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T E Z Ă D E D O C T O R A T

(SUMMARY)

E.U. Philosophy about the Area of Freedom, Security and Justice

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SUMMARY

Area studies in the socio-human fields were born in the United States during the Cold War, in order to study international relations depending on the various geographical areas with cultural, ideological or historical particularities. They are interdisciplinary because they refer to the obtaining and use of historical, political, sociological, cultural, linguistic, geographical, literary knowledge. Referring to a certain population, with its own identity, Area studies are also dealing with diaspora and immigration issues of that population. In Europe, Area studies have developed with delay, but at present, the problem of an Area of freedom, security and justice has become part of the philosophy of the European construction.

For the European Union the studies of the area of freedom, security and justice have overlapped its borders, where in spite of the differences between the component states, the identity of the Union asserted as a set of values that give its specificity: humanism, solidarity, legality, people's security – which are materialized by all Union's politics -, and especially the ones that refer to: human fundamental rights and liberties, the four liberties, asylum, immigration, Schengen Space. The multidisciplinary character of the Area studies adds, in the conception of the European Union, to the plurality of policies that are going to materialize the creation of the Area of freedom, security and justice. The promotion of the Area studies touches the old conception of the European Union concerning the Area of freedom, security and justice, which is being realized, first of all, by putting in work politics on which the third pillar was based, and then, after the Lisbon Treaty, by their integration into a unitary vision concerning the strengthening of the European Union.

The present paper, with the title `The Conception of the European Union about the Area of Freedom, Security and Justice` was structured of four chapters, each of them concentrating on an important aspect of the Area of freedom, security and justice in European Union. In this sense, we have referred to the philosophy of the European Union about human rights; to the conception of the European Union about Area of freedom, security and justice; to the conception of the European Union about the four fundamental liberties; and to the Schengen Space.

The first chapter of the present paper named `The philosophy of the European Union concerning human rights` is dedicated to presenting: the history of the phrase `human rights` and the documents that attest their appearance; United Nations Organization with reference to human rights; and human rights in the framework of the European Union. Our analysis in this chapter culminates with presenting the European philosophy concerning human rights.

In the European philosophy there are many authors who bring up the issue of human rights. Starting from the idea that `all things have their laws`[1], Montesquieu believed that: the whole material and spiritual existence is submitted to the laws. Concentrating his entire research on the laws that govern human life, Montesquieu put in balance man – as a physical being – and man – as a moral, intellectual being[2]. Unlike Hobbes, for whom *homo-homini lupus*[3], for Montesquieu, the man in the natural state is by his nature gentle, shy, coward, not inclined to attack and subjugate others, but to hide and run from them.

International, political and civil rules make up the main substance of the law. Deepening the analysis of the genesis of the laws, Montesquieu shows that their establishment must keep in mind the characteristics of the country in which they are adopted, but they also have to relate to the form of government, to the nature and to the governance principle. In his work, he assumes the task of examining all these relationships, because being the spirit of the society `they form all together what it is called the spirit of the laws`. Montesquieu transforms the law into an instrument of the freedom. The forms of governance analyzed by Montesquieu are relevant for our approach, because just so we can see the historical evolution of human rights recognition, and also the percentage of their recognition within each of these forms (the Democratic Republic, the Aristocrat Republic, the monarchy, and the despotism).

Jean-Jacques Rousseau also starts from the idea that man had initially lived in a natural state[4], and in this natural state, natural man does not need the others whom he does not even know[5]. Appreciating the nature of the contract, Rousseau argues that through it, each of us shares the person and all its power, under the supreme leadership of the general will, becoming, each of us, an indivisible part of the entire[6]. Rousseau shows that through the social contract each man obtains the benefits of solidarity, without giving up freedom and equality. According to Rousseau, the disappearance of freedom determines the disappearance

[1]Charles Louis de Montesquieu, Despre spiritul legilor, Editura Ştiinţifică, Bucureşti, 1964, p. 234.
[2] Georgescu Ştefan, Filosofia dreptului. O istorie a ideilor, Partea I, Editura All Beck, Bucureşti, 1998, p. 122.
[3]Montesquieu, op. cit., p. 26.
[4] J. J. Rousseau, Discurs asupra originii şi fundamentelor inegalităţii dintre oameni, Editura Ştiinţifică, Bucureşti, 1958, p. 118.
[5]Idem, p. 119.
[6] J.J.Rousseau, Contractul social, Editura Ştiinţifică, Bucureşti, 1957, p. 101.

of morality. The role of preserving freedom and implicitly morality is the responsibility of the laws. Kant named Rousseau `the Newton of the moral world` because of the fact that he explained the world through a single principle: of freedom, as Newton explained the physical world through the principle of universal attraction.

I. M. Zlătescu believes that even though the issue of human rights was and still is debated by many philosophers, the ideas of Montesquieu and Rousseau were and remain the basic philosophical stone of the consecration of human rights in normative acts[7].

Enlightenment represented the moment of the modern conception of the human rights. It was the time in which early Catholicism snapped in front of the modern concepts of the State, when the divine laws were contested by the political thinkers and the natural rights campaigners. The rights to life, to the property, to the civic freedom, have become a credo of that period. The freedom of expression and religion has occupied central places in the liberal State imagined by the Enlightenment thinkers.

As for John Locke, life, freedom and property were innate and inalienable rights of man. The mission of the States was to protect these natural rights. The ideas of Locke were assumed by the constitutional organs from England and United States of America, and were included in the fundamental texts of those countries.

According to Brian Orend, natural rights are not facts and descriptions, but they are values and prescriptions. These rights do not describe us as humans, but they are prescribing us a behavior and are values because they require to all of us to treat the others as we consider that they deserve to be treated. Rights, in the most general sense, are not facts themselves, but they are the reasons to treat people in a respectful way[8].

In another opinion, expressed by Ronald Dworkin, rights are seen as *strengths*. In the debates concerning this topic, some authors have interpreted it as being absolutist, but according to Orend, rights are indeed strengths if all other things are equal.

Hence, rights justify by the necessity of introducing a certain type of treatment – which materializes in an object of the human rights. This treatment consists of a minimum of dignity and respect which can be offered to each human being.

The history of human rights provides all necessary resources for the definition of the concept of `human rights`, but there is also the risk that based on some old concepts, that are no longer compliant to the contemporary practice, its definition to no longer correspond to the reality. It was shown that it is possible to develop a conception about human rights which to

[7]Irina M. Zlătescu, Drepturile omului – un sistem în evoluţie, IRDO, Bucureşti, 2007, p. 14.
[8]Brian Orend, Human Rights: Concept and Context, Broadview Press, Canada, 2002, p. 19.

include the dynamic elements of the `global current practice`, without loosing sight of the `historical notion` of human rights. In this respect are also the works of J. Habermas and Rainer Forst about the discursive theory. Starting from the works of these philosophers, J. Flynn considers that if we grant actual social and political struggles for the human rights with the proper importance we can achieve a genuine theory of human rights in which their meaning belongs with the practice from the past, and also with the one from the present[9].

Thereby, while some authors consider that the origins of human rights are in the revolutionary era from the end of the 18th century, others consider they are a lot more recent, referring to them in relation to the contemporaneity. In his work *Inventing Human Rights: A History* (2007), Lynn Hunt shows the way in which the philosophical basis of human rights were established, by means of some new forms of art, reading, torture and pain, at the end of the 18th century.

Without being able to totally detach from the historical landmarks concerning human rights, at the onset of this work we gave place both to the history of human rights – their approach from a historical point of view being of a particular relevance for outlining the concept in question; and to the contemporary concepts concerning the origins and the current significance of human rights. On this occasion, there have been mentioned a series of concepts: `minimum rights, natural rights, fundamental rights, universal rights, constitutional rights, human rights`.

Hence, human rights realization process is a complex one and remains, until today, `a field of struggle and contestation, internally and internationally, for the rights, for the access to power, resources and also for their distribution`. We may remember that, `the action in favor of human rights starts from the need for the State and society, through various forms of action, ensuring equal rights and the exercise of the individual rights, to become an instrument of participation and of redistribution in favor of all, especially of the ones who are or who become disadvantaged, in order to avoid their exclusion, marginalization or their removal outside social life`[10].

The place occupied by the United Nations Organization in the legitimation and promotion of human rights is essential and materializes in the adoption of some important acts as, for example: The Universal Declaration of Human Rights; The International Pact on Economic, Social and Cultural Rights; The International Pact on Civil and Political Rights; and the Charter of the United Nations. After the Charter of the United Nations and the

[9] Jeffery Flynn, op. cit., pp. 3-4.
[10] I. Diaconu, Drepturile Omului, IRDO, Bucureşti, 1993.

Universal Declaration of Human Rights, the notion of `human rights` extended and was enacted, and it also enjoyed the creation of some devices that were designed to ensure their respect.

In regard to the matters dealt with in the subchapter concerning the European Union and human rights, we considered that there are necessary some references to: the European Convention on Human Rights because European Union is part to the European Convention on Human Rights, given the new circumstances created by the adoption of the Lisbon Treaty, concerning its legal personality; and also to the Charter of fundamental rights of the European Union which according to the previsions of the Lisbon Treaty was integrated in it.

Due to the fact that by the Lisbon Treaty it was decided that the European Union accedes to the European Convention on Human Rights and Fundamental Freedoms, it shall become the main shareholder of the European Court of Human Rights, because its accession to the Convention means that all complaints against European Union, on the subject of human rights, shall be submitted to the Court in the same conditions as the complaints formulated against the Member States. Besides, it is possible that the European Union's institutions to occur as defendants in the complaints launched against them[11].

In turn, the Charter of fundamental rights expresses the preferences and common values of the European Union. For this reason, the Charter is seen by many as being the foundation of the `European social contract`. This reflects the essential features of the liberal citizenship, representing a European common law system (*ius commune europaeum*), which is based on human dignity and on the respect of the members of the European societies and also on their specific identities. Hence the Charter highlights the diversity of identities and their heterogeneous character. European citizenship, as a part of the political community, is expressed by the equality of the European citizens before the law. There are also expected the results of this aspect which would result in the development of a common political identity that is the common narrative background of the future European democracy[12].

Among the major objectives of the Union can also be counted the one of maintaining and developing the Union as an Area of freedom, security and justice in which the free movement of persons/workers, goods, services and capitals is ensured, in correlation with appropriate measures of criminality prevention and of fight against this phenomenon. The fulfillment of this objective is meant to ensure the citizens of the European Union with a high level of security through the creation of various European policies. In the economic field, it

[11] M. Emerson, R. Balfour, T. Corthaut, J. Wouters, P. M. Kaczynski, Th. Renard, op. cit., p. 98.
[12] Ireneusz Pawel Karolewski, op. cit., p. 129.

was created the Internal Market based on the already reminded four essential liberties, and in the security field, preparations were made for the elaboration of some policies on the prevention of crime and on the fight against this phenomenon through a better cooperation between the judicial authorities and through the harmonization of national rules, and also through the creation of the Schengen Space, where the efficient management of the external borders of the Union is desired. Providing a space of freedom, security and justice was a priority of the European Council's policy. This priority is, at the same time, a necessary answer to the concerns of the peoples of the European Union Member States.

The progress was noted, especially after the creation of the Single Market. National borders between the Member States were practically eliminated. The resulting Single Market determined the free movement of goods, persons, services and capitals on the entire territory of the European Union and opened the economic and job opportunities which transformed the lives of hundreds of millions of Europeans.

After the adoption of the Unique Act, the Commission and the Governments of the Member States have began to question weather the Single Market will be complete and efficient without a single currency, with the role of ensuring the financial stability, of reducing the business expenses and of increasing the importance of Europe in the world, considerably facilitating, at the same time, the comparison of prices by the consumers and their movement without having to pay for various commissions. Since 1990 there was a consensus in favor of this idea, reinforced by the desire to realize a greater political integration. This way, European leaders have transformed European and Monetary Union into an objective of the European Union. This was inscribed in the Maastricht Treaty, signed in 1992, which provided for the introduction of the European currency by some Member States of the European Union until 1999. At the European Council in Madrid from December 1995, the European leaders have agreed that the name of the new currency to be EURO. At the 1st of January 2002, 12 of the 15 Member States, at that moment, introduced euro banknotes and coins, placing themselves in the EURO area. Denmark, Sweden and Great Britain chose to stand outside it.

European agencies as Europol, Eurojust, the Agency for Fundamental Rights and Frontex have reached a mature level of operational activity in their fields of action. However, in the field of freedom, security and justice, Europe was still confronting with numerous challenges. In this sense, it was adopted a multiannual programme for the period 2010-2014 (known as the Stockholm Programme) which has the role of consolidating the successes and

of responding to the future challenges. Within it there are defined the main orientations for the legal and operational planning in the area of freedom, security and justice.

The second chapter of the present paper is dedicated to the full analysis of the `Conception of the European Union about the Area of freedom, security and justice`. The magnitude and the complexity of this theme allowed us a short foray in the history of the formation of the European Union, with references to the genesis of the idea of `area of freedom, security and justice`, in the first part of the chapter.

In the second part of this chapter we have focused our attention on the economic object of the European Union – the creation of the Internal Market -, in which we considered that we must make reference to: the general aspects that characterize the Internal Market of the European Union; and to its purpose and legal framework.

In close relation to the Internal Market, the third part of this chapter was dedicated to a short analysis of the Economic and Monetary Union – as a major step made in the process of integrating the economies of the European Union. In this sense, we presented: the architecture of the Economic and Monetary Union and its institutions.

Finally, the last part of this chapter was dedicated to the analysis of the Area of freedom, security and justice, and we have referred to: the competences of the Union in terms of border controls, asylum and immigration; the situation of the European citizens and of the citizens of the third countries within this area; the regime of the European Union for granting asylum; and to the refugees and their subsidiary protection.

The complex processes that we experience today – the construction of the United Europe and the dynamics of its enlargement – put European institutions in front of an unique challenge aiming at ensuring the common security in the European area of freedom and justice, in which people to be able to move freely, and to be able to exercise their right to work anywhere, to enjoy the rights and freedoms consecrated by the law. A comprehensive European policy concerning immigration, which to enroll in a vision of the future, is based on solidarity and represents a primary objective for the European Union. The policy in the field of migration aims to establish a balanced approach of the legal migration and of the illegal immigration. The Treaties of Maastricht, Amsterdam, Nice and Lisbon have brought successive changes to this policy, which is also regulated by the Stockholm Programme for the period 2010-2014[13].

[13] V. Efremov, op. cit.

In this context, European Union aims to establish a balanced approach of the situations of legal migration and illegal immigration. The proper management of the migratory flows involves ensuring a fair treatment for the nationals of the third countries which legally live on the territory of a Member State, and also the intensification of the measures to combat illegal immigration and of the cooperation with the countries that are not members in all fields. According to the Lisbon Treaty, the policies concerning immigration are regulated by the principle of solidarity and of equal distribution of the liability, including of its financial implications, between Member States. The Lisbon Treaty confirmed the objective of a common policy in the field of immigration and introduced co-decision and qualified majority in the field of legal migration, and also a new legal basis for the promotion of the integration measures. At present, ordinary legislative procedure applies both to the policies concerning illegal immigration, and to the ones in the field of legal migration. On the other hand, it is the first time when the treaty states that the Union shares with the Member States their competences in this field, especially in terms of the quotas of immigrants who enter on the territory of a Member State[14]. Hence, the Lisbon Treaty offers an adequate legal basis for the integration, which represents a favorable premise for the future evolutions of this policy[15].

In the chapter titled `The conception of the European Union of the four liberties` we made reference to the four directions of action initially established by the Single European Act, for the accomplishment of the Internal Market: the free movement of goods, services, workers and capitals. We must underline the fact that the analysis on these liberties was made through the angle of the previsions of the Treaty concerning the Functioning of the European Union, presenting legal and technical features which are more emphasized than the rest of the aspects presented in the present paper.

But the four fundamental liberties represent, as we have already shown in the content of the paper, `the corner stone of the Internal Market`, and Article 3 (c) of the Treaty on the European Communities defined them as being `characterized by the abolition, between the Member States, of the obstacles to the free movement of goods, persons, services and capitals`. Along time, there have been identified two dimensions of the legal previsions concerning the movement freedoms which are closely related. First of all, it is the dimension of determining the types of measures that are comprised by the rules of the movement freedoms and then, the dimension of defining the justifications of the legitimacy of the public interest. The treaty contains previsions referring to the free movement of goods, services,

[14] Idem.
[15] Gina Clayton, op. cit., p. 189.

workers and capitals without discriminations based of origins or nationality. For these types of measures the treaty contains explicit justifications referring to the public health, to the public policy, to the public security, etc. In the process of interpretation of these measures, the European Court of Justice demands to the Member States not only to do not make discriminations in the application of the recalled measures, but also to enlarge the purposes in which they invoke the defense of the public interests in order to establish restrictions to the fundamental freedoms[16].

An important mark in the analysis of the four fundamental liberties of the European Union was represented by the rich jurisprudence of the Court of Justice of the European Union because it has become an important mark for the doctrinal interpretation of these liberties.

In the end, the last chapter of the present paper - `Schengen Space` - is structured on three subchapters and has the purpose of presenting some of its main features. Within the first subchapter, we considered that we must present the Schengen Space through the angle of the aspects that are related to its creation and to its perception at a European level, both by the national Governments and the citizens, and by the research literature dedicated to this subject.

Hence, we have shown that at the beginning of the ’80, at a European level was started a discussion referring to the importance of the collocation of `freedom of movement`. After numerous polemics, France, Luxembourg, Germany, Belgium and Netherlands decided to create a space without internal borders. At the 14th of June 1985 was signed the Schengen Agreement, and at 19th of June 1990 was signed the Convention concerning the Implementation of the Schengen Agreement. The Convention entered into force in 1995, hence being eliminated the controls at the internal borders of the signatory states. This process also meant the establishment of a single external border where controls are developing according to the Schengen *acquis* (normative acts and decisions made in common by the Member States). By the Treaty of Amsterdam, the Schengen acquis was taken over by the *acquis* of the European Union, and the Council of the European Union took the place of the Schengen Executive Committee established by the Schengen Agreement. Then, beginning with the 1st of May 1999, the Schengen Secretariat was incorporated by the General Secretariat of the Council[17].

[16] Wolf Sauter, Harm Schepel, op. cit., p. 29.

[17] Convenţia de Aplicare a Acordului Schengen din 14 iunie 1985, Manual de Prezentare, Direcţia Generală Schengen, Serviciul Autoevaluare Schengen, p. 2.

Also, beginning with the 1st of May 1999, the Schengen Protocol of the Treaty of Amsterdam from the 2nd of October 1997 integrated the Schengen cooperation within the European Union. Thereby, the European Community assumed its competence for the areas of the Schengen *acquis* (the Schengen Agreement and the various previsions adopted in this context), and also for its future development. For the citizens of the European Union and the ones of the third countries who live in the European Union, the Schengen Agreement has as a result the substantial growth of the freedom of travel and the improvement of the safety within the Schengen States and their external borders[18].

Schengen has become not only the symbol of the *sui generis* entity on the political regional map, often wearing the name of ` Schengenland`, but also a new way of thinking and of practical management concerning the borders of Europe. In other words, Schengen is today, the new `sense of reality` on the entire continent[19].

Given that the borders of Europe are very distinct and in constant development, researchers and political scientists were attracted to this theme. For these reasons, the research literature is in constant development. In spite of the major interest, the specific theoretical works about the creation of the Schengen Space as `a new governance of the borders` are rare. The stories of those who participated to its formation process are valuable sources, but these papers present in a short way the factors that made possible the development of the Schengen Space.

The second subchapter concentrates on the `abolition of internal border controls in Europe`. In relation to this issue we referred to the abolition itself of the controls to the internal borders, to the Internal Market and to the free movement of the persons, to the Convention for the Implementation of the Schengen Agreement and to the evolution of the Schengen Space as a consequence of the entering into force of the Treaty of Amsterdam because it had important consequences over the first.

The last subchapter was dedicated to presenting data protection within the Schengen Space because data protection is a fundamental human right. In this subchapter we presented a series of European normative acts which had a decisive impact over the Schengen information system. In this part we also presented the basic concepts with which Schengen Space operates, among which we recall: the protection of personal data and Schengen Information System.

[18] Idem.
[19] Ibidem, p. 6.

At the end of the final part we made a short presentation of the Schengen Space after the adoption of the Lisbon Treaty, with reference, especially to the Charter of Fundamental Rights of the European Union – as a part of the Lisbon Treaty, and also to the measures undertaken by certain institutions of the European Union in order to ensure the free movement within the Schengen Space.

Today the Schengen regime includes all European Union Member States, with certain exceptions: Great Britain and Ireland; and also Bulgaria, Cyprus and Romania (these last ones shall become, in the near future, Member States of the Schengen Space). Schengen Space also includes third countries as: Norway, Iceland, Switzerland and Lichtenstein.

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