Army played a decisive role in the 1992 war, intervening on the part of the Transnistrian separatists.³⁰ During 1991, the 14th Army consisted of several thousand soldiers, infantry, artillery, armoured and aviation units (including fighter jets and helicopters) and had several depots and ammunition, including one of the largest depots of ammunition in Europe, located in Colbasna, Transnistria³¹. For comparison, the Republic of Moldova did not have an army of its own, so police and volunteer detachments fought in the 1992 armed conflict. In the years 1991-1992, as a result of the confrontations with the Moldovan law enforcement forces, several military units belonging to the USSR, later to the Russian Federation, sided with their ammunition with the Transnistrian separatists, while numerous military equipment of the 14th Army came into the possession of the separatists³². The logical conclusion of the involvement of the armed forces of the Russian Federation in the conflict and implicitly in the crystallization of the Transnistrian separatist entity is the signing of the Agreement on the principles of peaceful settlement of the armed conflict in the Transnistrian region of Moldova on July 21, 1992 by the President of Moldova Mircea Snegur and the President of the Russian Federation, Boris Yeltsin. By this Agreement, the Russian Federation and the Republic of Moldova are expressly recognized as "conflicting parties", which undertake to take measures to cease armed actions. Considering that the mentioned Agreement was signed by the highest representative of the political elites of the Russian Federation, the involvement of the Russian armed forces in the internal affairs of the Republic of Moldova is directly recognized and the "contribution" to the consolidation of the separatist regime in Tiraspol is demonstrated.

According to the so-called "Constitution" of the Tiraspol regime³³, it declares itself a democratic regime, which respects human rights and equal rights, ensures free elections, ensures the right to property. In practical terms, however, the situation is completely different, democracy being present only on paper. According to data provided by the organization "Freedom House", which conducts an annual survey of the level of democracy in all countries of the world, Transnistria recorded in 2018-2019 a score of 10/40 in the category of political rights and 14/60 in the category of civil rights³⁴. At the level of 2020, these parameters have become even lower (9/40 - political rights and 13/60 civil rights). According to the "Freedom House" report for 2019, it is found that in Transnistria there are no effective means of investigating and combating high-level corruption, there is no real political pluralism with the guarantee of real rights for the opposition.

Moreover, there is no independent justice system in the Transnistrian region, which is subordinate to the *de facto* authorities, so there are no guarantees of a fair trial. In other words, the fact that in the Transnistrian region there is an oligarchic regime with economic elites who support political elites or, over time, have become part of them, and promote their own interests, has been

³⁰ Christopher J. Boergen, *Thawing a frozen conflict: legal aspects of the separatist crisis in Moldova*, St. John's university school of law, 2006, p.9.

³¹ Case of Ilașcu and others v. Moldova and Russia of 8 July 2004, p.10.

³² Ibidem p. 13.

³³ <http://www.vspmr.org/legislation/constitution/>

³⁴ <https://freedomhouse.org/country/transnistria/freedom-world/2019>.

documented in studies conducted by international experts³⁵. Even so, it is simply impossible for a regime that cannot exist independently economical, political and military, have an army of a foreign state on its territory, to be considered a democratic regime.

Although respect for human rights is a component of a democratic state and the existence of a genuine democracy, the importance and complexity of this process requires a separate analysis. Especially, if we refer to the situation in the Transnistrian region, there are notorious decisions of the European Court of Human Rights (ECHR), an institution that is part of the Council of Europe. Probably the most well-known decision of the ECHR involving Transnistria is the case of *Ilascu and others v. The Republic of Moldova and the Russian Federation*, in which, besides recognizing multiple human rights violations such as the prohibition of torture and the right to liberty and security, the court also established the responsibility of the Russian Federation for the violations taking place in Transnistria. In paragraph 392 of the judgment, the Court states that Transnistria was formed in 1991-1992 with the support of the Russian Federation, being invested with organs of power and its own administration, which in 2004³⁶ continued to remain under the effective control or at least under the decisive influence of the Russian Federation and which, in any case, survived thanks to the military, economic, financial and political support provided by the Russian Federation. In 2016³⁷, The Court reiterated that Transnistria can only exist - resisting the efforts of Moldova and international actors to resolve the conflict and restore democracy and the rule of law in the region - only as a result of Russia's military, political and economic support. Finally, the Russian Federation was convicted of violating the rights of the European Convention on Human Rights, as a result of the actions of the *de facto* authorities of Transnistria, namely - the prohibition of torture (art. 3); the right to liberty and security (art. 5); the right to respect for private and family life (art. 8); freedom of thought of conscience and religion (art. 9); the right to an effective remedy (art. 13). In fact, human rights violations in the Transnistrian region take place and are regularly reported by the Promo-Lex³⁸, a non-governmental organization that aims to develop democracy in the Republic of Moldova, including in the Transnistrian region.

CONCLUSION

Despite the fact that the entity called Transnistria owns population, territory and control over it (some kind of state power), it is not only the question of recognition that prevents it from becoming a state and a subject of international relations. It is clear that there are serious concern over the capacity of the *de facto* authorities (state power) to maintain their control over the territory without the economic, military and political support of a foreign state. As well, it is quite disputable that population living within its territory identifies itself as a people of Transnistria and have a national consciousness. Even if it is more a question of politics, the level of democracy in the Transnistrian region constitutes another serious barrier in the efforts of *de facto* authorities to obtain recognition. I hope this opinion will be useful for those that are interested in Transnistrian issue and will help to better understand the current situation.

³⁵ See in this regard Margarita M. Balmaceda, *Privatization and elite defection in de facto states: The case of Transnistria, 1991–2012*, Communist and Post-Communist Studies, University of California Press, 2013, Renars Danelsons, *Moldova, Minorities and the International Community*, Advanced Social and Political Research Institute, University of Latvia, 2008.

³⁶ The decision of the European Court of Human Rights was delivered on 8 July 2004. Similar findings regarding the exercise of effective control of the Russian Federation over Transnistria can be found in the Case of *Catan and others v. Moldova and Russia* of October 19, 2012.

³⁷ Case of *Mozer v. The Republic of Moldova and Russia* of 23 February 2016, para. 110.

³⁸ <https://promolex.md/12633-incalcari-masive-ale-drepturilor-omului-in-regiunea-transnistreana/?lang=ro>.
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Unavoidability of Sino-American Rift: History of Strategic Decoupling

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Abstract: *Does our history only appear overheated, while it is essentially calmly predetermined? Is it directional or conceivable, dialectic and eclectic or cyclical, and therefore cynical? Surely, our history warns (no matter if the Past is seen as a destination or resource). Does it also provide for a hope? Hence, what is in front of us: destiny or future? Theory loves to teach us that extensive debates on what kind of economic system is most conducive to human wellbeing is what consumed most of our civilizational vertical. However, our history has a different say: It seems that the manipulation of the global political economy (and usage of fear as the currency of control) – far more than the introduction of ideologies – is the dominant and arguably more durable way that human elites usually conspired to build or break civilizations, as planned projects.*

Keywords: *US, China, decoupling, geopolitics, technology, money, freedoms, multilateralism,*

Americans performed three very different policies on the People's Republic: From a total negation (and the Mao-time mutual annihilation assurances), to Nixon's sudden cohabitation. Finally, a Copernican-turn: the US spotted no real ideological differences between them and the post-Deng China. This signalled a 'new opening': West imagined China's coastal areas as its own industrial suburbia. Soon after, both countries easily agreed on interdependence (in this marriage of convenience): Americans pleased their corporate (machine and tech) sector and unrestrained its greed, while Chinese in return offered a cheap labour, no environmental considerations and submissiveness in imitation. Both spiced it by nearly religious approach to trade.

However, for each of the two this was far more than economy, it was a policy – Washington read it as interdependence for transformative containment and Beijing saw it as interdependence for a (global) penetration. In the meantime, Chinese acquired more sophisticated technology, and the American Big tech sophisticated itself in digital authoritarianism – 'technological monoculture' met the political one.

Now with a tidal wave of Covid-19, the honeymoon is over.

(These days, many argue that our C-19 response is a planetary fiasco, whose size is yet to surface with its mounting disproportionate and enduring secondary effects, causing tremendous socio-economic, political and psychosomatic contractions and convulsions. However, worse than our response is our silence about it.²

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² It is an established fact that the quintessence of Nazism was not Hitler and the circle of darkness around him. It was rather a commonly shared 'banality of crime' atmosphere: an acceptance of ordinary village people living next to Auschwitz, Treblinka, Dachau ... The day when questioning stops and silent acceptance becomes a 'new normal' is a day when fascism walks in big time. Or, manufacturing consent through choice architecture, of a fear-imprisoned psychology. So, our C-19 response illustrates – the argument goes – nothing else but a social pathology: the non-transparent concentration of power and our overall democracy recession – further bolstering surveillance and social control systems; lasting consequences of cutbacks, environmental holocaust, privatisation of key intergovernmental and

E.g. *Le Monde Diplomatique* – while examining the possible merge between tech oligopoly and political monopoly – claims: “Political decisions have been central in shaping this tragedy — from the destruction of animal habitats, to the asymmetric funding of medical research, to the management of the crisis itself. They will also determine the world into which we emerge after the worst is over.” Over the past 30 years, every critical conjecture had a similar epilogue: pardon and enhancement for the capital, a burden and suppression for the labour. The C-19 is no exception to it: Ever since early lockdowns of March 2020, the capital flows unhindered while the labour, ideas and humans are under the house arrest. The XXI century frontline is the right to health and labour, privacy and human rights. (LMD, IV20))

Still to be precise, the so-called virus pandemic brought nothing truly new to the already overheated Sino-American relations and to the increasing binarization of world affairs: It only amplified and accelerated what was present for quite some time – a rift between alienated power centres, each on its side of Pacific, and the rest. Would it be about an expansion of techno-totalitarian model of government as an alternative to liberal democracy? Moreover, is now a time to return to the nation-state, a great moment for all dictators-in-waiting to finally build a cult of personality? Hence, will our democracy be electro-magnetised and vaccinated for a greater good (or greedier ‘god’)?

This text examines a prehistory of that rift; and suggests possible outcomes past the current crisis.

ORIGINS OF FUTURE

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vital national institutions, ill-fated globalisation on (overly allopathic, mandated drugs -centred) healthcare, and lack of public data commons. Pandemic or *plundermic* ...

Early lockdowns, mid-March 2020, were justified by a need to *flatten the curve* of the ‘sudden’ virus impact, since there were *no enough hospital beds*. In the meantime, the lockdowns were extended and widened, curves not arguable changed. Still, for the past 8 months, there is hardly any new hospital built in the EU although the non-essential medical services are by and far suspended. Nor, there is any massive investment into general health prevention. The only visible infrastructure growth is in 5/6G networks expansion.

Following a simple ratio that *the one's level of health is genetic expression of life-style choices made*, it is no surprise that there are also growing speculations if the lockdown – as the most notorious expression of monofocal perspective and rejection to any integrated judgment, is invasion or protection. Whether the aim is a herd-immunity or herd loyalty (and to it related growing, yet still unrefuted, rumours that the eventual C-19 vaccine might contain biohacking nano-properties which establish backdoor interface via extensively set 5/6G). And, if is there any back-to-normal exit from the crisis or this disaster ‘turned into planetary terror, through global coup d’état’ will be exploited to further something already pre-designed (with a fear, not as a side-effect, but rather as a manufactured tool to gain control) – more related to biotronics and demographics, than to health and economics or any common social purpose.

³ Flow and irreversibility (as well as the non-directionality and the Boltzmann’s unfolding) of time is one of the fundamental principles that governs visible (to say; comprehensible) universe. If and when so, the Future itself must be certain, but unshaped. Hence, Future is a manifestation of the second law of thermodynamics (one of the fundamental principles of chemo-physics that governs us), but it also has to be (a net sum of) our collective projection onto the next: Collapse of the (multivectoral) probability and its realisation into (a four dimensional) possible tomorrow. For a clerical reason, we tend to deduce future events from human constructs (known as the theoretical principles) or to induce them from deeply rooted/commonly shared visions (known as past experience).

of fear as the currency of control) – far more than the introduction of ideologies – is the dominant and arguably more durable way that human elites usually conspired to build or break civilizations, as planned projects. Somewhere down the process, it deceived us, becoming the self-entrapment. How?

* * *

One of the biggest (nearly schizophrenic) dilemmas of liberalism, ever since David Hume and Adam Smith, was an insight into reality: Whether the world is essentially *Hobbesian* or *Kantian*. As postulated, the main task of any liberal state is to enable and maintain wealth of its nation, which of course rests upon wealthy individuals inhabiting the particular state. That imperative brought about another dilemma: if wealthy individual, the state will rob you, but in absence of it, the pauperized masses will mob you.

The *invisible hand* of Smith's followers have found the satisfactory answer – sovereign debt. That 'invention' meant: relatively strong central government of the state. Instead of popular control through the democratic checks-&-balance mechanism, such a state should be rather heavily indebted. Debt – firstly to local merchants, than to foreigners – is a far more powerful deterrent, as it resides outside the popular check domain.

With such a *mixed blessing*, no empire can easily demonetize its legitimacy, and abandon its hierarchical but invisible and unconstitutional controls. This is how a debtor empire was born. A blessing or totalitarian curse? Let us briefly examine it.

The Soviet Union – much as (the pre-Deng's) China itself – was far more of a classic continental military empire (overtly brutal; rigid, authoritative, anti-individual, apparent, secretive), while the US was more a financial-trading empire (covertly coercive; hierarchical, yet asocial, exploitive, pervasive, polarizing). On opposite sides of the globe and cognition, to each other they remained enigmatic, mysterious and incalculable: *Bear* of permafrost vs. *Fish* of the warm seas. Sparta vs. Athens. Rome vs. Phoenicia... However, common for both (as much as for China today) was a super-appetite for omnipresence. Along with the price to pay for it.

Consequently, the Soviets went bankrupt by mid 1980s – they cracked under its own weight, imperially overstretched. Therefore, did the Americans – the 'white man burden' fractured them already by the Vietnam War, with the *Nixon shock* only officialising it? However, the US imperium managed to survive and to outlive the Soviets. How?

The United States, with its financial capital (or an outfoxing illusion of it), evolved into a debtor empire through the Wall Street guaranties. Titanium-made *Sputnik* vs. gold mine of printed-paper... Nothing epitomizes this better than the words of the longest serving US Federal Reserve's boss, Alan Greenspan, who famously quoted J.B. Connally to then French President Jacques Chirac: "True, the dollar is our currency, but your problem". Hegemony vs. *hegemony*.

HOUSE OF CARDS (FOREVER R>G)

Conventional economic theory teaches us that money is a universal equivalent to all goods. Historically, currencies were a space and time-related, to say locality-dependent. However, like no currency ever before, the US dollar became – past the WWII – the universal equivalent to all other moneys of the world. According to history of currencies, the core component of the non-precious metals' money is a so-called promissory note – intangible belief that, by any given point in future, a particular shiny paper (self-styled as money) will be smoothly exchanged for real goods.

Thus, roughly speaking, money is nothing else but a civilizational construct about imagined/projected tomorrow – that the next day (which nobody has ever seen in the history of humankind, but everybody operates with) definitely comes (i), and that this tomorrow will certainly be a better day than our yesterday or even our today (ii).

This and similar types of collective constructs (horizontal and vertical) over our social contracts hold society together as much as its economy keeps it alive and evolving. Hence, it is money that powers economy, but our blind faith in constructed (imagined) tomorrows and its alleged certainty is what empowers money.

Tellingly, the universal equivalent of all equivalents – the US dollar – follows the same pattern: Bold and widely accepted promise. For the US, it almost instantly substantiates extraterritorial economic projection: American can print (any sum of) money without fear of inflation. (Quantitative easing is always exported; value is kept home.)

(Empire's currency loses its status when other nations lose confidence in ability of that imperial power to remain solvent. For the pre-modern and modern history, it happened with 5 powers – two Iberian, Dutch, France and the UK – before the US dollar took the role of world reserve currency. Interestingly, each of the empires held it for roughly a century. The US century is just about to expire, and there are already contesters, territorial and non-territorial, symmetric and asymmetric ones. On offer are tangibles and intangibles: gold, cryptocurrencies, and biotronics/nano-chemoelectricals.)

But, what does the US dollar promise when there is no gold cover attached to it ever since the time of Nixon shock of 1971?

Pentagon promises that the oceanic sea-lanes will remain opened (read: controlled by the US Navy), pathways unhindered, and that the most traded world's commodity – oil, will be delivered. Therefore, it is not a crude or its delivery what is a cover to the US dollar – it is a promise that oil of tomorrow will be deliverable. That is a real might of the US dollar, which in return finances Pentagon's massive expenditures and shoulders its supremacy.

Admired and feared, Pentagon further fans our planetary belief in tomorrow's deliverability – if we only keep our faith in dollar (and hydrocarbons' energized economy), and so on and on in perpetuated circle of mutual reinforcements.

(Supplementing the Monroe Doctrine, President Howard Taft introduced the so-called 'dollar diplomacy' – in early XX c. – that "substitutes dollars for bullets". This was one of the first official acknowledgements of the Wall Street – Pentagon symbiotic link.)

These two pillars of the US might from the East coast (the US Treasury/Wall Street and Pentagon) together with the two pillars of the West coast – both financed and amplified by the US dollar, and spread through the open sea-routes (Silicone Valley and Hollywood), are an essence of the US posture. Country that hosts such a dream factory, as the US does Hollywood, is easy to romanticize – though other 3 pillars are to take and to coerce.

This very nature of power explains why the Americans have missed to take the humankind into completely other direction: towards the non-confrontational, decarbonized, de-monetized/de-financialized and de-psychologized, the self-realizing and green humankind. In short, to turn history into a moral success story. They had such a chance when, past the Gorbachev's unconditional surrender of the Soviet bloc, and the Deng's Copernicus-shift of China, the US – unconstrained as a *lonely superpower* – solely dictated terms of reference; our common destiny and direction/s to our future/s.

WINNER IS RARELY A GAME-CHANGER

Sadly enough, that was not the first missed opportunity for the US to soften and delay its forthcoming, imminent multidimensional imperial retreat. The very epilogue of the WWII meant a full security guaranty for the US: Geo-economically – 54% of anything manufactured in the world was carrying the *Made in USA* label, and geostrategically – the US had uninterruptedly enjoyed nearly a decade of the 'nuclear monopoly'. Up to this very day, the US scores the biggest number of

N-tests conducted, the largest stockpile of nuclear weaponry, and it represents the only power ever deploying this 'ultimate weapon' on other nation.

To complete the irony, Americans enjoy geographic advantage like no other empire before. Save the US, as Ikenberry notes: "...every major power in the world lives in a crowded geopolitical neighbourhood where shifts in power routinely provoke counterbalancing". Look the map, at Russia or China and their packed surroundings. The US is blessed with its insular position, by neighbouring oceans. All that should harbour tranquillity, peace and prosperity, foresightedness.

Why the lonely might, an *empire by invitation* did not evolve into **empire of relaxation**, a generator of harmony? Why does it hold (extra-judicially) captive more political prisoners on Cuban soil than the badmouthed Cuban regime has ever had? Why does it remain obsessed with armament for at home and abroad? Why existential anxieties for at home and security challenges for abroad? Eg. 78% of all weaponry at disposal in the wider MENA theater is manufactured in the US, while domestically Americans – only for their civilian purpose – have 1,2 small arms pieces per capita.)

Why the fall of Berlin Wall 30 years ago marked a beginning of decades of stagnant or failing incomes in the US (and elsewhere in the OECD world) coupled with alarming inequalities. What are we talking about here; the inadequate intensity of our tireless confrontational push or about the false course of our civilizational direction?

Indeed, no successful and enduring empire does merely rely on coercion, be it abroad or at home. The grand design of every empire in past rested on a skilful calibration between obedience and initiative – at home, and between bandwagoning and engagement – abroad. In XXI century, one wins when one convinces not when one coerces. Hence, if unable to escape its inner logics and deeply rooted appeal of *confrontational nostalgia*, the prevailing archrival is only a winner, rarely a game-changer.

How did we miss to notice it before? Simply, economy –right after history– is the ideologically most 'colored' scientific discipline of all.

To sum up: after the collapse of the Soviet Union, Americans accelerated expansion while waiting for (real or imagined) adversaries to further decline, 'liberalize' and bandwagon behind the US. One of the instruments was to aggressively push for a greater economic integration between regional and distant states, which – as we see now, passed the 'End-of-History' euphoria of 1990s – brought about (irreversible) socio-political disintegration within each of these states.

A COUNTRY OR A CAUSE, BOTH OR NONE?

Expansion is the path to security dictatum, of the post-Cold War socio-political and (hyper-liberal) economic mantra, only exacerbated the problems afflicting the *Pax Americana*, which acidified global stewardship; hence oceans, populations and the relations to the unbearable levels. That is why and that is how the capability of the US to maintain its order started to erode faster than the capacity of its opponents to challenge it. A classical imperial self-entrapment (by the so-called bicycle theory: keep pedalling same way or topple over).

Clearly, the US post-Cold War preponderance is now challenged in virtually every domain: America can no longer operate unrestrained in the traditional spheres of land, sea and air, not in newer ones like the (near and deeper) outer space and cyberspace. The repeated failure to notice and recalibrate such an imperial emasculation and retreat brought the painful hangovers to Washington, the most noticeably, by the last two presidential elections.⁴ Inability to manage the rising costs of

⁴ Average American worker is unprotected, unorganised/disunionised, disoriented, and pauperised. Due to (the US corporate sector induced) colossal growth of China, relative purchasing power of American and Chinese labourer now equals. At present, the median US worker would frictionlessly accept miserable work conditions and dismal pay, not

sustaining the imperial order only increased the domestic popular revolt and political pressure to abandon its 'mission' altogether. (E.g. during the peak times of its longest – still ongoing – foreign intervention, the US was spending some \$110 billion per annum in Afghanistan, roughly 50% more than annual American federal spending on education.) Perfectly hitting the target to miss everything else ...

In short, past the Soviet collapse Americans intervened too much abroad, regulated too little at home, and delivered less than ever – both at home and abroad. Such model attracts none.⁵ No wonder that today all around the globe many do question if the States would be appealing ever again. Domestically, growing number of people perceive foreign policy mostly as an expensive destruction, divinized trade and immigration as destroyers of jobs and communities. Its political system is unable to decouple and deconcentrate wealth and power which suffocates the very social fabrics.

Hence, Americans are not fixing the world anymore. They are only managing its decline. Look at their footprint in former Yugoslavia, Afghanistan, Iraq, Pakistan, Georgia, Libya, Syria, Ukraine or Yemen – to mention but a few. Violence as a source of social cohesion is dying out.

* * *

When the Soviets lost their own indigenous ideological matrix and maverick confrontational stance, and when the US dominated West missed to triumph although winning the Cold War, how to expect from the imitator to score the lasting moral or even a temporary economic victory?

Dislike the relationship with the Soviets Union which was on one clear *confrontational acceptance* line from a start until its very last day, Americans performed three very different policies on the People's Republic: From a total negation (and the Mao-time mutual annihilation assurances), to Nixon's sudden cohabitation. (Withdrawal of recognition from Formosa to Beijing formally opened relations between the two on 1 January 1979. On a celebratory tour to America later that very month, Deng Xiaoping recommended that China and the US were 'duty bound to work together [and unite] to place curbs on the polar bear').

Finally, a Copernican-turn: the US spotted no real ideological differences between them and the post-Deng China. This signalled a 'new opening' – China's coastal areas to become West's industrial suburbia. Soon after, both countries easily agreed on interdependence: Americans pleased their corporate (machine and tech) sector and unrestrained its greed, while Chinese in return offered a cheap labour, no environmental considerations and submissiveness in imitation. However, for both it was far more than economy lubricated by sanctified free trade, it was a policy – Washington read it as interdependence for transformative containment and Beijing saw it as interdependence for (global) penetration. American were left in a growing illusion that the Sino growth is on terms defined by them, and Chinese – on their side – grew confident that these terms of economic growth are only accepted by them.

The so-called Financial crisis 2008/09 (or better to say the peak time of Casino economy) undermined positions of the largest consumer of Chinese goods (US), and simultaneously boosted confidence of the biggest manufacturer of American products (PRC). Consequently, soon after, by 2012, Beijing got the first out-of-Deng's-line leadership. (One of the famous Asia's Bismarck dictatums was 'hide the capabilities, bide your time' – a pure Bismarckian wisdom to deter any domestic imperialism in hurry.)

too different from the one of the Chinese labourers – just to get a job. The first to spot that and then wonderfully exploited it was the Trump team.

⁵ "A rogue superpower ... colossus lacking moral commitments ... aggressive, heavily armed, and entirely out for itself. ... some US security guaranties have started to look like protection rackets. ... participates in international institutions but threatens to leave them when they act against US narrow interests; and promotes democracy and human rights, but mainly to destabilize geopolitical rivals" – enumerates some in the long list of contemporary US sins Michael Beckley (FAM 99/6/20, pg.80).

However, in the process of past few decades, Chinese acquired more sophisticated technology, and the American Big tech sophisticated itself in digital authoritarianism.

Nevertheless, as America (suddenly) returns home, the honeymoon seems over now.

Why does it come now? Washington is not any more able to afford treating China as just another trading partner. Also, the US is not well situated to capitalize on Beijing's eventual belligerence (especially with Russia closer to China than it was ever before).

The typical line of western neo-narrative goes as: 'The CCP exploited the openness of liberal societies and particularly its freedom of speech as to plunder, penetrate and divert'. And 'Beijing has to bear the reputational costs of its exploitative practices'.

Accelerating collision course already leads to the subsequent calls for a strategic decoupling (at best, gradual disengagements) of the two world's largest economies and of those in their orbits. Besides marking the end of global capitalism, which exploded since the fall of Berlin Wall, this may finally, trigger a global realignment. The rest of the world would end up – willingly or not – in the rival (trade) blocks. It would not be a return to 1950s and 1960s, but to the pre-WWI constellations.

Epilogue is plain to see: Neither more confrontation and more carbons nor more weaponized trade and traded weapons will save our day. It failed in our past; it will fail again any given day.

ENTRAPMENT IN IMITATION

Interestingly, China opposed the I World, left the II in rift, and ever since Bandung of 1955 it neither won over nor (truly) joined the III Way. Today, many see it as a main contestant, a leader from the global South. But, where is a lasting success?

There is a near consensus among the economists that China owes its economic success to three fundamental factors. Firstly, it is that the People's Republic embraced an imitative economic policy (much like Japan, Singapore, Taiwan or ROK did before) through Deng-proclaimed opening. Second goes to a modest domestic consumption, and German-like thick home savings. Finally, as the third factor that the economists attribute to Chinese miracle, is a low production costs of Sino nation – mostly on expenses of its aging demography, and on expenses of its own labour force and country's environment.⁶ (And that Beijing mixes up its nearly obsessive social control, environmental negligence and its dismal human and minority rights with the *right to development*.)

Therefore, many observers would agree that the so-called China's miracle is a textbook example of a highly extractive state that generates enormous hidden costs of its development, those being social, environmental and health ones as much as expanding and lasting. And indeed, energy-intensive exports (especially carbon footprint) from China as well as its highly polluting industrial practices (overall ecological footprint) were introduced to and then for a long while tolerated in People's Republic by the West.

Further on, China accepted a principled relation with the US (Russia, too), but insists on transactional one with its neighbours and BRI (Belt and Road Initiative) clients. This reduces the

⁶ High tech and know-how appropriation via mandated/forced technology transfers and copy-cats, joint ventures, discriminatory patent-licencing practices and cross-sectoral state-led industrial modernisation have lifted China up the value chain. No wonder that its GDP per capita has jumped from \$194 (1980) to over \$9,000 (2019). Beijing is modernising its navy, and is engaged in international economic expansion and geopolitical projection via its Belt and Road Initiative, and so far has bought, built or is operating 42 ports in 34 countries. In the meantime, Washington is publicly lamenting return to a 'worker-focused trade policy' – as the US Trade Representative Robert E. Lighthizer calls it – and openly objecting to both 'market-distorting state capitalism in China and a dysfunctional WTO'. "No trade policy decision since the end of WWII proved more devastating to working people than the extension of permanent normal trade relations to China in 2000. Despite President Clinton's predictions... , the opposite occurred" – he concludes. (FAM, 99/04/20)

choice (offered by the two protagonists) on selection between the colonial democracy and authoritarian paternalism.

None of the above has an international appeal, nor it holds promise to an attainable future. Therefore, no wonder that the Imitative power fights – for at home and abroad – a defensive ideological battle and politics of cultural reaction. Such a reactive status quo has no intellectual appeal to attract and inspire beyond its borders.

So, if for China the XIX was a “century of humiliation”, XX “century of emancipation”, should it be that the XXI gets labelled as a “century of imitation”?

(The BRI is what the most attribute as an instrument of the Chinese planetary posture. Chinese leaders promised massive infrastructure projects all around by burning trillions of dollars. Still, numbers are more moderate. As the 2019 *The II BRI Summit* has shown (and the forthcoming BRI Summit of November 2020 may confirm), so far, Chinese companies had invested USD 90 billion worldwide. Seems, neither People’s Republic is as rich as many (wish to) think nor it will be able to finance its promised projects without seeking for a global private capital. Such a capital –if ever – will not flow without conditionalities. The Asian Infrastructure Investment Bank (AIIB) and the BRICS or ‘New Development’ – Bank have some \$150 billion at hand, and the Silk Road Infrastructure Fund (SRIF) has up to \$40 billion. Chinese state and semi-private companies can access – according to the OECD estimates – just another \$600 billion (much of it tight) from the home, state-controlled financial sector. That means that China runs short on the BRI deliveries worldwide. Ergo, either bad news to the (BRI) world or the conditionalities’ constrained China.)

How to behave in the world in which economy is made to service trade (as it is defined by the Sino-American high priests of globalization), while (preservation of domestic jobs and) trade increasingly constitutes a significant part of the big power’s national security strategy? And, how to define (and measure) the existential threat: by inferiority of ideological narrative – like during the Cold War; or by a size of a lagging gap in total manufacturing output – like in the Cold War aftermath. Or something third? Perhaps a return to an inclusive growth.

If our civilizational course is still the same – the self-realization of mankind; than the deglobalization would be a final price to pay for re-humanization of labour and overall planetary greening. Are we there yet?

PROMISE OF THE SCHUMANN RESONANCE

Earlier in this text, we already elaborated on imperial fictions and frictions: Empires and superpowers create their own realities, as they are not bound to ‘situation on ground’. For them, the main question is never what they can but what they want in international conduct.

For sure, there is no intellectual appeal in a growth without well-being, education that does not translate into fair opportunity, lives without dignity, liberalization without personal freedom. Greening international relations along with a greening of social fabrics and its economy – geopolitical and environmental understanding, de-acidification and relaxation is that missing, third, way for tomorrow.

This necessitates both at once: less confrontation over the art-of-day technology and their monopolized redistribution as well as the resolute work on the so-called Tesla-ian implosive/fusion-holistic systems. That would include the free-transfer non-Hertzian energy technologies (able to avoid life in electromagnetic technologically generated soup of unbearable radiation toxicity, actually able to de-toxicate our troposphere from dangerous fields, waves and frequencies emittance - drawing us closer to Schumann resonance); carbon-sequestration; antigravity and self-navigational

solutions; bioinformatics and nanorobotics. Surely, with the bioinformatics and nanorobotics being free from any usage for eugenics' ends (including the vaccination for microchipping purpose).⁷

In short, more of initiative than of obedience (including more public control over data hoovering). More effort to excellence (creation) than a struggle for preeminence (partition). Leader of the world needs to offer more than just money and intimidation.

'Do like your neighbour' is a Biblical-sounding economic prophecy that the circles close to the IMF love to tirelessly repeat. Indeed, it is hard to imagine a formidable national economic prosperity, if the good neighbourly relations are not built and maintained.⁸ Clearly, no global leader has ever in history emerged from a shaky and distrustful neighbourhood, or by offering a little bit more of the same in lieu of an innovative technological advancement.

(Eg. many see Chinese 5G – besides the hazardous electrosmog of IoT that this technology emits on Earth's biota – as an illiberal innovation, which may end up servicing authoritarianism, anywhere.⁹ And indeed, the AI deep learning inspired by biological neurons (neural science) including its three methods: supervised, unsupervised and reinforced learning can end up by being used for the diffusion of digital authoritarianism, predictive policing and manufactured social governance based on the bonus-malus behavioural social credits.)

Ergo, it all starts from within, from at home: socio-economically and environmentally. Without support from a home base (including that of Hong Kong, Xinjiang and Tibet), there is no game changer. China's home is Asia. Its size and its centrality along with its impressive output is constraining it enough.

Conclusively, it is not only a new, non-imitative, turn of socioeconomics and technology what is needed. Without truly and sincerely embracing mechanisms such as the NAM, ASEAN and SAARC (eventually even the OSCE) and the main champions of multilateralism in Asia, those being India Indonesia and Japan first of all, China has no future of what is planetary awaited – the third force, a game-changer, *discursive power*, lasting visionary and trusted global leader.¹⁰

⁷ Confronting the long-term interests of stakeholders with the short-term interests of shareholders, private sector exercises disproportionate power in the technological share (infrastructure and data). Nondisclosure agreements and other legal instruments as well as the close ties between the private sector, intelligence agencies and these with the media. The same applies to a big Pharma which increasingly dictates a non-preventive monofocal approach to medicine and research, and controls reporting about it – not always in the name of the general public health.

This represents the largest underreported threat to our democracy and future.

Ergo: Bioinformatics is a dual-use technology. It has huge weaponization potential for at home and abroad.

⁸ Fully aware of it, China and Russia (in their historical and yet still ongoing rapprochement) are pushing on a new Asian continental/regional security organisation. Building on the best legacy of comprehensive pan-European security mechanism – that of the Vienna-based OSCE (Organisation for Security and Cooperation in Europe), these two are committing themselves to and inviting their neighbours to join with the CICBMA (Conference on Interaction and Confidence Building Measures in Asia), architecting the CSTO (Collective Security Treaty Organisation) and the QCCM (Quadrilateral Cooperation and Coordination Mechanism). It is on a top of already elaborate SCO (Shanghai Cooperation Organisation) and well-functioning economic FORAs – China-run AIIB (Asian Infrastructure Investment Bank) and Russia-backed EAEU (Eurasian Economic Union). Hence, in a matter of just two decades the central section of Eurasian continent became the most multilateralised – and therefore stable, region of the world. The collective one is far better than the bilateral or selective/Ad Hoc security arrangement preferred by the US in the Asia-Pacific. Alliances are built on shared interest, solidified by formulated principles and maintained on reliability and predictability – hence, are structural stabilisers.

⁹ Seems that China leads but is not alone with its much-criticised bonus-malus social credit system powered by facial recognition technology. Human Rights monitoring agencies (including the US Carnegie Endowment's AI Global Surveillance Index) report that practically each and every of the G-20 countries extensively uses the AI-enabled surveillance appliances, including variety of facial recognition programs, aimed at social 'predictability'. Not to mention that such new technologies are particularly dangerous for weak democracies since many of their digital tools are dual use technology.

¹⁰ Over the past few months, People's Republic has upped the ante in nearly all of its many territorial disputes and even provoked new ones, in another departure from past practice. Beijing has also reversed course when it comes to its

If there was ever in history a lasting triumph, this is over now. In the multipolar world of XXI century dominated by multifaceted challenges and multidimensional rivalries, there is no conventional victory. Revolution or restauration?

RUSSIA'S KEY ROLE IN THIS CONTEXT

To varying degrees, but all throughout a premodern and modern history, nearly every world's major foreign policy originator was dependent (and still depends) on what happens in, and to, Russia. Therefore, neither a structure, nor content or overall direction of world affairs for the past 300 years has been done without Russia. It is not only a size, but also a centrality of Russia that matters. That is important as much (if not even more), as it is an omnipresence of the US or a hyperproduction of the PR China. Ergo, that is an uninterrupted flow of manufactured goods to the whole world, it is a balancing of the oversized and centrally positioned one, and it is the ability to controllably corrode the way in and insert itself of the peripheral one. The oscillatory interplay of these three is what characterizes our days.

Therefore, reducing the world affairs to the constellation of only two super-players – China and the US is inadequate – to say least. It is usually done while superficially measuring Russia's overall standing by merely checking its current GDP, and comparing its volume and PPP, and finding it e.g. equal to one of Italy. Through such 'quick-fix', Russia is automatically downgraded to a second-rank power status. This practice is as dangerous as it is highly misleading. Still, that ill-conceived argument is one of the most favoured narratives, which authors in the West are tirelessly peddling. What many analysts miss to understand, is in fact plain to see; throughout the entire history of Russia: For such a big country the only way to survive – irrespectively from its relative weaknesses by many 'economic' parameters – is to always make an extra effort and remain great power.

To this end, let us quickly contrast the above narrative with some key facts: Russia holds the key positions in the UN and its Agencies as one of its founding members (including the Security Council veto right as one of the P5); it has a highly skilled and mobilized population; its society has deeply rooted sense of a special historic mission (that notion is there for already several centuries – among its intellectuals and enhanced elites, probably well before the US has even appeared as a political entity in the first place). Additionally and tellingly, Moscow possesses the world's largest gold reserves (on surface and underground; in mines and its treasury bars); for decades, it masters its own GPS system and the most credible outer space delivery systems (including the only remaining working connection with the ISS), and has an elaborate turn-key-ready alternative internet, too.

Finally, as the US Council of Foreign Relations' Thomas Graham fairly admits: "with the exception of China, no country affects more issues of strategic and economic importance to the US than Russia. And no other country, it must be said, is capable of destroying the US in 30 minutes." (FAM, 98-6-19, pg.134)

national periphery. "Past Chinese leaders, notably Deng Xiaoping and Jiang Zemin, believed in the institutionalized processes of collective leadership. Xi has disabled or neutralized many of these channels. The world may now be getting a sense of what China's decision-making looks like when a singularly strong leader acts more or less on his own -noted Campbell-Rapp-Hooper recently (FAM, 4/2020). That of course triggers constant shockwaves all over Asia. While Indonesia is contemplating the NAM's reload and the ASEAN block strengthening, others are reactive. India and Japan, two other Asian heavyweights, are lately pushed to sign up on the so-called Indo-Pacific maritime strategy with the United States. However, none of these three has any coherent plan on what to do on the Asian mainland. They all three differ on passions, drives and priorities. This is so since the truly pan-continental organization is nonexistent in Asia.

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Historical and Economic Changes in the Development of Teaching in Canada in the 19th and 20th century

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Abstract: Different authors have presented the development of teaching in Canada and its characteristics in the provinces of Eastern and Western Canada. There are several approaches concerning historical changes of the teaching profession in Canada and how the professionalization of teaching can affect the teacher socially, economically and politically. The development of teaching in Canada as a profession started in the 19th century and is presented with different critical observations concerning its particularities as it has evolved through time.

This research describes the development of the teaching profession in Canada and introduces the concept of the professionalization of teaching and its implications for Canadian teachers, their education and work in class. This paper generally shows the particularities of the evolution of this profession in different provinces from the 19th to the 20th century. Then, the role played by progressive education in Canada and the importance for Canadian education of the "back-to-basics" movement are presented.

Moreover, this paper briefly depicts the characteristics of self-regulated professions and a timeline of the establishment of teaching as a self-regulating profession in different provinces of Canada, with an example of teaching as a self-regulated profession in British Columbia. Another aspect presented in this work shows the effects of professionalization on the recruitment and status of teachers, with an example from Nova Scotia concerning gender discrimination.

Keywords: teaching profession in Canada, professionalization and proletarianization of teaching, "back-to-basics" movement, "feminization of teaching".

THE PARTICULARITIES OF TEACHING AND ITS DEVELOPMENT IN CANADA; THE CONDITIONS FOR A SELF-REGULATED PROFESSION

From a general perspective, teaching is seen as a profession like any other, but its conditions and terms of employment are rather unique. Ozga and Lawn (1981) identified three common ways of understanding teaching as a profession: professional traits, history and group theory¹.

When describing traits that characterize professions, Carr-Saunders (1966) presents them as being a mix of knowledge provided for social recognition, capacity for decision-making in the workplace, and dedication to work and customers. Different authors, including Wotherspoon (2014), conclude, "Teaching falls short of full professional status because it lacks autonomy and prestige, or that teaching is at best a semi- or quasi-profession that remains constrained by external forces such as other professions and bureaucratic school authority structures"².

Concerning the historical perspective of understanding teaching in Canada, in 1962 Paton listed four historical steps taken by Canadian teachers to have their profession recognized. The first, from 1850 to 1914, was just for teachers to meet and find information about the interests of their schools. The second, from 1914 to 1935, was based on the organization of teachers to improve their working conditions. The third, from 1935 to 1955, was based on teachers' efforts for official recognition and inclusion in educational policy decision-making. The fourth, which started in 1955, includes teachers' attempts to strengthen their professional status in terms of their responsibilities and benefits.³

¹ Ozga, J, Lawn, M. (1981) *Teachers, Professionalism and Class: A Study of Organized Teachers*. London: Falmer.

² Wotherspoon, T. (2014). *The sociology of education in Canada: Critical perspectives* (4th ed.). Toronto: Oxford University Press. p. 163.

³ Paton, J.M. (1962). *The Role of Teachers' Organizations in Canadian Education*. Toronto: W.J. Gage.

The impact of group theory on the teaching profession includes some of the following effects: one is collective bargaining and another concerns the regulations created through provincial legislation, which dictate the responsibilities of teachers. Wotherspoon claims that at present Canadian teachers are well-represented “on curriculum committees and other educational bodies that set or influence policies relating to schooling. Their work is informed by critical reflection, collaboration, reliance on specified performance indicators, and extensive in-service and continuing learning”⁴.

The development of Codes of Ethics by teachers’ associations have helped guide teachers when solving conflicts, assigning duties and responsibilities, and defining expectations and benefits.

PROGRESSIVE EDUCATION, THE “BACK-TO-BASICS” MOVEMENT AND THE DEVELOPMENT OF THE TEACHING PROFESSION IN CANADA LEADING TO SELF-REGULATION

The movement of progressive education had its beginnings in the United States. The development of progressive education in Canada started after World War I and was supposed to be possible due to the implementation of educational reforms in different provinces. Teachers were to change the way in which they taught their subjects and treated their students.

Patterson (1986) presents aspects of progressive education in the United States and its particularities in Canada in the 20th century. He organized his research around the goal of showing if progressive education existed in Canada at that time and the particularities of the practical adoption of it in Canadian schools. The author shows how the implementation of progressive education was unsuccessful in Canada and was impossible to be implemented for the teaching profession due to the economic and social conditions of the interwar period and the difficulty in finding skilled teachers. Regarding complaints about a lack of equipment, in Calgary, Superintendent Frank G. Buchanan observed that some difficulty was “experienced in providing all the additional equipment and supplies that teachers would like in connection with their project work”⁵. Patterson completed his research with different interviews that he used to find out how teachers approached the reforms at that time and concluded that at both formal and informal levels there was not a real applicability of progressive education in Canada. In this sense, he states that “the formal policy level showed only a partial commitment to progressive education” and “confusion and reluctance” were felt by teachers in classrooms during the Depression and World War II⁶.

Another author who brought a critical perspective to progressive education and its particularities in Canada is Kach (1987).

In his analysis, Kach includes several criticisms of the progressive education movement. Firstly, he describes three sides that the *Humanistic Critique* presents as aspects of progressive education: “the excessive contemporaneity of the moderns; the pseudo-science of pedagogy; the educational value of the classics”⁷. The critiques embodied by this perspective state that modernistic preoccupations are not as lasting as the eternal humanistic approach on the spirit and that students have to be protected from the “pseudo-science of *progressive pedagogy*”⁸. Secondly, Kach presents the Neo-Thomistic Criticisms, which are related to the criticisms of progressive education that came

⁴ Wotherspoon, T. (2014). Op. cit., p. 165.

⁵ Superintendent of Schools. (1936-1937). *Annual Report 1936-37*. Alberta: Calgary Board of Education Archives.

⁶ Patterson, R.S. (1986). *The implementation of progressive education in Canada. 1930-1945*. In Kach, Mazurek, Patterson and DeFaveri (eds.) *Essays on Canadian education*. (pp.79-96). Calgary: Detselig Enterprises Ltd, p. 93.

⁷ Kach, N. (1987). *Criticism of progressive education*. In Kach, Mazurek, Patterson and DeFaveri (eds.) *Essays on Canadian education*. (pp.121-140). Calgary: Detselig Enterprises Ltd, p. 122.

⁸ Kach, Op. cit., p. 123.

from different sides of the Catholic Church at the beginning of the 20th century. Two different perspectives of the Catholics are presented: the side that accepted the reforms of progressive education and the other side which considered that modern education was a challenge to the traditional perspective of the Catholic Church. In the traditional approach concerning the teaching process, the article about pedagogy in the work of the church, written by Cain in 1921 states that education as a whole must be religious⁹. Then eight years later, in 1929, O'Hara criticizes the work of Dewey, who is considered the father of progressive education, stating that his work is "a complete rupture with the tradition"¹⁰.

Kach includes the opinion of Pope Pius XI in 1929 who claimed that Catholic education was the ideal education because it prepared students for their destiny guided by the will of God. Three points were presented as being the difference between Encyclical and progressive education: "education should primarily be religious, not secular in character, the content of curriculum should be determined according to the canons of tradition; doctrines such as freedom and student government should be opposed"¹¹. Another criticism from the Thomistic perspective presented by Kach was that "modern secular education denied spiritual values by focusing on the relationship of the child to society" and not preparing the "child's soul for immortal life"¹². This traditional approach maintained that the subject of teaching was not to be decided by teachers and that teachers should not have freedom of choice regarding their teaching process. Concerning the first and second criticisms of the progressive education, the initiators of these approaches were traditionalists following more the interest of church, then the interest of developing the teaching process according to the values of a free education.

Thirdly, Kach presents the *Traditionalist Condemnation* of progressive education based on the criticisms that progressive education attacked traditional education without consideration of conserving traditional cultural heritage and that it was more inclined to innovation and materialistic interests. Fourthly, the author presents the *Progressivist Critique* which claimed that "progressive education tended to be intellectually and academically weak" because it "was not based on a planned and distinctively organized curriculum"¹³. The third and fourth criticisms show how any change in the teaching process was condemned by the traditionalist perspective presented by the church and by the progressivist perspective that wanted to see a curriculum oriented progressive reform in the teaching process.

When analysing the Canadian view concerning progressive education, Kach presents two points of view: the acceptance of the new educational approach as being part of the initial steps to build a good "educational millennium" and the traditionalist approach presented by the Catholic Church in Alberta. In 1936, Alberta had its education system reorganized by having new public secular schools under the direction of a new Divisional Board. These reforms challenged the Catholic influence in education and the traditional approach on education that now had to be adapted to the needs of a contemporary world in change as opposed to the traditional approach that failed to keep its dominant position in Canadian education. Therefore, the *Alberta Catholic Education Association* was formed in 1947 and its publication, *The Bulletin*, analysed "religious education, minority rights and principles of progressive education vis-à-vis Catholic education"¹⁴.

⁹ Cain, M. (1921). *The Danger of False Principles of Pedagogy in Catholic Educational Work*. In *Catholic Educational Association Bulletin*, XVIII, p. 445.

¹⁰ O'Hara, J.H. (1929). *The Limitations of Educational Theory of John Dewey*. Washington D.C: Catholic University of America, p. 42.

¹¹ Kach. Op. cit, p. 124.

¹² Idem, p. 126

¹³ Kach, Op.cit. p. 130.

¹⁴ Idem, p. 132.

The writers of *The Bulletin* were strongly against the new educational approach, but they did not represent all of the Catholic community and did not include a common view point from teachers. This shows that teachers were not consulted or asked to share their perspectives concerning changes that took place in their educational system.

In analysing the development of the teaching profession in Alberta, Chalmers (1968) describes in two parts the story of the Alberta Teachers' Association (ATA), known at its beginnings as the Alberta Teachers' Assembly, and its impact on the teaching profession. In Chapter 5 from Part 1, titled *From Trade to Profession*, Chalmers presents the role of the ATA in the development of the teaching profession in Alberta. The members of the association understood that "with better qualified teachers, better salaries could be obtained and the financial circumstances of teachers as a group will improve" (p.87). The ATA's membership did not value being rich; instead, they sought recognition of the importance of their profession: "the prize which the majority of people value most highly is not wealth, but prestige"¹⁵. Another reason for the representation of teachers' interests in Alberta and the investment in research and classroom facilities was to improve the quality of education in the province and to help teachers to have better conditions concerning their work.

Looking at the development of the teaching profession in Alberta it can be seen that many of the recommendations that the ATA made in the 1920s were not taken into consideration by the minister of education. However, an important piece of advice that was accepted for the training of teachers was the creation of a school designed just for teaching about education, which was created in 1928.

Chalmers shows that even if the ATA was taking small steps in representing teachers' interests at that time starting in 1935 the association received authority "to enact and enforce disciplinary powers over its members who from 1936 included all the teachers from the foothills province"¹⁶. The Teaching Act of 1935 and its amendments from 1936 gave a legal voice to the ATA that in June 1935 changed its name from the Alberta Teachers' Assembly to the Alberta Teachers' Association and "made it legal to refer to teaching as a profession"¹⁷ and the Association's voice changed to represent the teachers' interests. Here Chalmers states that "the Association's representatives could claim that just as their medical or legal opposite number spoke for all the physicians or lawyers, so did they for all the teachers"¹⁸. The argument that Chalmers gives here is in the favour of teaching as a self-regulated profession, which is represented by an organized body with an institutional value and historical impact for the development of the teaching profession in Alberta.

In the mid-20th century, educational research in Canada presented a strong view that progressive education could not benefit the work of teachers because it lacked an academic structure and there were no guides for teachers or students about how education could be better organized. In this sense, Harries (1948) presents the circumstances that created the negative effects of progressive education: Firstly, there was a "lack of consensus regarding the definition of education, and particularly of progressive education". Secondly, there was "confusion of the practical purposes of progressive education". Thirdly, there was "ambiguity regarding student's power of choice". Fourthly, there were "dubious grading methods", and finally, there was an "absence of objectives and the means to achieve these objectives"¹⁹. Harries also argued that before analysing the failure of progressive education, there is a need to find an acceptable approach concerning a general objective of education.

¹⁵ Chalmers, J.W. (1968). *Teachers of the Foothill Province: The Story of The Alberta Teachers' Association*, Toronto: University of Toronto Press, p. 87.

¹⁶ Chalmers, Op. cit, p. 99.

¹⁷ Idem, p. 128.

¹⁸ Idem, p. 131.

¹⁹ Harries, S.O.(1948) *Has Progressive Education Failed?* In *The B.C Teacher*, pp.146-147.

Ewing (1948) compared Traditionalism and Progressivism and concluded that neither one “can serve the purposes of Canadian education”²⁰, but that a new educational philosophy was needed as a mix of both traditionalist and progressivist principles.

The teaching profession at that time was not a self-regulated profession and was affected by the dilemma of how to organize the work in class. Additionally, there was the failure of standardized tests that were supposed to follow the requirements of progressive education.

In the 1960s, the “back-to-basics” movement came not just as a critique of progressive education in Canada, but as a solution to the new situation created by the increase in the number of students who needed teachers, qualified and ready to teach masses. During the 1960s and 1970s, some teachers in Canada were poorly qualified and unable to meet the needs of both an increased number of students and new immigrants coming from a wider world than previously was the case in Canada. Stevenson (1960) states that “by 1960 about 90% of elementary teachers in the country were without degrees; 24 percent of secondary teachers had none”²¹. The practical solution found here was to import from abroad the necessary qualified teachers.

Titley and Mazurek (1990) show that the increase in graduation rates in British Columbia, Alberta, Ontario and Saskatchewan meant also an increase in spending for education, not just for each student, but also for the increasing number of teachers and their better salaries. At that time, Canadian schools “were regimented, teacher-directed and authoritarian”²². The profession of teaching was more a necessity than an organized activity. The need for more teachers made the Canadian government spend more on education, students studied harder in order to earn more in the future, and the investment in “human capital” was used to answer the needs of the market. More students came from the Third World, creating the need to introduce the policy of multiculturalism into a new learning environment. Education was seen more and more as a controlled investment, not as a way to discover one’s soul, but to improve its contribution to society’s development through efficient work.

Concerning the teaching profession, Titley and Mazurek show that in 1968, Ontario’s Hall-Dennis Report, titled *Living and Learning*, which followed a progressive approach, was considering “teacher autonomy to be a key factor in the successful implementation” of a reorganized curriculum at the interdisciplinary level which included communication or environmental studies²³. The report was received with optimism by elementary school teachers, but criticized by other academics who found it lacking a rigorous intellectual format. The old centralized control was replaced with giving freedom to teachers to organize their classes based on what they considered relevant for their students and situations. In many cases, this approach affected the profession of teaching because teachers without experience did not have any standard materials to follow for their teaching practice, making it difficult to have an innovative teaching process if there are no specific rules to follow.

The concerns about education that were recognized throughout the country made Canadian provinces review their secondary school programs in 1984-85 and led them to offer teachers and students a new educational approach.

The teaching profession is included in the group of regulated professions in Canada, being controlled by provincial or territorial law and being “governed by a professional organization or

²⁰ Ewing, J.M. (1948). *Educational Paradise More Than Hope?* In *Toronto Saturday Night*, p. 21.

²¹ Stevenson, H.A. (1970). *Developing Public Education in Post-War Canada to 1960*. In Wilson, Stamp, Audet (eds.) *Canadian Education: A History*. Scarborough, Ont.: Prentice Hall of Canada, p.390.

²² Titley, E, Mazurek, K. (1990). *Back to basics. Forward to Fundamentals?* In Titley (ed.) *Canadian education: Historical themes and contemporary issues*. (pp.111-125). Calgary: Detselig Enterprises Ltd, p.113.

²³ Idem, p. 116.

regulatory body”²⁴. The common terms of self-regulated professions are the Status of being *Registered, Accredited, Certified or Licensed*. The ten provinces and three territories have their own regulations and strategies concerning the practices of the teaching profession. For example, only in 1987 did teaching become a self-regulated profession in British Columbia when the Teacher Profession Act established the B.C. College of Teachers with the “sole responsibility for governing the profession’s standards of entry, discipline, and professional development, and in doing so distinguished these from other interests pursued by the traditional teachers’ association, such as collective bargaining and the welfare of teachers”²⁵.

HOW THE GENDER DEBATE, THE ECONOMIC CONTEXT, THE PROFESSIONALIZATION OF TEACHING AND LATER ITS PROLETARIANIZATION HAVE IMPACTED TEACHERS’ ACTIVITY

The impact of gender on professionalism is presented by Perry (2003) who analysed 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 be employed for 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”²⁶. 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”²⁷. 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.

According to Harris (1994) the professionalism of teachers in the Western world reached a peak in the 1980s. The author affirms that after the 1980s teachers lost their autonomy and control, creating a process of deprofessionalization that can be understood as being the proletarianization of teaching²⁸. The author argues that if the proletarianization of teaching is promoted and accepted, it will produce negative effects socially, politically and economically. Proletarianization will force teachers to concentrate more on management and less on instruction, creating a relatively de-skilled instructional process. The proletarianization of teaching will also cause teachers to lose control over curriculum and have less knowledge concerning the conditions of their employment.

The concept of the proletarianization of teaching was also described by Wotherspoon (2014) who presents it as “the processes whereby teachers, like workers in many industries, are subject to increasing, externally driven forms of control and pressures to intensify their work”²⁹. The author

²⁴ Building Canada’s Competitive Edge (2014). *Professional Practice in Canada*, retrieved in October 2018 on <http://www.capeinfo.ca/professional-practice-in-canada/>.

²⁵ Wallin, Dawn. (2014). *Understanding Canadian Schools*, retrieved in October 2018 on <http://homepage.usask.ca/~dcw130/chapternine.html>

²⁶ Perry, George. (2003). *A Concession to Circumstances: Nova Scotia’s ‘Unlimited Supply’ of Women Teachers, 1870-1960*. In *Historical Studies in Education / Revue d’histoire de l’éducation*, 15, 2 (pp. 327-60), p. 333.

²⁷ Ibidem, p. 338.

²⁸ Harris, K. (1994). *Teachers: Constructing the future*. London: Falmer Press, p.7.

²⁹ Wotherspoon, T. (2014). Op. cit., p.184.

argues that according to some researchers the teaching profession is not dominated by professionalism and gender equity, but is starting to be more regulated and to have a dominant tendency of proletarianization. In this sense, proletarianization is presented by Braverman (1974) as being part of every job, having a common tendency of de-skilling workers who lose their ability for planning, deciding and choosing the right skills for their work³⁰.

The profession of teaching has its own particularities that makes it quite difficult to understand, penetrate or change. The professionalization and proletarianization of teaching have affected the political and social environment of teaching. Looking through Canadian history, examples can be found of teachers used as instruments of the state to promote the interest of common schooling by excluding the values of Natives and forcing the assimilation process upon them. For instance, the evolution of common public schooling in the Upper Canada of the 19th century was not just fragmented but also operated according to a "hidden curriculum". The interest of governments was to develop schools controlled by the state that would "civilize", educate and help the poorer people. Describing the class nature of education, Alison Prentice (1978) argues that Ryerson, the father of Canadian public schooling, established an instrument for social control by centralizing school administration³¹.

In the past teachers were not consulted about their working conditions and from many perspectives were considered simple agents of the state. According to modern teaching requirements, teachers have to respect a provincial curriculum that promotes a multicultural society, is more open to dialogue and accepts diversity.

At the end of the 20th century, the economic perspective of teachers' work can be understood in many ways. Teachers can be seen as promoters of equality or, from the neo-conservative perspective, teachers provide students with the knowledge and skills necessary for economic recovery when the business cycle reaches a low. From this perspective, in the case of a long economic recession, teachers would be responsible for it and would be expected to find solutions for economic recovery. In this sense, different authors write that schools tend to be market-oriented, especially universities. Buchbinder (1993) describes market-oriented universities as changing their role by adapting teaching to the context of the globalization of capital and a society of information³². Therefore, the role of the teaching profession in Canada is not just to deliver information, but also to make learners to create arguments, to develop critical-thinking skills, to be ready to understand the challenges of the modern globalized world and to find the suitable answers to theoretical questions that can be applied in the social context.

CONCLUSIONS

In conclusion, the development of the teaching profession in Canada followed periods of reform and adaptation to meet the needs of an increasing number of students that came from different cultures and areas from around the world. The Great Depression and the interwar periods brought another perspective to the profession of teaching, based on having more qualified teachers that had to adapt to the changes of Canadian society of that time.

Based on the historical evidence from the provinces analysed, the development of teaching in Canada was very slow in the 19th century and was accompanied by small steps toward improving

³⁰ Braverman, H. (1974). *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century*. New York: Monthly Review Press.

³¹ Prentice, A. (1978). *The School Promoters: Education and Social Class in Mid-Nineteenth Century Upper Canada*. In *The Canadian Historical Review*, volume 59, Number 3, (pp. 362-363). Toronto: University of Toronto Press.

³² Buchbinder, H. (1993). *The market oriented university and the changing role of knowledge*. In Marginson S (eds.) *Higher Education*, volume 26, Issue 3.(pp. 331-347). Netherlands: Springer.

the conditions of teaching and providing teachers with adequate knowledge and an adequate school system.

The profession of teaching in Canada developed at the end of the 19th and in the 20th centuries differently in throughout the provinces. It could be argued that teachers were relatively better organized in Alberta, especially after World War I. However, the employment of many 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 training of teachers is very important and was slowly developed in the 19th and 20th centuries in Canada, being affected first by a traditional approach, then by a progressive approach, and then by a back-to-basics approach.

At the end of the 20th century, the modern approaches of teaching show that in many cases it is expected to have teachers ready to bring innovation into the classroom because success cannot be achieved in the classroom without talent and because students have to be prepared for the demands of the market. The profession of teaching is unique because it is based on following a curriculum and adjusting it to the needs and abilities of the students that come from different social and religious backgrounds, have unique genders and different expectations.

Based on the arguments given in this paper, it can be concluded that teaching as a profession slowly developed in Canada in the 19th and 20th century, developing into a self-regulated profession in British Columbia in 1987, and waiting to be a self-regulated profession in other provinces.

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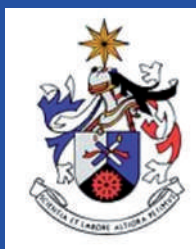
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